The O'Bannon Court Got it Wrong: The Case Against Paying NCAA Student-Athletes

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I. INTRODUCTION:

Johnny “Football” Manziel throws a touchdown for the Texas A&M Aggies and the stadium goes crazy.1 He immediately rubs his fingers toward the sky, asking for his payday in iconic fashion.2 This is his protest against the National Collegiate Athletic Association (“NCAA”) and its rules disallowing any monetary compensation for his efforts.3

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1. See Texas A&M Football Tickets Higher in 2014 than Previous Seasons with Manziel, CBS Houston (Sept. 5, 2014), http://houston.cbslocal.com/2014/09/05/texas-am-football-tickets-higher-in-2014-than-previous-seasons-with-manziel/ (indicating the average cost of a ticket to an Aggies football game in 2012 was about $175); see also Sam Khan Jr., A&M to Add Nearly 20,000 Seats, ESPN College Football (May 1, 2013), http://espn.go.com/college-football/story/_/id/9233122/texas-aggies-approve-plans-seat-more-100000-sec-largest-stadium (their stadium holds over 80,000 fans).

2. See Rodger Sherman, Explaining the Johnny Manziel Hand Sign Texas A&M’s President Used, SB Nation (Sept. 6, 2013), http://www.sbnation.com/college-football/2013/9/6/4700258/johnny-manziel-texas-am-president-drake-ovo-hand-signal (explaining that Manziel has not revealed the true meaning of his celebration ritual, probably because he was accused of taking money for autographs despite his amateur status).

3. See NCAA, 2013-2014 NCAA Division I Manual §12.01.1 [hereinafter NCAA Bylaws] (“Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”). What Manziel does receive is a full “grant in aid.” This amount is meant to cover tuition and the other expenses necessary for attending school, but is highly criticized for consistently falling short and requiring athletes to pay out of pocket for necessary expenses. See Christopher Davis, Jr. & Dylan Malagrino, The Myth of the “Full Ride”: Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform, 65 Okla. L. Rev. 605 (2013). O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) discussed infra, addresses this issue and holds that schools must be allowed to cover the gap using funds the players bring in. This article does not focus on the...
The NCAA is the educational non-profit organization which manages and controls college sports. Its two most profitable leagues are Division I men’s basketball and the Football Bowl Subdivision (“FBS”). The NCAA, member institutions, conferences, and ancillary businesses all profit heavily from the ticket sales, television contracts, and merchandise sales associated with the athletics contests. The amount a “star” player like Manziel brings in for these organizations is hard to quantify, but many millions of dollars are directly attributable to his popularity and his performance on the field.

Student-athletes have challenged the NCAA’s compensation policy on antitrust grounds in the past. The United States Supreme Court indicated in *NCAA v. Board of Regents of University of Oklahoma* that the prohibition against student-athlete compensation is not a violation of section 1 of the Sherman Antitrust Act (“Sherman Act”). The Court found that the alleged prohibition was necessary to preserve the concept of amateurism, and amateurism contributed to the success of college sports. Until recently, the courts addressing the issue deferred to the Court’s decision in *Board of Regents*; finding the NCAA’s compensation policies justified as a matter of law.

The Northern District of California took a different approach in a landmark decision, *O’Bannon v. NCAA*. Judge Claudia Wilken did not apply *Board of Regents* and instead used the “Rule of Reason” burden shifting analysis to conclude the NCAA “grant in aid” issue and assumes that “full scholarship” athletes are not being forced to pay anything out of pocket.

4. See Christopher Lee, *College Athletics by the Numbers: A Deeper Look at Profitability*, SPORTSOLOGIST (Sept. 29, 2010), http://sportsologist.com/college-athletics-by-the-number/ (indicating division I men’s basketball and FBS Football (formerly Division I-A) are the “revenue generating” college sports leagues).

5. Schools with teams that are part of the NCAA.


7. This is the “industry” in which the “product” of revenue generating college sports are delivered to consumers in the form of live contests, game telecasts, merchandise, etc.

8. See Sam Khan Jr., *What Johnny Manziel Meant to Texas A&M*, ESPN (Jan. 8, 2014), http://espn.go.com/blog/sec/post/_/id/77873/what-johnny-manziel-meant-to-texas-am (discussing the media revenue from his 2012 Heisman trophy award for most outstanding college football player is estimated at $37 million and the football program made $300 million more than they ever had in fundraising that year).


10. Id. It is interesting that the main holding in *Bd. of Regents* was that the NCAA could not limit the amount of football games a school could license to be televised without violating the Sherman Act. It was an antitrust challenge that opened the door to the television juggernaut that is NCAA football, and now antitrust law could be costing the organization the model it created.

11. See Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012) (challenging the practice of only awarding scholarships on a year-to-year basis); see also Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990) (challenging rule not allowing a player to be eligible after they declared for the professional football draft); see also Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998), vacated on other grounds, 525 U.S. 459 (1999) (challenging rule not allowing student-athletes to change schools for a graduate program and continue playing); see also Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569 (E.D. Pa. 2004) (challenging rules affecting summer basketball camps and NCAA coach visits).

violated the Sherman Act. The NCAA conceded the compensation ban is a restraint on trade and acknowledges permitting recruits to enter into contracts would allow them to profit from their names, likenesses, and images ("NIL"). The court accepted two of the NCAA’s procompetitive justifications for the restraint: Preservation of amateurism, and integrating the student-athletes into the academic community. However the court concluded the NCAA could further their two legitimate interests through less restrictive alternatives.

The plaintiffs, a class of current and former student-athletes, successfully argued that providing student-athletes with a full scholarship and a limited amount of deferred income would substantially achieve the NCAA’s goals because no money would be disbursed while a student-athlete was eligible to play in the NCAA.

An injunction to go into effect August 1, 2015 requires the NCAA to allow member institutions to deposit up to $5,000 in a trust account for the benefit of each eligible student-athlete every year they participate. The funds will only become available once the student-athlete is no longer NCAA eligible. The NCAA is appealing the ruling, but if the Ninth Circuit affirms the decision, it will have to abide by the injunction for the college football and basketball recruiting beginning in 2015.

College sports and antitrust law have a complicated theoretical relationship. The product that all sports provide is athletic competition, and competition is what antitrust law sets out to encourage. While horizontal restraints such as price fixing are typical antitrust violations, sports leagues cannot exist without them. The competitors need to agree on rules and cooperate to promote the league. The compensation ban in college sports presents an additional antitrust complication.

13. id. at 963.
14. id.
15. id. at 978.
16. See id. at 981.
17. id. at 963.
18. O’Bannon, 7 F. Supp. 3d at 962; see also Division I Initial-Eligibility Toolkit, NCAA, http://www.ncaa.org/student-athletes/resources/division-i-initial-eligibility-toolkit (last visited Apr. 25 2015) (indicating eligibility expires after four years of participation or when a player declares that he will enter the NFL or the NBA draft).
19. See Motion for Clarification, United States District Court Records and Briefs, (August 2014), O’Bannon, 7 F. Supp. 3d (this is the date colleges can start offering scholarships to student-athletes planning to enroll for the 2016-2017 school year).
20. See O’Bannon, 7 F. Supp. 3d at 1008 (explaining the schools can decide whether to offer the trust funds at all, or which football and basketball players receive the funds).
21. id. (discussing that the NCAA could put restrictions on the trust funds so student-athletes would not be allowed to borrow against them while they are in school).
23. See O’Bannon, 7 F. Supp. 3d at 1008.
25. See Rodney K. Smith, A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics, 11 Marq. Sports L. Rev. 9, 12 (2000) (indicating the NCAA was created in the early 1900s in response to an increasing number of deaths and serious injuries occurring during ivy-league football games).
Efforts by the professional sports leagues to control the amount of compensation the athletes can receive have been found to violate the Sherman Act, and similar logic is being used against the NCAA in the O'Bannon litigation.

However, the District Court opinion fails to recognize the fatal flaw in the plaintiff’s argument as established in Board of Regents. College sports are extremely popular and highly demanded products that consist of athletic contests between student-athletes. Rules that “define the essential character and quality” of this popular product are justified as a matter of law and without “a detailed analysis.”

It is true that the profitability of the industry has increased tremendously since Board of Regents, and the compensation ban is now a recurring controversial issue. College football had its first four-team playoff this year, and it could eventually expand into eight or more teams. Industry revenues will continue to grow along with the league’s expanding market. The escalating growth of the college sports industry will increase tension between the NCAA and student-athletes indefinitely.

It could be true that paying athletes would actually increase the demand for the product. The example of minor league baseball is some evidence, however, that the college sports model contributes to the popularity of the revenue generating NCAA sports. Either way, the NCAA is not a corporation with a duty to maximize profits, it is an educational non-profit organization. Its decision not to pay student-athletes was recognized thirty years ago by the Supreme Court, and again in the O'Bannon


See Top Five ‘Pay to Play’ Scandals Rocking College Football, WEEK (Jan. 6, 2011), http://theweek.com/article/index/210800/top-5-pay-to-play-scandals-rocking-college-football (describing the list of scandals involving students and programs violating the NCAA bylaws goes on and on: whether it is Ohio State football players selling their championship rings, Reggie Bush accepting illegal gifts while a star running back at USC or Johnny Manziel taking "back pocket" money for unauthorized autographs, athletes have been known to supersede the NCAA policy at the risk of sanctions and ineligibility).

See Mark Schlabach, Playoff Expansion is Inevitable, ESPN (May 23, 2014), http://espn.go.com/college-football/story/_/id/10969476/not-matter-when-college-football-playoff-expand (quoting one FBS coach that said, “It’s never going to stay at four . . . they’ll never keep everybody happy,” commenting on the fact that the current four-team playoff will always leave at least one of the five big football conferences out).

In this author’s opinion, taking into account that the March Madness college basketball tournament is so profitable. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES CONSOLIDATED FINANCIAL STATEMENTS 17, (Dec. 4, 2013) http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006713.pdf (stating the television deal for March Madness pays more than $10 billion to the NCAA over fourteen years).

In this author’s opinion.

If star athletes had more of an incentive to play in the NCAA for four years, the talent level of the revenue generating leagues could increase, and the beneficial effect of this could outweigh the lost revenue from customers who disagreed with the decision to compensate athletes.

See Dave Warner, Why College Sports Prevail over Minor Leagues: Brands Matter, WHAT YOU PAY FOR SPORTS (Jan. 29 2014), http://www.whatyoupayforsports.com/2014/01/why-college-sports-prevail-over-minor-leagues-brands-matter/ ("A new football league attempting to sign kids out of high school and develop them for pro careers would struggle mightily against the billion-dollar machine that is college football, because the brands of the schools — the names, the logos, the traditions, and all that surrounds them — are far too entrenched in the public psyche.")

decision, as being in line with the legitimate goals of preserving amateurism and integrating athletes with the academic community.\textsuperscript{35}

The \textit{O'Bannon} court discounted the precedent followed by courts for thirty years as mere dicta, and stated that college sports have changed dramatically since the Supreme Court addressed the issue.\textsuperscript{36} The District Court applied the entire Rule of Reason analysis,\textsuperscript{37} even though the Supreme Court recently reaffirmed that such NCAA policies can be evaluated under the abbreviated “twinkling of an eye” approach.\textsuperscript{38}

However, the District Court’s approach ultimately allows the restraints on competition only to the extent that there are no “less restrictive alternatives” for achieving the procompetitive objectives.\textsuperscript{39} This gave the District Court the power to override the NCAA policy and allow athletes to be compensated if there would be no substantial effect on demand, and the compensation did not alienate the athletes from the other students during their NCAA career.\textsuperscript{40}

This was intended to enhance competition among talented recruits in choosing their schools because these recruits can be offered deferred compensation in addition to a full scholarship.\textsuperscript{41} The District Court relied on testimony by an NCAA expert that $5,000 a year would probably not have a substantial negative impact on revenues.\textsuperscript{42} The court also assumed that since many of the top schools could afford to pay their student-athletes high salaries, the costs of creating the product would not substantially increase.\textsuperscript{43}

The District Court took their power to prevent violations of the Sherman Act to an unprecedented and inappropriate level when they recognized a restraint on competition that prevented star athletes from making six or seven figures, and then “fixed” it by allowing $5,000 a year in deferred payments.\textsuperscript{44} It seems that the court wanted to provide student-athletes with compensation comparable to what a student with a part-time minimum-wage job would expect to earn\textsuperscript{45} under the Fair Labor Standards Act, if the NCAA was not exempt from those provisions with regard to paying student-athletes.\textsuperscript{46}

\textsuperscript{35} See Brief for Thomas C. Arthur et al. as Amici Curiae Supporting Respondents at 1-2, O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (No. 14-16601).


\textsuperscript{37} \textit{Id.} at 27.

\textsuperscript{38} See American Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010).

\textsuperscript{39} See O’Bannon v. NCAA, 7 F. Supp. 3d 985 (N.D. Cal. 2014).

\textsuperscript{40} \textit{Id.} at 1005.

\textsuperscript{41} \textit{Id.} at 1005-06.

\textsuperscript{42} \textit{Id.} at 1006.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} See Brief for Thomas C. Arthur, \textit{supra} note 35, at 14; see also Brief of Respondent-Appellant, \textit{supra} note 36, at 14.

\textsuperscript{45} If a student-athlete “worked” for the school forty weeks a year and twenty hours a week, awarding them $5,000 would equal $6.25 per hour, and it will be untaxed. The Federal Minimum Wage is $7.25 an hour. 29 U.S.C. § 206(a) (2006).

The Supreme Court recognized that the college sports industry is not suitable to be analyzed under this flexible burden-shifting framework.\textsuperscript{47} Moreover, the Court recognized the fact that the industry is gaining in profitability and popularity should not affect its decision.\textsuperscript{48} Competition cannot flourish if a successful business model can be eroded as a result of its effectiveness, especially once the courts have scrutinized it under antitrust law. The NCAA has operated under the Supreme Court decision allowing it to be free from such close judicial scrutiny for thirty years. This freedom has allowed the organization to build an extremely profitable enterprise that pours money back into the institutions and their athletic programs.\textsuperscript{49} The top college football and basketball teams are in an arms race for the best recruits to stay popular and continue making enormous amounts of money.\textsuperscript{50} These schools compete with each other in a plethora of ways to draw these recruits in, and the NCAA rules do not prohibit this behavior.\textsuperscript{51}

The Ninth Circuit should disagree that a trust fund is the answer. It is difficult to see how offering $5,000 a year in deferred income increases competition in the college sports industry, and competition alone should be determinative in this analysis.\textsuperscript{52}

Given the amount of money the NCAA is making from college football and basketball, allowing a payment of $5,000 a year in deferred income seems like a win for the organization. The NCAA is appealing the District Court’s decision, however, because the ruling identifies it as a cartel, and this label could be used to challenge many of its practices.\textsuperscript{53} Furthermore, there is nothing to stop a future student-athlete from challenging the ruling to increase the amount of the fund. It is hard to predict when it will stop,\textsuperscript{54} because “the University of Texas-Austin could [without other


\textsuperscript{48} Id. at 119.


\textsuperscript{51} Id.

\textsuperscript{52} See generally Gregory J. Werden, Antitrust’s Rule of Reason: Only Competition Matters, 79 ANTITRUST L.J. 713 (2014) (indicating the Supreme Court has consistently held that a Sherman Act analysis values nothing but the competitive process); see also Cont’l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (explaining the freedom of distributors and retailers in the context of a vertical price restraint was irrelevant); see also Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679 (1978) (indicating public safety and standards of professionalism did not sway the analysis); see also Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1061 (2d Cir. 1996) (discussing consumer injury could not create an antitrust injury unless it could be linked to harming competition).

\textsuperscript{53} See Strauss, supra note 22.

\textsuperscript{54} See Jon Solomon, NCAA Faces New Suit Over Number, Length of Football Scholarships, CBS SPORTS (Sept. 1, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24691100/ ncaa-faces-another-lawsuit-over-number-length-of-football-scholarships (indicating another class action, based on the O’Bannon ruling, was filed against the NCAA in August, 2014 challenging the rules restricting the length and amount of scholarships).
expenses] pay each of its 99 of their football players up to $619,000 [per] year . . . ."\(^{55}\)

The Ninth Circuit must reverse the decision if they are interested in protecting the legitimate goals of the organization.

A. The NCAA

To put it mildly, organized sports in the United States are big business.\(^{56}\) Across the country stadiums, arenas, and bars are filled with fanatics on a weekly basis. Millions of fans are glued to their flat screen televisions, and pay a hefty cable bill to do so.\(^{57}\) They show their loyalty by purchasing jerseys, jackets, hats, and just about anything else with their favorite team's logo.\(^{58}\) All of this generates huge amounts of income for the various leagues, team owners, and ancillary businesses.\(^{59}\)

Two of these revenue generating sports leagues are Division I men's basketball and the Football Bowl Subdivision ("FBS").\(^{60}\) These leagues are divided into various conferences comprised of several teams, which are all members of the NCAA.\(^{61}\) The athletic competition produced by the NCAA along with member conferences and institutions comprises the product the college sports industry provides to consumers.

This industry has been commercialized from the beginning.\(^{62}\) Michigan Stadium, or "The Big House" opened in 1927 with an initial capacity of 84,401. Now The Big House seats well over 100,000, every game.\(^{63}\) The first NCAA Men's Basketball Tournament was held in March of 1939 and failed to generate a profit.\(^{64}\) In


\[^{56}\] See CONSOLIDATED FINANCIAL STATEMENTS, supra note 30.

\[^{57}\] See Ankur Sakaria, Combatting the Influence ESPN, Sports Networks Have on Cable, PITTS NEWS (Mar. 16, 2014), http://www.pittnews.com/opinion/article_a99a2554-ad78-11e3-9c24-0017a43b2370.html (stating ESPN charges $5.13 per month, which is twenty times more than what an average channel charges).


\[^{60}\] See About the NCAA, NCAA, http://www.ncaa.org/about (last visited April 25, 2015) (these just are two of the leagues organized by the NCAA, which also encompasses many other Division I sports, FCS Football, Division II, and Division III).

\[^{61}\] Id.

\[^{62}\] See Zimbalist, supra note 59 (the 1852 rowing contest between Harvard and Yale was the first intercollegiate athletic contest in this country). Naturally, the contest involved ineligible participants and was part of an advertisement for a railroad company. Id. This was a very fitting start to an industry that is now a multi-billion dollar commercial behemoth.

\[^{63}\] See Michigan Stadium, MGoBLUE, http://www.mgoblue.com/facilities/michigan-stadium.html (last visited Apr. 9, 2015) (stating there have been 251 consecutive home crowds of more than 100,000 through 2013 season).

\[^{64}\] See JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 31 (NCAA 1st ed. 2005) ("It was held in March that year, minus the madness . . . [i]t produced a loss of $2,531.").
1940 the first college football game was shown on television, and by 1952 the NCAA had signed a national deal with the National Broadcasting Company ("NBC") worth over $1 million. From 1966 to 1982, the American Broadcast Company ("ABC") was the "TV King of College Football" and their contracts were worth $31 million by the end of that run.

These were the relatively humble beginnings of an economic giant. The annual revenue of the NCAA is approaching $1 billion dollars. This number is nearly four times as large as it was in 1996. Meanwhile the NCAA has accumulated almost $600 million for its "reserve fund." Most of this revenue is generated from the broadcast of the NCAA Division I men's basketball "March Madness" Tournament.

More than half of the revenue is distributed to the Division I Members, with the remainder committed to championships, tournaments, programs, management, and building the reserve fund. The distributions include: $188,309,000 to the Basketball Fund; $125,539,000 to the Grants-In-Aid Fund; $73,514,000 to the Student Assistance Fund; $62,770,000 to the Sports Sponsorship Fund; $24,411,000 to Academic Enhancement; and $8,466,000 for Conference Grants. The Basketball Fund is distributed to conferences based on their average success in the "March Madness" Tournament. For example, the Big Ten Conference's Basketball Fund Distribution for the 2011-2012 season was $18,165,296. The NCAA encourages these conferences to distribute the funds equally, but they are not required to do so.

The distributions from the NCAA are not the only source of revenue for schools with profitable sports teams. The colleges alone generate $8 billion a year from sports. On top of that there are ancillary businesses, including corporate partners, and licensing companies reaping the benefits. "In the 2012-2013 academic year the football and men's basketball programs at the 69 major-conference schools

65. Id. at 38-39 (indicating these first television deals limited the number of games televised because of a perceived adverse impact to ticket sales). This strategy led to Bd. of Regents, the NCAA's first major antitrust litigation. 468 U.S. 85, 102 (1984).
66. See Crowley, supra note 64, at 40.
67. See Consolidated Financial Statements, supra note 30 (indicating $912,804,046 Total Revenue for the year ending August, 31 2013; up from $871,687,872 the previous year).
69. See Consolidated Financial Statements, supra note 30, at 17 (stating that in 2010, the NCAA signed a fourteen year Multimedia Agreement granting exclusive broadcast rights to Turner and CBS for the Men's Basketball Tournament). The NCAA makes more than $10 billion over the life of the contract, which included $681 million in 2013, or 75% of their Total Revenue. Id.
71. Id. at 3.
72. Id. at 7.
73. Id. at 9.
74. Id. at 8.
75. See Zimbalist, supra note 59.
76. Id.
77. Id.
collectively had about $3.5 billion in revenue, mainly through ticket sales, television broadcast contracts, and other licensing.”

The teams in both revenue generating college sports leagues play a regular season set of games. The best teams are chosen to participate in a post-season tournament to decide the national champion. Many of the basketball and football teams fly across the country for nationally televised games playing in front of enormous crowds. The players at the schools with the best programs have access to top-notch facilities, trainers, coaches, and medical attention. The seasons last about four or five months but the athletes are typically expected to train year-round. Practicing, weightlifting, conditioning, traveling, playing, and recovering can amount to a full time workload for the athletes. Their position on the team can result in fame and media attention, and their conduct outside of sports is heavily scrutinized. In these ways the experience of a college athlete at a top-ranked program is comparable to that of their counterparts in the National Football League (“NFL”) or the National Basketball Association (“NBA”).

While the games they are playing are virtually the same, the lives of college student-athletes differ significantly from professionals. Professional athletes have agents that negotiate the most favorable contracts for their services, resulting in increasingly lucrative salaries. Professional athletes can also sign endorsement contracts with third-party businesses to capitalize on their notoriety.

78. See Brief of Respondent-Appellant, supra note 36, at 8.
79. See NCAA March Madness: Filling the Division I Basketball Brackets, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-march-madness-filling-division-i-basketball-brackets (last visited Apr. 25, 2015) (Ohio State University won the inaugural four-team college football playoff tournament in January, 2015). The playoff teams are chosen at the end of the regular season by the Selection Committee. Id. College basketball’s “March Madness” tournament is comprised of 68 teams. Id. Each of the 32 conference champions receives an automatic bid and a committee fills the remaining spots. Id.
80. See Are We There Yet?, COLLEGE SPORTS SCHOLARSHIPS (Mar. 7 2013), http://www.collegesportscholarships.com/2013/03/07/college-sports-road-trips.htm.
82. The FCS football season begins in late August and the National Championship is played in early January. Division I Men’s College Basketball begins in November and the Nation Champion is crowned at the end of March. See Al Scates & Michael Linn, Year-Round Conditioning, MAXPREPS, http://www.maxpreps.com/news/VWKvpf2kX0ii5J7iuBS4EA/year-round-conditioning.htm (last visited Apr. 25, 2015) (“Long gone are the days of beginning workouts a month or so before preseason practice begins.”).
hand, college athletes are forbidden from consulting with an agent during the recruiting process.\textsuperscript{86}

Each NCAA team represents a four-year college or university.\textsuperscript{87} Every player must be a full-time student of that institution.\textsuperscript{88} Representatives of the schools negotiate directly with the students and can only offer up to the athlete’s cost of attending school in return for their athletic performance.\textsuperscript{89} All athletes must sign an NCAA contract that provides the organization with the ability to profit from their NIL.\textsuperscript{90} Furthermore the NCAA Bylaws prevent all players from accepting any endorsements.\textsuperscript{91} In addition to athletic requirements, college athletes must meet academic eligibility standards.\textsuperscript{92}

The NFL requires athletes coming out of high-school to play two years in another league before they are eligible.\textsuperscript{93} The NBA requires one.\textsuperscript{94} There are other domestic and international professional leagues that do not have any such restrictions, but the NCAA has the best competition and offers players the best chance to make it to the NFL or NBA.\textsuperscript{95} The effect is that top recruits who are talented enough to play in the pros out of high school, and instantly make a six or seven figure salary, must temporarily face the financial realities of a college student.\textsuperscript{96}

The NCAA, created in 1910\textsuperscript{97}, is organized as an unincorporated educational not-for-profit, and is comprised of over 1,200 schools, conferences, and other organizations.\textsuperscript{98}

The National Collegiate Athletics Association is . . . dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life. We support learning through sports by integrating athletics and higher education to \textit{enrich} the college experience of student-athletes.\textsuperscript{99}

Unfortunately for the athletes seeking a payday, ‘enrich’ does not equate to ‘get rich’ because the NCAA forbids direct compensation for their talents. NCAA

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} See \textit{O’Bannon} v. NCAA, 7 F. Supp. 3d 955, 966 (N.D. Cal. 2014).
\textsuperscript{93} See \textit{Amateurism}, supra note 86.
\textsuperscript{94} See \textit{O’Bannon}, 7 F. Supp. 3d at 967.
\textsuperscript{95} See Id.
\textsuperscript{96} Id. at 967-68.
\textsuperscript{98} See CONSOLIDATED FINANCIAL STATEMENTS, supra note 67, at 7.
Bylaw 12.01.1 provides, “[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”100 It cannot be said, however, that NCAA Division I Basketball and FBS Football players receive nothing for their effort; the NCAA allows “grants-in-aid” if they do not exceed the limitations set by the organization.101 A full grant-in-aid includes tuition and fees, room and board, and required textbooks.102 This limit fails to account for many of the “estimated costs of attendance” and leaves the student-athlete, on average, $3,000 short of the full ride they were promised.103

B. The Sherman Antitrust Act Section 1

A capitalistic economy is highlighted by free markets that allow aggressive competition among vendors. Vigorous competition provides consumers with the best prices, highest quality, most choices, and best opportunity for innovation.104 Congress enacted the Sherman Antitrust Act in 1890 in response to the challenge monopolies presented to the preservation of competitive markets.105

Section 1 of the Sherman Act provides that “[e]very 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.”106

This provision is only intended to prohibit restraints if they are unreasonable,107 but the courts have interpreted the broad language to prohibit many types of actions.108 Some restraints, such as horizontal price fixing and market allocation, can be declared unreasonable under the per se or “quick look” approach.109 The default standard however, requires the plaintiff in an antitrust action to prove that “a particular contract or combination is in fact unreasonable and anticompetitive.”110

100. NCAA Manual, supra note 3, § 12.01.1.
101. Id. § 12.01.4.
102. Id. § 15.02.5.
103. See generally Davis & Malagrino, supra note 3. As mentioned in the introduction, this article does not address the “grant-in-aid” issue.
105. See The Antitrust Laws, FED. TRADE COMM’N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Apr. 25, 2015) (indicating in 1914 the Federal Trade Commission Act and the Clayton Act were created). These three acts comprise the bulk of the anti-trust legislation, while other statutes in specific areas also contain anti-trust principles. Id.
108. See Antitrust, CORNELL UNIV. LAW SCHOOL, https://www.law.cornell.edu/wex/antitrust (last visited Apr. 10, 2015) (examples of Sherman Act § 1 violations include: horizontal (between firms competing in the same industry) and vertical (between firms at different stages of the supply chain) price-fixing, tying agreements that require purchasing unwanted products or services to get desired products or services, and exclusive agreements between buyers and suppliers).
This is determined by the flexible “Rule of Reason” analysis, which must be used if the restraints on competition are necessary for the product to exist.\textsuperscript{111}

1. \textit{Board of Regents of University of Oklahoma v. NCAA}

Thirty years ago the Supreme Court addressed the issue of whether the NCAA was subject to section 1 of the Sherman Act in \textit{Board of Regents}.\textsuperscript{112} After the University of Pennsylvania started televising all their home football games in the 1940s, the NCAA decided to develop a television plan for college football.\textsuperscript{113} The “Television Committee” studied the effects of live telecasts, and determined live telecasts have an adverse impact on game attendance.\textsuperscript{114} The Television Committee’s 1951 plan limited the amount of games that could be telecast in each geographic area to one a week, each team could only be televised twice a season, and no games would be shown three weeks out of the year.\textsuperscript{115} This plan was used for the next twenty-five years in a series of short-term agreements.\textsuperscript{116} ABC received the exclusive right to televise college football games in 1965, and they later entered into a four-year deal that started in 1978.\textsuperscript{117}

The plan for the 1982-1985 seasons and the agreements following that plan are at issue here.\textsuperscript{118} Like all the previous agreements, these included limitations and requirements for the number of games to be televised.\textsuperscript{119} This drastically limited the ability of the schools to sell their game telecasts.\textsuperscript{120}

The Universities of Oklahoma and Georgia, plaintiffs in the action, are members of the College Football Association ("CFA").\textsuperscript{121} The organization attempted to negotiate its own television agreement, and received an offer from NBC that would have provided the CFA members with greater revenue.\textsuperscript{122} The NCAA announced that it would discipline any CFA member who participated in the contract.\textsuperscript{123} Plaintiffs

113. \textit{Id.} at 89.
114. \textit{Id.} at 89-90.
115. \textit{Id.} at 90.
116. \textit{Id.} at 90-91.
117. \textit{See Board of Regents, 468 U.S.} at 91.
118. \textit{Id.} at 92 (indicating the NCAA allowed two “carrying networks” for this plan and added CBS as the second network). The agreements entered with each of the networks gave them the exclusive right to negotiate with the schools for their game telecasts. \textit{Id.}
119. \textit{Id.} at 94 (discussing only a certain number of games were allowed to be shown, teams could only appear on television six times every two years, appear on national television four times every two years, and the appearances had to be divided equally among the networks). Each of the eighty-two football teams had to be shown in each two-year period. \textit{Id.}
120. \textit{Id.}
121. \textit{Id.} at 94-95 (the CFA was created by the five major football conferences along with the major football schools to promote the interests of the major football schools).
122. See \textit{id.} at 94-95.
123. \textit{Board of Regents, 468 U.S.} at 95.
filed the action to enjoin the NCAA from punishing the schools for contracting with NBC.124

The Court found that these practices created a horizontal price restraint in violation of section 1 of the Sherman Act.125 The member institutions control the NCAA television policy because they have the ability to vote to change it.126 The policy places an “artificial limit” on the amount of football games available to be shown on television.127 Output limitations such as this have frequently been held unreasonable restraints of trade.128 The NCAA television plans further unreasonably restrained trade by setting the price of the broadcasts and eliminating price negotiation between the schools and the networks.129 This constituted horizontal price fixing because the member schools were agreeing, through the NCAA, to set the aggregate value of their broadcasts higher than they would otherwise receive.130

While courts typically apply the “per se” analysis to find output limitations and horizontal price fixing illegal restraints of trade,131 the Court here would not use the truncated approach.132 They reasoned that the college sports industry relies on horizontal restraints to exist, so the “per se” rule is inappropriate.133 The service the industry provides is athletic competition between competing institutions. The competitors need to agree on rules and work together to market the league. “The integrity of the ‘product’ cannot be preserved except by mutual agreement . . . [t]hus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”134 The Court applied the full “Rule of Reason” analysis and looked at the restraint’s impact on competition.135

The Court found that the NCAA could not limit the number of games schools were allowed to televise.136 The Court recognized that sports leagues in general present a unique situation for antitrust law because some degree of horizontal restraint is necessary for the product to exist. The league and the teams need to “create and define the competition to be marketed.”137 “The Supreme Court declared that, ‘to preserve the character and quality of’ collegiate sports, ‘athletes must not be paid.’ ”138

124. Id.
125. Id.
126. Id. at 95-96.
127. See id. at 96.
129. See Board of Regents, 468 U.S. at 99.
130. Id.
131. See Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979) (indicating joint selling arrangement can be procompetitive if it increases the total output).
132. Board of Regents, 468 U.S. at 100-01.
133. Id.
134. Id. at 102.
135. Id.
136. Id. at 120.
137. See id. at 100-01.
138. Board of Regents, 468 U.S. at 102.
"The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports," and "there can be no question but that it needs ample latitude to play that role . . . ."  

2. Agnew v. NCAA

In accordance with Board of Regents, lower courts have upheld the rules relating to compensation for student-athletes as promoting competition without using the complete Rule of Reason approach. The plaintiffs in Agnew are two former football players who accepted full scholarships to play for FBS teams, but were injured and unable to complete all of the years of their eligibility. The scholarships, as required by the NCAA, are only awarded on a year-to-year basis. The NCAA also limits the amount of scholarships each team is allowed to award each year. The effect is that players with career ending injuries, like the plaintiffs in this case, typically do not have their scholarships renewed.

The plaintiffs challenged these limitations as violations of section 1 of the Sherman Act because without these rules schools could be compelled to offer multi-year scholarships to compete for recruits. The Seventh Circuit affirmed the district court's dismissal of the case. In doing so they held that while the NCAA's commercial transactions are subject to the Sherman Act, the bylaws relating to student-athlete eligibility are presumptively procompetitive. These policies can be found valid under the Rule of Reason in the "twinkling of an eye" without a "detailed analysis." The scholarship rules at issue were found not to fit into the same "mold" as the eligibility rules "blessed" by the Supreme Court in Board of Regents, but the plaintiffs failed to allege a sufficient market to show anticompetitive effects in their complaint.

3. American Needle v. NFL

A discussion of another Supreme Court decision is necessary to understand how antitrust laws affect the NCAA. The NFL is an unincorporated organization made up of the thirty-two professional football teams in the league. Each team

139.  Id. at 120.
140.  See Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012).
141.  See id. at 332.
142.  Id.
143.  Id. at 333.
144.  Id.
145.  Id. at 332.
146.  See Agnew, 683 F.3d at 332.
147.  Id. at 342; see also Smith v. NCAA, 139 F.3d 180, 186 (3d Cir. 1998); see also McCormack v. NCAA, 845 F.2d 1338, 1344-1345 (5th Cir. 1988) ("The eligibility rules create the [NCAA's] product and allow its survival in the face of commercializing pressures.").
148.  See Agnew, 683 F.3d at 341.
149.  Id.
licensed their intellectual property separately until 1963, when an organization was formed to handle the property rights collectively.151 This organization, National Football League Properties ("NFLP"), granted licenses for the manufacture and sale of products with team logos.152 The plaintiff in American Needle was a licensed vendor until the league started granting exclusive licenses, one of which went to Reebok International Ltd. to sell team headwear for ten years.153

In response to the plaintiff’s claim that the exclusive license violated the Sherman Act, the NFL argued that there could be no conspiracy between them, NFLP and the teams because they are a “single economic enterprise.”154 The Supreme Court took on the issue of whether the NFL and the thirty-two teams were a single entity for purposes of antitrust law, and thus unable to create a “contract, combination . . . or conspiracy” necessary for a violation of the Sherman Act.155

When a group of competing firms are in control of an entity that is essentially a vehicle for concerted action it can amount to a conspiracy.156 There must be “separate economic actors pursuing separate economic interests” putting a restraint on competition to override the presumption that agreements within an entity constitute independent action.157

NFL teams compete against each other for fans and in the market for selling hats.158 It does not matter that they formed a distinct entity to manage the intellectual property sales collectively.159 Each of the teams is an independent source for making decisions with their own corporate purpose, and the arrangement with the NFL deprives the market of these decision makers.160 In line with this reasoning the Supreme Court overruled the decision to dismiss the complaint at the summary judgment stage.161

Before remanding the case the Court reaffirmed Board of Regents and stated, “the restraint must be judged according to the flexible Rule of Reason and is likely to survive . . . [it] may not require a detailed analysis; it ‘can sometimes be applied in the twinkling of an eye.’”162

151. Id.
152. Id.
153. Id.
154. See id. at 188.
155. Id. at 189.
156. See United States v. Sealy, Inc., 388 U.S. 350 (1967) (indicating Sealy, Inc. licensed the trademark to mattress manufacturers and made them operate within specific boundaries).
158. Id. at 197.
159. Id.
160. Id. at 199.
161. Id. at 204.
162. See id. at 204.
4. O'Bannon v. NCAA

O'Bannon might be the most important lawsuit in the history of college athletics. O'Bannon is a former college basketball player who was playing a video game of himself and wondered why he never made a cent from it. He represents a class of current and former college athletes who contend that the NCAA's compensation ban violates antitrust law. In order to prove a section 1 antitrust violation, the plaintiff needs to prove (1) that a contract, combination, or conspiracy exists, (2) the agreement unreasonably restrains trade, and (3) the restraint affects interstate commerce.

Unlike most other lower-court decisions, this court declined to follow Board of Regents and went through the full Rule of Reason analysis to decide whether the restraint is unreasonable. The Rule of Reason is violated if the "harm to competition outweighs its procompetitive effects." In this burden shifting analysis, first the plaintiff must show that some harm to competition exists, then the defendant must show procompetitive effects, and last the plaintiff must show that there is a substantially less restrictive way to achieve the legitimate objectives.

To prove anticompetitive effects the plaintiff must show that the defendant impacted competition in a relevant market. The plaintiffs offered two relevant markets that they claimed were being restricted by the NCAA bylaws. The court recognized the "Group Licensing Market" existed in that the student athletes could potentially bundle the rights to their NIL with their teammates and sell them to the television networks and video game developers. However, it could not be proven that there was harm to the market that reached "a field of commerce in which the claimant is engaged." While they might harm student-athletes, the NCAA bylaws could not be shown to affect the competition between the ones actually able to make the deals.

It is the plaintiff's other offered market, the "College Education Market", that the court ultimately accepted to have been harmed. The schools compete to offer their unique goods and services in return for the student-athlete's services and use of

165. See O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014).
166. See Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).
167. See Brief of Respondent-Appellant, supra note 36, at 14.
168. Tanaka, 252 F.3d at 1063.
169. See O'Bannon, 7 F. Supp. 3d at 985.
170. Id.
171. Id. at 986.
172. Id. at 996.
173. Id. at 994.
174. Id. at 997.
175. O'Bannon, 7 F. Supp. 3d at 993.
their NIL. The NCAA bylaws operate as a price fixing agreement because they set the value of the athlete’s services and NIL to the cost of a full scholarship. Though there is no harm to the consumer, restraining competition in a market for labor is a sufficient anticompetitive effect. If it were not for the NCAA rules, the premier football and basketball recruits would be paid more because the buyers of their services would be free to compete.

After the court decided that there was harm to a relevant market, they turned to the four procompetitive justifications offered by the NCAA. The court concluded that the first of such objectives, the preservation of amateurism, does not justify a complete ban on sharing revenue with the athletes. They did recognize however, that it justifies a limitation on compensation to the extent that it will maximize consumer demand. The court rejected the second justification, maintaining a competitive balance among the teams to increase popularity, because it could not be shown that the compensation restriction had any effect on competitive balance. The court narrowly recognized the third justification, integrating student-athletes into the academic community, but said it also does not justify the complete ban. The court completely rejected the fourth justification, increased output. The NCAA argued that by attracting schools committed to the concept of amateurism and enabling those schools to compete in Division I who could not otherwise afford to do so, they create more opportunity for athletes to participate. Like the second justification, the court found no casual connection to the restraint.

Since the NCAA offered two viable procompetitive justifications, the burden switched to the plaintiff to show a less restrictive way to achieve those goals. Plaintiffs must show an alternative that is “substantially less restrictive and is virtually as effective in serving the legitimate objective without significantly increased cost.” The plaintiffs argued that the NCAA could allow limited and equal shares of the NIL revenue to be held in trust for student-athletes. The court agreed that this narrowly

176. Id. at 966-67 (finding that FBS football teams and Division I basketball teams do not compete with other collegiate leagues including Division II, Division III, and NAIA or professional leagues such as the AFL, NBA D-League, and leagues abroad). They are not suppliers in the College Education Market. Id.
177. Id. at 971.
178. Id.
179. See id. at 972.
180. Id. at 973.
181. O'Bannon, 7 F. Supp. 3d at 978.
182. Id.
183. Id. at 979.
184. See id. at 981.
185. Id. at 981-82.
186. Id.
187. O'Bannon, 7 F. Supp. 3d at 981-82.
188. Id. at 982.
190. See O'Bannon, 7 F. Supp. 3d at 983-84.
taiored trust payment system would increase competition without undermining the procompetitive justifications.  

The Sherman Act gives districts courts the power to enjoin violations, and the court issued an injunction that will prevent the NCAA from enforcing rules to prevent the trust system. The NCAA can set a cap on the amount that can be awarded for each athlete, but they are enjoined from setting the cap at an amount less than $5,000. The NCAA can enforce rules that prevent the student-athletes from using the trust funds as collateral for loans while they are in school. The NCAA can enforce rules making the trust amount uniform for members of the same team in the same class. The court denied the plaintiff’s other offered alternative that would allow limited endorsements for student athletes.  

Judge Wilken would not stay the injunction pending review of the case, so the class of recruits for 2016 is affected by the ruling. Whether something is a violation of the Sherman Act is a question of law and will be reviewed de novo.  

II. Restraint on Student-Athlete Compensation  

It is not disputed that the NCAA bylaws are the result of an agreement between members and that they affect interstate commerce. The only issue is whether the NCAA bylaws unreasonably restrain trade.  

In O’Bannon, the district court agreed not to find the compensation ban illegal as a matter of law because the NCAA bylaws at issue affect a sports league, in which horizontal restraints are often necessary. College sports are identifiable by the exclusive use of amateur athletes, and without the NCAA bylaws this distinct product would not exist. The lower court properly analyzed the issue under the default Rule of Reason standard rather than the per se rule of illegality.  

The Rule of Reason requires balancing the anticompetitive and procompetitive effects through a burden shifting analysis. If the plaintiff proves significant harm to competition and the defendant proves a legitimate procompetitive reason for the

191. Id.
192. Id. at 1007.
193. Id. at 1008.
194. Id.
195. See id. at 1008.
196. O’Bannon, 7 F. Supp. 3d at 1008.
197. Id. at 984.
198. Id. at 1008.
199. See Brief of Respondent-Appellant, supra note 36, at 21.
200. See American Needle, Inc. v. NFL, 560 U.S. 183 (2010) (recognizing that even though the actions of sports teams are conducted through a separate entity they can still be considered to have engaged in a conspiracy) The O’Bannon court relied on this reasoning to satisfy the concerted action requirement for a Sherman Act violation. See O’Bannon, 7 F. Supp. 3d at 985.
201. Id.
202. Id. at 1009.
203. See Brief for Thomas C. Arthur, supra note 35, at 5; see also Texaco, Inc. v. Dagher, 547 U.S. 1, 8 (2006).
restraint, the plaintiff can argue that a substantially less restrictive way to achieve the goals exists.\textsuperscript{204}

A. The Inapplicability of the "Full Rule of Reason" Analysis

The NCAA asserts that the court should never have applied the full Rule of Reason analysis. According to Board of Regents, rules that are based on a desire to preserve the tradition of amateurism are procompetitive as a matter of law. The district court did not identify the "material changes" upon which the decision not to follow Board of Regents is based.\textsuperscript{205} It cites a Seventh Circuit concurring-and-dissenting opinion in Banks v. NCAA that stated, "a more innocent era . . . where amateurism was more a reality than an ideal" has been replaced by "a vast commercial venture that yields substantial profits for colleges."\textsuperscript{206} However, the author of that opinion adhered to the analytical framework of Board of Regents twenty years later in Agnew, recognizing that the precedent still applies despite the changes.\textsuperscript{207}

The district court also disregarded the precedent because they considered it dicta, but the Supreme Court has repeatedly referred to the analytical framework. "The Third and Sixth Circuits have concluded that similar NCAA eligibility rules do not regulate commercial activity and are therefore outside the scope of the Sherman Act."\textsuperscript{208} There are also no publicity rights for the NIL payments the plaintiffs are seeking. "The court did not identify any negative effect on output or overall competition in the relevant college-education market."\textsuperscript{209}

The NCAA argues that the district court equated commercialism with professionalism, but high school football in Texas is commercialized, and Little League Baseball’s television contract is worth $76 million over eight years.\textsuperscript{210}

B. The Harm Caused by the Full Rule of Reason Analysis

"The policy unequivocally laid down by the [Sherman] Act is competition."\textsuperscript{211} The Act focuses on "the competitive process, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest."\textsuperscript{212}

\textsuperscript{204} See Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996) (quoting Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991)).

\textsuperscript{205} See Brief of Respondent-Appellant, supra note 36, at 18.

\textsuperscript{206} See Banks v. NCAA, 977 F.2d 1081, 1094 (7th Cir. 1992).

\textsuperscript{207} See Brief of Respondent-Appellant, supra note 36, at 18.

\textsuperscript{208} Id. at 22.

\textsuperscript{209} Id. at 16.


\textsuperscript{212} Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986).
Focusing on the competitive process has major implications for the Rule of Reason analysis. First, the plaintiff does not need to show a negative effect on the public welfare such as price, quality, and quantity effects. Second, the plaintiff cannot meet their burden by simply showing some of these indicators. They must show that the negative effect on price, quality, or quantity stems from a restraint to competition. The final implication is that the defendant may not justify a restraint by showing that it enhances public welfare in some way other than promoting competition.

This focus on the competitive process extends the reach of the Sherman Act when applied to buyers (the NCAA and their member institutions) restraining trade to lower their prices. While these practices are harmful to suppliers (student-athletes), they do not always affect the consumer. There is debate over whether or not to apply a consumer welfare standard to the Sherman Act, but neither Congress nor the Supreme Court has rewritten the law.

This is important for the antitrust litigation against the NCAA regarding compensation of student-athletes. If the impact of the alleged restraint on the consumer was the key, the organization would have nothing to worry about because college basketball and football are extremely popular and lucrative, which evidences that the product itself is unharmed by the restraint. This is irrelevant under the proper analysis, and the plaintiffs in O'Bannon make their case only by showing harm to the sellers, the student-athletes. Antitrust law assumes that the consumers will inevitably be harmed by the lack of competition in the college education market, even if there is no direct impact. The only thing the defendant can offer to justify the restraint is evidence that the alleged restraint actually promotes competition.

The district court was correct to consider the NCAA's procompetitive justifications only to the extent that they increase the popularity of the sport. If there are people who will lose interest if student-athletes are paid, the NCAA bylaws restricting compensation naturally increase the total output of college sports. The problem is that this line is going to be different for every person. This can be addressed with consumer surveys, but those will have reliability concerns. A prediction of one's behavior in a given situation is no guarantee of what they will actually do. A consumer who is strongly opposed to compensating college athletes may underestimate the desire to watch the game when Saturday morning comes along.

The deferred effect of the trust fund system is supposed to alleviate these concerns; a consumer opposed to compensation could be more willing to watch if the athletes cannot use the money while in school. This assumes that a major reason for the consumer attitude is the lifestyle of the student-athlete. For example, someone

\[213. \text{See Werden, supra note 52, at 757-58.}\]
\[214. \text{Id. at 758.}\]
\[215. \text{Id. at 758-59.}\]
\[216. \text{Id. at 758.}\]
\[217. \text{Id. at 759.}\]
who is opposed to compensation because they enjoy watching athletes play "for the love of the game" would not care when they get the money.

Despite these complications in determining the actual effect allowing compensation would have on the consumer, and after recognizing that a courtroom may not be the appropriate forum for making that determination, the district court judge decided that $5,000 a year would be an appropriate minimum.

III. CONCLUSION: O'BANNON v. NCAA AND THE NINTH CIRCUIT'S OPPORTUNITY TO GET IT RIGHT

Ed O'Bannon was playing a video game of himself and felt that he should have received some of the profits.218 It is true that the current professional and collegiate football and basketball rules prevents some athletes from receiving large salaries for a year or two that they otherwise would receive.219 The Supreme Court in Board of Regents decided that the use of nonpaid student-athletes is important for making a set of products that many people enjoy.220 The onslaught of past, pending, and anticipated antitrust litigation has caused the NCAA to re-evaluate their successful business practices. One of the popular adaptations of their product, the NCAA College Football and Basketball video games produced by EA Sports, has been discontinued.221 The O'Bannon decision further reduces the NCAA’s ability to create successful products in accordance with antitrust legislation, which harms the consumer.

A strong affirmation of the principles created in Board of Regents would restore the NCAA’s confidence in its business model, which creates enormous opportunities for many people. The Ninth Circuit should reject the application of the Rule of Reason analysis altogether, and follow the Supreme Court’s 1984 Board of Regents decision, which declares the NCAA’s compensation policy to be reasonable without the need of the complete Rule of Reason analysis.

Even if the Ninth Circuit agrees that the issue of compensating college athletes needs to be revisited under closer scrutiny, they should not agree that the deferred trust fund system is an acceptable substantially less restrictive alternative.

Either of these holdings by the Ninth Circuit in the summer of 2015 will prevent an injunction from taking effect that will erode the NCAA’s product and open the door to unnecessary, highly speculative micromanagement by the judicial system.

219. Top drafted professional baseball players often receive large signing bonuses and salaries right out of high school. See Nationals Sign Bryce Harper for $9.9M, ESPN (Aug. 17, 2010), http://sports.espn.go.com/mlb/news/story?id=5468993 (stating Bryce Harper was the first draft pick in the 2010 amateur baseball draft and signed a contract worth $9.9 million when he was 17 years old). He received $1.25 million of his $6.25 million signing bonus 30 days after signing the contract. Id.
Frank Kaminsky could have left the University of Wisconsin basketball team for the NBA after his junior year. In his blog the seven-foot forward explains his decision to play for the Badgers another year.\textsuperscript{222} One factor that influenced his decision was that the NBA looked “flat out boring” compared to the atmosphere of college sports.\textsuperscript{223}

This illuminates one of the shortcomings of the major professional sports leagues. Practically everybody on the field or court is a millionaire trying to lock-in their next contract. Student-athletes on the other hand, make sacrifices just to be given a chance to play, even when their bank account has less than $20 in it.\textsuperscript{224} It is this unconditional “love of the game” which makes college sports unique, and it needs to be preserved.


\textsuperscript{223} Id.

\textsuperscript{224} Id.