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Board of Regents of University of Oklahoma v. National Collegiate Athletic Association, Application of the Per Se Rule to Price-Fixing Agreements

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BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, APPLICATION OF THE PER SE RULE TO PRICE-FIXING AGREEMENTS

In *Board of Regents of University of Oklahoma v. National Collegiate Athletic Association*,[1] the Tenth Circuit Court of Appeals affirmed a lower court ruling that invalidated regulation of college football television contracts by the National Collegiate Athletic Association (NCAA). This decision left colleges and universities free to contract for the sale of broadcast rights to their football games. The United States District Court for the Western District of Oklahoma held that the NCAA television football plan and network contracts constituted an illegal price-fixing agreement and thus were per se violations of section 1 of the Sherman Anti-Trust Act.[2] The Tenth Circuit Court of Appeals affirmed the holding that the NCAA regulations were illegal per se and, under the rule of reason analysis of the Sherman Anti-Trust Act, also found the regulations to be unreasonably restrictive of competitive conditions.[3]

On July 21, 1983, Justice Byron White of the United States Supreme Court issued a stay blocking the implementation of the Tenth Circuit's decision pending the Supreme Court's decision to grant certiorari.[4] Justice White found the per se price-fixing holding to be questionable and expressed doubt as to whether the correct result was reached under the rule of reason analysis.[5] This comment analyzes the Tenth Circuit's decision under the per se rule and the rule of reason, and suggests the possible outcome of the Supreme Court decision.

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1. 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).

2. Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983). Section 1 of the Sherman Anti-Trust Act states that "[e]very 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 . . . ." 15 U.S.C. § 1 (1982).

3. *NCAA*, 707 F.2d 1147. In addition to the illegal price-fixing decision, the district court found that the NCAA regulations constituted an illegal group boycott and monopolized the intercollegiate football broadcast market. *NCAA*, 546 F. Supp. at 1282. Although addressing these issues, the circuit court was primarily concerned with two questions: (1) whether the NCAA television plan and network contracts constituted price-fixing which was unlawful per se, and (2) whether the NCAA television plan and network contracts were unlawful under a rule of reason analysis. 707 F.2d at 1150, 1159 n.16.

4. 104 S. Ct. 1 (White, Circuit Justice 1983). Certiorari was granted on Oct. 17, 1983. 104 S. Ct. 272 (1983).

5. 104 S. Ct. 1 (White, Circuit Justice 1983).

I. Introduction

A. *Price Fixing Agreements and the Supreme Court*

Taken literally, the broad language of section 1 of the Sherman Anti-Trust Act (Sherman Act) prohibits every agreement in restraint of trade or commerce.[6] To distinguish between legal and illegal restraints, the courts developed two modes of analysis: the per se rule and the rule of reason.

The rule of reason was first articulated in *Standard Oil Co. of New Jersey v. United States.*[7] Realizing that the language of section 1 of the Sherman Act could cause even insignificant restraints of trade to be barred, the Supreme Court construed the act as prohibiting only those restraints that were "unreasonably restrictive of competitive conditions."[8]

The rule of reason requires a court to determine whether a restraint merely regulates competition or restrains it. In making this determination, the court must analyze the nature, purpose, and character of the restraint, as well as the surrounding circumstances.[9] Because this inquiry involves an analysis of many aspects, it frequently necessitates substantial costs and elaborate, time-consuming investigation.[10] As an alternative to the burdensome and sophisticated analysis required under the rule of reason, the courts developed the per se rule.

The per se rule allows courts, based on past experience with particular

6. *See* 15 U.S.C. § 1 (1982). The Sherman Act was initially read by the Supreme Court to condemn all restraints of trade, not just unreasonable restraints. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). *But see* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (espousing the modern view that Congress only intended to preclude agreements that unreasonably restrict trade or commerce).

7. 221 U.S. 1 (1911).

8. *Id.* at 58.

9. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). Writing for the Court, Justice Brandeis articulated the best known interpretation of the rule of reason:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains . . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

10. *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). The Court in *Northern* described the rule of reason analysis as "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Id.* at 5.

kinds of restraints, to invalidate certain practices as unlawful per se.[11] The rule applies to those activities that are so adverse to competition that they are conclusively presumed to be unreasonable restraints on trade.[12] They are "naked restraints of trade with no purpose except [the] stifling of competition."[13] Occasionally the result obtained under the per se rule will differ from the result that would have been obtained under the rule of reason. However, "[f]or the sake of business certainty and litigation efficiency, [courts] have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable."[14]

Price-fixing is one activity that the Supreme Court has held to be unreasonable per se.[15] The Court first applied the Sherman Act to a price-fixing agreement in *United States v. Trans-Missouri Freight Association,*[16] and declined to inquire into the reasonableness of a rate agreement among railroads. Instead it found the agreement to be illegal on its face.[17]

In *United States v. Trenton Potteries Co.,*[18] the Supreme Court reasoned that all price-fixing agreements were illegal per se because they purposefully eliminated competition.[19] The Court noted that it was insig-

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11. *See* United States v. Topco Assocs., 405 U.S. 596, 607 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.").

12. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). "[T]here are certain agreements or practices which because of their pernicious effect on competition 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." *Id.*

13. White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

14. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 (1982) ("As in every rule of general application, the match between the presumed and the actual is imperfect."). *See* United States v. Container Corp. of America, 393 U.S. 333 (1969). In *Container Corp. of America* Justice Marshall explained:

> Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

Id. at 341 (Marshall, J., dissenting).

15. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). In *Socony,* the Court defined price-fixing:

> [P]rices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon.

Id. at 222.

16. 166 U.S. 290 (1897).

17. *Id.* at 292.

18. 273 U.S. 392 (1927).

19. *Id.* at 397-98. In *Trenton,* the Court justified the per se rule application stating:

nificant that the prices fixed were reasonable, because it was the power to control the market and fix unreasonable prices in the future that made such agreements illegal.[20] The Court further applied the rule pertaining to possible restraints in *United States v. Socony-Vacuum Oil Co.*,[21] stating that price-fixing agreements, whatever their economic justification, were "banned because of their actual or potential threat to the central nervous system of the economy."[22]

The per se rule has been extended to include agreements that have traditionally benefited consumers. For example, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[23] the Court invalidated a maximum price-fixing agreement that was intended to put a ceiling on the retail price of certain liquor products. The Court did not consider the possible economic benefits of the maximum price agreement, but instead argued that any agreement to fix prices will "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."[24] In *National Society of Professional Engineers v. United States*,[25] the Court found illegal on its face a restriction by the professional society against competitive bidding for engineering services.[26] Although the ban on competitive bidding did not literally constitute price-fixing, the Court found that the restriction unreasonably restrained competition by preventing price comparisons by consumers.[27]

In the most recent price-fixing case before the Supreme Court, *Arizona v. Maricopa County Medical Society*,[28] the Court held that maximum fee

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> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may, through economic and business changes, become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed . . . . [W]e should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable . . . .

Id. at 397-98.

20. *Id.* at 398.

21. 310 U.S. 150 (1940).

22. *Id.* at 226 n.59. The *Socony* Court stated that "[u]nder the Sherman Act [any] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se." *Id.* at 223. The Court also noted that no inquiry as to the reasonableness of the plan was necessary because the plan interfered with market forces regardless of whether it raised, lowered, or stabilized prices. *Id.*

23. 340 U.S. 211 (1951). The Court held that an agreement to fix maximum resale prices violated the Sherman Act "no less than [an agreement] to fix minimum prices." *Id.* at 213.

24. *Id.*

25. 435 U.S. 679 (1978).

26. *Id.* at 693.

27. *Id.* at 692-93.

28. 457 U.S. 332 (1982).

schedules set by medical foundation doctors were unlawful per se.[29] The Court found that the maximum fee rates tended "to provide the same economic rewards to all practitioners"[30] regardless of their skill, experience, or training. Notably, the Court rejected the defendant's argument that the per se rule should not apply because the plan had procompetitive justifications.[31] Finding this argument to be a "misunderstanding of the per se concept,"[32] the Court stated that "the anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."[33]

B. *The Ancillary Restraint Exception*

Naked restraints which have as their sole purpose the elimination of competition are unlawful. However, some restraints that eliminate competition are ancillary to a "cooperative productive activity" or an "integration of [legitimate] functions."[34] These restraints are deemed to be subordinate to the main justifiable purpose of the activity, and their purpose becomes one of promoting the efficiency of that activity.[35] Thus, one

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29. *Id.* The defendants, in an attempt to provide the surrounding community with a competitive alternative to existing health insurance plans, organized the medical society to promote fee-for-service medicine. Under such a plan, a policyholder paid one flat fee which provided coverage for all medical expenses incurred during the term of the policy. The primary activity of the medical society was to establish the maximum fees that participating doctors could charge for services rendered to patients insured under the program. *Id.* at 339.

30. *Id.* at 348.

31. *Id.* at 351.

32. *Id.*

33. *Id.*

34. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898). In *Addyston,* Judge Taft first proposed the concept of ancillary restraints as a way of judging the legality of those restrictions on competition that were socially valuable. One familiar example of the use of ancillary restraints occurs in the typical law partnership. A law firm consists of lawyers who have agreed to eliminate competition between themselves and, instead, integrate their activities in the interest of making their resources more effective. The lawyers agree on the fees to be charged and the division of proceeds. While this looks similar to price-fixing, the law firm is lawful because of the shared belief that economic cooperation in production is beneficial to the economy. As Judge Taft explained:

> [W]hen two [men become] partners in a business, although their union might reduce competition, this effect [is] only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restriction in the articles of partnerships upon the business activity of the members, with a view of securing their entire effort in the common enterprise, [are], of course only ancillary to the main end of their union, and [are] to be encouraged.

Id. at 283. *See also* R. BORK, THE ANTITRUST PARADOX 26-30 (1978); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 131 (1977); Brodley, *Joint Ventures and Antitrust Policy,* 95 HARV. L. REV. 1521, 1527-29 (1982).

35. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979). *See also* R. BORK, *supra* note 34, at 279.

method used to test the enforceability of agreements in restraint of trade is to determine whether the restraints involved are naked, or whether those restraints are ancillary to a legitimate activity or function, and therefore lawful.[36]

One of the most recent cases applying the ancillary restraint test was *Broadcast Music, Inc. v. Columbia Broadcasting System*,[37] where the Supreme Court stated that not every agreement that "literally" fixes prices is illegal per se.[38] The question before the Court was whether the issuance of blanket licenses to copyrighted musical compositions at fees negotiated by the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. constituted per se price-fixing.[39] The test utilized by the Court was whether the activity was "one that would always or almost always tend to restrict competition and decrease output, or instead . . . 'increase economic efficiency and render markets more, rather than less, competitive.' "[40] The Court held that the challenged activity literally fixed a price, but an established price was found to be a "necessary consequence" of the creation of blanket licenses, which had unique characteristics that made the market for copyrighted compositions more efficient.[41] The blanket licenses, therefore, accompanied a legitimate integration of functions which included sales, monitoring, and enforcement.[42]

C. Board of Regents v. NCAA

The NCAA was organized in 1905 to regulate and supervise college athletics.[43] The NCAA has controlled all aspects of televised college football

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36. *See* National Soc'y of Professional Eng'rs, 435 U.S. 679, 683 (1978).

37. 441 U.S. 1 (1979).

38. *Id.* at 9.

39. Blanket licenses give the licensee the right to perform any and all of the compositions owned by the organization issuing the license. The fee for the license is the same regardless of the number of compositions a user anticipates performing or actually performs, and is based on a percentage of total revenues or a flat dollar amount. Blanket licenses relieve individual composers of the impossible task of negotiating with all the hopeful users of their copyrighted material, and more importantly, the blanket license aids in the detection of unauthorized users. *Id.* at 5.

40. *Id.* at 19-20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

41. *Broadcast Music*, 441 U.S. at 22. Among the advantages were substantial lowering of costs, immediate use of material without negotiation delay, flexibility in choice of material, and easier enforcement against unauthorized users. *Id.* at 20-22.

42. *Id.* at 20.

43. An excellent review of the history and functions of the NCAA is found in the district court opinion. *NCAA*, 546 F. Supp. at 1282-87. The fundamental policy of the NCAA is to "maintain intercollegiate 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 college athletics and professional sports." CONSTITUTION AND INTERPRETATIONS OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION art. 2, § 2(a)(1983).

since 1953.[44] It first instituted controls based on the expressed concern of its members that the unlimited telecasting of games would be detrimental to attendance at non-televised games.[45] The basic aspects of the original controls have survived, and include restrictions on the total number of games televised each season and the specific number of appearances any one team can make during a season.[46]

The specific regulations challenged in *NCAA* are found in the 1982-1985 NCAA Television Football Plan.[47] Under the network contracts, ABC Sports, Inc. (ABC) and CBS Sports, Inc. (CBS) shared exclusive first rights to negotiate with NCAA member institutions regarding the live broadcast of their football games. In return for these rights, ABC and CBS each guaranteed to pay a "minimum aggregate compensation" over the contract period.[48] This sum was to be divided among all the teams appearing on the networks during the course of the season.[49]

Under the rules developed by the NCAA, CBS and ABC alternately selected dates over which they have the first right to choose any given game played that day. Once the network holding first choice selected its games, the other network was in the position to be the only buyer for the remaining games played that day. Thus, the rules eliminated competitive bidding between the networks.[50]

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44. *NCAA*, 546 F. Supp. at 1283.

45. *Id.* at 1276. In response to these concerns, the NCAA appointed a Football Television Committee to study and report on the effects of televised college football on the gate attendance of college games. The Committee retained the services of the National Opinion Research Center, whose studies supported the notion that televising games did result in decreased live gate attendance at games not being televised. The NCAA instituted controls based on these studies. *Id.*

46. *Id.* at 1283. The controls were voted on by the entire membership, including those members which did not field a football team. Of the approximately 880 members, less than 500 played football, and of that 500, only 188 were Division I schools. Although the controls obligated the networks to telecast a few Division II and III games, football telecasts remain dominated by Division I schools. New rules were adopted in 1982 to allow only those members that sponsored a varsity football team to vote on adoption of television controls. CONSTITUTION AND INTERPRETATIONS OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION art. 8, § 2(a)(1983).

47. *See NCAA*, 707 F.2d at 1150.

48. *NCAA*, 546 F. Supp. at 1289-90. The minimum aggregate compensation fee was equal to the total amount the networks paid to individual schools for the right to their particular games. A percentage of this fee went to the NCAA to fund certain activities. A specified amount was reserved for the teams participating in the NCAA Division II and III football championships, which the networks were required to televise. The remainder of the fee was divided among all the schools which appeared on the weekly college football telecasts. *Id.* at 1289.

49. The particular way the sum should be divided was not specified in the contract. Instead the NCAA made "recommendations" as to how much should be paid for each regional and national telecast. The networks have always implemented the recommendations and have always paid the amount recommended by the NCAA. *Id.*

50. *Id.* at 1293. The NCAA contended that the possibility of competitive bidding cured

An important aspect of the network contracts concerns limitations placed on the number of appearances a school can make. In an attempt to feature as many different teams as reasonably possible, the NCAA limited schools to six appearances every two years, with a limit of four national appearances over the same period.[51] Appearances were to be equally divided between ABC and CBS.

Based on their dissatisfaction with various aspects of the NCAA regulations, a number of major football conferences and independent schools, all members of the NCAA, banded together to form the College Football Association (CFA).[52] The original purpose of the CFA was to promote the interests of major football playing schools within the NCAA structure.[53]

The CFA investigated the possibility of negotiating its own agreement with the television networks for the broadcasting rights to games involving CFA members. It developed an independent plan and received a contract offer from NBC Sports, Inc. (NBC).[54] In response to CFA activities, the NCAA adopted an official interpretation of its bylaws stating that the NCAA controlled "all forms of televising of the inter-collegiate football

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between the networks any alleged illegality of the contracts. However, the district court found that the networks never had the intention to engage in competitive bidding. *Id.* at 1292-93. One witness from ABC Sports stated that, while it was theoretically possible for the networks to engage in a bidding war, "the system [was] not set up in that way." *Id.* at 1293.

A consequence of this lack of competition was that the prices paid to teams for their television rights became uniform, regardless of the dynamics of the games. A clear example occurred in the fall of 1981 when the University of Oklahoma played the University of Southern California (USC). Both teams had prestigious football programs and were ranked among the top five teams in the nation. ABC selected the Oklahoma-USC game as one of its regional telecasts, along with a game between The Citadel and Appalachian State, two schools not well-known for their football programs. Two hundred local ABC stations carried the Oklahoma-USC game while only four stations carried the Appalachian State-Citadel game. However, all four teams received exactly the same fee for making a regional appearance. But for the NCAA contract, it is doubtful that any network would have paid the same amount for an Appalachian State-Citadel game as it would for an Oklahoma-USC game which carried much more national interest and importance.

51. *NCAA*, 707 F.2d at 1150. Each network was required to broadcast a minimum of 35 games per season. Within the 70 games broadcast over a two year period, at least 82 different teams must be featured by each network. *Id.*

52. *NCAA*, 546 F. Supp. at 1285. Membership in the CFA included five prominent athletic conferences—the Big 8, Southeastern, Southwestern, Atlantic Coast, and Western Athletic Conferences—and several major independent football powers such as Notre Dame, Penn State, Pittsburgh, and the service academies. These schools are the powerhouses that dominate college football television and would benefit most from having independent television negotiating rights. The University of Oklahoma and the University of Georgia are both members of the CFA.

53. *Id.*

54. *Id.* At that time only ABC and CBS were allowed to negotiate with schools under the NCAA plan. The NBC contract was far more lucrative to CFA members than was the NCAA contract. It allowed each team more appearances per season and resulted in larger television income per school. *Id.*

games of member institutions."[55] Despite the action, the CFA completed negotiations with NBC for the television rights to games of CFA members. NCAA officials then made public statements suggesting that a CFA-NBC contract would be a violation of NCAA rules and would result in disciplinary sanctions against all CFA members.[56] These circumstances led the University of Oklahoma and the University of Georgia to initiate a lawsuit to block the NCAA's interference with the ability of individual colleges to control the television rights to their football games.

II. Analysis of the Tenth Circuit's Decision

A. *The Court's Conclusions Under the Per Se Rule*

Vital to the court's decision that the NCAA regulations constituted price-fixing which was illegal per se was the determination that the regulations were naked, and not ancillary, restraints. To the extent that the regulations were naked attempts to restrict output and manipulate price, they were illegal per se under *Arizona v. Maricopa County Medical Society*.[57] However, had the restraints been ancillary to a cooperative productive activity, they would have been extracted from the per se category, and subjected instead to the tests of the rule of reason.[58]

The NCAA argued that, as an integration of the rulemaking and rule-enforcing activities of its members, it is a cooperative activity whose purpose is to protect the amateur nature of college sports through regulation and supervision.[59] The television plan and network contracts were ancillary to this cooperative activity because they promoted its efficiency and had procompetitive, rather than anticompetitive, effects.[60] Therefore, the NCAA contended that the regulations should have been scrutinized under *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[61] which calls for analysis under the rule of reason.[62]

Before analyzing the NCAA television plan, the court commented on the scope of its examination. In reference to restraints accompanying integrations, the court held that under *Broadcast Music*, the inquiry should be limited to "whether the practice *facially* appears to . . . restrict com-

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55. Constitution and Interpretations of the National Collegiate Athletic Association, Official Interpretation of art. 11, § 3(a)(Apr. 18, 1981). This interpretation was the first clear statement by the NCAA that it had the right to act as the sole agent for member institutions in negotiating football television rights, contracts, or fees.

56. *NCAA*, 546 F. Supp. at 1286.

57. 457 U.S. 332 (1982).

58. *See* R. Bork, *supra* note 34, at 263-70.

59. Brief for the Appellant at 17, Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n, 707 F.2d 1147 (10th Cir. 1983).

60. *Id.* at 20-28.

61. 441 U.S. 1 (1979).

62. *Id.* at 19-20.

petition and decrease output . . . ."[63] Therefore, the court would not engage in a rule of reason analysis unless an examination of the face of the regulations showed that they were not illegal per se.

In deciding that the NCAA regulations were not ancillary restraints, the court examined three arguments. First, the court analyzed the contention that the regulations promoted competition by protecting live attendance at games. The NCAA argued that the detrimental economic effect that televised football had on live attendance was lessened by the regulations, and this in turn, increased competition.[64] The court found that, for the regulations to be procompetitive, they must increase total viewership—both live and televised—instead of increasing only live viewership.[65] If total viewership was not increased, live attendance was promoted at the expense of televised viewerership. The court determined that this argument failed to qualify the restraint as ancillary.[66]

Second, the court addressed the NCAA's claim that the regulation promoted athletically balanced competition.[67] The court dispensed with this claim for two reasons. Although facially this appeared to be a noneconomic justification for restricting competition, noneconomic justifications, however worthy, cannot be used to justify restraints that adversely affect competition.[68] The court stated that if restraints are necessary to promote athletic balance, then the NCAA is contending that open competition would destroy athletic balance. This contention fails because "[t]he Sherman Act will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable."[69] The court also added that less restrictive

63. *NCAA*, 707 F.2d at 1152 (emphasis added) (quoting *Broadcast Music*, 441 U.S. at 19-20).

64. Brief for the Appellant at 21, *NCAA*, 707 F.2d 1147 (10th Cir. 1983). The NCAA argued that live attendance at football games is the "lifeblood" of most schools which rely on football box office receipts and concession revenues for support of all their athletic programs. The diversion of audiences to television may undermine college sports at these schools, reducing the effectiveness of competition in general. *Id.*

65. *NCAA*, 707 F.2d at 1154.

66. *Id.* The court found the plan to be competitively neutral at best because it created inefficiencies such as the "reduced output of desired products and the increased consumption of less desirable products." *Id.* This analysis assumes that more viewing (consumption) of televised football games is actually desired.

67. The logic behind this contention is that the more television exposure a school receives, the better known and more appealing it becomes. Exposure makes a school more attractive to prospective student athletes and generates more money enabling schools to increase the size of their football programs. An imbalance of exposures enables some schools to become better at the expense of others. Brief for the Appellant at 26, *NCAA*, 707 F.2d 1147 (10th Cir. 1983).

68. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692-96 (1978).

69. *NCAA*, 707 F.2d at 1154 (quoting *Professional Eng'rs*, 435 U.S. at 689).

means could be used to achieve athletic balance.[70]

The final argument the court considered was that the regulations were ancillary to an integrated marketing arrangement. The NCAA stated that college football needed to be promoted as a television series, similar to "Dallas" or "M**S*H*", to successfully penetrate the network programming market and compete with other television programming.[71] In other words, by promoting college football as a series, competition between football games (intrabrand competition) was reduced, while competition between football and other entertainment programming (interbrand competition) was stimulated.[72] The court acknowledged that the stimulation of interbrand competition at the expense of intrabrand competition was potentially procompetitive.[73] However, the court did not validate this argument because an analysis of the nature of the television market would be necessary to see if the promotion of college football as a series actually stimulated interbrand competition.[74] The court declined to engage in such an analysis because it went beyond an assessment of facial validity, into the complexity of a rule of reason analysis.[75] In the absence of such an analysis, the court concluded that the regulations were "so fraught with anticompetitive potential that [they] must be considered invalid per se."[76]

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70. 707 F.2d at 1154. The court did not say what these less restrictive means were, noting only that the district court found that such means existed. The district court never specified what the less restrictive means were. *NCAA*, 546 F. Supp. at 1309-11.

71. Brief for the Appellant at 28-29, *NCAA*, 707 F.2d 1147 (10th Cir. 1983). The NCAA argued that viewers and advertisers develop loyalties to shows due to the efforts of networks to promote those shows. If NBC, ABC, and CBS bid week by week for episodes of "Dynasty", no one network would have an incentive to promote the show or to assure continuity and quality of its episodes, because part or all of the gain would go to another network. This would be true for college football also; thus, the NCAA argued that it must limit the number of broadcasts of NCAA football to allow the effective promotion of college games against other television programming. *Id.*

72. *NCAA*, 707 F.2d at 1155.

73. *Id. See also*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-52 (1977).

74. *Continental*, 433 U.S. at 52 n.19.

75. *See Broadcast Music*, 441 U.S. at 19 n.33.

76. *NCAA*, 707 F.2d at 1155. The court highlighted these anticompetitive risks by comparing the television plan with the integration in *Broadcast Music*. In *Broadcast Music*, the copyright holders retained the right to negotiate individual contracts and could sell outside the blanket licensing arrangement. This ensured the presence of potential competition to inhibit the exercise of total market power by the copyright societies. However, the court in the instant case found no indication of potential competition because the television regulations bound the individual schools to sell their broadcast rights through the NCAA television plan only. The television plan also created foreclosure of competition by restricting the total number of games to be broadcast, thus limiting the amount of product available to buyers. In *Broadcast Music*, however, no foreclosure risks were involved since an unlimited number of blanket licenses were offered for sale. *See supra* text accompanying notes 37-42.

B. *Examination of the Court's Reasoning Under the Per Se Rule*

The underlying reasons for the court's invalidation of the NCAA television regulations demonstrate a strict adherence to the language of a consistent line of Supreme Court cases concerning price-fixing. *Arizona v. Maricopa County Medical Society*[77] represents the culmination of those cases and the *NCAA* decision echoes many of the principles affirmed by the Supreme Court in *Maricopa County.*

In *Maricopa County*, the Supreme Court reaffirmed the rule of *Broadcast Music* that the analysis of restraints accompanying integrations calls only for facial examination.[78] Staunchly supporting this theory that the true per se rule finds illegality solely on the face of an agreement,[79] the *NCAA* court refused to engage in any analysis beyond a superficial inquiry. Thus, the court declined to consider the argument that the television regulations stimulated interbrand competition, even though the court recognized that the stimulation of interbrand competition at the expense of intrabrand competition was potentially procompetitive.[80] Similarly, the court rejected the contention that competition was enhanced by the promotion of live gate attendance, and instead, substituted its belief that total viewership must be promoted for the regulations to be procompetitive.[81]

The *Maricopa County* opinion was influential in the court's decision to invalidate the regulations based purely on a facial examination[82] and to refute the NCAA's strongest argument—the promotion of athletically balanced competition.[83] The court's decision was devoid of analysis on this point. The court rejected the argument on its face because it appeared to be a noneconomic justification and it "shaded" into the argument that competition was actually harmful to the market.[84]

The per se analysis by the Tenth Circuit appears to be in harmony with *Maricopa County*, yet the decision is disturbing because it seems shallow

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77. 457 U.S. 332 (1982).

78. *Id.* at 344 n.16. The *Maricopa County* Court supported application of the per se rule even to the extent that it invalidated practices that would have been decided differently under the rule of reason. So even though cases arise that do not fit the per se category generally, such cases are not deemed "sufficiently common or important to justify the time and expense necessary to identify them." *Id.*

79. *See* R. BORK, *supra* note 34, at 267.

80. *NCAA*, 707 F.2d at 1155. *See supra* notes 72-76 and accompanying text.

81. 707 F.2d at 1155. *See supra* notes 64-66 and accompanying text. *See also Maricopa County*, 457 U.S. at 345 (The Court stated "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.") (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940)).

82. *See Maricopa County*, 457 U.S. at 351-54.

83. *See* Brief for the Appellant at 26, *NCAA*, 707 F.2d 1147 (10th Cir. 1983).

84. *NCAA*, 707 F.2d at 1154. *See supra* notes 67-70 and accompanying text.

and incomplete. In its determination to engage only in facial examination, the court left behind unanswered questions—questions that may have been a step removed from the facial category but even further removed from the rule of reason category.

Although the court referred to the NCAA as the "guardian of amateurism",[85] the court's decision never addressed the public service aspect of the purpose and goals of the NCAA. The non-profit NCAA poses a situation different from the profit-oriented business enterprises that are usually associated with price-fixing violations.[86] Non-television regulations by the NCAA have been upheld as being "endowed with certain benefits to society" and for "curtailing . . . potentially monopolistic practices by the more powerful . . . ."[87] In referring to the nature of a particular profession, the Supreme Court has stated that "the public service aspect, and other features of [a profession], may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."[88] But in *NCAA* the court seemed to focus on the "pot of gold"[89] potential behind restraint-free televised football, and ignored the NCAA's articulated purpose for the restraints. Viewed in a light more favorable to the NCAA, some of the doubtful aspects of the plan, such as the potentially procompetitive stimulation of interbrand competition, look more attractive.

Although the language of most Supreme Court price-fixing decisions speaks in broad terms, the Court does not appear to be as eager as the Tenth Circuit to apply the per se label. A survey of many Supreme Court price-fixing cases reveals the tendency of the Court to take a more discerning approach toward pure facial analysis.[90] The Court consistently tends to equivocate on the per se rule and allow greater insight into the purposes and potential values of the restraints it scrutinizes. If the Supreme Court zealously follows its own language, then the NCAA televi-

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85. 707 F.2d at 1153.

86. *Id.* at 1167 (Barrett, J., dissenting) (indicating that the per se rule has been applied only in cases involving true competitive business enterprises with purely profit-oriented goals).

87. Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1153 (5th Cir. 1977). *See also* Warner-Amex Cable Communications, Inc. v. American Broadcasting Co., 499 F. Supp. 537 (S.D. Ohio 1980) (sustaining the 1978-81 NCAA television plan and network contract).

88. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975). *See also Maricopa County*, 457 U.S. at 341 (indicating that price-fixing agreements premised on public service or ethical norms could justify a different form of analysis).

89. *NCAA*, 707 F.2d at 1165 (Barrett, J., dissenting).

90. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); Catalano v. Targer Sales, Inc., 446 U.S. 643 (1980); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). *See generally* R. BORK, *supra* note 34 (suggesting conflict between language of Supreme Court and actual application of per se rules).

sion plan and network contracts will be held to be per se violations. However, if the Court gives some weight to the socially-beneficial purposes of the NCAA, the regulations may be regarded in a light different from that usually given profit-oriented business organizations, and the rule of reason test will be invoked.

C. *The Court's Conclusions Under the Rule of Reason*

Anticipating a possible review by the Supreme Court, the *NCAA* court scrutinized the television plan and network contracts under the rule of reason. Applying the test of *Standard Oil Co. of New Jersey v. United States*,[91] the court found the regulations to be unreasonably restrictive of competitive conditions.

The court found that the NCAA regulations increased the potential for foreclosure of competition by limiting the number of buyers and sellers in the marketplace.[92] Since schools were allowed to sell their broadcast rights only according to the provisions of the television plan, the NCAA was found to be the only vendor of college football broadcast rights.[93] The number of actual buyers was restricted by the exclusivity of the plan, and the number of possible buyers was also limited because the broadcast rights were sold only as a package.[94] If a broadcaster did not want or was unable to purchase an entire package of games, it was effectively eliminated from the bidding.

The court then concluded that, in order to fully gauge the regulations' net effect on competition, an assessment of market power was necessary.[95] Market power is "the power to control prices or exclude competition,"[96] and it can occur when there is a marketable product for which no readily available substitute exists.[97] The court agreed with the district court's

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91. 221 U.S. 1 (1911). The *Standard Oil* test prohibits contracts that are "unreasonably restrictive of competitive conditions." *Id.* at 58. The Court has held under the *Standard Oil* test that "[u]nreasonableness . . . could be based either (1) on the nature or character of the contacts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." *National Soc'y of Professional Eng'rs*, 435 U.S. at 690. *See also supra* note 9.

92. *NCAA*, 707 F.2d at 1157.

93. *Id.*

94. *Id. See supra* notes 47-49 and accompanying text.

95. 707 F.2d at 1158. Market power has traditionally been one of the factors examined under the rule of reason. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

96. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

97. *Id.* at 404. Whether a readily available substitute exists is determined by two factors:
(a) The reasonable interchangeability of use to which two or more products can be put. This factor, in turn, is satisfied when two or more products (i) have essentially similar physical characteristics, or (ii) can be put to use for the same purpose.
(b) The cross-elasticity of demand, i.e., the extent to which consumer preference

conclusion that NCAA football constituted a unique type of Saturday afternoon programming for which no readily available substitute existed.[98] The court held that the NCAA controlled virtually one hundred percent of the relevant market, defined as televised college football.[99] The NCAA had argued that the relevant market should be all television programming, or at least all fall sports programming, thirteen percent of which was NCAA football.[100] The court rejected this argument and broadly stated that "[e]ven assuming that the market definition is too narrow, the NCAA's total control over televised intercollegiate football, when combined with NCAA football's apparent uniqueness from the perspective of broadcasters, supports the inference that the NCAA possesses some degree of market power."[101]

The court rejected the contention that the restraints promoted athletically balanced competition by reasserting that less restrictive means existed.[102] A properly drawn system of passover payments was suggested as one way that the disparity in television revenues between schools could be reduced to ensure adequate athletic funding for all schools.[103] The court further noted that without the imposition of the NCAA's television regulations, the networks would show more games on a local level. This would allow more schools the opportunity to have their games televised and would have the effect of equalizing revenues.[104]

The NCAA's contention that the regulations were vital to the penetration of college football into the network programming market was essentially destroyed by the earlier finding that NCAA football was a unique form of programming. Since no readily available substitutes existed for NCAA football, there was no television programming to compete against

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shifts freely between two or more products.

2 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 6G.04(1) (1982).

98. *NCAA*, 707 F.2d at 1158. Several factors that support this conclusion were mentioned by the court. First, NCAA football dominates the audience share of Saturday afternoon programming. The cost per viewer for advertising time during NCAA telecasts is more than 2 ½ times greater than the average cost per viewer for other programming. NCAA football has never been seriously challenged by programming in opposing network time slots—old movies, cartoons, and comedies are usually shown. Professional football, the most logical substitute, is precluded by its own antitrust exemption from being broadcast on Saturday afternoons during the NCAA football season. *See* 15 U.S.C. §§ 1291, 1293, 1294 (1982). Finally, the demographic makeup of viewers of NCAA football in unique in that it consists mostly of persons in middle to upper income brackets and college graduates. These findings were based on the evidence in the district court record. 546 F. Supp. at 1319-23.

99. *NCAA*, 546 F. Supp. at 1319-23.

100. Brief for the Appellant at 40, *NCAA*, 707 F.2d 1147 (10th Cir. 1983).

101. *NCAA*, 707 F.2d at 1159.

102. *Id.*

103. *Id. See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 270-71 (1963) (Brennan, J., concurring) (suggesting that a distributor who raids or sells across territorial boundaries may be obligated to share the profit with the dealer whose territory is invaded).

104. 707 F.2d at 1159-60.

it and no interbrand competition existed. The lack of interbrand competition, combined with the television plan's removal of intrabrand competition, eliminated price competition from the market.[105]

Finally, the court suggested that the NCAA had used its dominance over all college sports regulation to obtain control of the broadcast rights to college football.[106] The NCAA had used sanctions to force schools to submit to the television regulations. These activities affected the bigger schools, such as CFA members, almost exclusively since they were the schools whose games had the most commercial value.[107]

D. *Examination of the Court's Reasoning Under the Rule of Reason*

The court's scope of inquiry under the rule of reason was limited to an examination of the commercial effects of the NCAA's television regulations. No attempt was made by the court to analyze the restraints in light of the NCAA's traditional regulatory functions. The court appeared to agree with the appellees' contention that when the NCAA enters into the market place and involves itself in commerce, it must follow the same rules as traditional business and commercial entities.[108]

The court's initial conclusion that the NCAA regulations increased concentration in the marketplace appears to be somewhat conjectural. The court does not explain how the exclusive network contracts differ from any other long-term commitment contracts.[109] The court also fails to mention that in many commercial transactions potential buyers are foreclosed from sales opportunities because they are financially unable to bid on a certain product. Essentially, the court states that while there is nothing wrong with an individual university entering into a long-term exclusive contract, anticompetitive risks are created when the NCAA enters into such a contract on behalf of that university. It is the NCAA's regulation, not the type of contract executed, that is unreasonable.

The court's conclusion that NCAA football constitutes a unique type of Saturday afternoon programming appears to be better substantiated. The district court record contained enough evidence to reasonably support a conclusion that from the standpoint of the networks, which must face the problem of finding satisfactory programming for Saturday afternoon, no readily available substitute for NCAA football exists.[110] Thus, the NCAA could dictate the conditions under which the networks may televise col-

105. *Id.* at 1160.

106. *Id.*

107. *Id. See supra* note 52.

108. Brief for the Appellees at 35, *NCAA*, 707 F.2d 1147 (10th Cir. 1983).

109. *See* United States v. General Dynamics Corp., 415 U.S. 486 (1979); Fleer Corp. v. Tops Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981).

110. *NCAA*, 546 F. Supp. at 1297-1301.

lege football.

In response to the contention that the NCAA television plan promotes athletically balanced competition, the court again asserted that less restrictive means existed.[111] The court's suggested alternative of the passover payment plan[112] does not seem reasonable since the goal of the CFA members was to free themselves of any restraints affecting the sale of their broadcast rights. Although such a system could equalize revenues, it would not be acceptable to those bigger schools which were actually bringing in the revenues. The controlling factor in the court's rule of reason analysis was its definition of the relevant market and the subsequent determination that market power existed. The existence of market power was essential to finding that the NCAA regulations presented marketwide anti-competitive risks. When the market was narrowly defined as televised college football rather than all sports programming in the fall, the court could infer that the NCAA controlled virtually one hundred percent of the relevant market.[113] None of the commercial justifications of the NCAA would be sufficient against this conclusion.[114]

The district court was justified in its finding that the NCAA television plan is unreasonably restrictive of competitive conditions. The conclusions of product uniqueness and market power are dispositive of the case. However, the court neglected to examine the intent and purposes behind the regulations. The Supreme Court has given some recognition to the public service and socially redeeming aspects of an enterprise.[115] Should the Supreme Court examine the commercial effects of the regulations in light of the NCAA's noncommercial purposes and goals, the restraints might be found to be legal ancillary restraints. Nonetheless, the determination of market power appears to be the controlling factor under the rule of reason. Therefore, despite an inquiry into purpose and intent, if the Supreme Court finds that the NCAA possesses some reasonable degree of market power, the television plan and network contracts will be deemed to constitute price-fixing and will be illegal per se.

III. Conclusion

NCAA deals with an important aspect of antitrust law—the proper application of the per se rule to price-fixing agreements. This case illustrates a classic example of balancing judicial convenience against discern-

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111. *NCAA*, 707 F.2d at 1159.

112. *Id.*

113. *Id.*

114. *See* R. Bork, *supra* note 34, at 279 (suggesting that a restraint will only be legal if the market share of the party involved does not amount to market power). *See also* L. Sullivan, *supra* note 34, § 17.

115. *See supra* notes 86-88 and accompanying text.

ing examination. The *NCAA* court attempts to adhere to the language of a recent line of Supreme Court cases dealing with price-fixing and the application of the per se rule. However, in its quest for a purely facial examination of the NCAA television regulations, the court has left the decision open to question.

The Supreme Court decision probably will analyze the NCAA regulations under the rule of reason, and give more deference to the socially beneficial aspects of the regulations. However, under the rule of reason, the validity of the regulations will ultimately be determined by the test of market power. If the Supreme Court concludes that the NCAA possesses a substantial degree of market power, the television regulations will be held to be unreasonably restrictive of competitive conditions.

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ADDENDUM

On June 27, 1984, the Supreme Court handed down its decision in *National Collegiate Athletic Association* v. *Board of Regents of University of Oklahoma.*[1] The Court relied on a "rule of reason" analysis in affirming the judgment of the court of appeals.

1. No. 83-271 (June 27, 1984).