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## They're Not Yours, They's My Own: How NCAA Employment Restrictions Violate Antitrust Law

Gregory Sconzo

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# They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law

GREGORY SCONZO<sup>1</sup>

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## I. INTRODUCTION

Jeremy Bloom, an Olympic Gold-Medal skier, wanted to play col-

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1. University of Miami Law Review; J.D. Candidate 2013, University of Miami School of Law; B.A. 2010, University of Miami. I dedicate this paper to Paul T. Dee, Esq. who sadly passed away before my article could be published. Despite battling illness, Professor Dee went above and beyond to help me with the completion of this article. Others will rightfully remember Professor Dee for what he did as General Counsel and Athletic Director at University of Miami, but I will always remember him as an adviser, mentor, and friend. I would also like to thank my family, my roommates, and my girlfriend, for without their support and assistance, I would still be trying to come up with a topic to write about.

lege football at Colorado University, but he did not want to give up on his pursuit for another gold medal. NCAA rules, however, restrict student employment and promotions which forced him to choose between the two. Bloom had to abandon college football so that he could cover the necessary costs of continuing to pursue his dream of being an Olympic skier.<sup>2</sup>

Darnell Autry was a Northwestern Football player who aspired to be a movie star. Autry was fortunate enough to be selected for a role in a commercial film. However, the same NCAA rules that forced Bloom to choose between skiing and football prevented Autry from being able to receive any compensation for his role in the film.<sup>3</sup>

Aaron Adair was a prospective baseball player for Oklahoma University who, prior to beginning to play college baseball, went through battles with cancer, battles with a debilitating stomach ailment, and the death of his father. To help cope with his struggles, Adair wrote a book describing his battles. His story inspired readers all over the world, but not the NCAA. Again, the NCAA's employment restrictions had found yet another victim. Since Adair used his name and reputation to promote his book, he was forced to abandon his dreams of playing college baseball.<sup>4</sup>

Each of these students faced a difficult decision, with just two options. First, they could have pursued their ambitions. But in doing so, they would collide with NCAA regulations. Specifically, NCAA bylaws outlaw any remuneration of the student athlete based on the student's reputation, fame, or publicity<sup>5</sup> and prohibit student athletes from using their names or pictures in advertisements or promotions.<sup>6</sup> Bloom violated these bylaws by receiving endorsements for skiing. If Autry would have received money for his participation in the film, the use of his image would have violated these NCAA bylaws. Lastly, since Adair's book had his name and image on the cover, he was found to violate these NCAA bylaws.

The second option available to them was to abandon their other career goals and continue pursuing a profession in their collegiate sport.

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2. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 622 (Colo. Ct. App. 2004).

3. See Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 682–83 (2003) (citing Mark Brown, *Autry Sues NCAA Over Film Role*, CHI. SUN-TIMES, Apr. 3, 1996, at 108).

4. Christian Dennie, *Amateurism Stifles A Student-Athlete's Dream*, 12 SPORTS LAW. J. 221, 235–37 (2005) (citing Interview with Aaron Adair, Former Student-Athlete, University of Oklahoma, in Norman, Okla. (Oct. 26, 2003)).

5. NCAA, NCAA 2009-10 NCAA DIVISION I MANUAL, art 12.4.1(b), at 72 (2011), available at <http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx> (last visited Jan. 16, 2012) [hereinafter NCAA Manual].

6. NCAA Manual, *supra* note 5, at art. 12.5.2.1(b).

Bloom would have had to give up being an Olympic skier, Autry would have had to walk away from his aspirations to be a movie star, and Adair would have had to cancel the publication of his book. The option of abandoning alternative career options seems even more ominous for student athletes when one considers how few of the NCAA student athletes actually become professionals in their sport. The NCAA's student website paints this picture clearly, stating: "There are over 400,000 student athletes, and just about every one of them will go pro in something other than sports."<sup>7</sup>

To further this unfairness, college players must sign away their rights to profit off their own names and likenesses to the NCAA and the member institutions.<sup>8</sup> The limitations on profiting off college athletes' names and images are far less restrictive when the college the player attends, the NCAA, or even third parties use them. NCAA bylaws allow member institutions to use the student's name, picture, or appearance to promote the school and the athletic events.<sup>9</sup> The NCAA may use the name or picture of any student in order to promote NCAA championships, events, and programs.<sup>10</sup> NCAA bylaws even allow third parties to use student athletes' names or images either when they are acting on behalf of the NCAA<sup>11</sup> or when used during advertisements of private businesses to congratulate players on their achievements.<sup>12</sup> Yet, while others gain large profits from the athlete's names and images,<sup>13</sup> the athletes themselves have no rights or abilities to do the same.

This Comment will examine the inconsistencies surrounding the NCAA bylaws on amateurism and the restraint that they place on the players' right to profit off their name and image. This will be done through an analysis of the employment restrictions placed on student athletes by the NCAA. Part II will discuss the various ways that the NCAA maintains the amateurism of its student athletes.<sup>14</sup> This section

7. The NCAA's major ad campaign over the last few years has been one featuring student athletes first on the playing field, and then, later, showing them participating in some other form of employment. NCAAstudent.org, Watch TV Spots, <http://ncaastudent.org/> (last visited Jan. 16, 2012); see also, Robert A McCormick, *A Trial of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (noting the strangeness of the NCAA's choice of marketing and the true goal of "masking" the true status of student athletes).

8. NCAA, Form 08-3a Academic Year 2008-2009, available at [http://www.ukathletics.com/doc\\_lib/compliance0809\\_sa\\_statement.pdf](http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf) (last visited Jan. 16, 2012) [hereinafter Form 08-3a].

9. NCAA Manual, *supra* note 5, at art. 12.5.1.1.

10. *Id.* at art. 12.5.1.1.1

11. *Id.*

12. *Id.* at art. 12.5.1.4.

13. In the year 2009-10, NCAA revenue was \$749.8 million. *Revenue*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue> (last visited Jan. 16, 2012).

14. See *infra* Part II.

will discuss the NCAA's history<sup>15</sup> and bylaws relating to amateurism.<sup>16</sup> Part III will focus specifically on how the NCAA restricts college athletes' rights to profit off of their names, images, and reputations.<sup>17</sup> This section will discuss the NCAA's restrictions relating to employment<sup>18</sup> and the forms student athletes are required to sign to participate in intercollegiate athletics.<sup>19</sup> Part IV will contain an antitrust analysis of the employment restrictions.<sup>20</sup> This section will begin with a brief history of the Sherman Antitrust Act<sup>21</sup> and its past applications involving the NCAA.<sup>22</sup> Then, a rule of reason analysis will be performed on the NCAA's employment restrictions which will demonstrate that NCAA Bylaw 12.4 constitutes an anticompetitive agreement.<sup>23</sup> Part V will compare the employment restrictions on student athletes with students who are not under the control of the NCAA.<sup>24</sup> Lastly, part VI will conclude that the employment restrictions violate antitrust law and lead to a suggestion that the restrictions must be lifted.<sup>25</sup>

## II. NCAA AND AMATEURISM

"I think you would compare the NCAA to Al Capone and to the Mafia. . . . I think they're just one of the most vicious, most ruthless organizations ever created by mankind."

Illinois Rep. Bobby Rush<sup>26</sup>

### A. History of NCAA

The National Collegiate Athletic Association (NCAA) was created out of necessity. Before the NCAA's creation in 1905, cheating scandals, lack of rule enforcement, and serious injuries plagued intercollegiate sports. Even in one of the first intercollegiate athletic events, a regatta between Yale and Harvard Universities, allegations of cheating

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15. See *infra* Part II.A.

16. See *infra* Part II.B.

17. See *infra* Part III.

18. See *infra* Part III.A.

19. See *infra* Part III.B.

20. See *infra* Part IV.

21. See *infra* Part IV.A.

22. See *infra* Part IV.B and Part IV.C.

23. See *infra* Part IV.D.

24. See *infra* Part V.

25. See *infra* Part VI.

26. Associated Press, *Bobby Rush Compares NCAA to Mafia*, ESPN, Nov. 2, 2011, [http://espn.go.com/college-sports/story/\\_id/7177833/illinois-congressman-bobby-rush-compares-ncaa-mafia](http://espn.go.com/college-sports/story/_id/7177833/illinois-congressman-bobby-rush-compares-ncaa-mafia). Congressman Bobby Rush made these accusations at a forum organized to examine the impact of "back-room deals, payoffs and scandals" in college sports. *Id.*

caused controversy.<sup>27</sup> Yale accused Harvard of cheating by using a coxswain who was not a student at Harvard.<sup>28</sup> Such difficulties in overseeing matches between schools led to the formation of the first athletic conferences and eventually to calls for a formation of a national organization to monitor and control college athletics.<sup>29</sup> However, it was not until President Theodore Roosevelt called for a national conference in response to the growing number of deaths and injuries resulting from intercollegiate athletics that a national organization would be formed.<sup>30</sup>

On December 28, 1905, sixty-two universities joined together to form the Intercollegiate Athletic Association of the United States ("IAAUS")<sup>31</sup> and established a principle of amateurism at the heart of its constitution.<sup>32</sup> In 1910, the IAAUS switched to its present name, the National Collegiate Athletic Association ("NCAA").<sup>33</sup> Initially, the NCAA was solely a discussion group and rule-making body, but in 1921, the NCAA organized its first national championship, the National Collegiate Track and Field Championships.<sup>34</sup> Gradually, more sports fell under the rule-making control of the NCAA, as did the number of sports having national championships.<sup>35</sup>

After World War II, college attendance skyrocketed, resulting in an increased interest in intercollegiate sports. Also during this time, television became a mainstay in the majority of family homes, leading to increased pressure to broadcast intercollegiate sporting events. Concern with the growing attendance numbers and how television would affect attendance, the NCAA enacted the Sanity Code which would be enforced by the Constitutional Compliance Committee. Although the purpose behind the Sanity Code was to "alleviate the proliferation of exploitive practices in the recruitment of student athletes", the Constitutional Compliance Committee lacked the proper enforcement methods.<sup>36</sup>

The 1950s was a time of great change for the NCAA. The Sanity Code was repealed and the Constitutional Compliance Committee was replaced by the Committee on Infractions (COI). The COI was given

27. MATHEW J. MITTEN ET AL., *Sports Law and Regulation: Cases, Materials, and Problems* 100 (2d ed. 2009).

28. *Id.* The coxswain is the person on the rowing team who is in charge of the boat.

29. *Id.*

30. *Id.* In 1905 alone, there were over 18 deaths and 100 major injuries in college football. *Id.*

31. *History*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last visited Jan. 16, 2012).

32. MITTEN ET AL., *supra* note 27, at 101.

33. *Id.*

34. *Id.*

35. *Id.* For example, the first basketball Championship was held in 1939. *Id.*

36. MITTEN ET AL., *supra* note 27, at 102. In fact, the only enforcement power that the Constitutional Compliance Committee had was expulsion. This penalty was so severe and so reluctantly used that it essentially left the Constitutional Compliance Committee powerless. *Id.*

much greater sanction authority and became far more willing to exercise this authority.<sup>37</sup> The NCAA also recognized that with the growth of the NCAA in terms of member institutions and exposure, a central leader was needed to run the NCAA.<sup>38</sup> The NCAA named Walter Byers as the executive director of the NCAA in 1951 and established a NCAA headquarters in Kansas City, Missouri, in 1952.<sup>39</sup> Byers immediately strengthened the NCAA, specifically its enforcement division, and negotiated the first television contract to televise college football games.<sup>40</sup>

The NCAA continued to grow at a rapid pace with member institutions diverging away from one another in terms of sports emphasis.<sup>41</sup> In response, in 1973, the NCAA divided the member institutions into three Divisions: I, II, and III.<sup>42</sup> Eventually, Division I would be divided into two subdivisions, namely Division I-A and Division I-AA.<sup>43</sup> In the 1980s, the NCAA would begin to expand to include women's sports.<sup>44</sup> Today, the NCAA consists of 1,273 member institutions<sup>45</sup> with over 400,000 student athletes.<sup>46</sup> Further, the NCAA oversees eighty-nine championships in twenty-three different sports<sup>47</sup> and has become a multibillion dollar a year enterprise.<sup>48</sup>

### B. NCAA Bylaws Dealing with Amateurism

From its very beginnings, the primary principle behind the NCAA was amateurism. The IAAUS bylaws created in 1906 outlined what the association felt the principles of amateurism were and required members

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37. *Id.*

38. *History*, *supra* note 31.

39. *Id.*

40. *Id.* See also, MITTEN ET AL., *supra* note 27, at 102. The television contract was worth over \$1 million. *Id.* This contract would eventually be found to violate antitrust law. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 119 (1984) (holding that schools must be allowed to negotiate their own television contracts, any restriction by the NCAA was considered an antitrust violation. The court reasoned that restraints on football telecasts did not maintain competitive balance but rather imposed a restriction on one source of revenue that was more important to some schools than to others.).

41. *History*, *supra* note 31.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Composition and Sport Sponsorship of the NCAA*, NCAA, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/Ncaa/ncaa/ababo+the+ncaa/membership/membership\\_breakdown.html](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/Ncaa/ncaa/ababo+the+ncaa/membership/membership_breakdown.html) (last visited Jan. 16, 2012). 1,066 are active member institutions. *Id.*

46. *Who We Are*, NCAA, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last visited Jan. 16, 2012).

47. *Id.*

48. *Revenue*, *supra* note 13. For 2009–10, NCAA revenue was \$749.8 million, most of which came from the final year of a rights agreement with CBS Sports for March Madness. *Id.*

to “enact and enforce” measures which were necessary to prevent violations of these principles, including:

- a. Proselyting [sic]
  1. The offering of inducements to players to enter Colleges or Universities because of their athletic abilities, and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly.
  2. The singling out of prominent athletic students of preparatory schools and endeavoring to influence them to enter a particular College or University.
- b. The playing of those ineligible as amateurs.
- c. The playing of those who are not bona-fide students in good and regular standing.
- d. Improper and unsportsmanlike conduct of any sort whatsoever, either on the part of the contestants, the coaches, their assistants, or the student body.<sup>49</sup>

A formal definition of amateurism was not released by the NCAA until 1916. It defined an amateur athlete as “one who participates in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom.”<sup>50</sup> Even though a formal definition was agreed upon, it was not until the 1950s with the creation of the Committee on Infractions that the principles of amateurism began to be strictly enforced.<sup>51</sup>

The current NCAA Constitution lists that the basic purpose of the association “is to maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>52</sup> The NCAA maintains this demarcation by allowing only amateur student-athletes to participate in intercollegiate sports.<sup>53</sup> Once students lose their amateur status in a particular sport, they are no longer eligible to participate in that sport,<sup>54</sup> unless the NCAA grants a waiver or if the conduct falls within one of the few exceptions spelled out in the bylaws.<sup>55</sup>

49. MITTEN ET AL., *supra* note 27, at 101 (citing IAAUS Bylaws, art. VI, 1906 Proc. at 33).

50. Kay Hawes, *Debate on Amateurism Has Evolved over Time*, NCAA NEWS, Jan. 3, 2000, <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateurism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html>. The defining of the term “amateur” was highly debated within the NCAA. The NCAA decided to put forth a definition in 1908, but agreement could not be reached on the definition until 1916. *Id.*

51. *Id.*

52. NCAA Manual, *supra* note 5, at art. 1.3.1. (Basic Purpose).

53. *Id.* at art. 12.01.1., 12.01.2.

54. *Id.* at art. 12.1.2.

55. *Id.* at art. 12.1.2.4. This section spells out the few exceptions to the amateurism rule.



Article 12.1.2 provides a list of ways individuals can lose their amateur status:

**12.1.2 Amateur Status.** An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

- a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (Revised: 4/29/10 effective 8/1/10)
- d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
- e) Competes on any professional athletics team per Bylaw 12.02.4, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (Revised: 4/25/02 effective 8/1/02, 4/29/10 effective 8/1/10)
- f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or (Revised: 4/25/02 effective 8/1/02, 4/24/03 effective 8/1/03)
- g) Enters into an agreement with an agent. (Adopted: 4/25/02 effective 8/1/02)<sup>56</sup>

The most egregious and overarching of these banned activities is the restriction on the use of a student athlete's skill for either a direct or indirect financial gain. The remainder of this article will focus on the way this restriction places a college athlete in a difficult and unjust position.

### III. COMPENSATION BASED ON THE SKILL OR REPUTATION OF THE ATHLETE<sup>57</sup>

Student athletes cannot directly or indirectly use their athletic skill for monetary gain. The most obvious form of monetary gain would be a salary from the schools for playing in games. This article differs from others previously written which advocate that the students should get paid by either the schools or the NCAA for their participation in

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These exceptions include prize money, payments based on team performance, insurance, fundraising, training expenses, travel expenses, eligibility fees, equipment, and expenses relating to participation in the Olympics. *Id.*

56. *Id.* at art. 12.1.2.

57. For the purposes of this article, employment will be considered under this subcategory.

games.<sup>58</sup> Student athletes, like all students, are able to be compensated in the form of scholarships and grants. Student athletes on full scholarships receive funding to cover their cost of attendance. This includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.<sup>59</sup> This places student athletes on an equal or greater playing field than other non-athlete students who attend the same institution.

However, the NCAA bylaws go much further than just limiting players from direct “pay for play” compensation. The bylaws place restraints on athletes that put them at a disadvantage to non-athlete students. The most egregious of these restrictions are those relating to student employment.<sup>60</sup>

### A. Student Employment

The NCAA limits student athlete employment both by narrowing the fields that students can work in and by fixing the rate at which the students can be paid. Section 12.4 of the NCAA Bylaws permits student athletes to obtain employment, but limits compensation for such employment to being “only for work actually performed” and “at a rate commensurate with the going rate in that locality for similar services.”<sup>61</sup> This is further qualified by outlawing any remuneration of the student athlete based on the student’s reputation, fame, or publicity even if this would be of additional value to the employer.<sup>62</sup> Student athletes can offer athletic lessons and work in sporting goods stores, but cannot use their names, pictures or appearances to attract individuals who would be interested in lessons or in purchasing merchandise.<sup>63</sup> Lastly, students may start their own businesses, but the students name, photograph, appearance or athletics reputation cannot be used to promote the business.<sup>64</sup>

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58. See, e.g., Christian Dennie, *Amateurism Stifles A Student-Athlete’s Dream*, 12 SPORTS LAW. J. 221, 252-53 (2005) (suggesting the NCAA should provide student-athletes with financial aid that covers the “actual cost of attendance”); Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athlete’s Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1107 (2010) (Suggesting the court should establish a trust fund for former student-athletes); Julia Brighton, *The NCAA and the Right of Publicity: How the O’Bannon/Keller Case May Finally Level the Playing Field*, 33 HASTINGS COMM. & ENT L.J. 275, 289 (2011) (Suggesting that the NCAA should implement a trust system like the one used by the United States Olympic Committee).

59. NCAA Manual, *supra* note 5, at art. 15.02.2.

60. Other prohibited methods of indirect compensation include restrictions on promotional activities, *Id.* at art. 12.5., and financial donations from outside organizations. *Id.* at art. 12.6.

61. *Id.* at art. 12.4.1.

62. *Id.* at art. 12.4.1.1.

63. *Id.* at art. 12.4.2.1(f).

64. *Id.* at art. 12.4.4.

These restrictions are unique to student athletes. Students who are not under the restrictions of the NCAA can work wherever they want to work, use their name to start a business, use their appearance to advertise for a business (whether the business is their own or owned by someone else), and most importantly get compensated at whatever rate an employer sees fit. A musician in a college band is not restricted from getting paid more than other employees to work at the local music store, if the employer feels that the musician's reputation would increase sales or traffic into the store. The winner of the Miss University Pageant is not barred from working at a local beauty salon because she may attract more customers with either her good looks or reputation. These restrictions exist only for NCAA college athletes.

Student athletes are forced to sell themselves short in the employment market. Not only is this unfair to these students when compared to others, these restrictions constitute an anticompetitive agreement which violates Section 1 of the Sherman Antitrust Act.

#### B. *Form 08-3a*

Student athletes are required by the NCAA Constitution Article 3.2.4.6<sup>65</sup> and NCAA Bylaw 14.1.3.1<sup>66</sup> to sign Form 08-3a at the beginning of each season. The form has seven parts, of which Part I and Part IV relate to student employment and the use of a students' name, image, or reputation.<sup>67</sup>

Part I of Form 08-3a requires student athletes to affirm that they "meet the NCAA regulations for student-athletes regarding eligibility, recruitment, financial aid, amateur status and involvement in gambling activities" and that they "understand that if [they] sign this statement falsely or erroneously, [they] violate NCAA legislation on ethical conduct and [they] will further jeopardize [their] eligibility."<sup>68</sup>

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65. *Id.* at art. 3.2.4.6. "Student-Athlete Statement. An active member shall administer annually, on a form prescribed by the Legislative Council, a signed statement for each student-athlete that provides information prescribed in Bylaw 14.1.3." *Id.*

66. *Id.* at art. 14.1.3.

Student-Athlete Statement. 14.1.3.1

Content and Purpose. Prior to participation in intercollegiate competition each academic year, a student-athlete shall sign a statement in a form prescribed by the Legislative Council in which the student-athlete submits information related to eligibility, recruitment, financial aid, amateur status, previous positive-drug tests administered by any other athletics organization and involvement in organized gambling activities related to intercollegiate or professional athletics competition under the Association's governing legislation. Failure to complete and sign the statement shall result in the student-athlete's ineligibility for participation in all intercollegiate competition. *Id.*

67. Form 08-3a, *supra* note 8.

68. *Id.* at Part I.

Part IV of Form 08-3 requires student athletes to “authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use [their] name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”<sup>69</sup>

#### IV. ANTITRUST ANALYSIS OF STUDENT EMPLOYMENT RESTRICTIONS

When examined under the framework of antitrust law, the NCAA employment restrictions must be found to constitute an anticompetitive agreement, of which the NCAA cannot proffer any legitimate procompetitive rationales.

##### A. *Elements of a Sherman Antitrust Act Claim*

Section 1 of the Sherman Antitrust Act states that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”<sup>70</sup> Since nearly all contracts that bind parties to a certain agreed course of conduct constitute some form of restraint of trade, the Supreme Court has limited the restrictions contained in section 1 to bar only “unreasonable restraints of trade.”<sup>71</sup> Further, the Supreme Court has clearly defined two kinds of Sherman Act violations: per se violations and ones that violate the rule of reason.<sup>72</sup>

Per se violations occur “when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”<sup>73</sup> The per se rule only pertains to practices that are void of any redeeming competitive rationales.<sup>74</sup> Once found to be illegal per se, a court need not examine the impact the practice has on the market or the defendant’s procompetitive justifications for the practice before finding a violation of antitrust law.<sup>75</sup> Examples of per se violations include horizontal market division,<sup>76</sup> hori-

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69. *Id.* at Part IV.

70. 15 U.S.C. § 1 (2006).

71. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 98, 104 S.Ct. 2948, 2959 (1984); *see also* Law v. Nat’l Collegiate Athletic Ass’n, 134 F.3d 1010, 1016 (10th Cir. 1998).

72. Bd. of Regents, 468 U.S. at 103; *see also* Law, 134 F.3d at 1016.

73. Bd. of Regents, 468 U.S. at 103–04.

74. Law, 134 F.3d at 1016.

75. *Id.*

76. United States v. Topco Associates, Inc., 405 U.S. 596 (1972). The Supreme Court held that agreements between competitors to allocate territories to minimize competition are illegal. *Id.* Topco had its members sign an agreement designating the territory in which they could sell Topco-brand products. *Id.* Members could not sell products outside the territory in the agreement. *Id.*

zontal price-fixing<sup>77</sup> and horizontal boycotts.<sup>78</sup>

If the agreement does not fall under a recognized per se violation, the rule of reason test is used to determine if the restraint on trade is "unreasonable."<sup>79</sup> Under the rule of reason test, the initial burden is on the plaintiff to show that the agreement had a "substantially adverse effect on competition."<sup>80</sup> If met, the burden then shifts to the defendant to provide evidence of the procompetitive reasoning behind the alleged wrongful conduct.<sup>81</sup> If demonstrated, the plaintiff must then show that the challenged conduct is "not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner."<sup>82</sup> If all three steps are met, it must be determined if the harms and benefits outweigh each other in order to judge whether the challenged behavior passes the rule of reason test.<sup>83</sup>

### B. *The NCAA is Subject to Section 1 of the Sherman Act*

The NCAA previously was immune from federal antitrust actions being brought against them, because the laws were "generally not applicable to self-regulatory organizations with noncommercial goals."<sup>84</sup> However, in *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court found that antitrust laws were applicable to the NCAA.<sup>85</sup> University of Oklahoma and University of Georgia sued the NCAA for antitrust violations based on the NCAA restricting the number of college football games televised each year and prohibiting member institutions from contracting to have additional games broadcasted.<sup>86</sup>

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77. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 394 (1927). The Supreme Court held that an agreement to fix prices is unlawful per se, regardless of whether the prices fixed are themselves reasonable. *Id.* The case involved fixing and maintaining uniform prices for the sale of sanitary pottery. *Id.*

78. *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990). The Supreme Court held that a horizontal boycott, or an agreement between a group of competitors not to deal with individuals or companies outside the group, was a per se violation of § 1 of the Sherman Act. *Id.* The case involved an agreement between a group of attorneys to not work for wages that they felt were too low. *Id.*

79. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 98 (1984); see also *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016 (10th Cir. 1998).

80. *Law*, 134 F.3d at 1019; see also *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir.1997).

81. *Id.*

82. *Id.*

83. *Id.*

84. Christine A. Burns, *Potential Game Changers Only Have Eligibility Left to Suit Up for A Different Kind of Court: Former Student-Athletes Bring Class Action Antitrust Lawsuit Against the NCAA*, 6 J. BUS. & TECH. L. 391, 403 (2011).

85. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 119-20 (1984).

86. *Id.* at 94.

The Supreme Court found that by placing a ceiling on the number of games televised, the NCAA was effectively engaging in horizontal price-fixing, which would normally be a per se violation.<sup>87</sup>

However, since the NCAA would not be able to put forth a product without horizontal restraints, the court instead analyzed the agreement under a rule of reason analysis.<sup>88</sup> In doing so, the court weighed the anticompetitive consequences of the agreement, namely loss of freedom to compete and higher prices and lower output than would exist were there not an agreement,<sup>89</sup> with the procompetitive reasons proffered by the NCAA, namely to promote equality among member institutions and to protect attendance at live games.<sup>90</sup> The court held that the agreement failed the rule of reason test and violated antitrust law since other less restrictive options were available that would sufficiently preserve the competitive balance between teams.<sup>91</sup> Also, by protecting live attendance the NCAA was choosing to protect one form of increasing revenue, attendance at games, over another, revenue from television contracts.<sup>92</sup>

Further, the NCAA, in *Law v. NCAA*, was also found to violate section 1 of the Sherman act when it limited individual's salaries. In *Law*, the NCAA, in an effort to reduce costs, decreased the number of coaches each sport was allowed to have.<sup>93</sup> In doing so, it developed the restricted-earnings coaches' rule (REC rule) under which entry-level coaches could only make \$16,000 a year.<sup>94</sup> A class of basketball coaches who were affected by the rule challenged the REC rule as a violation of section 1 of the Sherman Antitrust Act.<sup>95</sup> The NCAA did not contest that the REC rule was the result of an agreement between its members,<sup>96</sup> but instead contested that the coaches could not define a relevant market.<sup>97</sup>

Using the same reasoning as *Board of Regents*, the Tenth Circuit did not consider these horizontal restraints to be per se violations, because restraints such as this are essential for the product to be available at all.<sup>98</sup> Instead, the court used the rule of reason test to determine if the REC Rule violated antitrust laws.<sup>99</sup> The plaintiff therefore was

87. *Id.* at 100.

88. *Id.* at 101–02.

89. *Id.* at 105–06.

90. *Id.* at 114–15.

91. *Id.* at 119.

92. *Id.*

93. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1014 (10th Cir. 1998).

94. *Id.*

95. *Id.* at 1012.

96. *Id.* at 1016.

97. *Id.* at 1019.

98. *Id.* at 1017–18.

99. *Id.* at 1019.

required to show that the defendant had requisite market power within a defined market or to show actual anticompetitive effect such as control over price or output.<sup>100</sup> Law did not have to show market power since the court found price-fixing has obvious anticompetitive effects.<sup>101</sup> The NCAA offered three procompetitive rationales, namely the desire to retain positions, cost reduction, and maintaining competitive balance, but the court rejected all three of these reasons.<sup>102</sup> In terms of retaining positions, the court found that nothing in evidence suggested that the salary limits for the coaches would be effective at creating entry level positions, since many positions were filled by experienced coaches.<sup>103</sup> The court found no evidence that restricting coach's salaries would reduce deficits, and even if there were evidence, mere cost saving does not qualify as a defense under antitrust law.<sup>104</sup> Lastly, with regard to maintaining competitiveness, the court found that it was not clear that the REC rule would equalize the experience level of coaches, since there was no evidence that the salary restrictions enhance competition, level the playing field, or reduce coaching inequities.<sup>105</sup> Therefore, the Tenth Circuit held that Restricted Earnings Coach Rule violated Section 1 of the Sherman Antitrust Act.<sup>106</sup>

### C. *Students-Athletes Have Standing to Sue the NCAA*

In the past decade, players have increasingly brought claims against the NCAA.<sup>107</sup> This gate to the courts was opened by Jeremy Bloom when he brought claims against the NCAA seeking declaratory and injunctive relief requiring the NCAA to allow him to participate in college football at University of Colorado while continuing to receive endorsements he earned as an Olympic Skier.<sup>108</sup> Although Bloom did not bring antitrust claims against the NCAA and although he was unsuccessful in his actions against the NCAA,<sup>109</sup> this case is significant because of the resulting ruling regarding college athletes' standing to sue the NCAA. The court determined that as an intended third-party benefi-

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100. *Id.*

101. *Id.* at 1020. The court terms this method of "proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects" as the "quick look" rule of reason. *Id.*

102. *Id.* at 1021.

103. *Id.* at 1022.

104. *Id.* at 1023.

105. *Id.* at 1024.

106. *Id.*

107. *See, e.g.,* Bloom v. NCAA, 93 P. 3d 621 (Colo. App. 2004); Hart v. Elec. Arts, Inc., 740 F. Supp. 2d 658 (D.N.J. 2010); *In re NCAA Student-Athlete Name & Likeness Litig.*, C 09-1967 CW, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

108. Bloom, 93 P. 3d at 622.

109. *Id.* at 628.

ciary to the contractual relationship between the NCAA and its member institutions, student athletes have standing to pursue claims against the NCAA.<sup>110</sup>

#### D. *Applying the Rule of Reason Test to the Student Employment Restrictions Found in Article 12.4 of the NCAA Constitution*

For the same reasons that the Restricted-Earnings Coach Rule was found to violate antitrust laws in *Law v. NCAA*, the restrictions on rates at which the students may be compensated should also be found to violate section 1 of the Sherman Antitrust Act. As a result of the NCAA Constitution, student athletes are required to sign Form 08-3a certifying that they are bound by the NCAA bylaws.<sup>111</sup> This creates an agreement that affects interstate commerce. By restricting the remuneration athletes can receive from employment to “a rate commensurate with the going rate in that locality for similar services,”<sup>112</sup> the NCAA is horizontally fixing the price at which students can be paid. The reasons proffered by the NCAA are not legitimate procompetitive rationales for these anticompetitive employment restrictions.

#### 1. A PER SE ANALYSIS WILL LIKELY NOT BE USED BY A COURT WHEN EVALUATING THE EMPLOYMENT RESTRICTIONS

In both *Board of Regents* and in *Law*, the courts chose not to use a per se analysis despite allegations of horizontal price-fixing which would normally fall under the per se category. The reasoning against a per se analysis is that the NCAA requires some horizontal restraints to maintain the product of college sports. A per se analysis would result in nearly every restriction of the NCAA being overturned, including those regarding eligibility and academics. Instead, both *Board of Regents* and *Law* advocate the use of the rule of reason analysis to determine whether an antitrust violation occurs, allowing the court to weigh the anticompetitive effects against the procompetitive reasons in support of the act.

#### 2. ANTICOMPETITIVE EFFECTS OF THE STUDENT EMPLOYMENT RESTRICTIONS

The first step in performing a rule of reason analysis is that the plaintiff is required to show that an agreement had a substantially adverse effect on competition, or was anticompetitive.<sup>113</sup> The plaintiff

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110. *Id.* at 624.

111. *See supra* Part III.C.

112. NCAA Manual, *supra* note 5, at art. 12.4.1(b).

113. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 113 (1984); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998).



therefore must show that the defendant had the required market power within a certain market or show actual anticompetitive effect such as control over price or output.<sup>114</sup> As in *Law*, this can be accomplished through a "quick look" analysis, by showing "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."<sup>115</sup>

Applied here, the restrictions on student employment rates clearly represent an agreement between the NCAA and its member institutions. Just as the NCAA did not dispute that the REC Rule was an agreement among its members,<sup>116</sup> the classification as an agreement here likely would not be contested by the NCAA. Form 08-3a, which the student athletes are required to sign, binds the student athletes to the restrictions set for in the NCAA Bylaws<sup>117</sup> and Bylaw 12.4.1(b) restricts the remuneration available to the student to the going rate for that particular type of employment.

Although not as clear-cut of a horizontal restriction as limiting coaches' salaries to \$16,000 a year, as was the case with the REC Rule,<sup>118</sup> the 12.4.1(b) restriction still sets a cap on the amount students can receive per hour from their employer. The cap does range depending on the field and position that the student is employed in, but within the same field and position of employment there is clearly a horizontal limit on the rate at which students can be paid. This agreement effectively ensures that students cannot get compensated at a higher rate than the restriction allows. If a student were to receive compensation at a higher rate than the norm in that field, the student would be ineligible, since per the NCAA Bylaws, that student would no longer be considered an amateur.

The 12.4.1(b) restriction is also more favorable to the NCAA and its member institutions than it would have from the operation of market forces. Again, although not as clear cut as member institutions not having to pay more than \$16,000 to retain a coach, these restrictions allow the member institutions to compensate student athletes who work on campus at a rate lower than market value and provide the member institutions with the benefit of being the only entity that can fully benefit off of the attractiveness of having a student athlete as an employee.

Further, many student athletes either chose to obtain or are given

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114. *Law*, 134 F.3d at 1020.

115. *Id.*

116. *Id.* at 1016.

117. *See supra* Part III.C.

118. *Law*, 134 F.3d at 1012.

jobs on campus. If students were able to market themselves to the height of their marketability, then the schools would be forced to pay the students what the market demanded for the student, rather than the going rate for a non-athlete in that position. Outside employers would likely be willing to pay student athletes at a higher wage than the wage they receive at low-paying jobs on campus. This is because hiring student athletes as employees can be advantageous to a business. The company who hires them can benefit from potential increases in traffic and attention, without the need to advertise or promote and depending on the field can benefit from the unique knowledge the student athlete can provide to customers.<sup>119</sup>

An example may be helpful. A local sporting goods store can hire a student athlete, as can a campus book and apparel store. The operation of market forces suggests that the sporting goods store would be willing to pay the college athlete at a higher rate than a non-athlete employee, since hiring the student athlete could potentially increase sales and customers would likely be more willing to purchase equipment from someone who knows from experience about the equipment. But, by fixing the rate at which these athletes can be compensated, the NCAA not only denies the students this additional money that the market would demand, but also, the campus store is given the competitive advantage since it can pay the student less and still reap the full benefits from the ability to use the student athlete to market their school.

Further, according to *Board of Regents*, such an in-depth analysis is not necessary to determine that the employment restrictions are anticompetitive. "To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of the agreement."<sup>120</sup> Again, here it is highly likely that a court will find that an agreement does exist and that the agreement results in elimination of market competition in terms of the price paid to athletes at their place of employment.

### 3. POTENTIAL PROCOMPETITIVE REASONS THAT COULD BE OFFERED BY THE NCAA

After the plaintiff has satisfied the initial burden of showing that

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119. The NCAA clearly saw the likelihood and feasibility of employers paying student athletes at a higher rate when they developed rule 12.4.1.1 of the NCAA Bylaws. The rule states that "Such compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability." NCAA Manual, *supra* note 5, at art.12.4.1.1. (Athletics Reputation).

120. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 109 (1984) (internal quotations omitted).

the agreement had an adverse effect on competition, the burden shifts to the defendant to put forth legitimate procompetitive benefits of the agreement.<sup>121</sup> An anticompetitive agreement may still not be a violation of antitrust under Section 1 of the Sherman Act if the procompetitive benefits of the restraint outweigh or justify the anticompetitive effect.<sup>122</sup> The reasons provided by the defendant are only considered if they tend to show that "the challenged restraint enhances competition."<sup>123</sup> Applied here to the employment restrictions found in 12.4.1(b), the only legitimate rationales that could be recognized by a court in support of the employment restrictions are those which are necessary to produce competitive intercollegiate sports.

No such rationales can be successfully proffered by the NCAA with regards to the 12.4.1(b) employment restrictions. The possible reasons that the NCAA could offer include maintaining amateurism, equity among schools or maintaining competitiveness, equity among players, fear of abuse, and cost-reduction. None of these rationales outweigh the anticompetitive effects of the agreement.

#### i. Maintaining Amateurism

The chief reasoning behind all of the NCAA's eligibility requirements is amateurism and courts have provided "ample latitude" when reviewing these eligibility restrictions. In *Board of Regents*, the Supreme Court recognized that certain horizontal restraints, such as rules of the game and certain eligibility requirements, are justifiable under section 1 of the Sherman Act because they are vital to the continued existence of intercollegiate athletics.<sup>124</sup> Therefore, it is likely that the NCAA would argue that the employment restrictions found in Rule 12.4.1(b) should be given deference as they are necessary eligibility requirements. As in other cases, the NCAA would point to the desire to distinguish collegiate sports from professional sports and a desire not to become a minor league training ground for professional sports.<sup>125</sup> By allowing students to be compensated at a higher rate than other students, the NCAA

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121. Law, 134 F.3d at 1021.

122. Bd. of Regents, 468 U.S. at 113; see also Law, 134 F.3d at 1021.

123. Bd. of Regents, 468 U.S. at 104; see also Law, 134 F.3d at 1021.

124. Bd. of Regents, 468 U.S. at 120.

125. See *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1091 (7th Cir. 1992) (Upholding the no-draft and no-agent requirements of the NCAA since they would "turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a "minor-league" farm system out of college football that would operate solely to improve players' skills for professional football in the NFL); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) ("The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures.").

would argue that the emphasis on the academic part of the student athlete would be greatly diminished.

But, as Justice Stevens noted in *Board of Regents*,

[C]onsistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.<sup>126</sup>

By restricting the rates at which student athletes can be compensated, the NCAA is doing the same type of curtailing that the Supreme Court found violated antitrust laws in *Board of Regents*. Certain eligibility requirements such as the no-draft and no-agent rules provide this necessary distinction between college and professional sports. However, the employment restrictions are not the same type of eligibility requirement. Rule 12.4.1(b) allows students to get any job in any field. This includes being a professional athlete in another sport.<sup>127</sup> By not limiting the job, but instead limiting the compensation available for that job, the NCAA is not protecting amateurism. Instead, it is "curtailing" the rate at which these students can get paid and "blunting" the ability of employers to respond to the market's demand for these student athletes as employees. Thus, on its face, this rule does not protect amateurism.

Further, as pointed out by Daniel E. Lazaroff, there are less restrictive means for the NCAA to promote the student athlete and maintain a demarcation between amateur and professional sports. Lazaroff notes that the NCAA "should realize that such a distinction [between college and professional athletes] probably rests less on the question of compensation and more on emphasizing the 'student' part of the student-athlete."<sup>128</sup> NCAA efforts that focus on the academic aspects of student athletes are less likely to create such antitrust issues<sup>129</sup> and therefore would be a less restrictive means of protecting amateurism and the sanctity of intercollegiate sports.

## ii. Maintaining Equity Among Schools (Competitiveness)

Another main principle of the NCAA is the Principle of Competi-

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126. *Bd. of Regents*, 468 U.S. at 120.

127. NCAA Manual, *supra* note 5, at art.12.1.3. (Amateur Status if Professional in Another Sport). "A professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport." *Id.*

128. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 368 (2007).

129. *Id.* at 369.

tive Equity.<sup>130</sup> The NCAA could argue that these employment restrictions foster a level playing field between the universities. The argument would likely allege that by allowing students to get compensated at rates that reflect their athletic reputations, member institutions in bigger markets will be given an advantage over member institutions in smaller markets. This argument relies on the assumption that the larger markets have larger and more established companies in them and that students will choose schools located in these markets to fully benefit off of the ability to market themselves in these cities. The NCAA would likely point to schools in small markets, like Boise State University<sup>131</sup> and Wake Forest University,<sup>132</sup> and compare them to the schools in larger markets like University of Southern California<sup>133</sup> and University of Miami.<sup>134</sup>

However, even if it were conceded that student athletes would be attracted to schools in larger markets, it would be no different than the current structure of the NCAA. The best student athletes go to the schools with the best reputations in that sport, with the top programs consistently getting the higher-rated athletes.<sup>135</sup> Further, students are already compensated for employment at different levels depending on where they live, with the average income in Massachusetts and New York being much higher than the average income in Mississippi and Arkansas.<sup>136</sup> Thus, it is unlikely that lifting the employment restrictions

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130. *Id.* at art. 2.10.

The Principle of Competitive Equity

The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics. *Id.*

131. Boise State University is located in Boise, Idaho. *This is Boise State*, BOISE STATE UNIVERSITY, <http://news.boisestate.edu/this-is-boise-state/> (last visited Jan. 16, 2012).

132. Wake Forest University is located in Winston-Salem, North Carolina and has a total university Enrollment of 7,079 students. *Just the Facts*, WAKE FOREST UNIVERSITY, <http://admissions.wfu.edu/discover/facts.php> (last visited Jan. 16, 2012).

133. University of Southern California is located in Los Angeles, California. *About USC*, UNIVERSITY OF SOUTHERN CALIFORNIA, <http://about.usc.edu/> (last visited Jan. 16, 2012).

134. University of Miami is located in Coral Gables, Florida. *About Us*, UNIVERSITY OF MIAMI, [http://www.miami.edu/index.php/about\\_us/](http://www.miami.edu/index.php/about_us/) (last visited Jan. 16, 2012).

135. See, e.g., *Team Football Recruiting Rankings*, ESPN, <http://insider.espn.go.com/college-football/recruiting/classrankings> (last visited Jan. 16, 2012). The following schools have been ranked in the top 25 of football recruiting classes for each of the last 5 years: Alabama, Florida, Georgia, Ohio State, University of South California, Oklahoma, Norte Dame, Texas, LSU, Florida State, Miami, Michigan, and Auburn. *Id.*

136. *Median Household Income and Gini Index in the Past 12 Months by State and Puerto Rico: 2009 and 2010*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/prod/2011pubs/acsbr10-02.pdf> (last visited Jan. 16, 2012). The states with the highest average income in 2010 were Maryland and New Jersey and the states with the lowest average income were Mississippi and Arkansas. *Id.*

will result in a shift in the competitive balance of intercollegiate athletics.

### iii. Maintaining Equity Among Students

The NCAA may also contend that a system where athletes can be given additional compensation based on their higher value in the market would result in inequality among student athletes. They would likely argue that the current system places each student athlete on equal footing and therefore creates the fairest venue for competition. If more popular student athletes were allowed to be paid more, it may create resentment among players and disintegrate team unity.

However, the current system is in no way equal. For starters, not all student athletes receive financial aid. Further, even for those who do, the values can be set at different amounts (full, half, quarter, etc.). At certain schools this could result in a financial gap between players of over \$160,000 throughout the four years at a university.<sup>137</sup> Therefore, it is unlikely that a court will find that maintaining equity among athletes is a legitimate procompetitive rationale for the employment restrictions imposed by the NCAA.

### iv. Fear of Abuse

The NCAA could also argue that this would open the door for individuals to pay student athletes high dollar amounts to attend the schools of their liking. However, it is highly unlikely that companies would be willing to pay much higher than what they feel the true market value is for an employee. Lifting these employment restrictions would not mean that people could just pay large amounts of money to students. The compensation of these student athletes would still be analyzed to ensure that actual work is being performed. However, this analysis would also take into consideration the additional value that the student athlete may possess.

This argument is also not valid because the potential for abuse already exists in the current system of student employment. This is especially true in fields of employment that involve student athletes who receive tips or other forms of gratuity. Students who work as valets, taxi drivers, or in the restaurant business receive a base pay which is monitored by the NCAA, but it is impossible to keep track of what individu-

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137. This gap varies depending on cost of tuition, with the gap at public schools being much less than that at private schools. At University of Miami, the cost of tuition for the 2011–2012 school year came to \$37,836 a year with the total price of admission ranging to over \$50,000. Non-athletic scholarships can also reduce this gap. *Net Price Calculator*, UNIVERSITY OF MIAMI, <http://public.cgcent.miami.edu/AttendanceCalculator/Calculator.aspx> (last visited Jan. 16, 2012).

als provide to these student athletes in the form of gratuity. The current employment restrictions do not address the issue of disproportionate gratuity, and therefore, the NCAA should not be allowed to proffer fear of abuse as a legitimate procompetitive rationale. Rather, the employment restrictions found in rule 12.1.4(b) deal with businesses, whose goal is to make a profit. It is likely that an employer will pay only as much as keeps the company profitable with respect to that employee.

#### v. Cost Reduction

A last ditch reason that the NCAA could offer is that by ensuring that student athletes are not compensated higher than the rate at which their position would normally call for, member institutions are able to reduce costs. This argument would rely on the fact that the cost of paying student athletes who have on-campus jobs is lower with these restrictions in place. However, *Law v. NCAA* makes it very clear that “reducing costs for member institutions, without more, does not justify anticompetitive effects. . . .”<sup>138</sup> Therefore, it is highly unlikely that such a reason would be considered by a court reviewing the restriction.

Thus, it is clear that the NCAA’s employment restrictions violate antitrust law since the NCAA will not be able to proffer any legitimate procompetitive reasons for the 12.4.1(b) employment restrictions. Even if any of the above reasons is found to be a sufficient procompetitive reason, the anticompetitive effects of the agreement significantly outweigh these procompetitive reasons.

### V. EXAMINING THE EMPLOYMENT RESTRICTIONS FROM OUTSIDE THE SCOPE OF ANTITRUST LAW

Before discussing the suggested remedy for the antitrust violation, an examination of how the employment restrictions place college athletes at a disadvantage when compared to non-athletes may help to further illustrate the injustice of the restrictions.

#### A. Comparison to Other Students

“The N.C.A.A. likes to conflate paying college athletes with the issue of whether they would still be students. Students get paid all the time.”<sup>139</sup>

Although the student athletes’ stage, particularly for athletes in sports like football and basketball, is not matched by any other group of

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138. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1023 (10th Cir. 1998).

139. 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?pagewanted=all> (quoting Andy Schwartz, a litigation consultant interested in the economics of college sports).

college students, a comparison with where other students stand provides a unique perspective to an analysis of any NCAA rule. This is especially helpful when one considers that the fundamental policy of the NCAA is to maintain intercollegiate athletics as being an integral part of education and the student body.<sup>140</sup> The NCAA and the member institutions pride themselves on putting academics in front of athletics, which they claim makes their product unique from professional sports.<sup>141</sup> Yet, they do not allow the student athletes the same employment rights as other students who attend these member institutions.<sup>142</sup>

At any of the member institutions of the NCAA, undergraduate students who are not athletes do not face any restrictions on employment.<sup>143</sup> Yet many of these students, like athletes, also have talents outside of their academic ability that make them attractive in the job marketplace. One such group of students is those who have talents in the performing arts. As with most athletes, college is a necessary step in the career of most aspiring musicians, actors, and artists. While bettering themselves academically, college also provides an environment where they can further develop their talents through classes, performances, and lessons.<sup>144</sup> Yet in pursuing their talents, they are not forced to abandon other goals and options should their talents not lead them to a career.

A student athlete can provide lessons to others, just as an aspiring student actor or actress is allowed to provide acting lessons. However, a student actor or actress is free to advertise that he or she is providing the lessons and use his or her image and reputation to seek out individuals who might be interested in taking lessons. A student athlete, however, cannot use his or her name, picture or appearance to promote the availability of lessons.<sup>145</sup> This essentially limits student athletes to only being able to provide lessons to individuals who approach them requesting

140. NCAA Manual, *supra* note 5, at art.1.3.1.

141. *Id.*; see also *Id.* at art. 2.4. (The Principle of Sound Academic Standards) (Requiring academics to be a "vital component" of the student athlete).

142. This article is aware that the NCAA is not subject to constitutional claims of equal protection, per the Supreme Court's ruling in *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988). This section is meant to provide prospective, not to suggest that student athletes have a constitutional claim against the NCAA.

143. Of course students have their academic requirements and commitments which they have to work around, but there are no prohibitions on where they can work, how much they can make, or what they can do to market themselves.

144. Pursuing performing arts while in college "can open doors to careers in such varied fields as musical and theatrical performance, teaching, theater design, music publishing, arts management, and stage managing." *Performing Arts*, EMMANUEL COLLEGE, [http://www.emmanuel.edu/Departments/Performing\\_Arts/Individualized\\_Major.html](http://www.emmanuel.edu/Departments/Performing_Arts/Individualized_Major.html) (last visited Jan. 16, 2012).

145. NCAA Manual, *supra* note 5, at art.12.4.2.1.



their services.<sup>146</sup> For if they were to try to seek out individuals who would be interested in lessons, they would be in violation of the employment restrictions put forth by the NCAA.<sup>147</sup>

A student athlete can work at a local sporting goods store just as a student musician can work at a local music store. The musician and the musician's employer could use the musician's name, picture, or reputation as a great college musician to advertise for the business and increase the number of sales by the musician and the store. Further, the employer could pay the musician at any rate they saw fit. Not surprisingly, the student athlete would be restricted from all of these things under Rule 12.4.2.3 of the NCAA's Bylaws.<sup>148</sup>

### B. *Mark Zuckerberg and Michael Dell*

Mark Zuckerberg invented Facebook as a college student at Harvard University. His picture and information were used to create the first profile on Facebook. His name was placed on the main page.<sup>149</sup> Thankfully for him there were no rules prohibiting him from profiting off his own name or using his image to spark the growth of his company.

Michael Dell, founder of Dell Computers, started his company while he was freshman at University of Texas at Austin<sup>150</sup>. From his dorm room on the Texas campus he compiled and sold upgrade kits for computer systems.<sup>151</sup> Again, thankfully for him, there were no rules stopping him from starting his company while he was still a student.

Imagine that instead of just being brilliant students, Mark Zuck-

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146. However even this may be considered using their reputation to promote lessons, since it is likely that the individual is only approaching them because of their reputation as an athlete.

147. NCAA Manual, *supra* note 5, at art.12.4.2.1(f).

148. NCAA Manual, *supra* note 5, at art. 12.4.2.3.

#### Athletics Equipment Sales

A student-athlete may not be employed to sell equipment related to the student-athlete's sport if his or her name, picture or athletics reputation is used to advertise or promote the product, the job or the employer. If the student-athlete's name, picture or athletics reputation is not used for advertising or promotion, the student-athlete may be employed in a legitimate sales position, provided he or she is reimbursed at an hourly rate or set salary in the same manner as any nonathlete salesperson. *Id.*

149. *Founder Bios*, FACEBOOK, <http://www.facebook.com/press/info.php?founderbios> (last visited Jan. 16, 2012). According to the founder biographies, Mark Zuckerberg and his roommates invented Facebook while living in their dorm room at Harvard University. *Id.*

150. *Michael S. Dell*, DELL, <http://content.dell.com/us/en/corp/d/bios/michael-dell-bio> (last visited Jan. 16, 2012).

151. Peter H. Lewis, *The Executive Computer; Michael Dell Says He's More Than Ready for a Good Fight*, N.Y. TIMES, July 5, 1992, <http://www.nytimes.com/1992/07/05/business/the-executive-computer-michael-dell-says-he-s-more-than-ready-for-a-good-fight.html?ref=michaelsdell>.

erburg also played football at Harvard and Michael Dell also played basketball for the Texas Longhorns. They would have been faced with a difficult decision with just two options. First, they could have pursued their ambitions and started their companies. However in doing so, they would have most certainly violated NCAA regulations. Zuckerberg's name and image being on his website and Dell's last name being in the company's title would have violated NCAA Bylaw 12.4.4 on self-employment.<sup>152</sup> This is because Bylaw 12.4.4 states "A student-athlete may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business."<sup>153</sup> Therefore, by starting their companies, they would have been forced to forfeit their athletic careers.

The second option that would have been available to them was to abandon their ideas and continue pursuing their athletic careers. This is an unfair position to put student athletes in. For if Mark Zuckerberg and Michael Dell were aspiring actors, musicians, poets, writers, lawyers, doctors, or astronauts, they would not have faced any issues with starting and attempting to develop their companies. In fact, if they aspired to be anything other than athletes, they would have been allowed to continue in their pursuits. But if Mark Zuckerberg and Michael Dell were aspiring athletes, Facebook and Dell Computers would not exist as we know them.<sup>154</sup>

## VI. THE NCAA MUST ELIMINATE THESE EMPLOYMENT RESTRICTIONS ON STUDENT ATHLETES

By limiting the employment compensation of student athletes, "the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."<sup>155</sup> The NCAA bylaws restricting student employment constitute an anticompetitive agreement between the NCAA and its member institutions that is in violation of section 1 of the Sherman Antitrust Act.<sup>156</sup> This agreement places NCAA student athletes at a disadvantage to fellow students at these member institutions by not

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152. NCAA Manual, *supra* note 5, at art. 12.4.4. While it is possible that Mark Zuckerberg could have started Facebook without using his picture or his name and that Michael Dell could have named the company something other than Dell, it is also possible that fear of violating NCAA rules would have stopped them from pursuing the development of Facebook and Dell Computers.

153. *Id.*

154. Once again, this is because, NCAA Bylaw 12.4.4 restricts student athletes from using their name, photograph, appearance or reputation to promote and develop their own business. NCAA Manual, *supra* note 5, at art.12.4.4.

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

156. See *supra* Part IV.D.2.

allowing them to fully market themselves and by not compensating them according to their true market value.<sup>157</sup> Therefore, the employment restrictions must be lifted from these student athletes.

The NCAA's goals of maintaining amateurism and competition should not be allowed to be used by the NCAA to place student athletes in a position where they are not able to have access to a fair and equal employment market. This is not to say that the NCAA should stop monitoring student employment altogether. Instead, the NCAA should continue to require student athletes to report who they are working for, what their duties at that position entail, and the compensation that they will be receiving. If the NCAA feels that there is some misconduct occurring with either the compensation or the performance of the job, then the employer and the student should be allowed an opportunity to explain the disparity between what the NCAA believes the student should make for such a position and what the employer is willing to pay that athlete. In reviewing this explanation, the NCAA must be required to fully weigh the athlete's value to that employer, including the additional value that student's name and reputation offer to an employer.

In terms of self-employment, a similar reporting process must be used, requiring the students to disclose the details of their employment. The NCAA should not be allowed to restrict students from using their name, image or likeness in the operation and promotion of their business. Again, this does not mean that the NCAA should stop monitoring student self-employment, but in doing so, the restrictions must be reduced and the value of the student athlete's reputation must be considered.

The NCAA claims that lifting these employment restrictions would lead to the end of amateurism and the destruction of the college brand.<sup>158</sup> But as two leading sport economists, Andy Schwarz and Dan Rascher, recently pointed out in a New York Times article, "Amateurism has nothing to do with why fans love college sports. What draws us to college athletics is that we love seeing students representing our schools."<sup>159</sup> This would be just as true if student athletes were allowed to be compensated for their employment at their full market value.

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157. *See Id.*; *see supra* Part V.

158. *See supra* Part IV.D.3.

159. Nocera, *supra* note 139.