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Edward H. Grimmiett

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Cover Page Footnote

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NCAA AMATEURISM AND ATHLETICS: A PERFECT MARRIAGE OR A DYSFUNCTIONAL RELATIONSHIP?—AN ANTITRUST APPROACH TO STUDENT-ATHLETE COMPENSATION

*Edward H. Grimmett**

I. INTRODUCTION

With the allegations surrounding Johnny Manziel, a National Collegiate Athletic Association (“NCAA”) Heisman Trophy winner, the ongoing debate regarding student-athlete compensation is reaching new heights.¹ Manziel allegedly received improper benefits in exchange for his autograph and was suspended for the first half of Texas A&M’s season opener for an “inadvertent violation of NCAA rules.”² Manziel’s notoriety and the nature of his alleged scandal acted as a spark in the debate over whether student-athletes should receive compensation. The NCAA and its member institutions generate billions of dollars through television revenue.³ Additionally, the NCAA and its licensing affiliate, The Collegiate Licensing Company (“CLC”), procure large profits through the licensing of the names and images of student-athletes.⁴ Meanwhile, the products that the NCAA

* J.D. Candidate, 2015, Touro College Jacob D. Fuchsberg Law Center; B.S. Sports Management, St. John’s University. I would first like to thank both my parents and my brother, Joey, for their support throughout my life and all of the patience they displayed during my work on this Comment. I would also like to thank my Faculty Advisor, Professor Rena Sepowitz, for her insight and assistance on this topic. Lastly, I would like to thank Brandon Maharajh and Jason Prince for their guidance on this Comment and the tremendous generosity they have demonstrated throughout law school.

¹ Tom Fornelli, *Johnny Manziel suspended for first half of Rice game*, CBSSPORTS.COM (Aug. 28, 2013, 3:40 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/23366173/johnny-manziel-suspended-for-first-half-of-rice-game>.

² *Id.*

³ Pete Thamel, *With Big Paydays at Stake, College Teams Scramble for a Spot*, N.Y. TIMES (Sept. 19, 2011), http://www.nytimes.com/2011/09/20/sports/ncaafootball/in-conference-realignment-colleges-run-to-paydaylight.html?pagewanted=all&_r=0.

⁴ See Michael Smith, *Collegiate licensing explodes in CLC’s 30 years*, SPORTS BUS. DAILY GLOBAL J. (Jun. 13, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011>

relies on, its student athletes, are only entitled to receive full-athletic scholarships for their contribution to intercollegiate athletics.⁵

The NCAA, a non-profit organization, states in its bylaws that its non-compensation policy is imperative to maintain amateurism in collegiate athletics.⁶ However, this policy leads to improper practices that require the NCAA to penalize its member institutions. One example is the sanctions that have been imposed on member schools for providing benefits to student-athletes during the recruiting process.⁷ Recently, an investigation of a Miami booster, Nevin Shapiro, revealed that Shapiro provided improper benefits to at least seventy-two University of Miami student-athletes.⁸ Shapiro stated that he gave money, cars, jewelry, and many other gifts to the athletes.⁹ Providing a uniform system of compensating athletes could deter improper inducements, which affect fair competition among member institutions.

Along with the billions of dollars that the NCAA receives for its television broadcasts, a large part of its revenue is attributed to collegiate licensing.¹⁰ The NCAA's member institutions license their collegiate jerseys to big-time apparel companies, such as Nike and Under Armour.¹¹ These companies are granted the rights to sell the school's jersey, which supposedly features a "random" number.¹² Jay Bilas, an ESPN college basketball analyst, made a shocking revelation that required the NCAA to take immediate action.¹³ Bilas revealed that these jerseys were searchable by player name, although

/06/13/Colleges/CLC-at-30.aspx ("[T]he collegiate licensing industry has become a \$4.3 billion business in annual retail sales. About 60 percent of it comes from apparel sales.").

⁵ Josh Levin, *The Most Evil Thing About College Sports*, SLATE (May 17, 2012, 7:50 PM), http://www.slate.com/articles/sports/sports_nut/2012/05/ncaa_scholarship_rules_it_s_morally_indefensible_that_athletic_scholarships_can_be_yanked_after_one_year_for_any_reason_.html.

⁶ JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA'S FIRST CENTURY* 15 (2006).

⁷ *Miami booster says improper benefits given to now-NFL players*, NFL.COM (Aug. 16, 2011, 9:16 PM), <http://www.nfl.com/news/story/09000d5d8218456f/article/miami-booster-says-improper-benefits-given-to-nownfl-players>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Smith, *supra* note 4.

¹¹ *Id.*

¹² Richard Deitsch, *Jay Bilas Clowns the NCAA, NBC's Premier League plans, more*, SPORTS ILLUSTRATED (Aug. 11, 2013, 9:26 PM), <http://sportsillustrated.cnn.com/more/news/20130811/jay-bilas-nbc-premier-league-deitsch/>.

¹³ *Id.*

no surname is present on the jersey.¹⁴ Therefore, searching “Johnny Manziel jersey” directs users to Texas A&M’s website and displays a jersey bearing his number.

Bilas’s discovery could provide an avenue for student-athletes to receive compensation through the right of publicity. States have enacted right of publicity statutes to protect the misappropriation of an individual’s image.¹⁵ Using a player’s number on the jersey of his corresponding school is arguably a misappropriation in itself. Moreover, the student-athletes’ claims are even stronger if the NCAA and its members have purchased the keywords to make the jerseys searchable by the players’ names on their websites.

Despite the unauthorized use of these athletes’ likenesses, the argument remains that student-athletes receive sufficient compensation through academic scholarships. One proponent of this argument is Sports Illustrated writer Seth Davis, who stated, “[s]tudent-athletes earn free tuition, which over the course of four years can exceed \$200,000.”¹⁶ Although this is a valid argument, that compensation does not seem adequate in comparison to the billions of dollars the NCAA generates. Student-athletes, on average, spend approximately eighty hours per week performing their athletic and academic responsibilities.¹⁷ Thus, student-athletes do not have much time to receive compensation through employment opportunities. Regardless of student-athletes’ inability to obtain part-time jobs, the NCAA places strict regulations on outside employment that, which limits the amount of money a college athlete may receive.¹⁸ Nevertheless, the strongest argument for college athletes is that their scholarship can be rescinded at any time, without cause.¹⁹

¹⁴ *Id.*

¹⁵ *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013) (“According to the Restatement [(Second) of Torts (1977)], [o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability”) (internal quotations omitted). The right of publicity was enacted in order “to protect the property interest that an individual gains and enjoys in his identity through his labor and effort.” *Id.*

¹⁶ Levin, *supra* note 5.

¹⁷ RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE \$6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM* 9 (2012), available at http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study_Full.pdf (providing that in a round table discussion with Congress, NBA basketball player, Shane Battier, stated that college athletics are more demanding than professional athletics).

¹⁸ Kathryn Young, *Deconstructing the Façade of Amateurism: Antitrust and Intellectual Property Arguments in Favor of Compensating Athletes*, 12 VA. SPORTS & ENT. L.J. 338, 353 (2013).

¹⁹ Levin, *supra* note 5.

This Comment addresses whether the NCAA may restrict the use of student-athletes' likenesses under Section 1 of the Sherman Act, which prohibits unreasonable restraints on trade.²⁰ Edward O'Bannon, a former UCLA basketball player, is currently litigating this issue.²¹ The NCAA has been subject to antitrust scrutiny for a variety of reasons,²² but an unfavorable decision regarding student-athlete compensation may have a lasting effect on the landscape of the NCAA.

As case law indicates, the NCAA's role as a regulatory body acts as a shield from antitrust liability.²³ The NCAA has the responsibility of preserving the amateur status of its athletes, which justifies many of its regulations that restrict competition.²⁴ However, as the NCAA's economic power grows, restraints on student-athletes appear increasingly unreasonable. By amending its bylaws, the NCAA could reward student-athletes for their contributions to intercollegiate athletics. Furthermore, the NCAA would not harm its fundamental principle of amateurism if restrictions were placed on the amount a student-athlete could receive for the use of his or her image. If the maximum amount a student-athlete could earn does not exceed the costs associated with attending the institution, amateurism would not be harmed because the compensation would still relate to an educa-

²⁰ *NCAA v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984).

²¹ *O'Bannon v. NCAA*, No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 19170, at *2 (N.D. Cal. Feb. 8, 2010).

²² *Bd. of Regents*, 468 U.S. at 88 (alleging that the NCAA's restriction on televised football games was an antitrust violation); *Smith v. NCAA*, 139 F.3d 180, 182 (3d Cir. 1998) (alleging that the NCAA's eligibility regulations, which prohibited a student-athlete from competing while enrolled in a graduate program were an antitrust violation); *Law v. NCAA*, 134 F.3d 1010, 1012 (10th Cir. 1998) (alleging that the NCAA's restriction on college basketball coaches' salaries was an antitrust violation).

²³ *Justice v. NCAA*, 577 F. Supp. 356, 383 (D. Ariz. 1983) (upholding the NCAA's sanctions of the University of Arizona, the court reasoned that "it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type . . . is rooted in the NCAA's concern for protection of amateurism; the other type is increasingly accompanied by a discernable economic purpose"); *Smith*, 139 F.3d at 185 (holding that regulations that preserve amateurism are non-commercial in nature); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (D. Pa. 2004) (relying on *Smith*, the court held that recruiting rules were implemented to preserve amateurism and were exempt from antitrust scrutiny); *Basset v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (recruiting rules forbidding improper inducements and academic violations are non-commercial).

²⁴ *See Bd. of Regents*, 468 U.S. at 101-02. The Court explained that the NCAA markets a unique product because sports coupled with academic tradition make the product more popular. *Id.* The NCAA must play a vital role in preserving the amateur status of its players in order for the product to remain available. *Id.*

tional purpose.

In this Comment, Section II concentrates on the history of the NCAA and its evolution as a regulatory body. Section III focuses on how the courts interpret Section 1 of the Sherman Act in relation to claims against the NCAA. When applying the Act, the courts must choose whether to adopt a Rule of Reason or a *per se* analysis; this section explains why a Rule of Reason analysis is more appropriate in an action against the NCAA. Section IV examines the various antitrust claims that have been brought against the NCAA. The case law illustrates obstacles that a claimant faces when bringing an action against the NCAA. Section V provides an in-depth analysis of how potential issues confronting the NCAA may be resolved pursuant to antitrust principles, and how the NCAA may compensate student-athletes while preserving amateurism.

II. OVERVIEW OF THE NCAA

As Kay Hawes, a former NCAA employee, once wrote, the NCAA's "father was football and its mother was higher education."²⁵ Little did he know, the marriage would result in a dysfunctional relationship. The NCAA is a non-profit entity that acts as a regulator of amateur athletics and works closely with its member universities to promote excellence in athletics as well as academics.²⁶ A background of the NCAA illuminates the issues that the institution faces in the realm of antitrust litigation.

A. Formation

Intercollegiate sports were born in 1852 when Harvard and Yale competed in a rowing match.²⁷ The need for an organized body in intercollegiate athletics became apparent as other sports began to emerge and the lack of formal regulations resulted in serious injuries to players.²⁸ The gruesome nature of football led to the decision of many universities to discontinue the sport, but student groups ran the programs that remained.²⁹ These groups were not concerned with the

²⁵ CROWLEY, *supra* note 6, at 7.

²⁶ *Id.* at 15.

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ *Id.* at 3-4.

amateurism of student-athletes because they often hired non-students to compete.³⁰ Consequently, President Theodore Roosevelt summoned collegiate athletic leaders to two separate White House conferences in order to encourage the reform of intercollegiate athletics.³¹ In response to the White House meetings, in 1906, sixty-two college institutions became members of the Intercollegiate Athletic Association of the United States, which officially became the NCAA in 1910.³²

The NCAA established itself as a non-profit organization with amateurism acting as the foundation.³³ However, initially, the NCAA did not have a significant administrative role.³⁴ That authority was entrusted to its member institutions to enforce the principles and rules set out in NCAA bylaws.³⁵ The need for NCAA authority grew in the 1920s when the first college football game was broadcasted and the first championship was held for track and field.³⁶ As more NCAA championships developed, additional rule committees were necessary, which sparked the shift of authority from the member institutions to the NCAA.³⁷

B. Growth and Evolution of the NCAA

Membership grew progressively in the 1930s and 1940s, and by the time the NCAA elected its first executive director, Walter Byers, in 1951, nearly 400 institutions and conferences belonged to the NCAA.³⁸ As more institutions became involved and the nation's interest increased, concern developed regarding the athletic-eligibility and amateurism of student-athletes.³⁹ The exponential growth of the NCAA resulted in substantial differences in size, ambition, and complexity among athletic programs, which required the NCAA to step in as a regulatory body.⁴⁰ However, the authority granted to the NCAA

³⁰ CROWLEY, *supra* note 6, at 4.

³¹ *Id.* at 9-10.

³² *Id.* at 10.

³³ *Id.* at 15.

³⁴ *Id.*

³⁵ CROWLEY, *supra* note 6, at 15.

³⁶ *Id.* at 23-24.

³⁷ *Id.* at 31.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ CROWLEY, *supra* note 6, at 37.

has frequently attracted antitrust scrutiny.

As television emerged as the prominent broadcasting medium, Byers believed it would have a negative effect on in-game attendance.⁴¹ In order to maintain attendance records, Byers implemented a program that limited the total number of televised intercollegiate football games.⁴² In 1985, the validity of Byers's television plan was the basis of the antitrust suit brought before the Supreme Court in *National Collegiate Athletic Association v. Board of Regents*.⁴³ The Court held that the restriction on televised sporting events had a significant anticompetitive effect among broadcasters in the market and, therefore, was a violation of Section 1 of the Sherman Act.⁴⁴ The Court reasoned "that by curtailing output and blunting the ability of member institutions to respond to consumer preferences, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."⁴⁵ This decision has spurred competition among broadcasters and has resulted in a dramatic increase in the price for NCAA television rights.

At the time of *Board of Regents*, each broadcasting network agreed to pay participating member institutions a minimum aggregate compensation of \$131,750,000 over a four-year period.⁴⁶ Thirty years later, television contracts with the NCAA and its member institutions have increased at a shocking rate. In 2010, the NCAA announced a 14-year, \$10.8 billion contract with Turner Broadcasting and CBS to televise the NCAA basketball tournament.⁴⁷ Furthermore, the NCAA recently struck a deal with ESPN for its newly implemented playoff system that will replace the BCS Championship in college football.⁴⁸ The contract is a 12-year deal that will begin in the 2015-2016 season, and it will pay the NCAA approximately \$470 million a year for the broadcast rights to only three games.⁴⁹

⁴¹ *Id.* at 38.

⁴² *Id.* at 39.

⁴³ 468 U.S. 85, 87 (1984).

⁴⁴ *Id.* at 120.

⁴⁵ *Id.*

⁴⁶ *Id.* at 92-93.

⁴⁷ Steve Berkowitz, *Parts of NCAA's TV contract with CBS, Turner go public*, USA TODAY (Oct. 16, 2012, 8:04 PM), <http://www.usatoday.com/story/sports/ncaab/2012/10/16/ncaa-tournament-turner-cbs-contract/1637179/>.

⁴⁸ Jerry Hinnen, *ESPN reaches 12-year deal to air college football playoffs*, CBSSPORTS.COM (Nov. 21, 2012, 2:03 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/21083689/espn-reaches-12-year-deal-to-air-college-football-playoffs>.

⁴⁹ *Id.*

The economic growth of the NCAA is alarming because of its impact on the activity of its member institutions. Currently, college football is composed of eleven conferences and one group of independent schools.⁵⁰ Recently, schools have left their conference when a superior financial opportunity has presented itself.⁵¹ With their economic wellbeing at stake, schools want to belong to a premier athletic conference, which generates the most television revenue.⁵² For instance, Texas University, a member of the Big 12, a premier conference, formed its own television network with ESPN that will gross approximately \$15 million annually for the University.⁵³ The Pac-12, another conference with regional dominance, signed a 12-year, \$3 billion contract with ESPN, which will be split among the members of the conference.⁵⁴ Syracuse University and the University of Pittsburgh, longtime members of the Big East, recently joined the Atlantic Coast Conference in order to capitalize on the money available through college football.⁵⁵ Although conference realignment has provided certain institutions with more economic flexibility, it has also eliminated longtime rivalries in basketball and football. This opens up the question of whether the priority of the NCAA and its member institutions is to preserve the wellbeing of amateur student-athletes or to benefit economically.

With regard to this issue, Edward O'Bannon, a former UCLA basketball player, has brought a class-action antitrust suit against the NCAA.⁵⁶ The complaint alleges that the NCAA unreasonably restricted competition by fixing the players' income at "zero" for the use of their names and likenesses.⁵⁷ Therefore, the plaintiffs contend that student-athletes should have the right to pursue compensation for the notoriety they have gained as result of their collegiate athletic ca-

⁵⁰ Mike Bostock, *Tracing the History of N.C.A.A. Conferences*, NY TIMES, Nov. 30, 2012, <http://www.nytimes.com/newsgraphics/2013/11/30/football-conferences/> (providing a chart that displays all of the massive changes that occurred recently to the NCAA's conference structure).

⁵¹ Thamel, *supra* note 3.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Class Action Complaint and Demand for Jury Trial at 2, *O'Bannon v. NCAA*, 2010 U.S. Dist. LEXIS 19170 (N.D. Cal. 2009) (No. C 09-1967 CW) [hereinafter *O'Bannon Complaint*].

⁵⁷ *O'Bannon*, 2010 U.S. Dist. LEXIS 19170, at *5.

reers.⁵⁸ The plaintiffs argue that the prohibition of this right is an unreasonable restraint on trade in violation of Section 1 of the Sherman Antitrust Act. Electronic Arts Inc. (“EA”) and the Collegiate Licensing Company (“CLC”), which were also part of the lawsuit, recently settled with the players, but the NCAA contends that it is willing to continue litigating the issue.⁵⁹

The NCAA’s defense is predicated on the fundamental principles enunciated in its bylaws.⁶⁰ The NCAA stresses the importance of its role as a regulator of amateur athletics and its duty to implement regulations to ensure its preservation.⁶¹ Therefore, the restrictions placed on student-athletes serve the purpose of maintaining a clear distinction between professional and amateur athletics.⁶² Despite the NCAA’s tenacity to continue litigation, an unfavorable verdict would have a profound effect on its future because it would be required to share a percentage of its revenue with student-athletes.⁶³ It is possible that a substantial portion of the NCAA’s collegiate licensing and television revenue could shift into the student-athletes’ hands.⁶⁴ Changes have already begun to materialize as EA Sports will no longer produce the NCAA College Football video game and the NCAA will no longer sell players’ jerseys on its website.⁶⁵ Until this case reaches a resolution, the future relationship between the NCAA and its student-athletes will remain uncertain.

⁵⁸ *Id.*

⁵⁹ Michael McCann, *O’Bannon settles with EA and CLC, NCAA still remaining*, SPORTS ILLUSTRATED (Sep. 26, 2013, 8:18 PM), <http://sportsillustrated.cnn.com/college-football/news/20130926/mccann-obannon-ea-clc-settlement/>.

⁶⁰ *O’Bannon*, 2010 U.S. Dist. Lexis 19170, at *3. The NCAA requires student-athletes to sign Form 08-3a, which allows the NCAA to use players’ names to generally promote the NCAA championship or other events. *Id.* A member institution or recognized entity may also use an athlete’s name, picture, or appearance to support its charitable or educational activities, or to support activities considered incidental to the student-athlete participation in intercollegiate athletics under bylaw Article 12.5.1.1. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Steve Berkowitz, *Judge lets class-action efforts in O’Bannon case go on*, USA TODAY (Jan. 30, 2013, 12:11 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/01/30/ncaa-obannon-players-lawsuit-name-and-likeness/1877031/>.

⁶⁴ *Id.*

⁶⁵ McCann, *supra* note 59; Terrance Harris, *Ed O’Bannon Antitrust Lawsuit has Serious Implication for Student-Athletes*, TIMES-PICAYUNE (Aug. 30, 2012, 6:23 AM), http://www.no-la.com/tulane/index.ssf/2013/08/ed_obannon_antitrust_lawsuit_h.html.

III. NCAA AND SECTION 1 OF THE SHERMAN ACT

The NCAA has virtually no competitors in the market of amateur athletics, which seems to violate the basic principles of the Sherman Act. The legislative history delineates that Congress passed the law to restrain mergers among competitors.⁶⁶ Congress's concern was that these combinations could weaken competition in the market, leaving the merged business with complete market power.⁶⁷ However, the NCAA's market is more ambiguous when analyzing an anti-trust claim because it is an organization of members that compete with one another. How the courts deal with distinct markets, such as the NCAA's, is addressed in this section.

In order to have a claim under Section 1 of the Sherman Act, a plaintiff must demonstrate: "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce."⁶⁸ Some restraints on competition may be justifiable to achieve a specific purpose; therefore, the Act condemns "only unreasonable restraints of trade."⁶⁹ This creates a challenge for student-athletes, who must establish that the NCAA bylaws they adhere to create an unreasonable restraint on trade despite the NCAA's justifiable reasons for enforcing them.

Although the restriction on student-athletes was not in controversy in *Board of Regents*, the Court stressed the importance of the NCAA's regulations and established a strong foundation for future antitrust claimants.⁷⁰ Justice Stevens, in dicta, expressed the importance of the NCAA's task as a regulatory body to preserve the amateur and academic status of student-athletes, as well as maintain competitive balance among member institutions.⁷¹ The Court noted,

⁶⁶ *Brown Shoe v. United States*, 370 U.S. 294, 320 (1962); *see also* *Agnew v. NCAA*, 683 F.3d 328, 334-35 (7th Cir. 2013) (citing *Banks v. NCAA*, 977 F.2d 1081, 1087 (7th Cir. 1992) ("The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition.")).

⁶⁷ *See id.* (holding that not all monopolies are per se illegal). If the court believes that an entity is justified in restricting competition, then it will analyze whether that restriction is unreasonable. *Bd. of Regents*, 468 U.S. at 117.

⁶⁸ *Hairston v. Pac. 10 Conference*, 101 F.3d at 1315, 1318 (9th Cir. 1996) (quoting *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991)).

⁶⁹ *Bd. of Regents*, 468 U.S. at 98.

⁷⁰ *Id.* at 101-02.

⁷¹ *Id.*

“[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams.”⁷² Therefore, most courts look at whether the regulation has an effect on amateurism or fair competition when analyzing NCAA restraints on competition.

A. Rule of Reason Analysis

Most courts adopt a Rule of Reason analysis in claims involving the NCAA because, as a regulator of amateur athletics, the NCAA possesses justifiable means to restrict competition.⁷³ A restraint on competition is unreasonable under a Rule of Reason analysis if “the restraint’s harm to competition outweighs its procompetitive effects.”⁷⁴ Therefore, the initial burden is on the plaintiff to demonstrate that the restraint has an anticompetitive effect within a “relevant market.”⁷⁵ If the plaintiff can make a sufficient showing, the burden shifts to the defendant to demonstrate a procompetitive justification.⁷⁶

If the plaintiff can establish a presumption of anticompetitive conduct, the NCAA will most likely be able to rebut this presumption. As a non-profit entity, the NCAA’s purpose is to promote academics, amateurism, and competitive balance among student-athletes. In *Board of Regents*, Justice Stevens noted the importance of the NCAA’s role in preserving amateurism by stating, “[i]n order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”⁷⁷ Therefore, the NCAA’s legitimate reason behind its regulatory measures acts as a

⁷² *Id.* at 117.

⁷³ *Id.* (“Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.”). The courts employ both a per se rule and the Rule of Reason analysis to come to a consensus regarding the extent of a defendant’s anticompetitive conduct. *Bd. of Regents*, 468 U.S. at 103. A per se rule is employed when the surrounding circumstances demonstrate that the defendant’s anticompetitive conduct is so great that no further analysis is necessary. *Id.* at 103-04.

⁷⁴ *Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001) (citing *Hairston*, 101 F.3d at 1018).

⁷⁵ *Id.* (citing *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988) (contending that in order to ascertain whether the proper relevant market has been established, the court analyzes the geographic region where a consumer can turn to an alternate source for the product)).

⁷⁶ *Id.*

⁷⁷ *Bd. of Regents*, 468 U.S. at 102.

shield against prospective antitrust violations.⁷⁸

B. Per Se Analysis

Courts will rarely apply a per se rule against the NCAA, unless there is no regulatory measure apparent.⁷⁹ Courts apply a per se rule when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”⁸⁰ This analysis differs from a Rule of Reason analysis because a restraint is facially presumed unreasonable.⁸¹ As a non-profit entity, the NCAA imposes a myriad of regulatory controls to administer its ideals, creating a justifiable reason behind restricting competition. Applying a per se rule against the NCAA would require its actions to be facially unreasonable, which is unlikely because its regulations serve the purpose of preserving amateur athletics.

If the NCAA were to lose its non-profit status, however, the consequences would be devastating. It would open the floodgates to antitrust litigation and require the courts to apply a per se standard because there would be no purpose behind its regulations. In 2006, Congress questioned the NCAA’s tax-exempt status as a non-profit entity.⁸² The Chairman of the House Committee on Ways and Means, Bill Thomas, sent a letter to the NCAA president expressing concern with lucrative television contracts, the increase in coaches’ salaries, and the effect these practices have had on college athletics’ commitment to higher education.⁸³ Thomas wrote that the activities member institutions undertake as educational organizations clearly reflect their tax-exempt status; however, “[t]he exempt purpose of intercollegiate athletics . . . is less apparent, particularly in the context of major college football and men’s basketball programs.”⁸⁴ The NCAA still stands as a non-profit entity, but as its revenues continue

⁷⁸ *Id.* at 117.

⁷⁹ *See id.* (contending that the Supreme Court in *Board of Regents* reversed the Court of Appeals’ decision because it employed a per se rule and found that a Rule of Reason analysis was appropriate because most of the regulatory controls that the NCAA enforces are a justifiable means for hindering competition).

⁸⁰ *Id.* at 100 (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)).

⁸¹ *Id.*

⁸² Steve Wieberg, *NCAA’s tax-exempt status questioned*, USA TODAY (Oct. 5, 2006, 2:40 PM), http://usatoday30.usatoday.com/sports/college/2006-10-04-ncaa-tax-status_x.htm.

⁸³ *Id.*

⁸⁴ *Id.*

to rise at an exponential rate, Congress's concern regarding its tax-exempt status will only increase.

IV. BARRIERS TO BRINGING A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

When the NCAA acts in its regulatory capacity, it strengthens its product and, therefore, enhances competition. Accordingly, the major challenge an antitrust claimant faces is demonstrating that a regulation is unreasonable when it serves the purpose of preserving amateurism, promoting education, and maintaining competitive balance.⁸⁵ Most courts follow the dichotomy enumerated in *Board of Regents*, in which an unreasonable restraint on competition is weighed against the NCAA's fiduciary duty to its student-athletes.⁸⁶ The Supreme Court expressed the importance of many of the NCAA's regulatory controls, which often shield the NCAA from antitrust scrutiny when it is acting in a regulatory manner.⁸⁷ The Supreme Court, as well as many lower courts, suggest that an antitrust violation has occurred if a regulation constrains, rather than enhances, intercollegiate athletics.⁸⁸

The Supreme Court in *Board of Regents* was the first to address the issue inherent in applying an antitrust claim to a collegiate sports organization. The Court reasoned that the NCAA places a horizontal restraint on trade because it consists of member institutions, which agree on rules that restrict the way in which they compete against one another.⁸⁹ Thus, in order to ascertain the reasonableness

⁸⁵ See, e.g., *Smith*, 139 F.3d at 185; see, e.g., *Justice*, 577 F. Supp. at 383 ("Because the sanctions evince no anticompetitive purpose, are reasonably related to the association's central objectives, and are not overbroad, the NCAA's action does not constitute an unreasonable restraint under the Sherman Act."); see, e.g., *Bassett*, 528 F.3d at 433.

⁸⁶ See, e.g., *Smith*, 139 F.3d at 187.

⁸⁷ *Bd. of Regents*, 468 U.S. at 117.

⁸⁸ See, e.g., *id.* at 104 ("[T]he essential inquiry remains the same—whether or not the challenged restraint enhances competition."). The Court held that the NCAA's regulation, which limited the number of games that could be televised, violated the Sherman Act because it restricted, rather than enhanced, intercollegiate athletics for all of its viewers. *Id.* at 120; see also *Smith*, 139 F.3d at 187 ("the [eligibility] bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition"). Because the challenged regulation enhanced intercollegiate athletics by ensuring fair competition, the bylaw survived antitrust scrutiny. *Id.*; see also *Basset*, 528 F.3d at 433 (stating that recruiting regulations that result in the sanctioning of member institutions are not an antitrust violation, because they enhance intercollegiate athletics by ensuring fair competition).

⁸⁹ *Bd. of Regents*, 468 U.S. at 101 (citing ROBERT H. BORK, *THE ANTITRUST PARADOX* 278).

of the restriction, the Court must gauge the effect the restriction has on the operation of a free market.⁹⁰ This could prove to be challenging for an antitrust claimant because if substitute products are available, it will expand the contested market, making a restraint on trade less likely.⁹¹ Nevertheless, the Court determined that college football was the relevant market because of the effect the restriction had on the operation of broadcasters.⁹² The Court found that college football provides a unique product to advertisers and the horizontal restraint placed on the product eliminated competition among broadcasters in the market.⁹³ This section addresses, in more detail, the specific challenges that exist when bringing a claim against the NCAA and how these challenges can possibly be overcome.

A. NCAA's Pro-Competitive Justifications as a Non-Profit Entity

Courts have consistently viewed the NCAA's regulatory powers as an axe against antitrust scrutiny, with the foundation established in *Board of Regents* acting as the handle.⁹⁴ The NCAA markets a unique product, which must combine academics with athletics, and the fragile nature of maintaining an association between the two is the source of the NCAA's power.⁹⁵ Thus, courts consistently recognize the importance of regulatory measures taken in order to pre-

(1978) (noting that league sports require a unique analysis because they are a product that can only be carried out jointly)).

⁹⁰ *Id.* at 101 (“[W]hat the NCAA . . . market[s] . . . is competition itself—contest between competing institutions . . . this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed.”). “By participating in an association which prevents member institutions from competing against each other . . . the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another.” *Id.* at 99.

⁹¹ *See id.* at 111 (stating that the NCAA argued that the relevant market was the entertainment industry). An expansive view of the relevant market would not restrict competition among broadcasters because they would still be able to compete for all of the programs available in the entertainment industry. *Id.*

⁹² *Bd. of Regents*, 468 U.S. at 111-13.

⁹³ *Id.* at 111 (finding that the willingness of advertisers to pay more per viewer for college football audience demonstrated how unique the product is).

⁹⁴ *Id.* at 101-02 (“The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports Thus, the NCAA plays a vital role in enabling college football to preserve its character”).

⁹⁵ *Id.*

serve the integrity of the product.⁹⁶

The NCAA's paramount goal has been the preservation of amateurism and regulations which achieve this goal have been uniformly upheld as procompetitive.⁹⁷ The Third Circuit, in *Smith v. NCAA*,⁹⁸ expressed the importance of ensuring amateurism among student athletes because of its effect on fair competition.⁹⁹ In *Smith*, a college volleyball player was denied her remaining two years of athletic eligibility when she enrolled in a post-graduate program at a different school than her undergraduate institution..¹⁰⁰ The court held that the NCAA's regulation, which prohibited a student-athlete from using his or her remaining athletic eligibility while enrolled in a different school's post-graduate program, was deemed procompetitive.¹⁰¹ The rule furthers the NCAA's goals of amateurism and fair competition by preventing a form of post-graduate recruiting where premier athletic institutions induce student-athletes to withhold their athletic eligibility at their undergraduate institution.¹⁰²

The NCAA's regulatory powers are so strong that the court in

⁹⁶ See *Jones v. NCAA*, 392 F. Supp. 295, 303-04 (D. Mass. 1975) (alleging that an eligibility rule that disqualified a hockey player from participating in intercollegiate athletics was an antitrust violation). The court found no antitrust violation and reasoned that "[t]he N.C.A.A. eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding." *Id.*; see also *Justice*, 577 F. Supp. at 362-63, 383 (challenging NCAA sanctions that excluded the University of Arizona from the television market and postseason competition). The sanctions were implemented due to a recruiting violation where football players were compensated for their play. *Id.* The Court found no antitrust violation because the regulation was "rooted in the NCAA's concern for the protection of amateurism." *Id.*; see also *Gaines v. NCAA*, 746 F. Supp. 738, 740, 746 (D. Tenn. 1990) (challenging the NCAA's rule which invalidates a player's eligibility when hiring an agent or entering a professional draft). The court held that the "regulation by the NCAA in fact makes a better 'product' available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs." *Id.*; see also *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988) (holding that the NCAA's "no-draft" and "no-agent" rules are procompetitive because they further the NCAA's goal of integrating academics with athletics).

⁹⁷ *Id.*

⁹⁸ 139 F.3d 180.

⁹⁹ *Id.* at 187.

¹⁰⁰ *Id.* at 183-84 (noting that the NCAA allows four years of athletic eligibility and *Smith* was within all eligibility requirements at the time of the case).

¹⁰¹ *Id.* at 187 ("[T]he bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive.").

¹⁰² *Id.* The regulation also serves the purpose of preventing student-athletes from withholding eligibility on their own initiative in order to play at a better athletic institution when they are older and have more experience. *Smith*, 139 F.3d at 187.

*Pocono Invitational Sports Camp v. NCAA*¹⁰³ held that a restriction on an entity not even affiliated with the NCAA did not constitute an antitrust violation.¹⁰⁴ In *Pocono*, a top tier basketball camp alleged that the NCAA placed an unreasonable restraint on competition by requiring the camp to certify with the NCAA in order for Division I coaches to visit.¹⁰⁵ This clearly places a restriction on the camp because high school athletes will only sign up for the camp if it provides adequate recruiting opportunities.¹⁰⁶ However, the court afforded deference to the fact the NCAA enacted this rule after its studies suggested that non-institutional camps exploit campers in the recruiting process.¹⁰⁷ Thus, the court held that the restriction was procompetitive because “when the NCAA promulgated these rules it was acting in a paternalistic capacity to promote amateurism and education.”¹⁰⁸

The courts are consistent in applying regulations on recruiting and athletic eligibility.¹⁰⁹ The *Smith* and *Pocono* decisions illustrate the importance of NCAA intervention in these concerns because the regulations ensure that member institutions do not receive an upper hand when attempting to recruit players.¹¹⁰ Because of the concerns

¹⁰³ 317 F. Supp. 2d 569 (E.D. Pa. 2004).

¹⁰⁴ *Id.* at 583-84. The NCAA’s regulatory power has also broadened as a result of the outcome in *Pennsylvania v. NCAA*. 948 F. Supp. 2d 416 (M.D. Pa. 2013). The dispute in *Pennsylvania* arose out of the sanctions imposed on Penn State University for the highly publicized scandal of Jerry Sandusky. *Id.* at 420. Sandusky, a former Penn State assistant football coach, was convicted for the sexual abuse of children, which high-ranking Penn State officials failed to report. *Id.* at 421. Despite the plaintiff’s argument that the sanctions were not sufficiently tied to athletics, the court relied on *Smith* and held that the NCAA’s regulatory power is not commercial in nature. *Id.* at 426-27. This is troublesome because the regulations in *Smith* were enforced to preserve amateurism, and here they are to punish criminal activity that did not involve student-athletes. *Id.* at 421; *see also Smith*, 139 F.3d at 185.

¹⁰⁵ *Pocono*, 317 F. Supp. 2d at 571-73.

¹⁰⁶ *Id.* at 575.

¹⁰⁷ *Id.* at 583-84 (“The NCAA has provided substantial evidence in support of its position that the rules were enacted to protect young players from being exploited.”).

¹⁰⁸ *Id.* at 584. The NCAA provides in its constitution that it enacts recruiting regulations “to promote equity among member institutions in their recruiting of prospects and to shield them from undue pressures that may interfere with the . . . athletics interests of the prospects.” *Id.* at 572 (quoting NCAA Constitution, Article 2.11).

¹⁰⁹ *See supra* note 96.

¹¹⁰ *See, e.g., Smith*, 139 F.3d at 185 (“Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in inter-collegiate athletics.”); *see, e.g., Pocono*, 317 F. Supp. 2d at 583 (“[T]he prohibition of gifts and inducements, and the requirement that camp events not be financed by marketers, are grounded in the paternalistic goal of separating high school athletics from the realm of pro-

expressed in *Board of Regents*, it is unlikely a court will find an anti-trust violation if the challenged regulation serves the purpose of enhancing intercollegiate athletics.¹¹¹ Therefore, the NCAA's responsibility for maintaining a clear distinction from professional athletics is what stands in the way of student-athlete compensation.¹¹²

B. Ability to Identify a "Relevant Market"

Another hill that an antitrust claimant must climb is establishing that the challenged NCAA regulation has an anticompetitive effect within a relevant market. As noted in *Board of Regents*, the nature of the NCAA creates a horizontal restraint on trade, which requires the court to analyze the effect the contested regulation has on the free market.¹¹³ Therefore, if the NCAA's regulation is not commercial in nature, it cannot possibly affect the free market.

The plaintiff will most likely be deprived of the opportunity to identify a relevant market when the NCAA regulation serves a non-commercial purpose.¹¹⁴ The Third Circuit in *Smith* held that eligibility rules are enacted in order to ensure fair competition and are not related to the NCAA's commercial or business activities.¹¹⁵ The Sixth Circuit in *Basset v. NCAA*¹¹⁶ came to the same determination regarding rules that sanction coaches for providing student-athletes with improper inducements.¹¹⁷ The court held that regulations preventing the exploitation of student-athletes were non-commercial because their objective is to ensure competitiveness among member schools.¹¹⁸ Therefore, if a regulation does not relate to the NCAA's commercial or business activities, it most likely falls outside the

fessional sports.”).

¹¹¹ *Bd. of Regents*, 468 U.S. at 120.

¹¹² *Id.* at 101-02.

¹¹³ *Id.* at 113.

¹¹⁴ See *Smith*, 139 F.3d at 186-87 (“[T]he Sherman Act primarily was intended to prevent unreasonable restraints in ‘business and commercial transactions,’ and therefore has only limited applicability to organizations which have principally noncommercial objectives.”); see also *Agnew*, 683 F.3d at 343 (“Most-if not all-eligibility rules . . . fall comfortably within the presumption of procompetitiveness.”).

¹¹⁵ *Smith*, 139 F.3d at 185.

¹¹⁶ 528 F.3d 426 (6th Cir. 2008).

¹¹⁷ *Id.* at 433.

¹¹⁸ *Id.* (“Similar to the eligibility rules in *Smith*, NCAA’s rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial.”).

scope of antitrust law.¹¹⁹

When there is a question as to whether the challenged regulation is commercial in nature, courts will adopt the “reasonable interchangeability” standard.¹²⁰ This test was applied in *Worldwide Basketball & Sport Tours, Inc. v. NCAA*,¹²¹ and requires the court to analyze whether there are substitute products in a specific market and whether there is consumer sensitivity to the substitute products.¹²² In *Worldwide Basketball*, the challenged regulation imposed a limitation on the number of tournaments a basketball team can play within a four-year period (Two in Four Rule).¹²³ The court found that the “reasonable interchangeability” standard was more appropriate than a “quick look” rule of reason analysis, which is only applied when the anticompetitive effect within a relevant market is readily apparent.¹²⁴ Therefore, when the relevant market is neither obvious nor undisput-

¹¹⁹ See *id.* (holding that “[i]f the rules themselves and the corresponding sanctions are not commercial[,] . . . then the enforcement of those rules cannot be commercial”); see also *Smith*, 139 F.3d at 185 (holding that eligibility requirements are not subject to the Sherman Act because they “are not related to the NCAA’s commercial or business activities.”); *Gaines*, 746 F. Supp. at 746 (holding that eligibility rules are not subject to antitrust law); *Jones*, 392 F. Supp. at 304 (holding that eligibility rules are not subject to antitrust law).

¹²⁰ See *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004).

¹²¹ 388 F.3d 955 (6th Cir. 2004).

¹²² *Id.* at 961. This inquiry establishes a relevant market because it demonstrates that the challenged restriction has had an anticompetitive effect within a specific market. *Id.* The plaintiff is required to display products that consumers may find interchangeable with the product in dispute (i.e., professional football may be considered a substitute product of college football because both products broadcast the same sport). *Id.* If the court finds that consumers will treat the substitute products in a similar fashion then they are considered “reasonably interchangeable,” which establishes that competition still exists within the market. *Id.* Consumer sensitivity means that consumers will treat the products differently, which increases the demand of the product and thus, eliminates competition in the market. See *Worldwide Basketball*, 388 F.3d at 961. The court also noted that sub-markets may also exist “by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity.” *Id.* (quoting *Brown Show Co.*, 370 U.S. at 325).

¹²³ *Worldwide Basketball*, 388 F.3d at 957 (contending that the Two in Four Rule limits a college basketball team from participating in more than one certified basketball tournament a year and no more than two every four years).

¹²⁴ *Id.* at 961 (contending that a quick look rule of reason analysis is appropriate when the relevant market is readily apparent to permit the court to identify the market without any in depth market analysis). The court did not believe that a restriction on the number of college basketball tournaments a program could participate in qualified for a quick look rule of reason analysis. *Id.* at 961. The court will apply a quick look rule of reason analysis when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Id.* (quoting *California Dental Assoc. v. FTC*, 526 U.S. 756, 770 (1999)).

ed, the “reasonable interchangeability” standard will be applied.¹²⁵

The Sixth Circuit’s application of the “reasonable interchangeability” standard was fatal to the plaintiffs’ claim because the plaintiffs presented no evidence of any substitute products.¹²⁶ The plaintiff has the burden of presenting substitute products in order to gauge the anticompetitive effects of the defendant’s conduct.¹²⁷ If the court finds that consumers will treat substitute products in the market similarly, then the products are “reasonably interchangeable,” and there has not been an unreasonable restraint on trade.¹²⁸ Because the plaintiffs did not advance any evidence of substitute products that demonstrate consumer sensitivity, the court was required to dismiss the plaintiffs’ claim.¹²⁹ However, the court noted “that the Two in Four rule has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the [plaintiffs].”¹³⁰ This establishes that although a rule may be enacted for a noncommercial purpose, the court may still find that the rule has a commercial impact.¹³¹

Case law places a heavy burden on the plaintiff when identifying a relevant market.¹³² First, the challenged regulation must contain a commercial objective in order to fall within the subject matter of Section 1 of the Sherman Act.¹³³ If the regulation is commercial, then the plaintiff must identify substitute or identical products or services to gauge the regulation’s anticompetitive effect.¹³⁴ This process permits the court to apply the “reasonable interchangeability” test and examine the substitute products to determine if the NCAA regulation

¹²⁵ See *id.* (“Under the ‘quick-look’ approach, extensive market and cross-elasticity analysis is not necessarily required, but where . . . the precise product market is neither obvious nor undisputed, the failure to account for market alternatives . . . will not suffice.”).

¹²⁶ *Worldwide Basketball*, 388 F.3d at 963.

¹²⁷ *Id.* at 961.

¹²⁸ *Id.*

¹²⁹ *Id.* at 963; see *Tanaka*, 252 F.3d at 1063 (noting that the failure to establish a relevant market is a ground for dismissal).

¹³⁰ *Worldwide Basketball*, 388 F.3d at 959.

¹³¹ *Id.* (“The dispositive inquiry in this regard is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial.”).

¹³² *Id.* at 963 (holding that the plaintiff was required to introduce evidence of substitute products to gauge the anticompetitive effect in the relevant market); see also *Smith*, 139 F.3d at 185-86 (recognizing that antitrust law has limited applicability to organizations with non-commercial objectives); see, e.g., *Basset*, 528 F.3d at 433 (“In order to state a claim under the Sherman Act there must be a commercial activity implicated.”).

¹³³ *Smith*, 139 F.3d at 185-86; see also *Basset*, 528 F.3d at 433.

¹³⁴ *Worldwide Basketball*, 388 F.3d at 961.

restrains trade in the market.¹³⁵ Therefore, ascertaining the relevant market is difficult because of the non-commercial objectives of the NCAA and the plaintiff's burden of establishing consumer sensitivity to substitute products.

C. Overcoming Antitrust Barriers

Not many antitrust claims against the NCAA have been successful since the ruling in *Board of Regents*.¹³⁶ This is attributed to the words of Justice Stevens, concerning the NCAA's role of maintaining a distinct line between amateur and professional athletics.¹³⁷ Because of the dicta in *Board of Regents*,¹³⁸ it is apparent that claims concerning eligibility and amateurism face a severe challenge. However, as the NCAA's economic prowess increases, maintaining that distinct line will become more difficult.

The NCAA's economic success has increased coaches' salaries, which was the basis of the dispute in *Law v. NCAA*.¹³⁹ This suit was initiated due to an NCAA regulation that placed a restriction on coaches' salaries.¹⁴⁰ The NCAA argued that the rule was implemented in order to maintain competitiveness because schools were starting to pay higher salaries for experienced coaches, which certain smaller schools could not afford.¹⁴¹ However, the Tenth Circuit held that the rule created an unreasonable restraint on trade and provided an interesting analysis that could be beneficial for future claimants.¹⁴²

In *Law*, the court recognized that "[n]o 'proof of market power' is required where the very purpose and effect of a horizontal agreement is to fix prices so as to make them unresponsive to a com-

¹³⁵ *Id.*

¹³⁶ See, e.g., *Smith*, 139 F.3d at 185 (holding that regulations that preserve amateurism are non-commercial in nature); *Pocono*, 317 F. Supp. 2d at 584 (holding that the recruiting rules were implemented to preserve amateurism and were exempt from antitrust scrutiny); *Basset*, 528 F.3d at 433 (holding that recruiting rules forbidding improper inducements and academic violations are non-commercial in nature); *Gaines*, 746 F. Supp. at 746 (holding that the eligibility rules are not subject to antitrust law); *McCormack*, 845 F.2d at 1345 (holding that the NCAA's "no-draft" and "no-agent" rules are procompetitive because they further the NCAA's goal of integrating academics with athletics).

¹³⁷ *Bd. of Regents*, 468 U.S. at 102.

¹³⁸ *Id.*

¹³⁹ *Law*, 134 F.3d at 1012.

¹⁴⁰ *Id.* at 1015.

¹⁴¹ *Id.* at 1014.

¹⁴² See generally *id.* at 1016-24.

petitive marketplace.”¹⁴³ The court held that the member schools’ agreement to restrict coaches’ salaries constituted a horizontal price fixing agreement because the agreement eliminated market competition for assistant football coaches.¹⁴⁴ The NCAA did not possess a procompetitive justification because it failed to establish that restricting salaries would enhance competition, level the playing field, or reduce coaching inequities.¹⁴⁵

The commercialization of the NCAA has provided student-athletes with more opportunities to obtain compensation through anti-trust law.¹⁴⁶ This is apparent in existing case law, as the regulation in *Law* was invalidated because the coaches could not compete for higher salaries that member institutions were willing to offer.¹⁴⁷ Also, the court in *Agnew v. NCAA*¹⁴⁸ noted that because member institutions compete to acquire athletes through “in-kind benefits,” such as premier coaches with high salaries and top-tier athletic facilities, a “labor market for student-athletes” would satisfy the plaintiffs’ burden of identifying a relevant market.¹⁴⁹ Although the plaintiffs’ claim involving the NCAA’s restriction that prohibited multi-year athletic scholarships was dismissed for the failure to introduce evidence regarding a relevant market, the court recognized the commercial impact of regulations which place a restriction on student-athletes.¹⁵⁰

Another case that dealt with a restriction on scholarships is *NCAA I-A Walk-On Football Players’ Litigation*,¹⁵¹ in which the plaintiffs established Division I athletics as a possible relevant market for student-athletes.¹⁵² The plaintiffs did not receive scholarships for their participation in intercollegiate athletics and claimed that a limitation on the number of athletic scholarships provided was an anti-trust violation.¹⁵³ The court denied the defendant’s motion to dismiss based on the plaintiffs’ allegation that Division I-A football was the

¹⁴³ *Id.* at 1020.

¹⁴⁴ *Law*, 134 F.3d at 1020.

¹⁴⁵ *Id.* at 1022.

¹⁴⁶ *Id.* at 1012; *see also Agnew*, 683 F.3d at 347.

¹⁴⁷ *Law*, 134 F.3d at 1022.

¹⁴⁸ 683 F.3d 328.

¹⁴⁹ *Id.* at 346-47 (“These are all part of the competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain.”).

¹⁵⁰ *Id.* at 347.

¹⁵¹ 398 F. Supp. 2d 1144 (D. Wash. 2005).

¹⁵² *Id.* at 1150.

¹⁵³ *Id.* at 1147.

relevant market because of the absence of substitute markets in which the plaintiffs could fully utilize their skills.¹⁵⁴

The cases discussed in this section may provide student-athletes with a framework for overcoming the challenges of bringing a claim against the NCAA. The decision in *Walk-On Football Players* may permit future claimants to assert Division I as a relevant market because it is the only “viable option[] for student[-athletes] wishing to make full use of their skills at the highest level of competition.”¹⁵⁵ Furthermore, *Agnew* establishes a “labor market for student-athletes” and demonstrates the commercial nature of a regulation which restricts what college athletes may receive in exchange for their athletic commitment.¹⁵⁶ Additionally, the court found that providing multi-year scholarships would not harm amateurism because “[i]t is not until payment above and beyond educational costs is received that a player is considered a ‘paid athlete.’”¹⁵⁷ Therefore, student-athletes may be able to receive compensation as long as the amount they receive is regulated to ensure that it is not in excess of educational costs. Lastly, *Law* demonstrates that a horizontal agreement to fix prices is unlawful when no procompetitive justification exists.¹⁵⁸ Currently, the existence of a horizontal agreement to exclude college athletes from collegiate licensing may seem unreasonable when analyzing the size of the market.¹⁵⁹

D. Recent Litigation

Ed O’Bannon’s current lawsuit against the NCAA and its licensing affiliates could have serious implications for the future of the NCAA.¹⁶⁰ In the class action, antitrust suit, student-athletes seek the right to use their names and likenesses in order to enter into licensing agreements.¹⁶¹ However, “the (plaintiffs) are not advocating an end to the principle of amateurism, nor are they advocating salaries.”¹⁶²

¹⁵⁴ *Id.* at 1150.

¹⁵⁵ *Id.*

¹⁵⁶ *Agnew*, 683 F.3d at 346-47.

¹⁵⁷ *Id.* at 344.

¹⁵⁸ *Law*, 134 F.3d at 1020.

¹⁵⁹ See generally *O’Bannon Complaint*, *supra* note 56.

¹⁶⁰ See *McCann*, *supra* note 59.

¹⁶¹ *O’Bannon Complaint*, *supra* note 56, at 2.

¹⁶² Steve Berkowitz, *O’Bannon plaintiffs seek summary judgment against NCAA*, USA TODAY (Aug. 28, 2013, 3:40 PM), <http://www.usatoday.com/story/sports/college/2013/11/15>

The complaint alleges that the NCAA has fixed the price of student-athletes' images at "zero" and conspired to boycott student-athletes in the collegiate licensing market.¹⁶³

The nature of O'Bannon's claim is inherently comparable to a right of publicity claim because it alleges the misuse of student-athletes' likenesses.¹⁶⁴ As a result, the court consolidated O'Bannon's action with a right of publicity claim asserted by former Nebraska quarterback, Samuel Michael Keller.¹⁶⁵ Keller's claim is similar to the claim asserted in *Hart v. Electronic Arts, Inc.*,¹⁶⁶ in which EA was found liable for misappropriating the use of a former student-athlete's image.¹⁶⁷ Although Keller does not assert an anti-trust claim, both his and O'Bannon's claims provide a possible avenue for the compensation of student-athletes through collegiate licensing.

O'Bannon's claim presents several key issues. First, compensating student-athletes poses a threat to amateurism. The Supreme Court has already expressed this concern by stating that in order to preserve amateurism, student-athletes must not be paid.¹⁶⁸ Thus, the plaintiffs must work around the words of the Supreme Court. The second challenge the plaintiffs face is identifying a relevant market because the NCAA has the non-commercial objective of preserving amateurism. Courts may find that no relevant market exists because the regulations that bar student-athletes from receiving compensation are not commercial in nature. Potential means of addressing these issues are discussed in the next section.

The NCAA currently has its hands full, as another recently filed complaint alleges that the NCAA violated Section 1 of the

/ncaa-ed-obannon-lawsuit-name-and-likeness-summary-judgement/3598497/.

¹⁶³ *O'Bannon Complaint*, *supra* note 56, at 32.

¹⁶⁴ *See, e.g., Hart*, 717 F.3d at 151 (holding that the right of publicity protects individuals' property rights to their image).

¹⁶⁵ Dennis Dodd, *Keller lawsuit vs. gamer EA Sports, NCAA clears major hurdle*, CBSSPORTS.COM (July 31, 2013, 6:41 PM), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/22954567/keller-lawsuit-vs-gamer-ea-sports-and-ncaa-clears-major-hurdle>.

¹⁶⁶ 717 F.3d 141 (3d Cir. 2013). The plaintiff was a quarterback for the University of Rutgers and brought an action against EA, alleging a violation of the right of publicity for the misappropriation of his likeness in a college football video game. *Id.* at 145. The court held that EA violated Hart's right of publicity because of the use of his recognizable features in a game that involved the same activity. *Id.* at 169.

¹⁶⁷ *Id.* at 170.

¹⁶⁸ *Bd. of Regents*, 468 U.S. at 102.

Sherman Act by unreasonably capping athletic scholarships.¹⁶⁹ This class action was brought by former West Virginia running back, Shawn Alston, claiming that the NCAA has capped scholarships at a price much lower than the costs to attend an institution.¹⁷⁰ In his complaint, Alston alleges that during his collegiate career he had to take out a loan to cover the actual cost of attendance.¹⁷¹ This claim is similar to the one asserted in *Agnew*, which alleged that denying athletes multi-year scholarships constitutes an antitrust violation.¹⁷² Although the plaintiffs' claim was dismissed for failure to produce sufficient evidence, *Agnew* may support Alston's claim because the court stated that "[t]he proper identification of a labor market for student-athletes . . . would meet the plaintiffs' burden of describing a cognizable market."¹⁷³

The argument still remains whether the NCAA has exceeded the scope of its authority by placing the specified economic restrictions on student-athletes. The recent antitrust suits attempt to lessen the NCAA's regulatory power which shield it from antitrust scrutiny.

V. ANTITRUST APPROACH TO STUDENT-ATHLETE COMPENSATION

The thought of paying student-athletes will make the NCAA and its members cringe because of the threat it poses to amateurism. However, a larger concern is that compensation would deplete the revenue of the NCAA and its member schools. Regardless of the NCAA's motive, an antitrust litigant must overcome the precedent that protects the NCAA's regulatory power of preserving amateur-

¹⁶⁹ Martin Rickman, *Former West Virginia player files lawsuit against the NCAA for capping scholarship value*, SPORTS ILLUSTRATED (Mar. 5, 2014), <http://college-football.si.com/2014/03/05/ncaa-lawsuit-shawne-alston-antitrust/>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Agnew*, 683 F.3d at 332. The plaintiffs in this action were injured during their participation in collegiate athletics and as a result did not receive a scholarship for their entire academic career. *Id.* at 347. The facts surrounding this dispute may suggest that a scholarship is not adequate compensation for student-athletes.

¹⁷³ *Id.* at 346-47. The court expressed that a restriction on scholarships can have an anti-competitive effect because schools engage in a competitive market to attract student-athletes. *Id.* The labor market for student-athletes is competitive in nature because "the pay involves in-kind benefits as opposed to cash." *Id.* For instance, institutions compete for top-tier coaches and invest a significant amount of money in its athletic facilities to obtain premier athletes in order to benefit its athletic program. *Agnew*, 683 F.3d at 347.

ism.¹⁷⁴

Despite these concerns, compensating college athletes may actually preserve amateurism more successfully than the strict regulations that are currently in effect. College athletes in dire need of financial assistance are often confronted with the temptation of accepting enticements to attend an institution or participate in point shaving scandals.¹⁷⁵ In order to enforce its regulations, the NCAA is mandated to investigate and penalize such activity.¹⁷⁶ Consequently, the investigations that surface result in a negative conception of the NCAA because they expose the public to the corruption and unfair practices that exist in intercollegiate athletics.¹⁷⁷ As the NCAA's revenue continues to rise, student-athletes will assert a greater entitlement to compensation and improper inducements will continue. Easing the burden on student-athletes might deter this sort of illegal activity and ensure fair competition among member institutions. This section explores how student-athletes can procure compensation through the use of antitrust law and how the NCAA can monetize its product without eliminating the fundamental principle of amateurism.

A. The NCAA's Violation of Section 1 of the Sherman Act

Existing precedent favors the NCAA.¹⁷⁸ Nevertheless, the NCAA has developed immense market power in the thirty years following the decision in *Board of Regents*.¹⁷⁹ Thus, some power has

¹⁷⁴ See *Jones*, 392 F. Supp. at 304 (holding that eligibility rules are procompetitive because they preserve amateurism); see also *Justice*, 577 F. Supp. at 383 (holding that recruiting rules are immune from antitrust scrutiny because they preserve amateurism); see also *Gaines*, 746 F. Supp. at 746 (holding that an eligibility "regulation by the NCAA in fact makes a better 'product' available by maintaining the educational underpinnings of college football and preserving stability and integrity of college football programs."); see also *McCormack*, 845 F.2d at 1345 (holding that the NCAA's "no-draft" and "no-agent" rules are procompetitive because they further the NCAA's goal of integrating academics with athletics).

¹⁷⁵ See, e.g., Rob Dauster, *FBI: San Diego point-shaving scandal netted 'more than \$120,000*, NBC SPORTS (May 22, 2014, 11:52 AM), <http://collegebasketballtalk.nbcsports.com/2013/05/22/fbi-san-diegos-brandon-johnson-paid-up-to-10000-per-game-to-shave-points/> (stating that a former San Diego point guard was sentenced to six months in prison for his role in a point shaving scandal during the 2009-2010 season when he received up to \$10,000 a game); see, e.g., *supra* note 7.

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., Dauster, *supra* note 175.

¹⁷⁸ See, *supra* note 174.

¹⁷⁹ See, e.g., Berkowitz, *supra* note 47; see, e.g., *Bd. of Regents*, 468 U.S. at 92-93 (stating

swung in favor of the plaintiffs because it is unlikely that the NCAA's economic growth will go unnoticed when resolving an anti-trust claim.

Although the largest portion of the NCAA's revenue derives from its television broadcasts,¹⁸⁰ an attempt to receive a portion of this revenue through antitrust law will most likely be futile. Because it is the NCAA and member institutions that engage in broadcast contracts, student-athletes cannot allege that they are excluded from the broadcasting market. This is analogous to professional sports, where the professional organization and its members enter into broadcasting contracts, and the revenue contributes to part of a professional athlete's salary.¹⁸¹ If student-athletes were to receive a portion of the NCAA's television revenue, it would require them to receive a salary on top of their scholarship, which would undoubtedly destroy amateurism.

Claims involving the use of student-athletes' likenesses are distinguishable because the NCAA has precluded individual student-athletes from pursuing compensation in a competitive marketplace through the use of their images.¹⁸² Excluding student-athletes from the market may influence courts to find that the prohibition on their property rights unreasonable. However, if student-athletes receive compensation, a detailed analysis is required to overcome the amateurism concerns associated with paying players.

The size of the market from which current and former student-athletes are excluded will contribute to the strength of a claim in an action pursuing the rights to student-athletes' images. For instance, IMG Worldwide, the owner of the CLC, states on its website that it "manag[es] the licensing rights for nearly 200 leading institutions that represent more than \$3 billion in retail sales and more than 75% share of the college licensing market."¹⁸³ Moreover, the use of a student-athlete's likeness can extend beyond the sale of jerseys and apparel to the sale of game-footage to advertisers, classic games that have been re-aired, and the sale of photographs and DVDs.¹⁸⁴ The

that networks were able to negotiate directly with member schools for television rights for a minimum aggregate compensation of \$131,750,000 over a four-year period).

¹⁸⁰ Berkowitz, *supra* note 47.

¹⁸¹ See Huma, *supra* note 17, at 11 (stating that NFL players are guaranteed to receive at least 46.5% percent of the revenue generated by the league).

¹⁸² *O'Bannon Complaint*, *supra* note 56, at 2.

¹⁸³ *Id.* at 7.

¹⁸⁴ *Id.* at 15.

NCAA has developed immense market power in collegiate licensing because it has sole possession of student-athletes' images in a market with no competitors.

In an antitrust suit, which alleges an unreasonable restriction on the use of names and likenesses of student-athletes, the plaintiff will easily satisfy the first element.¹⁸⁵ The existence of a contract is obvious based upon the member schools' agreement to adhere to the bylaws, as well as the student-athletes' requirement to sign Form 08-3a.¹⁸⁶

Although the first element does not pose a threat to claimants in an action against the NCAA, plaintiffs may also be able to demonstrate a conspiracy among the NCAA, CLC, and EA to satisfy this element. Form 08-3a incorporates NCAA bylaw 12.5.1.1.1, which permits the NCAA to use the image of a "student-athlete to generally promote NCAA championships or other NCAA events, activities or programs."¹⁸⁷ This is overly broad language because "generally promot[ing the] NCAA" may extend to any licensing deal because it will generate consumer interest through the increased exposure of the brand. This may establish a conspiracy because it provides the NCAA and its affiliates, EA and CLC, with the power to control the collegiate licensing market through deals that misappropriate athletes' images.

The second element requires the plaintiff to demonstrate an anticompetitive effect within a relevant market; therefore, the challenged regulation must first be commercial in nature.¹⁸⁸ The courts in *Smith* and *Basset* found no competitive effect on the market because the challenged regulations did not relate to the NCAA's commercial or business activities.¹⁸⁹ However, these regulations were purely regulatory measures to ensure fair competition, and the NCAA did not receive any profit as a result of its enforcement of the regulations.¹⁹⁰

¹⁸⁵ See *Tanaka*, 252 F.3d at 1062 (noting that the first element requires "a contract, combination, or conspiracy").

¹⁸⁶ See *O'Bannon Complaint*, *supra* note 56, at 3; see also *Agnew*, 683 F.3d at 335 ("There is no question that all NCAA member schools have agreed to abide by the Bylaws; the first showing of an agreement or contract is therefore not at issue in this case.").

¹⁸⁷ *O'Bannon Complaint*, *supra* note 56, at 11.

¹⁸⁸ *Smith*, 139 F.3d at 185-86.

¹⁸⁹ *Id.* at 185; *Basset*, 528 F.3d at 433.

¹⁹⁰ *Smith*, 139 F.3d at 185 (noting that the NCAA cannot profit from denying the plaintiff's athletic eligibility); see also *Basset*, 528 F.3d at 433 (holding that rules preventing academic fraud are not commercial and the NCAA could not profit from the suspension of a coach).

The court in *Agnew* noted that “the Sherman Act applies to commercial transactions, and the modern definition of commerce includes ‘almost every activity from which [an] actor anticipates economic gain.’”¹⁹¹ Because the NCAA may use a student-athlete’s likeness to “generally promote [the] NCAA,” the regulation is commercial in nature.¹⁹² The NCAA can reasonably anticipate an economic gain as a result of the restriction it places on student-athletes because it may use their images for promotional purposes, which ultimately increases consumer interest in the product.

Because the regulation is commercial in nature, the plaintiff must then demonstrate that it has an “anticompetitive effect” within a “relevant market.”¹⁹³ However, according to the court in *Law*, no proof of market power is needed when a horizontal agreement to fix prices makes a product unresponsive to competition.¹⁹⁴ Form 08-3a is a horizontal agreement because the member institutions, which compete against one another, have essentially agreed to fix the price of student-athletes’ images at zero.¹⁹⁵

Pursuant to this agreement, college athletes relinquish the right to the use of their likeness, which prohibits them from competing in the collegiate licensing market.¹⁹⁶ In order for the plaintiff to be relieved of its burden of identifying a relevant market, the court must find that the agreement to fix student-athlete compensation similar to *Law*, where assistant coaches could not respond to competition because their salaries were fixed at a maximum price.¹⁹⁷ Because a horizontal agreement exists that completely excludes student-athletes from the market, the NCAA’s market power in the collegiate licensing market will most likely be presumed.¹⁹⁸

Despite the horizontal agreement to fix prices, if the court finds that the anticompetitive effect is not readily apparent because licensing companies may still compete with one another it will apply

¹⁹¹ *Agnew*, 683 F.3d at 340 (quoting *Areeda & Hovenkamp*, *Antitrust Law*, ¶ 1260b, at 250 (2000)).

¹⁹² See *O’Bannon Complaint*, *supra* note 56, at 11.

¹⁹³ *Tanaka*, 252 F.3d at 1063.

¹⁹⁴ *Law*, 134 F.3d at 1020.

¹⁹⁵ See *O’Bannon Complaint*, *supra* note 56, at 3.

¹⁹⁶ *Id.*

¹⁹⁷ *Law*, 134 F.3d at 1020.

¹⁹⁸ See *id.* (noting that a horizontal agreement to fix prices requires the court to apply a “quick look” rule of reason analysis where the plaintiff is not required to identify a relevant market).

the “reasonable interchangeability” test.¹⁹⁹ Still, a claimant will most likely be able to demonstrate consumer sensitivity to consumer products because, as mentioned in *Board of Regents*, the NCAA markets a unique product that is distinct from all other products because it combines athletics with academics.²⁰⁰ This uniqueness provides the NCAA with market power in the collegiate licensing market because no “reasonable interchangeability” exists that causes consumers to differentiate intercollegiate athletics from other athletic products.²⁰¹ Furthermore, *Walk on Football Players Litigation* recognizes that a single product market may be sufficient when no substitute markets exist,²⁰² and the collegiate licensing market provides student-athletes with the only viable option to utilize the use of their names and likenesses.

The greatest challenge that a plaintiff faces is demonstrating an unreasonable restraint on trade that outweighs the NCAA’s procompetitive justification of preserving amateurism.²⁰³ The plaintiff will be able establish an unreasonable restraint on trade due to the complete market power that the NCAA possesses over the collegiate licensing market. By fixing student-athletes’ images at zero, the NCAA has retained complete control of its athletes’ likenesses, thus, allowing it to exclude competition from the market. A restriction exists because a competitor must deal solely with the NCAA and its member institutions, which possess ultimate control of the price and output of the product. Litigating this issue will require the plaintiff to introduce specific evidence regarding the profits attributable to the NCAA’s control over the market and the effect of the lack of competition in the market.

The NCAA is justified in restricting competition because preserving amateurism is essential to maintain the integrity of its product.²⁰⁴ In order for the restriction on competition to outweigh the

¹⁹⁹ *Worldwide Basketball*, 388 F.3d at 961.

²⁰⁰ *Bd. of Regents*, 468 U.S. at 101-02.

²⁰¹ See *Worldwide Basketball*, 388 F.3d at 961 (noting that if the plaintiff introduced professional football as a football product the court would find that there is not “reasonable interchangeability” between the two products because of the NCAA’s uniqueness, which provides them with complete market power).

²⁰² *Walk on Football Players*, 398 F. Supp. 2d at 1150.

²⁰³ See *Bd. of Regents*, 468 U.S. at 102. Because the NCAA is justified in restricting competition in order to preserve amateurism the courts will most likely conduct this inquiry under a Rule of Reason analysis. *Id.* at 117.

²⁰⁴ *Id.* at 102.

NCAA's justification to curtail competition, a plaintiff must work around the language of the Supreme Court in *Board of Regents*, which noted that student-athletes should not be paid and that the NCAA has the power to restrict competition if the regulation serves the purpose of enhancing public interest in intercollegiate athletics.²⁰⁵ To overcome this language, a plaintiff must emphasize that the words are mere dicta from nearly thirty years ago when the economic growth of the NCAA could not be predicted. Although the NCAA's revenue has risen sharply in the last thirty years, paying athletes still poses a threat to amateurism. If agents are involved in the process and players are competing for compensation, the NCAA will morph into a professional league.

Board of Regents established that the proper inquiry to determine if there has been an antitrust violation is to analyze whether the challenged regulation enhances or restricts the NCAA.²⁰⁶ Although ensuring amateurism enhances the product, not every NCAA regulation may promote this purpose.²⁰⁷ Permitting student-athletes to use their own images does not necessarily destroy amateurism if the use is strictly regulated.

The exclusion of student-athletes from the collegiate licensing market also places an unreasonable restriction on intercollegiate sports because of its negative effect on consumers. The NCAA owns complete market power of collegiate licensing and has granted the CLC 75% of the market, which prohibits competitors from entering the market and providing an alternative service that may be more appealing to certain consumers.²⁰⁸ Thus, the NCAA's market power has harmed consumers because without competition in the market the NCAA has complete control over prices and output, which precludes collegiate licensing companies from conforming to consumer preferences. Additionally, consumers wish to support their favorite players, and prohibiting the use of student-athletes' images prevents consumers from owning any apparel containing a specific student-athlete's surname.

As the NCAA continues to grow economically, players may believe the use of their images unjustly enriches the organization and

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 120.

²⁰⁷ *Bd. of Regents*, 468 U.S. at 120.

²⁰⁸ *O'Bannon Complaint*, *supra* note 56, at 7.

their acceptance of improper inducements will persist.²⁰⁹ Allowing student-athletes to pursue compensation in a regulated manner might act as a deterrent because a penalty for receiving improper inducements would diminish the value of a student-athlete's likeness.

An argument can also be made that the NCAA has tarnished its image as a regulator of amateur athletics through the mistreatment of its student-athletes. It is immediately apparent to an observer that the NCAA's revenue stream is completely dependent on its athletes. Meanwhile, anyone who follows college sports is likely aware of the billions of dollars that the NCAA receives for its broadcast rights. In addition, the NCAA and its affiliates have sold products that misappropriate student-athletes' images, such as NCAA football video games, which contain all of the features of college players except for their names.²¹⁰ There has been widespread criticism of the NCAA's exploitation of its athletes and the failure to take any action recognizing student-athletes' contribution will continue to tarnish the NCAA's reputation.²¹¹ For many student-athletes, intercollegiate athletics might be the only time that their image has any value, but Form 08-3a requires them to relinquish all rights to their names and likenesses.²¹² Although permitting student-athletes to pursue compensation through the use of their name and likenesses poses a threat to amateurism, courts may find that the increase in the NCAA's revenue has exploited student-athletes and resulted in an adverse impact on the nation's view of the NCAA.

Former student-athletes are more likely to prevail under anti-trust law. The NCAA does not possess any procompetitive justification for its horizontal agreement, which forces student-athletes to relinquish their rights to their images in perpetuity. Barring the use of their likenesses, which they developed in college, does not serve the purpose of ensuring amateurism or fair competition when they are no longer subject to NCAA regulations. This is comparable to *Law* because former student-athletes are subject to a horizontal price fixing agreement that makes their property rights unresponsive to competition.²¹³ For instance, former Boston College football star Doug Flutie's most memorable moment is a Hail Mary pass that was completed

²⁰⁹ See, e.g., Dauster, *supra* note 175.

²¹⁰ See, e.g., Hart, 717 F.3d at 169.

²¹¹ See, e.g., Deitsch, *supra* note 12.

²¹² See *O'Bannon Complaint*, *supra* note 56, at 3.

²¹³ *Law*, 134 F.3d at 1020.

on the last play of the game to win the 1984 Orange Bowl.²¹⁴ Although Flutie no longer has any affiliation with the NCAA, he may not be compensated for any playback of that video for which he is best known.²¹⁵ Thus, the perpetuity requirement under NCAA by-laws should not withstand an antitrust challenge because it unreasonably restrains former student-athletes from competing in the collegiate licensing market.

This section demonstrates that the NCAA's economic success may have detrimental effects to amateurism. If the courts believe that the NCAA has tarnished amateurism through its own actions, they will most likely find the NCAA's justifications for restricting competition less persuasive. Thus, arguments that demonstrate how the commercialization of the NCAA has hurt intercollegiate athletics will benefit antitrust claimants. For instance, student-athletes' propensity to accept improper inducements and the exploitation of student-athletes in licensing agreements may contribute to destruction of the NCAA's appearance of amateurism. As a consequence of the NCAA's economic growth, change is imminent, and in order for student-athletes to be compensated, a plan must be implemented that will not destroy amateurism.

B. Solution to Compensating Student-Athletes Without Destroying Amateurism

Prohibiting players from receiving compensation raises several fairness issues that provide insight into the controversy of whether student-athletes are entitled to any benefits outside of a scholarship. Several commentators have conducted a market analysis on the value of NCAA athletes by comparing their worth to professional athletes.²¹⁶ This analysis was first conducted by examining professional leagues' collective bargaining agreements, which provide that National Football League players must receive at least 46.5% of the revenue generated by the league.²¹⁷ This percentage was applied to the revenue reported by member institutions minus the cost of a scholar-

²¹⁴ Rick Wienberg, 9: *Doug Flutie's Hail Mary beats Miami*, 47-45, ESPN.COM, <http://sports.espn.go.com/espn/espn25/story?page=moments/9>.

²¹⁵ See *O'Bannon Complaint*, *supra* note 56, at 3 (stating that Form 08-3a relinquishes student-athletes' likenesses "in perpetuity").

²¹⁶ Huma, *supra* note 17, at 10.

²¹⁷ *Id.* at 11.

ship to assess the fair market value of college players.²¹⁸ The study illustrated that in 2011, Division I football players lost an average of \$456,612 over a four-year period.²¹⁹

A “full-ride” scholarship coupled with the concern for amateurism does not justify the prohibition on student-athlete compensation. A “full ride” scholarship under NCAA bylaws “consists of tuition and fees, room and board, and required course-related books.”²²⁰ However, this does not include other expenses that are related to attending the institution, such as transportation and school supplies.²²¹ During the 2011-2012 season, these expenses for Division I football players averaged \$3,285.²²² Allowing student-athletes to pursue compensation to cover their out of pocket expenses would actually provide them with a “full grant in aid” to attend the institution.²²³

Reform is necessary to bridge the gap between the NCAA’s increasing revenue and college athletes’ stagnant position. The failure to accommodate its athletes can pose great threats to the NCAA, as its not-for-profit status requires it to act in the best interests of its student-athletes.²²⁴ While the status of college athletes remains stagnant, coaches’ salaries are increasing at a rate higher than corporate executives,²²⁵ member institutions are developing athletic complexes valued in the hundreds of millions,²²⁶ and television ratings are reaching the equivalent of those for professional sports.²²⁷ The failure to

²¹⁸ *Id.*

²¹⁹ *Id.* at 12.

²²⁰ *Id.* at 11.

²²¹ Huma, *supra* note 17, at 11.

²²² *Id.*

²²³ *Id.* The NCAA has attempted to bridge this gap by approving a plan that provides student-athletes with unlimited food. Zach Schonbrun, *The N.C.A.A. Ensures Athletes Will Get All They Can Eat*, NYTIMES.COM (April 24, 2014), <http://www.nytimes.com/2014/04/25/sports/ncaa-ensures-athletes-will-get-all-they-can-eat.html>. The plan was put into place shortly after 2014 College Basketball Champion, Shabazz Napier, expressed his concerns “that he sometimes went to bed starving because his money ran out or the three-meal allowance was not enough to fuel his calorie-melting training.” *Id.*

²²⁴ Wieberg, *supra* note 82.

²²⁵ Huma, *supra* note 17, at 6.

²²⁶ Brian Bennett, *Facilities arms races proves recession proof*, ESPN.COM (June 14, 2012), http://espn.go.com/college-football/story/_/id/8047787/college-football-facilities-arms-race-proves-recession-proof (noting that Michigan University completed a \$226 million dollar renovation of its stadium in 2010).

²²⁷ See, e.g., Dominick Patten, *NCAA Championship Game Ratings Up 18% Over Last Year*, DEADLINE.COM (Apr. 9, 2013), <http://www.deadline.com/2013/04/ncaa-championship-ratings-louisville-michigan-final/>; see, e.g., Richard Sandomir, *Game 7 of N.B.A. Finals Draws High TV Ratings*, NY TIMES, Jun. 21, 2013, <http://www.nytimes.com/2013/06/22/sp>

amend its bylaws can expose the NCAA to even more litigation and put its not-for-profit status in jeopardy.

Providing college athletes with the right to their likenesses is the best solution to this problem. Many states recognize that an individual's likeness is a property right because the individual has developed the value of his or her image through hard work.²²⁸ This essentially means that the NCAA deprives its athletes of their own property by requiring them to sign Form 08-3a, at a time when their image is possibly at its highest point.

Lifting the restriction on student-athletes' intellectual property rights will not remove all of the issues confronting the NCAA. Clearly, the biggest issue is maintaining amateurism in intercollegiate athletics. To address this concern, the monetary incentives received for the use of athletes' images must be capped. The NCAA should conduct a study to determine the out of pocket expenses of college athletes that are associated with attending school. Therefore, amateurism will not be affected because the compensation will still be related to academic purposes. In addition, the NCAA is not violating its own "no pay for play" policy because the players are receiving the benefit of their own property rather than compensation from the NCAA.

The thought of corporate advertisers dealing directly with student-athletes also poses a threat to amateurism. The NCAA bylaws prohibit a player from consulting with an agent while the player still has athletic eligibility.²²⁹ This results in a conflict because corporate advertisers should not deal directly with individuals who do not have expertise in negotiating contracts. Allowing agents to help negotiate these contracts would not only violate NCAA regulations, but would also harm amateurism because of the agents' economic interest in the professional careers of student-athletes. The NCAA can resolve this conflict by acting as liaison for college athletes, which eliminates student-athletes from pursuing professional representation.

Another major concern is that this policy will result in the disparate treatment of student-athletes because sponsors will only pay for top-tier athletes. To address this, student-athletes should receive a percentage of any licensing deal by the NCAA, which incorporates their likenesses or images. For example, a percentage of the revenue

orts/basketball/game-7-of-nba-finals-draws-high-tv-ratings.html?_r=0.

²²⁸ See, e.g., *Hart*, 717 F.3d at 151.

²²⁹ *Gaines*, 746 F. Supp. at 740.

that the NCAA receives in a video game deal with EA or through the licensing of players' jerseys should be pooled and distributed to student-athletes evenly in their respective sport. Therefore, every athlete will receive some sort of compensation, and the restriction on the amount players may receive all but eliminates any disparity among athletes. Moreover, the NCAA will be able to conform to consumer preferences by entering into licensing deals without misappropriating its athletes' images.

In addition to the solutions proposed, the NCAA should allow athletes who make more than the calculated out of pocket expenses to be eligible to receive the excess amount of money *after* their collegiate career. This prevents the misappropriation of student-athletes' likenesses if the NCAA engages in group licensing deals that result in profits for college athletes in excess of the capped amount. The NCAA may also require athletes to surrender all money left in escrow, as well as relinquish the rights to their likenesses for receiving improper inducements. This can act as a strong deterrent on top of the existing punishments that the NCAA already enforces because athletes will not want to risk possible suspensions when they are already being compensated. Also, putting the money in escrow does not pose a threat to amateurism because student-athletes will be compensated at the cessation of their amateur careers. However, there must be a limitation on the amount college athletes may receive upon the termination of their athletic eligibility. This will prevent a large disparity in compensation among student-athletes and the over-endorsement of marketable players.

The final issue which must be addressed is that the implemented restrictions proposed still constitute a horizontal agreement that fix student-athletes' prices. This horizontal agreement, however, will survive antitrust scrutiny because of the NCAA's procompetitive justification of preserving amateurism. This is not an unreasonable restraint on trade because student-athletes are being compensated through reasonable means. Without restrictions, advertisers would sign the most talented players to lucrative endorsement deals, which would undoubtedly turn the NCAA into a professional league.

This proposal has advantages over other recommendations. One idea, implemented for a brief time by the NCAA, provides college athletes with a stipend to cover out of pocket expenses.²³⁰ There

²³⁰ Young, *supra* note 18, at 352.

are several issues that a stipend creates, which is possibly why the idea was struck down in 2012.²³¹ First, a stipend would clearly violate the NCAA's no pay for play policy, which can be distinguished from the proposed solution because it provides athletes with compensation through their own property rights. Second, Title IX requires the equal treatment of men and women's sports.²³² This would require member institutions to provide extra funding for women's athletic programs that do not generate the same revenue that men's football and basketball generate.²³³ Although there will be a disparity among men and women, the proposed solution confers intellectual property rights on all students and does not discriminate between men and women. Finally, if the NCAA implements a stipend it will still be subject to antitrust scrutiny because a horizontal agreement to fix athletes' prices at zero will remain. This will become even more problematic as the NCAA's revenue in the collegiate licensing market continues to grow.

The suit brought by Alston, regarding the alleged restriction on scholarship funds, also suggests a solution that will not harm amateurism because the amount student-athletes may receive only equates to a full grant in aid.²³⁴ However, this creates many similar issues because the excess money required for scholarships will come out of the institutions budget rather than a third party's pocket. An institution will also be required to provide this inflated scholarship to every athlete due to Title IX regulations. Ninety six percent of the revenue that the NCAA receives is redistributed to its member institutions, and a method of compensation that cuts into this funding may require schools to reduce other athletic programs that do not generate revenue.

The student-athletes of Northwestern University have also taken a unique approach in an attempt to profit from their fair market value.²³⁵ The Northwestern athletes have filed to unionize with aspirations that the National Labor Relations Board will recognize them as employee-athletes instead of student-athletes.²³⁶ If the players' un-

²³¹ *Id.*

²³² *Id.* at 353.

²³³ *Id.*

²³⁴ See Rickman, *supra* note 169.

²³⁵ Lester Munson, *Player-union attempt gets under way*, ESPN.COM (Feb. 12, 2014, 11:42 AM), http://espn.go.com/college-football/story/_/id/10433422/northwestern-university-players-union-attempt-gets-way-wednesday.

²³⁶ *Id.*

ionization attempt is upheld, then the players will be given the right to bargain for benefits from the NCAA.²³⁷ However, the major concern associated with this attempt is that the NCAA will retain immense bargaining power. In a collective bargaining agreement, one of the negotiation chips that the union holds is the ability to strike if it believes it is being treated unfairly. If student-athletes wished to strike, they would be required to forego their education.

In sum, the best reform that the NCAA can implement is allowing athletes to seek compensation through the use of their likenesses. However, the compensation that these athletes receive must be limited in order to preserve amateurism. The most effective method is to prohibit student-athletes from receiving compensation that exceeds the out of pocket expenses during their collegiate careers. Any additional money should be put in escrow for athletes to receive after they no longer have athletic eligibility. The excess amount must also be limited to whatever the NCAA deems fit in order to prevent a large disparity among student-athletes and ensure that certain institutions cannot become more marketable than others. Also, the NCAA has a fiduciary duty to its student-athletes and should act as a liaison to prevent the exploitation of its athletes. This proposed method will result in the proportional compensation of athletes based on the revenue they generate for the NCAA and its member institutions. Student-athletes would no longer be deprived of their property and the NCAA could continue its prominence as a regulator of amateur athletics.

VI. CONCLUSION

Dollar signs are ruining a product that was initially created to provide a safe outlet for young adults wishing to compete against one another athletically. Instead of acting in the student-athletes' best interests, member institutions have clearly become motivated by economic concerns. A prime example is Syracuse's departure from the Big East Conference to pursue a more lucrative economic opportunity in the Atlantic Coast Conference.²³⁸ Syracuse disregarded the tradition and rivalries it had developed over a 34 year period for a big-

²³⁷ *Id.*

²³⁸ *Syracuse to bolt for ACC next July*, ESPN.COM (Jul. 16, 2012, 8:13 PM), http://espn.go.com/college-sports/story/_/id/8170460/syracuse-orange-leave-big-east-year-early-july-2013.

ger paycheck.²³⁹

Is it right to suspend Johnny Manziel, a former Heisman Trophy winner, for allegedly receiving compensation for his autograph, while the NCAA generates revenue through the sale of his jersey? Manziel worked hard for his signature to have value but may not benefit from it in any way. Meanwhile, the NCAA is a not-for-profit entity, exempt from taxes, but generates revenue from its athletes' jerseys.²⁴⁰ It seems impossible for this issue to go unnoticed as the disparity increases between the NCAA's revenue and student-athletes' compensation in the form of their scholarships. The NCAA and its member institutions should reward athletes for their accomplishments while maintaining its foundational principles.

²³⁹ *Id.*

²⁴⁰ *See* Deitsch, *supra* note 12.