CHANGING THE GAME: THE LITIGATION THAT MAY BE THE CATALYST FOR CHANGE IN INTERCOLLEGIATE ATHLETICS

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INTRODUCTION TO THE NCAA AND THE COMMERCIALIZATION OF INTERCOLLEGIATE ATHLETICS

The first reported intercollegiate athletics contest in the United States took place in 1852.[1] Harvard University challenged Yale University to a rowing contest similar to those staged in England by Oxford University and Cambridge University. To tilt the competition in its favor, Harvard University sought to gain an unfair advantage over

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1. *See* RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 168 (Peter Levine & Steven Tischler eds., 1988).

Yale University by obtaining the services of an athlete who was not a student.[2] Subsequently, colleges and universities across the country challenged one another to athletics contests in a variety of sports.

In 1905, the United States was in an uproar over the violence associated with intercollegiate football. Football student-athletes' use of gang tackling and mass formations led to numerous injuries and deaths.[3] Thus, the public urged universities to abolish football or take steps to reform the game. As a result, President Theodore Roosevelt called the nation's top intercollegiate athletics leaders to the White House to discuss reformation of intercollegiate football.[4] One such leader, Chancellor Henry M. MacCracken of New York University, called a meeting of officials from the nation's thirteen most prominent universities to discuss reformation of the intercollegiate football playing rules. Subsequently, a sixty-two member body formed the Intercollegiate Athletic Association of the United States (IAAUS).[5] In 1910, the IAAUS became known as the National Collegiate Athletic Association (NCAA). For the next ten years, the NCAA was merely a discussion group that developed rules applicable to intercollegiate athletics.

The complexity and scope of intercollegiate athletics has grown substantially since the 1920s. Today, the NCAA is a voluntary unincorporated association that governs more than 1,200 colleges, universities, athletic conferences, and sports organizations; 380,000 student-athletes; and eighty-eight championship events in three divisions.[6] To improve efficiency and parity, the NCAA promulgated

2. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 (1987). Clearly, the propensity to seek unfair advantages existed from the beginning of intercollegiate athletics in the United States.

3. *Id.* at 990 (stating in 1905, there were approximately eighteen deaths and one hundred major injuries in intercollegiate football).

4. *Id.*

5. It was the flying wedge, football's major offense in 1905, that spurred the formation of the NCAA. *See* Dr. Myles Brand, Address to the National Press Club (Mar. 4, 2003), *available at* http://www.ncaa.org/wps/wcm/connect/06f11d004e0d4e059106f11ad6fc8b25/20030304_nat_press_club_speech.pdf?MOD=AJPERES&CACHEID=06f11d004e0d4e059106f11ad6fc8b25.

6. *See Differences Among the Three Divisions*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/differences+among+the+divisions/division+i/about+division+i (last visited Apr. 12, 2011); *see also* Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 529 (3rd Cir. 2007); *Breakdown of 88 NCAA Championships International Rights Holder*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/wps/wcm/connect/6322f5804e0da8699802f81ad6fc8b25/App6.pdf?MOD=AJPERES&CACHEID=6322f5804e0da8699802f81ad6fc8b25 (last visited Oct. 6,

rules and regulations to monitor a variety of issues facing member institutions, conferences, student-athletes, and coaches, including bylaws governing amateurism,[7] recruiting,[8] eligibility,[9] financial aid,[10] and practice and playing seasons.[11] These rules and regulations, established by volunteer representatives from member institutions and conferences, govern intercollegiate athletics and seek to further the goals set forth by the NCAA.[12] The NCAA has established goals to "[p]romote student-athletes and college sports through public awareness . . . [p]rotect student-athletes through standards of fairness and integrity . . . [p]repare student-athletes for lifetime leadership, and [p]rovide student-athletes and college sports with the funding to help meet these goals."[13]

Intercollegiate athletics has become a successful commercial enterprise. Through the advent of television and media outlets and a growing public appetite for sports spectacle, intercollegiate athletics has continued to grow rapidly. In 1938, the University of Pennsylvania televised the first intercollegiate football game.[14] Then, in 1951, the NCAA members endorsed a program of restricted live football telecasts, administered through the 1983 playing season.[15] However, the NCAA television plan was met with skepticism, and it was ultimately found by the United States Supreme Court to violate antitrust laws.[16] Today, the NCAA's television involvement includes broadcasts and cable telecasts

2011); Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website (Mar. 13, 2007), *available at* http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html.

7. *See* 2010-2011 NCAA Division I Manual § 12 (2011) [hereinafter NCAA Bylaws].

8. *See id.* § 13.

9. *See id.* § 14.

10. *See id.* § 15.

11. *See id.* § 17.

12. *See* 2010-2011 NCAA Division I Manual § 1.2-1.3 (2011) [hereinafter NCAA Constitution].

13. *State of the Association address*, THE NCAA NEWS (Jan. 17, 2000, 3:20:09 PM), http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/state%2bof%2bthe%2bassociation%2baddress%2b-%2b1-17-00.html.

14. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 89 (1984).

15. *A Brief History of NCAA Television Coverage*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/wps/wcm/connect/broadcast/media/broadcasting/a+brief+history+of+ncaa+television (last visited Apr. 12, 2011).

16. *Bd. of Regents*, 468 U.S. at 106-113 (holding the record supported the district court's conclusion that the NCAA unreasonably restrained trade under the Sherman Act).

of championship events such as the Division I Men's Basketball Tournament ("March Madness").[17] In June 2010, the NCAA negotiated another blockbuster deal to televise March Madness, whereby the NCAA will receive $10.8 billion over fourteen years from CBS and Turner Sports for March Madness' media rights.[18]

As a result of commercial advancements, intercollegiate athletics has grown into a multibillion-dollar industry annually.[19] During the 2010-2011 college football bowl season, the Bowl Championship Series (BCS) distributed over $169 million, which derives, in part, from a $125 million ESPN media rights agreement.[20] Intercollegiate athletic conferences are also negotiating and obtaining enormous media rights agreements, which is evidenced by the Southeastern Conference's fifteen-year, $2.5 billion agreement with ESPN.[21] As a result of the economic prosperity in intercollegiate athletics, coaches and administrators are receiving generous salaries and benefits.[22]

In the mid 1990s, economic analysts estimated the capitalized economic value of major intercollegiate athletics programs, such as the University of Michigan, University of Notre Dame, the Ohio State University, University of Florida, and other similarly situated programs, to be $250 to $300 million, which is comparable to major professional sports franchises.[23] It would seem these programs would have substantially more value today.

This article will argue NCAA student-athletes are neither professionals nor amateurs; therefore, courts should adopt a new standard of review to determine whether student-athletes have cognizable claims against the NCAA when balanced against the traditional notions of amateurism. Part II of this article provides a

17. *A Brief History of NCAA Television Coverage*, *supra* note 15.

18. Steve Weiberg, *NCAA President: Time to discuss players getting sliver of revenue pie*, USA TODAY (Mar. 29, 2011), *available at* http://www.usatoday.com/sports/college/mensbasketball/2011-03-29-ncaa-pay-for-play-final-four_N.htm.

19. *See* KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 17 (2001), *available at* http://www.knightcommission.org/images/pdfs/2001_knight_report.pdf.

20. *Revenue Distribution Data Released*, ESPN.COM (Jan. 25, 2011), http://espn.go.com/espn/print?id=6057935&type=story; Weiberg, *supra* note 18. In turn, bowl games distributed over $260 million to colleges and universities. And, the bowl games generated $1.285 billion in economic impact for the host communities. *Id.*

21. Weiberg, *supra* note 18.

22. *Id.* (stating University of Louisville head basketball coach Rick Pitino is being paid $7.5 million in 2011).

23. *See* RICHARD G. SHEEHAN, KEEPING SCORE: THE ECONOMICS OF BIG TIME SPORTS 314-17 (1996).

historical view of amateurism and how the principles of amateurism have changed over time. Part III discusses and sets forth claims brought by student-athletes against the NCAA in five very important lawsuits: *White v. NCAA*, *Oliver v. Barratta*, *Keller v. NCAA*, *O'Bannon v. NCAA*, and *Agnew v. NCAA*. Finally, Part IV discusses how these lawsuits will impact the future of the NCAA and intercollegiate athletics, and how the traditional notions of amateurism are no longer a cognizable justification to challenges brought by student-athletes.

I. AMATEURISM

In the nineteenth century, the term "amateur" was held in high esteem in relation to the term "professional."[24] The genesis of "amateurism" derives from England and was created to exclude the working class from athletic competitions staged by the social elite.[25] The English reasoned a rich man does not need to become a professional player, because he has more leisure time and sufficient time to devote to athletic endeavors.[26] The distinction between amateur and professional was merely a function of social class.

Amateurism, originally, derived from five simple points: an amateur athlete had 1) never competed in open competition, 2) never competed for public money, 3) never competed for gate money, 4) never competed with a professional, and 5) never taught[27] or pursued athletics as a means of livelihood.[28] This tradition carried forward to the United States in the late nineteenth century. In fact, members of the Harvard University[29] faculty believed collecting gate receipts for intercollegiate competition had an "undesirable professional tone," which ultimately led to Harvard University banning gate receipts on campus in the 1870s.[30] However, by the 1880s and 1890s, most colleges accepted the premise of charging spectators to attend

24. *See* SMITH, *supra* note 1, at 166.

25. *Id.*

26. *Id.* at 167.

27. Student-athletes may accept compensation for teaching and coaching sports skills and techniques. *See* NCAA Bylaws § 12.4.2.1.

28. *See* SMITH, *supra* note 1, at 166.

29. Harvard University is the oldest institution of higher learning in the United States and was established in 1636. It was named after the institution's first benefactor, John Harvard. Today, a statute of John Harvard stands in Harvard Yard in front of University Hall. *History of Harvard University*, HARVARD U., http://www.news.harvard.edu/guide/content/history-harvard-university/ (last visited Apr. 15, 2011).

30. SMITH, *supra* note 1, at 169.

intercollegiate athletic contests.[31] Even Harvard University succumbed to the temptation of staging major intercollegiate athletics contests and built the United States' first reinforced concrete stadium in 1903 to hold 40,000 spectators.[32]

In 1906, the IAAUS, an organization that would eventually evolve into the NCAA, held its first convention to develop restrictive principles of amateurism.[33] There was to be no recruiting (called "proselytizing") of top preparatory school athletes, and no scholarships were permitted for athletic ability.[34] The gentility provisions from early English sport remained.[35]

The early amateurism battle within the IAAUS revolved around baseball.[36] As it grew in popularity during the early twentieth century, baseball spawned opportunities for athletes to profit in major, minor, and summer leagues.[37] The summer leagues, which attracted large numbers of intercollegiate baseball players, drew prompt criticism.[38] According to some critics, those who participated in the summer leagues lost intercollegiate athletics eligibility merely by associating with professionals, whether or not there was remuneration for play.[39] To others, the motivation to participate in the summer leagues was more benign, and the intercollegiate athletes were analogous to other students who used their talents for pay, such as actors or musicians.[40]

The dialogue between two university officials captured the contrasting viewpoints of the NCAA amateurism debate.[41] Amos Alonzo Stagg of the University of Chicago opposed any relaxation of

31. *Id.*
32. *Id.*
33. Kay Hawes, *Debate on amateurism has evolved over time*, THE NCAA NEWS (Jan. 3, 2000), http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateurism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html.
34. *Id.*
35. *Id.*
36. *See Trying to Define Amateur Athlete: Intercollegiate Athletic Association Committee Suggests Strict Law*, N.Y. TIMES, Mar. 14, 1909, at 53 (discussing the term "amateurism" and prohibition against college students playing summer baseball in leagues for pay).
37. Hawes, *supra* note 33 (stating "[o]ne of the first divisive issues in the NCAA involved amateurism. In the 1900s, professional baseball began to grow in popularity. Many college athletes began turning to minor-league baseball as a way to make money during the summer months, setting off a heated debate.").
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

the amateurism rules.[42] Stagg stated: "[i]t is my prophecy that in a few years you will find that many of our large cities will be supporting professional football teams composed of ex-college players . . . the passing of [less restrictive amateurism rules] would be an unceasing catastrophe."[43] Professor J. P. Welsh of Pennsylvania State University, on the other hand, framed the debate in terms of intrinsic capitalism, arguing a college student who earns money during the summer "needs to be let alone in the full, free, untrammeled exercise of his American citizenship, which entitles him to life, liberty and the pursuit of happiness, which sometimes means money."[44]

Today, the NCAA Constitution provides, "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[45] Indeed, courts have long stated, "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and the NCAA "needs ample latitude to play that role."[46] Thus, "most of the regulatory controls of the NCAA [are] a justifiable means of fostering competition among the amateur athletic teams and therefore . . . enhance public interest in intercollegiate athletics."[47] Additionally, courts have articulated that the NCAA amateurism and eligibility rules were promulgated to preserve the honesty and integrity of intercollegiate athletics.[48]

Historically, the NCAA has attempted to remain within the confines of the amateurism principles that were passed to the United States by the English. However, in recent years, the NCAA has relaxed the amateurism provisions to allow student-athletes to obtain prize money for competition prior to enrollment,[49] to compete as a professional in one sport and as an amateur in another,[50] and to compete

42. Hawes, *supra* note 33.

43. *Id.*

44. *Id.*

45. NCAA Constitution § 2.9.

46. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

47. *Id.* at 117.

48. Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1090 (7th Cir. 1992).

49. NCAA Bylaws § 12.1.2.4.1 (stating "[p]rior to collegiate enrollment, an individual may accept prize money based on his or her place finish or performance in an open athletics event").

50. *Id.* § 12.1.3 (stating "[a] professional athlete in one sport may represent a member

as a member of a professional team.[51] These provisions evidence a substantial change from the original function of amateurism and can only serve as a "modified amateurism model." In fact, the current principles of amateurism are merely a function of the NCAA's definition (i.e., it is what we say it is).

II. THE GAME CHANGERS: THE LITIGATION THAT MOVES FOR CHANGE

The NCAA is no stranger to protracted litigation and has been involved in a plethora of lawsuits relating to nearly every conceivable area of the law, including antitrust,[52] United States constitutional challenges,[53] state constitutional challenges,[54] tortious interference with a contract,[55] and complaints that NCAA bylaws are applied arbitrarily and capriciously.[56] Challenges have come from every direction and relate to both external commitments and agreements,[57] and challenges to NCAA Bylaws.[58] Historically, the NCAA has fared favorably in the courts by asserting the time-honored tradition of amateurism as a defense to most claims.[59] Indeed, courts have professed a reluctance to serve as a "super referee" when evaluating NCAA bylaws.[60] However, the dynamics of intercollegiate athletics has changed substantially over the course of the last five years and appears to be moving towards sweeping changes as a result of five lawsuits. The lawsuits described below have the potential to reshape intercollegiate athletics and have

institution in a different sport and may receive institutional financial assistance in the second sport").

51. *Id*. § 12.2.3.2.1 (stating "before initial full-time collegiate enrollment, an individual may compete on a professional team, provided he or she does not receive more than actual and necessary expenses to participate on the team").

52. *Bd. of Regents*, 468 U.S. 85; Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998); Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

53. *E.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 181-82 (1988).

54. *E.g.*, Nat'l Collegiate Athletic Ass'n v. Yeo, 171 S.W.3d 863, 865 (Tex. 2005).

55. *E.g.*, Harrick v. Nat'l Collegiate Athletic Ass'n, 454 F. Supp. 2d 1255, 1259-60 (N.D. Ga. 2006).

56. *E.g.*, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 624 (Colo. App. 2004).

57. *Bd. of Regents*, 468 U.S. at 91-94 (discussing the NCAA's television plan for intercollegiate football games and holding the television plan violated antitrust laws).

58. *E.g.*, Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1083-84 (7th Cir. 1992) (discussing NCAA bylaws relating to agents and entering a professional draft).

59. *Bd. of Regents*, 468 U.S. at 120 (stating "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports," and the NCAA "needs ample latitude to play that role . . . .").

60. Nat'l Collegiate Athletic Ass'n v. Yeo, 171 S.W.3d 863, 870 (Tex. 2005) (stating judges are not "super referees").

asserted frontal attacks on the NCAA's time-honored principles of amateurism.

A. White v. National Collegiate Athletic Association

In 2006, a class of student-athletes banded together in an effort to attack the limitations placed on athletic scholarships by the NCAA.[61] Division I-A[62] football ("Major College Football") and Division I men's basketball ("Major College Basketball") are the cash cows of intercollegiate athletics. Major College Football and Major College Basketball culminate each season with a showcase of the top teams in the BCS[63] and March Madness,[64] respectively. These events are among the most watched sporting events of the year and garner top-dollar ticket prices, television and radio contracts, advertisements, and merchandise sales.[65] According to the class of student-athletes, although these events have become a major part of American sports culture, the student-athletes who make these events competitive and spectacular are prohibited from reaping financial benefits.[66] Student-athletes may not receive more than full athletics-based financial aid or, as termed by the NCAA, full grant-in-aid.[67] However, under limited circumstances, student-athletes may receive additional financial aid by and through a

61. *See* Second Amended Complaint for Plaintiff, White v. Nat'l Collegiate Athletic Ass'n, No. CV-06-0999 RGK (C.D. Cal. Sept. 8, 2006) [hereinafter White Complaint].

62. Division I-A is now known as the Division I Football Bowl Subdivision. *See* NCAA, *Differences Among Three Divisions*, *supra* note 6.

63. The BCS was established in 1998 to determine the college football national champion, while maintaining the bowl system as a fabric of American sports culture. *About the BCS*, ESPN, http://espn.go.com/abcsports/bcs/about/ (last visited Oct. 1, 2011). The BCS bowl games, currently, are the BCS National Championship Game, Rose Bowl, Nokia Sugar Bowl, FedEx Orange Bowl, and Tostitos Fiesta Bowl. *BCS background*, BCSFOOTBALL.ORG, http://www.bcsfootball.org/news/story?id=4809699 (last updated Sept. 22, 2010).

64. The term "March Madness" refers to the Division I NCAA men's basketball tournament, which culminates in a national champion. *See* Ill. High Sch. Ass'n v. GTE Vantage, Inc., 99 F.3d 244, 245 (7th Cir. 1996). The term "March Madness" became the source of litigation when the Illinois High School Association (IHSA) filed a reverse confusion trademark action in federal court alleging the trademark "March Madness" belongs to IHSA and causes confusion among consumers. *See id.* at 245-46. The NCAA began using the term after CBS Sports Broadcaster, Brent Musburger, designated the NCAA Division I men's basketball tournament as "March Madness." *See id.* at 245. The court held the term "March Madness" was a generic term coined by a member of the media and found against trademark protection. *See id.* at 247.

65. *See* White Complaint, *supra* note 61, ¶¶ 1-2.

66. *Id.* ¶ 3.

67. Full grant-in-aid is defined as "financial aid that consists of tuition and fees, room and board, and required course-related books." NCAA Bylaws § 15.02.5.

Pell Grant,[68] financial aid unrelated to athletic ability,[69] the Special Assistance Fund,[70] and Student-Athlete Opportunity Fund,[71] up to the cost of attendance.[72]

The class filed suit pursuant to section 1 of the Sherman Act, claiming the NCAA and its member institutions agreed, through an unlawful horizontal agreement, to "deny a legitimate share of the tremendous benefits of their enterprise to the student athletes who make the big business of big-time college sports possible."[73] Due to the cap on athletics-based financial aid, student-athletes are unable to obtain the necessary funds to cover expenses such as "school supplies, . . . laundry expenses, health and disability insurance, travel costs and incidental expenses."[74] The class argued, absent the unlawful agreement to impose a cap on athletics-based financial aid, colleges and universities competing against one another to attract student-athletes in the Major College Football and Major College Basketball markets would increase athletics-based financial aid to cover the cost of attendance.[75]

The class defined the relevant markets, as required by antitrust law, as the colleges and universities competing in Major College Football and Major College Basketball in the United States.[76] Student-athletes competing in Major College Football and Major College Basketball compete at the highest level of the NCAA structure. The class argued there is no reasonable substitute for intercollegiate competition at the highest level, where student-athletes have the opportunity to earn a

68. A student-athlete who receives a Pell Grant may receive financial aid up to the cost of attendance. *Id.* § 15.1.1.

69. A student-athlete may receive other financial aid (i.e., academic scholarship) unrelated to athletics ability up to the cost of attendance. *Id.* § 15.1.

70. The receipt of monies from the NCAA Special Assistance Fund for student-athletes is not included in determining the permissible amount of financial aid. *See id.* § 15.01.6.1.

71. The receipt of monies from the NCAA Student-Athlete Opportunity Fund for student-athletes is not included in determining the permissible amount of financial aid. A member institution may not use these funds to finance salaries, grant-in-aid (other than summer school), capital improvements, or stipends. *Id.* § 15.01.6.2.

72. Cost of attendance is defined as "an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." *See* NCAA Bylaws §15.02.2. Increasing athletics-based financial aid to the actual cost of attendance would require an institution to add approximately an additional $2,000-$3,000 annually to each student-athlete's financial aid package. White Complaint, *supra* note 61, ¶ 7.

73. White Complaint, *supra* note 61, ¶ 3.

74. *Id.* ¶ 4.

75. *Id.*

76. *Id.* ¶ 29.

college degree (thereby excluding professional sports as an alternative) and a much greater opportunity to advance to playing football or basketball as a vocation.[77] The class acknowledged that some colleges and universities seem to meet the market definition, but are not included in the market.[78] Specifically, member institutions of the Ivy Group[79] and military academies[80] were excluded from the market definition because they did not offer athletics-based financial aid and thus did not qualify as reasonable substitutes for the class members.[81]

It is undisputed that Major College Football and Major College Basketball are successful commercial enterprises. As a result, the demand for student-athletes in these sports can be overwhelming, as demonstrated by the influx of recruiting services and media outlets made available to colleges and universities.[82] The class argued absent an unlawful cap on athletics-based financial aid, colleges and universities in the relevant market would have competed against one another to offer more athletics-based financial aid[83] (up to cost of attendance) to these student-athletes.[84] Therefore, student-athletes would consider the availability of additional financial aid when determining where to attend college. Thus, the award of athletics-based financial aid is a commercial transaction that affects interstate commerce per antitrust jurisprudence.[85] The class argued the cap on athletics-based financial aid was effective in reducing the permissible amount of aid awarded to student-athletes.[86] According to the class, this impermissible horizontal restraint on competition depressed, fixed, and stabilized the amount and terms of athletics-based financial aid and

77. *Id.* ¶¶ 31, 33.

78. White Complaint, *supra* note 61, ¶ 37.

79. The class argues the institutions of the Ivy Group are not reasonable substitutes despite competing in Major College Basketball, because these institutions possess relatively high academic admission standards and do not offer financial aid based on athletics ability. *Id.* ¶ 38.

80. The class argues the military academies are not reasonable substitutes despite competing in both Major College Football and Major College Basketball, because these institutions offer full scholarships and stipends to all students who attend these institutions (not related to athletics ability) and require each student to complete a military service commitment subsequent to graduation. *Id.* ¶ 37.

81. *Id.* ¶ 37-38.

82. *See e.g.* RIVALS.COM, http://www.rivals.com (last visited Apr. 12, 2011); SCOUT.COM, http://www.scout.com (last visited Apr. 12, 2011).

83. Major College Basketball and Major College Football are headcount sports and are allowed to provide full athletics-based financial aid to thirteen and eighty-five total counters, respectively. *See* NCAA Bylaws § 15.5.5.1 (basketball) & § 15.5.6.1 (football).

84. *See* White Complaint, *supra* note 61, ¶ 40.

85. *See id.* ¶ 48.

86. *See id.* ¶ 66

should be stricken to allow student-athletes to receive more generous athletics-based financial aid up to the cost of attendance.[87]

Ultimately, the *White* class and the NCAA resolved the disputes at issue. In accordance with the settlement agreed upon by the parties and subsequently approved by the United States District Court, the parties agreed to the following consideration: 1) for the academic years 2007-2008 through 2012-2013, the NCAA will make available a total of $218 million to NCAA Division I member institutions for the benefit of student-athletes under the guidelines of the Student-Athlete Opportunity Fund to be used by student-athletes with demonstrated financial and/or academic needs; and 2) the NCAA will make available, over a three-year period, a total of $10 million to be distributed to class members, upon application, for career development expenses (i.e. resume preparation, career counseling, or job placements) and continued educational expenses to attend a two-year or four-year undergraduate degree or an accredited professional, graduate, post-graduate degree or professional certificate.[88]

B. Oliver v. Baratta

In 2008, Andy Oliver[89] ("Oliver") filed suit against the NCAA, among others, alleging the NCAA's prohibition on the use of an

87. *See id.* ¶¶ 68, 76.

88. Stipulation and Agreement of Settlement between Plaintiffs and Defendant National Collegiate Athletic Association at 10-11, White v. Nat'l Collegiate Athletics Ass'n, No. CV-06-0999 RGK (C.D. Cal. Jan. 29, 2008) *available at* http://i.usatoday.net/sports/college/2008-01-29-ncaa-settlement.pdf; *see also* Jack Carey & Andy Gardiner, *NCAA Agrees to $10M Settlement in Antitrust Lawsuit*, USA TODAY, Jan. 30, 2008, *available at* http://www.usatoday.com/sports/college/2008-01-29-ncaa-settlement_N.htm.

89. Andy Oliver is a native of Ohio and attended Vermillion High School where he went 6-0 with a 0.40 ERA as a senior. Andrew Oliver Bio, OKLA. ST. U. ATHLETICS OFFICIAL WEBSITE, http://www.okstate.com (last visited Aug. 6, 2008). Following his senior year of high school, Oliver was drafted in the seventeenth round of the Major League Baseball amateur draft. *Id.* As a collegian, in 2008, Oliver was received second-team All-American honors. *Oliver Named Rivals.com All American*, OKLA. ST. U. ATHLETICS OFFICIAL WEBSITE, http://www.okstate.com/sports/m-basebl/mtt/oliver_andrew00.html (last visited Oct. 27, 2011). Following his junior season at OSU, Oliver was drafted in the second round of the Major League amateur draft by the Detroit Tigers and reportedly received a signing bonus of $1,495,000.00. Oliver made his major league debut for the Detroit Tigers on June 25, 2010. Andrew Oliver Bio, OFFICIAL WEBSITE OF THE DETROIT TIGERS, http://mlb.mlb.com/team/player.jsp?player_id=501989 (last visited Apr. 8, 2011); Andy Seiler, *2010 Draft Review—Detroit Tigers*, MLBBONUSBABY.COM, http://www.mlbbonusbaby.com/2010/03/17/2010-draft-preview-detroit-tigers/ (last visited Apr. 8, 2011).

attorney[90] during negotiations with a professional sports franchise was a violation of the laws of Ohio and the NCAA's application of such rules were arbitrary and capricious.[91] Following Oliver's senior year of high school, he was drafted in the seventeenth round of the Major League Baseball amateur draft by the Minnesota Twins.[92] During his senior year of high school, Oliver retained an "advisor" to assist him and his family with weighing his options to attend college or sign a professional baseball contract.[93] Towards the end of the summer, the Minnesota Twins requested a meeting with Oliver and his family and ultimately presented Oliver with an offer to join a Minnesota Twins farm team and in return Oliver would receive a $390,000 signing bonus.[94] Oliver's advisor was present when the offer was made.[95] After weighing his options, Oliver rejected the Minnesota Twins' offer and decided to attend college at Oklahoma State University[96] (OSU).[97]

Following his matriculation at OSU, the "advisors" continued to remain in contact with Oliver.[98] According to Oliver, the "advisors" provided nothing of value during this time.[99] In March 2008, Oliver terminated his relationship with his "advisors" and retained the services of another "advisor."[100] Shortly thereafter, Oliver's former "advisors" provided him with a bill requesting payment for services performed in the amount of $113,750, but the billing statement did not provide any detail or time entries evidencing the basis for the charges.[101] After receiving the invoice, Oliver provided the invoice to his coach at OSU,

90. NCAA rules allow for a student-athlete to seek advice from a lawyer concerning a proposed professional sports contract, as long as the lawyer does not represent the student-athlete in negotiations for such a contract. NCAA Bylaws § 12.3.2.

91. *See generally* Plaintiff's Second Amended Complaint, Oliver v. Baratta, No. 2008-CV-0520 (Ohio Ct. of Comm. Pleas July 16, 2008) [hereinafter Oliver Second Amended Complaint].

92. *Id.* ¶ 30.

93. *Id.* ¶¶ 12-28.

94. *Id.* ¶ 32.

95. *Id.*

96. OSU, formerly known as Oklahoma A&M University, was created on December 25, 1890 by a land grant from the Oklahoma Territorial Legislature. *See University History*, OSU ALUMNI ASS'N, http://orangeconnection.org/s/860/index-blue.aspx?pgid=311&gid=1 (last visited Oct. 25, 2011). Today, OSU has more than 21,000 students and a wide range of majors and academic pursuits. Athletically, OSU is a member of the Big 12 Conference and has won fifty (50) national titles in wrestling, golf, basketball, baseball, and cross country. *See Welcome to Oklahoma State Athletics*, OKSTATE.COM, http://www.okstate.com/trads/okst-trads.html (last visited Oct. 24, 2011).

97. Oliver Second Amended Complaint, *supra* note 91, ¶ 32.

98. *Id.* ¶ 34.

99. *Id.* ¶ 35.

100. *Id.* ¶ 36.

101. *Id.* ¶ 38.

the OSU compliance office, and his new "advisor."[102] On May 19, 2008, Oliver's former "advisors" drafted correspondence to the NCAA detailing their relationship with Oliver and describing his failure to pay for the advisory services.[103] Subsequently, the NCAA launched an investigation to determine whether Oliver had forfeited his amateur status.[104]

Towards the end of May 2008, the NCAA and OSU interviewed Oliver, his father, the former "advisors," and others and ultimately concluded Oliver would be suspended indefinitely from competition.[105] The suspension at issue took place immediately prior to OSU's competition in the NCAA Division I Regional Tournament.[106] Oliver claimed he was interviewed in "Gestapo-like fashion" from 8:30 p.m. until after midnight.[107] The NCAA claimed OSU acted alone in suspending Oliver from competition[108] and Oliver was informed by OSU the NCAA's investigation concluded that he violated NCAA Bylaws section 12.3.1[109] and section 12.3.2.1.[110]

As a result of the NCAA's conduct, Oliver sought, among other claims, a declaratory judgment finding that NCAA Bylaws section 12.3.2.1 is unenforceable and arbitrary and capricious.[111] Additionally,

102. Oliver Second Amended Complaint, *supra* note 91, ¶ 40.

103. *Id.* ¶ 52.

104. *Id.* ¶ 54.

105. *Id.*

106. *Id.* ¶¶ 54, 67.

107. Oliver Second Amended Complaint, *supra* note 91, ¶ 65.

108. *Id.* ¶¶ 67-68; *See* Liz Mullen, *OSU AD Says NCAA Had Role in Declaring P Andy Oliver Ineligible*, SPORTS BUS. DAILY (Aug. 26, 2008), http://www.sportsbusinessdaily.com/Daily/Issues/2008/08/Issue-235/Collegiate-Sports/OSU-AD-Says-NCAA-Had-Role-In-Declaring-P-Andy-Oliver-Ineligible (stating "the NCAA's public statement that Oklahoma State Univ. (OSU) acted alone in declaring P Andy Oliver ineligible were 'inaccurate,' and 'shifted all the blame' for the NCAA investigation from the NCAA to the university").

109. Oliver Second Amended Complaint, *supra* note 91, ¶ 69; NCAA Bylaws § 12.3.1 states:

> [a]n individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sports. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.

NCAA Bylaws § 12.3.1.

110. NCAA Bylaws § 12.3.2.1 states "[a] lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contract (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered reputation by an agent." *Id.*

111. Oliver Second Amended Complaint, *supra* note 91, ¶ 133.

Oliver sought a preliminary injunction to enjoin the enforcement of NCAA Bylaws section 12.3.2.1, to enjoin the continued investigation of Oliver, and to require the NCAA and OSU to vacate their indefinite suspension of Oliver's athletic eligibility.[112]

On January 12, 2009, the court convened a bench trial relating to Oliver's claims for declaratory judgment and injunctive relief.[113] Judge Tone had a skeptical view of the NCAA and granted the relief sought by Oliver.[114] The NCAA argued heavily that it did not have a contractual relationship with Oliver, but the court concluded Oliver was a third-party beneficiary of the NCAA's agreement with OSU and, therefore, Oliver conferred a benefit.[115] The court chastised the NCAA for its application of NCAA Bylaws section 12.3.2.1 by stating the mere presence of an attorney during negotiations, without saying a word, can strip a student-athlete of his eligibility.[116] The court further stated, "this rule [NCAA Bylaws section 12.3.2.1] is impossible to enforce and . . . allows for exploitation of the student-athlete 'by professional and commercial enterprises,' in contravention of the positive intentions of the [NCAA]."[117] In sum, the court concluded and entered a judgment holding NCAA Bylaws section 12.3.2.1 is arbitrary and capricious and against the public policy of the State of Ohio, as well as all states within this Union, and further limits the player's ability to effectively negotiate a contract and NCAA Bylaw 12.3.2.1 is void.[118] Subsequently, Oliver and the NCAA agreed to settle all matters at issue. The NCAA agreed to pay Oliver $750,000 and Oliver agreed to vacate the judgment and order entered by Judge Tone.[119] As a result of the vacation of the judgment and order, NCAA Bylaws section 12.3.2.1 remains in full force and effect.

C. Keller v. NCAA

In 2009, Sam Keller[120] ("Keller"), a former football student-

112. *Id*. ¶ 140.

113. Oliver v. Nat'l. Collegiate Athletic Ass'n., 155 Ohio Misc. 2d 17, 22 (2009).

114. *See id.* at 30.

115. *Id.*; *see also* Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 623-24 (Colo. App. 2004) (holding student-athletes are third-party beneficiaries to agreements between an institution and the NCAA).

116. *Oliver*, 155 Ohio Misc. 2d at 31-32.

117. *Id.*

118. *Id*. at 32.

119. Michael McCann, *Oliver v. NCAA Ends in Settlement*, SPORTS L. BLOG (Oct. 13, 2009), http://sports-law.blogspot.com/2009/10/oliver-v-ncaa-ends-in-settlement.html.

120. Sam Keller attended San Ramon Valley High School in Danville, California, where he was a letterman in football and basketball. *See Sam Keller Bio*, HUSKERS.COM,

athlete, filed a lawsuit against Electronic Arts[121] (EA), the NCAA, and the Collegiate Licensing Company[122] (CLC), alleging these defendants blatantly and unlawfully misappropriated his and other student-athletes' likenesses in videogames produced by EA.[123] Keller asserts that EA utilizes the likenesses of current and former student-athletes in NCAA basketball and football videogames to increase sales and profits.[124] Keller also argues that EA "intentionally circumvent[ed]" NCAA rules and regulations prohibiting the use of student-athletes' names in commercial endeavors by allowing game players to upload team rosters from a third party through the "EA Locker" feature, which applies the student-athletes' names to their corresponding team within a "matter of seconds."[125]

EA produces videogames under the names *NCAA Football* and

http://www.huskers.com/ViewArticle.dbml?SPSID=4&SPID=22&DBOEM_ID=100&ATCLID=866801&Q_SEASON=2007 (last visited Oct. 16, 2009). In high school, Keller was a three-year starter at quarterback and was named the ninth best quarterback prospect in the nation by Rivals.com during his senior year. *Id.* In 2003, Keller matriculated at Arizona State University, but ultimately transferred to the University of Nebraska in 2006. *Id.*

121. EA was founded in 1982, and currently produces twenty-seven videogame titles that have sold more than one million copies. *See About Us*, ELECTRONIC ARTS, http://aboutus.ea.com/home.action (last visited Oct. 16, 2009). In 1993, EA began to distribute videogames based on sports under the name EA Sports. *See EA Sports—A Gridiron Experience*, FANTASY INTERACTIVE, http://www.f-i.com/work/ea-sports/ea-sports-teambuilder (last visited Oct. 6, 2011). The EA Sports brand has been very successful in the production of several sports-based videogames, including the *Madden NFL* series, the *NCAA Football* series, the *NCAA Basketball* series, the *FIFA* series, and many others. *See About Us*, ELECTRONIC ARTS (Oct. 22, 2009), http://aboutus.ea.com/companylabels.action. As a result of EA's success as the videogame innovative leader, EA boasted an annual revenue of approximately $4 billion for the fiscal year ending March 31, 2009. *See* Press Release, Electronic Arts, Inc., EA Reports Fourth Quarter and Fiscal Year 2009 Results (May 5, 2009), *available at* http://investors.ea.com/releasedetail.cfm?ReleaseID=381903.

122. The CLC is the nation's leading collegiate trademark licensing and marketing company that provides assistance in protecting, managing, and developing the brands of nearly 200 universities, colleges, athletic conferences, bowl games, the NCAA, and the Heisman Trophy, among others. *About CLC*, THE COLLEGIATE LICENSING COMPANY, http://www.clc.com/clcweb/publishing.nsf/Content/aboutclc.html (last visited Oct. 16, 2009).

123. *See* Class Action Complaint ¶ 1, Keller v. Elec. Arts, Inc., No. CV-09-1967 (N.D. Cal. May 5, 2009) [hereinafter Keller Class Action Complaint]; *see also*, *Athletes Challenge NCAA's Use of Likenesses in Video Games*, SPORTS BUS. DAILY (July 6, 2009), http://www.sportsbusinessdaily.com/article/131499 (stating that former Rutgers University quarterback Ryan Hart filed a similar lawsuit against EA in a New Jersey court). In addition, Hall of Fame running back Jim Brown has also filed suit against EA asserting that his likeness was inappropriately used by EA in the Madden series. *See Jim Brown Doesn't Want Anyone to Play Madden '09*, SPORTS BUS. DIG. (Aug. 5, 2008), http://sportsbusinessdigest.com/jim-brown-doesnt-want-anyone-to-play-madden-09.

124. Keller Class Action Complaint, *supra* note 123, ¶ 1.

125. *Id.*

NCAA Basketball. These games depict virtual basketball and football games between NCAA member institutions that feature student-athletes in the correct uniform, jersey number, skill set, and size.[126] EA also replicates university logos, marks, mascots, and stadiums.[127]

Keller provides several examples of virtual student-athletes that mirror the traits of specific student-athletes and indicated that these virtual student-athletes have the same jersey number, home state, height, weight, build, skin tone, hair color, and hairstyle as the corresponding real-life student-athlete.[128] Specifically, Keller points to, among others, Eugene Jarvis,[129] a running back on the Kent State University[130] football team, and Roy Hibbert,[131] a center on the Georgetown University[132] basketball team.[133] The examples cited by

126. *Id*. ¶¶ 4, 11.

127. *Id*. ¶ 11.

128. *Id*. ¶ 17.

129. Eugene Jarvis stands 5'5" tall and weighs 170 pounds, as accurately depicted in EA's *NCAA Football 09*. *See Eugene Jarvis Biography*, KENT ST. SPORTS.COM, http://www.kentstatesports.com/sports/fball/2010-11/bios/jarvis_eugene (last visited Oct. 22, 2009). Despite his size, Jarvis has obtained substantial success on the gridiron and broke Kent State University's rushing records as a sophomore when he rushed for 1,669 yards in 2007. *Id.*

130. The founding of Kent State University was a gradual progression encompassing several years. *See Frequently Asked Questions*, KENT ST. U. SPECIAL COLLECTIONS & ARCHIVES, http://www.library.kent.edu/page/15954#KSUHist (last visited on Oct. 22, 2009). On May 19, 1910, Kent State University became the home of a normal school that was devoted to training elementary school teachers and classes began at Kent State Normal School in 1913. *Id.* In 1935, the university's name was officially changed to Kent State University. *Id.* Today, Kent State University boasts 41,000 students and competes athletically in the Mid-American Conference. *Kent State Reports Highest Ever Enrollment*, KENT STATE UNIV , http://www.kent.edu/news/announcements/success/fallenrollment.cfm (last visited Oct. 6, 2011); *see also*, THE MID-AMERICAN CONF., http://admin.xosn.com/fls/9400/08FBGuide/MAC_History_outl.pdf (last visited Oct. 22, 2009).

131. Roy Hibbert stands 7'2" tall and weighs 275 pounds, as accurately depicted in EA's *NCAA March Madness 08*. *See Roy Hibbert*, MEN'S BASKETBALL, http://guhoyas.cstv.com/sports/m-baskbl/mtt/hibbert_roy00.html (last visited Oct. 22, 2009). As a senior, Hibbert earned All-American honors and was named First Team All-Big East Conference. *Id.* In 2008, Hibbert was selected by the Toronto Raptors as the seventeenth pick of the 2008 NBA Draft, but was traded shortly thereafter to the Indiana Pacers. *See Roy Hibbert*, YAHOO! SPORTS, http://sports.yahoo.com/nba/players/4479;_ylt=ApK2HHvadQnS83CB9VyYGyPcPaB4 (last visited Oct. 25, 2011).

132. Georgetown University was founded in 1789 and is the nation's oldest Catholic and Jesuit University. *About*, GEO. U., http://www. georgetown.edu/about.html (last visited Oct. 22, 2009). Today, Georgetown University has grown into a major international research institution. *Id.* Georgetown, which competes athletically in the Big East Conference, is known for its basketball program and won its first NCAA National Championship in 1984 when it was led by future NBA hall-of-famer Patrick Ewing. *College Basketball's 10 Greatest Teams*, SPORTINGNEWS, http://aol.sportingnews.com/125/college-basketballs-10-greatest-teams/gallery/9/1984-

Keller clearly show both lesser-known student-athletes and prominent student-athletes are accurately depicted in the EA videogames.

Despite creating nearly identical virtual student-athletes, neither EA, nor the NCAA, nor the CLC compensate the student-athletes for the use of their likenesses in *NCAA Football* and *NCAA Basketball*. Keller asserted EA, the NCAA, and the CLC have conspired to permit the use of student-athletes' names and likenesses in EA videogames for monetary gain without compensating the individual student-athletes.[134] Keller filed a class-action lawsuit seeking certification of a class of "[a]ll NCAA football and basketball players listed on the official opening-day roster of a school whose team was included in any interactive software produced by Electronic Arts, and whose assigned jersey number appears on a virtual player in the software."[135] As a result of the aforementioned conduct, Keller has set forth multiple causes of action including: 1) common-law right of publicity, 2) statutory violations under California and Indiana right-of-publicity law, 3) civil conspiracy, 4) breach of contract, 5) unjust enrichment, and 6) unfair trade practices.[136]

D. O'Bannon v. NCAA

In 2009, Ed O'Bannon ("O'Bannon"), a former University of California, Los Angeles[137] (UCLA) student-athlete and National Basketball Association (NBA) player,[138] filed a class action complaint

georgetown-hoyas (last visited Oct. 1, 2011).

133. *See* Keller Class Action Complaint, *supra* note 123, ¶¶ 18, 23.

134. *Id.* ¶¶ 67-68.

135. *Id.* ¶ 58. Keller excluded from the class

> Defendants, their employees, co-conspirators, officers, directors, legal representatives, heirs, successors and wholly or partly owned subsidiaries or affiliated companies, class counsel and their employees, and the judicial officers, and associated court staff assigned to this case. Also excluded from the class are the limited number of players whose assigned jersey number appears in the game, but the virtual players' height is not within one inch of the player's roster height and the virtual player's weight is not within 10% of the player's roster weight.

Id. ¶ 59.

136. *Id.* ¶¶ 66-91.

137. UCLA was founded in 1919 and has grown into one of the top research institutions in the world. Currently, UCLA has an enrollment of 40,000 students and participates athletically in the Pacific 10 Conference (soon to be known as the Pacific 12 Conference). *About UCLA*, UCLA, http://www.ucla.edu/about.html (last visited Apr. 15, 2011).

138. Ed O'Bannon played college basketball at UCLA and led the Bruins to the 1995 National Championship. During the 1994-1995 season, O'Bannon was a first-team All-American and received numerous accolades including Most Outstanding Player of the NCAA Tournament and the Wooden Award. *Ed O'Bannon*, SR/COLLEGE BASKETBALL,

in the U.S. District Court for the Northern District of California seeking unspecified monetary damages for the NCAA's use and license of former student-athletes' images and likenesses by multiple commercial enterprises.[139] O'Bannon complains the NCAA allows his and other student-athletes' images, names, likenesses, and other identifiable characteristics to be used to sell DVDs of championship seasons, classic competitions featured on television, action figurines, memorabilia, and videogames.[140] O'Bannon argues the NCAA receives substantial compensation from these commercial ventures, but bars student-athletes who have exhausted their eligibility from receiving compensation relating to the use of their images, names, likenesses, and other identifiable characteristics.[141]

O'Bannon has set forth a class action lawsuit with a class of plaintiffs, which includes former NCAA student-athletes competing in Major College Football and Major College Basketball whose images and likenesses have been commercially licensed by the NCAA and specifically its official licensing representative, CLC.[142] O'Bannon takes umbrage with the Student-Athlete Statement, a form completed by all Division I student-athletes prior to participation in intercollegiate athletics, which states "[you authorize the NCAA . . . to use your] name or picture to generally promote NCAA championships or other NCAA events, activities or programs."[143] By executing the Student-Athlete Statement, O'Bannon argues the NCAA exploits young student-athletes, who do not have counsel, by requiring the student-athlete to relinquish all of his future rights to his name, image, likeness, and other identifiable characteristics in perpetuity.[144] Further, O'Bannon argues

http://www.sports-reference.com/cbb/players/o/obanned01.html (last visited Apr. 12, 2011). Following his senior season at UCLA, O'Bannon was drafted by the New Jersey Nets with the ninth overall pick of 1995 NBA Draft. O'Bannon went on to play two seasons in the NBA and several others overseas, *Ed O'Bannon*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/o/obanned01.html (last visited Apr. 12, 2011).

139. Class Action Complaint ¶¶ 1-2, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. CV-09-3329 (N.D. Cal July 21, 2009), 2009 WL 2416720 [hereinafter O'Bannon Class Action Complaint].

140. *Id.* ¶ 8.

141. *Id.* ¶¶ 6-7. Licensed NCAA products are a part of a $4 billion collegiate licensing industry. Michael Rietmulder, *Lawsuit Threatens Big Business of Collegiate Licensing*, MINN. DAILY, http://www.mndaily.com/2010/02/25/lawsuit-threatens-big-business-collegiate-licensing (last visited Apr. 15, 2011).

142. O'Bannon Class Action Complaint, *supra* note 139, ¶ 1, 5.

143. *Id.* ¶ 11; NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA Form 10-3a, Student-Athlete Statement—Division I, Part IV: Promotion of NCAA Championships, Events, Activities or Programs (2010), http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Form%2011-3a.pdf.

144. O'Bannon Class Action Complaint, *supra* note 139, ¶¶ 9, 11.

student-athletes are left without a choice and must execute the Student-Athlete Statement or risk their scholarships and opportunity to compete.[145] Historically, the NCAA has articulated the ideals of amateurism to protect student-athletes from using their images and likenesses for monetary gain; however, O'Bannon argues such an argument is without merit when applied to former student-athletes like O'Bannon, who exhausted his eligibility sixteen years ago.[146]

O'Bannon's case is based in two areas of the law and he argues: 1) the NCAA has unlawfully restrained trade in violation of Section 1 of the Sherman Act,[147] and 2) the NCAA has violated the former student-athletes' right of publicity[148] by failing to compensate the former student-athletes for the use of their names, images, likenesses, and other identifiable characteristics.[149] If successful on his claims, O'Bannon requests that a constructive trust be established for any resulting damages or compensation.[150] The trust would be available to current student-athletes upon exhaustion of their intercollegiate athletic

145. *Id.* ¶¶ 10, 83.

146. *Id.* ¶¶ 16-17, 25.

147. 15 U.S.C. § 1 (2006). The Sherman Act was enacted in an era where trusts and combinations of businesses controlled the market by suppressing competition for goods and services. These agreements created monopolistic concerns and threatened to deteriorate the market. The Sherman Act intended to prevent restraints on competition in business and commercial transactions that restricted production, raised prices, or controlled the market to the detriment of consumers. Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940).

148. The right of publicity has grown out of the commercial reality of the burgeoning "associative value" that celebrities impose upon products and services and has been recognized to protect a celebrity's nickname, likeness, portrait, performance, biographical facts, statistics, and symbolic representations from unwanted commercial misappropriation. *See* Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 856-59 (1995); *see also* J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 133-34 (1995). The right of publicity, as determined by the Second Circuit in *Haelan Laboratory, Inc. v. Topps Chewing Gum, Inc.*, gives a celebrity the right to damages and other relief for the unauthorized commercial appropriation of that celebrity's identity independent of a common law or statutory right of privacy. 202 F.2d 866 (2d 1953). Section 46 of the *Restatement (Third) of Unfair Competition* states, "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . . ." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). Section 47 of the *Restatement (Third) of Unfair Competition* states, however, that "[the] use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses." *Id.* § 47.

149. O'Bannon Class Action Complaint, *supra* note 139, at ¶ 15.

150. *Id.* ¶ 19.

eligibility.[151]

In January 2011, legendary basketball star Oscar Robertson[152] ("Robertson") joined O'Bannon and a class of others in their fight against the NCAA.[153] Robertson is a member of the College Basketball Hall of Fame and the NBA Hall of Fame and is uniformly considered a class act and a strong member of the community.[154] Robertson was a member of the University of Cincinnati's basketball team concluding in 1960 and, at seventy-two years old, is far removed from his days running on the hardwood.[155] Robertson states his "collegiate image continues to be licensed without his consent . . . and sold for profit" without his approval, which is contrary to Robertson's arrangements relating to the use of his image as a professional athlete.[156] Robertson's addition to the case adds credence to the plaintiffs' position. Indeed, Robertson is no stranger to protracted litigation. He was the head of the National Basketball Player's Association and the lead plaintiff in the NBA players' fight for free agency.[157]

E. Agnew v. NCAA

In summer 2010, the United States Justice Department announced that it is investigating the NCAA to determine whether the NCAA's prohibition on multi-year scholarships is a violation of antitrust laws.[158] Shortly thereafter, Joseph Agnew[159] ("Agnew") filed suit against the

151. *Id.*; *see also* Katie Thomas, *College Stars See Themselves on Video Games, and Pause to Sue*, N.Y. TIMES, July 4, 2009, at A1.

152. Oscar Robertson is one of the most decorated athletes to ever grace the hardwood. Robertson competed as a collegian at the University of Cincinnati and went on to play fourteen seasons in the NBA for the Cincinnati Royals and Milwaukee Bucks. *Oscar Robertson Info Page*, NBA, http://www.nba.com/historical/playerfile/index.html?player=oscar_robertson (last visited Oct.. 25, 2011). Statically, Robertson was second to none. During his professional career, Robertson scored 26,710 points and averaged a triple-double during the 1961-1962 season. *Id.* Robertson was named first team All NBA nine times, a twelve time All-Star, a 1960 gold medalist, and enshrined in the Naismith Memorial Basketball Hall of Fame in 1980. *Id.*

153. Class Action Complaint ¶ 1, Robertson v. Nat'l Collegiate Athletic Ass'n, No. CV-11-00388 (N.D. Cal. Jan. 26, 2011).

154. *Id.* ¶ 37.

155. *Id.* ¶ 34.

156. *Id.* ¶ 7.

157. Robertson v. Nat'l Basketball Ass'n, 556 F.2d 682 (2d Cir. 1977).

158. *See* Marlen Garcia, *Federal government investigates NCAA scholarship* rules, USA TODAY, Apr. 7, 2011, *available at* http://www.usatoday.com/sports/college/2010-05-06-notes-scholarships-hayward_N.htm.

159. Joseph Agnew was a two-sport athlete at Rice University. He competed as a defensive back on the football team and participated as a decathlete and javelin thrower on the track team. *See Jospeh Agnew Bio*, RICE U. ATHLETICS OFFICIAL WEB SITE,

NCAA under section 1 of the Sherman Act alleging NCAA scholarship practices violate antitrust laws in the following ways: 1) the prohibition on multi-year athletics-based scholarships[160] (Plaintiff's petition calls scholarships discounts),[161] and 2) caps on the athletics-based scholarships[162] that can be awarded by member institutions.[163] According to Plaintiff's petition, Agnew was a heavily recruited football student-athlete from Southlake Carroll High School[164] in Southlake, Texas.[165] He garnered both athletic and academic success and received all-state honors following his senior season.[166] Agnew was recruited by eight Division I institutions and ultimately selected Rice University.[167] In 2006, Mr. Agnew matriculated at Rice University and played in all thirteen games as a true freshman.[168] During his sophomore season, his playing time was significantly reduced following a coaching change.[169] Problems continued for Agnew thereafter when he was required to have ankle and shoulder surgery and also experienced severe migraine headaches.[170] Prior to Agnew's junior season, he was informed he would no longer be associated with the Rice University[171] football team and his scholarship would not be renewed.[172] Accordingly, Agnew filed an appeal of the non-renewal of his scholarship and ultimately was awarded a

http://www.riceowls.com/sports/m-footbl/mtt/agnew_joseph00.html (last visited Sept. 23, 2011).

160. NCAA Bylaws § 15.3.3.1.

161. Class Action Complaint ¶ 1, Agnew v. Nat'l Collegiate Athletic Ass'n, CV-10-04804 (N.D. Cal. Oct. 25, 2010) [hereinafter Agnew Class Action Complaint].

162. NCAA Bylaws § 15.5.

163. Agnew Class Action Complaint, *supra* note 161, ¶ 1.

164. Southlake Carroll High School is a Texas football powerhouse and is widely acclaimed as one of the top prep football programs in the United States. Southlake Carroll High School has won seven high school football state championships in forty-four years of competition including four championships since moving to 5A (the highest classification in Texas). *2011 Preseason Top 25: #12 Southlake Carroll Dragons*, 5ATEXASFOOTBALL.COM (May 30, 2011), http://www.5atexasfootball.com/2011/05/2011-preseason-top-25-southlake-carroll-dragons/.

165. Agnew Class Action Complaint, *supra* note 161, ¶ 5.

166. *Id.*

167. *Id.*

168. *Id.* ¶ 42.

169. *Id.* ¶ 43.

170. Agnew Class Action Complaint, *supra* note 161, ¶ 44.

171. Rice University is a private research institution located in Houston, Texas. It has an enrollment of approximately 6,000 students and competes athletically in Conference USA. *About Rice*, RICE U., http://professor.rice.edu/professor/Rice_University.asp (last visited Apr. 15, 2011); *Varsity Athletics*, RICE U. OFFICIAL WEB SITE, http://professor.rice.edu/professor/Varsity_Sports (last visited Apr. 15, 2011).

172. Agnew Class Action Complaint, *supra* note 161, ¶ 45.

scholarship for his junior year of college.[173] However, he was not awarded a scholarship for his senior year and, therefore, was required to pay for the cost of tuition and other fees associated with attending Rice University.[174]

Agnew has filed a class action suit seeking to set forth a class as follows: "Any individual who, while enrolled in an NCAA member institution, (i) received an athletics-based Grant-In-Aid (GIA) from an NCAA member institution for at least one year, (ii) had their GIA reduced or not renewed and (iii) subsequently paid tuition at a college, university or other institution of higher education."[175] Agnew and the class argue the above-referenced restrictions placed on athletics-based scholarships constitute a blatant price-fixing agreement between the member institutions of the NCAA (i.e., horizontal price-fixing).[176] Additionally, Agnew claims these restrictions are not necessary to protect the amateur status of the NCAA, but are a disguised plan to reduce costs and to deter competition.[177] But for such practice, Agnew argues the NCAA would be forced to offer multi-year athletics-based scholarships to student-athletes and would be forced to dramatically increase the overall supply of scholarships.[178]

Agnew asserts the relevant market in this antitrust litigation is former student-athletes with a bachelor's degree from accredited colleges and/or universities in the United States.[179] Such a market, according to Agnew, does not have a reasonable substitute because a vast majority of salaried positions in the United States require the applicant to possess a bachelor's degree from an accredited college or university.[180] Agnew further claims that regulations pertaining to scholarships place student-athletes who are injured at a disadvantage and can easily be set aside because they are no longer able to compete.[181]

III. THE FUTURE OF THE NCAA AND INTERCOLLEGIATE ATHLETICS: MODIFIED AMATEURISM

Come gather 'round people wherever you roam and admit that the

173. *Id.*
174. *Id.*
175. *Id.* ¶ 54.
176. *Id.* ¶¶ 63-68.
177. Agnew Class Action Complaint, *supra* note 161, ¶¶ 32-34.
178. *Id.* ¶ 2.
179. *Id.* ¶ 15.
180. *Id.*
181. *Id.* ¶ 3.

> waters around you have grown and accept it that soon you'll be drenched to the bone. If your time to you is worth savin' then you better start swimmin' or you'll sink like a stone for the times they are a-changin'.[182]
>
> —Bob Dylan[183]

The desire to win at virtually any cost, combined with the increases in public interest in intercollegiate athletics, in a consumer sense, has led inexorably to a highly commercialized world of intercollegiate athletics.[184] Yet, student-athletes are not compensated, often times cannot afford to take a girlfriend on a date, and are unable to seek and receive compensation for their images and likenesses from external sources.[185] There is no shortage of critics that bemoan many of the NCAA's archaic practices and arguments in favor of the rainbows of amateurism.[186] In fact, Michael Lewis, the author of *The Blind Side: Evolution of a Game*, joined the debate in 2007 when he drafted an opinion column for the New York Times and stated:

> Everyone associated with [intercollegiate athletics] is getting rich except the people whose labor creates the value. At this moment there are thousands of big-time college football players, many of whom are black and poor. They perform for the intense pleasure of millions of rabid college football fans, many of whom are rich and white . . . . The poor black kids put up with it because they find it all but impossible to pursue N.F.L. careers unless they play at least three years in college. Less than one percent actually sign professional football contracts and, of those, an infinitesimal fraction ever make serious money. But their hope is eternal, and there ignorance exploitable. Put that way the arrangement sounds like simple theft;

182. BOB DYLAN, *The Times They Are a Changin'*, *on* THE TIMES THEY ARE A CHANGIN' (Columbia Records 1964).

183. Bob Dylan, born Robert Allen Zimmerman, is an American singer-songwriter who has been a mainstay in the music business for five decades. Dylan has received critical acclaim for his work and has been awarded a plethora of awards including Grammy, Golden Globe, and Academy Awards. *Bob Dylan*, ROLLING STONE, http://www.rollingstone.com/music/artists/bob-dylan/biography (last visited Oct. 6, 2011).

184. *See* Smith, *supra* note 2, at 991.

185. Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 668 (1995); Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 215-16 n.86 (1996).

186. Rick Reilly, *Corrupting Our Utes*, SPORTS ILLUSTRATED, Aug. 11, 2003, at 154; *see also* Thomas, *supra* note 151; Monte Poole, *Big-Time College Athletics are Sordid Zoo Run by Inmates*, SAN JOSE MERCURY NEWS, Apr. 2, 2011, *available at* http://www.mercurynews.com/news/ci_17661052?source=rss; Joe Nocera, *N.C.A.A.'s Double Standard*, N.Y. TIMES, Apr. 8, 2011, at A21.

> but up close, inside the university, it apparently feels like high principle.[187]

Indeed, several athletics administrators and coaches, without the zeal professed by Mr. Lewis, have called for student-athletes to have the opportunity to receive more funds. For example, University of North Carolina men's basketball coach, Roy Williams, has questioned why student-athletes cannot receive financial aid packages that rival the top academic packages on campus, and Ohio State University athletics director, Gene Smith, has called for an additional stipend of some kind for student-athletes.[188] Additionally, former shoe company executive, Sonny Vaccaro, has made it his personal mission to rid intercollegiate athletics of exploitation and has stated "young kids [are] misused in the system of the NCAA."[189]

As with any organization with power as vast and superior as the NCAA, change is slow and does not come without a push. For years, administrators and even former NCAA President, Myles Brand, have championed and recommended an increase in grant-in-aid packages to the actual cost of attendance, but there has not been a substantial reform.[190] As such, litigation is likely the only force that will create the change envisioned by the antagonists who criticize the NCAA's practices and policies. After years of substantial success in the courtroom, the NCAA is faced with the most critical litigation it has

187. Michael Lewis, *Serfs of the Turf*, N.Y. TIMES, November 11, 2007, at 4, *available at* http://www.nytimes.com/2007/11/11/opinion/11lewis.html.

188. Weiberg, *supra* note 18. Also, former longtime Florida State University football coach, Bobby Bowden, has candidly conceded that "[t]he boys go out and earn millions for their university [and] [e]veryone benefits except the players." Orion Riggs, Note, *The Façade of Amateurism: The Inequities of Major College Athletics*, 5 KAN. J.L. & PUB. POL'Y 137, 142 (1996).

189. Lewis Rice, *At HLS symposium, the "godfather of grassroots basketball" decries exploitation of college athletes* (Apr. 7, 2011), http://www.law.harvard.edu/news/spotlight/student-pursuits/sonn-vacarro-sports-law-symposium.html. Mr. Vacarro has advocated extensively on behalf of student-athletes and has indicated that third-party commercial entities have to pay endorsement fees to institutions due to NCAA rules, but they really want the student-athletes. Telephone Interview with Sonny Vacarro (Apr. 13, 2011).

190. Memorandum from Jim Delany, Commissioner of the Big Ten Conference, to the Council of Presidents/Chancellors 2 (June 3, 2001) (on file with author) (stating Commissioner Delany is "committed to closing the gap between the cost of grants-in-aid and the full cost of attendance"); Mark Alesia, *Lawsuit: NCAA should pay 'full cost'; 3 former athletes want to remove scholarship limits; Brand Supports Idea*, INDIANAPOLIS STAR, Feb. 22, 2006, at D1 (quoting the late Dr. Myles Brand as saying "[i]t seems to me, it makes life a little easier for our student-athletes. If it's not need-based, it still strikes me as a reasonable approach to provide the full cost for student-athletes, who, in Division I, work very hard in their sports.").

experienced. Presently before the courts is litigation that may require the NCAA to pay royalties to student-athletes and remove the restrictions placed on multi-year scholarships. In isolation, the litigation that has occurred over the last five years does not seem to depress the NCAA's omnipotence. However, coupling recent victories and the potential for large future victories may be just short of catastrophic for the NCAA.

Looking into a crystal ball and predicting the future of pending litigation requires taking a step back to 2006. In 2006, the *White* class filed litigation that frontally attacked the NCAA's revered notion of amateurism. Historically, student-athletes have been wholly unsuccessful in challenging the NCAA related to its internal governance (i.e., rules relating to the function of intercollegiate athletics—amateurism, eligibility, and financial aid). The *White* class, however, was able to strike fear in the eyes of the NCAA due to the possibility of enormous damages trebled in accordance with antitrust laws. Ultimately, the *White* litigation resulted in a $228 million settlement in favor of the aggrieved student-athletes. This type of settlement and the rules at issue, internal rules rather than an external relationship (i.e., football television agreement), triggered the interest of great legal minds and law firms of some of the top litigators in the country. Now, student-athletes are taking umbrage with NCAA rules and top litigators are interested in the financial fruits of pursuing actions against the NCAA. The *White* settlement is the catalyst that led to litigation currently pending in the courts.

Shortly thereafter, Andy Oliver frontally attacked one of the NCAA's most coveted components of amateurism, the no agent rule.[191] Oliver challenged the NCAA by placing the no agent rule in a light only a group of lawyers and judges could adequately appreciate. The question posed was: why is it impermissible for a lawyer to be present during negotiations relating to his/her client? Lawyers do not like to be told they cannot be in a room while negotiations relating to their client's interests are occurring. The best part about filing such a lawsuit is that the judge was once a lawyer and will have a similar opinion. Again, the NCAA was forced to defend against a creative challenge from a student-athlete relating to internal rules. Oliver's success was a signal to other student-athletes that the NCAA is not unbeatable. In fact, Oliver was able to have the no agent rule, NCAA Bylaws section

191. Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1090 n.13 (7th Cir. 1992); *see also*, Paul B. McCarthy & Michael Kettle, Comment, *An End Run Around the Sherman Act? Banks v. NCAA and Gaines v. NCAA*, 19 J.C. & U.L. 295, 297 (1993).

12.3.2.1, declared void.[192] Although a later settlement vacated Judge Tone's ruling, attorneys and judges around the country took an interest in the litigation and made note of the ruling.[193]

The NCAA's primary legal justification for nearly all of its rules and regulations relate to the principles of amateurism. In fact, the principles of amateurism have provided the NCAA with a distinct legal advantage. However, commentators have argued that courts have consistently failed to acknowledge "the ideal of amateurism" and the reality of the commercialization of intercollegiate athletics.[194] For many student-athletes competing in Major College Football and Major College Basketball, academics and amateurism are mere illusions. These student-athletes practice or compete nearly each night of the week. In efforts to consume sizeable revenue for colleges and universities, these student-athletes must travel all across the country at the expense of their education. In addition, their images and likenesses are plastered on a multitude of commercial products.[195] The NCAA routinely argues its rules and regulations enhance the purity of intercollegiate athletics; however, such an argument simply fails to acknowledge the changing realities of the commercialization of intercollegiate athletics and the product put forth by the NCAA and member institutions.

Courts are beginning to realize and appreciate the vast commercialization of intercollegiate athletics and appear to be reluctant to simply abide by the NCAA's historical arguments relating to amateurism. *White* and *Oliver* provided courts with a rationale that exposes many of the NCAA's arguments as watered-down social

192. Oliver v. Nat'l Collegiate Athletic Ass'n, 155 Ohio Misc. 2d 17, 32 (Ohio Misc. 2009).

193. Michael McCann, Oliver v. NCAA *Ends in Settlement*, SPORTS L. BLOG (Oct. 13, 2009), http://sports-law.blogspot.com/2009/10/oliver-v-ncaa-ends-in-settlement.html.

194. Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1304 (1992); *see also* Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17, 38-39 (2010); J. Trevor Johnston, *Show Them the Money: The Threat of NCAA Athlete Unionization in Response to the Commercialization of College Sports*, 13 SETON HALL J. SPORTS L. 203, 237 (2003); *see generally* Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008).

195. The NCAA noted a problem with the use of student-athletes images and likenesses and the sale of commercial products and enacted legislation that prevents the sale of a single student-athletes image or likeness. NCAA Bylaws § 12.5.1.1(h) (stating "[i]tems that include an individual student-athlete's name, picture, or likeness (e.g., name on jersey, name or likeness on a bobble-head doll), other than informational items (e.g., media guide, schedule cards, institutional publications) may not be sold.").

justifications. Precedent indicates the social justifications for advancing the principles of amateurism are nothing more than elusive ideals. These social values should only be considered if the NCAA can show amateurism serves to "regulate and promote competition."[196]

The cases currently pending present an immense dilemma for the NCAA. If the NCAA summarily settles the litigation, it will likely have to pay substantial settlements and will encourage more litigation. If the NCAA cannot or chooses not to settle the pending litigation, then it will be forced to expose its justification of amateurism to additional review by courts that have recently failed to see the amateur nature of heavily commercialized intercollegiate athletics. In turn, the NCAA's notion of amateurism appears to be eroding at its very core and subject to challenge in a variety of legal arenas. As a result, the NCAA is left with the challenge of protecting the core of amateurism, i.e., pay for play and employment status for student-athletes. If the NCAA fails to protect these areas, the current form of the NCAA will change substantially. The remainder of this article will discuss the traditional forms of amateurism and describe the future of amateurism and student-athlete rights.

A. Pay for Play

"Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[197] Indeed, the NCAA's new president, Mark Emmert, has recently stated "[i]t's grossly unacceptable and inappropriate to pay players . . . converting them from students to employees."[198] Of course, pay for play is the top priority for the NCAA and maintaining the current "payment" structure, i.e., grant-in-aid for play.

196. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1021-22 (10th Cir. 1998) (holding the alleged social value of opening up coaching positions for younger people does not impact competition); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) (holding boycotting court-appointed trial work was not a justification to increase the quality of representation); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462-63 (1986) (holding an ethical policy to insure proper dental care is not a procompetitive justification); Nat'l Soc'y of Prof'l Eng. v. United States, 435 U.S. 679, 695-96 (1978) (holding policy goals of protecting public safety and promoting ethical conduct do not qualify as procompetitive justifications unless they serve to "regulate and promote" competition).

197. NCAA Bylaws § 2.9.

198. *See* Weiberg, *supra* note 18, at 18.

Historically, the NCAA has been successful in preventing pay for play arguments. In *Board of Regents*, the United States Supreme Court stated, "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and the NCAA "needs ample latitude to play that role."[199] Thus, "most of the regulatory controls of the NCAA are [a] justifiable means of fostering competition among [the] amateur athletic teams and therefore . . . enhance public interest in intercollegiate athletics."[200]

Following the *Board of Regents* dictum, courts have applied the principles of amateurism as a procompetitive justification in antitrust actions and courts have summarily concluded the principles of amateurism outweigh any purported harm for instituting a prohibition on compensation in excess of grant-in-aid packages. Indeed, in *McCormack* and *Jones*, the courts stated that the principles of amateurism play a vital role in enabling intercollegiate athletics to preserve its character as a unique product, and thus student-athletes may not be compensated.[201]

In these two cases, courts have specifically addressed compensation involving student-athletes. In *McCormack*, the plaintiff argued student-athletes should be able to receive compensation beyond the athletics-based financial aid permitted by NCAA legislation.[202] The student-athletes at Southern Methodist University (SMU) received various impermissible inducements and gifts including cars, cash payments, and entertainment in violation of NCAA recruiting[203] and awards and benefits[204] rules.[205] The court failed to appreciate an argument that student-athletes should be compensated.[206] Similarly, in *Jones*, a hockey student-athlete matriculated at Northeastern University and attempted to play for the university's intercollegiate team.[207] The student-athlete indicated he received compensation for playing hockey

199. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

200. *Id.* at 117.

201. McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1344 (5th Cir. 1988) (quoting *Bd. Of Regents*, 468 U.S. at 102); Jones v. Nat'l Collegiate Athletic Ass'n,, 392 F. Supp. 295, 302-03 (D. Mass. 1975).

202. *McCormack*, 845 F.2d at 1340.

203. NCAA Bylaws § 13.2.1.1.

204. *Id.* § 16.11.2.

205. *See* Press Release, Nat'l Collegiate Athletic Ass'n Comm. on Infractions, S. Methodist Univ. Infactions Report (Feb. 25, 1987); Press Release, Nat'l Collegiate Athletic Ass'n, S. Methodist Univ. Placed on NCAA Probation (Aug. 16, 1985).

206. *McCormack*, 845 F.2d at 1344 (quoting *Bd. of Regents*, 468 U.S. at 102).

207. Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 296 (D. Mass. 1975).

prior to initial full-time enrollment, which rendered him ineligible to compete on the university's intercollegiate team.[208] After review, the court concluded the NCAA amateurism provisions justifiably require that student-athletes not be compensated for athletic competition.[209] In these cases, the courts concluded that compensating student-athletes in excess of grant-in-aid packages and receiving compensation prior to full-time enrollment, respectively, ran afoul of NCAA legislation relating to amateurism and, therefore, concluded that NCAA rules pertaining student-athlete compensation are procompetitive.[210]

It appears to be unlikely that student-athletes will receive compensation from a member institution or the NCAA. Indeed, courts have drawn a line that separates compensation from member institutions and the possibility of seeking compensation from external sources, i.e., videogames, memorabilia, and jersey sales. Additionally, if student-athletes were compensated in excess of full grant-in-aid, other legal requirements would be triggered like tax filings and worker's compensation insurance.[211] It is unlikely a court will require a member institution to compensate student-athletes and would ultimately find the NCAA's form of "pay," i.e., grant-in-aid packages, would come as a permissible scholarship.

B. The Term "Student-Athlete" and Employee Status

The debate over employment status for student-athletes has been at issue for nearly sixty years. In fact, in 1953, the Colorado Supreme Court found a student-athlete injured during a football game was entitled to workers' compensation benefits for his injuries.[212] In the 1950s, at the urging of the first executive director of the NCAA, Walter Byers, the NCAA discussed the "Sanity Code," calling for need-based aid and conversion to the grant-in-aid system. In his seminal memoir, Mr. Byers explained, "[i]t was then that they came face to face with a serious, external threat that prompted most of the colleges to unite and insist with one voice that, grant-in-aid or not, college sports still were

208. *See Jones*, 392 F. Supp. at 302.

209. *Id.*

210. *McCormack*, 845 F.2d at 1344 (quoting *Bd. of Regents*, 468 U.S. at 102); *Jones*, 392 F. Supp. at 302-03.

211. *See* 26 U.S.C. § 117(a) (2006); *see also Withholding Federal Income Tax on Scholarships, Fellowships, and Grants Paid to Aliens*, IRS, http://www.irs.gov/businesses/small/international/article/0,,id=129249,00.html (last visited Apr. 9, 2010).

212. Univ. of Denver v. Nemeth, 257 P.2d 423, 430 (Colo. 1953).

only for 'amateurs.'"[213] Indeed, the "threat [from Nemeth] was the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts."[214] As a result, the NCAA crafted the term "student-athlete" and categorically changed the use of the term "player" or "athlete" to student-athlete in rule books, publications, and speeches.[215]

Following the adoption of the term "student-athlete," courts have consistently been reluctant to find that student-athletes are employees.[216] In *Waldrep v. Texas Employers Insurance Ass'n*, a former Texas Christian University[217] (TCU) student-athlete, Kent Waldrep,[218] filed suit to recover workers' compensation benefits as a result of a severe injury suffered in a college football game.[219] In October 1974, Waldrep was injured during a football contest against the University of Alabama and suffered a severe spinal cord injury that left him paralyzed from the neck down.[220] In 1993, Waldrep filed a claim seeking employee benefits from TCU relating to his injury.[221] At the conclusion of the trial, the jury found that Waldrep was not an employee of TCU and, therefore, he was not entitled to workers' compensation benefits.[222] Waldrep subsequently appealed the decision and the court applied the employee factors to determine whether an employee-employer relationship existed between Waldrep and TCU.[223] Ultimately, the court concluded TCU did not have a sufficient right to

213. WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES, 69 (1995).

214. *Id.*

215. *Id.*

216. State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 289 (Colo. 1957) (denying a student-athlete's beneficiaries' claims for death benefits under the Colorado Workmen's Compensation Act and holding that the evidence failed to establish that at the time of injury he was under a contract of hire to play football); Rensing v. Ind. State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1175 (Ind. 1983) (holding Rensing was a student-athlete and not as an employee within the meaning of the Workmen's Compensation Act).

217. TCU was established in 1873 and currently has an enrollment of over 9,000 students. Athletically, TCU currently competes in the Mountain West Conference, but will move to the Big East Conference for the 2011-12 academic year. *About TCU*, TEX. CHRISTIAN U., http://www.tcu.edu/at-a-glance.asp (last visited Sept. 13, 2011).

218. ALLEN SACK, COUNTERFEIT AMATEURS: AN ATHLETE'S JOURNEY THROUGH THE SIXTIES TO THE AGE OF ACADEMIC CAPITALISM 145-50 (2008).

219. 21 S.W.3d 692, 696 (Tex. App. 2000).

220. *Id.*

221. *Id.* at 696 n.7.

222. *Id.* at 697.

223. *Id.* at 700. The employee factors are "(1) the right to hire and discharge the workers, (2) the carrying of the worker on social security and income tax withholding records, (3) the providing of equipment, (4) the responsibility to pay wages, and (5) the right to control the specifics of a worker's performance." *Waldrep*, 21 S.W.3d at 700 n.13.

control Waldrep's work and, therefore, he was not an employee in the eyes of the law.[224]

In applying the employee-employer factors, a strong case can be made in favor of the student-athlete serving as an employee of an institution. Often times, student-athletes spend hours after practice, under the control and eyes of coaches, reviewing film, lifting weights, and glad-handing powerful alumni on caravan tours. In total, student-athletes often spend more than forty hours per week developing and cultivating their athletic skills. Of course, this is in addition to a full course load. However, courts, in recent years, have been reluctant to find that student-athletes are employees by stating they are simply students receiving scholarships and not recognizable employees under state laws. The NCAA has done a remarkable job at proffering a sense of amateurism that courts will buy and use as fodder to deny benefits to injured student-athletes.[225] Although student-athletes spend substantial time and effort under the scrutiny and control of coaches and performance staff, the NCAA has crafted a body of case law that provides a position that student-athletes will remain simply student-athletes and will not obtain employee status.[226]

In recent years, the NCAA has made additional benefits available to injured student-athletes in accordance with the NCAA Catastrophic Insurance Program whereby injured student-athletes receive benefits.[227] Additionally, member institutions provide insurance for injured student-athletes that pay for surgeries and rehabilitation for injuries that resulted from athletic competition.[228] The NCAA structure and benefits allotted to injured student-athletes have come a long way since Waldrep was injured in 1974. As a result of the changes made and present state of the law, it will be difficult for student-athletes to infiltrate the system and find employment status. Indeed, the NCAA will work industriously to lobby and fight to ensure student-athletes do not receive employee status.

224. *See id.* at 707. However, the court left an opening for future challenges by stating that the application of NCAA rules only pertains to the years in which Waldrep was a student-athlete and did not offer any conclusions on the current state of NCAA rules. *Id.*

225. *See* SACK, *supra* note 218, at 145-50.

226. Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 744-45 (2007) (suggesting that NCAA athletes are not "employees" under the primary purpose test).

227. Michelle Brutlag Hosick, *NCAA Catastrophic-Injury Insurance Program Extended*, NCAA NEWS, May 28, 2010.

228. Jay Weiner & Steve Berkowitz, *What players get: $120K a year*, USA TODAY, Mar. 30, 2011, at 1C.

IV. THE FUTURE OF NCAA REGULATION AND AMATEURISM

University leaders have long acknowledged that intercollegiate athletics, especially Major College Football and Major College Basketball, are heavily commercialized.[229] Commercialism is not in all things bad. Consumers will pick and choose how to spend their discretionary income and, often times, that income is spent on intercollegiate athletics contests, memorabilia, and apparel. What is not to like about March Madness, the BCS, and the College World Series?[230] These championship events provide high level competition displaying some of the future stars of professional sports. Of course, the debate does not end with the level of competition and the strength of viewership. In fact, that is where the debate begins. What is the student-athlete's role? Should student-athletes be compensated? Is high level intercollegiate athletics a minor league system that does not pay its laborers?

Over the course of the last several years, the NCAA has acknowledged that intercollegiate athletics is a commercial endeavor and student-athletes appear to be pawns in the game that leads to substantial revenue for all others involved.[231] Former NCAA president,

229. *See generally* JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE (The Univ. of Mich. Press 2000) (2003).

230. *See generally* RYAN MCGEE, THE ROAD TO OMAHA: HITS, HOPES, AND HISTORY AT THE COLLEGE WORLD SERIES (St. Martin's Griffin 2010).

231. The NCAA recently organized the Task Force on Commercial Activity to discuss the use of student-athletes' names, images, and likenesses in commercial endeavors. Although the taskforce set forth a plethora of recommendations, it stopped short of recommending that student-athletes' names, images, and likenesses should not be used in commerce. The Task Force recommended the following legislation:

a. Principle 1—Student-athlete's name or likeness cannot be used in a manner to portray the student-athlete as promoting or endorsing the sale or use of a commercial product or service in a manner that a reasonable person would consider exploitation of the student-athlete.
b. Principle 2—Use of a student-athlete's name or likeness (e.g. via game footage) that does not portray the student-athlete in a manner as promoting or endorsing the sale or use of a commercial product or service is permissible if the student-athlete has consented to such use, such use is approved by the institution's director of athletics and there is a clear, official and visibly referenced-association between the commercial entity and the institution, conference or NCAA (e.g. 'The ABC Company is an official corporate partner of X University and applauds the academic achievements of the institution's student-athletes'). If an institution or student-athlete learns of an improper use of the student-athlete's name or likeness, the member institution must issue a cease and desist notice to the entity.
c. Principle 3—Use of a student-athlete's name or likeness is permissible if it is part of the actual coverage, in any medium, of the student-athlete's competition; [(e.g., TV broadcast, Internet Web cast, mobile statistics and highlights)] or is a representation of

Myles Brand, acknowledged that student-athletes hold the rights to the use of their images and likenesses, but NCAA rules prohibit such use.[232] With the advancement of commercialization of intercollegiate athletics and the use of student-athletes' names, images, and likenesses in a wide array of products including videogames, DVDs, memorabilia, trading cards, and other products, the values and notions of amateurism that existed twenty-five years ago, as articulated in *Board of Regents*, have substantially changed. As a result, it is hard to fathom a cognizable argument that student-athletes participating in Major College Football and Major College Basketball are really student-athletes, rather than athlete-students.[233] Of course, student-athletes are provided the opportunity to obtain an education, but substantially more time and effort is spent chasing athletic glory than pursuing academic success.[234] Indeed, a student-athlete with a strong academic transcript can be released from his/her scholarship for failure to perform athletically at a

that actual competition (e.g., photo[s], footage), provided such use does not take the form of a fabricated product.

d. Principle 4—Student-athlete may not be paid in any form [(see Bylaw 12.02.2)] for use of his or her name, likeness or athletics reputation.

e. Principle 5—Commercial Activities Oversight Committee shall be established and empowered to:
(1) Make binding determinations for questions regarding uses of student-athlete's names and likenesses that while not prohibited under NCAA amateurism rules should nonetheless be prohibited as exploitation; and
(2) Monitor and review annually the advertising/marketing/sponsorship and other commercial trends[,] practices and policies.

f. Principle 6—All institutions, conferences, and the [NCAA] National Office shall include specific contractual language in all licensing, marketing/sponsorship, advertising, broadcast, and other commercial agreements that would outline the entity's obligation to comply with NCAA bylaws, policies and interpretations, particularly those relating to use of student-athlete's name or likeness.

g. Principle 7—Each institution, conference, and the [NCAA] National Office shall maintain written policies for its licensing, marketing/sponsorship, advertising, broadcast and other commercial agreements.

NCAA, REP. OF THE NAT'L COLLEGIATE ATHLETIC ASS'N DIV. I LEADERSHIP COUNCIL (2009), *available at* http://www.docstoc.com/docs/28522338/REPORT-OF-THE-NATIONAL-COLLEGIATE-ATHLETIC-ASSOCIATION-DIVISION-I. Additionally, the NCAA has prohibited the use of an individual student-athlete's image and likeness for sale. *See* NCAA Bylaws § 12.5.2.2.

232. Marc Isenberg, *NCAA's Amateurism Principles Becoming Just a Fantasy*, SPORTS BUS. J., Nov. 17, 2008, at 26, *available at* http://www.sportsbusiness journal.com/articl/60634. Student-athletes are prohibited from using their name, image, or likeness to advertise, recommend, or promote directly the sale or use of a commercial product or service of any kind. *See* NCAA Bylaws § 12.5.2.1.

233. *See* Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221, 248 (2005).

234. *Id.*

high level.[235] As noted in *Agnew*, this relationship provides for the athlete-student title, rather than the student-athlete title.

The NCAA has been extremely slow in processing the requests of the student-athletes to augment the amateurism and financial aid systems. It has taken a vaunt legal push over the course of the last five years to place these matters into perspective. The lawsuits at issue could have simply been avoided by progressively and actively reviewing NCAA rules while the commercialization of intercollegiate athletics became the norm. Instead of providing stronger scholarships or stipends for student-athletes, more and more revenue went to coaches and administrators. NCAA proponents would argue that most Division I programs lose money each year; however, such an argument fails to take into consideration the mismanagement of growing revenue and the allocation of such revenue to coaches, opulent facilities, and everything other than student-athletes. The NCAA's reticent approach to student-athlete issues and failure to adapt to commercialization has placed the principles of amateurism before courts for interpretation in a time where amateurism does not seem as pure as it once did.

In turn, the NCAA is fighting to hold onto time honored traditions of amateurism that are no longer commonplace. As such, the proper standard for evaluating a claim set forth by student-athletes will require an understanding of intercollegiate athletics. Student-athletes are not professionals and should not be compensated by member institutions, and the NCAA would likely be able to convince courts the pay for play scheme is not a workable system in intercollegiate athletics because student-athletes are students and receive scholarships within the confines of the IRS code. As a result, intercollegiate athletics is a different product and offers a different game to consumers and, therefore, student-athletes will not be considered employees. However, the empirical evidence shows student-athletes, especially student-athletes competing in Major College Football and Major College Basketball, are simply not amateurs. Student-athletes' performances, images and likenesses are heavily commercialized and are provided to consumers for purchase in a wide variety of consumer products. Thus, it is not cognizable to consider the principles of amateurism as a true justification to prohibit student-athletes from pursuing legal claims, generally antitrust claims.

By and through the evolution of intercollegiate athletics, student-

235. NCAA Bylaws § 15.3.3.1. *But see id.* at § 15.3.4.3 (stating a student-athlete's financial aid may not be reduced during the period of the award based on athletic performance).

athletes as a class fall somewhere between a professional athlete and an amateur, i.e., someone competing as an avocation. Short of pay for play and employee status, the NCAA's amateurism and related arguments are simply without merit. Cases like *Keller*, *O'Bannon*, and *Agnew* have the makings of exposing the NCAA's justifications and will likely change the face of the governance of intercollegiate athletics, unless settled. These legal claims are gaining momentum for student-athletes. In short order, with successful challenges as described above, it is likely that student-athletes will seek more opportunities to use their names, images, and likenesses while competing as a student-athlete, which would require the NCAA to essentially reinvent amateurism regulations. This would also create an opening for student-athletes to organize and have representatives provide and negotiate legislation on their behalf, similar to a labor union, which is a problem the NCAA does not want.[236] In sum, these game changing cases may change intercollegiate athletics and formulate a new standard for courts in reviewing amateurism-related claims, whereby student-athletes, especially those competing in Major College Football and Major College Basketball, will be considered a separate class distinct from professional athletes and amateur athletes, i.e., "modified amateurs." With such a change, the NCAA's time honored traditions of amateurism will be a thing of the past and will lack the justification necessary to bar challenges from "modified amateurs" under a modified amateurism standard.

CONCLUSION

Intercollegiate athletics is a successful commercial enterprise that has grown substantially in recent years, yet the NCAA has failed to legislatively keep pace with such expansion and growth. In the last five years, some of the most important lawsuits relating to intercollegiate athletics have been filed and have received positive results through settlement and judicial intervention. Three lawsuits currently pending, *Keller*, *O'Bannon*, and *Agnew*, have the potential to change intercollegiate athletics and cause the erosion of the principles of amateurism. With the continued commercialization of intercollegiate athletic contests and the student-athletes themselves, the traditional notions of amateurism are archaic and simply without legal justification.

236. NCPA Featured Video (National College Players Association 2011), *available at* http://www .ncpanow.org (last visited Apr. 20, 2011) (video explaining how the NCPA has established itself as a voice for college athletes); *see also* Chris Isidore, *College Athletes Trying to Flex Muscle*, CNNMONEY.COM (Sept. 23, 2002, 11:44 AM), http://money.cnn.com/2002/09/20/commentary/column_sportsbiz/college_union/index.htm.

Short of pay for play and employee status, courts will likely create a new classification for student-athletes, especially those competing in Major College Football and Major College Basketball, whereby student-athletes would be considered neither professionals nor amateurs, *i.e.*, "modified amateurs." Under such a classification, student-athletes would not be able to be compensated by a member institution and will not be considered employees, but would have more open opportunities to seek judicial review of NCAA rules and regulations that prohibit the use of their images and likenesses and NCAA rules and regulations that artificially cap forms of financial aid. This evolution would create a necessity for the NCAA to reinvent itself and, indeed, provide for a more progressive view of the growth of intercollegiate athletics and regulations that oversee student-athletes.