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UNCONSCIONABLE AMATEURISM: HOW THE NCAA VIOLATES ANTITRUST BY FORCING ATHLETES TO SIGN AWAY THEIR IMAGE RIGHTS

BRIAN WELCH*

INTRODUCTION TO NCAA POLICY AND THE O'BANNON COMPLAINT

The story of Ed O'Bannon is not uncommon among former National Collegiate Athletic Association (NCAA) athletes. In 1995, he was the greatest college basketball player in the world.¹ He was an NCAA champion, the recipient of the Wooden Award for the nation's most outstanding player, and a future lottery pick² in the National Basketball Association (NBA) draft.³ However, O'Bannon, who was once a can't-miss prospect, lasted only a season and a half in the NBA, and he now works as a car salesman

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1. See Chris Chase, *NCAA Riches to NBA Rags*, Yahoo! Sports, June 25, 2009, http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/NCAA-Riches-to-NBA-Rags-No-1-Ed-O-Bannon?urn=ncaab,172848 (stating that O'Bannon was the top basketball prospect coming out of high school and realized his potential as a star basketball player by scoring thirty points and collecting seventeen rebounds in the NCAA National Championship game). The article goes on to lament O'Bannon's career as one that started with promise and inevitably peaked too soon, as he obtained college glory, but fizzled as he never obtained the same type of glory as a professional player. *Id.*

2. National Basketball Association, *Evolution of the Draft and Lottery*, http://www.nba.com/history/draft_evolution.html (last visited Apr. 5, 2011). Beginning in 1990, the NBA adopted a weighted system so that the team with the worst record in the league would have the highest odds at obtaining the top pick in the league. *Id.* Under this system, fourteen balls are placed in a drum and randomly drawn so that when four balls are drawn, there are 1001 possible outcomes. *Id.* Prior to the draft, each team is assigned a number of combinations based on their record in the previous season. *Id.* The top three picks are determined by picking balls and then the following picks are determined based on the teams' records in the previous season. *Id.* There were thirteen teams eligible under this system. *Id.* In the 1995 NBA draft, Ed O'Bannon was selected in the lottery with the ninth overall pick by the New Jersey Nets. Chase, *supra* note 1. He was thought by many to be capable of turning the Nets' historically poor fortunes around. *Id.*

3. Dave Sheinin, *From the Court to the Sales Floor*, WASHINGTON POST, June 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/11/AR2009061103332.html>; Paul Gutierrez, *UCLA Hero Ed O'Bannon is Right at Home in Las Vegas Selling Cars*, SI.COM, Mar. 18, 2009, http://sportsillustrated.cnn.com/2009/writers/the_bonus/03/18/obannon/index.html.

in Las Vegas, Nevada.⁴ In July 2009, he attempted to bolster his earning power, and that of every other former collegiate athlete, by filing a class action lawsuit against the NCAA and the Collegiate Licensing Committee (CLC). This antitrust case alleges violations for the continued use of O'Bannon's and other former athletes' images for profit, and without compensation, after their collegiate careers ended.⁵ Currently, the annual market for collegiate licensed merchandise stands at \$4 billion.⁶ As a result, the implications of a potential victory for O'Bannon are colossal.⁷

This Comment will explore the antitrust implications that Ed O'Bannon's suit will have on the NCAA and its marketing partners now and in the future. In doing so, this Comment will place particular emphasis on the bargaining practices used by the NCAA that allow for it to obtain perpetual licensing rights over athletes' images.

Part I will give background on Ed O'Bannon's complaint against the NCAA and investigate what may make his case a viable antitrust attack against the NCAA. Part II will apply antitrust law to O'Bannon's lawsuit, assessing potential antitrust arguments for and against current NCAA practice in securing athletes' image rights. In Part III, this Comment will propose several alternatives to the NCAA's amateurism policies and evaluate the consequences arising from those alternatives. Finally, Part IV of this Comment will summarize the previous arguments and suggest the best method for the NCAA to move forward and avoid future antitrust claims.

In order to understand the antitrust implications of the NCAA's amateurism policies, it is important to understand the arguments in O'Bannon's complaint and the legal history of the NCAA and antitrust claims.

4. Sheinin, *supra* note 3; Gutierrez, *supra* note 3; Dan Wetzel, *Making NCAA Pay?*, YAHOO! SPORTS, July 21, 2009, <http://rivals.yahoo.com/ncaa/basketball/news?slug=dw-ncaasuit072109&prov=yhoo&type=lgn>.

5. Wetzel, *supra* note 4; Complaint at 2, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 09-3329 (N.D. Cal. July 21, 2009).

6. Collegiate Licensing Company, <http://www.clc.com/clcweb/publishing.nsf/Content/history.html> (last visited Apr. 5, 2011); Complaint for O'Bannon, *supra* note 5. O'Bannon's complaint notes that the CLC has a relationship with the NCAA as "official licensing representative," which helps create this \$4 billion annual market. *Id.* ¶ 5.

7. Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Antitrust Case*, SI.COM, July 22, 2009, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html; Darren Rovell, *NCAA Put on Defensive with Another Lawsuit*, CNBC.COM, July 22, 2009, <http://www.cnbc.com/id/32085150>.

I. AMATEUR ATHLETICS: HOW ED O'BANNON'S DISPUTE
WITH THE NCAA AROSE

A. O'Bannon's Complaint

Ed O'Bannon filed a civil complaint in the Northern District of California in July 2009 against the NCAA, the CLC, and other co-conspirators.⁸ In the complaint, O'Bannon alleges that the NCAA has unreasonably restrained trade to commercially exploit former NCAA athletes into their post-collegiate lives.⁹ Sources of revenue from which the NCAA and its partners allegedly exploited current and former athletes include DVD sales, jersey sales, video games, and corporate advertising, to name a few.¹⁰

8. Complaint for O'Bannon, *supra* note 5. The complaint defines the CLC as a licensing team that manages licensing rights for two hundred institutions and seventy-five percent of the college licensing market. *Id.* ¶ 36. The co-conspirators alleged are Electronic Arts (EA) and various unnamed co-conspirators including NCAA member schools and conferences. *Id.* ¶¶ 38-40. With regard to EA, O'Bannon alleges that the video game maker and the NCAA have conspired for financial benefit by using identical video game likenesses of current and former players. *Id.* ¶¶ 135-48. Furthermore, the complaint states that the NCAA and EA allow third parties to create and market modifications that allow users to upload complete roster information for current and classic teams in order to benefit financially. *Id.* ¶¶ 145-46. This is interesting in light of recent developments in the Northern District of California, where the former quarterback for the University of Nebraska, Samuel Keller, has filed a class action lawsuit against NCAA and EA for use of player images that violate the class' right to publicity. Complaint, Keller v. Elec. Arts, No. 09-1967 (N.D. Cal. May 5, 2009). See also Mark Kriegel, *NCAA Video Game Stance is Pure Hypocrisy*, FOX NEWS, July 25, 2009, <http://msn.foxsports.com/cfb/story/9844702/NCAA-video-game-stance-is-pure-hypocrisy> (stating that the NCAA's stance on video game images is hypocritical when EA can replicate players down to the way they wear their socks, yet do not have to compensate players so long as their name is not used in the game); Steve Wieberg, *Ex-QB Sues NCAA, EA Sports Over Use of Athletes' Likenesses*, USA TODAY, May 7, 2009, http://www.usatoday.com/sports/college/2009-05-07-keller-ncaa-easports-lawsuit_N.htm (comparing the video game "QB #5" of Arizona State to the real Keller, who shares the same height, weight, hair color, home town, and year in school).

9. Complaint for O'Bannon, *supra* note 5, ¶ 6. See also *id.* ¶ 2 (stating that the NCAA and the CLC violate antitrust laws by engaging in price fixing and group boycott barring former athletes from ownership of, or compensation for use of their images following the end of their college careers).

10. *Id.* ¶¶ 104-65. The complaint seeks unspecified damages from the NCAA and its partners for their profits derived from a number of sources. *Id.* ¶ C. The sources of illegal use named in the complaint are: media rights for televising games, DVD and On-Demand sales and rentals, video clips sales to corporate advertisers, photos, action-figures, trading cards, posters, video games, rebroadcasts of classic games, jerseys, and other apparel. *Id.* ¶¶ 104-65.

While the damages are unspecified because the size of the class and the exact monetary relief requested by the class are not yet calculated, the complaint requests disgorgement of profits earned from illegal sales of former

The complaint further alleges that the NCAA uses its bylaws to deliberately force eighteen-year-old college students to perpetually release their image rights for the financial benefit of the NCAA and third parties with whom it contracts.¹¹ O'Bannon argues that the NCAA accomplishes student-athletes' adherence to these bylaws by requiring all athletes to release their rights each year.¹² This process requires athletes to sign a document titled "Student-Athlete Statement," currently known as "Form 08-3a."¹³ The complaint states that Form 08-3a is a tool used by the NCAA to unconscionably obtain perpetual ownership of image rights of college athletes through consent that is "coerced and uninformed and is even signed, in some cases, by minors."¹⁴

athletes' images, and three times the amount of damages incurred by the class as a result of the damage caused by the defendants and alleged co-conspirators. *Id.* ¶¶ C-D. Furthermore, O'Bannon seeks declaratory relief for all current and former athletes declaring any release statements, such as Form 08-3a, be made void and unenforceable for causing the class members to give up their right to compensation for the use of their images. *Id.* ¶ F.

11. *Id.* ¶ 10. O'Bannon specifically refers to Article 12.5.1.1 of the NCAA Bylaws, a section titled "Institutional, Charitable, Educational or Nonprofit Promotions," which requires student-athletes to release their image rights to the NCAA, its member schools and conferences, and third parties with whom the NCAA contracts (such as CLC or Electronic Arts video games), allowing these entities to benefit financially through this "Institutional, Charitable, Educational, or Nonprofit promotions release". NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2009-10 NCAA DIVISION 1 MANUAL 71 (2009), available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx>.

12. Complaint for O'Bannon, *supra* note 5, ¶ 9..

13. *Id.* ¶ 59. The title of this document changes each year, in connection with the year in which it is administered. *Id.*; See *infra* notes 17-19 (noting the specifications of Form 08-3a and its origins in NCAA Bylaws 12.5.1.1, 14.1.3.1, and 30.12). See generally NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, FORM 08-3A ACADEMIC YEAR 2008-2009, STUDENT-ATHLETE STATEMENT DIVISION 1 (2008), available at http://www.ukathletics.com/doc_lib/compliance/0809_sa_statement.pdf (stating that student-athletes, by signing the Form 08-3a, affirm their eligibility for NCAA athletics and accept the provisions of the NCAA Manual and its regulations).

14. Complaint for O'Bannon, *supra* note 5, ¶¶ 66-69. The complaint later alleges that the form is unreasonably ambiguous because no reasonable person would interpret the terms provided by the form, such as "support educational activities" or "promote NCAA championships or other NCAA events" to grant an unending license of student-athletes image rights to the NCAA and its partners for perpetual use and profit. *Id.* ¶ 69. Moreover, the complaint contends that Form 08-3a is intentionally misleading, incomplete, ambiguous, and signed under duress by NCAA athletes without informed consent. *Id.* ¶ 9. Furthermore, the complaint accuses the NCAA of inadequately informing student-athletes that they are relinquishing their legal rights over the use of their images, and undermines the consent that is given through the fact that the NCAA does not inform the students that they may seek legal advice before releasing these rights. *Id.* ¶ 70. See McCann, *supra* note 7 (noting that a finding in favor of O'Bannon might change the way the NCAA defines a student's relationship with a lawyer and may force the

B. NCAA Amateurism Rules

The amateur nature of NCAA competition is a defining feature of collegiate sports and is a core value of the NCAA.¹⁵ This core value is codified at section 12 of the organization's bylaws.¹⁶ Section 12.5.1.1 of the NCAA bylaws states that the NCAA (or a third party acting on its behalf) may use the name or picture of an enrolled student to promote NCAA events or programs.¹⁷ NCAA bylaw 14.1.3.1 makes student-athlete eligibility contingent on the signing of the Student-Athlete Statement.¹⁸ Later in the bylaws, in section 30.12, the specifications for the content and administration of the Student-Athlete Statement are set forth.¹⁹ Pursuant to these bylaws, student athletes are required to sign a Student-Athlete Statement, (earlier referred to as Form 08-3a) prior to obtaining eligibility for the coming season.²⁰

Ed O'Bannon's suit for damages is brought on behalf of a class comprised solely of *former* college athletes; however, there is an injunctive relief class, including current and former athletes, asking for Form 08-3a to be deemed unconscionable and unenforceable.²¹ O'Bannon believes that scholarship athletes should live up to the amateur commitment required when they are under scholarship.²² However, O'Bannon argues that Form 08-3a unfairly pressures uninformed eighteen, nineteen, and twenty-year-olds to sign in order to fulfill the obligations of their scholarship.²³ The form is offered on an obligatory basis and failure to complete Form 08-3a renders a student athlete ineligible

NCAA to actively teach student-athletes about the importance of counsel and methods of obtaining a lawyer in instances like the signing of Form 08-3a).

15. See NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2009-10 NCAA DIVISION 1 MANUAL 61 (2009), available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx> (stating in NCAA bylaw 12.01.1 that "only an amateur student athlete is eligible for participation in a particular sport"). See also Nat'l Collegiate Athletic Ass'n. v. Bd. Of Regents, 468 U.S. 85, 102 (1984) (holding that an academic tradition aligned with an amateur character of NCAA football that requires athletes not to be paid is what differentiates college sports from its professional counterparts). The Court stated that this amateur nature of the sport must be maintained in order to "maintain the character and quality of the product." *Id.* at 102.

16. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 15, at 61.

17. *Id.* at 71.

18. *Id.* at 127.

19. *Id.* at 363. Bylaw 30.12 provides that Form 08-3a must be administered individually to each athlete by the athletic director of his school. *Id.* There is no mention as to whether a lawyer may or may not be present for the administration of this form. Furthermore, it makes no mention of perpetual licensing of image rights to the NCAA or its partners. Complaint for O'Bannon, *supra* note 5, ¶ 67.

20. McCann, *supra* note 7.

21. Complaint for O'Bannon, *supra* note 5, ¶¶ 25-34.

22. Wetzel, *supra* note 4.

23. *Id.*

to participate in NCAA competition.²⁴ The class action lawsuit is brought not because of the deprivation of licensing rights of students while in college, but because the NCAA policy has “extended that privilege into eternity.”²⁵

C. The NCAA and Antitrust Laws

O'Bannon's complaint alleges that the NCAA and the CLC have committed violations of federal antitrust laws by unlawfully barring former athletes from receiving compensation for the use of their images after their college careers have ended.²⁶ The antitrust action is brought pursuant to the Sherman Antitrust Act.²⁷ The Sherman Act provides that “every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”²⁸

Despite the powerful language of the Sherman Act, however, it is not meant to make all contracts restraining trade unlawful. Rather, the Sherman Act only makes those contracts which are *unreasonable* unlawful.²⁹ As a result, in order to demonstrate a violation of the Sherman Act, a plaintiff must show the following: (1) that there is an agreement; and (2) that the agreement unreasonably restrains trade.³⁰ Courts will generally apply the “rule of reason” test to determine whether a contract unreasonably limits competition in the open market when it does not find it to *per se* violate antitrust law.³¹ Under this rule, the court must weigh the circumstances of a given cause of action to decide

24. Complaint for O'Bannon, *supra* note 5, ¶¶ 6, 61.

25. Wetzel, *supra* note 4. See also Complaint for O'Bannon, *supra* note 5, ¶ 13 (alleging that the concerted action of the NCAA, CLC, and alleged co-conspirators is designed to avoid compensation to former players by forcing them to sign forms that require a perpetual release of all rights regarding the use of their images).

26. Complaint for O'Bannon, *supra* note 5, ¶ 2. See also McCann, *supra* note 7 (asserting that “by requiring student-athletes to forgo their identity rights in perpetuity, the NCAA has allegedly restrained trade in violation of the Sherman Act, a core source of federal antitrust law”).

27. Complaint for O'Bannon, *supra* note 5, ¶ 46.

28. 15 U.S.C. § 1 (2004).

29. *Bd. Of Regents*, 468 U.S. at 98. The court in *Regents* noted that a restraint in trade may be unreasonable based on either (1) the nature and character of the contracts, or (2) the circumstances giving rise to the presumption that they were intended to restrain trade. *Id.* at 103 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978)).

30. *Law v. Nat'l Collegiate Athletics Ass'n*, 134 F.3d 1010, 1016 (10th Cir. 1998).

31. See *Bd. of Regents*, 468 U.S. at 103 (applying the rule of reason to the NCAA's mandatory structured TV plan). The court in *Board of Regents* states that the *per se* rules as well as the rule of reason are necessary for courts to have a basis of deciding on the competitive significance (the reasonableness) of a particular restraint. *Id.*

whether it constitutes an unreasonable restraint on competition.³² Courts have historically taken a deferential approach to antitrust claims against the NCAA and no antitrust lawsuit against the NCAA's amateur restrictions has ever succeeded.³³

The seminal NCAA antitrust case is *National Collegiate Athletic Association v. Board of Regents*. In this case, the U.S. Supreme Court simultaneously struck down an NCAA contract as an antitrust violation and created what has proven to be an insurmountable standard for antitrust challenges to amateurism rules.³⁴ The Court in *Board of Regents* made statements that were crippling to later antitrust suits, without even ruling on the antitrust implications of amateurism.³⁵ The Court stated that “[i]n order to preserve the character and quality of the ‘product’, athletes must not be paid, must be required to attend class, and the like.”³⁶ Moreover, the Court stated that the NCAA markets the brand of college sport, and its alignment with an educational and amateur tradition is what distinguishes it from its professional competition. As such, the court believed that the NCAA should be afforded authority in safeguarding these ideals.³⁷ Thus, while the holding of *Board of Regents* would seem to exemplify mistrust for NCAA activities with potential anticompetitive outcomes, the effect of the dicta of the case was to allow courts to defer to the NCAA's role as purveyor of amateurism.³⁸

The cases since *Board of Regents* have consistently ruled against plaintiffs bringing suit against the NCAA involving

32. Cont'l T.V. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

33. Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLIN L. REV. 24, 37 (2000).

34. *Bd. of Regents*, 468 U.S. at 120. The court stressed that the NCAA has a unique opportunity to maintain the purity of amateur sport as a purveyor of the tradition, and should be given leeway in doing so. *Id.* However, a television plan that limited television appearances for teams under certain circumstances and fixed the price of televised games failed the rule of reason and violated section 1 of the Sherman Act. *Id.* at 99-100.

35. Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 339 (2007); Pekron, *supra* note 33, at 38.

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

37. *Id.* at 101-02.

38. See Tibor Nagy, *The Blind Look Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 340-41 (2005) (noting that the effect of *Board of Regents* is contrary to its holding, as no court has used the rule of reason to require the NCAA's offering of proof that rules concerning amateurism are necessary to market college football as different from its professional competition). The note goes on to criticize the holding in *Board of Regents* as the “personal opinion” of Justice Stevens and merely as voluntary statements that were not at issue that have since framed the way that courts approach antitrust claims against the NCAA. *Id.*

disputes of the amateurism rules.³⁹ The first case after *Board of Regents* was *McCormack v. NCAA*,⁴⁰ where the Fifth Circuit Court of Appeals applied the rule of reason, instead of finding a *per se* violation of antitrust law. The court held that the NCAA's sanctions of a university for paying football players above the limit set by NCAA rules were reasonable because the eligibility rules maintained a product that was distinct from professional football and allowed for its survival.⁴¹ The court found that the NCAA rules limiting compensation of athletes were meant to distinguish the college game from the professional and to integrate amateur athletics with academics, and as a result, the rules reasonably furthered those goals.⁴²

In *Gaines v. NCAA*, the U.S. District Court for the Middle District of Tennessee held that a player who entered the NFL draft and attempted to return to college after going undrafted did not have a viable antitrust claim against the NCAA.⁴³ Like the court in *McCormack*, the district court relied on the amateur distinction in reaching its conclusion; flat-out rejecting the notion that eligibility rules may be struck down by antitrust law and reaffirming the NCAA as a purveyor of the "Athenian concept of a complete education derived from fostering full growth of both mind

39. See *Banks v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 850, 862-63 (N.D. Ind. 1990) (denying a motion for preliminary injunction regarding enforcement of the NCAA's "no draft" rule when a player who entered the NFL draft, went undrafted, and was denied a return to college football). The court held that the precompetitive nature of the amateurism rules outweighed the anticompetitive effect. *Id.*; see *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988) (holding that restrictions on athlete compensation were not price fixing in violation of the Sherman Act and finding that sanctioning universities that violate amateurism rules are "justifiable means of fostering competition . . . and therefore precompetitive.")

40. *McCormack*, 845 F.2d at 1345.

41. *Id.*

42. *Id.* at 1344-45. The court went on to address the plaintiff's argument that NCAA limits on compensation limit competition because of the NCAA's allowance of certain compensation such as scholarships. *Id.* at 1345. The plaintiff further argued that the NCAA allowed athletes to be compensated professionally in one sport while remaining eligible for amateur NCAA participation in another. *Id.* The court undermined these arguments by strongly stating, "[t]hat the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable." *Id.* See *Banks*, 746 F. Supp. at 862 (striking down the plaintiff's argument that the NCAA's rules protect a "flawed amateurism" for allowing professional baseball players status as amateur football players, but considers a football player who has not been compensated professionally to be professional where he only tries out at the NFL level). The court cites *McCormack's* aforementioned rationale pertaining to "the purest form of amateurism" to maintain that NCAA rules are reasonable. *Id.*

43. *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738, 744-45 (M.D. Tenn. 1990).

and body” through the ideal of amateurism.⁴⁴

The same no-draft eligibility rule was challenged in *Banks v. NCAA*, where the U.S. District Court for the Northern District of Indiana found the concept of amateurism absolved the NCAA of any antitrust violation because of the pro-competitive effects of the NCAA differentiating its product from its competition.⁴⁵ The court noted that Banks offered anti-competitive effects of the no-draft rule that were credible: namely, that it would deter top college players from entering the draft and gaining a chance to earn a large NFL salary.⁴⁶ However, the court relied on the NCAA’s justification of amateur ideals articulated in *Board of Regents* as a pro-competitive justification that outweighed Banks’ antitrust interpretation of the NCAA rules.⁴⁷

Thus, the aggregate effect of *Board of Regents* and the decisions that followed was to allow the notion of amateurism to become a viable defense of justification for any anti-competitive NCAA rules in the face of an antitrust challenge.⁴⁸

44. *Id.* at 744.

45. *Banks*, 746 F. Supp. at 862. The court noted that Banks presented several anticompetitive effects of the NCAA’s no-draft and no-agent rules; notably, that the disputed rules “protect a flawed concept of amateurism.” *Id.* However, the district court found that the bylaws define amateurism, and that the “need for such a definition is central to a procompetitive purpose.” *Id.* As a result, the court found the plaintiff could not demonstrate that anticompetitive effects (that is, harm to consumer welfare from an inability to watch him play in the NCAA during the season) outweighed the pro-competitive effect of the NCAA’s amateurism rules. *Id.*

46. *Id.* at 860. The court went on to note that the effect of this would be for better players to remain in the NCAA, enhancing their already marketable product while harming the instant profitability of the collegiate athletes who feared entering the NFL draft. *Id.*

47. *Id.* at 860-61. The court articulated several purposes of the NCAA no-draft rule. It stated that it contributed to a “clear line of demarcation” between amateur and athletic competitions while forcing NCAA athletes to focus on their “collegiate endeavors.” *Id.* at 861. Furthermore, the court noted that without the rule, college players could move freely between their personal pursuit of monetary gain and their NCAA obligations, allowing their pursuit of profit to overshadow their responsibilities as amateur student athletes. *Id.* at 860-61. In accepting the NCAA’s argument, the court does note that the NCAA certainly exaggerates their case, however, the distinction between amateur and professional sport still controls. *Id.* Furthermore, the appellate decision in this case stated that college athletes simultaneously pursue a college degree alongside their athletic endeavors and held that the rules provided by the NCAA are designed to preserve the honesty and integrity of college athletics. *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1090 (7th Cir. 1992). See also Nagy, *supra* note 38, at 355 (stating that this finding would protect the NCAA from any later antitrust allegations in future Seventh Circuit cases).

48. See Pekron, *supra* note 33, at 37-41 (arguing that since *Board of Regents*, courts have simply chosen to accept the fact that college sports are amateur in nature without factually determining whether NCAA athletics are truly amateur by investigating whether college athletics could survive without

D. Unconscionability

One way that a plaintiff may choose to argue that a contract is unreasonable is to establish that it was formed unconscionably.⁴⁹ Unconscionability usually arises under contractual circumstances marked by the absence of a meaningful choice for one party (procedural unconscionability) coupled with unfavorable terms for the other party (substantive unconscionability).⁵⁰ For a court to find that a contract was entered into under unconscionable terms, it generally requires a showing that both procedural and substantive unconscionability were present when the contract was entered into.⁵¹ In determining whether a contract is procedurally unconscionable, and consequently, whether the harmed party may obtain relief from an unfavorable term, courts have looked at several factors including: age, intelligence, business savvy and experience, and relative bargaining power of the parties.⁵²

being labeled as amateur in nature). Pekron goes on to propose that the dichotomy of amateurism, which courts readily accept to excuse anti-competitive rules, can be undermined by defining athletes as employees of the universities that they attend, factually proving that college sports as they are currently are already professionalized, and that the notion of amateurism that courts have relied on so often violates the core of antitrust law so that the labor that produces wealth to the NCAA and its partners goes unpaid. *Id.* at 41-66. *See also* Nagy, *supra* note 38, at 358-59 (contending that courts have erroneously relied on the assumption that college athletes are amateurs because NCAA athletics have categorized their sports as similar to extracurricular activities). Nagy posits that rather than student-athletes, however, NCAA players are more similar to athlete-students, whose obligations to their team come ahead of their educational pursuits by virtue of receipt of scholarships despite poor academic records. *Id.* at 359. Thus, at least for the best players, the NCAA serves as a minor league system for the NFL. *Id.* at 359-360. Furthermore, courts addressing this issue have never engaged in sufficient fact-finding to determine whether amateurism is actually necessary for the product of college sport to survive. *Id.* at 360. Instead, courts have assumed that these rules are necessary, and have relied on the dicta, not the holding, of *Board of Regents*. *Id.* at 358.

49. *See* Complaint for O'Bannon, *supra* note 5, ¶¶ 66-73 (arguing that Form 08-3a is anti-competitive because it coerces student-athletes to consent to unconscionable terms).

50. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. 1965).

51. *Id.* In analyzing the issue of unconscionability, courts focus on the factual circumstances of the case at bar that may point to "a gross inequality in bargaining power." *Id.* *Williams* places particular importance on the way in which a contract is entered into in order to come to a finding of unconscionability. *Id.* The court articulates that each party to a contract must be afforded a reasonable opportunity to understand the terms contained therein, and in circumstances where a party is not afforded this ability due to a disparity in bargaining power, it is not likely that that injured party's consent was ever really given to the actual terms of the contract. *Id.*

52. *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1377 (11th Cir. 2005) (articulating Georgia courts' factors for evidence of procedural

An adhesion contract, which is a frequent but unnecessary aspect of an unconscionable agreement, is a form contract administered by one party to another party who has little choice as to the terms of the agreement.⁵³ The mere fact that an agreement is entered into through an adhesion contract is only evidence of procedural unconscionability and does not make a contract *per se* unconscionable.⁵⁴ Rather, in evaluating an adhesion contract a court will void terms that are unconscionable and construe any contractual ambiguities against the drafter, but will not simply ignore terms because they may be enforced at the detriment of the party with less bargaining power.⁵⁵ A defense of consent to a contract raised by the drafting party can be defeated upon a showing of procedural and substantive unconscionability that will

unconscionability as: age, education, intelligence, business acumen and experience, relative bargaining power, ambiguity of the contract language, fairness of the terms, and the presence of a meaningful choice); *Price v. Taylor*, 575 F. Supp. 2d 845, 852 (N.D. Ohio 2008) (elucidating Ohio factors of unconscionability which include: age, education, intelligence, business expertise, bargaining power, whether the terms of the contract were explained to the weaker party, and whether modification was possible); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 166 (Wis. 2006) (stating the same factors as mentioned in *Price*, but broadening them by stating that the factors are not limited only to those and further including the availability of alternative sources of the subject matter of the contract).

53. BLACK'S LAW DICTIONARY 342 (8th ed. 2004). There are several circumstances that give rise to adhesion, among them are: the drafting party has ample time to create the terms of the contract, inevitably creating terms in its favor, the signing party is not familiar with the terms of the contract nor has he/she received significant time to review the contract (often supplemented by fine print or distorted language), a disparity in bargaining power or a total lack of bargaining (take-it-or-leave-it contract). E. ALLEN FARNSWORTH, CONTRACTS § 4.26, at 296-97 (3d Ed. 1999).

54. *Amer. Bankers Mortg. Corp. v. Federal Home Loan Mortg. Corp.*, 75 F.3d 1401, 1412 (9th Cir. 1996). The court held that a mortgage contract was not unconscionable despite the presence of elements of adhesion. *Id.* at 1412-13. Even assuming that termination clauses in the mortgage contract were adhesive for the party seeking unconscionability, the court held that the party seeking unconscionability had failed to establish that the disputed provisions were not within their reasonable expectations at the time the contract was entered into. *Id.* at 1412. While the contract was offered adhesively on a take-it-or-leave it basis, meeting the California requirement for adhesion, there were alternative sources of supply from which to gain the contractual benefit. *Id.* at 1413. As a result, the mere presence of an adhesion contract did not give rise to a finding of unconscionability. *Id.*

55. *Walther v. Sovereign Bank*, 872 A.2d 735, 746 (Md. 2005). The Maryland court found an arbitration agreement within a contract enforceable despite the presence of adhesion in the bargaining process. *Id.* at 746-48. The arbitration clause did not provide mutuality because it provided a lender with a foreclosure option that was not offered to the borrower. *Id.* at 748. However, the court noted that identical mutuality need not exist for a contract to be enforceable, and as a result, the arbitration term was not so oppressive so as to render the contract unconscionable and unenforceable despite the presence of adhesion. *Id.*

render the injured party's consent invalid, as the unconscionability of the terms of the contract will make its content void and unenforceable.⁵⁶

Because the law governing the issues of NCAA antitrust and unconscionability are established and unambiguous, the pivotal point becomes whether O'Bannon's antitrust attack introduces a unique issue concerning amateurism that has the capacity to overturn years of legal precedent.

II. IS AMATEURISM FOREVER PROTECTED BY COURTS?

As previously mentioned, the Supreme Court has created what seems to be an insurmountable standard for plaintiffs who choose to bring antitrust claims against the NCAA.⁵⁷ This standard was established in *Board of Regents*, and cases that have followed have easily upheld the notion of the NCAA as the defender of amateurism in collegiate sports.⁵⁸ Furthermore, the

56. See Sean Hanlon & Ray Yasser, "*J.J. Morrison*" and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 277 (2008) (arguing a hypothetical case on behalf of a college athlete who alleges a violation of his right to publicity arising out of the use of an athlete's image in similar circumstances to the O'Bannon case). This section of the note examines the NCAA athlete's consent, or lack thereof, to the terms of the NCAA by signing a scholarship offer to his university of choice and a national letter of intent. *Id.* at 281-83. Hanlon and Yasser argue that university athletic scholarships are contracts of adhesion offered on a take-it-or-leave-it basis. *Id.* at 286-87. The scholarship incorporates the National Letter of Intent and the Statement of Financial Aid, which, in turn, incorporate the NCAA's rules and regulations. *Id.* at 290-91. Hanlon and Yasser then posit that the scholarship is unconscionable because in order to receive the benefits of the athletic scholarship, such as enrollment, tuition, and status as a student-athlete, students are required to sign standard-form adhesion contracts; the National Letter of Intent and the Statement of Financial Aid. *Id.* at 291. There is also a gross inequality of bargaining power between the very experienced and knowledgeable NCAA and the weaker student-athlete, particularly with regard to the 476 pages of NCAA rules that must be accepted. *Id.* at 292. Furthermore, the note argues that the contract is substantively unconscionable because it is one-sided and harsh for athletes who must retain amateur status without being paid for their participation, while other organizations linked with the NCAA are unjustly enriched by using the amateur athletes for profit. *Id.* at 294-96. See also *Williams*, 350 F.2d at 449 (noting that if consent arises out of a disparity in bargaining power that produces contractual terms that are unreasonably favorable to one party, it is not likely that consent, "or even an objective manifestation of his consent," was ever given to the terms of the contract).

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

58. See Pekron, *supra* note 33, at 37-41 (noting that several courts have relied on the *Board of Regents* dicta to rule in favor of anti-competitive NCAA amateurism restrictions while failing to conduct the factual investigations necessary to make a legitimate antitrust ruling). The note goes on to undermine the *Board of Regents* precedent. *Id.* Pekron argues that *Board of Regents* is precedent that courts use erroneously by relying on dicta in order to reach a judgment. *Id.* at 39-40. Furthermore, the note argues that objective

NCAA antitrust appearance of immunity is bolstered by the *McCormack* case's assertion that because "the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."⁵⁹

While courts have readily ruled against challenges to the NCAA's amateurism rules in light of the *Board of Regents* dicta, O'Bannon's action may pose a legitimate threat.⁶⁰ O'Bannon is bringing his antitrust suit for damages against the NCAA on behalf of *former* athletes who wish to join the class.⁶¹ He argues that the NCAA's use of athletes' images when those athletes are in school is legal, but maintains that it is the use of these images in perpetuity, and without compensation, that violates the Sherman Act.⁶²

As a result, O'Bannon does not challenge the ideal of amateurism that the NCAA uses to defeat antitrust suits brought against its regulations.⁶³ Instead, O'Bannon challenges the policies, bargaining practices, and other means that the NCAA uses to induce college students to release their image rights (which he concedes should be allowed) for the NCAA and its marketing partners to use for a profit into eternity.⁶⁴ The ramifications of the

courts, carrying out the necessary factual investigations, would find that collegiate football and basketball have strayed from the amateur tradition. *Id.* at 40.

59. *McCormack*, 845 F.2d at 1345.

60. See generally McCann, *supra* note 7 (noting that while the NCAA's goal of maintaining amateurism may be legitimate, it does not seem to apply to former athletes, who are several years, if not decades, removed from their time under the scope of the NCAA, and possess substantial business capabilities and earning power).

61. Complaint for O'Bannon, *supra* note 5, ¶ 43. O'Bannon's class action suit seeks damages for all former athletes who competed on a Division I men's basketball or football team and wish to join the class for what he alleges as the unlawful use of their images in perpetuity. *Id.* However, current athletes are not barred from joining the class action as members of the "Declaratory and Injunctive Relief Class," thus allowing current participants in NCAA competition to seek relief from the alleged oppressive policies of the NCAA. *Id.* ¶¶ 43, 46.

62. *Id.* ¶¶ 66-67.

63. Mark Alesia, *Suit Targets NCAA Over Profits from Ex-Athletes' Images*, INDYSTAR.COM, July 22, 2009, <http://wap.indystar.com/detail.jsp?key=494843&rc=sp&full=1>. O'Bannon's suit is not the first antitrust case brought against the NCAA, but what makes it unique is that amateurism rules are not at issue. *Id.* While in the past, the NCAA was able to argue that it needed to disallow compensation to its players in order to preserve amateurism, this suit is brought because players are not paid for their likenesses after their careers are over. *Id.*

64. Complaint for O'Bannon, *supra* note 5, ¶¶ 58-78. The complaint mentions specific NCAA bylaws that are meant to promote amateurism in the NCAA. *Id.* However, the class action does not seek that the NCAA amateurism rules themselves be invalidated, but seeks the invalidation of improper

complaint are important because they present a unique challenge to the NCAA's seemingly insurmountable antitrust armor (by not challenging the notion of NCAA amateurism) while challenging the practices that the NCAA uses to perpetuate its amateurism-driven policies on a season-to-season, athlete-to-athlete basis.⁶⁵

A. Antitrust Analysis

The infamous dicta from *Board of Regents* reads:

[T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice not only the choices available to sports fans but also those available to athletes and hence can be viewed as pro-competitive.⁶⁶

O'Bannon does not challenge the NCAA's potential antitrust violations from the perspective of a current player. However, the implications of the case would certainly affect current NCAA athletes in the future.⁶⁷

As previously noted, the Sherman Act protects only against restraints of trade that are unreasonable.⁶⁸ To show an unreasonable restraint of trade, a plaintiff must show that the challenged action is "commercial" and that the action is illegal.⁶⁹ In light of the case law which has followed *Board of Regents*, it would appear that any NCAA regulation in pursuit of amateurism is reasonable.⁷⁰ However, former athletes may have a number of

bargaining policies undertaken in the administration of these rules, such as Form 08-3a. *Id.* ¶¶ 58-73. Essentially, the antitrust cause of action does not arise because the NCAA attempts to keep its competitions amateur in nature; it arises because refusing to compensate players for the use of their images into eternity has no relationship to amateurism when athletes are no longer amateurs. *Id.* ¶ 184.

65. *Id.*

66. *Bd. of Regents*, 468 U.S. at 102. The result of such dicta was to make the NCAA's amateurism regulations untouchable in antitrust actions. See generally Lazaroff, *supra* note 35 (arguing that courts have adopted an overly deferential approach to antitrust analysis of NCAA amateurism regulations by simply declining to apply antitrust law or shielding the NCAA from challenges).

67. McCann, *supra* note 7. McCann notes that an O'Bannon victory would compel the NCAA to change the ways in which it interacts with players. *Id.* Furthermore, he states that while O'Bannon does not seek damages for current athletes, a victory for damages in this case would result in the creation of a trust for current student-athletes, the contents of which would be available to athletes upon their departure from college. *Id.*

68. *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 461 (3rd Cir. 1998).

69. 15 U.S.C. § 1 (2006).

70. See generally *Banks*, 977 F.2d 1081 (holding that the NCAA's no-draft, no-agent policies were valid regulations that uphold amateur ideals); *McCormack*, 845 F.2d 1338 (ruling that the NCAA's eligibility rules limiting

facts surrounding the means that the NCAA uses to secure the rights over players' images, which may point to unreasonableness in the NCAA's practice.⁷¹

The principle argument that the former players will rely on is the ambiguity in Form 08-3a, which is administered by the NCAA and signed by current players prior to participation in each season.⁷² While the NCAA purports to use its constitution, bylaws, and Form 08-3a to secure eligibility, compliance with amateurism rules, disclosure of academic records, and drug testing, players will argue that the NCAA uses these statements in a manner unrelated to image rights to secure perpetual control over the image rights of athletes well after their college careers end.⁷³ O'Bannon's lawyer stated Form 08-3a is "a one year contract that

compensation to players were meant to maintain amateurism in college sport and were not unreasonable); *Gaines*, 746 F. Supp. 738 (finding that NCAA eligibility rules were not subject to antitrust analysis). *See also* Pekron, *supra* note 33, at 36-37 (noting that no antitrust lawsuit challenging NCAA amateurism restrictions has ever succeeded and arguing that in order to prevail in an antitrust lawsuit challenging the NCAA's amateurism rules, it is "imperative" that a plaintiff make the court understand that amateurism is not necessary for the NCAA to produce college athletics). This is because, as the note argues, if the "veil of amateurism" is removed from NCAA regulation, their activities mirror those "of any garden-variety price-fixing cartel." *Id.*

71. *See* Pete Thamel, *N.C.A.A. Sued Over Licensing Practices*, N.Y. TIMES, July 21, 2009, <http://www.nytimes.com/2009/07/22/sports/ncaabasketball/22ncaa.html> (stating that the crux of the O'Bannon suit is "Form 08-3a" and quoting his attorney as stating that the NCAA is illegitimately allowed to delineate what amateurism is).

72. Complaint for O'Bannon, *supra* note 5, ¶¶ 55-73. The complaint notes that the provision in Form 08-3a stating that the statement concerning promotion of NCAA championships and other NCAA events "shall remain in effect until a subsequent Division I Student-Athlete Statement/Drug-Testing Consent form is executed" effectively releases NCAA athletes' image rights over to the NCAA forever. *Id.* ¶ 66. The complaint proceeds to argue that the mandatory requirement that athletes sign a statement titled "Institutional, Charitable, Education or Nonprofit Promotions Release" and the phrases within reading "support educational activities" and "generally promote NCAA championships or other NCAA events, activities, or programs" are unreasonably ambiguous because they make no mention of a perpetual release of image rights to the NCAA. *Id.* ¶ 69. Nor do the specific uses, such as DVD sales, classic game rebroadcasts, video game sales, and the like ever appear in the contract that the athlete signs to consent to the NCAA's ownership of image rights. *Id.*

73. *Id.* ¶ 67. *See also* NCAA DIVISION 1 MANUAL, *supra* note 15, Const. 3.2.4.6, at 9 (stating that the Student-Athlete statement must be signed annually); *Id.* Bylaw 14.1.3.1, at 129 (stating that the Student-Athlete Statement is required for an athlete to retain eligibility and that the content will be related to "eligibility, recruitment, financial aid, amateur status, previous positive drug tests . . . and involvement in organized gambling activities . . ."); *Id.* Bylaw 30.12, at 363 (stating that the statement must be administered prior to participation in athletic competition each year).

ends when the student is no longer a student athlete."⁷⁴ While the NCAA's conduct of administering the form on a year-to-year basis for all athletes seems to affirm this idea, its conduct in marketing player images and likenesses in perpetuity is contrary to the practice of repeatedly obtaining the athletes' signatures.⁷⁵

In addition to cases such as *Banks*, *McCormack*, and *Gaines*, however, the NCAA has cases working in its favor that include antitrust challenges to amateurism rules from non-athletes.

In 2004, the U.S. District Court for the Eastern District of Pennsylvania heard *Pocono Invitational Sports Camp v. National Collegiate Athletic Association* where a for-profit basketball camp sued the NCAA for antitrust violations resulting from their amateurism recruiting rules.⁷⁶ The plaintiff argued that NCAA regulation was unreasonable because it was designed to protect institutional (NCAA) basketball camps⁷⁷ while also threatening to destroy non-institutional camps.⁷⁸ The NCAA countered that the recruiting regulation is intended to protect student athletes from being exploited.⁷⁹ In coming to the conclusion that the recruiting rules did not violate antitrust laws, the court strongly stated that the NCAA rules were immune from scrutiny, as they keep with the NCAA principle of amateurism and distinguish collegiate athletics from professional sports.⁸⁰ Because the NCAA regulations have been upheld as protection of amateurism in student-athlete challenges and non-student-athlete challenges alike, it is clear that the former athletes will have difficulty overcoming the NCAA's protection from antitrust action.

B. Is Form 08-3a Unconscionable?

One way that a former athlete may circumvent the inherent difficulties in trying to bring an antitrust suit against the NCAA is to argue that the NCAA's bargaining tactics in the administration

74. Thamel, *supra* note 71.

75. Complaint for O'Bannon, *supra* note 5, ¶ 66; see also Wetzel, *supra* note 4 (quoting O'Bannon's attorney Michael Hausfeld saying, "[The scholarship] requires annual signing . . . It's proof that the NCAA has no right over former athletes."). Hausfeld is further quoted as stating, "[w]hat [Form 08-3a] does is emphasize the illegality with the Association essentially saying by reason of these annual, limited grants of right, the Association and the universities can exercise the right to use the image of the former student-athlete eternally." *Id.*

76. *Pocono Invitational Sports Camp v. Nat'l Collegiate Athletic Ass'n*, 317 F. Supp. 2d 569, 572-73 (E.D. Pa. 2004).

77. The rules that were disputed involved an NCAA requirement that Division I coaches only evaluate prospects at camps specifically certified by the NCAA, a limit on the number of days in which coaches are permitted to attend basketball camps to evaluate prospects, and a rule prohibiting coaches from being employed by non-NCAA certified basketball camps. *Id.* at 573.

78. *Id.* at 577.

79. *Id.*

80. *Id.* at 584.

of Form 08-3a are unconscionable. If this is the case, then its acquisition of perpetual image rights over athletes is illegal, as it is procured through the administration of an unenforceable contract.⁸¹ It would appear that former athletes have a strong basis for a showing of procedural unconscionability because Form 08-3a is an adhesion contract, administered by the NCAA every year to young student-athletes, whose ability to attend a university may be contingent on their signing the form to secure a scholarship.⁸² However, in order to find that a contract is void due to unconscionability, this procedural unconscionability must be paired with unfavorable terms that show substantive unconscionability.⁸³

A finding of substantive unconscionability will require a court to weigh the benefit conferred through the signing of Form 08-3a (namely, eligibility for participation in NCAA competition and eligibility for an athletic scholarship) with the detriment of perpetual release of image rights that the athlete may have been able to profit from in his post-collegiate career.⁸⁴ Athletes will further argue that the unfavorable terms extend to their time under the watch of the NCAA as student-athletes.⁸⁵

81. See Complaint for O'Bannon, *supra* note 5, ¶¶ 66-73 (asserting that Form 08-3a is anti-competitive for a number of reasons, including: vagueness and ambiguity regarding the perpetual release in pursuit of promotion of NCAA events, coercion by requiring uninformed students (and even minors in certain cases) to consent to unconscionable terms, and perpetration of this contract through a gross disparity in bargaining power that requires student athletes to sign non-negotiable forms with non-negotiable terms, or face the loss of athletic eligibility).

82. See discussion, *supra* note 52 and accompanying text, (establishing that procedural unconscionability can be shown through several factors including: age, education, business acumen, ambiguity of contract language, disparity in bargaining power, whether modification is possible, and the availability of alternative sources of the contract's subject matter).

83. *Williams*, 350 F.2d at 449.

84. See Complaint for O'Bannon, *supra* note 5, ¶¶ 166-72 (arguing that former student-athletes are exposed to harsh realities in the post-collegiate world, including responsibility for medical bills resulting from ongoing sports-related injuries, debt because scholarships do not cover necessities outside of education, and an inadequate college education that result from the sports-related demands placed on scholarship athletes that are not proportional to a perpetual release of earning power related to the likeness of the college athlete).

85. Hanlon & Yasser, *supra* note 56, at 294-96. The article argues that athletic scholarships are substantively unconscionable because of harsh terms, the sum of which drastically favors the NCAA and member institutions. *Id.* at 294. Student-athletes can be quickly disposed of by the NCAA for the violation of its bylaws in the event that an athlete receives payment or even allows his name or photograph to be used without compensation. *Id.* at 294-95. The result of these unconscionable policies is to unjustly enrich the NCAA, member institutions, and its partners while inadequately redistributing the value to student-athletes. *Id.* at 296.

The most important factor for former players regarding their substantive unconscionability claim will be the perpetual release itself.⁸⁶ Former athletes will argue that while it may have been foreseeable at the time they entered into the contract, despite its procedural unconscionability, that they were giving up their image rights for the duration of their college careers, it was not reasonably foreseeable at the time of contract that they would be handing these rights over to the NCAA for eternity.⁸⁷ If the class of former athletes can successfully show elements of procedural unconscionability and substantive unconscionability—through the NCAA's oppressive terms and extension of those terms into perpetuity without contractual justification—there is a strong probability that a court will deem Form 08-3a unconscionable and void.

C. *The Rule of Reason*

The rule of reason applies when a restraint challenged as unreasonable is not a *per se* violation of the Sherman Act.⁸⁸ Rule of reason analysis takes a formulaic approach: (1) a plaintiff must demonstrate that a restraint has had substantial adverse anti-competitive effects; (2) the defendant must show that the conduct promotes a sufficiently pro-competitive objective; and (3) the plaintiff must demonstrate the restraint is not reasonably necessary to achieve the stated objective.⁸⁹

86. See Wetzel, *supra* note 4 (interviewing O'Bannon's attorney Michael Hausfeld, who states that there is no actual perpetual release by former athletes for universities or the NCAA to use image rights, however, these entities exercise these rights anyway). Later, the article quotes O'Bannon saying, "When you're in school you're obligated to live up to your scholarship. . . [b]ut once you're done, you physically, as well as your likeness, should leave the university and the NCAA." *Id.*

87. See *Amer. Bankers Mortg. Corp.*, 75 F.3d at 1412 (9th Cir. 1996) (holding that a mortgage contract was not unconscionable despite the presence of elements of adhesion). However, assuming for the party seeking unconscionability, that termination clauses in a mortgage contract were adhesive, the court held that the party seeking unconscionability had failed to establish that the disputed provisions were not within their reasonable expectations at the time the contract was entered into. *Id.* As a result, former athletes will argue that while it may have been foreseeable at the time they entered into the contract that they were giving up their image rights for the duration of their college careers, it was not reasonably foreseeable at the time of contract that they would be handing these rights over to the NCAA for eternity.

88. *Cont'l T.V.*, 433 U.S. at 49.

89. *Schering-Plough Corp. v. Fed. Trade Comm'n.*, 402 F.3d 1056, 1065 (11th Cir. 2005).

1. Substantial Adverse, Anti-Competitive Effect

A finding of a substantial adverse anti-competitive effect requires a showing of four factors: (1) that the defendants contracted or conspired among each other; (2) that this led to anti-competitive effects within the relevant product markets; (3) that the objects of that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result.⁹⁰

The plaintiff former athletes will attempt to show a conspiracy by arguing that the NCAA, CLC, and other defendants engaged in a group boycott that, through their signing of Form 08-3a, barred former athletes from receiving compensation for their image rights.⁹¹ The anti-competitive effect within the market is a lower number of distributors of collegiate athletes' images, which in turn would lead to less competitive distribution market, meaning higher prices for consumers of collegiate memorabilia.⁹²

The objects of the contract are illegal as demonstrated by the analysis of unconscionability relating to Form 08-3a. If the release is procured through a void and unenforceable contract because that release was never substantively consented to, then the NCAA is using illegal instruments to further this anti-competitive restraint on the market.⁹³ Finally, the proposed injury to the class is that they have been deprived of their ability to sell licenses of their images, and as a result, have been denied compensation after their college careers for the use of their images.⁹⁴

90. *Rossi*, 156 F.3d at 464-65 (3rd Cir. 1998).

91. Complaint for O'Bannon, *supra* note 5, ¶¶ 2, 193-95. This group boycott includes a concerted refusal by the NCAA and its licensing partners to compensate athletes for use of their images, concerted action to coerce consent on a yearly basis in the administration of Form 08-3a, and an ongoing effort to deny compensation for the continued use of former athletes' images. *Id.* ¶¶ 193-95.

92. McCann, *supra* note 7. Because the NCAA obtains current athletes' authorization for use of image rights, those athletes are unable to negotiate their own image rights once leaving college. *Id.* Without this policy (perpetual release via Form 08-3a), there would be a more competitive market for sales because there would be more sellers of licenses, thus driving prices down for consumers. *Id.*

93. See Wetzel, *supra* note 4 (noting that reform in the NCAA's licensing policy is "a long time coming" because the Association retains licensing rights that continue forever by arbitrarily extending Form 08-3a into eternity).

94. Complaint for O'Bannon, *supra* note 5, ¶¶ 25-34. The complaint cites examples of sales in which the NCAA and CLC has profited off of the image of O'Bannon and others for a profit. *Id.* For instance, the NCAA and its partner, Thought Equity Motion, sell a two disc DVD package titled "1995 Men's Basketball National Championship Box Set" for \$39.99. *Id.* ¶ 26. This box set is marketed to consumers with the phrase "Ed O'Bannon, earning MOP honors, lead UCLA back to prominence by defeating Arkansas 89-78 . . ." *Id.* While the NCAA explicitly refers to O'Bannon in order to induce consumers to buy the discs, O'Bannon receives no compensation for the use of his image. *Id.*

The most highly publicized use of current and former athletes' images

2. Pro-Competitive Objective

In rebuttal, the defendant in rule of reason analyses is required to demonstrate a sufficiently pro-competitive objective.⁹⁵ The NCAA's response to these former-athlete antitrust claims is simple: the administration of Form 08-3a is meant to further the NCAA's promotion of amateurism,⁹⁶ and the precedent on this matter overwhelmingly states that actions done for this purpose do not violate the Sherman Act because they will generally lead to *reasonable* restraints of trade.⁹⁷

at issue is in video games. See Kriegel, *supra* note 8 (branding NCAA "hypocrisy" as "faux amateurism" with a principle purpose of maximization of profit). The O'Bannon class action alleges that video games by makers such as EA Sports use photograph-like realism, and while not identifying players by name, they use "uniquely identifiable idiosyncratic characteristics of real-life players." Complaint for O'Bannon, *supra* note 5, ¶ 141. O'Bannon argues that because no right to use these life-like images of players was ever validly obtained, any use of the likeness of a current or former player is the direct result of the NCAA's anticompetitive dominance of the market for these images. *Id.* ¶ 148.

O'Bannon's analysis of action-figures, trading cards, and posters is particularly interesting as O'Bannon reveals that former college star athletes are being paid by McFarlane Toys to be depicted in their college uniforms. *Id.* ¶ 133. In obtaining the license to use these images, McFarlane Toys has to contract CLC. *Id.* After obtaining the license, McFarlane pays the school for the use of the uniform, and then the player for the use of his likeness in a particular action-figure contract. *Id.* The class action alleges that because the CLC has participated in such a deal, this is an express recognition that former athletes are entitled to a sum of money for the use of their image. *Id.* ¶ 134.

95. Rossi, 156 F.3d at 464.

96. See McCann, *supra* note 7 (providing a possible perspective of the NCAA, that without the bylaws and releases such as Form 08-3a, the sport would become increasingly professionalized). If the student-athlete became more professionalized, NCAA compliance with standards like Title IX would become more difficult, and there could be a substantial economic divide between student athletes based on marketing appeal. *Id.* Furthermore, professionalization of the student-athlete would practically invite the influence of "unsavory businesspersons" such as agents, scouts, and marketing teams to college campuses across the country, and these are the type of people whom the NCAA amateurism rules guard against in the first place. *Id.* But see Marlen Garcia, *Class-Action Suit Filed vs. NCAA Over Use of Players' Likenesses*, USA TODAY, July 22, 2009, http://www.usatoday.com/sports/college/2009-07-21-ncaa-class-action-lawsuit_N.htm (quoting Richard Southall, director of the College Sport Research Institute at the University of North Carolina in stating that collegiate athletics are clearly commercial in nature and the only people who are excluded from the market are the athletes who make it viable).

97. See Nagy, *supra* note 38, at 349-58 (analyzing the many decisions that weigh antitrust challenges to the NCAA's amateurism rules in favor of the NCAA); Lazaroff, *supra* note 35, at 344-49 (arguing that while courts have not ruled in favor of the plaintiff who challenges amateurism rules, there has at least been a move toward a breaking down of any distinction between NCAA athletes and other market participants).

3. *Not Reasonably Necessary to Achieve Objective*

The identity of the damages class, plaintiffs as former athletes, rather than current athletes, will be beneficial. While courts since *Board of Regents* have construed NCAA rules in pursuit of amateurism to be valid restraints of trade, the crux of O'Bannon's argument as a former athlete is that any NCAA regulation of him in his post-collegiate career, or post-amateur competition life, is not reasonable to further the ideal of amateurism in college sports.⁹⁸ Proposed less restrictive means that are available to the NCAA that will still allow for the ideal of amateurism to stay in place exist and include: group-licensing methods to share revenues among teams and players, the creation of trust funds for health insurance, educational and vocational training, or student-athlete pension plans.⁹⁹

III. ARE THERE MORE DESIRABLE ALTERNATIVES TO NCAA POLICY?

Because of the potential antitrust ramifications of the O'Bannon complaint, the NCAA may need to consider alternatives to the methods currently used to procure image rights over athletes without compensation.

A. *O'Bannon's Modest Requests*

O'Bannon's class action seeks a declaratory judgment that any release, such as Form 08-3a, that was signed by the athletes be ruled unenforceable.¹⁰⁰ Furthermore, the suit requests that the NCAA and its licensing partners be permanently enjoined from the use of release agreements that make college athletes renounce their image rights in perpetuity.¹⁰¹ Throughout the complaint, O'Bannon lists several alternative means the NCAA might consider that would be less restrictive than the current "zero

98. See Complaint for O'Bannon, *supra* note 5, ¶ 18 (noting that less restrictive means are available to the NCAA. Under its current system, the NCAA provides "zero compensation" to former athletes for the use of their images in a \$4 billion market).

99. *Id.* See also Pekron, *supra* note 33, at 54-62 (arguing more radically that the notion of amateurism in NCAA sports should be eradicated completely for several reasons such as: the NCAA's regulations are not narrowly tailored to withstand an antitrust challenge, college sports are already professionalized where athletes compete in markets that generate millions of dollars for schools and other organizations, and that it is a fallacy that consumers prefer a product labeled "amateur").

100. Complaint for O'Bannon, *supra* note 5, ¶ F.

101. *Id.* ¶ H. O'Bannon's suit also seeks treble damages for three times the amount sustained by the class. *Id.* ¶ C. Furthermore, the suit seeks disgorgement of all profits earned from the alleged wrongful use of player images with pre-judgment and post-judgment interest added. *Id.* ¶¶ D-F. See also McCann, *supra* note 7 (noting that potential damages in this case might range from tens of millions of dollars to possibly hundreds of millions).

compensation” policy.¹⁰² These include: group licensing agreements similar to those used by professional leagues,¹⁰³ pension plans for former athletes, vocational training for life after collegiate sports, and the creation of funds for health insurance for former athletes.¹⁰⁴

B. More Radical Solutions

The O’Bannon complaint proposes simple reform to NCAA practice and bargaining policy.¹⁰⁵ However, in analyzing the NCAA’s antitrust armor, some scholars have argued that more radical, wide-sweeping reform of NCAA policy as it relates to amateurism and antitrust law is necessary.¹⁰⁶

1. Judicial Reform

In challenging the NCAA’s antitrust exemption from suit, arguments must at least implicitly assume that the current system of judicial restraint is unreasonable.¹⁰⁷ Since *Board of Regents*, courts have easily found in favor of the NCAA whenever challenges to its amateurism rules have been brought. In some instances, courts have dismissed claims without even applying the rule of reason framework to assess the merits of the antitrust claim.¹⁰⁸ In other cases, courts have applied the rule of reason analysis only to affirm the notion that *any* NCAA regulation in pursuit of amateurism is pro-competitive and reasonable.¹⁰⁹

102. Complaint for O’Bannon, *supra* note 5, ¶ 18.

103. See Liz McKenzie, *NCAA Slams Antitrust Suit over Athlete Licensing*, LAW 360 Oct. 14, 2009, <http://www.law360.com/articles/128302> (stating that the NCAA is the only sports association that does not offer players a licensing deal, whereas the major sports leagues have group licensing policies that share revenues among players).

104. Complaint for O’Bannon, *supra* note 5, ¶ 18.

105. See discussion *supra* Part III(A) (stating that O’Bannon’s lawsuit has sought a declaratory judgment that Form 08-3a be unenforceable and that the NCAA employ less restrictive means than its “zero compensation” policy).

106. See Lazaroff, *supra* note 35, at 361-71 (proposing a shift in judicial philosophy regarding NCAA antitrust claims, possible NCAA regulatory reform, and Congressional regulation of NCAA practice); Peckron, *supra* note 33, at 41-66 (arguing that the NCAA does not create a product that is necessarily amateur in nature, and as a result, the amateurism exemption from antitrust suit is unreasonable).

107. See Lazaroff, *supra* note 35, at 362-66 (arguing that courts’ deference to the NCAA in antitrust suits fails to recognize that student-athletes are a part of a commercial endeavor).

108. See *Gaines*, 746 F. Supp. at 746 (dismissing an antitrust complaint against the NCAA because NCAA amateurism rules benefit players and college football consumers (fans) by preserving amateur appeal while advancing the stability and integrity of college football programs).

109. See *McCormack*, 845 F.2d at 1344 (ruling an antitrust suit in favor of the NCAA because “each of these regulations represents a desirable and legitimate attempt to keep university athletics from becoming professionalized

An argument centering around judicial reform tends to oversimplify the process by which judicial standards are overturned.¹¹⁰ Courts hearing antitrust attacks on NCAA amateurism rules since *Board of Regents* have been deferential to NCAA policy and have relied on arbitrary precompetitive justifications for these rules.¹¹¹ Despite this, courts *have* applied the rule of reason to NCAA amateurism rules, and strong precedent has been established that NCAA amateurism regulation will be reasonable even when courts apply a less deferential approach.¹¹² As a result, it is unlikely that over twenty years of judicial precedent will be overturned in favor of a more cynical level of judicial scrutiny.¹¹³ Furthermore, while wide-sweeping judicial reform in the NCAA antitrust framework would be beneficial in the case of Form 08-3a, the current system may not prevent a ruling in favor of a plaintiff challenging the NCAA's unconscionable bargaining practices.¹¹⁴

2. NCAA Regulatory Reform

Judicial reform would be favorable for NCAA antitrust suits moving forward. However, as it relates to procurement of image rights in perpetuity, it is akin to trying to kill a fly with a sledgehammer. O'Bannon does not intend to undermine the

to the extent that profit making objectives would overshadow educational objectives); *Banks*, 977 F.2d at 1090-91 (holding that NCAA amateurism regulations are reasonable as they maintain "a clear line of demarcation between college and professional" sport which is a precompetitive justification).

110. See Lazaroff, *supra* note 35, at 364-65 (arguing that courts should apply the rule of reason in NCAA antitrust suits with more skepticism than has been used since *Board of Regents* because the judicial assumption that NCAA amateurism rules are precompetitive is an unsubstantiated conclusion that was reached without proof of its truth). At the very least, Lazaroff argues, courts should apply a rule of reason analysis to NCAA antitrust suits so that the burden is shifted to the NCAA to prove that its anti-competitive rules *actually* promote the objectives that it sets forth. *Id.* at 365.

111. See, e.g., Lazaroff, *supra* note 35, at 359 (arguing that NCAA justifications for disallowing player compensation are illegitimate because players are essentially paid through the economic benefit that they receive in the form of an athletic scholarship).

112. See discussion *supra* note 109 (describing two instances where federal courts considered antitrust attacks on the NCAA's amateurism regulations on the merits).

113. Since *Board of Regents*, courts have consistently relied on dicta stating, "it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore precompetitive because they enhance public interest in intercollegiate athletics," in order to uphold virtually all NCAA amateurism regulations. 468 U.S. at 104.

114. See Thamel, *supra* note 71 (quoting O'Bannon's advisor and organizer of the O'Bannon case, Sonny Vacarro, "I'm not looking to overthrow the government or the NCAA, I'm looking to do the right thing. They don't own [student-athletes] and they're going to have to explain it.").

NCAA's role as a purveyor of amateurism in collegiate sports.¹¹⁵ Because O'Bannon does not seek to change the ideal of amateurism in the NCAA, one need only look to narrowly tailored ways to rectify the NCAA's unconscionable bargaining practices.

a. Eliminating the Ambiguity in Form 08-3a

The core of O'Bannon's lawsuit against the NCAA is that by signing Form 08-3a student-athletes relinquish their image rights in perpetuity.¹¹⁶ The procurement of the signature is allegedly achieved because the document is purposely misleading and ambiguous, and it is signed under duress without informed consent.¹¹⁷ The result of this process is that the NCAA purports to obtain the athletes consent to this form, when athletes are never given a reasonable opportunity to consent in the first place.

By asking for declaratory judgment that Form 08-3a be void,¹¹⁸ the lawsuit seems to ask for the simplest reform possible: that Form 08-3a be eliminated from the NCAA eligibility process, or that it at least be modified so that athletes *actually* consent to the content of the form. A reading of Form 08-3a quickly evinces a sense of ambiguity about what the form is meant to do. Form 08-3a is administered by the NCAA for the purpose of "promotion of NCAA championships or other NCAA events, activities, or programs of college athletics."¹¹⁹ There is no mention of release of image rights for eternity on the face of the document,¹²⁰ nor does Form 08-3a inform athletes that they are relinquishing their legal rights to the NCAA.¹²¹

The NCAA could effectively rectify this ambiguity by simply changing the wording of the document, so that any right that is relinquished is apparent in its clear language.¹²² Because the

115. See Wetzel, *supra* note 4 (quoting O'Bannon, "when you're in school you're obligated to live up to your scholarship, but once you're done, you physically, as well as your likeness, should leave the university and the NCAA.").

116. Complaint for O'Bannon, *supra* note 5, ¶ 66.

117. *Id.* ¶ 9.

118. *Id.* ¶ H.

119. *Id.* ¶ 69. The complaint alleges that no reasonable person would read the NCAA release documents and interpret the phrases used therein (for example, "support educational activities") to grant the NCAA a license to use player images for a profit into eternity. *Id.*

120. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 13. While the document states that the signing athlete authorizes the NCAA to use his/her name or picture to promote NCAA championships, there is no mention of a time-frame for which the NCAA retains this right. *Id.* at 4. Furthermore, the document does not state that the images may be used for profit by the NCAA or its partners (for example, CLC), nor does it mention the type of "use" that is involved. *Id.*

121. *Id.*; Complaint for O'Bannon, *supra* note 5, ¶ 70.

122. See discussion *supra* note 14 (exploring O'Bannon's allegation that

Form is administered on a yearly basis to players, this could be enacted fairly easily. While this type of reform would change the way the NCAA interacts with its athletes,¹²³ it could effectively eliminate the procedural and substantive unconscionability that are present in the current administration of Form 08-3a.¹²⁴ By stating in Form 08-3a that image rights were released in perpetuity, the terms of the contract would be reasonable, and former athletes would have no argument that such a release was not reasonably foreseeable at the time of the contract's creation.

b. Ambiguity Concerning Student-athletes and Lawyers

The O'Bannon complaint argues that the NCAA manages to obtain adherence to the terms of Form 08-3a by failing to inform student-athletes that they may obtain legal advice.¹²⁵ The role of lawyers in the NCAA amateurism rules is important and may be confusing for athletes hoping to secure amateur eligibility.¹²⁶

While the NCAA rules proscribed against player-agent relationships are heralded by the NCAA as a means to protect student-athletes from exploitation, in effect, they contribute to an inequitable bargaining relationship between the NCAA and student-athletes.¹²⁷ On its face, this appears to be a broad reform, requiring the NCAA to advise student-athletes of the importance of legal counsel and of ways in which student-athletes can obtain counsel.¹²⁸ However, it would not change the current bylaws of the NCAA, which only ban representation for *promotion of one's abilities*. This proposal, on the other hand, encourages informed decision-making and promotes an equitable relationship between the NCAA and student-athletes.¹²⁹

students who sign Form 08-3a are ill-informed of their legal rights and that the NCAA does not even instruct students that they may seek legal advice prior to relinquishing their image rights).

123. McCann, *supra* note 7.

124. For more information on procedural and substantive unconscionability, see discussion *supra* Part I(D), Part II (B) (elaborating on the elements of procedural and substantive unconscionability and analyzing whether the doctrine of unconscionability applies to the current administration of Form 08-3a).

125. Complaint for O'Bannon, *supra* note 5, ¶¶ 70-72.

126. See NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 15, Bylaw 12.3.1, at 69 (stating that a student-athlete will be ineligible if he/she has entered into an agreement with an agent for the purpose of marketing his/her abilities in that sport). This type of bylaw may create ambiguity about what types of activities a student-athlete may consult a lawyer about.

127. McCann, *supra* note 7.

128. *Id.*

129. *Id.* McCann also lists counter-arguments that the NCAA would provide for this proposal. Namely, critics of this argument would counter that the agency bylaws are in place to protect athletes from "swindlers" and "charlatans." *Id.* Such athlete-lawyer relationships would create anxiety that

IV. CONCLUSION

Through its administration of Form 08-3a, the NCAA has unconscionably and illegally obtained rights over former athletes' images for eternity. Securing these image rights results in a violation of the Sherman Antitrust Act as an unreasonable restraint on trade. There are several less restrictive alternatives that the NCAA could choose to employ in order to obtain these image rights for eternity. The simplest remedy in this instance would be for a declaratory judgment deeming Form 08-3a unconscionable, which would force the NCAA to change its practice. If the NCAA rewrote Form 08-3a, eliminating the ambiguity of the contract that secures perpetual image rights over athletes, it is likely that informed consent to the contract could be achieved, and Form 08-3 would simply be an unambiguous means of securing amateur ideals in collegiate sport.

these "swindlers" and "charlatans" would have easier access to college athletes. *Id.* This easy access would be paired with weakened regulation regarding student-lawyer relations. *Id.* Critics would also maintain that advocating the presence of a lawyer at the signing of release forms would create a drawn-out "litigious experience" for the NCAA and athletic departments. *Id.*