

**WHAT IS REASONABLE:  
ARE THE NCAA’S RESTRAINTS ON ATHLETE  
COMPENSATION REASONABLE?**

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## INTRODUCTION

When you look at the National Collegiate Athletic Association (NCAA) and college athletics today, it is easy to see why, with all the money flowing into colleges' and universities' athletic programs and conferences, a growing number of people have started to call for colleges and universities to actually start paying the athletes who play the games. For example, during the 2014–2015 academic year, college athletics generated over \$2 billion for the so-called Power Five Conferences (Southeastern Conference (SEC), Big 10, Atlantic Coast Conference (ACC), Pacific 12 (Pac-12), and Big 12).<sup>1</sup> The SEC distributed \$31.2 million to each member school, followed by the Big 10 at \$30.9 million, the ACC at \$26.4 million, the Pac-12 at \$25.1 million, and the Big 12 at \$23.4 million.<sup>2</sup> While a large part of this money comes from the NCAA men's basketball championship tournament, currently over \$770 million a year, and the college football bowl series championship, which brings in an additional \$500 million annually, those are just two of the biggest revenue streams available to athletic departments.<sup>3</sup> For example, during the 2014–2015 academic year, athletics generated over \$100 million for twenty-eight schools.<sup>4</sup> No school illustrates this point better than the University of Texas, whose athletic department generated \$179.6 million.<sup>5</sup>

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1. Jon Solomon, *Power Five Conferences See Revenue Grow by 33 Percent in One Year*, CBS SPORTS (May 27, 2016), <http://www.cbssports.com/college-football/news/power-five-conferences-see-revenue-grow-by-33-percent-in-one-year/>.

2. Chris Carlson, *ACC Revenue Increases \$100 Million Over Last Year; Syracuse Receives \$24 Million*, SYRACUSE.COM (May 27, 2016, 3:57 PM), [http://www.syracuse.com/acc/index.ssf/2016/05/acc\\_revenue\\_increases\\_100\\_million\\_over\\_last\\_year\\_syracuse\\_receives\\_24\\_million.html](http://www.syracuse.com/acc/index.ssf/2016/05/acc_revenue_increases_100_million_over_last_year_syracuse_receives_24_million.html). In 2015–2016, the average payout to SEC schools “was \$40.4 million, ranging from \$41.9 million (Georgia) to \$39.1 million (Alabama).” Jon Solomon, *SEC Schools Receive Upwards of \$40M from League as Slive Pulls in \$4.3M in 2015–16*, CBS SPORTS (Feb. 2, 2017), <http://www.cbssports.com/college-football/news/sec-schools-receive-upwards-of-40m-from-league-as-slive-pulls-in-4-3m-in-2015-16/>.

3. The NCAA recently extended the rights to televise the men's basketball tournament for \$8.8 billion. The new deal runs to 2032 and will average \$1.1 billion a year, up from the current \$700 million a year. *NCAA Tournament Deal with CBS, Turner Extended Through 2032*, ESPN (Apr. 12, 2016), [http://www.espn.com/mens-college-basketball/story/\\_/id/15190549/ncaa-tournament-deal-cbs-turner-extended-2032](http://www.espn.com/mens-college-basketball/story/_/id/15190549/ncaa-tournament-deal-cbs-turner-extended-2032); Roger Pielke Jr., *Why Not a College Degree in Sports?*, N.Y. TIMES (Sept. 14, 2016), <http://www.nytimes.com/2016/09/14/opinion/14pielke.html>.

4. Jon Solomon, *Inside College Sports: SEC, Big Ten Dominate \$100M Revenue Club*, CBS SPORTS (Dec. 17, 2015), <http://www.cbssports.com/college-football/news/inside-college-sports-sec-big-ten-dominate-100m-revenue-club/>.

5. The University of Texas and Ohio State University were only two of the twenty-eight

It is understandable, therefore, that when looking at the large sums of money college athletes, and in particular FBS Division I football<sup>6</sup> and basketball players, are generating for their colleges and universities, that some people have suggested the players should receive a share of the money.<sup>7</sup> After all, they claim, it is the athletes who are playing the games and generating all of the revenue.<sup>8</sup> When looking at college sports, however, it is impossible to look at college football and basketball in isolation. It is essential that you look past just football and men's basketball and look at the whole athletic department, which includes all the non-revenue sports. For example, during the 2014–2015 academic year, the Department of Athletics at Ohio State University generated over \$170 million.<sup>9</sup> While the vast amount of this revenue came from the major revenue producing sports of football and basketball, Ohio State also fielded teams in thirty-five other sports, ranging from women's synchronized swimming to men's pistol and rifle, most, if not all, of which lost revenue.<sup>10</sup>

As a result, the NCAA and those running college sports fear that paying college athletes any sum above the value of their scholarships would have dire consequences for the entire multibillion dollar college

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colleges' and universities' athletic departments that made at least \$100 million during the 2014–2015 academic school years. Solomon, *supra* note 4. Here is the complete list of generated revenue in descending order: Texas, \$179.6 million; Ohio State, \$170.9 million; Alabama, \$150.6 million; LSU, \$138.9 million; Oklahoma, \$135.7 million; Michigan, \$132.3 million; Florida, \$130.8 million; Penn State, \$127.9 million; Auburn, \$126.6 million; Wisconsin, \$125.8 million; Tennessee, \$121.8 million; Notre Dame, \$121.3 million; Florida State, \$121.3 million; Kentucky, \$116.5 million; Arkansas, \$116.2 million; Georgia, \$116.2 million; South Carolina, \$113.2 million; Michigan State, \$113 million; Texas A&M, \$110 million; Stanford, \$109.7 million; Iowa, \$107.4 million; Baylor, \$106.1 million; USC, \$105.9 million; Minnesota, \$105.6 million; Louisville, \$104.3 million; Nebraska, \$103.8 million; Washington, \$103.5 million; Kansas, \$103.3 million. *Id.*

6. Division I football is divided into two subdivisions: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Feb. 4, 2017) [hereinafter *Divisional Differences*]. Because the FBS is made up of the bigger schools and allows those schools to offer more scholarships, the level of competition is generally better. *Id.*; see also *O'Bannon v. NCAA (O'Bannon I)*, 7 F. Supp. 3d 955, 964, 981 (N.D. Cal. 2014).

7. Michael Wilbon, *College Athletes Deserve to Be Paid*, ESPN (July 18, 2011), [http://www.espn.com/college-sports/story/\\_id/6778847/college-athletes-deserve-paid](http://www.espn.com/college-sports/story/_id/6778847/college-athletes-deserve-paid).

8. *Id.*

9. Solomon, *supra* note 4.

10. Jonathan Berr, *Ohio State's Big Win Doesn't Mean Big Money*, FISCAL TIMES (Jan. 13, 2015), <http://www.thefiscaltimes.com/2015/01/13/Ohio-State-s-Big-Win-Doesn-t-Mean-Big-Money>; *2009–10 Student-Athlete Handbook*, OHIO ST. DEP'T ATHLETICS, <http://www.ohiostatebuckeyes.com/compliance/sa-handbook.html> (last visited Feb. 4, 2017); Solomon, *supra* note 4.

sports industry.<sup>11</sup> In particular, they claim that if college football and basketball players were paid like professionals, fans would stop attending games and watching them on TV.<sup>12</sup> In the alternative, they argue that if football and basketball players (those generating the money) are paid, colleges and universities will be forced to cut non-revenue sports to balance budgets.<sup>13</sup>

The purpose of this Article is to look at both arguments and determine whether refusing to pay athletes is a reasonable restraint under the antitrust law's rule of reason. The Article begins by looking at the development of antitrust law and the rule of reason. Next, the Article reviews past challenges to NCAA rules and bylaws, and how the courts have applied antitrust law to those rules and bylaws. After which, the Article examines both the District Court of the Northern District of California and Ninth Circuit decisions in *O'Bannon v. NCAA*. Finally, the Article looks at the purpose and rationale behind the NCAA, and concludes by asking whether the current restraints on college football and basketball players are reasonable in today's college sports marketplace.

#### I. THE DEVELOPMENT OF ANTITRUST LAW AND THE RULE OF REASON

While a number of individual states in the late nineteenth century had laws prohibiting monopolies and other predatory business practices, it was not until 1890 that the federal government started regulating monopolies and other predatory business practices, such as price fixing, dumping, and product output controls.<sup>14</sup> The basic purpose of the new legislation, called the Sherman Antitrust Act (the "Sherman Act"),<sup>15</sup> is to promote competition and protect consumers from unfair business practices and monopolies.<sup>16</sup> The two main sections of the Sherman Act are section 1, which deals directly with contracts, combinations, and conspiracies in restraint of trade; and section 2, which prohibits both monopolies and attempts to monopolize.<sup>17</sup>

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11. See *O'Bannon I*, 7 F. Supp. 3d at 975–76, 999.

12. *Id.* at 975–76.

13. *Id.* at 1004.

14. PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 48–50 (4th ed. 1988). As the Congressional record illustrates, the debates in Congress on the Sherman Act show that one of the influences leading to the enactment of the statute was "doubt as to whether there was a common law of the United States" governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absence of legislation. *Standard Oil Co. v. United States*, 221 U.S. 1, 50, 56 (1911).

15. Act of July 2, 1890 (Sherman Act), ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

16. *Standard Oil Co.*, 221 U.S. at 52.

17. *Id.* at 50–51, 59.

A. *Section 1 of the Sherman Antitrust Act*

Section 1 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is [hereby] declared to be illegal.”<sup>18</sup> However, as noted by the Supreme Court in *National Society of Professional Engineers v. United States*, the “[o]ne problem presented by the language of section 1 of the Sherman Act is that it cannot mean what it says,”<sup>19</sup> since “restraint is the very essence of every contract.”<sup>20</sup> As a result, if read literally, section 1 would prohibit all contracts and combinations of any kind or nature, whether they operated as a restraint on trade or not. Since clearly Congress had no intent to prohibit “every” contract when it passed the Sherman Act, the legislative history of the Sherman Act makes it perfectly clear that it is the role of the courts to “give shape to the statute’s broad mandate by drawing on common-law tradition.”<sup>21</sup>

In giving shape to the statute, the Supreme Court in *Standard Oil Co. v. United States* held that the Sherman Act should be viewed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in interstate commerce.<sup>22</sup> Section 1, therefore, only bars “unreasonable restraints of trade.”<sup>23</sup> If the contract or restraint is reasonable and actually enhances competition in the market, such contracts and restraints will be allowed under section 1.<sup>24</sup>

To help the lower courts determine what is an “unreasonable restraint of trade,” the Supreme Court has developed two rules: the illegal

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18. 15 U.S.C. § 1. To prevail on a claim under section 1 of the Sherman Act, a plaintiff must show “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.” *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (quoting *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996)).

19. 435 U.S. 679, 687 (1978).

20. *Id.* at 687–88 (citing *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)).

21. *Id.* at 688 (citing 21 Cong. Rec. 2456 (1890) (comments of Sen. Sherman)).

22. *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911).

23. *NCAA v. Bd. of Regents (NCAA III)*, 468 U.S. 85, 98 (1984) (citing *Ariz. v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 342–43 (1982)).

24. *Id.* at 103–04.

per se rule<sup>25</sup> and the rule of reason.<sup>26</sup> However, since the courts will only use illegal per se for cases involving those “agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality,”<sup>27</sup> the rule of reason, which “has been used to give the [Sherman Act] both flexibility and definition,”<sup>28</sup> is seen as the presumptive or default standard for testing the enforceability of contracts and actions under section 1.<sup>29</sup> When conducting a rule of reason analysis, the role of the court is to examine “the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed”<sup>30</sup> and whether it has positive or negative impact on competition in the relevant product market.<sup>31</sup> To assist in this analysis, the courts apply a three prong burden-shifting analysis.<sup>32</sup> The first prong requires the plaintiff to show “that the restraint produces [a] significant anticompetitive effect[] within” a relevant market.<sup>33</sup> If the plaintiff is able to satisfy this first prong, the second prong requires the

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25. *Standard Oil Co.*, 221 U.S. at 66; *see also NCAA III*, 468 U.S. at 99 (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979)). The reasoning behind the per se rule is that certain types of restraints or agreements, such as price fixing among competitors, resale price maintenance, and market allocations, are almost always antitrust violations, regardless of the intent of the participants or the justifications offered. Once the courts identify something as a per se violation, they will refuse to engage in a detailed (and costly) market and effects analysis of conduct. There are only a handful of categories that will trigger the per se rule, as such, the courts tend to limit the application of the per se rule. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 255, 257, 398 (3d ed. 2005).

26. When a practice has obvious anticompetitive effects, “almost to the point of deserving *per se* condemnation,” the courts will apply a “quick look” rule of reason analysis, which allows the courts to proceed directly to the question of whether the pro-competitive justifications advanced for the restraint outweigh the anticompetitive effects. HOVENKAMP, *supra* note 25, at 265–66. For example, in *Law v. NCAA*, the court, using a quick look rule of reason analysis, found that an

anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces.

134 F.3d 1010, 1020 (10th Cir. 1998) (citing Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2636–39 (1996)).

27. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

28. *Id.* at 688.

29. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10–19 (1997)).

30. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

31. HOVENKAMP, *supra* note 25, at 279.

32. *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996); AREEDA & KAPLOW, *supra* note 14, at 49–50.

33. *Hairston*, 101 F.3d at 1319.

defendant to demonstrate that the restraint has a procompetitive effect on the market.<sup>34</sup> If the defendant is able to meet this burden, the third prong shifts the analysis back on the plaintiff, who must show that “any legitimate objectives can be achieved in a substantially less restrictive manner.”<sup>35</sup> Specifically, the court examines “whether the challenged agreement is one that promotes competition or one that suppresses competition.”<sup>36</sup>

### *B. Section 2 of the Sherman Antitrust Act*

While not addressed in this Article, it should be noted that the Sherman Act also prohibits monopolies or attempted monopolization in section 2.<sup>37</sup> In particular, “the second section seeks, if possible, to make the prohibitions of the [Sherman Act] all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization.”<sup>38</sup>

Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”<sup>39</sup> In looking at whether the defendant was guilty of violating section 2 of the Sherman Act, the plaintiff will generally have to demonstrate two elements: “(1) the possession of monopoly power in [the] relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes.”<sup>40</sup>

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34. *Id.*

35. *Id.* (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)).

36. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

37. 15 U.S.C. § 2 (2012).

38. *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911).

39. 15 U.S.C. § 2. Unlike section 1, which requires that at least two parties combine or conspire in restraint of trade, it is important to note that section 2 of the Sherman Act can be triggered by a single party acting alone. *Id.* §§ 1–2. In order to establish a violation under section 2, the Supreme Court has identified two elements that must be present: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

40. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595–96 n.19 (1985) (quoting *Grinnell Corp.*, 384 U.S. at 570–71).

## II. ANTITRUST LAW AND THE NCAA

When determining whether certain concerted actions undertaken by joint ventures, like the NCAA and its member schools, violate section 1 of the Sherman Act, the Supreme Court has held that the actions must be analyzed under the rule of reason.<sup>41</sup> In reviewing NCAA rules and bylaws under the rule of reason the courts have historically been of two views.<sup>42</sup> The first view of the NCAA involves cases where the challenged actions involved rules and regulations that were designed to protect the amateur nature of intercollegiate athletes and athletic eligibility. In such cases, the courts have generally found that the NCAA's actions were reasonable and did not violate antitrust law.<sup>43</sup> The second view of the NCAA, however, concerns cases involving the business of sport. In these cases, even though the courts have recognized that the NCAA is "the guardian of an important American tradition, [and their] motives must be accorded a respectful presumption of validity, [the courts have held that] it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice."<sup>44</sup> Therefore, when the NCAA's challenged rules and bylaws involved the business or commercial aspect of running college sports, the courts have traditionally found that the NCAA's actions were illegal restraint of trade under section 1 of the Sherman Act.<sup>45</sup>

*A. Rules that Affect Non-Commercial Activity—Eligibility Rules*

A good example of how the courts have traditionally viewed NCAA rules and bylaws that either govern athletic eligibility or have another non-commercial aspect to them is *Smith v. NCAA*.<sup>46</sup> While playing volleyball at St. Bonaventure University for two years, Renee Smith was able to complete her undergraduate degree in two and a half years.<sup>47</sup> After which, Smith enrolled in graduate programs at Hofstra University and the University of Pittsburgh where she attempted to continue playing

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41. *Am. Needle v. Nat'l Football League*, 560 U.S. 183, 202–03 (2010) (quoting *NCAA III*, 468 U.S. 85, 86 (1984)).

42. *See NCAA III*, 468 U.S. at 117, 119–20.

43. *See id.*

44. *Id.* at 101 & n.23 (citing *United States v. Griffith*, 334 U.S. 100, 105–06 (1948)).

45. *Id.* at 133 (White, J., dissenting) (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)) (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 n.17 (1975)).

46. 139 F.3d 180, 186 (3d Cir. 1998) (citing *Klor's, Inc.*, 359 U.S. at 213 n.7), *vacated on other grounds*, 525 U.S. 459 (1999).

47. *Id.* at 183.



volleyball.<sup>48</sup> Both Hofstra and the University of Pittsburgh applied to the NCAA for a waiver of its bylaw,<sup>49</sup> which prohibited Smith from competing for any school other than St. Bonaventure, but both requests were denied by the NCAA.<sup>50</sup>

In challenging the NCAA's enforcement of its rules, Smith claimed that the NCAA was in violation of section 1 of the Sherman Act and had an adverse anticompetitive effect in the college athletics market.<sup>51</sup> In reviewing Smith's argument, the Third Circuit Court of Appeals first examined whether the Sherman Act's restraint of trade provision even applied to NCAA eligibility rules.<sup>52</sup> The NCAA argued that the Sherman Act only applied to the NCAA's commercial activities.<sup>53</sup>

In ruling that the antitrust laws are limited to commercial and business endeavors, the Third Circuit held, "The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions."<sup>54</sup> Therefore, having concluded that antitrust laws were limited to commercial and business endeavors, it was only logical that the Third Circuit would find that the antitrust laws did not apply to the NCAA's eligibility rules.<sup>55</sup> In support of this conclusion, the court found that the eligibility rules were primarily designed to ensure

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48. *Id.* (citing NCAA, 1993–94 NCAA Division I Manual § 14.1.8 (1993)).

49. *Id.* The NCAA based its decision on section 14.1.8.2 (the "Postbaccalaureate Bylaw") which provided that

[a] student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable 10-semester/15-quarter period set forth in Bylaw 14.2.

NCAA, *supra* note 48, § 14.1.8. The NCAA has since repealed this rule and athletes are allowed to compete as graduate students at a second institution if the first school does not have the degree program. *See* NCAA, 2016–17 NCAA Division I Manual § 14.4.3.6 (2016).

50. *Smith*, 139 F.3d at 183.

51. *Id.* at 184.

52. *Id.* at 185 (citing *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988)).

53. *See id.*

54. *Id.* (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492–93 (1940)).

55. *Smith*, 139 F.3d at 185 (quoting *Apex Hosiery Co.*, 310 U.S. at 493) (citing *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)). Other courts have reached similar conclusions. *See, e.g.*, *Gaines v. NCAA*, 746 F. Supp. 738, 744–45 (M.D. Tenn. 1990); *McCormack*, 845 F.2d at 1343; *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); *Coll. Athletic Placement Servs. v. NCAA*, No. 74-1144, 1974 U.S. Dist. LEXIS 7050, at \*14 (D.N.J. Aug. 22, 1974).

fair competition in intercollegiate athletics and not related to the NCAA's commercial or business activities.<sup>56</sup> Finally, the court held that "even if the NCAA's actions in establishing eligibility requirements were subject to the Sherman Act," since the NCAA's eligibility rules played a vital role in allowing college sports to retain its amateur character, the NCAA's actions expand the choices available to consumers and hence can be viewed as procompetitive.<sup>57</sup> In particular, the court found that the NCAA's eligibility rules allow for the survival of the college sports product and an even playing field.<sup>58</sup> Therefore, the court found that the NCAA's rules were a reasonable restraint which further the NCAA's goal of fair competition and the survival of college sports.<sup>59</sup>

### *B. Rules that Affect Commercial Activity*

As stated above, even though the courts have recognized that the NCAA is "the guardian of an important American tradition," and have found that its "motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice."<sup>60</sup> Therefore, since the NCAA is not exempt from antitrust law, it must show that any challenged activity involving the commercial aspects of running college sports is reasonable under the rule of reason.<sup>61</sup> The leading case, and the one that best illustrates this approach is *NCAA v. Board of Regents of the University of Oklahoma*.<sup>62</sup>

In *NCAA v. Board of Regents*,<sup>63</sup> the Supreme Court was asked to decide whether the NCAA's plan to control and limit the total number of football games individual member institutions could broadcast during a two-year period was a reasonable restraint of trade in violation of section 1 of the Sherman Act.<sup>64</sup> The NCAA implemented a "television plan" in 1951 to "reduce, insofar as possible, the adverse effects of live television upon football game attendance" at all member schools.<sup>65</sup> Under the plan,

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56. *Smith*, 139 F.3d at 185.

57. *Id.* at 186 (citing *NCAA III*, 468 U.S. 85, 102 (1984)).

58. *Id.* at 187 (citing *McCormack*, 845 F.2d at 1345).

59. *Id.*

60. *See NCAA III*, 468 U.S. at 101 & n.23 (citing *United States v. Griffith*, 334 U.S. 100, 105-06 (1948)).

61. *See id.* at 103, 113 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-96 (1978)).

62. *Id.* at 103 (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 690, 692).

63. *Id.* at 85.

64. *Id.* at 88, 90, 94 (first citing 15 U.S.C. § 1 (2012); and then citing *Bd. of Regents v. NCAA (NCAA I)*, 546 F. Supp. 1276, 1293 (W.D. Okla. 1982)).

65. *NCAA III*, 468 U.S. at 91. In 1951, the NCAA warned its members at its annual

the NCAA contracted with three broadcasters, ABC, CBS, and Turner, to televise a certain number of college football games each year.<sup>66</sup> The plan also contained “appearance requirements” and “appearance limitations” which restricted the number of times a school could appear on television during the two-year period that the plan would be in effect.<sup>67</sup>

Unhappy with the restrictions imposed on them by the television plan, a group of colleges and universities belonging to the College Football Association (CFA), an organization made up of the “five major conferences together with major football-playing independent institutions,” sought to develop their own independent television plan and entered into a separate contract with NBC.<sup>68</sup> Worried that they were about to lose control over the football television market, the NCAA announced that it would take disciplinary action against any CFA member that complied with the NBC contract.<sup>69</sup> In its announcement, the NCAA made it clear that the sections would not be limited to just college football, but would impact all the member’s athletic programs.<sup>70</sup> As a result of the NCAA’s threat, the CFA schools, led by the University of Georgia and the University of Oklahoma, filed suit challenging the NCAA actions.<sup>71</sup>

In finding that the NCAA’s control over the televising of college football games unreasonably restrained the trade of its member schools in violation of the Sherman Act, the district court, using a rule of reason analysis, held that the NCAA controls over college football were those of a “classic cartel” with an

almost absolute control over the supply of college football which [was] made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members . . . sought

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convention that “television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation’s overall athletic and physical system.” *Id.* at 89–90.

66. *Id.* at 92 & n.9 (citing *NCAA I*, 546 F. Supp. at 1291–92); *see also id.* at 124 (White, J., dissenting). Under the contracts, ABC and CBS could broadcast fourteen games each year, while Turner could show nineteen games. *Id.* at 124 (White, J., dissenting).

67. *NCAA III*, 468 U.S. at 92, 94 (majority opinion) (citing *NCAA I*, 546 F. Supp. at 1293). The basic requirement was that ABC and CBS were required to “schedule appearances for at least 82 different member institutions during each 2-year period” and “no member institution [was] eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks.” *Id.* at 92, 94 (citing *NCAA I*, 546 F. Supp. at 1293).

68. *Id.* at 89, 94–95. This contract, which it signed in August 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members.” *Id.* at 95 (citing *NCAA I*, 546 F. Supp. at 1286).

69. *Id.*

70. *NCAA III*, 468 U.S. at 88, 95.

71. *Id.*

and achieved a price for their product which [was], in most instances, artificially high. The NCAA cartel impos[ed] production limits on its members, and maintain[ed] mechanisms for punishing cartel members who [sought] to stray from these production quotas. The cartel . . . established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products.<sup>72</sup>

The Tenth Circuit Court of Appeals even went further and found that the NCAA television plan constituted illegal per se price fixing, since it entirely eliminated competition between producers of football.<sup>73</sup> On appeal, the Supreme Court started its review of the NCAA's television plan by noting that since what the NCAA and its member institutions were marketing athletic competitions between competing institutions, rules regulating fair competition, agreed upon by all member schools, were essential to the marketing and selling of the games.<sup>74</sup> The Supreme Court held that the NCAA

play[ed] a vital role in enabling college football to preserve its character, and as a result enabl[ed] a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen[ed] consumer choice—not only the choices available to sports fans but also those available to athletes—and hence [could] be viewed as procompetitive.<sup>75</sup>

Therefore, even though the Supreme Court ruled that there was no doubt the NCAA's television plan constituted a "restraint of trade" in the sense that it limited schools from entering into their own television contracts, it still had to determine whether the restraint might be reasonable under the rule of reason.<sup>76</sup> In applying the rule of reason, the district court found that because it restrains price and output, the NCAA's plan had a significant potential for anticompetitive effects.<sup>77</sup> In finding

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72. *NCAA I*, 546 F. Supp. at 1300–01, 1304, 1314–15.

73. *Bd. of Regents v. NCAA (NCAA II)*, 707 F.2d 1147, 1156 (10th Cir. 1983).

74. *NCAA III*, 468 U.S. at 101.

75. *Id.* at 102 (first citing *Justice v. NCAA*, 577 F. Supp. 356, 379–83 (D. Ariz. 1983); then citing Phillip J. Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C. L. REV. 341, 344–45 (1983); then citing Lewis Kurlantzick, *Thoughts on Professional Sports and the Antitrust Law: Los Angeles Memorial Colosseum v. National Football League*, 15 CONN. L. REV. 183, 189–94 (1983); then citing Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802, 817–18 (1981); and then citing Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L. J. 655, 665–66, 673–75 (1978)).

76. *Id.* at 98, 103 (citing *Ariz. v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 342–43 (1982)).

77. The district court held that the football controls imposed by the NCAA constituted a "horizontal agreement among competitors to fix prices and restrict output," in violation of the

that a potential threat had been realized, the district court held that if member institutions were free to sell television rights, many more games would be shown on television.<sup>78</sup> In addition, the district court found that the NCAA's output restriction had the negative effect of raising the price the networks pay for television rights.<sup>79</sup> The district court also found that by fixing a price for television rights to all games, the NCAA created a price structure that was unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.<sup>80</sup>

Accepting the district court's findings, the Supreme Court ruled that the anticompetitive consequences of the NCAA's plan were clear since individual competitors lost their freedom to compete, while the price was artificially higher and output lower than it could have been in a competitive market, which was responsive to consumer preference.<sup>81</sup> "Restrictions on price and output," the Supreme Court held "are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."<sup>82</sup>

Having concluded that the NCAA's television plan constituted a restraint on trade, the Supreme Court moved on to the second prong of the rule of reason: whether the NCAA could show any procompetitive benefits to the plan.<sup>83</sup> The NCAA presented three arguments to support the plan: efficiency, the protection of live attendance at games, and the maintenance of competitive balance among schools.<sup>84</sup> The Supreme Court rejected these arguments, finding that none of them enhanced competition.<sup>85</sup> If the NCAA's television plan produced procompetitive efficiencies, the Supreme Court held that it would increase output and reduce the price of televised games.<sup>86</sup> Since, as the Court observed, the opposite was true and production was limited, the plan did not produce efficiencies.<sup>87</sup> As for the NCAA's argument that the plan was necessary to protect live attendance at those games not on television, the Court held

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Sherman Act. *NCAA I*, 546 F. Supp. at 1281–82, 1302, 1304, *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd sub nom.* 468 U.S. 85 (1984).

78. *Id.* at 1320.

79. *Id.* at 1318.

80. *Id.* at 1318–19.

81. *NCAA III*, 468 U.S. at 96, 106–07 (citing *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465 (1941)).

82. *Id.* at 107–08 (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 50–58 (1911)).

83. *Id.* at 113.

84. *Id.* at 114, 116–17.

85. *Id.* at 114, 117 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978)).

86. *NCAA III*, 468 U.S. at 114.

87. *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 696).

that if live college football games were not attractive enough on their own to draw live attendance when faced with competition from televised games, it was not the role of the Sherman Act to protect an inferior product from competition.<sup>88</sup> Such a position, the Supreme Court held, is inconsistent with the basic policy of the Sherman Act.<sup>89</sup> As for the NCAA's final claim, that the television plan helped to maintain a competitive balance among schools, the Supreme Court recognized that a certain degree of cooperation was necessary if college sports and the public's interest in them were to be preserved.<sup>90</sup> The NCAA's television plan, however, the Supreme Court held was not intended or tailored to serve such an interest.<sup>91</sup> According to the Supreme Court, there was no evidence that the NCAA's television plan produced a greater level of competitive balance "than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity."<sup>92</sup>

Since the NCAA was unable to meet the burden of showing that the television plan had some competitive benefit, the Supreme Court was not required to analyze whether those benefits could be achieved in a substantially less restrictive manner.<sup>93</sup> Therefore, the Supreme Court concluded that even though the "NCAA play[ed] a critical role in the maintenance of a revered tradition of amateurism in college sports," and that "it need[ed] ample latitude to play that role," NCAA "rules that restrict[ed] output [were] hardly consistent with this role. . . . [B]y curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA . . . restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."<sup>94</sup>

### III. O'BANNON V. NCAA

In one of the most closely watched antitrust cases involving college sports since *NCAA v. Board of Regents*, a group of current and former FBS football and Division I men's basketball players, who had all played between 1956 and 2014, filed suit against the NCAA to challenge the association's rules restricting athlete compensation.<sup>95</sup> In particular,

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88. *Id.* at 116–17.

89. *Id.* at 117.

90. *Id.*

91. NCAA III, 468 U.S. at 119.

92. *Id.*

93. See generally *id.* at 120 (analyzing NCAA's TV plans and finding the NCAA's procompetitive rationales failed, but not analyzing whether those rationales could be achieved in a less restrictive manner).

94. *Id.*

95. *Cf. O'Bannon I*, 7 F. Supp. 3d 955, 962–63, 965 (N.D. Cal. 2014) (discussing

O'Bannon<sup>96</sup> argued that the NCAA's regulations governing athlete compensation violated section 1 of the Sherman Act because they precluded FBS football and Division I men's basketball players "from receiving a share of the revenue that the NCAA and its member schools earn[ed] from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and [re-broadcasts and archival game] footage."<sup>97</sup> The NCAA, on the other hand, argued that its "restrictions on student-athlete compensation [were] necessary" because they (1) preserved college sports' "tradition of amateurism," (2) "maintained competitive balance among FBS football and Division I basketball teams," (3) "promot[ed] the integration of academics and athletics," (4) upheld the NCAA's "educational mission," and (5) protected "the popularity of collegiate sports."<sup>98</sup>

*A. O'Bannon v. NCAA (O'Bannon I), 7 F. Supp. 3d 955 (N.D. Cal. 2014)*

In August 2014, Judge Claudia Wilken of the Northern District of California sent shockwaves through the college sports world when she ruled that the NCAA's compensation rule prohibiting athletes from being paid for use of their names, images and likenesses (NILs) was an unreasonable restraint of trade in violation of section 1 of the Sherman Act.<sup>99</sup> In reaching the decision, the district court applied the burden-shifting framework of the rule of reason and asked whether the NCAA's compensation rules produced a significant anticompetitive effects within

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plaintiffs' antitrust claims).

96. The case began when Ed O'Bannon, a former All-American basketball player at the University of California, Los Angeles (UCLA), was visiting a friend's house and saw a video game created and produced by Electronic Arts (EA) that featured an avatar that visually resembled him playing for UCLA. Sara Ganim, *As Testimony Starts in Former College Star's Suit, NCAA Settles Another Suit*, CNN, <http://www.cnn.com/2014/06/09/us/ed-obannon-ncaa-lawsuit/> (last updated June 9, 2014, 11:38 PM). O'Bannon sued the NCAA, EA, and the Collegiate Licensing Company (CLC) for violating his right of publicity. Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), <http://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html>. The right of publicity case was eventually consolidated with other cases involving athletes' image rights and settled for sixty million dollars. Ganim, *supra*. O'Bannon's antitrust claims against the NCAA, however, went forward. *In re NCAA Student Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013); Eder & Strauss, *supra*.

97. *O'Bannon I*, 7 F. Supp. 3d at 963, 973, 999.

98. *Id.* In particular, the NCAA argued that the rules helped preserve its tradition of amateurism, "maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product." *Id.* at 973.

99. *Id.* at 971, 1007.

a relevant market.<sup>100</sup> However, to answer this question the district court first needed to determine which market the NCAA's rules impacted.<sup>101</sup>

*1. Significant Anticompetitive Effects Within a Relevant Market*

O'Bannon alleged that the NCAA rules restrained trade in two markets: the college education and the group licensing markets.<sup>102</sup>

*A. College Education Market*

In looking at whether there was a college education market for elite high school football and basketball recruits, the district court found that NCAA colleges and universities regularly competed to recruit the best high school football and basketball players in the country by offering them a unique bundle of goods and services in exchange for their services.<sup>103</sup> Additionally, the court found "that FBS football and Division I basketball schools [were] the only suppliers of" these unique goods and services since recruits who were skilled enough to play at this level did not "typically pursue other options for continuing their education" or professional athletic careers.<sup>104</sup> In fact, the court found that none of the other opportunities available to the athletes "provided the same combination of goods and services offered by FBS football and Division I basketball schools."<sup>105</sup> As a result, the district court concluded that "the qualitative differences between the opportunities offered by FBS football and Division I basketball schools and those offered by other schools and sports leagues illustrat[ed] that FBS football schools and Division I basketball schools operat[ed] in a distinct market."<sup>106</sup>

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100. *Id.* at 984–85 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001)).

101. *See O'Bannon I*, 7 F. Supp. 3d at 986.

102. *Id.*

103. *Id.* at 965. The district court found that FBS football and Division I basketball schools compete to sell unique bundles of goods and services to elite football and basketball recruits. The bundles include scholarships to cover the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services. They also include access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences. In exchange for these unique bundles of goods and services, football and basketball recruits must provide their schools with their athletic services and acquiesce in the use of their names, images, and likenesses for commercial and promotional purposes. They also implicitly agree to pay any costs of attending college and participating in intercollegiate athletics that are not covered by their scholarships.

*Id.* at 965–66.

104. *Id.* at 966.

105. *O'Bannon I*, 7 F. Supp. 3d at 967.

106. *Id.* at 987–88; *see also* *Rock v. NCAA*, No. 1:12-cv-1019, 2013 U.S. Dist. LEXIS



### B. Group Licensing Market

In addition to the college education market, the court also found that there was a market for group licenses to use the athletes' NILs.<sup>107</sup> In support of this conclusion, the district court noted that "professional athletes often sell group licenses to use their [NILs] in live game telecasts, videogames, game re-broadcasts, advertisements, and other archival footage."<sup>108</sup> Absent the NCAA's rules prohibiting athlete compensation, the district court found that FBS football and Division I basketball players would also be able to sell group licenses for the use of their NILs.<sup>109</sup> Specifically, the court held that there were three submarkets within this broader group licensing market: (1) a submarket for group licenses to use the athletes' NILs in live football and basketball game telecasts;<sup>110</sup> (2) a submarket for group licenses to use the athletes' NILs in videogames;<sup>111</sup> and (3) a submarket for group licenses to use the athletes' NILs in game re-broadcasts, advertisements, and other archival footage.<sup>112</sup>

Having identified the markets to be measured, the court next examined whether the NCAA rules<sup>113</sup> regulating athlete compensation

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1161333, at \*38 (S.D. Ind. Aug. 16, 2013) ("[T]he superior competition, institutional support, overall preference, higher revenue, and more scholarship opportunities provided in Division I football, as opposed to Division II or NAIA football. . . . [are] sufficient factual allegations supporting [the] proposition that Division II and NAIA football are not adequate substitutes for Division I football and, thus, not part of the same relevant market.").

107. *Id.* at 968.

108. *Id.*

109. *Id.* at 970.

110. *O'Bannon I*, 7 F. Supp. 3d at 968 ("Television networks frequently enter into licensing agreements to use the intellectual property of schools, conferences, and event organizers . . . in live telecasts of football and basketball games. In these agreements, the networks often seek to acquire the rights to use the [NILs] of the participating student-athletes.").

111. *Id.* at 970 (finding that videogame developers typically negotiate licenses with professional leagues and teams and EA would do the same with college athletes in order to produce college sports-themed videogames if it were not prohibited from doing so under NCAA rules).

112. *Id.* at 970–71 ("[T]elevision networks, advertisers, and third-party licensing companies seek to use archival footage of student-athletes in game re-broadcasts, commercials, and other products. . . . Absent the NCAA's challenged rules, there would be a demand among television networks, third-party licensing companies, and advertisers for group licenses to use students-athletes in game re-broadcasts, advertisements, and other archival footage.").

113. *Id.* at 971–72. NCAA bylaws "prohibit[] any student-athlete from receiving 'financial aid based on athletics ability' that exceeds the value of a full 'grant-in-aid.' . . . [A] full 'grant-in-aid' . . . 'consists of tuition and fees, room and board, and required course-related books.' . . . Any student-athlete who receives financial aid in excess of this amount forfeits his athletic eligibility." *Id.* at 971. In addition to the cap on grant-in-aid, the NCAA also prohibits athletes "from receiving financial aid in excess of [their] 'cost of attendance'" or the amount of attendance above and beyond "'the total cost of tuition and fees, room and

produced an anticompetitive effect on those markets.<sup>114</sup> The NCAA rules prohibited athletes from receiving any compensation from their schools or outside sources for the use of their NILs.<sup>115</sup> In support of its rules, the NCAA claimed that while its rules restrained competition among schools for recruits, if the grant-in-aid limit was not capped, colleges and universities would be forced to “compete for the best recruits by offering them compensation exceeding the cost of attendance.”<sup>116</sup> The NCAA therefore claimed that the rules served a procompetitive purpose by keeping the costs to the schools down.<sup>117</sup>

In rejecting the NCAA’s argument, the court found that the price fixing agreement among the NCAA and its member schools at the FBS football and Division I basketball level had an anticompetitive effect on the athletes.<sup>118</sup> In support of this conclusion, the district court noted that in exchange for his or her athletic performance and the use of his or her NILs, the college or university agreed to provide the athlete with a standard grant-in-aid package which included tuition, room and board, fees, and book expenses.<sup>119</sup> However, since the schools agreed to value the athletes’ NILs at zero and not compete with each other, the rule had an anticompetitive effect.<sup>120</sup> As a result, the district court found that the NCAA illegally fixed prices and restrained competition in the college education market.<sup>121</sup>

The district court also found that elite football and basketball recruits, the buyers in the college education market, were sellers in an almost identical market: the group licensing market.<sup>122</sup> In this market, FBS football and Division I basketball schools were the only buyers and had the power, acting in concert with the NCAA, to fix the price of the athletes’ NILs at zero.<sup>123</sup> “From that perspective, the NCAA’s restrictions

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board, books and supplies, transportation, and other expenses related to attendance’ at that school. . . . The gap between the full grant-in-aid and the cost of attendance varies from school to school but is typically a few thousand dollars.” *O’Bannon I*, 7 F. Supp. 3d at 971–72. The NCAA also prohibits athletes “from endorsing any commercial product or service while they are in school, regardless of whether or not they receive any compensation to do so.” *Id.* at 972.

114. *Id.*

115. *Id.* at 971.

116. *Id.* at 972.

117. *O’Bannon I*, 7 F. Supp. 3d at 1004.

118. *Id.* at 972–73.

119. *Id.* at 973.

120. *Id.*

121. *Id.*

122. *O’Bannon I*, 7 F. Supp. 3d at 973.

123. *Id.*

on student-athlete compensation still represent[ed] a form of price fixing but creat[ed] a buyers' cartel, rather than a sellers' cartel."<sup>124</sup> Such an agreement, the district court held, "violat[ed] section 1 of the Sherman Act just as a price-fixing agreement among sellers would."<sup>125</sup> Without the agreement, colleges and universities would be forced to engage in competition for the athletes' athletic services and NILs; the only difference would be that they would be viewed as buyers in the transactions rather than sellers.<sup>126</sup>

The district court, however, held that O'Bannon was unable to identify any harm to competition in the submarket for group licenses in video games and television.<sup>127</sup> In particular, while it held that O'Bannon suffered an injury due to the NCAA's rules, since they deprived athletes of compensation that they would otherwise receive, the district court held that O'Bannon was unable to show that in the absence of the challenged restraint, athletes would actually compete against one another to sell their group licenses.<sup>128</sup> In support of this conclusion, the district court found that the networks that broadcast sporting events "would have to obtain a group license from every team that could potentially participate in that event."<sup>129</sup> Therefore, the district court concluded that colleges and universities "would [not] compete against each other as sellers of group licenses because the group licenses would constitute perfect complements: that is, every group license would have to be sold in order for any single group license to have value."<sup>130</sup> Accordingly, the district court ruled that O'Bannon "failed to show that the challenged NCAA rules harm[ed] competition in this submarket."<sup>131</sup>

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124. *Id.* The district court noted that "[i]n recent years, several courts have specifically recognized that monopolistic practices in a market for athletic services may provide a cognizable basis for relief under the Sherman Act." *Id.* at 991 (citing *Rock v. NCAA*, No. 1:12-cv-1019, 2013 U.S. Dist. LEXIS 1161333, at \*29 (S.D. Ind. Aug. 16, 2013)); see *Agnew v. NCAA*, 683 F.3d 328, 346 (7th Cir. 2012) (identifying the proper requirements to show a cognizable market under the Sherman Act); *NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (identifying the proper requirements to show a cognizable market under the Sherman Act); *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) (discussing how the identification of a "horizontal agreement to fix prices" establishes an anticompetitive effect).

125. *O'Bannon I*, 7 F. Supp. 3d at 991.

126. *Id.* at 1007.

127. *Id.* at 998.

128. *Id.* at 994–95.

129. *Id.* at 995.

130. *O'Bannon I*, 7 F. Supp. 3d at 995.

131. *Id.* at 996–97.

## 2. Procompetitive Effect of NCAA Rules

Having found that the NCAA exercised market power and that its rules imposed a restraint on competition in that market, the district court moved on to examine the second prong of the rule of reason and whether the NCAA was able to demonstrate that the restraint was justified by having had a procompetitive effect on the market.<sup>132</sup> In support of this justification, the NCAA presented four procompetitive purposes for its compensation rules: “(1) the preservation of amateurism in college sports; (2) promoting competitive balance among FBS football and Division I basketball teams; (3) the integration of academics and athletics; and (4) the ability to generate greater output in the relevant markets.”<sup>133</sup>

### A. Preservation of Amateurism

First, the NCAA asserted that its rules governing athlete compensation were “necessary to preserve the amateur tradition and identity of college sports.”<sup>134</sup> It was this tradition and unique identity, the NCAA argued, that “contribute[d] to the popularity of college sports and help[ed] distinguish them from professional sports.”<sup>135</sup>

In rejecting the NCAA’s argument, the district court found that the NCAA’s restrictions on athlete compensation, which capped the value of an athletic scholarship below the actual cost of attending the college or university, were not even justified under the NCAA’s own definition of amateurism.<sup>136</sup> The district court found that although the historical evidence might “justify some limited restrictions on student-athlete compensation,<sup>137</sup> it [did] not justify the specific restrictions challenged in this case.”<sup>138</sup> In particular, the district court noted that the history of the NCAA showed that while having a longstanding commitment to amateurism, the organization “revised its rules governing student-athlete compensation numerous times” since its creation in 1905, “sometimes in significant and contradictory ways.”<sup>139</sup> Therefore, when looking at the

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132. *Id.* at 999 (quoting *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003)).

133. *Id.*

134. *Id.*

135. *O’Bannon I*, 7 F. Supp. 3d at 999.

136. *Id.* at 975.

137. However, only if the challenged restraints actually help “play a substantial role in maximizing consumer demand for the NCAA’s products” would the restrictions be procompetitive. *Id.* at 1000 (citing *NCAA III*, 468 U.S. 85, 120 (1984)).

138. *Id.* at 999.

139. *Id.* at 1000.

history of the NCAA, the district court found that rather than demonstrating an “adherence to a set of core principles,” it only showed “how malleable the NCAA’s definition of amateurism had been.”<sup>140</sup>

Additionally, even though the NCAA tried “to establish the importance of these restrictions by asserting that they increase[ed] consumer interest” in college sports, the district court found “that consumer demand for FBS football and Division I basketball-related products” was not driven by athlete compensation, or lack of it, “but instead by other factors, such as school loyalty and geography.”<sup>141</sup> Therefore, the district court concluded that while consumer preferences “might justify a restriction on large payments to student-athletes while [they were still] in school,” consumer demand did not “justify the rigid prohibition” imposed by the NCAA on compensating athletes for the use of their NILs.<sup>142</sup>

### *B. Competitive Balance*

The NCAA’s second argument was that its restraints on athlete compensation were “reasonable and procompetitive because they [helped] maintain the current level of competitive balance among FBS football and Division I basketball teams.”<sup>143</sup> Keeping the colleges and universities competitively balanced, the NCAA argued, was essential in order to sustain consumer demand for college sports.<sup>144</sup>

While the district court noted that a sports league’s efforts to achieve the optimal competitive balance was a legitimate procompetitive justification for certain restrictions,<sup>145</sup> the district court rejected the NCAA’s argument, since it found that the NCAA failed to demonstrate that the restrictions on athlete compensation actually had “any effect on competitive balance, let alone produce an optimal level of competitive balance.”<sup>146</sup> In support of this conclusion, the district court found that the NCAA’s restrictions on athlete compensation had zero effect on the competitive balance of college sports teams and may have actually reduced competitive balance by strengthening the position of the stronger, more dominate teams.<sup>147</sup> Also, “since the popularity of college sports is driven primarily by factors such as school loyalty and

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140. *O’Bannon I*, 7 F. Supp. 3d at 1000.

141. *Id.* at 975, 1001.

142. *Id.* at 1001.

143. *Id.* at 978.

144. *Id.* at 978.

145. *O’Bannon I*, 7 F. Supp. 3d at 1001 (quoting *NCAA III*, 468 U.S. 85, 119–20 (1984)).

146. *Id.*

147. *See id.* at 1002.

geography,” the district court found no evidence that consumer demand for college sports would suffer if FBS football or Division I basketball teams were less competitively balanced.<sup>148</sup> Therefore, the district court held, competitive balance was a procompetitive justification that the NCAA could use to justify its restraint on athlete compensation.<sup>149</sup>

### *C. Integration of Academics and Athletics*

The NCAA’s third argument in support of its restrictions on athlete compensation was that the rules were reasonable under the rule of reason because they help college athletes integrate into the wider academic communities of their colleges and universities.<sup>150</sup> In support of this argument, the NCAA tried to show that the rules helped ensure that athletes were able to obtain all of the educational benefits available at their colleges or universities.<sup>151</sup> According to the NCAA, it is this integration of academics and athletics that allowed athletes to receive the quality educational services that they get while in the college education market.<sup>152</sup>

While agreeing with the NCAA that athletes received educational and other benefits from participation in college sports, both while in school and later in the employment market, the district court ruled that the NCAA was unable to connect those benefits to its restrictions on athlete compensation.<sup>153</sup> In particular, the court found that the benefits that athletes enjoyed were the result of their increased access to financial aid, academic support, and other educational services that Division schools offered to all of their athletes independent of the NCAA’s restriction on athlete compensation.<sup>154</sup>

The district court did however find that the NCAA’s compensation rules may have helped integrate athletes into the broader campus community.<sup>155</sup> Although not sure “why paying student-athletes would be any more problematic for campus relations than paying other students who provide services to the university,” the district court held that “certain limited restrictions on student-athlete compensation may [have

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148. *Id.*

149. *Id.* at 1001 (first citing *NCAA III*, 468 U.S. at 114; and then citing *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998)).

150. *O’Bannon I*, 7 F. Supp. 3d at 1002.

151. *Id.* at 979.

152. *Id.* at 979, 1002.

153. *Id.* at 1003.

154. *Id.* at 980.

155. *O’Bannon I*, 7 F. Supp. 3d at 980.

helped] to integrate student-athletes into the academic communities.”<sup>156</sup>

#### *D. Increased Output*

The NCAA's last argument was that its compensation rules were reasonable and procompetitive because they limited the amount of money needed to run college athletic departments, thereby increasing the number of schools playing Division I sports, which ultimately increased both the number of scholarships available to athletes and the number of FBS football and Division I basketball games available to college sports fans.<sup>157</sup>

In rejecting the NCAA's claim, the district court once again found no relationship between the NCAA's restrictions, both on athlete compensation and in the number of scholarship opportunities, with the number of games played in college sports.<sup>158</sup> In support of this finding, the district court noted that there was no evidence to support the NCAA's suggestion that schools would leave Division I if the athletes were not amateurs.<sup>159</sup> In fact, since 2014, the changes brought about by the Power Five Conferences seemed to indicate that they were committed to providing athletes more benefits, not less.<sup>160</sup>

As for the NCAA's argument that its rules limiting the compensation paid to athletes “enable[ed] some schools to participate in Division I that otherwise could not afford to do so,” the district court found no evidence to support such a finding.<sup>161</sup> There was no evidence, the district court noted, that colleges and universities were using the money they saved from not compensating their athletes to fund additional teams or scholarships.<sup>162</sup> Also, since O'Bannon was not seeking to require schools to provide compensation to their athletes, only that schools be permitted to do so, the district court concluded that any school that could not afford to compensate its athletes would not have to do so.<sup>163</sup> Each school would be allowed to decide independently if it could afford to compensate its athletes, and those that decided that they could not, did not have to pay their athletes.<sup>164</sup> However, based on how much money colleges and

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156. *Id.*

157. *Id.* at 1003–04.

158. *Id.* at 1004.

159. *Id.*

160. *O'Bannon I*, 7 F. Supp. 3d at 981.

161. *Id.* at 1004.

162. *Id.*

163. *Id.*

164. *Id.*

universities were paying their football and basketball coaches<sup>165</sup> and spending on campus training facilities,<sup>166</sup> the district court found that “many schools would be able to afford to offer their athletes a limited share of” their NILs.<sup>167</sup> Accordingly, the district court rejected the NCAA’s claim that its restrictions on compensation increase[ed] the number of opportunities for schools or athletes.<sup>168</sup>

### 3. *Alternatives to the Restraint*

Since the NCAA met its burden under the rule of reason by showing that its rules restricting athlete compensation had some procompetitive benefit, namely that preventing schools from paying FBS football and Division I basketball players large sums of money protected consumer demand and helped integrate the athletes into their larger academic communities, the burden under section 1 of the Sherman Act now shifted back to O’Bannon to show that these procompetitive goals could be achieved in less restrictive alternatives.<sup>169</sup>

Since the NCAA was unable to show that its compensation rules had any procompetitive benefits in creating more competitive balance or increasing output, the district court only focused on whether O’Bannon was able to identify any less restrictive alternatives for preserving amateurism and integrating athletes into their academic communities.<sup>170</sup> In claiming that the NCAA could achieve their goals in a less restrictive

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165. In thirty-nine of the fifty states, college coaches are the highest paid state employees. *Highest-Paid College Coaches*, CHRON (Sept. 16, 2016, 3:00 PM), <http://www.chron.com/business/moneytips/article/Highest-Paid-College-Coaches-9229450.php>. (“[T]he football coach in twenty-six, the basketball coach in twelve, and a tie between the football and basketball coach in Minnesota.”) In eight of the states, the coach is being paid over five million dollars a year, lead by Nick Saban and Jim Harbaugh, the football coaches at the University of Alabama and the University of Michigan, respectively, at over seven million dollars a year. *Id.* The income for other coaches include the following in descending order: John Calipari, earning \$6.89 million at the University of Kentucky; Urban Meyer, earning \$5.86 million at Ohio State University; Bob Stoops, earning \$5.4 million at the University of Oklahoma; Jimbo Fisher, earning \$5.15 million at Florida State University; Charlie Strong, earning \$5.1 million at the University Texas; and Kevin Sumlin, earning \$5 million at Texas A&M University. *Id.*

166. For example, in September 2016, the University of Florida announced that it would spend \$100 million of facility improvements for football, baseball, and softball. Garry Smits, *University of Florida Announces \$100 Million Improvements for Football, Baseball, Softball Facilities*, JACKSONVILLE.COM (Sept. 16, 2016, 3:44 PM), <http://jacksonville.com/sports/college/florida-gators/2016-09-16/story/university-florida-announces-100-million-improvements>.

167. *O’Bannon I*, 7 F. Supp. 3d at 1004.

168. *Id.* at 982.

169. *Id.* at 1004 (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 n.4 (9th Cir. 1991)).

170. *Id.* at 1005.



manner, O'Bannon identified three modifications that would allow the NCAA to achieve their stated purpose.<sup>171</sup> First, O'Bannon claimed that the NCAA could raise the grant-in-aid limit to allow schools to award athletes stipends derived from licensing revenue.<sup>172</sup> Second, O'Bannon claimed that the NCAA could allow schools to deposit a share of licensing revenue into a trust fund for athletes to be paid after the athletes graduated or left school.<sup>173</sup> Third, O'Bannon claimed that the NCAA could permit athletes "to receive limited compensation for third-party endorsements approved by their schools."<sup>174</sup>

After reviewing the three proposals, the district court held that O'Bannon's first proposed alternative would in fact "limit the anticompetitive effects of the NCAA's current restraint without impeding the NCAA's efforts to achieve its stated purposes, provided that the stipends [did] not exceed the cost of attendance as that term [was] defined in the NCAA's bylaws."<sup>175</sup> Such a stipend, the district court held, would also be in compliance with the "NCAA's own definition of amateurism because it would only cover educational expenses."<sup>176</sup> Additionally, the district court found no evidence to suggest that such a change would have a negative impact on consumer demand for college sports or hinder any school's efforts to integrate its athletes into the academic community.<sup>177</sup> If anything, the district court held that providing athletes with stipends would increase their integration into the academic community by removing some of the expenses associated with attending college.<sup>178</sup>

As for O'Bannon's second proposal, allowing schools to hold payments in trust for athletes, the district court found that it "would likewise enable the NCAA to achieve its goals in a less restrictive manner, provided the compensation was limited and distributed equally among team members."<sup>179</sup> The district court therefore ordered the NCAA to allow its member schools to make limited payments (\$5000 per year), placed into a trust for their athletes payable when the athlete left school.<sup>180</sup> Such payments, the district court found, would not negatively affect the

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171. *Id.*

172. *O'Bannon I*, 7 F. Supp. 3d at 1005–06.

173. *Id.* at 1005.

174. *Id.* at 982.

175. *Id.*

176. *Id.* at 983. The district court found that the NCAA allowed member schools to provide athletes with similar stipends previously. *O'Bannon I*, 7 F. Supp. 3d at 983.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1008.

popularity of college sports nor hurt consumer demand for college sports.<sup>181</sup>

As for O'Bannon's third proposal, allowing athletes to receive money for endorsements, the district court found that "[a]llowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools" and therefore did not accomplish the NCAA's goals in a less restrictive manner.<sup>182</sup>

Therefore, "[c]onsistent with the less restrictive alternatives found," the district court held that the NCAA could not cap player compensation below the cost of attendance,<sup>183</sup> and was prohibited "from enforcing any rules to prevent its member schools . . . from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball" athletes.<sup>184</sup>

*B. O'Bannon v. NCAA (O'Bannon II), 802 F.3d 1049 (9th Cir. 2015)*

A couple of things happened before the district court's ruling could be implemented for the 2015–2016 school year, however. First, in August 2014, the NCAA under pressure from the Power Five Conferences announced it would allow their member schools to increase scholarships up to the full cost of attendance.<sup>185</sup> The members of the Power Five Conferences voted in January 2015 to increase the scholarship cap awarded to athletes to cover the full cost of attendance.<sup>186</sup> Second, the NCAA appealed the district court's decision to the Ninth Circuit Court of Appeals.<sup>187</sup>

On appeal, the NCAA argued that based on the Supreme Court's decision in *NCAA v. Board of Regents*,<sup>188</sup> the district court erred in even considering O'Bannon's claim.<sup>189</sup> In the alternative, the NCAA argued that its compensation rules were not covered by the Sherman Act because they did not involve commercial activity.<sup>190</sup> After reviewing the

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181. *O'Bannon I*, 7 F. Supp. 3d at 984.

182. *Id.*

183. *Id.* at 1007–08.

184. *Id.* at 1008.

185. *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049, 1054–55 (9th Cir. 2015); Mark Schlabach, *Is It Time for Football Powers to Split?*, ESPN (Jul. 22, 2013), [http://www.espn.com/college-football/story/\\_/id/9499740/is-college-football-big-five-conferences-split-ncaa](http://www.espn.com/college-football/story/_/id/9499740/is-college-football-big-five-conferences-split-ncaa).

186. *O'Bannon II*, 802 F.3d at 1055 (citing Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills*, N.Y. TIMES (Jan. 17, 2015), <https://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html>).

187. *Id.* at 1061.

188. 468 U.S. 85 (1984).

189. *O'Bannon II*, 802 F.3d at 1061 (citing *NCAA III*, 468 U.S. at 109).

190. *Id.*

arguments, the Ninth Circuit rejected them all.<sup>191</sup> The Ninth Circuit held that while the Supreme Court in *NCAA v. Board of Regents* discussed the NCAA's amateur rules, it discussed the amateur rules only "to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se."<sup>192</sup> Nowhere in the decision, the Ninth Circuit ruled, did the Supreme Court find that the NCAA's rules were exempt from antitrust scrutiny and nothing in *NCAA v. Board of Regents* would support such an exemption.<sup>193</sup> In sum, the Ninth Circuit held that with regard to the NCAA's amateurism rules, "validity must be proved, not presumed."<sup>194</sup>

As for the NCAA's other argument, that its compensation rules were really "eligibility rules" not commercial in nature and therefore not subject to section 1 of the Sherman Act, the Ninth Circuit found that while "restraints that have no effect on commerce are indeed exempt from Section 1, the modern legal understanding of 'commerce' is broad, 'including almost every activity from which the actor anticipates economic gain.'"<sup>195</sup> Therefore, the Ninth Circuit concluded that the NCAA's rules restricting athlete compensation and NIL rights undeniably fell under section 1 of the Sherman Act.<sup>196</sup> To hold otherwise, the Ninth Circuit held, would allow the NCAA and its member schools to insulate their relationships with athletes from "antitrust scrutiny by renaming every rule governing student-athletes [as] an 'eligibility rule.'"<sup>197</sup> Citing *Simpson v. Union Oil Co.* the Ninth Circuit held that the antitrust laws could not be avoided by such a "'manipulation of words.' In other words, the substance of the compensation rules matter[ed] far more than how they [were] styled."<sup>198</sup>

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191. *Id.*

192. *Id.* at 1063 (citing *NCAA III*, 468 U.S. at 103, 117).

193. *Id.*

194. *O'Bannon II*, 802 F.3d at 1064.

195. *Id.* at 1064–65 (first citing 15 U.S.C. § 1 (2012); and then citing IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 260b (4th ed. 2013)).

196. *Id.* at 1065–66 (citing *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012)).

197. *Id.* at 1065.

198. *Id.* (quoting *Simpson v. Union Oil Co.*, 377 U.S. 13, 21–22 (1964)). In reaching its decision, the Ninth Circuit specifically rejected the Sixth Circuit's decision in *Bassett v. NCAA*, which held that the NCAA's rules against giving recruits "improper inducements" were "anti-commercial and designed to promote and ensure competitiveness amongst NCAA member schools." 528 F.3d 426, 433 (6th Cir. 2008) ("Violation of the applicable NCAA rules gives the violator a decided competitive advantage in recruiting and retaining highly prized student athletes."). In rejecting the Sixth Circuit's decision in *Bassett*, the Ninth Circuit held that it "simply cannot understand this logic. Rules that are 'anti-commercial and designed to promote and ensure competitiveness,' surely affect commerce just as much as rules

Having concluded that O'Bannon had standing to bring the case, the Ninth Circuit proceeded to the merits of his Sherman Act claim.<sup>199</sup> In evaluating O'Bannon's claim the Ninth Circuit used the three-step rule of reason analysis.<sup>200</sup>

### *1. Significant Anticompetitive Effects Within a Relevant Market*

On appeal, the NCAA did not challenge the district court's finding that a "college education market" exist[ed], wherein colleges compet[ed] for the services of [athletes] by offering them scholarships," and as a result the Ninth Circuit began its analysis by determining whether the NCAA's compensation rules had a significant anticompetitive effect on the market.<sup>201</sup> In finding that the compensation rules had a significant anticompetitive effect on the college education market, the Ninth Circuit noted that athletes were forced to accept a grant-in-aid in exchange for their athletic performance and NILs.<sup>202</sup> However, since the NCAA and member schools had all "agreed to value the athletes' NILs at zero, which is 'an anticompetitive effect,'" O'Bannon satisfied the initial burden under the rule of reason.<sup>203</sup>

### *2. Procompetitive Effects*

Since O'Bannon was able to meet his burden and demonstrate that the NCAA's compensation rules had an anticompetitive effect within a relevant market, the burden shifted to the NCAA to demonstrate that the restraint had a procompetitive effect.<sup>204</sup> At the district court, the NCAA offered "four procompetitive justifications for the compensation rules: (1) promoting amateurism, (2) promoting competitive balance among NCAA schools, (3) integrating student-athletes with their schools' academic community, and (4) increasing output in the college education

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promoting commercialism." *O'Bannon II*, 802 F.3d at 1066 (quoting *Bassett*, 528 F.3d at 433). "The intent behind the NCAA's compensation rules does not change the fact that the exchange they regulate—labor for in-kind compensation—is a quintessentially commercial transaction." *Id.*

199. *O'Bannon II*, 802 F.3d at 1069 (first citing 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 1998); and then citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)).

200. *Id.* at 1070 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

201. *Id.*

202. *Id.* at 1071 (quoting *O'Bannon I*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014)).

203. *Id.* at 1071 (quoting *O'Bannon I*, 7 F. Supp. 3d at 973) (citing *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 777 (1999)).

204. *O'Bannon II*, 802 F.3d at 1072.

market.”<sup>205</sup>

Since on appeal, the NCAA focused entirely on the promotion of amateurism; the Ninth Circuit upheld the district court's “findings that the compensation rules [did] not promote competitive balance [in college sports], that they [did] not increase output, . . . and that they play[ed] a limited role in integrating student-athletes with their schools' academic communities.”<sup>206</sup> As far as the NCAA's argument that its compensation rules promot[ed] competition, the Ninth Circuit agreed with the district court and found two procompetitive justifications for the rules: “integrating academics with athletics[] and ‘preserving the popularity’” of college sports.<sup>207</sup> Findings, the Ninth Circuit noted, which were consistent with the Supreme Court's findings in *NCAA v. Board of Regents*.<sup>208</sup>

### 3. Substantially Less Restrictive Alternatives

Having found a procompetitive justification for the NCAA's compensation rules, the Ninth Circuit moved on to the final prong of the rule of reason analysis: “whether there [were] substantially less restrictive alternatives to the NCAA's current rules.”<sup>209</sup> The district court accepted two of O'Bannon's alternatives as substantially less restrictive.<sup>210</sup> The first alternative would require “NCAA member schools to give student-athletes grants-in-aid that cover[ed] the full cost of attendance,” instead of the current grants that stopped short of the full costs.<sup>211</sup> The second alternative was to allow member schools to pay athletes up to \$5000 a year into a deferred trust for use of their NILs.<sup>212</sup>

In agreeing with the district court finding that awarding athletes “grants-in-aid up to their full cost of attendance would be a substantially less restrictive alternative to the current compensation rules,” the Ninth Circuit found that “raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism.”<sup>213</sup> In addition, the Ninth Circuit found that compensating athletes up to the cost of attendance would also not negatively impact consumer demand for college sports or

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205. *Id.*

206. *Id.* (citing *Md. Cas. Co. v. Knight*, 96 F.3d 1284, 1291 (9th Cir. 1996)).

207. *Id.* at 1072–73 (quoting *O'Bannon I*, 7 F. Supp. 3d at 1005).

208. *Id.* at 1074 (quoting *NCAA III*, 468 U.S. 85, 101–02 (1984)).

209. *O'Bannon II*, 802 F.3d at 1073–74 (quoting *O'Bannon I*, 7 F. Supp. 3d at 1005).

210. *Id.* at 1074 (citing *O'Bannon I*, 7 F. Supp. 3d at 1005–07).

211. *Id.* at 1074–75 (citing *O'Bannon I*, 7 F. Supp. 3d at 1005–07).

212. *Id.* at 1074, 1078 n.24, 1079 (citing *O'Bannon I*, 7 F. Supp. 3d at 1005–07).

213. *Id.* at 1074–75.

prevent the integration of athletes into their academic communities.<sup>214</sup> In support of this conclusion, the Ninth Circuit ruled that while it is not the job of the courts to use the “antitrust law to make marginal adjustments to broadly reasonable market restraints,” the NCAA’s grant-in-aid cap, set below the cost of attendance, was not a reasonable market restraint.<sup>215</sup> In fact, the Ninth Circuit found that the compensation rule had “no relation whatsoever to the procompetitive purposes of the NCAA,” since according to the NCAA’s own standards, the athletes would “remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.”<sup>216</sup> Therefore, the Ninth Circuit held, “[W]here, as here, a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.”<sup>217</sup>

As for the district court’s conclusion that allowing member schools to pay athletes \$5000 per year in deferred compensation for use of their NILs, “untethered to their education expenses,” the Ninth Circuit ruled that the district court was wrong.<sup>218</sup> “Having found that amateurism is integral” to the college sports market, the Ninth Circuit held that it was impossible to find that paying athletes cash was “virtually as effective” as not promoting amateurism, since “not paying student-athletes is *precisely what makes them amateurs*.”<sup>219</sup> If colleges and universities start paying their athletes, the Ninth Circuit held, the product will be taking a

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214. *O’Bannon II*, 802 F.3d at 1075 (citing *O’Bannon I*, 7 F. Supp. 3d at 983). Interestingly, even though the NCAA had already passed legislation allowing Division I members to voluntarily increase the grant-in-aid cap awarded to athletes to cover the extra cost of attendance, the NCAA still argued that even this “modest” change in the compensation rule would “open the floodgates to new lawsuits demanding all manner of incremental changes in the NCAA’s and other organizations’ rules.” *Id.* at 1054, 1075. In particular, the NCAA argued that as long as its restraint on compensation was “‘reasonably necessary to a valid business purpose,’ it should be upheld,” even if the court believed that it could have been improved. *Id.* at 1075.

215. *Id.* at 1075 (citing *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1982)).

216. *Id.*

217. *O’Bannon II*, 802 F.3d at 1075.

218. *Id.* at 1076, 1079. The Ninth Circuit focused its analysis on the procompetitive nature of the NCAA’s compensation rules. *Id.* at 1076 n.19. It should be noted, however, that the court stated how prior cases made it clear that any alternative, to be “virtually as effective,” must also “not significantly increase costs to implement.” *Id.* at 1076 & n.19 (citing *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)). While neither court addressed this issue, it seems impossible under that standard that the plaintiffs could show that allowing schools to pay for students’ NILs with cash compensation would not significantly increase costs to the NCAA and its member schools.

219. *Id.* at 1076.

“quantum leap” and college sports as we know it will no longer exist.<sup>220</sup> In particular, the Ninth Circuit stated, “Once that line is crossed . . . [,] the NCAA will have surrendered its amateurism principles entirely and transition[.]” from its unique brand of sport into a minor league.<sup>221</sup> “In light of that,” the Ninth Circuit ruled that it was clear that “the district court erred in concluding that small payments in deferred compensation [were] a substantially less restrictive alternative restraint.”<sup>222</sup>

#### IV. WHAT IS REASONABLE IN COLLEGE SPORTS?

In looking at what is “reasonable,” it is important to first look at the NCAA and the purpose of the organization. The NCAA was founded in 1905 in an attempt to create a uniform set of rules to regulate college football.<sup>223</sup> “Since 1973, the NCAA’s member schools have been organized into three divisions—Divisions I, II, and III.”<sup>224</sup> For a college or university to qualify for Division I, the college or university must sponsor a minimum of fourteen varsity sports teams, of which seven must be for women.<sup>225</sup> The college or university must also “meet minimum financial aid awards for their athletics program.”<sup>226</sup> There are roughly 345 schools currently competing at the Division I level, 128 of which compete at the FBS level.<sup>227</sup> As of September 2015, the association had roughly 1092<sup>228</sup> member schools, and regulated athletic competitions in 24 sports at the Division I level.<sup>229</sup> Besides football<sup>230</sup> and basketball, there are over 175,000 athletes competing at the Division I level and the NCAA awards championships in twenty-two other sports.<sup>231</sup>

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220. *O’Bannon II*, 802 F.3d at 1076, 1078.

221. *Id.* at 1078–79 (quoting *NCAA III*, 468 U.S. 85, 101–02 (1984)).

222. *Id.* at 1079.

223. *O’Bannon I*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

224. *Id.*

225. *Id.* at 964; *Divisional Differences*, *supra* note 6.

226. *Divisional Differences*, *supra* note 6.

227. *O’Bannon I*, 7 F. Supp. 3d at 964; *Composition and Sport Sponsorship of the NCAA Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/composition-and-sport-sponsorship-ncaa-membership?division=d1> (last visited Feb. 4, 2017).

228. *Composition and Sport Sponsorship of the NCAA Membership*, *supra* note 227.

229. *Division I Championships*, NCAA, <http://www.ncaa.org/championships?division=d1> (last visited Feb. 4, 2017).

230. The NCAA does not offer a championship for the 128 schools who play football at the Division I FBS level. It does however offer a championship at the Division I FCS level. *Difference Between FBS and FCS*, DIFFERENCEBETWEEN.NET, <http://www.differencebetween.net/miscellaneous/difference-between-fbs-and-fcs/> (last updated Dec. 25, 2010).

231. *Composition and Sport Sponsorship of the NCAA Membership*, *supra* note 227. Fall Sports include the following: Cross Country (M/W); Field Hockey; Football; Soccer (M/W); Volleyball (W); Water Polo (M). *Id.* Winter Sports include the following: Basketball (M/W);

As stated in the introduction, the question of what is reasonable for college athletes really depends on how you view college sports. If you only look at those FBS football and Division I basketball teams in the Power Five Conferences and all the money that these athletes are generating for their colleges and universities, it is understandable that you would believe it reasonable that the athletes receive a fair share of the money. After all, without the athletes there would be no one to play the games, and thus no revenue.

However, as also mentioned in the introduction, college sports is more than just football and basketball.<sup>232</sup> College sports is crew, cross country, field hockey, and all the other non-revenue sports.<sup>233</sup> Therefore, when looking at college sports, it is essential that you look at the entire athletic department. If you do, those running college sports argue that what you will see is that all of the revenue generated by football and basketball is simply going back into funding scholarships for all the other non-revenue sports.<sup>234</sup> As a result, NCAA member schools claim to actually be losing money running college sports.<sup>235</sup> For example, according to the *2004–14 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report*, only 24 of the 125 schools that play football at the FBS level generated more revenue than they spent in 2014, all the other schools in all the other levels lost money.<sup>236</sup> According to the report, for the 24 schools that were profitable, they only generated a median net profit of \$6,071,000 in 2014.<sup>237</sup> For the other 101 schools, the median net deficit was \$16,964,000 in 2014.<sup>238</sup> If you only

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Bowling; Fencing; Gymnastics (M/W); Ice Hockey (M/W); Rifle (M/W); Skiing (M/W); Swimming and Diving (M/W); Indoor Track and Field (M/W); Wrestling. *Id.* Spring Sports include the following: Baseball; Golf (M/W); Lacrosse (M/W); Rowing; Softball; Tennis (M/W); Outdoor Track and Field (M/W); Beach Volleyball (W); Volleyball (M); and Water Polo (W). *Id.*

232. *Divisional Differences*, *supra* note 6 (“Division I member institutions have to sponsor at least seven sports for men and seven for women (or six for men and eight for women) with two team sports for each gender. Each playing season has to be represented by each gender as well.”).

233. *Id.*, see *supra* text accompanying note 231.

234. Clay Travis, *The 20 Most Profitable College Football Teams*, OUTKICK COVERAGE (Dec. 22, 2015, 4:18 PM), <http://www.outkickthecoverage.com/the-20-most-profitable-college-football-teams-122215>.

235. *Myth: College Sports Are a Cash Cow*, AM. COUNCIL ON EDUC., <http://www.acenet.edu/news-room/Pages/Myth-College-Sports-Are-a-Cash-Cow2.aspx> (last visited Feb. 4, 2017).

236. DANIEL L. FULKS, 2004–14 REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 12–13, 21 (2015); *Composition and Sport Sponsorship of the NCAA Membership*, *supra* note 227.

237. FULKS, *supra* note 236, at 13.

238. *Id.*



considered football and men's basketball, the report claims that "[b]etween 50 and 60 percent of football and men's basketball programs have reported net generated revenues (surpluses) for each of the nine years reported."<sup>239</sup>

Since so many schools are actually losing money on athletics, the NCAA and its member schools argue that if colleges and universities were required to compensate athletes above the value of their scholarship, the entire multibillion dollar college sports industry would begin to crumble and disappear.<sup>240</sup> In particular, the NCAA worries that colleges and universities will be forced to cut non-revenue sports to balance budgets.<sup>241</sup> If that were the case, the NCAA would have been correct in arguing that restrictions on athlete compensation truly were reasonable and procompetitive since they ultimately did increase both the number of scholarships available to athletes and the number of games available to college sports fans.<sup>242</sup>

The counterargument to this, however, is that, as the district court in *O'Bannon I* pointed out, there is no evidence that colleges and universities are using the money they save from not compensating their athletes to fund additional teams or scholarships.<sup>243</sup> As the NCAA's own *2004–14 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report* states, two of the three line items that made up almost two-thirds of total expenses for the FBS subdivision are coaches' salaries and benefits at about thirty-four percent, and facilities at approximately fourteen percent of total expenses.<sup>244</sup>

Additionally, over the last decade, a number of colleges and universities have cut athletic teams without even having to compensate their athletes.<sup>245</sup> While the colleges and universities have offered a number of reasons, both financially and legislatively, for cutting non-revenue sports, only in a limited number of cases have the schools reduced or cut the budgets of their football or basketball teams. Finally, as the district court noted, *O'Bannon* was not seeking to require every

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239. *Id.*

240. *See O'Bannon II*, 802 F.3d at 1083; Pielke, *supra* note 3; *see also O'Bannon I*, 7 F. Supp. 3d 955, 1004 (N.D. Cal. 2014).

241. *But see O'Bannon I*, 7 F. Supp. 3d at 1003–04.

242. *Id.* at 963, 973, 1003–05.

243. *Id.* at 1004.

244. FULKS, *supra* note 236, at 12–13.

245. *Id.* at 13 (stating that student grants-in-aid or scholarships made up only fifteen percent of an athletic department's budget); Ken Belson, *Universities Cutting Teams as They Trim Their Budgets*, N.Y. TIMES (May 3, 2009), <http://www.nytimes.com/2009/05/04/sports/04colleges.html>.

school to provide compensation to its athletes, only that schools be permitted to do so.<sup>246</sup> Therefore, each school will be free to decide independently if it can actually afford to compensate its athletes, and those that decided that they cannot, do not have to pay their athletes.<sup>247</sup>

#### CONCLUSION

Are FBS football players and Division I basketball players being exploited? The easy answer is yes. The athletes in these sports, especially in the Power Five Conferences, generate tens of millions of dollars for their schools and receive a free education in return for their labor.<sup>248</sup> That is assuming, of course, that the athletes actually get an education. Most athletes at that level are so concerned with playing in the NFL or the NBA that they do not have time to even go to class.<sup>249</sup> In addition, in no other market would an athlete or employee be asked to take a salary below market value just so the owner could run an unprofitable venture.<sup>250</sup> For example, the NBA is not asking LeBron James to take less money so the league and its owners can put more money onto the WNBA. Yet, that is exactly what we are asking FBS football players and Division I basketball players to do.

If, however, you believe that the NCAA has an obligation to oversee all college sports and that colleges and universities should be just as concerned with the athletes on the field hockey and golf teams as those on the football and basketball teams, the answer is a little more difficult, since athletic departments, even at Ohio State and Texas, have budgets based on expected revenues and expenses.<sup>251</sup> When you increase the expense of running the football and basketball programs, chances are the schools are going to need to cut expenses in other areas. While at schools in the Power Five Conferences this might be done by cutting down coaches' salaries or reducing the facility budget, at other schools it will probably result in the dropping of a non-revenue sport or two. Thereby

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246. *O'Bannon I*, 7 F. Supp. at 1004.

247. *Id.*

248. Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html>.

249. *Cf. id.* ("During the season, they can end up putting in 50-hour weeks at their sports, and they learn early on not to take any course that might require real effort or interfere with the primary reason they are on campus: to play football or basketball.")

250. See Allen R. Sanderson & John J. Siegfried, *Enough Madness: Just Pay College Athletes*, CHI. TRIB. (Feb. 2, 2016, 4:02 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-ncaa-athletes-pay-sports-college-perspec-0203-20160202-story.html>.

251. Dennis Dodd, *Best in College Sports: No Topping Ohio State's 2014-15 Season*, CBS SPORTS (July 7, 2015), <http://www.cbssports.com/college-football/news/best-in-college-sports-no-topping-ohio-states-2014-15-season/>.

gradually decreasing the total number of opportunities available to athletes in those sports, and diminishing the entire college sports experience.

Regardless of how you view college sports, there seems to be no reasonable justification in restricting the amount of money college athletes can make marketing and selling their NILs independently of their schools. As a result, the NCAA and college sports administrators need to loosen some of their rules around NILs compensation. This will allow the colleges and university to keep the number of opportunities available, in both scholarships and teams, at its current level, while at the same time allowing those athletes generating the revenue for the schools to get a fair value for their labor.