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Potential Game Changers Only Have Eligibility Left to Suit Up for a Different Kind of Court: Former Student-Athletes Bring Class Action Antitrust Lawsuit Against the NCAA

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I. Introduction

Ed O'Bannon starred on the 1995 University of California, Los Angeles ("UCLA") basketball national championship team.[1] He went on to play for a few years in the National Basketball Association ("NBA") and now lives a comfortable life as a car salesman in Las Vegas.[2] About three years ago, he discovered that kids in his neighborhood knew him because they "played him" on a classic college basketball video game.[3] This video game incorporates all of O'Bannon's identifying characteristics into his video game character, with the exception of his name.[4] The neighborhood kids learned O'Bannon's playing style, his jersey number, and even his lefty jump shot, all just by playing the video game.[5] O'Bannon was disturbed to discover that the National Collegiate Athletic Association ("NCAA") and its licensing company, the Collegiate Licensing Company ("CLC"), were still profiting from his collegiate image and likeness 14 years after he left college without ever compensating him.[6]

In July 2009, O'Bannon initiated an antitrust class action lawsuit against the NCAA and the CLC in the U.S. District Court for the Northern District of Califor-

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1. *See* Dan Wetzel, *Making NCAA Pay?*, Yahoo! Sports (July 21, 2009), http://rivals.yahoo.com/ncaa/basketball/news?slug=dw-ncaasuit072109&prov=yhoo&type=lgns (explaining Ed O'Bannon's situation and the circumstances giving rise to a class action antitrust challenge brought against the NCAA by former NCAA student-athletes).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

nia[7] on behalf of former college men's basketball and football players, seeking unspecified damages for the use, sale, and licensing of the former players' images and likenesses in video content, photographs, and other memorabilia.[8] O'Bannon's complaint includes an allegation that the NCAA restrained trade in violation of § 1 of the Sherman Antitrust Act ("Sherman Act") by requiring student-athletes to forgo compensation for the use of their collegiate identity rights, even after leaving college.[9] The licensing of the player images and likenesses at issue generates revenue for the NCAA and its institutions through a variety of technological formats, including video games, DVDs, photographs, stock footage used in television commercials, and rebroadcasts of "classic" games.[10]

O'Bannon and the class of former NCAA student-athlete plaintiffs claim that the NCAA's conduct is "blatantly anticompetitive and exclusionary, as it wipes out in total the future ownership interests of former student-athletes in their own images—rights that all other members of society enjoy—even long after student-athletes have ceased attending a university."[11] O'Bannon and the class of plaintiffs seek injunctive relief permanently prohibiting the NCAA from using "Form 08-3a" and any similar image rights release forms.[12] The class also seeks to enjoin the NCAA and the CLC from "selling, licensing, or using former student-athletes' rights" that these entities do not own.[13]

This comment analyzes the allegations in the class action lawsuit brought by former NCAA student-athletes that the NCAA and its institutions violate § 1 of the Sherman Act by continuing to sell, license, and use student-athletes' images and likenesses after they leave collegiate competition without compensation.[14] Part II examines the purpose and elements of § 1 of the Sherman Act and the two types of

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7. Class Action Complaint at 1, O'Bannon v. Nat'l Collegiate Athletic Ass'n (NCAA), Collegiate Licensing Co. (CLC), No. CV 09-3329 (N.D. Cal. July 21, 2009), http://online.wsj.com/public/resources/documents/072209obannonsuit.pdf.

8. *See id.* at 8*; see also* Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case,* SPORTS ILLUSTRATED (July 22, 2009), *available at* http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html (listing the kinds of NCAA activities the class of former NCAA student-athletes allege to be in violation of antitrust laws).

9. *See* Class Action Complaint, *supra* note 7, at 3; *see also* McCann, *supra* note 8.

10. Class Action Complaint, *supra* note 7, at 4.

11. *Id.* at 3.

12. *Id.* at 8 (stating the kind of relief the class of former NCAA student-athletes seeks against the NCAA).

13. *Id.* at 8–9.

14. U.S. District Court Judge Claudia Wilken recently combined a similar case brought on behalf of current student-athletes, *Keller v. EA Sports, NCAA*, with *O'Bannon v. NCAA, CLC*, but the focus of this comment is the former student-athletes' claims in *O'Bannon v. NCAA, CLC*. O'Bannon v. NCAA, No. CV 09-3329, 2010 WL 445190, at *8 (N.D. Cal. Feb. 8, 2010).

antitrust violations under § 1 of the Sherman Act.[15] Part III focuses on federal courts' treatment of the NCAA under antitrust scrutiny and details the lawsuits that student-athletes have brought against the NCAA in recent years.[16] Part IV analyzes the former student-athletes' antitrust claim in light of the case law among the Supreme Court and U.S. Courts of Appeals.[17] This analysis leads to the conclusion that the NCAA's zero compensation policy for continued sale, licensing, and use of former student-athletes' images and likenesses does not likely constitute a *per se* § 1 violation, but most likely restrains trade in violation of § 1 of the Sherman Act because the policy is unreasonable under the circumstances, as its anticompetitive effects outweigh any procompetitive benefits.[18]

II. Purpose and Elements of § 1 of the Sherman Antitrust Act

The Sherman Act is a federal antitrust statute that Congress enacted in 1890 to deter unreasonable restraints on free competition.[19] Section 1 of the Sherman Act prohibits every "contract, combination . . . or conspiracy, in restraint of trade."[20] The following subsections discuss the purpose of the Sherman Act,[21] the elements of an antitrust violation cause of action under § 1 of the Sherman Act,[22] and the two kinds of Sherman Act violations: *per se* violations[23] and agreements that courts deem violations because they constitute "unreasonable" restraints on competition after the three-step analysis[24] under the "rule of reason" standard.[25]

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part IV.

19. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 490–93 (1940) (noting that the Sherman Act's intended goal was "the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury").

20. 15 U.S.C. § 1 (2006).

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. *See infra* Part II.B.1.

24. *See infra* Parts II.B.2.a–c.

25. *See infra* Part II.B.2.

A. *Purpose of the Sherman Act*

The Sherman Act was designed as a charter to protect economic liberty via protection of trade and free competition.[26] A freely competitive market results in businesses competing with each other to attract the most customers by maintaining the lowest prices and increasing the quality of the goods or services it offers.[27] Underlying the Sherman Act is the idea that free competition creates the best allocation of economic resources, the lowest prices, and the highest quality, along with an atmosphere conducive to maintaining American democratic political and social institutions.[28] Free competition allows profit opportunities to be made by the businesses that have the best products and services for the lowest prices.[29] The Sherman Act exists to prevent undue restrictions of trade, which inhibit free competition and its desirable results.[30]

The Supreme Court of the United States explained that the purpose of the Sherman Act is to protect competition and the public from the failure of the market.[31] Consumers lose the benefit of a freely competitive market when businesses distort the allocation of resources by fixing prices or dominating the market to prevent competitors' entry into the market.[32] The Sherman Act was designed to prevent restraints to free competition in market transactions that tend to restrict production, raise prices, or otherwise control the marketplace to the detriment of consumers.[33] Accordingly, the Sherman Act directly protects free competition, which in turn pro-

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26. *See* N. P. R. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

27. *See* U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER, http://www.justice.gov/atr/public/div_stats/211491.htm (explaining the economic results of a freely competitive market).

28. *See N. P. R. Co.*, 356 U.S. at 4 (noting how the "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, wh le at the same time providing an environment conducive to the preservation of our democratic political and social institutions").

29. *See* U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER, http://www.justice.gov/atr/public/div_stats/211491.htm (describing the incentives businesses have in a freely competitive market).

30. *See* Nw. Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d. 967, 970 (7th Cir. 1943) (explaining that the Sherman Act and antitrust laws were "intended to advance the public welfare by promoting free competition and preventing undue restriction of trade and commerce").

31. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

32. *See* U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER, http://www.justice.gov/atr/public/div_stats/211491.htm (explaining how restrictions on a freely competitive market harm consumers).

33. *See N. P. R. Co.*, 356 U.S. at 4.

tects the public and businesses from the negative consequences of restricted competition.[34]

B. Elements of an Antitrust Violation Cause of Action under § 1 of the Sherman Act

The relevant part of § 1 of the Sherman Act reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[35] A violation of § 1 of the Sherman Act has three aspects: (1) an agreement, (2) that unreasonably restrains competition, and (3) affects interstate commerce.[36] There are two kinds of Sherman Act violations: *per se* violations[37] and agreements that courts deem violations because they constitute "unreasonable" restraints on competition under the "rule of reason" standard.[38]

C. Per Se Violations of § 1 of the Sherman Act Are Illegal Trade Restraints

Per se violations of § 1 of the Sherman Act occur when "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[39] An action restraining trade constitutes a *per se* violation of § 1 of the Sherman Act when it always or almost always tends to inhibit competition and output.[40] Current *per se* violation categories include agreements resulting in horizontal market division, horizontal price fixing, and horizontal boycotts.[41]

For example, in *Palmer v. BRG of Georgia*,[42] the United States Supreme Court held that two bar review course competitors' agreement to allocate the Georgia bar review course market to one of them was horizontal market division and a *per se*

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34. *See id.* (explaining that the "policy unequivocally laid down by the Act is competition").

35. 15 U.S.C. § 1 (2006).

36. *See infra* Parts II.B.1–2.

37. *See infra* Part II.B.1.

38. *See infra* Part II.B.2; s*ee also* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997) (explaining that under rule of reason analysis, the court determines "whether the restraints in the agreement are reasonable in light of their actual effects on the market and their pro-competitive justifications").

39. NCAA v. Bd. of Regents, 468 U.S. 85, 103–04 (1984).

40. *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 886–87 (2007) (explaining that courts only resort to *per se* rules when a restraint on trade is always or almost always going to restrict competition and decrease output).

41. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 55 (6th ed. 2007); *see infra* notes 42–49 and accompanying text. Vertical price fixing is no longer a *per se* violation of the Sherman Act and should be analyzed under the rule of reason. *See Leegin*, 551 U.S. at 882 ("[V]ertical price restraints are to be judged by the rule of reason.").

42. 498 U.S. 46 (1990).

violation of the Sherman Act because the anticompetitive effect of the arrangement was clear; the price for the review course immediately increased by $250 after the agreement.[43] In *United States v. Socony-Vacuum Oil Co.*,[44] the Supreme Court ruled that major oil companies' agreement to purchase surplus gasoline from independent refiners in a spot market to prevent dramatic price decreases was *per se* illegal under the Sherman Act as price fixing among competitors, even without a direct agreement on the specific prices to be maintained.[45] The Supreme Court held in *FTC v. Superior Court Trial Lawyers Association*[46] that an agreement between a group of attorneys not to work for wages that they considered to be too low was a boycott, and thus was a *per se* violation of § 1 of the Sherman Act.[47] A horizontal boycott is an agreement between a group of competitors not to deal with individuals or companies outside the group, deal only on certain terms, or coerce suppliers or customers not to deal with a boycotted competitor.[48] When alleging a *per se* violation, the party bringing the claim must prove that the alleged conduct occurred and that the conduct resulted in restraints that have manifestly anticompetitive effects that lack any redeeming value.[49]

Agreements are *per se* violations of § 1 of the Sherman Act if they are unreasonable as a matter of law, which means the agreements always tend to restrict competition or output and result in higher prices.[50] The Supreme Court has noted that courts do not classify business relationships or agreements as *per se* violations of the Sherman Act without having considerable experience with those kinds of relationships or agreements.[51] However, recognized *per se* Sherman Act violation categories are not fixed over time and may shift in response to new circumstances or new judicial thought.[52]

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43. *Id.* at 47–49.

44. 310 U.S. 150 (1940).

45. *Id.* at 198, 218, 222.

46. FTC v. Superior Court Trial Lawyers Assoc., 493 U.S. 411 (1990).

47. *Id.* at 414, 436.

48. *See* Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.").

49. *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 886 (2007) (internal citations omitted) ("To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue'.").

50. *Leegin*, 551 U.S. at 886; *see* discussion *infra* Part III.B.1.

51. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act."), *abrogated on other grounds by In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3rd Cir. 2010).

52. *See Leegin*, 551 U.S. at 882 (holding that vertical price fixing is no longer a *per se* violation category); *id.* at 899–900 (explaining how it would not make sense to allow the rule of reason to evolve with new circumstances without also allowing the line of *per se* illegality to shift with new circumstances or wisdom).

D. The "Rule of Reason" Determines Which Non-Per Se Violation Trade Restraints Are Illegal

If the Supreme Court does not currently recognize the agreement under an existing *per se* violation category, the agreement may still violate § 1 of the Sherman Act if the restrained trade is deemed "unreasonable" under the circumstances.[53] While many contracts restrain trade to some degree, courts evaluate whether it is in violation of § 1 of the Sherman Act by using "rule of reason" analysis, which involves three steps: (1) the plaintiff must meet its burden of showing that the agreement resulted in an actual adverse effect on competition as a whole in the relevant market; (2) if the plaintiff meets its burden in the first step, then the burden shifts to the defendant to show the procompetitive virtues of its action; and (3) if the defendant meets the burden in the second step, then the burden shifts back to the plaintiff to prove that alternative means resulting in less restricted competition exist to achieve the same procompetitive effect.[54] Courts hold agreements that unreasonably restrain trade unlawful.[55]

The purpose of antitrust analysis is to judge the possible anticompetitive effect of the restraint.[56] The rule of reason test does not involve a broad inquiry into the anticompetitive effects of an agreement balanced against its possible social benefits, but rather concerns whether the challenged agreement is one that promotes competition or suppresses competition.[57] Accordingly, the factfinder will apply a rule of reason analysis to determine whether the restraints on the market are reasonable by weighing any anticompetitive effects against any procompetitive justifications.[58] This analysis involves considering the case's circumstances to determine whether the agreement that results in restrained trade violates the Sherman Act.[59] The main focus of rule of reason analysis is to what extent the alleged trade restraint harms competition, which in turn potentially harms consumers.[60] For example, in *Clorox Co. v. Sterling Winthrop, Inc.*,[61] the U.S. Court of Appeals for the Second Circuit

53. *See id.* at 885 ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1."); *see* discussion *infra* Part III.B.2.

54. *See* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); *see* discussion *infra* Part III.B.2.

55. *See Clorox*, 117 F.3d at 56; *see* discussion *infra* Part III.B.2.

56. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978) ("[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.").

57. *Id.*

58. *See Clorox*, 117 F.3d at 56.

59. *Id.*

60. *Id.*

61. *Id.*

held that a 1987 trademark agreement between the prior owner of LYSOL and predecessor-in-interest of Clorox, regulating the advertising and packaging of PINESOL disinfectant products and restricting types of the product that may be sold, did not violate antitrust laws because it did not significantly affect any competitor's ability to compete.[62]

The fact-finding court must first identify the specific restraint on competition before considering possible anticompetitive effects and procompetitive justifications.[63] In the *Clorox* case, the court began by noting that Clorox was challenging a trademark agreement.[64] The court discussed how trademark agreements are "common and favored, under the law" and explained that the agreement regulates how a competitor may use a competing mark.[65] The court further explained that the trademark agreement at issue is not illegal *per se* under antitrust laws because it does not fall into any of the historically recognized *per se* illegal categories of agreements.[66]

1. The plaintiff must meet its burden of showing that the agreement resulted in an actual adverse effect on competition as a whole in the relevant market.

Rule of reason analysis contains three steps.[67] The first step in the rule of reason inquiry is for the factfinder to consider whether the plaintiff has met its burden of showing that the agreement resulted in an actual substantial adverse effect on competition as a whole in the relevant market.[68] In the *Clorox* case, the plaintiff, Clorox, had to prove that the 1987 trademark agreement harmed competition in general.[69] The Court explained that Clorox had to show more than the defendant's conduct harmed them—Clorox needed to show an actual adverse effect in the relevant market—because the antitrust laws exist to protect against unreasonable restraints of overall competition, not to protect competitors from making agreements that turn out to be unfavorable to one of the parties.[70] However, in *County of Tuolumne v. Sonora Community Hospital*,[71] the U.S. Court of Appeals for the Ninth Circuit applied

62. *Id.* at 52.

63. *Id.* at 56.

64. *Id.* at 55.

65. *Id.* at 55–56.

66. *Id.* at 56.

67. *Id.*

68. *Id.* (internal quotation marks omitted) ("First, the plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market.").

69. *Id.*

70. *Id.* at 57.

71. 236 F.3d 1148 (9th Cir. 2001).

the rule of reason to a hospital's rule that created privileging criteria for which doctors could perform cesarean sections ("C-sections").[72] The Ninth Circuit held that the hospital's rule had the effect of foreclosing family doctors from the market, and found that there was an anticompetitive effect due to the fact that the hospital enjoyed complete control of the relevant market.[73]

Sometimes an agreement's actual adverse effect on competition is so obvious that courts only give a "quick-look" over the first step in the rule of reason inquiry and hold that the agreement is unreasonable.[74] "Quick-look" rule of reason analysis applies when the anticompetitive effect of an arrangement is obvious but does not qualify under an existing *per se* violation category.[75] Although the agreement is not *per se* illegal, if the resulting trade restraint is unrelated to the purpose of the agreement or obviously anticompetitive, the agreement is nevertheless unreasonable unless otherwise justified.[76] Quick-look analysis should be applied when someone with even a basic understanding of economics could see that the arrangement in question would negatively affect competition.[77] Situations where quick-look analysis applies include when there are flat limits on output or refusal to provide a requested service.[78] For example, in *NCAA v. Board of Regents of the University of Oklahoma*,[79] the NCAA adopted a plan that limited the total number of televised college football games and the number of football games that any individual college may televise, and prohibited NCAA member institutions from selling television rights except in accordance with the plan.[80] The Supreme Court explained that when there is an agreement not to compete in terms of price or output, no "elaborate industry analysis" is needed to determine its anticompetitive effect.[81] The Court held that the NCAA television plan "on its face" constituted a trade restraint that resulted in higher prices and lower output.[82] Additionally, in *F.T.C. v. Indiana Federation of*

72. *Id.* at 1152, 1159.

73. *Id.*

74. *See, e.g.,* California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

75. *See id.* at 759 (explaining that when any anticompetitive effects of given restraints are not intuitively obvious, the rule of reason demands a more thorough examination into the restraints' consequences on competition).

76. *Id.* at 770.

77. *Id.*

78. *See, e.g.,* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) (describing a horizontal agreement among certain dentists to withhold a particular service their customers desired); NCAA v. Bd. of Regents, 468 U.S. 85, 99–100 (1984) (explaining how the NCAA limited the number of televised games and fixed a minimum price).

79. 468 U.S. 85 (1984).

80. *Id.* at 91–92.

81. *Id.* at 109–10.

82. *Id.* at 113.

Dentists,[83] the Supreme Court applied quick-look rule of reason analysis to determine that a dental association rule prohibiting member dentists from submitting x-rays to dental insurers for evaluating claims constituted an unreasonable restraint of trade.[84] The Court held that such a rule constituted a horizontal agreement among the participating dentists to refuse to provide their customers with the requested service of forwarding x-rays to insurance companies to supplement claims forms and noted that industry analysis was not required to show the anticompetitive nature of the agreement.[85]

2. If the plaintiff meets its burden in the first step, then the burden shifts to the defendant to show the procompetitive virtues of its action.

According to a recent empirical study (the "Carrier study") on courts' applications of the rule of reason, courts dispose of 97% of cases at the first step in the analysis because they find there is no anticompetitive effect.[86] If, however, the plaintiff meets the burden in the first step, then the burden shifts to the defendant in the second step.[87] In the second step, the defendant must show "pro-competitive redeeming virtues" of its action.[88] The party accused of anticompetitive behavior in violation of the Sherman Act has the "heavy burden of establishing an affirmative defense which competitively justifies [the] apparent deviation from the operations of a free market."[89] Accordingly, under the second step of rule of reason analysis, the factfinder considers whether the defendant has presented evidence to sufficiently establish the procompetitive virtues of its challenged action.[90] In the *Clorox* case, the Court held that Clorox did not meet the burden of showing that the 1987 trademark agreement could significantly affect competition as a whole, so it was accordingly irrelevant whether procompetitive justifications for the agreement existed.[91] The Court discussed the procompetitive justifications of trademark agreements, such as how they are a means by which parties agree to market products to reduce the likelihood of

83. 476 U.S. at 447.

84. *Id.* at 459.

85. *Id.*

86. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) ("Courts dispose of 97% of cases at the first stage, on the grounds that there is no anticompetitive effect. They balance in only 2% of cases.").

87. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 59 (1997) ("Only if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its procompetitive redeeming virtues.").

88. *Id.*

89. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 113 (1984).

90. *Clorox*, 117 F.3d at 59.

91. *Id.* at 59–60.

consumer confusion, and concluded that the procompetitive justifications supported its conclusion that the arms-length agreement did not violate antitrust laws.[92] However, in the *Sonora Community Hospital* case, the Ninth Circuit accepted the defendant hospital's procompetitive justification for its rule that created privileging criteria.[93] The Ninth Circuit explained that the procompetitive effect of requiring the doctors that perform the procedures to have certain training—optimizing patients' health—outweighed the rule's anticompetitive effect.[94]

3. If the defendant meets the burden in the second step, then the burden shifts back to the plaintiff to prove that alternative means resulting in less restricted competition exist to achieve the same procompetitive effect.

According to the Carrier study, courts have ultimately disposed of zero rule of reason cases at the second step—the "no procompetitive justification" stage—and only 0.5% of such cases because of an unrebutted procompetitive justification.[95] These low statistics make it more difficult to predict how courts will analyze cases that proceed beyond the first step of the rule of reason analysis.[96] If the defendant meets its burden in the second step, then the burden shifts back to the plaintiff to prove that alternative means resulting in less restricted competition exist to achieve the same procompetitive effect.[97] In the *Sonora Community Hospital* case, the plaintiff presented suggestions for less restrictive alternatives to the hospital's anticompetitive rule, but the Ninth Circuit was not satisfied with the alternatives because they required additional information from doctors and significantly increased cost.[98] The Carrier study noted that courts have ultimately disposed of 0.5% of rule of reason cases at the third step, the "no less restrictive alternative" stage.[99] In all three steps of the rule of reason analytical framework, the essential concern is whether the restrained trade harms or potentially harms competition.[100]

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92. *Id.* at 60.

93. Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001).

94. *Id.*

95. Carrier, *supra* note 86, at 829 (stating that of 222 cases involving a court's final determination in a rule of reason case, courts disposed of zero cases at the "no procompetitive justification" stage, and only one at the "unrebutted procompetitive justification" stage).

96. *See generally id.* at 829–30.

97. *Clorox*, 117 F.3d at 56 (internal citation omitted) ("Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.").

98. *Sonora Cmty. Hosp.*, 236 F.3d at 1159–60.

99. Carrier, *supra* note 86, at 829.

100. *Clorox*, 117 F.3d at 57 ("The antitrust laws protect consumers by prohibiting agreements that unreasonably restrain overall competition . . . .").

After completion of this third step, courts balance anticompetitive and procompetitive effects.[101] In the *Sonora Community Hospital* case, after analyzing the third step, the Ninth Circuit proceeded to balance the anticompetitive harms of the hospital's rule that created privileging criteria for C-sections (foreclosing family doctors from the market) against the procompetitive effects of the hospital's rule (maintaining the quality of patient care that it provides) and held that the procompetitive effects offset any anticompetitive harm.[102] However, courts almost never get to the point of balancing these effects, as the vast majority of case analyses under the rule of reason end before the third step.[103]

Notably, there is no bright line separating *per se* analysis from rule of reason analysis.[104] Courts' analyses are shifting from *per se* analysis to the rule of reason.[105] In practice, application of the *per se* rule "may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."[106] Categories of *per se* violations may change as economic circumstances change.[107] No matter whether the finding results from a *per se* presumption or actual market analysis using the rule of reason, the judicial inquiry under the Sherman Act involves how the restraint affects competition.[108]

III. The Current State of the Law: The NCAA is Not Immune to Antitrust Scrutiny

The Sherman Act is treated as a common law statute.[109] Just as common law evolves to adapt to "modern understanding and greater experience," as a common law statute, the Sherman Act's ban of unreasonable trade restraints adapts to meet the dy-

101. *See, e.g., Sonora Cmty. Hosp.*, 236 F.3d at 1160.

102. *Id.* at 1152, 1160; s*ee* Carrier, *supra* note 86, at 832.

103. *See* Carrier, *supra* note 86, at 828 ("They balance in only 2% of cases.").

104. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 104 at n.26 ("[T]here is often no bright line separating *per se* from Rule of Reason analysis.").

105. Carrier, *supra* note 86, at 828 ("Because analysis is migrating away from per se analysis and towards the rule of reason, an exploration of what courts actually do in applying the framework may prove useful."). *See, e.g.,* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (striking down vertical price fixing as a *per se* category).

106. *See NCAA*, 468 U.S. at 104 n.26.

107. *Leegin,* 551 U.S. at 899 (explaining that stare decisis does not necessitate adherence to any *per se* rule and how the rule of reason's case-by-case adjudication implements the Sherman Act's treatment as a common law statute).

108. *See NCAA*, 468 U.S. at 103.

109. *See Leegin,* 551 U.S. at 899.

namics of the current economic landscape.[110] The courts determine whether restraining trade is "unreasonable" to the point of illegality under the Sherman Act on a case-by-case basis.[111] The NCAA, an association of schools that compete against each other to attract revenue, fans, and student-athletes, and its licensing company, the CLC, fall within § 1 of the Sherman Act's domain.[112] This section describes how the NCAA is no longer immune from antitrust lawsuits and details the lawsuits that student-athletes have brought against the NCAA in recent years.

A. The NCAA Is Subject to § 1 of the Sherman Act

Previously, the NCAA maintained immunity from lawsuits brought under federal antitrust laws because the laws were generally not applicable to self-regulatory organizations with noncommercial goals.[113] However, judicial antitrust treatment of the NCAA changed in 1975 in *Goldfarb v. Virginia State Bar*,[114] when the Supreme Court held that professional self-regulatory organizations are not immune from antitrust scrutiny.[115] In *NCAA v. Board of Regents of the University of Oklahoma*,[116] the Supreme Court stated that when NCAA rules restrain competition in terms of price and output, a fair evaluation of the rules' competitive character requires consideration of the NCAA's justifications for the restraints.[117]

The Supreme Court considered the competitive effects of NCAA actions allegedly restraining trade before finding that the actions violated the Sherman Act.118 The Court applied rule of reason analysis to NCAA regulations and held that an NCAA rule is "procompetitive" if it is a "justifiable means of fostering competition

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110. *Id.*

111. *Id.*

112. *See generally NCAA*, 468 U.S. at 99 (explaining the role of the NCAA); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1301 at n.9 (1992) (listing cases where the NCAA was subject to antitrust scrutiny).

113. *See* Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1223 (1993) (explaining that before *Goldfarb v. Virginia State Bar*, the NCAA's immunity to antitrust challenges was justified because the Sherman Act was not intended to apply to self-regulatory organizations with noncommercial goals and activities).

114. 421 U.S. 773 (1975).

115. *Id.* at 787 (holding that the nature of an occupation does not alone provide immunity from the Sherman Act and explaining that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption . . . would be at odds with that purpose").

116. 468 U.S. 85 (1984).

117. *Id.* at 120 (holding that NCAA rules that restrict output are not consistent with the NCAA's role of preserving and enhancing the tradition of intercollegiate athletics in American life). *See also Sherman Act Invalidation of the NCAA Amateurism Rules*, *supra* note 112 ("NCAA rules should be upheld if they increase economic marketplace competition by preserving the distinct product of college sports.").

118. *See NCAA*, 468 U.S. at 120.

among amateur athletic teams."[119] An NCAA rule does not violate the Sherman Act if it is tailored to the goal of preserving the product of intercollegiate sports in the economic marketplace.[120]

B. NCAA Student-Athletes Have Brought Claims against the NCAA in Recent Years

Recently there have been claims brought by student-athletes against the NCAA.[121] For example, in *Bloom v. NCAA*,[122] star college football player Jeremy Bloom sued the NCAA for declaratory and injunctive relief against the NCAA's prohibition of student-athletes receiving endorsements.[123] Bloom represented the United States in two Winter Olympics in moguls skiing before playing football for the University of Colorado from 2002 to 2003.[124] He had various commercial endorsements before joining the football team and wished to continue his endorsements while he was a student-athlete to fund his skiing career.[125] While the *Bloom* case did not involve trade restraint claims in violation of antitrust laws,[126] it is significant because the Colorado Court of Appeals held that student-athletes have standing to sue the NCAA because they are third-party beneficiaries to the contract between the NCAA and its member institutions.[127] The Court ultimately did not grant Bloom relief, finding that Bloom could not prove that the NCAA had inconsistently applied or unfairly interpreted its rules.[128]

Most recently, former Arizona State and Nebraska quarterback Sam Keller filed a class action antitrust lawsuit in the U.S. District Court in San Francisco.[129] Keller claimed that EA Sports video games make illegal use of football and basketball players' names and unidentified, but obvious, likenesses and that the NCAA condones

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119. *Id.* at 117 (explaining that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur collegiate teams, and therefore "procompetitive," in that they enhance public interest in intercollegiate athletics, but also noting that restraints on telecasts of games are not the same as rules that are necessary to foster competition among the teams, such as the rules that define the conditions of the games, like the eligibility of participants).

120. *Id.*

121. *See* Joel Eckert, *Student-Athlete Contract Rights in the Aftermath of* Bloom v. NCAA, 59 VAND. L. REV. 905, 912 (2006).

122. 93 P.3d 621 (Colo. App. 2004).

123. *Id.* at 622; *see also* Eckert, *supra* note 121, at 913.

124. *See* Eckert, *supra* note 121, at 906.

125. *Id.*

126. *See Bloom*, 93 P.3d at 623 ("Although Bloom refers to his restraint of trade claim in a footnote in the opening brief, this reference is insufficient to warrant review of that claim.").

127. *Id.* at 623–24.

128. *Id.* at 627–28; *see also* Eckert, *supra* note 121, at 923.

129. *See* Keller v. Electronic Arts, Inc., No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

this use in violation of its own rules.[130] On February 8, 2010, U.S. District Court Judge Claudia Wilken combined the Keller and O'Bannon class action suits against the NCAA.[131] O'Bannon and the class of former student-athletes argue that once a player leaves collegiate competition, he should control his own collegiate image and likeness and accordingly, receive royalties from its use.[132] O'Bannon requests that the NCAA establish a constructive trust for any resulting damages or compensation arising from the adjudication, which would be made available to current players upon leaving college.[133]

IV. Analysis of the Former NCAA Student-Athletes' Allegations: The NCAA's Zero Compensation Policy for Former Student-Athletes Unreasonably Restrains Trade in Violation of § 1 of the Sherman Act

The NCAA uses the CLC to license student-athletes' images to companies selling merchandise nationwide.[134] The NCAA does not compensate student-athletes for the licensing of their images while they are in college, nor after their collegiate sports careers end.[135] The NCAA's zero compensation policy for former student-athletes does not likely constitute a *per se* violation of § 1 of the Sherman Act.[136] However, the NCAA's zero compensation policy for former student-athletes results in restrained trade that is unreasonable under the circumstances, and therefore violates § 1 of the Sherman Act.[137]

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130. *Id.* at *1. *But see Adderley, Brown Seek to File Brief*, ESPN.COM: College Football (Sept. 28, 2009), http://sports.espn.go.com/ncf/news/story?id=4512202 (describing how a federal judge in Los Angeles dismissed a similar lawsuit brought by NFL Hall of Famer Jim Brown in a U.S. District Court against EA Sports concerning the use of his image in the company's "vintage" games in "Madden NFL," ruling that video games are "much like realistic paintings of athletes depicted in real-life situations, which are protected by the First Amendment as artistic expressions").

131. O'Bannon v. NCAA, No. CV 09-3329, 2010 WL 445190, at *8 (N.D. Cal. Feb. 8, 2010); *see generally Keller*, 2010 WL 530108.

132. *See* Class Action Complaint, *supra* note 7, at 4 ("Former-student athletes do not share in these [NCAA] revenues even though they have never given informed consent to the widespread and continued commercial exploitation of their images.").

133. *See id.* at 8 ("Plaintiff further seeks an accounting of the monies received by Defendants, their co-conspirators, and their licensees in connection with the exploitation of Damages Class members' images, and the establishment of a constructive trust to benefit Damages Class members.").

134. *See About CLC*, The Collegiate Licensing Co., http://www.clc.com/clcweb/publishing.nsf/ Content/aboutclc.html (stating that the Collegiate Licensing Company currently represents the NCAA).

135. *See, e.g.,* Form 08-3a for the 2008-2009 academic year, University of Kentucky, 4, http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (describing how the NCAA requires all student-athletes to sign "Form 08-3a" each year, which purports to require each student-athlete to relinquish their rights to the commercial use of their images).

136. *See infra* Part IV.A.

137. *See infra* Part IV.B.

The NCAA operates in both the commercial market and the noncommercial, educational market.[138] When the NCAA acts in the commercial market, as is the case here, courts have subjected it to antitrust scrutiny.[139] Former NCAA student-athletes have standing to bring an antitrust challenge against the NCAA in the instant case because a provision in the Sherman Act allows a private right of action for parties injured by an antitrust violation.[140]

To be eligible to play in NCAA sports, student-athletes must sign Form 08-3a each year, as required by NCAA Constitution 3.2.4.6 and NCAA Bylaws 14.1.3.1 and 30.12.[141] Part IV of Form 08-3a, "Promotion of NCAA Championships, Events, Activities or Programs," requires the student-athlete to "authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use" his or her "name or picture to generally promote NCAA championships or other NCAA events, activities or programs."[142] Form 08-3a creates an agreement that affects interstate commerce, and accordingly meets two of the three requirements to be a violation of § 1 of the Sherman Act.[143] In effect, the authorization given by student-athletes through signing Form 08-3a allows the NCAA complete freedom to use an athlete's likeness however the NCAA sees appropriate, including selling and licensing the image in interstate commerce without compensating the student-athletes, as long as there is some link to an NCAA championship, event, activity, or program.[144] As a result of signing Form 08-3a, stu-

138. *See* Gaines v. NCAA, 746 F.Supp. 738, 744 (M.D.Tenn. 1990) ("[T]he NCAA, with its multimillion dollar annual budget, is engaged in a business venture and is not entitled to a *total* exemption from antitrust regulation on the ground that its activities and objectives are educational and are carried on for the benefit of amateurism.").

139. *Id. See also Sherman Act Invalidation of the NCAA Amateurism Rules*, *supra* note 112, 1301 at n.9 (1992) (listing cases where the NCAA was subject to antitrust scrutiny).

140. *See* 15 U.S.C. § 15 (2006) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

141. *See, e.g.,* Form 08-3a, *supra* note 135, at 1 (stating that Form 08-3a must be signed and returned to the student-athlete's sports director before the student-athlete competes each year, as required by NCAA Constitution 3.2.4.6. and NCAA Bylaws 14.1.3.1 and 30.12).

142. *Id.* at 4.

143. The NCAA licenses the collegiate images of former student-athletes to companies that sell products in interstate commerce. *See* Anastasios Kaburakis, et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry: The* Keller *Forecast*, 27 ENT. & SPORTS LAW. 1, 15 (2009) (explaining the current state of NCAA exclusive licensing); *see also* discussion *supra* Part.II.B. Discussion and analysis concerning the third requirement, that the agreement be one that unreasonably restrains trade, is found in Parts IV.A–B.

144. *See, e.g.,* Form 08-3a, *supra* note 135, at 4 (stating in Part IV that by signing, the student-athlete is authorizing "the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local

dent-athletes have no control over and receive no compensation for the future commercial use of their collegiate images and likenesses.[145] As Form 08-3a Part IV does not include a time frame, it apparently requires the student-athlete to relinquish all rights in perpetuity to the commercial use of his or her image.[146]

A. The NCAA's Zero Compensation Policy for Former Student-Athletes Does Not Likely Constitute a Per Se Violation of § 1 of the Sherman Act

Restraints that are *per se* illegal are always or almost always likely to raise prices or reduce output, quality, service, innovation, or competition and include "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable."[147] Here, O'Bannon alleges that the NCAA's conduct is "blatantly anticompetitive and exclusionary."[148] Instead of individual athletes negotiating with EA Sports, television networks, and memorabilia companies, the NCAA uses the control it obtains via Form 08-3a to negotiate collegiate image licensing with these parties.[149] However, the agreement created by Form 08-3a does not fall under any of the current *per se* illegal categories—horizontal price fixing, horizontal market division, or boycotts—to be conclusively presumed to be an unreasonable restraint of competition.[150] Form 08-3a does not result in either horizontal market division or horizontal price fixing because the agreement it forms is not horizontal, as it is between the NCAA and the student-athlete, not between competitors.[151] Additionally, Form 08-3a does not form a boycott because it is not an agreement between a group of competitors not to deal with individuals or companies outside the group, deal only on certain terms,

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organizing committee)] to use" the student-athlete's "name or picture to generally promote NCAA championships or other NCAA events, activities or programs").

145. *See* Wetzel, *supra* note 1 (explaining Ed O'Bannon's situation and the circumstances giving rise to a class action antitrust challenge brought against the NCAA by former NCAA student-athletes).

146. *Id.*

147. *See* N. P. R. Co. v. United States, 356 U.S. 1, 5 (1958).

148. *See* Class Action Complaint, *supra* note 7, at 3 (alleging how the NCAA has unreasonably and illegally restrained trade to commercially exploit former student-athletes by eliminating future ownership interests of former student-athletes in their own images).

149. *See generally* Form 08-3a, *supra* note 135, at 4 (stating in Part IV that the NCAA seeks student-athlete authorization to use the student-athlete's name or picture to generally promote NCAA championships or other NCAA events, activities or programs).

150. *See infra* notes 151–53 and accompanying text.

151. *See generally* Form 08-3a, *supra* note 135 (serving as the contract between the NCAA and its student-athletes).

or coerce suppliers or customers not to deal with a boycotted competitor.[152] *Per se* violations happen when circumstances cause the likelihood of anticompetitive conduct to be so high that the court does not need to examine the challenged conduct.[153]

Even if the NCAA student-athlete agreements were *per se* illegal, the NCAA could still avoid liability if the agreement created procompetitive effects that could not exist without an agreement.[154] However, the procompetitive effects of preserving the goals of the NCAA, such as maintaining amateurism in collegiate sports and using players' images to promote intercollegiate sporting events and products could exist without requiring student-athletes to sign away their collegiate publicity rights forever.[155] For instance, the NCAA could be more specific in Form 08-3a to contract with student-athletes for the use and licensing of their collegiate images for a certain limited time period, such as up to five years after they leave their respective schools. This way, the NCAA could still use recent collegiate images of former student-athletes to promote NCAA events and products and maintain current student-athletes' amateurism, without also infringing on former student-athletes' publicity rights beyond that limited time period. Once this contracted time passes, then the NCAA should be required to enter negotiations with former student-athletes concerning compensation for the continued use and licensing of their collegiate images. Alternatively, the NCAA could avoid such negotiations by compensating former student-athletes by establishing funds for health insurance, providing educational or vocational training, or forming pension plans.

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152. FTC v. Superior Court Trial Lawyers Assoc., 493 U.S. 411, 414, 436 (1990) (holding that an agreement between a group of attorneys not to work for wages that they considered to be too low was a *per se* violation of § 1 of the Sherman Act).

153. *See, e.g.,* Palmer v. BRG of Georgia, 498 U.S. 46, 47, 50 (1990) (holding that a $250 product price increase made the anticompetitive effect of the arrangement so clear as to render it a *per se* violation of § 1 of the Sherman Act); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 251–53 (1940) (holding that an agreement to purchase surplus product in a spot market to prevent dramatic price decreases was a *per se* violation of § 1 of the Sherman Act).

154. *See, e.g.,* NCAA v. Bd. of Regents, 468 U.S. 85, 101 (1984) (explaining how the NCAA markets competition itself and how the NCAA would be completely ineffective if there were no rules to which competitors agreed concerning the creation and definition of the competition to be marketed). *But see id.* at n.23 ("While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.").

155. *See generally* Class Action Complaint, *supra* note 7, at 8 (listing examples of alternative ways for the NCAA to fulfill its procompetitive goals without forever depriving former student-athletes compensation for use of their collegiate images, such as "establishment of funds for health insurance, additional educational or vocational training, and/or pension plans to benefit former student athletes").

B. The NCAA's Zero Compensation Policy for Former Student-Athletes Results in Restrained Trade That Is Unreasonable under the Circumstances

The court will apply three steps in the rule of reason inquiry to determine whether the NCAA's zero compensation policy for former student-athletes results in restrained trade that is unreasonable under the circumstances.

1. Step One: Burden on Plaintiff to Show Agreement's Adverse Effect on Relevant Market as a Whole[156]

The first step in the rule of reason inquiry is to consider whether the plaintiff has met the burden of showing that the agreement actually adversely affected competition as a whole in the relevant market.[157] Here, O'Bannon and the class of former student-athlete plaintiffs should be able to prove that the zero compensation agreement resulting from the requirement that student-athletes sign Form 08-3a results in an actual and substantial adverse effect on competition.[158] Without Form 08-3a eliminating image use compensation for former student-athletes, these individuals could negotiate licensing deals with various competitors beyond the companies with which the NCAA has lucrative exclusivity deals.[159] For instance, instead of being limited to the NCAA's deal with EA Sports, former student-athletes could negotiate deals with competing video game developers, publishers, and distributors, such as 2K Sports, Activision Blizzard, Take-Two Interactive Software, or Microsoft Game Studios.[160]

2. Step Two: Burden on Defendant to Show Procompetitive Virtues of Its Action[161]

Once the class of former student-athletes meets the burden in the first step of the rule of reason analysis, then the burden shifts to the NCAA and the CLC in the second step.[162] The NCAA and the CLC must show "pro-competitive redeeming vir-

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156. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997).

157. *Id.*

158. *See generally* Kaburakis et al., *supra* note 143, at 15 (explaining the current state of NCAA exclusive licensing).

159. *Id.*

160. *See About Us*, 2K SPORTS (2008–2009), http://2ksports.com/info/about; *Corporate Overview*, TAKE-TWO INTERACTIVE SOFTWARE, http://ir.take2games.com/phoenix.zhtml?c=86428&p=irol-irhome; Microsoft Game Studios, http://www.microsoft.com/games/; *Our Company*, ACTIVISION BLIZZARD, http://www.activisionblizzard.com//corp/b/aboutUs/ourCompany.html.

161. *Clorox*, 117 F.3d at 56.

162. *Id.*

tues" of its action.[163] The NCAA will likely argue that the procompetitive redeeming virtues of its action include maintaining the four objectives it lists for its licensing program.[164] These four objectives are: (1) to "[e]nsure the quality and consistency of all of the NCAA's Championship Event merchandise"; (2) to "[p]rotect all service marks, trademarks, and verbiage that relates to the NCAA (or have come to be associated with the NCAA), and to ensure that the use of these marks reflects on the NCAA in a favorable manner"; (3) to "[p]roduce revenue to support and enhance NCAA programs and to fund scholarships, programs or services to student-athletes" of NCAA member schools and conferences; and (4) to "[p]rotect the consumer from faulty or inferior products bearing the NCAA's trademarks."[165]

The NCAA requirement that student-athletes sign over their publicity rights for the period that they compete in NCAA sports follows from the NCAA requirement that student-athletes maintain amateurism.[166] The class of current student-athletes added to the lawsuit from the *Keller* case would need to defeat amateurism as an antitrust defense.[167] However, not compensating *former* student-athletes for the continued commercial use of their images is not tailored to the goal of preserving college sports in the economic marketplace because the NCAA amateurism requirement only exists while the student-athlete plays in the NCAA.[168] The U.S. Supreme Court has held that an NCAA bylaw does not violate the Sherman Act if it is tailored to the goal of preserving the product of college sports in the market.[169] However, the NCAA regulation of the licensing of former student-athletes' images is not on a level of necessity for the NCAA to regulate as, for example, the number of coaches a school may hire, the recruitment process, student eligibility, and the

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163. *Id.*

164. *See NCAA Licensing Program: Frequently Asked Questions*, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/corp_relations/CorpRel/Corporate+Relationships/Licensing/faqs.html#1.Whyhavealicensingprogram (listing the NCAA licensing program's four main objectives).

165. *Id.*

166. *See* Chin, *supra* note 113, at 1217 (stating that the NCAA's goal of ensuring that intercollegiate athletics are distinct from professional sports is proper because in theory a student-athlete's main concern should be to obtain an education, rather than generate revenue or make money).

167. *See generally* Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 32–34 (2001) (describing the likely judicial rule of reason analysis of the NCAA's compensation policies).

168. *See, e.g.,* Bloom v. NCAA, 93 P.3d 621, 622 (Colo. App. 2004).

169. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 119 (1984) (explaining that the NCAA television plan at issue in the case was not tailored to the goal of preserving intercollegiate sports in the marketplace because the plan does not regulate to produce equal ty throughout the NCAA); *see also Sherman Act Invalidation of the NCAA Amateurism Rules*, *supra* note 112, at 1307 ("[A]n NCAA bylaw will withstand antitrust attack if it is 'tailored to the goal' of preserving the 'product' of college sports in the economic marketplace.").

number of games played, which have all been recognized by the Supreme Court as regulations necessary for the preservation of intercollegiate athletics.[170]

3. Step Three: Burden on Plaintiffs to Prove Less Restrictive Alternatives Exist to Achieve Same Procompetitive Effect[171]

If the NCAA and the CLC meet their burden in the second step, then the burden shifts back to the class of former student-athletes to prove that alternative means resulting in less restricted competition exist to achieve the same procompetitive effect.[172] The class of former student-athletes would most likely be able to meet this burden because the procompetitive effects of maintaining amateurism in collegiate sports and using collegiate images to promote NCAA events and products could exist without requiring student-athletes to sign away their publicity rights in perpetuity.[173] There are various reasonable, less restrictive alternative means of achieving the same procompetitive effects of maintaining the quality of NCAA-licensed collegiate images in the market, protecting consumers, and producing revenue to support current student-athletes, while also compensating former student-athletes.[174] For instance, the NCAA could compensate former student-athletes by establishing funds for health insurance, providing educational or vocational training, or forming pension plans.[175] Additionally, as proposed earlier in this comment, the NCAA could also be more specific in Form 08-3a to contract with student-athletes for the use and licensing of their collegiate images for a certain limited time period, such as up to five years after they leave their respective schools. This would mean that the NCAA could still promote NCAA events and products with the recent collegiate images of former student-athletes and maintain current student-athletes' amateurism, without also infringing on former student-athletes' publicity rights beyond that limited time period. Once this contracted time passes, the NCAA would then need

170. *See NCAA*, 468 U.S. at 122–23 (White, J., dissenting) (explaining the NCAA's goal of preserving intercollegiate athletics and how many of the NCAA's regulations would not be permitted in a traditional business setting, but are allowed in order for the NCAA to achieve its goals because intercollegiate athletics could not exist in a freely competitive market).

171. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997).

172. *Id.*

173. *See NCAA*, 468 U.S. at 122–23 (White, J., dissenting) (explaining that the NCAA regulations not subject to antitrust scrutiny are those required for organized intercollegiate athletic competition to exist); *see also* Class Action Complaint, *supra* note 7, at 8 (listing examples of alternative ways for the NCAA to fulfill its procompetitive goals, such as "establishment of funds for health insurance, additional education or vocational training, and/or pension plans to benefit former student athletes").

174. Class Action Complaint, *supra* note 7, at 8; *see also* discussion *supra* Part IV.A.

175. *See* Class Action Complaint, *supra* note 7, at 8.

to enter negotiations with former student-athletes pertaining to compensation for the continued use and licensing of their collegiate images.

The ultimate restraint on competition in this situation is the combination of the NCAA having exclusive rights to the former student-athletes' images through Form 08-3a and the NCAA, via the CLC, granting exclusive licenses to these images.[176] The NCAA granted exclusive licenses to NCAA basketball and football to EA Sports.[177] In 2005, the CLC made an exclusive deal with EA Sports, in which EA Sports holds the rights to the "teams, stadiums, and schools" for all video game consoles.[178] An expanded argument to include these two levels of exclusivity would likely be successful because the essential concern underlying the rule of reason analytical framework is whether the action resulting in restrained trade harms competition.[179]

Without Form 08-3a, former student-athletes could promote competition by individually negotiating the licensing of their collegiate images with video game and media companies beyond the ones with which the NCAA has exclusive deals.[180] The combination of Form 08-3a and the NCAA's exclusivity deals with EA Sports harms competition.[181] EA Sports faced a competitor, 2K Sports, in NCAA basketball licensing through the mid-2000s.[182] 2K Sports canceled its NCAA basketball series in January 2008 after ending negotiations with the CLC.[183] EA Sports representatives stated that 2K Sports "walked away from college basketball," but sports bloggers claimed that EA Sports influenced the CLC to increase the demanded price of the

176. *See generally* Kaburakis et al., *supra* note 143, at 2 (stating that EA Sports holds exclusive licenses to NCAA basketball and football); Form 08-3a, *supra* note 135, at 4 (stating in Part IV that by signing, the student-athlete is authorizing the "NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use [the student-athlete's] name or picture to generally promote NCAA championships or other NCAA events, activities or programs").

177. *See* Kaburakis et al., *supra* note 143, at 2.

178. *Id.* (explaining the exclusivity deal between the NCAA and EA Sports).

179. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (noting that the purpose of the Sherman Act is "not to protect businesses from the working of the market," but rather "to protect the public from the failure of the market"); Apex Hosiery Co. v. Leader, 310 U.S. 469, 490–93 (1940) (noting that the Sherman Act's intended goal was "the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury"); Nw. Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d. 967, 970 (7th Cir. 1943) (explaining that the Sherman Act and antitrust laws were "intended to advance the public welfare by promoting free competition and preventing undue restriction of trade and commerce").

180. *See generally* Kaburakis et al., *supra* note 143, at 15 (explaining the exclusivity deal between the NCAA and EA Sports).

181. *See id.* (explaining the exclusiv ty deal between the NCAA and EA Sports and the situation surrounding EA Sports' previous competitor for college basketball licensing, 2K Sports).

182. *Id.*

183. *Id.*

NCAA basketball license.[184] More information about the NCAA's licensing contracts and activities would be necessary to conclusively determine whether unreasonable vertical price fixing occurred between the NCAA and EA Sports in violation of the Sherman Act.

When interpreting the Sherman Act, courts are not bound by formal conceptions of contract law, but rather look to the economics of the relevant agreements.[185] Thus, an argument from the NCAA that Form 08-3a creates a valid contract does not make the agreement immune from antitrust scrutiny.[186] The NCAA requirement that student-athletes sign away their economic right to their collegiate images and likenesses forever amounts to restrained trade unreasonable under the circumstances.[187] Absent the requirement, NCAA student-athletes could negotiate the licensing of their likeness and image rights to various media and memorabilia competitors after leaving college, without undermining the NCAA's goal of preserving intercollegiate athletics.[188] The contracts between the NCAA and its student-athletes unreasonably limit student-athletes' economic rights after their collegiate sports careers end because they are not necessary to preserve the procompetitive benefits underlying the NCAA's existence and less restrictive procompetitive alternatives exist.[189]

C. Possible Impacts of the Case

There are various potential implications of the *O'Bannon* decision.[190] There is a $4 billion annual market for collegiate licensed merchandise that stands to be affected

184. *Id. See, e.g.,* Tom Magrino, *College Hoops 2K9 Ejected*, GAMESPOT.COM (Jan. 14, 2008), http://www.gamespot.com/xbox360/sports/collegehoops2k8/news.html?sid=6184658 (suggesting that the breakdown in negotiations between the NCAA and 2K Sports resulted from the outside influence of EA Sports).

185. *See* United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 208 (1968) (explaining that courts are not bound to formal conceptions of contract law when interpreting antitrust laws and must instead consider "the economic reality of the relevant transactions").

186. *Id.*

187. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 118–19 (1984) (explaining that the NCAA television plan at issue in the case was not tailored to the goal of preserving intercollegiate sports in the marketplace because the plan does not regulate to produce equality throughout the NCAA).

188. *See Sherman Act Invalidation of the NCAA Amateurism Rules*, *supra* note 112, 1307 (1992) ("[A]n NCAA bylaw will withstand antitrust attack if it is 'tailored to the goal' of preserving the 'product' of college sports in the economic marketplace.").

189. *See NCAA*, 468 U.S. at 122–23 (1984) (White, J., dissenting) (noting that the NCAA regulations not subject to antitrust scrutiny are the ones that are required for organized intercollegiate athletic competition to exist); Class Action Complaint, *supra* note 7, at 8 (listing examples of alternative ways for the NCAA to fulf ll its procompetitive goals, such as "establishment of funds for health insurance, additional education or vocational training, and/or pension plans to benefit former student athletes").

190. O'Bannon v. NCAA, CLC, No. CV 09-3329 (N.D. Cal. July 21, 2009); *see infra* notes 191–96 and accompanying text.

by the ruling.[191] The NCAA and CLC's financial information is private.[192] Even if the class action lawsuit is not successful, at minimum it has the effect of making public the NCAA and CLC's financial records through the discovery process, which are needed to uncover the exact amount of revenue generated from the licensing of former student-athletes' images and likenesses.[193]

Other issues arise beyond the billions of dollars of licensing fees that would be affected if the former student-athletes' lawsuit is successful, including who receives how much compensation, in what form, and when.[194] If the former student-athletes prevail in the suit, the NCAA would likely face changing how it handles licensing fees and revenue from intercollegiate sports.[195] Without the NCAA's current unreasonable trade restraints, the market for such products will likely change – competition will increase over licensing deals for the images of former college stars, as each will negotiate his or her own image licensing with companies, which may lead to lower product prices for consumers.[196] The purpose of the Sherman Act is to protect such competition and to ultimately protect the public (the fans buying the videogames and college sports memorabilia) from the failure of the market.[197]

V. Conclusion

The NCAA and the CLC's continued commercial licensing of the collegiate images and likenesses of NCAA student-athletes after they leave college results in restrained trade unreasonable under the circumstances, in violation of § 1 of the Sherman

191. *See* Wetzel, *supra* note 1 (stating that at stake is a $4 billion market for collegiate licensed merchandise, a market that has greatly expanded over the past 15 years); *see also* Class Action Complaint, *supra* note 7, at 29, 35 (noting that the Collegiate Licensing Company is the market leader in collegiate licensing with more than a 75% share of the market).

192. *See* Brian Cook, *Limber Up Your Suin' Arm, Ed O'Bannon, Because You've Got a Stick Now*, THE SPORTING BLOG (Feb. 9, 2010), http://www.sportingnews.com/blog/the_sporting_blog/entry/view/55139/limber_up_your_suin_arm,_ed_obannon,_because_youve_got_a_stick_now.

193. *See id.*; *see also* Pete Thamel, *N.C.A.A. Fails to Stop Licensing Lawsuit*, N.Y. TIMES, Feb. 9, 2010, at B14 (describing how the NCAA's licensing contracts will be open to discovery).

194. *See* Jeff Levine, *Former Bruin Leads Potentially Costly Antitrust Lawsuit Against NCAA*, THE BIZ OF BASKETBALL (July 24, 2009), http://www.bizofbasketball.com/index.php?option=com_content&view=article&id=652:former-bruin-leads-potentially-costly-antitrust-lawsuit-against-ncaa&catid=42:articles-a-opinion&Itemid=57 (listing the questions ESPN personality Mike Golic posed in reaction to the O'Bannon lawsuit: "[W]here do you draw the line? If O'Bannon wins, who receives compensation? Do only former athletes from revenue producing teams receive compensation? Should only star players be the only former athletes compensated? What process would govern distributing the payments?").

195. *Id.* (noting that a successful suit for O'Bannon and the class of plaintiffs would likely change the landscape of the NCAA and its operations).

196. *See supra* Part IV.B.

197. *See supra* Part II.A; *see also supra* note 179 and accompanying text.

Act.[198] It makes sense that the NCAA requires student-athletes to sign Form 08-3a, but it should only be a valid agreement during the period that they participate in collegiate competition to maintain the NCAA requirement that current student-athletes maintain amateurism.[199] Current NCAA student-athletes should remain amateurs during their time in collegiate competition and accordingly should not receive compensation for the commercial use of their images and likenesses during that period.[200] However, once student-athletes leave collegiate competition, they should be compensated for the continued commercial use and licensing of their collegiate images.[201] Protection of player likenesses once they graduate increases competition within the NCAA because it adds incentive for players to leave positive legacies so that their images will be featured in video games, photographs, video content, and other memorabilia, from which they can profit after their collegiate playing days end.[202]

198. *See supra* Part IV.B.

199. *See generally* Chin, *supra* note 113, at 1217 (explaining why maintaining amateurism in intercollegiate athletics is proper).

200. *Id. But see* Pekron, *supra* note 167, at 29–30 (arguing that amateurism is not necessary to produce collegiate athletics and that universities should compensate student-athletes for their labors).

201. *See supra* Part IV.B.

202. *See supra* Part IV.B.