

# Utilizing The Sherman Act To Defeat Age Discrimination In Professional Basketball

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What do the Microsoft Corporation and the National Basketball Association's ("NBA") new development league have in common? Both entities may have recently violated federal antitrust laws.

November 2001 marked the inaugural season of the NBA's Developmental League ("NBDL"). The NBDL serves, for the most part, as the NBA's minor league system – allowing players to develop their skills in a competitive atmosphere under the umbrella of the NBA and serving as a talent pool for the NBA.

The NBDL's age requirements, however, have some people crying "Foul." Under NBDL rules, a player must be at least twenty years old to be eligible to play in the league. The NBDL rules provide for an exception for players who are at least eighteen years old, drafted by an NBA team and subsequently cut. No other exceptions have been articulated so far by the NBDL ("NBDL Rule"). As a result, many talented teenage athletes, not drafted by the NBA, are blocked from the NBDL and deprived of the opportunity to develop their skills and increase their chances of making it to the NBA.

While this may seem like a clear case of age discrimination, it is not. A teenage athlete claiming age discrimination will find that the NBDL has complied with federal age discrimination laws. Under federal age discrimination laws, individuals under the age of forty are not members of a "protected class," and they may not assert a cause of action for age discrimination. See *Tracy v. PMC Medical Management, Inc.*, 2000 U.S. Dist. Lexis 13938, 6 (U.S. District Court of Maine 2000).

On the other hand, the federal antitrust laws may provide the player under twenty years of age with an opportunity to play in the NBDL. Under federal court precedent, the NBDL Rule most likely constitutes a "group boycott" that is illegal under Section 1 of the Sherman Act, exposing the NBDL to a potential fine of Ten Million Dollars (\$10,000,000.00). See 15 U.S.C. §1.

## A. Relevant History Of The Sherman Act In Professional Sports

Many professional sports such as hockey, baseball and tennis have rarely limited the participation of teenagers. However, the National Football League ("NFL") and the United States Football League ("USFL") have historically restricted teenage athletes from playing professional football. For example, the NFL has precluded high school graduates, and college freshmen and sophomores, from playing professional football by banning them from entering the NFL Draft ("NFL Draft Rule"). The



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NBA, through the NBDL, has taken a stance similar to the NFL in its attempt to reduce the number of teenagers that bypass college to play professional basketball and may have run foul of federal antitrust laws due to the eligibility requirements necessary to enter the NBDL.

The teenage athlete that seeks to challenge the NBDL Rule has been given a template on how to test the legality of the rule, courtesy of the NBA. In *The Denver Rockets, et al. v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (U.S. District Court, C. D. of California 1971), Spencer Haywood claimed that the NBA by-laws provision that prevented him from playing in the NBA until four years after his high school class graduated, violated 15 U.S.C. §1 of the Sherman Act. The Sherman Act declares illegal any contract, combination, trust or conspiracy in the restraint of trade or commerce among the States. See 15 U.S.C. §1. In considering the plaintiff's motion for partial summary judgment, Judge Ferguson of the United States District Court for the Central District of California held that the NBA's four-year college rule constituted a group boycott under the Sherman Act.

In reaching its decision, the Court found that (a) the NBA engaged in interstate commerce; (b) that the member teams of the NBA had conspired and decided not to deal with persons whose high school classes were not four years beyond graduation, and (c) that the NBA applied the rule so as to render Haywood ineligible to play in the NBA. Judge Ferguson also held that the NBA's rule imposed an absolute exclusion on all persons whose high school class has not graduated for more than four years and that the NBA failed to provide procedural safeguards whereby Haywood could contest his exclusion. See *Rockets*, 325 F. Supp. at 1060-1067. With this decision, the NBA by-law provision restricting NBA teams from contracted with high school athletes was deemed a group boycott under the Sherman Act.

The NBA has not had a four-year requirement banning high school athletes since the *Rockets* matter in 1971, and several players have entered the NBA over the past thirty years without attending college.

Professional basketball is not the only sport that has had to deal with potential violations of the Sherman Act. The USFL was found responsible for Sherman Act violations in 1984. In the matter of *Boris v. United States Football League*, (1984 U.S. Dist. Lexis 19061), Robert F. Boris was a varsity football player at the University of Arizona during the 1980-81 and 1981-82 seasons, and for the first three games of the 1982-83 season. During the 1982-83 season, Boris voluntarily withdrew from the university, thus was ineligible to play college football. Boris wanted to play professional football in the USFL. The USFL had a Eligibility Rule ("Rule") which stated:

"No person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired, or (2) at least five years shall have elapsed since the player first entered or attended a recognized junior college or university or (3) such player received a diploma from a recognized college or university."

*Boris*, 1984 U.S. District Lexis 19061.\*2-3.

For most college football players, this Rule meant that a player had to be at least twenty-one years of age before he could play professionally in the USFL. The Rule was strictly adhered to and no exceptions were made to the Rule by the USFL. Judge Waters of the United States District Court for the Central District of California, found that the USFL did not provide procedural safeguards whereby an individual could contest his exclusion under the Rule and that it imposed an absolute exclusion on all person who theoretically still had collegiate athletic eligibility remaining. *Id.*

The Court then held that the Rule as applied to Boris, constituted a group boycott and was therefore a violation of the Sherman Act (15 U.S.C. §1). The attempt of the teams within the USFL to apply the Rule constituted an agreement among the member teams to boycott athletes like Boris. The *Boris* decision was never appealed by the USFL.

## B. The Application Of The Sherman Act And State Law To The NBDL Rule

The NBDL Rule is not very different from the USFL Rule that has been rejected by the Court in *Boris*. The effect of the NBDL Rule is the same as the USFL Rule: athletes under the age of twenty will not be allowed to play professionally in the respective leagues. In fact, the NBDL Rule may be more harsh, as it articulates a strict age cut off, unlike the USFL Rule, thus enhancing the probability that a Court will find the NBDL Rule to be a violation of the Sherman Act.

Furthermore, the results produced by the NBA by-laws provision in the *Rockets* matter, and the results that will be produced by NBDL Rule, are for the most part, identical. Application of the four-year college rule by the NBA and the requirement that players must be twenty years of age to play in the NBDL, each constitutes a concerted refusal to deal wherein the actors at one level of a

trade pattern (NBA team members and NBDL team members) refuse to deal with an actor at another level (those ineligible under the NBA's four-year college rule and the athletes under twenty years of age in the NBDL). See *Rockets*, 325 F. Supp. at 1061.

The harm resulting from the application of the NBDL Rule is threefold. First, teenage athletes not drafted by the NBA will be excluded from the market they seek to enter, the NBDL. Second, competition in the NBDL will suffer due to the fact that potentially superior athletes will not be afforded an opportunity to play in the NBDL. Third, by pooling their economic power, the individual member teams of the NBDL, like the NBA, have, in effect, established their own private government, and the NBDL possesses market power in a degree approaching a shared monopoly. See *id.*

Due to the legal precedent discussed above, the NBDL will be hard pressed to convince a federal court that the NBDL Rule excluding athletes from trying out for a team based on the fact that the athlete is under twenty years of age does not constitute a group boycott under the Sherman Act.

## C. Conclusion

The NBDL and NBA are concerned with the number of early-entry candidates leaving college or never attending college in order to enter the NBA and NBDL. Some of these candidates are without the maturity or skill level to survive in the respective leagues. For every Kobe Bryant, there are thousands of young men that were unsuccessful in making the transition from high school basketball to the NBA. The NBA and NBDL have a legitimate interest in maintaining a high level of play throughout the leagues and have a right to do everything within their power without violating the law.

The NBDL presently has two member teams in Alabama, one member team in Georgia, two member teams in North Carolina, two member teams in South Carolina and one member team in Virginia. The laws of these states afford no additional protection to players in regard to an age discrimination claim; however, they do have antitrust statutes similar to the Sherman Act which provide in part that persons or corporations which restrain the freedom of trade or production, or attempt to destroy competition, shall be liable for their actions. See Code of Ala §8-10-3 (2001); O.C.G.A. §13-8-2 (2000); S.C. Code Ann. §39-3 (2000); N.C. Gen. Stat. §71 (1999). If the NBDL is found responsible under the Sherman Act and various state law anti-trust violations, it faces potential fines that could exceed Ten Million Dollars (\$10,000,000.00).

Due to the eligibility requirements of the NBDL, litigation challenging the NBDL Rule pursuant to the Sherman Act seems inevitable. The NBA and NBDL are both attempting to keep students in high school and college, which is a noteworthy goal. However, utilizing a strict age requirement over merit will eventually lead to judicial scrutiny.

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