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Articles

ALLEGING AN ANTICOMPETITIVE IMPACT ON A DISCERNIBLE MARKET: CHANGING THE ANTITRUST LANDSCAPE FOR COLLEGIATE ATHLETICS

RANDY HAIGHT*

I. INTRODUCTION

The National Collegiate Athletic Association's ("NCAA") basic purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."¹ Historically, courts have given deference to the principles cited in the NCAA's Constitution, its fundamental purpose of maintaining amateurism and promoting academics in collegiate athletics.² Nevertheless, success from continuous expansion in size and scope, and the multitude of rules reconstructing the regulation of collegiate athletics, brings a litany of lawsuits challenging the organization's abusive concentrations of market power. As a result, a class action lawsuit brought by John Rock in 2012 against the NCAA calls into question the continuing legal validity of this deference to antitrust scrutiny concerning collegiate athletics.³

This Article will argue that the NCAA's per sport scholarship limit is an anticompetitive measure impacting a discernible market,

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1. NCAA, 2012-2013 NCAA DIVISION I MANUAL (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> [hereinafter NCAA CONSTITUTION].

2. *Id.* ("The competitive athletics programs of member institutions are designed to be a vital part of the educational system. 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."). For a detailed discussion of cases in which the courts deferred to NCAA principles, see *infra* notes 76-107 and accompanying text.

3. See *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:12-cv-1019, 2013 WL 4479815 (S.D. Ind. July 25, 2012) (challenging NCAA regulations prohibiting multi-year scholarships, and cap on number of allowable scholarships). The prohibition on multi-year scholarships has since been rescinded. See *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2013).

thereby creating an antitrust violation. Section II will provide a historical overview of how NCAA regulations have changed over time. Section III sets forth the antitrust issue, stemming from the Sherman Anti-Trust Act, surrounding the NCAA scholarship limits, and reviews the analysis courts utilize when considering challenges to NCAA rules and regulations that affect antitrust matters. Lastly, Section IV details a pending lawsuit, *Rock v. NCAA*, and describes how the aforementioned cases will likely affect the outcome.

II. NCAA BACKGROUND

A. Commercialism: How Intercollegiate Athletics Developed Into an Enterprise Subject to Antitrust Scrutiny

Intercollegiate athletics emerged in 1852 when Harvard and Yale Universities organized a rowing competition.⁴ Shortly thereafter, colleges and universities across the country began challenging each other to athletic events that were generally governed by the students themselves.⁵ Interscholar athletic competitions grew steadily throughout the nineteenth century, and, consequently, questions arose concerning the governance of these sporting events.⁶ Although faculty members started playing a more supportive role in controlling athletic programs, the vital shift in regulating the excesses of intercollegiate athletics occurred in 1905 when President Roosevelt called for the reformation of college football playing rules due to the growing number of reported injuries and deaths occurring during football games.⁷ In response, Henry McCracken, Chancellor of New York University, coordinated a national meeting of representatives from the major intercollegiate football teams.⁸

4. See WADE J. GILLEY, ADMINISTRATION OF UNIVERSITY ATHLETIC PROGRAMS: INTERNAL CONTROL AND EXCELLENCE 18 (1986) [hereinafter "Administration of University Programs"].

5. See *id.* ("In the 1850s the [athletic captain] . . . assured the continuance of the organization, served as its coach and administrator, organized fund raisers, and promoted his club; he was the sole arbiter of the athletic program.")

6. See *id.* (citing B. SPEARS & R. SWANSON, HISTORY OF SPORT AND PHYSICAL ACTIVITY IN THE UNITED STATES 208 (1978)).

7. See John J. Miller, *How Teddy Roosevelt Saved Football*, N.Y. Post, Apr. 27, 2011, available at <http://nypost.com/2011/04/17/how-teddy-roosevelt-saved-football/> ("In 1905, with football's violence becoming impossible to ignore, [Teddy Roosevelt] summoned the coaches from Harvard, Princeton and Yale to the White House and encouraged them to reform the game. That winter, they created the organization that became the NCAA and invented the forward pass — a revolutionary rule change that separated the sport from its rugby-like origins and made it a uniquely American game loved by millions today.")

8. See GILLEY, *supra* note 4, at 20 (discussing efforts to create national organization to govern amateur athletics).

Shortly thereafter, a group of representatives in attendance formed the Intercollegiate Athletic Association of America, later becoming the NCAA.⁹ Initially, the NCAA only served as a rulemaking body that would eliminate “unsavory violence” and preserve “amateurism.”¹⁰ However, the NCAA has since developed substantially due to the continued growth and complexity of intercollegiate athletics.

Beginning in the 1920’s, college football grew so much in popularity that enforcing the NCAA rules “presented a dilemma not unlike the one posed by the Eighteenth Amendment of the U.S. Constitution where [] it prohibited the manufacture and sale of alcoholic beverages.”¹¹ In 1948, in an effort to develop a compliance mechanism, the NCAA adopted a collection of rules on amateurism, eligibility, and financial aid, known as the “Sanity Code.”¹² More importantly, the Sanity Code created a tool through a compliance committee that allowed the NCAA to terminate an academic institution’s NCAA membership.¹³ Despite lofty expectations, the Sanity Code had little success because expulsion was the sole remedy. Thus, the Sanity Code was repealed, and replaced in 1951 with a new set of enforcement rules. These rules were further developed in 1976. These rules included the creation of an enforcement body given the authority to, among other things, penalize members for rules violations.¹⁴

The various enforcement regulations afford the NCAA great oversight over financial aid allotment, including the ability to provide economic support to student-athletes without regard to financial need or “remarkable academic ability.”¹⁵ The NCAA crafted the foundation for “today’s corporate college sport” by balancing and managing more than 1,200 athletic programs and an array of regulations governing eligibility, penalizing improper payments or endorsements, and limiting scholarship awards.¹⁶

9. *See id.*

10. James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 12 (1986).

11. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332 (2007) (quoting ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH* 35 (1998)).

12. ARTHUR A. FLEISHER ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 47 (1992).

13. *See id.* at 47-48.

14. *See id.*

15. *See* ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH* 47 (1998).

16. *Id.* at 49; *see also* In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1146 (W.D. Wash. 2005).

B. NCAA Scholarship Limitations Signal an Anticompetitive Impact

The NCAA's history of awarding athletic scholarships, including enforcing per sport scholarship limitations, exemplifies the NCAA's tradition of exhibiting anticompetitive behavior. Initially, in 1906, the NCAA identified "[t]he offering of inducements to players to enter Colleges or Universities because of their athletic abilities and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly" as a violation of the "amateurism" ideal that the organization was created to preserve.¹⁷ Despite the NCAA's stance, it was common for student-athletes to receive funding from outside sources to pay for the student's college education. Nearly thirty years later, the NCAA finally drafted a declaration emphasizing the amateur status of student-athletes, and stressing that financial awards were entirely need-based and independent of a student's athletic participation.¹⁸ Notwithstanding this declaration, prior to 1973, a free market athletic scholarship system was in place because no formal NCAA rule or regulation limited the length or number of scholarships an institution could award, thus allowing competition among the colleges and universities to vie for the athletic services of an unfixed amount of players for a one to four year term.¹⁹

In 1973, at the NCAA Annual Convention, the NCAA passed numerous amendments to its constitution and bylaws creating a more centralized regulation of athletic scholarships, including changing the duration of grants-in-aid from four-years to one-year renewable contracts.²⁰ Only three years later, the constitution was further amended to limit the number of total scholarships awarded in a given sport and for a specified year.²¹ Article 15.5 of the NCAA bylaws details the maximum limit on the number of athletes partici-

17. See Intercollegiate Athletic Ass'n of the United States, CONST., PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE UNITED STATES 33 (1906) [hereinafter BYLAWS] (providing bylaws at article VI, § (a)(1)).

18. See Louis Hakim, Article, *The Student-Athlete vs. the Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & LAW 145, 169 (2000) (citing RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 25 (1988)).

19. See Thomas R. Ost diek, *LB 69: Need Based Financial Aid for College Athletes*, 25 CREIGHTON L. REV. 729, 740 (1992).

20. *Id.* at 741.

21. James V. Koch & Wilbert M. Leonard, *The NCAA: A Socio-Economic Analysis*, 37 AM. J. OF ECON. & SOC. 225, 235 (1978).

pating in sports that can receive financial aid for their athletic ability.²²

The primary purpose for enforcing a scholarship cap was to create uniformity in terms of the number of athletic scholarships institutions could award; however, that logic fails when instead, the bylaw oppresses competition. More specifically, imposing this rule restricts an athlete's opportunity to receive a scholarship by providing coaches with the ability to reduce their production costs in players who get injured or fail to yield results to their coach's satisfaction. Accordingly, the scholarship cap eliminates, or at a minimum weakens, economic competition for collegiate athletes that cannot negotiate their financial aid packages even though the athletic programs continue to benefit from the revenue players generate.²³ Put differently, scholarship caps were created to provide "cost reduction" to institutions, but such caps work to the detriment of student athletes by increasing the cost of a college degree.²⁴ If this issue presented itself in professional sports, absent a collective bargaining agreement providing otherwise, Sherman Act concerns would undoubtedly be implicated.²⁵ Enforcing scholarship caps has not received considerable scholarly attention, but the issue has been, and remains, the subject of numerous antitrust lawsuits against the NCAA.

II. SHERMAN ACT IMPLICATIONS IN THE NCAA'S ANTITRUST LITIGATION

Enacted in 1890, Section I of the Sherman Act states, in broad language, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

22. NCAA CONSTITUTION, *supra* note 1, art. 15.5, at 210-18 (stating that student who receives financial aid based upon his or her involvement in athletics shall become counter for year when aid is received).

23. See Daniel L. Fulks, NCAA, Revenues and Expenses: 2004-2010 NCAA Division I Intercollegiate Athletics Programs Report, 36 tbl.3.11 (2011), *available at* <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf> (finding that median revenue for Division I Football Bowl Subdivision schools in fiscal year 2010 was more than \$16 million).

24. See Koch & Leonard, *The NCAA: A Socio-Economic Analysis*, *supra* note 21, at 235 (noting that caps or limitations reduce scholarship costs for NCAA institutions while increasing cost of attendance for student-athletes who may otherwise receive financial aid based upon his or her athletic ability).

25. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978) (finding that NFL could not regulate competition for player's services); see also *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976) (deciding that league could not inhibit free agency).

several States, or with foreign nations, is declared to be illegal.”²⁶ The Supreme Court laid the fundamental framework for analyzing conduct under Section I when it applied a “standard of reason” to distinguish those “restraints of trade” that are necessary to develop healthy free enterprise from restraints that are competitively harmful.²⁷ Following this model, only business conduct in unreasonable “restraint of trade” violates Section I of the Sherman Act. Thus, the NCAA is not exempt from scrutiny under the Sherman Act.²⁸ When the NCAA’s actions are “commercial” in nature, the Sherman Act applies with full force.²⁹

A. Analyzing the NCAA’s Business Conduct

The indisputable policy of the Sherman Act is to deter unreasonable restraints on competition.³⁰ Whether a restraint is unreasonable must be determined by examining “the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive substitute.”³¹ Courts have established three categories of analysis for determining if the challenged restraint enhances or oppresses competition: per se, rule of reason, and quick-look.³²

The per se rule is utilized when a “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”³³ Pursuant to this rule, certain restraints of trade are likely to harm competition and facially lack procompetitive benefits. These restraints are deemed illegal and do not justify the time and expense necessary when “the Court [can] predict with confidence that the Rule of Reason will con-

26. 15 U.S.C. § 1.

27. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (applying standard of reason to determine whether trust agreement at issue was unreasonable restraint of trade).

28. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98-100 (1984) (discussing NCAA policies with respect to television rights constituted unreasonable restraint of trade under Sherman Act).

29. See, e.g., *id.* (holding that “payment of tuition in return for educational services constitutes commerce” and thereby making NCAA subject to Sherman Act).

30. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 490-93 (1940) (noting that intended goal was “the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury”).

31. PHILLIP AREEDA, *ANTITRUST LAW* ¶ 1500, at 362-63 (1986).

32. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779-80 (1999); see also *Board of Regents*, 468 U.S. at 104.

33. *Board of Regents*, 468 U.S. at 100 (internal quotation omitted).

demn [a restraint].”³⁴ However, the per se rule is a “demanding” standard that should only be applied to certain business practices by reason of their nature.³⁵

Under the rule of reason analysis, the finder of fact must determine whether an agreement has an anticompetitive effect on a legally cognizable market. As a threshold matter, the plaintiff has the burden of establishing anticompetitive effects.³⁶ Generally, this includes an analysis of the defendants’ collective market power, and, in some cases, proof of actual anticompetitive effects.³⁷ If the plaintiff meets his burden, the defendant must then show that the restraint promotes a procompetitive objective.³⁸ The rule of reason analysis applies to cases that do not follow the per se rule. Further, the rule of reason has been applied to antitrust lawsuits against the NCAA. However, matters generally involving industries or organizations “in which horizontal restraints on competition are essential if the product is to be available at all” may use a different method tangentially related to the rule of reason.³⁹

In *NCAA v. Board of Regents*, the Supreme Court suggested a third approach, a middle ground analysis between the per se and rule of reason called the “quick-look” analysis.⁴⁰ This third framework is utilized when the per se analysis is unsuitable, proof of market power is not necessary, and “no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an

34. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) (quoting *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 344 (1982)); see also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) (“[A] per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.”).

35. See *Continental T.V., Inc.*, 433 U.S. at 49-50 (explaining that applying per se rule may be appropriate when considering horizontal agreements in emerging markets).

36. *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986).

37. See, e.g., *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019-20 (10th Cir. 1998); *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 600 (7th Cir. 1996) (“Substantial market power is an indispensable ingredient of every claim under the full rule of reason.”).

38. See, e.g., *Law*, 134 F.3d at 1019; *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996).

39. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents Univ. of Okla.*, 468 U.S. 85, 100-01 (1984); *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1088 (7th Cir. 1992) (“Under the Supreme Court’s ruling in [*Board of Regents*], allegations that the NCAA rules restrain trade or commerce may not be viewed as per se violations of the Sherman Act.”); see also Robert E. Freitas, *Overview: Looking Ahead at Sports and the Antitrust Law*, 14 ANTITRUST 15, 16 (2000) (stating that “it is now settled that the practices typically associated with . . . organizations such as the NCAA are not subject to the per se rule”).

40. *Board of Regents*, 468 U.S. at 108-09.

agreement.”⁴¹ Additionally, the quick-look approach is used when a restraint would normally be considered illegal per se, but “a certain degree of cooperation is necessary if the [product at issue] is to be preserved.”⁴² Under this approach, treatment of the issue is confined to the generalizations that “[inquire into] the case, looking to the circumstances, details, and logic of a restraint,” and that “[consider] whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.”⁴³

Both the rule of reason and quick-look approaches have been utilized in lawsuits against the NCAA. Determining the proper analysis to use in a given context may change a plaintiff’s chance for success in a Section I claim alleging the anticompetitive impact scholarship limitations has on a bachelor’s degree. Notwithstanding whether the rule of reason or quick-look approach is utilized, the following section will focus on the steps necessary for student-athletes to establish an antitrust claim against the NCAA.

1. *Anticompetitive Effect*

In every Section I claim, plaintiffs must establish that NCAA bylaws or regulations have an anticompetitive effect on a relevant market. Rules and regulations are by definition anticompetitive when outputs are inconsistent with those in competitive markets. However, a relevant market and market power must be properly alleged to receive any merit.

a. Student Athletes Can Establish A Relevant Market

Included within an anticompetitive effects review is the determination of whether the market in which goods or services compete is relevant to the plaintiff’s complaint. The Supreme Court stated that “no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that ‘part of the trade or commerce’, monopolization of which may be illegal.”⁴⁴ There are three principal decisions providing precedent for establishing relevant markets

41. *Id.* at 109 (quoting Nat’l Soc’y of Prof’l Engineers v. United States, 435 U.S. 679, 692 (1978)).

42. *Id.* at 117.

43. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999) (Breyer, J. concurring in part).

44. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

concerning the NCAA. First, in *Board of Regents*, a relevant market was found where college football telecasts were unreasonably restrained by an NCAA agreement limiting the quantity of televised games each member could make available for broadcast.⁴⁵ Second, in *Law v. NCAA*, the court held that a relevant market existed where college basketball coaches were unjustly controlled by price-fixing constrains among NCAA member institutions that negatively affected collegiate basketball.⁴⁶ More recently, and equally important, in *In re NCAA I-A Walk-On Football Players Litigation*,⁴⁷ the district court found a relevant market for Division I football programs. These cases illustrate how courts are willing to recognize the existence of relevant markets for the services of student-athletes.

b. NCAA Does Have Market Power to Control Prices and Exclude Competition

If student-athlete plaintiffs successfully establish a relevant market for their services, then they must prove that the NCAA has power over the specified market in order to establish anticompetitive effects. The Supreme Court has defined market power as the “power to control prices or exclude competition.”⁴⁸ Alternatively, “market power may be presumed if the defendant controls a large enough share of the relevant market.”⁴⁹ Courts have recognized the NCAA’s power over the student-athlete market. In *Banks v. NCAA*, the court stated “the NCAA and its member institutions have near total control of the market of college players; such control might be deemed to provide more than adequate market share to constitute market power.”⁵⁰ Moreover, the NCAA’s market power has been acknowledged to be the “only rational inference that can be drawn based on the nature of [the NCAA].”⁵¹ In a similar viewpoint, “where a practice has obvious anticompetitive effects—as

45. *Board of Regents*, 468 U.S. at 120.

46. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998).

47. 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

48. *E.I. du Pont*, 351 U.S. at 391; see also *Board of Regents*, 468 U.S. at 108 (“Market power is the ability to raise prices above those that would be charged in a competitive market.”).

49. *Metro. Intercollegiate Basketball Ass’n v. Nat’l Collegiate Athletic Ass’n*, 339 F. Supp. 2d 545, 550 (S.D.N.Y. 2004) (quoting *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995)).

50. *Banks v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 850, 860 (N.D. Ind. 1990).

51. *White v. Nat’l Collegiate Athletic Ass’n*, No. CV 06-999-RGK, slip op. at 4 (C.D. Cal. Sept. 21, 2006), available at <http://www.ncaaclassaction.com/deny.pdf>.

does price-fixing—there is no need to prove that the defendant possesses market power.”⁵² Therefore, alleging market power may be necessary, but is not a difficult hurdle to overcome.

B. Setting the Stage for Future Litigation: Case Law Development

The Supreme Court’s seminal decision in *NCAA v. Board of Regents*⁵³ paved the way for antitrust lawsuits against the NCAA. In that case, the Supreme Court considered a Section I challenge to the NCAA’s restriction on televising college football games. Even though the Court acknowledged that cooperation is necessary to preserve collegiate competition, the Court ultimately concluded that the challenged plan “prevent[ed] member institutions from competing against each other,” thereby “creat[ing] a[n] unlawful horizontal restraint.”⁵⁴ After applying the quick-look analysis, the Court held the restraint violated Section I of the Sherman Act.⁵⁵

Prior to 1984, courts were extremely dismissive of antitrust challenges to NCAA rules and regulations and often cited non-commercial objectives when deciding in favor of the NCAA’s promotion of amateurism and free competition.⁵⁶ Nevertheless, the dynamics of collegiate athletics changed significantly since *Board of Regents* and the legal arena governing these challenges appears to be changing as well.⁵⁷ For instance, courts have found the award of financial aid implicates “trade or commerce” and therefore is subject to the Sherman Act.⁵⁸ The scholarship limitations fall into both categories, establishing a necessary condition for finding a Section I violation. Recalling that the purpose of the rule was to address production costs rather than to promote competition, a

52. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998).

53. 468 U.S. 85 (1984).

54. *Id.* at 99; *see also id.* at 117.

55. *See id.* at 120. For a detailed discussion of the anticompetitive effects of this holding, *see supra* notes 81-93 and accompanying text.

56. *See Lazaroff, supra* note 11, at 337 (citing several cases for proposition including challenges to number of assistant coaches and transfer eligibility requirements).

57. *See Board of Regents*, 468 U.S. at 108-09.

58. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 667 (3d Cir. 1993) (citing *Board of Regents*, 468 U.S. at 100 n.22) (“[P]ayment of tuition in return for educational services constitutes commerce.”); *see also Metro. Intercollegiate Basketball Ass’n v. Nat’l Collegiate Athletic Ass’n*, 339 F. Supp. 2d 545, 550-52 (S.D.N.Y. 2004) (detailing rules affecting sporting tournaments); *Law v. Nat’l Collegiate Athletic Ass’n*, 902 F.Supp. 1394, 1410 (D. Kan. 1995) (discussing rules limiting coaching salaries).

plaintiff challenging the cap as a commercially motivated product inhibiting inter-firm competition by unlawfully fixing prices would likely be successful in an antitrust lawsuit against the NCAA.⁵⁹ The lawsuits below portray the legal developments – through the various nuances within each decision – at the forefront of reshaping inter-collegiate athletics and the NCAA rule limiting scholarship awards.

1. *McCormack v. NCAA*

When striking down lawsuits against the NCAA, early decisions following *Board of Regents* were premised upon preserving amateurism because eligibility restraints were deemed to enhance competition. For instance, in *McCormack v. NCAA*, a group of football players, cheerleaders, and alumni challenged an NCAA rule that limited “compensation” for student-athletes.⁶⁰ The plaintiffs claimed that the rule was a price-fixing measure to limit output costs.⁶¹ While the Fifth Circuit allowed the complaint to survive a rule of reason analysis at summary judgment, the court ultimately ruled against the plaintiffs, reasoning that although the “NCAA has not distilled amateurism to its purest form[,] [that] does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable.”⁶²

In its decision, the Fifth Circuit – following the foundation set by *Board of Regents* – was the first court to assume that the NCAA’s bylaws and rules were subject to Section I of the Sherman Act.⁶³ More specifically, the court found that the NCAA marketed college football as a “product.”⁶⁴ Despite that fact, the court stated that it is “reasonable to assume” that the majority of NCAA regulations are “justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”⁶⁵ Although the court ruled against the plaintiffs, *McCormack* is significant because it is the first

59. For a detailed discussion of the NCAA violating the Sherman Act by capping scholarships, see *supra* notes 76-107 and accompanying text.

60. *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338 (5th Cir. 1988).

61. *Id.* at 1340.

62. *Id.* at 1345.

63. The Third Circuit used this logic when it upheld the dismissal of a lawsuit claiming that an NCAA bylaw prohibited a student athlete from participating in collegiate sports while enrolled in a graduate institution different from the student’s undergraduate institution. See *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180 (3d Cir. 1998).

64. See *McCormack*, 845 F.2d at 1344.

65. *Id.* at 1344.

case where a circuit court applied a reasonableness (i.e. rule of reason) standard to NCAA bylaws restricting financial payments to student-athletes.

2. *In re NCAA I-A Walk-On Football Players Litigation*

In the case of *In re NCAA I-A Walk-On Football Players Litigation*, football players brought an antitrust claim alleging that walk-on football players would have received athletic scholarships if the NCAA did not limit the total number of scholarships that an NCAA member school can award annually.⁶⁶ In the complaint, the plaintiffs argued that the NCAA bylaw restricting schools to eighty-five football scholarships was a horizontal restraint of trade in violation of Section I of the Sherman Act.⁶⁷ The court denied the NCAA's motion for judgment on the pleadings because it found that the plaintiffs stated a valid cause of action.⁶⁸ In their cause of action, the plaintiffs alleged that the schools compete for athletic services of amateur players who create a necessary "input" market to bring a meritorious claim.⁶⁹

Not surprisingly, the NCAA successfully pursued a settlement that resulted in the plaintiffs accepting an extremely small amount of money.⁷⁰ Nevertheless, this case is important because the decision serves as the first example of a court finding a relevant market in a case challenging the NCAA bylaws that limit scholarships for athletic programs. Furthermore, student athletes may now overcome the NCAA's traditional amateurism defense and at least survive the motion to dismiss stage of litigation.

3. *Agnew v. NCAA*

Agnew v. NCAA is an example of yet another case indicating that reform is on the horizon.⁷¹ Joseph Agnew, a former NCAA

66. See *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

67. See *id.* at 1147 (discussing plaintiff's argument).

68. See *id.* at 1149-50 (deciding that capping number of scholarships college team can grant does not implicate student-athlete eligibility "in the same manner as rules requiring students to attend class or rules revoking eligibility for entering a professional draft").

69. See *id.*

70. See *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1144; see also Mark Alesia, *3 Lawsuits May Change How NCAA Operates*, USA TODAY, July 26, 2009, available at www.usatoday.com/sports/college/2009-07-26-ncaa-lawsuits_N.htm (indicating that NCAA prefers litigating claims brought against it because settlement may excite flood of lawsuits brought by student athletes).

71. 683 F.3d 328 (7th Cir. 2012). "[T]he prohibition against multi-year scholarships is, in a sense, a rule concerning the amount of payment a player reviews for

student-athlete, brought a class action suit against the NCAA alleging the prohibition on multi-year athletic scholarships and restriction on capping athletic scholarships for collegiate sports violates Section I of the Sherman Act.⁷² Agnew argued the scholarship restrictions represented a deliberate price-fixing agreement that reduced competition and costs for NCAA member institutions.⁷³ Put differently, Agnew asserted that scholarship caps discouraged competition by prohibiting athletic departments from offering scholarships to fill all roster spots available on a given team. Agnew decided to claim that the relevant market was former student-athletes seeking a bachelor's degree; however, citing circuit precedent, the district court dismissed the complaint on the pleadings because the market was not "plausible."⁷⁴ The Seventh Circuit upheld the decision, but submitted that the district court failed to consider whether the restraint of trade was unreasonable.⁷⁵

The *Agnew* decision signals the difficulty of claiming that the NCAA's bylaws violate Section I of the Sherman Act, but when read together with the two aforementioned decisions, it suggests that the NCAA's price-fixing behavior, including its failure to cure output costs, could violate antitrust provisions.

III. ROCK v. NCAA – THE NCAA VIOLATES THE SHERMAN ACT BY CAPPING SCHOLARSHIPS

In July 2012, John Rock became the most recent student-athlete to bring a lawsuit against the NCAA for violation of Section I of the Sherman Act.⁷⁶ Rock is a former football player from Gardner-Webb University whose scholarship was not renewed following a coaching change at the school.⁷⁷ In his claim, Rock alleged that his previous coach assured him a four-year scholarship if he remained

his labor, and thus may seem to implicate the split between amateur and pay-for-play sports." *See id.* at 344.

72. *See id.* at 332 (discussing Agnew's argument that scholarship restriction is violation of Sherman Act).

73. *See id.*; *see generally* 15 U.S.C. § 1.

74. *Agnew v. Nat'l Collegiate Athletic Ass'n*, No. 1:11-cv-0293-JMS-MJD, 2011 WL 3878200, at *8 (S.D. Ind. Sept. 1, 2011) (discussing implausibility of Plaintiffs' argument establishing that "market" exists for sale of bachelor's degrees due to requirements that must be met for student-athletes to obtain degree (citing *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1090 (7th Cir. 1992)).

75. *See Agnew*, 683 F.3d at 335 ("Most § 1 cases focus not on whether a relevant market exists, but on the other aspect of the second required showing – whether a restraint of trade in a given market was actually unreasonable.").

76. *See Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:12-CV-10190JMS-DKL, 2013 WL 4479815, at *2 (S.D. Ind. Aug. 16, 2013).

77. *Id.*

academically eligible and further contended that limiting the number of athletic scholarships a school can offer prevented him from obtaining a bargained for education.⁷⁸

Two years ago, the United States Justice Department announced an investigation to determine whether the NCAA's prohibition on scholarships violates antitrust laws.⁷⁹ Spontaneously, the NCAA changed the bylaw prohibiting multi-year scholarships in 2011 before the Justice Department completed its investigation;⁸⁰ however, the NCAA failed to address the rule limiting the number of scholarships an institution may award to student athletes. The *Rock* claim addressed this concern by citing the rule limiting the number and amount of scholarships that a school can give to student athletes as a violation of Section I of the Sherman Act.⁸¹

A. The Anticompetitive Effects

Awarding athletic scholarships at the collegiate level would seem, on its face, to promote a competitive market amenable to antitrust concerns. Undeniably, there can be little doubt that the NCAA often promotes competition: during recruiting season, as athletes may compete for elite athletic programs at well-known institutions or within specific conferences.⁸² Such competition motivates colleges and universities to make themselves more appealing by reducing prices through, among other things, athletic scholarships.⁸³

Despite this competitive facade, the NCAA's per sport scholarship limitation induces anticompetitive elements that buttress any procompetitive benefit afforded to student athletes. As previously discussed, the first step in the rule of reason analysis is to determine

78. *Id.*

79. See Marlen Garcia, *Federal Government Investigates NCAA Scholarship Rules*, USA TODAY, Apr. 7, 2011, available at http://www.usatoday.com/sports/college/2010-05-06-notes-scholarships-hayward_N.htm.

80. See David Frank, *Multiyear Scholarships: Why It May Affect You Differently Than You Think*, ATHLETIC SCHOLARSHIPS.NET (Apr. 9, 2012), <http://www.athleticscholarships.net/2012/04/09/multiyear-scholarships-why-it-may-affect-you-differently-than-you-think.htm>.

81. See Complaint at 13, ¶ 54, *Rock*, No. 1:12-CV-10190JMS-DKL (quoting Bylaw which states that Division I collegiate football teams may award eighty-five full scholarships to student athletes).

82. See NCAA CONSTITUTION, *supra* note 1, at art. 13.02.13.1, at 79 (stating that "institution[s] may officially visit recruit, arrange telephone contact or in-person visits and issue National Letter of Intent to offer athletically related financial aid to prospective student athletes").

83. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 234 (1990) (discussing how athletes are interested in financial gains including scholarship monies).

whether the defendant possessed “the requisite market power within a defined market” or produced “actual anticompetitive effects, such as control over output or price.”⁸⁴ As a factual matter, the NCAA possesses significant market power in regulating the competition for student-athletes. Intercollegiate athletes have few, if any, substitutes for providing athletic services in exchange for receiving a college degree.⁸⁵ Thus, the NCAA directly decides the output costs for college athletes by inducing scholarship restrictions for member schools, thereby creating an anti-competitive effect in an unparalleled market.

The Seventh Circuit expressly held that “a labor market for student-athletes . . . would meet plaintiffs’ burden of describing a cognizable market under the Sherman Act.”⁸⁶ When NCAA member schools offer “in-kind benefits” in exchange for the opportunity to pursue a bachelor’s degree,⁸⁷ NCAA member schools are clearly engaged in “transactions that are commercial in nature.”⁸⁸ Thus, the relevant market asserted by the plaintiffs in *Rock* – alleging a nationwide market for the labor of student athletes – is consistent with the relevant markets found in other antitrust lawsuits filed against the NCAA, along with the explicit instructions given by the Seventh Circuit in *Agnew*.⁸⁹

Notwithstanding the market analysis, an anticompetitive effect may still be found without determining whether a relevant market exists. In *Board of Regents*, the Supreme Court stated that “when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required,” and “naked restraint[s] on price and output require[] some competitive justification even

84. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (D. Kan. 1995).

85. See, e.g., Christopher Chin, Comment, *Illegal Procedures: The NCAA’s Unlawful Restraints of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1245 (1993) (“By imposing its regulations and restraining student-athletes, the NCAA willfully maintains its monopoly power.”); see also Aidan McCormack, Comment, *Seeking Procedural Due Process in NCAA Infractions Procedures: States Take Action*, 2 MARQ. SPORTS L.J. . 261, 262 (1992) (“The NCAA is the monopoly of all intercollegiate sports.”).

86. *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 346 (7th Cir. 2012) (describing burden on plaintiffs necessary to satisfy test under Sherman Act).

87. See *id.* at 347 (discussing potential basis for commercial market regarding NCAA schools and scholarships).

88. *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993) (describing how universities engage in commercial transactions).

89. See *Agnew*, 683 F.3d at 341 (deciding that “the transactions between NCAA schools and student-athletes . . . take place in a relevant market with respect to the Sherman Act”); see also *White v. Nat’l Collegiate Athletic Ass’n*, No. CV 06-0999 RGK (C.D. Cal. Sept. 20, 2006) (holding that “Major College Football” is relevant market in which “colleges and universities compete to attract prospective student-athletes”).

in the absence of a detailed market analysis.”⁹⁰ The complaint in *Rock* specifically states:

By unlawfully agreeing to limit the number and amount of athletics-based scholarships that a member institution can grant in any given year, the NCAA and its member institutions have ensured that student-athletes in the class receive tens of millions less for their labor for member institutions than they would receive — and the member institutions would pay — in a competitive market.⁹¹

The anticompetitive effects of the challenged regulation are evident. To participate in NCAA sanctioned events, member institutions must adhere to NCAA bylaws, including the scholarship cap, thereby completely inhibiting student-athletes and schools from entering into competitive pricing agreements that both parties favor. Once again, the scholarship restrictions were initially a response to NCAA members’ financial difficulties.⁹² Therefore, if the scholarship limitation is considered a cost-cutting measure, then the anticompetitive effect – exploiting students by unnecessarily maximizing the cost of bachelor’s degrees – gains support.

Whether “proof of market power” is required to analyze the anticompetitive effects in the *Rock* case should be of no concern to the plaintiffs. Under either the rule of reason or “quick-look” standards, the undisputed evidence supports a finding of anticompetitive effect. The NCAA adopted the scholarship cap primarily to reduce costs for NCAA institutions. One insider noted after the rule’s passage that schools appreciated how the rule “giv[es] them the legal and moral sanction of the NCAA” to cancel the scholarships for athletes who did not perform to their expectations.⁹³ While the member schools compete vigorously to recruit student athletes, the scholarship cap remains successful in artificially lowering the price of student-athlete services.⁹⁴ As a result, this horizontal restriction on financial aid for student-athletes eliminates price competition among the NCAA members, and given the practice’s

90. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109-10 (1984) (internal quotation marks and citation omitted).

91. Amended Complaint, *supra* note 76, at 6.

92. See BYLAWS, *supra* note 17, at § II.B.

93. Koch & Leonard, *The NCAA: A Socio-Economic Analysis*, *supra* note 21, at 236.

94. See Amended Complaint, *supra* note 75, at 6 (revealing that schools spend millions of dollars in “travel expenses, letters, phone calls, on-campus visits and the use of recruiting services” to attract top talent).

cost-cutting origins, Rock's claim of unfair treatment receives even greater standing.

B. The Procompetitive Benefits

Assuming the *Rock* plaintiffs will succeed in alleging anticompetitive behavior on the part of the NCAA, the burden will then shift to the NCAA to prove that the restraint on trade caused by the scholarship restrictions have procompetitive justifications that outweigh the anticompetitive effects.⁹⁵ In essentially every antitrust claim against the NCAA, two procompetitive justifications are alleged: preserving amateurism and maintaining a competitive balance in intercollegiate athletics.⁹⁶

First and foremost, the NCAA will have difficulty arguing that the scholarship limitations help maintain amateurism. As discussed earlier, the NCAA has maintained its amateur system through by-laws where four-year scholarships were the norm. However, after lifting the multi-year scholarship ban, there is no reason to believe that the scholarship cap has any independent effect on amateurism. In fact, the Seventh Circuit recently acknowledged that the limit on scholarships per team is “not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product” of college sports.⁹⁷ Instead, and as the district court properly observed in *In re NCAA I-A Walk-On Football Players Litigation*, “the NCAA’s attempt to frame [the scholarship limitation] as challenging . . . amateurism . . . is a mis-characterization of the issues raised”⁹⁸

Next, the NCAA may use the procompetitive defense of competitive balance. To determine whether the NCAA’s proffered evidence demonstrates competitive balance, the court must “consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.”⁹⁹ Recalling the origins of the scholarship limitation, it can be demonstrated that the purpose was to cut costs in order to “save money for the col-

95. *Board of Regents*, 468 U.S. at 103.

96. *See id.* at 96; *see also* *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 343 (7th Cir. 2012) (citing numerous cases that found amateurism to be at “very existence” of college football).

97. *Agnew*, 683 F.3d at 343.

98. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005).

99. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

leges,” thereby creating an unlawful restraint on trade.¹⁰⁰ Elite colleges, deemed the “Overlap Group,” attempted a similar feat by establishing a universal formula for financial aid that produced comparable aid packages for admitted students.¹⁰¹ Under the Overlap Agreement, the member schools agreed to: (1) award aid only on the basis of demonstrated need, (2) institute a uniform calculation system, and (3) share financial information for admitted students.¹⁰² Initially, the Justice Department charged the Overlap Group with “unlawfully conspir[ing] to restrain trade” and, after all of the defendant colleges (with the exception of MIT) entered into a consent decree, the district court ruled against the lone school by finding that the Overlap Agreement created illegal horizontal price-fixing.¹⁰³ Following an unfavorable appeal to the Third Circuit, MIT settled with the Justice Department.¹⁰⁴ Consequently, all colleges were required to implement their own financial aid for common admits.¹⁰⁵

The NCAA’s per sport scholarship limitation looks remarkably similar to the issue in *Brown University*. Under the Overlap Agreement, member institutions colluded to set financial aid package limitations and agreed to not negotiate further with admitted students, resulting in direct horizontal price-fixing. Athletic scholarship restrictions take the form of the same antitrust violation. Prior to 1976, there were no scholarship restrictions, absent the multiyear athletic scholarship ban, indicating that the change to the scholarship cap had nothing to do with competitive balance. Moreover, schools likely have severe recruiting disadvantages by limiting the players they can accept on scholarship. As the Supreme Court eloquently stated, “The heart of our national economic policy long has been faith in the value of competition.”¹⁰⁶ Consequently, if the court determines that the NCAA’s scholarship cap exists primarily for cost cutting measures, and as a result deters competition, *Rock* will successfully defeat the NCAA’s conventional defense mechanism to Section I lawsuits.

100. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 228 (1995).

101. See *United States v. Brown Univ.*, 5 F.3d 658, 662 (3d Cir. 1993).

102. *United States v. Brown Univ.*, 805 F. Supp. 288, 293 (E.D. Pa. 1992).

103. See *id.* at 289-90.

104. See CHRISTOPHER AVERY ET AL., THE EARLY ADMISSIONS GAME: JOINING THE ELITE 33 (2003).

105. See *id.*

106. *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

C. Less Restrictive Alternatives

The final step in the rule of reason analysis focuses on whether a less restrictive alternative could accomplish the procompetitive justification. Accordingly, if the NCAA were to convince the district court that the scholarships cap provides a net procompetitive effect, the restraint still violates Section I of the Sherman Act if the effect could have been achieved through a less restrictive alternative. Each federal circuit court has adopted its own version of a “less restrictive alternative” inquiry into their rule of reason analysis, and the Seventh Circuit, not unlike its sister circuits, employs a standard that lacks clarity. In *Agnew v. NCAA*, the court stated, without considering, that the test must focus on “the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive substitute.”¹⁰⁷

Bearing in mind the broad language in the Seventh Circuit’s analysis, if the *Rock* case reaches this step, the lack of a less-restrictive alternative to the existing scholarship cap – that would preserve amateurism and maintain competitive balance – would weigh in favor of the plaintiffs.

IV. CONCLUSION

In the last twenty years, some of the most important lawsuits relating to intercollegiate athletics have been filed, yielding mixed results. Nevertheless, the pending *Rock* case presents an interesting dichotomy: settle the lawsuit and encourage student-athletes to bring additional claims, or expose its weak justifications for the scholarship limitation bylaw. Even though the NCAA has experienced consistent success in defending against student-athlete antitrust attacks, the recent repeal of the prohibition on multi-year scholarships, coupled with the *Rock* lawsuit, will bring a great challenge to the NCAA that has the potential to substantially change the current form of the NCAA’s bylaws.

107. *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335 (7th Cir. 2012) (quoting Phillip Areeda, *Antitrust Law* ¶ 1500, at 362–63 (1986)).