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The NCAA and the Student-Athlete: Reform is on the Horizon

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COMMENTS

THE NCAA AND THE STUDENT-ATHLETE: REFORM IS ON THE HORIZON

I. INTRODUCTION

In late 1905, sixty-two colleges and universities became the charter members of the Intercollegiate Athletic Association of the United States.¹ In 1906, the organization took the name the National Collegiate Athletic Association (the “NCAA”).² The NCAA was established “to protect young people from the dangerous and exploitive athletics practices of the time.”³ Today, the organization regulates some 400,000 student-athletes and boasts around 1000 member institutions.⁴ The NCAA, a voluntary organization, is the “oldest, wealthiest, and most powerful of the national associations, governing the largest, richest, and most popular sports programs in higher education.”⁵ The organization established it-

1. *History*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last visited May 1, 2012).

2. *Id.*

3. *Id.*; see ROGER I. ABRAMS, *SPORTS JUSTICE: THE LAW AND BUSINESS OF SPORTS* 67 (2010). See generally Ronald J. Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, in L. & AMATEUR SPORTS 161, 162 (Ronald J. Waicukauski ed., 1982) (“The NCAA was formed in 1906 to regulate and supervise college athletics throughout the United States. It is a voluntary association dedicated to the objective, as described in its first constitution, of maintaining athletic activities ‘on an ethical plane in keeping with the dignity and high purpose of education.’ Almost all the major colleges and universities in the United States are members. There are other national associations regulating intercollegiate sports, including the National Association of Intercollegiate Athletics (NAIA), composed of approximately 500 small four-year colleges and universities, the National Junior College Athletic Association (NJCAA), with a membership of about 600 two-year colleges in its men’s division, and the Association of Intercollegiate Athletics for Women (AIAW), controlling women’s sports for almost 800 colleges and universities.”).

4. *Who We Are*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are> (last visited May 1, 2012).

5. Waicukauski, *supra* note 3, at 162.

self on the principle of protecting the amateur student-athlete and has prided itself on that notion ever since.⁶ The NCAA is a prominent organization and understandably so; each year, millions of Americans occupy sofas and bar stools to watch college football and college basketball games. Society highly values these “amateur” athletes,⁷ and millions of young adults have participated as student-athletes at NCAA member institutions over the years.

The term “student-athlete” was designed by the NCAA to preserve the amateur ideal⁸—that the student-athlete competed in athletics for his or her own benefit and to increase his or her own physical and moral fortitude.⁹ But the NCAA crafted the term to provide an easy defense against workers’ compensation claims.¹⁰ This term might in fact be a complete falsehood. Student-athletes, ideally, should be attending class and earning decent grades while enjoying the opportunity to play the sport they love. In reality, these student-athletes are arguably far more athlete than student.¹¹ Although the NCAA rules mandate that student-

6. *History*, NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 1.

7. This comment focuses primarily on Division I football and men’s basketball student-athletes because their talents generate the most revenue. See Joe Nocera, *Let’s Start Paying College Athletes*, N.Y. TIMES MAG. (Jan. 1, 2012), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all>.

8. See Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FL. COASTAL L. REV. 459, 600 (2010) (“The NCAA’s exploitation of college athletes for its own commercial gain is egregious when the NCAA justifies such exploitation on the basis that the players are student athletes—a term made up by the NCAA that has no legal meaning.”); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/20/the-shame-of-college-sports/8643/>.

9. NAT’L COLLEGIATE ATHLETIC ASS’N, 2011–12 NCAA DIVISION I MANUAL, § 1.2, at 1 (2011) [hereinafter NCAA MANUAL] (noting that the purpose of the NCAA is “[t]o initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit”).

10. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83–84 (2006) (noting that the NCAA was “[s]tunned” by the Colorado Supreme Court’s finding in *University of Denver v. Nemeth*, 257 P.2d 423, 430 (Colo. 1953), that Ernest Nemeth, a football player at the University of Denver, was an employee, and responded by creating the term “student-athlete” and subsequently requiring its exclusive use).

11. See *id.* at 135 (“On the contrary, most of them are inadequately prepared for academic inquiry and, once enrolled, face enormous obstacles to fully experiencing the intellectual aspect of university life.”).

athletes may only be required to participate in athletic activities for twenty hours per week,¹² student-athletes attend hours of “voluntary” workouts and spend their time on other activities that are not actually voluntary.¹³ The student-athlete spends countless hours training, watching film, participating in workouts, and traveling to and from games.¹⁴ These “students” generate billions of dollars for the NCAA, the universities, and third parties, such as athletic apparel and equipment companies and television networks.¹⁵ The businessmen and businesswomen are not concerned with the student-athletes’ academic performance but rather with their business model. Academic goals are easily disregarded when the conversation turns to money and profits.¹⁶

Yet the student-athlete sees none of the money that exchanges hands as a result of his or her performance. For instance, big college football teams, including the University of Texas, the University of Florida, the University of Michigan, and Pennsylvania State University, bring in between “\$40 million and \$80 million in profits a year, even after paying coaches multimillion-dollar salaries.”¹⁷ The student-athlete is granted a scholarship that often fails to cover the true cost of living, and thus he or she frequently lives below the poverty line.¹⁸ The student-athlete is exploited.

12. NCAA MANUAL, *supra* note 9, § 17.1.6.1, at 238 (“A student-athlete’s participation in countable athletically related activities . . . shall be limited to a maximum of four hours per day and 20 hours per week.”).

13. See, e.g., Athletics Compliance Office, *Countable Hours*, U. NOTRE DAME, http://ncaacompliance.nd.edu/countable_hours.shtml (last visited May 1, 2012) (showing that non-countable athletically related activities include meetings, study hall, training room activities, travel to and from the competition, voluntary sport-related activities (initiated by student-athlete), training banquets, fundraising, community service, or other public relation activities including media activities).

14. See McCormick & McCormick, *supra* note 10, at 99–101.

15. See *id.* at 76.

16. See *id.* at 136 (“In favoring commercial success over academic standards, colleges and universities have minimized academic entrance requirements for athletes, weakened academic standards, diluted curricula, assigned responsibilities to athletes that would conflict with any meaningful academic program, and stood by as wave after wave fails to graduate or even to learn.”).

17. Branch, *supra* note 8; Cork Gaines, *Penn State’s Football Program Brings in \$50 Million Every Year*, BUS. INSIDER, (Nov. 9, 2011), <http://www.businessinsider.com/penn-states-football-program-worth-50-million-2011-11> (noting that Penn State’s football program “produced \$70.2 million in revenue and a profit of \$50.4 million. . . [and] [o]nly the University of Texas and the University of Georgia . . . made more money” from football programs in 2009–2010.).

18. RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT’L COLLEGE PLAYERS ASS’N, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT* (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>; McCormick & McCormick, *supra* note 10,

Scandals have recently crowded the newspapers and sports blogs with stories of one football player or another selling his own jersey for a profit or accepting money from a booster.¹⁹ These scandals are unnerving because the NCAA's bylaws strictly prohibit a student-athlete from profiting from his or her athletic performance.²⁰ But, as distinguished civil rights writer Taylor Branch notes, the "real scandal is not that players are getting illegally paid or recruited"—it is that the NCAA's amateurism and student-athlete principles are "legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes."²¹ It is hard to imagine that the NCAA's founding revolved around protecting student-athletes when those same athletes do not receive a penny for their efforts and lack basic rights under the NCAA's bylaws. In turn, the universities they represent on the field receive millions of dollars in revenue based on their athletic talents.²²

This comment examines the NCAA's rules and regulations of student-athletes and explores the possibility that the NCAA's existence, under its current bylaws and manual, is at least immoral and likely unlawful. Additionally, this comment analyzes the idea that the NCAA needs not only internal restructuring but judicial and possibly congressional intervention in order to truly protect young athletes' financial, academic, and basic human interests. Part II of this comment explores the historical development of the NCAA and the current relationship between the NCAA and the student-athlete. Part III discusses the fundamental unfairness in the NCAA's bylaws, which results in the denial of certain rights to student-athletes. Part IV discusses whether student-athletes should be compensated and how compensating student-athletes might help create a fairer system. Part V examines how the NCAA might reform through self-regulation, or more likely, be-

at 78–79 ("Indeed, many full-scholarship athletes live below the poverty line.").

19. See, e.g., Mike Wagner et al., *Significant Inquiry by NCAA and OSU Under Way for Pryor, Sources Say*, COLUMBUS DISPATCH, May 30, 2011, available at <http://www.dispatch.com/content/stories/sports/2011/05/30/zzz.html> (discussing the NCAA investigation into Ohio State University student-athlete Terrelle Pryor allegedly selling memorabilia for cars and tattoos).

20. See NCAA MANUAL, *supra* note 9, § 12.1.2.1, at 63–65.

21. Branch, *supra* note 8.

22. See Steve Berkowitz & Jodi Upton, *Money Flows to College Sports; Spending Up Amid Schools' Right Times*, USA TODAY, June 16, 2011, at 1A (noting that "[m]ore than \$470 million in new money poured into major college athletic programs" in 2010).

cause of government or judicial intervention. Part VI concludes by addressing possible future claims against the NCAA and the means by which reform may come to fruition.

II. THE "STUDENT-ATHLETE"

A. *The Birth of the NCAA and the Student-Athlete*

The NCAA, under its current name, began in 1910 and grew to become the country's main "regulatory and enforcement body for intercollegiate athletics."²³ With amateurism as the goal, the organization put certain principles into the bylaws to protect the student-athlete.²⁴ As a former NCAA employee noted, the organization's "[f]ather was football and its mother was higher education."²⁵ She observed that the merger between football and higher education was an "almost unintentional union," and it was "brought about in part by the proclivity of students to play games."²⁶

Even prior to the 1920s, the lines seemed blurred between the amateur status of players and the role of students as athletes.²⁷ In 1929, the Carnegie Foundation for the Advancement of Teaching delivered to the NCAA a report titled *American College Athletics*.²⁸ The study focused on two main issues: "commercialism and a negligent attitude toward the educational opportunity for which a college exists."²⁹ The study commented on the problems with the athletic programs. It found that the programs themselves placed "heavy burdens on the athletes"; furthermore, athletes faced "disproportionate time requirements," and were "isolat[ed] from the rest of the student body."³⁰ Moreover, the report noted that the "highly compensated 'professional' coaches" focused primarily on the sport instead of on the college education of their players.³¹ The

23. JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 43, 55 (2006).

24. *Id.* at 55.

25. *Id.* at 42 (internal quotation marks omitted).

26. *Id.* (internal quotation marks omitted).

27. See *id.* at 42–43 (noting that the union of sports and higher education was "beset with cross-purposes and conflicting principles").

28. *Id.* at 65 (internal quotation marks omitted).

29. *Id.* (internal quotation marks omitted).

30. *Id.*

31. *Id.* at 65–66.

lengthy report discussed "sportsmanship, eligibility, amateurism . . . and worsening professionalism, health questions, and the 'sorry role' of institutional alumni and excessive publicity."³² Overall, the research exposed "the record of excesses of intercollegiate athletics" while offering hopeful suggestions for a future that would feature "a restoration of traditional amateur values and practices."³³ Although these findings were made over eighty years ago, the same conclusions might be drawn regarding the state of the NCAA today.

As the NCAA has grown and evolved over the last century, the findings in the Carnegie Foundation report remain incredibly poignant. The current NCAA climate reveals that athletes, coaches, parents, and fans alike still grasp onto the hopeful ideal of traditional amateur values, yet there is clear evidence that the NCAA fails to protect student-athletes.³⁴ The NCAA's bylaws are the code that student-athletes and member universities must follow if they want to be a part of the million-dollar industry.³⁵ Yet student-athletes are not really a part of the industry at all. Division I men's basketball and men's football athletes provide the entertainment, but they remain outsiders to the contracts, endorsements, and financial gain. Although "big money" sports comprise a small percentage of NCAA athletes, the NCAA derives ninety percent of its revenue from this one percent of the college athletes.³⁶ The NCAA, universities, companies that provide equipment and apparel to the universities, and television networks gain astronomically from the student-athlete and his or her performance, but the student-athlete remains an outsider to the system. The athlete is continuously exploited by the NCAA's rules and regulations.

32. *Id.* The report also discussed that the "subsidized college athlete of today . . . connives at disreputable and shameful practices for the sake of material returns and for honors falsely achieved." *Id.* at 66. (internal quotation marks omitted).

33. *Id.* at 67.

34. *See, e.g.*, Branch, *supra* note 8 (observing that "two of the noble principles on which the NCAA justifies its existence—'amateurism' and the 'student-athlete'—are cynical hoaxes" in place to "exploit the skills and fame of young athletes").

35. *See* NCAA MANUAL, *supra* note 9, § 1.3.2, at 1.

36. Branch, *supra* note 8.

B. *Today's NCAA and the "Student-Athlete"*

In June 2010, the NCAA completed a four-year investigation of Reggie Bush, formerly a star running back for the University of Southern California'.³⁷ The NCAA found that "Bush and his family received hundreds of thousands of dollars in gifts" from two sports agents.³⁸ Bush's actions violated the NCAA's rules, which prohibit compensation of student-athletes and prohibit football players from hiring a sports agent until the student declares for the NFL draft.³⁹ In September 2010, Reggie Bush forfeited the Heisman Trophy, which is awarded to the most outstanding player in college football.⁴⁰ He did so in response to reports that the Heisman Trophy Trust considered stripping him of the trophy because NCAA violations made him technically ineligible to play during the 2005 season.⁴¹

The NCAA also investigated Cam Newton, Auburn University's star quarterback, regarding a pay-for-play allegations that his father's attempted to sell Newton's services to a college for \$180,000.⁴² The NCAA concluded Newton did not violate the NCAA's rules after completing an intensive thirteen-month investigation.⁴³ Another scandal included twenty-eight Ohio State University ("OSU") football players.⁴⁴ These student-athletes traded autographs, jerseys, and other team memorabilia in exchange for cash and tattoos.⁴⁵ The incident also included former OSU Head Coach Jim Tressel.⁴⁶ Article 10.1 (d) of the NCAA bylaws provides that unethical conduct by a prospective or enrolled athlete may include, but is not limited to, "[k]nowingly furnishing or knowingly influencing others to furnish the NCAA or the individual's in-

37. Mark Yost, *Schools for Scandals*, WALL ST. J., Sept. 14, 2010, at D5.

38. *Id.*

39. *Id.*

40. Bill Pennington, *Bush, Ineligible for '05, Returns His Heisman*, N.Y. TIMES, Sept. 15, 2010, at B15.

41. Chris Dufresne, *Reggie Bush Gives Back the Heisman Trophy*, L.A. TIMES, Sept. 15, 2010, at C1.

42. Pete Thamel, *Auburn Is Cleared in Investigation into Newton*, N.Y. TIMES, Oct. 13, 2011, at B17.

43. *Id.*

44. Teddy Greenstein, *Cloud of Disgust; Buckeyes Coach Steps Down amid Ever-widening Charges of Serious NCAA Violations*, CHI. TRIB., May 31, 2011, at C1.

45. *Id.*

46. *Id.*

stitution false or misleading information concerning an individual's involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation."⁴⁷ This provision means that the players must cooperate with NCAA investigators, even if state or federal law does not require it. In the OSU case, Tressel was suspended for failing to bring forward to OSU or the NCAA the matter of his players selling memorabilia.⁴⁸

These scandals demonstrate the corruption within the system. The NCAA's compliance officers and investigations are a law unto themselves. The system needs reform for a number of reasons, including the functionality of its bylaws as well as how the student-athletes are treated as an unpaid labor force. The NCAA's bylaws are very specific rules enforcing a system where the student-athlete is essentially powerless. Rules are rules, of course, and the NCAA is at least called a "voluntary organization."⁴⁹ But a student-athlete competing week after week while generating huge profits for the NCAA, television networks, and universities must be treated with at least a certain amount of respect. After all, it is the student-athlete who produces all of the excitement. A football player who brings thousands of fans to the stadium and even more to the television, equating to millions of dollars in ticket sales and contract deals, cannot earn a single dollar based on his likeness, the sale of a replica jersey, or his autograph without losing his student-athlete status and, consequently, his scholarship.⁵⁰

It would seem that these sports programs would be financial powerhouses based on the pure volume of fans and media attention. Yet according to the NCAA, in 2010 just twenty-two schools had athletic departments that turned a profit.⁵¹ For example, the

47. NCAA MANUAL, *supra* note 9, § 10.1(d), at 45.

48. Greenstein, *supra* note 44.

49. NCAA MANUAL, *supra* note 9, § 4.02.1, at 18.

50. See, e.g., Ben Cohen, *The Case for Paying College Athletes—The Issue Is Gaining Momentum, but Nobody Knows How to Do It*, WALL ST. J., Sept. 16, 2011, at D10 (discussing that television income from athletic performances totals over \$14 million while a student-athlete at the University of Miami was suspended for a football game for accepting benefits totaling \$140). See generally NCAA Manual, *supra* note 9, § 12, at 61–62 (discussing that amateur status requires lack of compensation).

51. Libby Sander, *22 Elite College Sports Programs Turned a Profit in 2010, but Gaps Remain, NCAA Reports Says*, CHRON. OF HIGHER EDUC., June 15, 2011, <http://chronicle.com/article/22-Elite-College-Sports/127921/>; Berkowitz & Upton, *supra* note 22 ("The NCAA, in an annual report on Division I finances released Wednesday, notes that the median net surplus for the 22 self-sufficient programs was about \$7.4 million and the median

University of Oregon athletic equipment generated \$122,394,483 in total revenue while its total expenses amounted to \$77,856,232—providing a profit of \$41,853,109.⁵² However, these numbers may be unreliable. According to Walter Byers, the former Executive Director of the NCAA, “[t]he accounting variables in college athletics make it difficult if not impossible to know whether a big-time sport pays for itself, much less whether it generates net receipts to finance deficit sports. Actual cost accounting, in the sense of a hard-nosed business analysis, isn’t done.”⁵³ It is worth noting that the history, English, biology, and other educational departments at colleges and universities across the country do not operate at a profit.⁵⁴ Should athletic departments be expected to turn a profit? And even if they do generate a profit, is there still something inherently wrong in allowing student-athletes to receive some sort of payment based on their talents? It appears that the goal for big time football and men’s basketball programs is profit, unlike, for instance, the goals of the history department. The public involvement in college sports (unlike college academics) makes men’s basketball and football programs complex and seemingly far more important financially than the academic programs. The NCAA itself made \$845.9 million in revenue in 2010–2011.⁵⁵ The money surrounding college athletics makes it evident that the student-athletes are in the most unfortunate position of those involved. The way universities treat the student-athletes in the current system is simply unworkable despite the amateurism goals that the NCAA once represented. Student-athletes are forced to take part in an unfair system perpetuated by the NCAA rules and regulations. The NCAA’s rules and regulations have become a self-protection measure for the NCAA rather than carefully thought out rules to protect the student-athlete.

net deficit for the other 98 major programs was about \$11.3 million. The gap of nearly \$19 million is up from \$15.6 million in 2009.”)

52. Berkowitz & Upton, *supra* note 22.

53. ANDREW S. ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 149 (1999) (quoting Walter Byers) (internal quotation marks omitted). “Even the best and most regularly collected of the data we examined (the NCAA Surveys) are fraught with problems of definition of elements, response bias, lack of weighting, and misleading interpretations.” *Id.* (citation omitted) (internal quotation marks omitted).

54. *Id.* at 150.

55. *Revenue*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/revenue> (last updated Jan. 17, 2012).

Current data suggest that the financial aid permitted under the NCAA rules sometimes runs short anywhere from \$200 to over \$10,000 per athlete.⁵⁶ There is a clear disjunction between reality and the way that the NCAA currently operates. The NCAA should consider a number of reforms in order to become an organization focused on the protection of student-athletes instead of the million-dollar contract.

The NCAA has received, and continues to receive, criticism over the organization's treatment of players and the organization's massive profits. The NCAA established itself as an organization committed to protecting college athletes from the dangers and injuries attributed to playing sports at the collegiate level, but more recently the NCAA has been condemned for how few protections the student-athlete actually receives. "Oppressive NCAA laws" are the main issue.⁵⁷

III. THE NCAA'S BYLAWS

The *2011–2012 NCAA Division I Manual* is 426 pages long.⁵⁸ The bylaws cover a wide range of student-athlete activities, but there are certain provisions that specifically deny the student-athlete general rights and treat the student-athlete as solely the "entertainment product" rather than a protected participant in college athletics.⁵⁹

A. *The Restitution Rule*

The NCAA's bylaw referred to as the "Restitution Rule" pertains to student-athletes who are ineligible under the NCAA rules but allowed to participate in competition based on a court order or injunction.⁶⁰ Under the rule, if the injunction is vacated or reversed, the NCAA may take action against the student-athlete's

56. *NCPA Scholarship Shortfall Search; NCAA Forces College Amenities to Pay*, NAT'L COLLEGE PLAYERS ASS'N, <http://www.ncpanow.org/research?id=0018> (last visited May 1, 2012); see McCormick & McCormick, *supra* note 10, at 78–79 ("Indeed, many full-scholarship athletes live below the poverty line."); Irvin Muchnick, *Welcome to Plantation Football*, L.A. TIMES MAG., Aug. 31, 2003, at I14.

57. WALTER BYERS, UNSPORTSMANLIKE CONDUCT 365 (1995).

58. See NCAA MANUAL, *supra* note 9, at 426.

59. See, e.g., *id.*, § 12.3, at 70.

60. *Id.* § 19.7, at 326.

college.⁶¹ This rule essentially undermines the judicial process by allowing the NCAA to punish student-athletes and member institutions following a matter's final ruling.

As noted by law professors Matthew J. Mitten and Timothy Davis, "The actual or threatened application of rules of restitution provides a strong disincentive for schools to allow student-athletes to participate in athletic competition even when athletes have prevailed in litigation against a sports governing body at the trial court level."⁶² The rule allows the NCAA to intimidate schools into following the NCAA's bylaws and constitution, instead of a court order.⁶³ The Restitution Rule effectively is "the same as if the student-athlete had been required, as a condition of participation in NCAA athletics, to sign a waiver of recourse to judicial review of NCAA eligibility decisions."⁶⁴ This practice results in keeping member schools from enforcing judicial court orders and injunctions.⁶⁵

The rule was explored in the Ohio case, *Oliver v. NCAA*.⁶⁶ Richard Johnson, the attorney for the student-athlete, followed his participation in the case by writing an extensive law review article on the topic.⁶⁷ He suggests that the Restitution Rule, in its current form, is void as against public policy because the rule "seeks to influence the issuance of an injunction, and then it seeks to overrule the court's appellate bond with one of its own making."⁶⁸ This argument is compelling and indicative of the NCAA's true power to control university action.

61. *Id.* (noting that "if a student-athlete who is ineligible under the terms of the [NCAA] constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take" a number of actions against the university or college the student-athlete attends).

62. Johnson, *supra* note 8, at 568 (quoting Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 146 n.362 (2008)).

63. Stephen F. Ross & S. Baker Kensinger, *Judicial Review of NCAA Decisions: Evaluation of the Restitution Rule and a Call for Arbitration* 7-8 (May 2009) (unpublished manuscript), http://works.bepress.com/stephen_ross/1.

64. *Id.* at 3.

65. Johnson, *supra* note 8, at 501.

66. 920 N.E.2d 203, 208 (Ohio Com Pl. 2009).

67. Johnson, *supra* note 8, at 462-64.

68. *Id.* at 571.

In *Oliver v. NCAA*, Andrew Oliver, a college baseball player, was indefinitely suspended from playing baseball because he was accused, by his former attorneys, of having lawyers present during a meeting with a professional baseball team.⁶⁹ NCAA Bylaw 12.3.2.1 prohibits this activity,⁷⁰ and the NCAA generally prohibits student-athletes from hiring an agent.⁷¹ Oliver took his case to the Ohio courts and won.⁷² An Ohio judge invalidated the NCAA's bylaws that according to Richard Johnson "deprive college athletes of the right to counsel to indirectly regulate attorneys, and to manipulate the judicial system."⁷³ The court held that the bylaw "prohibiting attorney representing a student athlete from being present during contract negotiations between athlete and professional sports organization violated the contractual obligation of good faith and fair dealing."⁷⁴ Johnson also notes that to his knowledge the NCAA "has never found any college athlete to be improperly suspended."⁷⁵ The ruling could have had nationwide implications in granting student-athletes rights. But before Oliver's next suit regarding contract rights was to be heard, the NCAA and Oliver settled the case for \$750,000.⁷⁶ The settlement required Judge Tone, who had invalidated the NCAA bylaws earlier, to vacate his order.⁷⁷

Despite Oliver's success in court, the NCAA continues to maintain the status quo through deep pockets and fearful member institutions. This case is illustrative of the need for a court to mandate the bylaws be changed to provide student-athletes adequate rights. At least one judge has found the student-athlete's claim viable,⁷⁸ so one could conclude that judicial review may be an avenue for student-athletes to access rights they deserve. The Restitution Rule was adopted based on the NCAA's intent "[t]o eliminate references to disciplinary or corrective actions against

69. *Oliver*, 920 N.E.2d at 207; see T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175, 177 (2010).

70. *Id.* (citing NCAA MANUAL, *supra* note 9, § 12.3.2.1, at 70).

71. NCAA MANUAL, *supra* note 9, § 12.3.1, at 70.

72. *Oliver*, 920 N.E.2d at 218–19.

73. *Id.* at 212, 215; Johnson, *supra* note 8, at 461 editor's note.

74. *Oliver*, 920 N.E.2d at 215.

75. Johnson, *supra* note 8, at 468.

76. Lockhart, *supra* note 69, at 178.

77. *Id.*

78. *Oliver*, 920 N.E.2d at 219.

student-athletes.”⁷⁹ But it is clear from *Oliver v. NCAA* that the rule itself denies student-athletes basic due process rights.⁸⁰ The NCAA continues to be unwilling to adopt measures to protect the student and, in this case, even denies a student the right to move forward after a court order.

B. *Scholarship Options and Protecting the Student-Athlete*

The 2011–2012 *NCAA Manual* allows NCAA member institutions to offer one-year renewable scholarships.⁸¹ Recently, the measure changed and now universities may offer a multi-year scholarship, although they are not required to do so.⁸² The former one-year scholarship rule is an example of how the NCAA emphasized the athlete rather than the student. The one-year scholarship, with the option of renewal, benefits the coaches, and even the more current option of providing a multi-year scholarship still does not require coaches to renew offers. If a new coach is brought in because the former coach failed to win enough games, the new coach may decide not to renew a number of scholarships, enabling him to bring in his own players and recruits. Accordingly, universities are far less concerned with the student-athlete’s graduation and are more concerned with championships and the revenues they generate. The American Council on Education has suggested making all the athletic scholarships need-based, which would leave the decision-making process to the financial aid offices, rather than to the coaches’ playbooks.⁸³ Under a need-based model, no athlete would be at the whim of a coach to provide a one-year or multi-year scholarship.

79. Johnson, *supra* note 8, at 487 (internal quotation marks omitted) (noting that the Restitution Rule is a means by which the NCAA prohibits traditional due process rights to student-athletes).

80. The NCAA does not have to provide due process rights to its student-athletes. BRIAN L. PORTO, *THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS* 143 (2012). In *NCAA v. Tarkanian*, 488 U.S. 179 (1988), the Supreme Court held that the NCAA was not a state actor and therefore the NCAA was not required to provide due process. *Id.* at 191, 195–96. This resulted in colleges “still danc[ing] to the NCAA’s tune, and their students and employees continu[ing] to be denied sufficient legal protections in the enforcement process.” *Id.* at 143.

81. NCAA MANUAL, *supra* note 9, § 15.3.1, at 200, § 15.3.3, at 201.

82. Steve Yanda, *NCAA Wrestles With Implications of Stipends for Student-Athletes*, WASH. POST, Feb. 22, 2012, at D06.

83. MURRAY SPERBER, *BEER AND CIRCUS* 34 (2000).

Student-athlete Joseph Agnew attempted to change the one-year scholarship rule through a suit against the NCAA.⁸⁴ He attended Rice University in Texas after accepting an athletic scholarship to play football.⁸⁵ The scholarship was equal to the annual cost of attending Rice.⁸⁶ Unfortunately, Agnew was injured during his second year at Rice and was informed that his scholarship would not be renewed for his junior year.⁸⁷ Agnew “appealed the non-renewal of his scholarship and ultimately ‘receiv[ed] a full year’s tuition despite no longer being a member of the Rice football team.’”⁸⁸ However, Agnew had to pay his own tuition and expenses for his senior year.⁸⁹

Agnew, along with his co-plaintiff Patrick Courtney, subsequently filed suit arguing that the NCAA bylaws created a “price-fixing agreement and restraint between member institutions of the NCAA.”⁹⁰ They challenged two of the NCAA bylaws as unlawful.⁹¹ Agnew and Courtney challenged bylaw 15.3.3.1, which includes the one-year scholarship limit that prohibits NCAA member institutions from offering multi-year athletic based scholarships to student-athletes.⁹² They also challenged the NCAA’s bylaws which cap the number of athletic based scholarships a school can offer per sport per year.⁹³

Ultimately, the court denied Agnew’s request to strike down the NCAA’s rule prohibiting colleges and universities from offering any scholarship longer than a one-year commitment—to be renewed, or not, unilaterally by the school.⁹⁴ This rule in practice means that coaches, who are often concerned only with winning, get to determine which players continue to receive scholarships.

84. *Agnew v. Nat’l Collegiate Athletic Ass’n*, No. 1:11-cv-0293-JMS-MJD, 2011 WL 3878200, at *1 (S.D. Ind. Sept. 1, 2011).

85. *Id.* at *2.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at *1 (internal quotation marks omitted).

91. *Id.*

92. *Id.* (citing NCAA MANUAL, *supra* note 9, § 15.3.3.1, at 200).

93. *Id.* (citing NCAA MANUAL, *supra* note 9, § 15.5.4, at 207).

94. *Id.* at *10.

Essentially, the court sided with the NCAA and found that (1) the plaintiffs failed to plead that there was a relevant market and (2) that the facts were insufficient to show that the NCAA's actions had in fact injured competition as a whole in the relevant market.⁹⁵ But despite the court's finding, it appears the one-year scholarship rule may in fact be an unlawful restraint on the market of college athletes. The thousands of NCAA member schools who participate in recruiting college athletes to play at their particular programs make up this market. A few states have attempted to implement reform to provide multi-year scholarships.⁹⁶ However, such measures then risk the possibility that the NCAA will exclude their athletic programs from competition, which means a loss in revenue.⁹⁷

The NCAA now provides member institutions with the option of offering multi-year scholarships.⁹⁸ In October 2011, the NCAA Division I board of directors approved the multi-year scholarship option which gave NCAA member institutions the option of offering multi-year scholarships to athletes.⁹⁹ This measure did not come from pressure from university presidents, court cases, or other influential sources—the NCAA proposed this rule itself.¹⁰⁰ The member schools attempted to repeal this option in February 2012, but failed to do so.¹⁰¹ The option's opponents were just two votes short to repeal, which is indicative of the member institution's sentiments regarding multi-year scholarships.¹⁰² They hoped to repeal the NCAA's measure under the belief that "coaches were using multi-year grants as a recruiting enticement."¹⁰³ The measure should provide more stability to student athletes; however, because students are still unable to secure an agent to help negotiate and guarantee a scholarship, the option in practice may be less effective than Agnew once argued. The op-

95. *Id.* at *8, *9 n.9.

96. HUMA & STAUROWSKY, *supra* note 18, at 25.

97. *Id.* "The NCAA threatened pro-reform states such as California and Nebraska of the loss of NCAA membership and revenue that would accompany the implementation of these types of changes." *Id.* (citations omitted).

98. Steve Wieberg, *Multiyear Scholarship Rule Narrowly Survives Override Vote*, USA TODAY (Feb. 17, 2012), <http://www.usatoday.com/sports/college/story/2012-02-17/multiyear-scholarships-survives-close-vote/53137194/1>.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.*

tion is the first step, but the NCAA should also provide the ability for students to secure an agent to help negotiate the terms of the scholarship as a contract in order to ensure fairness throughout the process.

This multi-year scholarship will be a significant change from the NCAA's former practices and will hopefully create an environment more protective of student-athletes' academic pursuits. Yet scholarship is still an area where the NCAA seems to fail in its mission to protect student-athletes. Some argue that an athletic scholarship is sufficient compensation for an athlete's performance. A college education certainly is valuable and will pay exponentially upon graduation. But is an athletic scholarship truly compensation? And even if it is, does that validate the scholarship, transfer, and other restrictions that the NCAA imposes?

The IRS has found that "in the absence of an explicit requirement of athletic performance, an athletic scholarship is not regarded as compensation for tax purposes."¹⁰⁴ This finding has been "criticized as 'rather naïve,' since athletic awards 'are made to secure the athlete's services and generally are maintained subject to his participation in college athletics."¹⁰⁵ Although one-year scholarships may now be a thing of the past, if universities are not required to guarantee multi-year scholarships, is this another indication that scholarships are not in fact just "compensation" for an athlete's performance? Additionally, if a student-athlete is unable to negotiate with the assistance of counsel or an agent for a beneficial scholarship guarantee, the rule may be ineffective in truly protecting the student-athlete's academic or athletic pursuits.

C. *Transfer Restrictions*

The NCAA's bylaws also include lengthy and confusing transfer restrictions. They allow a university or college to restrict any player from transferring to another NCAA program.¹⁰⁶ The transfer restriction is outlined in NCAA bylaw 14.5: "Transfer Regula-

104. Waicukauski, *supra* note 3, at 174 (citing Rev. Rul. 77-263, 1977-2 C.B. 47).

105. *Id.* (quoting Richard L. Koplan, *Intercollegiate Authorities and the Unrelated Business Income Tape*, 80 COLUM. L. REV. 1430, 1462 (1980)).

106. See NCAA MANUAL, *supra* note 9, § 14.5, at 1873-82; see, e.g., Jeff Barker, *Asking Fresh Start, Terps QB O'Brien Gets Release*, BALT. SUN., Feb. 14, 2012, at D1.

tions.”¹⁰⁷ Under bylaw 14.5.1, a student-athlete who transfers to a member institution from any college institution must “complete one full academic year of residence . . . at the certifying institution before being eligible to compete for . . . the member institution” unless the student meets the transfer exception requirements.¹⁰⁸ The bylaws allow student-athletes to be eligible for four years, but they must compete within a five-year window.¹⁰⁹ The bylaws do provide a complete exception for a one-time transfer without penalty; however, this exception is available only to students who do not participate in “baseball, basketball, bowl subdivision football or men’s ice hockey.”¹¹⁰ The only other exceptions apply narrowly to a few specific student groups, including the exchange student exception,¹¹¹ the discontinued academic program exception,¹¹² the military service exception,¹¹³ and the international student program exception.¹¹⁴

The NCAA transfer restrictions have caused players and coaches alike to get lost in the NCAA regulations. Todd O’Brien, a former basketball player at St. Joseph’s University (“St. Joe’s”), wrote an article for *Sports Illustrated* describing his experience with the transfer restrictions under the NCAA’s rules.¹¹⁵ O’Brien is an intelligent and athletic twenty-two-year-old who graduated

107. See NCAA MANUAL, *supra* note 9, § 14.5, at 173–82.

108. *Id.* § 14.5.1, at 173; cf. Sarah M. Kinsky, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1586 (2003) (“Practically, then, a student-athlete wishing to use his maximum four years of athletic eligibility can transfer colleges only once.”).

109. NCAA MANUAL, *supra* note 9, § 14.2, at 152, § 14.2.1, at 152 (“A student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program . . .”).

110. *Id.* § 14.5.5.2.10(A), at 179.

111. *Id.* § 14.5.5.2.2, at 178 (“The student is enrolled in the certifying institution for a specified period of time as a bona fide exchange student participating in a formal educational exchange program that is an established requirement of the student-athlete’s curriculum.”).

112. *Id.* § 14.5.5.2.3, at 178 (“The student changed institutions in order to continue a major course of study because the original institution discontinued the academic program in the student’s major.”).

113. *Id.* § 14.5.2.2.5, at 178 (“The student returns from at least 12 months of active service in the armed forces of the United States.”).

114. *Id.* § 14.5.5.2.4, at 178. (“The individual is an international student who is required to transfer (one or more times) because of a study program predetermined by the government of the student’s nation or the sponsoring educational organization.”).

115. Todd O’Brien, *St. Joe’s Won’t Release Me to Play at UAB and I Don’t Know Why*, SI.COM (Dec. 19, 2011, 2:51 PM), <http://sportsillustrated.cnn.com/2011/basketball/ncaa/12/19/todd.obrien/index.html>.

from St. Joe's after transferring from Bucknell University.¹¹⁶ He chose to pursue a graduate degree at the University of Alabama at Birmingham ("UAB") in order to further his education.¹¹⁷ O'Brien is also eligible to participate in the basketball program as a graduate student—he hoped to do so, but under the NCAA's rules, St. Joe's reserves the right to refuse to release him.¹¹⁸ Without St. Joe's permission—which they did not grant—O'Brien may not compete at UAB.¹¹⁹ Upon review the NCAA upheld St. Joe's denial of the transfer waiver despite the lack of evidence showing that O'Brien is pursuing a graduate degree at UAB simply to play basketball.¹²⁰

The twenty-two year old is now practicing with, training with, and is essentially part of the UAB basketball team—yet he cannot actually play because his former coach will not allow him to do so.¹²¹ The rule seems completely arbitrary in this case. If the coaches can decide not to renew a player's scholarship or to offer multi-year or one-year scholarships,¹²² it seems that a player should, within reason, be able to transfer to another school or pursue a graduate degree and be allowed to play.

D. *Likeness and Licensing Rights*

Article 16 of the NCAA's bylaws discusses rules regarding benefits and expenses for enrolled student-athletes.¹²³ Under the provision, a student-athlete is not entitled to receive "any extra benefit."¹²⁴ Under Article 12, titled "Amateurism," the bylaws set out general principles regarding a student-athlete's amateur status.¹²⁵ Under bylaw 12.5.2, a student-athlete is not permitted to use his or her name or picture to promote a business.¹²⁶ As such, a student-athlete may not profit or receive royalties from his or her

116. *Id.*

117. *Id.*

118. *See* NCAA MANUAL, *supra* note 9, § 14.5.5.2.10(d), at 179.

119. O'Brien, *supra* note 115.

120. *Id.*

121. *Id.*

122. *See, e.g.,* Ray Glier, *N.C.A.A. Offers Answers to States Challenging Its Rules*, N.Y. TIMES, Jan. 15, 2004, at D4.

123. *See* NCAA MANUAL, *supra* note 9, § 16, at 217–34.

124. *Id.* § 16.01.1, at 217.

125. *See id.* § 12, at 61–77.

126. *Id.* § 12.5.2., at 75.

NCAA likeness as a student-athlete, even after graduation.¹²⁷ Additionally, the NCAA further requires that “[i]f a student-athlete’s name or picture appears on commercial items . . . or is used to promote a commercial product sold by an individual or agency without the student-athlete’s knowledge or permission, the student-athlete . . . is required to take steps to stop such activity.”¹²⁸ The NCAA requires players to sign Form 08-3a, which in effect requires each student-athlete “to relinquish all rights in perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations.”¹²⁹ These rules place significant burdens on student-athletes and keep them from profiting, even after their college careers are over.¹³⁰ One former college star, Ed O’Bannon, has waged a battle against the NCAA for this very reason.¹³¹

O’Bannon is a former University of California at Los Angeles (“UCLA”) basketball star, who went on to play in the NBA for several years.¹³² O’Bannon helped UCLA win the 1995 national title; today he is a car salesman in Nevada.¹³³ O’Bannon filed suit, individually, against the NCAA and the Collegiate Licensing Company (the “CLC”) in July 2009 claiming that the NCAA unlawfully uses student-athletes’ likenesses and images by refusing to compensate the individuals even after the students have graduated from college.¹³⁴ The NCAA forces student-athletes to sign away their right to their likeness, and according to O’Bannon, the NCAA and the CLC conspire to prevent former collegiate student-athletes from receiving compensation for the use of their images.¹³⁵ O’Bannon claims that such practices unlawfully constrain trade in violation of the Sherman Act, a core source of antitrust law.¹³⁶ Several athletes joined the suit against the NCAA and the

127. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 U.S. Dist. LEXIS 19170, at *2–3 (N.D. Cal. Feb. 8, 2010).

128. NCAA MANUAL, *supra* note 8, § 12.5.2.2, at 75.

129. *O’Bannon*, 2010 U.S. Dist. LEXIS 19170, at *3 (citations omitted) (internal quotation marks omitted).

130. *Id.* at *3–5.

131. *Id.* at *2–5.

132. See Paul Gutierrez, *UCLA Hero Ed O’Bannon Is Right at Home in Las Vegas Selling Cars*, SI.COM (Mar. 18, 2009, 2:09 PM), http://sportsillustrated.cnn.com/2009/writers/the_bonus/03/18/obannon/index.html.

133. *Id.*

134. *O’Bannon*, 2010 U.S. Dist. LEXIS 19170, at *2–3.

135. *Id.* at *4–5.

136. *Id.* at *5.

case was consolidated and renamed *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*.¹³⁷

The first claim in the suit focuses on whether the NCAA violates the Sherman Act by requiring student-athletes to forgo their identity rights in perpetuity.¹³⁸ If student-athletes were not required by the NCAA to forgo their rights, the athletes would have the opportunity to negotiate their own licensing deals.¹³⁹ The plaintiffs' second claim revolves around the "right of publicity."¹⁴⁰ The right of publicity involves a person's right to one's property, including the person's name or likeness and even one's image, voice, or signature.¹⁴¹ Under the action, the plaintiffs claim that the NCAA "sanctions, facilitates and profits from EA's use of student-athletes' names, pictures and likenesses."¹⁴² The complaint asserts that in exchange for profits from video games, the NCAA "granted the software company [EA] the right to reproduce the stadiums, uniforms, and mascots of schools that are members of the NCAA."¹⁴³ The current rules allow video game purchasers to download rosters of the players, although the players' names are absent from the jerseys on the video game.¹⁴⁴ Further, the plaintiffs assert that the EA and NCAA conspired by agreeing to "boycott and refuse to deal with [a]ntitrust [p]laintiffs . . . regarding compensation for the use and sale of their images, likenesses, and/or names."¹⁴⁵

137. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-011967 CW, 2011 U.S. Dist. LEXIS 82682, at *7 (N.D. Cal. July 28, 2011). Eleven additional athletes have since joined the case as plaintiffs. Shaun Assael, *Five Lawsuits that Will Change Sports*, ESPN (Nov. 8, 2010, 12:08 PM), http://espn.go.com/iespn/otl/blog/name/assael_shaun/id/5780468.

138. See *In re NCAA Student-Athlete*, 2011 U.S. Dist. LEXIS 82682, at *7.

139. To state a claim under the Sherman Act, a plaintiff must plead facts that point to a contract or conspiracy between two or more parties that "was intended to impose an unreasonable restraint of trade." *Id.* at *12 (citing *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008)).

140. *Id.* at *7.

141. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 958 (6th Cir. 2003) (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001)).

142. Consolidated Amended Class Action Complaint at 52, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2011 U.S. Dist. LEXIS 46841 (N.D. Cal. 2011).

143. *Id.* at 112.

144. *Id.* at 113.

145. Second Consolidated Amended Class Action Complaint at 142, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2011 U.S. Dist. LEXIS 46841 (N.D. Cal. 2011).

Despite the lawsuit and the meritorious claims, there is a counterargument: the NCAA's bylaws require amateurism in order to enforce and maintain the "boundary between college and professional sports."¹⁴⁶ Additionally, the student-athlete's scholarship is a contract based on the student's promise to participate in college athletics and the college's promise to provide assistance to finance the student's education.¹⁴⁷ The NCAA's bylaw prohibiting a student-athlete from profiting seems to embody the amateur ideal and superficially would keep college sports "educational" rather than "profitable." However, the system has become a big business for the NCAA, member colleges, and other corporations and businesses, including television networks, broadcasters, and video game companies. This big business atmosphere, like the current NCAA structure, exploits the student-athlete rather than protecting the amateurism ideal for which the NCAA once stood.

The *O'Bannon* case is set for trial in May 2013.¹⁴⁸ Michael Hausfeld, counsel for the plaintiffs, believes that athletes have certain rights and that the plaintiffs will win the battle.¹⁴⁹ If the plaintiffs win this case, the NCAA may be required to restructure the way that it operates and, in turn, would be required to compensate players in one form or another.¹⁵⁰ The NCAA has reason to be fearful and hope the case settles because damages in a case like this could be colossal.

This lawsuit may open the doors for compensation of student-athletes. Allowing student-athletes to profit from their images, even if only after they graduate from college, would provide one way for students to gain access to the market. The NCAA's bylaws maintain a complete bar on the compensation of student-athletes, arguably, other than the scholarships student-athletes are offered. The bylaws act above the law and consistently deny student-athletes the ability to live with financial, academic, and athletic stability.

146. Mary Catherine Moore, *There Is No "T" in NCAA: Why College Sports Video Games Do Not Violate College Athletes' Rights of Publicity Such to Entitle Them to Compensation for Use of Their Likenesses*, 18 J. INTEL. PROP. L. 269, 278 (2010).

147. *Id.* at 279.

148. Nocera, *supra* note 7.

149. *Id.*

150. *Id.*

IV. COMPENSATION

From the mega stars like Cam Newton to the red-shirted freshmen, the NCAA men's basketball and football players are the "Entertainment Product."¹⁵¹ These students are invaluable to their colleges and universities. The NCAA fails to provide athletes with the right to their likenesses and fails to provide an agent or attorney at pivotal times. The NCAA also fails to provide adequate financial support to student-athletes, despite athletic scholarships that pay for full tuition and board. Scholarships may only cover certain costs, and the NCAA does not require member colleges to provide for the true cost of living.¹⁵² The NCAA is also guilty of depriving students of simple workers' compensation. A student-athlete should be treated just like the student who works in the library. If a student who works behind the library's circulation desk is injured on the job, he or she will receive workers' compensation under most states' workers' compensation laws.¹⁵³ On the other hand, a football player, basketball player, or any other student-athlete may be sent home after a concussion, ACL tear, or any other serious injury.¹⁵⁴

The NCAA's bylaws provide that a NCAA member school may provide medical insurance, but it is not required to do so.¹⁵⁵ Article 16.4 provides that an institution may finance certain permissible medical expenses including medical insurance, life insurance, drug-rehabilitation expenses, counseling for eating disorders, glasses, medical examinations, and expenses for medical treatment.¹⁵⁶ But the language of the Article clearly does not require member schools to provide such benefits, and because student athletes are not considered employees, they may not re-

151. MARK YOST, VARSITY GREEN 13–14, 18 (2010). "My job is to protect The Entertainment Product My job is to make sure that The Entertainment Product studies. My job is to make sure that The Entertainment Product makes adequate academic progress according to NCAA guidelines." *Id.* (quoting Phil Hughes, athletic director for student services at Kansas State University).

152. Patrick Hruby, *Stop the Madness: The Free Market Case Against the NCAA's Chokehold on College Sports*, WASH. TIMES, Apr. 2, 2012, at C10.

153. 5 U.S.C. §§ 8101–02 (2006) (federal worker's compensation); *see, e.g.*, VA. CODE ANN. § 65.2-101 (2007 & Supp. 2011) (defining "employee" under Virginia worker's compensation law).

154. *See, e.g.*, Agnew v. Nat'l College Athletic Ass'n, No. 1:11 cv0293 JMS MJD, 2011 3878200 (S.D. Ind. Sept. 1, 2011).

155. NCAA MANUAL, *supra* note 9, § 16.4.1, at 221.

156. *Id.* § 16.4, at 221.

ceive any benefits under state workers' compensation laws or university employee benefit policies.

A. Waldrep v. Texas Employers Insurance Association

Texas Christian University ("TCU") is a small college in Fort Worth, Texas.¹⁵⁷ In 1974, Kent Waldrep was a star running back at TCU.¹⁵⁸ By October 1974, Waldrep was no longer a college athlete; instead, he was a former college athlete, paralyzed after a collision with another player.¹⁵⁹ During a regular season game against the University of Alabama, Waldrep's neck snapped after a violent collision.¹⁶⁰ TCU paid for his medical bills for nine months, but then they stopped providing support.¹⁶¹ Doctors told him that he would never have feeling from the neck down.¹⁶² Waldrep chose to file a worker's compensation claim in order to receive benefits because of the injury he sustained "on the job" as a student-athlete.¹⁶³ In 1993, the Texas Workers' Compensation Commission "found that [Waldrep] was indeed an employee and awarded him \$70 a week for life and medical expenses dating to the accident."¹⁶⁴ TCU's insurance carrier appealed the decision. The case, *Waldrep v. Texas Employers Insurance Association*, went to the Texas Court of Appeals where the court struck down Waldrep's worker's compensation claim.¹⁶⁵ The court determined that under Texas law the letter of intent and the college scholarship did not make Waldrep a college employee.¹⁶⁶ Waldrep's attorney argued that "[TCU] had a written contract with Waldrep, that the university paid him, and that the university had the right of control."¹⁶⁷ Waldrep's case was decided in 2000, but there

157. *At a Glance*, TEXAS CHRISTIAN U., <http://www.tcu.edu/at-a-glance.asp> (last visited May 1, 2012).

158. Joe Drape, *College Football: A Question of Responsibility; Injured Player's Case Could Shake up N.C.A.A.*, N.Y. TIMES, Oct. 15, 1997, at C1.

159. *Id.*

160. *Id.*

161. Editorial, *College Sports: Hardly Amateur*, CHARLESTON GAZETTE, Nov. 25, 2011, at P4A.

162. Drape, *supra* note 158.

163. *Id.*

164. *Id.*

165. 21 S.W.3d 692, 695 (Tex. App. 2000).

166. *Id.* at 701.

167. Drape, *supra* note 158.

is still the possibility that a court could find that student-athletes are in fact employees.

It is hard to believe that a student-athlete is not an employee when one considers that CBS and Turner Broadcasting paid \$771 million to the NCAA for the television rights to the 2011 Men's NCAA Basketball Tournament.¹⁶⁸ Certainly money exchanged for television contracts, ticket sales, and other financial gains from college athletics pay for scholarships, training facilities, and multi-million dollar stadium construction. If those against "pay-for-play" measures argue that the student's scholarship is in fact "payment," that would, using common sense, make the student-athlete an employee.¹⁶⁹ There is no denying that the student-athlete gains a great deal from simply being a part of the team and by receiving an athletic scholarship; however, the student-athlete needs greater protection under the NCAA's bylaws.

B. *Should We Pay Them?*

Workers' compensation naturally brings up questions of "pay-for-play." Should a college-athlete be paid for his work on the field? How could this measure ever be feasible? It seems against traditional notions of "amateurism" and even seems inherently wrong for a college athlete to be paid for his or her performance on the field. Isn't the athlete just a college student who suits up to play a sport for the good of his body and soul? In reality, the player is not just playing for his own personal growth and benefit; the result of his performance—for third parties—is dollars and cents. As inherently wrong as it seems to pay the athlete, it is equally unjust for the universities, Nike, ESPN, and the NCAA to profit while the athlete is left unprotected and uncompensated. As prominent writer and economist Andrew Zimbalist notes, "[b]ig-time intercollegiate athletics is a unique industry. No other industry in the United States manages not to pay its principal pro-

168. Branch, *supra* note 8.

169. McCormick & McCormick, *supra* note 10, at 79 ("[G]rant-in-aid athletes in revenue-generating sports at Division I NCAA schools are 'employee-athletes,' not merely 'student-athletes.' Under the foundational pillar of U.S. labor policy—the National Labor Relations Act . . . —the relationship between scholarship athletes and their colleges and universities can no longer be fairly characterized as anything other than an employment relationship in which the athletes serve as employees and the institutions for which they labor as their employers.") (footnote omitted).

ducers a wage or salary.”¹⁷⁰ He further reasons that, “[t]o grasp its *modus operandi*, it is necessary to consider each of its component parts: its unpaid athletes . . . , its athletic directors and coaches . . . , its relations to the media . . . , to the government, to the athletic shoe companies and other businesses . . . , and, finally, its relation to the NCAA cartel.”¹⁷¹

This NCAA “cartel” brings in billions of dollars, and the numbers do not lie.¹⁷² The Southeastern Conference brought in revenues of over \$1 billion last year, and the Big 10 Conference made over \$900 million.¹⁷³ A student-athlete is mostly disposable—a new coach may create a new line-up or even decide not to renew a player’s scholarship. The conference will still make hundreds of millions of dollars, regardless of which player is scoring three-pointers or touchdowns. Furthermore, the cable networks and athletic apparel companies are not the only actors bringing in millions.¹⁷⁴ Top-tier football programs pay their coaches huge salaries. Urban Meyer, the head coach for OSU, has an employment contract that includes \$4 million in annual compensation.¹⁷⁵ The contract includes a golf membership, bonuses for certain achievements, and a \$1200 monthly automobile stipend for the costs of two automobiles.¹⁷⁶

College football coaches are not alone in their pursuit of million-dollar coaching contracts. Some big time basketball coaches now have annual contracts exceeding \$4 million.¹⁷⁷ Although student-athletes are also meant to be attending classes, professors’ average salaries have increased by 32% since 1984, while head

170. Zimbalist, *supra* note 5, at 6 (“Rather than having many competing firms, big-time college sports is organized as a cartel, like OPEC, through the NCAA.”).

171. *Id.*

172. The NCAA alone brought in \$845 million in revenues in 2010–2011. *Revenue*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/revenue> (last visited May 1, 2012).

173. Charles P. Pierce, *The Beginning of the End for the NCAA*, GRANTLAND, (Nov. 1, 2011, 10:38 AM), http://www.grantland.com/story/_/id/7177921/the-beginning-end-ncaa; *see also* Branch, *supra* note 8 (“That money comes from a combination of ticket sales, concession sales, merchandise, licensing fees, and other sources—but the great bulk of it comes from television contracts.”).

174. *See, e.g.*, Yost, *supra* note 151, at 74 tbl. 4.1 (showing recent all-school endorsement deals, including a \$6 million five-year contract between Florida State University and Nike and a \$5.7 million six-year contract between Nike and the University of Michigan).

175. *Document: Urban Meyer’s Ohio State Contract*, CBS SPORTS BLOG (Nov. 29, 2011, 3:16 AM), <http://www.cbssports.com/mcc/blogs/entry/24156338/33581501>.

176. *Id.*

177. Branch, *supra* note 8.

football coaches' salaries have increased by 750%.¹⁷⁸ The disjoint is astonishing. Moreover, the NCAA did attempt to cap assistant coaches' salaries, but nearly 2000 of the coaches filed an antitrust lawsuit and settled for more than \$50 million.¹⁷⁹ Today, the top assistant coaches' salaries are over \$500,000 and in 2009 at least one assistant coach's salary topped \$1 million.¹⁸⁰ Urban Meyer's \$4 million contract is an absurd amount of money compared to the \$87,700 average associate professor salary at OSU.¹⁸¹ Academic institutions exist for the pursuit of academics rather than the pursuit of championships—yet some of the highest paid (and one would argue highest valued) individuals on campus are the men's basketball or football coaches.

Multiple sports writers have suggested, in one form or another, a new system where the NCAA pays players for their performance.¹⁸² Possible sources are endorsement deals from various companies or a flat-out paycheck from the member institution. One coach has even suggested that coaches should pay the players out of their own pockets on game day.¹⁸³ The cases described above demonstrate that student-athletes need contractual rights that they are not afforded under the NCAA's current bylaws. A contractual right should not be disregarded simply because a person is a student-athlete. Moreover, the student-athlete has rights that, despite notions of amateurism, should be upheld.

1. Olympic Model

Olympic athletes were once like student-athletes—they were forbidden from profiting from their success in the Olympic Games.¹⁸⁴ Now, Olympic athletes are featured in television, print, and other advertisements.¹⁸⁵ Student-athletes could operate simi-

178. *Id.*

179. *Id.*

180. *Id.*

181. *AAUP Faculty Salary Survey*, CHRON. HIGHER EDUC., <http://chronicle.com/stats/aaup/index.php?action=detail&id=2874> (last visited May 1, 2012).

182. *See, e.g.*, Tracee Hamilton, *In College Football, Everyone Cashes in but the Players*, WASH. POST, Nov. 26, 2010, at D01; Michael Wilbon, *As Colleges' Greed Grows, So Does the Hypocrisy*, WASH. POST, Sept. 10, 2010, at D05.

183. David Jones, *Spurrier Wants to Pay Players*, FLA. TODAY, June 2, 2011, at C5 (describing South Carolina coach Steve Spurrier's proposal that coaches pay players \$300 per game).

184. *See* Alexander Theroux, *The Olympic Sham*, WALL ST. J., Jan. 13, 1999, at A22.

185. *See, e.g.*, Michael E. Ruane, *Olympics Still Months Away, Swimmer Brings Home*

larly. The NCAA would not be required to offer any money to the individual athletes,¹⁸⁶ instead the student-athlete could contract with businesses, advertisers, apparel companies, and others to profit from his or her success. The NCAA would then only need to alter the bylaws to allow the NCAA student-athlete to profit from his or her image and would need to allow a student to hire an agent and an attorney to negotiate acceptable contracts.

The National College Players Association (the "NCPA") recommends adopting the Olympic model for paying student-athletes.¹⁸⁷ The model would allow players to accept payments for autograph signing and endorsement deals and to generally participate in the free market.¹⁸⁸ The legislation would be enforceable against the NCAA, and the NCAA's bylaws could not force compliance with threats of deeming a player ineligible.¹⁸⁹ The NCPA also recommends legislation that would "deregulate" the NCAA.¹⁹⁰ Such legislation includes a law to allow member colleges to provide larger scholarships to help players make ends meet.¹⁹¹

In early 2011, the NCAA proposed allowing companies like Nike and Under Armour the ability to feature college athletes in advertising.¹⁹² A possible scene would be famous college players wearing the Nike emblem and endorsing Nike in commercials and print advertisements.¹⁹³ Currently, the NCAA's rules bar this kind of activity, but under the proposal student-athletes could take part in television and other advertisements as long as the advertisement also featured the student's institution.¹⁹⁴ Athletes would likely join the opposition to this proposal. The opposition has "called the proposal 'the essence of exploitation,'" because

Gold, WASH. POST, June 1, 2004, at A01 (detailing Michael Phelps's advertisements).

186. Ben Cohen, *The Case for Paying College Athletes*, WALL ST. J., Sept. 16, 2011, at D10. ("The financial burden would land with the shoe companies, multinational corporations and local car dealerships who want to enlist the athletes to help them push products.").

187. HUMA & STAUROWSKY, *supra* note 18, at 26.

188. *Id.*

189. *See id.* at 25.

190. *Id.* at 26.

191. *Id.*

192. *See* Libby Sander, *NCAA Proposal Would Give Companies More Latitude to Use Athletes' Images in Ads*, CHRON. HIGHER EDUC. (Jan. 10, 2011), <http://chronicle.com/article/NCAA-Proposal-Would-Give/125914/>.

193. *See id.*

194. *Id.*

athletes would still have no right to profit off of such images.¹⁹⁵ There is a call to modernize the advertising and marketing rules in this system, but to pass such a measure would continue to exploit the student-athletes.

The Olympic model seems to reconcile the desire to promote athleticism and academics while still providing students with the opportunity to maintain the rights to his or her image and talent. This method is also appealing to the NCAA because it is the least costly measure. There would be no payment directly from the university to the athlete, and the athlete would be responsible for his or her own endorsements. The challenge would be to pressure the NCAA to change the current bylaw to allow the implementation of this model.

Critics might argue that the Olympic model provides “payment” only to star athletes, which is completely true. Star athletes will be more sought after than student-athletes participating in less popular sports. Yet the big money affects only a certain population of college athletes. Right or wrong, this scenario is the current landscape of college athletics. The small percentage of players who attract million-dollar television contracts should have the ability to take part in the free market if they so choose.

2. A Paycheck for the Players

On November 2, 2011, *USA Today* ran a story about Congressman Bobby Rush’s obvious disdain for the NCAA.¹⁹⁶ Congressman Rush compared the NCAA to the mafia and Al Capone.¹⁹⁷ The Congressman made these remarks at a forum called especially to investigate the impact of “back-room deals, payoffs and scandals’ in college sports.”¹⁹⁸ About a week before *USA Today* reported about Congressman Rush’s comparison between the NCAA and the mafia, the NCAA announced the possibility of paying student-athletes an extra \$2000 per year to supplement

195. *Id.* (quoting Jams E. Delany).

196. Nicole Auerback, *Congressman Likens NCAA to Capone, Mafia*, USA TODAY, Nov. 2, 2011, at 6C (quoting Congressman Rush, who described the NCAA as “one of the most vicious, most ruthless organizations ever created by mankind”).

197. *Id.*

198. *Id.* (quoting Congressman Rush).

scholarships.¹⁹⁹ The NCAA president was adamant that this \$2000 stipend was not a “pay-for-play” measure, but was instead meant to “close the gap” between the true cost of attending college and the scholarship funds student-athletes receive.²⁰⁰ The NCAA chose to give conferences the option of giving student-athletes the \$2000 stipend.²⁰¹ The NCAA, in consecutive meetings in December 2011 and January 2012, tabled the discussion of the stipend and, as of time of publication, plans to address the issue in August 2012.²⁰²

The proposal has been expressly denied as a “pay-for-play” measure, but colleges and universities could opt to simply write students a check each week or semester for their participation in the money-generating sports. The payment might cover the gap between true living costs and the scholarship awarded to the student. Payments could come after a successful game or be kept in a trust fund until the student-athlete graduates. The true pay-for-play measure is unsettling because of the complicated nature of setting a salary or pay scale for some athletes and not others. The member institutions and colleges would be required to find financial means to pay for athletes’ talents.

The pure pay-for-play measure seems unworkable if the NCAA is to maintain a sense of amateurism at all. Otherwise, the college sports teams could simply become professional sports teams, where enrollment in the college or university is welcomed but not required.²⁰³ Student-athletes should still be treated as students with academic goals. Handing them a paycheck and calling them an employee may taint the amateur model too much. However,

199. *Id.*

200. *NCAA Prez: Stipend Not ‘Pay for Play’*, ESPN (Nov. 3, 2011, 6:56 PM), http://espn.go.com/college-sports/story/_/id/7187028/ncaa-stipend-not-lean-pay-play-president-mark-emmert-says.

201. David Wharton, *NCAA’s Pay-For-Play Proposal Has Its Supporters and Detractors*, L.A. TIMES (Nov. 16, 2011), <http://articles.latimes.com/2011/nov/16/sports/la-sp-1117-ncaa-pay-for-play-20111117>.

202. *Athlete Stipend Delayed*, N.Y. TIMES, Dec. 16, 2011, at B18 (noting that “125 colleges requested the delay”); Michael Marot, *NCAA Considers Delaying Some Academic Changes*, SEATTLE TIMES (Apr. 25, 2012), http://seattletimes.nwsourc.com/html/sports/2018070861_apncaanewproposals.html.

203. See Branch, *supra* note 8 (“The International Olympic Committee expunged the word *amateur* from its charter in 1986. Olympic officials, who had once disdained the NCAA for offering scholarships in exchange for athletic performance, came to welcome millionaire athletes from every quarter, while the NCAA still refused to let the pro Olympian Michael Phelps swim for his college team at Michigan.”).

allowing them to profit based on their individual talents and their individual decisions to enter the free market seems to strike a balance. Legally, the student-athlete may be more like a student employee than a volunteer athlete. Yet notions of amateurism still dominate the academic landscape, and the Olympic model provides ample room for students to remain student-athletes instead of professionals. The NCAA itself must change, not only to allow for the Olympic model but also to provide student-athletes with greater rights under the bylaws themselves including multi-year guaranteed scholarships, the ability to transfer freely within the open market, and freedom to participate in athletics as the law allows. The NCAA must become the moral institution it once thought it would be.²⁰⁴

V. A NEW NCAA

A. NCAA Self-Regulation

Regardless of whether Ed O'Bannon and his co-plaintiffs win their antitrust lawsuit, it is clear that the law must step in to protect the student-athlete. The NCAA, despite its "amateurism" goals, has failed to self-regulate and has instead created a system exploiting the student-athlete. Member universities and colleges are also at fault. They have continued to take part in a system that ultimately brings them just what they want and need: money and publicity.²⁰⁵ The NCAA has become more of a "trade association for coaches and athletic directors, implementing their wishes regardless of whether these are in the best interests of the member schools, or the multitude of athletes engaged in intercollegiate athletics."²⁰⁶ Member schools have yet to put pressure on the NCAA to make changes. Although many athletic programs, and arguably most, are not profitable,²⁰⁷ success in Division I men's basketball and football generates huge revenues and places

204. "Collegiate amateurism is not a moral issue; it is an economic camouflage for monopoly practice." Byers, *supra* note 57, at 376.

205. Sperber, *supra* note 83, at 33-34 ("One of the most pernicious myths about the NCAA is that the association represents the will of its member colleges and universities, and that it tries to keep intercollegiate athletics in line with its members' educational objectives.").

206. *Id.* at 34.

207. *Id.* at 35.

these colleges on center stage. Athletic success often equates to higher numbers of university applicants and positive publicity.²⁰⁸ Additionally, appearances in postseason basketball tournaments and football bowl games are a good indicator of alumni donations.²⁰⁹ Robert Baade and Jeffrey Sundberg's study on alumni generosity found that "alumni giving for a successful college bowl game increased on average about 54 percent."²¹⁰ College athletics affects more than the sports programs; it affects the entire university—its reputation, status, and the public's interest.

Based on the bylaws in place, as well as the money at stake, "looking to the NCAA itself as a source of potential reform of college athletics is equivalent to putting the fox in charge of the henhouse."²¹¹ If the NCAA, the body dedicated to regulating college athletics and protecting student-athletes, cannot adequately protect students through the implementation of fair and just policies, another entity must take charge and create some clarity from the chaos.

B. *Government Intervention*

Based on the visible corruption and exploitation within the big NCAA football and basketball teams, something must be done to correct the system or at least assist student-athletes participating at member institutions. Although only a small percentage of NCAA student-athletes participate on the big college teams, this issue is still of resounding importance. A recent NCPA report notes that "[w]ithout an act of Congress and support from the [Department of Justice], universities, athletic programs, coaches,

208. See Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 S. ECON. J. 750, 750 ("Key findings include the following: (1) football and basketball success significantly increases the quantity of applications to a school, with estimates ranging from 2% to 8% for the top 20 football schools and the top 16 basketball schools each year, (2) private schools see increases in application rates after sports success that are two to four times higher than public schools, (3) the extra applications received are composed of both low and high SAT scoring students, thus providing potential for schools to improve their admission outcomes, and (4) schools appear to exploit these increases in applications by improving both the number and the quality of incoming students.").

209. Yost, *supra* note 151, at 48–49.

210. *Id.* at 48 (citing Robert A. Baade & Jeffrey Sunberg, *What Determines Alumni Generosity?*, 15 ECON. EDUC. REV. 75, 75–81 (1996)).

211. ARTHUR A. FLEISHER III, BRIAN L. GOFF & ROBERT D. TOLLISON, *THE NATIONAL COLLEGIATE ATHLETICS ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 145–46 (1992).

and players will continue to spiral embarrassingly into the abyss that has been on full display over the past 12 months and beyond.”²¹² The report further concluded that “[c]ollege athletes will also continue to drift as a group of Americans harmed by the NCAA’s un[-]American, monopolistic arrangements.”²¹³ Government intervention may be the only fix.²¹⁴

Congress or the judiciary must take action because the NCAA has failed to self-regulate. The student-athlete has become the plaintiff in legal actions because the NCAA and member institutions have failed to adequately protect the students’ interests. Walter Byers suggests that the NCAA should require a report card in academics and publicly reported financials for all member institutions.²¹⁵ Most importantly, he suggests that Congress enact a College Athletes Bill of Rights.²¹⁶ Student-athletes should be taking part in the free market while also acquiring an education. Notions of amateurism and the fans’ “comfort” with the current system should not take precedence over an individual’s right to compete with fair compensation for their talents. If the law is about enforcing justice and fairness, the NCAA and the member institutions themselves have avoided the law for far too long.

VI. CONCLUSION

Division I men’s basketball and football programs are multi-billion dollar businesses that rest on the voluntary labor of young men. The NCAA’s arbitrary rules,²¹⁷ which apply to all NCAA student-athletes, maintain a system that operates with revenue, rather than the protection of student-athletes, as its first priority. The NCAA is charged with serving as an advocate for all NCAA athletes, but the NCAA’s bylaws operate counter to that

212. HUMA & STAUROWSKY, *supra* note 18, at 25.

213. *Id.*

214. *See id.*

215. *See* Byers, *supra* note 57, at 392–94.

216. *Id.* at 374.

217. *See, e.g.,* Joe Nocera, *The Latest N.C.A.A. Impermissible Benefit? Books*, N.Y. TIMES BLOG (Feb. 3, 2012, 1:34 PM), <http://nocera.blogs.nytimes.com/2012/02/03/the-latest-n-c-a-a-impermissible-benefit-textbooks>. The NCAA put the University of Nebraska on two-year probation and fined the school \$38,000 for the “major violation” of providing student-athletes “not just the books that were required for their courses, but also the books that their professors recommended as helpful reading for their classes.” *Id.*

goal. These student-athletes deserve more—more compensation, more due process rights, more transparency, and more stability as student-athletes. Congressional and judicial intervention is likely their best and, perhaps, only shot.

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