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Should the NCAA's Eligibility Rules Be Subjected to the Sherman Antitrust Act?

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Should the NCAA's Eligibility Rules Be Subjected To The Sherman Antitrust Act?

The National Collegiate Athletic Association (NCAA) is a large business capable of generating millions of dollars. In 1989, the NCAA's basketball tournament generated over $70 million.[1] Each of the 64 schools qualifying for the tournament received direct payments of $275,000.[2] Football programs were also successful with bowl games generating upwards of $60 million.[3] Yet for as much revenue college athletics can generate for each educational institution, the NCAA has been successful at classifying itself as a non-profit, non-competitive entity and has managed to shelter itself from direct scrutiny of the Sherman Antitrust Act. Although the Supreme Court in *Board of Regents v. NCAA*[4] concluded that determining television contracts was an NCAA action subject to the Sherman Act, NCAA eligibility rules have thus far avoided such scrutiny. In essence, the Supreme Court skirted the eligibility issue, only recognizing that the NCAA rules concerning the issue were not without justification.[5] The question becomes, do the NCAA eligibility/amateur rules prohibiting student-athletes from receiving compensation not authorized by the NCAA, amount to price fixing violating the Sherman Act? This article seeks to answer that question.

I. WHO IS THE NCAA?

The NCAA is a private, nonprofit association consisting of over 1000 members of accredited colleges and universities within the boundaries of the United States of America.[6] These members are divided into various sections depending upon the size of the institution and its respective emphasis upon athletics.[7]

The NCAA, based in Mission, Kansas, operates pursuant to the rules and regulations set forth in its Constitution and Bylaws.[8] The members of the NCAA convene yearly, generally in January, at the NCAA convention to review rules and make amendments. These rules are adopted by the members and may be

1. NCAA News, July 19, 1989 at 1, col 4.
2. *Id.*
3. *Id.*
4. 468 U.S. 65 (1984)
5. *Id.*
6. NCAA News, Aug. 30, 1989, at 1, col. 1.
7. NCAA v. Board of Regents, 468 U.S. 85, 89 (1984).
8. NCAA News, May 24, 1989, at 3, col. 3.

amended subject to membership approval. All principles of the NCAA are set forth in a printed manual and sent to each member institution.[9]

The NCAA was created in 1905 in response to the frightening increase in the level of violence associated with college football.[10] Since then, its responsibilities have grown to include regulation of recruiting, eligibility, financial aid, negotiating television contracts, and supervision of the conduct of its members.[11] Yet even with its continuously increasing responsibilities, the NCAA has always maintained that its basic goal is "to maintain intercollegiate athletics as an integral part of the educational 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."[12]

It is not surprising that the NCAA has gone far beyond its original intended purpose. Presently, it is now the governing body of a large business, the business of college athletics. With large payouts to schools with successful athletic programs, competition for star high-school athletes can be intense.[13] Unfortunately, due to the high stakes involved, rules and regulations are frequently sacrificed.

In response to such illegal practices as payments to students or recruiting violations, the NCAA closely regulates the "courting" of high school athletes. By maintaining strict recruiting guidelines, the NCAA seeks to regulate the competition for incoming "laborers." These same rules also regulate these "laborers" once they reach the collegiate level and dictate what the student-athlete must do to maintain his or her eligibility. The NCAA rules state that:

> 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 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; (d) Receives, directly or indirectly,a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Completes on any professional athletics team . . . even if no pay . . . was received; or (f) Enters into a professional draft or an agreement with an agent or other entity to negotiate a professional contract.[14]

Via its amateur-status rules, the NCAA limits compensation to tuition, fees, and room and board, with stringent rules concerning indirect forms of compensation.

The existence of such restrictions upon the recruitment of student-athletes — the same athletes who will help a college or university gain financial benefits

9. 1993-94 NCAA MANUAL 8 (1993) [hereinafter, NCAA Manual].
10. J. Falla, NCAA: THE VOICE OF COLLEGE SPORTS 15 (1981).
11. NCAA Manual, *supra*, note 9 at 7.
12. *Id.* at 1.
13. Lee Goldman, *Sports and Antitrust: Pay to Play?*, 65 NOTRE DAME L. REV. 206 (1990).
14. NCAA Manual, *supra*, note 9 at 64.

through its athletic program — begs the question of whether the NCAA engages in the unfair restriction of trade? Through the Sherman Antitrust Act, the Congress of the United States has set forth the policy that trade shall not be unfairly restricted in this country.[15]

However, before going further, some understanding of the Sherman Antitrust Act is necessary. The Act was enacted in 1890 and was, as the Supreme Court later stated, "aimed at preserving free unfettered competition as the role of trade."[16]

The drafters of the Sherman Act had a dual focus in mind. Section 1[17] was geared towards preventing any type of contract that resulted in a restraint of trade or commerce. Section 2[18] made it illegal for a person to monopolize or act with others to monopolize any part of trade or commerce within the United States or its foreign partners.[19] The courts have declared certain business transactions as being in restraint of trade. One such example are group boycotts. "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."[20] This would include a group of large department stores refusing to deal with smaller retail stores.[21] Another type of illegal restraint on trade is a "horizontal restraint." Such restraints are agreements between competitors at the same level of market structure (generally agreements to purchase or not purchase goods from particular dealers).[22] They are intended to restrain competition at the same level of distribution.[23]

As time has shown, asserting antitrust claims has been far from easy, primarily because courts have made the requirements for bringing such claims difficult. In order to bring a claim under §1 of the Sherman Antitrust Act, the claimant must prove three elements: (1) an agreement or conspiracy;
(2) resulting in an unreasonable restraint of trade; and, (3) causing "antitrust injury."[24] Such an injury, to "business or property by reason of anything forbidden in the antitrust laws,"[25] must be sustained by both the claimant as well as by the competition in general.[26]

Under §2 of the Sherman Antitrust Act, in order to claim monopolization, a claimant must show both (1) possession of monopoly power in the relevant

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15. 15 U.S.C §1 (1890) provides:
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.

16. Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1959).
17. 15 U.S.C. § 1 (1890).
18. 15 U.S.C. § 2 (1890).
19. 15 U.S.C. § 1 and § 2.
20. Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 466 (1959).
21. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
22. Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978).
23. Const. Aggregate Transport v. Florida Rock Ind., 710 F.2d 752 (11th Cir. 1983).
24. Taggert v. Rutledge, 657 F.Supp. 1420, 1433 (D. Mont. 1987).
25. City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir. 1992).
26. Southern Business Com. v. Matsushita Elec., 806 F. Supp. 950, 956 (N.D. Ga. 1992).

market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[27]

Thus, with the assumption that college athletics can be a money-making operation, the question remains: Should the Sherman Antitrust Act be applied to college athletics?

II. How the Courts Have Viewed the Issue of Amateurism to Date

Determining whether the NCAA's rules concerning amateur status violate the Sherman Act has not yielded clear-cut results yet. Although the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states,"[28] it has been recognized that this statement cannot be applied literally as virtually every contract restrains trade in some manner, even if between the two parties.[29] Thus, the Supreme Court has limited the Sherman Act to those contracts that limit competition in an unreasonable manner.[30] Unfortunately for those seeking clear direction, the Court has not specified what acts are considered "unreasonable."

The Court's ruling in *NCAA v. Board of Regents*[31] did provide some examples of what types of behavior would not be tolerated. One such example is a horizontal restraint where competitors agree on the way in which each will compete against the other.[32] An example of this would be an agreement between two equally situated businesses which agree to only do business with one dealer and not that dealer's competitor.[33] Additionally, the Court determined that placing a limit upon the output of a certain product was unreasonable as it created an artificially limited product.[34] Thus horizontal restraints and output limitations are two examples of what the Supreme Court would deem as "unreasonable" limits on competition.

In applying this to the NCAA regulations, the NCAA has for all intents and purposes engaged in horizontal restraints. By making it illegal for universities and colleges to provide student-athletes with little more than tuition and room/board, the NCAA has managed to set a horizontal restraint upon athletes. Because the NCAA has limited the compensation a university may pay its athletes, there is an "across-the-board" limitation on the fair market value of these athletes. This is true regardless of how valuable an athlete may be to the university's athletic program. By having an agreement between all NCAA members NOT to provide student-athletes with what may be their market value, the NCAA has restrained trade.

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27. *Id.* at 959.
28. 15 U.S.C. §1 (1988).
29. Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).
30. Board of Regents, 468 U.S. 85, 98.
31. *Id.*
32. *Id.* at 99.
33. Const. Aggregate Transport v. Florida Rock Ind., 710 F.2d 752 (11th Cir. 1983).
34. *Id.*

What needs to be addressed is whether the Sherman Act should apply to the NCAA's regulations imposed upon amateurs. Prior case law has not dealt with the issue directly, instead choosing to apply the Supreme Court's discussion of the matter in dictum. In *NCAA v. Board of Regents*,[35] the Universities of Oklahoma and Georgia challenged the NCAA's regulations concerning televising college football games. The NCAA controlled all negotiations with networks regarding televising games, forcing all members to comply with any agreement made between the NCAA and any network. Included in the NCAA's rules was a limitation upon the number of television appearances each team could have.[36]

Both universities challenged the restrictions forbidding individual universities from negotiating independently with television networks, claiming that the NCAA restricted trade in violation of §1 of the Sherman Act. The Supreme Court, in affirming the lower court's conclusion that NCAA rules were in violation of the Sherman Act, concluded that the agreement restricted output and affected price.[37] The NCAA attempted to make an argument that the TV plan actually *helped* trade in that it assisted in the marketing of broadcast rights and was therefore pro-competitive.[38] However, the Court refused to accept this claiming that the NCAA limit on the number of televised games each school could have served as an artificial restraint on both consumers and broadcasters.[39]

Of importance to later cases concerning the legality of NCAA amateur restrictions, the Supreme Court did not decide the matter of the legality of the NCAA's amateur rules directly, instead concluding that restraints concerning a student-athletes eligibility and amateur status were reasonable and necessary to "preserve the character and quality of the 'product.'"[40] The Court believed that in order to protect the integrity of college athletics, the NCAA had to be allowed to establish mutual agreement between the various collegiate institutions.[41] Such rules were a necessary means of reaching the valid ends of maintaining "amateurism." Therefore, because the Supreme Court merely dealt with the amateur issue in dictum, it has yet to receive the highest court's full attention and analysis.

Subsequent cases have not clarified the antitrust analysis of the NCAA's amateur rules any further. In *McCormack v. NCAA*,[42] the court relied upon the reasoning in *Board of Regents* in concluding that NCAA sanctions suspending an athletic program was a reasonable exercise of its police powers.[43] In *McCormack*, a member of the Southern Methodist University football program

35. 468 U.S. 85.
36. *Id.* at 92-93.
37. *Id.* at 113.
38. *Id.*
39. *Id.* at 99.
40. *Id.* at 102.
41. *Id.*
42. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).
43. *Id.*

sued the NCAA claiming that its suspension of the football program for recruiting violations conflicted with the Sherman Antitrust Act. The player claimed the suspension amounted to an illegal group boycott by way of denying all student-athletes involved with the football program a chance to compete. It was his belief that because the NCAA suspended the football program, it had in essence boycotted SMU's football team.[44] After amending his complaint to include other football player and cheerleaders as co-plaintiffs, the plaintiff took the matter to the Court of Appeals. The Court of Appeals for the Fifth Circuit found that because the eligibility rules of the NCAA were lawful means of maintaining the integrity of college athletics, the means of *enforcing* the rules were also lawful and thus the suspension did not constitute an illegal boycott.

In *United States v. Walters*,[45] two sports agents were charged with secretly paying college athletes to sign representation contracts, thereby violating NCAA Bylaw 12.3.1.[46] In their defense, both agents charged the NCAA eligibility rules with being contrary to the Sherman Act by denying student-athletes compensation for their athletic services and sought to have the charges dismissed. Relying on both *Board of Regents* and *McCormack*, the *Walters* court rejected such claims and reaffirmed the conclusion that the NCAA's restrictions on eligibility are shielded from the Sherman Act.

In *Gaines v. NCAA*,[47] Bradford Gaines, then a junior at Vanderbilt University, declared himself eligible for the 1990 National Football League draft following the 1989 college football season. The NFL required underclassmen who intended on entering the draft to waive their final year of eligibility.[48] Additionally, Gaines consulted a sports agent (though not receiving or providing any compensation) and entered the NFL's scouting combine. After proceeding through the draft unclaimed and after a fruitless attempt to sign a free agent contract, Gaines attempted to re-enter Vanderbilt University and reclaim his eligibility.[49]

The NCAA, invoking its "no agent"[50] and "no draft"[51] rules, refused to

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44. *Id.*
45. United States v. Walters, 711 F.Supp 1435 (N.D. Ill. 1989).
46. *See*, note 50, *infra.*
47. Gaines v. NCAA, 746 F.Supp 738 (M.D. Tenn. 1990).
48. *Id.* at 740.
49. *Id.* at 741.
50. NCAA Bylaw 12.3.1 provides:
> An individual shall be ineligible for participation in an inter-collegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports and the individual shall be ineligible to participate in all sports.

51. NCAA Bylaw 12.2.4.2 provides:
> An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport even though:
>
> (a) the individual asks that his or her name be withdrawn from the draft list

reinstate Gaines' final year of eligibility. Gaines filed a suit seeking an injunction theorizing that the NCAA rules violated section 2 of the Sherman Act. The court concluded that the Sherman Act was not expansive enough to cover non-economic activities such as determining amateur status and that even if it did, the NCAA would be sheltered because of its goal of preserving amateurism in college. The court concluded that the NCAA did not willfully establish itself as a monopoly and that Gaines had no basis for relief.[52]

In *Banks v. NCAA*,[53] a case whose facts were identical to *Gaines* until reaching the court, Braxton Banks also sued the NCAA concerning his eligibility status.[54] However, unlike Bradford Gaines, Banks brought suit under section 1 of the Sherman Act in federal district court in the Northern District of Indiana claiming that the NCAA rules were an unfair restraint of trade.

The court in *Banks*, contrary to the *Gaines* court, relied upon *NCAA v. Board of Regents* in concluding that the Sherman Act *did* apply to the NCAA.[55] Although the Supreme Court in *Board of Regents* primarily addressed the NCAA's television rules, the court in *Banks* extended the Supreme Court's rationale to the NCAA eligibility rules.[56] However, the court concluded that the NCAA rules were reasonably related to their goal preserving amateurism, not over-broad, did not display anti-competitive effects, and that Banks did not show a reasonable likelihood of showing a significant harm to consumer welfare.[57] Thus, Banks also failed in his attempt at injunctive relief.[58]

III. RULE OF REASON V. PER SE RULE

Because every contract can in someway be stretched to be interpreted as restraining trade, the Sherman Act has been narrowed to only proscribe "unreasonable restraints."[59] In subjecting particular conduct to the Sherman Act, it is first necessary to determine the appropriate test for legality to apply to the conduct, either the per se rule of illegality or the rule of reason analysis.[60]

The per se doctrine is applied to that type of conduct that is substantially injurious to competition and generally includes price fixing (establishing a pre-set price regardless of market value), group boycotts and resale price

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prior to the actual draft,
(b) the individual's name remains on the list but he or she is not drafted, or
(c) the individual is drafted but does not sign an agreement with any professional athletics team.

52. *Id.* at 747.
53. 746 F. Supp. 850 (N.D. Ind. 1990).
54. *Id.* at 855.
55. *Id.* at 857.
56. *Id.*
57. *Id.* at 861.
58. *Id.*
59. Cha-Car v. Calder Race Course, Inc., 752 F.2d 609, 612 (11th Cir. 1985).
60. Wendy T. Kirby and T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L. J. 31, 33 (1985).

maintenance.[61] The Supreme Court has declared "per se" illegal those restraints which have a "pernicious effect on competition and lack . . . any redeeming virtue . . . without elaborate inquiry as to the precise harm they have caused."[62] In such cases, the court will apply the per se rule and automatically deem the conduct illegal.

Unfortunately, such decisions are rarely clear-cut and cannot be so easily classified. When the conduct is questionable, courts often apply the "rule of reason" analysis whereby the courts "examine the challenged conduct to determine its purpose and likely effects on competition. They then balance the conduct's pro- and anti-competitive effects to determine it legality."[63] Essentially, this means that certain activity may appear to be against free trade and commerce, but should the activity also have the weightier effect of *encouraging* competition, it will be allowed.

Because the per se doctrine determines legality on a black and white basis, courts have been less willing to apply the rule and instead have allowed for exceptions to the rule if the court believes the restrictive rules are geared to a legitimate purpose.[64]

Plaintiffs suing the NCAA on antitrust grounds have argued for the application of the per se rule, claiming that the NCAA has eliminated all forms of price competition for student-athletes, thereby fixing the market value of these athletes.[65] However, the Supreme Court has concluded that the NCAA has a legitimate enough goal in promoting amateur athletics to warrant applying the more ad hoc analysis of the rule of reason analysis.[66] However, it must be noted that merely applying the rule of reason test does not save the NCAA. A determination that the NCAA rules result in a weightier anti-competitive effect would warrant invalidating the rules.[67]

IV. SHOULD THE NCAA BE SUBJECTED TO ANTITRUST REGULATIONS?

The question that still stands unanswered by the Supreme Court today is whether the NCAA's eligibility rules violate the Sherman Act in that they effectively set restrictions upon the amount of compensation payable to a student-athlete, often far below his or her market value.

Justification for maintaining the NCAA's exemption from the Sherman Act is evident in caselaw. In addition to those cases set forth above as examples, other cases display the judicial system's unwillingness to consider the NCAA as a true "business."

In *Jones v. NCAA*,[68] the NCAA's reviewing board determined that a student

61. Const. Aggregate Transport, 710 F.2d at 772.
62. Northern Pacific Ry. Co., 356 U.S. at 5.
63. *Id.* at 34.
64. *Id.*
65. *See, supra* note 13, at 219.
66. Board of Regents, 468 U.S. at 104.
67. Banks, 746 F. Supp. at 859.
68. 392 F. Supp. 295 (D. Mass. 1975).

who received compensation for two seasons when he was not enrolled in college was not allowed to return to college and maintain eligibility, reasoning that to grant eligibility would be contrary to the NCAA's goal of recognizing "amateur" standing in athletics.[69] The NCAA's decision was reviewed in a Massachusetts district court which upheld the ruling, concluding that the Sherman Act did not apply to eligibility standards as the Act was aimed at associations with commercial objectives and applied to non-profit organizations in limited situations.[70] That court also noted that Jones failed to show how the eligibility requirements were connected to any commercial or business activities that involved him.[71] The district court concluded the NCAA was entitled to limit access to intercollegiate sports in its attempt to reach the legitimate end of maintaining the amateur status of collegiate sports.[72]

Support based upon similar findings came from the Arizona district court in *Justice v. NCAA*,[73] where that court refused to apply the per se analysis to the NCAA rules. It was the court's contention that per se analysis was limited to those circumstances where "the exclusionary or coercive conduct is a direct affront to competition, or a 'naked restraint' rather than action that merely had an incidental effect upon competition."[74] In *Justice*, the University of Arizona was suspended from post-season play as a result of NCAA rules violations. The court reasoned that such a suspension lacked an anti-competitive purpose and was merely a means to the enforcement of the NCAA goal of preserving amateurism.[75]

It is apparent from the reasoning in these cases that courts, to this point, have been willing to give great deference to the NCAA. Because it has buttressed its position with the contention of furthering "amateurism," the NCAA has been relatively untouched by the Sherman Act with reference to its eligibility rules. However, the court's decision in *Banks*, indicates the NCAA may no longer be untouchable. With that case, it appears that courts may no longer be hesitant to subject a noncommercial entity's rules to the Sherman Act, regardless of the legitimacy of its goals.

Should the courts follow through on their seeming willingness to stop shielding the NCAA, it would be an action that is long overdue. Regardless if these courts refuse to apply the "per se" rule, even under the "rule of reason," the NCAA regulations seem to weigh more towards anti-competitive behavior than pro-competitive behavior.[76]

The NCAA's rules concerning eligibility requirements have an anti-competitive effect in that the prohibition upon student-athletes from testing

69. *Id.*
70. Jones, 392 F. Supp. at 295.
71. *Id.* at 303.
72. *Id.* at 304.
73. 577 F. Supp. 356 (D. Ariz. 1983).
74. *Id.* at 379.
75. *Id.* at 382.
76. Goldman, *supra* note 13, at 206, 225.

professional drafts denies the athlete from attaining his or her market value.[77] However, the Court's dicta in *NCAA v. Board of Regents* has indicated the general notion that these anti-competitive effects are a necessary evil in hopes of distinguishing college and professional athletics.[78]

Such arguments must be placed in perspective when considering that in the spirit of preserving amateurism, the NCAA has established itself as quite a cartel. The NCAA has virtually done away with price competition among its members.[79] Through its rules, it has guaranteed that compensation to student-athletes is at a particular level and cannot be supplemented through indirect means.[80]

There has been debate as to whether the Sherman Act requires a plaintiff to establish a nexus between the challenged restraint and interstate commerce or merely an effect on commerce from the defendant's general business.[81] Because the NCAA engages in nationwide recruiting and enters into television contracts whereby contests are broadcast nationwide and because tickets to such events are sold throughout the country, there is an obvious affect upon interstate commerce and thus this question is moot.[82]

Traditionally, the NCAA has sought exemption from antitrust litigation by claiming itself to be a non-profit organization pursuing non-commercial purposes. They have cited to cases such as *Marjorie Webster College v. Middle States Association,*[83] where the court there concluded that the Sherman Act was not meant for non-commercial groups and learned professions. Although this case does not actually deal with the NCAA, the NCAA has analogized itself as being a non-profit, non-commercial group.

However, reliance upon such cases became invalid after the Supreme Court decided *Goldfarb v. Virginia State Bar.*[84] There, the Court, addressing a bar association's minimum fee schedule, concluded broadly that the Sherman Act applied to restraints used by non-profit regulatory groups in general.[85]

Regardless of the *Goldfarb* decision, the NCAA may attempt to claim exemption by arguing that such cases as *Missouri v. National Organization for Women,*[86] and *Henry v. First National Bank,*[87] apply to NCAA. In *Missouri v. NOW*, the defendant's campaign for a convention boycott of states that had not ratified the Equal Rights Amendment was not subjected to the Sherman Antitrust

77. Paul B. McCarthy and Michael Kettle, *An End Run Around The Sherman Act? Banks v. NCAA and Gaines v. NCAA*, 19 J. OF COLLEGE AND UNIVERSITY LAW 295 (1992).

78. 468 U.S. 65 (1984).

79. Goldman, *supra* note 13, at 210.

80. *Id.*

81. *Compare,* Western Waste Sev. Sys. v. Universal Waste Control, 616 F.2d 1094, 1096-97 (9th Cir. 1980), *with* Furlong v. Long Island College Hospital., 710 F.2d 922, 925-26 (2d Cir. 1983).

82. Goldman, *supra* note 13, at 215.

83. 400 U.S. 965 (1970).

84. 421 U.S. 773 (1975).

85. Goldman, *supra* note 13, at 216.

86. 620 F.2d 1301, 1312 (8th Cir. 1980).

87. 595 F.2d 291, 304 (5th Cir. 1979).

Act. In *Henry v. First National Bank*, the civil rights boycott of business' discriminating based upon race was determined to be beyond the Sherman Act. However, these cases can be distinguished from the NCAA in that those were non-commercial groups asserting First Amendment claims. Here, the NCAA is clearly a commercial entity with its revenue-aimed athletic programs.[88] The NCAA seeks to constantly improve and market its athletic programs resulting in an athletic budget in the millions of dollars.[89] Even the Supreme Court has accepted that the NCAA and its members are organized to reach the maximum profits.[90]

It would seem that the Supreme Court did not provide the NCAA with blanket protection in its decision in *Board of Regents* where it labeled the NCAA's eligibility rules as "reasonable." Because the NCAA eligibility rules affect interstate commerce and because the NCAA no longer receives blanket immunity, the restraints on eligibility should be subjected to the Sherman Antitrust Act.[91]

The Supreme Court in *Board of Regents* allows for NCAA rules to be viewed under the "rule of reason" test. However it would seem that the Court applied the test incorrectly.[92] In *Board of Regents*, the Court inferred that an NCAA rule will withstand antitrust challenges if it is "tailored to the goal" of maintaining the "product" of college sports in the economic marketplace.[93] However, the Court defers to the NCAA's own definition of what its goals and intentions are.[94] This allows the NCAA to claim that any marketing of its product is merely done in order to maintain its product. This leaves the rule of reason analysis of amateurism rules without any bite.[95]

Under the *Board of Regents* analysis, the NCAA rules should fail. The Supreme Court there stated that "when there is an agreement not to compete in terms of price or output, no elaborate . . . analysis is required to demonstrate the anti-competitive character of such an agreement."[96] Applying this to the eligibility requirements, it seems that by affecting the compensation paid to student-athletes, a presumption of anti-competitive behavior is acceptable.[97]

The NCAA's contention that the "no draft" and "no agent" rules are necessary to maintain the product of college sports, is also meritless because the NCAA rules themselves do not prohibit contact with agents and professional teams. College hockey and baseball players, although subjected to the same NCAA rules as other student-athletes, are allowed to be drafted by professional teams

88. Goldman, *supra* note 13, at 216.
89. *Id.*
90. Board of Regents, 468 U.S. at 100-101.
91. *Id.*
92. Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299 (1992)
93. Board of Regents, 468 U.S. at 119.
94. Note, *supra* note 92, at 1308.
95. *Id.*
96. Board of Regents, 468 U.S. at 109.
97. Note, *supra* note 92, at 1310.

and still maintain their eligibility as long as they do not accept payment.[98] If the NCAA allows some of its athletes to have contact with professional teams, it cannot claim that such contact taints a student-athlete's amateur status.[99]

Finally, the NCAA's claims that limited compensation for athletes is necessary to further the goal of promoting intercollegiate athletics. However, one needs only to look at the recent number of rule violations consisting of illegal payments to student-athletes to conclude otherwise. It appears that by limiting compensation, student-athletes and athletic programs are finding alternative methods of rewarding athletes, usually under the table.[100]

V. CONCLUSION

The NCAA has successfully hidden the wolf of price-fixing and other anti-competitive conduct within the sheep's clothing known as amateurism. The NCAA is clearly no longer simply the regulating body of college athletics but has become a lucrative business. With sports drawing large crowds and television contracts to promote the game, educational bodies have fully realized the power of college athletics. Yet, under the guise of maintaining amateurism, the NCAA has set a limit to the compensation a student-athlete can receive while the gains to the institution seem limitless. Such amateur restrictions deprive the athlete of his or her fair market value. The judicial system has taken steps towards piercing the wolf's disguise by subjecting eligibility rules to the Sherman Act. It is now a matter of time before the rule of reason test does justice to its name and forces the NCAA to rethink its eligibility requirements.

Asim S. Raza

98. *Id.*

99. *Id.*

100. N.Y. TIMES, Nov. 17, 1989, at 25, col. 5; N.Y. TIMES, Feb. 22, 1981 at 2S, col. 1.