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Recommended Citation

Cary M. McCallister, *Aluminum Bat Manufacturers Anticompetitive Trade Practices in Collegiate Baseball: A Case Review*, 2 DePaul J. Sports L. & Contemp. Probs. 293 (2004)
Available at: <https://via.library.depaul.edu/jslcp/vol2/iss2/5>

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**ALUMINUM BAT MANUFACTURERS ANTICOMPETITIVE
TRADE PRACTICES IN COLLEGIATE BASEBALL: A CASE REVIEW**

*Cary M. McCallister**

INTRODUCTION

In 1998, a wooden baseball bat manufacturer brought suit against aluminum bat manufacturers, and associated collegiate bodies.¹ Plaintiff Steve Baum, and Baum Research and Development Company (collectively Baum) manufacture wood baseball bats.² Defendants include Hillerich & Bradsby Co. Inc. (H&B), Easton Sports Inc. (Easton), and Worth, Inc. (Worth). Each of these defendants manufacture aluminum baseball bats.³ Defendants also include the Sporting Goods Manufacturers Association (SGMA); a not-for-profit trade association of bat manufacturers,⁴ and the National Collegiate Athletic Association (NCAA); an

* The author wishes to thank Adam Gill and the *DePaul Journal of Sports Law & Contemporary Problems*' editors for their contributions. The author is especially grateful to Professor Ray Waters for his ongoing support and first-year legal writing instruction.

¹ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d 1189 (D. Kan. 1999).

² Wooden baseball bats are made of several possible materials. Ash wooden bats are generally harvested in Pennsylvania and Upstate New York. Ash is graded for quality with strait grain being the most important criteria. Maple wooden bats tend to outlast ash wooden bats when made from the right material known as Rock or Sugar Maple. Hickory wooden bats weigh more than ash or maple, because hickory is very dense. New developments remove some of the moisture that add to hickory's weight. Bamboo wooden bats do not flake or split easily. See Coach John Peter's Baseball Tips, How to Choose a Wood Bat By Coach John Peter, at <http://www.baseballtips.com/howto/wood.html> (last visited Dec. 3, 2004). See also, Rawlings, at <http://www.rawlings.com> (last visited Dec. 3, 2004). (which explains pros and cons of wooden baseball bats). Wood bats offer a classic feel and sound. They offer more choices in shape and taper that can be customized to a player's swing. On the other hand, wooden bats crack more easily, have reduced sweet spots on the barrel, and have far less hitting power than metal bats.

³ Aluminum baseball bats are lighter in weight which increases control and bat speed. Despite generally higher costs than other materials, aluminum is durable and not prone to crack or break. Aluminum bats vary in weight, and contain different combinations of Zinc, Copper, Magnesium, and Aluminum. See Rawlings, at <http://www.rawlings.com> (last visited Dec. 3, 2004).

⁴ As read on their website, "The association of the sports product industry dedicated to growing the business of sports and fitness worldwide." See SMGA International, SMGA international, at <http://www.sgma.com/index.html> (last visited Dec. 3, 2004).

association of colleges and universities that participate in intercollegiate athletics.⁵

Filed in a Michigan Court, the claims alleged antitrust violations and tortious interference.⁶ The Michigan Court dismissed the antitrust claims, and suggested amending the tortious interference claim.⁷ The wooden bat manufacturer filed an amended action, where the judicial panel on multidistrict litigation transferred it to the Kansas District Court.⁸ The Kansas Court sustained the tortious interference claim, and dismissed several directly related antitrust claims.⁹

This discussion reconciles the sustained tortious inference claim with the dismissed antitrust claims. Tortious interference with business relationships and prospective economic advantage is evaluated. The allegations accepted by the Kansas Court are highlighted in sustaining this tortious interference claim, and are evaluated under the Kansas Courts' acceptance as *if the allegations were true*. The allegations are then applied to the antitrust claim; first, the antitrust injury requirement, then the necessary predicate requirement. The allegations support the contention that the antitrust claim should have been sustained under the same analysis that sustained the tortious interference claim. Analysis under The Sherman Act and The Clayton Act, not discussed by the Kansas Court, is offered to further support the antitrust

⁵ The NCAA serves as a governance and administrative through which its members [among other things] enact legislation to deal with athletics problems when the problems spread across regional lines and when member institutions conclude that national action is needed. The NCAA provides financial assistance and other help to groups that are interested in promoting and advancing intercollegiate athletics. It maintains committees to write and interpret playing rules in 13 sports. The NCAA conducts research as a way to find solutions to athletic problems. Administer national and international marketing and licensing programs to enhance intercollegiate athletics and to expand youth development programs. See Nat'l Collegiate Athletic Assoc., The Official NCAA Website, at <http://www.ncaa.org/about/services.html> (last visited Dec. 3, 2004). See also, Nat'l Collegiate Athletic Assoc., NCAA – About the NCAA, at http://www2.ncaa.org/about_ncaa/ (The National Collegiate Athletic Association is a voluntary organization through which the nation's colleges and universities govern their athletics programs. It comprises more than 1,250 institutions, conferences, organizations and individuals committed to the best interests, education and athletics participation of student-athletes).

⁶ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1192.

⁷ *Id.*

⁸ *Id.*

⁹ See generally, *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d. at 1189.

contention. Finally, the Motion for Leave to Amend the State and Federal Antitrust Claims is evaluated after establishing the appropriateness of the antitrust claims.

II. BACKGROUND

NCAA rules allow both wooden and aluminum bats in NCAA baseball games,¹⁰ with ninety percent of the market using aluminum bats.¹¹ Defendant manufacturers produce aluminum bats, and have signed exclusive contracts to provide baseball bats to NCAA member teams.¹²

The NCAA does not restrict bat performance in men's collegiate baseball.¹³ Baum claims this lack of restriction was the result of a conspiracy to diminish the use of wooden bats in the collegiate market.¹⁴ Baum alleged the defendant bat manufacturers conspired to eliminate competition from the market by (1) engaging in exclusive arrangements with colleges, universities and coaches to eliminate these teams from using competitor-wooden products, and (2) cooperating with SGMA and the NCAA to control the standard-setting function of the NCAA to establish unreasonable bat performance standards that excluded wood composition bats from

¹⁰ *Id.* at 1194.

¹¹ *Id.* at 1193.

¹² *Id.* at 1193-1194.

¹³ *Id.* at 1194. Bat performance varies between batted balls from a wooden bat and batted balls from an aluminum bat.

Research indicates the existence of a window of vulnerability of approximately 0.04 seconds to a baseball pitcher reacting to a batted ball. The risk for serious injury during this time is difficult to quantify; however, it has happened, and there is a potential for it to continue to occur as indicated by an estimated 375 pitchers struck in games this past year. NCAA umpires have responded to the reaction-time issue by modifying their positions in a three-person umpire crew. *Collegiate women's softball has eliminated use of titanium bats because of similar concerns*. The NCAA Executive Committee changes are consistent with these concerns as well as re-establishing a competitive balance between offense and defense.

Randall W. Dick, *Sports Sciences Newsletter – A Discussion of the Baseball Bat Issue Related to Injury from a Batted Ball*, THE NCAA NEWS: NEWS & FEATURES, Apr. 12, 1999, available at <http://www.ncaa.org/news/1999/19990412/active/3608n39.html> (last visited Dec. 3, 2004) (emphasis added).

¹⁴ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1194.

competition.¹⁵

On July 13, 1998, Baum filed a complaint against H&B, Easton, Worth, the NCAA, and the SGMA, claiming, (1) violations of state and federal antitrust laws and tortious interference with contractual relations, and (2) prospective economic advantage in violation of state law.¹⁶ On November 19, 1998, the United States District Court for the Eastern District of Michigan dismissed Baum's state and federal antitrust claims for failure to state a claim upon which relief can be granted.¹⁷ The court held that if Baum's had suffered injury, it was not the result of anticompetitive effects on the market, but from competition itself.¹⁸ The court also suggested that Baum amend the complaint to better describe the specific expectation of an economic relationship in advancing its claims for tortious interference.¹⁹ Baum filed an amended motion for reconsideration and to amend the complaint on December 4, 1998.²⁰ Five days later on December 9, the judicial panel on multidistrict litigation transferred the Baum action to the United States District Court for the District of Kansas, where the court denied plaintiff's motion for consideration.²¹ The motion for leave to amend was granted in part and denied in part. The

¹⁵ *Id.*

¹⁶ *Id.* at 1191-1192. This applies to *Baum Research & Dev. Co. v. Hillerich & Bradsby Co.*, 31 F. Supp. 2d 1016 (E.D. Mich. 1998).

¹⁷ *See Baum Research & Dev. Co.*, 31 F. Supp. 2d at 1023. "Even if Baum could somehow establish that the NCAA's failure to regulate bat performance had an anticompetitive effect on the market, Baum cannot show that its injury flowed from the purported violation of the antitrust laws." *Id.*

¹⁸ *Id.* at 1023.

¹⁹ *See id.*

²⁰ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1192.

²¹ *Id.* The judicial panel transferred the action pursuant to Multidistrict Litigation, 28 U.S.C. § 1407 (1976). The pertinent parts of the code read: (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded. c) Proceedings for the transfer of an action under this section may be initiated by (i) the judicial panel on multidistrict litigation upon its own initiative. (d) The judicial panel on multidistrict litigation shall consist of seven circuit and

case was then remanded from the Kansas District Court to the United States District Court for the Eastern District of Michigan with the support of one of the original defendants.²²

Baum's motion for leave to amend was sustained because they provided sufficient allegations of a valid business expectancy necessary to claim tortious interference with business relationships and prospective economic advantage.²³ Baum offered three specific allegations in support of its motion for leave to amend: (1) Baum had more than mere hope for business opportunities or the optimism of a salesman;²⁴ (2) Baum's wood bats were well regarded by baseball players and coaches and had previously seen substantial sales; and²⁵ (3) Baum specified an identifiable class of prospects to whom they had a reasonable expectation of selling their wood bats.²⁶

Baum's motion for reconsideration claiming violations of state and federal antitrust laws, and its subparts, was still denied. Yet, the court found three sufficient allegations to sustain a

district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit.

²² See *In re Baseball Bat Antitrust Litig.*, 112 F. Supp. 2d 1175 (J.P.M.L. 2000). The Judicial Panel found that remand of *Baum* in its entirety was appropriate. *Id.* The Panel's decision departed from the suggestion received from the transferee judge that the Panel remand only the one remaining Baum claim (tortious interference) that has not been dismissed. *Id.* The transferee court considered this approach would afford it the opportunity after remand to enter final judgment to i) overrule plaintiffs' motion for reconsideration of the decision of the Michigan transferor court, and ii) deny plaintiffs' motion to amend the complaint insofar as it sought to restate the antitrust claims. *Id.* The Judicial Panel disagreed with the transferee judge because all other actions had been dismissed pursuant to stipulations of the parties, and thus there were no actions, apart from the Baum claim, in which any appellate activity could occur. Indeed, the possibility that Baum could appeal in two circuits can only arise if the Panel orders remand of less than *Baum* in its entirety. *Id.* The Panel found it far preferable to order remand of the entire Baum action, leaving both plaintiffs and defendants with one appellate court option. *Id.* The Court of Appeals for the Sixth Circuit would have power and authority to review any and all rulings made in the case, without regard to whether those rulings were made by the transferee court or the transferor court. *Id.* Baum argued against remand and desired relief in the Tenth Circuit, and also stated that several motions pending should be decided by the transferee court because of its familiarity with the underlying issues. *Id.* The Panel disagreed and held that the transferee judge's suggestion of remand to the Panel is obviously an indication that the transferee judge perceives his or her role to have ended. *Id.* The transferee judge indicated this because i) all actions save *Baum* have been terminated in the transferee district, and ii) remaining pretrial proceedings in *Baum* can best be managed in the Eastern District of Michigan before the transferor judge who, is the judge who must preside over any eventual *Baum* trial. *Id.*

²³ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1205. "The proposed complaint sufficiently alleges the existence of a valid business expectancy." *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

directly interrelated tortious interference claim.

This paper applies the three sufficient allegations that sustained the tortious interference motion to the claims the court incorrectly denied. Arguments presented by the court are deconstructed revealing the court's inconstancies in its outcome with additional support from case law.

III. ANALYSIS

This analysis begins by reviewing Baum's sustained motion of tortious interference in order to establish the court's correct reasoning in reaching its conclusion. The court's reasoning is then applied to Baum's interrelated claims considered invalid by the court, with emphasis highlighting the court's inconsistencies. Baum's dismissed antitrust claim is scrutinized by focusing on the requisite elements the court considered not met: antitrust injury and necessary predicate.²⁷ As well under antitrust, The Sherman Act and the Clayton Act are discussed as being overlooked by the court, or as overlooked by Baum. After establishing the sustainability of the antitrust claim, the court's errant ruling to overrule Baum's Motion for Leave to Amend the Antitrust Claims will be discussed.

A. Tortious Interference with Business Relationships and Prospective Economic Advantage

Under Michigan law, a claim for tortious interference with a business relationship a plaintiff must establish: (1) the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy;²⁸ (2) knowledge of the relationship or expectancy on

²⁷ *Id.* at 1198. "[T]he court concludes that Baum has not alleged antitrust injury and that its motion for consideration of that issue should be overruled...As an alternative basis for dismissing Baum's antitrust claims, the Michigan court held that 'even if Baum could somehow establish that NCAA's failure to regulate bat performance had an anticompetitive effect on the market, Baum cannot show that its injury flowed from the purported violation of the antitrust laws'." *Id.*

²⁸ *Matis v. Massman*, 355 F.3d 902, 906 (6th Cir. 2004).

the part of the defendant interferer;²⁹ (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy;³⁰ and (4) resulting damage to the party whose relationship or expectancy has been disrupted.³¹

The defendants successfully moved to dismiss this claim under the original complaint. The Michigan Court gave Baum the opportunity to amend the complaint better describing the business expectations.³² Baum then alleged more than a mere hope for a future business opportunity or the innate optimism of the salesman.³³ Baum claimed that the bat manufacturers and SGMA induced the Mid-American and Cape Cod Conferences to terminate arrangements Baum had previously made for the use of Baum's bats.³⁴ Baum continued to other allegations including, inter alia: (1) the market for amateur baseball bats is huge, consisting of colleges, universities, and little leaguers throughout the world that are complimented by professional players and coaches for their durability, performance and value;³⁵ (2) the defendants induced the NCAA Executive Committee to override decisions of the Rules Committee;³⁶ (3) the defendants gave free aluminum bats, equipment and money to colleges, universities and coaches to "induce and coerce" the Rules Committee, the Executive Committee and NCAA member schools and

²⁹ *Id.*

³⁰ *Id.* See also *Wausau Underwriters Ins. v. Vulcan Development*, 323 F.3d 396, 404 (6th Cir. 2003) ("The third element requires more than just purposeful or knowing behavior on the part of the defendant. The plaintiff must also allege that the interference was either (1) a *per se* wrongful act or (2) a lawful act done 'with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another'.")

³¹ *Matis*, 355 F.3d, at 906.

³² *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1203.

³³ *Id.* See also *Schpani v. Ford Motor Co.*, 303 N.W.2d 307 (Mich. Ct. App. 1981). The court stated that the tort of intentional interference with business requires, as a basis, that a business relationship be proved with some degree of specificity, at least to the point that future profit be a realistic expectation and not merely wishful thinking. *Id.* It is true that where a prospective advantage is alleged, plaintiff need not demonstrate a guaranteed relationship because anything that is prospective in nature is necessarily uncertain. *Id.* The tort does not deal with certainties, but with reasonable likelihood or probability. *Id.* This must be something more than a mere hope or the innate optimism of the affected party. *Id.* The tort contemplates a relationship, prospective or existing, of some substance, some particularity, before an inference can arise as to its value to plaintiff and defendant's responsibility for its loss. *Id.*

³⁴ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1203. The SGMA and defendant bat manufacturers induced the arrangements' termination and removed and destroyed Baum's bats and replaced them with free high performance aluminum bats. *Id.*

³⁵ *Id.* at 1204.

³⁶ *Id.*

coaches to refrain from adopting any rules, standards or tests that curtailed the use of high performance aluminum bats" in order to exclude wood or wood composition bats;³⁷ (4) the defendants submitted information to the NCAA, the National Federation of State High School Associations, and college, high school and amateur baseball coaches false information³⁸ about the defendants' aluminum bats.³⁹ Finally, Baum included an allegation that in November 1998, Easton disseminated to the Rules Committee, and to hundreds of college and high school baseball coaches, false information regarding results of tests on the Baum Hitting Machine.⁴⁰

The Kansas District Court ruling on these allegations under Michigan's tortious interference with a business relationship criteria determined there were: (1) sufficient allegations of the existence of a valid business expectancy; (2) an identifiable class of prospects to whom Baum had a reasonable expectation of selling composite wood bats; (3) indications that Baum's composite wood bats were well received by baseball players and coaches and had previously enjoyed not insubstantial sales; and (4) expectations for better sales and profits from the amateur baseball bat market.⁴¹

The District Court appropriately sustained Baum's motion to amend for tortious interference with a business relationship based upon these allegations. The court sustained this motion not determining these allegations *are facts*, but on the basis as "*if these allegations are*

³⁷ *Id.*

³⁸ *Id.* at 1205. The false information submitted was that aluminum bats are safe and no faster than wood, that aluminum bats did not upset the offensive/defensive balance or affect the "integrity of the game."

³⁹ *Id.* at 1204-1205.

⁴⁰ The Baum Hitting Machine methodology developed by Steve Baum, president of Baum Research and Development in Traverse City, Michigan, measures batted-ball velocities for any combination of pitch speed and swing –speed velocities. Project director of a year long review and research program for the NCAA, recommends that steps in forming the foundation for future testing that would allow the NCAA Baseball Rules Committee to develop permanent bat-performance standards based on published, scientific evidence rather than beliefs or anecdotal information. The recommended compliance program would require manufactures to test bats and balls using the American Society for Testing and Materials methodology and the Baum Hitting Machine methodology. Theodore A. Breidenthal, *Expert Recommends compliance program for bat performance*, THE NCAA NEWS: NEWS & FEATURES, Dec. 8, 1997, available at <http://www.ncaa.org/news/1997/19971208/active/3444n02.html> (last visited Dec. 6, 2004).

⁴¹ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1205.

true.”⁴²

The remaining portion of this paper analyzes the motions that were denied using: (1) the above allegations accepted by the court in its reasoning to sustain the directly interrelated tortious inference claim, and (2) the statement offered by the court in accepting these claims based upon *a possibility that the allegations could be true*,⁴³ which sustained Baum’s tortious interference claim.

1. The State and Federal Antitrust Claims: Antitrust Injury

The United States District Court for the Eastern District of Michigan dismissed Baum’s antitrust claims⁴⁴ for failure to properly allege antitrust injury resulting from any anticompetitive effect on the market but from competition itself.⁴⁵ Baum cited authority establishing that a direct competitor has standing and suffers antitrust injury when it is targeted and victimized by a conspiracy to exclude it from competition.⁴⁶ In response to this authority, the Kansas District Court explained that the defendants’ simply *induced* the NCAA not to pass a rule which

⁴² *Id.*, (emphasis added).

⁴³ *Id.*

⁴⁴ The analysis is the same for Baum’s state antitrust claims and federal antitrust claims. *See* Michigan Antitrust Reform Act, Construction of Act, MICH. COMP. LAWS § 445.784(2) (1985), which states it is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason. Michigan comment to 445.784 reads, this section is intended to give the courts and individuals the maximum amount of certainty possible as to the meaning of the Michigan Antitrust Reform Act and its application by drawing on the thousands of decisions developing and interpreting the Federal antitrust laws (and the Uniform State Antitrust Act) which is the most advanced and well developed body of antitrust law available.

⁴⁵ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1194-1195.

⁴⁶ *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999). In *Re/Max* a national real estate brokerage firm sued a local real estate firm. *Id.* Plaintiffs alleged that the means by which defendants chose to dominate the market violated antitrust laws. *Id.* Plaintiffs claimed that the local firms prevented *Re/Max* from hiring knowledgeable and experienced field agents needed to effectively serve buyers’ and sellers’ homes. *Id.* The court stated that to deny the franchisors standing would result in antitrust violations going undetected or un-remedied if *Re/Max* was barred from the markets. *Id.* Also, *Re/Max* cites authority for antitrust standing as consisting of five factors: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff’s alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. *Id.*, citing *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983).

restricted bat performance standard.⁴⁷ The court misapplied this inducement act. The court could have, and should have, applied the multiple allegations Baum offered and the court accepted in sustaining the tortious interference claim, such as: (1) bat manufactures and SGMA *induced* the Mid-American and Cape Cod Conferences to terminate arrangements Baum had made for the use of Baum's bats; (2) defendants *induced* the NCAA Executive Committee to override decisions of the Rules Committee, and; (3) gave free aluminum bats, equipment and money to colleges; and *induced and coerced* the Rules Committee, the Executive Committee and NCAA member schools and coaches to refrain from adopting any rules, standards or tests that curtailed the use of high performance aluminum bats in order to exclude wood or wood composition bats.⁴⁸

The First Circuit Court of Appeals has examined agreements and inducements and their relation to conspiracy.⁴⁹ Terms like "conspiracy," or even "agreement," might well be sufficient in stating a claim in conjunction with a more specific allegation.⁵⁰ Conspiracy in antitrust parlance is pretty much a synonym for agreement.⁵¹ The use of standards setting as a predatory device by some competitors to injure others is the principal concern; normally there is a showing that the standard was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other *improper forms of influence* in addition to a further showing of market foreclosure.⁵²

The allegations the Kansas Court determined *could be true* in sustaining the tortious interference claim, should have dictated the court to also sustain this antitrust claim. Baum

⁴⁷ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1197.

⁴⁸ *Id.* at 1203.

⁴⁹ See *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999).

⁵⁰ *Id.* at 56.

⁵¹ *Id.* at 54.

⁵² *Id.* at 57-58.

highlighted inducement allegations by competitors against Baum as improper forms of influence. Baum stated several instances when these inducements may constitute an antitrust conspiracy for which Baum may be entitled to relief.

2. *The State and Federal Antitrust Claims: Necessary Predicate*

In dismissing Baum's antitrust claims citing no antitrust injury, the Michigan district court dismissed Baum's antitrust claims for lack of necessary predicate.⁵³ The court held that Baum cannot establish the antitrust violation was the cause for its injury.⁵⁴ Baum argued that its exclusion from the amateur baseball bat market was the "direct and proximate consequence" of defendants' conspiracy,⁵⁵ and the defendant's conspiracy "rigged" the rule process.⁵⁶ The defendant bat manufacturers conceded the 'necessary predicate' requirement was secondary to the lack of antitrust injury claim, and that the 'necessary predicate' requirement has been widely criticized and rejected in other courts.⁵⁷ The Kansas District Court agreed with the Michigan Court on this issue, holding that Baum cannot establish an antitrust violation was the "necessary predicate" to its injury because the NCAA had the lawful authority to refuse to change the bat rules.⁵⁸

The United States Supreme Court stated the true test of legality is whether the restraint imposed is one which merely regulates, and perhaps, promotes competition or whether it is one which suppresses or even destroys competition.⁵⁹ In multidistrict litigation "a transferee court

⁵³ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1198. Necessary predicate requires Baum to show that its injury flowed from the purported violation of antitrust laws. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1199.

⁵⁷ *Id.* See e.g. *Reazin v. Blue Cross Blue Shield of Kan., Inc.*, 889 F.2d 951 (10th Cir. 1990) (upholding antitrust damage award despite defendant's right to refuse to deal with plaintiff absent anticompetitive behavior.) "Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations... would be likely to cause.'" *Id.* at 962.

⁵⁸ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1200.

⁵⁹ *National Soc. of Prof. Eng. v. United States*, 435 U.S. 679, 691 (1978).

should normally use its own best judgment about the meaning of federal law when evaluating a federal claim.”⁶⁰ In this multidistrict litigation, the Kansas transferee court should have used its own independent judgment on this matter, and not relied on the findings of the Michigan Court.

The allegations the Kansas District Court accepted in sustaining the tortious interference claim should have influenced the ‘necessary predicate’ requirement under antitrust claims. Of particular influence should be the allegations that: (1) the defendants gave free aluminum bats, equipment and money to colleges, universities and coaches to "induce and coerce" the Rules Committee, the Executive Committee and NCAA member schools and coaches to refrain from adopting any rules, standards or tests that curtailed the use of high performance aluminum bats" in order to exclude wood or wood composition bats;⁶¹ and (2) Easton disseminated to the Rules Committee, and to hundreds of college and high school baseball coaches, false information regarding results of tests on the Baum Hitting Machine.⁶² These allegations, which the court accepted as possibly true, demonstrate suppression of competition by illegally presenting false information. Also, providing free bats, equipment, and money to institutions certainly suppresses competition. This conspiracy by the defendants excluding Baum from the market was the direct and proximate cause of Baum’s injury or inevitable injury. The necessary antitrust predicate requirement and the antitrust injury requirement are met.

3. The State and Federal Antitrust Claims: The Sherman Act and Recovery under the Clayton Act

Necessary predicate and antitrust injury were the two elements the Kansas District Court

⁶⁰ *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F. Supp. 914, 919 (D.D.C. 1994).

⁶¹ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1203.

⁶² *Id.*

discussed in defeating Baum's antitrust claims.⁶³ Not raised by Baum, thus not addressed by the court, are other elements that should have sustained the antitrust claims. These elements alone should have also provided sufficient criteria for sustaining Baum's antitrust action. These elements include the Sherman Act⁶⁴ and the Clayton Act.⁶⁵

The Michigan Anti-Trust statute and the Sherman Anti-Trust Act mirror each other under Michigan law.⁶⁶ As well, under the terms of the Michigan Antitrust Reform Act,⁶⁷ courts examining claims under this act apply the same legal analysis as courts examining analogous claims under the Sherman Act.⁶⁸ Any person who is injured in his business or property because of actions forbidden by antitrust laws may sue for injuries . . . and may recover threefold the damage sustained.⁶⁹ The burden of proving antitrust injury is by a preponderance of the

⁶³ Under "Motion to Reconsider the Dismissal of Baum's State and Federal Antitrust Claims," the Kansas court evaluated only two elements, Antitrust Injury and Necessary Predicate. *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1192-93.

⁶⁴ Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 100,000,000 if a corporation, or, if any other person, \$ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. Monopolies and combinations in Restraint of Trade, Monopolizing Trade a Felony; Penalty, 15 U.S.C. § 2 (2004).

⁶⁵ The Clayton Act provides in pertinent part; any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Monopolies and combinations in Restraint of Trade, Suits By Persons Injured, 15 U.S.C. § 15 (1982).

⁶⁶ *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery Inc.*, 323 F.3d 366, 368 (6th Cir. 2003). The court applied the same analysis to both the federal and state antitrust claims. *Id.*

⁶⁷ Michigan Antitrust Reform Act, Construction of Act, MICH. COMP. LAWS ANN. § 445.784(2) (1985).

⁶⁸ *DXS, Inc. v. Siemens Med. Sys.*, 991 F.Supp. 859, 865 (E.D. Mich, 1997). *See also* Michigan Antitrust Reform Act, Construction of Act, MICH. COMP. LAWS ANN. § 445.784(2) (1985). Under the Michigan comment, this section is intended to give the courts and individuals the maximum amount of certainty possible as to the meaning of the Michigan Antitrust Reform Act and its application by drawing on the thousands of decisions developing and interpreting the Federal antitrust laws (and the Uniform State Antitrust Act) which is the most advanced and well developed body of antitrust law available. *Id.*

⁶⁹ *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299 (4th Cir. 1979). In *Lee Moore Oil* the defendant whose antitrust violations caused harm to the plaintiff may not be exonerated because the plaintiff may have suffered an injury in any event through the defendant's lawful activities. *See also* Charles N. Charnas, *Segregation of Antitrust Damages: An excessive Burden on Private Plaintiffs*, 72 CALIF. L. REV. 403, 410 (1984).

evidence standard, and some courts permit latitude in the proof that satisfies the burden.⁷⁰

In *Lee-Moore Oil Co. v Union Oil Co.*, the Fourth Circuit determined a supplier may lawfully refuse to deal with a customer, so long as the refusal does not involve an illegal combination or agreement.⁷¹ Defendant Union Oil Company of California terminated its supply contract with plaintiff Lee-Moore Oil Company. Lee-Moore brought this antitrust action under the Clayton Act.⁷² The Court of Appeals for the Fourth Circuit thought that Lee-Moore's evidence demonstrated an injury which, if proved to have been caused by an antitrust violation, would have been recoverable under The Clayton Act.⁷³ A plaintiff may recover under The Clayton Act only if it meets its burden of proving the alleged antitrust violation: (1) by the fact of injury; (2) displaying the requisite causal relationship between violation and injury; and (3) displaying the amount of damages.⁷⁴

The defendant in *Lee-Moore* recovered under The Clayton Act by establishing an injury, a relationship in violation of the injury, and damages. Combine this with: (1) the *Lee-Moore*

⁷⁰ See Charnas, *supra* note 69. For example, courts have allowed the plaintiff to show that injury resulted from conduct occurring both prior to and during the period in which it sustained damages, and circumstantial evidence may be submitted to satisfy the plaintiff's burden where direct proof is unavailable. See also, *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (Mass. Dist. Ct. 2004) where court stated that plaintiffs must demonstrate a threatened loss or damage by a violation of the antitrust laws). "The Supreme Court has held that this requirement is satisfied by a showing of 'significant threat of injury from an impending violation of the antitrust laws or from a cotemporary violation likely to continue or recur.'" *Id.* at 274 (citing *Zenith Radio Corp., v Hazeltine Research, Inc.*, 395 U.S. 100 (1969)). In *Zenith*, the Supreme Court concluded that evidence was quite sufficient to sustain a finding that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. *Id.* Their clear purpose was to exclude concerns like [the plaintiff's] from the Canadian market unless willing to manufacture there. *ZenithRadio corp.*, 395 U.S. at 118.

⁷¹ *Lee-Moore Oil Co., v. Union Oil Co.*, 599 F.2d 1299 (4th Cir. 1979). See also, *Money Station. v. Electronic Payment, Services, Inc.* 1996 U.S. Dist. LEXIS 19788 (S.D. Ohio 1996) (citing *Lee-Moore Oil*, "A supplier may lawfully refuse to deal with a customer, so long as the refusal does not involve an illegal combination or agreement").

⁷² Lee-Moore brought this antitrust action under section 4 of the Clayton Act. Monopolies and combinations in Restraint of Trade, Suits By Persons Injured, 15 U.S.C. § 15 (1985). Note 1 of the Clayton Act states, purposes of antitrust laws are best served by insuring that private action will be ever-present threat to deter anyone contemplating business behavior in violation of antitrust laws. The Clayton Act not only has purpose of deterring violators and depriving them of fruits of their illegality, but also is designed to compensate victims of antitrust violations for their injuries.

⁷³ *Lee-Moore Oil Co.*, 599 F.2d at 1300.

⁷⁴ *Id.* at 1306.

analysis; (2) Michigan's antitrust statute's similarity to the uniform Sherman Act; and (3) Baum's accepted tortious interference allegations, the antitrust claim should have been sustained. First, Baum claimed that the bat manufactures and SGMA induced the Mid-American and Cape Cod Conferences to terminate arrangements Baum had made for the use of Baum's bats, and removed and destroyed Baum's bats by replacing them with free high performance bats.⁷⁵ Second, the defendant bat manufacturers gave free aluminum bats, equipment and money to colleges, universities and coaches to "induce and coerce" the Rules Committee, the Executive Committee and NCAA member schools and coaches to refrain from adopting any rules, standards or tests that curtailed the use of high performance aluminum bats in order to exclude wood or wood composition bats.⁷⁶ Third, the defendants submitted false information about the defendants' aluminum bats to the NCAA, the National Federation of State High School Associations, and college, high school and amateur baseball coaches.⁷⁷ Finally, Easton disseminated to the Rules Committee and hundreds of college and high school baseball coaches false information regarding results of tests on the Baum Hitting Machine.⁷⁸

Baum satisfied, through these allegations, the requirements for an antitrust claim by a preponderance of the evidence. Also, just as latitude in proof of the allegations was allowed in the tortious interference claim, latitude is allowed here under the Sherman Act and The Clayton Act. The requisite causal relationship between violation and injury was satisfied.

The Kansas District Court allowed Baum's allegations considering "*if these allegations are true.*"⁷⁹ These accepted allegations sustained the tortious interference claim. These same

⁷⁵ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1205 (The court's analysis in accepting the allegations that "if they are true").

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

accepted allegations should have been sufficient to prove the antitrust injury claim and the necessary predicate claim; both denied by the court. The allegations *could* have sustained an action under The Sherman Act with recovery under The Clayton Act.

4. *Motion for Leave to Amend the State and Federal Antitrust Claims*

The above analysis illustrates the court's incompatibility in accepting tortious interference allegations and not allowing the same allegations to sustain interrelated antitrust claims. The same pragmatic analysis applies here with the court's irreconcilable analysis in not allowing interrelated Motion for Leave to Amend claims.

The United States District Court of Kansas sustained Baum's Motion to Amend the Complaint for the Tortious Interference with Prospective Economic Advantage claim.⁸⁰ The prior Michigan Court agreed with the defendant's claim that Baum had failed to allege no reasonable expectation of a business relationship on the original complaint.⁸¹ The Michigan Court, however, gave Baum an opportunity to amend the complaint to better describe those allegations.⁸²

In the Kansas District Court, Baum filed a Motion for Leave to Amend the State and Federal Antitrust Claims.⁸³ Baum sought the motion because of the Michigan Court's erroneous and unsupported factual conclusion that under no set of facts could Baum ever show antitrust injury.⁸⁴ The Kansas Court determined that Baum did not properly seek to amend its complaint

⁸⁰ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1205.

⁸¹ *Id.* at 1203. The Michigan court held that the allegations supporting this count are sparse. *Id.*

⁸² *Id.* Under this motion, Baum presented allegations sustaining the Tortious Interference with Business Relationships and Economic Advantage that have been applied in this paper establishing how these allegations should have sustained the antitrust injury, necessary predicate, and Sherman Act. *Id.*

⁸³ *Id.* at 1201. Baum characterized its motion as a request for 'reconsideration of the Michigan Court's refusal to permit amending the antitrust claims. *Id.*

⁸⁴ *Id.*

prior to the Michigan Court's dismissal.⁸⁵ The Kansas Court continued, stating that the court may refuse to grant leave to amend where the proposed amendment would be futile.⁸⁶ Baum's appropriately responded that its proposed amended complaint "streamlines and clarifies the antitrust claims."⁸⁷

The accepted allegations in the tortious interference claim should have sustained the antitrust injury. By refusing to do so, this court again presents its irreconcilable decisions. The court dismissed allegations that it accepted in other interrelated claims. Moreover, the Kansas court had the discretion to grant the leave to amend when justice so required.⁸⁸ Baum sufficiently presented allegations that furthered its antitrust claims and showed injury to a prospective economic advantage. The court should have allowed the re-submitted allegations to sustain a Motion for Leave to Amend the State and Federal Antitrust Claims, just as the allegations were sufficient in Baum's Motion to Amend under tortious interference.

IV. CONCLUSION

Baum's claim under Tortious Interference with Business Relationships and Prospective Economic advantage was properly sustained under Michigan law. The allegations offered by Baum were accepted by the court, and accepted that they *could be true*. The reasoning the court established in sustaining the tortious interference claim should have sustained the directly related

⁸⁵ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1202. Baum cannot amend the complaint after a motion to dismiss has been granted. *Id.* Baum must first reopen the case pursuant to a motion under Rule 59(e) or Rule 60(b) and then file a motion under Rule 15, and properly apply to the court for leave to amend by means of a motion which in turn complies with Rule 7. *Id.* See *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989).

⁸⁶ *In re Baseball Bat Antitrust Litig.*, 75 F. Supp. 2d at 1202.

⁸⁷ *Id.* Baum proceeds to detail overt acts by the defendant bat manufacturers. *Id.* The Kansas court was not persuaded by these allegations even though these allegations do not differ from the allegations that sustained the tortious interference claim. *Id.*

⁸⁸ *Smith v. Nat'l Collegiate Athletic Ass'n.*, 139 F.3d 180, 189 (3d Cir. 1998). Under Rule 15(a) a plaintiff has an absolute right to amend a complaint once at any time before a responsive pleading is served; thereafter, plaintiff must seek leave to amend, and although within its discretion, the district court should grant such requests freely when justice so requires. *Id.*

antitrust claim. The tortious interference allegations, that the court determined could be true, could have been likewise true under Michigan antitrust law. By accepting the allegations, both requirements under antitrust law would have been met; the antitrust injury requirement and the necessary predicate requirement. Furthermore, the Sherman Act and the Clayton Act would have secured the necessary requirements for an antitrust claim. Because the antitrust claim was valid, the Kansas Court should have allowed Baum's Motion for Leave to Amend the Antitrust Claims. The reasoning in which the lower Michigan Court allowed Baum to amend the tortious interference claim should have established similar reasoning in allowing the motion to amend the antitrust claims. The lower Michigan Court ruled improperly on the antitrust claims. The Kansas Court should have corrected the misruling from the lower court in favor of Baum. The case currently remains unsettled.⁸⁹

⁸⁹ See *In re Baseball Bat Antitrust Litig.*, 112 F. Supp. 2d 1175 (J.R.M.L. 2000) (Baum's single claim of tortious interference remained the only valid claim according to the Kansas Court and the Judicial Panel on Multidistrict Litigation. The entire Baum action was remanded to the Michigan court with no subsequent history). For recent history see also, *Traverse City producer sues NCAA over baseball bat*, MACOMB DAILY NEWS, Nov. 27, 2004, available at http://macomdaily.com/stories/112704/spo_batsuit001.shtml (last visited Dec. 7, 2004).

Jury selection begins Thursday in a Michigan baseball bat manufacturer's lawsuit claiming that the National Collegiate Athletic Association and top equipment producers conspired to keep his bats from being used. Steven Baum and his Traverse City-based Baum Research and Development Co. filed suit in 1998 in U.S. District Court in Detroit against the NCAA, the sporting goods makers association SGMA International, and bat manufacturers Easton Sports, Worth and H&B, the producer of Louisville Sluggers. The trial is expected to take two months... Baum says he has lost at least \$120 million because his bat, an ash veneer over a plastic foam core and other materials -- was not approved for use. Baum's lawyer, David Nelson, told The Detroit News that Baum's bats are legal in the NCAA, but college teams will never use them if others are allowed to use aluminum bats because aluminum bats hit the ball harder and farther. The suit also says use of aluminum bats is unsafe. NCAA spokesman Erik Christianson said the organization believes aluminum bats used by college players are safe.

Id. See also, Robert Schoenberger, *H&B Rival Claims Aluminum Bat Plot: Jury Selection to Start in 1998 Suit*, COURIER-JOURNAL, Dec. 2, 2004, available at <http://www.courierjournal.com/business/news2004/12/02/D1-bat01-4846.html> (last visited Dec. 7, 2004).

A Michigan baseball bat maker has sued Hillerich & Bradsby, accusing the Louisville Slugger maker of working with other bat makers and the NCAA to keep possibly safer alternatives to aluminum bats out of college baseball. Jury selection is to start today in federal court in Detroit. The 1998 suit was filed against H&B, Worth Inc., the National Collegiate Athletic Association, the Sporting Goods Manufacturers Association and Easton Sports Inc. Inventor Steve Baum and

his Michigan-based Baum Research & Development Co. claim H&B worked with bat makers Easton and Worth to threaten and mislead the NCAA into allowing aluminum bats. Keeping aluminum bats legal, he argues in the suit, prevented alternative bats from succeeding in the market... "The bat companies engaged in joint and concerted action to prevent any rule changes — particularly a wood-like bat standard — in order to prevent the market from shifting to composite bats," Baum claims in his suit... Baum filed his suit soon after the NCAA adjusted its rules to limit the performances of aluminum bats. New bats were to limit the speed at which a baseball could leave a bat to 94 mph, the top speed achieved by wood bats... Last year, 20 NCAA Division 1-A baseball players were injured by hit balls in games or in practice, NCAA statistics show. Most Division 1-A teams use aluminum bats. Being hit by batted balls accounted for 7.5 percent of baseball injuries that year. In the 2002-2003 college season, 59 players were hit by batted balls, making that the cause of 10.3 percent of baseball injuries.

Id.

