

FLAG ON THE PLAY: THE IMPACT OF UNITED STATES ANTITRUST LAWS ON THE NCAA

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I. INTRODUCTION

Over the past decade, the financial coffers of the National Collegiate Athletic Association (NCAA), affiliated universities, and sports media conglomerates have grown considerably while the student-athlete has not been able to cash-in on this lucrative enterprise. During the 2014 fiscal year, the NCAA reported revenue of almost \$1 billion.² ESPN/ABC, CBS, and Turner Sports are consistently paying hundreds of millions of dollars to obtain licensing rights to broadcast NCAA contests.³ Revenue-generating coaches at top programs around the country are increasingly signing multi-million dollar contracts.⁴ By touting itself as having the “best business model in the world,” the NCAA is using the argument of preserving the integrity and competitive balance of major college sports as a shield to protect athletes from the commercial influences and potentiality of losing their amateur status.

With the rising costs and the time pressures of major college athletics, the demands on student-athletes have increased exponentially.⁵ In addition to the demands required of every student at a particular university, the athlete faces additional challenges regular students may not face. The guarantee of a one-year scholarship to cover only tuition, room and board, and books does not leave room in the budget for an occasional trip to the

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² *National Collegiate Athletic Association and Subsidiaries Consolidated Financial Statements*, NCAA, https://www.ncaa.org/sites/default/files/2014-15NCAA_Financial_Statement.pdf (last visited Apr. 1, 2016) [hereinafter NCAA Consolidated Financial Statements] (stating that in the 2014 fiscal year, the NCAA’s total revenue was \$989 million).

³ See *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement> (last visited Apr. 1, 2016); see also Jerry Hinnen, *ESPN reaches 12-year deal to air college football playoffs*, CBS SPORTS, <http://www.cbssports.com/collegefootball/eye-on-college-football/21083689/espn-reaches-12-year-deal-to-air-college-football-playoffs> (last visited Apr. 1, 2016).

⁴ See generally Allie Grasgreen, *Coaches Make More than You*, INSIDE HIGHER ED, <https://www.insidehighered.com/news/2013/11/07/football-coach-salaries-10-percent-over-last-year-and-top-5-million> (last visited Apr. 1, 2016) (stating that head football coach salaries at major NCAA programs are up 10% over the last year and 90% since 2006).

⁵ See generally Ryan Piurek, *IU Student-Athletes Face their Biggest Foe: Time*, INDIANA UNIVERSITY TEACHING & LEARNING, http://www.indiana.edu/~tandlpub/story.php?story_id=73 (last visited Apr. 1, 2016).

movie theater, splurging on a pizza, or the ability to travel home on the weekend or during school breaks.⁶ Because of the demands placed on these athletes, there is little time left for the pursuit of part-time employment to supplement the scholarship and provide a source of income. With no source of income, athletes are confronted with the temptation of receiving illegal compensation from boosters, agents, and other related entities that could leave their remaining eligibility hanging in the balance.

While the goal of the NCAA's amateurism rules may be to preserve amateurism and maintain the competitive balance, the NCAA has been engaging in anti-competitive conduct in violation of Section I of the Sherman Act.⁷ This note seeks to examine the NCAA's traditional role in college athletics, the changing landscape of college athletics, and whether the NCAA's restraint on a student-athlete's ability to be compensated for his or her athletic ability and performance violates antitrust laws. Specifically, this note will explore the *O'Bannon* litigation's impact on the NCAA model.⁸

Part II of this note examines the history of the NCAA model and the justifications the NCAA uses to legitimize its endeavor. By using NCAA antitrust litigation, Part III explains the relationship between the NCAA and antitrust regulation, including why the NCAA's restraint on the student-athlete's ability to be compensated is a violation of the Sherman Antitrust Act. Part IV discusses the NCAA's historical use of a player's likeness and the implications of the landmark *O'Bannon* decision. Part V provides possible solutions to the NCAA's restrictions on a player's ability to use his or her likeness and proposes the most feasible solution. Part VI sets forth a brief discussion on the future of intercollegiate athletics.

II. A HISTORICAL LOOK INTO THE NCAA

The NCAA is comprised of “[m]ore than 1,200 schools, conferences, and affiliate organizations” and offers “opportunities to participate in 89 championship events.”⁹ First chartered in 1905 by trustees of sixty-two colleges as a coalition to discuss the health risks associated with intercollegiate sports and advocate for reform,¹⁰ the NCAA is a

6 Michelle Hill, 3 Points for Paying College Athletes, Sports Networker, <http://www.sportsnetworker.com/2010/03/22/3-points-for-paying-college-athletes/> (last visited Apr. 1, 2016).

7 15 U.S.C. §1 (2012).

8 *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

9 Membership, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Apr. 1, 2016).

10 See generally Howard J. Savage, *American College Athletics 13-29* (1929) (discussing how violence in college athletics during the late 19th and early 20th centuries led to the NCAA's formation); see also Frank W. Carsonie, Comment, Educational Values: A Necessity for Reform of Big-Time Intercollegiate Athletics, 20 Cap. U. L. Rev. 661, 667

“membership-driven organization dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom, and throughout life.”¹¹ Its mission is to promulgate rules and regulations, host championship contests, enforce standards of academic eligibility, and promote the general growth and welfare of college athletics.¹² NCAA goals include enriching the college experience of student-athletes by integrating athletics and higher education, promoting and developing educational leadership, physical fitness, athletics excellence, and athletics participation as a recreational pursuit.¹³ To achieve these goals, NCAA members, mostly colleges and universities, but also conferences and affiliated groups, work together to create the framework of rules for fair and safe competition.¹⁴

Since 1973, NCAA member schools have been organized into three divisions— Divisions I, II, III--- to create a fair playing field for similar institutions and provide student-athletes with opportunities to participate in championship events.¹⁵ The differences among the divisions are primarily as a result of how schools chose “to fund their athletic programs and in the national attention that they command.”¹⁶ Division I consists of the schools with the largest student bodies, largest athletic budgets, and the ability to provide students with the most opportunities for athletic participation.¹⁷ To qualify for membership in Division I, a school must sponsor at least fourteen varsity sports (seven for men and seven for women), including football and must meet minimum financial aid award requirements for the athletics program.¹⁸ Membership in Division I is partially predicated on

(1991); see also Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L.J. 655, 656 n.5 (1978).

11 About the NCAA, NCAA, <http://www.ncaa.org/about> (last visited Apr. 1, 2016).

12 Marc Edelman, A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act, 64 Case W. Res. L. Rev. 61, 65 (citing *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, 388 F.3d 955, 957 (6th Cir. 2004) (explaining that the NCAA “promulgates rules and regulations” pertaining to college sports)); see also *Bd. of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1153 (10th Cir. 1983) (describing the NCAA as “essentially an integration of the rulemaking and rule-enforcing activities of its member institutions”), *aff’d*, 468 U.S. 85 (1984); see also *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (explaining that according to the NCAA’s constitution, its purpose is to maintain amateur athletics “as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”).

13 About the NCAA, *supra* note 11.

14 *Id.*

15 *Id.*; see also *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Apr. 1, 2016).

16 *About NCAA Division II*, NCAA, <http://www.ncaa.org/about?division=d2> (last visited Apr. 1, 2016).

17 *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Apr. 1, 2016).

18 *Divisional Differences and the History of Multidivision Classification*, *supra* note 15.

football sponsorship within two subdivisions - Football Bowl Subdivision (FBS) and Football Championship Subdivision (FCS).¹⁹ Unlike at FCS schools, which are further limited in the amount of financial aid awards, FBS schools may offer up to 85 full scholarships.²⁰ As a result of the increased scholarship opportunities, the level of competition tends to be higher, and highly-touted recruits tend to accept FBS offers.²¹

In addition to the football subdivisions, Division I is further divided into conferences. These conferences typically have their own membership requirements that operate alongside NCAA rules and regulations.²² Conferences, on behalf of member schools, organize conference games and championship tournaments,²³ negotiate multi-million dollar television broadcasting deals,²⁴ and advocate for modification of NCAA rules.²⁵

Division II provides “thousands of student-athletes the opportunity to compete at a high level of scholarship athletics while excelling in the classroom and fully engaging in the broader campus experience.”²⁶ The balance between athletics contributions and campus/community involvement is one philosophical difference between it and Division I.²⁷ Division II’s financial aid model is a mix of partial athletic scholarships, merit and academic awards, need-based grants, and/or employment earnings.²⁸ Finally, Division III offers participation in a “competitive athletic environment that pushes student-athletes to excel on the field and build upon their potential by tackling new challenges across campus.”²⁹ As evidenced by Division III’s shorter practice and playing seasons and regional competition sites, academics are the primary focus for Division III student-athletes.³⁰

¹⁹ *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Apr. 1, 2016).

²⁰ John Solomon, *NCAA faces new suit over number, length of football scholarships*, CBS SPORTS, <http://www.cbssports.com/collegefootball/writer/jon-solomon/24691100/ncaa-faces-another-lawsuit-over-number-length-of-football-scholarships> (last visited May 4, 2016).

²¹ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 966 (2014).

²² *See generally About the Conference*, BIG 10, <http://www.bigten.org/school-bio/big10-school-bio.html> (last visited Apr. 1, 2016).

²³ *Id.*

²⁴ Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES, <http://www.forbes.com/sites/chris-smith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/> (last visited Apr. 1, 2016).

²⁵ Sharon Terlep, *NCAA Votes to Give Big Conferences More Autonomy*, WALL STREET JOURNAL, <http://www.wsj.com/articles/ncaa-votes-to-give-big-conferences-more-autonomy-1407433146> (last visited Apr. 1, 2016).

²⁶ *About NCAA Division II*, *supra* note 16.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *About NCAA Division III*, NCAA, <http://www.ncaa.org/about?division=d3> (last visited Apr. 1, 2016).

³⁰ *Id.*

One of the NCAA's key rules seeks to preserve amateurism and protect student-athletes from exploitation by professional and commercial enterprises.³¹ In attempting to preserve student-athlete amateurism, the NCAA prohibits student-athletes from receiving any form of payment for their athletic ability in their respective sports.³² Additionally, student-athletes may not accept any promises of future payment to be received after graduation, including payments based on the use of their name, likeness, and images.³³ NCAA-member universities are, however, permitted to "use a student-athlete's name, picture or appearance to support its charitable or educational activities," as long as, among other requirements, it is not used to promote commercial ventures of a non-profit agency.³⁴ Member universities are also permitted to sell items with names, likenesses, and/or pictures of multiple student-athletes.³⁵ Items that only include an "individual student-athlete's name, likeness, and/or picture...may not be sold."³⁶ Before the *O'Bannon* case was brought before a district court in California, NCAA policy did not address the use of student-athletes' likenesses in Electronic Arts' videogames.³⁷

The NCAA also required all student-athletes to sign a series of documents before participating in intercollegiate athletics.³⁸ The documents, including Form 08-3a, authorized the NCAA, or a third-party organization acting on behalf of the NCAA, to use the student-athlete's name or picture to "generally promote NCAA championships or other NCAA events, activities or programs."³⁹ Though not expressly stated on the forms, the NCAA's stance is that this form forces student-athletes to "relinquish in perpetuity all future rights in the NCAA's licensing of their images and likenesses."⁴⁰

³¹ Nat'l Collegiate Athletic Ass'n Division I Manual, 2015-2016 NCAA Division I Manual § 12.5.2.1 (2015), available at <http://www.ncaapublications.com/productdownloads/D116.pdf> [hereinafter NCAA Division I Manual].

³² NCAA Division I Manual § 12.1.2.

³³ *Id.*

³⁴ NCAA Division I Manual § 12.5.1.1.

³⁵ *Id.* at § 12.5.1.1(h)

³⁶ *Id.*

³⁷ See Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry: The Keller Forecast*, 27 ENT. & SPORTS LAW 1, 23-31 (analyzing the issues of *Keller v. Electronic Arts, Inc.*).

³⁸ Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, SPORTS ILLUSTRATED, <http://www.si.com/more-sports/2009/07/21/ncaa> (last visited Apr. 1, 2016).

³⁹ NCAA Division I Manual § 12.5.1.1.1; see also Dan Wolken & Steve Berkowitz, *NCAA Removes Name-Likeness Release from Student-Athlete Forms*, USA TODAY SPORTS, <http://www.usatoday.com/story/sports/college/2014/07/18/ncaa-name-and-likeness-release-student-athlete-statement-form/12840997/> (discussing the NCAA eliminating Form 08-3a as a required form before participating in intercollegiate athletics) (last visited Apr. 1, 2016).

⁴⁰ McCann, *supra* note 38.

For fiscal year 2014, the NCAA alone generated \$989 million in total revenue.⁴¹ Most of the revenue generated came from media and marketing rights agreements with Turner Broadcasting and CBS associated with the Division I NCAA Men's Basketball Tournament, which inevitably included the ability for the networks to use student-athletes' names, likenesses, and images during the telecasts and promotion of the event.⁴² The revenue figure included an \$80.5 million surplus, year-end net assets of \$708 million, and a \$59 million increase of the endowment fund.⁴³ The NCAA also distributed \$547.1 million to Division I schools and conferences.⁴⁴ The revenue distribution was broken down into the following categories and percentages: basketball fund (39%), grant-in-aid (26%), student assistance (15%), sports sponsorship (13%), academic enhancement (5%), and conference grants (2%).⁴⁵

III. AN OVERVIEW OF THE SHERMAN ANTITRUST ACT AND ITS EFFECT ON THE NCAA

As the seminal case in NCAA antitrust litigation, the Supreme Court's 1984 decision in *NCAA v. Board of Regents of the University of Oklahoma*⁴⁶ guided subsequent federal judges' analysis and interpretation of antitrust claims against the NCAA.⁴⁷ Decisions gave deference to the NCAA's theory of amateurism and desire to maintain a competitive balance.⁴⁸

A. Section I of the Sherman Antitrust Act

Section I of the Sherman Act stipulates that any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."⁴⁹ Section I also provides for a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule[s] of trade."⁵⁰ By allowing the unrestrained interaction of trade,

⁴¹ *NCAA Consolidated Financial Statements*, *supra* note 2.

⁴² Steve Berkowitz, *NCAA Nearly Topped \$1 Billion in Revenue in 2014*, USA TODAY SPORTS, <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/> (Mar. 11, 2015).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *NCAA Revenue Distribution Plan*, NCAA, <http://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf> (last visited Apr. 1, 2016).

⁴⁶ *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

⁴⁷ Edelman, *supra* note 12 at 79-86 (discussing how district courts differentiate between NCAA rules that affect trade or commerce, and therefore subject to antitrust scrutiny, and those that affect eligibility).

⁴⁸ *Id.*

⁴⁹ 15 U.S.C. § 1 (2012).

⁵⁰ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

“competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.”⁵¹ In *Northern Pacific*, the Supreme Court interpreted the act to only prohibit unreasonable restraints of trade because in a sense every contract is a restraint on trade.⁵² To prevail on a claim under Section I, a plaintiff must prove three elements.⁵³ First, a plaintiff must show that there was a contract, combination, or conspiracy.⁵⁴ Second, a plaintiff must show that the agreement at issue unreasonably restrained trade within any relevant market under either a *per se* rule of illegality or a rule of reason analysis.⁵⁵ Finally, a plaintiff must show that the restraint affected interstate commerce.⁵⁶ Ultimately, the Supreme Court has stated that the act is “aimed . . . [at restraints] comparable to restraints deemed illegal at common law, although accomplished by means other than contract which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.”⁵⁷ The Court has also stated that even non-profit organizations such as the NCAA may be subjected to antitrust scrutiny, insofar as its commercial activities.⁵⁸

B. The Tests of Antitrust Analysis

Through established NCAA rules, member institutions have “banded together to fix the amount of compensation they will pay college athletes . . . [D]eny[ing] student-athletes a fair share of the revenue[] they generate.”⁵⁹ Even though NCAA rules on compensating athletes “restrain competition among member institutions, depress student-athlete compensation, and [may] result in resource misallocation,” it does not automatically result in the violation of Section I of the Sherman Act.⁶⁰ The court will analyze the challenged restraints under a *per se* analysis or a rule of reason analysis.⁶¹

The rule of reason is the presumptive or default standard the court will use to make a determination into the legality of the challenged rules.⁶² A restraint is unreasonable and violates the rule of reason if “the restraint’s

⁵¹ *Id.*

⁵² *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984).

⁵³ *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Apex Hosiery Co. v. Leader*, 310 U.S. 982, 993-94 (1940).

⁵⁸ *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100-01 (1984).

⁵⁹ Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1300 (1992).

⁶⁰ Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 212 (1990).

⁶¹ *Id.* at 219-20.

⁶² *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011).

harm to competition outweighs its procompetitive effects.”⁶³ In addition to being reluctant to adopt *per se* rules with regard to “restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious,”⁶⁴ the Supreme Court has held that collective decisions by third-party intermediaries and joint ventures are still concerted actions subjected to Section I scrutiny.⁶⁵

If, upon first impression, the court believes that the restraint is likely to have some competitive benefit, then it analyzes the restraint under a rule of reason analysis.⁶⁶ When analyzing a restraint’s reasonableness, the initial burden is on the plaintiff to show that the “restraint produces ‘significant anticompetitive effects’ within a ‘relevant market.’”⁶⁷ The rule of reason test “distinguishes between restraints with anticompetitive effect[s] that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”⁶⁸ It requires investigating every aspect of a restraint, including whether the parties to the restraint had the power to control any relevant market, whether the restraint encourages or suppresses competition, and whether the restraint caused the marketplace anticompetitive harm.⁶⁹ A relevant market

[E]ncompasses notions of geography as well as product use, quality, and description. The geographic market extends to the “‘area of effective competition’ . . . where buyers can turn for alternate sources of supply.”⁷⁰ The product market includes the pool of goods or services that

⁶³ *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (citing *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996)).

⁶⁴ *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986).

⁶⁵ *See Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 202-03 (2010) (“When ‘restraints on competition are essential if the product is to be available at all,’ *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.” (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984))); *see also Id.* at 117 (“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.”); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (“Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all.”).

⁶⁶ *See O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 985-87 (N.D. Cal. 2014), *aff’d in part, vacated in part sub nom.*, 802 F.3d 1049 (9th Cir. 2015).

⁶⁷ *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (citing *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996)).

⁶⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

⁶⁹ Edelman, *supra* note 12 at 74.

⁷⁰ *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988) (citing *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1218 (9th Cir. 1977)) (defining the area of the relevant geographic market).

enjoy reasonable interchangeability of use and cross-elasticity of demand.⁷¹

Alleged relevant markets may survive antitrust scrutiny because their validity is normally a factual element rather than a legal element.⁷²

“The rule of reason does not govern all restraints.”⁷³ Certain restraints are deemed unreasonable, eliminating the need to conduct a rule of reason analysis.⁷⁴ This is because the restraint is automatically presumed to suppress competition without engaging in any further inquiry.⁷⁵ Resorting to the *per se* rules is “confined to restraints . . . that would always or almost always tend to restrict competition and decrease output.”⁷⁶ Restraints that have “manifestly anticompetitive”⁷⁷ effects and “lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”⁷⁸ As such, a *per se* rule analysis is only appropriate after courts have had considerable experience with the type of restraint at issue,⁷⁹ and only if courts can predict with confidence that it would be invalidated in all or almost all instances under a rule of reason analysis.⁸⁰

If a court applies a rule of reason analysis to determine whether a restraint’s harm to competition outweighs its procompetitive effects, then it typically relies upon a burden-shifting framework.⁸¹ Under this framework, the plaintiff “bears the initial burden of showing that the restraint produces ‘significant anticompetitive effects’ within the relevant product and geographic markets.”⁸² If this initial burden is satisfied, “the defendant must come forward with evidence of the restraint’s procompetitive effects.”⁸³ If satisfied, the burden then shifts to the plaintiff to “show that any legitimate objectives can be achieved in a substantially less restrictive manner.”⁸⁴

Most courts that apply the *per se* analysis do so in favor of the plaintiff based on a preliminary finding of anticompetitive effects, relieving the burden of establishing market power and shifting the burden to the

⁷¹ *Id.* (citing *Syfy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986)).

⁷² *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008).

⁷³ *Leegin Creative Leather Prods.*, 551 U.S. at 886.

⁷⁴ *Id.* (explaining that “the *per se* rule, treating categories of restraint as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.”).

⁷⁵ *Id.*

⁷⁶ *Id.* (internal quotation marks omitted) (citation omitted).

⁷⁷ *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977).

⁷⁸ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

⁷⁹ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979).

⁸⁰ *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 344 (1982).

⁸¹ *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996).

⁸² *Id.* (emphasis added).

⁸³ *Id.*

⁸⁴ *Id.*

defendant to provide justification. Nevertheless, several antitrust decisions have found that courts may also analyze the restraint pursuant to the *per se* rule in favor of defendants if it is “essential if the product is to be available at all.”⁸⁵

C. Antitrust Scrutiny and the NCAA

Antitrust plaintiffs have argued that restrictions on payments to student-athletes are horizontal agreements restraining price competition, which is *per se* unreasonable.⁸⁶ Historically, courts have refused to apply the *per se* test when analyzing allegations of NCAA antitrust violations because of the NCAA’s stated amateurism principles⁸⁷ as well as the necessity of horizontal restraints on competition if the product is to be available at all.⁸⁸

Plaintiffs arguing before the court using the rule of reason test have equally been unsuccessful.⁸⁹ The Court has stipulated that NCAA rules render the organization as procompetitive and, as such, requires an analysis under the rule of reason if the restraint is a “justifiable means of fostering competition among amateur athletic teams,” and therefore enhances public interest in intercollegiate athletics.⁹⁰

Historically, NCAA rules withstand antitrust violation claims if the rule is to preserve the product of college sports in the economic marketplace.⁹¹ The Court has reasoned that NCAA members “share an interest in making the entire league successful and profitable,” collectively benefiting from colluding in the production and scheduling of games.”⁹²

⁸⁵ Edelman, *supra* note 12 at 75; *see also* NCAA v. Bd. of Regents of Univ of Okla., 468 U.S. 85, 101 (1984) (noting that horizontal restraints on competition are essential in some industries).

⁸⁶ Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 219 (1990).

⁸⁷ Tibor Nagy, *The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 339-343 (2005).

⁸⁸ NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. at 101.

⁸⁹ *See id.* at 117.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 202 (2010); *see also* *Texaco, Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (stating that “[it is not] *per se* illegal under § 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which [it] sells its products.”); *see also* *Justice v. NCAA*, 577 F. Supp. 356, 380 (D. Ariz. 1983) (noting that a “clear trend has emerged in recent years under which courts have been extremely reluctant to subject the rules and regulations of sports organizations to the group boycott *per se* analysis.”).

D. An Analysis of Court Decisions Reviewing NCAA Eligibility and Antitrust Regulation

In one of the first lower court decisions regarding NCAA exemption from antitrust regulations, the District of Massachusetts decided in *Jones v. NCAA* the legality of the NCAA's no-pay rules.⁹³ In *Jones*, the NCAA ruled an ice hockey player ineligible for competition since the player had previously received a stipend based on athletic ability.⁹⁴ The court concluded that the plaintiff could not challenge the NCAA's rule banning the player because the plaintiff did not show how "the action[s] of the [NCAA] in setting eligibility guidelines ha[d] any nexus to commercial or business activities in which the defendant might engage."⁹⁵ In addition, the court noted that even if the claim was not barred on noncommercial grounds, the NCAA still did not act with sufficient "scienter" to violate antitrust law.⁹⁶

In 1984, the Supreme Court held in *NCAA v. Board of Regents of the University of Oklahoma*⁹⁷ that limiting the number of games an NCAA member may broadcast on television violated Section I of the Sherman Act because it "eliminate[d] competitors from the [broadcast television] market."⁹⁸ At the district court level, the court held that the NCAA's television bylaws represented an illegal restraint on output, and that the NCAA, in its allocation of television rights, illegally "maintain[ed] mechanisms for punishing cartel members who [sought] to stray from these production quotas."⁹⁹ The Tenth Circuit affirmed, concurring that "[t]he television plan at issue . . . restrict[ed] the plaintiffs' revenues, market share, and output,"¹⁰⁰ and further noting that "the television [plan's] . . . threat of expulsion and boycott [are] sanctions which clearly have

⁹³ *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975).

⁹⁴ *Id.* at 297-98.

⁹⁵ *Id.* at 303.

⁹⁶ *Id.* at 304.

⁹⁷ *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

⁹⁸ Edelman, *supra* note 12 at 79 (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 85, 108).

⁹⁹ See *Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1301 (W.D. Okla. 1982), *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984) (stating the district court found each of the other elements required under a full rule of reason analysis were also met and concluding that the University of Oklahoma and the University of Georgia suffered "antitrust harm" because they were able to show the likelihood of lost revenues due to the television broadcast restraints); *Id.* at 1301-02, 1288 (concluding that such injuries are "direct and substantial, and not indirect or derivative of injury alleged to have been suffered by the public at large" and that the NCAA exercised "market power" in both a relevant market for college football television broadcasts and the competition in college sports because, "[a]s a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program.")

¹⁰⁰ Edelman, *supra* note 12 at 79; (quoting *Bd. of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1151 (10th Cir. 1983)).

anticompetitive potential.”¹⁰¹ As such, it appears that even if the NCAA restraint had not affected output, the appellate court still would have found the threat of ousting noncompliant members to require careful scrutiny under a rule of reason analysis.¹⁰²

A subsequent decision in *McCormack v. NCAA* dealt with a college football player’s unsuccessful challenge to NCAA death penalty rules.¹⁰³ The player’s challenge failed under the rule of reason analysis with the court reasoning that eligibility rules, used to determine who can and cannot participate in college football games, “enhance public interest in intercollegiate athletics” and support an “academic tradition” and ultimately are the foundation of the unique character of intercollegiate athletics.¹⁰⁴ Using some of the same language as the Fifth Circuit in *McCormack*, the Seventh Circuit described the plaintiff’s antitrust claims in *Banks v. NCAA* as “absurd” because, in the court’s opinion, “the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education.”¹⁰⁵

In the 1990 decision in *Gaines v. NCAA*, the Middle District of Tennessee similarly held that a plaintiff wishing to return to college football after entering the NFL draft could not bring an antitrust challenge against the NCAA.¹⁰⁶ The court noted a legal difference “between the NCAA’s efforts to restrict the televising of college football games and the NCAA’s efforts to maintain a discernible line between amateurism and professionalism.”¹⁰⁷ Thus, the court adopted a bifurcated test to determine whether NCAA conduct affects interstate commerce, placing “business rules” (such as the television policy) on one side of a line and “eligibility rules” (such as those related to amateurism) on the other side.¹⁰⁸ Then in 1998, the Third Circuit formally adopted *Gaines*’s two-prong test for determining the commerciality of NCAA rules in another case, *Smith v. NCAA*.¹⁰⁹ *Smith* involved a plaintiff’s challenge to an NCAA bylaw that prohibited a student-athlete from participating in intercollegiate athletics while attending a graduate school different from the one she attended for

¹⁰¹ Edelman, *supra* note 12 at 79-80, 80 n. 85 (“[F]inding that plaintiffs’ claim of an output restraint was *per se* illegal, and their group boycott claim was subject to the full rule of reason inquiry.”) (citing *Bd. of Regents*, 707 F.2d at 1161).

¹⁰² *Bd. of Regents*, 707 F.2d at 1161.

¹⁰³ See generally *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988).

¹⁰⁴ *Id.*

¹⁰⁵ *Banks v. NCAA*, 977 F.2d 1081, 1089-90 (7th Cir. 1992).

¹⁰⁶ *Gaines v. NCAA*, 746 F. Supp. 738, 740 (M.D. Tenn. 1990).

¹⁰⁷ *Id.* at 743.

¹⁰⁸ *Id.* at 747.

¹⁰⁹ *Smith v. NCAA*, 139 F.3d 180, 185 (1998).

undergrad.¹¹⁰ Citing *Jones and Gaines*, the court found this particular bylaw immune from antitrust scrutiny because “many district courts have [already] held that the Sherman Act does not apply to the NCAA’s promulgation and enforcement of eligibility requirements.”¹¹¹

After *Smith*, two other Third Circuit rulings found the NCAA’s eligibility rules to be noncommercial and thus exempt from antitrust scrutiny. In *Bowers v. NCAA*, the District of New Jersey held that the NCAA bylaws that determine academic eligibility lie outside the Sherman Act’s reach because Third Circuit precedent indicated that those bylaws are “not related to the NCAA’s commercial or business activities.”¹¹² Similarly, the Eastern District of Pennsylvania held in *Pocono Invitational Sports Camps v. NCAA* that an NCAA bylaw allowing Division I coaches to evaluate high school basketball players only at certified camps did not violate antitrust law because the plaintiff did not show that the challenged restraint involved “trade or commerce.”¹¹³

In *Bassett v. NCAA*, the Sixth Circuit followed the Third Circuit’s precedent when it adopted a bifurcated test for evaluating whether NCAA conduct is sufficiently commercial to fall within the scope of the Sherman Act.¹¹⁴ The dispute in *Bassett* specifically involved the legality of an NCAA mandate requiring that any college wishing to hire a coach who previously engaged in recruiting violations to first receive permission from the NCAA Committee on Infractions.¹¹⁵ Ultimately, the court found the rule was noncommercial, meaning that there was no unlawful restraint, even though the court acknowledged that the NCAA itself was a commercial actor.¹¹⁶ To justify its decision, the court described the NCAA coaching restraint as “anti-commercial” because, if not for the rule, any NCAA member that wanted to hire a coach who had engaged in previous NCAA recruiting infractions could obtain “a decided competitive advantage in recruiting and retaining highly prized student athletes.”¹¹⁷

Taken individually, each of these previous decisions seems to present a strong basis for finding the NCAA’s restraint on compensating student-athletes to be noncommercial and thus valid under Section I of the Sherman

¹¹⁰ *See id.*

¹¹¹ *Id.* at 185.

¹¹² *Bowers v. NCAA*, 9 F. Supp. 2d 460, 497 (D.N.J. 1998) (quoting *Smith v. NCAA*, 139 F.3d at 185-86).

¹¹³ *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 581-84 (E.D. Pa. 2004).

¹¹⁴ *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008).

¹¹⁵ *Id.* at 431.

¹¹⁶ *Id.* at 433.

¹¹⁷ *Id.*

Act.¹¹⁸ Going forward, a plaintiff must show the court that the NCAA's amateurism rules and procompetitive justifications are commercial, rather than merely eligibility, rules in nature and therefore not sufficient to justify the blanket prohibition on compensating student athletes.

IV. NCAA AND MEMBER-INSTITUTIONS USE OF STUDENT-ATHLETE'S NAMES, IMAGES, AND LIKENESSES: THE O'BANNON DECISION

In 2009, Edward O'Bannon, a former student-athlete on the University of California, Los Angeles men's basketball team from 1991 to 1995, filed a class action complaint in the Northern District of California, on behalf of himself and current and former student-athletes.¹¹⁹ The remedies sought in the O'Bannon complaint included monetary relief associated with the NCAA's use and licenses of student-athlete's names, images, and likenesses by the NCAA and other commercial enterprises.¹²⁰ If the plaintiffs were to receive a favorable settlement, "the NCAA, along with its member [institutions and conferences], could be required to pay tens of millions, if not hundreds of millions, of dollars in damages."¹²¹

O'Bannon argued that NCAA actions allowed the organization, member-schools, and other commercial enterprises to use student-athlete's names, images, and likenesses in live game telecasts, television re-broadcasts, memorabilia, and videogames.¹²² Because of NCAA rules, current and former student-athletes could not receive compensation, beyond the value of their athletic scholarship, based on the use of their names, images, and likenesses, while the NCAA could be compensated.¹²³ A student-athlete is deemed ineligible to play if he or she were to use his or her athletic skill (directly or indirectly) for pay in any form in his or her sport.¹²⁴ O'Bannon's complaint was based on the legal theory alleging that the NCAA had unlawfully restrained trade in violation of Section I of the Sherman Act.¹²⁵ In the absence of NCAA restraints, O'Bannon and other student-athletes could collectively bundle their rights and sell them to the NCAA, member-institutions, and other commercial enterprises.¹²⁶

¹¹⁸ Edelman, *supra* note 12 at 86.

¹¹⁹ O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014).

¹²⁰ Christian Dennie, *He Shoots, He Scores: An Analysis of O'Bannon v. NCAA on Appeal and the Future of Intercollegiate Athletics*, 93 N.C.L. REV. 90, 103 (2015).

¹²¹ McCann, *supra* note 37.

¹²² Steve Berkowitz, *Amended O'Bannon Filing Has Highly Charged Allegations*, USA TODAY, <http://www.usatoday.com/story/sports/college/2013/07/19/ncaa-ed-obannon-lawsuit-amended-complaint-allegations-ea/2567367/> (last visited Apr. 1, 2016).

¹²³ *Id.*

¹²⁴ See 2015-16 NCAA Division I Manual § 12.11.4.2, at 88 (2015).

¹²⁵ O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014).

¹²⁶ See NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984).

After initial proceedings, including the district court's denial of the NCAA's motion to dismiss¹²⁷ and the plaintiffs being awarded class certification,¹²⁸ Judge Claudia Wilken analyzed the case based on the burden-shifting rule of reason analysis, despite the plaintiffs desire for the restraint to be analyzed under a *per se* rule analysis.¹²⁹ This was decided because "courts have found that the NCAA's general restrictions on student-athlete compensation could conceivably enhance competition," which under a *per se* analysis could be deemed necessarily illegal.¹³⁰

There was no dispute among the NCAA and the plaintiffs in regards to whether the rules were enacted and enforced pursuant to an agreement among the NCAA, member institutions, and conferences,¹³¹ or that the rules affect interstate commerce.¹³² The only issue is whether the restrictions constituted an unreasonable restraint of trade.¹³³

A. O'Bannon Rule of Reason Analysis

The two relevant markets identified by the plaintiffs as causing anticompetitive effects are the "college education market," which colleges and universities compete in to recruit student-athletes to play FBS football or Division I basketball and the "group licensing market," in which television networks, videogame developers, and other commercial enterprises compete for group licenses to use the names, images, and

¹²⁷ See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 998-1006 (N.D. Cal. 2013). (following a more progressive view of *NCAA v. Bd. of Regents of Univ. of Okla.* by stating that the Supreme Court has "never examined whether or not the ban on student-athlete compensation actually had a procompetitive effect on the college sports market," *Id.* at 1002, Also the Sherman Act clearly applies to at least some of the NCAA's behavior and the seminal case on the interaction between the NCAA and the Sherman Act, implies that *all* regulations passed by the NCAA are subject to the Sherman Act. *Id.* at 1004) (citing *Agnew v. NCAA*, 683 F.3d 328, 338-39 (7th Cir. 2012)).

¹²⁸ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1153 (N.D. Cal. 2014).

¹²⁹ *Id.* at 1136.

¹³⁰ *Id.* at 1137. Under a traditional rule of reason review, "[t]he plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within [a] relevant . . . market[]." *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996). If the plaintiff satisfies the initial burden, "the defendant must come forward with evidence of the restraint's [c]ompetitive effects." *Id.* If the defendant produces this evidence, the plaintiff must show that "any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.* (citation omitted); see also Gabe Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 Am. U. L. REV. 561, 563 (2009) (arguing that this additional prong adds confusion rather than clarity to the analysis).

¹³¹ See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (the first element of a claim under Section I of the Sherman Antitrust Act requires a plaintiff to demonstrate there was a "contract, combination, or conspiracy."); see also *NCAA v. Bd. of Regents*, 468 U.S. at 99 ("NCAA member institutions have created a horizontal restraint an agreement among competitors on the way in which they will compete [against each other].").

¹³² *NCAA v. Bd. of Regents*, 468 U.S. at 100.

¹³³ *Id.* at 101.

likenesses of FBS football or Division I men's basketball players in broadcasts, videogames, and re-broadcasts.¹³⁴ For the "college education market," the court concluded that evidence of NCAA member-institutions' agreement to charge football and men's basketball recruits the same price for the bundle of educational and athletic opportunities that they offered, i.e., a recruit's athletic services along with use of his name, image, and likeness, while he was in school, constituted "restraint of trade."¹³⁵ The court also concluded that the evidence sufficiently established anticompetitive effects on the "group licensing market" by providing evidence from experts showing NCAA legislation prohibits videogame producers and broadcasters from competing freely to offer licenses to student-athletes for use of their names, images, and likenesses.¹³⁶

B. NCAA Procompetitive Justifications

Since the plaintiffs presented sufficient evidence to show that NCAA rules impose a restraint on competition in the "college education market," the burden then shifted to the NCAA to prove that the restraint is justified.¹³⁷ The NCAA asserted four procompetitive justifications for its rules barring student-athletes from receiving compensation for the use of their names, images, and likenesses: (1) preserving amateurism; (2) maintaining the competitive balance among FBS football and Division I basketball teams; (3) promoting the integration of academics and athletics; and (4) the increasing the greater total output of its in the relevant markets.¹³⁸

The NCAA asserted that challenged restraint promoted consumer demand for its product by preserving its tradition of amateurism in college sports.¹³⁹ The court then went through an analysis of how the NCAA's definition of amateurism has changed since 1906.¹⁴⁰ Because of the changes in rules and the inconsistencies in aid, the court concluded that NCAA restrictions on student-athlete compensation, capping athletics-based financial aid below the cost of attendance, are not justified by the definition of amateurism.¹⁴¹ The court did conclude, however, that restraints on

¹³⁴ In re NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d at 1136-38.

¹³⁵ *Id.* at 1137-38.

¹³⁶ *Id.* at 1138.

¹³⁷ *Paladin Ass'n, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1156 (2003) (in considering the justifications, the court must determine whether the "anticompetitive aspects of the challenged practice outweigh its procompetitive effects.").

¹³⁸ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 - 81 (N.D. Cal. 2014).

¹³⁹ *Id.* at 973-78.

¹⁴⁰ *Id.* at 973-75 (noting that initial NCAA rules, which would have barred the current athletic scholarship, have changed many times since 1906 as well as inconsistencies in grant-in-aid rules that allow student-athletes to accept Pell grants in excess of their cost of attendance and tennis recruits to earn prize money).

¹⁴¹ *Id.* at 975.

student-athlete compensation play a limited role in driving consumer demand in FBS football and Division I basketball related products and promoting amateurism.¹⁴²

The second justification asserted by the NCAA was that the restraints are necessary to maintain a level of competitive balance among FBS football and Division I basketball teams.¹⁴³ One of the plaintiff's witnesses, Dr. Richard Noll, along with a number of sports economists found "little evidence that the NCAA rules and regulations have promoted competitive balance in college athletics . . ." ¹⁴⁴ Additionally, evidence was offered to show that the NCAA does not have rules in place to "rein in spending by the high revenue schools or minimize existing disparities in revenue and recruiting."¹⁴⁵ These high revenue schools typically receive the highest payouts, which hinders, rather than promotes, competitive balance.¹⁴⁶ As such, the court concluded the NCAA's challenged restraints are not necessary to achieve or maintain current levels of competitive balance.¹⁴⁷

The NCAA's third justification, that restraints on student-athlete compensation promoted the integration of academics and athletics, was supported through evidence from university administrators.¹⁴⁸ They "asserted that paying student-athletes large sums of money could potentially 'create a wedge' between student-athletes and others on campus."¹⁴⁹ The district court concluded that some limitations to student-athlete compensation may assist in integrating student-athletes into the "academic communities of their schools, which may in turn improve the schools' college education product."¹⁵⁰

The NCAA's final justification, which was rejected by the district court, noted that the challenged restraints allow institutions to increase the number of opportunities available to institutions and student-athletes to participate in FBS football and Division I basketball, which in turn increases the number of games that can be played.¹⁵¹ Again, the district court rejected this justification for two main reasons. First, evidence was presented to show that member-institutions have increasingly sought greater autonomy from the NCAA to enact their own rules.¹⁵² Second, because current Division I institutions and conferences do not subsidize non-FBS

¹⁴² NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984).

¹⁴³ *Id.*

¹⁴⁴ *O'Bannon*, 7 F. Supp. 3d at 978.

¹⁴⁵ *Id.* at 978-79 (Dr. Mark Emmert conceded that it is "not the [NCAA's] mission to . . . try and take away the advantages of a university that's made a significant commitment to facilities and tradition and all of the things that go along with building a program.").

¹⁴⁶ *NCAA v. Bd. of Regents*, 468 U.S. at 119.

¹⁴⁷ *Id.*

¹⁴⁸ *O'Bannon*, 7 F. Supp. 3d at 980.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1003-04.

¹⁵² *Id.* at 1004.

football or non-Division I basketball, it is difficult to make the connection that the restraints to student-athlete compensation allow non-FBS football or non-Division I basketball schools the ability to join the highest divisions.¹⁵³

C. Less Restrictive Alternatives to NCAA Compensation Rules

After a determination that two of the procompetitive justifications offered by the NCAA sufficiently supported an inference that some restraints on student-athlete compensation may provide procompetitive benefits,¹⁵⁴ the burden shifted back to the plaintiff to provide less restrictive alternatives to achieve the same procompetitive effects.¹⁵⁵ The district court concluded that the plaintiffs provided two less restrictive alternatives that still allowed the NCAA to achieve its stated procompetitive goals.¹⁵⁶ The first less restrictive alternative suggested that the NCAA could allow FBS football and Division I basketball schools to award stipends to student-athletes up to the full cost of attendance, as determined by NCAA bylaws and individual member-institutions, to make up for any gaps in the traditional grant-in-aid scholarship award.¹⁵⁷ The second less restrictive alternative proposed that the NCAA permit member-institutions to hold in a trust “limited and equal shares of its licensing revenue . . . until after student-athletes leave school.”¹⁵⁸

Because none of the NCAA’s key witnesses, when given the opportunity to respond, provided any contrary evidence to the NCAA’s ability to implement the trust payment system, the court concluded that, along with the first alternative, that the second alternative also provided a less restrictive alternative to compensate student-athletes equal shares of the licensing revenue generated from the use of their names, images, and likenesses.¹⁵⁹ A third proposed alternative that would allow for student-

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1005 (“Because we hold that the NCAA did not establish evidence of sufficient procompetitive benefits, we need not address question of whether the plaintiffs were able to show that comparable procompetitive benefits could be achieved through viable, less anticompetitive means.” (citing *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998)).

¹⁵⁵ *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004); *see also* *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (2001) (“As part of their burden to show the existence of less restrictive alternatives, however, plaintiffs must also show that ‘an alternative is substantially less restrictive and is virtually as effective in serving the legitimate objective without significantly increased cost.’”); *see also* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984) (“Not only do plaintiffs bear the burden at this step, but the Supreme Court has admonished that we must generally afford the NCAA “ample latitude” to superintend college athletics.”); *see also* *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) (“Courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics.”).

¹⁵⁶ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 982-84 (N.D. Cal. 2014).

¹⁵⁷ *Id.* at 982

¹⁵⁸ *Id.* at 983.

¹⁵⁹ *Id.*

athletes to receive money for endorsements was not determined to offer a less restrictive way for the NCAA to achieve its stated procompetitive goals.¹⁶⁰ This alternative would threaten the NCAA's ability to protect student-athletes from the "commercial exploitation."¹⁶¹

Since the plaintiffs did offer two less restrictive alternatives, Judge Wilken entered an injunction prohibiting the NCAA from enforcing rules that do not allow member-institutions to offer FBS football or Division I men's basketball recruits a share of the revenue generated from the use of their names, images, and likenesses up to the cost of attendance.¹⁶² The rationale behind the ruling is that the rules prohibiting student-athletes from receiving any compensation for the use of their names, images, and likenesses violated Section I of the Sherman Act as they restrained "price competition among FBS football and Division I basketball schools, as suppliers of the unique combination of educational and athletic opportunities . . ." ¹⁶³ Elite football and basketball recruits sought to attend these institutions, which restrained trade in the market where the schools competed "to acquire recruits' athletic services and licensing rights."¹⁶⁴ Not only did the NCAA's procompetitive justifications not justify the restraint, they could be achieved through less restrictive means.¹⁶⁵

D. O'Bannon on Appeal and Going Forward

On appeal, only the less restrictive alternative of awarding student-athletes a stipend up to the cost of attendance was upheld.¹⁶⁶ NCAA president, Dr. Mark Emmert, as well as other NCAA witnesses, testified that "raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism."¹⁶⁷ While the court noted that courts should not use antitrust law to make marginal adjustments to broadly reasonable market restraints,¹⁶⁸ it was satisfied by the evidence and testimony from the NCAA, which stated that student-athletes remain amateurs "as long as any money paid to them goes to cover legitimate educational expenses."¹⁶⁹ In regards to the second less restrictive alternative offered by the plaintiffs, the Ninth Circuit concluded that the district court "clearly erred in finding it a viable alternative" to allow student-athletes to receive cash payments, such as those in a trust available following

¹⁶⁰ *Id.* at 984.

¹⁶¹ *Id.*

¹⁶² *O'Bannon*, 7 F. Supp. 3d at 1008.

¹⁶³ *Id.* at 1007.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

¹⁶⁷ *Id.* at 1075.

¹⁶⁸ *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1982) (showing that defendants are "not required to adopt the least restrictive" alternative).

¹⁶⁹ *O'Bannon*, 802 F.3d at 1075.

graduation, unrelated to educational expenses.¹⁷⁰ It reasoned that a “rule permitting schools to pay students pure cash compensation [with a \$5,000 cap]” cannot be as effective as not paying them, which is “precisely what makes them amateurs.”¹⁷¹ However, it seems as if the Chief Judge Thomas’ dissent is more compelling. In the dissent, Chief Judge Thomas notes inconsistencies in NCAA rules that allow FBS football players to receive Pell grants in excess of their cost of attendance figure and Division I tennis recruits to earn up to \$10,000 per year in prize money from athletic events.¹⁷² While the \$5,000 cap to the cash compensation alternative seemed fairly arbitrary¹⁷³, overall, the second less restrictive alternative should have also been upheld.¹⁷⁴ The evidence provided the district court with enough information to make a determination. On appeal, the court reviews the lower court’s determinations for clear errors, while being significantly deferential to the district court’s findings.¹⁷⁵ It does not appear that the Ninth Circuit followed set precedent.

It should be noted that since the beginning of the O’Bannon litigation, the NCAA and member-institutions have implemented the less restrictive alternative that awards stipends to student-athletes up to the full cost of attendance.¹⁷⁶ Each member-institution calculates cost of attendance figures and has the opportunity to provide aid to its student-athletes up to the institutional cost of attendance.¹⁷⁷ So, while failing to completely grant student-athletes legal protection to license rights to their names, images, and likenesses to third parties,¹⁷⁸ the impact of the *O’Bannon* decision and subsequent appeal was pioneering to the extent that it was among the first to recognize that certain restraints on the NCAA’s student-athlete

¹⁷⁰ *Id.* at 1076 (agreeing with the district court regarding the NCAA’s two legitimate procompetitive justifications served by the NCAA’s current rules: (1) “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism” and (2) “integrating academics and athletics.” However, since amateurism is integral to the NCAA’s mission, paying student-athletes even a small amount for use of their names, images, and likenesses, is not “virtually as effective for that market as being an amateur.” Additionally, the only evidence before the district court contemplated the difference between the effects of small payments versus large payments and not whether consumer demand would be affected by paying student-athletes.).

¹⁷¹ *Id.*

¹⁷² *Id.* at 1080.

¹⁷³ *Id.* at 1076 (the cap was offered as a fairly offhand comment by an NCAA witness. The NCAA witness, an expert on the issue of whether paying college athletes will negatively impact consumer demand, mentioned that he was not prepared to “opine on whether pure cash compensation, of any amount, would affect amateurism.”).

¹⁷⁴ *Id.* at 1083.

¹⁷⁵ *United States v. Ironworkers Local 86*, 443 F.2d 544, 549 (9th Cir. 1971); *see also* *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 848-49 (9th Cir. 2004).

¹⁷⁶ Steve Berkowitz & Andrew Kreighbaum, *College Athletes Cashing in With Millions in New Benefits*, USA TODAY SPORTS (Aug. 19, 2015, 4:05 PM), <http://www.usatoday.com/story/sports/college/2015/08/18/ncaa-cost--attendance-meals-2015/31904839/>.

¹⁷⁷ *Id.*

¹⁷⁸ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014).

compensation model may violate Section I of Sherman Act.¹⁷⁹ It established a limited free market for student-athlete services and legal precedent for future NCAA antitrust challenges.¹⁸⁰ The NCAA, just like other business entities, must continue to find innovative ways to restructure its compensation model to keep up with the times and society or risk being eliminated and replaced by a more “progressive system.”¹⁸¹

V. POSSIBLE ALTERNATIVES TO NCAA’S CURRENT PROHIBITION ON COMPENSATION BASED ON THE USE OF STUDENT-ATHLETE’S NAMES, IMAGES, AND LIKENESSES

Historically, athletic scholarships have only provided student-athletes with enough aid to cover tuition and fees, room and board, and course-related books. The scholarships did not cover the additional cost of attendance figures determined by each university’s financial aid office. Aided by the *O’Bannon* decision, the NCAA and participating universities’ administrations made strides to attempt to quell critiques of their organizations by implementing an additional cost of attendance stipend. This stipend provides student-athletes with the difference between university cost of attendance figures and the historical amount given for athletic scholarships. Critics of providing the additional amount up to the cost of attendance have lamented that this additional amount will provide unfair recruiting advantages.¹⁸² In response to the criticisms, advocates respond that while some universities might have cost of attendance amounts well above average, it is important to note that individual athletic departments do not control the cost of attendance figures and therefore cannot arbitrarily provide more money in hopes of luring top recruits.¹⁸³

A. Allowing the Free Market to Reign Supreme

Some advocates for NCAA reform suggest that reform efforts are stunted by the misperception that since the majority of student-athletes do not end up playing professionally, they should not ask for compensation beyond that provided by a scholarship. However, it could also be argued that under proposed models, a greater percentage of student-athletes should

¹⁷⁹ Marc Edelman, *The District Court Decision in O’Bannon v. NCAA: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2363 (2014).

¹⁸⁰ *Id.*

¹⁸¹ Ray Yasser, *A Comprehensive Blueprint For the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 123 (1993).

¹⁸² Audrey C. Sheetz, *Student-Athletes vs. NCAA Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 882-83 (2016).

¹⁸³ See Jon Solomon, *Cost of attendance results: The chase to pay college players*, CBS SPORTS, <http://www.cbssports.com/collegefootball/writer/jon-solomon/25275500/cost-of-attendance-results-the-chase-to-legally-pay-college-players> (last visited May 4, 2016).

be compensated based on their current value to the institution and not their potential value as a professional athlete. By allowing market forces to work, the star quarterback on the national championship winning football team could sign an exclusive deal with Huntington Bank or whatever sponsor they choose. If the school chooses, it could also pay the quarterback, despite not being required to.

Critics of this model suggest that major athletic departments such as Ohio State and Alabama will benefit from the proposed model. However, these institutions are already benefitting from the current model largely because of their ability to generate revenue, their large alumni bases, and their ability to attract top tier recruits.

B. Emulating the Olympic Model with the NCAA

Many NCAA critics have advocated for the NCAA to implement the so-called Olympic model. In addition to providing an athletic scholarship, college athletes would receive money based on individual deals, such as endorsements or autograph signings. This model would allow athletes to receive whatever the outside market bears benefit while the NCAA would keep its broadcasting and licensing revenue without having to compensate players. Criticisms have been leveled at the Olympic model as rogue boosters could set up fake endorsement deals to funnel money to players. While this is possible, establishing a clearinghouse to confirm the eligibility of certain companies to provide commercial opportunities to student-athletes would provide a starting place. Companies that are currently NCAA or university sponsors have already been vetted and could begin providing sponsorship opportunities to student-athletes.

C. Hybrid Solution Allowing Free Market Forces to Interact with Limitations

Another possible solution to the NCAA's no-pay model that has gained the most traction is a hybrid model between the Olympic model and the free market model that restricts the timing of when a student-athlete is allowed to receive the compensation. So, just as in the Olympic model, student-athletes would be able to receive compensation based on individual deals. However, unlike in the Olympic model, institutions would also be able to compensate student-athletes above and beyond the athletic scholarship, if they chose to do so. Additionally, the student-athlete would not be able to receive the compensation until after he or she graduates or no longer competes for the university. Until that point, the compensation would be put in a trust, established by the university, for the student-athlete. Upon graduation or the termination of eligibility, the student-athlete can withdraw those funds and is free to use them as her or she desires. When those funds are withdrawn, the student-athlete is no longer eligible to compete as an amateur in NCAA-sponsored athletic competitions.

With whatever reform measure the NCAA implements, it must continue to evolve. The change from the old BCS bowl system to a playoff system shows some of the willingness of the organization to become more progressive.¹⁸⁴ However, the switch from the BCS bowl system to the football playoff system also had the ability to be a more “wildly successful commercial entity” because of the perception that it was better than its predecessor¹⁸⁵ and because of the additional revenue from broadcasting rights and sponsorship opportunities.¹⁸⁶ These additional revenue streams drive up the payouts given to “Power Five” conferences meeting NCAA standards.¹⁸⁷ This additional revenue can assist in offsetting the costs of implementing a compensation model that eliminates unreasonable restraints on student-athletes’ ability to be compensated for the use of their name, image, and likeness.

VI. CONCLUSION

As exhibited by the *O’Bannon* decision, there is currently no unanimously satisfactory solution to address the NCAA’s current reluctance of compensating student-athletes. Through their performances on the playing field, major college football and basketball student-athletes are generating millions of dollars for institutions around the country. The NCAA, individual schools and conferences, marketing and broadcasting executives, and athletics directors and coaches, among others, are consistently becoming wealthier at the expense of student-athletes. If the NCAA wishes to continue operating without continuously being inundated with antitrust litigation, then it must continue to develop internal reform measures as alternatives to the current student-athlete compensation restrictions.

While the general public may want to believe in the fact that student-athletes play “for the love of the game,” the NCAA should no longer be able to hide behind the theory of amateurism in order to avoid having to compensate student-athletes while also setting record profit and revenue numbers. Many critics of the current NCAA model note that the NCAA will not voluntarily alter its model. Those invested in the model have to either be willing or forced to change the model. Whether that means that the NCAA and member institutions will need to uncover additional revenue

¹⁸⁴ Jack Wilkinson, *Bowl Restructuring Appears Inevitable Meeting in Atlanta Addresses Issue, But Football Title Playoff Not Likely*, Atlanta Const., May 23, 1994, at D2.

¹⁸⁵ Jacob Pramuk, *Playoffs Are a Revenue Bonanza for College Football*, NBC NEWS (Jan. 21, 2015, 2:42 PM), <http://www.nbcnews.com/business/business-news/playoffs-are-revenue-bonanza-college-football-n277641>.

¹⁸⁶ *Id.* (ESPN paid \$7.3 billion over 12 years to secure college Football Playoff broadcasting rights, tripling the annual fee ESPN paid during the last four years of the BCS. Other sponsors see the potential for increased exposure highlighted by Dr. Pepper’s \$35 million commitment to become a championship partner).

¹⁸⁷ *Id.*

streams or allow for non-athletic department entities to pay student-athletes, reform is needed.

Starting with the *O'Bannon* litigation, it appears that forced reform from the NCAA could be on the horizon. Public perception, court decisions, current and former student-athletes, and NCAA reform advocates are gaining ground in their quest to change NCAA no-compensation rules. It appears evident that the NCAA will no longer be able to skirt around antitrust regulations by arguing the theory of amateurism to avoid allowing student-athletes to be compensated.