

One more result that came from our studies is that proficient batters have consistent swings. They are machine-like. They train this machine-like precision. Compare the height of the data crosses (the standard deviation) of the swings of the Little League player of Figure 38, who had been playing ball for five years, with the height of the crosses for the swings of the professional player who had been playing ball for 24 years (Figure 39). Consistency is important and the professional player shows this consistency.

◆ *Generalizations and Limitations* ◆

It is not surprising that in a game that is more than 100 years old, played by players who are being paid hundreds of thousands of dollars per year, that professional athletes, without the benefit of scientists and engineers, have found that their best bat weights are between 30 and 34 ounces. However, it is interesting to note that, given the relative newness of the aluminum bat and the fact that the players using aluminum bats are amateurs, Little League and slow-pitch softball players cannot yet get bats that are light enough for them. The lightest Little League-approved bat that we have seen is 21 ounces. The lightest legal softball bat that we have seen is 27 ounces. (However, these numbers are decreasing at the amazingly high rate of about an ounce per year.)

For the Little Leaguer of Figure 38 the batted-ball speed varies greatly with bat weight. This means that it is very important for him to have the correct weight bat. However, for most professional baseball players, once the bat is in the correct range, the batted-ball speed varies little with bat weight, as shown in Figure 39. That player could use any bat in the range 33 to 40 ounces and there would be less than a 1 percent change in batted-ball speed. This fact is not in the literature and it could not be determined accurately by experimentation by ballplayers on the ball field. For example, imagine an experiment where a pitcher alternately throws 20 white balls and 20 yellow balls to a batter who alternately hits with a 32- and a 34-oz bat. Imagine then going into the outfield and looking at the distribution of distances of the balls. You would not see the yellow balls or the white balls consistently farther out. Variability in the pitch and the location of the contact point between the bat and the ball would obscure any differences. However, with our instrument we can accurately measure bat speed and calculate the resulting batted-ball speed. Our calculations show that this curve is

flat. This knowledge should help professional batters eliminate futile experimentation with bat weights, while attempting to get higher batted-ball speeds. As long as the player uses a bat in the flat part of his curve, there will be less than a 1 percent variation in batted-ball speed caused by varying bat weights. What does a 1 percent decrease in batted-ball speed mean? A ball that would normally travel 333 feet would only travel 330 feet. This is not terribly important.

In our studies we measured bat speed as a function of bat weight. Next, we coupled these measurements to the equations of physics and physiology to determine the ideal bat weight for each individual batter. We can say nothing about the "feel" of a bat; this is a psychological variable that we cannot measure. We cannot say anything about the grain or strength of the bat. In this study we say little about choking up on the bat. We treat a 33-oz bat choked up 1 inch as a 32-oz bat. We are not concerned with the availability of bats. Our recommendations are independent of what equipment is actually available. We have tried to make sure that our solutions to tomorrow's problems are not stated in terms of the hardware that was available yesterday. We have no means of assessing the accuracy of the swing. Throughout our analysis we assume that it is easier to control a lighter bat than a heavier one.

In this study we measured the linear velocity of the center of mass of the bats. It is obvious that in addition to this translation the bat also rotates about two different axes. However, our results derived from only linear velocity agree in most details with those Brancazio derived using angular velocity. The exception is that for a rotating bat, the place where the ball hits the bat becomes important, as will be shown. If the ball hits the bat at its center of mass, the results of the linear approximation are the same as those derived treating translation and rotation separately. However, if the ball hits the bat 6 inches closer to its end, then the ideal bat weight would increase 2 ounces for the Little Leaguer of Figure 38, and 3 ounces for the major leaguer of Figure 39. All in all, we think our approximation of linear velocity is reasonable. We will return to this issue in the next section of this chapter.

We have also neglected the effect of air resistance on pitch speed. We calculated the ideal bat weights of the major league players based on a pitch speed of 90 mph. If the ball was going 90 mph when it hit the bat, it would indeed be a fast pitch, because the ball loses about 10 percent of its speed on its way to the plate. If we decreased our 90-mph figure by 10 percent, the ideal bat weights would decrease by approximately one ounce.¹

Our data have low variability for physiological data. For the data of

Figure 39 the standard deviations are about ± 5 percent. However, the repeatability of our experiments is not as good. On any given day the data are repeatable, but tests run 1, 2, or 12 months apart differ by as much as 20 percent in bat speed for any given bat. However, in spite of these large differences in bat speed, the calculated ideal bat weight varies by only an ounce or two. We are still looking for the sources causing the lack of repeatability. We think the most likely causes are warm-up status, adrenaline, positioning of the subject, and fatigue.

Our experiments were done indoors. Some of the ball players thought things would be different out on the field swinging against a real pitcher. To study this effect we took the equipment out to the ball field. Immediately after an intrasquad game, we measured the bat speeds of four players while they hit the ball. For each player these data fell within the range of his data collected in the laboratory six months earlier and one week later.

◆ Two Types of Force-Velocity Curves ◆

We found two classes of batters: those whose force-velocity relationships were fit best with straight lines (like Figure 39), and those that were fit best with hyperbolic curves (like Figure 38). The data of the Little Leaguer shown in Figure 38 are fit best with this hyperbola: $(w_{bat} + 28.0) \times (\text{speed} + 12.8) = 2728$. The data of his brother, also a Little Leaguer, collected on the same day are fit best with a straight line. Most Little Leaguers were fit best with hyperbolas, half of our college players were fit best with hyperbolas, and one-fourth of our major leaguers were fit best with hyperbolas.

The data for two more San Francisco Giants are shown in Figure 43. The top figure is for a quick player (a short stop/third baseman): the hyperbolic fit (solid line) is 35 percent better (in a mean squared error sense) than the straight line fit (dotted line). The bottom figure is for a nonquick player (an outfielder); his data are fit best with a straight line. Both of these players have maximum batted-ball speeds above 110 mph (in Chapter 6 we show that 110 mph is needed for a home run). And indeed both of these players have hit more than 20 home runs in a season.

The two professional players of Figure 43 both normally used 33-ounce bats. As shown in this figure, they swung our 31- and 33-ounce

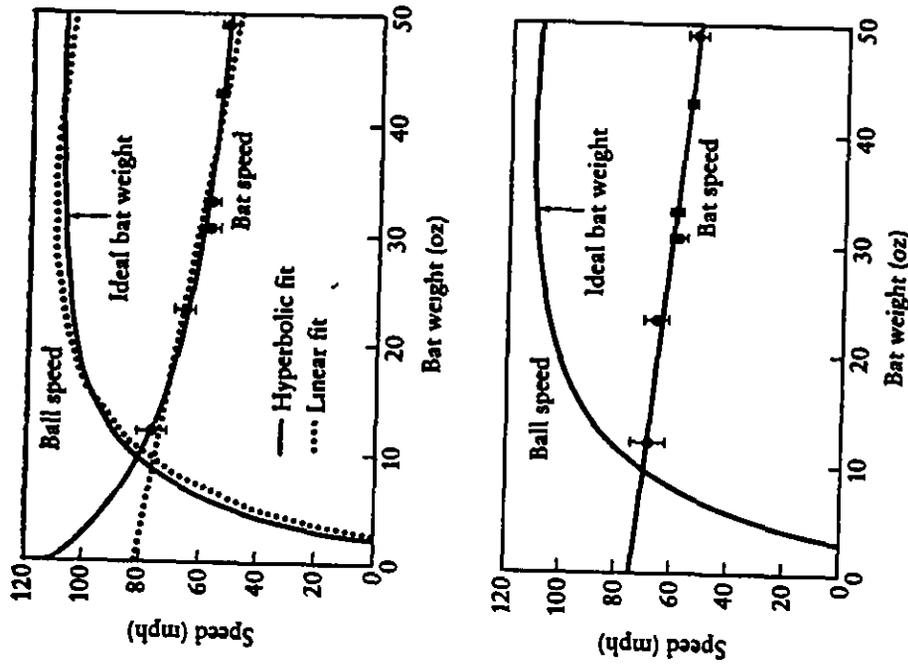


FIGURE 43. Bat speed and batted-ball speed as functions of bat weight for an 90-mph pitch for two different members of the San Francisco baseball team. The player of the top graph was "quick," the player of the bottom graph was not. These data were collected with a different set of bats than that described in Table 2. [Adapted from A. T. Bahill and K. J. Karnaus, *Biological Cybernetics*, 62:89-97, 1989.]

bats at the same speed. Within the limits of statistical variability, we can say that for bats in the range that they normally use, the two players swing with the same speed. However, our recommendations for these two players were quite different. We recommended that the player of the bottom figure keep his 33-ounce bat, but that the player of the top

figure change to a 31-ounce bat. Why did this happen? In our experiments we gave them very heavy and very light bats, unlike any bats they have ever encountered. From the data collected with their swinging these bats we made mathematical models of each human, for example, the solid lines of Figure 43. From these models we made predictions about each individual's ideal bat weight. Modeling is a common scientific technique. Scientists and engineers build models and use the models to make predictions about the physical world. That is what we have done here. We have made models of the individual players and have used these models to predict their ideal bat weights. Such predictions could not be made using just experimental data from bats that they normally use.

We tried to correlate the type of curve that gave the best fit (i.e. straight line or hyperbola) with height, weight, body density, arm circumference, present bat weight, batting average, slugging average, running speed, etc., but had no success. However, we noted that the subjects who were fit best with hyperbolas were described by their coaches as being "quick." Quickness is not the same as running speed, but it is related. Quickness is easy to identify but hard to define. Shortstops, centerfielders, and lead-off batters are usually quick. Coaches easily identified their quick players, but when asked to explain why they called these players quick, they waffled. Their uneasy verbalizations include phrases like "they react quickly," "they move fast," "they steal many bases," "they get into position to field the ball quickly," "they swing the bat fast," and "they beat out bunts." But all these phrases describe resulting behavior, not physiological characteristics. So we decided to measure eye-hand reaction time and try to correlate it with the bat swing data. Eye-hand reaction time was measured by:

1. Holding a meter stick in front of a subject. Instructing him to place his opened index finger and thumb at the 50-cm mark and to watch the fingers of the experimenter, who holds the end of the meter stick.
2. Having the subject close his fingers as quickly as possible when the experimenter releases the meter stick and it begins to fall.
3. Noting the place where the subject catches the meter stick. The place indicates eye-hand reaction time ($d = 1/2 at^2$).

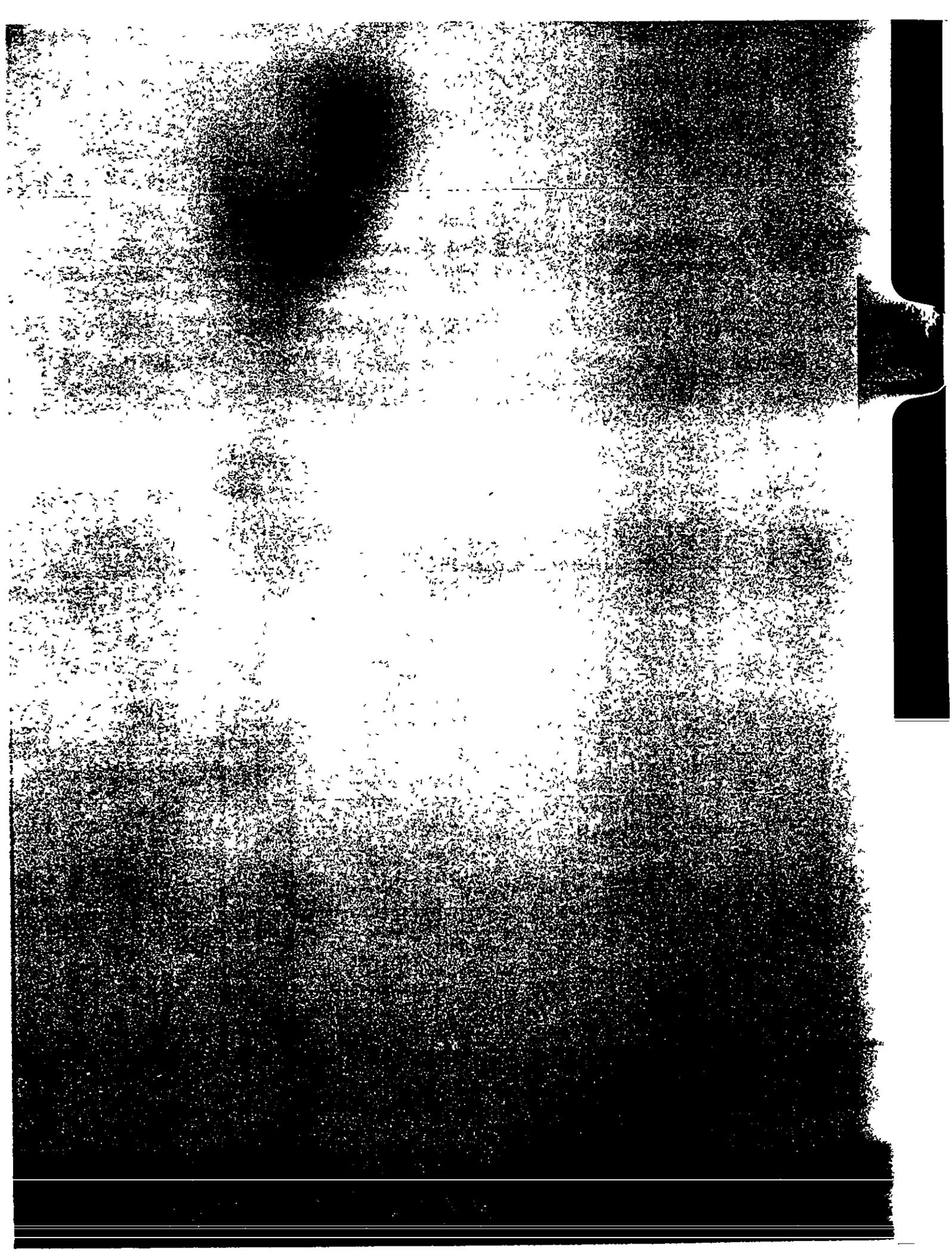
4. Giving each subject two warm-up trials, and then collecting data for ten trials.
5. Selecting the median value of these ten trials as our measure of quickness.

The median eye-hand reaction time for the quick boy of Figure 38 was 143 ms; for his nonquick brother it was 256 ms. We collected eye-hand reaction times for 21 of the San Francisco Giants and compared it with the percentage superiority of the hyperbolic fit over the straight line fit. We found that the physiologic parameter that best differentiates between players whose data can be fit best with a straight line and those who require a hyperbola is the eye-hand reaction time.

For our nonquick subjects the weight of the bat seemed to have little effect on how they swung it. They swung all bats with about the same speed, and their data were fit best with a straight line, as shown in the bottom graph of Figure 43. For our quick subjects the weight of the bat was a limiting factor; speed depended on weight. The curves had steep slopes and needed hyperbolas to fit the data, as shown in the top graph of Figure 43. We hypothesize that the quick people change their control strategies when given different bats; whereas nonquick people do not change their strategies—they swing all bats the same way.

◆ Résumé ◆

The physics of bat-ball collisions without consideration of physiology (specifically the equations for conservation of momentum and the coefficient of restitution) predicted an *optimal bat weight* of 15 ounces. The physiology of the muscle force-velocity relationship showed that the professional baseball player of Figure 39 could put the most energy into a swing with a 46-oz bat; that is, the *maximum-kinetic-energy bat weight* was 46 ounces. Coupling physics to physiology showed his *maximum-batted-ball-speed bat weight* to be 40 ounces. Finally, trade-offs between maximum ball speed and controllability showed that his *ideal bat weight* was 33 ounces. These experiments explain why most adult batters use bats in the 28- to 34-oz range, they explain the variability in human choice of bat weight, and they suggest that there is an ideal bat weight for each person.



FOR IMMEDIATE RELEASE CONTACT:

Saturday, June 12, 1999 Wallace I. Renfro

Director of Public Relations

WOOD-LIKE PERFORMANCE RECOMMENDED FOR NONWOOD BATS

OMAHA, NEBRASKA—Wood could become the standard for nonwood baseball bat performance if recommendations from the NCAA Baseball Research Panel are approved by the Association's Executive Committee.

The recommendations were announced today in Omaha, Nebraska, in a press conference at the College World Series. Milton Gordon, chair of the panel and president of California State University, Fullerton, discussed the group's recommendations.

"In terms of both risk and integrity, the panel concluded that wood should be the standard," Gordon said.

He noted that the panel reaffirmed use of the so-called "two-prong" standards for nonwood bats used in NCAA baseball championships this year. Those standards limit the diameter of the bat to 2 5/8 inches and the difference between weight and length to three units (not including the grip).

In addition, the panel concluded that a batted-ball exit speed should be adopted for nonwood bats that equates to the highest average exit speed using Major League Baseball quality, 34-inch, solid wood bats that meet other nonwood bat specifications.

The panel's report, which will be sent to the NCAA Baseball Rules Committee and NCAA Executive Committee in a few weeks, also recommends delaying implementation of the new standards for regular-season competition until January 1, 2000. That date, if approved by the Executive Committee, would mandate use of the specifications for bats in play during regular-season and *championship competition next spring*.

The NCAA Executive Committee will address sometime before the scheduled August 1, 1999, implementation date whether the implementation deadline will be extended.

The NCAA Baseball Research Panel, which was created by the NCAA Executive Committee in January to review available research data and make recommendations, included representatives from the sports medicine field, baseball coaching, athletics administration and scientists in the disciplines of physics and biomechanical engineering.

The goal of the panel, according to Gordon, has been to study the effects of a number of factors that might influence the assessment of risk and integrity of the game in terms of balance between offense and defense.

Gordon noted that the overall injury rate for baseball is among the lowest of any sport sponsored by NCAA member schools but said the panel concluded that a limit on the risk of injury should be set.

"Given the fact that baseball has been played with wooden bats since the inception of the game, the group determined that the level of risk associated with wooden bats is generally accepted by all associated with the game," he said. "Therefore, the panel recommends that a standard tied to the

performance of wooden bats will result in risk levels acceptable to the sport."

Gordon said the panel is also convinced that there are legitimate issues that should be addressed with regard to balance between offense and defense based on performance data collected over time as well as anecdotal evidence.

"The consensus of the group is that a standard that attempts to keep the performance level of all bats as similar to wood as possible would best preserve the integrity of the game," he said.

To achieve these outcomes, Gordon said the panel recommends:

- Use of a Baum Hitting Machine housed in an independent lab at the University of Massachusetts at Lowell for bat testing and certification.
- Testing and certification input speeds for both the baseball and bat swing be increased from 70-miles-per-hour to 80-miles-per-hour to better approximate game conditions.
- That testing be conducted of 34-inch solid wood bats to establish the highest average batted-ball exit speed as a standard for nonwood bats.

In addition, the panel recommends:

- That current standards for baseballs be retained but that the NCAA Baseball Rules Committee explore ways to ensure that the standards are enforced.
- Additional testing to determine if a ball compression standard be adopted for baseballs.
- Testing to determine the effect of "work-hardening" and distribution of mass on nonwood bat performance.

The bat performance issue gained national attention last summer when the NCAA Baseball Rules Committee recommended changes in the bat specifications to reduce the diameter, reduce the unit difference between weight and length, and establish a batted-ball exit speed for nonwood bats. In August last year, the NCAA Executive Committee adopted the three standards but delayed implementation until August 1, 1999.

In January of this year, the Executive Committee adopted the bat diameter and weight-length differentials for this year's tournaments but did not approve use of the batted-ball exit speed. The committee also created the Baseball Research Panel at the same time.

[NOTE TO EDITORS: A list of NCAA Baseball Research Panel members is attached below.]

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NCAA BASEBALL RESEARCH PANEL

Milton A. Gordon, chair

- **Dr. Milton A. Gordon**, president at California State, Fullerton, since 1990. He has a Ph.D. from Illinois Institute of Technology in mathematics and is a member of the NCAA Division I

Board of Directors.

- **Dr. James A. Ashton-Miller**, research scientist in the department of mechanical engineering and applied mechanics and the department of biomedical engineering at the University of Michigan.
- **Dr. Michael M. Carroll**, professor of engineering and retired dean of the school of engineering at Rice University.
- **Dr. Kenneth W. Johnson**, professor of physics at Southern Illinois University, Carbondale.
- **Dave Keilitz**, executive director of the American Baseball Coaches Association and former baseball coach and athletics director at Central Michigan University.
- **Dr. Richard A. Rasmussen**, executive secretary of the University Athletic Association, a group of nine major research universities, and a member of the NCAA Division III Management Council.
- **Dr. Bryan Wesley Smith**, clinical assistant professor of pediatrics and orthopedics and head team physician at the University of North Carolina, Chapel Hill, and the incoming chair of the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports.

The NCAA News News & Features

The NCAA News – May 8, 2000

Midseason trends point to decline in offensive performance

Now that the midseason baseball statistics are available, it is possible to back up hunches with concrete numbers: This season's baseball bats are not as hot as last year's bats, according to Don Kessinger, chair of the NCAA Baseball Rules Committee and associate athletics director and assistant baseball coach at the University of Mississippi.

"We're seeing more shutouts, more low-scoring games," he said. "Strategy is coming back into the game."

Midseason statistics released by the Association a few weeks ago show batting averages, home-run averages and pitchers' earned-run averages all are lower than last season in Division I. Also notable is a comparison between this season's trends and those from the 1998 season.

Batting averages went from .303 in 1999 and .306 in 1998 (an all-time high) to .294 at the middle of the season this year. Home runs per game stand at 0.77 this season compared to 0.95 in 1999 and 1.06 (another all-time high) in 1998. Earned-run average has improved from a 1998 high of 6.12 to 5.94 in 1999 and 5.49 by midseason this year.

The decline in offense can be attributed to changes in the NCAA's bat protocol, said Ty Halpin, NCAA publications editor and liaison to the Baseball Rules Committee. "Declines like these are what the committee was trying to achieve," Halpin said. "I think perhaps the most telling trend is that the home runs are down."

Bats used in 1999 had to meet a two-prong standard that limited their diameter to 2 5/8 inches and specified that they could be no more than 3 ounces lighter than their weight in inches. This year's bats must meet a three-prong standard that added a batted-ball exit speed of no more than 97 miles per hour in the laboratory.

"It's absolutely a better game than it was two years ago," Kessinger said. "Then, we'd gotten to the point that the bats were too hot. This year, the players who are hitting home runs are the ones who should be hitting home runs. You used to see a lot of little guys hitting opposite-field home runs. You don't see that as much right now."

Halpin also noted that the NCAA Baseball Research Panel will continue to monitor the bats used this season, and the group also is planning to explore the possibility of adding a balance-point requirement to the standard, an issue that has received a great deal of attention lately.

"The panel will continue to review the bat standard," Halpin said. "Those plans have not changed."

-- *Kay Hawes*



The NCAA News – July 31, 2000

Baseball group OKs status quo on bat standards

The NCAA Baseball Rules Committee, citing the return to a more balanced brand of baseball, made no immediate changes concerning specifications for baseball bats and balls that are used in NCAA play.

The committee did, however, establish several limits to hold bat and ball performance at current levels during its annual meeting July 10-13 in Indianapolis.

"The committee feels we have a very positive game right now and the balance between offense and defense has been restored," said Don Kessinger, associate athletics director for internal affairs at the University of Mississippi and chair of the committee. "We made several changes to close potential loopholes and keep the game where it is."

Safety and integrity

At its annual meeting in Indianapolis July 10-13, the committee considered recommendations from the NCAA Baseball Research Panel and reviewed results from laboratory testing, performance and safety during the 2000 season, and recommended that no changes be made in specifications for the 2001 season.

"We agree with the research panel that the recommendations the group made a year ago restored the balance of the game and made metal bats perform more like wood bats," Kessinger said. "The panel was concerned this year that there might be areas in the protocol that would allow for increases in performance. We have addressed those potential problems."

The committee discussed safety and integrity of the game as potential reasons for further changes to be made. The group reviewed injury data and statistical information and decided that changes have made the bats more wood-like and that the game is being played with an acceptable amount of risk.

The committee added the following items relating to baseball equipment:

- The establishment of a moment-of-inertia (MOI) standard for each bat length and weight based on bats previously certified by the NCAA Bat Certification Program. The moment of inertia affects how weight is distributed along the barrel of the bat during the swing. All currently certified bats will meet the MOI standard. The MOI of future bats may not be less than the lowest MOI for bats of that length and weight recorded during the certification process for the 2000 season. The committee will continue to monitor the effect of MOI on the integrity of the game.

- During the 2001 season, the NCAA will conduct random testing of baseballs for coefficient-of-restitution (COR) compliance. All baseballs used for regular-season and postseason play must have a COR value of between .525 and .555 to be eligible for play in the 2002 season. The NCAA will collect data to determine if an additional or substitute standard is necessary.
- Effective January 1, 2003, a sliding scale for swing speed based on the bat length will be implemented as part of the NCAA Bat Certification Program. The scale will be based on the original exit speed standard of 97 miles-per-hour for a 34-inch bat.
- The committee supported the Baseball Research Panel's recommendations that further study be conducted on the possible effects of bat "work-hardening" and that the NCAA collect data to determine the accuracy of the NCAA Bat Certification Program testing procedures.

The research panel had recommended a change in COR of baseballs from .525-.555 to .515-.535. The rules committee voted to measure baseballs for all competition, instead of championship competition only, at the current COR.

"We want to be sure that baseballs being used throughout the season are meeting the standard, and we think that is the first important step," Kessinger said. "We may want to make adjustments in the future, but we want to take this one step at a time."

Kessinger said the committee had the same concern about creating an MOI standard. The research panel had recommended a minimum standard for the 2002 season.

"Again, we may want to adjust the MOI in the future, but we want to get another season of competition under our belts with the certified bats we are using today before we do that," Kessinger said. "We agree with the panel regarding a sliding scale for swing speeds during testing, but we want to hold off on that for another two years."

"The bottom line is that two years ago, coaches were calling members of the committee to say that something was wrong and we needed to make some changes in specifications for the bats," he said. "After this season and the changes we saw in the field as a result of the new specifications, those coaches were calling to say they liked how the game was played this year."

According to season statistics in college baseball over the last 20 years, batting averages, scoring and home runs had remained at a similar level until the last five years. From 1981 to 1995, batting averages were steady at .296, home runs at .80 per game, and scoring from 6.49 to 6.52 per game.

From 1995 through 1999, batting averages increased to .301, home runs to .91 per game and scoring to 6.8 per game. In the just completed 2000 season, following changes to bat specifications, batting averages returned to .297, home runs to .80, and scoring to 6.53.

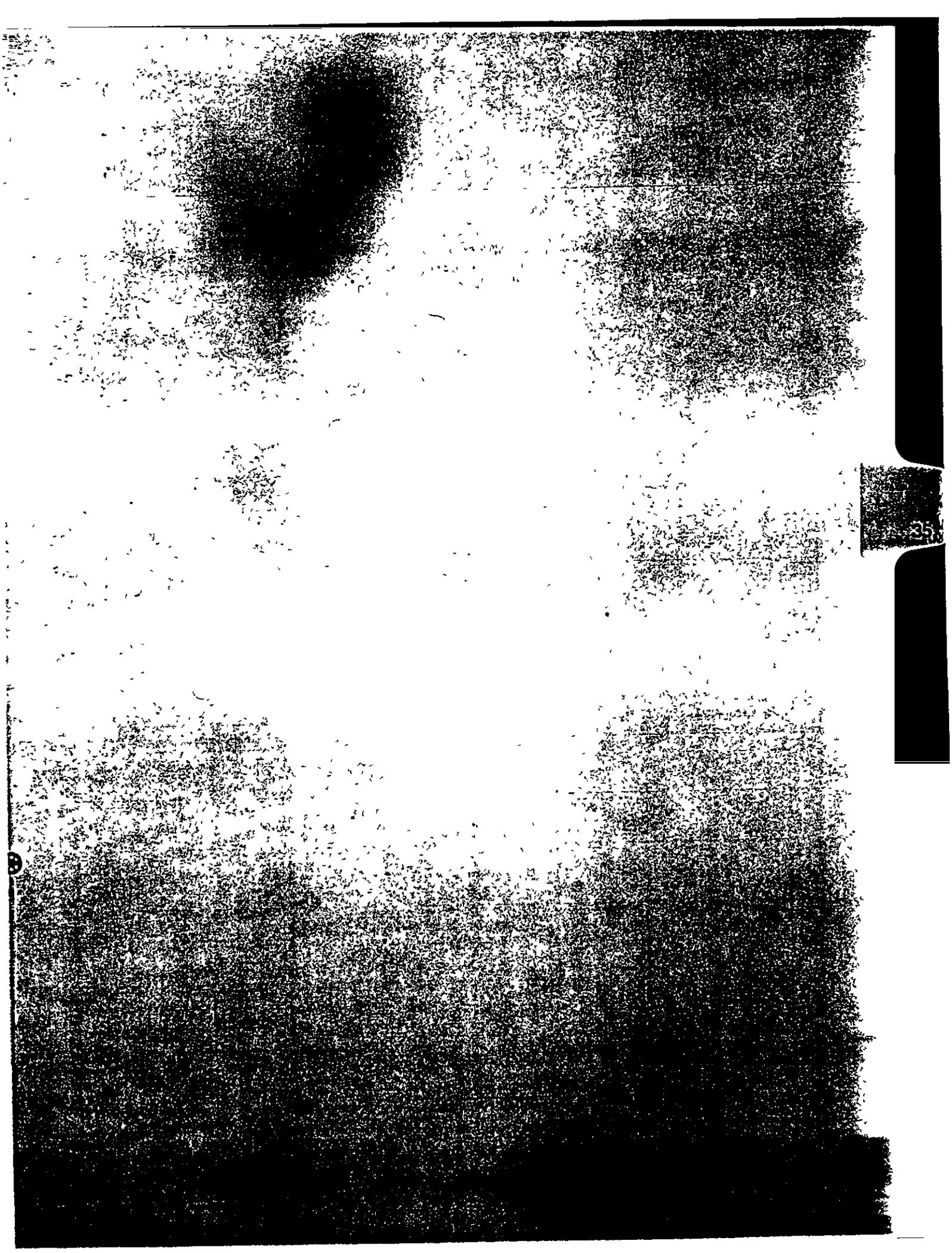
The Division I Championships/Competition Cabinet and the Divisions II and III Championships Committees will consider the rules committee's recommendations when

those groups meet in the fall.

Other highlights

Baseball Rules Committee July 10-13/Indianapolis

- Decided to alter the rule relating to batters being hit by a pitched ball. The committee added wording to reemphasize and clarify this rule. When a batter makes no attempt to avoid being hit by a pitch (or attempts to be hit by the pitch), the ball is dead and the pitch shall be called a ball or strike. The committee took this action in response to the increasing number of batters who are attempting to be hit in order to reach base.
- Changed wording concerning offensive interference. The rule will now read: "No offensive team member either in or out of the lineup shall deliberately physically or verbally hinder, confuse or impede any defensive player who is attempting to make a play."
- Clarified the designated-hitter rule concerning that player becoming a position player later in the same game.
- Altered the 12-run rule, decreasing the number of runs to 10. If teams mutually consent or a conference rule is in place, a game may be stopped (ruled complete) only after seven innings if one team is leading by at least 10 runs. Each team must play an equal number of innings.
- Allowed National Association of Intercollegiate Athletics rules to be used when teams play on an NAIA member institution's home field.
- Added an approved ruling to the slide rule, which reads: "When the base runner slides beyond the base, but does not (1) make contact with, or (2) alter the play of the defensive player, interference shall not be called."
- Focused on forcing pitchers to stop all motion in the set position. Rule 9-1-b (2) will read: "The pitcher shall deliver the pitch from the set position only after coming to a complete stop with his entire body."
- Selected the set position, batter's-box rule, designated-hitter rule, positions of the offensive team, obstruction and strike zone as points of emphasis for the next season.
- Voted to allow fielder's gloves other than leather to be used in play.
- Recommended that bat handlers (i.e., bat boys or girls) wear helmets.



May 12, 2000 UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN

In Re: BASEBALL BAT ANTITRUST LITIGATION
MDL No. 1249

Case No. 98-72946
HON. AVERN COHN

This Document Applies to:

BAUM RESEARCH AND DEVELOPMENT CO., INC., a Michigan
corporation; and STEVE BAUM, an individual,
Plaintiffs,

v.

HILLERICH & BRADSBY CO, INC., a Kentucky corporation;
EASTON SPORTS, INC., a California corporation; WORTH, INC., a
Tennessee corporation; NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, a Kansas non-profit educational organization; and
SPORTING GOODS MANUFACTURERS ASSOCIATION, a Florida
not-for-profit corporation,

Defendants

**PLAINTIFFS' FIRST
SECOND
AMENDED
AND SUPPLEMENTAL
COMPLAINT**

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**PLAINTIFFS' SECOND AMENDED
FIRST AMENDED AND SUPPLEMENTAL COMPLAINT**

PRELIMINARY STATEMENT

NOW COME Baum Research and Development Co., Inc., a Michigan corporation ("Baum Research"), and Steven Baum, an individual ("Baum"), and bring this Complaint for tortious interference against Hillerich & Bradsby Co., Inc., a Kentucky corporation authorized in Michigan ("H&B"), Easton Sports, Inc., a California corporation ("Easton"), Worth, Inc., a Tennessee corporation ("Worth"), and the Sporting Goods Manufacturers Association, a Florida not-for-profit corporation, ("SGMA"), and in support of their Complaint, state as follows:

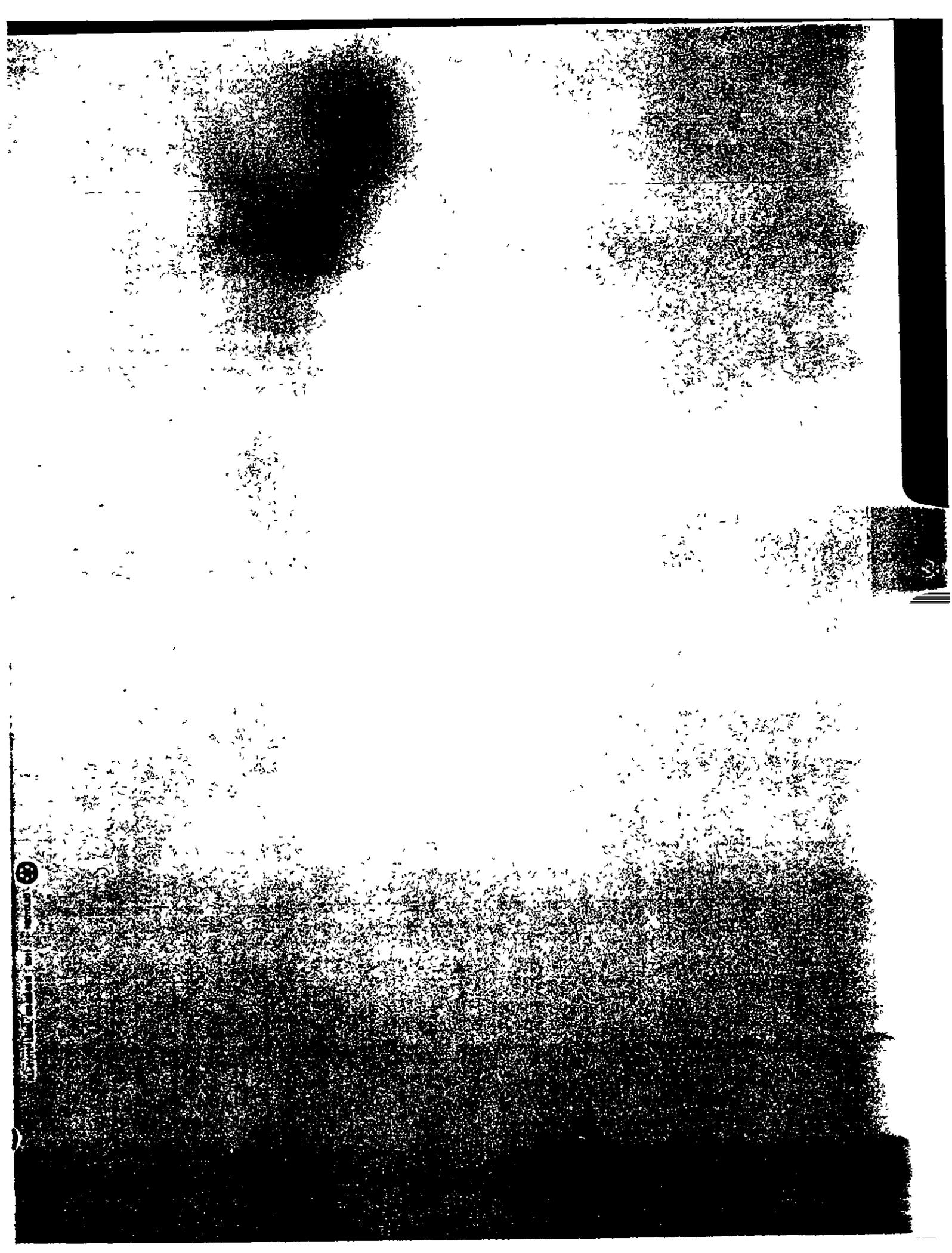
1. H&B, Easton and Worth (hereinafter also referred to as "The Big Three") dominate the sale of baseball bats to amateur baseball teams and amateur baseball players within the United States. H&B, Easton, Worth, SGMA, and others, acting in concert with them, have engaged in a conspiratorial scheme to dominate the baseball bat market for amateur baseball and foreclose and exclude bat manufacturers, including specifically Baum, from competing in the markets for these products. In furtherance of their anticompetitive scheme, The Big Three have:

- a. made substantial payments and other inducements to NCAA member institutions and baseball coaches in exchange for exclusive equipment contracts for the purpose of securing the exclusive use of their high performance aluminum bats throughout amateur baseball within the United States;
- b. entered into exclusive supply contracts with collegiate amateur baseball teams and provided millions and millions of dollars in free goods to reinforce their control of the amateur markets for bats;
- c. dominated, manipulated and rigged the bat performance standards of the National Collegiate Athletic Association ("NCAA") to perpetuate the dominance of high performance aluminum bat makers for amateur baseball games without regard to their safety or the effect they would have on the integrity of baseball;
- d. developed and presented false testing procedures, false testing data, false safety test results and a program of misrepresentation and obfuscation, to prevent and obstruct any changes in the NCAA bat performance standards to prevent other bat makers from competing in the sale of bats of amateur baseball teams;

had approved the action of the Rules Committee; (2) postponed its effectiveness from January 1, 1999 to August 1, 1999; and (3) warned them about the danger to player safety from high performance aluminum bats that prompted the change in the standard. Attached to the warning was a partial list of injuries, which included two deaths, irreversible brain damage, surgical implantation of metal plates and screws and skull fractures within the last year.

68. During the period from 1992 until August 1998, the Big Three controlled over 90% of the markets for bats for amateur baseball. More than 99% of all bats in these markets, which exceeds 200 million dollars a year in sales, were aluminum bats. Essential to perpetuating and maintaining this market dominance was the approval of the NCAA and specifically bat performance standards that were designed to provide a competitive advantage to the high performance aluminum bats despite their danger to player safety and erosion of the integrity of the game. Without the NCAA's approval the aluminum bat manufacturers would have had to compete with wood and wood composite bat manufacturers. Throughout this period the approval of the high performance aluminum bats and the concerted acts that prevented and obstructed the NCAA performance standards changes, in combination with the other anti-competitive interference conduct of the Big Three, had the effect of foreclosing and preventing all other competing bat products, such as wood or wood composite bats from the amateur baseball markets, including Baum. No teams or conferences would use wood or wood composite bats so long as the NCAA continued to give its approval to the high performance aluminum bats, there was economic coercion of the institutions and coaches in the form of millions of dollars of free goods and substantial payment of money to coaches.

69. Before the NCAA Executive Committee postponed the effective date of the new performance standard, Easton filed an antitrust Complaint in Kansas City, Kansas, (Case No. 98-2351-KHV) admitting that it had previously been assured by the NCAA that there would be no performance



United States District Court,
E.D. Michigan,
Southern Division.

**BAUM RESEARCH AND DEVELOPMENT
CO., INC.**, a Michigan corporation; and Steve
Baum, an individual, Plaintiffs,

v.

HILLERICH & BRADSBY CO., INC., a
Kentucky corporation; Easton Sports, Inc., a
California corporation; Worth, Inc., a Tennessee
corporation; National
Collegiate Athletic Association, a Kansas non-
profit educational organization;
and Sporting Goods Manufacturers Association, a
Florida not-for-profit
corporation, Defendants.

No. 98-72946.

Nov. 19, 1998.

Wooden composition baseball bat manufacturer commenced action against National Collegiate Athletic Association (NCAA), aluminum bat manufacturers, and trade association of sporting goods manufacturers, alleging they violated federal and state antitrust laws and committed state-law torts. Defendants filed motions to dismiss for failure to state claim. The District Court, Cohn, J., held that: (1) wooden bat manufacturer failed to establish antitrust injury; (2) manufacturer failed to state claim for interference with contractual relations under Michigan law; and (3) manufacturer failed to state claim for interference with prospective economic advantage under Michigan law.

Ordered accordingly.

West Headnotes

[1] Monopolies ⇨28(1.4)
265k28(1.4)

In order to show "antitrust injury," private antitrust plaintiff must show that alleged violation tended to reduce competition in some market and that plaintiff's injury resulted from decrease in that competition, rather than from some other consequence of defendant's actions. Clayton Act, § 4, 16, 15 U.S.C.A. §§ 15, 26.

[2] Monopolies ⇨28(1.4)
265k28(1.4)

Alleged conspiracy between National Collegiate Athletic Association (NCAA) and aluminum baseball bat manufacturers to exclude wooden composition baseball bat manufacturer from amateur baseball bat market by manipulating NCAA rules so that they did not include bat performance restrictions did not have anticompetitive effect on market, and, thus, wooden bat manufacturer did not suffer antitrust injury. Sherman Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

[3] Monopolies ⇨28(1.4)
265k28(1.4)

Wooden composition baseball bat manufacturer's assertion, that alleged conspiracy between aluminum bat manufacturers and National Collegiate Athletic Association (NCAA) to exclude wooden bat manufacturer from amateur baseball market caused college baseball to become unsafe due to speed at which baseballs were hit with aluminum bats, was irrelevant in determining whether plaintiff suffered an antitrust injury. Sherman Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

[4] Monopolies ⇨28(1.4)
265k28(1.4)

Even if alleged conspiracy between National Collegiate Athletic Association (NCAA) and aluminum baseball bat manufacturers to exclude wooden composition baseball bat manufacturer from amateur baseball bat market by manipulating NCAA rules so that they did not include bat performance restrictions had anticompetitive effect on market and violated antitrust laws, wooden bat manufacturer failed to establish that antitrust violation was necessary predicate to its injury, since NCAA could lawfully refrain from including performance restrictions in its rules, and, thus, manufacturer failed to show antitrust injury. Sherman Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

[5] Torts ⇨12

379k12

Wooden composition baseball bat manufacturer failed state claim for tortious interference with contractual relations under Michigan law based on allegation that aluminum bat manufacturers induced collegiate baseball conference to reject manufacturer's wooden bat and contracts wooden bat manufacturer made with teams in that conference.

[6] Torts ⇨12
379k12

Under Michigan law, the elements of a claim for tortious interference with contractual relations are: (1) a contract; (2) a breach; and (3) instigation of the breach without justification by the defendant.

[7] Torts ⇨10(3)
379k10(3)

In absence of explanation as to its expectations of economic relationships, wooden composition baseball bat manufacturer failed to state claim against aluminum bat manufacturers and trade association of sporting goods manufacturers for

interference with prospective economic advantage under Michigan law, based on allegations that defendants engaged in concerted campaign to "remove and destroy" plaintiff's bats, "sideline" plaintiff's hitting machine, prevent plaintiff from establishing relationships with amateur baseball teams, and "disrupt" plaintiff's sales to minor league teams

*1017 Salvatore A. Romano, Washington, DC, and David L. Nelson, Southfield, MI, for plaintiffs.

David A. Ettinger, Detroit, MI, for Easton Sports, Inc.

Barbara Goldman, Bloomfield Hills, MI, for Hillerich & Bradsby Co., Inc.

Dennis Barnes, Detroit, MI, for Worth, Inc.

Gregory L. Curtner, Ann Arbor, MI, for National Collegiate Athletic Association.

Joseph James Shannon, Detroit, MI, for Sporting Goods Manufacturers Association.

*1018 OPINION

COHN, District Judge.

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If a man write a better book, preach a better sermon, or make a better mouse-trap than his neighbour, tho' he build his house in the woods, the world will make a beaten path to his door.
Ralph Waldo Emerson

I. Introduction

This is an antitrust case. Plaintiffs Baum Research and Development Company and Steve Baum (collectively referred to as "Baum"), are suing defendants National Collegiate Athletic Association (NCAA), baseball bat manufacturers Hillerich & Bradsby Co. (H & B), Easton Sports, Inc. (Easton), Worth, Inc. (Worth) (collectively referred to as "bat manufacturers"), and Sporting Goods Manufacturers Association (SGMA) for violating federal and state antitrust laws and for committing state-law torts. The gravamen of Baum's complaint is that the bat manufacturers have conspired with the NCAA to manipulate the standard for baseball bats used in NCAA-sanctioned baseball games to perpetuate their dominance and exclude Baum from the market for baseball bats used in amateur baseball.

Before the Court are defendants' motions to dismiss the complaint pursuant to Fed R.Civ.P. 12(b)(6). Among other things, each of the defendants argue that the injury Baum claims is not an "antitrust injury." Essentially, defendants argue that Baum's alleged injury is from competition rather than a lack of competition, and thus Baum's injury does not arise from a violation of the antitrust laws.

As will be explained below, Baum has failed to state an antitrust claim on which relief can be granted because it can prove no set of facts to show that it suffered an antitrust injury. Accordingly, defendants' motions to dismiss the antitrust counts of the complaint will be granted. Baum will have leave to amend the state-law claims to better describe them.

II. The Complaint

The following is a summary of the allegations in Baum's meandering forty-four page complaint. The complaint is in six counts:

- Count I--Conspiracy to Monopolize--Section 2 of the Sherman Antitrust Act--All Defendants
- *1019 Count II--Conspiracy to Restrain Trade--All

Defendants

Count III--Conspiracy in Restraint of Trade--Section 2 of the Michigan Antitrust Reform Act of 1984--All Defendants

Count IV--Conspiracy to Monopolize--Section 2 of the Michigan Antitrust Reform Act of 1984--All Defendants

Count V--Interference with Contractual Relationships--Defendants H & B, Easton, and Worth

Count VI--Interference with Prospective Economic Advantage and Business Relationships--H & B, Easton, Worth and SGMA

Thus there are two categories of claims: antitrust and tort.

The federal antitrust claims are brought pursuant to sections 4 and 16 of the Clayton Act. [FN1] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in part: "[A]ny 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...." Under section 16 of the Clayton Act: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws...."

FN1. The state antitrust claims are analyzed under the same precedent as the federal claims. Pursuant to Mich.Comp Laws Ann § 445.784(2):

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.

A. Antitrust claims

1. Relevant Market and Parties

The relevant market is the market for baseball bats used in amateur baseball, which includes, but is not limited to, collegiate baseball. [FN2] Baum is a manufacturer of wooden composition baseball bats. Defendant bat manufacturers manufacture aluminum bats. Baum implicitly acknowledges that the aluminum bats manufactured by defendants are superior in performance to wooden bats. Baum also notes that the wooden bats cost less than the

aluminum bats. The aluminum bats produced by defendant bat manufacturers are used by ninety percent of the market. Defendant bat manufacturers have signed exclusive contracts with various college teams to provide baseball bats, though Baum does not allege how many teams have signed exclusive contracts or the length of such contracts.

FN2. According to Baum: "In amateur baseball, the Division I teams of the NCAA are recognized in the sport as a flagship standard setter, so that the use of a baseball bat with high performance hitting capabilities at the NCAA Division I level will permeate amateur baseball and cause NCAA Division II and III teams, high school teams, and little league baseball teams to follow suit and employ similar baseball bats. Thus, control of bat selection at the NCAA Division I level controls bat selection through all of amateur baseball and the market for amateur baseball bats."

The NCAA is an association of colleges and universities that participate in intercollegiate athletics. The NCAA adopts and promulgates playing rules, among other things. According to the complaint, the SGMA is "a not-for-profit trade association of manufacturers."

2. NCAA Rules

NCAA rules allow wooden and aluminum bats to be used in NCAA-sanctioned baseball games. NCAA rules did not restrict the performance of bats during the relevant time period. According to Baum, three consequences flow from the purportedly lax standards. First, college baseball has become unsafe due to the speed at which a baseball travels after being hit with an aluminum bat. Second, aluminum bats have compromised the integrity of the game due to a recent, dramatic rise in runs scored in collegiate baseball games. Third, defendant bat manufacturers have aggressively competed with each other to design and manufacture high performance aluminum bats.

3. The Conspiracy

On their face, the NCAA rules regarding baseball bats seem benign; they contain few restraints on bat manufacturers. Baum, *1020 however, says the rules, or lack thereof, are the product of a conspiracy by defendants to squeeze Baum's wooden

bat out of the market. Particularly, according to Baum, the bat manufacturers conspired to eliminate competition in the market by: "engaging in exclusive arrangements with universities and colleges which foreclose those institutions from using competing products;" "entering into exclusive agreements with coaches which foreclose the use of competing products by the teams they coach;" and "operating through and with the active participation of SGMA and the NCAA to manipulate and control the standard- setting function of the Rules Committee of the NCAA to establish unreasonable bat performance standards that exclude wood or wood composition bats from competition." Baum says the effect of the conspiracy "has been to systematically exclude the manufacturers of wood or wood composition bats, such as [Baum], from the markets for amateur baseball bats."

4. Theory of Case

A concise statement of Baum's theory of the case is as follows:

- . Baum is injured because it is unable to sell its wooden composition bats to college baseball teams.
- . The injury is caused by the lax NCAA standards that allow aluminum bats.
- . The lax NCAA standards stem from a conspiracy between defendant bat manufacturers, the SGMA, and the NCAA to entrench defendant bat manufacturers in, and exclude Baum from, the relevant market.
- . The conspiracy is a violation of the antitrust laws; [FN3] specifically, defendants have conspired to restrain trade in violation of 15 U.S.C. § 1 and the corresponding state law provision, [FN4] and have conspired to monopolize in violation of 15 U.S.C § 2 and the corresponding state law provision. [FN5]

FN3. Baum briefly mentions that defendants "engaged in fixing of prices for aluminum and aluminum alloy bats by artificially inflating prices at the retail level to secure monopoly profits and to fund the protection of their monopoly."

FN4. Under 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony....

FN5. Under 15 U.S.C. § 2:

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....

B. Tort claims

Baum says it entered into agreements to sell wooden composition bats to members of the Mid-American Conference, and that defendant bat manufacturers unreasonably interfered with the contracts to induce "the Mid-American Conference to reject the Baum Bat and the contracts [Baum] made with the teams in that conference." Baum also claims that defendant bat manufacturers and the SGMA engaged in a concerted campaign to: "Remove and destroy Baum's bats;" "Sideline the Baum Hitting Machine;" "Prevent Baum from establishing relationships with amateur baseball teams;" and "Disrupt Baum's sales to minor league professional baseball teams." As a result, Baum claims defendant bat manufacturers interfered with its prospective economic advantage.

III. Analysis

A. Standard of Review

When analyzing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must take the well-pleaded allegations as true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 1, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). "[W]hen an allegation is capable of more than one inference, it must be construed in the plaintiff's favor." *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1039-40 (6th Cir.1991). "[A] complaint should be dismissed for failure to state a claim only where 'it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *1021 *Monette v. Electronic Data Systems*, 90 F.3d 1173, 1189 (6th Cir.1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion." *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir.1988).

B. Antitrust Injury

As a threshold matter, Baum, a private antitrust plaintiff bringing suit pursuant to sections 4 and 16 of the Clayton Act, is required to plead facts tending to show "antitrust injury," a concept akin to standing. [FN6] "A private antitrust plaintiff does not acquire standing merely by showing that he was injured in a proximate and reasonably measurable way by conduct of the defendant violating the antitrust laws." III Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 362a at 209-10 (1995). Rather, as first explained in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977):

FN6. The related concepts of antitrust injury and antitrust standing are often confused.

This confusion occurs because the two concepts "share a common ingredient." The common ingredient is that both requirements limit "recovery to those who have been injured by restraint on competitive forces in the economy." Any inquiry to determine whether antitrust injury has been shown is more limited than one to determine whether the plaintiff has standing. The single determinant of antitrust injury is whether the plaintiff has suffered an "injury the type the antitrust laws were intended to prevent and that flows from that which makes [a defendant's] act [] unlawful." On the other hand, even if an antitrust injury is shown sufficiently, standing may be denied on the basis of other factors. The purpose of the additional inquiries is to confine recovery to cases that promote the congressional intent to ensure that consumers receive the benefits of competitive markets.

Axis S.p.A. v. Micafil, Inc., 870 F.2d 1105, 1110-11 (6th Cir.1989) (citations omitted).

Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations ... would be likely to cause."

(Second emphasis added) (citation omitted). See also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986) (antitrust injury required to obtain injunctive relief under § 16 of the Clayton Act). "The antitrust

injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). As elucidated by the United States Supreme Court:

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248, 71 S.Ct. 240, 95 L.Ed. 239 [(1951)]. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain--quality, service, safety, and durability--and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

National Society of Professional Engineers v. United States, 435 U.S. 679, 695, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). The mere fact that a competitor has lost profits does not necessarily indicate that competition in the market is lessened. See *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir.1989). [FN7]

FN7. "[I]t is important for courts to keep in mind that the main purpose of the antitrust laws is to preserve and promote competition. Whether or not a particular practice violates the antitrust laws is determined by its effect on competition, not its effect on a competitor." *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 825 (6th Cir.1982).

*1022 [1] The Court of Appeals for the Sixth Circuit has fashioned a two-pronged test from *Brunswick* and its progeny:

[T]he antitrust plaintiff "must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions."

Tennessean Truckstop, 875 F.2d at 88 (quoting

Areeda & Hovenkamp, Antitrust Law ¶ 334.1b at 299 (1988 Supp.)). Baum can prove no set of facts to satisfy either prong.

1. Anticompetitive Effect

[2][3] Baum has not averred that competition in the amateur baseball bat market is at all reduced by virtue of the alleged conspiracy to manipulate the rules for baseball bats. Instead, Baum focuses exclusively on the fact that it cannot sell its bat in the relevant market without a rule regulating the performance of its competitors' bats. Indeed, Baum acknowledges that H & B, Easton, and Worth have "aggressively compet[ed] with each other." [FN8] Thus the fatal flaw in Baum's case: the NCAA rules, even if the result of a conspiracy that violates the antitrust laws, pose no threat to competition in the relevant market. In fact, there is a logical inference that the absence of a rule regulating bat performance actually fosters competition. [FN9]

FN8. Baum has not alleged that defendant bat manufacturers have conspired to divide the market.

FN9. Baum's concern about the safety of the aluminum bats does not alter the analysis of whether an antitrust injury exists. In *National Society of Professional Engineers*, 435 U.S. at 695, 98 S.Ct. 1355, the Supreme Court stated that an attempt to justify a restraint on competition "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act."

A brief examination of *Brunswick* and its progeny illustrates why Baum's theory is flawed. In *Brunswick*, the defendant, at the time the largest operator of bowling centers, acquired several bowling centers with financial problems in the markets in which the plaintiff bowling centers operated. The plaintiffs sued the defendant for damages pursuant to section 4 of the Clayton Act, claiming that by acquiring the financially troubled bowling centers, the defendant "might substantially lessen competition or tend to create a monopoly" in violation of the antitrust laws. *Brunswick*, 429 U.S. at 480, 97 S.Ct. 690. Although the Supreme Court assumed that the plaintiffs would have lost profits as a result of the defendant's illegal acquisition of the bowling centers, it found that the plaintiffs did not

suffer an antitrust injury:

At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained [in the district court] are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of competition not competitors[.]" It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

Id. 429 U.S. at 488, 97 S.Ct. 690 (emphasis added) (citation omitted). As Areeda and Hovenkamp have explained in their treatise: "At its most fundamental level, the antitrust injury requirement precludes any recovery for losses resulting from competition, even though such competition was actually caused by conduct violating the antitrust laws." Areeda & Hovenkamp, Antitrust Law, ¶ 362a at 210.

The Court of Appeals for the District of Columbia Circuit's decision in *Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484 (D.C.Cir.1996), is also instructive. There, the plaintiff and the defendants competed in the "Blue Car," or corporate account, taxicab market. Unmarked luxury cars, which are expensive to operate, are generally used in the "Blue Car" market. The plaintiff claimed that the defendants, two competitors, attempted to monopolize the "Blue Car" market by offering "Blue Car" service with regular*1023 taxicabs, which are less expensive to operate. Thus, the plaintiff argued that the defendants' ability to offer lower prices was a form of predatory conduct intended to drive the plaintiff out of the market, thereby monopolizing the "Blue Car" market in violation of section 2 of the Sherman Act. Defendants moved to dismiss the complaint arguing, among other things, that the plaintiff had not shown an antitrust injury.

After noting that, because the antitrust laws "were enacted for the protection of competition, not competitors, [the plaintiff] must allege facts that would show an anticompetitive impact on the market as a whole," id. 82 F.3d at 486 (citations omitted), the court stated:

The District Court found that [the plaintiff] had pleaded no facts that would show that appellees' conduct was anticompetitive. Indeed, the introduction of both [defendants] into the market

(whether legal or not) would appear to be fostering competition, rather than reducing it. While [the plaintiff] alleges injury to itself, that injury involves only one specific competitor and is insufficient to support a finding that the market as a whole is or will be injured.

Id. 82 F.3d at 486-87. Accordingly, the court held that the plaintiff's complaint was properly dismissed.

Baum has only alleged an injury to a single competitor: itself. Baum has not alleged an injury to the amateur baseball bat market as a whole. In fact, it has alleged the opposite: that lax standards have allowed its competitors to compete "aggressively" with each other by designing and manufacturing superior products. Baum's alleged injury--its inability to sell the Baum Bat--is not the result of any anticompetitive effect on the market. Rather, Baum's injury stems from the competition itself: the performance of Baum's wooden composition bat is inferior to that of the bats manufactured by H & B, Easton, and Worth. "Competition is a ruthless process ... and the antitrust laws are not balm for the rivals' wounds." *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 90 (6th Cir.1989) (quoting *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir.1986)). Indeed,

[a]nticompetitive conduct is conduct designed to destroy competition, not just to eliminate a competitor. Lively legal competition will result in the efficient and shrewd businessman routing the inefficient and imprudent from the field. The antitrust laws must be administered in such a way that they do not restrain such vigorous competition in order to protect inefficient competitors. As Judge Learned Hand has pointed out, "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Company of America*, 148 F.2d 416, 430 (2d Cir.1945). Merely to attempt to succeed in business is not anticompetitive conduct.

Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 823 (6th Cir.1982).

2. Necessary Predicate

[4] 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. Simply put, assuming the conspiracy to manipulate the NCAA rules for baseball bats violated the antitrust laws, Baum cannot establish that the violation was the "necessary predicate" to its injury because it lawfully could have been excluded from the market by the NCAA. See *Valley Products Co., Inc. v. Landmark*, 128 F.3d 398, 404 (6th Cir.1997).

For example, in *Axis, S.p.A. v. Micafl, Inc.*, 870 F.2d 1105 (6th Cir.1989), the defendant purchased two companies that held the rights to use key patents. The plaintiff, an Italian manufacturer of armature winding machines, claimed it was foreclosed from entering the relevant American market for the product due to the defendant's illegal acquisition of the competitors. Although it assumed the defendant's acquisition of the competitors violated the antitrust laws, the Sixth Circuit held that the plaintiff had not stated a claim on which relief could be granted:

The injury for which [the plaintiff] sought relief was not inflicted by reason of [the defendant's] newly-acquired position in the market and the elimination of one competitor. *1024 The patents and licenses owned and possessed by three companies[,] ... not by [the defendant] alone, precluded [the plaintiff's] entry into the U.S. market for armature winding machines. Thus, Axis' alleged injury is not "of the type the antitrust laws were intended to prevent" and it did not "flow from" the element of the acquisition that made it unlawful.

Axis, 870 F.2d at 1112 (quoting *Brunswick*, 429 U.S. at 489, 97 S.Ct. 690).

Also, in *Hodges v. WSM, Inc.*, 26 F.3d 36 (6th Cir.1994), the plaintiffs alleged that the defendants, operators of "Opryland" and owners of an airport shuttle service, conspired to divide the market for airport shuttle service by entering into agreements with other shuttle service companies. The allegation essentially was that the other shuttle service companies agreed not to transport passengers from the airport to Opryland, and Opryland in turn would hire vans and buses from the shuttle service companies, including the plaintiffs, for its sightseeing tour business. The plaintiffs asserted

that this conspiracy deprived them of the opportunity to compete in the airport shuttle service market.

The Sixth Circuit affirmed the district court's dismissal pursuant to Fed.R.Civ.P. 12(b)(6), opining that:

The district court applied correctly the Axis reasoning to dismiss the complaint. Here, defendants were accused of orchestrating with former competitors a combination designed to free defendants of competition. This violation of the antitrust laws, a market division conspiracy to restrain competition, was not the cause of plaintiffs' exclusion from the shuttle service market between the airport and Opryland. In *Axis*, the plaintiff was injured by the lawful refusal of the defendant and others to share their patents; here, plaintiffs' injury resulted from defendants' lawful refusal to grant plaintiffs access to their private property. Accordingly, plaintiffs were not harmed by the kind of evil contemplated by § 1 of the Sherman Act. Their injury was not an "antitrust injury" because it did not result from any decrease in competition among shuttle operators.

Id. 26 F.3d at 39. See also *Valley Products*, 128 F.3d at 404 ("the sales losses would have been suffered as a result of the cancellation whether or not [the defendant] had entered into the alleged tying arrangements with the franchisees. Here, as in *Hodges*, the alleged antitrust violation was simply not a necessary predicate to the plaintiff's injury.").

As the NCAA points out, Baum's injury stems from the NCAA's lawful authority to regulate the rules for baseball bats. [FN10] Or, more appropriately, Baum's injury flows from the NCAA's lawful refusal to change the baseball bat rules in its favor. As in *Axis* and *Hodges*, Baum's injury flows from the NCAA's lawful refusal to grant it a privilege rather than violations of the antitrust laws. The violation of the antitrust laws, therefore, is not the necessary predicate to Baum's injury; Baum cannot show that "defendants could exclude plaintiff[] only by engaging in the antitrust violation." *Hodges*, 26 F.3d at 39. [FN11]

FN10. In analyzing whether the alleged violation of the antitrust laws was the "necessary predicate" to Baum's injury, the Court assumes that defendants violated the antitrust laws.

FN11. In addition, the NCAA argues that the

antitrust claims should be dismissed on the ground that it is not subject to Sherman Act scrutiny under the circumstances because formulation of bat performance standards is a "fundamentally noncommercial activity." This argument, however, need not be addressed given that Baum lacks standing to bring the antitrust claims.

C. Tort Claims

1. Interference with Contractual Relations

[5][6] Baum claims that defendant bat manufacturers unreasonably interfered with its contracts to induce "the Mid-American Conference to reject the Baum Bat and the contracts [Baum] made with the teams in that conference." The elements of a claim for tortious interference with contractual relations are: "(1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant." See *Wood v. Herndon & Herndon*, 186 Mich.App. 495, 499, 465 N.W.2d 5 (1990). [FN12]

FN12. Although Baum argues that defendant bat manufacturers have misrepresented the elements of the claim, the elements Baum argues are applicable also contain an element of breach.

*1025 Defendant bat manufacturers move to dismiss this count, arguing that "the complaint simply does not indicate whether any contracts were breached as a result of any actions by Defendants." In response, Baum says the allegation is that defendant bat manufacturers' conduct "caused teams within the Mid- American Conference to breach contracts with the plaintiffs." Baum shall have the opportunity to clarify this ambiguity in an amended complaint. If Baum does not file an amended complaint, this count will be dismissed.

2. Interference With Prospective Economic Advantage

[7] Baum also claims that defendant bat manufacturers and the SGMA engaged in a concerted campaign to: "Remove and destroy Baum's bats;" "Sideline the Baum Hitting Machine;" "Prevent Baum from establishing relationships with

amateur baseball teams;" and "Disrupt Baum's sales to minor league professional baseball teams." As a result, Baum claims defendant bat manufacturers and the SGMA interfered with its prospective economic advantage.

Defendant bat manufacturers and the SGMA move to dismiss this claim, arguing that Baum "must show an interference with a realistic expectation of an economic relationship, an expectation which amounts to more than that of wishful thinking." Defendant bat manufacturers argue that Baum has not described its hope for business, and Baum did not have a specific expectancy because defendant bat manufacturers sell over ninety percent of the bats in the market. The allegations supporting this count are sparse. Baum shall have an opportunity to amend the complaint to better describe its expectations. If it does not, this count will be dismissed.

IV. Conclusion

Although the Supreme Court has admonished that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly," see *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (citation omitted), courts have not been hesitant to dismiss cases for failure to state a claim when the plaintiff cannot show an antitrust injury. See *Valley Products*, 128 F.3d at 403 ("The Sixth Circuit, it is fair to say, has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation."); *Dial A Car*, 82 F.3d at 484. If the determination that antitrust injury is absent "can be made with confidence on the basis of the complaint, it is better to cut the string before the substantial costs of litigating an antitrust case have been incurred." *Tennessean Truckstop*, 875 F.2d at 91.

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United States District Court,
D. Kansas.

**In re BASEBALL BAT ANTITRUST
LITIGATION (MDL No. 1249).**

**This Document Applies To:
Baum Research, et al. v. Hillerich & Bradsky
Co., Inc., et al., (No. 99-2112-
KHV).**

No. 98-MC-1249-KHV.

Oct. 28, 1999.

Manufacturer of wooden baseball bats sued manufacturers of aluminum bats and sporting goods manufacturers' association, alleging antitrust violations and interference with business relations and prospective economic advantage in violation of Michigan law. Judicial panel on multidistrict litigation transferred case to District of Kansas for consolidated pretrial, after original court granted motion to dismiss antitrust claim and required that interference claim be repleaded. Claimant moved for reconsideration of dismissal and for leave to amend. The District Court, Vratil, J., held that: (1) claimant failed to allege antitrust injury arising from alleged conspiracy to withhold performance standards for bats used in college games under which wooden bats would be competitive; (2) complaint dismissed prior to transfer of case for pretrial purposes required consent of transferee court or opponents before it could be amended; (3) permission to amend antitrust complaint would be denied, as amendment would be futile; (4) tortious interference claim could be amended; and (5) as amended, claim was stated.

Motion granted in part, denied in part.

West Headnotes

**[1] Federal Civil Procedure ⇨928
170Ak928**

Court may reconsider decision (1) when there has been an intervening change in controlling law, (2) new evidence becomes available, or (3) there is need to correct clear error or prevent manifest injustice.

**[2] Federal Civil Procedure ⇨928
170Ak928**

Motion to reconsider is not second chance for losing party to make his strongest case or to dress up arguments that previously failed.

**[3] Federal Civil Procedure ⇨825
170Ak825**

After the district court enters judgment on a motion to dismiss, plaintiff no longer may amend its complaint as of right, and may only do so with leave of the Court. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.; U.S.Dist.Ct Rules E.D.Mich., Local Rule 7.1(g)(3).

**[4] Monopolies ⇨28(6.7)
265k28(6.7)**

Manufacturer of wooden baseball bats failed to allege antitrust injury arising from alleged conspiracy of collegiate athletic association and manufacturers of aluminum bats, pursuant to which association failed to issue performance regulations for bats necessary in order for complaining manufacturer's wooden bats to be competitive in college baseball market; absence of regulation was favorable to competition generally, as it allowed for aluminum bats to come into use, and damages sustained by wooden bat manufacturer was damage to competitor rather than competition. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; M.C.L.A. § 445.784(2).

**[5] Federal Civil Procedure ⇨9
170Ak9**

Transferee court to which multidistrict litigation has been transferred for pretrial purposes should be free to decide federal claim in manner it views as correct without deferring to interpretation of transferor circuit. 28 U.S.C.A. § 1407.

**[6] Federal Civil Procedure ⇨9
170Ak9**

**[6] Monopolies ⇨28(1.4)
265k28(1.4)**

Federal district court sitting in Kansas, to which antitrust suit brought in Michigan was transferred by judicial panel on multidistrict litigation for

consolidation of pretrial with other cases, would apply antitrust rule of Sixth Circuit Court of Appeals, requiring that antitrust violation be necessary predicate to claimant's injury, even though application was not compulsory.

[7] Federal Civil Procedure ⇨928
170Ak928

Court to which antitrust case was transferred by judicial panel on multidistrict litigation, for consolidated pretrial procedures, would not reconsider decision of transferor court that complainant failed to make showing that antitrust violation was necessary predicate for its loss; no effort was made to invoke any of grounds justifying reconsideration, including intervening change in controlling law, availability of new evidence, or need to correct clear error or prevent manifest injustice. 28 U.S.C.A. § 1407; Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[8] Federal Civil Procedure ⇨9
170Ak9

Complaint dismissed prior to transfer of antitrust case for consolidated pretrial procedures, before any responsive pleading was served, required consent of transferee court or adversaries before it could be amended. 28 U.S.C.A. § 1407; Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[9] Federal Civil Procedure ⇨851
170Ak851

Court may refuse to grant leave to amend complaint when proposed amendment would be futile. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[10] Federal Civil Procedure ⇨851
170Ak851

Court would reject request of manufacturer of wooden bats, to amend antitrust complaint alleging that athletic association and aluminum bat manufacturers conspired to preclude use of wooden bats in college baseball games; proposed amendments would not cure basic defect, that manufacturer was alleging damage to itself while antitrust complaint was required to show injury to competition generally. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[11] Torts ⇨10(1)
379k10(1)

Under Michigan law, the elements of tortious interference with economic relations are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of a relationship or expectancy, and (4) damages.

[12] Torts ⇨10(1)
379k10(1)

Under Michigan law, tort of interference with prospective economic advantage contemplates relationship, prospective or existing, of some substance and particularity, before inference can arise as to its value to plaintiff and defendant's responsibility for its loss.

[13] Torts ⇨10(3)
379k10(3)

Under Michigan law, manufacturer of wooden baseball bats stated claim that collegiate athletic association and manufacturers of aluminum bats interfered with business relationships and prospective economic advantage in college market for bats; manufacturer alleged existence of large market for baseball bats, that its bats were widely accepted in professional baseball, and that manufacturers of aluminum bats misrepresented qualities of aluminum and wood bats and promoted boycotts of manufacturer's bats.

*1191 Cathy J. Dean, Jeffrey B. Rosen, Christopher Swafford, Polsinelli, White, Vardeman & Shalton, Overland Park, KS, Bruce Keplinger, Norris, Keplinger & Herman, L.L.C., Overland Park, KS, David A. Ettinger, Honigan Miller Schwartz & Cohn, Detroit, MI, David L. Nelson, Patrick B. McCauley, David J. Szymanski, Sommers, Schwartz, Silver & Schwartz, P.C., Southfield, MI, Christopher E. Ondeck, Salvatore A. Romano, Jenkins & Gilchrist, P.C., Washington, DC, for Plaintiffs.

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MEMORANDUM AND ORDER

VRATIL, District Judge.

Following a transfer order of the judicial panel on multidistrict litigation under 28 U.S.C. § 1407, the Court has jurisdiction over consolidated pretrial proceedings in these actions. This matter comes before the Court on Motion For Reconsideration And To Amend The Complaint (Doc. # 53) which the Baum plaintiffs filed December 4, 1998 in Baum Research & Dev. Co. v. Hillerich & Bradsby Co., Inc., Case No. Civ.A. 99-2112-KHV.

Pursuant to E.D.Mich. Local Rule 7.1(g)(3), plaintiffs seek reconsideration of the order of the United States District Court for the Eastern District of Michigan which dismissed their state and federal antitrust claims for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Pursuant to Rule 15(a), Fed.R.Civ.P., plaintiffs also seek leave to amend their antitrust claims and claims for tortious interference. For reasons stated below, plaintiffs' motion is sustained in part and overruled in part. [FN1]

FN1. Because jurisdiction over consolidated pretrial proceedings lies in this transferee Court, we apply the Rules of Practice and Procedure of this district. See, e.g., *Van Dusen v. Barrack*, 376 U.S. 612, 639 n. 40, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (although transferee court must apply substantive law of transferor, "the transferee District Court may apply its own rules governing the conduct and dispatch of cases in its court."). As discussed below, however, the Court would reach the same result under the local rules of either court.

Procedural Background

On July 13, 1998, Steve Baum and Baum Research and Development Company [collectively "*1192 Baum"] filed a complaint against Hillerich & Bradsby Co., Inc. ["H & B"], Easton Sports, Inc. ["Easton"], Worth, Inc., the National Collegiate Athletic Association ["NCAA"], and the Sporting Goods Manufacturers Association ["SGMA"], claiming violations of state and federal antitrust laws and tortious interference with contractual relations and prospective economic advantage in violation of state law. [FN2] See Complaint (Doc. # 1) filed July 13, 1998 in Case No. Civ.A. 99-2112-KHV.

FN2. Baum has abandoned the claim for tortious interference with contractual relations. See Memorandum In Support of [Baum's] Motion For Reconsideration And To Amend The Complaint (Doc. # 52) filed December 4, 1998 in Case No. Civ.A. 99-2112-KHV, at 1 n. 1.

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 under Fed.R.Civ.P. 12(b)(6). Assuming that Baum had suffered injury as a result of defendants' antitrust violations, it held that Baum's injury was not the result of any anticompetitive effect on the market; rather, Baum's injury stemmed from competition itself. The Michigan court further held that Baum had not pleaded actionable claims for tortious interference, and directed Baum to amend the complaint to better describe the specific expectation of an economic relationship. The court held that if Baum should fail to sufficiently amend those claims, the court would dismiss them.

Baum filed the present motion on December 4, 1998. Five days later, on December 9, 1998, the judicial panel on multidistrict litigation transferred the Baum action to this Court pursuant to 28 U.S.C. § 1407. [FN3]

FN3. Section 1407(a) provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred [by the judicial panel on multidistrict litigation] to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made ... for the convenience

of parties and witnesses and [to] 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.

Applicable Standards

1. Motion To Reconsider

[1][2] The Court has discretion whether to grant or deny a motion to reconsider. [FN4] See *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir.1988); *Shinwari v. Raytheon Aircraft Co.*, 25 F.Supp.2d 1206, 1208 (D.Kan.1998). The Court may recognize any one of three grounds justifying reconsideration: an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. See *Shinwari*, 25 F.Supp.2d at 1208. See also *Anderson v. United Auto Workers*, 738 F.Supp. 441, 442 (D.Kan.1990) (motion to reconsider appropriate when court has obviously misapprehended party's position, facts, or applicable law, or when party introduces new evidence that could not have been obtained through exercise of due diligence). A motion to reconsider is not a second chance for the *1193 losing party to make his strongest case or to dress up arguments that previously failed. See *Shinwari*, 25 F.Supp.2d at 1208 (citing *Voelkel v. General Motors Corp.*, 846 F.Supp. 1482, 1483, aff'd 43 F.3d 1484 (10th Cir.1994)). Such motions are not appropriate if the movant only wants the Court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. See *id.* (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991), cert. denied, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 51 (1992)). [FN5]

FN4. The Federal Rules of Civil Procedure do not recognize motions for reconsideration. See *Hatfield v. Board of County Comm'rs*, 52 F.3d 858, 861 (10th Cir.1995); *Loum v. Houston's Restaurants, Inc.*, 177 F.R.D. 670, 671 (D.Kan.1998). While the Rules of Practice and Procedure for the District of Kansas contain a provision entitled "Motions to Reconsider," D.Kan.Rule 7.3, this provision is intended to apply only to non-dispositive judgments and orders. See

Loum, 177 F.R.D. at 671. Nevertheless, a motion to alter or amend is essentially a motion for reconsideration. See *Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir.1989); *Koch v. Shell Oil Co.*, 911 F.Supp. 487, 489 (D.Kan.1996).

FN5. Eastern District of Michigan Rule 7.1(g)(3) sets forth a similar standard:

Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

E.D.Mich. Local Rule 7.1(g)(3).

2 Amendment Of Pleadings

[3] Under Rule 15(a), Fed.R.Civ.P., a party may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. After the district court enters judgment on a motion to dismiss, plaintiff no longer may amend its complaint as of right, and may only do so with leave of the Court. See *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368 (10th Cir.1989) (after district court granted motion to dismiss, appellants could have amended their complaint only by leave of court or by written consent of adverse party). See also *Smith v. National Collegiate Athletic Ass'n*, 139 F.3d 180, 189 (3d Cir.1998) ("[a]fter the district court enters judgment on a motion to dismiss, a plaintiff no longer may amend [its] complaint as of right," and may only do so with leave of court) (citations omitted), vacated on other grounds, 525 U.S. 459, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999). The Court may refuse to grant leave to amend where, for example, the proposed amendment would be futile. See *Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 858-59 (10th Cir.1999) (notwithstanding Rule 15(a) requirement that leave to amend shall be given freely, district court may deny leave to amend where amendment would be futile and proposed amendment is futile if amended complaint would be subject to dismissal).

Factual Background [FN6]

FN6. The Court derives this factual background from the Michigan court's opinion which dismissed the Baum complaint. See *Baum Research and Dev. Co. v. Hillerich & Bradsby Co.*, 31 F.Supp.2d 1016 (E.D.Mich.1998). Where appropriate, the Court notes additional factual allegations set forth in the Baum Complaint (Doc. # 1) filed July 13, 1998 in Case No. Civ.A. 99-2112-KHV and Baum's [Proposed] First Amended Complaint (Doc. # 50) filed March 8, 1999 in this consolidated action, In re Baseball Bat Antitrust Litigation, Case No. 98MC1249-KHV.

In this case, the relevant market is the market for amateur baseball bats, which includes but is not limited to college baseball. Baum manufactures wood composition baseball bats. H & B, Easton and Worth [collectively, "bat manufacturers"] manufacture aluminum baseball bats. The SGMA is a not-for-profit trade association of bat manufacturers. The NCAA is an association of colleges and universities that participate in intercollegiate athletics. Among other things, the NCAA adopts and promulgates playing rules.

Ninety percent of the market uses aluminum bats which defendant manufacturers *1194 produce, and they have signed exclusive contracts to provide baseball bats to various college teams. Wood bats cost less, but Baum implicitly acknowledges that defendants' aluminum bats outperform wood bats. NCAA rules allow both wood and aluminum bats in NCAA-sanctioned baseball games. During the relevant period, NCAA rules did not restrict bat performance. According to Baum, the NCAA rules (or lack thereof) were the product of a conspiracy to squeeze its wood composition bat out of the market. In particular, Baum alleges that the bat manufacturers conspired to eliminate competition from the market by (1) engaging in exclusive arrangements with colleges, universities and coaches to foreclose these teams from using competing products, and (2) cooperating with SGMA and the NCAA to manipulate and control the standard-setting function of the NCAA Baseball Rules Committee ["Rules Committee"] to establish unreasonable bat performance standards that excluded wood or wood composition bats from competition.

Analysis

Baum brings suit against the NCAA, the bat manufacturers and the SGMA, claiming violations of federal and state antitrust laws and tortious interference in violation of state law. The gravamen of Baum's complaint is that to perpetuate their dominance and exclude Baum from the market for amateur baseball bats, aluminum bat manufacturers conspired with the NCAA to manipulate the standard for baseball bats used in NCAA-sanctioned baseball games. In a nutshell, the theory is that because of lax NCAA standards which allowed aluminum bats, Baum could not sell wood composition baseball bats in the amateur baseball bat market. According to Baum, the lax standards stemmed from a conspiracy between the bat manufacturers, SGMA and the NCAA and the conspiracy violated federal and state antitrust law. [FN7]

FN7. The analysis is the same for Baum's state antitrust claims and federal antitrust claims. See Mich.Comp.Laws 445.784(2) (in construing Michigan Antitrust Reform Act, courts shall give "due deference to interpretations given by federal courts to comparable antitrust statutes....").

Baum's theory of tortious interference with business relationships and prospective economic advantage is that the bat manufacturers and the SGMA engaged in a concerted campaign to remove and destroy Baum's bats, "sideline" the Baum Hitting Machine, prevent Baum from establishing relationships with amateur baseball teams, and disrupt Baum's sales to minor league professional baseball teams.

Baum seeks reconsideration of the order which dismissed its antitrust claims as well as leave to amend those claims. Specifically, Baum seeks reconsideration of the Michigan court's dismissal of the state and federal antitrust claims on the ground that "additional events have taken place which directly bear on and support" those claims. Motion For Reconsideration And To Amend The Complaint at 2. Baum also seeks "to amend, clarify and streamline" its antitrust claims "based on the former rulings of [the Michigan] Court, the factual information set forth in Steve Baum's Affidavit, and the new facts that have taken place after the filing of the original Complaint and to more clearly set forth the nature of the antitrust violation and antitrust injuries Plaintiffs have sustained." Id. at 3.

I. Motion To Reconsider The Dismissal Of Baum's State And Federal Antitrust Claims

Prejudice (Doc. # 144) filed Sept. 29, 1999.

A. Antitrust Injury

[4] The United States District Court for the Eastern District of Michigan dismissed Baum's antitrust claims for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The court held that the Baum *1195 complaint failed to properly allege antitrust injury, in that Baum's injury did not result from any anticompetitive effect on the market; rather, Baum's injury stemmed from competition itself.

Likewise, Baum notes that the NCAA has filed a declaratory judgment complaint against Hillerich & Bradsby, Worth and Baum, and that it contains admissions which support Baum's claims. See National Collegiate Athletic Ass'n v. Hillerich & Bradsby, Co., Inc., et al., No. 99-2367-KHV. Baum contends that the NCAA complaint makes it clear that the NCAA had the "duty and authority to promulgate rules or standards designed to insure player safety and the integrity of the game," and that defendants' conspiracy to obstruct the NCAA from enacting a rule "did not foster competition unless it can be found that the NCAA neither had the duty nor the authority to do so." Id. at 5.

Baum argues that since the Michigan court dismissed its antitrust claims, "additional events have taken place which directly bear on and support" those claims. Motion For Reconsideration And To Amend The Complaint at 2. In particular, Baum notes that the NCAA Rules Committee adopted a "new bat rule" on July 14, 1998. The new rule established off-the-bat ball speed limitations at "wood-like levels" and "had the market effect of permitting wood, wood composition and wood-like bats to compete." Id. Baum contends that the new rule has caused "a substantial increase in competition and now wood and wood composition bat manufacturers are competing with aluminum bat manufacturers," id. at 3, thus establishing that "the absence of the new performance standard changes did not foster competition; rather, it had the effect of stifling competition and limiting competition" to aluminum bat manufacturers. Memorandum In Support of [Baum's] Motion For Reconsideration And To Amend The Complaint at 4.

Finally, Baum contends that "Easton has now falsely disparaged the Baum Hitting Machine and has threatened to sue college teams or coaches who have signed exclusive use contracts with Baum if they switch to wood or wood composition bats or fail to use Easton's high performance aluminum bats." Id.

Baum further notes that after the NCAA adopted the new rule, Easton sued the NCAA in this Court, claiming that the new rule violated Section 1 of the Sherman Act. [FN8] According to Baum, the Easton complaint contains "a number of admissions which support" the Baum claims. The gist of Easton's complaint, says Baum, is that Easton has been injured by the new bat rule because Easton "no longer controls and manipulates the NCAA rule-making process to its benefit." Id. at 5.

Even assuming that this "new evidence" was unavailable, the Court is not persuaded that it justifies a different outcome. Inclusion of the "new evidence" does not alter the flawed theory of antitrust injury which the evidence purports to support. This Court agrees with the Michigan court that "there is a logical inference that the absence of a rule regulating bat performance actually fosters competition." Baum Research & Dev. Co. v. Hillerich & Bradsby Co., 31 F.Supp.2d 1016, 1022 (E.D.Mich.1998). The Michigan court properly pointed out that "the main purpose of the antitrust laws is to preserve and promote competition," and "[w]hether or not a particular practice violates the antitrust laws is determined by its effect on competition, not its effect on a competitor." Id. at 1021 n. 7 (quoting Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 825 (6th Cir.1982)) (emphasis *1196 added). [FN9] See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) (antitrust laws were enacted for protection of "competition not competitors"). The Michigan court therefore correctly concluded that "Baum has failed to state an antitrust claim upon which relief can be granted because it can prove no set of facts to show that it suffered an antitrust injury." Baum, 31

FN8. On September 29, 1999, the Court dismissed the Easton Sports, Inc. v. National Collegiate Athletic Ass'n case, No. 98-2351-KHV. See Stipulation And Order Dismissing Case With

F.Supp.2d at 1022.

FN9. Nor does Baum's concern about the safety of aluminum bats alter the analysis whether an antitrust injury exists. See *Baum Research and Dev. Co.*, 31 F.Supp.2d at 1022 n. 9 (citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (rejecting attempt to justify restraint on competition on basis that competition posed threat to public safety and ethics of profession, as contrary to policy of Sherman Act)).

Baum also uses an array of antitrust buzzwords to argue that its "new evidence" establishes, e.g., "the onset of the conspiracy," "predatory" "exclusionary" and "overt acts" and control of the "cartel market," "dominant market power" by the NCAA, and "before and after market conditions." Taken as a whole, Baum's convoluted arguments essentially re-argue the issue which the Michigan court has already decided. A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed. See *Shinwari*, 25 F.Supp.2d at 1208 (citing *Voelkel v. General Motors Corp.*, 846 F.Supp. 1482, 1483, aff'd 43 F.3d 1484 (10th Cir.1994)). Such motions are not appropriate if the movant only wants the Court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. See *id.* (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991), cert. denied, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 51, (1992)). See also E.D.Mich.Rule 7.1(g)(3) (motions for reconsideration which merely present same issues ruled upon by court, either expressly or by reasonable implication, shall not be granted).

To the extent that Baum's motion for reconsideration implicitly claims the need to correct clear error or prevent manifest injustice, the foregoing analysis is equally applicable. As noted, the Michigan court's opinion was thoughtful, well-reasoned and—in this Court's view—entirely correct. None of the arguments which Baum has advanced in the present motion convince this Court otherwise. [FN10]

FN10. The Court would reach the same result under E.D.Mich. Local Rule 7.1(g)(3). Baum has failed to demonstrate a palpable defect by which the Michigan court and the parties have been misled. Also, the Court is in substantial agreement with the

arguments which the bat manufacturers have proffered in opposition to Baum's motion, and the Court therefore adopts those arguments by reference.

Baum has submitted a supplemental citation of authority which advances the conclusory argument that *Re/Max Intern., Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir.1999), is "informative on the issue of antitrust injury and standing" and "should further clarify any confusion that somehow Sixth Circuit and Tenth Circuit holdings on antitrust injury" differ from this case. Baum's Supplemental Citation Of Authority (Doc. # 103) filed April 16, 1999 in Case No. Civ.A. 98MC1249-KHV, at 1-2. According to Baum, *Re/Max* confirms that "a direct competitor has standing and suffers antitrust injury when it is targeted and victimized by a conspiracy to exclude it from competition." *Id.* at 2.

In *Re/Max*, a national real estate brokerage franchisor, subfranchisor and franchisees sued two local real estate firms. Under defendants' adverse-splits policy, whenever *Re/Max* agents were involved in a transaction, defendants paid them only 25 or 30 percent of the commission, rather than the industry norm of a 50/50 split. Plaintiffs alleged that the adverse-splits *1197 policy—the means by which defendants chose to dominate the market for hiring real estate agents—violated the antitrust laws. Plaintiffs claimed that defendants controlled the market for knowledgeable and experienced sales agents and that through the unfair adverse-splits policy, they prevented *Re/Max* from recruiting those agents, thereby depriving *Re/Max* franchises of the information and expertise they needed to effectively serve buyers and sellers of homes.

In *Re/Max*, the Sixth Circuit rejected defendants' argument that the franchisor plaintiffs lacked standing to bring antitrust claims because they could not show antitrust injury. The court noted that "defendants admit[ed] [that] they intended to thwart, through the implementation of adverse splits, *Re/Max*'s attempt to recruit defendants' agents." The court further noted that

Although the policy was aimed more directly at *Re/Max* franchises, the effect was to deter agents from defecting to *Re/Max*, thereby impeding an innovative competitor's access to the market. *** Denying the franchisors standing would result in antitrust violations going "undetected or unremedied" if in fact *Re/Max* franchises were

barred from [the] markets.

173 F.3d at 1023.

That situation is not analogous to this case. Here, defendants allegedly induced the NCAA not to pass a rule which restricted bat performance standards. As a result, bat manufacturers continued to produce and market different bat designs and the amateur baseball market retained the right to choose which type of baseball bats to use. It was the consumers' unhindered preference for aluminum bats, then, which prevented Baum from selling composite wood bats. The Michigan court therefore properly concluded that "there is a logical inference that the absence of a rule regulating bat performance actually fosters competition." Baum, 31 F.Supp.2d at 1022. See also Valley Products, 128 F.3d at 403 (antitrust injury doctrine bars recovery where asserted injury, although linked to alleged violation of antitrust laws, flows directly from conduct that "is not itself an antitrust violation").

Baum also cites *DM Research, Inc. v College of Am. Pathologists*, 170 F.3d 53 (1st Cir.1999), for the proposition that the antitrust laws specifically prohibit defendants' "conspiratorial and biased standard setting activities" because defendants distorted and manipulated the standard setting process to prevent increased competition. In *DM Research*, the First Circuit Court of Appeals noted that in cases which involve anticompetitive quality standards, "the principal concern has been the use of standards setting as a predatory device by some competitors to injure others" and that in such cases, there is normally "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." 170 F.3d at 57-58 (footnote omitted). The First Circuit further opined that "it is not intrinsically an antitrust violation for an organization to limit its endorsement to those who meet its published standards unless the standard itself is shown to be anticompetitive in purpose or effect." 170 F.3d at 58. In this case, however, Baum's complaint is not that the NCAA set an anticompetitive standard; its complaint is that the NCAA's failure to set a standard (albeit because of a distorted standard-setting process) injured its ability to compete. As the Michigan court noted, it is logical to infer from Baum's allegations that the

absence of a bat performance rule actually enhanced competition. Therefore DM Research is clearly inapposite.

Finally, Baum cites *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 *1198 (10th Cir.1999), for the proposition that the proposed amended complaint properly alleges antitrust injury, in that Baum was the target of the conspiracy and was victimized by its anticompetitive consequences. *Full Draw Productions* is readily distinguished, however, on its facts. In that case an archery trade show promoter sued archery manufacturers and an archery trade association, alleging a group boycott of its trade show in violation of the antitrust laws. In concluding that plaintiff's injury reflected the anticompetitive effects of the group boycott, the Tenth Circuit noted that because plaintiff produced "one of only two archery trade shows in the United States, the purposeful and wrongful destruction of [plaintiff's] business by Defendants directly injured competition as well as injuring [plaintiff]." 182 F.3d at 754. The court further opined that "we have no doubt that alleging the loss of one of two competitors in this case alleges injury to competition" and therefore "the instant case is not one in which it is alleged that a competitor fell prey to competition; it is one in which it is alleged that competition fell prey to a competitor." *Id.* Finally, the court noted that the effect of defendants' boycott "was not to increase competition," but rather to reduce competition through the elimination of one source of output, "thereby limiting consumer choice to the other source of output" and causing "the unnatural demise of [plaintiff's trade show] at the hands of defendants." *Id.* at 755.

This case involves several competitors, and Baum cannot allege the loss of one of only two competitors. More importantly, this is essentially a case in which plaintiff complains that a competitor fell prey to competition. Baum alleges that defendants induced the NCAA not to pass a rule which restricted baseball bats. As a result, amateur baseball retained the right to choose which types of bats to use, and in exercising that right did not choose Baum's wood composition bat. Thus, unlike *Full Draw Productions*, the elimination of a competitor was the direct result of "the economic freedom of participants in the relevant market." *Id.* (citations omitted).

For all of these reasons, the Court concludes that Baum has not alleged antitrust injury and that its motion for reconsideration of that issue should be overruled.

B. Necessary Predicate

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." Baum, 31 F.Supp.2d at 1023. Simply stated, the court held that Baum cannot establish that the antitrust violation was the "necessary predicate" to its injury because the NCAA had the lawful authority to refuse to change the baseball bat rules in Baum's favor. *Id.* See also *Valley Products Co., Inc. v. Landmark*, 128 F.3d 398, 403-04 (6th Cir.1997) ("[t]he Sixth Circuit, it is fair to say, has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation.").

Baum briefly challenges this portion of the Michigan court's ruling, arguing that its exclusion from the amateur baseball bat market was the "direct and proximate consequence" of defendants' conspiracy, that Baum's resulting injury was the "ineluctable result" thereof, and that "the violation was the necessary predicate to Baum's injury." Memorandum In Support of [Baum's] Motion For Reconsideration And To Amend The Complaint at 9. Baum *1199 further argues that its injury does not flow from the NCAA's lawful refusal to change the rules because the rule process is "rigged" by defendants' conspiracy. In the alternative, Baum claims since the recent rule change promotes competition and were it not for defendants' conspiracy, the change "would and should have taken place at least five years ago." *Id.* at 9-10.

The bat manufacturers note that the "necessary predicate" requirement was not the basis for their motion to dismiss Baum's original complaint. They argue that the Michigan court's discussion of the necessary predicate requirement was secondary to its holding that Baum had not suffered antitrust injury.

The bat manufacturers also contend that the "necessary predicate" requirement is peculiar to the Sixth Circuit and has been widely criticized and rejected in other circuits, see, e.g., *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir.1979); *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378, 1384-87 (9th Cir.1982); *Irvin Indus. v. Goodyear Aerospace Corp.*, 974 F.2d 241, 245 (2d Cir.1992), and that the doctrine is inconsistent with Tenth Circuit caselaw on antitrust injury. See, e.g., *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 960-63 (10th Cir.1990) (upholding antitrust damage award despite defendant's right to refuse to deal with plaintiff absent anticompetitive behavior). Accordingly, the bat manufacturers argue that the Court need not address the Michigan court's analysis of the issue in ruling on Baum's motion for reconsideration.

Concurring with the reasoning of the Michigan court, the NCAA argues that

any alleged injury that [Baum] suffered from the NCAA's promulgation of bat performance standards cannot be an "antitrust injury" because the NCAA's power to set those standards is derived from its own rulemaking authority, and not the alleged conspiracy[,] and thus the NCAA's alleged participation in this "conspiracy" was not a necessary predicate to Baum's alleged injury. See *Hodges v. WSM, Inc.*, 26 F.3d 36 (6th Cir.1994).

NCAA Response To Plaintiffs' Motion For Reconsideration And To Amend The Complaint (Doc. # 1) filed December 23, 1998, at 2. Because Baum cannot establish the necessary predicate requirement, the NCAA concludes that Baum's proposed amended complaint will suffer the same fate as Baum's original complaint: dismissal under Fed.R.Civ.P. 12(b)(6). Accordingly, the NCAA argues that Baum's motion for reconsideration and to amend must be denied. . .

Unlike the bat manufacturers, however, the NCAA does not believe that this Court, in ruling on Baum's motion for reconsideration, should simply disregard the portion of the Michigan decision which addresses the "necessary predicate" requirement. The NCAA argues that the Michigan court order is "the law of the case." See, e.g., *KCI Corp. v. Kinetic Concepts, Inc.*, 18 F.Supp.2d 1212, 1214 (D.Kan.1998) ("[t]raditional principals of law of the case counsel against the transferee court reevaluating

the rulings of the transferor court"). Therefore, the NCAA contends, the only proper basis upon which this Court may upset the Michigan court determination of the issue is one of the three grounds justifying reconsideration. See, e.g., *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir.1991).

The NCAA disputes the bat manufacturers' contention that the "necessary predicate" requirement is inconsistent with the Tenth Circuit approach to the question of antitrust injury. It also posits that even if the "necessary predicate" requirement is inconsistent with Tenth Circuit precedent, such inconsistency is irrelevant in this multidistrict litigation case because the Baum *1200 action (should it be revived) will eventually return to Michigan for trial. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) (cases consolidated under Section 1407 must be remanded to transferor court for trial). The NCAA contends that reinstatement of Baum's antitrust claims on the ground that the Tenth Circuit does not follow the "necessary predicate" requirement would lead to a bizarre result, in that once the action returned to Michigan, it would again be subject to dismissal under Sixth Circuit precedent.

[5] The Court agrees with the Court of Appeals for the District of Columbia that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." In re *Korean Air Lines Disaster* of Sept. 1, 1983, 829 F.2d 1171, 1174 (D.C.Cir.1987) (quoting Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 721 (1984); and citing Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U.Pa.L.Rev. 595, 662- 706 (1987)). See also In re *United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F.Supp. 914, 919 (D.D.C.1994) (accepting basic principle that in multidistrict litigation "a transferee court should normally use its own best judgment about the meaning of federal law when evaluating a federal claim") (citing In re *Korean Air Lines Disaster*, 829 F.2d at 1174).

[6][7] Although this Court is not bound by stare decisis to follow Sixth Circuit precedent simply by

virtue of the fact that it is a transferee Court, nor is it obligated to ignore Sixth Circuit precedent. Unlike In re *Independent Service Organizations Antitrust Litigation*, 1998 WL 919125, at *2- 3 (D.Kan.1998), where this Court queried whether it was bound to follow Ninth Circuit precedent in resolving motions for summary judgment, in the present case the Michigan court has already applied Sixth Circuit precedent in dismissing Baum's antitrust claims. As a transferee Court ruling on Baum's motion for reconsideration, it is clearly reasonable to follow Sixth Circuit precedent. Applying its own best judgment, In re *Korean Air Lines Disaster*, 829 F.2d at 1174, the Court therefore concludes that Baum's motion for reconsideration should be analyzed under Sixth Circuit precedent.

That said, the Court concludes that Baum has failed to establish that the Michigan court erred in applying the "necessary predicate" issue. Baum's cursory and conclusory arguments do not establish, or even attempt to invoke, any of the grounds which justify reconsideration: an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. See *Shinwari*, 25 F.Supp.2d at 1208; see also *Anderson*, 738 F.Supp. at 442. The Court agrees with the well- reasoned opinion of the Michigan court on this issue. Baum cannot establish that an antitrust violation was the "necessary predicate" to its injury because the NCAA had the lawful authority to refuse to change the bat rules in Baum's favor. Nothing in Baum's motion persuades the Court of any error in the Michigan decision. Baum's motion for reconsideration on the necessary predicate issue is therefore overruled.

II. Motion For Leave to Amend The State And Federal Antitrust Claims

[8] Baum argues that it "may have" a right to amend its antitrust claims without leave of court and that in any event, the Court should grant leave to amend to correct a palpable defect or prevent manifest injustice. See Rule 15(a), Fed.R.Civ.P.; see also *Foman v. Davis*, 371 U.S. 178, 182-83, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *1201 *Ohio Cas. Ins. Co. v. Farmers Bank*, 178 F.2d 570 (6th Cir.1949) (where no responsive pleading filed when appellant tendered first amendment to complaint,

asserted untimeliness of amendment was not valid ground for rejecting amendment); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269, 270-71 (9th Cir.1965) (plaintiff may amend one time as a matter of right even after motion to dismiss has been granted); *Smith*, 139 F.3d at 189 (under Rule 15(a) plaintiff has absolute right to amend complaint once at any time before responsive pleading is served; thereafter, plaintiff must seek leave to amend, and although within its discretion, district court "should grant such requests freely when justice so requires").

Baum characterizes its motion as a request for "reconsideration of the [Michigan] Court's apparent refusal to permit amendment of the antitrust claims based on the erroneous and unsupported factual conclusion that under no set of facts could Baum ever show 'antitrust injury.'" Baum's Reply To Briefs In Opposition To Motion For Reconsideration And To Amend Complaint (Doc. # 6) filed January 8, 1999, in *In re Baseball Bat Antitrust Litigation*, 1999 WL 1062519 at 5-6, Case No. 98MC1249-KHV (D.Kan.1999).

Baum's argument that it is entitled to amend without leave of court is not well taken in light of Tenth Circuit authority. In *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368 (10th Cir.1989), plaintiffs did not exercise their right to amend before the trial court decided defendants' motion to dismiss. On appeal, the Tenth Circuit held that "[a]fter the court granted the motion to dismiss, Appellants could have amended their complaint only by leave of court or by written consent of the adverse party." 868 F.2d at 370. The Tenth Circuit further rejected plaintiffs' argument that because they "requested" leave to amend before the trial court dismissed their complaint, they were entitled to formally amend as a matter of right. It reasoned:

If Appellants' theory were to be adopted, the pleading phase of a lawsuit would never end. Such a practice would undermine the distinctions in Fed.R.Civ.P. 15 between "right" to amend and "leave" to amend, and plaintiffs' counsel would then have the right to amend indefinitely simply by including a "request to amend" in their response to a motion to dismiss.... After a motion to dismiss has been granted, plaintiffs 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. In that event, in accordance with Rule 15, "leave shall be freely given when justice so requires."

868 F.2d at 371 (emphasis added). Cf. *Breuer v. Rockwell Intern. Corp.*, 40 F.3d 1119, 1131 (10th Cir.1994) (where record clearly showed that plaintiff had repeatedly expressed willingness to amend and had demonstrated particular grounds, but district court misled her to believe that she should wait to amend until court disposed of motions to dismiss, court should have reserved to plaintiff right to amend upon dismissal of action); *Triplett v. Leflore County*, 712 F.2d 444, 445 (10th Cir.1983) (accepting plaintiff's motion to reconsider as request to amend despite its irregularity because motion to reconsider--which included brief with bold captioned title reading "REQUEST FOR LEAVE TO AMEND COMPLAINT"--unequivocally gave district court and opposing counsel clear notice of request to amend and grounds therefore).

In dismissing Baum's antitrust claims, the Michigan court made no mention of any proposed amendments to the antitrust claims. Indeed Baum has identified no pleadings which sought to amend those *1202 claims. To the extent that Baum characterizes the present motion for leave to amend as a motion to "reconsider" the Michigan court's "apparent refusal to permit amendment of the antitrust claims," the motion must fail: Baum has not shown that it properly sought to amend its complaint prior to the Michigan court's order of dismissal, and therefore it cannot establish that the Michigan court's apparent "refusal" to permit such amendment sua sponte constitutes clear error or results in manifest injustice. See, e.g., *Calderon v. Kansas Dept. of Social and Rehabilitation Services*, 181 F.3d 1180, 1187 (10th Cir.1999) (because motion for leave to amend was never properly before it, district court did not abuse discretion in failing to address plaintiff's request for leave to cure deficiencies in her pleadings) (citing *Brannon v. Boatmen's First Nat'l Bank*, 153 F.3d 1144, 1150 (10th Cir.1998) (court need not address motion never placed before it); *Dahn v. United States*, 127 F.3d 1249, 1252 (10th Cir.1997) (same)).

[9][10] Addressing Baum's motion as one for leave to amend in the first instance, the Court briefly

analyzes whether justice requires it to exercise its discretion in favor of the proposed amendment. See Fed.R.Civ.P. 15(a). The Court may refuse to grant leave to amend where the proposed amendment would be futile. See Jefferson County School Dist. No. R-1, 175 F.3d at 858-59 (proposed amendment futile if amended complaint would be subject to dismissal). Baum argues that its proposed amended complaint "streamlines and clarifies the antitrust claims," defines the onset of the conspiracy, avers that Baum was the specific target, details defendants' overt acts ("exclusionary and predatory conduct designed to prevent changes in the NCAA bat rules," obstruction of acceptance of the Baum Testing Machine, and use of exclusive dealing arrangements and gifts to keep Baum from competing), more clearly demonstrates the interrelatedness of the conspiratorial acts and how they adversely affected competition, sets forth more precisely the lack of any procompetitive or efficiency rationales, and more specifically articulates that defendants' conspiracy was designed to and did injure competition and specifically caused antitrust injury to Baum. Furthermore, in an apparent effort to address the Michigan court's conclusion that Baum has not alleged antitrust injury, *id.* at 1023, Baum proposes to amend its complaint to include allegations that, e.g., "[t]he effect of the Defendants' conspiratorial conduct has been to systematically exclude and foreclose the manufacturers of wood or wood composition bats, such as Plaintiffs, from the markets for amateur baseball bats," [Proposed] First Amended Complaint at 6, ¶ 15, and the "anticompetitive conduct of the [bat manufacturers] had the effect of foreclosing all other competing bat products, such as wood or wood composite bats from the amateur baseball [bat] markets." *Id.* at 2, ¶ 69.

Baum has proffered no grounds which justify leave to amend. None of the proposed amendments would alter the flawed theory which is the basis for Baum's antitrust claims. The Michigan court properly concluded that even if Baum suffered injury as a result of antitrust violations by defendants, Baum's injury was not the result of any anticompetitive effect on the market, but rather stemmed from competition itself. Baum's effort to evade the ruling by alleging that it claims injury to a competitor rather than to competition are to no avail. The assertion that defendants' conduct injured Baum and other wood and wood composition

bat manufacturers and the liberal use of the word "competition," throughout the allegations of antitrust injury, do not alter the nub of Baum's case. The proposed complaint still alleges that non-restrictive bat performance standards granted a competitive advantage to aluminum bat manufacturers, "which had the *1203 effect in the markets of excluding competitors such as Baum," and that Baum was the "specific target" of the aluminum bat manufacturers. *Id.* at 23, ¶ 76. The gravamen of the proposed complaint remains the same as the original, legally insufficient, complaint.

The Court's analysis with respect to the motion for reconsideration is equally applicable here. It would be futile to grant leave to amend because the proposed amended complaint, like the original complaint, would be subject to dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Accordingly, Baum's motion for leave to file an amended complaint pursuant to Fed.R.Civ.P. 15(a) is overruled.

III. Tortious Interference With Business Relationships And Prospective Economic Advantage

[11] Under Michigan law, the elements of tortious interference with economic relations are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of a relationship or expectancy, and (4) damages. See *Lifeline Ltd. v. Connecticut Gen. Life Ins. Co.*, 821 F.Supp. 1213, 1216 (E.D.Mich.1993); *Pryor v. Sloan Valve Co.*, 194 Mich.App. 556, 487 N.W.2d 846., 848-49 (1992).

Defendants moved to dismiss Baum's claim for tortious interference in the original complaint, on the ground that Baum had alleged no reasonable expectation of a business relationship. The Michigan court agreed, holding that "[t]he allegations supporting this count are sparse." It gave Baum an opportunity to amend the complaint to better describe those expectations, however, and cautioned that if Baum did not do so, the count would be dismissed. See *Baum*, 31 F.Supp.2d at 1025. Accordingly, Baum now seeks to amend "to elaborate the nature of Defendant[s]' interference and state the nature of Baum's business expectation." Memorandum In Support of

[Baum's] Motion For Reconsideration And To Amend The Complaint at 1 n. 1.

Defendants complain that the proposed amendment merely alleges that many people buy baseball bats; that professional baseball leagues prefer wood bats; that Baum "can think of reasons why people might prefer its bats" and some customers have agreed with those reasons; and that Baum has sold 15,000 bats. The bat manufacturers argue that except for Baum's allegations concerning the Mid-American and Cape Cod Conferences, [FN11] the proposed amendment does not identify specific business relationships or sales that Baum would have made and with which defendants interfered. Further, none of the allegations set forth facts necessary to establish a reasonable expectancy of business. Accordingly, the bat manufacturers argue that Baum's proposed amendment would be futile and that the Court should therefore deny its motion for leave to amend.

FN11. The proposed amended complaint alleges that the bat manufacturers and SGMA "interfered with Baum's business opportunity and expectancy" by inducing the Mid-American and Cape Cod Conferences "to terminate arrangements Baum had made for the use of Baum's bats" in the conferences and by "removing and destroying Baum's bats and replacing them with free high performance aluminum bats." [Proposed] First Amended Complaint at 34, ¶ 101.

These arguments are unpersuasive. Although Michigan law governing tortious interference with prospective economic advantage requires Baum to allege more than a mere hope for a future business opportunity or the innate optimism of the salesman, e.g., *Bell Data Network Communications, Inc. v. Symbol Technologies, Inc.*, 1995 WL 871222, at *5 (E.D.Mich.1995); *Schipani v. Ford Motor Co.*, 102 *1204 Mich.App. 606, 302 N.W.2d 307, 314 (1981), Baum need not demonstrate a guaranteed relationship, however, because "anything that is prospective in nature is necessarily uncertain," and "[w]e are not here dealing with certainties, but with reasonable likelihood or probability." *Schipani*, 102 Mich.App. at 622, 302 N.W.2d at 314 (citing *Behrend v. Bell Tel. Co.*, 242 Pa.Super. 47, 363 A.2d 1152, 1160 (1976)).

[12] "[T]he tort contemplates a relationship, prospective or existing, of some substance, some

particularity, before an inference can arise as to its value to the plaintiff and the defendant's responsibility for its loss." *Id.* "To demonstrate such a realistic expectation, [plaintiff] must prove a business relationship with an identifiable class of third parties." *Liberty Heating & Cooling, Inc. v. Builders Square, Inc.*, 788 F.Supp. 1438, 1451 (E.D.Mich.) (citing *Schipani*, 302 N.W.2d at 314), appeal dismissed, 968 F.2d 1215 (6th Cir.1992); see also *Hoffman v. Roberto*, 85 B.R. 406, 416 (W.D.Mich.1987) (to establish whether expectation of economic advantage was reasonable, plaintiff need not prove existence of enforceable contract; it is sufficient to show interference with specific third parties or identifiable prospective class of third persons with whom plaintiff had reasonable expectation of contracting) (citing *Schipani*, 102 Mich.App. at 621-22, 302 N.W.2d 307 and *Wilkerson v. Carlo*, 101 Mich.App. 629, 300 N.W.2d 658, 659 (1980)).

[13] The amendments which Baum proposes would rectify the defects in the original complaint. In its revised incarnation, the complaint alleges that the market for amateur baseball bats is huge, consisting of some 11,000 colleges and universities, 16,000 high schools, and 3,600,000 little league baseball players throughout the world; that Baum's wood composition bats are durable and sell for half the price of aluminum bats; that professional baseball teams, players and coaches compliment Baum bats for durability, reliability, performance and value as compared to aluminum and traditional wood bats; that major professional baseball leagues purchase and use Baum bats for use in minor leagues; that major professional leagues prefer college and high school teams to use bats with wood-like speeds for training purposes; that since 1991 Baum has manufactured 15,000 bats, generating approximately \$1,600,000.00 in total revenues; that representatives of H & B and Easton have admitted that Baum's bat is a marketable product; that the Baum hitting machine has wide approval among industry experts and is "the best hitting device available to test batted ball speeds"; and that if the NCAA had enforced its wood-like bat standards during the relevant period, the Baum bat "would have been extensively used in college, high school and amateur baseball since 1992, and the Baum Hitting Machine would have been used as a device to test baseball bat speeds since 1996." [Proposed] First Amended Complaint at 33-34, ¶ 100.

The proposed complaint further alleges that defendants induced the NCAA Executive Committee to override decisions of the Rules Committee; induced the Mid-American and Cape Cod Conferences to terminate arrangements with Baum for the use of Baum bats, removed and destroyed Baum's bats and replaced them with free high performance aluminum bats; 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; submitted information to the NCAA, the National Federation of State High School Associations, and college, high school and amateur baseball *1205 coaches which falsely indicated that defendants' aluminum bats were safe and no faster than wood, that aluminum bats did not upset the offensive/defensive balance or affect the "integrity of the game," and that the "Brandt BPF standard" confirmed the safety of aluminum bats (when in fact it was an invalid test); and boycotted the Baum Hitting Machine. *Id.* at 34-35, ¶ 101.

Finally, the proposed complaint alleges 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. *Id.* at 35-36, ¶ 101. The complaint alleges that defendants' misconduct interfered with Baum's business relationships and prospective economic advantage, in the form of lost profits on sales of Baum bats; loss of licensing fees for the Baum Hitting Machine; loss of time and expense incurred in developing the Baum bat and Baum Hitting

Machine; and injury to Baum's business, good will, name and business reputation. See *id.* at 36, ¶ 102.

The proposed complaint sufficiently alleges the existence of a valid business expectancy. The allegations reveal that Baum had more than a mere hope for business opportunities or the innate optimism of a salesman. They indicate that Baum's composite wood bats were well received by baseball players and coaches and had previously enjoyed not insubstantial sales. The allegations also point to an identifiable class of prospects to whom Baum had a reasonable expectation of selling composite wood bats. If these revised allegations are true, Baum realistically could have expected better sales and profits from the amateur baseball bat market.

The Court concludes that Baum's claim for tortious interference with business relationships and prospective economic advantage would not be subject to dismissal in its amended form and that the proposed amendments would not be futile. Accordingly, Baum's motion for leave to amend is sustained.

IT IS THEREFORE ORDERED that the Baum plaintiffs' Motion For Reconsideration And To Amend The Complaint (Doc. # 53) filed December 4, 1998 in Baum Research and Dev. Co. v. Hillerich & Bradsby Co., Case No. Civ.A. 99-2112-KHV, be and hereby is overruled in part and sustained in part. Plaintiffs' motion for reconsideration is OVERRULED. Plaintiffs' motion to amend the complaint is SUSTAINED as to the claim for tortious interference with prospective economic advantage in violation of state law. Baum shall file its first amended complaint on or before November 8, 1999.

END OF DOCUMENT

Bats 8

Petition: CP 00-1
Petition on: Baseball Bats

To Whom It May Concern:

We are submitting our research regarding the petition requesting performance requirements for non-wood baseball bats. There are increasing assertions that non-wood bats have become increasingly dangerous because of bat swing speeds and larger "sweet spots". The argument is that the high performance aluminum bats allow the ball to achieve a faster exit velocity, therefore, not allowing the pitcher sufficient time to react. Our research discusses possible rule reviews and implementations, test studies, possible risks, local opinions and manufacturer reactions.

For the last two years, the Baseball Rules Committee has publicly expressed an intention to change the bat rule. The Committee wishes to make the maximum permissible performance for bats used interscholastic competition more akin to wooden bat performance. The Committee assesses potential rule changes based on risk minimization, maintenance of an appropriate balance between offense and defense and preservation of the sound traditions of the sport of baseball.

The Baseball Rules Committee believes that it is finally time to convert its intention into a specific rule. They recommend that the NFHS Board of Directors approve a rule for non-wood bats that in size, weight and moment of inertia replicates wood. This change would cause the effort required to swing a non-wood bat to replicate closely the effort required to swing a wooden bat.

The Committee, however, does not wish to act in a way that imposes hardship on any of the affected parties: student-athletes, parents, high schools, dealers and manufacturers. Non-wood bats meeting the new three-part criteria (risk minimization, maintenance of an appropriate balance between offense and defense and preservation of the sound traditions of the sport of baseball) have always been permissible and student-athletes and high schools are free to use them immediately. The currently permissible bats that would no longer be permitted will be allowed a two-year phase-out period. However, from the 2002 season onwards, these bats will no longer be permissible.

A group of independent scientist hired by Major League Baseball conducted a study on the dangers of metal bats in comparison to wooden ones. The tests were conducted utilizing the patented Baum Hitting Machine that is a "state of the art machine capable of accurately measuring ball exit velocity." (www.baumbat.com/page5.htm) The research study focuses on three different variables ball exit speed (wood verses metal), ball composition, and metal bat differences to wood bats.

When testing ball exit velocities from wood and metal bats a considerable difference could be measured. Metal bats tended to average a ball exit velocity of 101.6 mph., which indicated that metal bats have impact points ranging from 3" to 11". In comparison wood bats averaged 95.14 mph. This indicates that the impact points range anywhere from 5.5' to 7.5". The differences do not look impressive till one notes that the numbers indicate a 400% increase in the power of a metal bat to a wood bat. This is explained by the trampoline effect that metal bats have because of the barrel spring, which wood bats do not have because of their inelasticity. It was also noted that for every mph in the bat swing the speed of the exit velocity is equal.



Differences in ball composition were also tested because of the controversy behind the ball exit velocity begin due to different core composites. It was noted that balls with the solid cork center core had less exit velocity due to the dampening effect of the core. On the other hand balls with a rubber and cork composite core tended to give a little more to exit velocity. The conclusion on ball differences verses exit velocity showed no material difference.

Lastly the scientist compared the physical properties of metal bats to wood bats. It was found that metal bats are two to three times stiffer and stronger. They are lighter by up to five ounces. Their sweet spot is 470% larger and their hitting surface is 400% larger. They are a quarter of an inch larger in diameter. Which leads to increase batting averages of 150-200 points and increase distance of 100-160 feet.

The following statistics where recorded for division one players in 1997 Summer Cape Cod League.

	Batting Ave	Home Runs per at Bat
Metal	0.339	0.04
Wood	0.232	0.0135135

Statistic	Difference
Batting Ave.	-107
Slugging Percentage	-266
Hours per at Bat	-66%
Base on Balls	0
Strikeouts	7%
Runs Percentage per at Bat	-52%
RBI Percentage per at Bat	-55%

The Division I. Championships/Competition Cabinet and Divisions II and III Championships Committees have considered whether to adopt the new bat standards for the 1999 Championships. In 1988, 1993, 1994, 1995, 1996, 1997 and 1998, the committee studied the issue that it believed would reasonably curtail ever-increasing aluminum bat performance. Easton has promoted statistics on bat performance that it claims it show that wood bats perform close to aluminum bats, and that even wood bats perform in excess of the new rule. Studies conducted on the Baum Hitting Machine, which all experts acknowledge to be the most state of the art testing machine available, show that traditional wood bats when swung 70 miles per hour (mph) at a ball moving at 70 (mph) will produce an exit velocity of approximately 93 (mph) or less. Aluminum bats regularly produce exit velocities in excess of 97 (mph) under the same conditions. Most experts believe that game conditions result in even higher exit speeds and greater disparity between traditional wood bats and current aluminum bats since light aluminum bats can be swung faster.

Easton claims that a few, very heavy or specialty wood bats will produce exit velocities in excess of 93 (mph) under the same test conditions. As Easton knows, these results stem from the use of an unusually heavy or unusually balanced bat being swung by a machine at a fixed speed.

To this end, the NCAA supports proposed research to be sponsored by metal bat manufacturers to conduct field-testing of bats. Major League Baseball have agreed to purchase state of the art equipment for collegiate bat testing by and independent testing group in a laboratory setting. The NCAA also will conduct random testing of bats to ensure they meet the new NCAA standards.

Several college baseball players were questioned on their opinion towards the use of aluminum bats as opposed to wooden bats:

What risks, if any, do you find in the use of aluminum bats?

Mike Quintana-FIU third baseman- answered, "The ball bounces off bat really hard at almost 95 mph There is a lot of risk for injury to occur."

Mario Suarez- former FIU pitcher- answered, "Aluminum bats create many risks compared to that of wooden bats. The impact of the bat hitting the ball is very powerful. Serious injury can occur due to the lack of time players have to react to a hit."

Have you ever experienced or seen a serious injury caused by the use of aluminum bats?

Mike Quintana responded, "Yes, people have been hit in the face. Serious knee injuries have occurred because people do not have time to react and move out of the way."

Mario Suarez responded, "I have seen a pitcher dislocate his knee due to the impact of the hit of the bat with the ball. I myself have experienced my chin being split and had to receive medical attention."

What do you think should be made differently on aluminum bats?

Mike Quintana, "Warning labels should be placed on these powerful objects. Aluminum bats should only be used until high school level, thereafter, wooden bats should be used."

Mario Suarez, "Aluminum bats should be restricted as to who can and cannot use them. The material used should be changed as to make them a bit safer."

What is your opinion on the use of wooden bats?

Mike Quintana said, "The game is safer when wooden bats are used. The game also becomes more competitive because aluminum bats have more of a span to contact the ball than the narrow width of a wooden bat."

Mario Suarez said, "That's a good idea because it would make the game more competitive and less risky."

Our research would not be complete if the bat manufacturers were not allowed to comment on the petition and the future impact of non-wood baseball bats on the high school and collegiate level. Although we tried contacting several bat manufacturers for comment, only Easton's public relations company, Formula P.R., returned our call. Easton's comment to the petitioner's argument that non-wood bats present an unreasonable risk of injury was that it was unfounded. Easton claimed that the Consumer Product Safety Commission had to post J.W. Mackay's petition for comment because it was filed proper and not because there was any overwhelming proof to his allegation. They also claim that there is not difference between wood and non-wood when it comes to exit velocity. Easton had conducted their own tests and found that that wood and non-wood bats exit velocities were relatively the same 93-mph.

When asked about the possible and added risk to players, especially pitchers, Easton responds by alluding to a September 1, 1997 National Collegiate Athletic Association (NCAA) New and Features article. In this article, *Baseball, softball injury rates still among NCAA's lowest* (www.ncaa.org), Easton holds its position that baseball is among the safest sports and most injuries occur by running and sliding at bases than pitchers hit by batted balls. Finally, when asked what impact or possible impact this petition could have on it's future, Easton felt confident that the Consumer Product Safety Commission would find that non-wooden bats posed no unreasonable risk to injury

In summarizing our research we have come to the conclusion that the petition requesting performance requirement should be implemented. The basis for our opinion is derived from the above referenced key points. We agree with the possible risks that can be incurred from the use of high performance aluminum bats. In our opinion bat manufactures should design aluminum bats which lessen the possibility of injury to baseball players overall.

Sincerely,

Rafael Cortada
Alejandra Escalona
Jeanette Plotrowski
Janet Pujol
Vanessa Ruiz

August 15, 2000

Attn: Todd Stevenson

Dear Mr. Stevenson,

On Sunday August 13, 2000, I submitted via e-mail comments concerning Petition: CP 00-1, Petition on Baseball Bats. Yesterday evening, August 14th, when checking my e-mail I noticed that I had received a message from you advising that the Word document I submitted contained a virus. Moreover, you advised that I would have to submit my request via fax.

My concern is that the last day to submit comments on the above mentioned petition was yesterday August 14th. Although our comment is late for reasons beyond my control, I hope that you still review and accept our comments on the Baseball Bat petition.

Enclosed with this letter, please find our comments concerning the Baseball Bat petition (5 pages including cover letter).

Sincerely,


Rafael Cortada

Amherst College Baseball

Coach Bill Thurston
Office Tel. 413-542-2284
Home Tel. 413-665-4026
Office Fax. 413-542-2026



*Baseball
Committee
9
CC00-1-9*
Athletic Dept.
Amherst College
Amherst, Mass. 01002

May 11, 2000

Dr. Sue B. Kyle, Ph.d
U.S. Consumer Protection Safety Commission
4330 East-West Hi-way
Bethesda, MD 20814

Dear Dr. Kyle,

I am writing to offer my support of the petition submitted by Mr. Jack MacKay concerning high performance non-wood baseball bats. As the Rules Editor for the NCAA Baseball Rules Committee for the past 15 years I have been deeply involved with the non-wood bat performance and the player safety issue.

First, let me give you a little background on my baseball playing and coaching experience so you can see how much I have been involved in college and amateur baseball:

- Played baseball (P + OF) at the University of Michigan
- Played professionally in the Detroit Tiger Organization for three seasons.
- Head Coach at Amherst College for 35 years, winning 70% of all games coached.
- Inducted into the American Baseball Coaches Association's Hall of Fame, January 1997.
- Pitching consultant for Dr. James Andrews, American Sport Medicine Institute, Birmingham, AL.
- Coached National teams or conducted baseball clinics in Australia, Canada, China, Holland, Italy, Panama, and Romania
- Pitching Coach for Team USA.
- Produced pitching videos, books, and various articles on baseball. Speaker at close to 200 baseball coaching clinics.
- Baseball Rules Editor for the NCAA Baseball Rules Committee 1985 – Present.

As the long term Rules Editor, my work and experience in the bat issue is more extensive than that of any other member of the NCAA Baseball Rules Committee or NCAA staff personnel. I have observed and been involved in testing baseballs and baseball bats. I developed the "Pitchers Hit by Batted Ball Study" for the NCAA and NATA as well as completing a number of statistical studies comparing wood to non-wood bat performance. (You have records of many of the studies along with the petition.) I have had my records and files subpoenaed by Louisville Bat Company, and in 1999 I gave a total of 3 days of deposition involving the bat issue! Needless to say, I've been more involved than I wanted to be!

It is my personal belief that the present non-wood high performance bats not only clearly out perform wood bats, but are much more dangerous to defensive players, particularly pitchers. A player can swing a lighter, better-balanced aluminum bat faster than a normal wood bat. Not only is the batted ball exit speed greater (10-12 mph) but the ball is hit harder more frequently. (According to Dr. Crisco's study, 12 times more frequent than off a wood bat.) The reason the aluminum bat out performs wood is because of the trampoline effect, increased swing speed, and gives a hitter better bat control.

Bat manufacturers like to state that major league pitchers are hit by batted balls off wood bats. That's true, and these pitchers have more experience than college or high school pitchers who have to defend themselves against line drives which are hit faster and faster more often. Believe me, if pro pitchers faced pro hitters using aluminum bats, the number of pitchers being hit by batted balls would increase dramatically. The pro game could not be played safely with aluminum bats.

A good example of professional baseball's concern about safety is that they do not allow aluminum bats to be used in Olympic baseball competition! The major reason for this is their concern about injury to their pro prospects.

Much of the information I have learned about the performance on non-wood bats comes from men such as Jack MacKay, Dr. Trey Crisco, Prof. Sherwood, Dr. Glenn Fleisig, and Steve Baum. Jack MacKay is the only one of these men who has worked in the aluminum bat industry and clearly understood what bat manufacturers were doing to increase bat performance each year.

By 1996, Jack came to believe that the bat manufacturers had gone too far in elevating bat performance. Not only was the game out of balance, but he was troubled by the increased number of serious injuries from batted balls. Jack MacKay tried to get his company (Louisville) to detune bats, and even talked with representatives of Easton Bat Co. about doing the same. When these attempts proved fruitless, Jack started cooperating with me, as the Rules Editor, and the NCAA Baseball Rules Committee. I want to make it very clear, that without the work and help from Jack MacKay, the NCAA would not have had knowledge of the actions and lack of cooperation from various bat manufacturers. Their strategy was to confuse the issue and continue business as usual.

I personally appreciate, trust and respect what Jack MacKay has done in trying to get aluminum bat performance back to a safer wood like level. I hope we don't have to wait until some pitchers are killed by a batted ball as has happen in Japan three times in the past two years.

If I can be of further help, please feel free to contact me.

Sincerely,



Bill Thurston
Amherst College
NCA Baseball Rules Editor

September 15, 2000

TO: Ms. Ann Brown
FROM: Coach Bill Thurston
SUBJECT: Copy of my May 11, 2000 letter to Dr. Sue Kyle.

A handwritten signature in black ink that reads "Bill Thurston". The signature is written in a cursive style with a prominent flourish at the end of the last name.

Bill Thurston
Former NCAA Baseball Rules Editor

PETER J VISCLOSKY
1ST DISTRICT INDIANA

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEES
DEFENSE
ENERGY AND WATER DEVELOPMENT
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AND NUMBERED BY DISTRICT

October 3, 2000

The Honorable Ann Brown
Chairman
U.S. Consumer Product Safety Commission
Washington, D C. 20207

Dear Chairman Brown:

I write on behalf of Dave and Debbie Cook, owners of the Hoosier Bat Company and residents of Indiana's First Congressional District.

Mr. and Mrs. Cook have contacted me to lend their support to a petition to the Consumer Product Safety Commission regarding the safety of aluminum baseball bats. After reviewing the petition, originally submitted by J.W. Mackay, Jr., of Mt. Pleasant, Texas, I am disturbed by the overwhelming evidence of danger to Americans participating in our nation's pastime. Of particular concern to me is the knowledge that potentially unsafe aluminum bats are used not only by recreational players, but also by most of America's Little League, high school, and college players. In order to address my concerns and those of Mr. and Mrs. Cook, I ask that you carefully review the enclosed petition and make an expedited ruling at your earliest convenience on the safety of aluminum baseball bats. As chairman of the federal agency charged by Congress with protecting the public against unreasonable risks of injuries and deaths associated with consumer products, I am sure you understand the importance of a speedy remedy in the event the evidence enclosed is sufficient to warrant changes in the manufacture of aluminum baseball bats.

Thank you in advance for your serious consideration of this matter. Do not hesitate to let me know if you have any other questions or concerns.

Sincerely,

Peter J. Visclosky
Member of Congress

PJV:js
Enclosure

PETER J VISCLOSKY
1ST DISTRICT INDIANA

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE:
DEFENSE
ENERGY AND WATER DEVELOPMENT
CONGRESSIONAL STEEL CAUCUS
EXECUTIVE COMMITTEE VICE CHAIRMAN
NORTHEAST-MIDWEST
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WEST VICE-CHAIR

**Congress of the United States
House of Representatives
Washington, DC 20515-1401**

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PORTAGE CITY HALL
12101 762-2800
VALPARAISO CITY HALL
1570 484-8076
INTERNET:
www.house.gov/visclosky

October 24, 2000

Mr and Mrs. David Cook
Hoosier Bat Company
Post Office Box 432
Valparaiso, Indiana 46384

Dear Dave and Debbie:

I write to follow-up on a conversation you had with a member of my staff regarding a petition to the Consumer Product Safety Commission concerning the safety of aluminum baseball bats.

In order to address your concerns, I have taken the liberty of contacting Ann Brown, Chairman of the Consumer Product Safety Commission, asking that she review and rule on the petition that you have provided me. Enclosed, please find a copy of my cover letter to Chairman Brown, asking for her expedited consideration of this matter. I apologize for the delay in providing you with this information. I can assure you that I will be in touch with you as soon as I receive a response in this matter.

Thank you again for contacting my staff. Do not hesitate to let me know if you have any other questions or concerns.

Sincerely,



Peter J Visclosky
Member of Congress

PJV js
Enclosure

FAX COVER SHEET

TO: Mahammed Kahn

FROM: Jurnackay

DATE: 10-30-00

FAX #: 301 504 0533

OF PAGES INCLUDING COVER SHEET: 3

MESSAGE:

PERSONAL AND CONFIDENTIAL
ATTORNEY CLIENT PRIVILEGE
JACK AND KAYE MacKay
ROUTE 9, BOX 185, HIGHWAY 49
MT. PLEASANT, TEXAS 75455

****PLEASE NOTIFY IMMEDIATELY IF THERE IS A PROBLEM
RECEIVING THIS TELEFAX****

CAUTION: THE INFORMATION CONTAINED IN THIS FACSIMILE
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SERVICE. THANK YOU.

IF YOU DO NOT RECEIVE ALL PAGES INCLUDED IN THIS
TRANSMISSION, PLEASE CALL (903) 572-1615. FAX #: 903-572-1690

baseball bat P. 02/03
Winn

CC 00-1-11

Amherst College Baseball



Coach Bill Thurston
Office Tel. 413-512-2284
Home Tel. 413-665-4026
Office Fax. 413-542-2026

Athletic Dept
Amherst College
Amherst, Mass. 01002

October 23, 2000

TO: Consumer Product Safety Commission Members

FROM: Bill Thurston, Former NCAA Baseball Rules Editor

I am sending you the first part of my study comparing aluminum and wood bat performance during the 2000 season - the first season the 3-prong bat standards were in effect (minus 3 ounces, 2 5/8 inch diameter, and a maximum exit speed of 97 mph).

It is obvious that the present collegiate game is not remotely close to a wood bat performance level. I fully realize that the Consumer Product Safety Commission is not concerned about the game being out of balance, but is concerned about player safety and the increased potential of risk of injury due to bat performance.

I believe there is a direct correlation between increased offensive performance and a greater risk of injury. The primary reason that batting averages are close to 90 points higher is that defensive players do not have as much time to react to and field batted balls that have a greater batted ball exit speed. Ground balls and line drives get past fielders quicker; more fly balls go off or over fences. During the recovery phase, an average college pitcher is approximately 52 to 53 feet from the bat-ball contact point. The greater the ball exit speed, the less time a pitcher (or infielder) has to react and defend himself.

A study completed by J.J. Crisco, Ph D. July 1999 pointed out a number of facts that relate to the difference in the risk of injury from wood to aluminum bats. Dr. Crisco studied bat performance via high-speed video on a number of minor league, college and high school hitters who used wood and various aluminum bats.

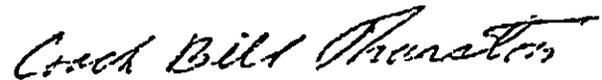
I have listed a number of his findings that relate to **increased risk of injury with the use of aluminum bats:**

1. For all three groups of players, the average bat swing speed increased by **5 mph** using a metal bat. Bat swing speed and the trampoline effect of an aluminum bat are the key elements in batted ball exit speed.
2. The average batted ball exit speed increased by **10 mph**.
3. At a 52-foot distance, **60% of the batted balls** were past the pitcher in 0.375 seconds. When hitting with wood, only **5% of batted balls** were past the pitcher in that time.
4. Off wood bats, **50% of batted balls** exit speed was at or under **87 mph**. Off the highest performing aluminum bat (a 1999 model), **50% of batted balls** were hit at **97 mph**. Off wood, **5% of hits** were at **97 mph**. Off aluminum **5% of hits** were at **108 mph**

There are three factors that should be of concern **One**, the ball is hit faster off aluminum, **two**, the ball is hit faster more frequently (12 times more frequently according to this study) and **three**, if a batted ball strikes a pitcher, an increased ball velocity would cause a more serious injury.

I hope this information will be useful to your Commission members as they study this issue.

Sincerely,

A handwritten signature in cursive script that reads "Coach Bill Thurston". The signature is written in black ink and is positioned centrally below the word "Sincerely,".

Bill Thurston

Amherst College
Department of Physical Education and Athletics
A.C. Box 2230
Post Office Box 5000
Amherst, MA 01002-5000

301-504-0533

TEL: - 413-542-2274
FAX: - 413-542-2026

FAX COVER SHEET

Date: 10-25-00

Time: 2PM

To: Mr. Kahn

From: Bill Thurston

Number of pages including cover page: 3

Message: A copy of the 2000 study will
be mailed to you tomorrow morning. I think
you will find it interesting and helpful.
If you have any questions, please
call me.

Bill Thurston
Tel. # 413-542-2784



October 6, 2000

Mr. Mohammed Kahn
CPSC
Office of the Secretary
4330 East-West Highway
Bethesda, Maryland 20814

Dear Mr. Kahn:

In order to assist the Consumer Product Safety Commission (CPSC), the National Collegiate Athletic Association (NCAA) encloses information regarding the baseball bat investigation.

Request 1: The CPSC requested the NCAA produce all raw injury data provided by our member institutions from 1998 until 2000. It is not the practice of the NCAA to retain the forms completed by our member institutions after the data has been collected and saved on the computer. Therefore, the NCAA cannot produce this information.

Request 2: The CPSC requested the NCAA produce copies of any reports generated by the NCAA from the above-mentioned raw injury data. I have enclosed a current "Injury Surveillance System" for the 1999-2000 Baseball season. This report compares the current data to data collected within previous years by computer graphics.

I have also enclosed copies of the computer data used to compile the "Injury Surveillance System" for the 1997-98, 1998-99 and 1999-00 seasons

Request 3: The CPSC requested any information on specific bats that the NCAA found to be non-conforming to its standards. We are currently aware of two bats that have failed our compliance testing. They are a 33-inch Easton bat with model number BZ6 and a 33-inch Louisville Slugger bat with model number CB3.

It is my understanding that all the information we have agreed to provide the CPSC will become part of the public record, thus available for review by anyone who requests it.

Please do not hesitate to contact Doris Dixon or myself should you have any questions regarding this information. Thank you.

Very truly yours,

Elsa Kircher Cole
General Counsel

EKC:aeg

Enclosures

cc: Selected NCAA Staff Members

National Collegiate Athletic Association

An association of 1,200 colleges, universities and conferences serving the student-athlete

PO Box 6222

Indianapolis, Indiana

46206-6222

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INJURY SURVEILLANCE SYSTEM



1999-00

BASEBALL

INTRODUCTION

The NCAA Injury Surveillance System (ISS) was developed in 1982 to provide current and reliable data on injury trends in intercollegiate athletics. Injury data are collected yearly from a representative sample of NCAA member institutions and the resulting data summaries are reviewed by the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports. The committee's goal continues to be to reduce injury rates through suggested changes in rules, protective equipment or coaching techniques based on data provided by the Injury Surveillance System. Injury data are also presented to NCAA sport committees and national sports science meetings.

During the 1982-83 academic year, injury data were collected only on the sport of football. Since that time the ISS has been expanded to include four additional NCAA fall sports (men's soccer, women's soccer, field hockey, and women's volleyball), six winter sports (men's gymnastics, women's gymnastics, wrestling, ice hockey, men's basketball, and women's basketball), and five spring sports (spring football, football, softball, men's lacrosse and women's lacrosse). This report presents information regarding injuries in **baseball since the 1985-86 season.**

It should be noted that no common definition of injury, measure of severity or evaluation of exposure exists in the athletic injury literature. The information contained in this summary must be evaluated under the definitions and methodology outlined for the NCAA Injury Surveillance System.

METHODS

Sampling

Participation in the NCAA Injury Surveillance System is voluntary and limited to the 964 member institutions (as of May, 1999). ISS participants are selected from the population of schools sponsoring a given sport. Selections are random within the constraints of having a minimum 10 percent representation of each NCAA division (I, II and III) and region (East, South, Midwest, West) (See Table 1). This sampling scheme assures a true cross-section of NCAA institutions, which can be used to express injury rates representative of the total population of NCAA institutions sponsoring a particular sport.

The regional distribution of schools is the same for all sports in the ISS although different from regional distributions as noted in the NCAA championship manuals. **Figure 1** documents the regional distribution of states used in the Injury Surveillance System.

It is important to emphasize that this system does not identify **EVERY** injury that occurs at NCAA institutions in a particular sport. Rather, it collects a sampling that is representative of a cross-section of NCAA institutions.

Data Reporting

Injury and exposure data are recorded by certified and student athletics trainers from participating institutions. Information is collected from the first official day of preseason practice to the final tournament contest.

Injuries

A reportable injury in the Injury Surveillance System is defined as one that

1. Occurs as a result of participation in an organized intercollegiate
2. Requires medical attention by a team athletics trainer or physician, and
3. Results in restriction of the student-athlete's participation for one or more days beyond the day of injury.

A separate report is submitted for each injury by an athletics trainer.

Each injury is described in detail including type of injury, body part injured, severity of injury, field type, field condition and special equipment worn

Exposures

To establish an injury rate, data are expressed as the number of injuries per unit of participation or risk.

An athlete exposure (A-E), the unit of risk in the ISS, is defined as one athlete participating in one practice or game where he or she is exposed to the possibility of athletic injury.

A one-page exposure form, submitted weekly, summarizes the number of practices and games, types of playing surfaces and numbers of participants. For example, five practices, each involving 60 participants, and one game involving 40 participants, would result in 300 practice A-Es, 40 game A-Es and 340 total A-Es for a particular week

Injury Rate

An injury rate is simply a ratio of the number of injuries in a particular category to the number of athlete exposures in that category. In the ISS, this value is expressed as injuries per 1,000 athlete exposures. For example, six reportable injuries during 563 athlete exposures result in an injury rate of $(6/563) \times 1,000$ or 10.7 injuries/1,000 athlete exposures.

In the above example, one would anticipate 10.7 injuries if one athlete participated in 1000 practices and/or games, if 50 athletes participated in 20 practices and/or games, or if 100 athletes participated in 10 practices and/or games.

Injury rates can be a valuable tool in data analysis, especially when the number of exposures associated with the injury categories is not similar. For example, consider a study reporting 100 injuries on artificial turf and 200 injuries on natural turf. If the numbers of exposures is similar to the possibility of injury, then one might conclude that the chances of being injured on natural turf are greater than being injured on artificial turf.

However, if the 100 artificial turf injuries were associated with 50,000 exposures and the 200 natural turf injuries were associated with 100,000 exposures, then the injury rates for artificial $(100/50,000 = 2 \text{ injuries}/1000 \text{ A-E})$ and natural $(200/100,000 = 2 \text{ injuries}/ 1,000 \text{ A-E})$ turf are identical.

Therefore, injury rates, rather than absolute number of injuries, may be a more valuable expression of injury tendencies. Because of the divisional and regional distribution of participants, injury rates are representative of those that occur at NCAA institutions sponsoring the given sport.

RESULTS

The following tables and figures are a summary of ISS information collected on the sport of **baseball**. It should be noted that these data represent selected information; a complete printout of injury data for each of the 16 sports monitored is available at the NCAA national office. The first section focuses on the sport of **baseball**; the next section compares selected **baseball** information with the 15 other sports monitored in the ISS. Additional topic areas will be added to this report annually.

The injury data presented in this report are descriptive in nature, no statistical analysis of these data has been performed. The amount of significance associated with differences in injury rates must be determined by the reader. **Emphasis in these tables should be placed on the yearly trends rather than on absolute numerical values.**

ACKNOWLEDGMENTS

The NCAA Injury Surveillance System should be acknowledged in any reports or publication resulting from evaluations or analyses of these data. A copy of all such reports or publications should be sent to the NCAA assistant director of sports sciences upon public release for accession to the Association's library. *In addition, the following statement should be incorporated in the acknowledgment of the source of the data:*

"Conclusions drawn from or recommendations based on the data provided by the National Collegiate Athletic Association are those of the author(s) based on analyses/evaluations of the author(s) and do not represent the views of the officers, staff or membership of the NCAA."

A special thanks is directed to the other staff members involved in the NCAA Injury Surveillance System, Brad Bolin and Andryana Getchell, current data input specialists, Kelly Shepherd, who revised and edited all charts and tables, Fred Worthman, who recorded injury data for the ISS since its inception until his retirement in 1998, and Dan Spencer, Dean Dautenhahn, Kathy Day, Doug Carpenter and Susan Brown, who developed computer enhancements for this system. The participating athletics trainers should also be recognized for contributing greatly to the success of this program.

Any questions regarding the NCAA Injury Surveillance System or its data reports should be directed to the following address:

Randall W. Dick
Assistant Director of Sports Sciences
NCAA
P.O. Box 6222
Indianapolis, Indiana 46206-6222
(317/917-6222)

Table 1 - Baseball
Distribution of Participating Teams

	<u>Div. I</u>	<u>Div. II</u>	<u>Div. III</u>	Regional Totals
1985-86	23 265	11 141	14 251	48 657
1986-87	34 271	31 133	34 258	99 662
1987-88	36 272	19 133	30 263	85 668
1988-89	36 272	10 144	26 262	72 678
1989-90	35 273	18 159	28 270	81 702
1990-91	45 275	27 159	39 274	111 708
1991-92	37 277	21 171	32 281	90 729
1992-93	37 276	22 177	49 291	108 744
1993-94	38 279	20 196	26 294	84 769
1994-95	30 278	16 209	21 319	67 806
1995-96	36 282	24 233	38 325	98 840
1996-97	37 273	29 196	44 288	110 760
1997-98	36 276	23 224	35 320	94 820
1998-99	28 276	17 232	47 338	92 846
1999-00	51 285	39 232	61 343	151 860

Note: Totals indicate regional and divisional breakdown of institutions participating in the NCAA Injury Surveillance System. Numbers in bold, italicized text indicate the total numbers of NCAA institutions sponsoring the sport by division and nationally.

Figure 1 - Baseball
Regions of the Injury Surveillance System

<u>East</u>	<u>South</u>	<u>Midwest</u>	<u>West</u>
Connecticut	Alabama	Illinois	Alaska
Delaware	Arkansas	Indiana	Arizona
Washington, D.C.	Florida	Iowa	California
Maine	Georgia	Kansas	Colorado
Maryland	Kentucky	Michigan	Hawaii
Massachusetts	Louisiana	Minnesota	Idaho
New Hampshire	Mississippi	Missouri	Montana
New Jersey	North Carolina	Nebraska	Nevada
New York	South Carolina	North Dakota	New Mexico
Pennsylvania	Tennessee	Ohio	Oregon
Rhode Island	Texas	Oklahoma	Utah
Vermont	Virginia	South Dakota	Washington
	West Virginia	Wisconsin	Wyoming

Figure 2 - Baseball
Practice Injury Rates by Division

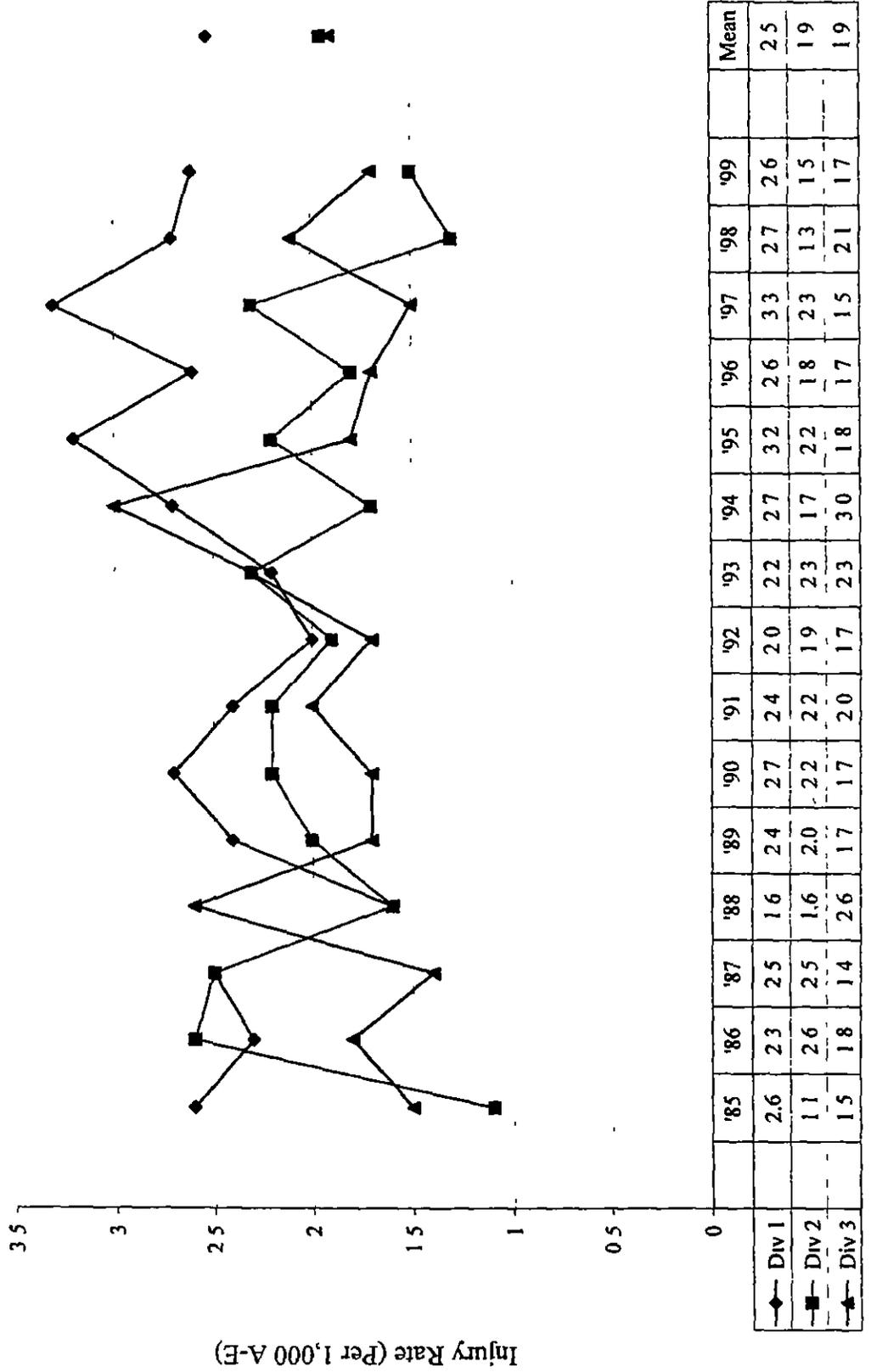


Figure 3 - Baseball
Game Injury Rates by Division

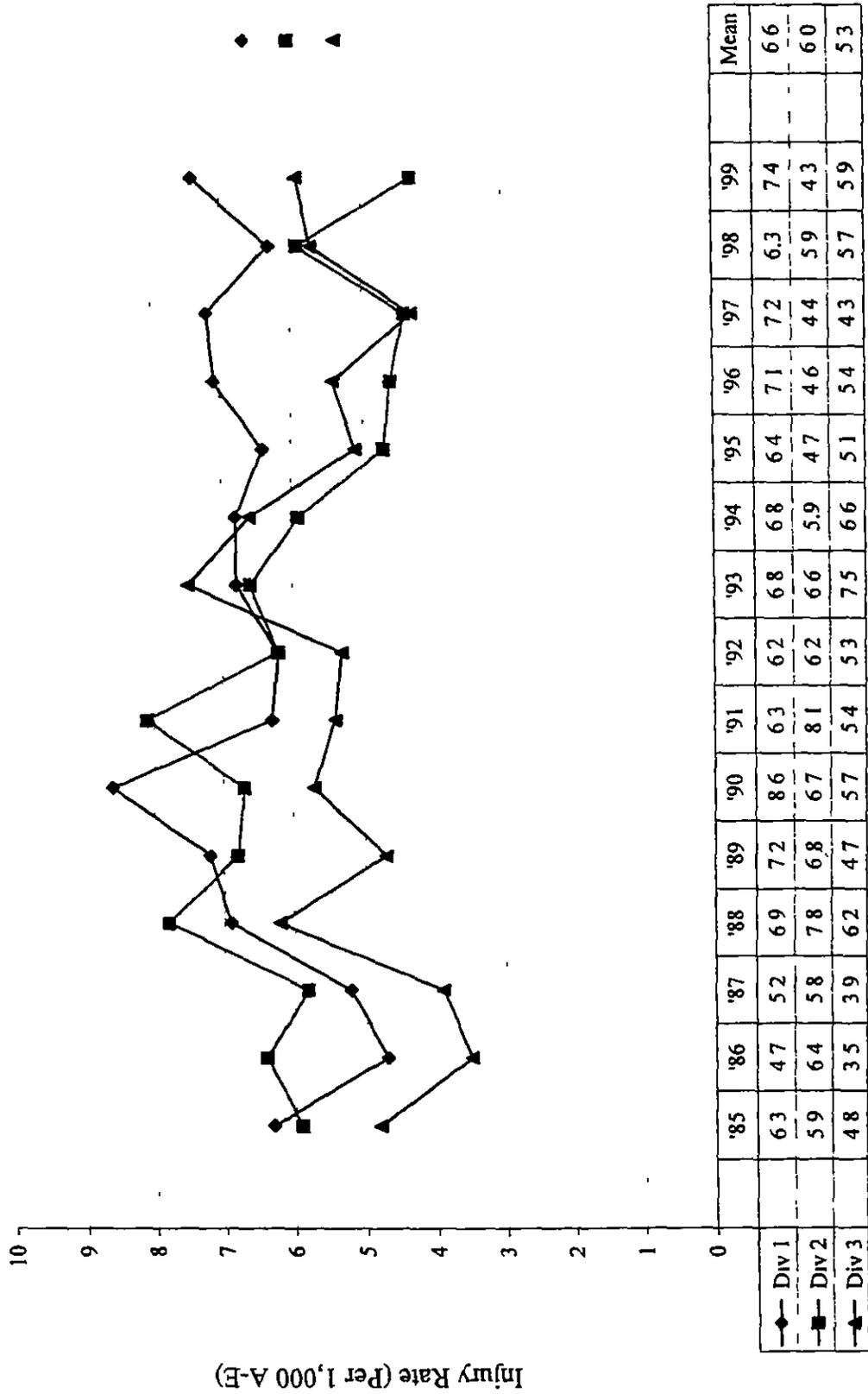


Figure 4a - Baseball
 Pre, Regular and Post Season Injury Rates
 Total (Practice and Game)
Preseason prior to the first regular season game
Postseason following the final regular season game

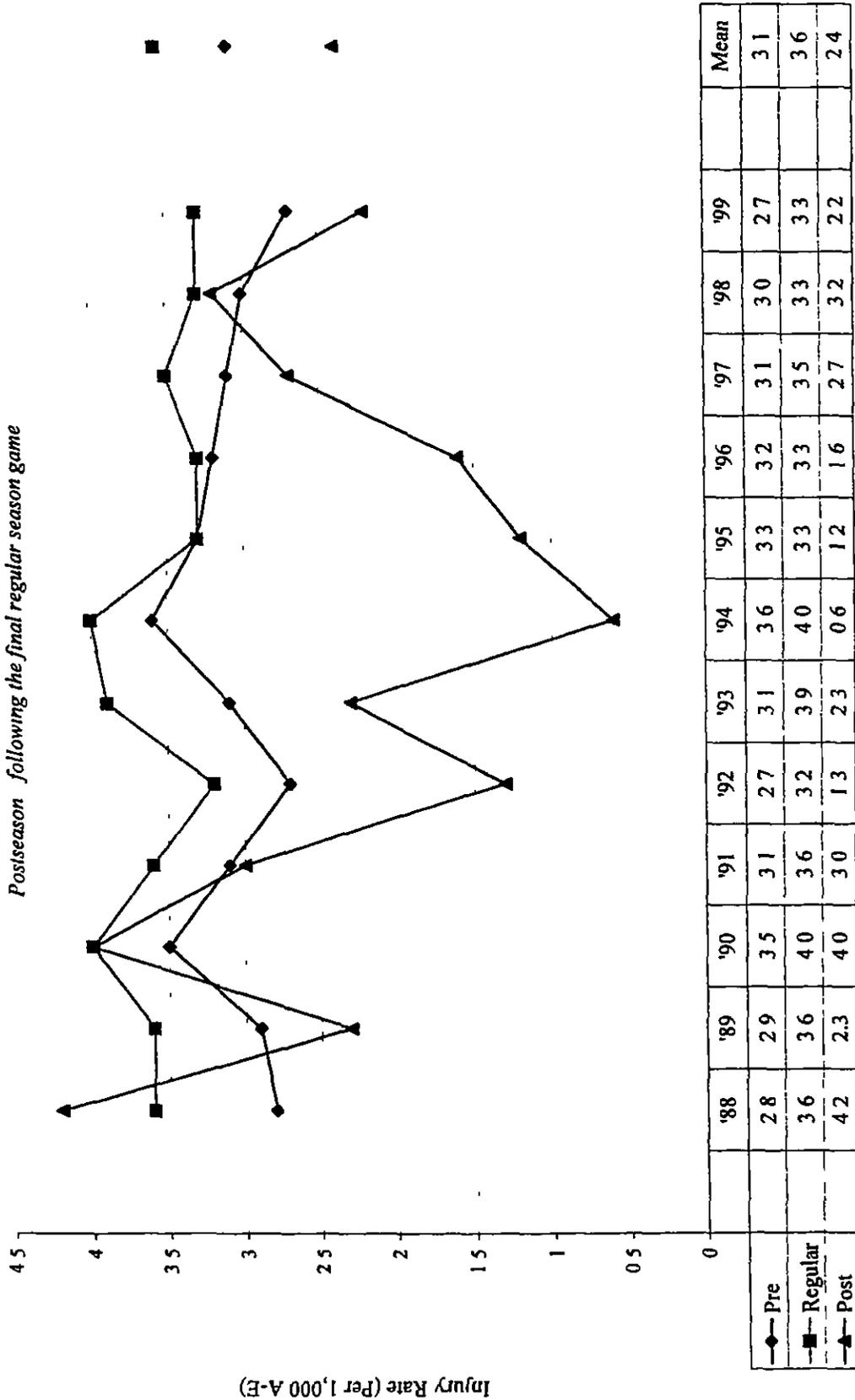


Figure 4b - Baseball
Pre, Regular and Post Season Practice Injury Rates
Preseason prior to the first regular season game
Postseason following the final regular season game

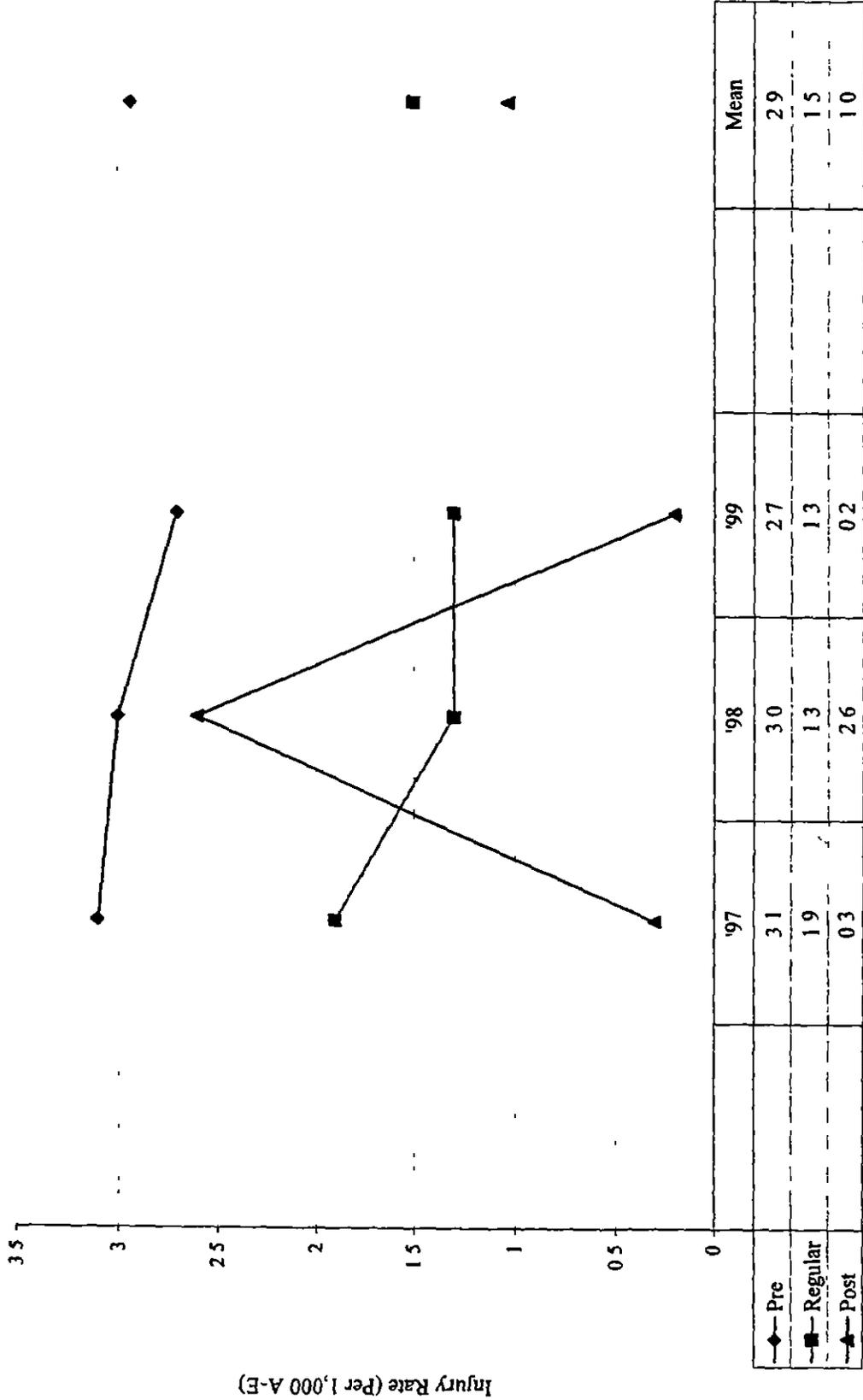


Figure 4c - Baseball
Pre, Regular and Post Season Game Injury Rates
Preseason prior to the first regular season game
Postseason following the final regular season game

