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ARTICLES

SOLVING THE PROBLEM OF SOCIAL COST THROUGH LEGISLATIVE PRESSURE: A CASE STUDY OF THE COASE THEOREM AS APPLIED TO THE COLLEGE BASKETBALL SHOE SCANDAL

STEPHEN F. ROSS & MILES J. GUENO*

I. INTRODUCTION

Recent federal prosecutions reveal widespread corruption in youth basketball.¹ Illegal fraud conspiracies are driven by major shoe companies, who seek an unfair advantage years later in signing National Basketball Association (NBA) stars to lucrative endorsement deals. The result victimizes many players, and it distorts how teenagers train and develop. Youth basketball could be reformed by direct government regulation. Most corruption could also be eliminated by an agreement between the NBA and its players association, the National Basketball Players Association (NBPA), to reshape how endorsement deals are made. Such an agreement would likely be efficient and beneficial to clubs, NBA players, and most youth basketball stakeholders serving legitimate interests. However, it is virtually certain that—absent outside help—the parties would never agree. This Article applies the principles of the original Coase

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1. Will Hobson & Kevin Armstrong, *All Three Defendants Found Guilty of Wire Fraud in College Basketball Corruption Trial*, WASH. POST, Oct. 24, 2018, https://www.washingtonpost.com/sports/colleges/all-three-defendants-found-guilty-of-wire-fraud-in-college-basketball-corruption-trial/2018/10/24/fba5b866-d7be-11e8-a10f-b51546b10756_story.html?utm_term=.77533a1cf292.

Theorem² to explain why. It then builds upon Coase's insights to suggest that, in a context of imperfect but attainable information, and significant-but-not-insurmountable bargaining costs, legislative pressure is an effective public policy strategy to facilitate a private agreement that is efficient and socially beneficial.

Recently, shoe company executives and college basketball coaches were convicted of conspiracy to violate federal anti-fraud statutes by funneling money to star high school players' families and advisors. The conspiracy was designed to induce players to attend specific universities with an endorsement relationship with the shoe company, and to steer these players toward selecting agents or financial managers likely to induce their future clients to sign endorsement contracts with the shoe companies.³ The first trial in fall 2018 resulted in convictions of two Adidas executives and an agent for fraud relating to under-the-table payments to families of star recruits to affirm their commitment to the Adidas-affiliated University of Louisville.⁴ The trial evidence showed that the defendants paid families of five recruits amounts ranging from \$2,500 to \$100,000.⁵

Brian Bowen, Jr., an elite high school basketball player whose parents accepted a \$100,000 payment by Adidas officials to commit to the University of Louisville, alleges that Adidas officials, Amateur Athletic Union (AAU) coaches, financial advisers, and college coaches conspired to commit bribery

2. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) [hereinafter Coase].

3. *United States v. Gatto*, 295 F. Supp. 3d 336, 340 (S.D.N.Y. 2018) (explaining the alleged scheme as: "defendants and their co-conspirators [paying] bribes to certain high school basketball players bound for NCAA Division I universities and/or their families in exchange for commitments by the students to matriculate at specific universities and then retain Dawkins' services and sign with Company—1 [Adidas] once they turned professional"). By infringing NCAA rules, the conspirators defrauded Louisville and the University of Miami, who would not have awarded scholarships to those recruits if they had known about the illicit payments. *Id.* The theory that the universities—whose coaches were active participants in the conspiracy and who profited by recruiting these star athletes—were the victims of fraud is controversial and is beyond the scope of this Article. For reasons the government's attorneys did not articulate, the claim that the victims were universities seeking to recruit the athletes in a non-corrupt manner was not raised. Nor did the prosecution pursue the argument that the athletes themselves were victims as the motivation to steer them to business managers and agents who would lead them to sign contracts with a particular shoe company was not fully disclosed. See, e.g., Gentry Estes, *College Basketball's Trap: How Agents and Shoe Companies Team Up to Exploit Athletes*, LOUISVILLE COURIER J. (Feb. 26, 2018), <https://www.ksdk.com/article/sports/ncaab/college-basketballs-trap-how-agents-and-shoe-companies-team-up-to-exploit-athletes/63-523407036> (explaining players often do not realize they are "being played" by shoe company representatives and coaches or family members).

4. Hobson & Armstrong, *supra* note 1.

5. *Id.*

and fraud.⁶ The scheme's purpose was to induce elite high school basketball players to play at certain universities for their own profit.⁷ Further, the complaint alleges that the concerted scheme caused disadvantaged high school athletes, like Bowen, to lose (a) their eligibility, (b) the funds necessary to further their education and (c) the opportunity to develop their basketball talents at the collegiate level.⁸

These payments arise in the context of the global industry of athletic shoe marketing. A cornerstone of the marketing strategy for major athletic shoe and apparel companies, such as Nike, Adidas, and Under Armour (hereafter referred collectively as "shoe companies"), is to obtain endorsements from star basketball players. Competition for star basketball players commences at the high school level.⁹ This is because an astounding number of players who choose to participate with youth clubs sponsored by a particular shoe company choose to attend universities who are officially sponsored by the same company, and an astounding number of NBA players choose to endorse the shoe company sponsoring their college team.¹⁰ Rivalry among the shoe companies is fierce, and exists in the context of regulations adopted by the member schools of the National Collegiate Athletic Association (NCAA) that prohibit players from signing endorsement contracts if they wish to play college basketball within the NCAA.¹¹ Because NCAA rules preclude an immediate commercial relationship between shoe companies and collegiate athletes, shoe companies see an enormous advantage if they can influence players in high school to attend universities with whom they have sponsorship relationships.¹² The advantages shoe companies gain from this tactic include: (a) profits from the success of sponsored college teams,¹³ (b) increased profits from promoting top high school

6. Complaint (Jury Trial Demanded) at 1-5, 147, *Bowen v. Adidas America, Inc.*, No. 3:18-3118-JFA, 2018 WL 6061800 (D. S.C. Nov. 19, 2018) [hereinafter *Bowen Complaint*].

7. *Id.* at 118–22.

8. *Id.* at 124.

9. *Estes*, *supra* note 3.

10. *Id.* ("Nike colleges landed more than 85 percent of the five-star prospects who have signed with a school since 2003, and roughly 75 percent of all of those five-star players who reached the NBA wear or have worn Nike").

11. NCAA, 2017-18 NCAA DIVISION I MANUAL art. 12.1.2.4.11, at 67 (Aug. 1, 2017) (stating a prospective student-athlete may not "enter into an arrangement . . . with an apparel or equipment manufacturer or distributor that permits the prospective student-athlete to select apparel and equipment items from a commercial establishment of the manufacturer or distributor[.]").

12. *Bowen Complaint*, *supra* note 6, at 57.

13. Will Hobson, *Inside the Basketball Black Market That Put Adidas in the FBI's Crosshairs*, WASH. POST, Oct. 1, 2018, <https://www.washingtonpost.com/sports/colleges/all-three-defendants-found-guilty-of-wire-fraud-in-college-basketball-corruption-trial/2018/10/24/fba5b866-d7be-11e8-a10f>

recruits wearing their brand,¹⁴ and (c) an advantage over rivals in signing future NBA stars to endorsement contracts upon turning professional.¹⁵

Under-the-table payments are problematic for many reasons, even for those who do not subscribe to the NCAA's view that college athletes should not be paid. The business model supporting these payments distorts the process by which elite teenagers select colleges, and creates strong incentives for coaches, families, and advisors to steer newly-professional players to sign endorsement contracts with the favored company, even if not in the athlete's best interest. It also creates a structure where many elite players are trained and developed by those primarily interested in gaining a competitive advantage in signing NBA stars to endorsement deals, rather than the interests of the players. Finally, the business model also results in less endorsement money for established NBA players, whose endorsements actually drive shoe sales.¹⁶

Solutions to this problem include everything from eradicating poverty, abolishing the NCAA, publicly funding youth basketball as a well-regulated competition under the aegis of USA Basketball, or direct federal regulation of youth coaches, agents and managers, and shoe company contracts. However, a less radical intervention may be required.

Most of this corruption could be eliminated if NBA players were compensated for endorsements under a scheme where they collectively agreed not to endorse shoe companies unless they were the official sponsor of the club for which they play. Under this scheme, a significant portion of the money now used to lure youth to sign with designated colleges would go directly to NBA clubs in the form of official sponsorships that would skyrocket in value; most of these funds would then be redistributed pursuant to a collective bargaining agreement to the NBPA and then redistributed by them back to the players. As

b51546b10756_story.html?utm_term=.77533a1cf292. "For Nike, Adidas and Under Armour, grass-roots basketball is an educated gamble—money spent in the hope that, among thousands of teenagers playing in their leagues, a few will become recognizable stars for their sponsored college teams and develop into NBA players worthy of endorsement deals. The overarching strategy is to cast a wide net and hopefully attract the next generational talent who will develop a lifelong affinity for the brand—and sell truckloads of shoes." *Id.*

14. Matthew Kish, *Exclusive: Adidas Drops Bid to Extend NBA Deal, Redraws Basketball Strategy*, PORTLAND BUS. J. (Mar. 16, 2015), https://www.bizjournals.com/portland/blog/threads_and_laces/2015/03/exclusive-adidas-drops-nba-bid-redraws-basketball.html (explaining that Adidas is implementing a new strategy by targeting their marketing efforts on promoting Adidas through high school kids. Chris Grancio, Adidas's global basketball general manager, explains, "[w]e haven't been able to elevate our brand for the basketball consumer that we're targeting. We ultimately decided that we would change our investment strategy and invest more players on the court.").

15. Hobson, *supra* note 13.

16. Cameron Chung, *Top 4 Sports Agent Scandals*, SPORTS AGENT BLOG (Aug. 18, 2017), <http://sportsagentblog.com/2017/08/18/top-5-sports-agent-scandals/> (illustrating how "UCLA basketball star Tyler Honeycutt, [] accepted over \$55,000 from agent Noah Lookofsky during his two years in LA and even while still in high school[,] then decided to employ another agent upon reaching the NBA.)

a result, young players would make less-distorted decisions about colleges, and new professionals would select agents and managers acting solely in their own interest. Elite teenagers may see fewer opportunities for free travel and apparel, and some families will see less money in under-the-table payments, but players would continue to participate in less-corrupt youth competitions and would henceforth receive training designed to maximize their own development rather than their club's brand.

The insights of Ronald Coase, the Nobel-prize winning pioneer in the field of law and economics, explain why the parties will never agree voluntarily to the proposed scheme, even though NBA players and clubs would arguably be better off. Coase is famous for his theorem that an efficient result will be obtained regardless of the legal assignments of rights and duties, if the relevant parties have perfect information and there are no transactional or bargaining costs.¹⁷ Less attention is given to the clear corollary to this theorem, which Coase also articulated: where the parties lack information, or where substantial bargaining costs exist, the parties cannot be expected to reach the optimal result, and so the law will affect the parties behavior and should be tailored to reach an efficient result.¹⁸ Even less attention is given to the intermediate case, where information asymmetries and bargaining costs inhibit an efficient agreement; the parties in this case may be induced by external pressure to overcome these challenges and reach an efficient solution.

Coase posited two cases to illustrate his theorem. In one, a farmer's corn is destroyed by an adjoining rancher's cows wandering through her crops. If the efficient solution is to build a fence, and the efficient fence-builder is the farmer, the farmer will build the fence regardless of liability. If the law imposes no liability, the farmer will build the fence as a cheaper alternative than crop destruction. If the law makes the rancher liable, she will pay the farmer to build the fence (which is cheaper either than paying for crop damage or building the fence herself).¹⁹ In the second case, a railroad traveling through farmland releases sparks creating fires that damage crops of hundreds of farmers within vicinity of the train's path. Although the efficient solution may be for the railroad to install equipment to prevent the engine from dispensing sparks, whether this occurs depends on liability.²⁰ If the railroad is not liable, it would be insurmountable to organize the mass of farmers along the railroad's route to

17. See generally Coase, *supra* note 2.

18. *Id.* at 15–16.

19. *Id.* at 2–6.

20. Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 588 (1987), citing Coase, *supra* note 2, at 33.

pay a proportionate share of the cost to the railroad for equipment installation. In the latter case, the law needs to intervene.

There is a third case however, where the information is not perfect and bargaining is not costless, but with sufficient incentives the parties can reach an efficient agreement. In such case, this Article analyzes how legislative pressure may persuade parties to overcome costs and reach the desired result. To illustrate, the Article discusses the current controversy of under-the-table payments by shoe companies to elite young basketball players and their families to illustrate the Coase Theorem, and offers a more modest solution than government intervention: legislative pressure to induce the parties to overcome bargaining and information problems to reach an efficient and socially-beneficial solution.

In Part II, the Article details how shoe companies compete to obtain endorsements from star athletes by massive subsidies to youth basketball teams, and by influencing high school athletes toward specific college basketball programs. It discusses the costs of this approach, both to the shoe companies and to the athletes' potentially inefficient selection of college programs and agents, as well as the side benefit of promoting access to elite competitions by economically disadvantaged teenagers. Part III proposes a more efficient way to market shoes through celebrity endorsement: including in the collective bargaining agreement between the NBA and the NBPA a provision that NBA players may not endorse shoe or apparel products except for the company that officially sponsors the club for which they are employed. This Article asserts that most of the money shoe companies would save from its massive indirect effort to influence teenagers would instead go into substantially increased payments to NBA clubs for official sponsorships; an efficient agreement would allow NBA clubs to retain a modest increase in their current income but would give an overwhelming percentage of the sponsorship money to the NBPA for redistribution to its players. Further, there would likely be sufficient funds leftover to provide organized support by the NBA and its players, perhaps under the aegis of USA Basketball, for targeted funding to promote equal economic access to youth sports. Under the proposed scheme, this Article argues that shoe companies, the NBA, and its players (collectively) would all be better off, and individual star players would be unharmed based on the redistribution formula adopted by the NBPA.

Part IV describes why this is unlikely to happen, based on a narrative understood by anyone with passing familiarity with the Coase Theorem. The precise amount of shoe company savings, and likely investment in official NBA club sponsorship, is unknown. At the outset of bargaining, NBA owners would be unlikely to agree to give ninety percent of the marginal funds to the players. Star players would be very reluctant to support a scheme that would endanger

their lucrative contracts without knowing the precise formula the union would adopt to redistribute funds. The NBPA would face pressure from stakeholders who would lose out from a more efficient scheme, including corrupt middlemen and legitimate agents who earn fees from player endorsements but not from income redistributed by the union.

Part V suggests a less interventionist alternative than regulation: legislative pressure. The facts and bargaining problems faced in securing a complex, multi-party understanding between shoe companies, the NBA, and its players are significant, but not insuperable. This part suggests an illustrative model: Major League Baseball's (MLB) ability to overcome similar obstacles to secure an agreement with its players union on drug testing for performance enhancing drugs (PEDs). Bargaining problems kept the parties apart until Senator John McCain, the chair of the Senate Committee on Commerce, credibly threatened federal legislation to regulate this issue. Faced with the prospect that a resolution to this complex issue might be subject to the political process, and that inevitable modifications because of the dynamic nature of drug testing would require returning to Congress, Commissioner Bud Selig and Major League Baseball Players Association (MLBPA) Director Donald Fehr overcame bargaining costs to reach a solution.²¹ This Article suggests a similar result here: a credible threat of federal legislation to regulate shoe endorsements would lead to a market-based result reflection from the negotiation of the parties.

II. THE CURRENT MARKET FOR SHOE COMPANY ENDORSEMENTS

The shoe companies' current scheme to target grassroots basketball is designed to lure young basketball players into their brand for future endorsement, if and when they become professional athletes. This Part discusses the profitability of this scheme, how the shoe companies' marketing strategy distorts high school players' selection of colleges, agents and managers, and identifies inefficiencies in the current scheme. Finally, it analyzes the benefits and downfalls of this strategy for youth basketball.

A. *Overview of the current business model*

Although only relatively few elite NBA stars have the fame to influence significant purchases of shoes and other sports apparel, shoe companies have recognized that waiting until a player establishes himself as a star is far too late

21. Larry Brown, *Exploring John McCain's Profound Impact on the Sports World*, LARRY BROWN SPORTS (Aug. 25, 2018), <http://larrybrownsports.com/baseball/john-mccain-profound-impact-sports-world/461521>; Dana Milbank & Thomas Heath, *McCain Threatens Baseball Over Drugs*, WASH. POST, Dec. 4, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A33702-2004Dec3.html>.

to commence competitive bidding for his endorsement.²² Shoe companies now focus on a wide array of efforts to influence the player's decision much earlier in their life and career. Aside from the actual compensation of an NBA player, most of the companies' investments fall into three major categories: (1) official sponsorship of major college basketball programs; (2) funding national tournaments under the auspices of the AAU; and (3) funding and sponsoring of individual teams participating in AAU competition.

The official sponsorship approach can be illustrated by UCLA's fifteen-year, \$280 million deal with Under Armour.²³ The deal states that "Under Armour [will commit] to supplying an average of \$7.4 million in clothing, shoes and equipment each school year and contribute an additional \$2 million over the next eight years for upgrades at [UCLA athletic] facilities."²⁴

The recruiting process begins by sponsorship of tournaments and teams in AAU competitions. The AAU summer leagues (hereinafter referred to as "circuits") provide a forum for AAU coaches, brand representatives and college coaches to influence the prospect and his family to remain loyal to the shoe company brand. Through the AAU circuits, AAU coaches and brand representatives, and college coaches facilitate continuous dialogue with parents and athletes, designed so the prospect will remain with the brand from AAU until the NBA.²⁵

At the AAU level, the shoe companies sponsor programs that regularly feature top prospects, who are lured to a limited number of teams that play in high-profile events sponsored by the companies.

Shoe companies also sponsor high school and prep school programs, but nothing is guaranteed. As with many AAU teams, the loss of top talent may mean the end of shoe company funding.

22. Brad Schmidt & Jeff Manning, *Basketball Bribes: How Adidas Bankrolled a Black Market for Top Teenage Talent*, OREGONIAN, Feb. 4, 2019, <https://www.oregonlive.com/business/2019/02/basketball-bribes-how-adidas-bankrolled-a-black-market-for-top-teenage-talent.html> ("Adidas would help coaches at Adidas-sponsored schools identify and recruit high-school talent while having direct access to college players who might be stars-in-the-making." This article eludes to the fact that the corrupt scheme shoe companies perform is predicated on identifying young talent in high school and monitoring these recruits progress toward stardom and profitability through college to the NBA.).

23. David Wharton, *UCLA's Under Armour Deal for \$280 Million is the Biggest in NCAA History*, L.A. TIMES, May 24, 2016, <https://www.latimes.com/sports/ucla/la-sp-0525-ucla-under-armour-20160525-snap-story.html>.

24. *Id.*

25. Estes, *supra* note 3.

The setup creates an incentive for basketball coaches at all levels to remain loyal to a shoe company brand — and have players do the same — while also continuing to recruit fresh talent on behalf of the shoe company.²⁶

Shoe companies contract with universities to be the sole apparel provider to all of the university's sports teams. These agreements provide a two-fold return on investment for the shoe company and the university. The shoe company benefits from increased profits due to the fans/alumni of the university who purchase their apparel. In addition, sponsorships provide shoe companies with irreplaceable exposure to prospective NBA stars, to facilitate their agreement to professional deals when the college stars make the NBA. In return, the universities profit from the revenue contractually designated to them and by having affiliation with the shoe brand. One report details how this scheme is extremely successful for Nike:

Since 2003, roughly 80 percent of five-star prospects from Nike-affiliated AAU or travel teams went on to play for a Nike-sponsored college. Of all five-star players who reached the NBA, roughly 87 percent of those who were affiliated with Nike through youth teams and colleges continued to wear or endorse those shoes as professionals.

Nike colleges landed more than 85 percent of the five-star prospects who have signed with a school since 2003, and roughly 75 percent of all of those five-star players who reached the NBA wear or have worn Nike, compared to 18 percent for Adidas and 3 percent for Under Armour.²⁷

The shoe companies' third major marketing expense is the cost of hosting national tournaments in concert with AAU. Nike, Adidas and Under Armour all sponsor circuits in which prospective players try out for a specific team.²⁸ For example, Team Whynot, a Los Angeles based team, will hold tryouts at a local high school or gymnasium.²⁹ If selected by Team Whynot, the athlete would become part of the EYBL circuit (Elite Youth Basketball League), owned and funded by Nike. Nike will then supply the teen with apparel and shoes,

26. *Id.*

27. *Id.*

28. Mike Enright, *How Much Does EYBL Cost*, RECRUIT LOOK (2015), <https://recruitlook.com/dwqa-answer/answer-for-how-much-does-eybl-cost/> (explaining that most AAU teams charge a tryout fee between \$10 and \$30, and a membership fee of \$500 to fund facilities to practice and train, and to cover costs for summer travel and tournaments, staff, and facility fees).

29. *Team Whynot (CA)*, D1 CIRCUIT, <https://www.d1circuit.com/page/show/4918376?subseason=599727&tab=content> (last visited Dec. 6, 2019).

worth hundreds of dollars, and exposure to scouts and coaches from top Nike-sponsored colleges, such as Kentucky, North Carolina, and Duke.³⁰ Given that AAU teams are non-profit organizations, they can hold fundraisers, seek sponsors, and receive donations.³¹ These other sources of income are usually designated for operating the team and helping economically challenged families who struggle to afford the costs to participate with the team.³²

Shoe companies spend significant capital operating their respective AAU circuits. Each is comprised of numerous tournaments and teams. To illustrate, the Nike Peach Jam is an end of the year tournament for Nike EYBL teams.³³ The teams in Nike's EYBL circuit who have the most success competing in EYBL tournaments throughout the summer will qualify for the Peach Jam invitational.³⁴ The Nike Peach Jam exhibits games from 9:00 A.M. to 9:00 P.M. for four days.³⁵ Nike's sponsorship deals with EYBL teams cover the costs of travel concerning trips to tournaments around the country.³⁶ In addition to receiving apparel throughout the year, Nike provides EYBL players whose teams qualify for the Peach Jam with exclusive shoes and apparel bearing the Peach Jam logo (this year's signature shoe will be the new Nike KD 11).³⁷

30. See *Nike EYBL the Inside Scoop*, HOOP DREAMS MAG. (May 23, 2013), <http://hoopdreamsmag.com/?p=6985> (discussing how EYBL players receive special edition shoes for qualifying for the Nike Peach Jam tournament: "all players receive a custom pair of Nike EYBL sneakers along with EYBL uniforms and an assortment of other gear"). See also *SI Wire, How Adidas, Nike and Under Armour Have Divvied Up Major College Basketball*, SPORTS ILLUSTRATED (Oct. 2, 2017), <https://www.si.com/college/2017/10/02/adidas-nike-under-armour-contracts-schools-conferences> (identifying schools signing with each shoe company).

31. Doug Green, *Bottom Line: AAU A Money Machine*, Q.C. TIMES (July 1, 2013), https://qctimes.com/sports/high-school/basketball/boys/bottom-line-aau-a-money-machine/article_b12456f6-607d-5fd1-9b8d-7d01d00aedb5.html.

32. *Id.*

33. See *Nike EYBL the Inside Scoop*, *supra* note 30.

34. Ricky O'Donnell, *Everything to Know About Peach Jam 2018, Basketball's Biggest Recruiting Showcase*, S.B. NATION (July 11, 2018), <https://www.sbnation.com/college-basketball/2018/7/11/17552838/peach-jam-2018-recruiting-college-basketball-cole-anthony-james-wiseman-duke-kentucky>.

35. *Peach Jam 2018: July 11–15, 2018*, NIKE EYBL, <https://web.archive.org/web/20190110193314/http://www.nikeeyb.com/games/>.

36. Donna Ditota, *How Does AAU Basketball Work? Inside the City Rocks, Upstate NY's Premier Team*, SYRACUSE (June 20, 2018), https://www.syracuse.com/sports/index.ssf/2018/06/albany_city_rocks_grassroots_basketball.html (explaining what a Nike EYBL team goes through and providing some truth to rumors about how EYBL teams operate. Ditota describes how City Rock's EYBL team sponsorship with Nike narrowly covers costs to "four required tournaments on the EYBL circuit (Dallas, Indianapolis, Atlanta, [and] Hampton" and that teams must do well at these required tournaments to qualify for the Nike Peach Jam.).

37. Zach Schlemmer, *Nike Readies a Limited Edition of Kevin Durant's New Shoe for Annual 'Peach Jam' Tournament*, FOOTWEAR NEWS (July 9, 2018), <https://footwearnews.com/2018/focus/athletic-outdoor/nike-kd-11-peach-jam-release-info-kevin-durant-1202585553/>.

Numerous high-profile individuals, including Nike-affiliated representatives (coaches, scouts, managers and executives) will attend EYBL tournament games featuring middle school and high school athletes. Their strategy is to identify potential NBA talent early on, then monitor the prospects' development as they mature.³⁸ The main purpose of this identification is to develop a rapport with those high school athletes identified as potential NBA stars, and eventually sign the prospects to shoe deals when they turn professional.³⁹ The earlier these representatives locate talent, the more time they have to evaluate a prospect's worth, the potential for marketing their brand, and to develop interpersonal relationships.⁴⁰ The most successful scouts, brand managers and executives will prioritize these players based on their talent, and will try keep their prospects in their respective circuit throughout their amateur basketball careers.⁴¹ Inserting themselves into the lives of these prospective NBA stars is key to the shoe companies' main goal: to gain an advantage in endorsing the prospective stars when they are drafted into the NBA.⁴²

These young men and their families are also exposed to corrupt business managers, financial advisors, and coaches who are sometimes affiliated with a shoe brand and work in concert to use their influence over high school athletes to attend specific universities.⁴³ According to one complaint challenging this model, the "principal purpose" of the scheme "is to help Adidas artificially grow and preserve market share in the ultracompetitive sneaker industry . . . [t]hrough this exploitation of the young players' images and likenesses to consumers . . . Adidas profited."⁴⁴ Under-the-table payments, free merchandise, and exploiting young men for the shoe brand's profit is a part of the larger scheme to keep these young men within the brand so the brand can profit from them when they are professionals.

38. Schmidt & Manning, *supra* note 22.

39. Hobson, *supra* note 13.

40. See, e.g., Oliver Maroney, *The Life of an NBA Player Manager*, BASKETBALL INSIDERS (Nov. 4, 2016), <http://www.basketballinsiders.com/the-life-of-an-nba-player-manager-randy-osei-thon-maker-anthony-bennett-andrew-wiggins/> (explaining how Randy Osei met former number one draft pick Anthony Bennett through playing AAU basketball, and how Tyler Ennis knew him since high school. He explains how his extended relationship with the two gave him an advantage in becoming these players' manager because he has known them for long enough to gain their trust.).

41. Estes, *supra* note 3.

42. Marsha Durr, *The Tipping Point: Mayhem in College Sports Requires Congress to Finally Intervene in NCAA Governance*, 8 ARIZ. ST. SPORTS & ENT. L.J. 26, 32 (2018) (explaining that the bribery scheme's main focus originated from a mutual agreement, which coaches to use influence over star athletes to steer them toward certain athletic shoe companies, agents, and advisors).

43. Bowen Complaint, *supra* note 6, at 89–90.

44. *Id.* at 104.

The major shoe companies compete aggressively to get elite players to join their circuits. This competition includes extensive funding for a network of AAU clubs. For example, the Oakland Soldiers (EYBL team), for whom LeBron James and other NBA stars played as high school stars, will likely use their NBA heritage as leverage to attract other high school phenoms across the country to want to play for that team.⁴⁵ These top high school players in turn obtain greater exposure to college, NBA scouts, and get to compete against the best players their age in the United States. Moreover, the teams from their respective circuits will compete against each other and the top teams will then compete in culminating national tournaments: Nike Peach Jam, Adidas Nations and the Under Armour Association.

During these national tournaments each of the three major shoe companies work in concert with college coaches and others with whom they have relationships to persuade top talent to switch over to their circuit; alternatively, they use the conference to obtain parents' contact information in order to influence their child to attend a certain college bearing their brand.⁴⁶ Rick Pitino, former head coach at the University of Louisville said, "[I]t's a very competitive thing by these shoe companies to get players. They're going out and recruiting like us, in the summertime. 'Let's get this kid to the (Nike) EYBL. Let's get this kid in the Adidas Nations.'"⁴⁷

B. Cost to shoe companies, including how much spent on young players who do not become stars.

The significant sums spent on AAU basketball became highly publicized as a result of recent criminal convictions for bribing star recruits and their families. This section suggests that much of the money shoe companies spend on youth athletics is wasted, because the vast majority of teens do not become NBA stars whose endorsements are valuable.

The case of Marvin Bagley, Jr., whose high school career was transformed by money poured into his AAU team for which his father was the coach, is illustrative.⁴⁸ Bagley's saga came to light when his parents filed for bankruptcy

45. Marc J. Spears, *The Weekend Bay Area Trip that Helped Make LeBron James a Star*, YAHOO (June 1, 2015), <https://sports.yahoo.com/news/the-weekend-bay-area-trip-that-helped-make-lebron-james-a-star-061242534.html>.

46. Estes, *supra* note 3.

47. *Id.* (discussing Rick Pitino's notion that shoe brand officials pursue young athletes from other circuits and try to influence them to switch another brand's circuit).

48. See Manning & Schmidt, *Marvin Bagley III and the Loyalty Game: How Sneaker Dollars Transformed Youth Basketball*, OREGONIAN, Mar. 17, 2018, https://www.oregonlive.com/business/index.ssf/page/the_loyalty_game.html.

in 2008, with a combined family income of \$44,000.⁴⁹ Four years later, tax forms in 2012 confirmed that the family listed a home in Southern California valued in a range between \$750,000 to \$1.5 million.⁵⁰ Marvin Jr. had attended Sierra Canyon High School, a Nike-sponsored private institution, whose tuition costs are \$36,250 per year.⁵¹ Sierra Canyon refused to reveal details of its Nike deal, but there was evidence that Nike merchandise-only sponsorships can quickly exceed \$10,000 a year for high school teams.⁵² In addition to cash payments for sponsorship, Nike also pays money to the coaching staff and those involved with the program.⁵³

Although reporters have been unable to uncover the precise amount of money Nike spent on the Bagley family, under the cloak of payments from Nike to Bagley's Nike-sponsored AAU team, his family was able to afford a better life including affording an expensive private school.⁵⁴ Unfortunately for Nike, their investment went awry when Bagley signed a highly publicized five-year deal worth \$2 to \$3 million a year with competitor Puma.⁵⁵

The size of shoe company investments in payments to sponsored AAU teams is significant. The Kentucky Travelers (EYBL team) "receive \$35,000 per year from Nike, paid in two installments. The first \$25,000 comes in March, and the final \$10,000 in June."⁵⁶ Further the team representative explained, "[p]ayments from Nike cover the Travelers' league entry, flights to tournaments, van rentals, hotel stays and meals."⁵⁷ In addition to investing in AAU teams and private high schools, Nike also sponsors numerous high-profile high schools around the country, as well as hundreds of AAU teams.⁵⁸

Major shoe companies also pay these prospects' parents thousands of dollars in an attempt to influence their son to attend a college program they

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Manning & Schmidt, *supra* note 48.

55. Nick DePaula, *Marvin Bagley III Inks 5-year Shoe Deal with Puma, Sources Say*, ESPN (June 14, 2018), http://www.espn.com/nba/story/_/id/23795930/marvin-bagley-iii-signs-endorsement-deal-footwear-apparel-endorsement-deal-puma.

56. Adam Himmelsbach, *Club Team, Nike Reap Benefits of Sponsorship*, COURIER J., Oct. 17, 2014, <https://www.courier-journal.com/story/sports/college/basketball/2014/10/17/club-team-nike-reap-benefits-sponsorship/17458415/Rines>.

57. *Id.*

58. Darren Rovell, *Shoe Company Wants Deal Maker's Influence*, ESPN (Sep. 23, 2016), <http://www.espn.com/sportsbusiness/news/2003/0922/1621525.html>.

sponsor.⁵⁹ Recent criminal convictions revealed Adidas payments of \$40,000 to the father of a star player being recruited by North Carolina State, and \$90,000 payments to the mother of a Kansas recruit.⁶⁰

Public information regarding funds spent on Nike AAU teams permits an estimate of Nike's expenditures. In the EYBL there are four divisions, with ten teams in each division for three age ranges (15U, 16U and 17U).⁶¹ Four teams multiplied by three age range groups equals 120 teams. Considering the annual payment Nike pays the Kentucky travelers of \$35,000 a year multiplied by 120 teams, this suggests that Nike spends around \$4.2 million dollars on funding EYBL teams alone (estimate not including women's EYBL teams).⁶² This calculation does not include Nike's sponsorship of elite high school teams or bribe money. In sum, Nike will spend well more than \$4 million annually on teenage boys, in an effort to steer them to Nike-colleges, in hopes this will facilitate Nike's ability to sign these young men to endorsement contracts should they become NBA stars. Others tell of NBA players who have clauses in their contracts requiring shoe companies to spend \$150,000 to \$165,000 on AAU teams of their choice,⁶³ suggesting this estimate may be low.

Because less than two percent of college players will get drafted into the NBA,⁶⁴ and less than one percent of high school players receive scholarship to a Division I college program,⁶⁵ Nike spends a significant amount on AAU teams and potential prospects who do not earn a scholarship at a major college program, much less play in the NBA at a level where their endorsement would lead to profitable sales of Nike products.⁶⁶ Although there are some benefits of the current system to youth basketball and to the shoe brands, there is wasted investment in those who participate within the circuits and in high school and

59. Will Hobson, *Before this Hoops Recruit Chose Indiana, Adidas Made Sure He Stayed Under its Tent*, WASH. POST, May 16, 2018, https://www.washingtonpost.com/sports/colleges/before-romeo-langford-chose-indiana-adidas-made-sure-he-stayed-under-its-tent/2018/05/16/2c77d384-539e-11e8-a551-5b648abe29ef_story.html?utm_term=.794dc6012758.

60. *Id.*

61. For a list of the U17 Teams see *2019 Nike EYBL Divisions Announced*, D1 CIRCUIT (Mar. 31, 2019), https://www.d1circuit.com/news_article/show/1008627.

62. Himmelsbach, *supra* note 56.

63. Estes, *supra* note 3 ("NBA player Derrick Rose's incentive-laden Adidas endorsement deal, for example, requires the company to pay an AAU team or teams of his choice a total of \$150,000 to \$165,000 per year, plus as much as \$85,000 in Adidas products — as long as the team is an Adidas affiliate.").

64. Brice Fleckenstein, *What Percentage of College Basketball Players Go to the NBA?*, QUORA (Jan. 27, 2018), <https://www.quora.com/What-percentage-of-college-basketball-players-go-to-the-NBA>.

65. Patrick O'Rourke, *Odds of a High School Athlete Playing in College*, SCHOLARSHIP STATS, <http://www.scholarshipstats.com/varsityodds.html> (last visited Dec. 6, 2019).

66. See, e.g., Himmelsbach, *supra* note 56 for an example of Nike spending \$35k a year on one team

do not proceed further. This wasted capital is an allocative inefficiency that could be reinvested in a more efficient way at the professional level.

C. Distorting effect on selection of colleges

If shoe companies were not intertwined within youth basketball, there would be a significant decrease of under-the-table payments. This would lead to less corruption, reduced instances where an athlete forfeits collegiate eligibility, saved expenses for shoe companies, and increased dispersion of talent in collegiate basketball. Elite players seeking to play college basketball would choose universities unbiased by under-the-table payments that come at the expense of their ability to make independent decisions about their rights as professional players. Their decisions, uninfluenced, can be tailored to the quality of their education, their athletic development, loyalty to their home region, and social concerns, rather than being steered to the university where their matriculation is most valued by a shoe company with whom their AAU team had been affiliated.

Shoe companies have taken advantage of the AAU process and made it their own corrupt bidding auction. Adidas executive Jim Gatto's recent conviction demonstrates how shoe company representatives distort and funnel top prospective athletes into top affiliate collegiate basketball programs.⁶⁷ Once an athlete tries out for an AAU circuit, it opens the door for those around the prospect to influence him to stay locked into that circuit. Not only are these prospects put on elite teams, they receive national recruitment, bragging rights, free shoes and apparel, and notoriety from their peers.⁶⁸ Just as a parent nurtures their child with clothes, food, love and a roof to live under, shoe brands have used AAU circuits to provide the similar essential means to prospective talented basketball players.⁶⁹ Absent the current competition to gain long-term advantages from future stars, shoe companies' capital allocated to persuading prospective athletes — most of whom will not play professionally and will not compete at profitable collegiate universities — and their families to attend a

67. See Jack Newsham, *Ex-University Of Arizona Coach Cops to \$20K Hoops Bribery Scheme*, LAW 360 (Jan. 22, 2019), https://www.law360.com/sports/articles/1120767/ex-univ-of-ariz-coach-cops-to-20k-hoops-bribery-scheme?nl_pk=b8322f18-889c-4abe-b5b2-6e47f2229d11&utm_source=newsletter&utm_medium=email&utm_campaign=sports&read_more=1 (“footwear company officials had paid athletes and their families to play ball for Adidas-sponsored schools in hopes that they would stick with Adidas when they went pro after graduating”).

68. See David Cordova, *Nike EYBL Starts Off In Hampton*, DAVE'S JOINT (Apr. 24, 2017), <https://davesjoint.net/2017/04/24/nike-eybl-starts-off-in-hampton/>. See also *Nike EYBL the Inside Scoop*, *supra* note 30.

69. Spears, *supra* note 45 (illustrating a story of how AAU coaches provide hospitality for highly touted prospects. Spears explains how head coach of the Oakland Soldiers allowed LeBron James to sleep on his couch in order for him to compete for their team in the Elite 8 tournament.).

university will be reallocated toward investments more likely to secure a return.⁷⁰

D. Distorting effect on selection of agent and managers

When young elite athletes become professionals, they must make critical business decisions in selecting agents and managers to negotiate contracts with professional clubs, pursue endorsement opportunities, and manage their finances.⁷¹ The recent case of former University of Arizona assistant basketball coach Emmanuel Richardson illustrates how shoe company practices distort a prospective athlete's selection of these critical advisors. Richardson recently pled guilty to conspiracy to commit bribery as he received "\$20,000 from undercover federal agents to refer college ballers their way for business."⁷²

The former Wildcats coach was caught on tape agreeing to refer players to Munish Sood, a sports management exec turned state's witness, and his business partner Christian Dawkins in exchange for envelopes of cash from two undercover agents who were supposedly providing financial support to Sood and Dawkins's company. He choked up as he admitted as much to U.S. District Judge Edgardo Ramos.⁷³

As United States Attorney Geoffrey Berman explained, "Richardson, entrusted to help players develop as athletes and young men, instead helped himself to the cash offered by unscrupulous agents and financial advisers[.]"⁷⁴

Another example is when,

[a] secretly recorded video played in New York federal court showed Christian Dawkins, who is accused of bribing assistant college basketball coaches in exchange for steering their players toward his business management venture, handing cash to former TCU assistant Corey Barker . . . Marty Blazer, a former financial adviser who aided the government's investigation, testified that the cash was a \$6,000 bribe, what was to be the first for Barker to establish a long-term 'relationship.'

70. Because the focus of this Article is how a new arrangement between the NBA and its players would also benefit shoe companies, a complete discussion of the distorting effects of youth basketball corruption on college basketball is beyond the scope of this Article.

71. See KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 20 (2003).

72. Newsham, *supra* note 67.

73. *Id.*

74. *Id.*

That meant funding illicit payments to players Barker recruited and monthly bribes, all in exchange for him using his influence to steer players to sign with them for management services when they go professional, Blazer said.⁷⁵

Agents can be family members, AAU coaches, or individuals affiliated with shoe companies. Agents frequently have relationships with shoe companies and AAU teams; the purpose of the relationships is to gain an advantage in signing the best players contingent on them turning pro.⁷⁶

Last month, the NCAA banned four AAU teams from the July live period for having an association with an agent. New England Playaz, Florida Rams and Worldwide Renegades had to separate themselves from their program director, and the players had to find a different team. SEBL Elite All-Stars was allowed to stay intact, but needed to find a new coach. The NCAA investigation stemmed from an email sent by prominent sports agent Andy Miller to the program directors of the four aforementioned AAU programs. In the email, Miller scolds the four men – T.J. Gassnola, Matt Ramker, Desmond Eastman and Tony Edwards – for not sending him enough first-round picks in exchange for financial support.⁷⁷

Shoe companies alter this process because they have established connections with their own preferred agents. Shoe companies indirectly employ agents because they pay the players the agents represent. Top players are likely to sign with the top agents. Therefore, the AAU coaches, college coaches and others affiliated with the shoe brand will steer a young prospect to sign with an agent they know will convince the athlete to sign with their brand.⁷⁸

It shouldn't come as a surprise that many of the top AAU programs have some association with agents. After all, when these prominent programs are getting big money from Nike, Adidas and Under Armour to be successful and produce pro players, it's hard to avoid sports agents. Agents funnel money to certain AAU teams in an attempt to get a leg up on the

75. Zachary Zaggar, *Feds' Hoops Trial Witness Explains Bribes Caught on Tape* (LAW 360), Apr. 25, 2019, <https://www.law360.com/articles/1153696/feds-hoops-trial-witness-explains-bribes-caught-on-tape>.

76. *Critical Coaches: How Deep is the Relationship Between Agents and AAU Programs?*, CBS SPORTS (Aug. 15, 2012), <https://www.cbssports.com/college-basketball/news/critical-coaches-how-deep-is-the-relationship-between-agents-and-aau-programs/>.

77. *Id.*

78. *Id.*

competition when it comes time for a prospect from that team to choose an agent.

Coaching one of the major AAU teams isn't necessarily a profitable exercise. It takes a financial commitment – or plenty of financial backing. If the shoe companies aren't providing enough funding, a program director is more apt to listen to agents or runners. Some college coaches also pointed to runners and agents placing kids on shoe-sponsored teams – and then giving money to said teams in exchange.

I spoke with several AAU coaches during the summer, and one of the subjects that came up was pipelines between AAU programs and sports agents.

'If multiple players from my program have had success with the same agent, it makes other players want to go to that agent too,' one AAU coach said.⁷⁹

In addition to agents, star athletes often select managers that, supplementing the contract negotiation and endorsement-finding work of agents, assist the athlete in everyday tasks similar to a personal assistant. "One night they could be negotiating an endorsement deal, the next they could be helping a player with a community event. [A manager's] job is to help his players with whatever they need, which can vary greatly from client to client."⁸⁰

Today's professional athletes are similar to many small businesses. The demands of the profession, the high amount of income, and numerous 'off the court' factors have some professional athletes choosing to hire a personal Business Manager. Often this is a close personal friend, family member, or representative from the Agents office.⁸¹

An example of how player managers spring into the lives of an NBA prospect can be illustrated by Randy Osei and his connection to former number one NBA draftee Anthony Bennet and current NBA player Tyler Ennis. He explains, "I came into this business as Anthony Bennett's manager. I am a few years older, but Anthony and I were pretty close after playing on the same AAU team."⁸² Tyler Ennis further describes that he has known Osei since middle school.⁸³ A

79. *Id.*

80. Maroney, *supra* note 40.

81. Adonal Foyle, *So What Does a NBA Business Manager Do?*, ADONAL FOYLE (Jan. 8, 2016), <https://www.adonalfoyle.com/so-what-does-a-nba-business-manager-do/>.

82. Maroney, *supra* note 40.

83. *Id.*

manager can range from a close friend of the prospect to someone who is affiliated with a shoe brand, including an AAU coach. The NBA journey and many of the connections that last throughout NBA player's career often begins during the AAU circuits.

Some agents and managers essentially vie for prospects by soliciting payments to the prospect or his family.

It can take different forms. Often a player has no idea he is being played. Often his parents, coaches or friends — the people he most trusts most — are active participants. And once a prospect or his family takes the bait by accepting cash or plane tickets or hotel rooms or any other benefit, the trap door snaps shut.

With his amateur eligibility damaged, his basketball career may no longer be his own.

...

'Everybody is involved in this scandal. There's nobody left out,' Sonny Vaccaro, a retired shoe company executive, told *Courier Journal* on Saturday. '... The most important person in the transaction is that high school kid ... and he's the poorest of all of them. And they're all bidding on his ability to play basketball — to win championships, go to the Final Four, to sell shoes, to sell suits, to put money in investments.'

...

'If we take care of everybody and everything is done, we control everything. ... You can make millions off of one kid,' sports agent Christian Dawkins allegedly told an undercover FBI agent when asked how he could 'guarantee' a player would sign with a particular financial adviser.⁸⁴

The key distortion is that agents and managers are supposed to be zealously pursuing the interests of their client, the athlete, while these illustrations illustrate how instead agents and managers are steering their client to a shoe company. When corrupt agents and managers develop relationships that provide money to athletes in their families in the recruitment process, they can then hold the prospect's future hostage. This coercion is a subsidiary effect of the current shoe company scheme that could be avoided if a new plan was implemented.

84. Estes, *supra* note 3.

E. Benefits to youth basketball

Counterbalanced against these distortions is one way in which shoe company subsidies to AAU basketball meet an important social need. Unlike baseball and ice hockey, where elite athletes ‘pay to play’ and youth sports often exclude those from lower socioeconomic backgrounds,⁸⁵ AAU basketball provides the kind of competition that would be unavailable to some socioeconomically disadvantaged athletes who only play high school basketball.

That said, in the current age of social media, it would be unlikely for professional scouts and college coaches not to notice a superior high school talent playing solely for his high school team. As the NCSA observes, “recruits can use the power of social media to contact coaches, show coaches what kind of recruit they are and even gain the attention of college coaches who weren’t previously recruiting them.”⁸⁶ A recruiting advisor suggests that “[s]ocial media can have a significant impact on your college recruiting journey. Since anyone can take a screen-shot and share it, nothing you post is ever really private anymore.”⁸⁷

For example, current NBA forward Otto Porter, Jr., did not participate in AAU and only competed with his high school team.

. . . the 24-year-old Washington Wizards forward [is] an anomaly in today’s NBA. Almost all of the sport’s young stars played AAU (Amateur American Union) ball during their teenage years, as the league’s long been known as a place for players to face elite competition while gaining exposure to college and pro scouts. It’s not that Porter wasn’t good enough to play AAU—plenty of teams would’ve loved to have him. But his father, Otto Porter Sr., believed it would be better for his son’s development to train and play in their hometown. That may sound crazy when you consider that Porter grew up in Sikeston, a rural town in southeast Missouri . . . Yet here’s

85. Stephen F. Ross & Michael James, Jr., *A Strategic Legal Challenge to the Unforeseen Anticompetitive and Racially Discriminatory Effects of Baseball’s North American Draft*, 115 COLUM. L. REV. SIDEBAR 127, 130 (2015) (explaining that the essay “articulates the arguments that can be marshaled to potentially persuade the Equal Employment Opportunity Commission, the FTC, or the courts to find the Rule 4 draft illegal, or at least to raise sufficient doubts to motivate MLB clubs to alter their anticompetitive and antisocial rules”).

86. *How to Use Social Media for Recruiting*, NCSA, <https://www.ncsasports.org/recruiting/contacting-college-coaches/social-media> (last visited Dec. 6, 2019).

87. Fred Bastie, *Recruiting Column: The Effects of Social Media on College Recruiting*, USA TODAY, Dec. 13, 2017, <https://usatodayhss.com/2017/recruiting-column-the-effects-of-social-media-on-college-recruiting>.

Porter today, a max-contract player with one of the most well-rounded skill sets in the NBA.⁸⁸

Young athletes and their parents prioritize participation in AAU over high school basketball for several reasons. First, AAU competitions provide greater exposure. Second, college coaches and NBA scouts want to see the best players compete against each other. Third, AAU not only helps the top players in the country improve their individual skills, but also aids NBA scouts in evaluating potential draftees and shoe company representatives evaluate who they want to endorse in the future. Further, young athletes get the immediate satisfaction of playing for teams backed by their childhood NBA heroes such as Russell Westbrook, Chris Paul, Carmelo Anthony and many more.

Nike's Elite Youth Basketball League, which concluded earlier this month in Augusta, Georgia, with its annual Peach Jam Tournament, is a prime example of this business model. The tournament includes signature PEs and this year's pool has teams backed by NBA players Chris Paul, Carmelo Anthony, and Bradley Beal, all of whom have endorsement deals with Nike or Jordan Brand. Moreover, Harry Giles, De'Aaron Fox, and Jayson Tatum—the third, fifth, and 20th selections in this year's NBA Draft, respectively—were all standout performers in the 2015 Peach Jam.

All three players played college ball at Nike-sponsored schools—Tatum and Giles at Duke, Fox at Kentucky—and have inked endorsement deals with the Swoosh since turning pro. If you're a teenager who's got skills and an obsession with basketball, why would you NOT want to be a part of that?⁸⁹

In addition, if the parents are a coach or team manager, they can receive funded trips around the country on the shoe company's dollar.

Further, although qualifying for a state championship or state tournament can improve a young athlete's skills, it remains less effective than participating in an AAU tournament like the Nike Peach Jam, where they compete against the best in their age in the country.

When talking to a college coach, he mentioned that it matters little to him how the player does during the season. Athletes could put up huge numbers but those don't matter a ton because

88. Brandon Hall, *Why Otto Porter Jr. Didn't Play AAU Basketball (And Believes He's Better Because of It)*, STACK (Oct. 20, 2017), <https://www.stack.com/a/why-otto-porter-jr-didnt-play-aau-basketball-and-believes-hes-better-because-of-it>.

89. Morgan McDaniel, *How AAU Is Dominating High School Basketball*, COMPLEX (Aug. 7, 2017), <https://www.complex.com/sports/2017/08/aau-is-dominating-high-school-basketball>.

it could be against bad competition. These coaches want to see them on the AAU circuit or at their camp during the summer. It allows the college coaches to work with them and see them against better competition.⁹⁰

To circumvent AAU, some top players would transfer to basketball prep schools.⁹¹ However, with states enforcing more rules limiting student transfers and discouraging recruiting, some players have deserted their high schools to put more emphasis on the AAU process.⁹²

Although AAU basketball benefits an elite teen player's chances of recruitment and success, fundamental aspects of basketball that are lost. College coaches, NBA coaches and prominent stars criticize AAU basketball. Steve Kerr, current head coach of the NBA's Golden State Warriors complains, "[w]hat trouble[s] me [is] how much winning is devalued in the AAU structure, . . . The process of growing as a team basketball player — learning how to become part of a whole, how to fit into something bigger than oneself — becomes completely lost within the AAU fabric."⁹³ NBA great Kobe Bryant expressed his dissatisfaction with AAU basketball:

I hate it because it doesn't teach our players how to play the right way, how to think the game, how to play in combinations of threes. . . I got lucky because I grew up in Europe and everything there was still fundamental, so I learned all the basics.⁹⁴

90. *Is AAU or High School Basketball More Important in the Recruiting Process?*, RECRUITING 101 (Mar. 19, 2018), <http://www.recruiting-101.com/2018/03/19/aa-u-high-school-basketball-important-overall-recruiting-process-2/>.

91. Scott Rieger, *The Tale of Brandon Jennings: Cautionary or Revolutionary?*, BLEACHER REPORT (Dec. 5, 2008) <https://bleacherreport.com/articles/89514-the-tale-of-brandon-jennings-cautionary-or-revolutionary> (explaining how Brandon Jennings transferred from his local high school in Compton, CA Dominguez Hills High School to Oak Hill Academy in Mouth of Wilson, VA); Sam Gordon, *Findlay Prep Honors Alum Avery Bradley During Blowout Victory*, LAS VEGAS REV.-J. (Nov. 6, 2018) <https://www.reviewjournal.com/nevada-preps/np-basketball/boys-basketball/findlay-prep-honors-alum-avery-bradley-during-blowout-victory-1713419/> (explaining how Avery Bradley transferred from Bellarmine Prep in the Tacoma, WA area to Findlay Prep in Las Vegas, NV); Michael Scotto, *Ben Simmons and D'Angelo Russell: From High School Teammates to 'Blood for Blood' NBA Playoff Opponents*, ATHLETIC (Apr. 23, 2019) <https://theathletic.com/939960/2019/04/23/ben-simmons-and-dangelo-russell-from-high-school-teammates-to-blood-for-blood-nba-playoff-opponents/> (explaining how D'Angelo Russell transferred to Montverde Academy, FL from high school in Louisville, KY.).

92. Bob Cook, *In High School Sports, Transfers are Creating Just Two Classes of Teams*, FORBES, Feb. 26, 2014, <https://www.forbes.com/sites/bobcook/2014/02/26/in-high-school-sports-transfers-are-creating-just-two-classes-of-teams/#1a50e6b2481b>.

93. Joshua Eferighe, *Is AAU Ruining Basketball? How This Generation of NBA Stars is Different*, KULTURE HUB (June 7, 2017), <https://kulturehub.com/aa-u-basketball-nba-stars/>.

94. *Id.*

Duke Coach Mike Krzyzewski observed that “the influence of the AAU programs on young players is that there is no structure to guide the coaches in developing leadership skills.”⁹⁵ This is unsurprising: shoe company-sponsored AAU competitions are designed by the shoe companies to promote their individual players’ talent for the benefit of NBA scouts and big-time college coaches, not to display fundamentals or even win games. Consequently, AAU critics note, in despair, that young players devalue winning, lack leadership qualities, and lack fundamentals. In high school, a coach’s incentive is to develop talent and win games, while the AAU coach’s incentive is to place the most players in college and hopefully to the NBA.

To be sure, some elite players who do not become NBA stars are better off under the current scheme. These include those who thoughtfully and willingly receive under-the-table benefits understanding that if successful they will be subject to relentless pressure to sign with agents and shoe companies that may not serve their future interests. Others may need less training in fundamentals and experience playing for winning teams, and so benefit from free travel and merchandise afforded by the shoe company scheme. Many others, however, particularly those from underprivileged areas where their parents cannot afford private coaching, would have greater opportunities for success if youth basketball focused on high schools and properly-supervised USA basketball teams whose goals were winning and fundamentals and not brand promotion.

In sum, shoe companies make huge investments in youth basketball, which appear to be inefficient, as well as leading to corruption and criminal behavior. Although youth basketball yields benefit to promising young talent, these benefits can be gained through other, less corrupt, organizations such as USA basketball. Part III will discuss how money will be saved by shoe companies, and how our proposal would be more profitable for shoe companies, NBA players, and the league, as well as setting the stage for athletes to receive better training and have access to better coaching and competition under the aegis of USA basketball.

III. A MORE EFFICIENT SOLUTION: EXCLUSIVE CONTRACTS WITH NBA CLUBS

There is a more efficient and socially-desirable approach than the current business model that major shoe companies use to attract athletes’ product endorsements. In this Part, we describe our proposal to shift shoe company endorsement money to those NBA stars whose endorsements will create sales, through a new provision in the NBA collective bargaining agreement giving a

95. *Coach K Shares His Thoughts on AAU*, WINNING HOOPS (Sep. 30, 2011), <https://winninghoops.com/news/coach-k-shares-his-thoughts-on-aau/>.

team's official shoe sponsor exclusive negotiating rights to obtain shoe and apparel endorsements from the club's players. We analyze how this scheme will result in significantly more shoe company funds invested in NBA team sponsorships, and how redistribution of most of this money back to the players followed by a further redistribution by the NBPA to its players will leave the players in as good of a financial position, if not better, than they would be in without our scheme. Finally, we suggest that there will be enough money after the redistribution of funds to NBA players to support and fund youth basketball under the auspices of USA basketball.

A. The proposal

The market distortions and inefficiencies from competition among shoe companies to spend millions to recruit young prospects could be avoided if compensation were focused entirely on NBA stars. We therefore propose an agreement between the NBA and the NBPA granting an NBA team's official shoe and apparel sponsor with exclusive rights to negotiate the endorsements of players contracted to that club for covered products. The agreement would still require a separate agreement between players and shoe companies for endorsement and transfer of name, image and likeness (NIL) rights, but would preclude players from endorsing or using their NIL rights to aid rival companies.⁹⁶ To illustrate, if our proposal had been in effect this year, we suspect Nike would win the bidding to sponsor the New Orleans Pelicans; Nike would then separately negotiate an NIL agreement with Zion Williamson, who would also receive a huge sum as part of the redistribution of funds from Nike to the Pelicans to the NBPA. Although Williamson's deal with Nike would reflect his inability to negotiate with Under Armour, he would be free to do nothing, or to devote all endorsement efforts toward other products.

A provision of the collective bargaining agreement limiting the ability of players to obtain competing bids from shoe companies for their services would

96. Although precise details would be negotiated by skilled attorneys for the NBA and the NBPA, we imagine that the official shoe company would have limited rights to all players' likenesses in team photos, but any other use of player NIL rights would require a separate endorsement deal. Some athletes claim that they have safety or competitive reasons for preferring a particular shoe. To separate these legitimate concerns from commercial considerations, under our proposal athletes would be permitted to wear shoes from a non-club sponsor, but would be required to cover up trademarks or other design traits that would identify the brand of shoe worn. See, e.g., Adam Himmelsbach, *Shoe Companies Pay Millions for Walking Ads*, COURIER J. (Oct. 20, 2014), <https://www.courier-journal.com/story/sports/college/basketball/2014/10/17/schools-shoe-deals-make-long-lasting-ads/17458387/>. ("At Kentucky, if an athlete has to wear a non-Nike shoe for medical reasons, the brand must be taped over and it cannot be promoted by the university."). It is noteworthy that, when this paper was presented at a Penn State faculty seminar, legendary women's volleyball coach Russ Rose claimed that over his long career at a Nike-sponsored school, none of his players had been unable to find a Nike shoe that was appropriate for athletic competition.

significantly increase the value of official sponsorship rights with each NBA club.⁹⁷ The public recognizes NBA players as celebrities, “whose name[s] [have] attention-getting, interest-riveting and profit generating value”⁹⁸ Because NBA players have celebrity “attributes such as reputation, likeability, believability and attractiveness, several businesses invest in celebrity athletes to establish connections between their brand and high-profile athletes.”⁹⁹ As with other businesses, NBA teams invest in players by offering them contracts in exchange for their services. Given NBA teams are their own brands and businesses, their acquisition of a top tier NBA star is of utmost value for their team brand.

Celebrity endorsement is valuable to an NBA team because NBA stars essentially “lend their image”, and relatable characteristics to the team allowing the team to connect with fans to boost sales and increase profits.¹⁰⁰ Essentially, NBA players favorable characteristics positively drive purchasing behavior of consumers.¹⁰¹ In turn, consumers driven by the characteristics of an NBA player will have a positive subsidiary increase on profits for NBA teams. For illustration, LeBron James’ move to the Los Angeles Lakers raised ticket prices by over 400%.¹⁰² Further, his Los Angeles Lakers number twenty-three (23) jersey was the best-selling jersey in the NBA, further boosting overall profit for

97. Peter Verry, *How to Get Kawhi Leonard’s Sold Out New Balance Shoes*, FOOTWEAR NEWS, May 8, 2019, <https://footwearnews.com/2019/focus/athletic-outdoor/how-to-get-kawhi-leonard-new-balance-sneakers-1202780552/> (Consider the decision of NBA star Kawhi Leonard to shift his endorsement deal from Nike to New Balance. His branded shoe sold out within minutes of the shoes being up for sale to the public.). See also, Matt Welty, *New Balance Bet on Kawhi Leonard and Won*, COMPLEX, (June 14, 2019), <https://www.complex.com/sneakers/2019/06/new-balance-bet-on-kawhi-leonard-and-won> (stating that the “true value of Leonard and New Balance lies in him wearing New Balance before games. We’ve come to a point where people care more about what NBA players wear before the game than what they during it.”).

98. Abeza, et al., *The World’s Highest-Paid Athletes, Product Endorsement, and Twitter*, 7 SPORT, BUS. & MGMT. J. 332, 334 (2017).

99. *Id.*

100. *Id.* (explaining that “[M]arketers use star players’ appeal to endorse sport and non-sport products, and their likeable and trustworthy persona to positively influence consumers’ purchase decisions.”). *Id.* At 332. At the same time, we are skeptical that customers purchasing Kawhi Leonard’s new New Balance shoes, did so based on a perception of quality endorsement by an expert. See generally Verry, *supra* note 97. As several observers have noted, affinity with celebrities, rather than the sincerity or motivation underlying the celebrity’s endorsement, seems to be driving sales. Concerns about ‘sincerity’ have dissipated. See, e.g., Lauren Myers, *A Picture Is Worth A Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission’s Endorsement Guides*, 66 DUKE L. J. 1371, 1375 (2017) (citing Kevin YC Chung, Timothy P. Derdenger & Kannan Srinivasan, *Economic Value of Celebrity Endorsements: Tiger Woods’ Impact on Sales of Nike Golf Balls*, 32 MARKETING SCI. 271, 271 (2013)).

101. Abeza et al., *supra* note 98, at 334.

102. Jessica Golden & Eric Chemi, *LeBron James Effect Boosts Lakers Ticket and Merchandise Sales*, CNBC (Oct. 7, 2018), <https://www.cnbc.com/2018/10/05/lebron-james-effect-boosts-lakers-ticket-and-merchandise-sales.html>.

the Lakers.¹⁰³ His presence alone has boosted the Lakers overall profitability, and ticket prices for away games as well.¹⁰⁴

Under our proposal, the increased shoe sponsorship income would be largely turned back to the NBPA for redistribution to players. Clubs would be acting, in effect, as wholesalers of image rights. Superficially, players would receive significantly less for their individual shoe endorsement deals. Although the shoe company that is the official sponsor of each player's club will continue to generously compensate a player for his endorsement and use his individual image rights, the exclusive right means the player's leverage is reduced to opportunities for endorsements with products of a different category. However, if properly structured, the *total* amount that major shoe companies will pay should increase, and the scheme will monetarily compensate these players through a redistribution from NBA franchises. An efficient agreement would allow NBA clubs to increase their current income, while returning the overwhelming percentage of the sponsorship money back to the NBPA for redistribution to players. Such an agreement would likely ensure that the NBPA would have sufficient funds to ensure that star players who would have received lucrative shoe deals are as well off as if they had been able to secure such a deal under the current system.

B. How the proposal will transfer money spent on AAU teams to the NBA

The proposal will channel millions that shoe companies spend funding summer youth circuits for the purpose of developing potential endorsement contracts more efficiently toward those players whose endorsement will actually benefit shoe companies. Instead of funding AAU teams for the primary purpose of securing loyalty from players who may never achieve professional success and distorting decisions of those that do, shoe companies would re-allocate funds to secure exclusive negotiating rights through an NBA team sponsorship.

Although shoe brands receive a significant amount of revenue and benefits from marketing universities and their fanbases, sponsoring an NBA team would be more valuable. Currently shoe companies spend as much money on endorsements with a single NBA player than an affiliate university. To illustrate, Adidas spent \$200 million dollars securing James Harden's endorsement,¹⁰⁵ significantly exceeding Adidas' \$160 million endorsement

103. *LeBron, Lakers Top NBA's Most Popular Merchandise Lists*, NBA (Apr. 25, 2019), <https://www.nba.com/article/2019/04/25/top-merchandise-jersey-sales-2018-19-season-official-release>.

104. Golden & Chemi, *supra* note 102.

105. Sam Amick, *James Harden Agrees to \$200 Million Shoe Contract with Adidas*, USA TODAY, Aug. 13, 2015, <https://www.usatoday.com/story/sports/nba/rockets/2015/08/13/james-harden-adidas-shoe-contract/31634809/>.

deal with the University of Louisville.¹⁰⁶ This suggests that the value of a university sponsorship as a means to drive sales among avid fans of that university is far less, and implies that even contributions to major programs like Louisville are driven to a significant degree by the shoe company's hopes of gaining a competitive advantage in signing former Cardinal hoop stars to professional endorsement contracts.¹⁰⁷

Likewise, LeBron James' value to Nike is reflected in Nike's sales of his signature shoe, which rose thirteen percent annually to \$340 million in 2014 and topped \$400 million in 2015.¹⁰⁸ UCLA men's basketball, while endorsed by Adidas, brought in \$12.3 million a year in average revenue for the school.¹⁰⁹ Although shoe companies would continue to offer modest sponsorship deals to colleges, a shift of shoe company investment from grassroots basketball circuits and collegiate sports to the NBA would be more efficient.

C. How the proposal significantly increases revenues to the NBPA

The proposal uses the collective rights of the players to ensure that shoe company endorsements more efficiently target those players who actually drive consumer purchases, with the NBA clubs acting in part as wholesale agents collecting a sizable fee.¹¹⁰ For this proposal to succeed, when individual NBA teams contract with one of the major shoe companies, the vast majority of the incremental money that NBA clubs will receive under the new scheme will need to be redistributed to the NBPA, which will then transfer the funds back to the players. To minimize harm to current expectations, all existing players would be excluded from the agreements, and going forward the NBPA would likely

106. Jeff Greer, *University of Louisville Releases Details of \$160 Million Adidas Contract*, COURIER J., Aug. 25, 2017, <https://www.courier-journal.com/story/sports/college/louisville/2017/08/25/university-louisville-announces-adidas-apparel-contract-extension/600482001/>.

107. David Southorn, *Boise State Athletics to Extend Nike Deal Through 2025*, I.D. STATESMAN, (June 12, 2018), <https://www.idahostatesman.com/sports/college/mountain-west/boise-state-university/boise-state-football/article212983494.html> (demonstrating Conferences less likely to attract NBA stars attract even smaller amounts in sponsorship dollars). For example, the Mountain West conference team Boise State University signed an extension with Nike for a total of \$12.16 million through the 2025 season, and Colorado State University obtained an \$11 million deal with Under Armour. *Id.* It is difficult to explain this difference solely in terms of the relative number of fans of the Louisville Cardinals, Boise State Broncos, or Colorado State Rams.

108. Leo Sun, *Why Nike Inc Signed a Lifetime Deal with LeBron James*, MOTLEY FOOL (Dec. 19, 2015), <https://www.fool.com/investing/general/2015/12/19/why-nike-inc-signed-a-lifetime-deal-with-lebron-ja.aspx>.

109. Cork Gaines, *The 25 Schools That Make the Most Money in College Sports*, BUS. INSIDER (Oct. 13, 2016), <https://www.businessinsider.com/schools-most-revenue-college-sports-2016-10>.

110. An NBA club sponsorship has independent value for sponsors beyond their ability to secure individual endorsement with players, and the opportunity to activate player/club endorsement has symbiotic effects.

adopt a formula that compensates top stars in a manner that permits them to receive, when combined with their substantial but reduced income from individual deals, an amount equivalent to that which they would receive under the current system.

The proposal's aim is to create a sufficient increase in payments likely to secure positive investment returns for shoe companies, and that the result is superior for the league and its players. NBA teams will achieve a marginal increase in sponsorship revenue even if the bulk of increased funds go back to the players. The lump-sum payment to the NBPA will allow star players to be compensated according to their worth, with additional funds available to support other players.

D. Enough money left over to support youth basketball

If crafted properly, the proposal will permit the shoe companies to reduce overall spending by substantially eliminating wasteful and often corrupt spending on teenagers, while providing more money to clubs and to players collectively. In addition, it should create additional surplus funds that would be available, if the owners and players would agree, to fund youth basketball programs. The legitimate purpose of allowing prospective collegiate athletes to obtain exposure for college scholarships can be done under the auspices of USA basketball, the official governing board for the sport and operator of youth representative teams in international competition.

Currently, USA Basketball invites the best high school players in the country to represent the USA.¹¹¹ The team is sponsored by Nike and they play other countries in an Olympic style format through FIBA (The International Basketball Federation). The goal would be to operate youth USA basketball as European clubs do with their youth teams,¹¹² and avoid criminal consequences from coaches and shoe company executives without stifling a high school athlete's ability to participate collegiately.

Shoe company subsidies for AAU basketball fill a strong need for development and exposure for elite players from poor, rural, or working-class families.¹¹³ Traditionally, development and exposure was filled by high school

111. See *Eighteen Finalists Remain for 2018 USA Men's U18 National Team*, USA BASKETBALL (June 3, 2018), <https://www.usab.com/news-events/news/2018/06/mu18-finalists.aspx>.

112. See, e.g., Jack Holmes, *Soccer's 10 Best Youth Academies*, PASTE (Mar. 31, 2015), <https://www.pastemagazine.com/articles/2015/03/soccers-10-best-youth-academies.html>.

113. See McDaniel, *supra* note 89 ("It's an enticing pitch; give exclusive gear and a chance to meet NBA stars to the kids, while guaranteeing little to no out-of-pocket cost to the parents—in the form of generous allowances for travel and lodging—and in exchange, the coaches influence players to sign with schools that have sponsorship deals with the companies that are bankrolling the entire operation.").

basketball, which attracted major public attention and exposure.¹¹⁴ In some east coast cities like New York City, local parks put on summertime informal competitions on urban hardcourts that received the same attention as an AAU tournament would today.¹¹⁵

As an illustration, a popular tournament was a summer pro-am league called the Entertainers Basketball Classic (EBC) hosted at Rucker Park in New York City. These teams were owned and sometimes coached by popular hip-hop artists and urban celebrities such as Jay Z, Sean “Diddy” Combs, and Fat Joe.¹¹⁶ The EBC at Rucker Park has hosted NBA stars ranging from Allen Iverson and Kobe Bryant to more recent LeBron James and Kevin Durant.¹¹⁷ Touted high school basketball players would be able to get a chance to compete against the NBA stars. An example is current Los Angeles Laker Lance Stephenson. Then enrolled in Lincoln High School, Lance was able to show his talents at an EBC game where he scored twenty-seven points against two NBA guards: Nate Robinson and Jamal Crawford.¹¹⁸ The EBC allowed Lance to get exposure to celebrities and college coaches and also gave him a chance to compete.¹¹⁹

If the business model for shoe companies changed, where would poor kids get access to training, development, and exposure? For many reasons, it is unclear if high school basketball will retain its former luster, as high school football still does. Unlike Europe or Latin America, elite players will not be trained in academies run by professional clubs seeking to sign players at age sixteen. In the United States this business model runs afoul of NCAA regulations, as high school kids are not permitted to receive payment from a professional club.¹²⁰ Consider current NBA player Enes Kanter, he received more than “\$33,000 in impermissible benefits” in exchange for his basketball

114. *Id.* (“AAU has long supplanted traditional high school hoops programs as the premiere destination for collegiate recruiting.”).

115. *See, e.g.,* Cal Griffin, *The Entertainers Basketball Classic*, ALL THINGS HOOPS (Aug. 13, 2017), <http://www.allthingshoops.com/the-entertainers-basketball-classic/>.

116. *Id.*

117. *Id.*

118. David Astramskas, *Top 10 Lance Stephenson Moments from GM4 Vs the Cavs*, BALL IS LIFE (Apr. 23, 2018), <http://ballislife.com/top-10-lance-stephenson-moments-from-gm4-vs-the-cavs/>.

119. *Lance Stephenson Is Born Ready*, STARTING FIVE (Jan. 15, 2008), <https://thestartingfive.wordpress.com/2008/01/15/lance-stephenson-is-born-ready/> (explaining how Lance Stephenson “followed up his Sophomore City Championship with a New York State Championship and became the youngest player to play in the [Pro-Am] division at EBC (Rucker Park). Although the championship game featured five NBA players, Stephenson was named its MVP and since then has been actively recruited by every major college program in the country.”).

120. *See* NCAA Division I Manual, rule 12.1.2(d), page 64.

services from a Turkish club during his high school years, and the NCAA declared him ineligible to compete in NCAA games that season.¹²¹

Further, there is no incentive for NBA clubs to create basketball academies to train elite players, because players cannot be signed by the sponsoring academy due to their young age and would be subject to the NBA draft.¹²² This point can be illustrated by the controversy of developing young talent in the MLB. MLB teams can sign foreign players younger than American players, and the foreign players are usually retained by the team that develops them, warranting a return on their investment.¹²³ In contrast, if MLB teams spent the money to make youth academies in America, they would not be able to sign American youth due to their age, and MLB teams funding these academies would risk a no return on their investment because the young prospects would be subject to the MLB draft and subsequently drafted by any team.¹²⁴ Moreover, “the return on investment in scouting and developing foreign players is far greater than the return on investing similar effort in young American ballplayers.”¹²⁵ However, NBA teams have no incentive to create basketball academies because it would be a wasted investment of funds.

Although NBA club-run basketball academies are not viable options today, USA Basketball is an appropriate organization to oversee grassroots basketball, with the potential for young athletes to receive benefits of training and leadership not currently available in AAU competitions.¹²⁶ USA basketball routinely attract the best coaches and training personnel that provides the athletes with a forum to leave egos aside, maximize their talent and compete with our country across their chests. USA basketball has been working in concert with the NBA to promote better youth basketball through a standard created by USA basketball and the NBA.¹²⁷ Although, AAU provides a competitive environment with qualified coaches and premier training designed to highlight individual skills for college coaches and NBA scouts, USA basketball creates an opportunity for kids to be coached and trained by former

121. ASSOCIATED PRESS, *NCAA Rules Kentucky's Enes Kanter Permanently Ineligible*, ESPN (Jan. 7, 2011), <http://www.espn.com/mens-college-basketball/news/story?id=6000134>.

122. See Ross & James, *supra* note 85, at 133.

123. *Id.*

124. *Id.*

125. *Id.* at 131.

126. Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783, 784 (1990) (noting that AAU provides a competitive environment with qualified coaches and premier training designed to highlight individual skills for college coaches and NBA scouts, USA basketball creates an opportunity for kids to be coached and trained by former NBA players, NBA coaches, and the most well-respected collegiate coaches in the country).

127. *Youth Basketball Guidelines*, NBA <https://youthguidelines.nba.com/> (last visited Dec. 6, 2019).

NBA players, NBA coaches and the most well-respected collegiate coaches in the country.¹²⁸ If reaching the NBA is that prospective athlete's goal, then the benefits surrounding USA basketball would be an acceptable alternative route.

For those primarily concerned about the welfare of elite underprivileged athletes, the optimal solution is, of course, a regulatory change permitting them to be compensated directly for endorsement deals. This would require overhauling NCAA rules, a topic beyond the scope of this Article. Under the current scheme, these athletes are rarely paid, and if they paid under-the-table, they risk serious consequences if discovered. A large segment of elite teens would, we concede, lose the benefits of free apparel and perhaps some reduction in free trips to tournaments were elite amateur teams sponsored by USA basketball and designed to develop fundamental skills rather than promote an apparel brand. We submit that this cost is outweighed by benefits to even these athletes of freedom from distorted decisions and the benefits to a greater number of young players from channeling youth sports through a non-profit governing entity.

IV. WHY THIS IS UNLIKELY TO HAPPEN

We acknowledge the informal reaction from almost any knowledgeable observer to our proposal: it is very unlikely to happen. Although many accept our claim that the proposal is an efficient change in contract rights, for change to occur—specifically NBA players limiting their ability to exploit endorsement opportunities and image rights for shoe and sports apparel contracts—an enormous payment by the NBA to the union would be required and then an enormous redistribution back to the players. What is theoretically possible is not always viable in reality. Our proposed scheme will not work unless parties are willing to overcome significant information asymmetries and bargaining costs.

This part explores these information asymmetries and bargaining costs associated with obtaining NBA club and player approval to implement our proposed scheme. First, we identify the uncertainty of information regarding the amount of money that will be redistributed and how redistribution will work. Second, we discuss the bargaining costs pertaining to reaching an agreement, and how the parties could be expected to overcome these bargaining problems because of the business acumen and intelligence of the parties to the deal.

128. *USA Basketball Men's U18 National Team*, USA BASKETBALL (2018), <https://www.usab.com/mens/u18/roster.aspx> (showing the roster for the 2018 U18 Men's Basketball team). The bottom of the page lists former NBA player, Danny Manning, and current University of Kansas coach, Bill Self, as well as Anthony Grant who is the current coach at the University of Dayton. *See id.* It is clear that these high school kids are getting premier basketball development from the best basketball minds in America.

A. Information problems

Even if the parties were to seriously consider our proposal, they would be faced with the lack of accurate information about the sums involved, which makes it difficult for any stakeholder to conclude that they would be better off under our proposal than with the status quo. The total sum that shoe companies are likely to spend securing sponsorships with NBA clubs, which would secure them exclusive rights to endorsements by each club's players, is in part a function of the total costs that major shoe companies spend on AAU programs and under the table payments made to high school phenoms' families. These costs are plainly uncertain. Major stars lack information as to whether the NBPA's redistribution formula would fairly compensate them for their loss of leverage to obtain competitive bids from rival shoe companies. Advocates of youth sports lack information as to how poor and working-class players will receive training, development, and exposure if shoe company subsidies are substantially reduced.

B. Bargaining problems

Bargaining costs are the costs required to come to an acceptable agreement with the other party to the transaction. As Professor Hovenkamp explains:

Social costs exceed private costs only when the costs of producing a bargain are so high that the market is unable to yield an efficient outcome. This might occur because there are too many bargainers, or the bargainers have imperfect information about relevant facts or the applicable law, or perhaps because they have opportunities to behave strategically. For example, if someone proposes to build a refining plant in a residential area, and the plant's smoke will injure 10,000 home owners, but each rather slightly, the costs of bargaining might prevent the plant owner from compensating the 10,000 for their losses (assuming the plant owner is liable), even though the value of operating the plant is greater than the losses imposed on the 10,000 home owners.¹²⁹

If there are too many bargainers, there is a very high probability that every party will not receive adequate compensation or receive what they are owed.¹³⁰ In the illustration above, is it impossible to compensate the surrounding 10,000 affected citizens, if legal liability is presumed. This leads the parties to take the

129. Hovenkamp, *supra* note 126, at 784.

130. *See id.*

more expensive litigation route.¹³¹ A court would consider the circumstances and likely provide damages for a select few of the 10,000 citizens who are affected more than the others.¹³² The court's decision is in conjunction with the hopes that this serves as an incentive for the plant to invest in better technology to fix their pollution problem harming the immediate citizens.¹³³

Hovenkamp also analyzes why strategic behavior can cause problems:

The strategist might always threaten to walk away unless he receives a larger share of the surplus, and he might occasionally walk away in order to make his threats credible. This multi-bargain strategy might be profitable for him if the larger shares of the surplus he obtains from the sum of the successful trades outweigh his losses from the occasional trade where he carries out his threat. This creates a prisoners' dilemma situation. If all the strategist's opponents held firm in insisting on half of the surplus, the strategy would not work. But, acting individually, each opponent might find it individually maximizing to complete the bargain and take less than half of the surplus, rather than risk not completing the bargain at all and losing all the surplus.¹³⁴

Hovenkamp concludes that the strategic bargainer will not be awarded the opportunity to be strategic where information is perfect.¹³⁵ However, in real life, perfect information rarely exists. Parties may not know if a bargainer is bluffing, or if information provided is misleading or inconsistent.

The hopes for an efficient solution, however, are not as bleak as discussed in Coase's train example and Hovenkamp's air pollution case. Unlike hundreds or thousands of unorganized and unsophisticated farmers or homeowners, NBA players are well organized and represented by sophisticated union leaders with expertise in law, business, and marketing that represent the player's profit maximizing interests. Further, the NBA owners, who would have to agree with the scheme, have selected an influential, innovative, and equally sophisticated commissioner in Adam Silver to represent them. Only a few shoe companies (Nike, Adidas and Under Armour) are the most relevant bargainers along with the NBA and the NBPA. Given the business acumen, expertise, and few numbers of parties to this transaction they are more than capable of overcoming significant bargaining and information costs that would exist.

131. *Id.*

132. *See id.*

133. *See id.*

134. *Id.* at 790-91.

135. *Id.* at 791.

Another difficulty is that, although the proposal is likely to enrich the NBA and its players and allow shoe companies to spend more efficiently, other influential stakeholders will be harmed and will use their influence to block the proposal. Player agents, for example, are likely to be adversely affected because they will not receive a monetary percentage from the redistribution of licensing income from the NBA to the NBPA to their clients. Corrupt and non-corrupt youth sport coaches paid handsomely by the shoe companies will also suffer.

Formally, these parties have no say. Collective bargaining agreements are solely between the NBA and the NBPA.¹³⁶ Things that are discussed and negotiated are: “base salaries of players, the number of games they will play per season, whether their contracts are guaranteed by the league, player transfer procedures, their medical coverage, retirement plans, injury and non-injury grievances, club discipline procedures and access to the personal files/data of players.”¹³⁷ Agents have a duty to their clients to educate themselves and their clients (NBA players) on the NBA bargaining agreement; however, they do not affect nor have their self-interests reflected in the actual negotiations.¹³⁸

V. ALTERNATIVE: LEGISLATIVE PRESSURE

An alternative approach to overcoming significant bargaining and information costs is through legislative pressure. The Coase theorem explains why the NBPA, NBA and the shoe companies will have issues reaching an agreement. The lack of information and high bargaining costs are significant hurdles, but these are not insurmountable obstacles. Because sports leagues typically do not face marketplace pressure to reach efficient agreements in the face of significant but not insuperable bargaining costs, another way to facilitate optimal results is the threat of legislative intervention. Congress has done this before, when Senate Commerce Committee Chairman John McCain threatened MLB and the MLBPA with federal legislation regarding performance enhancing drug use, resulting in a mutual agreement.¹³⁹

136. *Collective Bargaining Agreements in Sports: How do They Work in the United States vs Europe*, MONEY SMART ATHLETE BLOG (Aug. 29, 2018), <http://moneysmartathlete.com/2018/08/29/collective-bargaining-agreements-in-sports-how-do-they-work-in-the-united-states-vs-europe/>.

137. *Id.*

138. Leigh Steinberg, *How To Be A Great Sports Agent – Contract Negotiations*, FORBES, July 11, 2016, <https://www.forbes.com/sites/leighsteinberg/2016/07/11/how-to-be-a-great-sports-agent-contract-negotiations/amp/>.

139. Brown, *supra* note 21.

A. Coase theorem applied: costs significant but not insuperable

An efficient result is difficult to achieve in an environment that lacks the perfect information and costless bargaining posited by the Coase Theorem for a self-correcting market. This is particularly true where risk aversion makes it unlikely the parties will act on their own. In these cases, an external force may provide sufficiently more information and assist the parties in overcoming bargaining costs in order to achieve an efficient result. Though these bargaining costs are high, where the number of parties are limited, they should be able to negotiate with each other to reach an agreement.

An excellent vehicle to accomplish these objectives are legislative hearings. Congress can justify hearings because it has plenary power to regulate interstate commerce.¹⁴⁰ Legislative proposals could include regulation of youth sports, regulation of payments by shoe companies, hearings to determine why so many professional athletes sign endorsement contracts with the shoe company that sponsored their college team, and greater auditing of endorsement expenses.

None of these proposals would be supported by the major stakeholders, just as no baseball stakeholder favored government intervention into player doping. However, through consideration of these proposals, Congress can gain information about shoe marketing and basketball, and its negative and positive effects on society.

Legislative hearings can bring forward information the parties need to reach a bargain. Congressional investigators could unearth information on the total sums shoe companies spend on AAU basketball, including the amounts spent on AAU teams, reliable estimates of the amount of under-the-table payments, and professional player contracts. This information would allow the NBA and NBPA to calculate how much money shoe companies would save and how their reinvestment at the NBA level will attain the same or even better success than the shoe company's current scheme.

Even with better information, bargaining costs may still preclude an efficient result. Suppose, for illustrative purposes, that the NBA clubs would be

140. Shoe marketing and basketball are undoubtedly interstate commerce under modern definitions. NCAA rules regulating matters such as shoe marketing in basketball "affect interstate commerce, because they regulate transactions between [persons] and their schools in multiple states nation-wide." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019) (holding that NCAA rules that capped the amount of compensation they are permitted to receive violated federal antitrust law and had severe anticompetitive effects). A related case explained that "the modern legal understanding of 'commerce' is broad, 'including almost every activity from which the actor anticipates economic gain.'" *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1065 (9th Cir. 2015) (holding that NCAA compensation rules could be subject to antitrust scrutiny). Shoe marketing and basketball are both activities from which shoe companies, the NCAA, the NBA, and all ages of athletes involved seek to anticipate economic gain.

better off even if they shared all but 10% of the increased sponsorship income with players, while players would be better off even if the owners kept 30%. Under this scenario, the parties may be unable to reach an agreement on the appropriate sharing. Furthermore, bargaining costs may preclude the efficient result, but this is highly unlikely when the NBA and NBPA observe the amount of funds the shoe companies will save and reinvest into their organization.

The late Senator John McCain succeeded in this regard in similar circumstances. During McCain's career he had significant influence on the reformation of baseball and other sports. He recognized the impact of professional athletics on the youth of the United States and saw this as justifying pressure on the MLB to enact better standards for performance enhancing drugs (PEDs).¹⁴¹ Legislative hearings demonstrated the prominence of performance enhancing drugs in baseball.¹⁴² The MLB's standards regarding PED usage was initially very lenient; many players could use PEDs during the season by circumventing the testing process.¹⁴³ Congress was concerned about the effects of PEDs on youth.¹⁴⁴ As young athletes turned into promising baseball prospects, they would be susceptible to an introduction to PEDs through a professional trainer, who might explain how his childhood heroes use them. The pressure to use PEDs to gain a competitive advantage led many to risk severe long-term consequences from injury or some of PED's harsh side effects.¹⁴⁵

Initially, the MLB and the MLBPA could not reach an agreement because of the harshness of suspensions and randomness of testing.¹⁴⁶ Owners sought harsher and longer penalties for testing positive for PEDs.¹⁴⁷ Conversely, the MLBPA was heavily opposed to drug testing; this was "due to concerns about

141. Brown, *supra* note 21.

142. STAFF OF COMM. ON GOV'T REFORM, 109TH CONG., HEARING ON STEROID USE IN BASEBALL H.R. DOC. NO. 20515-6143, at 7-10 (2005), available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/20050317183306-12546%281%29.pdf>.

143. Zachary D. Rymer, *Full Timeline of MLB's Failed Attempts to Rid the Game of PEDs*, BLEACHER REPORT (June 10, 2013), <https://bleacherreport.com/articles/1667581-full-timeline-of-mlbs-failed-attempts-to-rid-the-game-of-peds>.

144. H.R. Doc. No. 20515-6143, at 5-6.

145. Associated Press, *Parents Say 'No Doubt' Steroids Killed Son*, ESPN, (Mar. 17, 2005) <http://www.espn.com/mlb/news/story?id=2015717> ("Rob Garibaldi shot himself in the head on Oct. 1, 2002, at the age of 24. For years, he had been told that he had all the ingredients of a major league baseball player except size, so he started using steroids to gain the bulk he needed to make the bigtime. The price, in Raymond Garibaldi's words, was 'mania, depression, short-term memory loss, uncontrollable rage, delusional and suicidal thinking and paranoid psychosis.'").

146. Rymer, *supra* note 143.

147. *MLBPA History: The 2000's*, MLB PLAYERS (Aug. 31, 2016), https://www.nmnathletics.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211157644.

respecting players' 'legitimate privacy and due process rights.'"¹⁴⁸ Both sides finally agreed to "more severe penalties for first and second-time drug offenders: first-time offenders would be suspended eighty games, and second-time offenders would be suspended for an entire season of 162 games without pay."¹⁴⁹

To facilitate agreement, Senator McCain, acting in his role as Commerce Committee Chairman, threatened federal legislation if MLB did not introduce a harsher drug policy:

Major league baseball players and owners should meet immediately to enact the standards that apply to the minor leagues, and if they don't, I will have to introduce legislation that says professional sports will have minimum standards for testing . . . I'll give them until January, and then I'll introduce legislation.¹⁵⁰

Soon thereafter, the MLB introduced its Joint Drug Prevention and Treatment Program.¹⁵¹ The program included more comprehensive testing as well as significantly harsher penalties to discourage cheating. "What I care about are high school athletes who are tempted to use steroids because they think that's the only way they can make it in the major leagues," McCain explained.¹⁵²

Just as Senator McCain worried about the effect on youth of PEDs, shoe company corruption also affects youth athletic opportunities. The Senate Commerce Committee Chairman would be similarly justified in intervening to pressure the NBA, NBPA and shoe companies to create an alternate scheme that does not have a negative impact on our country's youth.

B. Applying these lessons to the shoe controversy

Legislative pressure may be needed to facilitate an agreement between the NBA, NBPA, and shoe companies. The MLB was under pressure from Congress because Congress made PEDs an illegal substance prohibited by the Federal Controlled Substances Act.¹⁵³ The illegal acts of fraud and bribery that

148. Zackary Kessinger, "Strike Two, You're Out!" *the Need for A More Stringent Drug Policy in Major League Baseball*, 10 WASH. U. JURISPRUDENCE REV. 257, 259 (2018).

149. *Id.* at 266–67.

150. Brown, *supra* note 21.

151. *Id.*

152. *Id.*

153. Edward Lazarus, *Congress' Decision to Subpoena Former Baseball Players to Testify*, CNN.COM (Mar. 29, 2005), <http://www.cnn.com/2005/LAW/03/17/lazarus.steroids/>.

surround the shoe scandal are all crimes punishable by months or years in prison.¹⁵⁴

The illegality of the criminal acts arising out of the scandal in youth sports gives Congress leverage to pressure major shoe companies as well. Subpoena power with the resulting possibility of further criminal investigations, as well as public hearings, can force shoe companies to cooperate with the NBA and its players to reach a solution, negotiate a deal, and end the fraud, racketeering, and bribery that is ruining elite high school basketball players' ability to participate in collegiate athletics and receive a college education.

VI. CONCLUSION

Youth sports face recurring problems regarding access and development of elite players. In basketball, shoe companies have created a system that is both monetarily inefficient and detrimental to youth basketball players and their families, shoe companies and universities. Under-the-table payments by shoe companies have led to criminal indictments, compromised the careers of college coaches, and have hindered talented young basketball players from reaching the NBA and receiving a college education. Yet the current scheme can be resolved with transparency and cooperation between the relevant parties: the major shoe companies, the NBA and the NBPA. The business acumen, legal expertise and knowledge possessed by these parties leave no excuse to maintain the current scheme instead of reforms where most everyone involved will be better off.

However, bargaining costs and information asymmetries sometimes get in the way of even the most capable parties to a deal to reach an agreement. Unlike the bi-modal scenarios developed by Ronald Coase, these obstacles may be overcome with legislative pressure. Where the marketplace will not drive actors to efficient solutions and government regulation is not preferred to private agreements, public policy justifies pressure on the parties to reach an agreement. However, given the few parties to this potential deal, legislative pressure in the form of the credible threat of government regulation combined with hearings and other techniques to gain additional information may be all that is required.

154. Schmidt & Manning, *supra* note 22.