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# NCAA TRANSFER BYLAW HERE TO STAY: WHAT HAPPENS NEXT?

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**NCAA TRANSFER BYLAW HERE TO STAY: WHAT HAPPENS NEXT?**

*Julie Dambra*

## I. Introduction

In its totality, the NCAA makes up 1,117 colleges and universities, over 100 athletic conferences, with 40 affiliated sports organizations.<sup>1</sup> Their motto: prioritizing academics, well-being and fairness so college athletes can succeed on the field, in the classroom and for life.<sup>2</sup> Not surprisingly, each Division has their own set of rules, called bylaws.<sup>3</sup> Member representatives are appointed and serve on committees within the NCAA and are responsible for proposing rules and policies within the realm of college athletics.<sup>4</sup> It is the members who ultimately decide which rules will officially be adopted.<sup>5</sup> These rules include everything from recruiting and compliance, to academics and championships.<sup>6</sup> The NCAA national office consists of 500 employees located at the Indianapolis headquarters whose job is to “interpret and support member legislation,” run championships, and manage programs designed to benefit student athletes.<sup>7</sup>

The NCAA is composed of bylaws that are separated by division.<sup>8</sup> Specifically, the Division I manual, effective August 1, 2018, constitutes a 440-page manual of rules and regulations.<sup>9</sup> The bylaws are for all student athletes (those returning), and all new student athletes (those signing the Student-Athlete Statement for the first time).<sup>10</sup> The bylaws lay out of rules and regulations for all student-athlete participation and conduct.<sup>11</sup> Specifics of the bylaws include: ethical conduct, amateurism, financial aid, academic standards, regulations concerning eligibility, outside competition, transferring, recruitment, and more.<sup>12</sup>

The focus of this Note will surround Bylaw 14: Academic Eligibility. As a general overview, a student-athlete is not permitted to compete in intercollegiate athletics competition unless all applicable eligibility requirements are met.<sup>13</sup> Specifically, this Note will discuss the litigation surrounding Bylaw 14.5: Transfer Regulations. In general, “a student who transfers to a member institution from any collegiate institution is required to complete one full academic year of residence at the certifying institution before being eligible to compete for...the member institution, unless the student...qualifies for an exception as set forth in this bylaw.”<sup>14</sup> Additionally, a transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one

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<sup>1</sup> *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/mediacenter/ncaa-101/what-ncaa> (last visited Jan. 30, 2019) [hereinafter *What is the NCAA?*]

<sup>2</sup> *Our Priorities*, NCAA, <http://www.ncaa.org/> (last visited Jan. 30, 2019).

<sup>3</sup> *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Jan. 30, 2019) [hereinafter *Membership*].

<sup>4</sup> *Historical Outline of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Jan. 30, 2019). [hereinafter *Historical Outline*]

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *What is the NCAA?*, *supra* note 1.

<sup>8</sup> *Membership*, *supra* note 3.

<sup>9</sup> NCAA, DIVISION I MANUAL: AUGUST 2018-19 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx> [hereinafter NCAA DIVISION I MANUAL].

<sup>10</sup> *Id.*

<sup>11</sup> *See generally id.*

<sup>12</sup> *Id.*

<sup>13</sup> NCAA DIVISION I MANUAL, *supra* note 9, § 14.01.1

<sup>14</sup> *Id.* at § 14.5.1

full academic year at the certifying institution.<sup>15</sup> The litigation surrounding this Note stems from Bylaw 14.5.5.2.10: One-Time Transfer Exception. This bylaw states: “the student transfers to the certifying institution from another four-year collegiate institution, and all of the following conditions are met:

- (a) The student is a participant in a sport other than baseball, basketball, bowl subdivision football or men’s ice hockey at the institution to which the student is transferring...<sup>16</sup>
- (b) The student has not transferred previously from one four-year institution...<sup>17</sup>
- (c) At the time of transfer to the certifying institution (see Bylaw 14.5.2), the student would have been academically eligible had he or she remained at the institution from which the student transferred...<sup>18</sup>
- (d) If the student is transferring from an NCAA or NAIA member institution, the student’s previous institution shall certify in writing that it has no objection to the student being granted an exception to the transfer-residence requirement. If an institution receives a written request for a release from a student-athlete, the institution shall grant or deny the request within seven business days. If the institution fails to respond to the student-athlete’s written request within seven business days, the release shall be granted by default and the institution shall provide a written release to the student-athlete.<sup>19</sup>

The purpose of this rule is to prevent student-athletes participating in revenue-generating sports (basketball, football, baseball, and men’s hockey) from participating in NCAA competition at a new Division I member institution without first completing a full academic year. The only exception to this rule would be if a student athlete participating in one of these sports received a waiver, as found from Bylaw 14.7. The Committee on Academics may waive academic and general eligibility requirements under the following circumstances:

- (a) For student-athletes in times of national emergency;
- (b) For member institutions that have instituted a trimester or other accelerated academic program, provided any member institution applying for a waiver shall demonstrate a reasonable need for such waiver.<sup>20</sup>

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<sup>15</sup> *Id.* at § 14.5.5

<sup>16</sup> “...A participant in championship subdivision football at the institution to which the student is transferring may use this exception only if the participant transferred to the certifying institution from an institution that sponsors bowl subdivision football and has two or more seasons of competition remaining in football or the participant transfers from a Football Championship Subdivision institution that offers athletically related financial aid in football to a Football Championship Subdivision institution that does not offer athletically related financial aid in football;”

<sup>17</sup> “...unless, in the previous transfer, the student-athlete received an exception per Bylaw 14.5.5.2.6 (discontinued/nonsponsored sport exception);”

<sup>18</sup> “...except that he or she is not required to have fulfilled the necessary percentage-of-degree requirements at the previous institution; and”

<sup>19</sup> *Id.* at § 14.5.5.2.10(a)-(d)

<sup>20</sup> Further, no waiver shall be granted that permits a student-athlete to compete in more than the maximum permissible number of seasons of intercollegiate competition (see Bylaw 12.8). Under the waiver allowed, if a student in an accelerated academic program completes the requirements for a degree before completing eligibility,

(c) For institutions that have suffered extraordinary personnel losses from one or more of their intercollegiate athletics teams due to accident or illness of a disastrous nature<sup>21</sup>

This Note will discuss the litigation surrounding the current transfer process and analyze the judicial holdings' impact on all current student-athletes, regardless of sport. First, this Note will begin with a brief background of the NCAA's structural foundation and its divisional makeup. It is important to understand that the current transfer restrictions apply to Division I student athletes only. Next, it will shift into a case analysis regarding each pivotal case the NCAA has ever faced, beginning in 1984. All challenges are brought under the Sherman Antitrust Act, and this Note will discuss how an antitrust act made its way into college athletic bylaws. The ultimate conclusion is that the whereas some NCAA bylaws may be subjected to Sherman antitrust scrutiny, the transfer bylaws have, and will continue to, remain unaffected.

Moreover, this Note will discuss how the judicial holdings, in accordance with the NCAA transfer bylaws, in fact, protect student athletes, instead of cause harm. If the transfer rule were to be lifted, the current NCAA structure could be forever changed as we know, and that may not be in the best interests of the student athletes. The NCAA transfer bylaw seeks to protect amateurism, as continually held by the courts, which is exactly why the NCAA was created in the first place. From there, this Note will discuss alternate options for student-athletes seeking to transfer across Division I member institutions and the most recent reform the NCAA has taken in response to the current call for action. Lastly, this Note will conclude with a finding that a college education is priceless, and how the NCAA transfer regulations seek to protect that notion.

## A. Background

The National Collegiate Athletic Association (NCAA) was formed in 1906 with the purpose to create competition and eligibility rules for intercollegiate sports.<sup>22</sup> In the 1905 season, football was in danger of being abolished as it was deemed too dangerous.<sup>23</sup> During this season, 18 college and amateur players died during play.<sup>24</sup> As a result, President Theodore Roosevelt summoned thirteen football representatives to the White House to participate in meetings with the focus on reform to improve safety.<sup>25</sup> The NCAA was officially formed shortly thereafter on the curtail of this safety agreement.<sup>26</sup> From there, discussions transitioned into the preservation of amateurism alongside the notion of allowing college athletes to obtain a scholarship in exchange to represent the school in their respective sport.<sup>27</sup>

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the student may participate in competition that begins within 90 days after completion of the requirements for the degree; and

<sup>21</sup> *Id.* at § 14.7.1(a)-(c)

<sup>22</sup> *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/National-CollegiateAthletic-Association> (last visited Jan. 31, 2019). [hereinafter *National Collegiate Athletic Association*]

<sup>23</sup> Dan Treadway, *Why Does the NCAA Exist?*, Huffpost (Dec. 7, 2017), [https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility\\_b\\_3020985](https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985)

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Today, the NCAA serves as a general legislative and administrative authority for men's and women's intercollegiate athletics.<sup>28</sup> It creates and enforces the rules of play for every sport.<sup>29</sup> It creates eligibility requirement for student athletes.<sup>30</sup> It supervises not only national, but regional intercollegiate athletic contests.<sup>31</sup> It compiles statistics on about a dozen college sports, including: gridiron football, baseball, men's and women's basketball, soccer, ice hockey, and lacrosse.<sup>32</sup> It publishes rule books and guides on each and every sport.<sup>33</sup> In the early 21<sup>st</sup> century, NCAA member institutions include more than 1,000 college and universities.<sup>34</sup>

Since 1973, the NCAA has structured into a multiclass organizational system; with the three classes divided into Division I, Division II, and Division III athletics.<sup>35</sup> These institutions must meet minimum and maximum financial aid awards in each sport for their athletics programs.<sup>36</sup> The NCAA reorganization structure was approved in 1973 at the first Special Convention for competition and legislative purposes.<sup>37</sup> The President of the NCAA, at the time Dr. Alan Chapman, said that "reorganization was vital to keep the association a valuable force in athletics."<sup>38</sup> He felt that the organizations were drifting apart due to the vastly differing opinions between the large and small schools.<sup>39</sup> "No longer will the big guys be telling the little guys what to do..."<sup>40</sup> Whereas the divisions represent an organizational hierarchy, a Division II or Division III institution may elect to participate in any one Division I sport.<sup>41</sup> However, this is limited to any sport that is not football or basketball.<sup>42</sup>

One of the main goals of the NCAA is to serve college student-athletes.<sup>43</sup> They accomplish this goal via academic services, opportunities and experiences, financial assistance, wellness and insurance, and professional and personal development.<sup>44</sup> No matter what division a student-athlete may participate in, the NCAA serves to support and advance each and every individual.<sup>45</sup> Specifically, more than eight in ten Division I student-athletes earn bachelor's degrees.<sup>46</sup> This number constitutes their highest rate ever and higher than the general student body.<sup>47</sup> If the judicial system were to holding that any NCAA student athlete could transfer at any time, it could lead to

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/National-CollegiateAthletic-Association> (last visited Jan. 30, 2019).

<sup>36</sup> *Id.*

<sup>37</sup> *Historical Outline of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Jan. 30, 2019). [hereinafter *Historical Outline*]

<sup>38</sup> Gordon S. White Jr. *N.C.A.A. Reorganizes Into 3 Groups*, N.Y. Times (Aug. 7, 1973), <https://www.nytimes.com/1973/08/07/archives/ncaa-reorganizes-into-3-groups-national-league-standing-of-the.html>

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Historical Outline*, *supra* note 20.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Student-Athletes*, NCAA, <http://www.ncaa.org/student-athletes> (last visited Jan. 30, 2019).

<sup>47</sup> *Id.*

a situation where students would begin to transfer mid-semester. Credits may not necessarily properly transfer across institutions, forcing students to repeat classes or adding on an additional semester. Before long, a student athlete could no longer be athletically eligible, have a semester remaining, but no scholarship to cover the cost.

### **B. The Sherman Antitrust Act**

Since 1984, every single lawsuit against the NCAA challenging the enforceability of its bylaws has been brought under the Sherman Antitrust Act (“Act”). The Sherman Act was enacted in 1890 stemming from the constitutional power of Congress to regulate interstate commerce.<sup>48</sup> The Act was originally enacted to facilitate competition and prevent monopolies in major industrial and agricultural industries.<sup>49</sup> Over time, the Sherman Act grew to ensure a competitive free market system and has expanded over all differing types of industries in the United States.<sup>50</sup> Lawsuits against the NCAA for violation of the Sherman Act have stemmed from Section 1:

“1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

In the context of the NCAA, the Sherman Act serves to promote and protect against competition. In the realm of sports law, this Act has been the predominant mean applied to effect change in NCAA sanctioned sports. The main issue surrounding each legal claim is whether the actions of the NCAA violate the antitrust laws. As this Note will discuss, the NCAA transfer rule will not be subjected to the Act’s antitrust scrutiny as it is exempt from such analysis. Therefore, so long as an NCAA bylaw is presumptively competitive, it will be seen as a protection of amateurism.

## **II. Case Analysis**

Since 1984, the NCAA has seen a handful of pivotal cases challenging the enforceability of its bylaws. Whereas the judicial system has not upheld each and every single bylaw as competitive, to withstand the Act’s scrutiny, it has deemed a narrow set of circumstances where the NCAA is essentially untouchable. So long as the NCAA proves that their bylaws conform to preserving the tradition of amateurism, it will withstand the Act.

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<sup>48</sup> *The Sherman Antitrust Act of 1890*, <http://economics.fundamentalfinance.com/sherman-act.php> (February 2, 2019).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

### A. 1984: The First Challenge to the NCAA

This was the year the Supreme Court came out with their decision regarding the first Sherman Act challenge to the NCAA in NCAA v. Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association<sup>51</sup> *Board of Regents* was the first time the NCAA had ever been attacked via antitrust liability. Whereas the Supreme Court ultimately ruled the NCAA's monopoly on football television broadcasting violated the Sherman Act<sup>52</sup>, it was the dicta of Justice Stevens that would go on to be cited in numerous future cases and leave a true lasting impact that came to change the NCAA forever.

The relevant facts of the case are as follows. In 1981, the NCAA created a television plan for the college football games of its member institutions for the 1982-1985 seasons.<sup>53</sup> The intention of the plan was to reduce the adverse effect of live television upon football game attendance.<sup>54</sup> This plan limited the total amount of televised intercollegiate football games and subsequently, the number of games that any one college could televise.<sup>55</sup> No member of the NCAA was permitted to make any sales of television rights except in accordance with the plan.<sup>56</sup> The NCAA contracted with two outside television networks granting them each the right to telecast the live "exposures" described in the plan. In return, each network agreed to pay a specified fee to the participating NCAA members.<sup>57</sup>

Respondent members, as additionally part of the NCAA member-institutions, were members of the College Football Association (CFA), which was created to promote the interests of football colleges within the NCAA.<sup>58</sup> The CFA had negotiated their own contract with a different network that would have allowed more television appearances than the NCAA plan for each college, and subsequently increased CFA revenues.<sup>59</sup>

In response, the NCAA warned they would take disciplinary action against any CFA member that complied with their television plan.<sup>60</sup> Respondents then commenced legal action in the Federal District Court.<sup>61</sup> The District Court held that the controls exercised by the NCAA over television of the college football games violated Section 1 of the Sherman Antitrust Act, and accordingly granted injunctive relief.<sup>62</sup> The court found that competition in the live college football television market had been restrained in three ways: (1) the NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football.<sup>63</sup>

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<sup>51</sup> *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984).

<sup>52</sup> See generally *id.*

<sup>53</sup> *Id.* at 2995.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2952.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2957.

<sup>63</sup> *Id.*



The Court of Appeals agreed with the lower court's holding.<sup>64</sup> They found that the Sherman Act had been violated and the NCAA's plan constituted "illegal per se price fixing" and that even if it were not per se illegal, the anticompetitive limitation on output and price was justified by any procompetitive defenses.<sup>65</sup> In a 7-2 holding, authored by Justice Stevens, the Supreme Court reversed the judgement of the Court of Appeals and directed them to vacate the District Court's injunction pending further proceedings in accordance with the substantial remaining authority of the NCAA to regulate the telecasting of its member institutions' football games.<sup>66</sup>

The Court found that the NCAA member institutions created an unreasonable type of restraint via a horizontal agreement among members as the way in which they competed with one another.<sup>67</sup> It created an artificial limit on the amount of football games to be televised which created a limitation on output.<sup>68</sup> In addition, there was horizontal price fixing because the minimum aggregate price precludes any price negotiations between institutions and broadcasters.<sup>69</sup> As a matter of law, this is considered to be "illegal per se" because these practices are anticompetitive.<sup>70</sup> However, the Court did not use the "per se" approach in their analysis because this particular case involves a specific industry where horizontal restraints are essential to be available in the first place.<sup>71</sup> Instead, the Court's analysis falls under the Rule of Reason to determine the impact of competitive conditions under the horizontal structure.<sup>72</sup> Analysis under the Sherman Act in accordance with the Rule of Reason does not change the ultimate inquiry focus as its purpose is to analyze the competitive significance of the restraint.

Even under the Rule of Reason analysis, the Court still concluded that the NCAA's restraints on price and output had significant anticompetitive effects.<sup>73</sup> As previously stated by the District Court, if the member institutions were unrestrained from selling television rights, it was determined that more games would be shown on television at a lower price.<sup>74</sup> By the NCAA fixing the price for television rights, it created a structure that was unreceptive to viewer demands.<sup>75</sup> Not to mention, since all member institutions needed NCAA approval, no member institution had a real choice but to comply with the NCAA plan or face hefty sanctions.<sup>76</sup> The combination of all these points created an anticompetitive market where individual competitors essentially lost their right to compete.

Whereas the Supreme Court ultimately held that the NCAA's conduct violated the Sherman Act as it represented an unreasonable restraint of trade, it is the dicta of the Court's holding that would resonate for years to come via their "twinkling of an eye" analysis discussed in future litigation. The Court found that most of the regulatory NCAA controls are justifiable to foster competition among amateur athletics, and "therefore procompetitive because they enhance public interest in intercollegiate athletics," while ultimately concluding that the NCAA television plan is not in the same realm as "rules defining the conditions of the contest, the eligibility of

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<sup>64</sup> *Id.* at 2958.

<sup>65</sup> *Id.*

<sup>66</sup> *See generally id.*

<sup>67</sup> *Id.* at 2958-59.

<sup>68</sup> *Id.* at 2959.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See generally id.*

<sup>72</sup> *See generally id.*

<sup>73</sup> *Id.* at 2959.

<sup>74</sup> *Id.* at 2962.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2969.

participants, or the manner in which members of a joint enterprise share the responsibilities and the benefits of the total venture.”<sup>77</sup> This would come to serve as extremely important language in future litigation because Justice Stevens essentially paved the road for all future bylaws to be exempt from Sherman Act anticompetitive liability.

In the last section of the opinion, Justice Stevens concludes that the NCAA plays a “critical role” in the maintenance of tradition and amateurism in intercollegiate athletics, and that it needs “ample latitude” to play that role.<sup>78</sup> This vital language would come to serve as the pathway for the NCAA to create and enforce any such type of bylaw of their choosing, so long as the output is not restricted. Justice Stevens, along with six other members of the Supreme Court, felt that it was the NCAA’s role to “preserve a tradition that might otherwise die.”<sup>79</sup>

The NCAA was founded on the preservation of amateur athletics.<sup>80</sup> This theory of responsibility has allowed the Association to create a set of rules and twist them into whatever form they deem fit. As long as amateurism is protected, and the bylaws are deemed procompetitive, the NCAA has withstood any sort of scrutiny that has come its way.

### **B. The Difficulty of Proving an Anticompetitive Effect**

The burden of proving that a given bylaw produces an anticompetitive effect on the stated market rests with the plaintiff. As seen in *Board of Regents*, this is no easy feat to overcome. In *Agnew v. NCAA*<sup>81</sup> the plaintiffs failed to keep their claim alive past a motion to dismiss.

Plaintiffs, Agnew and Courtney, underwent similar undergraduate experiences regarding athletic scholarship award receivals. Both were awarded scholarships for a year of education, room, and board at no charge, in exchange for playing football at their respective colleges.<sup>82</sup> After the first year, both suffered serious injuries that prevented them from having their scholarships renewed for the entirety of their degree progression.<sup>83</sup> They jointly filed a lawsuit alleging their failure to acquire a scholarship to the full cost of obtaining a Bachelor degree was a direct result of the NCAA’s bylaws prohibiting specific member schools from offering multi-year scholarships, or capping the number of athletic scholarships a school can offer for each team in a given year.<sup>84</sup>

In 2011, the District Court granted the NCAA’s motion to dismiss holding that the plaintiffs failed to identify a cognizable market for which trade was improperly restrained, and even if done, that those markets were not cognizable under the Sherman Act.<sup>85</sup> The District Court dismissed the plaintiff’s claims with prejudice.<sup>86</sup> Plaintiffs appealed this decision to dismiss its claims and its decision to dismiss with prejudice.<sup>87</sup>

The Seventh Circuit began their opinion with reiterating that the NCAA bylaw analysis must be done under the Rule of Reason, where the plaintiff carries the burden of showing the

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2970.

<sup>79</sup> *Id.*

<sup>80</sup> *Board of Regents*, 468 U.S. 85 at 2978.

<sup>81</sup> *Agnew v. National Collegiate Athletic Association*, 683 F.3d 328 (7th Cir. 2012).

<sup>82</sup> *Id.* at 322.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 333.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

anticompetitive effect on a given market.<sup>88</sup> This court interprets Justice Stevens' dicta in *Board of Regents* to mean that most NCAA regulations will be a "justifiable means of fostering competition among amateur teams," and are therefore procompetitive.<sup>89</sup> The Court considers these types of regulations to have been "blessed by the Supreme Court" and therefore exempt from Sherman Act liability.<sup>90</sup> In the context of the case at hand, the Court finds that the regulations at issue are exactly those types of regulations that Justice Stevens addressed in his *Board of Regents* opinion.<sup>91</sup> For the preceding reasons, the Seventh Circuit affirmed the District Court's dismissal of the plaintiff's claims with prejudice.<sup>92</sup>

As demonstrated by *Agnew*, if bylaws surrounding athletic scholarship renewals will not sustain Sherman Antitrust Act scrutiny, what will? Whereas the *Agnew* court felt they conformed in accordance with Justice Stevens' dicta in *Board of Regents*, the following Ninth Circuit court case opened the pathway to the future of NCAA bylaws and questioned whether, in totality, they are actually procompetitive in nature.

### C. How to Obtain Any Relief

At the time, *O'Bannon v. NCAA*<sup>93</sup> was seen as a ground-breaking case for Sherman Antitrust Act challenges towards the NCAA. It gave a sense of hope for student athletes who felt harmed and seemed to open the pathway for future litigation challenges.

Plaintiff, Ed O'Bannon was a former All-American basketball player at UCLA.<sup>94</sup> One day in 2008, he was at a friend's house where he was informed by the friend's son that he had been depicted in a college basketball video game produced by Electronic Arts ("EA").<sup>95</sup> In the game, the avatar that O'Bannon saw was a virtual depiction of himself and wore his same jersey number.<sup>96</sup> O'Bannon never agreed to have EA use his likeness for the video game and received zero compensation for it.<sup>97</sup> In 2009, O'Bannon sued the NCAA and Collegiate Licensing Company ("CLC") on the ground that the NCAA's amateurism rules prevented himself, and other student-athletes, from being compensated for the use of their names, images, and likeness ("NILs").<sup>98</sup>

After a fourteen-day bench trial, the District Court entered judgement for O'Bannon, holding that the NCAA disallowing student athlete's to be compensated for their NILs violated Section 1 of the Sherman Act.<sup>99</sup> The Court applied the Rule of Reason to analyze the legality of the challenged NCAA rules and found they posed an anticompetitive effect in the college education market.<sup>100</sup> These rules allow colleges and universities to value a player's NILs at zero, effectively colluding to fix the price.<sup>101</sup> However, when applying the second step of the Rule of Reason, the

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<sup>88</sup> *Id.* at 335.

<sup>89</sup> *Id.* at 339.

<sup>90</sup> *Id.* at 341.

<sup>91</sup> *See generally id.*

<sup>92</sup> *Id.* at 328.

<sup>93</sup> *O'Bannon v. National College Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

<sup>94</sup> *Id.* at 1055.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1056.

<sup>100</sup> *Id.* at 1057.

<sup>101</sup> *Id.* at 1058.

Court found amateurism serves two procompetitive purpose.<sup>102</sup> The first, integrating academics and athletics to “improve the quality of educational services” provided, and second by promoting the understanding of amateurism, to help preserve consumer demand for college sports.<sup>103</sup> In the third and final prong in the Rule of Reason analysis, the Court considered whether there were means of achieving the NCAA’s procompetitive purposes that were “substantially less restrictive” than a total ban on compensating student athletes for the usage of their NILs.<sup>104</sup> To this point, the District Court found that student athletes could be paid by their institutions up to the cost of attendance, and up to \$5,000 per year to be put in a trust and paid when they leave school.<sup>105</sup>

The Ninth Circuit begins by discussing the *Board of Regents* dicta regarding amateurism. In *O’Bannon*, the NCAA makes the argument that amateurism is exempt from Sherman Act liability and cite the *Board of Regents*.<sup>106</sup> However, the Ninth Circuit disagrees with this contention, in that *Board of Regents* did not exempt amateurism from liability, it was only offered a deference of Rule of Reason analysis because the nature (“character and quality”) of the NCAA requires a less strict scrutiny; but is by no means exempt. The Court deems that the validity of amateurism rules must be “proved, not presumed.”<sup>107</sup>

Ultimately, the Ninth Circuit vacates the lower court’s holding an injunction requiring the NCAA to allow their member institutions to compensate student-athletes up to \$5,000 per year in deferred compensation.<sup>108</sup> They found that the District Court ignored the fact that not paying student athletes is “precisely what makes them amateurs,” which is an integral factor to the NCAA market.<sup>109</sup> The Ninth Circuit otherwise affirmed the lower court’s holding.<sup>110</sup>

Whereas the *O’Bannon* holding did not quite provide the relief various student athletes have desperately been seeking, it opened the pathway to for future litigation that NCAA bylaws are not automatically exempt from Sherman Act scrutiny, and a proper analysis must be performed before any bylaw can be deemed procompetitive under the NCAA model.

### III. Transfer Challenges to the NCAA

In search for a new means to challenge the NCAA bylaws as anticompetitive under the Sherman Act, three separate lawsuits were violated between November 2015 and November 2016. Each were class-action lawsuits challenging the NCAA transfer bylaw, all filed by the same firm: Hagens Berman Sobol Shapiro LLP. Each complaint alleges that the Year in Residence Rule acts as an illegal restraint on trade under the Sherman Act. Two of the three lawsuits have been litigated, with one having reached a Seventh Circuit opinion in summer 2018. Both of which, the courts ruled in favor of the NCAA. The last case was awaiting the Seventh Circuit decision before taking further action.

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<sup>102</sup> *Id.* at 1059.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1060.

<sup>105</sup> *Id.* at 1061.

<sup>106</sup> *See generally id.*

<sup>107</sup> *Id.* at 1063.

<sup>108</sup> *Id.* at 1079.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

### A. Initiation of the Year-In-Transfer Bylaw Movement

As harm-felt student athletes watched their fellow colleagues rise and fall in the judicial system, a particular law firm saw a hole in the movement. Transfer bylaws had never been brought to the courts under Sherman Antitrust Act liability, and the issue was ripe for hearing. Although all lawsuits were filed between 2015 and 2016, the transfer issue had been going on long before Hagens Berman filed its first suit in *Pugh v. NCAA*.<sup>111</sup>

In 2010, Pugh accepted a full ride scholarship to a Division I FCS school, Weber State University, on the promise by head coach, Ron McBride, that his scholarship would be renewed annually as long as he did well academically and remained eligible for NCAA competition.<sup>112</sup> In December 2011, Coach McBride retired and the new head coach, Jody Sears, informed Pugh that Weber state would not be renewing his scholarship and he should look into transferring.<sup>113</sup> Pugh had offers from multiple D1 schools, so long as he would apply and be granted a NCAA “hardship waiver” allowing him to play immediately.<sup>114</sup> The NCAA ultimately denied his request and every scholarship offer Pugh received was rescinded.<sup>115</sup> In 2013, Pugh transferred to a Division II school where he was eligible to compete immediately.<sup>116</sup> His scholarship was not a full ride, causing Pugh to have to take out loans.<sup>117</sup>

In his lawsuit against the NCAA, Pugh argues that the NCAA transfer bylaws violate the Sherman Act as an unreasonable restraint of trade, specifically focusing on the “year in residence” requirement.<sup>118</sup>

The Court focuses on the Supreme Court opinion of *Board of Regents* and the Seventh Circuit opinion of *Agnew*, to frame their decision in granting the NCAA’s motion to dismiss on Count II regarding the year-in-residence bylaw. When analyzing Pugh’s motion to dismiss, the Court focuses on whether the transfer rule is deemed “presumptively procompetitive” or not.<sup>119</sup> The transfer bylaw directly relates to eligibility, to which the Court held that “the law is clear” and NCAA eligibility bylaws, in accordance with *Board of Regents*, is presumptively procompetitive and therefore, does not violate the Sherman Act.<sup>120</sup>

Pugh argues that the transfer bylaw does not involve a challenge affecting eligibility, but instead, the distribution of scholarships, to which the Court found unpersuasive.<sup>121</sup> Additionally, the court found Pugh’s second argument that he was economically harmed by having to take a diminished scholarship at his new school to also be unconvincing.<sup>122</sup> Even if the court decided to view Pugh’s harm as a commercial challenge, the Court would nonetheless be required to examine the NCAA’s activities, instead of Pugh’s. Since it is the duty of the NCAA to maintain a tradition of amateurism in college sports, the court is required to give them “ample latitude”<sup>123</sup>

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<sup>111</sup> *Pugh v. National College Athletic Ass’n*, 2016 U.D. Dist. WL 5394408.

<sup>112</sup> *Id.* at \*1

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*2.

<sup>119</sup> *Id.* at \*3.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at \*4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (citing *Board of Regents*, 468 U.S. at 120).

The United States District Court for the Southern District of Indiana chose to conform their opinion directly within the decisions in *Agnew* and *Board of Regents*, and not to conduct any additional thought or analysis.

### **B. Try, and Try Again**

Shortly after attorney Hagens Berman filed the *Pugh* lawsuit, he filed another suit in the United States District Court for the Southern District of Indiana<sup>124</sup> with the exact same issue in *Deppe v. NCAA*<sup>125</sup> Deppe was recruited to play football as a punter by six different Division I universities, and ultimately chose Northern Illinois University (“NIU”) where he enrolled in June 2014 as a preferred walk-on. Deppe “red shirted” his first year, meaning he chose to forego one year of athletic eligibility, to carry over to a later year.<sup>126</sup> He planned to start the following year as the team’s punter and then have four years of athletic eligibility remaining.<sup>127</sup> He was told by the special team’s coach that he would be receiving an athletic scholarship in January 2015.<sup>128</sup> However, that coach left NIU prior to September 2015, when Deppe received office letters of release.<sup>129</sup>

Deppe then began recruiting with other schools immediately.<sup>130</sup> He visited the University of Iowa (“Iowa”), and during his visit, the coaching staff told him they wanted him if he would be eligible for the 2016/17 season, via a hardship waiver.<sup>131</sup> In November 2015, Iowa accepted Deppe into their institution for admission.<sup>132</sup> However, days later, the Iowa coach informed Deppe that their program had decided to pursue another punter who had immediate academic eligibility, instead of pursuing an NCAA waiver.<sup>133</sup> Deppe’s attorneys contact the NCAA inquiring if he could still receive a waiver given the circumstances but was ultimately denied because only the transfer institution can request a waiver in accordance with NCAA rules.<sup>134</sup>

Deppe filed a complaint with this Court claiming that the NCAA violated the Sherman Act by (1) limiting the number of Division I football scholarships that a member institution can grant in a given year; and (2) promulgating a “year-in-residency” bylaw that (with exceptions) requires Division I student athletes to forego a year of athletic eligibility when they transfer to another Division I school.<sup>135</sup> His second count alleges that the transfer bylaws also violate the transfer Sherman Act as an unreasonable restraint on trade.<sup>136</sup>

The Seventh Circuit ultimately affirms the District Court’s holding that the year-in-residence rule is a presumptively procompetitive eligibility in accordance with *Agnew* and *Board of Regents*, and found a full Rule of Reason analysis to be unnecessary.<sup>137</sup> A procompetitive presumption will not be warranted if a regulation does not preserve a tradition of amateurism. The

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<sup>124</sup> No. 1:16-CV-00528, 2016 U.S. Dist. (S.D. Ind. Mar. 8, 2016).

<sup>125</sup> *Deppe v. National College Athletic Ass’n*, 893 F.3d 498 (7th Cir. 2018).

<sup>126</sup> *Id.* at 499.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 499-500.

<sup>131</sup> *Id.* at 500.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See generally id.*

Seventh Circuit cites to *Board of Regents* explanation that most, if not all, NCAA eligibility rules will within the presumption of pro-competitiveness.<sup>138</sup> Deppe argues that the year-in-residence rule does not fit within traditional eligibility bylaws; however, the Court disagrees and holds that the rule “falls neatly in line” with other rules previous courts have characterized as eligibility rules.<sup>139</sup>

Deppe next makes the argument that the NCAA enforces the transfer rule for economic reasons and not to preserve the product of college football.<sup>140</sup> In shaping this argument, he notes that the transfer exception is unavailable to revenue-generating sports within the NCAA.<sup>141</sup> However, the Court explains that Deppe ignores the fact that these are “precisely the athletes who are most vulnerable to poaching,” and lifting these restrictions would allow institutions to essentially trade these student athletes like professional athletes.<sup>142</sup>

In the second part of this argument, Deppe contends administrative costs like recruiting and retention expenditures are lowered by impeding the transfer schools.<sup>143</sup> He states that member institutions are essentially saving money that they would otherwise need to spend on larger scholarships to tempt their student-athletes to stay, as long as additional funds necessary to recruit and train new players to replace the ones that leave.<sup>144</sup> The Court shuts down this argument finding that saving money as a consequence of an eligibility bylaw does not correlate to the presumption that such bylaw is “fundamentally aimed at containing costs” ahead of preserving amateurism in such sports.<sup>145</sup>

The last economic argument that Deppe makes is that the year-in-residence rule “preserves the hegemony of the ‘Power 5’ conferences.”<sup>146</sup> He makes the assertion that these schools recruit the most talented high-school athletes and the transfer rule prevents those athletes from transferring to less powerful schools.<sup>147</sup> The Court strikes this notion down because it believes that the rule impedes transfer in both directions because without the rule, the Power 5 schools could poach athletes from smaller schools, which would “risk eroding the amateur character of college games.”<sup>148</sup>

Ultimately, the Seventh Circuit found the year-in-transfer rule presumptively procompetitive on its face in accordance with *Agnew* and *Board of Regents*, forwent a full Rule of Reason analysis, and held that Deppe’s challenge of the NCAA year-in-residence bylaw under the Sherman Act failed on the pleadings.

### C. Accept Defeat and Re-Strategize

The third, and final, lawsuit filed in federal court was by plaintiff, Johnnie Vassar (“Vassar”).<sup>149</sup> Vassar is a former men’s basketball player at Northwestern University who filed a

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<sup>138</sup> *Id.* at 502.

<sup>139</sup> *See generally id.*

<sup>140</sup> *Id.* at 503.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> No. 1:16-CV-10590 (N.D. Ill. filed Nov. 14, 2016).

class-action lawsuit against Northwestern and the NCAA alleging that the two collaborated to “run him off” the team to free up his scholarship for another player.<sup>150</sup> According to his complaint filed in the Northern District of Illinois, he alleges that Northwestern put him on an internship to work as a janitor and that head coach, Chris Collins, “berated” him and told him that he had no future with the team.<sup>151</sup> Collins had no comment to the Northwestern daily newspaper, only stating that he would “let those things be handled behind closed doors.”<sup>152</sup>

According to the complaint, Vassar was placed in an internship in attempt to get him to give up his athletic scholarship.<sup>153</sup> He was required to report at 7 a.m. multiple days per week picking up trash and leaves, operating a leaf blower, wiping down tennis court bleachers and baseball diamonds, and to life heavy metal planks near the football field.<sup>154</sup> To make matters worse, the complaint alleges that Northwestern attempted to falsify his timecards attempting to prove misconduct on Vassar’s part.<sup>155</sup>

In 2016, Vassar was allegedly (informally) asked in March 2016 if he would take a cash payment that was to be equal to the remainder value of his current scholarship.<sup>156</sup> Following, he voiced concerns over the NCAA rules and was then asked if he would be willing to accept an equal scholarship based off of merit.<sup>157</sup> One month later, Vasser was notified that the University would be revoking his scholarship.<sup>158</sup>

The class-action lawsuit, like the others, alleges that the NCAA violated the Sherman antitrust law by requiring student-athletes to sit out for one year after transferring to another institution.<sup>159</sup> While Vassar remained a student at Northwestern, he reached out to multiple Division I basketball programs inquiring about transferring but was ultimately informed that he would not be accepted unless he could play immediately.<sup>160</sup> University spokesman Al Cubbage told the school newspaper, via email, that he believed the claim had no legal merit, and that he would “vigorously” defend the University.<sup>161</sup>

Vasser chose to await the summer 2018 *Deppe* decision in the Seventh Circuit before deciding whether he intended to further along the litigation process.<sup>162</sup> Following the decision, in August 2018, Vasser dropped his suit from federal court and re-filed a similar version of the lawsuit in Cook County circuit court, now solely against the University.<sup>163</sup> Prior to the *Deppe*

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<sup>150</sup> Complaint, Vassar v. NCAA, No. 1:16-cv-10590 (N.D. Ill. Nov. 14, 2016) (hereinafter Vassar Complaint).

<sup>151</sup> Vassar Complaint at 5.

<sup>152</sup> Max Gelman, *Former basketball player sues Northwestern, NCAA, alleges mistreatment by University*, The Daily Northwestern (November 15, 2016) <https://dailynorthwestern.com/2016/11/15/sports/former-basketball-player-sues-northwestern-ncaa-alleges-mistreatment-by-university/#photo> [herein after Former Basketball Player].

<sup>153</sup> Vassar Complaint at 5.

<sup>154</sup> *Id.* at 47.

<sup>155</sup> Vassar Complaint at 5.

<sup>156</sup> *Id.* at 51.

<sup>157</sup> *Id.* at 53.

<sup>158</sup> *Id.* at 54.

<sup>159</sup> *Id.* at 9.

<sup>160</sup> Former Basketball Player, *supra* note 152.

<sup>161</sup> *Id.*

<sup>162</sup> “MINUTE entry before the Honorable Andrea R. Wood: Status hearing held. The parties acknowledge that the outcome of the appeal in *Deppe v. NCAA*, Case No. 17-1711 pending in the Court of Appeals for the Seventh Circuit, will likely be dispositive of the antitrust claim in plaintiff’s complaint here.” Minute Entry, Vassar v. Nat’l Collegiate Athletic Ass’n, No. 1:16-cv-10590 (N.D. Ill. Nov. 22, 2017).

<sup>163</sup> Ben Pope, *Johnnie Vassar’s lawsuit dropped in federal court, re-filed against Northwestern in state court*, The Daily Northwestern (August 27, 2018) <https://dailynorthwestern.com/2018/08/27/sports/johnnie-vassars-lawsuit->



decision, the judge presiding over the Vassar case had repeatedly continued the NCAA's motion to dismiss.<sup>164</sup> According to Vassar's legal counsel, the choice to withdraw the lawsuit surrounded the fact that "the appeal was unlikely to survive."<sup>165</sup> Vassar graduated from Northwestern and has since enrolled as a graduate program at Tennessee Tech and plays on the men's Division 1 basketball team.<sup>166</sup> In accordance with the NCAA bylaws, graduate students do not have to sit out one year before becoming eligible.<sup>167</sup>

In the original federal lawsuit, Vassar alleges that he was "berated" by Coach Collins and placed in an "internship" that entailed manual labor.<sup>168</sup> The new re-filed lawsuit in Cook County court, alleges the exact same facts and description of events, but presents nine causes of action instead of four.<sup>169</sup> Vassar's lawyers stated that the additional state law complaints include claims such as 'Intentional Infliction of Emotional Distress,' and 'Negligent Infliction of Emotional Distress," that were not applicable in the federal court system.<sup>170</sup> Northwestern's legal counsel stated that the University will comply with the court rules and procedures, and "will defend those claims aggressively" because he believes they are without merit.<sup>171</sup> In accordance with the Cook County civil suit docket, as of March 2018, the case has yet to be set for trial.<sup>172</sup>

#### IV. Analysis

In light of the recent Seventh Circuit decision in Deppe, one must ask: did the Court get it right? As a matter of public policy, do we, as a society, want to prevent willing and able student-athletes in revenue-general to be able to freely transfer across member institutions? On the one hand, why should these individuals be prohibited from doing as they please? However, on the other, are there greater repercussions at stake if such a transfer would be allowed? Is it really about protecting amateurism? The answers to these questions will never be found in the judicial system.

The next step is to face the harsh reality and accept that the judicial system has placed its proverbial foot down and put the transfer issue to rest once and for all. They have made it crystal clear that so long as the NCAA bylaws seek to protect amateurism, they will be subjected to Rule of Reason analysis, and found to be competitive and not in violation of the Sherman Act. Like Vassar, those feeling incomplete by this decision have the option to seek alternate damages in state court, if applicable, or look to the current change happening in the NCAA for relief.

It is easy to make the argument that the year-in-transfer bylaw should be outlawed, and the NCAA should restructure their bylaws to be more student-athlete friendly and allow athletes to freely transfer whenever they choose. However, the better argument is that the year-in-transfer bylaw serves a dual purpose on both sides of the spectrum. First, the NCAA and member institutions win because this rule ensures that athletes cannot jump from conference to conference,

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dropped-in-federal-court-re-filed-against-northwestern-in-state-court/ [hereinafter Johnnie Vassar's Lawsuit Dropped].

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> NCAA DIVISION I MANUAL, *supra* note 9, § 14.6.1

<sup>168</sup> Vassar Complaint at 32.

<sup>169</sup> Johnnie Vassar's Lawsuit Dropped, *supra* note 163.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> "CASE CONTINUED FOR CASE MANAGEMENT CONFERENCE – ALLOWED" Vassar v. Northwestern University, No. 2018-L-008685 (Ill. Cir. Ct. April 4, 2019).

hindering large TV contracts and conference cash flow. Second, it protects what is most important at the end of the day: the value of a college degree. Student-athletes make the decision to attend college for the purpose of obtaining a degree, with athletics serving as a means to an end within a co-dependent relationship.

There is no doubt that certain athletic situations put a student-athlete in a position where they no longer feel that their current program best suits their needs, but recent litigation surrounding this exact issue has made an impact on the NCAA and forced them to alter their transfer process for the better. This next section will discuss how the year-in-transfer bylaw financially serves the NCAA and member institutions, and transitions into how the transfer process has been reformed for the better. Lastly, this section will conclude with how recent litigation, combined with NCAA reform, ultimately ensures that student-athletes are protected and will be set up to graduate with success.

### **A. At the End of the Day, It's All About the Money**

It comes as no surprise that the majority of NCAA revenue comes from the Division 1 men's basketball television and marketing rights.<sup>173</sup> In 2017, the NCAA made \$1 billion in revenue from "media rights fees, ticket sales, corporate sponsorships, and a proliferation of television ads" surrounding the March tournament.<sup>174</sup> The remainder revenue comes from championship ticket sales, and other small variety of sources, such as membership dues. From there, \$164.7 million is distributed amongst Division 1 conferences via a "Division 1 Basketball Performance Fund," (the Fund) based on their performance in the men's basketball tournament over a six-year rolling period.<sup>175</sup> Then, that money is distributed further down to fund individual sports and provide additional athletic scholarships.<sup>176</sup> This would be impossible without the student-athlete.

If a student-athlete in a revenue-generating sport, specifically men's basketball, were able to transfer at any time without having to miss one game, television contracts would be adversely affected. Sporting networks would be unable to make firm deals with conferences as they would have no assurance on a conference's popularity. Conferences athletic ability would be fluid, therefore, resulting in lower-costing television contracts for a shorter amount of time. Since the money that comes from the Fund is distributed by conference, it would be impossible to accurately allocate the money across conferences if athletes were able to transfer mid-season. Conferences would be constantly changing, and it would become more difficult to accurately measure distribution from the Fund.

The NCAA encourages conferences to divide their money equally among the members.<sup>177</sup> This is easier for larger conferences to do as they have other sources of income.<sup>178</sup> However, smaller conferences count on this NCAA money to cover their own expenses.<sup>179</sup> It is only the

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<sup>173</sup> *Where Does the Money Go?*, NCAA, <http://www.ncaa.org/about/where-does-money-go> (last visited March 20, 2019) [hereinafter *Where Does the Money Go*]

<sup>174</sup> Tim Parker, *How Much Money Does the NCAA Make off March Madness?*, Investopedia, <https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp> (last visited March 20, 2019) [hereinafter *How Much Money*].

<sup>175</sup> *Where Does the Money Go?*, *supra* note 173.

<sup>176</sup> *Id.*

<sup>177</sup> *How Much Money*, *supra* note 174.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

leftover money that actually gets distributed to the conference members.<sup>180</sup> Most universities do not even make money on their basketball programs, and only about one-third will break even.<sup>181</sup> Therefore, by allowing players to actively transfer schools, and across conferences, it shrinks the pot of money that gets distributed to each institution.

Less money per institution, means less money per athlete. There is an illustrious hype about the “glamorous” student-athlete life: the free trips, free meals, free clothing. However, none of this would be possible without those student-athletes in revenue-generating sports. Not to mention, most student athletes who are not participants of a revenue-generating sports, do not lead glamorous lives to say the least. They practice 40+ hours per week<sup>182</sup> and compete just as frequently, if not more, than those participating in a revenue-generating sport, with far less of a budget. The second that conferences are making less money, is the same second that the student-athletes at the bottom of the totem pole will suffer. It may begin with less clothing, no big deal. However, in the next minute it could mean not being able to afford travel to competition, or less money per meal while on the road. In the blink of an eye, student-athletes will second guess whether they actually want to subject themselves to such a lifestyle, and college athletics as we know it will be transformed forever.

Everyone views the NCAA as a money-grubbing institution that squeezes everything they can out of an athlete to make a profit.<sup>183</sup> However, student-athletes choose this life. They choose to commit four (or more) years to an institution, to serve a greater purpose. This relationship is co-dependent as after this time is up, they walk out of the door with a college degree. The more money that the NCAA makes is more money than gets allocated to the student-athlete, especially those athletes whose sports sit at the bottom of the totem pole. By allowing athletes to get up and change institutions at any point, would result in less money per conference, and subsequently, less money per athlete.

## B. Changes to the Transfer Process

Under the previous transfer regime, a student-athlete must first notify his or her school prior to transferring.<sup>184</sup> From there, the school may block the student-athlete from having any contact with any or all other schools.<sup>185</sup> Specifically, big time basketball and football programs sought to block their student-athletes from contact with other conference institutions.<sup>186</sup> As of June 2018, the NCAA Division 1 counsel approved a proposal that switched the transferring process to a “notification-of-transfer” system in order to bring transparency and open conversation.<sup>187</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Peter Jacobs, *Here's The Insane Amount Of Time Student-Athletes Spend On Practice* (January 27, 2015) <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1> [hereinafter *Here's The Insane Amount of Time*]

<sup>183</sup> Doug Robinson, *Opinion: NCAA Business Model Is Broken* (March 2018)

<https://www.athleticbusiness.com/college/opinion-ncaa-business-model-is-broken.html>

<sup>184</sup> Austin Nivison, *NCAA makes major change to transfer, redshirt rules* (June 13, 2018)

<https://247sports.com/Article/NCAA-adopts-major-change-to-transfer-process-redshirt-rule-119018996/>

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *New transfer rule eliminates permission-to-contact process*, NCAA,

<https://www.ncaa.org/about/resources/media-center/news/new-transfer-rule-eliminates-permission-contact-process> (last visited March 18, 2019).

Beginning in October 2018, student-athletes finally obtained the ability to transfer without asking for permission.<sup>188</sup>

Under this new system, once the student-athlete informs his or her school of their desire to transfer, the school is then required to enter that student's name into a national transfer database within two business days.<sup>189</sup> Once in the database, other coaches are free to contact that particular individual.<sup>190</sup> This rule change prevents the practice of coaches and/or administrators from preventing student-athletes from having contact with specific schools. However, conferences still maintain the ability to make rules that may be more restrictive than the national rule.<sup>191</sup> Tampering with a student-athlete's transfer is no longer considered a "significant breach of conduct," Level 2 violation.<sup>192</sup> This rule change officially took effect on October 15, 2018.<sup>193</sup> According to the NCAA, the Transfer Working Group is still continuing to work on other transfer issues and is "still exploring the possibility" of uniform transfer rules.<sup>194</sup>

Although this rule change may not be the solution every transferee seeks, it is one step in the right direction. It means that the NCAA acknowledges that there is a very real problem in practice and is taking active steps to right the wrong. Hopefully this rule will discourage shady recruiting and coaching practices, and force universities to incentivize their student-athletes to remain at their institution until graduation.

### C. Reform in Action

The 2018 high-profile reform to the transfer bylaws made major strides for student-athletes, falling short of creating a "free agency" in college sports.<sup>195</sup> The new transfer process can be seen as a modification, and ultimately, a compromise, clearing the way for a smoother transition between universities and maybe ultimately paving the way for immediate competition eligibility.<sup>196</sup>

According to NCAA vice President, Dave Schnase, "the membership wanted to put immediate eligibility back on the table," with the circumstances of each individual case essentially dictating the approval rate.<sup>197</sup> Immediate eligibility for all transfers was allegedly considered, but ultimately not included in the reform.<sup>198</sup> Before the change, immediate undergraduate eligibility was only granted when a school could show "extremely egregious behavior" by the previous school.<sup>199</sup> Other than that, all the NCAA could do was tack on an additional year of eligibility at the end of a college career.<sup>200</sup> Now, a request for immediate eligibility can be granted if the transfer

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Ralph D. Russo, *Revamped NCAA waiver policy helps transfers play right away*, Associated Press <https://www.apnews.com/f8992e601c8948548393843f58037664> (last visited March 20, 2019) [hereinafter *Revamped NCAA*].

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

was “due to documented mitigating circumstances that are outside the student-athlete’s control and directly impact [their] health, safety, and well-being.”<sup>201</sup>

Michigan quarterback, Shea Patterson, is the first well-publicized case to undergo the new guidelines, as he transferred to Michigan after Mississippi received NCAA sanctions.<sup>202</sup> Patterson alleges that he and his teammates were misled about the scope of an NCAA investigation into Ole Miss, and the Revels’ bowl ban fell under the mitigating circumstances category.<sup>203</sup> He worked with attorney Tom Mars on his waiver, who believes the waiver change seems to have been a positive step in the right direction by the NCAA.<sup>204</sup> Mars believes that this new rule allowing mitigating circumstances instead of egregious behavior has encouraged universities to settle matters without the previous institution having to admit any type of wrongdoing.<sup>205</sup> He believes it to be a more collaborative approach surrounding waiver requests, resulting in more positive outcomes for student-athletes.<sup>206</sup>

Mars has also worked with quarterback transfer, Justin Fields, who was the victim of several racial slurs directed at him during a game in October while he was playing for Georgia.<sup>207</sup> Fields made the argument that he feared for his own well-being as a student-athlete, which is a mitigating circumstance outside of his control.<sup>208</sup> However, in general, the NCAA and member institutions do not publicly explain waiver decisions citing to student privacy laws.<sup>209</sup>

#### D. Statistical Analysis

Between April 1 and November 9, 2018, the transfer waiver approval rate was 66% across all sports.<sup>210</sup> This was down from the 2017-18 school year, which was at 83%.<sup>211</sup> However, waivers requested before April 1, 2018, included those that requested an extra year of eligibility, not just the immediate eligibility option.<sup>212</sup>

NCAA Division 1 data since the change is as follows: 63 of football players requested waivers and 50 were approved, at 79%; and 55 men’s basketball players requested waivers and 33 were approved, at 60%.<sup>213</sup> Patterson and Fields were not the only highly publicized players granted waivers for immediate eligibility.<sup>214</sup> Other cases drew attention as well, including Demetris Robertson, who is a receiver from California allowed to play immediately at Georgia, and Antonio Williams, who is a running back transferring from Ohio State to North Carolina.<sup>215</sup> Whereas more

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Dennis Dodd, *Shea Patterson details scope of Ole Miss deception in lengthy letter to Michigan*, CBS Sports <https://www.cbssports.com/college-football/news/shea-patterson-details-scope-of-ole-miss-deception-in-lengthy-letter-to-michigan/> (last visited March 20, 2019).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Brad Crawford, *Why Justin Fields may get immediate NCAA transfer eligibility*, <https://247sports.com/Article/Justin-Fields-Georgia-Bulldogs-transfer-NCAA-Ohio-State-126527630/> (last visited March 20, 2019).

<sup>208</sup> *Id.*

<sup>209</sup> *Revamped NCAA*, *supra* note 195.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See generally id.*

<sup>215</sup> *Id.*

requests for immediate eligibility have been granted, since each request is different, it is too soon and too difficult to determine whether the reform can be deemed a success or not as of yet.

### **E. Alternate Waivers and Exceptions**

Whereas the judicial system has made it clear the NCAA is the master of their bylaws, without wiggle room, student-athletes should always look for alternate means to seek immediate eligibility. The one-time exception is the most commonly used exception for transfers from one four-year Division 1 university to another.<sup>216</sup> A student-athlete should always look for another transfer exception to use. However, although such an exception may have fewer requirements, it may not always be the better option. As discussed above, all three plaintiffs would not have had any issue transferring had they been granted waivers, and thereafter would have been able to continue to pursue a college degree via a collegiate sporting career. The various additional waivers and exceptions include: graduate exception, graduate transfer waiver, discontinued academic program exception, military service exception, discontinued/non-sponsored sport exception, two-year non-participation/minimal participation exception, return to original institution without participation or with minimal participation exception, and non-recruited student exception.<sup>217</sup>

The most controversial exception to the year-in-transfer rule is the family hardship waiver.<sup>218</sup> Student-athletes participating in basketball and football programs that are granted this waiver, are except from the year-in-transfer rule and are eligible to play their sport immediately.<sup>219</sup> However, the reason this waiver is so controversial is that whether one is granted or denied is extremely inconsistent.<sup>220</sup> To be eligible for this transfer, the student-athlete must make the argument that the best thing for the athlete and his or her family, is to allow the athlete to play immediately and that the athlete needs this transfer to assist with an injured or ill family member.<sup>221</sup> In accordance, the NCAA measures three areas: (1) the nature of the injury or illness; (2) the student-athlete's responsibilities related to the care of the family member; and (3) the chronology of events.<sup>222</sup>

First, the injury or illness alleged must be life threatening and must involve and immediate family member.<sup>223</sup> Waivers will typically be denied if involving an extended family member, such as an aunt/uncle, or grandparent; unless it can be proved that the particular family member raised the student-athlete.<sup>224</sup> Second, the more involved the student athlete is with the day-to-day care for that immediate family member, the more likely it is that the waiver will be granted.<sup>225</sup> Last, there must be something that changed to have prompted the student-athletes transfer.<sup>226</sup> Examples include a diagnosis, the actual injury, or a worsening condition.<sup>227</sup> Waivers are much less likely to

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<sup>216</sup> *NCAA Transfer Exceptions and Waivers*, Athnet, <https://www.athleticscholarships.net/ncaa-transfer-exceptions.htm>

<sup>217</sup> *See generally id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

be granted if a family member has been ill or injured for a while, or if nothing has changed that requires the student-athlete to transfer.<sup>228</sup>

The university must request the waiver and must submit at least three sets of information coming from the student-athlete/family: (1) documentation from the doctor who diagnosed the injured or ill family member; (2) documentation from the doctor currently treating the family member; and (3) a letter from the student-athlete explaining the need for a waiver.<sup>229</sup>

Additional examples include: (applied to any sport) a student-athlete may transfer and play immediately, if their academic program was discontinued and they enroll in the same major that they were studying at the previous institution.<sup>230</sup> A student-athlete may also transfer and play immediately if he or she was not recruited in accordance with the NCAA, never received an athletic scholarship, and did not practice or compete other than a tryout.<sup>231</sup> Lastly, a student-athlete may transfer and play immediately if the previous school publicly announced that it will drop the student-athlete's sport, will reclassify to another division, or the school never sponsored the student-athlete's sport.<sup>232</sup> Unfortunately, most of these exceptions and waivers are applied to extreme and unlikely circumstances.<sup>233</sup>

## F. The Bottom Line

Since its birth, the NCAA has virtually been able to act however it wants and has withstood countless protection from the judicial system under the blanket of "preserving amateurism." However, at the end of the day, student-athletes need to be prepared for a life after college, and by the courts upholding the year-in-residence rule, it creates a lasting impact affecting more than just any particular plaintiff. By not allowing student athletes from revenue-generating sports to freely transfer, or be traded like a professional athlete, it protects the entirety of their education.

In Division 1 athletes there are approximately 179,200 student-athletes across 351 NCAA member institutions.<sup>234</sup> 59% of all student-athletes will received some type of scholarship or academic aid during their athletic tenure.<sup>235</sup> In 2017, the graduation success rate was 87%. Fewer than 2% of NCAA student-athletes will go on to be a professional athlete.<sup>236</sup> The fact is, most student-athletes depend on their academics to prepare them for the harsh reality that is life after college. Not only is an education important, it is absolutely vital. The courts want to preserve amateurism and protect student-athletes from being free trade. Some may ask: what is actually being protected if student-athletes cannot move around at their own will? The answer: their education.

Officially, in season practice is restricted to 20 hours per week (or four hours per day) in accordance with NCAA rules.<sup>237</sup> However, many student-athletes have reported that they spend at

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *NCAA Recruiting Facts*, NCAA,

<https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> (last visited March 21, 2019) [hereinafter *NCAA Recruiting Facts*].

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Complaint, McCants v. NCAA*, No. 1:15CV00176 at 89 (M.D.N.C. Feb. 27, 2015) [hereinafter *McCants Complaint*]

least 30 hours per week practicing, with up to 40 hours including weekly practice commitments; according to a 2011 NCAA survey cited in the UNC lawsuit.<sup>238</sup> The 20-hour per week rule may be what the NCAA officially purports to follow but is not what is actually seen in practice. Student-led workouts do not count towards the 20 hours, neither do administrative meetings, film study, athletic training and rehab, nor any other “activity” where a coach is not present. Game days count as three hours, but some competitions extend far beyond the three-hour mark.<sup>239</sup> For example, track and field meets can last up to eight hours in one particular day, with meets lasting for two or three days.

This begs the question: what is the NCAA doing for student-athlete education and career development? Bylaw 16.3 covers “Academic and Other Support Services” with approximately three sub-sections.<sup>240</sup> 16.3.1, titled “Mandatory,” outlines general academic counseling and tutoring services available to all student-athletes.<sup>241</sup> However, such services “may be provided” in athletic departments but are not required.<sup>242</sup> If the NCAA valued the “student” portion as much as the “athletic” portion of the name, then these services would be mandatory. The NCAA needs to prove that they value the student-athlete as a whole. The NCAA should require that athletes mandatorily check in with their advisors for academic counseling and support, especially when an athlete is in season. The student-athlete is serving the institution through athletic participation and competition; therefore, the institution should be serving the student right back.

The NCAA brags via a 2016 Gallup study that interviewed 1,670 former student-athletes about their college experiences and currently well-being, that former student-athletes rated higher than 23,000 non-student-athletes graduating from the same institutions.<sup>243</sup> Five elements were measured: purpose, social, community, physical well-being, and financial-well-being.<sup>244</sup> Of those give, former student-athletes rated higher in all except financial well-being, where former student-athletes were thriving at similar levels in comparison to non-student-athlete peers.<sup>245</sup> Among these statistics, women stood out versus non-student athletes in employment rate and workplace engagement.<sup>246</sup> Additionally, men who played football or basketball scored higher in purpose and community well-being.<sup>247</sup> While these numbers appear promising, it must be noted that career services are not required by the NCAA.<sup>248</sup> Considering there are upwards for 200,000<sup>249</sup> Division I student-athletes alone, per year, these numbers from the Gallup poll must be taken with a grain of salt.

Given these facts, what the NCAA does do right is prevent student athletes in revenue-generating sports from freely transferring without having to sit out one year. Valuing education is likely not the reason why this rule is in place, although the court system claims it is protecting student athletes from free trade, this bylaw does serve a useful purpose. If student athletes did not

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<sup>238</sup> *Id.* at 96

<sup>239</sup> *Id.* at 91

<sup>240</sup> NCAA DIVISION I MANUAL, *supra* note 9, § 16.3

<sup>241</sup> *Id.* at § 16.3.1

<sup>242</sup> *Id.*

<sup>243</sup> *Gallup Study: Life Outcomes of Former Student-Athletes*, NCAA,

<http://www.ncaa.org/about/resources/research/gallup-study-life-outcomes-former-student-athletes> (last visited March 30, 2019)

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *See generally* NCAA DIVISION I MANUAL, *supra* note 9,

<sup>249</sup> *NCAA Recruiting Facts*, *supra* note 234.



have to sit out a year, they would be free to transfer at any point. This “any point” could mean mid-semester. Basketball players would be enticed to transfer around mid-March right before the NCAA tournament to a team that they feel is more likely to win. The repercussion of this transfer would be a total and complete hindering of the student-athlete’s education. Transferring can be difficult and stressful in and of itself, but breaking up an education has a lasting impact that could negatively affect their future. How would credits properly transfer over? What if credits were missed due to the new school’s academic policies? This could result in a student athlete having to tack on an additional semester to graduate resulting in the loss of a potential job opportunity post-graduation.

## **V. Conclusion**

The long, anticipated wait from the 7<sup>th</sup> Circuit holding is over. The NCAA year-in-transfer bylaw will continue to be upheld by the courts in an effort to preserve amateurism. What does this mean for future student athletes looking to transfer from their current schools? First, it means current high school athletes seeking to play in a Division 1 revenue generating sport should make a careful and cautious decision. Recruiting techniques have been exposed and serve to educate the youth on what they may be getting into when deciding what institution to attend. As for current student-athletes, this ruling means that they need to pursue alternate transfer means. With hardship waivers being seemingly easier to attain, if a student-athlete truly feels there are “mitigating circumstances” preventing them from staying at their school, they can pursue a waiver to play their sport. At the end of the day, college athletics serve as a means to an end: a college degree. Preserving the NCAA transfer rule will have a lasting impact on student athletes, it protects them from being bounced around like a professional athlete, and allow them to obtain a unhindered college education while simultaneously competing in a sport they love.