

2013

# Change of Pace for Grants-in-Aid: Why the Former NCAA Scholarship Bylaw Violated Antitrust and Student Athletes Should be Able to Recover

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## Recommended Citation

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***Change of Pace for Grants-in-Aid: Why the Former NCAA Scholarship Bylaw Violated  
Antitrust and Student Athletes Should be Able to Recover***

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**Introduction**

*A young man sits at a table with cameras everywhere and three hats in front of him. Each hat represents a different college; a college that offered him an athletic scholarship and a spot on the school’s football team. After some hesitation he picks up a hat and puts it on his head. The decision is made; he is going to Ole Miss.<sup>1</sup>*

What was once just a run of the mill occurrence has, in recent years, morphed into a quasi-holiday for many people. The holiday’s name – signing day. National signing day, which typically transpires during the first week of February, is the day when senior high school football

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<sup>1</sup> THE BLIND SIDE (Warner Bros. 2009).

stars announce what college they will attend in the fall;<sup>2</sup> rather, what college they will play *football* for. It is a day full of anticipation, fanfare and celebration, and it is all covered live on ESPN.

One of the driving factors behind where many high school seniors, not just student athletes, matriculate for college is money.<sup>3</sup> How much is the school's tuition? Did school X give more scholarship money than school Y? What are the terms for keeping the money? For student athletes, the pressures are that much greater. In addition to the typical questions regarding costs and financial aid, there are concerns about coaching changes, potential injuries, team performance, and the possibility of a new class of recruits making an athlete obsolete.<sup>4</sup>

Former National Collegiate Athletic Association (NCAA) Article/Bylaw 15,<sup>5</sup> which governed all aspects of financial aid for Division I student athletes, contained specific provisions limiting the amount and timing of aid permitted. Bylaw 15.3.3.1 permitted colleges in Division I to award a student athlete a scholarship for one year at a time, the "one-year scholarship rule."<sup>6</sup> Scholarships were renewable for up to five out of the six possible years of NCAA eligibility,<sup>7</sup> but

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<sup>2</sup> Matt Dollinger, *It's National Signing Day!*, THIS JUST IN (Feb. 2, 2011, 1:31 PM), <http://news.blogs.cnn.com/2011/02/02/si-com-its-national-signing-day/>.

<sup>3</sup> See *United States v. Brown Univ.*, 5 F.3d 658, 672-73 (3rd Cir. 1993). "The district court found that colleges and universities traditionally use financial aid to recruit desirable students and that students and their families are heavily influenced by the amount of financial aid schools offer."

<sup>4</sup> See Eric Reinauer, *Agnew v. NCAA: An End to the Subjective Scholarship?*, C. SPORTS BUS. NEWS, (May 15, 2011), <http://collegesportsbusinessnews.com/issue/may-2011/article/agnew-v-ncaa-an-end-to-the-subjective-scholarship>.

<sup>5</sup> This Comment refers to NCAA Bylaw 15.3.3.1 as the "former" bylaw because, in light of the failed vote to override the DI multi-year scholarship legislation on February 17, 2012, the multi-year scholarship provision will be incorporated into the DI Manual. Michelle Brutlag Hosick, *Multiyear Scholarship Rule Narrowly Upheld*, NCAA.ORG (Feb. 17, 2012), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/february/multiyear+scholarship+rul e+narrowly+upheld>. [hereinafter *Multiyear Scholarship Rule Narrowly Upheld*].

<sup>6</sup> NCAA BYLAWS art.15.3.3.1, 2011–2012 NCAA DIVISION I Manual (2011), *available at* <http://www.ncaapublications.com/productdownloads/D112.pdf>. [hereinafter NCAA BYLAWS] (last visited Mar. 19, 2012).

<sup>7</sup> NCAA BYLAWS, *supra* note 6, at art.15.01.5(c).

renewal was dependent upon a number of factors, including the discretion of the team coach and athletic director.<sup>8</sup>

In 2010 two events took place that focused attention on the one-year scholarship rule. First, on May 6, 2010 the NCAA announced that the U.S. Department of Justice's Antitrust Division was inquiring into the reasoning behind the bylaw concerning multi-year scholarships.<sup>9</sup> Second, on October 25, 2010, Joseph Agnew, a former Rice football player, filed suit against the NCAA alleging a "blatant price fixing agreement" concerning the limits on athletic scholarships that violated antitrust law.<sup>10</sup>

Accordingly, this Comment will argue that the former NCAA bylaw prohibiting multi-year grants-in-aid to student-athletes violated Section 1 of the Sherman Antitrust Act, and that current and past student-athletes were previously harmed by the bylaw and Section 1 should provide recourse to address this harm. Part I of this note will provide the relevant background information concerning the former NCAA bylaw prohibiting the award of multi-year athletic scholarships to student athletes and the pending legislation allowing multi-year scholarships.<sup>11</sup> Part II will look at the general tenets of antitrust law under Section 1 of the Sherman Antitrust Act (Section 1) where the lawsuit is based upon an alleged conspiracy to restrain trade; including the types of restrictions analyzed and the applicable standards of analysis. Part III of this note examines the history of antitrust analysis concerning both collegiate athletics and

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<sup>8</sup> *Behind the Blue Disk: How Do Athletic Scholarships Work?*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, July 21, 2011, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/How+Do+Athletic+Scholarships+Work>.

<sup>9</sup> Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Statement on Department of Justice Inquiry (May 6, 2010), *available at* <http://www.ncaa.org/wps/wcm/connect/ncaa/ncaa/media+and+events/press+room/news+release+archive/2010/official+statements/20100506+dept+of+justice+statement?pageDesign=old+news+releases+template>.

<sup>10</sup> Class Action Complaint at 1, *Agnew v. Nat'l Collegiate Athletic Ass'n*, 2010 WL 4227288 (N.D. Cal. Oct. 25, 2010) (No. 10-cv-4804), ECF No. 1.

<sup>11</sup> There are several different terms used to describe scholarships given to athletes, including "athletic scholarships," "athletic aid," "grants in aid," and "athletic discounts." For the purposes of this comment, the terms will be used interchangeably.

collegiate financial aid through an examination of two cases, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*<sup>12</sup> and *United States v. Brown University*.<sup>13</sup>

Part IV of this Comment analyzes the issue presented in *Agnew v. National Collegiate Athletic Association*, whether former NCAA bylaw 15.3.3.1 violates Section 1. The issue will be analyzed in terms of whether an agreement was formed, what type of restraint was instituted, whether the NCAA controls the relevant market, and the extent, if any, of the injury to the potential plaintiffs. Part V of this Comment focuses on the implications and potential ramifications of the pending NCAA legislation on scholarships.<sup>14</sup> It discusses the possible adverse impact of the ruling on colleges and universities who, in order to remain competitive, would now have to award automatic multi-year athletic scholarships to student athletes. Part VI concludes the Comment.

## I. Background

### A. NCAA's Bylaw Prohibiting Multi-Year Athletic Scholarships

The NCAA was founded in 1906 to protect student football players from commonly used “exploitive athletics practices” that threatened not only athlete safety but also the future of the sport itself.<sup>15</sup> The Supreme Court has stated “since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports.”<sup>16</sup> In the century since its founding the NCAA has grown not only in size, from sixty-two initial member colleges to over

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<sup>12</sup> *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) [hereinafter *Bd. of Regents*].

<sup>13</sup> *United States v. Brown Univ.*, 5 F.3d 658 (3rd Cir. 1993).

<sup>14</sup> Although “legislation” typically refers to a law or rule passed by the government, this Comment uses “legislation” when discussing the NCAA changes because the NCAA uses “legislation” when it refers to proposed or actual changes to rules and bylaws. *See* *Multiyear Scholarship Rule Narrowly Upheld*, *supra* note 5.

<sup>15</sup> *History*, NCAA.ORG (Nov. 8, 2010),

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/About+the+NCAA+history>.

<sup>16</sup> *Bd. of Regents*, 468 U.S. 85, 88 (1984).

one thousand today, but also in complexity.<sup>17</sup> With three athletic divisions, twenty-three sports, more than one thousand schools, and upwards of four hundred thousand athletes,<sup>18</sup> the NCAA is unquestionably the behemoth of college athletics and, as such, requires extensive and detailed regulations. The 2011 – 2012 NCAA Division I (DI) Manual, which contains the organization’s constitution, operating bylaws and administrative bylaws, is over four hundred pages and regulates everything from eligibility requirements,<sup>19</sup> to whether a student may retain frequent flyer miles gained through team travel.<sup>20</sup>

In 1973 the NCAA enacted Bylaw 15.3.3.1,<sup>21</sup> overturning a component of the 1956 grant-in-aid legislation that had allowed four year grants, in an effort to reduce the spiraling costs of intercollegiate athletics.<sup>22</sup> The purpose of the new bylaw was to both cut costs<sup>23</sup> as well as ensure that only the most deserving students received the limited number of scholarships available to athletes<sup>24</sup> by prohibiting multi-year scholarships and requiring that all athletic scholarships be awarded for only a single year with the potential for renewal.<sup>25</sup> Since the one-

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<sup>17</sup> *History*, NCAA.ORG (Nov. 8, 2010),

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/About+the+NCAA+history>.

<sup>18</sup> *Who We Are*, NCAA.ORG (Sept. 21, 2011),

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/>.

<sup>19</sup> NCAA BYLAWS, *supra* note 6, art.14.1.

<sup>20</sup> NCAA BYLAWS, *supra* note 6, art.16.11.1.12(b).

<sup>21</sup> David Moltz & Doug Lederman, *Are Athletics Scholarships Fair?*, INSIDE HIGHER ED (May 10, 2010), <http://www.insidehighered.com/news/2010/05/10/ncaa>.

<sup>22</sup> JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY* 46 (Digital Edition, 2006) *available at*, [http://www.ncaapublications.com/productdownloads/in\\_the\\_arena584e1fee-ea5d-4487-be73-cb2f718232d9.pdf](http://www.ncaapublications.com/productdownloads/in_the_arena584e1fee-ea5d-4487-be73-cb2f718232d9.pdf).

“By 1973, though, institutions were feeling the financial pinch. Savings were available from passing a one-year grant-in-aid limit . . . Athletics had become a costly proposition for members. . . . Institutions had spent. The authorization of athletics grants had complemented this zeal. Increases in student-athlete numbers, in numbers of coaches, in recruitment expenditures, ancillary benefits to the players (separate and sometime luxurious athletics dormitories, for example) and other areas had precipitated a near financial crisis on some campuses.” *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Press Release, *supra* note 9.

<sup>25</sup> NCAA BYLAWS, *supra* note 6, art.15.3.3.1. NCAA Bylaw 15.3.3.1 – One Year Period. “If a student’s athletic ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year.”

year rule was implemented, the question of whether financial aid for athletes “should be renewable or represent a four-year commitment” has never been fully settled.<sup>26</sup>

On October 27, 2011, the NCAA DI Board of Directors adopted sweeping changes to various aspects of the division bylaws, including the scholarship provisions.<sup>27</sup> The new legislation eliminates the one-year rule and moves back to the pre-1973 scholarship language allowing universities to provide multi-years grants to student athletes.<sup>28</sup> The drastic change in NCAA policy is neither surprising nor sudden; rather, it is likely a response to the events of 2010.

In May 2010, the Antitrust Division of the United States Department of Justice informed the NCAA that the Department was interested in both the reasoning behind the one-year scholarship rule as well as the effect of the rule.<sup>29</sup> While the Justice Department would not confirm the existence of the investigation,<sup>30</sup> Bob Williams, an NCAA spokesman, stated that they were “working with the federal agency ‘to help it understand that athletics financial aid is a ‘merit’ award’.”<sup>31</sup>

When commenting on the issue, Gary Roberts, Dean of the Indiana University School of Law at Indianapolis, stated, “many of the NCAA’s bylaws, not just those governing scholarships, are meant to create parity among athletics programs. But they are rules that, in any other context, could be seen as overly restrictive and possibly in violation of antitrust law.”<sup>32</sup>

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<sup>26</sup> Libby Sander, *Justice Department Examines NCAA Scholarship Rules*, THE CHRON. OF HIGHER EDUC. (May 6, 2010), <http://chronicle.com/article/Justice-Department-Examines/65430/>.

<sup>27</sup> Michelle Brutlag Hosick, *DI Board Adopts Improvements in Academic Standards and Student-Athlete Support*, NCAA.ORG (Oct. 27, 2011), [http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2011/october/di+board+of+directors+ado pt+changes+to+academic+and+student-athlete+welfare](http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2011/october/di+board+of+directors+ado pt+changes+to+academic+and+student-athlete+welfare.). [hereinafter *DI Board Adopts Improvements*].

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

<sup>29</sup> Press Release, *supra* note 9; Sander, *supra* note 26.

<sup>30</sup> Sander, *supra* note 26.

<sup>31</sup> Press Release, *supra* note 9; Sander, *supra* note 26.

<sup>32</sup> Sander, *supra* note 26.

## **B. Background of *Agnew v. National Collegiate Athletic Association***

On October 25, 2010, Joseph Agnew, a former Rice University football player, filed suit against the NCAA in the United States District Court, Northern District of California, alleging that the NCAA's bylaw restricting athletics based scholarships/grants-in-aid to one year violated the Sherman Antitrust Act.<sup>33</sup>

Agnew, a highly recruited star high school football player,<sup>34</sup> received formal offers from Rice University, Tulsa University, and Brigham Young University.<sup>35</sup> In 2006, Agnew enrolled at Rice University<sup>36</sup> and received an "athletics based discount" that equaled the yearly cost of his bachelor degree.<sup>37</sup> After injuries and issues with playing time, however, Agnew lost his scholarship following his sophomore year.<sup>38</sup> He appealed the decision, as per the NCAA Bylaws,<sup>39</sup> and was able to have his scholarship reinstated for his junior year, even though he was not on the team.<sup>40</sup> He did not receive a scholarship for his senior year.<sup>41</sup>

The complaint alleged that the NCAA and its member institutions engaged in a "blatant price fixing agreement,"<sup>42</sup> and that the member institutions have "unlawfully conspired to maintain the price of bachelor's degrees for NCAA student-athletes at artificially high levels by (i) agreeing never to offer student-athletes a multi-year discount on the price of a bachelor's degree and (ii) artificially reducing the total number of available athletics-based discounts by

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<sup>33</sup> Class Action Complaint, *supra* note 10, at 1.

<sup>34</sup> Class Action Complaint, *supra* note 10, at 2; Katie Thomas, *N.C.A.A. Sued Over One-Year Scholarships*, N.Y. TIMES, Oct. 25, 2010, at B16, available at <http://www.nytimes.com/2010/10/26/sports/ncaafotball/26ncaa.html>.

<sup>35</sup> Class Action Complaint, *supra* note 10, at 2.

<sup>36</sup> Thomas, *supra* note 34.

<sup>37</sup> Class Action Complaint, *supra* note 10, at 2.

<sup>38</sup> *Id.* at 10; Thomas, *supra* note 34.

<sup>39</sup> NCAA BYLAWS, *supra* note 6, art.15.3.2.4.

<sup>40</sup> Class Action Complaint, *supra* note 10, at 10.

<sup>41</sup> *Id.* at 11.

<sup>42</sup> *Id.* at 1.



imposing artificial caps.”<sup>43</sup> The NCAA made two motions in the District Court, a motion to dismiss<sup>44</sup> and a motion to transfer venue.<sup>45</sup> On February 22, 2011, the District Court granted the NCAA’s motion to transfer venue to the Southern District of Indiana and decided not to rule on the motion to dismiss.<sup>46</sup>

After the case was transferred to the Southern District of Indiana, the Plaintiff filed an amended complaint<sup>47</sup> and the NCAA again filed a motion to dismiss.<sup>48</sup> After oral arguments, on September 1, 2011, the United States District Court for the Southern District of Indiana ruled on the NCAA’s Motion to Dismiss for failure to state a claim on which relief can be granted.<sup>49</sup> The court found that Agnew failed to plead facts sufficient to sustain the antitrust claim and dismissed the complaint with prejudice.<sup>50</sup> Agnew’s lawyers have filed an appeal with the Seventh Circuit.<sup>51</sup>

## **II. Antitrust Law Generally**

### **A. Conspiracy to Restrain Trade Under Section 1 of the Sherman Antitrust Act**

Section 1 makes illegal “every contract, combination . . . or conspiracy, in restraint of trade.”<sup>52</sup> However, given the broad nature of Section 1 a literal application would lead to all

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

<sup>44</sup> Defendant’s Notice of Motion to Dismiss Complaint (FRCP 12(B)(6)); Memorandum of Points and Authorities in Support of Motion, Agnew v. Nat’l Collegiate Athletic Ass’n, No. 10-cv-4804 JSW (N.D. Cal. Dec. 22, 2010), ECF No. 24.

<sup>45</sup> Defendant’s Notice of Motion to Transfer Venue and Statement of Relief Sought; Memorandum of Points and Authorities in Support Thereof, Agnew v. Nat’l Collegiate Athletic Association, No. 10-cv-4804 JSW (N.D. Cal. Dec. 22, 2010), ECF No. 22.

<sup>46</sup> Order Granting Defendant’s Motion to Transfer Venue at 1, Agnew v. Nat’l Collegiate Athletic Ass’n, No. 10-cv-04804 JSW (N.D. Cal Feb. 22, 2011), ECF No. 64.

<sup>47</sup> Amended Complaint, Agnew v. Nat’l Collegiate Athletic Ass’n, No. 1:11-cv-00293-JMS-MJD (S.D. Ind. Mar. 29, 2011), ECF No. 84.

<sup>48</sup> Defendant Nat’l Collegiate Athletic Ass’n’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), Agnew v. Nat’l Collegiate Athletic Ass’n, No. 1:11-cv-00293-JMS-MJD (S.D. Ind. Apr. 29, 2011), ECF No. 91.

<sup>49</sup> Order on NCAA’s Motion to Dismiss Plaintiff’s Amended Complaint at 1, Agnew v. Nat’l Collegiate Athletic Ass’n, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist LEXIS 98744, at \*2 (S.D. Ind. Sept. 1, 2011).

<sup>50</sup> *Id.* at 1, 2011 U.S. Dist. LEXIS 98744, at \*2.

<sup>51</sup> Agnew v. Nat’l Collegiate Athletic Ass’n, *appeal docketed*, No. 11-3066 (7th Cir. Sept.12, 2011).

<sup>52</sup> 15 U.S.C. § 1 (2004). “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who

contracts being restraints of trade.<sup>53</sup> Accordingly, the Supreme Court has repeatedly stated that Section 1 of the Sherman Act “prohibit[s] only *unreasonable* restraints of trade.”<sup>54</sup>

While there is a strong legal presumption against agreements between competitors, not all such agreements are harmful to consumers, restrain trade, or are monopolistic.<sup>55</sup> It is the job of antitrust policy to distinguish between agreements that present “significant anticompetitive threats” and those that do not.<sup>56</sup> The commonly recognized restraints of trade are (1) naked restraints of trade and (2) ancillary restraints.<sup>57</sup> A naked restraint of trade is defined as a “restraint that is thought to have little potential for social benefit, and thus can be condemned under a ‘*per se*’ rule, which requires little or no inquiry into market power or actual anticompetitive effects.”<sup>58</sup> An ancillary restraint is a restraint that could serve a beneficial purpose, and as such is analyzed under the rule of reason, “which means they can be condemned only after a relatively elaborate inquiry into power and likely anticompetitive effects.”<sup>59</sup>

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shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

<sup>53</sup> *Bd. of Regents*, 468 U.S. 85, 98 (1984); *See*, *Standard Oil Co. v. United States*, 221 U.S. 1, 63 (1911): “To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce.”

<sup>54</sup> *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918); *See also*, *Bd. of Regents*, 468 U.S.85, 98 (1984); *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 342-343 (1982).

<sup>55</sup> The legislative history of the Sherman Antitrust Act implies “that Congress intended the antitrust laws to protect consumers from the high prices and reduced output caused by monopolies and cartels.” HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 59 (4th ed. 2011).

<sup>56</sup> *Id.* at 211.

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

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

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

For a plaintiff to prevail in a civil claim under Section 1, proof of three elements is required: “(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.”<sup>60</sup>

## **B. Standards of Analysis Under Section 1**

In the years since the Supreme Court first considered Section 1, two main categories of violations, and therefore of analysis, have emerged: *per se* violations and rule of reason violations. Additionally, a third category, the “quick look” analysis, exists as sub-category of the traditional rule of reason.

### **1. Per Se Analysis**

The first standard of analysis applies to practices or agreements that are “so plainly anticompetitive that . . . they are ‘illegal *per se*.’”<sup>61</sup> The test for determining whether price fixing amounts to *per se* unlawful price fixing is a test of substance, not of semantics.<sup>62</sup> The *per se* rule emerged after courts gained experience with certain kinds of restraints, such as price fixing and output limitations.<sup>63</sup> The experience made it possible for them to confidently predict that the practice would be condemned under rule of reason and thus apply the presumption that the restraint is unreasonable.<sup>64</sup>

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<sup>60</sup> *Angew*, 2011 U.S. Dist. LEXIS 98744 at 8; *See also*, *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1016 (10th Cir. 1998) (“To prevail on a *section 1* claim under the Sherman Act, the coaches needed to prove that the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.”).

<sup>61</sup> *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) [hereinafter *Professional Engineers*].

<sup>62</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8-9 (1979).

<sup>63</sup> *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 344 (1982); *See Bd. of Regents*, 485 U.S. 85, 100 n.21 (“judicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules . . . .”) (internal citations omitted).

<sup>64</sup> *See Maricopa*, 457 U.S. at 343-44 (1982) (discussing how the inquiry into the reasonableness of a challenged practice was made difficult by a Judges’ lack of expert understanding of industrial behavior, and how “once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it,” it has applied the *per se* rule.). *See also Broad. Music*, 441 U.S. at 20 n.33 (discussing why the *per se* rule is not utilized until after the Court has considerable experience with the challenged restraint.)

The *per se* rule is utilized when a restraint “facially appears to be one that would always or almost always tend to restrict competition and decrease output,”<sup>65</sup> such that an “elaborate study of the industry” is not needed to establish the practice’s illegality.<sup>66</sup> The court analyzing the restraint will presume that such a restraint is unreasonable without having to inquire into the market context of the restraint.<sup>67</sup>

In effect, with the *per se* analysis, the court makes “broad generalizations about the social utility of particular commercial practices.”<sup>68</sup> The court balances the probability of anticompetitive consequences, and their possible severity, against its procompetitive consequences and concludes that the conduct in question is almost always anti-competitive.<sup>69</sup>

One of the most common restraints to which courts apply the *per se* rule of invalidity is price fixing, defined as, “the artificial setting or maintenance of prices at a certain level, contrary to the workings of the free market.”<sup>70</sup> To be more precise, horizontal price fixing, which is defined as “price fixing among competitors on the same level,”<sup>71</sup> is among “the activities that the Supreme Court has consistently held to be illegal *per se*,”<sup>72</sup> due to the high probability that horizontal price fixing and limitations are anticompetitive.<sup>73</sup>

However, the “widespread application of the *per se* rule to price-fixing agreements has often obscured the underlying complexities of joint arrangements involving competitors and their

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<sup>65</sup> *Broad. Music*, 441 U.S. at 19-20.

<sup>66</sup> *Professional Engineers*, 435 U.S. 679, 692 (1978)

<sup>67</sup> *Bd. of Regents*, 468 U.S. 85, 100 (1984).

<sup>68</sup> *Maricopa*, 457 U.S. 332, 344 (1982) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50, n. 16 (1977)).

<sup>69</sup> *Id.* at 344.

<sup>70</sup> BLACK’S LAW DICTIONARY 1309 (9th ed. 2009); *see, United States v. Socony Vacuum Oil Co.*, in which the Court broadly construed what amounts to price fixing, stating “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing [prices] . . . is illegal *per se*.” 310 U.S. 150, 223 (1940). The Court further held that “Any combination which tampers with price structures is engaged in an unlawful activity” and “to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.” *Id.* at 221.

<sup>71</sup> BLACK’S LAW DICTIONARY 1309 (9th ed. 2009).

<sup>72</sup> *United States v. Brown Univ.*, 5 F.3d 658, 670 (3rd Cir. 1993).

<sup>73</sup> *Bd. of Regents*, 468 U.S. at 100.

great potential for efficiency.”<sup>74</sup> Additionally, the Supreme Court in *Broadcast Music* held that a blanket license agreement, which facially was a horizontal restraint, was not a *per se* violation because its purpose was to increase efficiency and make markets more competitive, not less competitive.<sup>75</sup>

## 2. Rule of Reason Analysis

Of the three standards for determining if an agreement unreasonably restrains trade under Section 1, the rule of reason standard is the one most frequently employed.<sup>76</sup> The Supreme Court first defined the parameters of the rule of reason in *Board of Trade of the City of Chicago v. United States*,<sup>77</sup> and since then “the contours of the traditional rule of reason inquiry have remained largely unchanged.”<sup>78</sup> In *Board of Trade*, the Supreme Court held that “the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition.”<sup>79</sup> According to the Court, the true test of legality is whether the restraint at issue simply regulates, and therefore promotes competition, or whether it suppresses competition.<sup>80</sup>

Under the rule of reason analysis, the fact-finder, when determining if a restraint should be prohibited as an unreasonable restraint on competition, must consider all of the circumstances.<sup>81</sup> There are three distinct steps to a rule of reason analysis: (1) plaintiff must allege and prove an anticompetitive effect; (2) if the plaintiff proves an anti-competitive effect,

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<sup>74</sup> HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 212 (4th ed. 2011).

<sup>75</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979).

<sup>76</sup> Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1588 (2003).

<sup>77</sup> *Bd. of Trade of Chicago v. United States*, 246 U.S. 231 (1918).

<sup>78</sup> *Brown Univ.*, 5 F.3d at 669.

<sup>79</sup> *Bd. of Trade*, 246 U.S. at 238; In the lower court, “the case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under Anti-Trust Law.” *Id.*

<sup>80</sup> *Id.* The Supreme Court put forth the following framework for analysis: “The court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.” *Id.*

<sup>81</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 233 U.S. 36, 49 (1977).

then the burden shifts to the defendant to demonstrate that the procompetitive qualities of conduct outweigh any anticompetitive qualities; and (3) if the defendant offers procompetitive justifications, the plaintiff must argue that a less restrictive alternative exists.<sup>82</sup>

In order to allege and prove an anti-competitive effect, the plaintiff must argue that (1) there exists a relevant market for the product at issue; (2) the defendant possesses power within said market; and (3) the agreement produced anti-competitive effects within the relevant product and geographic markets.<sup>83</sup> The burden can be satisfied by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services.<sup>84</sup> However, because it is often difficult or nearly impossible to provide such proof,<sup>85</sup> courts have allowed the plaintiff or prosecutor to submit “proof of the defendant’s ‘market power’ instead.”<sup>86</sup>

### 3. “Quick Look” Analysis

The “quick look” analysis<sup>87</sup> amounts to an abbreviated application of the rule of reason and is the “intermediate standard”<sup>88</sup> between the *per se* and rule of reason standards. In quick look cases, the restraint seems highly suspicious but it is unclear whether it actually restrains trade.<sup>89</sup> In *Board of Regents*, Justice Stevens wrote “when there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the

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<sup>82</sup> See Thomas A. Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS OF SPORT 75, 80 (2011) (discussing the breakdown of the Rule of Reason analysis into the three steps: (1) anticompetitive effect in a legally cognizable relevant market, (2) procompetitive justifications, (3) less restrictive alternative.) *Id.*

<sup>83</sup> Christian Dennie, *White Out Fall Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 112-15 (2007).

<sup>84</sup> *Brown Univ.*, 5 F.3d 658, 668 (1993).

<sup>85</sup> See *id.* (“Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct.”).

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

<sup>87</sup> Sometimes referred to as the “abbreviated rule of reason analysis.” *Id.* at 669.

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

<sup>89</sup> HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 211 (4th ed. 2011).

anticompetitive character of such an agreement,”<sup>90</sup> and that “the rule of reason can sometimes be applied in the twinkling of an eye.”<sup>91</sup>

In these cases, the courts will not apply the *per se* standard because it is inappropriate to summarily condemn the action, but the full rule of reason analysis is not necessary.<sup>92</sup> Many appellate courts approach the analysis as one of “shifting burdens of production and proof.”<sup>93</sup> Under the quick look, the plaintiff does not have to go through a detailed market definition or analysis.<sup>94</sup> The market analysis required to establish a *prima facie* case is simplified by the plaintiff showing that the defendant has market power and that the conduct is highly likely to have anticompetitive effects, so it is “unnecessary to go through a full-blown analysis” before the burden shifts to the defendant to offer plausible procompetitive justifications.<sup>95</sup>

The court will presume that the defendant’s conduct has a competitive harm, thus requiring the defendant to provide a competitive justification for the restraint.<sup>96</sup> A valid procompetitive justification must be economic in nature; non-economic justifications are not cognizable under this test.<sup>97</sup> If the court finds that the defendant has not offered any legitimate justifications, the court will proceed with the presumption that the restraint causes adverse competitive impacts, and will find that the restraint violates Section 1.<sup>98</sup> If, however, the court

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<sup>90</sup> *Bd. of Regents*, 468 U.S. 85, 109 (1984); *see* *Worldwide Basketball and Sport Tours, Inc. v. Nat’l Collegiate Athletic Ass’n*, 338 F.3d 955, 961 (7th Cir. 2004) (discussing that it is only appropriate to apply the quick look when extensive market analysis is not necessary.)

<sup>91</sup> *Bd. of Regents*, 468 U.S. at 109 n.39.

<sup>92</sup> *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993); *Bd. of Regents*, 468 U.S. at 109.

<sup>93</sup> Holmes, *Antitrust Law Handbook*, §2.10. *Per se* versus rule of reason analysis, pg 8; *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (10th Cir. 1998).

<sup>94</sup> *Law*, 134 F.3d at 1020.

<sup>95</sup> Holmes, *Antitrust Law Handbook*, §2.10.

<sup>96</sup> *Law*, 134 F.3d at 1020.

<sup>97</sup> *See generally* *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 769-71 (1999) (discussing the development and various applications of the quick look analysis).

<sup>98</sup> *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (“If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and ‘the court condemns the practice without ado’ . . . . If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.”) (internal citation omitted).

believes that the defendant *has* offered a valid procompetitive justification, the court will proceed to the full rule of reason analysis to evaluate the overall reasonableness of the conduct.<sup>99</sup>

### III. Collegiate Athletics and Collegiate Financial Aid under Antitrust Law

#### A. *NCAA v. Board of Regents*

The principal case concerning the application of antitrust law to NCAA regulations and actions is *NCAA v. Board of Regents of the University of Oklahoma*. The importance of *Board of Regents* lies not only in the development of the application of the quick-look rule of reason to the regulation of intercollegiate athletics, but also in the recognition that the NCAA was not, as many believed it to be prior, immune from antitrust law.<sup>100</sup>

At issue in *Board of Regents* was the NCAA regulation limiting the number of televised football games that could be broadcast each year.<sup>101</sup> The regulation stemmed from the NCAA's concern that televised football games had an adverse effect on college football attendance and, as such, presented a serious threat to the sport.<sup>102</sup> The plan at issue, the 1981 plan, limited the total amount of televised football games for the entire NCAA, as well as the number of games that each school could televise.<sup>103</sup> If a member institution sold television rights outside of the plan, the institution was in violation of NCAA rules.<sup>104</sup>

The NCAA adopted the plan at issue in 1981 for the 1982-1985 football seasons, and required that all televised football games of NCAA member universities be in compliance with

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

<sup>100</sup> See Thomas Scully, Note, *NCAA v. Board of Regents of the University of Oklahoma: The NCAA's Television Plan is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857, 857 (1985) ("the NCAA continued to elude Sherman Act challenges by virtue of its status as a nonprofit, self-regulatory organization that was primarily involved in promoting amateur competition, rather than in a purely commercial activity of the type traditionally regulated by the Sherman Act."); see also Susan Marie Kozik, Note, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association*, 61 CHI.-KENT L. REV. 593 (1985).

<sup>101</sup> *Bd. of Regents*, 468 U.S. 85, 89-91 (1984).

<sup>102</sup> *Id.* at 89-90 (discussing the history behind and development of various plans from implementation in 1951 to what was the current plan in 1981).

<sup>103</sup> *Id.* at 94.

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



it.<sup>105</sup> The plan awarded the rights to negotiate and contract for televised football games to the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS); any contract with a network other than ABC or CBS violated NCAA regulations.<sup>106</sup> The plan specified a minimum amount that had to be paid to each member institution for televising the games.<sup>107</sup> However, while the plan did contain different recommended fees for different telecasts, it did not account for certain differences in the type of game being televised.<sup>108</sup>

Several member universities, who also belonged to the College Football Association (CFA), believed that universities should have more say in negotiating television contracts for football games, and so the CFA obtained a contract offer from the National Broadcasting Company (NBC).<sup>109</sup> The NCAA threatened to impose sanctions on any member institution that complied with the contract.<sup>110</sup> The resulting litigation ensued.<sup>111</sup>

In *Board of Regents*, the Supreme Court held that the NCAA rule/agreement was clearly a horizontal restraint to which the courts would typically apply the *per se* rule, and presume the

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<sup>105</sup> *Id.* at 91-92.

<sup>106</sup> *Id.* at 92-93.

<sup>107</sup> *Bd. of Regents*, 468 U.S. 85, 92-93 (1984). Under the agreement, both ABC and CBS were granted the right to televise 14 live “exposures”, and each network agreed to pay “a specified minimum aggregate compensation” to the participating universities during the 4 years, in an amount totaling around \$131,750,000. *Id.*

<sup>108</sup> The plan set a recommended fee based on the type of game being broadcast in terms of a national telecast (most valuable), regional telecast, and Division II and Division III (least valuable). *Id.* at 93. However, when determining the fee each team received, the NCAA plan did not consider of the number of markets the game was broadcast in, the size of the viewing audience, or the teams participating in the game. *Id.* For example, arguably a game between rivals such as Notre Dame and the University of Michigan could have a higher draw than a game between other teams, and thus would be worth more to broadcasters, but this was not taken into consideration under the 1981 NCAA plan. *See generally* *Bd. of Regents*, 468 U.S. 85, 106-07 n.30 (1984) (discussing how the price which a telecaster would be willing to pay for a game would be dependent on the variables discussed but the NCAA plan was unresponsive to these variables).

<sup>109</sup> *Id.* at 94-95. Under the CFA-NBC contract, each institution would have had more televised appearances and realized greater revenues. *Id.* at 95.

<sup>110</sup> *Id.* at 95.

<sup>111</sup> The District Court held that the NCAA’s controls over televising football games violated Section 1 of the Sherman Act, and that the NCAA’s actions were those of a classic cartel imposing production limitations. *Id.* at 95-96. The Court of Appeals affirmed the ruling of the District Court, holding that the plan constituted illegal *per se* price fixing. *Id.* at 97. The Court of Appeals ultimately rejected all of the NCAA’s procompetitive justifications for the television plan. *Id.* at 97-98.

restraint unreasonable.<sup>112</sup> However the Court stated that it was inappropriate to apply a *per se* rule in *Board of Regents* because in order for the product, intercollegiate athletics, to be available horizontal restraints on competition were essential.<sup>113</sup> Therefore, due to the unique nature of the college football industry, the Court opted to apply the “more flexible rule of reason inquiry.”<sup>114</sup>

Under the rule of reason analysis, the Court held both that the plan had a significant potential for anticompetitive effects,<sup>115</sup> and that the anticompetitive effects were apparent.<sup>116</sup> The Court rejected the NCAA’s argument that the plan could have no significant anticompetitive effects because the NCAA did not possess market power.<sup>117</sup> Under the Court’s analysis the relevant market was college football broadcasts,<sup>118</sup> and since college football broadcasts are defined as a separate market,<sup>119</sup> it rationally follows that NCAA control<sup>120</sup> over the broadcasts gives the NCAA market power regarding the broadcasts.<sup>121</sup>

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<sup>112</sup> *Id.* at 99-101.

<sup>113</sup> *Bd. of Regents*, 468 U.S. 85, 100-101 (1984). While discussing the characteristics of the industry involved, Justice Stevens noted “some activities can only be carried out jointly. Perhaps the leading example is league sports.” *Id.* at 101 (quoting Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 278 (1978)).

<sup>114</sup> *Id.* at 100-03 (while the Court refers to the analysis utilized as a “rule of reason” analysis, the Court actually employs the quick-look rule of reason analysis. Because the restraint at issue was a naked restraint, the Court does not undertake an analysis of the market power of the NCAA. *Id.* at 109-10); *see* Scully, *supra* note 100, at 871.

<sup>115</sup> *Bd. of Regents*, 468 U.S. 85, 104 (1984).

<sup>116</sup> *Id.* at 106.

<sup>117</sup> *Id.* at 109.

<sup>118</sup> *Id.* at 112.

<sup>119</sup> The Court held that the District Court employed the correct test when it determined that college football broadcasts constituted a separate market. *Id.* at 111. “The proper test is whether there are other products that are reasonably substitutable for televised NCAA football games.” *Id.* The findings of the District court showed that college football telecasts “generated an audience uniquely attractive to advertisers” and that advertisers did not have substitute programming that attracted a similar audience. *Id.*

<sup>120</sup> As evidence of the NCAA’s control, the Court noted that “since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA’s . . . controls.” *Id.* at 106. The Court continued on to say, “Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for restraining institutions which require its approval.” *Id.* at 106 n.31.

<sup>121</sup> *Bd. of Regents*, 468 U.S. 85, 112 (1984). The Supreme Court went on to further state that the NCAA had monopoly power over the market. “When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.” *Id.* (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956)).

In light of the obvious market power that the NCAA possessed, the Court held that the agreement was a restraint of trade because it limited the freedom of member universities to negotiate their own contracts,<sup>122</sup> it placed an artificial limit on the quantity of televised football games available to broadcasters and consumers,<sup>123</sup> and created “a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.”<sup>124</sup> Therefore, the NCAA’s actions constituted a horizontal restraint of trade and were unreasonable as a matter of law.<sup>125</sup>

**B. *United States v. Brown University***

*Brown University* is a leading case concerning the application of antitrust law to the administration of financial aid by institutions of higher education,<sup>126</sup> holding that the provision of financial aid by a university is a discount. In 1958, the eight Ivy League Schools<sup>127</sup> and Massachusetts Institute of Technology agreed to form the “Ivy Overlap Group” (the Group), the purpose of which was to make a joint determination about the amount of financial aid to grant commonly admitted students.<sup>128</sup> The Group agreed that they would only offer financial aid<sup>129</sup> to students who demonstrated need and disallowed merit-based aid.<sup>130</sup>

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<sup>122</sup> *Id.* at 98.

<sup>123</sup> *Id.* at 99.

<sup>124</sup> *Bd. of Regents*, 468 U.S. 85 at 99 (1984). The Court held that the prices being paid were higher and output was lower than it would have been, and that both price and output were unresponsive to consumer preference, taking into account neither the quality of the teams nor viewer preference of the game. *Id.* at 106-07.

<sup>125</sup> *Id.* at 99.

<sup>126</sup> *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993).

<sup>127</sup> The eight Ivy League schools are: Harvard University, Yale University, Columbia University, Brown University, Cornell University, Princeton University, Dartmouth College, and the University of Pennsylvania. *Id.* at 662.

<sup>128</sup> *Id.* at 662.

<sup>129</sup> Financial aid in this context refers to financial need based aid; merit based scholarships/aid were not permitted under the Ivy Overlap Group agreement. *Id.*

<sup>130</sup> *Id.*

The Antitrust Division of the Department of Justice brought a civil suit against the Group, alleging that they violated Section 1 by unlawfully conspiring to restrain trade.<sup>131</sup> After the complaint was filed, the eight Ivy League schools signed a consent decree with the United States, leaving only MIT as a defendant.<sup>132</sup>

The District Court found that the Overlap Agreement amounted to price fixing, but decided not to apply the *per se* rule of illegality, nor the apply the full rule of reason.<sup>133</sup> Instead, the court applied the abbreviated rule of reason and “took a ‘quick look’ to determine if MIT presented any plausible procompetitive defenses that justified the Overlap Agreement.”<sup>134</sup> Ultimately, the court rejected MIT’s procompetitive justifications<sup>135</sup> and entered a permanent injunction against MIT continuing the practice.<sup>136</sup> On appeal, the Third Circuit agreed with the district court that, although the agreement was clearly a horizontal restraint,<sup>137</sup> the *per se* rule was inappropriate due to the nature of the activity.<sup>138</sup> The court further held that the quick look analysis was likewise insufficient because it failed to fully consider the procompetitive justifications offered by Brown University, and that, therefore, a full rule of reason analysis was required.<sup>139</sup>

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<sup>131</sup> *Id.* at 663-64. The three alleged ways that MIT violated antitrust law were: first, by agreeing to award aid solely based on need; second, by using a “common formula” to calculate need; and third, by jointly setting each commonly admitted students’ family contribution. *Id.*

<sup>132</sup> *United States v. Brown Univ.*, 5 F.3d 658, 662 (3d Cir. 1993).

<sup>133</sup> *Id.* at 664.

<sup>134</sup> *Id.* at 665.

<sup>135</sup> *See Id.* at 674. On appeal, MIT argued that the Overlap Agreement has three procompetitive effects/justifications: (1) by promoting socio-economic diversity at the school through the provision of need-based aid, the agreement improved the quality of education at the school; (2) eliminating merit-based aid increased the financial aid available to needy students and therefore “increased consumer choice by making an Overlap education more accessible to a greater number of students, *id.*”; and (3) the elimination of price competition for students allowed for competition in areas such as curriculum, student-faculty interaction, and campus activities. *Id.* at 375.

<sup>136</sup> *Id.* at 664-65.

<sup>137</sup> The court stated that, since the purpose of the agreement was to restrain “competitive bidding,” it therefore “deprive[d] prospective students of ‘the ability to utilize and compare prices’ in selecting among schools” and was “anticompetitive ‘on its face.’” *Id.* at 673 (quoting *Professional Engineers*, 435 U.S. 679, 693 (1978)).

<sup>138</sup> *Brown Univ.*, 5 F.3d 658, 672 (3d Cir. 1993).

<sup>139</sup> *Id.* at 678.

The central issue in *Brown University* was whether the Overlap Agreement involved commerce, and therefore was subject to a Section 1 action.<sup>140</sup> The determinative question then was, is the provision of financial assistance a discount from the full tuition amount, or is it a charitable gift.<sup>141</sup> The court held that because the amount of financial aid that a student receives directly determines the amount of tuition the student must pay,<sup>142</sup> “financial aid therefore is part of the commercial process of setting tuition”<sup>143</sup> and subject to antitrust analysis. Further, a joint agreement to give a discount among the colleges can be seen as the equivalent of price fixing.

During the discussion of MIT’s financial aid policy, the court noted MIT did not dispute that the purpose of the Overlap agreement was “to eliminate price competition for talented students among member institutions,”<sup>144</sup> and that MIT admitted that it competed with other Overlap schools for exclusive students.<sup>145</sup> Thus, by eliminating price competition for students,<sup>146</sup> and in so doing “depriv[ing] prospective students of the ability to utilize and compare prices in selecting among schools . . .”<sup>147</sup> MIT achieves certain institutional benefits at a bargain.<sup>148</sup> Such benefits include increased prestige and increased caliber of the student body.<sup>149</sup>

#### IV. Analysis<sup>150</sup>

##### A. Appropriateness of an application of the full Rule of Reason

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<sup>140</sup> *Id.* at 665.

<sup>141</sup> *Id.* at 666. The Court of Appeals further held that if financial aid is a component of setting the price of tuition, then it is commerce. *Id.*

<sup>142</sup> The price a university charges to a student is the difference between the tuition cost and the amount of financial aid awarded. *Id.* at 666 n.6. Therefore, since the exchange of money for services amounts to a “quintessential commercial transaction,” and students pay tuition in exchange for educational services, financial aid is a part of the tuition setting process. *Id.* at 666.

<sup>143</sup> *United States v. Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993).

<sup>144</sup> *Id.* at 673.

<sup>145</sup> *Id.* at 667.

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

<sup>147</sup> *Id.* at 673.

<sup>148</sup> *Id.* at 667.

<sup>149</sup> *Brown Univ.*, 5 F.3d 658, 666-67 (1993).

<sup>150</sup> In light of the fact that Plaintiff Agnew’s amended complaint was dismissed with prejudice under a 12(b)(6) motion and is currently pending appeal, this comment analyzes the issue of whether former NCAA Bylaw 15.3.3.1 violates antitrust law as if the motion had not been granted.

While, historically, the NCAA was immune from antitrust scrutiny due to its non-profit status,<sup>151</sup> following *Board of Regents*, in which the Supreme Court questioned the significance of the NCAA's nonprofit status,<sup>152</sup> courts now acknowledge that nonprofits can, and do, engage in actions that violate Section 1. Additionally, pursuant to *Board of Regents*, which recognized that, due to the unique nature of college athletics, certain horizontal restraints promulgated by the NCAA are entirely necessary in order for the product to exist,<sup>153</sup> courts do not automatically apply the *per se* analysis to NCAA; instead NCAA rules and regulations are usually analyzed under rule of reason.<sup>154</sup> Given the regulation at issue, a limitation on athletics based financial aid, it has been previously articulated that rule of reason analysis is the appropriate analytical approach for an antitrust case against the NCAA based upon such regulations.<sup>155</sup>

## **B. The One-Year Scholarship Rule Violates Section 1**

Former NCAA Bylaw 15.3.3.1<sup>156</sup> states “if a student’s athletic ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year.”<sup>157</sup> As discussed above, a

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<sup>151</sup> Scully, *supra* note 100, at 857; *See also*, Konsky, *supra* note 76, at 1589.

<sup>152</sup> *Bd. of Regents*, 468 U.S. 85, 101 (1984).

<sup>153</sup> “Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are *essential* if the product is to be available at all.” *Board of Regents*, 468 U.S. 85, 101 (1984); *See also*, Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable Nor Necessary: “Amateurism” in Big-Time College Sports*, 14 ABA ANTITRUST 51 (Spring 2000) (“in sports, courts have also ruled that certain types of otherwise *per se* illegal horizontal restraints are necessary to allow the product to exist at all and have adjudicated these cases using rule of reason analysis.”).

<sup>154</sup> *See* Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable Nor Necessary: “Amateurism” in Big-Time College Sports*, 14 ABA ANTITRUST 51 (Spring 2000) (“These cases generally have held that sports leagues are procompetitive joint ventures necessary to create a product, such as NFL football, so that some level of what would otherwise be labeled as collusion is accepted as a procompetitive activity necessary to create the product. Consequently, the courts have given these procompetitive joint ventures fairly wide latitude.”) *Id.*; *see also*, *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998) (“because some horizontal restraints serve the procompetitive purpose of making college sports available, the Supreme Court subjected even the price and output restrictions at issue in *Board of Regents* to a rule of reason analysis.”).

<sup>155</sup> Baker, *supra* note 82, at 80.

<sup>156</sup> Given the increasing likelihood that the multi-year scholarship rule will be approved by a full vote of the member institutions in February 2012, this Comment refers to the one-year scholarship rule as the former NCAA bylaw, and the proposed NCAA bylaw as the “new scholarship rule”.

<sup>157</sup> NCAA BYLAWS, *supra* note 6, at art.15.3.3.1.

primary motivation behind enacting the one-year scholarship rule in 1973 was the rising costs of intercollegiate athletics and the fear that such prohibitive costs would lead to financial ruin for many universities.<sup>158</sup>

However, enacting a rule whose sole purpose is to decrease costs, and thereby render more schools able to “compete” by establishing parity, violates the very principle of a free market.<sup>159</sup> Universities who possess the financial resources to spend more on their athletic programs were prevented from using their surplus resources when recruiting and enticing new athletes.

### **1. Anticompetitive Effect**

For an athlete to prove that the NCAA’s one-year scholarship rule had an anticompetitive effect under rule of reason analysis, he must define the relevant markets, both geographic and product, show that the defendant had market power, and that the defendant’s exertion of such market power caused anticompetitive effects.<sup>160</sup>

Under a Section 1 claim, a relevant market definition contains two aspects: the geographic market and the product market.<sup>161</sup> The geographic market encompasses the area of effective competition where buyers can turn for alternative supply sources.<sup>162</sup> The product market includes the pool of goods or services that are reasonably interchangeable in use and have cross-elasticity of demand.<sup>163</sup> Reasonable interchangeability, which is the essential test for

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<sup>158</sup> See Crowley, *supra* note 22.

<sup>159</sup> See *N. Pac. Ry. Co., v. United States*, 356 U.S. 1, 4 (1958) (discussing that the purpose of the Sherman Act was to preserve free competition as a central part of trade, and how the Sherman Act “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress . . . the policy unequivocally laid down by the Act is competition.”).

<sup>160</sup> *Worldwide Basketball and Sport Tours, Inc. v. Nat’l Collegiate Athletic Ass’n*, 338 F.3d 955, 959-60 (7th Cir. 2004).

<sup>161</sup> *Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

ascertaining the relevant product market,<sup>164</sup> can be gauged by (1) the product's uses or (2) consumer response to changes in price level.<sup>165</sup>

For the issue of whether the former NCAA bylaw violates Section 1, the relevant geographic market is the entirety of the United States due to the inherent national nature of collegiate sports and the lack of a competing entity.<sup>166</sup> In *Tanaka*, the Ninth Circuit stated, given the fact that universities throughout the United States heavily recruited Tanaka, Tanaka's "experience strongly suggests that the relevant geographic market is national in scope."<sup>167</sup> The reasoning of the Ninth Circuit is applicable to the regulation at issue in *Agnew*. It is clear that highly recruited student-athletes are more likely to receive multi-year scholarship offers, and the fact that they are highly recruited implies that universities from various parts of the country will be competing for the students, thus, as in *Tanaka*, the relevant market is national in scope. In this case, *Agnew* was recruited by several universities and received formal offers from colleges across the country,<sup>168</sup> and therefore, similar to the plaintiff in *Tanaka*, the relevant market is national in scope.

One of the largest hurdles that student-athlete plaintiffs face in a Section 1 claim is establishing a relevant market for their services as athletes.<sup>169</sup> A fatal flaw in the *Agnew* complaint is that the product market is alleged to be that of bachelor's degrees offered by

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<sup>164</sup> *White & White, Inc. v. Am. Hospitality Corp.*, 723 F.2d 495, 500 (6th Cir. 1983).

<sup>165</sup> *Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 338 F.3d 955, 962 (7th Cir. 2004) (citing to *White & White*, 723 F.2d at 500-01, "Reasonable interchangeability may be gauged by (1) the product uses, *i.e.*, whether the substitute products or services can perform the same function, and/or (2) consumer response (cross-elasticity); that is, consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service." *Id.*)

<sup>166</sup> *Tanaka*, 252 F.3d at 1063 (stating that the fact that Tanaka was recruited by universities from across the country "strongly suggests that the relevant geographic market is national in scope."); *see Dennie*, *supra* note 83, at 113-14.

<sup>167</sup> *Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1063; *see also Baker*, *supra* note 82, 84-84.

<sup>168</sup> Amended Complaint, *supra* note 47, at 3. Rice University in Houston, Texas, Brigham Young University in Provo, Utah, and University of Tulsa in Tulsa, Oklahoma. *Id.*

<sup>169</sup> *Baker*, *supra* note 82, at 81; *See, e.g., Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (antitrust action by a student-athlete challenging an NCAA/PAC 10 transfer rule. Ninth Circuit dismissed her claim because she limited her geographic market to the Los Angeles area, and her product market to the UCLA soccer program).



universities.<sup>170</sup> This product market is not only illogical given the circumstances,<sup>171</sup> but also fails to satisfy the requirements for a sufficiently alleged market. The *Agnew* case attempts to frame the issue in terms of a typical output market, where the restraint is aimed at limiting the price or output of the product in question. When it comes to financial aid for student-athletes, however, the market is not an output market, but rather an input market for the services of student athletes. While courts have traditionally been hesitant to acknowledge that a labor market exists for student-athlete services, there is a growing inclination to recognize such a market.<sup>172</sup>

In *In re NCAA I-A Walk-On Football Players Litigation (Walk on Football Players Litigation)*, the plaintiffs argued that, but for the NCAA bylaw restricting the number of football scholarships each school is able to award to eighty-five, they would have received full grant-in-aid scholarships.<sup>173</sup> In a motion for judgment on the pleadings, the District Court held that the plaintiff's definition of the relevant market as "Division I-A football" was sufficient and that the Plaintiffs had sufficiently alleged an input market "in which NCAA member schools compete for skilled amateur football players."<sup>174</sup> NCAA DI football players are a key, if not vital, input in the production, and therefore output of, college football. Just like other businesses that create a product for public use or consumption, "universities must attract the human resources necessary to operate. This inevitably involves competing for desired resources with those offering a

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<sup>170</sup> Amended Complaint, *supra* note 47, at 7.

<sup>171</sup> The type of product typically associated with the NCAA is that of intercollegiate sports, or, at the very least, something relating to college sports.

<sup>172</sup> See *Baker*, *supra* note 82, at 84-85 (discussing the dissent in *Banks v. NCAA* that acknowledges the existence of a nationwide labor market for college football players; as well as the findings of the district court in *Walk on Football Players Litig.*, that schools competed for the services of football players because they are necessary inputs to the production of Division I-A football; and *Tanaka v. Univ. S. Cal.*, where the court recognized that intercollegiate athletics programs compete for student-athlete services.)

<sup>173</sup> *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1146-47 (W.D. Wash. 2005).

<sup>174</sup> *Id.* at 1150.

similar product.”<sup>175</sup> The plaintiffs in *White v. NCAA* established a similar relevant market, defining it as an input market for the services of student-athletes at Major College Football and Major College Basketball universities in the United States.<sup>176</sup>

As in *Walk on Football Players Litigation* and *White*, the relevant input market for Agnew, as well as for other NCAA DI athletes hoping to challenge the former restrictions on grants-in-aid, is an input market for the services of the student athletes in their particular sport at DI colleges in the United States. The fact that a single product market exists is not fatal to a plaintiff’s claim.<sup>177</sup>

After establishing a relevant market, student-athlete plaintiffs are required to demonstrate that the NCAA possesses market power in the defined relevant market. Proving the NCAA’s market power regarding intercollegiate athletics is a minor issue. Market power is defined as the ability of an organization to affect the price members pay for goods or services.<sup>178</sup> The NCAA undisputedly has extensive, if not complete, control over intercollegiate athletics,<sup>179</sup> and has virtually no competition for control. This control is not limited to just game rules and standards, but extends to control over the market for student athletes,<sup>180</sup> a market on which NCAA member institutions are dependent for recruiting talent. In essence, the NCAA acts as a cartel and thus, has market power.

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<sup>175</sup> Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 70 (1995).

<sup>176</sup> (In Chambers) Order Denying Defendant’s Motion to Dismiss Venue at 2-3, *White v. Nat’l Collegiate Athletic Ass’n*, No. 2:06-cv-00999-VBF (C.D. Cal Sept. 20, 2006) (the district court, in the order denying the NCAA’s motion to dismiss, stated that the plaintiff’s relevant product market allegations were legally sufficient.).

<sup>177</sup> *Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (citing to *Int’l Boxing Club v. United States*, 358 U.S. 242, 249-52 (1959)).

<sup>178</sup> *Banks v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 850, 858-59 (N.D. Ind. 1990).

<sup>179</sup> *Bd. of Regents*, 468 U.S. 85, 106 (1984) (“since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA’s . . . controls.”).

<sup>180</sup> *See Dennie*, *supra* note 83, at 115; *see also*, *Baker*, *supra* note 82, at 86, (“the NCAA is in possession of considerable market power in regulating the competition for the services of student athletes.”).

Finally, student-athlete plaintiffs are required to show the anticompetitive effects of the NCAA's actions. In general, the test for anticompetitive effect "is whether consumer welfare has been harmed such that there has been a decrease in allocative efficiency and an increase in price."<sup>181</sup> As in *Walk on Football Players Litigation*, the market alleged here is a monopsony<sup>182</sup> over the student-athlete services market and injury to competition can occur by monopsony just as it may result from monopoly.<sup>183</sup> The NCAA's cartel-like actions prohibited price competition in the form of multi-year scholarships. This prohibition lowered the amount of financial aid available, in terms of years, for universities to negotiate with, and thus lead to allocative inefficiencies in the market for student services.

Additional anticompetitive effects of the one-year scholarship rule are quite clear in light of some of the scholarships offers that the 2012 class of recruits received under the new multi-year rule. The impact of the pending NCAA scholarship legislation, which applies to all aid agreements that take effect August 1, 2012,<sup>184</sup> is already visible. The DI Board of Directors reaffirmed the multi-year scholarship legislation on January 14, 2012,<sup>185</sup> and less than three weeks later, on National Signing Day, February 1, 2012, several universities confirmed that they awarded four-year scholarships to the 2012 class of recruits.<sup>186</sup>

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<sup>181</sup> *Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1151.

<sup>182</sup> A monopsony occurs when a single purchaser dominates the relevant market for a factor of production. *Id.* (citing *United States v. Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990), "Monopsony is defined as a market situation in which there is a single buyer or a group of buyers making joint decisions. Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side." *Id.* at 663.)

<sup>183</sup> *Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1151.

<sup>184</sup> DI Board Adopts Improvements, *supra* note 27.

<sup>185</sup> Michelle Brutlag Hosick, *DI Board Reaffirms Expense Allowance, Multi-year Scholarships*, NCAA.ORG (Jan. 14, 2012),

<http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/january/di+board+reaffirms+expense+allowance%2C+multi-year+scholarships>. [hereinafter DI Board Reaffirms].

<sup>186</sup> Brian Bennett, *Big Ten Schools Offering More Security*, ESPN.COM (Feb. 1, 2012, 6:49 PM), [http://espn.go.com/college-football/story/\\_/id/7528614/some-big-ten-offering-4-year-scholarships](http://espn.go.com/college-football/story/_/id/7528614/some-big-ten-offering-4-year-scholarships). Among the universities that confirmed to ESPN that they awarded four year scholarships were: Penn State, Michigan, Michigan State, Iowa, Wisconsin, Northwestern, and Illinois. *Id.*

The former rule deprived student-athletes of the ability to choose a school based on price considerations because the NCAA, by limiting the amount of financial aid that could be awarded, prevented the free market from establishing the market value for an athlete's abilities.<sup>187</sup> Jointly determined maximum limits on the financial incentives universities may offer to athletes deprives talented athletes of the opportunity "to receive offers of greater financial benefits from universities which have an independent economic incentive to do so."<sup>188</sup> In a free market system, student-athletes would receive aid awards proportionate to the student's worth to the university, thus enabling a student-athlete to take financial aid into consideration when choosing their college.<sup>189</sup> The NCAA's former regulation prohibiting multi-year scholarships, however, did not allow for this. As in *Law v. NCAA* and *NCAA v. Board of Regents*, in which the schools negotiated individually within the constraints of the price agreements,<sup>190</sup> universities negotiate individually with players regarding their scholarships within the confines of the NCAA bylaws. Thus, the NCAA bylaws directly dictate the limitations on the market price for the services of DI student-athletes.

The powerhouses of college athletics, universities like Alabama, Michigan, and Ohio State, are schools that are able to offer four-year athletic scholarships and will use their large

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<sup>187</sup> Mitten, *supra* note 175, at 74.

<sup>188</sup> *Id.* at 72-73.

<sup>189</sup> Dennie, *supra* note 83, at 118. *See Id.*, (stating that financial aid caps have been litigated and been found to be restraints on competitive bidding that deprive students of the ability to utilize price comparison in selecting a college. *Id.* at 114); *see also* Baker, *supra* note 82, at 88 (discussing how the reasoning of the Third Circuit in *Brown* might provide NCAA student athlete plaintiffs with a strong argument that financial aid restrictions (author was discussing the cap on the amount of aid allowed per year) have a similar anticompetitive effect on the market as those at issue in *Brown*).

<sup>190</sup> *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1018 (10th Cir. 1998) (holding that the compensation limit for "restricted earning status" DI basketball coaches was an unlawful restraint of trade, *id.* at 1024, and that the basketball coaches could not distinguish *Bd. of Regents* because, as in *Bd. of Regents*, the basketball coaches negotiated individually with the university. *Id.* at 1018); *Bd. of Regents*, 468 U.S. 85, 93 (1984) (each school independently negotiated with the television networks but only within the parameters of the predetermined agreement).

budgets as an advantage when making offers to new recruits.<sup>191</sup> When deciding between two schools, one that offers a four-year athletic scholarship, and one that offers a renewable one-year scholarship, with all other things being equal, a high school senior will likely choose the school that gave the four-year grant. Therefore, in order to remain competitive in NCAA DI athletics, schools need to sign top-recruits, and in order to sign top recruits universities must meet the demands of the market and offer four-year scholarships. The NCAA's pending legislation on scholarship rules addresses this defect in the NCAA bylaws, and allows the market to be subject to demand and promote competition among schools for top athletes, where as the restriction at issue did not.

## **2. Procompetitive Justifications**

If the plaintiff athletes sufficiently allege the anticompetitive effects of the one-year limitation on athletic scholarships, the burden shifts to the defendant NCAA to put forth the procompetitive qualities of the restriction and demonstrate that the justifications of the conduct outweigh the anticompetitive qualities of the prohibition on multi-year scholarships.<sup>192</sup> The procompetitive justifications typically offered by the NCAA are the defense of amateurism of student-athletes, parity among athletics programs, and reduction of costs.<sup>193</sup>

The District Court in *Walk on Football Players Litigation* succinctly dismissed the NCAA's argument that the scholarship regulations implicated the protection of amateurism such

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<sup>191</sup> See Dennie, *supra* note 83, at 100 (discussing the estimated economic value of major university athletics programs to be around \$250 to \$300 million).

<sup>192</sup> See, *Law*, 134 F.3d at 1019; *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (stating, "if a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.").

<sup>193</sup> *Law*, 134 F.3d at 1021-25 (the NCAA offered three procompetitive justifications for the compensation limits for certain DI basketball coaches: (1) retaining entry-level coaching positions, (2) cost reduction, and (3) maintaining competitiveness. The Court of Appeals rejected all three justifications.); *Bd. of Regents*, 468 U.S. 85, 119-20 (1984) (recognizing justifications based on preserving amateurism in college sports and the maintenance of a competitive balance).

that they were not subject to Section 1.<sup>194</sup> The Court found that the scholarship limitation did not involve the same types of conduct that rules requiring class attendance and revoking eligibility for entering a professional draft did, and therefore the numerical scholarship limitation “was not on all fours” with prior case law concerning NCAA eligibility rules.<sup>195</sup> Further, the NCAA can no longer attempt to justify the prohibition of multi-year scholarships as a protection of amateurism given the new rule allowing multi-year scholarships.<sup>196</sup> If providing multi-year grants-in-aid posed a true threat to the amateurism of student-athletes, the NCAA would not have changed the bylaws to allow for it.

That leaves the original purpose for the one-year scholarship rule. Cutting costs. The justifications of parity among athletics programs and reduction of costs can be addressed together as they both address similar concerns. Parity among athletics programs is great in theory but likely not achievable in actuality. For the NCAA to argue that certain regulations, like the one-year scholarship rule, promote parity ignores not only the entire premise of intercollegiate athletics, but also the unavoidable disparities in university athletics spending. Intercollegiate athletics competitions are based upon the notion that schools are not on par with one another, that one school is better than other and therefore will defeat the less able school in an athletic competition. Typically, the schools that are the “better” schools are the ones with larger athletics budgets, and these schools will not cut their budgets to achieve parity.

Furthermore, a cap on the number of years a school can guarantee a scholarship does little towards reaching parity. Just because a school was prohibited from promising a four-year scholarship up front, does not mean that a university will not ultimately end up providing a four-year scholarship to an athlete, and therefore will, in due course, end up spending the same

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<sup>194</sup> Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1148-49 (W.D. Wash. 2005).

<sup>195</sup> *Id.* at 1149.

<sup>196</sup> DI Board Adopts Improvements, *supra* note 27.

amount of money on scholarships. Nor does the one-year scholarship rule permit a university to provide a greater number of scholarships than the multi-year scholarship rule.

Cutting the costs of intercollegiate athletics is nothing more than a pipe dream. In total, intercollegiate athletics generates approximately \$3 billion in annual revenue.<sup>197</sup> The capitalized economic values of some major university athletics programs are estimated to be comparable to some major professional sports franchises.<sup>198</sup> In *Law*, the court held that the NCAA's procompetitive justification that the rule limiting the salary of certain entry level DI basketball coaches would cut costs was not itself valid. The NCAA proffered the argument that the rule was intended to prevent schools from trying to "keep up with the Joneses," but the Court of Appeals stated that "if holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a procompetitive effect justifying joint conduct, then *Section 1* can never apply to input markets or buyer cartels. This is not and cannot be the law."<sup>199</sup> Therefore, the procompetitive justification of reducing costs for university athletics programs is insufficient under a Section 1 cause of action.<sup>200</sup>

### **3. Less Restrictive Alternative**

The third step in the rule of reason analysis considers the existence of less restrictive alternative approaches to the regulation at issue that accomplish the procompetitive justifications put forth by the defendant.<sup>201</sup> This step is only necessary when the defendant convinces the court that the procompetitive benefits outweigh the anticompetitive effects.<sup>202</sup> It is unlikely that the NCAA would be able to convince a court that the procompetitive justifications outweigh the

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<sup>197</sup> Dennie, *supra* note 83, at 100.

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

<sup>199</sup> *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998).

<sup>200</sup> *Law*, 134 F.3d at 1022.

<sup>201</sup> *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997).

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

anticompetitive aspects given the NCAA's recent change of course on grant-in-aid policy. Not only has the NCAA decided to allow multi-year grants-in-aid, but the DI Board of Directors also decided to permit schools to offer a stipend up to the full cost of attendance, the issue central to cases such as *White v. NCAA*.<sup>203</sup> If procompetitive reasons justified allowing scholarships to cover less than full cost and allowing scholarships to only last for one year at a time, the NCAA would not have changed its policies. Thus, there is no need to consider less restrictive alternatives.

#### **4. Proposed Remedy**

While the NCAA's violation of Section 1 has been addressed for future athletes with the pending passage of the new scholarship bylaw, current and former student athletes were still harmed by the one-year rule and have been given no recourse. The NCAA should revoke the one-year grant-in-aid limitation for all current student-athletes and make the new grant-in-aid rule retroactive for all student athletes. The NCAA DI Board of Directors stated that the scholarship rule change was adopted to improve student-athlete well-being.<sup>204</sup> If this is the case, and athlete well being is the motivation behind multi-year grants-in-aid, then it should apply to all student-athletes, not just the student athletes who matriculate in Fall 2012.

For student-athletes who lost their scholarships after an injury or after being replaced on the team because of a coaching change or new recruit class, a cause of action should be conferred under Section 1. While it may be difficult for a plaintiff student-athlete to prove that, but for the one-year limitation, they would have received a multi-year scholarship, they should be provided the opportunity to present evidence supporting their claim. A highly recruited student athlete would have received offers from several universities and, given the high level of media attention

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<sup>203</sup> DI Board Adopts Improvements, *supra* note 27.

<sup>204</sup> DI Board Reaffirms, *supra* note 185.



that such student athletes receive, it would be possible for such an athlete to show that, as a result of the competition among universities to sign the athlete, he or she would have received a multi-year scholarship.<sup>205</sup>

#### **V. Aside – Ramifications of the NCAA’s New Scholarship Rule**

In light of the fact that many major universities across the country currently face funding deficits and substantial budget cuts, the NCAA’s new scholarship rule will likely lead to severe budget issues and constraints for many universities. Universities will essentially face a Catch 22. University athletics departments produce a substantial amount of revenue, but in order to remain competitive and bring in said revenue, the schools now need to recruit athletes with multi-year athletic scholarship offers.<sup>206</sup> This will end up requiring more funding from university financial aid. Since the financial aid budget will either, (1) need to be increased, meaning that money is taken from other areas such as academics and curriculum development, or (2) remain stagnant, implying that fewer funds are available for non-athletic scholarships, the university will have to make cuts in at least one area. If a university does not make the necessary cuts because they cannot afford to reduce funding to other areas, the athletic program will suffer and eventually revenues will decrease, ultimately impacting the university’s bank account even further.

Here in New Jersey, there has been incredible backlash for Rutgers University after several articles came out declaring that Rutgers was simultaneously cutting spending on academics while increasing funding to athletics.<sup>207</sup> During the 2009-2010 fiscal year, Rutgers

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<sup>205</sup> This Comment does not argue either that every student-athlete who lost his scholarship would have a cause of action or that he would have received a multi-year scholarship.

<sup>206</sup> See *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1012 (10th Cir. 1998) (stating that as a result of Title IX the NCAA saw that “some college presidents had to close academic departments, fire tenured faculty, and reduce the number of sports offered to students due to economic constraints. At the same time, many institutions felt the pressure to ‘keep up with the Joneses’ by increasing spending on recruiting talented players and coaches . . . in order to remain competitive with rival schools.” *Id.*)

<sup>207</sup> Curtis Eichelberger & Oliver Staley, *Rutgers Boosting Athletics at Expense of Academics Fails to Emulate Texas*, BLOOMBERG (Aug. 16, 2011, 2:51 PM), <http://www.bloomberg.com/news/2011-08-16/rutgers-boosting-athletics-at->

spent more money on athletics than any other public institution in the six biggest football conferences, and more than forty percent of the sports revenue “came from student fees and the university’s general fund.”<sup>208</sup> \$26.9 million dollars was given to subsidize athletics during fiscal year 2010.<sup>209</sup> Of that, only \$18.4 million came from the university bank account. Where did the remaining \$8.4 million come from? That came from student fees.<sup>210</sup>

This comment is not arguing that it is right for students at public universities to have their education compromised for the benefit of sports, it isn’t. The NCAA consistently lauds itself for having its primary goal be the education of its student-athletes; that they are students first, athletes second. However, neither is it right for the NCAA and university athletics programs across the country to violate federal antitrust law in order to save money. As compelling of an argument as cost cutting is, it does not justify a violation of antitrust law.

### **Conclusion**

Intercollegiate athletics are inextricably engrained in American culture. Every fall, all across the country, thousands of university students and alumni flock to football stadiums to cheer on their team against a rival school. It is in pursuit of this school spirit, and revenue, that athletics programs recruit top student-athletes for their teams. Prior to October 2011, NCAA member universities were able to recruit these star student-athletes without being subject to the demands of the marketplace because there was a prohibition on the duration of athletic scholarships. With the one-year scholarship rule in place, coaches, and by extension universities, were prevented from engaging in bidding wars with other universities over top-recruits. The rule

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expense-of-academics-fails-to-emulate-texas.html (discussing how the university has taken away desk phones, cut the ability of professors to use photocopiers for exams, and decreased the size of doctoral programs to save money, while at the same time forgiving \$100,000 of the football coach’s home loan, and providing the women’s basketball coach with a golf and car allowance.)

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

<sup>209</sup> *Id.*

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

violated the principles of a free market by precluding student-athletes from considering offers of multi-year financial aid, which, likely would have been offered to top-athletes but for the NCAA bylaw. The plaintiff student-athletes, under the rule of reason analysis, would be able to show the existence of a relevant market for their services, the existence of the NCAA's market power in controlling financial aid limitations, and the anticompetitive effects of the NCAA's use of its market power. Therefore, antitrust actions by former student-athletes who were previously harmed by the NCAA's one-year scholarship rule should be upheld as violations of Section 1.