Volume 21 | Issue 2 Article 5

8-1-2014

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Recommended Citation

Katherine D. Tohanczyn, *Fumble! How the North Carolina Courts Dropped the Ball in McAdoo v. University of North Carolina at Chapel Hill*, 21 Jeffrey S. Moorad Sports L.J. 385 (2014).
Available at: https://digitalcommons.law.villanova.edu/mslj/vol21/iss2/5

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Casenote

FUMBLE!: HOW THE NORTH CAROLINA COURTS DROPPED THE BALL IN *MCADOO v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL*

"[C]ollege sports, as overseen by the NCAA, is a system imposed by well-meaning paternalists and rationalized with hoary sentiments about caring for the well-being of the colonized. But it is, nonetheless, unjust."[1]

–Taylor Branch

I. Stepping to the Line of Scrimmage: Introduction to the National Collegiate Athletic Association and Its Rules and Regulations

Intercollegiate athletics is a multibillion-dollar business for universities, broadcasting networks, and sponsoring companies.[2] For student-athletes, who do not receive a salary, collegiate sports provides a stepping-stone to pursue a professional career.[3] Addition-

1. Taylor Branch, *The Shame of College Sports*, Atlantic (Sept. 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (discussing numerous scandals in college sports and impact of lawsuits against NCAA).

2. *See Business of College Sports*, Sports Archive Blog (May 14, 2012), http://thesportsarchivesblog.com/2012/05/14/the-sports-archives-the-business-of-college-sports/ (discussing how collegiate sports closely parallel big business even though NCAA defines its principal purpose as promoting amateurism). In 2010, NCAA Division I schools generated a combined $6.2 billion dollars in revenue. *See id.*; s*ee also, e.g.*, Paula Lavigne, *The Money That Moves College Sports*, ESPN.com (Mar. 3, 2010, 6:14 PM), http://sports.espn.go.com/espn/otl/news/story?id=4722523 (providing diagrams of revenue and expenses as well as break down of budgets for each collegiate athletic organization). Division I collegiate sports have become such a financial investment that head coaches are the highest paid employee in a majority of states. *See* Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, Deadspin.com (May 9, 2013, 2:23 PM), http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228 ("You may have heard that the highest-paid employee in each state is usually the football coach at the largest state school. This is actually a gross mischaracterization: Sometimes it is the basketball coach.").

3. *See* Glenn M. Wong, et al., *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicate Legal & Regulatory Environment*, 28 Cardozo Arts & Ent. L.J. 553, 555 (2011) ("About two-thirds of the 2,050 individuals drafted by the four major domestic leagues in 2010 came directly from college."); *see also Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NCAA (Sept. 27, 2011), http://www.ncaa.org/sites/default/files/Probability-of-going-pro-methodology_Update20123.pdf (outlining research regarding probability of competing as professional athlete coming out of college compared to coming out

ally, collegiate athletics offers student-athletes an opportunity to compete in an organized sport, which is governed by rules and regulations established by the National Collegiate Athletic Association (NCAA).[4]

The NCAA is a private and voluntary organization that derives its authority from its members.[5] It consists of 1,066 private and public universities, which are divided into three divisions generally based on the school's size.[6] The principle purposes of the NCAA

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of high school). For every sport researched, student-athletes are drastically more likely to be drafted by a professional sports team after competing in college athletics than high school athletics alone. *See id.*

4. *See* Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 267 (2010) ("The NCAA exists to do what no institution can do on its own: administer championships and regulate athletics competition . . . . NCAA [B]ylaws and policies cover a myriad of substantive areas as well as competition rules and scheduling."); *see also* Katherine Elizabeth Maskevich, Comment, *Getting Due Process into the Game: A Look at the NCAA's Failure to Provide Member Institutions with Due Process and the Effect on Student-Athletes*, 15 SETON HALL J. SPORTS & ENT. L. 299, 301 (2005) ("The NCAA is a centralized regulatory authority with the power to set its own standard and to enforce those standards through various sanctions."). For a discussion of the NCAA's ability to impose sanctions, see *infra* notes 14-26 and accompanying text.

5. *See* NCAA CONSTITUTION art. 4.02.1, *in* 2008-2009 DIVISION I MANUAL (2008), *available at* http://www.ncaapublications.com/productdownloads/D109.pdf [hereinafter NCAA CONSTITUTION] (stating that NCAA is "a diverse, voluntary, unincorporated Association of four-year colleges and universities, conferences, affiliated associations and other educational institutions"); *see also* Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 622 (Col. Ct. App. 2004) (recognizing member institutions join NCAA voluntarily). While joining the NCAA is a choice made by member institutions, student-athletes need to be part of the NCAA in order to develop skills and attract professional recruits. *See* J. Trevor Johnston, Comment, *Show Them the Money: The Threat of NCAA Athlete Unionization in Response to the Commercialization of College Sports*, 13 SETON HALL J. SPORTS & ENT. L. 203, 232 (2003) ("[I]ntercollegiate athletics provides an opportunity to develop their physical skills, and most importantly, a forum to showcase their talents for professional scouts. In sum, the athletes need NCAA competition to attain a professional athletic career."). The NCAA Division I Manual is divided into three sections based on the article number: articles 1-6 make up the constitution, articles 7-23 make up the operative bylaws, and articles 23-33 make up the administrative bylaws. Each of these three sections are cited separately throughout this Note.

6. *About the NCAA*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+NEW (last visited Sept. 1, 2013) (explaining NCAA membership is composed of Divisions I, II, and III). Members within each division must comply with different rules and regulations. *See* NCAA CONSTITUTION, *supra* note 5, at art. 3.01.3 (stating obligation to comply with criteria of specific Division). Division I institutions are among the largest universities, and are required to follow the Division I philosophy statement and the NCAA Constitution and Bylaws as well as various compliance criteria. *See Difference Among the Three Divisions: Division I*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa+old/who+we+are/differences+among+the+divisions/division+i/about+division+i (last visited Sept. 1, 2013) (explaining that Division I schools must offer at least fourteen sports, play minimum number of contests per sport, and offer minimum amount of financial aid to student-athletes); *see*

are to promote academics and maintain amateurism.[7] The NCAA has promulgated and enforced rules that govern nearly every aspect of competition and the student-athlete experience in order to "ensure equitable competition and maintain the integrity of collegiate athletics."[8] Schools that join the NCAA agree to abide by these strict standards, which include monitoring and sanctioning anyone within the school who violates NCAA rules, such as staff, boosters, and student-athletes.[9] Failure to enforce the Bylaws in the NCAA Constitution can result in NCAA sanctions against the institution.[10] The NCAA imposes its sanctions through the Enforcement Program's Committee on Infractions.[11] Any institution that wishes to

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also NCAA CONSTITUTION, *supra* note 5, at art. 3.2.1 (listing requirements to be active member of Division I). This Note only contemplates rules that apply to Division I athletics.

7. *See* NCAA CONSTITUTION, *supra* note 5, at art. 1.3.1 ("A basic purpose of this Association 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."). *But see Get the Facts About Transfer*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/May/Get+the+facts+about+transfers (last visited Sept. 17, 2013) (quoting NCAA President, Mark Emmert, as stating that "some of our rules were made with competitive intent rather than academic concern"); *see also* Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1583 (2003) (questioning NCAA's claims that its purpose is to reinforce academics among student-athletes).

8. *See* NCAA CONSTITUTION, *supra* note 5, at art. 1-2 (outlining rules governing purpose and policy of NCAA as well as conduct of member institutions); *see also Rules Compliance: Enforcement*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/index.html (last visited Sept. 1, 2013) (explaining that NCAA enforcement program "holds member institutions accountable by seeking out and processing information about possible violations of NCAA rules, giving schools opportunity to respond and presenting facts to membership-led committees"). NCAA rules and legislation are proposed, voted on, and adopted by the member institutions. *See* Potuto, *supra* note 4, at 267 (analogizing NCAA to "a multi-subject contract entered into by more than a thousand members").

9. *See* NCAA CONSTITUTION, *supra* note 5, at art. 3.2.4.1 (stating that member institutions must "administer athletic programs in accordance with" NCAA rules); *see also id.* at art. 2.8.1 (stating that member institutions must enforce NCCA rules and regulations). The NCAA does not take action against student-athletes directly and therefore, relies on member institutions to enforce eligibility rulings. *See* NCAA OPERATIVE BYLAWS art. 14.11.1, *in* 2008-2009 DIVISION I MANUAL (2008), *available at* http://www.ncaapublications.com/p-3880-2008-2009-division-i-manual.aspx [hereinafter OPERATIVE BYLAWS] (stating that member institution not NCAA must prevent ineligible student-athletes from competition); *accord* NCAA CONSTITUTION, *supra* note 5, at art. 3.2.4.3 (stating duty to withhold ineligible student-athlete from competition is member institutions and not NCAA).

10. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 19.5 (detailing new system of penalties against member institutions based on type and number of violations).

11. *See id.* at art. 19.1 ("The Board of Directors shall appoint a Committee on Infractions, which shall be responsible for administration of the NCAA enforcement program."). The NCAA created the Committee on Infractions in 1954 with

appeal a punishment imposed by the Committee of Infractions may follow the NCAA's internal appeals process.[12] However, as a condition of membership, institutions agree that once this internal appeals process is exhausted, they will not seek further outside review.[13]

If the NCAA believes that a student-athlete has committed an NCAA violation, the NCAA can declare that student-athlete ineligible from all collegiate competition.[14] Student-athletes who disagree with an NCAA eligibility ruling have no right to an independent appeals process and must simply rely on their universities or colleges to file an appeal with the Committee on Student-Athlete Reinstatement on their behalf.[15] Furthermore, the NCAA can also sanction a university that allows a student-athlete to compete if the student athlete attempts to seek redress outside of the NCAA appeals process.[16] While a number of commentators have

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the power to oversee investigations and punish members that violate rules quickly and efficiently. *See* Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS. L.J. 295, 298-99 (1996) (explaining creation of Committee on Infractions).

12. *See* NCAA ADMINISTRATIVE BYLAWS art. 32.10, *in* 2008-2009 DIVISION I MANUAL (2008), *available at* http://www.ncaapublications.com/p-3880-2008-2009-division-i-manual.aspx [hereinafter ADMINISTRATIVE BYLAWS] (outlining internal appeals procedures). Generally, these internal appeals are not effective. *See Infractions Decisions Stand for USC*, NCAA (May 27, 2011, 1:35 PM), http://www.ncaa.com/news/football/2011-05-26/infractions-decision-stands-usc (stating between 2008-2011 "only one appeal of NCAA sanctions has been successful"). *But see* Kevin McGuire, *Central Florida Football Wins NCAA Appeal at Perfect Time*, BLEACHER REP. (Apr. 22, 2013), http://bleacherreport.com/articles/1613308-central-florida-receives-ncaa-appeal-at-perfect-time (explaining how University of Central Florida's football team accepted sanctions from NCAA but also successfully appealed one year postseason ban).

13. *See* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.11.5 ("Determinations of fact and violations arrived at in the foregoing manner by the Committee on Infractions or by the Infractions Appeals Committee, on appeal, shall be final, binding and conclusive and shall not be subject to further review by the Leadership Council or any other authority.").

14. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 10.4 (stating that student-athletes found guilty of unethical conduct or sports wagering by NCAA are permanently ineligible from collegiate competition unless reinstated by Committee on Student-Athlete Reinstatement).

15. *See id.* at art. 14.12 (explaining that member institution must file appeal on behalf of student-athlete and provide specific reasons why reinstatement is warranted); *see also* W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. SPORTS & ENT. L. J. 1, 93 n.272 (2000) ("Lacking NCAA member status, student-athletes do not have the right to file independent appeals; the rules assume that the school will file the appeal for them.").

16. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 19.7 (listing actions NCAA may take "in the interest of restitution and fairness" against member institutions that allows student-athlete to compete because of court injunction preventing enforcement of NCAA ineligibility sanction). A Congressional Subcommittee hearing and independent reports have addressed how the NCAA enforces its rules including

criticized the NCCA's enforcement procedures over the years, the NCAA maintains that its policies provide student-athletes and schools with adequate protection from improper eligibility decisions.[17] Ultimately, state and federal courts are reluctant to interfere with the NCAA's internal decisions regardless of the issue at hand.[18] As a result, student-athletes and member institutions are

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use of the Restitution Rule. *Compare Due Process and the NCAA: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 108th Cong. 2 (2004) (examining NCAA's Restitution Rule but failing to come to determination regarding its legality), *with Independent Report on NCAA Processes and Procedures Provides Recommendations to Streamline and Improve Operations*, NCAA (June 12, 2006), http://fs.ncaa.org/Docs/PressArchive/2006/Miscellaneous/Independent%2BReport%2Bon%2BNCAA%2BProcesses%2Band%2BProcedures%2BProvides%2BRecommendations%2Bto%2BStreamline%2Band%2BImprove%2BOperations.html ("[T] procedures provided in NCAA enforcement, hearing, appeals, and waiver and reinstatement proceedings compare favorably with federal, administrative and state court process[es]").

17. *See* Sherry Young, *NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747, 748 (1992) (explaining complaints against NCAA enforcement procedures and NCAA's rejections of this criticism). Yet, the NCAA's enforcement of various rules has recently made headlines due to their perceived absurdity and unfairness toward student-athletes. *See, e.g.*, Jeff Barker, *Terps Notes: Player Can't Collect "Game Ball" Until He Finishes School*, BALT. SUN (Sept. 3, 2013, 5:59 PM), http://www.baltimoresun.com/sports/terps/tracking-the-terps/bal-terps-notes-whitfield-cant-collect-game-ball-until-he-finishes-school-20130903,0,4428623.story (explaining University of Maryland football player is unable to keep game ball because of NCAA limits on gifts to student-athletes); Gregg Doyel, *Silly NCAA Rules Stop Louisville Men from Supporting Women in Final Four*, CBS SPORTS (Apr. 10, 2013, 9:40 AM), http://www.cbssports.com/collegebasketball/story/22045021/silly-ncaa-rules-stop-louisville-men-from-supporting-women-in-final-four (discussing how University of Louisville could not allow men's basketball team to stop in New Orleans while returning from tournament in Atlanta in order to support women's basketball team); Justin Hussong, *Recent SEC Scandal is Latest Example of NCAA's Flawed System*, BLEACHER REP. (Sept. 12, 2013), http://bleacherreport.com/articles/1771193-recent-sec-scandal-is-latest-exampled-of-ncaas-flawed-system (stating that South Carolina's football program was sanctioned because head coach Steve Spurrier's wife sent Christmas cards to incoming freshmen); *Marine Who Played at Base Banned*, ESPN.COM (Aug. 19, 2013, 3:19 PM), http://espn.go.com/college-football/story/_/id/9579499/marine-appealing-ncaa-rule-preventing-playing-middle-tennessee (explaining how freshman at Middle Tennessee University is unable to play football for college because he is being charged with year of eligibility for each year he played in recreational league while serving in United States Marine Corps.); Patrick Rishe, *Johnny Manziel's Half-Game Suspension Reflects Half-Witted NCAA Justice*, FORBES.COM (Aug. 28, 2013, 7:17 PM), http://www.forbes.com/sites/prishe/2013/08/28/johnny-manziels-half-game-suspension-reflects-half-witted-ncaa-unbalanced-justice/ (discussing wide receiver Dez Bryant's opinion regarding NCAA's response to Johnny Manziel autograph scandal compared to when NCAA suspended Dez Bryant 10 games while at Oklahoma State for having dinner with Deion Sanders).

18. For a discussion on various courts' belief that the NCAA should be governed by internal rules see, *infra* notes 62-66 and accompanying text.

powerless to challenge an organization that acts as "investigator, judge, jury, and executioner."[19]

In 2008, the NCAA categorized its rule violations into two groups: secondary violations and major violations.[20] Both levels of violations can result in a reduction of the number of scholarships that a university or college may award as well as various limitations on the ability to recruit incoming freshmen.[21] The most severe sanction imposed by the NCAA is the suspension of a school's sports program due to repeat violations of NCAA rules.[22] The NCAA most notably handed down this "death penalty" to Southern Methodist University's (SMU) football program from 1987-1988 based on evidence that SMU was paying student-athletes to play football.[23] Moreover, an institution can receive a combination of

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19. *See* Lisa M. Bianchi & Bryan S. Gadol, Comment, *When Playing the Game of College Sports, You Should not be Playing "Monopoly,"* 1 CHAP. L. REV. 151, 152 (1998) (stating that "[a]nytime a nongovernmental organization completely controls an industry, the potential for abuse is dramatically increased," which allows NCAA immense control over all aspects of collegiate athletics).

20. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 19.02.2 (defining secondary violation as "a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit" and defining major violation as any violation that does not constitute secondary violation). The NCAA recently reorganized the categories of violations into four levels based on the premises that this structure will allow for conduct to be sanctioned more appropriately. *See New Reform Efforts Take Hold Aug. 1*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/august/new+reform+efforts+take+hold+august+1 (discussing changes to groups of NCAA violations).

21. NCAA CONSTITUTION, *supra* note 5, art. 19.5.1(e), 19.5.2(e) (stating limited reduction in number of financial aid awards to student-athletes as possible sanction). Over the past five years, scholarship reduction sanctions alone have cost twelve major football programs a combined $7 million. *See* Rachael Bachman, *The Costly Toll of NCAA Sanctions*, WALL ST. J. (June 28, 2013, 12:14 PM), http://online.wsj.com/article/SB10001424127887323419604578571512587696992.html.

22. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 19.5.2.3 (explaining sanctions that are given to repeat offenders and defining repeat offenders as those who violate NCAA Bylaws more than once every five years and explaining types of probation, forfeiture of financial aid to student-athletes, and other penalties). The NCAA has termed this penalty resulting in some form of probation as the "death penalty." *See id.* Critics of the "death penalty" point out the negative effects this sanction had on SMU both on and off the field. *See* Chris Smith, *Worse Punishment: Penn State Sanctions or SMU Death Penalty?* FORBES.COM (July 24, 2012, 11:39 AM), http://www.forbes.com/sites/chrissmith/2012/07/24/worse-punishment-penn-state-sanctions-or-smu-death-penalty/ (explaining that SMU lost revenue for two football seasons and did not have a winning record for ten years after the death penalty); s*ee also* Darren Rovell, *SMU's "Death Penalty": What Price Did it Pay?*, CNBC (Jan. 8, 2008, 9:55 AM), http://www.cnbc.com/id/22553608 ("SMU has lost at least $25 million over time from the death penalty.").

23. *See* Rovell, *supra* note 22 (discussing suspension of SMU's football program and other sanctions after NCAA discovered SMU was paying football players to compete). The NCAA determined that thirteen football players received a total

lesser sanctions such as the economic and corrective measures Penn State University (PSU) received in 2012 following the Jerry Sandusky scandal.[24] Finally, the NCAA can also force member institutions to declare a student-athlete ineligible from competition and require that student-athletes be withheld from competition unless the NCAA's reinstatement committee overturns the ineligibility decision.[25] For example, Ohio State University (OSU) withheld five student-athletes from competing in the first five games of the 2010 season for selling OSU football memorabilia to a tattoo parlor in exchange for cash and free tattoos.[26]

In some instances, such as in *McAdoo v. Univ. of N.C. at Chapel Hill*,[27] a student-athlete will turn to the courts for injunctive relief to prevent enforcement of the NCAA's ineligibility declaration, and to

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of $47,000 during the 1985-86 academic year and that eight players received payments up until December 1986 that totaled $14,000. *See* SOUTHERN METHODIST UNIVERSITY INFRACTIONS REPORT (1987), *available at* http://assets.sbnation.com/assets/388698/SMU_COI_report.pdf.

24. *See Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University*, NCAA.ORG (July 23, 2012), http://www.ncaa.com/content/penn-state-conclusions (discussing facts and conclusions of investigation as well as describing imposed sanctions). In 2012 former defensive coordinator, Jerry Sandusky, was found guilty of molesting ten boys over a fifteen year period and many individuals within PSU were fired or resigned following allegations that they knew of the child abuse but failed to inform authorities. *See Penn State Scandal*, ESPN.COM (Feb. 12, 2013, 2:37 PM), http://espn.go.com/ncf/topics/_/page/penn-state-scandal (providing overview of child abuse scandal at PSU). As a result of the Jerry Sandusky scandal PSU was penalized with a $60 million fine, a four-year postseason ban, four-year reduction in financial aid, five years of probation, vacation of wins by the football program from 1998-2011, and a waiver of transfer rules. *See id. But see* Scott Gleeson, *NCAA to Gradually Restore Penn State Scholarships*, USATODAY.COM (Sept. 24, 2013, 4:18 PM), http://www.usatoday.com/story/sports/ncaaf/2013/09/24/ncaa-executive-committee-to-gradually-restore-penn-state-scholarships/2860989/ (explaining that NCAA will gradually allow PSU to offer more athletic scholarships to student-athletes beginning in 2014-2015 school year). Critics of the NCAA's sanctioning process also point out the negative impacts sanctions, such as probation, have on innocent student-athletes and recruits. *See* Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where it Belongs*, 52 B.C. L. REV. 551, 565-68 (2011) (stating that NCAA sanctions are overly broad and impact student-athletes who were not involved in NCAA violations).

25. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 14.11.1 ("If a student-athlete is ineligible under the provisions of the [C]onstitution, [B]ylaws, or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule to withhold the student-athlete from all intercollegiate competition. The institution may appeal to the Committee on Student-Athlete Reinstatement for restoration of the student-athlete's eligibility."); *see also id.* at art. 14.12 (explaining reinstatement process).

26. *See Ohio State Football Players Sanctioned*, ESPN.COM (Dec. 26, 2012, 10:01 AM), http://sports.espn.go.com/ncf/news/story?id=5950873 (explaining that Terrelle Pryor and four other student-athletes were suspended for selling jerseys and other memorabilia as well as allegedly receiving free tattoos, which violates NCAA rules).

27. 736 S.E.2d 811 (N.C. Ct. App. 2013).

receive monetary damages for breach of contract.[28] In *McAdoo*, a football player at the University of North Carolina Chapel Hill (UNC), filed suit after UNC declared him ineligible following accusations of academic fraud and receipt of improper benefits.[29] However, both the North Carolina trial court and appeals court dismissed the case on the basis that McAdoo lacked standing to bring any of these claims and that all claims were moot because McAdoo had already entered into a professional contract with the Baltimore Ravens.[30] By dismissing the case on justiciability grounds rather than addressing whether the NCAA had in fact violated McAdoo's rights, the court granted the NCAA tremendous judicial deference, leaving future student-athletes, who have been unsuccessful in internally appealing an NCAA decision, without a means of judicial redress.[31]

This Note argues that the *McAdoo* decision creates a new barrier to student-athlete claims against the NCAA, and proposes guidance to help student-athletes in a claim against the NCAA when student-athletes have been declared ineligible.[32] Part II discusses the factual and procedural underpinnings of the *McAdoo* case.[33] Part III explains different approaches to litigation by student-athletes who previously sued the NCAA.[34] Part IV addresses how the North Carolina Court of Appeals continued this deferential approach in *McAdoo* and describes the court's failure to apply appropriate precedent in favor of granting continued judicial

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28. *See id.* at 820 (discussing McAdoo's claims against Defendants).

29. *See id.* (discussing McAdoo's complaint filed in Durham County Superior Court).

30. *See id.* (dismissing case for failure to meet justiciability standards).

31. *See* Joel Eckert, Note, *Student-Athlete Contract Rights in the Aftermath of* Bloom v. NCAA, 59 VAND. L. REV. 905, 913 (2006) ("[C]ourts have largely deferred to NCAA action in cases brought by plaintiffs. As a result, student-athletes have met with little success in bringing claims against the NCAA.").

32. *See generally* Gulf South Conference v. Boyd, 369 So. 2d 553, 557 (Ala. 1979) ("The athlete himself has no voice or bargaining power concerning the rules and regulations adopted by the athletic associations because he is not a member, yet he stands to be substantially affected, and even damaged, by an association ruling declaring him to be ineligible to participate in intercollegiate athletics."). In recent years, some courts have offered student-athletes the possibility to succeed in contract claims against the NCAA. *See, e.g.*, Bloom v. Nat'l Collegiate Athletic Ass'n., 93 P.3d 621, 623-24 (Col. Ct. App. 2004) (discussing how student-athletes are intended to benefit from contracts between NCAA and member institutions); Oliver v. Nat'l Collegiate Athletic Ass'n., 920 N.E.2d 203, 215-16 (Ohio Ct. Com. Pl. 2009) (finding in favor of student-athlete's third-party beneficiary claim).

33. For a discussion of the facts surrounding the North Carolina Court of Appeal's holding in *McAdoo*, see *infra* notes 38-57 and accompanying text.

34. For further discussion of the history of judicial deference toward the NCAA by different jurisdictions, see *infra* notes 59-110 and accompanying text.

deference.[35] Part V discusses why *McAdoo* creates another barrier to student-athlete claims against the NCAA across the country.[36] Finally, Part VI explains how attorneys can attempt to overcome the judicial deference reaffirmed in the *McAdoo* decision, in order to succeed in future lawsuits against the NCAA.[37]

II. FACTS AND PROCEDURE: MICHAEL MCADOO ATTEMPTS TO BLITZ UNC AND THE NCAA

In 2008, Michael McAdoo enrolled at UNC, where he played football during his freshman and sophomore years.[38] Prior to competing on the field, McAdoo agreed to abide by the NCAA's regulations and standards of conduct by signing the "Student-Athlete Statement."[39] While at UNC, McAdoo received a football scholarship as well as academic support and tutors from the University.[40] In July 2009, McAdoo e-mailed a former tutor and asked her to write a number of citations for a paper assigned to him for one of his classes.[41] After his tutor completed the footnotes and a works cited section, McAdoo submitted this final paper to his professor as his own.[42]

The following year, UNC officials discovered this e-mail correspondence while investigating McAdoo for an unrelated matter.[43]

35. For a discussion of how the *McAdoo* court addressed McAdoo's claims while granting deference to the NCAA *infra* notes 114-135 and accompanying text. For a discussion of the *McAdoo* court's failure to apply appropriate precedent to McAdoo's claims, see *infra* notes 136-158 and accompanying text.

36. For a discussion of the potential negative impacts of the *McAdoo* decision on student-athlete claims, see *infra* notes 159-184 and accompanying text.

37. For an explanation of the potential impact of the *McAdoo* decision and suggested arguments for practicing attorneys to distinguish McAdoo's holding, see *infra* notes 185-219 and accompanying text.

38. *See McAdoo v. Univ. of N.C. at Chapel Hill*, 736 S.E.2d 811, 815 (N.C. Ct. App. 2013) (explaining that McAdoo accepted football scholarship from UNC and played during 2008 and 2009 seasons). UNC is a member of the Atlantic Coast Conference and the National Collegiate Athletic Association. *See id.*

39. *See id.* at 815-16 (detailing relevant affirmations in Student-Athlete Statement regarding violations and player ineligibility); *see also* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 30.12 (providing official text of Student-Athlete Statement).

40. *See McAdoo*, 736 S.E.2d at 815-16 (discussing McAdoo's receipt of football scholarship, room and board, and tutor through UNC's Academic Support Program). Jennifer Wiley was McAdoo's assigned tutor from fall 2008 until spring 2009 when Wiley stopped working for UNC's tutoring center. In the Spring of 2009, another tutor was subsequently assigned to McAdoo. *See id.* at 816.

41. *See id.* at 816 (providing email correspondence in which Wiley sent completed footnotes and works cited page to McAdoo who then submitted draft from Wiley to his professor).

42. *See id.* (discussing Wiley's role in completing McAdoo's paper).

43. *See id.* at 816-17 (explaining that UNC read McAdoo's email in response to NCAA claims that UNC football players, including McAdoo, had received im-

Concerned that the tutor's assistance constituted academic fraud, UNC submitted a hypothetical scenario to the NCAA's Academic and Membership Affairs Department ("AMA") based on McAdoo's e-mail correspondence with his former tutor.[44] The AMA determined that the conduct was unethical and in violation of a NCAA Bylaw.[45] Consequently, UNC reported the violation to the NCAA and declared McAdoo ineligible to compete on September 2, 2010, pending official investigations by the NCAA and the UNC Honor Court.[46]

UNC subsequently filed a petition with the NCAA to have McAdoo's eligibility reinstated.[47] Before the NCAA could come to a decision regarding McAdoo's eligibility, UNC's student-led Honor Court found McAdoo guilty of one charge of academic fraud.[48] Additionally, the Honor Court sanctioned him with academic probation for the Fall 2010 semester, suspension from classes for the Spring 2011 semester, and a failing grade for submitting the work of his tutor as his own assignment.[49] The NCAA went further than UNC's Honor Court, declaring McAdoo permanently ineligible

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proper benefits from sports agents). The NCAA investigation began as a result of allegations that a sports agent had paid for McAdoo and two fellow student-athletes to stay in a hotel for two nights and paid McAdoo's cover charge at a night club, totaling $110 in improper benefits. *See* Darren Heitner, *Michael McAdoo Sues UNC, NCAA to Restore Eligibility*, SPORTS AGENT BLOG (July 6, 2013), http://www.sportsagentblog.com/2011/07/06/michael-mcadoo-sues-unc-ncaa-to-restore-eligibility/ (providing background information regarding McAdoo's lawsuit against UNC and NCAA).

44. *See McAdoo*, 736 S.E.2d at 817 (stating that UNC submitted Wiley's assistance to McAdoo as theoretical scenario to determine if any violations of NCAA regulations had occurred). The NCAA encourages member institutions to inform the NCAA of potential infractions by considering such self-disclosure as a "mitigating factor in determining the penalty" to be imposed upon the school by the enforcement staff. *See* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.2.1.2 (discussing how self-disclosure is to be viewed favorably when levying penalties for infractions).

45. *See McAdoo*, 736 S.E.2d at 817 (explaining how AMA staff determined hypothetical regarding Wiley and McAdoo's conduct violated NCAA Bylaw 10.1(b)).

46. *See id.* (noting that UNC fulfilled its obligation as NCAA member to declare McAdoo ineligible based on its suspicion of academic fraud).

47. *See id.* at 817-18 (citing UNC's Athletic Director's reinstatement petition to NCAA's Director of Student-Athlete Reinstatement, arguing that McAdoo was unaware help he received from his school-appointed tutor was inappropriate).

48. *See id.* at 818 (discussing UNC Honor Court's decision finding McAdoo guilty of one honor code violation).

49. *See id.* (discussing UNC Honor Court's sanctions). After McAdoo filed suit in Durham County Superior Court, it was discovered that McAdoo had also plagiarized parts of the paper from an online source; however, that information was not part of the evidence used by the NCAA in ruling McAdoo ineligible from future competition. *See* Andy Staples, *Plagiarism Discovery Complicates McAdoo's Case against UNC, NCAA*, SI.COM (July 8, 2011, 3:11 PM), http://sportsillustrated.cnn.com/2011/writers/andy_staples/07/08/unc-ncaa-michael-mcadoo/index.html.

from competing in intercollegiate football for committing three counts of academic fraud and receiving extra benefits.[50] Due to a dispute of facts regarding whether McAdoo had committed academic fraud, UNC appealed the NCAA's decision pursuant to the NCAA's internal appeal procedures, but the NCAA affirmed its ineligibility decision.[51] Because of his ineligibility, McAdoo decided to enter the National Football League's (NFL) supplemental draft, went undrafted, and eventually signed a contract as a free agent with the Baltimore Ravens.[52] By signing this professional contract, McAdoo was no longer an amateur athlete and was thereafter ineligible to compete in collegiate football.[53]

On July 1, 2011, McAdoo filed suit against UNC, the University's Chancellor, and the NCAA alleging breach of contract, breach of fiduciary duty, negligence, libel, tortious interference with contract, and state constitutional violations.[54] McAdoo based his alle-

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50. *See McAdoo*, 736 S.E.2d at 818 (referencing NCAA Student-Athlete Reinstatement Case Report, which states McAdoo is permanently ineligible due to violations of NCAA Bylaws 10.1(b), 12.3.1.2, 16.02.3, and 16.11.2.1). For a discussion of the allegations of extra benefits received by McAdoo, see *supra* note 43 and accompanying text.

51. *See McAdoo*, 736 S.E.2d at 818-19 (discussing NCAA appeal procedure and evidence presented during appeal hearing, which resulted in decision to reaffirm McAdoo's ineligibility). The NCAA refused to accept the contention that McAdoo made a good faith mistake, but rather, the NCAA determined that McAdoo deliberately intended to commit academic fraud when he emailed his former tutor, whom he knew would help him, as opposed to emailing his newly assigned tutor. *See id.* In reaching this decision, the NCAA concluded that there was no dispute McAdoo had committed multiple counts of academic fraud even though the UNC Honor Court had only found him guilty of one count. *See id.*; s*ee also Michael McAdoo's Reinstatement Denied*, ESPN.COM (July 13, 2011, 7:36 PM), http://espn.go.com/college-football/story/_/id/6767022/judge-denies-north-carolina-tar-heels-michael-mcadoo-reinstatement-bid (explaining McAdoo's argument that NCAA's decision was based on inaccurate).

52. *See McAdoo*, 736 S.E.2d at 819 (noting McAdoo was not drafted in supplement draft but did sign contract with Baltimore Ravens for $270,000 per year); s*ee also* Terry McCormick, *Ravens Grab McAdoo After Supplemental Draft*, NAT'L FOOTBALL POST (Aug. 23,2011, 9:30 AM), http://www.nationalfootballpost.com/Ravens-grab-McAdoo-after-supplemental-draft.html ("Michael McAdoo didn't get picked in the supplemental draft on Monday, but once it was over, it didn't take him long to find a landing spot.").

53. *See McAdoo*, 736 S.E.2d at 819-820 (citing NCAA Bylaw 12.2.5 as additional basis for McAdoo's ineligibility); *see also* OPERATIVE BYLAWS, *supra* note 9, at art. 12.2.5 ("An individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement.").

54. *See McAdoo*, 736 S.E.2d at 820 (discussing McAdoo's complaint filed in Durham County Superior Court). *See generally* Complaint, Michael McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811 (N.C. Super. Ct. 2011) (No. 11 CVS 3903), 2011 WL 8363727. While UNC's Chancellor, Holden Thorp, was also named as a defendant in McAdoo's lawsuit, this Note does not distinguish Thorp

gations on the premise that he was a "gifted" athlete who could have developed additional skills and become a prospective selection in the 2012 NFL Draft if the Defendants had not prevented him from playing football his senior year at UNC.[55] However, the Superior Court disagreed with McAdoo and granted the Defendant's motion to dismiss for failure to meet justiciability grounds.[56] McAdoo decided to appeal the Superior Court's decision.[57] The North Carolina Court of Appeals affirmed the trial court's dismissal, holding that McAdoo lacked standing because his injuries were speculative and his claims were moot.[58]

III. BACKGROUND

Generally, both state and federal courts refuse to intervene in the affairs of the NCAA, regardless of the subject matter, unless the NCAA's actions are arbitrary or capricious.[59] Consequently, lawsuits against the NCAA typically fail to pass the necessary threshold question, which effectively exempts the NCAA from suit.[60] However, recent decisions by state courts have held that student-athletes may succeed in bringing a claim against the NCAA for a breach of contract between a member institution and the NCAA.[61]

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individually from UNC since the court analyzed his claims in conjunction with the claims against UNC.

55. *See McAdoo*, 736 S.E.2d 820 (discussing McAdoo's allegations); *see also Michael McAdoo's Reinstatement Denied*, *supra* note 51 (explaining McAdoo's argument that he was being denied opportunity to play college football as well as possibility to sign more lucrative professional football contract).

56. *See McAdoo*, 736 S.E. 2d at 820 (stating lower court's decision to dismiss case).

57. *See id.* (noting McAdoo's decision to file timely appeal).

58. *See id.* (holding that McAdoo's claims failed to meet two subsets of doctrine of justiciability).

59. For a discussion of the judicial deference given to the NCAA and the limited scope of judicial review, see *infra* notes 62-70 and accompanying text.

60. *See, e.g.*, Arlosoroff v. Nat'l Collegiate Athletic Ass'n, 746 F.2d 1019, 1020-21 (4th Cir. 1984) (concluding that plaintiff must demonstrate that private action is "fairly attributable to the state" in order to be considered state action, which is subject to constitutional limitations); Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 95, 303 (D. Mass. 1975) ("A threshold question is whether the Sherman Act reaches the actions of [NCAA] members in setting eligibility standards for intercollegiate athletics. On the basis of the existing record, this court concludes that it does not."); Matthews v. Nat'l Collegiate Athletic Ass'n, 79 F. Supp. 2d 1199, 1205-06 (E.D. Wash. 1999) (determining NCAA was not subject to suit under Americans with Disabilities Act (ADA) because NCAA did not operate any public accommodation). *But see* Tatum v. Nat'l Collegiate Athletic Ass'n, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (finding that NCAA operates place of public accommodation for purposes of Title III of ADA to enable decision based on merits of case).

61. *See generally* Bloom v. Nat'l Collegiate Athletic Ass'n., 93 P.3d 621 (Col. Ct. App. 2004) (finding that student-athletes are intended third-party beneficiaries);

A. Protecting the NCAA's Blind Side: Using Judicial Deference to Shield the NCAA from Lawsuits

The Supreme Court of the United States has consistently held that private organizations have the right to establish and interpret their own rules.[62] However, courts will intervene if a private organization violates or erroneously interprets its established rules.[63] The NCAA has benefited from repeated instances of judicial deference based on its status as a private, voluntary organization.[64] Courts have also granted the NCAA deference because of the organization's status as an educational organization.[65] Notwithstanding that

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Oliver v. Nat'l Collegiate Athletic Ass'n., 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009) (holding that student-athletes may sue for breach of contract as third-party beneficiaries to contract between NCAA and its members).

62. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (explaining that courts grant deference to private organizations to make internal decisions).

63. *See* Schultz v. U.S. Boxing Ass'n., 105 F.3d 127, 135-36 (1997) (affirming right of private organization to set its own rules, but approving court intervention when organization violates its own rules) (citing Rutledge v. Gulian, 459 A.2d 680 (N.J. 1983)). In *Rutledge*, the court established the standard of review to allow for the invalidation of a private organization's decision only when (1) the plaintiff's interest is sufficient to warrant judicial action, and (2) that the defendant's action violates public policy or fundamental fairness. *See id.*; *see also* Gulf South Conference v. Boyd, 369 So.2d 553, 557 (Ala. 1979) (sanctioning judicial review of any fraudulent, collusive, or arbitrary association action).

64. *See, e.g.*, Shelton v. Nat'l Collegiate Athletic Ass'n, 539 F.2d 1197, 1198 (9th Cir. 1976) ("It is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules."); Cole v. Nat'l Collegiate Athletic Ass'n, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000) ("The NCAA's rules and decisions regarding the concerns and challenges of student-athletes are entitled to considerable deference and this court is reluctant to replace the NCAA subcommittee as the decision-maker"); *Bloom*, 93 P.3d at 626 ("Any ambiguity in NCAA [B]ylaws would have been enforced according to how the NCAA – not the court – interpreted them."); 6 AM. JUR. 2D, *Associations and Clubs* § 8 (1963) (stating association's right to administer its own rules without judicial intervention); *see generally* Russell W. Szwabowski, *The Federal Courts Have Given the NCAA Back Its Home Court Advantage*, 67 U. DET. L. REV. 29, 30 (1989) (explaining how federal courts and U.S. Supreme Court have "severely and permanently restricted access to judicial fora for plaintiffs who wanted to bring suit against the National Collegiate Athletic Association (NCAA) for fourteenth amendment violations"). *But see* Boyd, 369 So.2d at 557 (Ala. 1979) ("We hold that the general non-interference doctrine concerning voluntary associations does not apply to cases involving disputes between college athletes themselves and college athletic associations.").

65. *See* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1090 (7th Cir. 1992) (upholding NCAA's "No-Draft" rule in football to prevent "profit making objectives . . . [from] overshadow[ing] educational objectives"); *see also Justice*, 577 F. Supp. at 371-72 ("[P]laintiffs' interests . . . must give way to the NCAA's broader interests in maintaining intercollegiate athletics as an integral part of the educational program and preserving the amateur nature of the college sport."); Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 87 (2000) (discussing NCAA's claim that it should be granted deference because of its educational nexus). *But see* Hennessy v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136,

fact, courts have at times been willing to intervene in cases where the NCAA has acted arbitrarily and capriciously.[66]

B. Supreme Court of the United States and Circuit Court Decisions "Sack" Student-Athlete Anti-Trust Claims Against the NCAA

In order to succeed in an anti-trust claim against the NCAA, a student-athlete must demonstrate sufficient facts to show that the NCAA is a "commercial enterprise" and that the NCAA's actions have an anti-competitive effect.[67] While the Supreme Court of the United States held that the NCAA's sole control of television rights was a violation of the Sherman Anti-Trust Act ("Sherman Act"), the Third Circuit has held that the NCAA's rules and regulations relating to student-athletes do not violate the Sherman Act.[68] The Supreme Court established that suits brought under Section One of the Sherman Act must demonstrate that the wrongful conduct creates an unreasonable "restraint on trade or commerce."[69] There-

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1148-49 (5th Cir. 1977) (stating that NCAA should not be granted "blanket" deference).

66. *See* Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001) (stating that student-athletes should be able to challenge arbitrary decisions by NCAA that render student-athlete ineligible); *see also Boyd*, 369 So.2d at 557 (holding that court's standard "non-interference doctrine" should not apply to claims between student-athletes and private athletic associations because "[t]he athlete himself has no voice or bargaining power concerning the rules and regulations adopted by the athletic associations because he is not a member, yet he stands to be substantially affected, and even damaged, by an association ruling declaring him to be ineligible to participate in intercollegiate athletics."). *But see* Phillip v. Fairfield Univ., 118 F.3d 131, 135 (2d Cir. 1997) (establishing higher burden for student-athletes by holding that under Connecticut law, failure to demonstrate good faith is not enough, but rather, NCAA must exhibit bad faith or dishonest purpose in order for court to invalidate NCAA actions).

67. *See* Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545, 584-85 (1995) (analyzing background information of student-athlete anti-trust claims against NCAA).

68. *Compare* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984) (finding in favor of universities by holding that NCAA's television plan violated Sherman Act), *with* Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 187 (3d Cir. 1998) (dismissing student-athlete's claim that NCAA's enforcement of rules and regulations violates Sherman Act).

69. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50-51 (1911) ("There can be no doubt that the sole subject with which [Section 1] deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the 2nd section is concerned.").

fore, the NCAA will only be subject to Sherman Act when the NCAA's actions or policies are purely commercial.[70]

In 1984, a group of member institutions sued the NCAA over television rights to air football games in *National Collegiate Athletic Association v. Board of Regents*.[71] These universities claimed that the NCAA's sole control of television rights resulted in price fixing and output limitation, which violated the Sherman Act.[72] The Court acknowledged that, "as guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity."[73] However, the Court held that the NCAA's television plan restrained both price and output; therefore, the Court concluded that the NCAA had violated the Sherman Act.[74] While this decision was a huge win for universities, the Supreme Court noted that ineligible student-athletes would not have the same success in challenging the NCAA under the Sherman Act because a claim regarding eligibility is distinct from a claim regarding television rights.[75]

In *R.M. Smith v. Nat'l Collegiate Athletic Ass'n*,[76] the United States Court of Appeals for Third Circuit extended the decision of *Board of Regents* to create an explicit barrier to suits by student-athletes under the Sherman Anti-Trust Act.[77] In *Smith*, a student-athlete,

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70. *See generally Bd. of Regents*, 468 U.S. at 85 (analyzing NCAA's actions of creating horizontal price ceiling for television rights to determine if this NCAA practice constituted violation of Sherman Act).

71. *See id.* at 91 (explaining how NCAA developed plan to determine which college football games to air on television in order to maximize game attendance, resulting in lawsuit by universities to gain control of television rights).

72. *See id.* at 100 (discussing nature of claim against NCAA). *See generally* Susan Marie Kozik, Note, National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association 104 S.CT. 2948 (1984), 61 CHI.-KENT L. REV. 593 (1985) (discussing majority and dissenting opinions as well as Court's overall analysis of anti-trust claim).

73. *See Bd. of Regents*, 468 U.S. at 101 n.23 (explaining judicial deference given to NCAA); *see also id.* at 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.").

74. *See id.* at 113 ("[T]he NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output.").

75. *See id.* at 117 (distinguishing claim regarding football telecasts with claims related to contest, eligibility, and membership responsibility rules and regulations of NCAA).

76. 139 F.3d 180 (3d Cir. 1998).

77. *See* Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 187 (3d Cir. 1998), *aff'd*, 525 U.S. 459 (1990) (dismissing anti-trust claim on basis that NCAA Bylaw was reasonably related to NCAA's goal of preserving amateurism and promoting fair competition).

Renee Smith, applied for a waiver from the NCAA Graduate Transfer Rule, which renders a student-athlete ineligible to compete at a graduate university that is different from the student-athlete's undergraduate school unless the undergraduate school does not offer the graduate program the student-athlete is pursuing.[78] After the NCAA refused to grant Smith a waiver to play at a different graduate school, Smith brought suit against the NCAA, alleging that the NCAA Graduate Transfer Rule violated the Sherman Act and Title IX.[79]

Generally, Smith asserted that the Sherman Act should not be limited to the NCAA's commercial and business activities, but it should instead include any anti-competitive practices.[80] The Third Circuit disagreed with Smith and held that the Sherman Act does not apply to the NCAA's eligibility requirement because the NCAA's promulgation of eligibility requirements is not a commercial activity.[81] Additionally, the *Smith* court acknowledged that even if the NCAA's eligibility rules were subject to the Sherman Act, the policies were not inherently unreasonable or anticompetitive.[82] Ultimately, the Third Circuit affirmed the lower court's dismissal of Smith's anti-trust claim against the NCAA.[83] The Supreme Court of

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78. *See id.* at 463-64 (detailing how Smith attempted to obtain waiver to play while enrolled in graduate courses at both Hofstra University and University of Pittsburgh concurrently); *see also Get the Facts about Transfers*, *supra* note 7 ("Student-athletes who have graduated are subject to the same release requirements as undergraduates . . . . If the student-athlete wishes to pursue a degree program not offered at the original institution, he or she is eligible for a waiver to compete immediately at the new school.").

79. *See Smith*, 139 F.3d at 184 ("Smith alleged that the Postbaccalaureate Bylaw is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and the NCAA's refusal to waive the bylaw excluded her from intercollegiate competition based upon her sex in violation of Title IX.").

80. *See id.* ("Count I of Smith's complaint alleges that the NCAA, in promulgating and enforcing the Postbaccalaureate Bylaw, violated section 1 of the Sherman Act because the bylaw unreasonably restrains trade and has an adverse anticompetitive effect.").

81. *See Smith*, 139 F.3d at 184-85 (rejecting Smith's arguments as legally invalid and determining that NCAA's character is not commercial activity).

82. *See id.* at 186 (explaining that if NCAA's eligibility rules were subject to Sherman Act, court would "analyze them under the rule of reason," which entails looking at relevant factors to determine reason and effect of policies).

83. *See id.* at 187 ("[W]e think that the [B]ylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted."); *cf.* Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 747 (D. Md. 1990) ("[T]he Rules are overwhelmingly procompetitive, are justified by legitimate business reasons, and consequently cannot be viewed as having any unreasonably exclusionary or anticompetitive effect."); Banks v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990) (upholding eligibility rules under Section One of Sherman Act); McCormack v. Nat'l Collegiate Athletic

the United States refused to grant certiorari on Smith's anti-trust claim, which rendered the Third Circuit's holding on the matter final.[84]

C. Finding that the NCAA Is Not a "Stiff Arm" of the Government

1. *Requirement that the NCAA Must be a State Actor to Succeed in Due Process Claims*

In 1988, the Supreme Court of the United States enhanced the NCAA's control over student-athletes and member institutions by decreasing the ability to succeed in judicial challenges against the NCAA.[85] In *Nat'l Collegiate Athletic Ass'n v. Tarkanian*,[86] the Court determined that the NCAA is not a state actor and is therefore not required to provide members and student-athletes with constitutional due process.[87] In *Tarkanian*, the men's head basketball coach at the University of Nevada, Las Vegas (UNLV), sued UNLV and the NCAA after UNLV suspended him because of NCAA sanc-

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Ass'n, 845 F.2d 1338 (5th Cir. 1988) (holding NCAA eligibility rules were reasonable and did not violate Section 1 of Sherman Act).

84. *See* Smith v. Nat'l Collegiate Athletic Ass'n, 525 U.S. 872 (1998) (denying certiorari).

85. *See* Michael G. Dawson, Comment, National Collegiate Athletic Association v. Tarkanian*: Supreme Court Upholds NCAA's Private Status Under the Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*, 17 PEPP. L. REV. 217, 222 (1989) ("[T]he recent Supreme Court decision in National Collegiate Athletic Association v. *Tarkanian*, upholding the NCAA's status as a private actor under the fourteenth amendment, should pave the way toward increasing the NCAA's control over its members and decreasing the number of judicial challenges to its authority.").

86. 488 U.S. 179 (1988).

87. *See Tarkanian*, 488 U.S. at 193 (1988) (determining that NCCA is independent of any state and established rules in manual are rules of collective members only); s*ee also, e.g.*, Arlosoroff v. Nat'l Collegiate Athletic Ass'n, 746 F.2d 1019, 1021 (4th Cir. 1984) (holding that NCAA ineligibility rule did not involve state action even though half of NCAA's membership and revenues come from public universities); McCormack v. NCAA, 845 F.2d 1338, 1347 (5th Cir. 2000) (holding "the NCAA is not the state or a state agency and hence does not act under color of law within the meaning of § 1983" of the United States Code). *But see*, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 624 (Col. Ct. App. 2004) (acknowledging that judicial review should be available when NCAA takes on role of "quasi-state actor") (quoting Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77, 83 n.9 (Ky. 2001)). In *Lasege*, the court drew an analogy between the NCAA and a state high school athletic association, the latter whose actions were subject to review because of its role toward student-athletes. *See id.* ("[T]he [NCAA] occupies the role of a quasi-state actor with respect to individual student-athletes"); s*ee also, e.g.*, Cohane v. Nat'l Collegiate Athletic Ass'n, 215 F. App'x 13, 15-6 (2d Cir. 2007) (holding that District Court was incorrect in "[interpreting] *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school").

tions alleging improper recruiting practices.[88] The Court acknowledged that in certain circumstances a private organization could become a state actor if a member institution delegates such authority; however, in *Tarkanian* the court did not find that UNLV had delegated the appropriate authority to the NCAA.[89] Because the NCAA was not a state actor, the *Tarkanian* decision insulates the NCAA from due process challenges, allowing the organization to encroach upon the constitutional rights of student-athletes and member institutions.[90]

2. *Requirement that the NCAA Must Receive Federal Funding to Succeed Under Title IX*

Both the Supreme Court of the United States and the Third Circuit have held that the NCAA is not subject to suit under federal statutes because the NCAA does not receive federal funding.[91] For example, in *Nat'l Collegiate Athletic Ass'n v. R.M. Smith*,[92] the Plaintiff brought suit under Title IX and the Sherman Anti-Trust Act after the NCAA refused to grant her a waiver to play at a graduate school different from her undergraduate school.[93] Ultimately, the Su-

88. *See Tarkanian*, 488 U.S. at 180-81 (1988) (explaining factual background that lead former UNLV men's basketball coach, Jerry Tarkanian, to bring suit against UNLV and NCAA).

89. *See id.* at 194 (determining that NCAA was not acting under color of Nevada state law because UNLV retained ability to leave organization and establish own rules). *But see* John P. Sahl, *College Athletes and Due Process Protection: What's Left After* National Collegiate Athletic Association v. Tarkanian, *___ U.S. ___, 109 S. Ct. 454 (1988)?*, 21 ARIZ. ST. L.J. 621, 623 (1989) ("[M]ost experts [agree] that there is no viable alternative to the NCAA for successfully marketing athletic programs."). The court also left open the possibility that student-athletes could succeed in similar suits against different athletic associations. S*ee Tarkanian*, 488 U.S. at 194 n.13 ("The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign.").

90. *See* Wintehn K.T. Park, Comment, National Collegiate Athletic Association v. Tarkanian*: The End of Judicial Review of the NCAA*, 12 U. HAW. L. REV. 383, 383-84 (1990) (discussing how to bring suit against NCAA under 42 U.S.C. §1983 and explaining potential impact of *Tarkanian*). *But see* Richard J. Hunter, Jr. & Paula Alexander Becker, *Is It Time to Revisit the Doctrine of State Action in the Context of Intercollegiate and Interscholastic Sports?*, 14 VILL. SPORTS & ENT. L.J. 191, 224-26 (2007) (explaining possibility that United States Supreme Court could adopt dissent from Tarkanian and find that NCAA is state actor when acting jointly with public university or college).

91. *See generally* Nat'l Collegiate Athletic Ass'n v. R.M. Smith, 525 U.S. 459, 462 (1990) (preventing suit under Title IX); Cureton v. Nat'l Collegiate Athletic Ass'n, No. Civ.A. 97–131, 1997 WL 634376, at *2 (E.D. Pa., Oct. 9, 1997) (dismissing Title IX claim against NCAA).

92. 525 U.S. 459 (1990).

93. For a discussion of the factual underpinnings of the *Smith* case, see *supra* notes 78-79 and accompanying text. Title IX states: "no person in the United

preme Court of the United States rejected Smith's argument that the NCAA indirectly received federal funds because it benefited economically from member institutions who directly receive federal funds.[94] On the other hand, the Court indicated two alternative arguments that may have succeeded: 1) the NCAA receives federal funding through the National Youth Sports Program (NYSP), or 2) an organization that assumes control of a federally funded program, is subject to Title IX even if the organization does not receive federal funds directly.[95] Since Smith failed to raise either of these arguments, the Supreme Court found in favor of the NCAA.

In *Cureton v. Nat'l Collegiate Athletic Ass'n*,[96] the Third Circuit extended the Supreme Court's decision in *Smith* by finding that because the NCAA is not a recipient of federal funding, a student-athlete cannot succeed in a claim under Title VI of the Civil Rights Act of 1964.[97] The Plaintiffs in *Cureton* were African-American students-athletes who alleged that the NCAA's initial eligibility requirements, which prevented them from competing their freshman year, had an unjustified disparate impact on African-American student-athletes.[98] While the Plaintiffs argued that the NCAA received fed-

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States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. §1681(a) (1994).

94. *See Smith*, 525 U.S. at 462 (holding that acceptance of membership dues from institutions that receive federal funding is not enough to determine that NCAA also receives federal funding). The Plaintiff in *Smith* also raised an anti-trust claim; however, the Court did not review that issue on appeal. *See id.* at 464 n.2. For further discussion of the district court's dismissal of the anti-trust claim see *supra* notes 80-84 and accompanying text.

95. *See Smith*, 525 U.S. at 469-70 (presenting arguments that may support contention that NCAA receives federal funds). The Court cited two district court cases that supported the argument that the NCAA could be subject to suit under Title IX because of the National Youth Sports Program. *See id.* at 469 (citing Bowers v. Nat'l Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 494 (D.N.J. 1998)), *aff'd*, 118 F. Supp. 2d 527 (2000) (stating that "there are genuine questions of material fact as to whether the NCAA receives federal funds through the NYSPF or whether the NCAA is intertwined with the NYSPF such that it cannot be considered separate"); *see also* Cureton v. Nat'l Collegiate Athletic Ass'n, No. Civ.A. 97–131, 1997 WL 634376, at *2 (E.D. Pa., Oct. 9, 1997) (dismissing Title IX claim against NCAA but explaining that if facts demonstrated that "the National Youth Sports Program fund is nothing more than a sham to disguise the NCAA's use of federal funds for its own benefit, then the NCAA does receive federal financial assistance").

96. 198 F.3d 107 (3d Cir. 1999).

97. *See id.* at 118 (dismissing case against NCAA on grounds that NCAA does not receive federal funding). Title VI states "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006).

98. *See Cureton*, 198 F.3d at 111-12 (discussing plaintiffs arguments against NCAA).

eral funding though the NYSP, the Circuit Court determined that Title VI is "program specific" and cannot be applied to the NCAA organization as a whole.[99] Consequently, student-athletes can only bring a claim under Title VI against NCAA programs that directly receive federal funding.[100]

D. Turnover on Downs: District Courts Give Student-Athletes the Opportunity to Succeed in Contract Claims Against the NCAA

Two District Court decisions have allowed student-athletes to succeed in contract claims against the NCAA.[101] In *Bloom v. Nat'l Collegiate Athletic Ass'n*,[102] the Plaintiff, an Olympic skier who received a number of endorsement deals, including a modeling contract with Tommy Hilfiger, sued the NCAA after it required him to choose between playing football at the University of Colorado and continuing these endorsement deals.[103] The Colorado Court of Appeals refused to issue an injunction enjoining enforcement of the NCAA's rule against Bloom, holding that the rules involved were rationally related to the NCAA's core purpose of protecting amateurism and that the rules were not applied arbitrarily or capriciously.[104] Despite this final decision, the court also recognized that student-athletes have standing to sue the NCAA as third-party beneficiaries to a contract between the NCAA and member institu-

99. *See id.* at 115 ("[I]t is obvious that a recipient of Federal financial assistance need not give an assurance of nondiscrimination with respect to programs in no way affecting the Federally assisted program.").

100. *See* Douglas Bryant, Comment, *A Level Playing Field? The NCAA's Freshman Eligibly Standards Violate Title VI, But the Problems Can Be Solved*, 32 TEX. TECH L. REV. 305, 345 (2001) ("[T]he regulations, which, unlike Title VI[,] include disparate impact provisions, by their terms remain program specific. It therefore inexorably follows that, to the extent this action is predicated on the NCAA's receiving Federal financial assistance by reason of grants to the Fund, it must fail as the Fund's programs and activities are not in issue in this case.").

101. *See* Matthew Lockhart, Oliver v. NCAA*: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175, 190 (2010) ("The Bloom decision, although decided in favor of the NCAA, presented opportunities for cases like Oliver v. NCAA to be meaningfully heard because of its recognition that student-athletes have standing to challenge NCAA regulations through a third-party contract analysis.").

102. 93 P.3d 621 (Colo. Ct. App. 2004).

103. *See id.* at 622 (explaining that Bloom competed in Olympic and professional World Cup skiing events, which lead to many endorsement deals but Bloom also wished to compete in collegiate football at University of Colorado, where he had received athletic scholarship).

104. *See id.* at 628 (explaining that rule which prevents student-athlete from collecting endorsements is related to promotion of amateurism in college sports).

tions.[105] Consequently, *Bloom* is a useful tool to future student-athlete claims against the NCAA because it gives student-athletes standing to sue the NCAA for money damages for foreseeable losses based on material obligations owed.[106]

In *Oliver v. Nat'l Collegiate Athletic Ass'n,*[107] the Court of Common Pleas in Erie County, Ohio came to the same determination.[108] However, unlike *Bloom,* the *Oliver* Court determined that the two NCAA rules involved violated good faith and fair dealing, and therefore, the court granted an injunction to prevent the NCAA from enforcing those rules.[109] Ultimately, the court vacated the holding after the NCAA agreed to pay Oliver a $750,000 settlement agreement in order to reinstitute both of these rules.[110]

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105. *See id.* at 623-24 (discussing how student-athletes are intended to be benefited by contract between NCAA and member institutions). A third party beneficiary "may have a right to sue on the contract where (a) the performance of the promise will satisfy an obligation of the promisee . . . or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

106. *See* Laura Freedman, Note, *Pay or Play: The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 690 (2003) (defining parameters of third-party beneficiary theory and explaining that third-party beneficiary has proper standing to sue NCAA and University for injuries sustained due to breach of contract). *But cf.* Hairston v. PAC-10, 101 F.3d 1315, 1320 (9th Cir. 1996) (holding student-athletes were not to be intended beneficiaries to contract between high school conference and its school).

107. 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

108. *See id.* at 211 (acknowledging that agreement between Oklahoma State University and NCAA was intended to benefit student-athletes granting student-athletes third-party beneficiary status). Oliver was declared ineligible to play baseball for Oklahoma State University during his junior year of college after a law firm Oliver had previously met with complained to the NCAA that Oliver may have violated amateurism rules. *Id.* at 206-07. The NCAA Bylaw states "a lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact . . . with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent." OPERATIVE BYLAWS, *supra* note 9, at art. 12.3.2.1; *see also* John T. Wolohan, *NCAA Rule Intended to Protect Student-Athletes Does Opposite, Court Says,* ATHLETIC BUS. (June 2009), http://www.athleticbusiness.com/articles/article.aspx?articleid=2194&zoneid=30 (explaining NCAA Bylaw that prevents attorney presence at negotiations and how Ohio court addressed issues of *Oliver* case).

109. *See Oliver*, 920 N.E.2d at 215-16 (explaining how No Agent Rule hinders student-athlete's representation to legal counsel and that restitution rule is arbitrary); *see also* Hall v. Nat'l Collegiate Athletic Ass'n., 985 F. Supp. 782, 796-97 (N.D. Ill. 1997) ("There can be no doubt that an important function of the NCAA and its Constitution, Bylaws, and regulations, is to benefit student athletes. It is not clear, however that this fact is sufficient to elevate a student from an incidental to an intended beneficiary."). *But cf.* Hairston, 101 F.3d 1315, 1320 (9th Cir. 1996) (refusing to infer that the PAC-10 Conference's Constitution or Bylaws "intended to assume a direct contractual obligation to every football player on a PAC-10 team").

110. Parties' Settlement Agreement, *Oliver v. Nat'l Collegiate Athletic Ass'n,* 920 N.E.2d 203 (Ohio Ct. Com. Pl. Oct. 8, 2009) (No. 2008-CV-0762), *available at*

IV. ANALYSIS

The North Carolina Court of Appeals' decision in *McAdoo* dismissed a student-athlete's ability to challenge successfully the enforcement of the NCAA's ineligibility rules.[111] The court addressed McAdoo's claims against UNC and the NCAA individually and ultimately determined that McAdoo failed to raise a justiciable controversy against either defendant.[112] This decision will have negative effects on student-athletes who are deemed ineligible to compete because the availability of a judicial challenge to the NCAA's authority has greatly decreased.[113]

A. Narrative Analysis: North Carolina Court of Appeals Affirms Dismissal of McAdoo's Claims

McAdoo brought several contract claims against UNC under the Athletics Scholarship Agreement (the "Agreement"), which outlines the conditions of a student-athlete's scholarship, and the Instrument of Student Judicial Governance (the "Instrument"), which dictates the internal process for addressing UNC Honor Code violations.[114] McAdoo also claimed that the NCAA violated its internal rules and acted arbitrarily in determining that certain violations of academic fraud had occurred and that McAdoo had knowingly committed those violations.[115] The court in *McAdoo* noted that the procedures of UNC are independent of the NCAA even though both organizations prohibit some of the same conduct; therefore, the court reviewed claims against UNC and the NCAA separately.[116]

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http://www.docstoc.com/docs/12908872/Andy-Oliver-Settlement-Terms (outlining terms of settlement agreement). "Even though the decision has now been vacated by the settlement, this wide-sweeping proclamation by Judge Tone indicates that Oliver v. NCAA could be strike one to the NCAA's [N]o [A]gent rules." Lockhart, *supra* note 101, at 197 (explaining *Oliver* will still have positive effects for student-athletes despite order being vacated due to settlement).

111. *See* McAdoo v. Univ. N.C. at Chapel Hill, 736 S.E.2d 811, 815 (N.C. Ct. App. 2013) (dismissing all claims and leaving McAdoo without any means of legal redress).

112. *See id.* at 826 (concluding McAdoo did not meet necessary justiciability requirements).

113. *See* Bianchi & Gadol, *supra* note 19, at 152 (acknowledging that NCAA's sole control over college athletics creates potential for abuse and leaves student-athletes and universities without any power to overcome NCAA sanctions).

114. *See McAdoo*, 736 S.E.2d at 820 (listing McAdoo's claims for breach of contract, breach of fiduciary duty, negligence, libel, tortuous interference with contract, and state constitutional violations against UNC).

115. *See id.* at 825 (introducing three claims against NCAA).

116. *See id.* at 825-26 (explaining standards that NCAA is required to provide student-athletes as private organization differ from requirements UNC is required to provide as public university).

1. *Claims against UNC*

In looking at McAdoo's claim under the Agreement, the *McAdoo* court accepted that the Agreement between McAdoo and UNC constituted an express contract for full financial aid while McAdoo was a student-athlete at UNC.[117] However, UNC never terminated McAdoo's athletic scholarship, even after the NCAA declared McAdoo ineligible.[118] Consequently, the North Carolina Court of Appeals stated that the claim for breach of the Agreement was appropriately dismissed based on McAdoo's failure to present a prima facie case.[119] Furthermore, the court refused to accept McAdoo's allegation that the existence of "special damages" established the elements necessary for a breach of the Agreement.[120] McAdoo argued that UNC breached the Agreement by preventing him from playing football his senior year, which reduced McAdoo's subsequent earnings as a professional football player.[121] The court relied on North Carolina precedent, which held a court should reject a "claim for special damages by a disappointed student-athlete" as too speculative.[122] Ultimately, the court in *McAdoo* followed this precedent which justified dismissing McAdoo's claim for special damages.[123]

Moreover, the court also noted that a plaintiff's actions following the filing of a lawsuit could render the litigation moot, which

117. *See id.* at 820-21 (reviewing terms of ASA between UNC and McAdoo). In North Carolina, a contract-based claim requires a showing of a bargained-for loss. *See id.* at 821 (citing Beachcomber Props., L.L.C. v. Station One, Inc., 611 S.E.2d 191, 194 (N.C. Ct. App. 2005)) (explaining contractual claim only exists if plaintiff can show damages).

118. *See McAdoo*, 736 S.E.2d at 821 (explaining nothing in record indicates UNC ever terminated McAdoo's scholarship).

119. *See id.* at 821 ("[W]e conclude Plaintiff cannot show any bargained-for monetary loss under the ASA which is attributable to the acts of UNC or Thorp.").

120. *See id.* at 822 (stating McAdoo's contention that damages should not be limited to loss of scholarship money is not persuasive).

121. *See id.* (explaining McAdoo's claim that UNC's actions directly caused him to earn less money as free agent in NFL than he would have earned if he had been drafted after playing his senior year, as he anticipated).

122. *See id.* (holding McAdoo's claims are too speculative and hypothetical to withstand motion to dismiss) (quoting Arendas v. N.C. High Sch. Athletic Ass'n, 718 S.E.2d 198 (N.C. Ct. App. 2011)). In *Arendas*, the court held that students did not have standing to bring suit because their claims for special damages were all hypothetical. *See* Arendas, 718 S.E.2d at 198 (affirming dismissal of claims). The court in *McAdoo* also cited decisions from other courts that similarly held that damages to an interest in future career as a professional athlete are too speculative to afford relief. *See McAdoo*, 736 S.E.2d at 822 (discussing non-binding authority that came to similar decision).

123. *See McAdoo*, 736 S.E.2d at 822 ("Like in *Arendas*, we determine Plaintiff's alleged damages are too hypothetical and speculative to survive a motion to dismiss.").

means that the matter has been resolved extra-judicially, or the matter has come to an end before the time of judicial review.[124] While the lawsuit was pending, McAdoo had signed a contract to become a professional football player and therefore, the court determined that McAdoo's claims had become moot.[125] While the court discussed the question of mootness along with its analysis of McAdoo's claim, the court held that all claims against both UNC and the NCAA were moot because McAdoo had achieved his goal of becoming a professional athlete.[126]

Finally, the court addressed McAdoo's claims that UNC failed to follow its internal procedures as outlined in the Instrument by prematurely reporting the allegation of academic fraud to the NCAA.[127] The court recognized that as a public university, UNC was obligated to follow due process requirements established in the Instrument when bringing proceedings against a student.[128] However, the court explained that UNC was only required to grant students these rights when the student comes before UNC's Honor Court, and not when the student is accused of violating an NCAA rule.[129] Since McAdoo's claim did not involve UNC's handling of McAdoo's Honor Court trial, but rather UNC's reporting of the vio-

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124. *See id.* at 823 (discussing justiciability doctrine) (quoting *In re* Peoples, 250 S.E.2d 890, 912 (1978)). The North Carolina Supreme Court defined the test for mootness as whenever "it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed." *Id.*

125. *See id.* (discussing how McAdoo's contract with Baltimore Ravens rendered lawsuit moot).

126. *See id.* ("Because Plaintiff now plays professional football we find his claims to be moot."). The Baltimore Ravens released McAdoo on June 5, 2013, and he remained an unsigned free agent at the beginning of the 2013 season. *See* Josh Alper, *Ravens Sign Tony Wragge, Waive-Injured Michael McAdoo*, NBC SPORTS (June 12, 2012, 3:03 PM), http://profootballtalk.nbcsports.com/2012/06/12/ravens-sign-tony-wragge-waive-injured-michael-mcadoo/ (stating Ravens waived McAdoo from roster); *see also Player Roster*, BALTIMORERAVENS.COM, http://www.baltimoreravens.com/team/roster.html (last visited Oct. 3, 2013) (failing to list McAdoo on active roster or on injured reserve). The Ravens cut McAdoo from the team prior to the August 31, 2013 mandatory roster reduction deadline. *See* Ryan Van Bibber, *2013 NFL League Calendar Dates to Know*, TURF SHOW TIMES (June 7, 2013, 2:34 PM), http://www.turfshowtimes.com/2013/6/7/4407238/2013-nfl-league-calendar-roster-cuts-deadlines (stating NFL deadline that requires teams to reduce their roster to fifty-three players).

127. *See McAdoo*, 736 S.E.2d at 824 (discussing McAdoo's claim that UNC failed to follow its own procedures as outlined in Instrument, which governs how UNC is to address allegations of Honor Court violations by students).

128. *See id.* at 824-25 (noting UNC "is a state actor because it is a public university" and must grant student's due process rights when disciplining academic dishonesty).

129. *See id.* ("[N]othing in the Instrument addresses students' rights when [they are] accused of violating NCAA regulations").

lation to the NCAA prior to the Honor Court's determination, the court concluded that McAdoo failed to present facts that his due process rights were violated by a failure to comply with the Instrument.[130] Ultimately, the court held that UNC's obligation to report the alleged conduct to the NCAA was independent of UNC's requirements under the Instrument and therefore, the court dismissed McAdoo's claims against UNC.[131]

2. *Claims Against the NCAA*

The *McAdoo* court initially noted that North Carolina courts refrain from interfering in the internal affairs of private organizations, such as the NCAA.[132] The court also discussed the standard by which private organizations must follow their internal procedures in order to avoid judicial oversight.[133] While the court began an analysis of how to address McAdoo's claims against the NCAA, the court did not determine whether the NCAA had in fact violated McAdoo's rights.[134] Rather, the court held that since McAdoo generally did not have standing to bring the claims and because his claims were now moot, the case should be dismissed without addressing the alleged violations by the NCAA.[135]

B. Critical Analysis: The Court in *McAdoo* "Blocks" Another Claim to Protect the NCAA

The *McAdoo* decision maintained the tradition of granting judicial deference to the NCAA's enforcement of its own rules and reg-

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130. *See id.* at 825 (explaining that McAdoo failed to demonstrate how UNC's compliance with NCAA regulations resulted in violation of his constitutional right to due process).

131. *See id.* ("[T]he process required for violations of the Instrument is not required for compliance with an Institution's duties under the NCAA [C]onstitution and [B]ylaws . . . . [W]e conclude Plaintiff does not raise a justiciable issue against UNC.").

132. *See id.* at 825 (discussing judicial deference granted to private associations). For a discussion on the judiciary's hands off approach to review of private associations, see *infra* notes 62-70 and accompanying text.

133. *See McAdoo,* 736 S.E.2d at 825 (explaining that rules and procedures of private organizations must be fair). The *McAdoo* court also acknowledged that the appropriate test to apply to determine if a justiciable claim has been brought against a private organization was the *Topp* test. *See* Topp v. Big Rock Found., Inc., 726 S.E.2d 884, 889 (N.C. Ct. App. 2012) (holding a case be dismissed unless the facts alleged demonstrate "1) the decision was 'inconsistent with due process,' or 2) the organization engaged in 'arbitrariness, fraud, or collusion'").

134. *See McAdoo*, 736 S.E.2d. at 826 ("We need not apply the *Topp* test to analyze the substance of Plaintiff's claims against the NCAA.").

135. *See id.* (holding that claimed injuries are too speculative and Plaintiff cannot play for NCAA member institutions in future because he signed professional football contract).

ulations.[136] While the court recognized the appropriate precedent for determining if a plaintiff has presented a justiciable claim against a private, voluntary organization, the court neglected to apply this standard to McAdoo's claims against the NCAA.[137] Furthermore, the court's decision in *McAdoo* provides another example of how judicial deference leads a court to dismiss a case against the NCAA without actually having to address the merits of the claim.[138] Finally, the court failed to discuss McAdoo's legal contention that speculative damages should not be addressed prior to a jury trial, thereby dismissing McAdoo's claims without addressing precedent that allowed judicial review of his case against the NCAA.[139]

1. *Retiring to the Bench: How the Appellate Court's Decision "Sidelines" Appropriate Precedent in Favor of Judicial Deference*

The *McAdoo* court's decision to dismiss McAdoo's claim on justiciability grounds followed the precedent of dismissing student-athlete claims on a threshold question, rather than deciding on the merits of the case.[140] The *McAdoo* court correctly acknowledged that the doctrines of standing and mootness are subsets of justiciability and that the test to determine if a claim against a private, voluntary organization is justiciable is whether the "plaintiff alleges facts showing (i) the decisions was 'inconsistent with due process,' or (ii) the organization engaged in 'arbitrariness, fraud, or collusion.'"[141] While the *McAdoo* court introduced this appropriate precedent acknowledging the test for justiciability against an organization like the NCAA, the court simply failed to apply it to

136. *See id.* at 825-26 (discussing judicial deference granted to private voluntary organizations and applying deference to claims against NCAA).

137. *See id.* at 826 (holding that court does not need to apply *Topp* test to facts). For further discussion of the court's failure to apply established test for determining if a justiciable claim has been raised against the decision of a voluntary organization, see *infra* notes 140-145 and accompanying text.

138. For further discussion of how the *McAdoo* court's decision creates another barrier to student-athlete claims against the NCAA under premise that student-athletes cannot meet criteria for judicial review, see *infra* notes 146-151 and accompanying text.

139. For a discussion of the McAdoo court's failure to address legal argument related to speculative damages, see *infra* notes 152-158 and accompanying text.

140. For a discussion of history of judicial deference resulting in continual dismissal of student-athlete claims based on failure to affirmatively satisfy initial procedural questions see *supra* notes 62-102 and accompanying text.

141. *See McAdoo*, 736 S.E.2d at 814 ("[C]oncepts of justiciability have been developed to identify appropriate occasions for judicial action."); *see also id.* at 825 (quoting Topp v. Big Rock Found., Inc., 726 S.E.2d 884, 889 (N.C. Ct. App. 2012), *rev'd on other grounds*, 366 N.C. 369 (2013)).

McAdoo's claims against the NCAA.[142] Rather, the court deferred to its discussion of the claims against UNC, holding that because McAdoo's injury was conjectural and because he had achieved his goal of playing professional football, no justiciability issue existed against the NCAA.[143] Ultimately, by failing to apply North Carolina's justiciability test to the NCAA, the court defeated the purpose of its own precedent, which sought to provide plaintiffs with access to federal courts and allow courts to proceed with an examination of the alleged wrongdoings of a private organization.[144] Consequently, the court's decision to forgo a determination of whether the NCAA's actions were arbitrary or capricious further extends judicial deference to the NCAA and creates an additional barrier to student-athletes' lawsuits.[145]

2. *Pulling One Out of the Old Playbook: The North Carolina Court of Appeals Throws Case Out Before Addressing Potential Violation of Rights by the NCAA*

The *McAdoo* decision offers new precedent for both federal and state courts seeking to dismiss a student-athlete's claims against the NCAA's rules and regulations to avoid addressing the merits of these claims.[146] Both the Supreme Court and various circuit courts have dismissed claims against the NCAA by determining that student-athletes bringing suit failed to demonstrate sufficient facts to satisfy the applicable threshold question.[147] However, the North

142. *See McAdoo*, 736 S.E.2d at 825 ("[W]e need not apply the *Topp* test to analyze the substance of the Plaintiff's claims against the NCAA.").

143. *See id.* at 826 (refusing to apply *Topp* test because "(i) Plaintiff does not have standing to raise his claims; and (ii) his claims are not moot").

144. *See Topp*, 726 S.E.2d at 889 (stating exception to judicial deference toward private organizations warranting judicial review); *see also* Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001) ("[R]elief from our judicial system should be available if voluntary athletic associations act arbitrarily and capriciously toward student-athletes."); *see also, e.g.*, Oliver v. Nat'l Collegiate Athletic Ass'n, 920 N.E.2d 203, 215-16 (Ohio Ct. Com. Pl. 2009) (determining NCAA's Restitution Rule is arbitrary and breaches NCAA's duty of good faith and fair dealing toward Oliver).

145. *See* Szwabowski, s*upra* note 64, at 87 ("Despite the numerous court decisions regarding NCAA claims, these opinions had virtually no direct effect on the NCAA.").

146. *See McAdoo*, 736 S.E.2d at 826 (affirming dismissal due to McAdoo's failure to raise justiciable claims).

147. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193 (1988) (holding NCAA is not state actor and therefore, court does not need to determine if NCAA violated due process rights of student-athletes); *see also* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 462 (1990) (holding NCAA does not receive federal funding and therefore, there is no need to address potential violation of Title XI by NCAA); Cureton v. Nat'l Collegiate Athletic Ass'n., 198 F.3d 107, 118

Carolina Court of Appeals is the first of these courts to dismiss a student-athlete's claims on justiciability grounds.[148] Since justiciability is a preliminary inquiry by all United States courts, all courts will dismiss the case if the appropriate threshold question is not affirmatively answered.[149] While justiciability and other threshold questions are necessary forms of judicial restraint, some commentators believe that the courts should generally review more cases rather than dismissing them on justiciability grounds.[150] Additionally, because "precedents are sufficiently malleable to afford ample opportunity for courts to avoid [a] decision on 'justiciability' grounds simply because [a] decision is thought [to be] inconvenient," the *McAdoo* court created powerful precedent for the NCAA to succeed in a student-athlete's claims regarding the NCAA's rules and regulations.[151]

3. *Blown Coverage: How the North Carolina Court of Appeals Failed to Address McAdoo's Legal Arguments Regarding Speculative Damages*

In addressing whether McAdoo's claim for monetary damages was speculative, the *McAdoo* court failed to consider McAdoo's contention that he could reasonably prove an injury, and instead ana-

(3d Cir. 1999) (holding that since NCAA does not receive federal funding, student-athlete claim can be dismissed without addressing potential violation of Title VI by NCAA); Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 184-85 (3d Cir 1998) (dismissing Sherman Anti-Trust claim against NCAA on grounds that NCAA's actions are not commercial and therefore, court does not need to address merits of case); Wiley v. Nat'l Collegiate Athletic Ass'n., 612 F.2d at 477 (10th Cir. 1979) (dismissing case without ruling on merits because no substantial federal question was presented).

148. *See McAdoo*, 736 S.E.2d at 826 (dismissing McAdoo's claims for lack of standing and mootness). For a discussion of grounds on which courts have previously dismissed student-athlete claims, none of which include justiciability arguments, see *supra* note 62-102 and accompanying text.

149. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURES: JURISDICTION AND RELATED MATTERS § 3529 (3d ed. 2008) (discussing doctrine of justiciability and how it is used by courts); *see also McAdoo*, 736 S.E.2d at 814-15 (discussing doctrines of standing and mootness as subcategories of justiciability).

150. *See* Szwabowski, *supra* note 64, at 94 ("The doctrine of judicial deference has proven in the past and continues to demonstrate that at times the best role that a court may play in a controversy is no role at all."). *But see id.* at 29 n.3 (discussing competing views of judicial restraint including idea that sometimes there is greater need for "judicial activism" to review cases).

151. *See* WRIGHT, ET AL., *supra* note 149 (explaining debate about "extent to which courts should in fact be free to avoid awkward decisions on grounds of 'prudence' falling somewhere between implementation of strict principle and mere caprice").

lyzed McAdoo's third-party beneficiary argument.[152] In its decision, the *McAdoo* court agreed with the NCAA, who argued that allegations regarding injury to a future career are too conjectural in nature to establish standing.[153] Additionally, the *McAdoo* court distinguished the case from *Bloom* and *Oliver* (both of which held that a student-athlete could succeed in a contract claim as a third-party beneficiary) by contending that those plaintiffs did not allege injuries to future careers.[154] Therefore, the *Bloom* and *Oliver* courts could address the merits of those cases.[155]

However, McAdoo's Appellate Brief cited both *Bloom* and *Oliver* only as support for his contention that he had standing to sue under a breach of contract theory to which he was a third-party beneficiary.[156] Conversely, McAdoo claimed that damages should have survived a motion to dismiss because North Carolina precedent holds that the court cannot dismiss a claim based on potentially speculative damages.[157] As McAdoo stated in his Appellate

152. *Compare McAdoo,* 736 S.E.2d at 822-23 (holding McAdoo's damages were speculative and distinguishing McAdoo's claim from cases discussions third-party beneficiary status), *with* Plaintiff-Appellant's Brief at 30-31, McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811 (N.C. Super. Ct. 2011) (No. 11 CVS 3903) (explaining how precedent demonstrates that North Carolina courts are not to address issue of speculative damages during Rule 12(b)(6) motion to dismiss) *and id.* at 13-25 (discussing McAdoo's contention that NCAA and UNC breached contract, to which he is third-party beneficiary).

153. *See McAdoo,* 736 S.E.2d at 822 (citing Arendas v. N.C. High Sch. Athletic Ass'n, 718 S.E.2d 198, 199-200 (N.C. Ct. App. 2011), Bowers v. Nat'l Collegiate Athletic Ass'n, 1180 F. Supp. 2d 494, 509-10 (D.N.J. 1998), and Butler v. Nat'l Collegiate Athletic Ass'n, No. 06-2319 KHV, 2006 WL 2398683, at *4 (D. Kan. Aug. 15, 2006)) ("[W]hen disappointed student-athletes have presented similar arguments to courts, both in this state and elsewhere, these claims for damages have been rejected as speculative."); Defendant-Appellee Brief at 13-15, McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811 (N.C. Super. Ct. 2011) (No. 11 CVS 3903) (citing *Arendas,* 718 S.E.2d 200, Bowers v. Nat'l Collegiate Athletic Ass'n, 118 F. Supp. 2d 494, 509 (D.N.J. 2000), and Butler v. Nat'l Collegiate Athletic Ass'n, No. 06-2319 KHV, 2006 WL 2398683, at *4 (D.C. Kan. Aug. 15, 2006)) ("[C]ourts consistently have rejected claims by student-athletes alleging 'lost opportunities' in sports endeavors.").

154. *See McAdoo,* 736 S.E.2d at 822-23 (stating "the alleged injury in both Bloom and Oliver did not concern future career prospects and earning potential" and thus were factually distinguishable from McAdoo's case).

155. *See id.* (concluding that because *Bloom* and *Oliver* were factually distinguishable from McAdoo's case, those courts were able to probe further into those plaintiffs' claims).

156. *See* Plaintiff-Appellant's Brief, *supra* note 152, at 18-20 (explaining that McAdoo's third-party beneficiary allegation has substantive legal support based on decisions rendered in Ohio and Colorado).

157. *See id.* at 31-32 (stating that North Carolina trial court does not dismiss claims for damages as speculative under Rule 12(b)(6)) (quoting Grant v. High Point Reg. Health Sys., 645 S.E.2d 851, 855 (N.C. Ct. App. 2007). In *Grant,* the court held that since the Plaintiff's amended complaint alleged actual damages

Brief, North Carolina courts are required to address the issue of speculative damages as a matter of law following the plaintiff's presentation of evidence at trial.[158] While the NCAA agreed that this legal precedent was appropriate to the McAdoo case, the North Carolina Court of Appeals failed to address McAdoo's argument on this issue anywhere in its decision.[159]

V. TALLYING UP THE SCORE: THE NORTH CAROLINA COURT OF APPEALS' DECISION UNFAIRLY IMPACTS STUDENT-ATHLETE CLAIMS AGAINST THE NCAA

The *McAdoo* court's reliance on mootness as a means to dismiss McAdoo's claims creates another barrier to student-athlete lawsuits because such claims are time sensitive and will rarely be decided prior to a full-length appeals process.[160] Ultimately, the *McAdoo* court's holding demonstrates that student-athletes are in a position where regardless of what action, or inaction, they take, judicial review of the merits of any case regarding the NCAA's rules and regulations is unlikely.[161]

A. How the McAdoo Court's Mootness Rationale "Punted Away" Student-Athletes' Abilities to Succeed in Claims Against the NCAA

Since a student-athlete must endure the NCAA appeals process prior to filing suit, the *McAdoo* court's dismissal of the case estab-

arising from the claim in question, there was a legally sufficient basis to withstand a motion to dismiss. *Id.* ("[A]t the Rule 12(b)(6) stage, we look only to whether the allegations in a complaint, taken as true, state a legally cognizable claim.").

158. *See* Plaintiff-Appellant's Brief, *supra* note 152, at 30-31 (explaining that cases cited by NCAA regarding speculative damages also did not address this issue until after jury had determined damages could not be determined with reasonable certainty).

159. *See* Defendant-Appellee Brief, *supra* note 153, at 16-17 ("McAdoo correctly notes that two cases cited below for the relevant damages standard . . . were decided after trial.").

160. *See* Hans E. Berg, et al., *Hip, Thigh and Calf Muscle Atrophy and Bones Loss After 5-Week Bed rest Inactivity*, 99 EUR. J. APPLIED PHYSIOLOGY 283, 283 (2007) ("Unloaded inactivity induces atrophy and functional deconditioning of skeletal muscle, especially in the lower extremities."); *see also* Elizabeth Quinn, *Use it or Lose it*, ABOUT.COM (July 10, 2013), http://sportsmedicine.about.com/od/anatomyandphysiology/a/Deconditioning.htm (explaining that one can maintain physical ability generally but inability to do specific training can cause one to lose skills). For a discussion on the time student-athletes can be forced to sit on the bench prior to a hearing and decision from the NCAA or Courts, see *supra* notes 162-169 and accompanying text.

161. For a critique of why the court's decision places student-athletes in a position where they cannot succeed in a lawsuit against the NCAA, see *infra* notes 170-176 and accompanying text.

lishes important precedent.[162] This precedent makes it impossible for student-athletes to succeed in claims against the NCAA because the NCAA appeals process and court procedures are time intensive.[163] When the NCAA believes a potential violation of its rules and regulations has occurred, the NCAA will gather basic information and then, if necessary, commence a more in-depth investigation until the enforcement staff is satisfied that they have obtained all available information.[164] Once the investigation phase has concluded, the next five months involve submission of information to the NCAA's Committee on Infractions, followed by a hearing, a review of evidence, and testimony from witnesses.[165]

The Committee on Infractions takes ten to twelve weeks to inform those involved in the violation and publish an official decision, from which a party has fifteen days to file a notice of intent to appeal.[166] Overall, the NCAA asserts that it takes about 110 days for a member institution to complete the internal appeals process;

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162. For a discussion of the NCAA internal appeals process, which schools file on behalf of student-athletes, see *supra* note 12 and accompanying text.

163. For a discussion of how the court's decision in *McAdoo* has prevented success of future claims against the NCAA, see *infra* notes 177-185 and accompanying text.

164. *See* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.2, 32.4 (discussing process and procedures of gathering initial information following contention that there has been NCAA violation, based on severity of potential violation). While the NCAA does not designate how long the overall investigative process can take, the DI Manual does assert that "the enforcement staff shall make reasonable efforts to process infractions matters in a timely manner." *See* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.3.2; *see also* Stu Brown, *The NCAA Infractions Enforcement Process*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_ncaa_infractions_enforcement_process_role_of_counsel.html (last visited Sept. 16, 2013) (discussing how NCAA investigation phase of infractions process consists of carrying out "dozens of interviews and thousands of pages of documents" related to the allegation).

165. *See* Brown, *supra* note 164 (discussing how members and individuals have ninety days to respond to notice of allegations followed by four to six weeks in which NCAA enforcement staff drafts response and then additional week given to institution and individuals to submit additional information to Committee, which then leads to one-two day hearing); *see also* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.8 (detailing Committee on Infractions hearings procedures). Member institutions believed to have violated a major infraction may alternatively seek summary disposition, which allows the NCAA Committee on Infractions to review the case following an investigation and once all reports have been submitted can determine an outcome during the next scheduled meeting. *See* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.7 (discussing summary disposition process).

166. *See* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.9 (stating procedures for infractions report); *see also* Brown, *supra* note 164 (discussing time period and information provided in Committee on Infractions' report); ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.10 - 32.11 (outlining NCAA internal appeals process).

however, the NCAA also acknowledges that appeals can sometimes take additional time.[167] After the NCAA appeals process has been exhausted, student-athletes (unlike member institutions) may then bring suit in either state or federal court, which is a notoriously slow process.[168]

During the internal appeals process and a federal or state lawsuit, the NCAA's rules and regulations require that schools withhold a student-athlete from competition, even if the student-athlete has a court order enjoining enforcement of the NCAA's rules against the student-athlete.[169] Additionally, Division I student-athletes cannot put their college careers on hold to wait for a determination by the NCAA or a court because the NCAA Bylaws require that student-athletes complete their four years of eligibility within five years of starting college courses.[170] Consequently, once the en-

167. *See NCAA Rules Enforcement: Infractions Appeals Committee*, NCAA.ORG, https://www.ncaa.org/about/resources/media-center/ncaa-rules-enforcement-infractions-appeals-committee (last visited Sept. 16, 2013) ("The membership-approved process spells out a 110-day timeline, but it may take longer depending on the complexity of the case."). In McAdoo's case, the NCAA investigation began in June of 2010, and the final NCAA appeal decision was rendered in February of 2011, totaling seven months and encompassing an entire collegiate football season. *See* McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811, 816 (N.C. Ct. App. 2013) (stating date NCAA began investigation of McAdoo); Heather Dinich, *UNC's McAdoo Permanently Ineligible*, ESPN.COM (Feb. 9, 2011, 6:14 PM), http://sports.espn.go.com/ncf/news/story?id=6106202 (explaining UNC's public announcement to uphold NCAA's decision on February 9, 2011).

168. *See* ADMINISTRATIVE BYLAWS, *supra* note 12, at art. 32.11.5 (explaining that member institutions agree not to pursue appeal outside of NCAA). Generally, two-thirds of federal civil cases are resolved and reach final disposition within one calendar year, but thirty-five percent of cases last longer than a year. *See Civil Case Processing in the Federal District Courts*, INST. FOR ADVANCEMENT AM. LEGAL SYS., 4 (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/PACER_FINAL_1-21-09.pdf. McAdoo's federal claim was filed on July 1, 2011, and the Court of Appeals decision was rendered on January 15, 2013, lasting an additional eighteen months following the already slow NCAA internal appeal process. *See McAdoo*, 736 S.E.2d at 815 (stating date McAdoo filed complaint against UNC and NCAA).

169. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 14.11.1 (stating "if a student-athlete is ineligible under the provisions of the constitution, [B]ylaws or other regulations of the Association, the institution shall be obligation to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition"); *see also* OPERATIVE BYLAWS, *supra* note 9, at art. 19.7 (discussing how member institutions can be sanctioned for allowing student-athlete to compete even if in accordance with court order if court order is later vacated, stayed, or reversed). For further discussion on the NCAA Restitution Rule, see *infra* note 16 and accompanying text. "The only reason teams suspend good players is fear of having to forfeit wins." Barry Petchesky, *Report: Alabama Assistant Loaned Money to HaHa Clinton-Dix*, DEADSPIN.COM (Oct. 3, 2013, 4:04 PM), http://deadspin.com/report-alabama-assistant-loaned-money-to-haha-clinton-1440799155.

170. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 14.2.1 (stating student-athletes have five years to complete eligibly and only exceptions are for those who join

tire judicial process is complete, even if a student-athlete could be successful on the merits of the case, the student-athlete would be unable to compete in college athletics because his five years of eligibility will most likely have passed.[171]

B. The Appeals Court's Decision Gives the NCAA Home Field Advantage in Contract Claims by Student-Athletes

The North Carolina Court of Appeals decision, holding that McAdoo's decision to sign a professional contract rendered his case moot demonstrates an additional barrier that will prevent student-athletes from succeeding in a breach of a contract claim against the NCAA.[172] Generally, a student-athlete's contract claim against the NCAA will allege that the NCAA breached a contract with the member institution, of which the student-athlete was an intended third-party beneficiary.[173] In order to succeed in this claim, a student-

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military service or engage in religious mission). *But cf.* John Infante, *Reevaluating the Most Important Rule*, NCAA.ORG (Dec. 3, 2011), http://blog.ncaa.org/blog/2011/12/reevaluating-the-most-important-rule/ (explaining DII and DIII have 10-semester/15-quarter rule that allows student-athletes to stop eligibility clock while awaiting reinstatement for competition). DII and DIII have not adopted, but rather have a more forgiving rule, which allows student-athletes to postpone their eligibility by dropping out of school or becoming a part-time student until after litigation. *See id.*

171. *See Compliance 101, Session 3: Extension of the Five-Year Clock*, GRFX.CSTV, http://grfx.cstv.com/photos/schools/tam/genrel/auto_pdf/comp101-3-five-year-clock-ext.pdf (last visited Sept. 9, 2013) ("For an extension request to be successful, the institution requesting it on behalf of the student-athlete must prove that the student-athlete was deprived of more than one season of competition for reasons beyond his or her control.").

172. For discussion of how the court's decision in *McAdoo* illustrates issues with student-athlete's contractual claims against the NCAA, see *infra* notes 171-184 and accompanying text.

173. *See, e.g.*, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 622 (Col. Ct. App. 2004) (explaining Bloom's complaint alleged that he was entitled to pursue contract claim against NCAA as third-party beneficiary); Oliver v. Nat'l Collegiate Athletic Ass'n., 920 N.E.2d 203, 211-12 (Ohio Ct. Com. Pl. 2009) (addressing Oliver's claims that NCAA violated duty of good faith and fair dealing in contract of which he was third-party beneficiary); Hall v. Nat'l Collegiate Athletic Ass'n., 985 F. Supp. 782, 796-97 (N.D. Ill. 1997) (determining that student-athletes are intended third-party beneficiaries and not incidental beneficiaries to contract between NCAA and member institutions); Verified Amended Complaint at 149-69, McAdoo v. Univ. of N.C. Chapel Hill, 736 S.E.2d 811 (N.C. Super. Ct. 2011) (No. 11 CVS 3903), 2011 WL 8493961 (alleging that Defendants UNC and NCAA breached provisions of the NCAA Bylaws, to which he is intended third-party beneficiary). In order to establish a third-party beneficiary claim in North Carolina, a student-athlete must show: that "(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." United Leasing Corp. v. Miller, 263 S.E.2d 313, 317 (N.C. Ct. App. 1980) (internal citation omitted).

athlete must demonstrate that the contract was directly intended to benefit him.[174]

The NCAA's Constitution and Bylaws constitute a contract between the NCAA and its member schools in which the member schools receive NCAA membership in exchange for an agreement to comply with the NCAA's Bylaws.[175] The NCAA's Constitution explicitly states the purpose of the rules and regulations is to confer a benefit directly to student-athletes.[176] Furthermore, a number of lower courts have held that student-athletes are intended third-party beneficiaries to the contract between the NCAA and its member institutions, which allows student-athletes to sue the NCAA for breach of contract or tortious interference with a contract when the NCAA violates one of its Bylaws.[177] While these decisions appear to

174. *See, e.g.*, Sachs v. Ohio Nat. Life Ins. Co., 148 F.2d 128, 131 (7th Cir. 1945) (third-party can only recover damages from contract that was made for his "direct" or "primary" benefit); Carson Pirie Scott & Co. v. Parrett, 178 N.E. 498, 501 (Ill. 1931) ("The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract."); Voelkel v. Tohulka, 141 N.E.2d 344, 348 (Ind. 1957) (holding third parties may bring suit under contracts made directly for their benefit); Khabbaz v. Swartz, 319 N.W.2d 279, 284-85 (Iowa. 1982) (explaining third-party can only enforce contract which was made for his "express" benefit); Fasse v. Lower Heating and Air Conditioning, Inc., 736 P.2d 930, 932 (Kan. 1987) ("The third-party beneficiary can enforce the contract if he is one who the contracting parties intended should receive a direct benefit from the contract."); Toone v. Adams, 137 S.E.2d 132, 135 (N.C. 1964) ("[W]here a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he has been injured as a result of its negligent performance."); Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985) (third party can sue despite lack of privity if parties to agreement intended to benefit third-party); United States Trust Co., N.A. v. Rich, 712 S.E.2d 233, 238 (N.C. Ct. App. 2011) (quoting Revels v. Miss Am. Org., 641 S.E.2d 721, 723 (N.C. Ct. App. 2007)) (contract must have intended to benefit third party and not have incidentally conferred benefit); Title Guar. & Trust Co. v. Bushnell, 228 S.W. 699, 701 (Tenn. 1921) ("[T]he beneficiary, though not a party to the contract, may maintain an action directly in his own name against the promisor where such promise between the promisor and promisee is made upon sufficient consideration for the benefit of the third party."); Suthers v. Booker Hosp. Dist., 543 S.W.2d 723, 727 (Tex. Civ. App. 1976) (third-party must not be donee or creditor beneficiary and intended to be benefit based on plain meaning of contract).

175. NCAA CONSTITUTION, *supra* note 5, at art. 1.3.2 ("Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.").

176. *See id.* at art. 1.2(a) (stating that first purpose of NCAA is to "initiate, stimulate and improve intercollegiate athletics programs *for* student-athletes . . . .") (emphasis added).

177. *See Hall*, 985 F. Supp. at 796-97 (discussing contractual relationship between NCAA and member institutions); *see also Bloom*, 93 P.3d at 623-24 (analyzing plaintiff's claim that student-athletes are third party beneficiaries to contract between NCAA and member institutions). *But see* English v. Nat'l Collegiate Athletic Ass'n, 439 So.2d 1218, 1223 (La. Ct. App. 1983) (stating student-athlete, who

offer student-athletes support to succeed in future claims against the NCAA, the *McAdoo* decision highlights reasons why these claims will most likely not be successful.[178]

According to the *McAdoo* court, a student-athlete's claims will be moot if the student-athlete signs a contract with a professional sports team either before or during pending litigation against the NCAA.[179] This decision is based on the NCAA's amateurism principle, which states that entering into a draft or signing a contract to play a professional sport renders the student-athlete ineligible to compete in college sports.[180] Additionally, the court in *McAdoo* held that a student-athlete's claims for monetary damages would also be moot if the student-athlete signs a professional contract because the student-athlete has "obtained the relief sought."[181]

However, if a student-athlete brings a claim against the NCAA for damages and does not enter an available professional draft, the NCAA will likely argue that under contract law the student-athlete cannot recover because the student-athlete failed to mitigate potential damages.[182] Generally, an individual seeking to recover for a breach of contract has a legal obligation to minimize the effects and losses of an injury.[183] This duty extends to a third-party beneficiary of a contract "because a third-party beneficiary has the duties as well as rights of a signatory to a contract."[184] Therefore, a stu-

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sought injunction against enforcement of NCAA transfer rule, was merely incidental beneficiary to contract between member institution and NCAA).

178. *See* Bill Cross, Comment, *The NCAA as Publicity Enemy Number One*, 58 U. KAN. L. REV. 1221, 1235 (2010) ("Student-athletes or former student-athletes suing the NCAA no longer need to rely on vague assertions of implied obligations; rather, they can point directly to the NCAA's own rules.").

179. *See* McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811, 823 (N.C. Ct. App. 2013) (holding since McAdoo had signed contract with Baltimore Ravens, his claims for mandamus and injunctive relief are moot).

180. *See* OPERATIVE BYLAWS, *supra* note 9, at art. 12.1.2(f) ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: After initial full-time collegiate enrollment, enters into a professional draft."); *see also id.* at art. 12.2.4 (discussing terms of draft and inquiry).

181. *See McAdoo*, 736 S.E.2d at 823 (determining that no actions by any Defendants prevented McAdoo from becoming professional football player, which is what McAdoo wanted).

182. For a discussion of why the NCAA would present this argument against a student-athlete contract claim see *infra* notes 183-184 and accompanying text.

183. *See, e.g.*, Miller v. Mariner's Church, 7 Me. 51, 55-56 (1830) (explaining that if plaintiff could have prevented or reduced loss then recovery will be limited by that consideration); RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981) ("[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.").

184. *See* Wenfang Liu v. Mund, 686 F.3d 418, 421 (7th Cir. 2012) ("The duty to mitigate is a conventional part of the common law of contracts and can be

dent-athlete who alleges injury to a future professional career because of the NCAA's breach of contract will most likely face the argument that their failure to enter a professional draft or actively seek a professional contract precludes them from recovery.[185] Consequently, regardless of whether a student-athlete actively seeks a professional career or attempts to protect his or her amateurism by sitting out of competition, the court has placed student-athletes in a position where they are unlikely to succeed in contract claims against the NCAA.[186]

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enforced against a third-party beneficiary."); *see also* MICH. COMP. LAWS ANN. § 600.1405 (West 2012) ("Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promise."); Anderson v. Rexroad, 306 P.2d 137, 147 (Kan. 1957) (holding third-party beneficiaries had a duty to mitigate damages); Cordero Mining Co. v. U.S. Fidelity & Guarantee Ins. Co., 67 P.3d 616, 626 (Wyo. 2003) ("[T]hird-party beneficiary claims arising out of an alleged failure to exercise ordinary care are subject to the same defenses as would be available in an action between the actual parties to the contract."); RESTATEMENT (SECOND) OF CONTRACTS § 309(4) (1981) ("A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.").

185. For a discussion of obligation to mitigate damages, see *supra* note 184 and accompanying text. This defense requiring a student-athlete to limit their injury by obtaining some type of professional contract has limitations against football players because a player is not eligible to enter the NFL draft until three years after graduating high school. *See National Football League Eligibility Rules*, NFL REG'L COMBINES, https://www.nflregionalcombines.com/Docs/Eligibility%20rules.pdf (last visited Sept. 20, 2013) ("No player shall be . . . eligible for the draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier."). Similarly, this defense may have some limited application against basketball players due to the NBA draft rules. *See Article X: Player Eligibility and NBA Draft*, NBPA, http://www.nbpa.org/sites/nbpa.org/files/ARTICLE%20X.pdf (last visited May 24, 2013) (requiring player be at least "19 years of age during the calendar year in which the Draft is held, and . . . at least one NBA Season has elapsed since the player's graduation from high school or . . . since the graduation of the class with which the player would have graduated"). While baseball players are eligible to enter the Major League Baseball (MLB) Draft immediately after high school, if a player decides to attend a four-year college then he is barred from entering the MLB draft until after his sophomore year. *See First-Year Player Draft: Official Rules*, MLB, http://mlb.mlb.com/mlb/draftday/rules.jsp (last visited May 24, 2013) (stating eligibility requirements for MLB draft). B*ut see Delany: Let Players Bypass College*, ESPN.COM (Sept. 26, 2013, 12:14 PM), http://espn.go.com/college-sports/story/_/id/9723411/big-ten-commissioner-jim-delany-discusses-possible-football-basketball-changes (quoting Big Ten Commissioner, Jim Delany, as stating that student-athletes should be able to enter professional football or basketball straight out of high school because colleges and universities should not be "minor leagues" for professional sports).

186. For a discussion of how the *McAdoo* court has made it almost impossible for student-athletes to succeed in a contract claim against the NCAA, see *supra* notes 177-183 and accompanying text.

VI. GUIDE FOR PRACTICING ATTORNEYS: HOW TO PREVENT COURTS FROM MOVING THE GOALPOST WHEN STUDENT-ATHLETES SUE THE NCAA

For the foreseeable future, both state and federal courts will continue to grant the NCAA's rules and regulations tremendous deference in suits brought by student-athletes.[187] In order to overcome this deferential standard in a student-athlete contract claim, attorneys should be prepared to argue why student-athletes are third-party beneficiaries, and to raise defenses to the NCAA's claim that a student-athlete has a duty to mitigate damages by entering a professional draft.[188] Additionally, an attorney should defend a motion to dismiss by asserting that damages to a future professional career are not inherently speculative.[189] Finally, at trial, an attorney should present projected draft information from an already established professional advisory committee as evidence of the student-athlete's damages and as a basis for awarding damages.[190]

A. Overcoming the Argument of Mootness

Based on reasoning from various decisions, student-athletes would most likely succeed in alleging that the NCAA's relevant actions breached the contract with the member institution, of which the student-athlete is a third-party beneficiary.[191] However, a student-athlete bringing this claim must also be able to overcome the breaching party's defenses, including the obligation to reduce dam-

187. *See* Sheldon Elliot Steinbach, *NCAA v. Lasege and Judicial Intervention in Educational Decisions: The Kentucky Supreme Court Shoots an Air Ball for Kentucky Education*, 90 KY. L.J. 329, 338 (2001-2002) ("The sound and historic judicial policy of deference to educational standards pertains forcefully to standards that voluntary higher education associations, such as the NCAA, adopt.").

188. For an explanation of how a student-athlete's entrance into a professional draft is unreasonable, see *infra* notes 194-195 and accompanying text.

189. For a discussion of why damages to a student-athlete's professional career are not speculative simply because the student-athlete has not yet been drafted or offered a professional contract, see *infra* note 219 and accompanying text.

190. For an explanation of the current professional advisory committees and why their analysis of student-athlete's draft potential should be used as evidence of damages, see *infra* notes 208-219 and accompanying text.

191. *See, e.g.*, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 623-24 (Col. Ct. App. 2004) (recognizing student-athletes have standing to sue NCAA as third-party beneficiaries); Oliver v. Nat'l Collegiate Athletic Ass'n., 920 N.E.2d 203, 211 (Ohio Ct. Com. Pl. 2009) (stating Oliver was intended third-party beneficiary of contract between NCAA and member university); Hall v. Nat'l Collegiate Athletic Ass'n., 985 F. Supp. 782, 796-97 (N.D. Ill. 1997) (determining student-athletes are intended and not incidental third-parties to contract between NCAA and member institutions).

ages.[192] Because a court will automatically dismiss a claim by a student-athlete who has entered into a professional draft or signed a professional contract as moot, a student-athlete who wishes to sue the NCAA successfully cannot attempt to pursue a professional career while litigation is pending.[193]

A student-athlete can likely defeat the NCAA's contractual defense of a duty to mitigate by arguing that mitigation through entering into the professional draft is unreasonable.[194] Generally, the requirement that a plaintiff take steps to reduce the alleged injury is based in equity and therefore, only requires that an individual do what is reasonable under the circumstances.[195] For a student-athlete, this obligation requires a young adult, usually between the ages of twenty and twenty-two, to negotiate and form a contract with a professional team that will dictate the student-athlete's future career and financial stability.[196] Additionally, signing a professional

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192. For a discussion of a student-athlete's duty to mitigate as third-party beneficiaries, see *supra* note 182 and accompanying text.

193. *See* McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811, 823 (N.C. Ct. App. 2013) (holding McAdoo's claims are moot because he signed contract with Baltimore Ravens).

194. *See* Louisville & N. R. Co. v. Sandlin, 272 S.W. 912, 916 (Ky. Ct. App. 1925) ("[T]his obligation to minimize the damages when it arises never requires the party to do more than exercise ordinary care to that end."); Bridgeport v. Aetna Indem. Co., 105 A. 680, 683 (Conn. 1919) (stating that plaintiff must only do what is "reasonable under the circumstances").

195. *See, e.g.*, Monumental Life Ins. Co. v. Nationwide Ret. Solutions, Inc., 242 F. Supp.2d 438, 453 (W.D. Ky. 2003) (stating that duty exists to avoid additional damage "with reasonable effort and without undue expense"); Bass v. Janney Montgomery Scott, Inc., 210 F.3d 577, 589 (6th Cir. 2000) (quoting Cook & Nichols, Inc. v. Peat, Marwick, Mitchell & Co., 480 S.W.2d 542, 545 (Tenn. Ct. App. 1971)) (stating that party injured by contract or tort "bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof, or due to his failure to exercise such care and diligence, he cannot recover") (citation omitted); Robinson v. United States, 305 F.3d 1330, 1333 (Fed. Cir. 2002) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981)) ("[A] party cannot recover damages for loss that he could have avoided by reasonable efforts.") (emphasis added); Parker v. 20th Century Fox, 3 Cal.3d 176, 181-82 (Cal. 1970) (employee injured from breach of employment contract must only take reasonable efforts to secure other employment); Chandler v. Gen. Motors Acceptance Corp., 426 N.E.2d 521, 522 (Ohio Ct. App. 1980) (recognizing defendant is not obligated to pay damages which the plaintiff could have avoided "without undue risk, expense, or humiliation").

196. *See* Warren K. Zola, *Supporting Student-Athletes in Their Transition to the Pros: A Financial Argument*, HUFFINGTON POST (Sept. 26, 2011, 7:41 PM), http://www.huffingtonpost.com/warren-k-zola/college-sports-scandals_b_980935.html (explaining decisions that student-athletes face when they attempt to become professional athletes); *see also* Glenn M. Wong, et al., *supra* note 3, at 574-75 (discussing negative impacts on student-athletes who do not have adequate guidance when transitioning from college to professional sports).

contract would also require a student-athlete to withdraw from college and to forgo obtaining a degree, which contradicts the NCAA's core principle of promoting academics before athletics.[197] Consequently, a court would likely find that compelling a student-athlete to minimize injury affirmatively to a future career by entering a professional draft simply to be able to recover damages for a breach of contract is unreasonable and therefore would not be required.[198]

B. Overcoming the Argument of Speculativeness

The court in *McAdoo* held that a student-athlete could not recover monetary damages for injury to a future professional career because determining the actual injury would be too speculative and, therefore, a student-athlete does not have standing to sue under this contention.[199] Generally, to survive a motion to dismiss a plaintiff must simply present sufficient facts that demonstrate he is entitled to relief even if the relief sought is "very remote and unlikely."[200] McAdoo's Appellate Brief raised this contention citing North Carolina law, which provides that courts cannot address dam-

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197. *See* Complaint at 3, Nat'l Collegiate Athletic Ass'n. v. Corbett, No. 3:02-at-06000, 2013 WL 693401 (M.D. Pa. 2013) (stating NCAA's purpose is to "govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount"). In 2005 the NCAA began tracking academic progress and has stated that schools that fail to make sufficient progress will face sanctions from the NCAA. *See Division I Academic Reform*, NCAA.ORG, http://www.ncaa.org/governance/reform-efforts#awg (last visited Sept. 20, 2013) (outlining new reform policy); *see also NCAA Academic Reform*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/archive/library/Research+Archive/Education+and+Research/Academic+Reform/ (last visited Sept. 20, 2013) (providing links to academic progress rates as well as lists of penalties). The University of Connecticut men's basketball program faced a one year postseason ban as a result of low academic progress rate scores. *See* Adam Himmelsbach, *UConn is Among Those Barred from Postseason Basketball*, N.Y. TIMES, June 20, 2012, at B17, *available at* http://www.nytimes.com/2012/06/21/sports/ncaabasketball/uconn-basketball-is-among-those-to-receive-postseason-ban.html (explaining that "ten Division I basketball teams and five teams from other sports were penalized" for poor academic performance, but "Connecticut was the most prominent team to be disciplined").

198. *See* Bridgeport v. Aetna Indep. Co., 105 A. 680, 683 (Conn. 1919) (describing test for reasonableness as "one which had a broader outlook and took into account all the circumstances of the situation").

199. *See McAdoo*, 736 S.E.2d at 822 (deferring to other court decisions which held that claim for "special damages" is too conjectural to allow recovery).

200. *See* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (explaining that test for court is to determine if complaint states adequate claim and not if recovery is possible); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007) (stating that claim must only raise enough facts, that if taken as true, suggest claim has basis); *see also* Peebles v. Nat'l Collegiate Athletic Ass'n., 723 F. Supp. 1155, 1155 (D. S.C. 1989) (holding that *pro se* plaintiff that "filed numerous randomly labelled [sic] pleadings and motions" that failed to state a cognizable claim against NCAA lacked standing).

ages as speculative until after a trial has occurred.[201] The North Carolina Court of Appeals failed to recognize this precedent and thus left this argument open to student-athletes who in future complaints sufficiently provide evidence that damage to a future professional career occurred because of the NCAA's breach of contract.[202]

Prior to trial, a student-athlete's claim will likely face a motion to dismiss on the basis that injury to a future professional career is "inherently speculative."[203] To withstand a motion to dismiss, a student-athlete should argue that the injury sustained to his or her career is not "too speculative" because an insurance program provided by the NCAA allows student-athletes to recover an estimated amount for this future career.[204] The Exceptional Student-Athlete Disability Insurance program ("ESDI"), provides student-athletes competing in football, men or women's basketball, baseball, or men's ice hockey "with the opportunity to protect against future loss of earnings as a professional athlete due to a disabling injury or sickness that may occur during the collegiate career."[205] To be eli-

201. *See* Plaintiff-Appellant's Brief, *supra* note 152, at 31 (citing Grant v. High Point Reg. Health Sys., 645 S.E.2d 851, 855 (N.C. Ct. App. 2007)). In *Grant*, the court held that "at the Rule 12(b)(6) stage, we look only to whether the allegations in a complaint, taken as true, state a legally cognizable claim." *See id.* McAdoo's appellate brief also pointed out that the NCAA's cases on this point also addressed the issue of speculative damages following the presentation of evidence at a trial. *See* Plaintiff-Appellant's Brief, *supra* note 152, at 31 (citing Olivetti Corp. v. Ames Bus. Sys., Inc., 356 S.E.2d 578 (N.C. 1987) *and* Iron Steamer, Ltd. v. Trinity Restaurant, Inc., 431 S.E.2d 767, 771 (N.C. 1993)) (finding that Plaintiff had failed to present facts that establish damages within reasonable certainty).

202. *See McAdoo*, 736 S.E.2d at 821-23 (failing to discuss assertion that issues regarding certainty of damages should be addressed following trial).

203. *See* Defendant-Appellee Brief, *supra* note 153, at 16 ("North Carolina courts will not hesitate to dismiss cases under Rule 12(b)(6) where, as here, a plaintiff's damages are inherently speculative.").

204. *See id.* at 16 (contending that "claims for certain kinds of damages can be dismissed by the trial court as too speculative") (citing Pinehurst Area Reality, Inc. v. Vil. of Pinehurst, 394 S.E.2d 251, 254 (N.C. Ct. App. 1990)).

205. *See Exceptional Student-Athlete Disability Insurance Program*, NCAA.ORG, http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs (last visited May 12, 2014) (explaining parameters of disability insurance program). This program provides student-athletes with a lump sum payment twelve months after the NCAA has determined that the student-athlete has suffered a career ending injury. *See id.* (discussing permanent total disability standards). The ESDI policy pays coverage ranging from $250,000 up to $5 million. *See* Glenn M. Wong & Chris Deubert, *The Legal & Business Aspects of Career-Ending Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473, 507 (2010) ("The NCAA's ESDI program, administered through HCC Life Insurance Company, caps coverage at $5 million for projected first-round NFL draft picks and for men's basketball student-athletes. Coverage for baseball, men's ice hockey and women's basketball is capped at $1.5 million, $1.2 million and $250,000 respectively.").

gible a student-athlete must demonstrate that he or she has the potential to be selected in either the first three rounds of the National Football League or National Hockey League draft, or the first round of the upcoming National Basketball Association, Major League Baseball, or Women's National Basketball Association draft.[206] Consequently, the NCAA relies on draft predictions for eligibility to a policy, demonstrating that a potential future career is not speculative and a monetary amount can be determined.[207]

If a student-athlete's claim survives a motion to dismiss, then during a trial on the merits, a student-athlete must present enough evidence to demonstrate to a jury that damages occurred; however, the exact amount of injury sustained does not need to be certain.[208] In order to succeed in demonstrating that some damage occurred, a student-athlete can use as evidence a number of existing advisory programs designed to help student-athlete's determine whether the

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206. *See Exceptional Student-Athlete Disability Insurance Program*, *supra* note 205 (stating that eligibility for disability program requires determining potential to be selected in professional draft).

207. *See* Joseph Stuart Knight, Comment, *Blown Coverage: Tackling Problems with the NCAA's Exceptional Student-Athlete Disability Insurance Program*, 1 MISS. SPORTS L.J. 157, 166 (2012) ("[D]raft projections that the NCAA uses to decide who is and is not eligible for ESDI coverage [are] purely speculative."). Thus, individuals in charge of determining track student-athletes like draft experts and scouts to determine likelihood of a professional sports career in order to provide an adequate policy. *See* Mike Herndon, *NCAA Insurance Program Protects Elite Athletes, Future Earnings Against Injury*, ALLALABAMA.COM (Aug. 1, 2010, 6:03 AM), http://www.al.com/sports/index.ssf/2010/08/are_you_in_good_hands.html (quoting private insurance agent who follows student-athletes in order to "validate that number to the insurance agency").

208. *See, e.g.*, Amigo Broad., LP v. Spanish Broad. Sys., Inc., 521 F.3d 472, 483 (5th Cir. 2008) ("While some uncertainty as to the amount of damages is permissible, uncertainty as to the fact of damages will defeat recovery."); Pfahler v. Nat'l Latex Products Co., 517 F.3d 816, 837 (6th Cir. 2007) (explaining that speculative damages warranting dismissal requires that facts of damages be uncertain and not amount of damages); Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 4 (1st Cir. 1996) (stating that uncertainty regarding the amount of damages does not prevent ability so long as plaintiff claim has provided facts demonstrating injury) (citing Snelling & Snelling of Massachusetts, Inc. v. Wall, 189 N.E.2d 231, 232 (Mass. 1963) ("[T]he complaining party must establish his claim upon a solid foundation in fact, and cannot recover when any essential element is left to conjecture, surmise or hypothesis."); Matarese v. Moore-McCormack Lines, 158 F.2d 631, 636-37 (2d Cir. 1946) ("The rule which proscribes the recovery of uncertain and speculative damages applies where the fact of damages is uncertain, not where the amount is uncertain."); Leonard v. Pearce, 271 Ill. App. 428, 449 (1933) ("It is impossible to prove the exact amount of damages sustained, but this is no reason for denying damages altogether."); Ensink v. Mecosta Cnty. Gen. Hosp., 687 Mich. App. 518, 525-26 (2004) (stating that failure to determine damages with mathematical provision does not preclude recovery); Aircraft Guaranty Corp. v. Strato-Lift, Inc., 991 F. Supp. 735, 739-40 (E.D. Pa. 1998) (holding that summary judgment should not be granted when only amount of damages is uncertain and not existence of damages).

student-athlete is likely to be drafted and thus, be able to have a professional sports career.[209]

For example, the NCAA Bylaws allow member institutions to establish a Professional Sports Counseling Panel ("Panel") in order to "provide guidance to student-athletes regarding future professional athletic careers."[210] More specifically, these Panels not only advise student-athletes but also "assist the student-athlete in determining his or her market value (e.g. potential salary, draft status)."[211] Furthermore, student-athletes competing in football may also submit paperwork to the NFL's College Advisory Committee (CAC), whose purpose is "to give college underclassmen an idea of what their NFL value is heading into the draft."[212] In order to provide student-athletes with the most accurate assessment, at least four different NFL teams and two scouting combines review a student-athlete's information.[213] Together, these organizations try to arrive at a consensus opinion regarding the most likely round the student-athlete would be drafted, but if no consensus is reached, then additional teams will review the student-athlete's information.[214] Ultimately, the CAC provides the student-athlete with an evaluation, which informs the student-athlete if he or she has "the ability to be drafted" in round one through seven or if they will most likely not be drafted.[215] Similarly, student-athletes competing in basketball may also seek a draft projection from the National Basketball Association's (NBA) Undergraduate Advisory Commit-

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209. For a discussion of the available student-athlete advisory committees, see *infra* notes 210-218 and accompanying text.

210. *See* Glenn M. Wong, et al., *supra* note 3, at 575 (discussing reasons why NCAA adopted legislations to allow member institutions to form PSCPs).

211. *See* Operative Bylaws, *supra* note 9, at art. 12.3.4 (stating permissible actions and purposes of professional sports counseling panels).

212. *See* Greg Gabriel, *How does the NFL College Advisory Committee Work?*, NAT'L FOOTBALL POST (Dec. 16, 2011, 4:00 PM), http://www.nationalfootballpost.com/How-does-the-NFL-College-Advisory-Committee-work.html (explaining purpose of NFL advisory committee).

213. *See id.* (stating organizations that form NFL advisory committee and how they review student-athlete's application).

214. *See id.* (explaining evaluation process which includes involvement from every NFL team and two scouting combines).

215. *See NFL Advisory Committee Details*, CBS SPORTS (Dec. 21, 2010, 2:44 PM), http://www.cbssports.com/mcc/blogs/entry/13682485/26580096 (explaining how student-athletes are given "grades" that are broken down into five categories: "1st round, 2nd round, 3rd round, 4th-7th round, and unlikely to be drafted"); *see also* Gabriel, *supra* note 212 (citing language used in evaluation to student-athlete from CAC). While this projection can provide student-athletes with valuable information, it is non-binding and does not guarantee that a team will actually draft student-athlete in that particular round. *See* Glenn M. Wong, et al., *supra* note 212, at 567 (stating that despite benefits of program, projections are not guaranteed).

tee (UAC), which is comprised of NBA team executives.[216] While this evaluation by the UAC is "only an educated assessment and is not binding in any way or a commitment of guarantee that a player will or will not be drafted in a certain slot or at all," it provides student-athletes with insight by "testing the waters" through draft projections.[217] Overall, these three programs offer student-athletes information to make an informed decision about whether to leave school early and enter the draft.[218]

Generally, courts accept appraisals regarding the amount of damages in a wide variety of cases from experts in order to aid the jury.[219] Furthermore, courts have also allowed professionals to provide projections regarding a loss of future income based on a reading of relevant facts.[220] Similarly, the professionals and experts

216. *See* Luke Adams, *Draft Deadlines Facing NCAA Underclassmen* HOOPS RUMORS (Mar. 20, 2013, 12:59 PM), http://www.hoopsrumors.com/2013/03/draft-deadlines-facing-ncaa-underclassmen.html ("The committee allows players to get feedback on their draft stock from a committe [sic] of NBA executives that includes GMs, assistant GMs, and VP's of player personnel.").

217. *See* Warren K Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rules Changes*, 3 HARV. SPORTS & ENT. L. J. 159, 183 (2012) (explaining actions college basketball players can take to determine whether they wish to leave school and enter draft, including seeking evaluation from UAC). The NCAA has greatly diminished the benefit of this evaluation by requiring that a student-athlete withdraw from entering the NBA draft at an earlier date, which limits how much time student-athletes can weigh the evaluation given to them by the UAC. *See* Jonathan Givony, *Testing the NBA Draft Waters in 2012*, DRAFT EXPRESS (Mar. 22, 2012), http://www.draftexpress.com/article/Testing-the-NBA-Draft-Waters-in-2012-3869 (explaining how NCAA has moved up deadline to withdraw from draft from June 18th to April 10th in 2012).

218. *See, e.g.*, Glenn M. Wong, et al., *supra* note 3, at 575 (discussing intent of NCAA Bylaw establishing PSCP as means to provide student-athletes with guidance regarding their professional careers); Gabriel, *supra* note 212 ("The league as well as the colleges wanted to get the players proper information so that the player could make an intelligent decision as to either leave school early and enter the draft or go back to school for another year."); Adams, *supra* note 214 ("[T]he advisory committe [sic] is generally very conservative with its projections for players, so as not to encourage a prospect to leave school early only to be disappointed.").

219. *See, e.g.*, Julian Petroleum Corp. v. Courtney Petroleum Co., 22 F.2d 360, 362-63 (9th Cir. 1927) (holding that expert testimony could be used to determine uncertain losses regarding failure to build and operate oil well over time); Wheeland v. Fredonia Gas Co., 139 P. 1010, 1011 (Kan. 1914) (holding that where only way for plaintiff to establish claim for damages is to provide expert opinions, estimations by experts are sufficient to be brought before jury); Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202, 208-09 (Mo. 1991) (en banc) (holding that if witness "possesses peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice or experience" then opinion can be given to aid jury); Rochester & S.R. Co. v. Budlong, 10 How. Pr. 289, 293 (N.Y. Gen. Term 1854) ("[T]he opinion of witnesses enters, of necessity, as a large ingredient into the evidence which enables the jury to estimate the damages.").

220. *See* Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 92-94 (Mo. 1985) (holding that law school professors could render opinions regarding injured plaintiff's

involved in the student-athlete advisory committees can also determine the loss to a student-athlete's future professional career based on their experiences and positions within the sports arena, which the courts can accept as evidence in determining damages.[221]

VII. CONCLUSION

Due to its position as the main governing body of collegiate sports, the NCAA has faced numerous lawsuits from student-athletes.[222] However, student-athletes rarely succeed in these claims because of the judicial deference given to the NCAA as a private and voluntary organization.[223] In order for greater success in claims regarding the NCAA's enforcement of its rules and regula-

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likelihood of success as a lawyer and therefore, give determination as to plaintiff's losses to future career); *see also* Lasha v. Olin Corp., 634 So.2d 1354, 1358 (3d Cir. 1994) (determining amount of damages for personal injury based on testimony from economics professor at Louisiana State University and vocational rehabilitation specialist); Garrett v. Celino, 489 So.2d 335, 339 (4th Cir. 1986) (holding that while loss of future earnings cannot be determined with mathematical certainty, "calculations from actuarial expert merit substantial consideration by the trier of fact). Such expert opinions, made based on facts and adequate data are to be weighed by the jury not the judge. *See* Capra v. Phillips Inv. Co., 302 S.W.2d 924, 931 (Mo. 1957) (en banc) ("[P]laintiffs' expert's opinion [was] based on substantive evidence" and therefore, "[t]he weight of his testimony was for the jury").

221. For a discussion of qualifications of members of the advisory committees, see *supra* notes 208-211 and accompanying text.

222. *See, e.g.*, Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 552-53 (3d Cir. 2002) (asserting that NCAA initial eligibility requirement violates civil rights through discrimination); Arlosoroff v. Nat'l Collegiate Athletic Ass'n, 746 F.2d 1019, 1021 (4th Cir. 1984) (claiming that NCAA violated equal protection and due process); Agnew v. Nat'l Collegiate Athletic Ass'n., 683 F.3d 328, 333 (7th Cir. 2012) (alleging that NCAA's cap on financial aid violates Sherman Anti-Trust Act and Clayton Act); Justice v. Nat'l Collegiate Athletic Ass'n., 577 F. Supp. 356, 362-63 (D. Ariz. 1983) (seeking injunction against enforcement of NCAA sanctions on basis that they violate constitutionally protected rights and violate Sherman Anti-trust Act); Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 9 (1994) (determining whether NCAA drug testing program violated student-athletes' rights to privacy under California Constitution); Matthews v. Nat'l Collegiate Athletic Ass'n, 179 F. Supp.2d 1209, 1213 (E.D. Wash. 2001) (addressing whether NCAA violated Americans with Disabilities Act and Washington Law Against Discrimination); Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likeness in Sport Video Games: An Application of the Right to Publicity*, 20 J. LEGAL ASPECTS SPORTS 35, 35-36 (2010) (describing student-athlete's suit against videogame developer and NCAA under violation of right to publicity); Sarah McCarthy, Comment, *The Legal and Social Implications of the NCAA's Pregnancy Exception - Does the NCCAA Discriminate against Male Student-Athletes*, 14 VILL. SPORTS & ENT. L.J. 327, 328-29 (2007) (discussing claim brought by male student-athlete alleging discrimination under Title IX).

223. For a critique of the court's current approach to claims against the NCAA, see *supra* notes 62-66 and accompanying text. For a discussion of how the North Carolina Court of Appeals followed this precedent of judicial deference, see *supra* notes 140-158 and accompanying text.

tions, student-athletes must allege the necessary facts in their complaints and provide the appropriate precedent allowing judicial review.[224] Additionally, the courts must also be more willing to address the merits of cases against the NCAA rather than dismissing them before trial.[225] In doing so, the courts would provide student-athletes with a realistic ability to challenge the NCAA's rules and regulations.[226]

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224. For guidance regarding prevention of having claims dismissed, see *supra* notes 200-206.

225. *See* Szwabowski, *supra* note 64, at 68 (explaining how judicial deference toward NCAA developed in early 1970s due to impression that student-athlete claims were "increasingly unnecessary and unproductive").

226. *See* Eckert, *supra* note 31, at 935 ("The many rights guaranteed by the NCAA Constitution (including the right to a safe environment and the right to an education commensurate to that offered to other students) could now be the subject of cognizable claims if student-athletes can clear the necessary evidentiary hurdles.").

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