



5-24-2017

## Class Is in Session: Putative Class Action Could Forever Alter the "Grant-in-Aid" Compensation of College Athletes

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### Recommended Citation

Michael D. Ford, *Class Is in Session: Putative Class Action Could Forever Alter the "Grant-in-Aid" Compensation of College Athletes*, 24 Jeffrey S. Moorad Sports L.J. 237 (2017).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol24/iss2/3>

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## Comments

### CLASS IS IN SESSION: PUTATIVE CLASS ACTION COULD FOREVER ALTER THE “GRANT-IN-AID” COMPENSATION OF COLLEGE ATHLETES

*“As long as the NCAA continues to allow college athletics to be promoted as big-time television entertainment and then collects all the dollars that go along with this, I don’t see how it can do anything more than chase rats from a sinking ship.”<sup>1</sup>*

#### I. INTRODUCTION

The multibillion dollar per year industry related to Division I National Collegiate Athletic Association (“NCAA”) athletics is built around the athletic performances of scholarship compensated athletes, with schools supplying “more than \$2.9 billion in athletics scholarships annually” to athletes in exchange for their athletic services.<sup>2</sup> The financial aid that athletes receive through athletics scholarships covers many of their educational expenses, but until recently, *could not* cover the true cost to attend their schools like a student loan might.<sup>3</sup> For a long time, the NCAA restricted this

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1. Declaration of Steve W. Berman in Support of Consolidated Plaintiffs’ Motion for Class Certification of Damages Classes, Exhibit 57, at 7, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) [hereinafter Declaration of Steve W. Berman] (quoting anonymous response to NCAA survey produced by NCAA and written “sometime between 2002 and 2009”); *see also* Order Granting Unopposed Administrative Motion to Unseal Unredacted Consolidated Plaintiffs’ Motion for Certification of Damages Classes and Unredacted Declaration of Steve W. Berman, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) (ordering public filing of consolidated plaintiffs’ motion and documents).

2. *Scholarships*, NCAA, <http://www.ncaa.org/student-athletes/future/scholarships> [<https://perma.cc/DF9G-RZWQ>] (last visited Mar. 13, 2016) (explaining scholarship system); *see also NCAA Recruiting Facts*, NCAA (July 2016), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> [<https://perma.cc/W6BX-TT9V>] (stating that 56% of 176,000 Division I athletes—or approximately 98,560—receive athletics aid).

3. *See* Nat’l Collegiate Athletic Ass’n, 2016–17 NCAA DIVISION I MANUAL, By-law 12.02.2 (2016) [hereinafter NCAA MANUAL], *available at* <http://www.ncaapublications.com/productdownloads/D117.pdf> [<https://perma.cc/9Y84-WQX9>]. Player compensation is limited to

- (a) Meals; (b) Lodging; (c) Apparel, equipment and supplies; (d) Coaching and instruction; (e) Health/medical insurance; (f) Transportation (expenses to and from practice and competition, cost of transportation

“grant-in-aid” to tuition, university fees, room and board, and required course materials.<sup>4</sup> While attending school, athletes accrue incidental expenses, such as sundry items and laundry expenses, but the NCAA noticeably prohibited its member schools from providing funds to cover these expenses in exchange for their athletic services.<sup>5</sup>

In 2014 and 2015, college football and both male and female college basketball players filed class action complaints against the NCAA’s grant-in-aid regulations.<sup>6</sup> The athletes alleged that those regulations violate antitrust law.<sup>7</sup> Over the objection of the NCAA and various collegiate conferences, Judge Claudia Wilken of the Northern District of California certified classes of NCAA athletes seeking to enjoin the NCAA from promulgating grant-in-aid regula-

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from home to training/practice site at the beginning of the season/preparation for an event and from training/practice/event site to home at the end of season/event); (g) Medical treatment and physical therapy; (h) Facility usage; (i) Entry fees; and (j) Other reasonable expenses.

*Id.* See also Matt Hayes, *Report Concludes 86 Percent of Student Athletes Live in Poverty*, SPORTINGNEWS (Jan. 16, 2013), <http://www.sportingnews.com/ncaa-football/news/4465460-student-athletes-poverty-paid-scholarships-ncpa-texas-duke> [<https://perma.cc/UBU2-QZRZ>] (stating that in 2013, 86% of college athletes lived below poverty line and that NCAA views scholarships as worthy tradeoff for their services).

4. See NCAA MANUAL, *supra* note 3, at Bylaw 15.02.5 (allowing compensation up to cost of attendance). *But see* NAT’L COLLEGIATE ATHLETIC ASS’N, 2014–15 NCAA DIVISION I MANUAL, Bylaw 15.02.5 (2014) [hereinafter NCAA MANUAL 2014], available at <http://www.ncaapublications.com/productdownloads/D115.pdf> [<https://perma.cc/9Y84-WQX9>] (capping grant-in-aid at “tuition and fees, room and board, and required course-related books,” but declining to cover full cost of attendance).

5. See NCAA MANUAL, *supra* note 3, at Bylaw 12.02.2 (listing what compensation is limited to by NCAA). Compare NCAA MANUAL, *supra* note 3, at Bylaw 15.02.5 with NCAA MANUAL 2014, *supra* note 4, at Bylaw 15.02.5 (inserting compensation up to cost of attendance after NCAA MANUAL 2014).

6. See generally Complaint, Alston v. Nat’l Collegiate Athletic Ass’n, No. 4:14-cv-01011-CW (N.D. Cal. Mar. 5, 2014); Complaint and Jury Demand – Class Action Seeking Injunction and Individual Damages, Jenkins v. Nat’l Collegiate Athletic Ass’n, No. 3:14-cv-01678-FLW-LHG (D.N.J. Mar. 17, 2014); Class Action Complaint, Floyd v. Nat’l Collegiate Athletic Ass’n, No. 0:14-cv-01290 (D. Minn. Apr. 25, 2014); Hartman v. Nat’l Collegiate Athletic Ass’n, No. 4:15-cv-15-00178 (N.D. Cal. Jan. 13, 2015).

7. See generally Complaint, Alston v. Nat’l Collegiate Athletic Ass’n, No. 4:14-cv-01011-CW (N.D. Cal. Mar. 5, 2014); Complaint and Jury Demand – Class Action Seeking Injunction and Individual Damages, Jenkins v. Nat’l Collegiate Athletic Ass’n, No. 3:14-cv-01678-FLW-LHG (D.N.J. Mar. 17, 2014); Class Action Complaint, Floyd v. Nat’l Collegiate Athletic Ass’n, No. 0:14-cv-01290 (D. Minn. Apr. 25, 2014); Hartman v. Nat’l Collegiate Athletic Ass’n, No. 4:15-cv-15-00178 (N.D. Cal. Jan. 13, 2015).

tions that limit the ability of schools to distribute awards up to the cost of attendance.<sup>8</sup>

Drawing on that victory, counsel for the plaintiffs now seek to certify damages classes consisting of former and current athletes.<sup>9</sup> These athletes allege that they would have received additional funds up to the cost of attendance but for the grant-in-aid regulations.<sup>10</sup> These putative classes will attempt to show that the grant-in-aid regulations violated antitrust law and that the players subject to them should recover for the funds they claim they otherwise would have obtained to cover the cost of their attendance.<sup>11</sup> But first, Judge Wilken must decide whether to certify the classes.<sup>12</sup>

The NCAA is no stranger to antitrust lawsuits concerning the compensation of players.<sup>13</sup> However, the now-pending consoli-

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8. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532, 536 (N.D. Cal. 2015) (granting plaintiffs' joint motion for class certification of injunctive relief classes).

9. See generally Consolidated Plaintiffs' Notice of Motion and Motion to Certify Damages Classes, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) [hereinafter Motion to Certify Damages Classes] (seeking certification of damages classes and alleging NCAA and member institutions unlawfully restrained athlete compensation).

10. See *id.* at 2 (characterizing "direct pecuniary harm" as the result of "a colusive shortfall").

11. See [Unredacted] Consolidated Plaintiffs' Notice of Motion and Motion to Certify Damages Classes at 2, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) (seeking certification of damages classes and alleging NCAA unlawfully restrained athlete compensation such that grant-in-aid was "typically several thousands of dollars below the cost" to attend and play for one of schools).

12. See FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.")

13. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984) (holding NCAA engaged in price-fixing to suppress access to televised college football); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (holding players failed to identify harm to competition based on defendants' restraint of licenses for players' names and likeness), *aff'd in part, vacated in part* by 802 F.3d 1049 (9th Cir. 2015) (holding NCAA compensation rules are subject to antitrust regulation); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327 (N.C. Cal. Nov. 8, 2013) (granting certification of Federal Rule of Civil Procedure 23(b)(2) alleging antitrust violations attributed to use of players' names and likeness); *White v. Nat'l Collegiate Athletic Ass'n*, No. CV 06-0999-RGK (MANx), 2006 WL 8066803 (C.D. Cal. Oct. 19, 2006) (granting motion for certification challenging NCAA grant-in-aid limitations as violations of antitrust law); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (holding walk-on football players sufficiently plead antitrust action against NCAA); *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 WL 1207915 (N.D. Cal. 2006) (denying class certification of putative class alleging antitrust violations in suppressing walk-on player's compensation).

dated actions could meaningfully alter the way the NCAA compensates collegiate athletes and could cost the NCAA, its member conferences, and its member institutions' damages.<sup>14</sup>

Just prior to the publication of this Comment, the parties to this action agreed to settle.<sup>15</sup> Judge Wilken granted preliminary approval but will still need to permit class members to object and potentially opt-out of the settlement before she can make a final determination that the class action meets the requirements of Rule 23.<sup>16</sup> Despite the fact that the NCAA will no longer contest certification, class approval is not automatic and this Comment will argue that Judge Wilken should certify the damages classes.<sup>17</sup> Part II of this Comment will address the emergence of the grant-in-aid litigation, the requirements for class certification, and the arguments the parties have made for and against certification.<sup>18</sup> Part III will analyze the prospects of certification, ultimately arguing that Judge Wilken should certify the damages classes, and that failure to do so would undermine the utility of the class action device.<sup>19</sup> Finally, Part IV will conclude with a brief examination of the implications of certification and denial.<sup>20</sup>

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14. See Justin Sievert, *The Forgotten Antitrust Case: How an NCAA Loss in Alston Could Impact College Athletics*, SPORTINGNEWS (Nov. 4, 2015), <http://www.sportingnews.com/ncaa-football/news/ncaa-antitrust-case-shawne-alston-effects-college-athletics/1uro6chmw5naj1o6n15opblfmy> [<https://perma.cc/V7WK-82M4>] (arguing that recent grant-in-aid litigation "is a landmark era in college athletics litigation").

15. See Notice of Motion and Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) [hereinafter Unopposed Motion for Preliminary Approval of Class Action Settlement] (seeking preliminary approval of settlement classes without the NCAA's opposition).

16. See Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) [hereinafter Order Granting Preliminary Approval of Class Action Settlement] (granting preliminary approval on March 21, 2017, and setting out schedule for remaining steps prior to possible final approval of the class action).

17. For a discussion on the pending motion to certify damages classes, see *infra* notes 114–210 and accompanying text.

18. For background on the creation of current grant-in-aid litigation, requirements for class certification, and the pending motion before Judge Wilken, see *infra* notes 21–113 and accompanying text.

19. For a discussion that argues putative damages classes should be certified, see *infra* notes 114–210 and accompanying text.

20. For a discussion on the ramifications of the pending grant-in-aid lawsuit on class litigation and on college athlete compensation, see *infra* notes 211–223 and accompanying text.

## II. BACKGROUND: A LAWSUIT TO CLEAN UP A MESS CREATED LONG AGO

### A. The Emergence of the Grant-in-Aid MDL

Prior to 1976, schools could only offer their athletes with small amounts of funds in addition to funds given to cover academic expenses.<sup>21</sup> Those additional funds, commonly dubbed “laundry money,” equaled around fifteen dollars per month per player at that time, and were intended to cover such incidental expenses as sundries, gas for the player’s cars, and, as the name implies, the cost for players to launder their clothing.<sup>22</sup> But that all changed in 1976 when the NCAA forbade such compensation and began strictly limiting schools to compensating players for only a subset of school-related expenses, altering NCAA regulations and pegging the ceiling of total compensation at “grant-in-aid.”<sup>23</sup> Grant-in-aid was expressly limited to tuition, university fees, room and board, and required course materials by the NCAA.<sup>24</sup>

The NCAA recently amended the compensation structure to permit compensation up to the full cost of attendance.<sup>25</sup> But that amendment fails to address the compensation of players who played for NCAA schools prior to the alteration or at schools that

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21. See Motion to Certify Damages Classes, *supra* note 9, at 5–6 (stating that before change in regulations, players received approximately fifteen dollars per month in “laundry money”).

22. See *id.* (dubbing additional funds “laundry money”).

23. See *id.* See generally Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332–37 (2007) (outlining emergence of NCAA’s compensation of student athletes and regulation of it); NCAA MANUAL, *supra* note 3, at Bylaw 12.02.2 (delineating categories of player compensation); *id.* at Bylaw 15.02.5 (defining grant-in-aid compensation).

24. See NCAA MANUAL 2014, *supra* note 4, at Bylaw 15.02.5 (capping grant-in-aid at “tuition and fees, room and board, and required course-related books” but declining to cover full cost of attendance). Although schools may only offer a certain number of full grant-in-aid scholarships each year, they must give a minimum number of scholarships. See Steve Berkowitz & Andrew Kreighbaum, *College Athletes Cashing in with Millions in New Benefits*, USA TODAY (last updated Aug. 19, 2015, 4:05 PM), <http://www.usatoday.com/story/sports/college/2015/08/18/ncaa-cost—attendance-meals-2015/31904839/> [<https://perma.cc/7QYM-DSUE>] (specifying rule changes allowing athletes to be eligible for additional funds that will cover additional cost of attendance expenses); NCAA MANUAL, *supra* note 3, at Bylaw 15.05.2 (amended grant-in-aid to include cost of attendance, not just educational expenses).

25. Between 2014 and 2015, the NCAA amended Bylaw 15.02.5 to permit compensation up to the cost of attendance. This occurred when numerous lawsuits challenging the grant-in-aid regulation were pending against the NCAA. See, e.g., NCAA MANUAL, *supra* note 3, at Bylaw 15.02.5 (allowing compensation up to cost of attendance). But see NCAA MANUAL 2014, *supra* note 4, at Bylaw 15.02.5 (capping grant-in-aid at “tuition and fees, room and board, and required course-related books” but declining to cover full cost of attendance).

have not increased their award amounts in light of the amendment.<sup>26</sup> Furthermore, the amendment only permits schools to provide grant-in-aid up to the cost of attendance, but does not prevent schools from providing grant-in-aid packages below the cost of attendance.<sup>27</sup>

As a result of these shortcomings, in March 2014, two separate class action complaints were filed on behalf of male NCAA football and basketball players against the NCAA, which both alleged anti-trust violations.<sup>28</sup> First, putative class representatives filed *Alston v. National Collegiate Athletic Association* in the Northern District of California, which sought to enjoin the NCAA from enforcing its grant-in-aid regulations and to recover damages allegedly borne from their suppressed compensation under the grant-in-aid limit that was below their cost of attendance.<sup>29</sup> Shortly after the *Alston* complaint hit the docket, the *Jenkins v. National Collegiate Athletic Association* putative class representatives, also hoping to represent male college football and basketball players as classes, brought a similar class action complaint seeking injunctive relief and damages in the District of New Jersey.<sup>30</sup> Both the *Alston* and *Jenkins* plaintiffs alleged that the NCAA and its member institutions had violated section 1 of the Sherman Antitrust Act by conspiring to use grant-in-aid limits to suppress the market for players' services.<sup>31</sup>

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26. See generally Motion to Certify Damages Classes, *supra* note 9 (averring relaxation of grant-in-aid cap in 2015 fails to address previous market-wide suppression of compensation and has still left universities free to compensate players below the cost of attendance).

27. See generally *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532, 536 (N.D. Cal. 2015) (granting plaintiffs' joint motion for class certification).

28. See *id.* at 538 (citing two complaints filed against NCAA in separate federal courts during March 2014).

29. See Complaint at 1–3, *Alston v. Nat'l Collegiate Athletic Ass'n*, No. 4:14-cv-01011-CW (N.D. Cal. filed Mar. 4, 2014) (seeking “an injunction that enjoins the NCAA and the Power Conference Defendants from maintaining and abiding by the present NCAA Bylaw that limits financial aid to the presently-defined [grant-in-aid]” and “an award of damages for the difference between the grants-in-aid award and the Cost of Attendance”).

30. See Complaint at 2, *Jenkins v. Nat'l Collegiate Athletic Ass'n*, (No. 3:14-cv-01678) (D.N.J. filed Mar. 17, 2014) (seeking “to permanently enjoin violations by each of Defendant of the federal antitrust laws” and “to recover individual damages resulting from those violations”).

31. Hence, the argument goes, but for the suppression caused by the grant-in-aid cap on compensation, competition for their services would have been higher, as would their compensation. See Consolidated Plaintiffs' and *Jenkins* Plaintiffs' Amended Joint Motion for Class Certification at 6–8, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) (“Under the current NCAA Constitution and Bylaws, Plaintiffs and class members receive artificially depressed compensation for their labor

The *Alston* plaintiffs expeditiously moved the Judicial Panel on Multidistrict Litigation (JPML) to consolidate the related cases in one federal district court via 28 U.S.C. section 1407.<sup>32</sup> While that motion was still pending, different plaintiffs brought an additional, similar class action complaint in the District of Minnesota.<sup>33</sup> Notwithstanding the NCAA's opposition, the JPML granted the motion to consolidate, and in June of 2014, transferred all of the related actions against the NCAA to Judge Wilken in the Northern District of California in order to "eliminate duplicative discovery; prevent inconsistent pretrial rulings, *including with respect to class certification*; and conserve the resources of the parties, their counsel, and the judiciary."<sup>34</sup>

The newly-formed "consolidated plaintiffs" filed a joint motion for class certification of injunctive relief classes in November 2014 that they eventually amended in February 2015 to add even more parties who had filed other class action complaints in the interim that had become part of the grant-in-aid litigation.<sup>35</sup> Under the motion, the consolidated plaintiffs sought and prevailed in certifying classes under Federal Rule of Civil Procedure 23(b)(2) that now seek to enjoin the NCAA from permitting full grant-in-aid awards below the cost of attendance.<sup>36</sup> In the wake of that success followed the topic of this Comment, the now-pending motion to certify damages classes of NCAA athletes who allege that the market for their services was unjustly suppressed, causing them antitrust injuries.<sup>37</sup>

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services in the relevant labor markets. But for those rules, and the conspiracy to apply and enforce them, that compensation would be higher."); *see also generally* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2004) (outlining prohibition on monopolies and restraints of trade).

32. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 538 (stating that transfer motion was filed with JPML in March, the same month complaints were filed); *see also* Motion of Plaintiffs for Transfer of Actions to the Northern District of California Pursuant to 28 U.S.C. §1407 for Coordinated or Consolidated Pretrial Proceedings, No. 2541 (J.P.M.L. Mar. 19, 2014) (moving JPML to transfer *Alston* and *Jenkins* to Northern District of California).

33. Class Action Complaint, *Floyd v. Nat'l Collegiate Athletic Ass'n*, No. 0:14-cv-01290 (D. Minn. Apr. 25, 2014) (seeking certification of both men's and women's basketball classes).

34. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 538–39 (emphasis added) (noting history of litigation).

35. *See id.* at 538 (noting filing of *Floyd* while JPML motion was pending and that *Hartman* was filed directly in the Northern District to add a class representative for female basketball players).

36. *See id.* at 536 (granting certification but noting that consolidated plaintiffs had not yet moved to certify damages classes under Rule 23(b)(3)).

37. *See generally* Motion to Certify Damages Classes, *supra* note 9 (moving to certify damages classes of collegiate male football players and both male and female basketball players).



## B. Rule 23: The Certification of Class Actions

Federal Rule of Civil Procedure 23 dictates that a judge must certify a class action because it is brought in the aggregate by one or several members of a proposed class who purport to represent individuals who are absent from the litigation and may know nothing about the litigation at inception.<sup>38</sup> In federal courts, Rule 23 creates a heavy burden for certification with the intention of safeguarding the rights of absent class members and preserving the preclusive effect of a class action judgment.<sup>39</sup>

Class certification itself starts with four threshold requirements under Rule 23(a)(1)–(4): numerosity, commonality, typicality, and adequacy.<sup>40</sup> But satisfaction of Rule 23(a) is only the beginning, because at least one of the four possible types of class actions under Rule 23(b) must also be met for a court to certify a class.<sup>41</sup>

In meeting the demands of certification, the first threshold requirement of all class actions is Rule 23(a)(1) or “numerosity.”<sup>42</sup> Meeting numerosity is only possible if the proposed “class is so numerous that joinder of all members is impracticable.”<sup>43</sup> The crux of numerosity is not whether a certain minimum number of puta-

38. See FED. R. CIV. P. 23(a) (stating suits may be brought on behalf of others).

39. See FED. R. CIV. P. 23 (specifying requirements for valid class actions in federal courts). Additionally, class actions are regulated by case law and other statutes, like the Class Action Fairness Act of 2005, 28 U.S.C. section 1332(d). Because class actions are brought on behalf of individuals who are likely unaware of the pending litigation, additional requirements like notice are often required so that class members can opt-out. See FED. R. CIV. P. 23(c)(2)(B) (specifying requirements of notice for 23(b)(3) classes). *But see* FED. R. CIV. P. 23(c)(2)(A) (stating notice is optional for 23(b)(1) and 23(b)(2) classes). Moreover, because the rights of class members will be subject to any preclusive effect of a class judgement, it is vital that absent class members are adequately represented to assure their due process rights are not infringed. See FED. R. CIV. P. 23(a)(4) (requiring adequate representation).

40. See WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:1 (5th ed. 2011) (introducing class actions and requirements of Rule 23(a)).

41. See Amendments to Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims Rules of Criminal Procedure, 39 F.R.D. 69, 100 (1966) (stating that the Rule 23(a) requirements are “perquisites” and “necessary but not sufficient conditions for a class action” but that “Subdivision (b) describes the additional elements which in varying situations justify the use of a class action”). For certification of the damages classes here, only Rule 23(b)(2) and Rule 23(b)(3) are relevant because the injunctive classes were certified under 23(b)(2) and the consolidated plaintiffs have proposed the damages classes under Rule 23(b)(3). See *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Anti-trust Litig.*, 311 F.R.D. at 547 (granting certification of injunctive relief classes under 23(b)(2)); Motion to Certify Damages Classes, *supra* note 9, at 15 (bringing certification of damages classes pursuant to Rule 23(b)(3)).

42. See RUBENSTEIN, *supra* note 40, § 3:11 (introducing how joinder may be impracticable).

43. FED. RULE. CIV. P. 23(a)(1).

tive class members exist, but rather whether joinder of class members would be impracticable.<sup>44</sup> Otherwise, joinder is preferable because class actions by their very nature diminish the due process rights of the individual litigants.<sup>45</sup> When Judge Wilken previously certified the injunctive relief classes in the grant-in-aid litigation, she found the requirement of numerosity was met because there were thousands of putative class members (current NCAA players subject to the NCAA's grant-in-aid restrictions on player compensation) dispersed throughout the country.<sup>46</sup>

The second requirement for certification comes from Rule 23(a)(2) and is called "commonality," which demands that "there are questions of law or fact common to the class."<sup>47</sup> Commonality asks whether there is at least one common question of law or fact shared by all the putative class members, because without at least one such common issue, there would be nothing to bind the class together.<sup>48</sup> Looking again at the certification of the injunctive classes in the grant-in-aid litigation, Judge Wilken held that commonality was met because the consolidated plaintiffs alleged that the grant-in-aid violations applied generally to the class as a whole, giving rise to common questions of whether the grant-in-aid regulation violated antitrust law and thereby impacted individual class members.<sup>49</sup>

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44. See *Phila. Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) (approving class action of possibly only twenty-five litigants).

45. See *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940).

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires. To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

*Id.* (citations omitted).

46. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 539.

47. FED. R. CIV. P. 23(a)(2); RUBENSTEIN, *supra* note 40, § 3:18 (introducing concept of commonality).

48. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (holding that a putative class representative must "affirmatively demonstrate" that they are "prepared to prove" that common question of law or fact applies to purported class).

49. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 539.

The third requirement for certification comes from Rule 23(a)(3) and requires “typicality” of the putative class representative, meaning that the representative parties of the putative class must have claims or defenses that are “typical of the claims or defenses of the class.”<sup>50</sup> Typicality is supposed to assure that class representatives are archetypal members of the class, so that by pursuing their own interests, they will concurrently benefit the class as whole.<sup>51</sup> Recalling again the certification of the injunctive classes in the grant-in-aid litigation, the court held that typicality was met because all of the putative class representatives were the recipients of grant-in-aid awards and all alleged that the identical grant-in-aid regulations resulted in “cognizable antitrust injuries” for themselves and the class alike.<sup>52</sup>

The final requirement from Rule 23(a) is called “adequacy” and is met if the proposed “representative parties will fairly and adequately protect the interests of the class.”<sup>53</sup> With a class action, parties that will be bound by the results of the litigation are noticeably absent from the action, and thus their due process rights can only be protected by adequate representation.<sup>54</sup> Though the language of Rule 23(a)(4) calls for an evaluation of the “representative parties,” Rule 23(g)(4) requires a court to examine the adequacy of class counsel.<sup>55</sup> After an extensive battle on this point during certi-

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50. See FED. R. CIV. P. 23(a)(3) (defining typicality). This provision of Rule 23(a) serves to guard against the possibility that the class representative is actually not representative of the class as a whole, but does not require that the class representative and class members have identical claims. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (1998) (“Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.”).

51. See *P.P. v. Compton Unified Sch. Dist.*, No. CV 15-3726-MWF (PLAx), 2015 WL 5752770, at \*17 (C.D. Cal. Sept. 29, 2015) (“[T]ypicality insists that the class representative be a member of the class and have claims similar to those of other class members, and the requirement rests upon the belief that such a representative, pursuing her own interests, will pursue the class’s as well.”) (quoting RUBENSTEIN, *supra* note 40, § 3:28).

52. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D at 539–40.

53. FED. R. CIV. P. 23(a)(4).

54. See *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (“[T]here is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is res judicata as to members of the class who are not formal parties to the suit.”); see also RUBENSTEIN, *supra* note 40, § 3:50 (“Adequate representation is therefore the capstone of the Rule 23(a) requirements: it ensures that the class’s champion will pursue its interests sufficiently well so as to produce a judgment that can fairly bind all members of a group who cannot appear before the court individually.”).

55. FED. R. CIV. P. 23(g)(4) (requiring that “[c]lass counsel must fairly and adequately represent the interests of the class”). Prior to 2003, adequate counsel

fication of the injunctive relief classes, Judge Wilken ultimately held that adequacy was met by the representatives of the injunctive relief classes because their pursuit of the injunction against the NCAA permitting grant-in-aid caps below cost of attendance would benefit all class members.<sup>56</sup>

Though not an express requirement, often interlaced with all of the threshold elements is the implicit concern of whether the class itself is ascertainable.<sup>57</sup> If class members cannot be identified or ascertained, then class certification fails because without an idea of who belongs to the class, a court cannot readily determine if members are numerous, they share common issues, the class representatives are typical, and whether their representation of the unidentifiable class members would be adequate.<sup>58</sup> In approving the injunctive relief classes in the grant-in-aid litigation, the court made no mention of ascertainability, therefore indicating that the identification of class members was not an issue.<sup>59</sup>

Once the threshold aspects of Rule 23(a) have been met, under Rule 23(b)(3) plaintiffs may bring a class action to recover damages.<sup>60</sup> The rule requires that common questions of law and fact implicated by Rule 23(a)(2) must “*predominate* over any questions affecting only individual members,” such that “a class action is

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was not expressly required by Rule 23 but was often read into Rule 23(a)(4). See RUBENSTEIN, *supra* note 40, § 3:52.

Although Rule 23(a)(4) provides that a class action may be maintained only if ‘the representative *parties* will fairly and adequately protect the interests of the class,’ courts have long used Rule 23(a)(4) as an invitation to scrutinize the adequacy of class *counsel* as well as the adequacy of the class *representatives*. That review arguably exceeded the authority that Rule 23(a)(4) gave a court, but Congress closed that gap—if gap it had been—when, in 2003, it enacted Rule 23(g).

*Id.* (emphasis in original) (quoting FED. R. CIV. P. 23(a)(4)).

56. See *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D at 545.

57. See *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 235–37 (N.D. Cal. 2014) (disclaiming awareness of any Supreme Court of Ninth Circuit Court of Appeals precedent requiring ascertainability of class members, but joining with other courts in holding that class must inherently be definite to recover under Rule 23(b)(3)).

58. See *Mazur v. Ebay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) (holding that class defined as those who would have won unsuccessful eBay bids but for phony bidders was unascertainable).

59. See generally *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D at 532–47 (making no mention of ascertainability issues).

60. FED. R. CIV. P. 23(b). Injunctive relief classes can also seek *incidental* damages that are not the main focus of the litigation, but seeking any damages under 23(b)(2) has recently been strongly discouraged by the Supreme Court. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363–64 (holding that class of female Wal-Mart employees that sought damages under 23(b)(2) was not properly certified in part because 23(b)(2) failed to provide procedural protections of 23(b)(3)).

*superior* to other available methods for fairly and efficiently adjudicating the controversy.”<sup>61</sup> Thus, certification under Rule 23(b)(3) is itself a two-part process: first, whether the common questions of law or fact predominate over individual issues, and second, whether a class action is superior to other forms of adjudication.<sup>62</sup> Predominance requires that there is some common core issue, central to the parties’ dispute, but does not require that the predominating issue is dispositive of the case or that the parties have identical damages.<sup>63</sup> Superiority can be boiled down to determining whether proceeding as a class would be superior to proceeding as a set of individual actions, which often may be impracticable for plaintiffs with small amounts of individual damages to pursue.<sup>64</sup> It is important to note, however, that class certification is not based solely on the pleadings but instead requires the court to apply “rigorous analysis” to the plaintiff’s motion to certify.<sup>65</sup>

### C. The Athletes’ Side: Pending Motion to Certify Damages Classes in the Grant-in-Aid MDL

The consolidated plaintiffs began their pursuit of certification of the damages classes just like they did with the injunctive relief

61. FED. R. CIV. P. 23(b)(3) (emphasis added).

62. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must ‘predominate over any questions affecting only individual members’; and class resolution must be ‘superior to other available methods for the fair and efficient adjudication of the controversy.’ In adding ‘predominance’ and ‘superiority’ to the qualification-for-certification list, the Advisory Committee sought to cover cases ‘in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

*Id.*

63. See *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1183 (11th Cir. 2010) (reversing certification of class of 260 hospitals that sued insurers for underpayment of patients’ reimbursements, finding class failed to satisfy predominance because of distinctive contract terms, substantive contract law, and plaintiffs’ individual defenses).

64. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998) (holding that superiority requires a “comparative evaluation of alternative mechanisms of dispute resolution”); see also RUBENSTEIN, *supra* note 40, § 4:85 (“The superiority inquiry tests which of the alternatives is likely to be the most fair and efficient method of adjudication, and the ‘superior’ moniker implies that the search is for the best of the lot.”).

65. *Wal-Mart Stores*, 564 U.S. at 350–51 (“Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule. . . . [C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” (internal quotations omitted)).

classes, because Rule 23(a) must always be satisfied for successful certification.<sup>66</sup> Accordingly, the consolidated plaintiffs asserted that the putative class members are so numerous that joinder would be impracticable because there are thousands of current and former NCAA athletes dispersed throughout the country, which is demonstrated by the NCAA's "squad lists" that show the members of the various schools' teams.<sup>67</sup> Furthermore, the consolidated plaintiffs argued that commonality is satisfied because there are numerous, significant common questions of law and fact revolving "around the central issues of the existence and effect of the alleged conspiracy in restraint of trade" via the grant-in-aid caps on athletes' compensation.<sup>68</sup>

The consolidated plaintiffs likewise purported that the putative class representatives satisfy typicality because they all allege to have been subject to the same antitrust violation and the same resulting harm, with the antitrust violation being the cap on grant-in-aid and the harm being reduced compensation.<sup>69</sup> Putative class representatives and putative class members therefore both would have otherwise obtained additional funds in absence of the cap, making the class representatives typical.<sup>70</sup> Adequacy is satisfied, the consolidated plaintiffs argued, because no conflicts of interest exist between the putative class representatives and the putative class, and consequently, the class representatives' pursuit of damages will benefit the class as a whole.<sup>71</sup> Furthermore, the consolidated plaintiffs argued that class counsel are seasoned class action litigators and

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66. The plaintiffs' proposed damages classes mirror those certified under Rule 23(b)(2), though they allow for the additional inclusion of recipients of partial grant-in-aid awards. See Motion to Certify Damages Classes, *supra* note 9, at 9–10 (proposing three damages classes: one consisting of NCAA male football players, one consisting of NCAA men's basketball players, and one consisting of NCAA women's basketball players).

67. *Id.* at 11–12 (arguing numerosity was met on similar grounds in different class action against NCAA regarding name and likeness of players in media) (citing *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at \*3 (N.D. Cal. Nov. 8, 2013)).

68. *Id.* at 12 (noting interrelationship between common questions under 23(a)(2) and predominance of common questions under 23(b)(3)).

69. See *id.* at 12–13. The consolidated plaintiffs claimed that typicality was "plainly met here" as it was in the *White* litigation where the plaintiffs alleged a horizontal agreement between NCAA and member institutions to fix the grant-in-aid award amounts. See *White v. Nat'l Collegiate Athletic Ass'n*, No. CV 06-0999-RGK (MANx), 2006 WL 8066803, at \*2 (C.D. Cal. Oct. 19, 2006) (finding typicality).

70. See Motion to Certify Damages Classes, *supra* note 9, at 13 (stating class members and representatives rely on identical "facts and legal theories").

71. See *id.* at 13–14 (stating interests of class members and representatives are "squarely aligned").

therefore adequate.<sup>72</sup> Although not expressly required by Rule 23(a), the consolidated plaintiffs lastly assured the court that the putative class is ascertainable because the NCAA possesses “squad lists” that reflect the scholarship status of all putative class members.<sup>73</sup>

With the threshold of Rule 23(a) purportedly satisfied, the consolidated plaintiffs turned to the predominance and superiority requirements of Rule 23(b)(3).<sup>74</sup> In an antitrust case, predominance is satisfied if a price-fixing conspiracy existed, that conspiracy caused injury, and the injury resulted in damages.<sup>75</sup> The consolidated plaintiffs first maintained that the NCAA and member institutions engaged in systematic price-fixing by instituting the 1976 cap on grant-in-aid below the cost of attendance.<sup>76</sup> They further argued that common proof will show that the defendants violated antitrust law by suppressing the market for the consolidated plaintiffs’ services.<sup>77</sup> Consolidated plaintiffs purported that they could “utilize class-wide economic evidence to demonstrate that Defendants violated the antitrust laws” based on statistical modeling by their expert, Dr. Daniel Rascher.<sup>78</sup> Thus, the consolidated plaintiffs claimed that they could demonstrate the existence of a conspiracy by showing that the conduct of the NCAA and its member institu-

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72. *See id.* at 14 (noting both Hagens Berman and Pearson Simon have substantial experience with complex antitrust suits against the NCAA).

73. *See id.* at 14–15 (stating that squad lists will easily ascertain class membership).

74. *See id.* at 15.

75. *See id.* (citing *In re Static Random Access (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592, at \*5 (N.D. Cal. Sept. 29, 2008) (finding predominance satisfied by class of direct purchasers of SRAM for computers)).

76. *See id.* at 16 (referring to documents already produced and stating that “[t]here is a very substantial amount of documentary evidence and other proof illustrating the existence of the conspiracy.”).

77. *See id.* (citing three documents with illustrative quotes by NCAA’s agents implying conspiracy).

78. *Id.* at 16–17. Relying on their expert Dr. Rascher, plaintiffs highlighted the five following issues that will be common and predominate among the class:

- (1) [T]he process for identifying relevant markets and demonstrating market power,
- (2) the anti-competitive harm that all Class Members have suffered, and the common proof by which this anti-competitive harm can be proven,
- (3) the analysis of Defendants’ purported pro-competitive justifications,
- (4) the analysis of Plaintiffs’ proffered less restrictive alternatives, and
- (5) the fact that, but for the restraint, NCAA member schools would have competed more vigorously to acquire the services of Division I athletes, thereby increasing the value of Class Members’ scholarships.

*Id.*

tions demonstrates that a conspiracy suppressed the compensation of college athletes.<sup>79</sup>

But showing a conspiracy is only the first step, and consolidated plaintiffs must furthermore show that class members were actually injured by the antitrust activity.<sup>80</sup> To that end, consolidated plaintiffs asserted that examining the period before the NCAA instituted the grant-in-aid regulations and comparing it to the period after the NCAA removed the grant-in-aid cap will demonstrate the impact the regulations had on the market when the cap was in place.<sup>81</sup> The consolidated plaintiffs proposed to show two types of injuries through the statistical analysis of compensation data from before and after the grant-in-aid caps.<sup>82</sup> Under the first method of purported market-wide economic harm, the NCAA's regulations allegedly had depressed the market, and the subsequent relaxation of the cap and the emergence of cost of attendance scholarships demonstrates the harm class members suffered before the NCAA permitted schools to compensate players up to the cost of attendance.<sup>83</sup> For the second type, called pecuniary harm, the consolidated plaintiffs claimed they will show that class members would have received greater compensation for their services in the absence of the grant-in-aid cap.<sup>84</sup>

The consolidated plaintiffs argued that they have models in place that can ascertain the damages with more than enough accu-

79. *Id.* at 17 (citing *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013) (finding predominance was not undermined in fraud-on-the-market case because investors conceivably could have considered immaterial representations by the defendant when making their investments)).

80. For a description on the process for finding predominance, see *supra* notes 60–65 and the accompanying text.

81. See Motion to Certify Damages Classes, *supra* note 9, at 17–18. Recall that prior to the introduction of the grant-in-aid cap, schools provided players with additional sums above and beyond tuition, but ended that practice when the cap came into effect in 1976. Relatedly, since the amendment in 2015 to the grant-in-aid cap, some schools have begun to reevaluate the aid they offer to athletes, with some compensating players up to the cost of attendance. See *id.* at 18; see also *supra* notes 21–27 and accompanying text.

82. See Motion to Certify Damages Classes, *supra* note 9, at 17–19 (proposing common impact of artificially-depressed cap on athletic scholarships resulting in “market-wide economic harm” of grant-in-aid cap and “pecuniary harm” to the players themselves).

83. See *id.* at 18–19 (arguing actions by NCAA member institutions before and after cap was lifted demonstrate market-wide impact).

84. See *id.* The players who were subject to pecuniary harm are further broken down into two groups: one consisting of players at schools which immediately offered full cost of attendance aid once the regulations were changed, and those at schools that have offered only some compensation above the original grant-in-aid amount or will in the future receive aid up to the cost of attendance. See *id.* at 19–20.



racy to satisfy the certification stage of the case.<sup>85</sup> They characterized the method as “simple,” requiring only that they first identify the players who would have achieved greater compensation but for the original grant-in-aid cap, and then mathematically calculate the damages sustained due to that cap based on Dr. Rascher’s projections.<sup>86</sup> Lastly, consolidated plaintiffs noted that class treatment of these small claims is “superior” than if the players brought individual actions and, furthermore, that counsel are more exceedingly qualified to handle the class litigation.<sup>87</sup> Therefore, plaintiffs alleged that the requirements of Rule 23(a) and (b)(3) are satisfied and the damages classes should be certified.<sup>88</sup>

#### D. The NCAA’s Side: Opposition to Certification of Damages Classes

On August 26, 2016, the NCAA filed a brief in opposition to the consolidated plaintiffs’ proposed certification of damages classes under Rule 23(b)(3), making three primary arguments to undermine predominance.<sup>89</sup> First, the NCAA argued that predominance would fail because individual plaintiffs would not be able to demonstrate that the grant-in-aid regulation harmed all

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85. *See id.* at 17 (stating “[a]ll the Court must do is find that [consolidated] Plaintiffs have ‘come forward with seemingly realistic methodologies.’” (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at \*8 (N.D. Cal. June 5, 2006))).

86. *Id.* at 21 (stating Dr. Rascher’s method requires only the squad lists of those who are receiving cost of attendance, those receiving above the old cap on grant-in-aid, and those who attend schools that have committed to attaining cost of attendance scholarships).

87. *Id.* at 23–24 (arguing that class litigation is preferable because any amount individual plaintiffs recover would preclude them from pursuing litigation individually).

88. *See id.* at 24–25 (concluding that class should be certified because NCAA violated antitrust laws and thousands of players suffered same harm).

89. *See generally* Defendants’ Memorandum of Points and Authorities in Opposition to Consolidated Plaintiffs’ Motion to Certify Damages Classes, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) [hereinafter *Opposition to Motion to Certify Damages Classes*] (opposing certification of damages classes). Unlike in its opposition to the certification of the injunctive relief classes under Rule 23(b)(2), the NCAA seemingly conceded that the elements of 23(a) were satisfied in the consolidated plaintiffs’ brief, because the NCAA immediately plunges into an attack of the consolidated plaintiffs’ purported satisfaction of predominance under Rule 23(b)(3). *See id.* at 9 (beginning defendants’ brief with “[t]he particular inquiry here concerns the requirements of Rule 23(b)(3)” and never addressing Rule 23(a), which always must be satisfied for class certification). The certification sought here was about the same regulation and brought on behalf of overlapping groups of players as the injunctive relief classes. *See id.* Thus, it seems that because Rule 23(a) was met there, it also will be here. *See generally id.*

plaintiffs in a common way, and would instead have to show how it impacted each player individually.<sup>90</sup> While the market-wide impact model *might* show that competition for the services of players was reduced by the NCAA's previous grant-in-aid regulations, the NCAA claimed that the market-wide impact theory fails to show that each individual suffered injury as a result of the allegedly weakened market for their services.<sup>91</sup> Thus, the NCAA contended that "[s]imply put, common 'proof of conspiracy is not proof of common injury.'" <sup>92</sup> Furthermore, the NCAA attacked the consolidated plaintiffs' inclusion of partial grant-in-aid recipients in the class definitions, alleging the compensation of those players was subject to highly individualized questions, different from those of players who received full grant-in-aid awards, thus again undermining predominance.<sup>93</sup>

The NCAA next turned to the consolidated plaintiffs' theory of pecuniary harm, and argued that the consolidated plaintiffs will be unable to show that each plaintiff sustained the same damages and that this should prove to be a fatal flaw for predominance.<sup>94</sup> Essentially, the NCAA maintained that each individual athlete has been compensated based on a unique assessment by distinct schools.<sup>95</sup> Even if that compensation had been untethered from the previous grant-in-aid structure, the NCAA contended that a valuation of damages would require an individualized assessment of that athlete's compensation and how it would have been determined by the diverse set of factors utilized by schools that ultimately provided that aid.<sup>96</sup> Purportedly, even different players on the same team at

90. *See id.* at 10–11 (claiming plaintiffs cannot satisfy necessary precursor of showing there was antitrust violation before showing their was antitrust impact).

91. *See id.* at 11–14 (alleging consolidated plaintiffs cannot show substantive case and therefore fail to achieve rigorous standard of class certification).

92. *Id.* at 13 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005)).

93. *See id.* at 11–12 (arguing consolidated plaintiffs do not and cannot demonstrate that common questions predominate with regard to which partial grant-in-aid recipients).

94. *See id.* at 14 (citing concession by Dr. Rascher that not every putative class member was injured by the grant-in-aid regulation because some would not have received larger scholarships).

95. *See id.* at 17.

The enormous body of evidence adduced by plaintiffs from the individual schools shows that the way they award financial aid to student-athletes and account for that aid varies from school to school, and may vary from student-athlete to student-athlete within the same school, and from year to year for the same student-athlete.

*Id.*

96. *See id.* (characterizing Dr. Rascher's model as flawed by arguing that identical monetary awards would actually be product of different calculations).

the same school who both received full grant-in-aid awards had been compensated based on a unique assessment; therefore, evidence between teammates would not even be helpful in determining damages for class members.<sup>97</sup>

Lastly, the NCAA argued that predominance does not exist because the amount of damages sustained by each player would be different, leading to highly individualized assessments of damages, thereby eliminating the predominance of common issues.<sup>98</sup> Even with regard to schools that, since the amendment to the grant-in-aid cap, have expanded their players' compensation up to the cost of attendance, the NCAA challenged the assumption that these players would have been compensated to a greater amount than they were when grant-in-aid was capped below the cost of attendance.<sup>99</sup> According to the defendants, each individual athlete's compensation package would need to be evaluated to determine what additional compensation he or she would have received, if any, in the absence of the grant-in-aid cap.<sup>100</sup> Common questions could not predominate then, if each player was so uniquely impacted by the regulation.<sup>101</sup>

Furthermore, ascertaining whether an individual even is a class member will require an individualized assessment that vitiates predominance, according to the NCAA.<sup>102</sup> Former players may have received less than a full grant-in-aid award because other forms of aid existed, such as Pell grants, that would allow the school to diminish the grant-in-aid below the scholastic expenses it was permitted to cover, and thereby free up additional scholarships funds and slots for other athletes.<sup>103</sup> The NCAA maintained that there is no definitive proof that these players would have received full grant-in-

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97. *See id.* (alleging scholarship award to Georgetown basketball player one year will not prove anything about award to same player in different year).

98. *See id.* at 11 (stating calculating individual damages will vitiate predominance).

99. *See id.* at 19 (claiming Dr. Rascher "speculates, with no absolutely no factual or economic support" that players who attend schools that have since raised their awards would have been given cost of living scholarships in absence of grant-in-aid caps).

100. *See id.* at 21 (citing *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d. Cir. 2011) (upholding denial of certification where plaintiffs attempted to show common injury by averaging for medical monitoring class)) (opining that averages will not illuminate what particular player would have been awarded).

101. *See id.* (stating jury would have to make individualized assessments of liability which would undermine predominance).

102. *See id.* at 21–22 (arguing partial grant-in-aid recipients should be excluded).

103. *See id.* at 22 (noting potential reductions in grant-in-aid awards due to other financial aid sources).

aid in the absence of the cap, and that even if there were, the answer to that question would require an individualized assessment of each player's aid package.<sup>104</sup>

In sum, the NCAA argued that damages calculations will not be mechanical and will instead entail complex evaluations of each player's "unique financial aid packages comprised of athletics-based aid and often one or more of the hundreds of different federal, state, local, institutional or association-sponsored grants."<sup>105</sup> The athletes who competed at the various NCAA programs involved received unique evaluations of and unique awards for their services that would consequently result in unique damages if an antitrust violation even had occurred.<sup>106</sup> Therefore, the calculation of damages would be highly complicated because of the disparate sources of aid players received and would require individualized attention under the Seventh Amendment.<sup>107</sup>

#### E. The Athletes' Retort: Consolidated Plaintiffs' Reply in Support of Certification

On October 7, 2016, the consolidated plaintiffs filed a reply to challenge the NCAA's argument that their expert's methodology will not satisfy predominance by failing to produce class-wide proof of antitrust injury and pecuniary damages.<sup>108</sup> The consolidated plaintiffs also confronted the NCAA's attack on their inclusion of partial grant-in-aid recipients which the NCAA claimed would mud-

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104. *See id.* at 23 ("But neither Dr. Rascher nor the plaintiffs have any idea, with respect to any partial [grant-in-aid] recipient, whether their receipt of a partial [grant-in-aid] was really just an accounting issue, or something more serious.").

105. *Id.* at 24 (stating "the evidence conclusively establishes that Division I institutions have often treated a particular scholarship differently from on student to another in a given year, and from one year to another for the same student").

106. *See id.* at 24–25 (citing defense expert Dr. Jonathan Orszag and concluding that proof of damages will be a complex and individualized task for a jury).

107. *See id.* at 25 (opining that short ten-minute presentations on each allegedly injured player's aid could take up 16,900 hours of jury time and that this unmanageable and highly individualized feature undermines predominance and the superiority of class treatment).

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII

108. *See* Consolidated Plaintiffs' Reply Memorandum in Support of Motion to Certify Damages Classes at 5–14, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) [hereinafter Reply in Support of Motion to Certify Damages Classes] (contending that application of Dr. Rascher's statistical models will apply common methodology in mechanical fashion to putative class members).

dle the ascertainability of the classes.<sup>109</sup> Regarding partial grant-in-aid recipients, the consolidated plaintiffs responded that various places in the NCAA's records indicate who received partial awards, and that other offsetting awards like Pell grants are also reflected in the NCAA's own records.<sup>110</sup> The NCAA possesses most of the records that will determine class membership, with the member universities possessing any others, so the consolidated plaintiffs proposed that the records may be voluminous, but the process is sound and should not defeat predominance because putative class members are ascertainable via the records.<sup>111</sup>

Lastly, the consolidated plaintiffs challenged the NCAA's argument that the calculations of a class member's damages will be highly individualized and thus should eliminate predominance of common issues.<sup>112</sup> The consolidated plaintiffs maintained that the difficulty of calculating damages does not itself defeat predominance, especially because the proof of damages relies on a common statistical model developed by their expert, Dr. Rascher, that can be applied mechanically to determine damages for each individual class member.<sup>113</sup>

### III. ANALYSIS: WHY CERTIFICATION IS PROPER AND WHAT IT MEANS FOR CLASS LITIGATION

It is not surprising that the parties have filed dense briefs for and against certification of the damages classes, because certification is often the central focus of class litigation.<sup>114</sup> The fact that the injunctive relief classes were certified does not guarantee that the

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109. See generally *id.* at 2–5 (responding to NCAA's opposition).

110. *Id.* at 13–14 (arguing that, but for the grant-in-aid cap, the players whose awards were offset by other sources of aid like Pell grants still would have received larger awards).

111. See *id.* at 3 (claiming “all the law requires” for ascertainability is that class members can be identified by “objective criteria”).

112. See *id.* at 13–14 (asserting Dr. Rascher's algorithm will uniformly calculate damages).

113. See *id.* at 14 (citing *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (holding the complexity of damages calculations alone is insufficient to defeat class certification)).

114. See Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009).

With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial. In terms of their real-world impact, class settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant's operations.

*Id.*

damages classes will be, particularly because class certification requires “rigorous analysis,” meaning Judge Wilken must probe into the merits of the case itself.<sup>115</sup> While the parties have agreed to settlement and Judge Wilken has granted preliminary approval of the class action, preliminary approval of a class action settlement only requires only a cursory analysis and Judge Wilken will still need to determine that the class action meets the demands of Rule 23 before entering a final order of approval.<sup>116</sup> Thus, despite the recent developments in this case, this Section will analyze the merits of the parties’ arguments against the backdrop of Rule 23 to argue that Judge Wilken ultimately should certify and grant final approval to the class action.<sup>117</sup> Due to the prospect of millions of dollars in damages, successful certification should change the way college athletes are compensated, but this case should also serve as a vessel to highlight the important role statistical analysis can and should play in satisfying predominance.<sup>118</sup>

#### A. Satisfaction of Rule 23(a)(1)—Numerosity

Even though the NCAA has seemingly conceded the Rule 23(a) factors in its opposition to the motion for certification, the Northern District of California will still need to ensure that each factor is met.<sup>119</sup> Fortunately for the consolidated plaintiffs, here numerosity should be met because it was met for the injunctive relief classes in this same grant-in-aid MDL.<sup>120</sup> In the published opinion certifying the injunctive relief classes, this same court noted

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115. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (“With the same concerns in mind, we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”).

116. See *Order Granting Preliminary Approval of Class Action Settlement*, *supra* note 16, at 6 (granting preliminary approval and setting fairness hearing for November 17, 2017); *Unopposed Motion for Preliminary Approval of Class Action Settlement*, *supra* note 15, at 5 (“Preliminary approval is thus not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the ‘range of possible approval.’”).

117. For a discussion advocating certification, see *infra* notes 119–194 and accompanying text.

118. For a discussion on the broad impact of the certification of this case and the use of statistical evidence to show predominance, see *infra* notes 195–210 and accompanying text.

119. See *Falcon*, 457 U.S. at 161 (stating the prerequisites of Rule 23(a) must always be satisfied for certification); see also *Opposition to Motion to Certify Damages Classes*, *supra* note 89, at 9 (ignoring potential arguments against Rule 23(a) elements of Motion to Certify Damages Classes).

120. See *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532, 539 (N.D. Cal. 2015) (citing *In re Citric Acid Antitrust Litig.*, No. 95-1092, C-95-2963 FMS, 1996 WL 655791, at \*3 (N.D. Cal. Oct. 2,

that joinder of the various NCAA players throughout the country would be impossible and held that Rule 23(a)(1) was met.<sup>121</sup> Here, the damages classes are technically larger than the injunctive relief classes, because the damages classes include all players during a time period between March 5, 2010, and March 21, 2017, the date of preliminary approval.<sup>122</sup> In contrast, the injunctive relief classes were limited to players who received full grant-in-aid awards, meaning that the damages classes must be larger due to the fact that they include partial grant-in-aid recipients.<sup>123</sup> If joinder of the smaller injunctive relief classes was impracticable, then joinder of the larger damages classes must be too, and therefore numerosity should be met in the eyes of the court.<sup>124</sup>

### B. Satisfaction of Rule 23(a)(2)—Commonality

Although the NCAA outwardly did not contest commonality, Judge Wilken will still need to ensure that commonality is met because all threshold requirements must be met for certification.<sup>125</sup> Also, common issues logically may not predominate pursuant to 23(b)(3) if there are not common issues pursuant to 23(a)(2) from which predominance may arise.<sup>126</sup> Again, fortunately for the consolidated plaintiffs, commonality should also easily be met here, in part because commonality was not an issue during certification of the injunctive relief classes.<sup>127</sup> Because the NCAA's grant-in-aid limits gave rise to commonality for the injunctive relief classes, the grant-in-aid limits will also satisfy commonality for the damages clas-

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1996)) (finding numerosity met where plaintiffs indicated that class membership would be dispersed nationwide)).

121. *See id.* (noting “proposed classes comprise thousands of potential members because of the numerous FBS football and Division I men’s and women’s basketball programs implicated”).

122. *See* Motion to Certify Damages Classes, *supra* note 9, at 9–10 (defining three damages classes); Order Granting Preliminary Approval of Class Action Settlement, *supra* note 16, at 2 (specifying termination of class eligibility on date of preliminary approval).

123. *See In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D at 537 (defining three injunctive classes, each including only full grant-in-aid recipients).

124. *See id.* at 539 (finding numerosity satisfied by injunctive relief classes).

125. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (requiring elements of Rule 23(a) prior to certification).

126. *See* RUBENSTEIN, *supra* note 40, § 4:51 (stating “[t]he predominance demand is stricter than Rule 23(a)(2)’s commonality requirement,” implying that they are interlinked).

127. *See* Motion to Certify Damages Classes, *supra* note 9, at 12 (arguing common issues exist).

ses because the grant-in-aid caps are the same and the classes overlap.<sup>128</sup>

The court should not question whether there are common answers to how the grant-in-aid caps affected the class.<sup>129</sup> In *Wal-Mart v. Dukes*, female employees of Wal-Mart alleged that Wal-Mart's corporate policy of allowing discretion among store managers to make their own pay and raise decisions had the effect of systematically depressing the compensation of the female employees.<sup>130</sup> The Supreme Court decertified that class, holding that commonality was not satisfied because, although all of the individual employees were subject to Wal-Mart's overall policy that gave managers the discretion to make pay decisions, the individual employees could have still been subject to unique evaluation by distinct managers who made individualized assessments of whether or not to give their employees a raise.<sup>131</sup> This gives rise to an argument that the individual players are subject to the unique assessment of individual schools that have the discretion to make their own decisions about how to compensate players, much like how Wal-Mart's corporate office gave discretion to its individual store managers to make unique assessments of individual employees.<sup>132</sup>

That argument is unlikely to work for commonality, however, because *Dukes* was about the certification of Rule 23(b)(2) injunctive relief classes that had tagged some damages onto the action, perhaps as a way of circumventing predominance, which is different than the current case where certification is brought strictly as Rule 23(b)(3) damages classes.<sup>133</sup> Moreover, the plaintiffs in *Dukes* tried to show that a policy of decentralized discretion was the cause of the lower wages of female Wal-Mart employees, which is not as obviously a common issue as the current case where all the consolidated plaintiffs were subject to a consistent, centralized uniform

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128. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D at 539 (finding commonality met and not in dispute).

129. See Motion to Certify Damages Classes, *supra* note 9, at 18 (arguing anti-trust liability is itself common question and its resolution will provide common answer to whether NCAA is liable to each class member).

130. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342–45 (alleging discrimination of female employees via corporate policy of permitting wide discretion in pay and raise decisions).

131. See *id.* at 357 (“Other than the bare existence of delegated discretion, respondents have identified no ‘specific employment practice’—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.”).

132. See *id.* (stating “merely proving that the discretionary system has produced a racial or sexual disparity is not enough”).

133. See *id.* at 345–46 (stating plaintiffs rely on 23(b)(2) to certify class).



policy capping their compensation at the grant-in-aid amount.<sup>134</sup> Finally, as stressed above, commonality should be met here because Judge Wilken already found commonality satisfied by the injunctive relief classes and predicated that finding on the same grant-in-aid cap at issue in this case.<sup>135</sup>

### C. Satisfaction of Rule 23(a)(3)—Typicality

Typicality is also easily met by the consolidated plaintiffs' class representatives because they are technically even more representative than the class representatives were for the injunctive relief classes.<sup>136</sup> With the injunctive relief classes, the proposed and eventually appointed class representatives had graduated after the emergence of the grant-in-aid litigation, so they were actually no longer subject to the grant-in-aid caps that they sought to enjoin the NCAA from perpetuating.<sup>137</sup> The court applied the transitory exception to mootness, stating that although the claims of the individual class representatives were moot, those of others were not and that the litigation could proceed.<sup>138</sup>

Here, that issue should not even come up because the class representatives are seeking damages for past conduct, not an injunction against future conduct.<sup>139</sup> Thus, the backwards-looking claims of the putative class representatives of the damages classes are still alive and well and cannot be mooted by graduation, making them even more "typical" than the proposed class representatives

134. *See id.* at 354–55.

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.

*Id.* at 355 (emphasis in original).

135. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Anti-trust Litig.*, 311 F.R.D. 532, 539 (N.D. Cal. 2015) (holding commonality met by injunctive relief classes).

136. *See id.* at 539–40 (holding typicality met by injunctive relief classes, though their individual claims have been mooted).

137. *See id.* at 539 (noting that "[t]he complexity, pace and cutting edge nature of this [MDL] affected the timing of this Court's class certification hearing and decision," and consequently class representatives were no longer NCAA athletes).

138. *See id.* (stating counsel should replace named plaintiffs with players currently eligible to receive grant-in-aid but that claims may proceed regardless).

139. *See Motion to Certify Damages Classes, supra* note 9, at 11 (alleging class representatives were subject in the past to "identical unlawful practices").

were in the certification of the injunctive relief classes.<sup>140</sup> Therefore, the court should find typicality met by the representatives for the NCAA football and basketball players.<sup>141</sup>

#### D. Satisfaction of Rule 23(a)(4)—Adequacy

The final prong of Rule 23(a), adequacy, faced the fiercest opposition during the certification of the injunctive classes against the NCAA in the grant-in-aid litigation, but it should not here.<sup>142</sup> Essentially, the NCAA argued against certification of the injunctive relief classes on the grounds that adequacy was not demonstrated because of the theories proposed by the NCAA's expert; the "substitution effect" theory and the "economics of superstars" theory.<sup>143</sup>

Using the substitution effects theory, the NCAA argued that compensation to NCAA athletes would increase in the absence of the current grant-in-aid structure, making scholarship offers more attractive.<sup>144</sup> Accordingly, more attractive scholarship opportunities would induce more prospective athletes to vie for compensation packages from schools, and consequently at least some current recipients of grant-in-aid would be adversely impacted because they would lose some or all of their scholarship funds to increased competition.<sup>145</sup> But Judge Wilken held that hypothetical intraclass conflicts are insufficient to vitiate class certification, and the court held that the effects on the market for NCAA athletes presents speculative impacts on the market and the compensation of putative class members.<sup>146</sup>

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140. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 537 (defining classes in injunctive relief motion as those "who received or will receive such a full grant-in-aid" (emphasis added)).

141. See Motion to Certify Damages Classes, *supra* note 9, at 9–10 (defining classes in damages motion as those who "received" grant-in-aid awards (emphasis added)).

142. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 540–45 (finding adequacy met by injunctive relief classes after lengthy discussion of NCAA's counterarguments).

143. See *id.* at 540 (arguing changes to grant-in-aid would open market up for collegiate athlete's services to detriment of some athletes and make compensation system more akin to professional athletics).

144. See *id.* at 542 (predicting that "increases in the amount of athletics-based aid would naturally induce some people to accept or continue to receive such scholarships that otherwise would choose not to participate as FBS/D-I scholarship student-athletes").

145. See *id.* (noting theory by Dr. James Ordovery, the NCAA's expert, that "additional players" would emerge to take scholarship funds from class members).

146. See *id.* at 543 (holding NCAA failed to show both that additional athletes would enter the market and that schools would withdrawing grant-in-aid offers to current players). As an aside, while it seems possible that greater scholarship opportunities would induce more individuals to seek scholarship opportunities at a

Similarly, the NCAA pointed to the “economics of superstars theory,” positing that without the current grant-in-aid structure, schools would compete to obtain superstar athletes to the financial detriment of players who would have otherwise obtained full grant-in-aid.<sup>147</sup> The court declined to adopt the defendants’ view because schools need not distribute their scholarship funds to players that are not superstars now, yet in practice they routinely have distributed the maximum amount of scholarships.<sup>148</sup> Simply put, because schools already compensate as many players as they can with the full grant-in-aid amount, the court reasoned that schools must value the contributions of full grant-in-aid recipients at least as greatly as the value of the grant-in-aid.<sup>149</sup> Absent the current regulations, it would not be obvious, according to the court, that schools would suddenly reevaluate player compensation such that athletes would suddenly receive less compensation than they already do.<sup>150</sup>

The NCAA’s final argument was that some putative class members would be disadvantaged by a system that lacked the current grant-in-aid regulations because the schools they attend or might attend would not be able to afford to compensate the players.<sup>151</sup> The court rejected this argument, finding that it is not obvious that NCAA schools would suddenly be unable to afford college sports.<sup>152</sup>

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later date, it seems unlikely that an increase in scholarship funds now would impact the pool of talent today. Simply put, it takes too long to become a NCAA-level athlete and essentially anyone who could currently become an NCAA athlete today has the opportunity to become one. *See id.*

147. *See id.* at 543 (predicting 60% of football players and 40% of men’s basketball players would receive reduced grant-in-aid because of schools’ ability to compensate superstars).

148. *See id.* at 544 (“Dr. Ordoover does not explain why schools today provide full [grant-in-aid] to purportedly overvalued class members without being required to do so and would stop doing so absent the [grant-in-aid] cap.”).

149. *See id.* (citing Dr. Roger Noll, consolidated plaintiffs’ expert, in holding that past practices of compensating allegedly underqualified athletes with full grant-in-aid awards supports the inference that the schools value those players’ contributions at least as much as the grant-in-aid amount awarded).

150. *See id.* (holding NCAA failed to establish that system of compensation would change to the detriment of current grant-in-aid recipients).

151. *See id.* (“Defendants predict that an injunction would increase the costs to schools of participating in FBS and Division I athletics and, in turn, schools would stop participating in FBS and Division I athletics or take steps to lower their costs, such as offering fewer [grant-in-aid awards].”).

152. *See id.* at 545 (noting availability of alternative sources of funding, such as redistributing expenditures, subtracting from endowments, seeking additional donations, reducing coaching and staff salaries). Furthermore, the court noted the disproportionate increase in schools’ incomes from athletics compared to the essentially static value of grant-in-aid. *See id.* Notably, salaries of coaches and other sources of expenditure have increased tremendously over the years, undermining the economic infeasibility of shifting those funds to the players instead of coaches and administrators. *See id.* In sum, the court noted that alternative revenue

Additionally, even if schools were losing money on their sports programs, they have nonetheless continued to invest in them, leading the court to conclude that these schools may very well still value their sports programs at least as much as they spend on them, even if that expense does not strictly itself turn a monetary profit.<sup>153</sup>

However, because those arguments failed to convince Judge Wilken during certification of the injunctive relief classes, they should not undermine a finding of adequacy with regard to the certification of the damages classes.<sup>154</sup> Here, the court should note that the proposed class representatives will all adequately embody the interests of the class as a whole because the NCAA failed to show that the class representatives' pursuit of the suspension of the grant-in-aid limitations would harm putative class members during its opposition to certification of the injunctive relief classes.<sup>155</sup> The damages classes seek to recover past and current scholarship funds that were effectively lost because of the suppression of the market, but the damages will be limited to a set period of time.<sup>156</sup> Therefore, the NCAA fails to undermine adequacy here because the damages classes seek to impose only a one-time fee on the NCAA that could not impact the availability of scholarship funds to players who are class members that are already set to receive funds.<sup>157</sup> Additionally, class counsel here, who are identical to the injunctive relief certification, were adequate and highly experienced there and would necessarily have to be more experienced now with the injunctive relief certification under their belts.<sup>158</sup> Therefore, adequacy should not be a considerable roadblock for the court in evaluating whether to certify the damages classes.

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streams could be available to universities so that they could offset the increase to cost that a system without the current grant-in-aid cap. *See id.*

153. *See id.* (citing Dr. Edward Lazear's expert report that continued investment in "sports programs even when net revenues are negative means that schools value the programs at least as much as the amount they spend on them").

154. *See id.* (holding that injunctive classes satisfied Rule 23(a)(4)).

155. *See id.* at 542–45 (analyzing Substitution Effects and Economics of Superstars arguments and finding them insufficient to undermine adequacy of class representatives).

156. *See* Motion to Certify Damages Classes, *supra* note 9, at 9–10 (defining classes as individuals who received grant-in-aid awards during a particular period).

157. For a discussion on the damages that the damages classes seek to recover, see *supra* notes 133–135 and accompanying text.

158. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 545 (finding class counsel of injunctive relief classes adequate).

## E. Satisfaction of Rule 23(b)(3)—Predominance and Superiority

While the Rule 23(a) requirements should be met easily, the consolidated plaintiffs have a serious fight on their hands when it comes to predominance.<sup>159</sup> The NCAA has argued that the proof of antitrust injury will require individualized assessments, that the damages themselves will be subject to individualized assessments, and that the inclusion of the partial grant-in-aid recipients destroys predominance, and each argument presents a huge burden for the consolidated plaintiffs, with loss on any aspect effectively ending the litigation.<sup>160</sup>

In evaluating predominance and the regarding proof of the injury and damages caused by the grant-in-aid limits, the Northern District of California will likely consider *Comcast Corporation v. Behrend*<sup>161</sup> because *Comcast Corporation* is one of the newest Supreme Court cases to address predominance and the use of statistics.<sup>162</sup> In that case, the trial court certified a class that sought to compensate Comcast subscribers in the Philadelphia area that were allegedly part of a monopoly.<sup>163</sup> The plaintiffs' theory rested on the notion that competitors declined to enter the Philadelphia cable market because of Comcast's anticompetitive practices.<sup>164</sup> Plaintiffs obtained 23(b)(3) certification by comparing the Philadelphia market with nearby markets where Comcast faced competition to create a statistical model that compared prices between the adjacent markets and the Philadelphia area markets to demonstrate how pricing in Philadelphia would have functioned in the absence of Comcast's allegedly anticompetitive practices.<sup>165</sup> However, the Supreme Court reversed and held that the plaintiffs' statistical model failed

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159. See generally *Opposition to Motion to Certify Damages Classes*, *supra* note 89, at 1–25 (arguing that court should deny consolidated plaintiffs' motion for certification of the damages classes).

160. See generally *id.* Furthermore, defendants isolate the fact that cost of attendance aid was not forbidden under the previous grant-in-aid regulations but only that an athlete's "athletics-based" grant-in-aid "was limited to tuition, room, board, books and fees. *Id.* at 2. The NCAA argues that fact further undermined if some athletes were even injured at all, i.e., the ones who received cost of attendance aid via other forms. See *id.*

161. 133 S. Ct. 1426 (2013).

162. See *id.* at 1434–35 (holding plaintiffs failed to demonstrate predominance via statistical model).

163. See *id.* at 1430 (stating plaintiffs' suit against Comcast and affiliates over alleged monopolization of Comcast services in Philadelphia area).

164. See *id.* at 1430–31 (alleging Comcast's clustering of services in Philadelphia metro area deterred "overbuilders," or outside competition, but declining to certify class based on plaintiffs' other three theories of liability).

165. See *id.* at 1431 (projecting class-wide damages via regression model totaling \$875,576,662).

to show that common issues predominated because three of the four premises of the statistical model had been excluded from evidence via a successful *Daubert* motion.<sup>166</sup>

Here, the NCAA's best chance of vitiating predominance may come from undermining the consolidated plaintiffs proposed proof of injury, with the intention of convincing Judge Wilken the grant-in-aid MDL is similar to *Comcast Corporation* and, consequently, that the consolidated plaintiffs' theory cannot demonstrate injuries on a class-wide basis.<sup>167</sup> But *Comcast Corporation* is distinguishable in a crucial way: the expert's methodology was partially excluded so that the actual model the *Comcast Corporation* plaintiffs had relied on to show class-wide damages was maimed and flawed.<sup>168</sup> Here, although Dr. Rascher's testimony and models proposed to prove damages have been subject to a challenge under *Daubert*, his testimony has not yet been excluded.<sup>169</sup> If Judge Wilken excludes Dr. Rascher's testimony, then the consolidated plaintiffs will not be able to show predominance in terms of the common way that the grant-in-aid structure impacted them, unless they obtain another expert.<sup>170</sup> But if the court finds the models plausible, like it did during certification of the injunctive relief classes where it found Dr. Rascher's statistical modeling persuasive, then the statistical proof will stand and not destroy predominance.<sup>171</sup>

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166. *See id.* at 1433 (stating “[t]here is no question that the model failed to measure damages from the particular antitrust injury on which petitioners’ liability in this action is premised[ ]” because other theories of antitrust injury remained inherent in the model proposed by the plaintiffs); *see also* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–95 (specifying requirements for admission of expert evidence under Federal Rule of Evidence 702).

167. *See* Opposition to Motion to Certify Damages Classes, *supra* note 89, at 8 (citing *Comcast v. Behrend* to support the need for the court to “probe behind the pleadings” and assess the merits of consolidated plaintiffs’ theory of liability).

168. *See Comcast Corp.*, 133 S. Ct. at 1431 (noting that only one of plaintiffs’ theories of causation was admitted but that plaintiffs’ model “did not isolate damages resulting from any one theory of antitrust impact”).

169. *See generally* NCAA’s Defendants’ Notice of Motion, Motion and Memorandum of Points and Authorities in Support Thereof to Exclude the Opinions of Dr. Daniel A. Rascher, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) [hereinafter NCAA’s *Daubert* Motion] (seeking to exclude the opinions and testimony of consolidated plaintiffs’ expert Dr. Daniel Rascher).

170. *See* Opposition to Motion to Certify Damages Classes, *supra* note 89, at 3 (claiming consolidated plaintiffs have proposed “*ipse dixit* pronouncements based on unsupported assumptions and speculations that are contrary to the factual record” rather than an actual statically supported model).

171. *See In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532, 545 (N.D. Cal. 2015) (following Dr. Rascher’s reasoning that schools would not be forced into prohibitive budgetary dilemma by absence of grant-in-aid regulation).

The NCAA's argument that the inclusion of partial recipients of grant-in-aid will destroy predominance is even weaker.<sup>172</sup> The NCAA and the various universities have extensive records, and the identity of those players should be easy to ascertain.<sup>173</sup> Moreover, the court could tell the consolidated plaintiffs that additional subclasses are needed for the partial grant-in-aid classes to assure that their interests are adequately represented by independent counsel.<sup>174</sup> Thus, the inclusion of partial recipients here should not be a significant roadblock to certification and should not disrupt predominance.

The NCAA's facially stronger argument, that different damages calculations will destroy predominance, also should not convince the court to deny certification.<sup>175</sup> For starters, courts are typically reluctant to find the difficulty of damages dispositive.<sup>176</sup> However, the NCAA's best hope is that the court will be convinced that the way the grant-in-aid limits limited each school's autonomy resulted in individual, unique financial aid awards, because that would make it seem like the damages could not be calculated but would have to be determined by an individual hearing.<sup>177</sup>

On that issue, the Supreme Court has recently continued its dialogue on statistical proof of damages in class actions in *Tyson Foods, Inc. v. Bouaphakeo*.<sup>178</sup> That case involved employees at a pork processing plant and the time they spent "donning and doffing"

172. See Opposition to Motion to Certify Damages Classes, *supra* note 89, at 21–24 (arguing that partial grant-in-aid recipients preclude predominance).

173. See Reply in Support of Motion to Certify Damages Classes, *supra* note 108, at 7–10 (arguing partial grant-in-aid recipients should not undermine predominance).

174. See FED. R. CIV. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.").

175. See Opposition to Motion to Certify Damages Classes, *supra* note 89, at 25 (arguing if each athlete's individual damages assessment took ten minutes, then total trial "would exceed 16,900 hours of jury time").

176. See RUBENSTEIN, *supra* note 40, § 4:54 ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so *despite the need*, if liability is found, for *separate determination of the damages suffered by individuals within the class.*" (emphasis added) (quoting Amendments to Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims Rules of Criminal Procedure, *supra* note 41)).

177. See Opposition to Motion to Certify Damages Classes, *supra* note 89, at 24–25 (arguing individual hearings will be needed to demonstrate damages).

178. See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (finding plaintiffs could use aggregate proof to establish liability as it was "the only practicable means to collect and present relevant data").

their protective gear before and after butchering pigs.<sup>179</sup> Starting in 1998, Tyson paid its employees for four additional minutes each shift, as that was the time Tyson estimated that it took employees to put on and take off their gear.<sup>180</sup> The policy changed in 2007, resulting in some employees receiving four to eight minutes of paid time, while others received none, depending on which jobs the employees performed and which gear they consequently needed to wear for their particular roles.<sup>181</sup> The plaintiffs alleged that the “donning and doffing of gear” was an “integral and indispensable” part of all of their jobs, and thereby covered by the Fair Labor Standards Act (“FLSA”) as work.<sup>182</sup> Because Tyson neglected to keep accurate records of the time each of its employees spent donning and doffing, and because an award of damages would be based on this lost time, the plaintiffs sought to prove the average donning and doffing time by statistical analysis.<sup>183</sup>

The defendants argued that donning and doffing time varied from person to person and therefore that individual issues would destroy predominance under Rule 23(b)(3).<sup>184</sup> Specifically, they argued that the “person-specific inquiries into individual work time predominate[d] over the common questions raised by [plaintiffs’] claims, making class certification improper.”<sup>185</sup> The statistical study

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179. *See id.* at 1041 (“The employees’ primary grievance was that they did not receive statutorily mandated overtime pay for time spent donning and doffing protective equipment.”).

180. *See id.* at 1042 (stating that as result of lawsuit in 1998, defendant began paying all employees extra four minutes, dubbed “K-code time,” so they could put on their necessary work-related gear).

181. *See id.* (“In 2007, Tyson stopped paying K-code time uniformly to all employees. Instead, it compensated some employees between four and eight minutes but paid others nothing beyond their gang-time wages.”). “Gang-time” was the time employees spent at their workstations. *See id.*

182. *See id.* (“The FLSA . . . requires employers to pay employees for activities ‘integral and indispensable’ to their regular work, even if those activities do not occur at the employee’s workstation.”) (citing *Steiner v. Mitchell*, 350 U.S. 247, 255 (1956)). *Tyson* cites *Steiner*, which held that necessary and essential activities performed before or after the start of a shift are compensable under the FLSA, so long as they are not excluded under section 4(a)(1). *See Steiner*, 350 U.S. at 255.

183. *See Tyson Foods, Inc.*, 136 S. Ct. at 1042–44 (stating section 211(c) of FLSA requires timekeeping of employee hours). The plaintiffs relied on the defendant’s records on gang-time and K-code time to construct plaintiff model predicting lost wages. *See id.*

184. *See id.* at 1044 (specifying that defendant sought to set aside the jury verdict because “variation in donning and doffing time” mean that “the classes should not have been certified”).

185. *Id.* at 1046 (claiming employees would have to show how much time they individually spent putting on the necessary equipment for work); *see also* *IBP, Inc. v. Alvarez*, 546 U.S. 21, 42 (2005) (holding that time spent waiting to don and doff necessary equipment was *not* covered by FLSA).



proposed by the plaintiffs was characterized as manufacturing predominance by attempting to subsume diverse amounts of time that putative plaintiffs may have spent donning and doffing into one set amount of time.<sup>186</sup> Furthermore, the defendants expressly requested that the Court institute a broad rule against the use of statistical evidence to establish liability in class actions.<sup>187</sup> But the Supreme Court declined to do so and instead found that the plaintiffs had satisfied predominance, noting furthermore that that oftentimes statistics are “‘the only practicable means to collect and present relevant data’ establishing a defendant’s liability.”<sup>188</sup>

In this case, the ramifications of *Tyson Foods* are tremendous because without a statistical model to show exactly how much players were undercompensated, the consolidated plaintiffs would be left trying to ascertain what various schools would have paid each athlete in the absence of the grant-in-aid cap based on testimony of the schools and their administrators.<sup>189</sup> The consolidated plaintiffs would be in the same position that the *Tyson Foods* plaintiffs successfully avoided, where they would be required to retroactively reconstruct the minutes they each had worked to recover damages.<sup>190</sup> Now, with the help of their expert, consolidated plaintiffs should be able to demonstrate projections of what player compensation would have been through statistical analysis, like the plaintiffs in *Tyson* were able to, and therefore should satisfy predominance and dodge the NCAA’s contention that individual hearings will be required to determine damages.<sup>191</sup>

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186. See *Tyson Foods, Inc.*, 136 S. Ct. at 1046 (arguing for categorical exclusion of statistical evidence by claiming plaintiffs’ study “manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution”).

187. See *id.* (claiming use of representative evidence “unfair”).

188. *Id.* (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.493 (2004)) (denying categorical prohibition on use of particular type of evidence in particular types of cases and holding that statistical evidence is often only means of proof available)).

189. See Opposition to Motion to Certify Damages Classes, *supra* note 89, at 24–25 (arguing that individual questions of how much each player would have been compensated will require individual hearings).

190. For further discussion on the individualized proof of damages, see *supra* note 100 and accompanying text.

191. For an outline on how the consolidated plaintiffs propose to generate damages assessments for individual plaintiffs, see *supra* notes 60–88 and accompanying text. It is also worth noting that for certification plaintiffs need only show that their model is capable of proving damages on a class-wide basis but the calculation of damages is still a question of fact. See *Tyson Foods, Inc.*, 136 S. Ct. at 1045 (stating predominance may be satisfied even when some issues require a factfinder’s individualized determination).

Additionally, although not thoroughly addressed in the briefing, the damages classes clearly meet the superiority demands of Rule 23(b)(3).<sup>192</sup> Any monetary recovery of an athlete would be the small amount of “laundry money” the players claim they would have gotten without the restrictions on grant-in-aid over the course of at most a few seasons.<sup>193</sup> Litigating a case for such small amounts would not only be unwise, it would simply never happen.<sup>194</sup>

#### F. The Consequences for Class Action Litigation

Finally, in a broader sense, this case highlights the important role of class litigation and presents an opportunity for the court to safeguard the access to courts granted by the class action device.<sup>195</sup> The NCAA is effectively trying to force this class action to diverge into a mini-trial on the merits at the certification stage.<sup>196</sup> While class actions certification requires rigorous analysis, it does not require that the putative class representatives completely prove their case in chief.<sup>197</sup> Instead, to satisfy predominance, it is enough to show that the putative class will either win or lose through common proof but does not actually need to win a trial at certification.<sup>198</sup> In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Supreme Court held that a class of individuals who possessed retirement trust fund plans had satisfied predominance.<sup>199</sup> To prevail on

192. See generally Motion to Certify Damages Classes, *supra* note 9; Opposition to Motion to Certify Damages Classes, *supra* note 89; Reply in Support of Motion to Certify Damages Classes, *supra* note 108 (declining to argue class method would not be superior, save because of alleged lack of predominance).

193. See Motion to Certify Damages Classes, *supra* note 9, at 18 (describing laundry money).

194. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor. *Id.* (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 334 (7th Cir. 1997)).

195. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (finding “[e]conomic reality dictates that petitioner’s suit proceed as a class action or not at all” where \$70 sums were so small not to warrant individual representation).

196. For a discussion on predominance, see *supra* notes 89–107 and accompanying text.

197. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (holding class action certification requires rigorous analysis to ensure elements of Rule 23 are met).

198. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (characterizing class questions as those that can be decided together).

199. See *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1191 (2013) (holding plaintiffs did not need to prove materiality of defendant’s representations at certification despite needing to prove materiality to prevail on merits).

the merits in their action where the class alleged the defendant engaged in fraud on the market, that fraud had been material in impacting the market for the defendant's stock—a fact the plaintiffs did not prove at certification.<sup>200</sup>

Consequently, the defendant argued that the plaintiffs failed to satisfy predominance because they failed to show the materiality of defendant's alleged misrepresentations, and that therefore certification should never have occurred.<sup>201</sup> However, Justice Ginsburg, writing for the majority, held that the defendant “would have us put the cart before the horse” because “a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the ‘metho[d]’ best suited to adjudication of the controversy ‘fairly and efficiently.’”<sup>202</sup>

For certification, it was enough for the plaintiffs in *Amgen* to show that the common issues would be resolved by a uniform method, and that holding should guide this case as well.<sup>203</sup> The language of Rule 23 never calls for full-blown merits analysis at certification and doing so would result in an inequitable shift in power to defendants in all types of class litigation.<sup>204</sup> Getting a class certified is already a tall order, but turning certifications into a mini-trials would essentially give defendants a second bite at the apple to avoid liability.<sup>205</sup>

Rule 23 already provides a court with the ability to amend its certification order to alter the class's composition or outright

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200. See *id.* at 1190 (describing the fraud on the market theory as some false misrepresentation disrupting the otherwise efficient market for a security that is priced according to public, and allegedly truthful, information).

201. See *id.* at 1191 (summarizing defendant's position as plaintiffs failed to show that the defendant's statements made any impact on the defendant's stock price).

202. *Id.* (alteration in original) (finding defendant misunderstood that Rule 23 does not require plaintiffs to show they will win lawsuit at certification).

203. See *id.* (holding that failure to prove materiality of impact of defendant's misrepresentations on stock price would not vitiate predominance but would cause plaintiffs to completely lose).

204. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974)

We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. . . . In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

*Id.* (internal quotation marks omitted).

205. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–51 (2011) (holding that valid class certification requires rigorous analysis that Rule 23 requirements have been met).

decertify it.<sup>206</sup> If a court finds that a certified class does not, in fact, establish predominance once its proof is fully put before the trier of fact, the defendants, with the approval of the court, are free to pull the rug out from under the class and decertify it, thus ensuring that the elements of Rule 23 are always met.<sup>207</sup> Moreover, Rule 23's language does not automatically grant appeal after class certification, so treating a class certification order like a final judgment appears to be beyond the intentions of the rule itself.<sup>208</sup>

The NCAA winning this motion would have the effect of significantly weakening the utility of the class action device for all litigants who oftentimes only have statistical proof available to litigate their case.<sup>209</sup> Additionally, a victory for the NCAA could essentially graft requirements into Rule 23 that the legislative process has not yet envisioned.<sup>210</sup> Thus, so long as Dr. Rascher's testimony survives the *Daubert* motion to exclude it, the consolidated plaintiffs should obtain certification, leaving the damages classes able to seek recovery for the financial aid they claim they would have otherwise received.

#### IV. CONCLUSION

The timetable for certification and the NCAA's *Daubert* motion was extended and modified numerous times before the parties most recently agreed to settlement.<sup>211</sup> However, whether the settlement is approved will take at least until the end of 2017, but regardless, this case is certain to add to the growing jurisprudence on the

206. See FED. R. CIV. P. 23(c)(1) (defining class certification as conditional).

207. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.").

208. See FED. R. CIV. P. 23(f) (providing that "[a] court of appeals *may* permit an appeal from an order granting or denying class-action certification") (emphasis added).

209. See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (specifying statistics were the only form of proof plaintiffs had available to them).

210. See *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (holding that during certification plaintiffs need not "prove that the predominating question will be answered in their favor").

211. See Stipulation and Order Resetting Schedule for Plaintiffs' Motion to Certify Damages Classes as Modified, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) (rescheduling hearing on motion to certify damages classes for March 21, 2017); Stipulation and Order Resetting Schedule for Plaintiffs' Motion to Certify Damages Classes, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541) (adding various deadlines regarding fact discovery and dispositive motions); Order Granting Preliminary Approval of Class Action Settlement, *supra* note 16, at 6 (approving preliminary settlement, setting schedule through 2017).

use of statistics in Rule 23(b)(3) class actions and to the number of class actions that have challenged the NCAA's strict grip on the compensation of college athletes.<sup>212</sup>

Certification of the damages classes, or now dubbed settlement class and subclasses, would likely be the end to the NCAA's suppression of its athletes' compensation below the cost of attendance, but it importantly does not mean that the NCAA will suddenly become a free agent market for talented athletes.<sup>213</sup> The injunctive relief classes in this same grant-in-aid MDL only seek to prohibit the practice of allowing grant-in-aid scholarships below the cost of attendance but would leave untouched the NCAA's ability to regulate essentially all other aspects of athlete compensation.<sup>214</sup>

Settlement could cost the NCAA and member institutions millions of dollars, although trial could have arguably had additional negative effects on college athletics.<sup>215</sup> Detractors to the settlement might tenuously argue that compensating players for the scholarship funds they missed out on in the past is tantamount to paying athletes, and that compensation will have detrimental effects on the collegiate system.<sup>216</sup> But while the finances are large, the NCAA is in no position to fail on account of this lawsuit and potential settlement, or lose its vital role in regulating college athletics, meaning that any fear that this lawsuit will disrupt college athletics forever is largely unfounded.<sup>217</sup>

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212. See Order Granting Preliminary Approval of Class Action Settlement, *supra* note 16, at 6 (scheduling fairness hearing for settlement on November 17, 2017, meaning no decision will occur until sometime after). For a discussion on the use of statistics in satisfying the predominance requirement of Federal Rule of Civil Procedure 23(b)(3), see *supra* notes 159–210 and accompanying text. For an outline of the various class action complaints that have challenged the NCAA, see *supra* note 13 and accompanying text.

213. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Anti-trust Litig.*, 311 F.R.D. 532, 544 (N.D. Cal. 2015) (noting that consolidated plaintiffs do not seek free agent market for player's services). The NCAA would maintain its role in regulating player compensation, but just would not be able to suppress compensation below competitive levels in violation of the Sherman Anti-trust Act. See *id.*

214. See *id.* (advocating continued role for NCAA in setting compensation).

215. See *id.* (arguing that some schools may withdraw from athletics all together).

216. See e.g. John R. Thelin, *Here's Why We Shouldn't Pay College Athletes*, MONEY (Mar. 1, 2016), <http://time.com/money/4241077/why-we-shouldnt-pay-college-athletes/> [<https://perma.cc/N9V9-522L>] (arguing that paying athletes for their performance would have serious tax implications and might result in less funding to individual athletes and therefore should be avoided).

217. See *id.* (specifying that NCAA's role in regulating athletics is not threatened); see also *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> [<https://perma.cc/X6SE-PHQE>] (last visited Feb. 11, 2017) (stat-

Thus, it seems unlikely that the NCAA will be able to continue to suppress athlete compensation in the same manner going forward, if for no other reason than it has lifted the cap on grant-in-aid that was previously below cost of attendance, indicating that it is economically feasible for the athletes to have their full cost of attendance covered.<sup>218</sup> Even if Judge Wilken denies certification of the settlement, it is unlikely the schools would continue to compensate players below their cost to attend school because now the facts surrounding the compensation are readily available, with this case presenting a public record, highlighting that numerous administrators in different college programs have objected to that practice over the years.<sup>219</sup>

Moreover, as NCAA athletics have expanded to become big business where the coaches make more than all of the players' scholarships combined, where new facilities are built and staffs of assistant coaches blossom, it becomes increasingly untenable to argue that players should not have their needs to attend college met by the NCAA and the member schools.<sup>220</sup> Some restructuring may need to occur with how schools allocate their resources, and it is feasible that the NCAA might see diminished profits at least for a time, but making sure that the players who built that success are fairly compensated is a worthy trade-off.<sup>221</sup>

While the NCAA's commitment to amateurism appears to be an important aspect of college sports, there is nothing to say it will not remain so if the NCAA and its member institutions ultimately have to compensate the athletes for scholarship funds they would have earned but for the grant-in-aid limitations.<sup>222</sup> Surely if athletes

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ing that NCAA's revenue was \$871,600,000 in 2011–2012, significantly higher than any liability in this case).

218. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 545 (holding, additionally, that there are various ways schools could reallocate their funds).

219. See generally Declaration of Steve W. Berman, *supra* note 1 (outlining complaints made over years by administrators from various NCAA Division I programs about inability to compensate their players to level they felt appropriate because of grant-in-aid limitations).

220. See Chris Isidore, *College Coaches Make More than Players Get in Scholarships*, CNN MONEY (Jan. 11, 2016, 12:28 PM), <http://money.cnn.com/2016/01/11/news/companies/college-coaches-pay-players-scholarships/> [<https://perma.cc/CU2J-YT6T>] (stating college coaches make more in salary than total cost of all player's scholarships).

221. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 311 F.R.D. at 545 (stating reallocation of funds could minimize impact of increased total funds allocated to scholarships).

222. See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Feb. 11, 2017) ("Amateur competition is a bedrock principle of college athletics

in NCAA programs are students first and athletes second, the NCAA should welcome the opportunity to ensure that all of their athletes are able to afford the various, incidental expenses that every student accrues and not mind paying back those who missed that opportunity and perhaps struggled financially while earning their educations.<sup>223</sup>

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and the NCAA. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority.”).

223. *See id.* (“In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.”).

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