CHAPTER 10
ANTITRUST AND SPORTS: PLAYER RESTRAINTS

This is the first non-primer chapter that deals with substantive antitrust law, as opposed to antitrust exemptions (Chapter 7 is the antitrust primer, Chapter 8 covers the baseball exemption, and Chapter 9 addresses the labor exemption). Therefore, a law professor may want to remind students that, as they consider the sports antitrust cases in Chapters 10 through 13, they may want to refer back to Chapter 7 to refresh their understanding about the elements of the claims that are being asserted in the cases in these substantive antitrust chapters.

I. AN OVERVIEW OF CHAPTER 10

We start the substantive antitrust chapters with an examination of player restraints, because the issues are somewhat more narrow and the fact patterns somewhat less complicated than the issues in the following chapters. Although there may be passing reference to Section 2 of the Sherman Act in the player restraint cases, these are primarily cases brought under Section 1 of the Sherman Act -- challenges to agreements that are alleged to restrain trade unreasonably. There is seldom any question about the satisfaction of the agreement requirement, except for leagues' argument that they constitute a single entity -- which is addressed in detail in Chapter 12, and the issue in the *Volvo* case about members of an association conspiring with each other. The teams in a league or the events in a circuit have all agreed to certain restrictions on their dealings with players. The agreements among the teams or the agreements by the players and the producers of the events to abide by the circuit's rules and regulations satisfy the Section 1 requirement of a "contract, combination . . . , or conspiracy."

The *Kapp* and *Mackey* cases are traditional cases involving disputes between players and their league. *Kapp* challenged the collection of NFL player restraints that were then in effect -- the draft, anti-tampering provisions, compensation for free agents lost (the Rozelle rule), and so on. *Mackey* challenged the Rozelle rule. The rules at issue in *Kapp* and *Mackey* were of general applicability and restrained player compensation and mobility in the entire NFL. The restraints at issue in *Kapp* and *Mackey* were alleged to be means by which all of the NFL owners were able to keep their team costs for player services from rising.

The *Boris* case is different - it challenges a rule of the United States Football League that prevented players from skipping college and going straight to professional football. The restraint in *Boris* does not clearly harm or benefit the teams -- it simply prevents younger players who do not finish college from competing for positions on teams that will otherwise be filled by older players. The motivation for the rule at issue in *Boris* concerned the relationship between the new league (the USFL) and the colleges that were the primary source for the new league's players.

Then, the Chapter considers restraints imposed on players for disciplinary reasons -- in *Molinas* a basketball player who was involved in a gambling scandal was banned from the NBA for life, while in *Blalock*, a woman golfer was suspended from the major professional women's tour for a year because she was accused of cheating -- she allegedly moved her ball during a round of play. The restraint in *Molinas* was not about preventing player mobility or restricting player salaries, and it only affected players who were accused of gambling. The Commissioner of the NBA suspended Molinas and all teams were forced to boycott Molinas. Some of those teams might have preferred to "forgive and forget" to have the opportunity to compete for Molinas's services, but they were not permitted to do so because of the Commissioner's ruling and enforcement power. The rule in *Blalock* applied to all players, but only those who were accused of cheating in events were at risk of being penalized under the rules.

Finally, the *Volvo* case considers player restraints in the world of individual sports. Some of these restraints, such as the agreements dividing up the weeks of the year, are similar to the league restraints on players in purpose and effect – reduce competition for players and thereby reduce player compensation. Others, such as the commitment agreements, ranking systems, and bonus pool, are about forcing players to play to the exclusion of all other events, thereby helping the circuit eliminate existing competing events and prevent new competing events from ever coming into existence. The *Volvo* case is a transition from player restraints (Chapter 10) to restraints and conduct by one league or circuit directed at competing events (the subject of Chapter 11).

II. AN INTRODUCTION TO THE BUSINESS OF "PLAYER RESTRAINTS"

The following discussion is intended to give you, the professor, an overview of some of the business issues related to player restraints. This discussion is not directly tied to any particular case, but is meant to provide some context to the basic concept of player restraints and the fact that they take different forms and may have different purposes, even though they are sometimes discussed as though they are a unitary phenomenon. The cases we have selected discuss a few player restraints, but there are a number that are not addressed in the cases in this chapter. In order to ascertain the likely competitive effects of a player restraint, it is important to understand the purpose of the restraint, not because an unlawful purpose would render a restraint unlawful, but because it may inform the analysis of the restraint's actual competitive effects.

A. PLAYER RESTRAINTS IN TEAM OR LEAGUE SPORTS

Historically, the primary manner in which antitrust law was involved in professional sports was as a weapon used by the players in league sports against the owners of

the teams. As discussed in Chapter 2, the salaries paid to players in sports leagues are a cost of the business of producing the games. Each owner is, therefore, interested in fielding a competitive (hopefully, championship caliber) team at the lowest possible cost, and that includes minimizing the amount the owner has to pay the players on the team. From the earliest days of professional sports, owners of teams became aware that if they did not restrain competition among teams, team owners would compete for the players who were perceived to be the best players or the most marketable players, thereby driving up player salaries and reallocating wealth from owners to players. Therefore, owners and leagues have traditionally used several devices to eliminate competition for players and, thereby, to keep player salaries down.

One obvious way to restrict player salaries would be to permit each player to choose by which team he wants to be employed, but agree upon a wage scale that would be the same for every team in the league, specifying precisely how much each player would be paid, based on objective factors such as years of professional play (seniority), position played, or statistical performance (e.g., batting average, number of games started or played). However, there are obvious ways for one owner to cheat under such a system, attracting the top players by paying additional amounts to the players it wants, either direct "under-the-table" payments or better perquisites and amenities. In addition, if one team were in an undesirable location, or had a reputation as a perennial loser, or was known for unpleasant management personnel, it might be unable to attract quality players without paying them something extra to compensate the players for the undesirable attributes of the team.

Therefore, leagues have historically restricted competition by assigning the right to negotiate with each player to a single team. By some sort of draft or assignment system, players are selected or assigned to a specific team in the league. This process both divided the player talent around the league and restricted or eliminated competition for players' services. Whether the assignment is made by means of a player draft or some other system, leagues traditionally selected a single team that could negotiate with each player, and counted on the player's limited options (sign with that team or do not play in that league) to give the team sufficient leverage in the negotiations to negotiate a low player salary. The team that was given the exclusive right to a player was said to have "reserved" the rights to the player, and the overall system of restraints on players choosing to move to another team was described as a "reserve system."

As time progressed, the absolute, perpetual character of these "reserve systems" was modified, and players began to be free, after a specified period of time, to begin to negotiate with other teams in the league. That freedom was initially a very limited freedom, often so encumbered as to be an illusory freedom for many players. The freedom of a player to leave the team to which he was initially reserved became known as "free agency," as players who were not

forced to remain with the same team became employees or agents who had freedom to search out other employers or principals, although they often remained subject to certain encumbrances. In particular, the encumbrances often proved to be insurmountable for the top players in the league, as the systems tended to give teams the absolute right to retain their top players, so long as they were willing to adjust the compensation they paid those players.

The following list should help you isolate the various "player restraints" being considered in the league sport cases included in this Chapter. The list does not discuss restraints imposed on players as a result of a disciplinary process, such as the restraints considered in the *Molinas* and *Blalock* cases. The list identifies and describes the primary player restraints that have been utilized by leagues over the years, including the "reserve systems" and, more recently, in leagues that have free agency to varying extents, restraints during the period when a player is to some extent a free agent, but competition for that player's services remains subject to restrictions:

1. A draft system, by which teams take turns selecting players, and the players who are selected become reserved to the team that selected them for a specified period of time (originally, forever). If there is some limit on the period of time during which a team must sign the players it drafted, the player can threaten to sit out that period as leverage in his negotiations with the team. If, however, there is no time limit (the team that drafts the player maintains the right to that player until they enter into a contract), or the time limit is so long that sitting out that period is not a credible threat, if there is not a competing league to bid for the player, he may find himself forced to participate in a very one-sided negotiation (if, in fact, there is any negotiating at all).

2. Uniform player contracts, which require every team to use the same contract terms, and thereby restrict the players' freedom and eliminate competition among clubs with respect to the non-financial contract terms they offer. There is generally a requirement that all contracts be reviewed and approved by the league Commissioner, to permit the Commissioner to police compliance with the uniform player contract. Historically, under stringent reserve systems, the Commissioners reviewed the individual player contracts to ensure, among other things, that no team allowed its players to become free agents, thereby permitting competition for player services that might lead to higher player salaries and the eventual demise of the reserve system.

3. The requirement that a player released by a team "clear waivers" before becoming a free agent. The idea of these restrictions is that if the team that contracts with a player decides to release him, the player can only become a free agent if all of the other teams in the league decide not to "take him off of waivers" and hold him to the terms of his current contract.

4. Contract provisions that memorialized a team's right to assign a player's contract to another team. These provisions, combined with league rules about when players can be assigned, developed into systems of trading and selling players, their contracts, and the rights of reserve that applied to those players.

5. Anti-tampering rules, which prohibit all teams other than the team that has reserved a player to have any communications with the player about the prospect of the player leaving the employ of the team that has reserved the right to his services. These rules often provide for substantial penalties to be levied by the league Commissioner, in order to deter such "tampering."

6. Contracts that provided that upon the expiration of the term stated in the contract, if the team and the player were unable to come to terms on a new contract, the team was free to renew unilaterally its contract with the player. The team was merely required, by a specified date, to offer the player the same non-salary contract terms as the last contract, with a salary that was, at a minimum, a salary that was a specified percentage (e.g., 75%, 80%, or 90%) of the salary earned by the player for the previous season.

7. Rights of first refusal, which provided that if a player ever became a free agent, he could seek offers of employment from other teams, but if he received such an offer, he had to submit the offer to the team that held his rights. Then, the player's original team could choose to match the financial terms of the offer and retain the player, or it could choose not to match, and thereby allow the player to go to the new team.

8. Compensation provisions to benefit teams that lost free agents (known in football as "the Rozelle rule"). These restrictions provided that if a player became a free agent and left his original team to sign with another, the latter team had to compensate the original team for the loss of the player. If the two teams could not reach agreement about the compensation to be paid, the commissioner of the league was generally charged with deciding

the appropriate measure of compensation. If only nominal compensation is assessed for the loss of a star player, a compensation system does not create a substantial deterrence to free agents seeking more lucrative contract terms from another team. However, if the compensation awarded approximates the value of the player lost, teams will not achieve any net benefit if they sign free agent players, and they will not offer free agents lucrative terms. For example, when Team A with one superstar player signs Team B's free agent superstar, if the commissioner awards Team B the first superstar on Team A as compensation, Team A may find itself worse off than when it began seeking a free agent. That type of compensation decision will create a tremendous deterrent to teams raiding other teams' rosters to sign their free agents and will, at a minimum, substantially reduce the value of free agency to players. At worst, it will render free agency an illusion.

9. Salary caps are a relatively recent phenomenon, having started with a collective bargaining agreement between the National Basketball Association ("NBA") and the National Basketball Players Association ("NBPA") in the early 1980's, when it appeared that without player consent to a salary cap, the NBA might go out of existence. The basic concept of a salary cap is an overall ceiling on the amount of compensation that each team can pay the players on its roster. The salary cap may also involve a minimum -- a specification that the per team or overall league salaries must exceed a certain specified minimum. If a salary cap system is described as yielding a "hard" salary cap, that is supposed to mean that there are not significant exceptions that permit teams to pay more than the specified maximum team compensation. If a salary cap system is described as having a "soft" cap, that means that there are significant exceptions that permit a team to pay more than the specified maximum team compensation. An example of the latter is the salary cap system in the National Basketball Association, which has traditionally permitted all teams in the league to exceed the specified cap in order to re-sign or extend the contracts of players who have been under contract with that team. An example of a salary cap system that was supposed to yield a "hard" cap is the National Football League, but the NFL cap does permit teams to exceed the cap in total dollars paid in a given year if the team exceeds the cap by paying players signing bonuses, because signing bonuses are pro-rated over the life of the player's contract. Therefore, a team with $1 million left in its cap can pay an additional $5

million signing bonus to a player with a five-year contract, because only 1/5 -- one year's worth -- of the signing bonus, or $1 million, is charged against the salary cap that year.

10. Salary "taxes" involve a modification on the theme of a salary cap. Rather than place any absolute restriction on the total compensation paid by any team in a league, a salary tax involves assessing specified penalties against all teams that exceed specified team-wide salary amounts. The penalty amounts are then distributed among the other, lower-paying teams in the league. For example, a team that exceeds a team salary of $50 million might be assessed a tax of 50% of the excess amount. Therefore, a team that agrees to pay its players $60 million would also have to pay $5 million (50% x ($60 M - $50 M) = $5 M) to the other teams in the league. The 50% tax means that to pay an additional $1 million to a player costs the team $1.5 million, with $500,000 going to the other teams in the league. A 5% tax would only yield a tax of $50,000 per million. Salary taxes have been the subject of discussion in Major League Baseball's collective bargaining negotiations with the Major League Baseball Players Association. The idea is that teams could spend as much as they want, but if they exceed one or more thresholds, they would have to pay specified percentages of the excess to the other teams as a form of revenue sharing or "tax." The lower the tax, the less the restraint.

This list is not exhaustive, but there have been variations of many of these restraints in most of the professional sports leagues. Often a player is drafted and is then completely restricted to play for or be traded by the team that holds the player's rights via the draft. After a specific number of seasons in the major professional league, a player may first become a "restricted free agent," with any free agent offer to him at that point subject to a right of first refusal. Then, a specific number of seasons later, that same player will become an "unrestricted" free agent.

Other terms of the relationship between players and teams in the various sports have been negotiated through the collective bargaining process. Salary arbitration is an example of a process by which a fair determination of player salaries by independent arbitrators was supposed to be substituted for free agency, the player's freedom to seek a fair salary through competition. In the National Football League, teams now designate the one to three players whom they most fear losing to be "franchise" or "transition" players, and those players lose their right to be free agents but must be paid a salary commensurate with the top salaries paid to other players in the league who play their same position.

"Player restraints," as these restrictions on player freedom are referred to generally, are all likely to have some effect on the amount the players will be paid to play. Some of the restrictions also restrict a player's freedom to choose where the player will play -- for

which employer. The freedom to decide where to play or to move from one team to another is generally referred to as player mobility, and rules and contract terms that interfere with that freedom are called "player mobility restrictions" or "restraints on player mobility."

Player restraints can have other purposes beyond dividing talent around the league and restricting competition among the teams in the league to keep player salaries low. For example, player restraints that prohibit participation in competing leagues or off-season events or that disadvantage players who play in a competing league may be the means by which one league creates barriers to entry by competing leagues and events. Similarly, a system of perpetual reserve, enforced with injunctions against "jumping leagues," may be the means by which an established league prevents a newly formed league from ever gaining access to more experienced, or "star" or "marquis" players.

The antitrust analysis of player restraints tracks the competitive effects. Therefore, the most important starting point for discussion of the cases in this Chapter is to consider the purposes and effects of the rules or agreements being challenged in each case.

B. PLAYER RESTRAINTS IN INDIVIDUAL SPORTS

The restraints on players (or athletes) in individual sports are as varied as the sports. In general, athletes in these sports do not have exclusive multi-year contracts to play for one circuit of events, but rather play in different events at different times throughout the year. One exception is auto racing, where a driver and his car may contract to compete exclusively on one circuit. Another exception is boxing, where a championship fighter may sign an exclusive, multi-bout contract with a particular promoter. However, in boxing, the exclusivity may only last as long as the fighter maintains his championship position. After the champion loses his title, control over subsequent bouts may rest with the ex-champion's opponents, and their respective promoters.

In sports with tours of events (such as golf and tennis), the individual events compete to attract the top players, and the tours seek to force the players to expend as much of their competitive time as possible in events that are part of their tour. Some of the devices used by tours to force or encourage players to play more of their events (to the exclusion of all competing events) are considered in the last case in this Chapter, the *Volvo* case.

III. ANALYSIS OF THE CASES

Case: *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974)

Primary Reason for Inclusion: This case identifies and discusses a number of the standard

"player restraints" and discusses the question of whether the restraints should be judged under a per se standard or a Rule of Reason standard -- a key issue.

Points to Emphasize:

1) As this is the first case in the Chapter, it is important to emphasize that the students need to understand completely each challenged restraint, and how it works, in order to assess its competitive effects. For each restraint, the students should try to identify the ways in which the restraint is anticompetitive (e.g., it limits competition between teams for the player's services -- thereby reducing player salaries and limiting the players' ability to select where they want to work (play)) and the ways the restraint is procompetitive (e.g., it may increase competitive balance in the league, by preventing one team or a few teams from signing all of the best players).

2) Are there player restraints in league sports that should be assessed under a per se rule? If not, why not? Why are sports different? Are only league sports different, or should restraints in individual sports be assessed under a Rule of Reason? Subsequent to the *Kapp* case, in *NCAA v. Board of Regents*, the Supreme Court held that the agreements among the universities at issue in that case (concerning mandatory pooling of college football television broadcast rights) were to be judged under the Rule of Reason, not under a per se analysis. See N & Q 2. The Supreme Court in *NCAA* reasoned that because some agreements between or among the teams in a league are necessary to produce the product at all (the teams have to agree on schedule, rules, etc.), an antitrust tribunal should not jump to the conclusion that their agreements are anticompetitive or unlawful without a closer examination than the examination required under a per se analysis. The *NCAA* decision went on to hold that because there were obvious anticompetitive effects of the restraints at issue in that case and the defendants had not identified any substantial procompetitive benefits of the restraints, there was no need to proceed further -- the restraints were unlawful under a "quick look" Rule of Reason analysis. See Chapter 7.

3) What per se violation could the restraints be? To the extent they depress player salaries, they could be price fixing agreements by purchasers of player services. To the extent they prohibit other teams from competing for a player's services, they could be group boycotts, but they are not group boycotts designed to hurt a competitor -- should they be afforded per se treatment under *Northwest Wholesale Stationers*? See Chapter 7.

4) Did the district judge consider the possible procompetitive effects of the rules at issue? There is an argument that he did not consider sufficiently the possible benefit of the rules in improving NFL football by creating parity among the teams in the league. Does parity improve the product? While it is of course true that a number of perennially, totally, non-

competitive teams would be bad for the sport, does it hurt the sport to have a few teams that are almost always successful (e.g., the years of the Celtics and Lakers in the NBA, the San Francisco 49ers and Dallas Cowboys in the NFL in recent years, and so on)? Another issue is the extent to which Rule of Reason analysis permits anticompetitve effects in the relevant market at issue in the case (the market for player services) to be outweighed by alleged procompetitive benefits in a separate market (the market for NFL football in which fans pay to watch or the television market for NFL football, in which television companies purchase television broadcast rights). See discussion following *Sullivan* case in Chapter 12. At a minimum, to the extent the alleged improvement in NFL Football increases the amounts teams will pay for players, it could cause indirect procompetitive benefits in the relevant market.

5) The *Kapp* case discusses a subsequent collective bargaining agreement, in which the NFLPA agreed to many of the rules challenged in *Kapp*. Should a union be able to cloak past antitrust violations, retroactively, with the labor exemption?

6) As N & Q 9 explains, despite Kapp's initial legal victory, he was unable to convince a jury that the illegal conduct he challenged had caused his injury (or, perhaps, that he had suffered any injury at all). Having failed to prove injury, also known as "the fact of damage," Kapp had lost, the Court of Appeals did not have any reason to consider the district court's decision, and the Court of Appeals dismissed the NFL's appeal as moot.

Notes and Questions: N&Q 1-3 focuses on the question of whether league player restraints should be subject to *per se* analysis or the Rule of Reason. The court's reason for applying the Rule of Reason are set-out on pages 425-26.

N&Q 4 raises an unanswered question. From the point of view of the player, as with any employee, it makes good business sense to negotiate a new contract to follow an expiring contract. Non-athletes will tell anyone considering a new job that it is generally advisable to keep your existing job until you have a new job nailed down. Well, in professional sports it does not generally work that way. Within a league, players are generally not permitted, for understandable reasons, to enter into negotiations with another team while under their existing contract. If a player under contract with the Yankees was playing in a game against the Orioles and negotiating with the Orioles at the same time, might that adversely affect his performance? Would it be bad for the game for questions about that issue to be raised? However, when a player is negotiating with a team in another league, that concern does not exist. Perhaps a player might not play as hard at the end of his current contract, knowing he had already locked-in a lucrative contract with a different team for the next year. However, that remains true whether or not the deal is done – the player may take it easy, to avoid injury. How

could the leagues defend the NFL's agreement with the Canadian League?

N&Q 5 remains an open and often raised issue in litigation before the NFL Commissioner, but there are no published opinions concerning the issue. A California court recently ruled in favor of the Raiders and against Commissioner Tagliabue in an extreme case that presented this issue; the decision has been appealed and a published decision may be forthcoming.

If the league's rules are anticompetitive and adversely affect United States athletes, the court has jurisdiction under United States antitrust law. If considerations of comity suggest that the interests of other countries dominate, it is possible for a United States court to refrain from addressing the merits of a case, but that is unlikely to be the case if an international rule has a direct, anticompetitive effect on United States athletes. N&Q 6 raises issues of international application of United States antitrust law in the context of the current litigation in Boston concerning Major League Soccer.

N&Q 7 explores the question of why players associations agree to anticompetitive rules during collective bargaining. The draft is a classic example. The primary victims of a league's draft are generally players-to-be, college athletes or others who have not yet been subject to the draft. The draft helps teams keep player salaries down, particularly young players – leaving more money for veteran players. Veteran players, not soon-to-be-rookies, make the decisions about what positions a players union will take, and veterans are often more than willing to agree to restraints on players who will become rookies in the future in return for a wide variety of benefits for the veterans.

N&Q 8 explores a statement by Judge Sweigert, which seems to mis the fundamental fact that there is no limit on the antitrust violations that can be agreed to by players, as long as the requirements of the labor exemption (see Chapter Nine) are satisfied.

N&Q 9 discusses what happened in the *Kapp* saga after Judge Sweigert's decision was issued.

Case: <u>Mackey v. National Football League</u>, 543 F.2d 606 (8th Cir. 1976)

Primary Reason for Inclusion: This is the substantive law portion of the opinion considered in Chapter 9 -- re: the labor exemption. The decision addresses head-on the argument that restraints on player services do not harm consumers or for some other reason are not cognizable under the antitrust laws. It also addresses the <u>per se</u> v. Rule of Reason analysis question, and then conducts a concise application of the Rule of Reason to the Rozelle Rule.

Points to Emphasize:

1) Some commentators have taken the position that because restraints on the amounts paid to players reduce owners' costs, and those costs may be passed on to consumers as lower ticket prices or in other ways, the restraints do not injure consumers and, therefore, do not violate the antitrust laws. See N & Q 4. Some of those commentators have also argued that restraining a labor market (as opposed to a product market) does not violate the antitrust laws. See N & Q 3. Those arguments are rejected by the Eighth Circuit in *Mackey* and have been rejected by every other court that has decided this issue. The *Mandeville Farms* decision of the Supreme Court, discussed in footnote 23 of *Mackey* and in N & Q 4, answers the first argument -- price fixing by purchasers is price fixing that violates Section 1 of the Sherman Act.

2) It is important for the students to understand how the Rozelle Rule may render the right to be a free agent illusory. If the "compensation" that must be paid to sign a free agent is sufficiently severe (or is punitive), that may eliminate any incentive to sign free agents. Under all circumstances, the compensation is an additional cost that must be incurred by a team interested in signing a free agent, and is likely to reduce the amount any team is willing to pay to acquire the free agent. Presumably, the amount that a raiding team is willing to pay an incumbent team to sign a free agent player is an amount that the free agent might be able to secure for himself in a negotiation under a system that did not require any payment of compensation.

3) One reason for a plaintiff to assert both per se and Rule of Reason claims is that the discussion about whether the restraint is per se unlawful is an opportunity for the plaintiff to educate the judge that the restraint at issue is, on its face, the same as other restraints that have been held per se unlawful in other contexts and other industries. In other words, if this were not a sports case, the plaintiff will argue, the restraint at issue would be held per se unlawful. Therefore, the plaintiff will argue to the judge, the restraint has obvious anticompetitive effects and could only survive a Rule of Reason analysis if the defendant league could come forward with an incredibly strong showing of procompetitive benefits and a showing that those benefits could not be achieved by less restrictive means.

4) The *Mackey* court decided it did not have to reach the question of whether a restraint on the movement of top players was necessary to maintain competitive balance because the NFL's restraints applied to all players, and was therefore much more restrictive than possibly necessary. It was for that reason that the NFL unilaterally decided to limit the teams' ability to restrict movement by players to their top 38 players -- that was the concept of "Plan B" and "Plan B" free agency -- the lesser players could become free agents. The NFL also reduced

the number of rounds of the draft -- how could they argue that the player who was the 400th best player out of college in a given year had to be limited to negotiating with a single team to maintain competitive balance? The NFL made those decisions in an effort to improve their chances of prevailing in upcoming antitrust cases. Plan B was at issue in the 1992 *McNeil* case. See Chapter 9 at 375-76. The NFL attorneys knew it would be very difficult to defend restricting 38 players on each team, but the owners did not want unilaterally to give the players any more free agency than necessary -- whatever the league gave up unilaterally would serve as the starting point for collective bargaining negotiations. The more the owners gave up unilaterally, the argument went, the more the players would demand in negotiations. The owners were torn between improving their antitrust chances and leaving themselves with sufficient concessions they were willing to give to the players' union to convince the players to abandon their antitrust litigation in return for a labor exempt collective bargaining agreement.

Notes and Questions: N&Q 1-3 focuses on the question of whether league player restraints should be subject to *per se* analysis or the Rule of Reason.

N&Q 3-4 respond to arguments made by league defenders against antitrust claims by players. The player restraints considered thus far in this Chapter are basically price fixing by purchasers of players services, which must be considered under the Rule of Reason, but are generally destined to be held unlawful because their procompetitive benefits are non-existent or minimal, and their likely anticompetitive effects are manifest.

Case: Boris v. United States Football League, 1984-1 Trade Cas. (CCH) ¶ 66.012 (C.D. Cal. 1984)

Primary Reason for Inclusion: This case raises the question of can there be a per se violation in the context of a team sport. It also raises the question of whether the plaintiff in *Boris* could prove a Rule of Reason violation if a per se standard had not been applied -- the same question is raised by the *Blalock* case that follows.

Points to Emphasize:

1) The USFL did not particularly want to boycott college players, but did so in order to avoid repercussions from the NCAA and NCAA institutions and their coaches, who oppose sports leagues trying to take their marquis players out of the college ranks and into the pro ranks before the players have finished with their college eligibility. To stay on NCAA coaches' "good sides," did the USFL have to leave the colleges' players alone until they graduated or their class graduated -- thereby creating a substantial disincentive to players leaving school early? Would the USFL have been at a competitive disadvantage vis-a-vis the NFL if it

had not had such a rule?

2) The USFL's rule (see Fact # 9) says a player is eligible if "all college football eligibility of such player has expired." I understand that the intent of that rule was that the player had played his four years or he had played and five years had passed, so his eligibility expired (you generally have five years to play four), and that did not happen with Boris. However, the uncontroverted facts establish that "Boris will not be eligible . . . in the Fall of 1984 or any time thereafter . . . " (See Fact #4). Is there an argument that "all college eligibility of [Robert Boris] has expired"?

3) Is it possible that the USFL did not mind the court's decision in *Boris*? The decision allowed them to sign Boris. Could the USFL simply tell the colleges that they tried to enforce their rule, but they were ordered not to by a court and had no choice but to comply -- thereby employing the player without incurring the wrath of college coaches?

4) The USFL had a different rule than the NFL Draft for allocating players -- each team had the exclusive right to select five players from each of five colleges in the team's territory. See Statement of Uncontroverted Facts 15-16. By having local college players play for the professional team in their vicinity, the USFL hoped to transfer local college loyalty to become local fan loyalty for the USFL team. Is this better or worse than the NFL's draft? Does it have greater or lesser procompetitive benefits?

5) As the much weaker, secondary professional football league, should the USFL fare better under the antitrust laws? Under the Rule of Reason, was the USFL strong enough or important enough to restrain the relevant market for professional football player services? If not, then the USFL's restraints would not violate the Rule of Reason, because the plaintiff must prove anticompetitive effects in an overall relevant antitrust market -- not just injury to a few competitors. Therefore, if the court had not applied a per se rule, could the plaintiff have prevailed under the Rule of Reason? See N & Q 3. Should the law permit a secondary league to impose restraints that the dominant league cannot? Arguably, yes -- if the restraints cause some procompetitive benefits (e.g., help the secondary league survive and thereby prevent the dominant league from securing a monopoly position), and do not cause any overall anticompetitive effects, while the dominant league's restraint causes substantial anticompetitive effects in the overall market, the primary league's rule violates the antitrust laws, and the secondary league's do not. The idea is not unusual -- for example, a monopolist may be guilty of predatory pricing if it reduces prices below cost to take away business from new entrants, but a new entrant, trying to entice consumers to try its product rather than the product of the dominant firm, may offer promotional prices below its costs.

Notes and Questions: N&Q 1 suggests that it is difficult to understand how the decision in *Boris* is consistent with virtually all other sports decisions about what conduct should be subject to *per se* analysis or the Rule of Reason. It appears that the judge believed what was occuring in this case was wrong, and decided to resolve the dispute as quickly as possible. It is also possible that the USFL did not mind losing this case – all that occurred was that a USFL team was permitted to draft and sign a player they presumably wanted, and the colleges could not blame the USFL – the court decision left them without a choice.

N&Q 2 raises the question of the applicability of the labor exemption to a major professional sports league draft. The answer is that if there were a USFL union (whether or not there was a collective bargaining agreement), the restrictions on players, including the draft, would be labor exempt based on the Second Circuit's decision in *Wood* (see pages 365-66, N&Q 6 following *Mackey*) and the Supreme Court's decision in *Brown* (see pages 399-417).

N&Q 3 focuses on the difference between *per se* and Rule of Reason analysis. Given the USFL's second class status (arguably the USFL did not have market power) and the fact that the challenged rule only affected NCAA underclassmen or football players who did not go to an NCAA institution who were good enough to play in the USFL, but were delayed by the USFL rule challenged by Boris. How many players was that likely to be? Were enough players adversely affected that it could be said that the rule adversely affected overall market competition in a relevant market? It is likely a court would conclude that competitors, not competition, were adversely affected, and no Rule of Reason violation could be proven. If one of the purposes of *per se* analysis is to identify clear antitrust violations for which the Rule of Reason is unnecessary, how can a restraint not violate the Rule of Reason, but constitute a *per se* violation? We return to this issue when we address the *Molinas* and *Blalock* decisions.

N&Q 4 is intended to focus the students on two specific issues as they read the *Molinas* and *Blalock* cases that follow.

Case: <u>Molinas v. National Basketball Association</u>, 190 F. Supp. 241 (S.D.N.Y. 1961)

Primary Reason for Inclusion: This case illustrates that the Rule of Reason is not always applied as it should be -- Judge Kaufman finds a rule against gambling inherently reasonable and lawful without any discussion of relevant markets, anticompetitive effects, or procompetitive benefits. It is also an example of a court ruling quickly, almost summarily, for a sports league in a player discipline case.

Points to Emphasize:

1) Judge Kaufman did not apply the Rule of Reason analysis described in Chapter 7.

2) Teams alleged to have violated the antitrust laws may not admit they did not participate in exhibition games -- the collateral restraints -- because of an agreement. What does the plaintiff have to show to prove a conspiracy? Can he meet that burden? If the league did mandate that teams and players not participate in exhibition games with the plaintiff and not associate with him, should that violate the antitrust laws? Should it violate some other prohibition (e.g., tortious interference with contract or tortious interference with prospective business advantage)?

3) As discussed in detail in N & Q 1, a Rule of Reason plaintiff must show an injury to an overall market -- the market for basketball player services in this case -- not just injury to himself. Could *Molinas* satisfy that requirement? Given that the suspension simply cause Molinas to be out and one player to be substituted, it is difficult to see how this is an antitrust case in the modern era -- unless Molinas has a tort claim (see above) or a contract claim (the league violated its rules or the team violated Molinas' contract with the Pistons and the league tortiously interfered with that contract).

4) This case can be the vehicle for a variety of other discussions -- about gambling in sports (see N & Q 2), about the *Rose* case from Chapter 3 (see N & Q 3), etc.

5) This may be a useful place to consider the recent (December, 1997) dispute involving the National Basketball Association ("NBA") and Latrell Sprewell, who allegedly attacked and tried to kill his coach -- P.J. Carlessimo. Sprewell's team released him and voided Sprewell's contract, based on his alleged breach. That made Sprewell a free agent, but the NBA suspended Sprewell from playing for (or even signing with) any NBA team for a period of one year (until almost mid-way through the 1998-1999 season). On the one hand, what is the legitimate business reason for prohibiting all of the teams in the league from contracting with Sprewell if they so choose? Does "sending a message" to fans and others constitute a procompetitive justification? On the other hand, how is overall market competition in any relevant market affected by the suspension?

The Sprewell controversy presents issues about the power of the Commissioner (see Chapter Three), labor law (see Chapters 14-16), and other issues, as well. Sprewell retained O.J. Simpson's lead counsel, Johnnie Cochran, to represent him and there were allegations that Sprewell was being discriminated against because of his race. You may also want to consider the *Sprewell* case as a discussion point if and when you get to Chapter Seventeen

(Discrimination and Sports).

6) You may want to consider *Molinas* and *Blalock* together -- they both were suspended for breaking the rules of the sport -- Molinas was suspended for life and Blalock won because the Court held that the LPGA Tour committed a per se violation of the antitrust laws.

Notes and Questions: N&Q 1 discusses the concept that restraints directed at a few competitors or a small group of competitors in a market with many competitors may not adversely affect overall market competition. If the Rule of Reason is applied, this deficiency may be reflected in a finding that the plaintiff has not proven sufficient overall anticompetitive effects in a relevant market to sustain the claim. Another way the issue may be stated is that a court may find that because the restraint adversely affects competitors, not competition, it does not state an antitrust claim, based on the legal doctrine that the plaintiff has not suffered "antitrust injury." This is the same issue discussed after the *Boris* decision, and this N&Q provides citations to a great number of cases that dismissed plaintiffs' antitrust claims on this basis. However, the court did not conduct anything approaching that clear of an analysis – merely asserting that the decision to exclude Molinas was clearly "reasonable." Is this consistent with what Rule of Reason analysis is supposed to be as outlined in the primer chapter – Chapter 7?

Does the fact that Molinas admitted his guilt suggest that he would have a difficult time proving that excluding him was anticompetitive or does it suggest that there were procompetitive benefits (ridding the sport of the taint, maintaining fan interest, preserving the integrity of the sport) from his exclusion? This question is suggested by N&Q 2. Molinas was not the only sports figure alleged to have had involvement with gambling, and some examples are collected in N&Q 2.

N&Q 3 discusses the Pete Rose controversy from Chapter 3 as a possible antitrust claim. The problems with such a claim are many. First, would the baseball exemption apply – see Chapter 8. Second, it would have been very difficult for Rose to even articulate what overall relevant market might have been adversely affected or to suggest any anticompetitive goal that was furthered by his exclusion. Third, with respect to his exclusion from the Hall of Fame, who "agreed" to the exclusion to satisfy Section 1 of the Sherman Act's "contract, combination . . . , or conspiracy" requirement. Fourth, what relevant market was affected by exclusion from the Hall of Fame – does that involve commerce or simply honor and recognition? Fifth, having never sought reinstatement by Major League Baseball, would Rose have to prove futility to defend against the argument that he waived his claim?

N&Q 4 suggests that the outcome in the case that follows – Barbara Jane Blalock's successful antitrust case against the LPGA – was a surprise, given that the LPGA took

the position that Blalock was an admitted cheater and was excluded for only one year based on that offense.

Case: Blalock v. Ladies Professional Golf Association, 359 F. Supp. 1260 (N.D. Ga. 1973)

Primary Reason for Inclusion: It is an individual sports case that arguably stands for the general proposition that competitors in a sport should not be able to sit together and make subjective decisions that adversely affect other competitors. It applies a per se rule in a player restraint case, even a player discipline case. It may have implications in many other contexts, and is a favorite case for plaintiffs in sports antitrust litigation, even though it is a district court case from Georgia in 1973.

Points to Emphasize:

1) The decision strikes down the discipline for two reasons -- first, it is administered by Barbara Jane Blalock's competitors, who stand to gain from her exclusion, and second, because it involved "a completely unfettered, subjective and discretionary determination of an exclusionary sanction." With respect to the first issue, what if there was a small minority of competitors involved in the decision making, but those few had been the ones pressing for a major suspension? Does every competitor have to recuse himself or herself? Those questions are not answered in *Blalock*. See N & Q 1.

2) One key factor in the judge's decision appears to be that a decision was made about the penalty to be issued to Blalock ($500 fine and a year's probation), and for no reason other than Blalock admitting that she was guilty (and thereby, presumably, offering the defendants some comfort that Blalock would not have a leg to stand on no matter what penalty they issued), they reconsidered the penalty and suspended her for a year. That may be what caused the judge to emphasize that it was "a completely unfettered, subjective and discretionary determination."

3) If the judge had been required to decide what penalty would be reasonable, he would have had to second guess a private association in its decision making about how to run its sport. Who can say what is a reasonable penalty for cheating? By holding the process per se unlawful, he did not have to take any position on whether the penalty would have been permissible if issued by a neutral, independent decision maker, or a circuit commissioner who did not stand to gain from Blalock's exclusion from the tour.

4) As discussed in N & Q 3, there is an interesting question about what is necessary to prove anticompetitive effects. If Blalock was, at the time of the decision, winning

even after event in 100-woman fields, would her exclusion and replacement by a new 100th-ranked player constitute anticompetitive effects in an overall antitrust market? It would change the earnings of the top players -- giving them money Blalock would have been likely to earn. However, the total number of events, the total number of women playing, and the total prize money being paid would arguably not be affected. Would the plaintiff have to prove that the suspension of Blalock was having some sort of anticompetitive deterrent effect on other competitors (and if that effect was to over-deter cheating, would that be a bad outcome)? Therefore, it may be that Blalock could not win under a Rule of Reason analysis, but wins because the Court held the restraint to be per se unlawful. That is anomalous in the opinion of some, because of their understanding that per se violations are simply restraints where conducting a Rule of Reason analysis is unnecessary because that category of restraints always violates the Rule of Reason.

Notes and Questions: N&Q 1 raises an open question – what happens if only part of a decisionmaking body competes with the adversely affected competitor? This issue is discussed above, in the Points to Emphasize. Similarly, N&Q 1 suggests that the initial "slap on the wrist," followed by the severe penalty, may have suggested to the court that Ms. Blalock was not getting a fair hearing, precisely because she was a competitor (perhaps an unpopular competitor, and certainly a successful competitor) and the LPGA board members saw an opportunity to banish her from the tour for a year.

N&Q 2-4 return to the question raised after *Boris* and *Molinas* – there was held to be a *per se v*iolation, but a Rule of Reason violation may have been difficult to prove. However, this case is different, that those, because there is an argument that the decision by the LPGA in *Blalock* had a much broader impact and significance – it was not merely a decision to suspend Blalock, but rather was a decision that the competitors on the LPGA board had the power to regulate all competition, to decide who would and who would not be permitted to play. Anyone accused of some rule infraction could have been concerned about their fellow competitors deciding their fate – not just underage football players as in *Boris* or admitted gamblers as in *Molinas*. If the claim by Blalock had been unsuccessful, could she have brought a tortious interference claim or a state due process claim, on the basis that the decisionmakers were biased – similar to the legal route followed by Pete Rose in Chapter 3? The fact that there were no other tours strengthens Blalock's argument that an overall market was affected. Exclusion from one of three tours might be perceived as having even less overall market impact – as it would only exclude Blalock from a portion of the events in the market. If other tours decided to honor the suspension and Blalock could not show there was an agreement among the tours, that would present difficulties both in getting relief against the other tours and in proving that her damage was the result of an antitrust agreement.

N&Q 5 and the text that follows is intended to provide a lead-in and some background to the students as they prepare to read the *Volvo* decision.

Case: Volvo North America Corporation v. Men's International Professional Tennis Council, 857 F.2d 55 (2d Cir. 1988) and Background of Men's Professional Tennis that precedes the case

Primary Reason for Inclusion: There are very few cases that discuss individual sports at any length. Given the importance of professional golf and tennis, this case is an opportunity to consider a lot of the issues discussed in Chapter 2 that concern individual sports. In addition, as discussed above, player restraints in individual sports often serve additional anticompetitive purposes beyond reducing player compensation. They are often the means by which a group of events tries to force all of the top players to play exclusively in the group's events, to disadvantage competing events or groups of events. To understand which restraint has which consequences, the students have to understand each restraint and its effect on the business.

Points to Emphasize:

1) The history of the ITF and its "sanctioning" power, which are discussed on pages 450-51, are not unique to tennis. Today in soccer, for example, if a league is not sanctioned by FIFA, either directly or through the national governing body (a FIFA member) in the country where the league operates, players who play for teams in the unsanctioned league may lose their eligibility to ever play in sanctioned leagues or in FIFA events (e.g., the World Cup or the Olympics). Similarly, in swimming there have been recent issues about distance swimmers who swim in non-sanctioned events (events that compete with events favored by FINA) being disqualified from participating in the World Championships or other FINA-controlled or sponsored events.

Once an athlete or a team, league, or event "leaves the fold," and crosses the international federation that "governs" that sport, in many sports the international federations "black-ball" the athlete or the team, league, or event, and stigmatize anyone who competes against the athlete or participates in the disfavored league, team, or event. This eliminates any possibility an unsanctioned team, league or event can attract athletes, and ensures that a banned athlete cannot compete against athletes in good-standing because of a fear that it will become clear that the best athletes are banned and the sanctioned events do not include the best athletes, thereby hurting the sanctioned events financially.

2) The history detailed on pages 451-454 is the factual background to the *Volvo* lawsuit and shows a number of things, including the dramatic growth of professional

tennis (63 top professional tournaments in 1970 to 122 by 1978), the years when the Grand Prix and the WCT agreed to divide the year to avoid direct head-to-head competition between their events (e.g., in 1973, 1974, and 1976) and the years when they could not reach agreement and competed directly against each other (e.g., in 1970-1972, 1975, and 1977), and the eventual development of individual "special events" that competed directly against tour events (see pages 453-454).

It should also help the students understand the alphabet soup of the:

- MIPTC (Men's International Professional Tennis Council -- a nine member panel that ran the Grand Prix with three ATP representatives, three ITF representatives, and three "tournament" representatives)

- ITF (International Tennis Federation -- formerly the International Lawn Tennis Federation -- the international federation that governed tennis and still governs the Grand Slam events, the Davis Cup, and tennis in the Olympics)
- USTA (United States Tennis Association -- formerly the United States Lawn Tennis Association -- the United States National Governing Body for Tennis, and therefore a member of the ITF, it produces the United States Open in Flushing Meadow, New York -- formerly the United States Lawn Tennis Championships in Forest Hills, New York)

- WCT (Lamar Hunt's World Championship Tennis tour)

- ATP (the Association of Tennis Professionals, an association formed by the players)

- The ATP Tour (no real relationship to the ATP other than the ATP made the decision to launch the ATP Tour -- the name of the tour that was started after the *Volvo* decision and replaced the Grand Prix and the MIPTC)

- IMC (International Merchandising Corporation -- one (the tennis corporation) of the more than ten corporations that are part of Mark McCormack's International Management Group (IMG))

3) The *Volvo* case illustrates the new world of Section 1 -- we know price fixing, horizontal market division, and certain group boycotts are all per se violations, but what is price fixing? What is horizontal market division? What is a group boycott and which group boycotts are per se violations? What is the analysis -- is it some sort of a reasonableness analysis

to determine if the application of a Rule of Reason analysis is necessary? If so, what is left of a per se rule -- what does it mean that group boycotts are subject to a per se rules? All of this analysis has to take place in the context of the issue of whether a per se analysis is ever appropriate in a case about professional sports.

Basically, what has occurred is that the Supreme Court has delineated a type of analysis for group boycotts that replaces a totally open-ended rule of reason analysis, and directs the court toward the key issues to be considered. However, to ascertain whether the defendant has market power, some sort of market definition analysis has to be conducted. That is contrary to the traditional concept of per se analysis -- which was to the effect that the plaintiff did not have to prove the relevant market and there were few (if any) defenses available once the fact of the per se agreement was proven.

4) One significant typographical error in the Notes & Questions is as set forth below:

In the middle of N & Q 4, the sentence should be changed as follows:

> While nominally "owned" or "controlled" by the players, the ATP Tour is a not-for-profit entity that has continued to employ most of the same restrictions ~~found by~~ the *Volvo* court **found may** ~~to~~ be *per se* unlawful.

5) The *Volvo* decision is an excellent case for focusing on the multiple markets at issue in antitrust analysis of professional sports. The Complaint identifies three separate relevant markets. Discuss the relevant markets, the participants in those markets, the restraints on those markets that are challenged by the plaintiffs, and the participants who are injured (and those who are not injured) by each restraint on each market.

6) An extremely important antitrust issue is the question of antitrust injury, which is related to the issue of antitrust standing. The basic concept is that plaintiffs seeking to invoke the antitrust laws are supposed to be the persons the antitrust laws were designed to protect and that were injured in ways that the antitrust laws are concerned about -- for example, consumers who pay higher prices because of price fixing and other restraints, competitors who are put out of business because of exclusionary or predatory practices, and so on. In addition, there are situations in which an antitrust violation has ripple effects -- for example, the violation injures a corporation, the corporation fails, and the employees and shareholders of the corporation are damaged as a result. Because of concerns about duplicative recoveries and the indirect nature of their damage, the employees and shareholders are unlikely to be able to assert antitrust claims in their own name. Issues of antitrust injury are discussed at some length in

Volvo -- one of its important holdings is a clear statement that a participant in an illegal conspiracy can sue to dissolve the illegal agreements. Another key point is that both the players who are the subject of the restraints and the tournaments that are the target of the restraints on the players should be permitted to pursue claims against the tour. See N&Q 9.

There are many other points that can be discussed based on the *Volvo* decision, some of which are addressed in the twelve notes and questions that follow the case.

NOTES AND QUESTIONS: N&Q 1 discusses a substantial problem in "sports antitrust litigation" – judges who are unable or unwilling to perceive sports businesses in the same light as other businesses. Prejudices and biases derived from reading the sports pages may make it difficult for certain judges to fairly apply the antitrust laws in antitrust litigation about sports.

N&Q 2 presents some of the history of the *Volvo* litigation, while N&Q 3 discusses the post-decision history. The Second Circuit in *Volvo* says that a variety of conduct that is still ongoing may constitute a *per se* violation. N&Q 4 asks how a circuit can continue to engage in conduct that may be *per se* unlawful – the answer is that it is only unlawful conduct if a plaintiff invests the necessary funds to pursue an antitrust case to judgment.

N&Q 5 discusses the ATP Tour's argument that it is differently situated in 1998 from the MIPTC in 1988 because the Grand Slam events (Wimbledon, U.S. Open, French Open, Australian Open) were part of and controlled by the MIPTC, while they are independent of the ATP Tour. When the casebook was published there was already substantial coordination between the Grand Slam events and the ATP Tour that called that argument into substantial question. In 1998, the ATP Tour went much farther, entering into a series of allegedly anticompetitive agreements with the Grand Slam events – forcing ATP Tour players to participate in the Grand Slams, affording the Grand Slams substantially increased ranking system benefits, and seeking to convince the Grand Slams to eliminate the competition the ATP faces from the annual Grand Slam Cup. Whatever benefit the ATP Tour might get from its independence will be lost, and it will be much more difficult for the Grand Slams and the ATP Tour to allege and prove procompetitive benefits of coordination between and among events that are not part of the same tour. Perhaps all that is necessary for the ATP Tour to be held to have violated the antitrust laws is a motivated plaintiff with standing who suffered antitrust injury.

N&Q 6 discusses the horizontal market division aspects of the *Volvo* case, while N&Q 7 discusses the relationship of the analysis of the *Blalock* case to the facts at issue in *Volvo*.

N&Q 8 explains a fundamental problem with the district court's analysis – restraints that prevent individual events from operating and require instant creation of a full

competitive circuit certainly restrain trade unreasonably. It is not necessary that restraints prevent any creation of an entire competing circuit. However, one additional problem with the restraints was that they made it impossible for a number of separate events to develop, prosper, and eventually come together to form a competing tour.

N&Q 9 discusses the various groups of people and businesses who were adversely affected by the challenged conduct and suffered antitrust injury. While the closer question is whether players could assert damage claims, the better view is that they should be permitted to assert such claims.

N&Q 10 encourages students to focus on each element of challenged conduct and to consider the consequences of each element – who does the rule or agreement help and who is hurt? The last sentence points to the Ninth Circuit's decision in *Raiders* II *(Los Angeles Memorial Coliseum Commission v. NFL)* that a plaintiff who both benefited and suffered as a result of a challenged rule or agreement is only entitled to the net negative effects of the rule or agreement on that plaintiff.

N&Q 11 discusses a fundamental difference between many of the player restraints in *Volvo* and the other player restraints considered in the featured cases in this Chapter. Most of the *Volvo* case restraints were not designed to hurt players – they were designed to control the players to hurt any competing events. N&Q 12 asks the students to consider what procompetitive benefits the MIPTC could assert in defense of its rules and agreements if the case, upon remand, had been submitted to a trial under a Rule of Reason standard.