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Pennsylvania Rules of Appellate Procedure: Appreciating the Past and Anticipating the Future
Student Article

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O'BANNON v. NCAA: AN ANTITRUST ASSAULT ON THE NCAA'S DYING AMATEURISM PRINCIPLE

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I. INTRODUCTION

Derrick Henry can run. *Fast*. The University of Alabama's former star running back amassed 3,591 rushing yards and 42 rushing touchdowns throughout his college football career.¹ In the 2015-2016 season, he managed to break the legendary Herschel Walker's *494 single season Southeastern Conference (“SEC”) rushing record,² and he accomplished this feat while helping to lead the Alabama Crimson Tide to the National Collegiate Athletic Association (“NCAA”) Playoffs as well as the National Championship Game, where he ran for 158 yards and 3 touchdowns en route to Alabama winning the National Title.³ In doing so, he won the Heisman Memorial Trophy Award, an honor bestowed yearly on the most outstanding college football player.⁴ Given that accomplishing these feats of athleticism made Henry one of, if not the *most*, popular college football athlete of the 2015-2016 season, it was no surprise that his name, image, and likeness were found plastered across various forms of media.

While a member of the Crimson Tide football team, Henry, like thousands of other NCAA student-athletes, became a poster-child--his name, image, and likeness used by the University of Alabama and the NCAA in numerous forms.⁵ During the time period in which Henry was a member of the team, a quick trip around the Internet revealed that his replica jersey (Number 2) was featured for sale.⁶ More notably, during major network television broadcasts of Crimson Tide football games, audiences across the nation could watch Henry blaze down the field, scoring touchdown after touchdown, on the way to win after win.⁷

Interestingly enough, Henry, like the rest of the NCAA's Football Bowl Subdivision (“FBS”) student-athletes, did not see a dime of the revenue generated from the use of his name, image, and likeness (“NIL”) by either the University of

Alabama or the NCAA. Rather, the NCAA has reaped tremendous financial reward by negotiating for the rights in student-athletes' NILs, especially for big-name *495 players like Henry.⁸ And while these student-athletes *do* typically receive increased scholarships as well as subsidized room and board at school, the majority of these athletes will not go on to play sports professionally; thus, the value of their NILs is at a premium and will generate the most revenue during the time they play collegiately, where the talent pool is more diluted.⁹ Thus, the NCAA's framework is clearly flawed because its rules severely restrict a student-athlete's NIL rights. Recently, in *O'Bannon v. NCAA* ("*O'Bannon I*"),¹⁰ the United States District Court for the Northern District of California levied a major blow against the NCAA in holding that some of the NCAA's rules were an unreasonable restraint on trade, thereby opening the door for more student-athletes across the nation to crusade against the NCAA's oppressive NIL regulations.¹¹

En route to analyzing the outcome of *O'Bannon*, this article first discusses the history and background of the NCAA, its organization, and its comprehensive system of rules and regulations.¹² Next, it provides a brief overview of the relevant Sherman Antitrust Act sections,¹³ followed by an examination of the pertinent case law covering certain antitrust lawsuits brought against the NCAA in recent decades.¹⁴ Then, it explores the district court's *O'Bannon* decision.¹⁵ Lastly, this article provides an analysis of *O'Bannon's* outcome and explains how the United States Court of Appeals for the Ninth Circuit erred in its recent ruling ("*O'Bannon II*"). In doing so, this article ultimately concludes that certain NCAA rules do restrain trade, and that schools should be permitted to allow FBS football and Division I men's basketball players to receive a certain amount of compensation for use of their NILs in specific forms of media. However, courts should still be cautious in ensuring that schools are not permitted to give those student-athletes an excessive share of that compensation so as to *totally* demolish the NCAA's amateurism concept.¹⁶

*496 II. THE NCAA AND THE HISTORY OF ITS AMATEURISM PRINCIPLE

A. *The NCAA: Origins of an Empire*

Founded in 1906,¹⁷ the NCAA is a non-profit organization that dedicates itself "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."¹⁸ Over 1,200 schools, conferences, and affiliate organizations retain membership in the NCAA, which offers its more than 460,000 student-athletes¹⁹ the ability to participate in 89 championship athletic events.²⁰ The NCAA is further subdivided into three divisions: Division I, Division II, and Division III.²¹ Each one of these divisions creates its own rules in accordance with overarching NCAA principles, and the active school then determines its classified division as long as it can meet the applicable divisional criteria.²²

By far, Division I is the largest and most profitable of the divisions in that it boasts the biggest student bodies comprising nearly 350 colleges or universities, manages the largest athletics budgets of approximately 6,000 teams, and offers the most generous amount of scholarships to its more than 170,000 student-athletes.²³ To qualify for Division I membership, a school must sponsor a minimum of 14 varsity sports teams and distribute a baseline amount of financial aid to its student-athletes.²⁴

For football, Division I is further divided into two subdivisions: the FBS and the Football Championship Subdivision ("FCS").²⁵ FBS schools differ greatly from FCS schools in that FBS schools may offer up to 85 full scholarships to players while FCS schools are permitted to offer a smaller number of these scholarships to their football teams' players.²⁶ Thus, the level of competition within *497 FBS, where about 120 schools currently compete, tends generally to be higher than within FCS.²⁷

Additionally, FBS and Division I are broken down even further into different conferences, each of which is composed of eight to fifteen schools with their own eligibility requirements.²⁸ Conferences have the ability to organize conference-specific games, and while they are considered members of the NCAA, they mostly operate independently by generating their own revenue and setting their own rules, as long as they comply with existing NCAA policy.²⁹

An 18-member Board of Directors enacts the relevant rules governing the participation and competition within Division I.³⁰ Within Division I, the NCAA states that it has a number of purposes.³¹ The NCAA claims that one of its *basic* purposes is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”³² This basic purpose is perhaps best epitomized in the NCAA's strong emphasis on the principle of amateurism. The NCAA states that its student-athletes shall be amateurs within their respective sports, and that their primary motivation should be education and the physical, mental, and social benefits to be derived from that education, rather than for financial gain, like endorsement deals, or for other reasons associated with being a professional athlete.³³ The NCAA also calls students' participation in intercollegiate athletics an “avocation,” and mandates that student-athletes be protected from exploitation by professional and commercial enterprises.³⁴

The NCAA's amateurism concept serves as the foundation for the rules governing how its student-athletes may behave in certain situations. As such, if student-athletes commit any act that strips *498 them of their “amateur” status, they become ineligible for intercollegiate athletic competition in their particular sport.³⁵ Most notably, student-athletes lose amateur status when they “[u]se[] [their] athletics skill (directly or indirectly) for pay in any form in that sport”³⁶ Moreover, the NCAA defines numerous activities that constitute “prohibited forms of pay.” Most notably, the definition includes: (1) salary, (2) gratuity or compensation, (3) education expenses not permitted by the NCAA's governing legislation, (4) cash as an award for participating in athletic competition, (5) payment based on performance, and (6) preferential treatment, services, or benefits based on the student-athlete's skill or reputation.³⁷ The NCAA also bars student-athletes from endorsing any commercial product or service while they are in school, regardless of whether they receive compensation to do so.³⁸ Thus, while student-athletes may generally earn money from any “on- or off-campus employment” unrelated to athletic ability, they may not receive “any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.”³⁹

Most relevantly, NCAA rules also prohibit schools from offering current student-athletes any compensation from their schools or outside sources for the use of their NILs in live game telecasts, videogames, game re-broadcasts, advertisements, and other footage.⁴⁰ These rules currently affect FBS football and Division I men's basketball, two of the most popular NCAA sports. These rules in particular also impose one strict limitation on the amount of overall compensation schools may distribute to their student-athletes.⁴¹

The NCAA imposes this limitation in the form of a cap on the total amount of financial aid that a school may distribute to student-athletes by prohibiting student-athletes from receiving financial aid over the “cost of attendance.”⁴² The bylaws define “cost of attendance” as “an amount calculated by [a school]'s financial aid *499 office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance” at that school.⁴³ The cost of attendance has generally been higher than the value of a full grant-in-aid, and although the gap between the full grant-in-aid and the cost of attendance varies from school to school, it is typically a few thousand dollars.⁴⁴

Additionally, the NCAA used to prohibit any student-athlete from receiving “financial aid based on athletic[] ability” that exceeded the value of a full “grant-in-aid.”⁴⁵ The bylaws define full “grant-in-aid” as “financial aid that consists of tuition and fees, room and board, and required course-related books,” an amount that varies yearly from school to school.⁴⁶ If a student-athlete received financial aid over this amount, he used to have to forfeit his athletic eligibility.⁴⁷ However, in August 2014, the NCAA announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance.⁴⁸

Given the NCAA's strict limitations within its eligibility rules, including the NIL revenue restrictions, over the past decade or so, various student-athletes have clamored for change.⁴⁹ They have argued that the NCAA's rules are illegal as a matter of antitrust law, in that the NCAA imposes unreasonable restraints on trade.⁵⁰ As such, a robust body of case law now exists, documenting these student-athlete-plaintiffs' attempts to achieve a more equitable intercollegiate athletics atmosphere via the Sherman Antitrust Act.

B. The Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act (“Sherman Act”) mandates that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the *500 several States, or with foreign nations, is declared to be illegal.”⁵² To prevail on a claim under Section 1 of the Sherman Act, a plaintiff must show “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a *per se* rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.”⁵³

In determining whether an agreement restrains trade (the second element of the test), courts use either the rule of reason or *per se* analysis.⁵⁴ In the Ninth Circuit, the court presumptively uses the rule of reason as the default standard, rather than the “quick look” or *per se* analysis.⁵⁵ Additionally, concerted actions undertaken by joint ventures, like the NCAA, are analyzed under the more flexible rule of reason.⁵⁶ Under the rule of reason analysis, the Ninth Circuit utilizes a burden-shifting framework in which the plaintiff bears the initial burden of showing the restraint produces “significant anticompetitive effects within a relevant market.”⁵⁷ If the plaintiff meets this burden, the defendant must then attempt to prove the restraint's procompetitive benefits.⁵⁸ Lastly, if the defendant produces sufficient evidence of procompetitive benefits, the plaintiff must “show that any legitimate objectives can be achieved in a substantially less restrictive manner.”⁵⁹

C. Early Years of Amateurism: Pre-Board of Regents

As early as the 1970s, student-athletes began attacking the NCAA via various lawsuits under the Sherman Act.⁶⁰ In *Jones v. NCAA*,⁶¹ the plaintiff, a Northeastern University hockey player, alleged that the NCAA's eligibility rules, which prevented him from participating in intercollegiate hockey because he had received compensation for playing on other hockey teams before college, constituted an antitrust violation.⁶² In holding that the plaintiff could not *501 succeed on his antitrust claim, the district court stated that “[t]he N.C.A.A. [eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding.”⁶³ The court also stated that any limitation on college sports was merely an “incidental result” of the NCAA's pursuit of its “legitimate goals.”⁶⁴

Another antitrust suit arose in *Justice v. NCAA*,⁶⁵ where the NCAA imposed sanctions on the University of Arizona for numerous occasions when university staff members and officials provided compensation or other benefits to members of

the school's football team, or individuals being recruited by the school's football program.⁶⁶ The plaintiffs alleged “that the sanctions by an association of colleges and universities in competition with the University of Arizona constitute[d] a group boycott[,]” thus, violating Section 1 of the Sherman Act.⁶⁷ In ruling that the NCAA's sanctions were not an antitrust violation, the court reasoned that those rules were “rationally related to the NCAA's stated objective of promoting amateurism.”⁶⁸

D. Board of Regents: The First Major Antitrust Attack

While *Jones* and *Justice* provided brief glimpses into student-athletes' antitrust lawsuits against the NCAA, the first large-scale antitrust attack against the NCAA did not come until 1984. In *NCAA v. Board of Regents of the University of Oklahoma*,⁶⁹ the University of Oklahoma and the University of Georgia together challenged one of the NCAA's programs that limited the total number of televised intercollegiate football games.⁷⁰ The larger universities, mainly schools with successful football programs, had begun to realize that instead of using the NCAA to broker deals with major television networks, the universities could instead receive a better deal if they dealt *directly* with the television networks.⁷¹ The NCAA then *502 threatened sanctions against the schools, prompting the suit.⁷² The suit eventually reached the United States Supreme Court, and the Court held that the NCAA's rules constituted horizontal price fixing with output limitations; thus, the plan constituted a restraint on operation of the free market of college football.⁷³ Moreover, because restraints were not justified on the basis of the procompetitive effects of protecting live attendance or maintaining competitive balance among amateur athletic teams, the Supreme Court affirmed the lower courts' decisions in ruling that the NCAA's rules had significant anticompetitive effects, thereby violating the Sherman Act.⁷⁴

While the Court did not directly address the issue of the NCAA using student-athletes' NILs without compensating those student-athletes, it did comment on the topic in dicta by “express[ing] the importance of the NCAA's task as a regulatory body to preserve the amateur and academic status of student-athletes, as well as maintain competitive balance among member institutions.”⁷⁵ In reinforcing the above statement as the NCAA's objective on behalf of its student-athletes, the Court also stated that, “[i]n order to preserve the character and quality of the [NCAA's] ‘product,’ *athletes must not be paid*, must be required to attend class, and the like.”⁷⁶ Thus, because the Court assumed that “most of the regulatory controls of the NCAA are justifiable means of fostering competition,” moving forward from *Board of Regents*, other courts have looked to whether the NCAA regulation at issue has an effect on amateurism or fair competition when analyzing the legality of NCAA restraints on competition.⁷⁷

E. Board of Regents' Progeny

Following *Board of Regents*, a number of courts have offered some worthwhile commentary on the NIL compensation issue, and an *503 analysis of these decisions reveals that the NCAA has been the target of antitrust litigation for years.⁷⁸ For instance, in 1988, in *McCormack v. NCAA*,⁷⁹ the United States Court of Appeals for the Fifth Circuit held that a group of Southern Methodist University alumni, football players, and cheerleaders had failed to state a claim when they sued the NCAA on an antitrust basis, alleging that the NCAA's rules unreasonably restricted compensation in the form of scholarships to student-athletes.⁸⁰ In rejecting the plaintiffs' claims, the court noted that the rules determining eligibility for college football games “enhance public interest in [those games]” and are thus, procompetitive.⁸¹ Additionally, the court emphasized the dividing line between college sports and professional sports in stating that “[t]he NCAA markets college football as a product distinct from professional football [.]”⁸² and that the NCAA's “eligibility rules create the product and allow its survival in the face of commercializing pressures.”⁸³

In 1992, in *Banks v. NCAA*,⁸⁴ the United States Court of Appeals for the Seventh Circuit rejected a University of Notre Dame football player's argument that the NCAA's "no-draft" rule and "no-agent" rule⁸⁵ were anticompetitive restraints on trade.⁸⁶ In reaching its conclusion, the court reasoned that these rules were actually procompetitive in that "the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education."⁸⁷ The court elaborated on this position in stressing that the two rules at issue helped to maintain separation *504 between the commercial world of professional sports and the higher education-based world of intercollegiate athletics.⁸⁸

In 1998, in *Smith v. NCAA*,⁸⁹ a college volleyball player filed an antitrust lawsuit in relation to NCAA rules concerning her final two years of athletic eligibility when she enrolled at a post-graduate program different from her undergraduate university.⁹⁰ Stressing the importance of amateurism's effect on fair competition, the Third Circuit ruled that the NCAA's regulation was procompetitive in that it prohibited post-graduate recruiting so that student-athletes would not forgo eligibility at the undergraduate level to preserve athletic eligibility at the post-baccalaureate level.⁹¹

That same year, in *Law v. NCAA*,⁹² the Tenth Circuit held that an NCAA regulation restricting Division-I college coaches' salaries was an unlawful restraint of trade.⁹³ The NCAA had begun to fix these coaches' salaries at a certain amount because larger schools were paying more experienced coaches more money, which the smaller schools could not afford.⁹⁴ The court found that the NCAA member schools' agreement to restrict coaches' salaries constituted a "horizontal price fixing agreement because the agreement eliminated market competition for assistant football coaches."⁹⁵ In addition to ruling that the NCAA had not proffered a sufficient procompetitive justification, the court stated in a footnote that the NCAA could not argue that the challenged regulation fostered amateurism; rather, it could only use that argument in relation to preserving the amateur status of its student-athletes, *not* the schools' coaches.⁹⁶

Most recently, in 2012, in *Agnew v. NCAA*,⁹⁷ the Seventh Circuit affirmed the dismissal of an action filed by student-athletes against the NCAA under the Sherman Act, alleging that NCAA regulations capping the scholarships per team, and prohibiting multi-year *505 scholarships, had an anticompetitive effect on the market for student-athletes.⁹⁸ However, in doing so, the court used some instructive language for courts analyzing the NCAA's amateurism principle in the context of antitrust lawsuits. The court stated that when the NCAA's bylaws are challenged, the first--and perhaps only--question to ask is "whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court [in *Board of Regents*], making them presumptively procompetitive."⁹⁹ The court also emphasized that the eligibility rules are "clearly necessary to preserve amateurism and the student-athlete in college football. Indeed, they define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of the product of college football."¹⁰⁰ However, the court also stated that "if a regulation is not, on its face, helping to 'preserve a tradition that might otherwise die,' either a more searching Rule of Reason analysis ... or a quick look at the rule will obviously illustrate its anticompetitiveness."¹⁰¹

In 2013, and relating most relevantly to *O'Bannon*, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (hereinafter "*In re NIL Litigation*"),¹⁰² Electronic Arts ("EA"), a prominent video game developer, settled with the *O'Bannon* Plaintiffs over the burgeoning issue of commercial entities using student athletes' NILs without compensating them, going so far as to refrain from producing its popular "NCAA College Football" video game series.¹⁰³ EA had previously developed its annual "NCAA College Football" game for over a decade, allowing video game players to choose from numerous college football teams to use while playing against a virtual version of another team.¹⁰⁴ While EA did not use current or former college football players' *names* in the game, it did use their likenesses, attempting to model each virtual player after what he looked like in real life.¹⁰⁵ EA's "NCAA College Football" series was *506

extremely popular, but given the combination of three major FBS conferences disallowing EA to use its football players' NILs in the video game, and the pendency of the lawsuit where Plaintiffs claimed that the characteristics of the in-game players "essentially mirrored those of actual college athletes," EA determined that its best move was to discontinue making the game, at least for the time being.¹⁰⁶

F. O'Bannon v. NCAA: Rewriting the Script

While the gears of change churned slowly in the aftermath of *Board of Regents*, a recent decision resulted in a major uprooting of the NCAA's grasp on the college athletics landscape. In particular, the rules system governing the payment of student-athletes for the NCAA's use of their NILs is a hotly debated issue nationwide, especially given the tremendous depth and breadth of the NCAA. The issue came to a head in *O'Bannon I*.¹⁰⁷

Plaintiffs in the case are Ed O'Bannon, a former Division I basketball star at UCLA, and 19 other current or former student-athletes who play or played FBS football or Division I men's basketball between 1956 and the present.¹⁰⁸ Plaintiffs brought an antitrust class action lawsuit in the United States District Court for the Northern District of California against the NCAA, EA,¹⁰⁹ and Collegiate Licensing Company ("CLC"), a trademark licensing and marketing company providing its services to numerous colleges and universities.¹¹⁰ Plaintiffs alleged that the NCAA bylaws violated the Sherman Act by unreasonably restraining trade in precluding schools from allowing student-athletes to receive a share of revenue that the NCAA and its member schools earn from the sale of licenses to use the student athletes' NILs in various forms of media.¹¹¹ Prior to the *O'Bannon* decision, Plaintiffs reached a settlement with EA and CLC.¹¹²

*507 In regard to the three elements necessary to succeed upon an antitrust claim, neither party disputed the presence of the first and third elements.¹¹³ Thus, the only issue for the district court was whether the challenged NCAA rules unreasonably restrained trade.¹¹⁴ Regarding the second element, the district court explained that precedent in the Ninth Circuit maintained that "[a] restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects" based on a burden-shifting framework.¹¹⁵ In applying this framework, the *O'Bannon* district court first evaluated whether the restraint caused anticompetitive effects in Plaintiffs' two challenged markets: the "college education market" and the "group licensing market."¹¹⁶

The district court addressed the "college education market" first and found that there *was* a "national market in which NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits."¹¹⁷ Because other divisions and professional leagues differed greatly both in price and quality, the district court found that there were no acceptable substitutes for FBS football and Division I basketball.¹¹⁸ Thus, because no other non-Division I or professional leagues could deprive schools' FBS football or Division I basketball teams from a significant number of recruits, they were not suppliers in the market identified by Plaintiffs.¹¹⁹

*508 Second, the district court addressed Plaintiffs' alleged "group licensing market."¹²⁰ Plaintiffs argued that three submarkets covering group licenses for student-athletes' NILs existed in (1) live-game telecasts, (2) video games, and (3) game rebroadcasts, highlight clips, and other archival footage.¹²¹ In short, the district court deduced that each of these submarkets *did* exist; however, Plaintiffs were not able to demonstrate any recognizable harm in any of them.¹²²

Nonetheless, Plaintiffs were still able to demonstrate harm that restrained trade in the "college education market."¹²³ The *O'Bannon* district court found that "[b]ecause FBS football and Division I ... schools [were] the only suppliers [of

their product] in the relevant market, they [had] the power ... to fix the price of their product” via the NCAA and its conference.¹²⁴ Essentially, the schools formed an agreement to charge every recruit the same price for the bundle of educational and athletic services: “to wit, the recruit's athletic services along with [his NIL] while he is in school.”¹²⁵ The district court decided that the NCAA rules enabling schools to do the above price fixing constituted a restraint on trade, and in the absence of this agreement, schools would offer these student-athletes more compensation for their NILS, i.e., greater than zero dollars as the NCAA had mandated.¹²⁶

Having found a restraint, the district court moved to the second step in the burden-shifting framework by placing the burden on the NCAA to show procompetitive effects of the restraint.¹²⁷ The NCAA then proffered four procompetitive effects of the restraint: (1) preserving the NCAA's tradition of amateurism; (2) maintaining competitive balance among FBS football and Division I men's basketball teams; (3) promoting the integration of academics and athletics; and (4) increasing the total output of its product.¹²⁸

In assessing these “procompetitive effects,” the district court rejected the NCAA's second and fourth justifications,¹²⁹ but gave more *509 weight to the NCAA's first and third justifications. First, the district court addressed the NCAA's amateurism argument and stated that while “the NCAA's restrictions ... play a limited role in driving consumer demand for FBS football and Division I basketball-related products,” and while they may justify large payments to these student-athletes *during* school, “[the restrictions] do not justify the rigid prohibition on compensating student-athletes ... with any share of licensing revenue generated from the use of their [NILs].”¹³⁰ Second, the district court addressed the NCAA's argument that promoting the integration of academics and athletics “improve[s] the quality of educational services provided to student-athletes in the restrained college education market.”¹³¹ The district court explained that the goal of improving product quality has been recognized as a procompetitive effect,¹³² and then found that integrating student-athletes into their schools' academic communities does improve the quality of the educational services student-athletes receive.¹³³ However, while the district court agreed that limited restriction in this regard did further the procompetitive benefit, it stated that the restraint's sweeping reach was still not justified; thus, the district court accorded this third argument limited weight.¹³⁴ Consequently, because the NCAA had identified two pro-competitive benefits of the rules restraining NIL compensation to student-athletes, the Plaintiffs were next obligated to show less restrictive alternatives of accomplishing those procompetitive goals.¹³⁵

Plaintiffs offered three less restrictive alternatives: (1) raise the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes; (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes, payable after the student-athletes graduate or leave school for other reasons; and/or (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.¹³⁶ In evaluating the Plaintiffs' proffered less restrictive alternatives, the district court noted that antitrust *510 plaintiffs generally must show that “an alternative is substantially less restrictive *and* is virtually as effective in serving the legitimate objective *without significantly increased cost.*”¹³⁷ In applying this standard, the district court accepted the first two alternatives, i.e., that the NCAA could award stipends to student-athletes up to the full cost of attendance to make up for any shortfall in its grant-in-aid, and that the NCAA could deposit NIL licensing revenue into a narrowly-tailored trust payment system to be distributed to student-athletes after they leave college or their eligibility expires.¹³⁸

In formulating its overall holding, the district court ruled that the NCAA's restrictions unreasonably restrained trade by preventing FBS football players and Division I men's basketball players from sharing in at least *some* of the revenue generated by use of their NILs.¹³⁹ As a remedy, the district court then instituted an injunction accomplishing two goals: (1) that the overall compensation from the school that the student-athlete may receive shall not be capped below the cost

of attendance;¹⁴⁰ and (2) that the revenue from NIL licensing of each individual student-athlete could be deposited in a deferred trust at *no more* than \$5,000 for every year the student-athlete remains academically eligible.¹⁴¹ The student-athletes would only receive this compensation when they lost their eligibility--by *511 y using up their four years of athletic eligibility or by declaring themselves professionals and leaving school early.¹⁴² The injunction did not *obligate* schools to pay out this compensation but rather *permitted* them to do so.¹⁴³ Schools themselves could also offer lesser amounts of deferred compensation if they chose, but the district court ruled they could not unlawfully conspire with each other in setting those amounts.¹⁴⁴

This decision provides commentary on the larger, more general issue of whether certain student-athletes should be “paid” per se, even more so now that the Ninth Circuit has ruled on the matter. As such, the district court's decision was a major victory, not only for the Plaintiffs in the case, but also for student-athletes who see no financial gain from their school's use of their NILs due to the NCAA's overly restrictive rules.

G. Other Attacks on Amateurism

In addition to the *O'Bannon* litigation, two other cases currently focus on the issues of amateurism and student-athletes receiving compensation while in college. First, in *Jenkins v. NCAA*,¹⁴⁵ the plaintiffs, four FBS football and Division I men's basketball players, have sued the NCAA in the United States District Court for the District of California alleging an antitrust violation; they claim that the NCAA operates as a cartel that uses an illegal price-fixing agreement to unreasonably restrain trade without a legitimate procompetitive justification.¹⁴⁶ The complaint states that the NCAA “[has] lost [its] way far down the road of commercialism, signing multi-billion dollar contracts wholly disconnected from the interests of ‘student athletes,’ who are barred from receiving the benefits of competitive markets for their services even though their services generate these massive revenues.”¹⁴⁷ The plaintiffs in *Jenkins* are not seeking damages but rather an injunction to “open up athlete compensation to market forces, and basically blow up the NCAA as currently constructed.”¹⁴⁸ While the *Jenkins* lawsuit is *512 the “broadest and boldest challenge to the NCAA's amateurism system yet,” and the case may not be resolved for quite some time, it represents another potential threat to the NCAA's rules restricting student-athletes' rights to compensation for use of their NILs.¹⁴⁹

Second, while not involving an antitrust matter, in a National Labor Relations Board (“NLRB”) decision rendered on March 26, 2014, between Northwestern University and College Athletes Players Association (“CAPA”), the Regional Director of the NLRB ruled that student-athletes on the school's football team had adequately alleged certain violations of the Fair Labor Standards Act.¹⁵⁰ In doing so, the NLRB found that football players who are receiving scholarships to perform football-related services for the employer under a contract for hire in return for compensation are subject to the employer's control and are, consequently, employees.¹⁵¹ In making this ruling, the NLRB also stated that, given the football players' intense commitment to their sport and to their head coach's demands, they were *not* “primarily students,” and that the football players “worked” more hours per week during an academic year than some “undisputed full-time employees work at their jobs.”¹⁵²

Northwestern University appealed the decision, and the NLRB “exercised its discretion not to assert jurisdiction and dismissed the representation petition filed by the union.”¹⁵³ In the decision, the Board held “that asserting jurisdiction would not promote labor stability due to the nature and structure of NCAA Division I [FBS].”¹⁵⁴ *513 While this decision did not work in the favor of Northwestern's student-athletes, the NLRB itself stated that “[t]his decision is narrowly focused to apply only to the players in this case and does not preclude reconsideration of this issue in the future.”¹⁵⁵ Thus, by taking a relatively easy way out by declining jurisdiction, the NLRB did not truly analyze the players' arguments; if the NLRB does so in the future, in consideration of the changing attitudes towards student-athlete

compensation, perhaps the NLRB will give the players' arguments more thought. Both *Jenkins* and the NLRB decision provide powerful insight into student-athlete NIL compensation issues resulting from the *O'Bannon* decision in the Ninth Circuit, a decision that, despite its outcome, could affect the lives of numerous student-athletes for years to come.

III. THE NINTH CIRCUIT'S ROLE IN THE DOWNFALL OF AMATEURISM

Following the district court's decision issued on August 8, 2014, the NCAA promptly appealed. The key issue on appeal was whether the importance of the NCAA's amateurism concept served as a procompetitive justification of the NCAA's rules restricting compensation to student-athletes for use of their NILs, such that the district court overstepped its boundaries in formulating its less restrictive alternatives.¹⁵⁶ Essentially, the NCAA argued on appeal that *Board of Regents* still very much stands for the proposition that courts should defer to the amateurism principle as a vital ingredient in the NCAA's recipe for FBS and Division I men's basketball.¹⁵⁷ On the contrary, Plaintiffs argued that over the years, the forces of commercialism have gradually whittled away at the amateurism principle, making it entitled to less weight as a procompetitive justification, and consequently tipping the scales in Plaintiffs' favor.¹⁵⁸ Plaintiffs rightly diagnosed that the NCAA's amateurism principle no longer functions as it used to, because highly commercialized pressures have greatly diminished it.

A. Defusing the NCAA's Amateurism Defense

On September 30, 2015, the Ninth Circuit resolved the appeal by laying down its opinion.¹⁵⁹ By and large, the Ninth Circuit agreed *514 with much of the district court's opinion. Before delving into the rule of reason, the Ninth Circuit dismissed three of the NCAA's primary arguments.¹⁶⁰

In arguing for placing a restriction on NIL compensation to FBS football and Division I men's basketball players, the NCAA again stressed the procompetitive justifications offered in *O'Bannon*, while highlighting, in particular, the amateurism principle.¹⁶¹ More specifically, the NCAA made four main arguments: (1) the NCAA's amateurism rules define collegiate sports as a unique product and are, therefore, valid as a matter of law; (2) the challenged NCAA rules are not covered by the Sherman Act because they do not regulate "commercial" activity; (3) Plaintiffs lack antitrust injury; and (4) the challenged NCAA rules are valid under a rule of reason analysis.¹⁶²

The NCAA's strongest weapon on appeal appeared to be that the Supreme Court in *Board of Regents* heavily stressed the importance of the NCAA's regulations in preserving amateurism and fostering competition.¹⁶³ While *Board of Regents* was not the first decision to uphold the NCAA's amateurism defense as a valid procompetitive justification of the NCAA's rules,¹⁶⁴ it had the farthest-reaching effect, as other courts have used the Supreme Court's dicta as the basis for upholding amateurism as procompetitive. The NCAA contended on appeal that its rules designed to protect the amateur status of student-athletes are valid under the Sherman Act as a matter *515 of law,¹⁶⁵ and that *Board of Regents* mandated that "most of the regulatory controls of the NCAA" are assumed to be "justifiable means of fostering competition"¹⁶⁶ Thus, the NCAA stressed in its brief that there was a presumption that NCAA eligibility rules preserving amateurism were valid and procompetitive as a matter of antitrust law under the Sherman Act.¹⁶⁷

While the NCAA argued that substantial deference must be given to the Supreme Court's stance on amateurism, the immense growth and profitability of the NCAA over the past 30 years since *Board of Regents* was decided means that preserving the line between amateurism and professionalism is now more difficult, lessening this procompetitive justification greatly, and allowing for a less restrictive alternative that facilitates, rather than restricts, trade.¹⁶⁸ Also, interpreting mere dicta to serve as the standard upon which all current and future NCAA NIL cases are to be determined

runs contrary to the gigantic scope of the NCAA's rules.¹⁶⁹ Rather, “[b]y using the word ‘can’ rather than ‘must,’ ... it is clear that the Supreme Court ... never actually reached any legal conclusion in favor of specially preserving NCAA amateurism.”¹⁷⁰ Thus, one must be careful not to fall into the trap of adopting the view the NCAA urged there.

Overall, the NCAA's reliance on *Board of Regents* was greatly tested given that the decision was rendered over 30 years ago. The crux of the *O'Bannon* case was unique in that one of the key debates focused around a principle (amateurism) that is not fixed in time. Rather, this principle has been bent and molded over time, to the point that these eligibility rules stand in stark contrast to rules from years ago.¹⁷¹ While the NCAA attempted to make a case for following *Board of Regents*' pro-amateurism language in its first argument, it had to rely on other courts' subsequent application of the landmark Supreme Court decision because the Supreme Court in *516 *Board of Regents* did not address the NCAA's rules as an unreasonable restraint of trade.

In particular, the NCAA cited to a number of cases supporting its view of the *Board of Regents* holding.¹⁷² To begin, the NCAA argued that *Agnew* in particular favors a strong presumption of finding eligibility rules procompetitive on their face because their stated goal is to preserve the amateur status of the student-athlete.¹⁷³ Also, the NCAA used *Agnew* to argue that bylaws which eliminate the eligibility of players who receive cash payments beyond the cost of attendance “clearly protect[] amateurism.”¹⁷⁴ Next, the NCAA cited *Smith*, wherein the Third Circuit highlighted the importance of amateurism regarding its effect on fair competition.¹⁷⁵

Next, the NCAA relied on *McCormack*, where the Fifth Circuit held that the NCAA's eligibility rules “enhance public interest in” college football games and are, thus, procompetitive.¹⁷⁶ The Fifth Circuit stressed that even though the NCAA had mixed certain professional sports ingredients with amateurism principles into its recipe for student-athletes' intercollegiate athletic success and education, that did not mean the NCAA's eligibility requirements were unreasonable.¹⁷⁷ This last sentiment importantly acknowledges the modern effect that professionalism has had by chipping away bit by bit at the NCAA's amateurism concept while still maintaining the vitality of the remaining elements of amateurism aside from those professional influences. However, the *McCormack* decision was rendered 27 years ago, and commercialism within the NCAA has *517 increased so rapidly since then that amateurism is *much* less central to the NCAA's mission than it was nearly three decades ago.

Similarly, in *Banks*, the Seventh Circuit held that the “no-draft” rule and the “no-agent” rule were procompetitive.¹⁷⁸ The court then stressed that the two disputed rules helped to maintain separation between the commercial world of professional sports and the higher education-based world of intercollegiate athletics.¹⁷⁹ Also, while in *Law* the Tenth Circuit held an NCAA regulation that placed a restriction on Division I college coaches' salaries was an unlawful restraint of trade, the court made an important distinction.¹⁸⁰ In ruling that the NCAA had not proffered a sufficient procompetitive justification, the court stated that the NCAA could only use its amateurism argument to preserve the amateur status of student-athletes, *not* the schools' coaches.¹⁸¹ Thus, other courts' application of *Board of Regents* does seem to support the NCAA's claim that amateurism is, concededly, only a *somewhat* procompetitive justification of the eligibility rules, especially when looking at the recent decision rendered by the Seventh Circuit in *Agnew*.¹⁸²

In addressing this first argument of the NCAA, the Ninth Circuit held that NCAA rules concerning amateurism are *not* presumptively lawful.¹⁸³ More specifically, the court stated that, despite language in *Board of Regents*, the amateurism rules “are [not] automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well.”¹⁸⁴

*518 The NCAA next argued that the NCAA rules are not covered by the Sherman Act because they do not regulate “commercial” activity.¹⁸⁵ However, one of the principal cases on which the NCAA relied in its *first* argument endorses the view that the Sherman Act applies to nearly all of the NCAA's bylaws.¹⁸⁶

Overall, the court ruled that the challenged NCAA rules clearly regulate commercial activity, making them subject to the Sherman Act.¹⁸⁷ The Court stated that the “definition [of commerce] surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it.”¹⁸⁸

In its third argument, the NCAA maintained that the Plaintiffs suffered no antitrust injury.¹⁸⁹ In particular, the NCAA made this argument in regards to the three forms of media that allegedly harm competition: (1) live-game broadcasts; (2) videogames; and (3) archival footage.¹⁹⁰ In general, the NCAA argued that student-athletes do not have rights in their NILs with regard to live-game broadcasts, and that neither the district court nor the Plaintiffs identified one jurisdiction that recognizes a publicity right in livegame broadcasts.¹⁹¹ The NCAA itself admitted that when broadcasters and the NCAA negotiate contractually for televised games, the entities mention NILs; however, the NCAA claimed they do so merely out of caution, not because broadcasters would start paying for the NILs if the NCAA permitted it.¹⁹² Yet the NCAA cited no authority for this assertion.¹⁹³ Additionally, Plaintiffs' expert, Edwin Desser, who spent 23 years negotiating television contracts as an NBA senior executive, stated that NIL transfer provisions “are routine in sports broadcasting arrangements *irrespective of any particular state statute*,”¹⁹⁴ implying that these negotiating entities highly value NIL transfer provisions. Lastly, the Plaintiffs severely undercut the NCAA's position by pointing out that FBS football and *519 Division I men's basketball players sign release forms that require assignment of NIL rights as a condition of the student-athletes' eligibility.¹⁹⁵

The Ninth Circuit addressed this argument by demonstrating that the challenged NCAA rules cause the Plaintiffs injury in fact.¹⁹⁶ In order to satisfy the antitrust-injury requirement, a plaintiff must show “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.”¹⁹⁷ The court then made two points. First, the court stated that “without the NCAA's compensation rules, video game makers would negotiate with student-athletes for the right to use their NILs.”¹⁹⁸ Specifically, the Court noted that because of the NCAA's “previous, lengthy relationship” with EA, that it was reasonable for the district court to conclude that it would be possible for the NCAA and EA to rekindle their relationship to produce college football or college basketball video games.¹⁹⁹

Additionally, the NCAA argued that under the First Amendment, the Plaintiffs' right of publicity claims were barred under constitutionally protected free speech.²⁰⁰ However, as Plaintiffs rightly indicated, “[a]ntitrust injury is a modest hurdle, and the First Amendment provides no reason to ignore the substantial harm this anticompetitive restraint inflicts on Plaintiffs.”²⁰¹

Importantly, the NCAA predominantly tracked the district court's language used in the section of the *O'Bannon I* opinion addressing potential harm to the group licensing market, and the three submarkets identified in live-game telecasts, videogames, and archival footage.²⁰² However, the district court held that the restraint did not cause harm in the *group licensing* market but instead caused harm to the *college education* market.²⁰³ Thus, the NCAA unwisely attacked a section of the district court's opinion that actually worked in its favor.

*520 Second, the court held that “[w]hether the Copyright Act preempts right-of-publicity claims based on sports video games [was] tangential to this case and irrelevant to the plaintiffs' standing.”²⁰⁴ Ultimately, the court concluded that

“because the plaintiffs have shown that, absent the NCAA's compensation rules, video game makers would likely pay them for the right to use their NILs in college sports video games, the plaintiffs have satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury.”²⁰⁵ Thus, the court dismissed three of the NCAA's main arguments and proceeded to evaluate the district court's analysis under the rule of reason.

Finally, in its last argument, the NCAA maintained that the challenged NCAA rules were valid under a rule of reason analysis.²⁰⁶ The NCAA claimed that the district court did not identify any significant anticompetitive effects of the restraint and that within the college education market, student-athletes' opportunities to participate in FBS football and Division I men's basketball are not reduced.²⁰⁷ Also, the NCAA argued that if NILs are even *considered* as part of the unique bundle of goods and services that schools offer to student-athletes (such as tuition, fees, room and board, books, certain school supplies, tutoring, coaching, and access to medical facilities), the challenged rules would have “a *de minimis* effect in the relevant market because they would limit only one minor (or non-existent) component of the bundle, while competition in the overall relevant market remains robust.”²⁰⁸

The Ninth Circuit rejected the NCAA's arguments, and affirmed the district court's finding that the NCAA's compensation rules have a significant anticompetitive effect within the college education market.²⁰⁹ More specifically, the Court found that the NCAA's compensation rules have an anticompetitive effect in that “they fix the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component.”²¹⁰ The court held that this action constituted illegal price-fixing under the Sherman Act, and even if the precise value of the NIL compensation to the student-athletes cannot be calculated at this point in the rule of reason analysis, the Ninth Circuit agreed with the district court that the challenged restraint ***521** does indeed have anticompetitive effects on the college education market.²¹¹

Alternatively, the NCAA contended that even if the challenged restraint produces anticompetitive effects, the district court erred in rejecting two procompetitive justifications and, consequently, failed to give enough consideration to the NCAA's amateurism-principle as another justification.²¹² This argument mirrors the NCAA's first main argument on appeal because it *again* highlights the amateurism principle as the driving force behind the NCAA's rules. In particular, the NCAA attempted to counter the district court's assertion that the NCAA's definition of its amateurism principle has become more “malleable” over time, thereby suggesting that the importance of the amateurism principle as a guiding light is lessening.²¹³ Additionally, the NCAA countered that, given how “diverse” the organization is, the NCAA should not be penalized for making adaptive changes to its rules.²¹⁴ Like the NCAA's first main argument, the body of case law *does* seem to endorse the NCAA's amateurism principle as somewhat procompetitive. Thus, while the challenged rules do have an anticompetitive effect, fostering amateurism in particular is still recognized as at least a mildly procompetitive effect.

The NCAA then argued that the district court erred by choosing an illegitimate, less restrictive alternative of structuring the NCAA's rule prohibiting student-athletes from being paid.²¹⁵ The NCAA claimed that the district court overstepped its boundaries by departing from the NCAA's “century-old rule that student-athletes may not be paid to play”²¹⁶ The NCAA also argued that in doing so, the district court played the role of a “central planner,” “a role for which [courts] are ill-suited.”²¹⁷ The NCAA further claimed that the district court's less restrictive alternatives of a stipend filling ***522** the gap between grant-in-aid and cost of attendance and a narrowly-tailored deferred trust would “blur the line between amateur college sports and their professional counterparts,” and that “[t]he court's analysis also improperly fails to defer to the NCAA's judgment about how best to administer college sports.”²¹⁸

In addition to the NCAA's arguments on appeal, Antitrust Scholars filed an amicus brief supporting the NCAA's last argument.²¹⁹ Antitrust Scholars argued mainly that the district court erred in choosing the less restrictive alternatives because (1) a defendant is to be given substantial deference in implementing a restraint once a court finds a valid procompetitive justification; and (2) the district court's analysis, if accepted, would improperly permit federal courts to micromanage organizations.²²⁰ In short, Antitrust Scholars argued that the district court “expand[ed] the ‘less restrictive alternative’ prong of the antitrust rule of reason well beyond any appropriate boundaries and would install the judiciary as a regulatory agency for collegiate athletics.”²²¹ Antitrust Scholars contended that a less restrictive alternative must be “substantial” and that it cannot simply be a “tweaking” of the restraint, as that would give courts the power to control organizations, rather than interpret laws.²²² Application of that argument to the district court's ruling could be interpreted in one of two ways: (1) The district court used a substantially less restrictive alternative in that “paying” student-athletes *any* amount departs from the NCAA's amateurism principle; or (2) Paying student-athletes merely \$5,000 a semester for use of their NILs plus a stipend to make up for the *523 cost of attendance and grant in aid is only “tweaking,” and, thus, not valid under antitrust law.

Antitrust Scholars next contended that substituting an antitrust court's judgment for that of organizations' could open up other entities to similar unfounded judicial tinkering.²²³ In essence, Antitrust Scholars used *Board of Regents* to caution that courts are “ill-suited” to “act as central planners, identifying the proper price, quantity, and other terms of dealing” in place of the judgments of industry participants.²²⁴ Thus, Antitrust Scholars echoed some of the NCAA's arguments on appeal, in particular those dealing with the district court's less restrictive alternatives.²²⁵

This joint argument from the NCAA and the Antitrust Scholars was more persuasive than some of the NCAA's other arguments because, on one hand, the NCAA is not accomplishing its goal of furthering amateurism if players are being compensated. On the other hand, most of this compensation (the \$5,000 a year in a deferred trust) cannot be obtained until a student-athlete loses eligibility, in which case the NCAA rules would no longer apply. Additionally, the Plaintiffs posed persuasive arguments to counter the NCAA's and Antitrust Scholars' contentions.²²⁶ Plaintiffs contended that the less restrictive alternative of placing NIL payments into a trust fund to be distributed only after a student-athlete completes eligibility is actually supported by a number of NCAA internal documents, as well as a statement by the NCAA's Executive Vice President for Regulatory Affairs, Oliver Luck,²²⁷ who called the right for student-athletes to receive compensation for use of their NILs “constitutional” and “fundamental.”²²⁸

In addressing the argument that the district court should not have micromanaged the NCAA's approach to administering its amateurism principle, the Plaintiffs countered that “[t]he Sherman Act sets limits on what violators may and may not do,” and that “[t]he less restrictive alternative analysis under the Rule of Reason necessarily involves an evaluation of the available options a defendant *524 did not utilize.”²²⁹ Thus, while the above argument regarding not micromanaging organizations aided the NCAA more effectively than some of its other contentions, Plaintiffs' attempts to refute that argument were greatly bolstered by an internal NCAA communication, an NCAA executive's own opinion of the matter, and the detailing of the scope of the least restrictive alternative analysis.

B. Tipping the Scales

While the body of case law and the issue of potentially flawed less restrictive alternatives presented obstacles for the Plaintiffs, a number of the Plaintiffs' arguments detailed above, as well as other collateral authority, worked to defuse the strength of the NCAA's arguments. The value of the Plaintiffs' additional arguments increase when one realizes what this case was *not* about. It was *not* about “pay-for-play”; rather, the actual legal question here was: “May the NCAA and its members collude to depress to zero any compensation for use of Plaintiffs' NILs?”²³⁰

While the relevant case law indicates that over the years courts have placed at least some value on the NCAA's amateurism concept and eligibility requirements,²³¹ increasing opposition to the NCAA using certain student-athletes' NILs without compensating them has changed other courts' attitudes towards the NCAA's rules. For instance, further buttressing Plaintiffs' argument, the settlement stemming from *In re NIL Litigation* can be read to support the notion that entities, like video game companies and the NCAA, may be manipulating certain student-athletes' rights, at least to some degree.²³² Given that EA settled with the Plaintiffs and refrained, at least temporarily, from producing its popular "NCAA College Football" series,²³³ Plaintiffs proved that, unlike pure "amateurs," they do have some rights in their NILs--rights that can be negotiated if the NCAA's restraint is modified. Thus, Plaintiffs found support here for the concept that if EA cannot use FBS football players' NILs in this fashion without some form of revenue being shared with student-athletes featured in the video games, then the NCAA *525 should not be permitted to maintain a system of rules that unreasonably restricts payments to student-athletes for use of their NILs.

Other authorities also bolstered the Plaintiffs' argument by chipping away at the NCAA's amateurism defense, thereby weakening that procompetitive justification. Most recently, the plaintiffs in *Jenkins v. NCAA*²³⁴ have attacked the NCAA's amateurism principle via another antitrust lawsuit.²³⁵ This lawsuit symbolizes the underlying movement to give less weight to the NCAA's amateurism-principle, thereby allowing student-athletes the chance to share in some of the revenue generated by their NILs. If a number of other plaintiffs begin asserting a similar antitrust violation, perhaps courts may attribute less weight to the amateurism principle and accord more deference to the district court's less restrictive alternatives.

Also, while not an antitrust case, the NLRB decision ruling that certain FBS football players from Northwestern University were employees under the FLSA supported the notion that student-athletes should share in some form of compensation generated from universities' use of their NILs.²³⁶ Importantly, the NLRB found that Northwestern's football players were *not* "primarily students," and that the football players "worked" more hours per week during an academic year than "undisputed full-time employees work at their jobs."²³⁷ While the NLRB did not affirm the ruling on appeal, it merely declined to exercise jurisdiction and did not truly analyze the players' arguments.²³⁸ If the NLRB does so in the future, perhaps it will give the players' arguments more thought in consideration of the changing attitudes towards student-athlete compensation.²³⁹

Other realities lean themselves well to supporting the Plaintiffs' stance that the amateurism concept is now a less important means of fostering intercollegiate athletics. For instance, while some may argue that student-athletes are already "paid" via scholarships and financial aid, these amounts of money pale in comparison to the funds the NCAA and universities exchange for use of student-athletes' NILs.²⁴⁰ Additionally, given that these student-athletes' *526 scholarships can be rescinded without cause, an argument that student-athletes are already "paid" this way is similarly weakened.²⁴¹ Even if these schools strip student-athletes of their scholarships, schools may still use those student-athletes' NILs in television reairings and other media. Refusing to compensate those student-athletes in this situation flies in the face of recognized antitrust principles,²⁴² especially in light of the fact that, for many student-athletes, intercollegiate athletics might be the only time their NILs have any value.²⁴³ Yet instead, the NCAA (which already makes billions of dollars from broadcast rights)²⁴⁴ still requires these student-athletes to relinquish all rights to those NILs.²⁴⁵

Additionally, FBS football and Division I men's basketball coaches make more and more each year, and TV revenues approach those of professional sports, while the student athletes receive nothing for licensing of their NILs in spite of the intensely commercialized atmosphere in which they play their respective sports.²⁴⁶ While coaches are contractually hired to do a "job," and student-athletes participate on a sports team while in college, acknowledging the great disparity

between coaches and the NCAA on one hand and student-athletes on the other suggests that, whether the NCAA admits it or not, commercialization has crept further than ever into the NCAA's recipe for amateurism, setting the scene for a major shift in the world of intercollegiate athletics.

In consideration of the above arguments, the Ninth Circuit moved to the second step of the Rule of Reason, namely, determining whether the NCAA posited any procompetitive justifications for its compensation rules.²⁴⁷ In performing this analysis, the Ninth Circuit determined that the “compensation rules do not promote competitive balance, that they do not increase output in the college education market, and that they play a limited role in integrating *527 student-athletes with their schools' academic communities, since the [Ninth Circuit had] been offered no meaningful argument that those findings were clearly erroneous.”²⁴⁸ Thus, the Ninth Circuit focused mainly on the NCAA's amateurism defense.

In considering these points, the Ninth Circuit did indeed critically analyze the *Board of Regents* Court's and its progeny's interpretation of the amateurism principle. The Ninth Circuit stated that it “fail[ed] to see how the restraint at issue in this particular case--i.e., the NCAA's limits on student-athlete compensation--makes college sports more attractive to recruits, or widens recruits' spectrum of choices in the sense that *Board of Regents* suggested.”²⁴⁹ The Supreme Court in *Board of Regents* merely discussed the amateurism principle in dicta in identifying it as a procompetitive benefit.²⁵⁰ Also, while the Supreme Court wrote that the importance of amateurism is central to the mission of the NCAA,²⁵¹ and a number of courts following *Board of Regents* have mentioned amateurism as important to the NCAA,²⁵² the increased amount of commercial activity within FBS and Division I men's basketball in recent years has severely blurred the lines between the amateurism concept and professionalism.²⁵³ This blurring makes it extremely difficult to consistently cite amateurism as a highly regarded procompetitive benefit of the NCAA's challenged rules.²⁵⁴ Additionally, the Ninth Circuit stated that “as *Board of Regents* demonstrates, not every rule adopted by the NCAA that restricts the market is necessary to preserving the ‘character’ of college sports.”²⁵⁵

In addition, other collateral authority suggests that the amateurism principle is not the procompetitive benefit it once was. For one, the settlement reached in *In re NIL Litigation*²⁵⁶ implies that if a prominent video game developer cannot use college football players' NILs in video games without compensation, the NCAA should also be prohibited from barring any compensation to its student-athletes *528 for widespread use of their NILs in various forms. Additionally, the current *Jenkins* lawsuit may be the result of *O'Bannon's* ripple effect, where another group of Plaintiffs have sued the NCAA to fight for student-athletes' rights in their NILs.²⁵⁷ Viewing this case in conjunction with a vastly increased commercial atmosphere, amateurism is no longer as central to the NCAA's mission as in the past. Another case to be considered is the recent NLRB decision, before the NLRB reversed the decision on appeal, which declared certain Northwestern football players to be employees.²⁵⁸ Recognizing that certain student-athletes are “employees,” rather than strictly amateurs, is more akin to these players being considered professionals who are paid to do a job.

The Ninth Circuit seemed to agree that amateurism does have a limited procompetitive benefit; however, “it is primarily ‘the opportunity to earn a higher education’ that attracts athletes to college sports rather than professional sports ... and that opportunity would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships.”²⁵⁹ Further, the Ninth Circuit itself admitted that “if anything, loosening or abandoning the compensation rules might be the best way to ‘widen’ recruits' range of choices; athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school.”²⁶⁰ The Ninth Circuit even acknowledged that making the compensation rules less strict might be one of the most efficient ways of broadening student-athletes' choice. In concluding its analysis of the NCAA's amateurism principle, the Ninth Circuit agreed that the “NCAA cannot fully answer the district court's finding that the compensation

rules have significant anticompetitive effects simply by pointing out that it has adhered to those rules for a long time.”²⁶¹ Even so, the Ninth Circuit found, like the district court, that the NCAA's compensation rules do serve two limited procompetitive benefits: “integrating academics with athletics, and preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.”²⁶² Thus, the only remaining question for *529 the Ninth Circuit was the validity of the district court's two less restrictive alternatives.

C. The Turning Point

In assessing the landscape of *O'Bannon* at this juncture, one point became abundantly clear: given that amateurism was deemed only *somewhat* procompetitive by the Ninth Circuit, whether the district court overstepped its boundaries in formulating the less restrictive alternatives would determine the outcome of the case. By using thousands of NCAA FBS football and Division I men's basketball players' NILs in various forms of media, the NCAA has generated a massive following and, thus, indisputably makes billions of dollars via its student-athletes.²⁶³ Therefore, because the restraint governs commercial activity, the Plaintiffs correctly chose an antitrust lawsuit as the avenue to achieve more equitable rights for student-athletes, and the *O'Bannon* district court correctly held that the NCAA unreasonably restrained trade by fixing the price of their NILs at zero and disallowing athletes from receiving at least *some* of the revenue gained from the use of their NILs.²⁶⁴

In moving to the third step of the rule of reason analysis, the Ninth Circuit, however, partially disagreed with the district court in allowing athletes to receive no more than \$5,000 of deferred compensation a year until they leave school.²⁶⁵ “[T]o be viable under the Rule of Reason--an alternative must be ‘virtually as effective’ in serving the procompetitive purposes of the NCAA's current rules, and ‘without significantly increased cost.’”²⁶⁶

First, the Ninth Circuit evaluated the less restrictive alternative of capping the permissible amount of scholarships at the cost of attendance.²⁶⁷ The Ninth Circuit noted that the NCAA's President, Dr. Mark Emmert, testified at trial that this less restrictive alternative would not violate the amateurism principle as that money would cover student-athletes' legitimate costs to attend school, and no evidence suggested that consumers would lose interest in college sports if scholarships covered the cost of attendance.²⁶⁸ He also testified *530 that an increase in the grant-in-aid cap would not impede student-athletes' integration into their academic communities.²⁶⁹ Further, “evidence at trial showed that the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.”²⁷⁰ With regard to the first less restrictive alternative, the Ninth Circuit stated that if “a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.”²⁷¹ As such, the Ninth Circuit affirmed the less restrictive alternative of an injunction capping the permissible amount of scholarships at the cost of attendance.²⁷²

Second, the Ninth Circuit analyzed the district court's second less restrictive alternative, *i.e.*, allowing student-athletes to receive deferred cash compensation for the NCAA's and schools' use of their NILs.²⁷³ The Ninth Circuit stated that “[t]he question is whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses, is ‘virtually as effective’ in preserving amateurism as *not* allowing compensation.”²⁷⁴ Here, the Ninth Circuit diverged sharply from the district court's analysis. The court stated that “in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs.*”²⁷⁵

The Ninth Circuit continued by discussing the difference between offering student-athletes compensation vs. no compensation, and offering them small amounts of compensation vs. large amounts of compensation. For instance, the court stated that “there is a stark difference between finding that small payments are less harmful to the market than large payments--and finding that paying students *531 small sums is virtually as effective in promoting amateurism as not paying them.”²⁷⁶ Further, the court elaborated by stating, “The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”²⁷⁷

The Ninth Circuit then addressed various district court witnesses' opinions of NIL compensation to student-athletes. The NCAA's own expert witness Neal Pilson, a television sports consultant formerly employed at CBS, testified, “I tell you that a million dollars would trouble me and \$5,000 wouldn't, but that's a pretty good range.”²⁷⁸ When Pilson was asked whether deferred compensation to students would concern him, “Pilson said that while he would not be as concerned by deferred payments, he would still be ‘troubled by it.’”²⁷⁹ The court then surmised that “Pilson's offhand comment under cross-examination [was] the sole support for the district court's \$5,000 figure” and that this comment “[was] simply not enough to support the district court's far-reaching conclusion that paying students \$5,000 per year will be as effective in preserving amateurism as the NCAA's current policy.”²⁸⁰

However, the Ninth Circuit failed to properly acknowledge how, as discussed above, the NCAA's amateurism principle has been whittled away by increasing commercial forces within the industry. Thus, the term “amateur,” in and of itself, means something vastly different than it did 32 years ago in *Board of Regents*.²⁸¹ Further, if the Ninth Circuit had placed less procompetitive value on the NCAA's amateurism principle than the district court, the Ninth Circuit would, and should, have found that depositing deferred NIL compensation into a trust for student-athletes to use after leaving school, is not a “quantum leap.”²⁸² Rather, it is a calculated, logical maneuver made in order to enable these student-athletes to receive just compensation that they would not touch until they *left* their respective sports teams, thereby not technically affecting their status as “amateurs” while in school.

*532 In his dissent, Chief Judge Sidney Runyan Thomas correctly stated that the majority mischaracterized the question to be answered with regard to the less restrictive alternatives. He stated: “[R]ather, we must determine whether allowing student-athletes to be compensated for their NILs is ‘virtually as effective’ in preserving *popular demand for college sports* [not preserving amateurism,²⁸³ as not allowing compensation.”²⁸⁴ Additionally, the dissent rightly explained that “[i]n terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest.”²⁸⁵ To restate the rule again, “to be viable under the Rule of Reason--an alternative must be ‘virtually as effective’ in serving the procompetitive purposes of the NCAA's current rules, and ‘without significantly increased cost.’”²⁸⁶ Thus, the alternative must serve the procompetitive benefit's--amateurism's--procompetitive purposes, *i.e.*, preserving popular demand for college sports. Viewed through *this* lens, the Ninth Circuit would have properly analyzed the issue.

Moreover, the Ninth Circuit's analysis of Pilson's testimony, as well as its incorrect perception of the district court's formulation of the \$5,000 deferred compensation figure, each represent erroneous conclusions. The dissent rightly pointed out that a number of the NCAA's expert witnesses indicated that “smaller payments to student-athletes would bother them less than larger payments.”²⁸⁷ Additionally, in preparation for trial, NCAA expert witness Dr. J. Michael Dennis conducted a survey of consumer attitudes concerning college sports in 2013, a survey which revealed that “the public's attitudes toward student-athlete compensation depend heavily on the level of compensation that student-athletes would receive.”²⁸⁸ As such, this evidence was certainly enough to prove that \$5,000 of deferred NIL compensation would be “virtually as effective” at preserving “consumer demand for college sports.”²⁸⁹ Again, *this* statement supplies the proper issue to be determined. Being virtually as effective at preserving amateurism would be extremely difficult to

do given that “‘amateurism’ has proven a nebulous concept prone *533 to an ever-changing definition.”²⁹⁰ The dissent makes one final lasting point, the substance of which this Article echoes throughout:

Division I schools have spent \$5 billion on athletic facilities over the past 15 years. The NCAA sold the television rights to broadcast the NCAA men's basketball championship tournament for 12 years to CBS for \$10.8 billion dollars. The NCAA insists that this multi-billion dollar industry would be lost if the teenagers and young adults who play for these college teams earn one dollar above their cost of school attendance.²⁹¹

Thus, the dissent properly evaluated the district court's less restrictive alternatives and rightly pointed out (1) that the majority viewed the district court's less restrictive alternatives through the wrong lens; (2) that the evidence presented at trial was sufficient to justify the district court's selection of the \$5,000 deferred NIL compensation as a less restrictive alternative; and (3) that given how dramatically and dynamically the concept of “amateurism” has changed over time, the NCAA should not have been afforded as much deference, and consequently, the district court's selection of less restrictive alternatives was entirely sound.

Instead of vacating the district court's second less restrictive alternative, the Ninth Circuit should have properly employed the following framework when conducting the rule of reason analysis:²⁹² (1) As the Plaintiffs properly alleged anticompetitive effects of the NCAA's rules on the college education market, the Ninth Circuit should have weighed the NCAA's proffered procompetitive effects of the challenged restraint--in particular, the amateurism principle; (2) the Ninth Circuit should then have given less weight to the amateurism principle, a mildly procompetitive benefit that would, accordingly, have been less influential to the analysis because a \$5,000 ceiling is virtually as effective at preserving amateurism's procompetitive effects; and (3) if the procompetitive effects were rightly afforded less weight (as the district court concluded they should have been), then the Plaintiffs' less restrictive alternatives would have been strengthened by default, thereby tipping the scales in the Plaintiffs' favor on appeal.

If future courts tackle this issue and permit schools to share at least *some* compensation with their student-athletes, those courts *534 must still be cautious not to raise that cap excessively. In that situation, courts would enable these student-athletes to potentially reap a windfall from NIL licensing in conjunction with their scholarships and grant-in-aid, thereby *truly* transforming the NCAA into more of a professional organization akin to the National Football League (“NFL”) or National Basketball Association (“NBA”). While the NCAA is indeed much closer to resembling these professional organizations than it has been in the past, allowing student-athletes to be paid as true professionals *completely* obliterates, rather than strongly deemphasizes, the NCAA's amateurism principle--an outcome that current, and near future, courts should be very wary of permitting.

In sum, the Ninth Circuit, NCAA, and other authorities made *some* worthwhile arguments regarding the importance of amateurism and the *O'Bannon* district court's allegedly flawed selection of less restrictive alternatives. However, given the district court's careful consideration of the NCAA's procompetitive justifications, the magnitude and breadth of the modern-day NCAA, and the changing attitudes towards student-athletes being “paid,” the Ninth Circuit erred in vacating the district court's less restrictive alternative of requiring the NCAA to allow its member schools to pay student-athletes up to \$5,000 per year in deferred compensation. Because commercialism has invaded the NCAA's once defensible citadel of “amateurism,” and also because the compensation given to these student-athletes would not be *mandatory* but rather *permissible* by NCAA member schools, the Ninth Circuit should have determined that both of the district court's less restrictive alternatives were valid under the rule of reason. While the *O'Bannon* Plaintiffs petitioned the United States Supreme Court to review the case,²⁹³ the Court denied certiorari,²⁹⁴ thereby denying the district court's second less restrictive alternative. However, current and future student-athlete plaintiffs should not relent and should follow in the *O'Bannon* Plaintiffs' footsteps in an attempt to acquire a ruling that will rewrite how college athletes are treated within the NCAA, an empire many once thought invincible.

*535 IV. CONCLUSION

The atmosphere of intercollegiate athletics has changed dramatically since the *Board of Regents* decision. Undoubtedly, the worlds of FBS football and Division I men's basketball are encircled by the forces of commercialism more than ever before, with players' NILs appearing during games on televisions, computers, tablets, social media, and even cell phone applications.²⁹⁵ Student-athletes play competitive collegiate sports in a world where the NCAA's concept of amateurism intertwines itself inextricably with a hugely commercialized industry that uses players' NILs to generate and maintain massive fan bases year after year, while the players themselves receive no revenue from the NCAA's use of their NILs.²⁹⁶

The *O'Bannon* Plaintiffs rightly turned to an antitrust lawsuit to wage war on the NCAA's unreasonably restrictive rules system. While the NCAA's amateurism concept is still *mildly* important to the success of its product, the importance of this principle is nowhere near the guiding light it used to be decades ago. As such, the Ninth Circuit should have given *less* weight to the NCAA's amateurism principle as a procompetitive benefit and, in turn, given *more* weight to the district court's approved less restrictive alternatives. The district court properly found less restrictive alternatives in the \$5,000 a year of deferred compensation via a trust, plus the difference in full grant-in-aid and cost of attendance via a stipend. While, admittedly, the decision to allow or disallow student-athletes to receive NIL compensation is a close one, the Ninth Circuit erred by reversing the district court's less restrictive alternative of allowing student-athletes to receive deferred NIL compensation. And while the Supreme Court denied certiorari, future student-athletes should not throw in the towel. Rather, they should draw up a "Hail Mary" pass and keep fighting in the court system, where, if they are successful, they could alter the landscape for intercollegiate athletes' rights for years to come.

Footnotes

- ^{a1} Matthew N. Korenoski graduated from Duquesne University School of Law, *cum laude*, in June 2016. In December 2012, he graduated from the University of Pittsburgh, *cum laude*, with a B.A. in English Writing and History with a Certificate in Public and Professional Writing. He would like to thank his supportive and loving family and girlfriend, his extremely hard-working and keen-eyed *Duquesne Law Review* editors, and especially Professor Julia M. Glencer, his faculty advisor, mentor, and friend, who spent countless hours editing this piece of writing, and without whom this article would not have been possible.
- ¹ See ESPN, *Derrick Henry: Player Profile*, ESPN.COM, http://espn.go.com/college-football/player/_id/546368/derrick-henry (last visited March 8, 2016).
- ² See Sports Reference LLC, *Southeastern Conference Single Season Leaders and Records for Rushing Yards*, SPORTS-REFERENCE.COM, <http://www.sports-reference.com/cfb/conferences/sec/leaders/rush-yds-player-season.html> (last visited Dec. 22, 2015).
- ³ See ESPN & Associated Press, *Alabama Blanks Michigan State to Reach CFP Title game*, ESPN.COM (Jan. 1, 2015), <http://espn.go.com/college-football/recap?gameId=400852732>; ESPN, *No. 2 Alabama Holds Off No. 1 Clemson for Nick Saban's 5th National Title*, ESPN.COM (Jan. 12, 2015), <http://espn.go.com/college-football/recap?gameId=400852743>.
- ⁴ ESPN.com News Services, *Alabama's Derrick Henry Wins Heisman; Christian McCaffrey 2nd*, ESPN.COM (Dec. 13, 2015), http://espn.go.com/college-football/story/_id/14346202/derrick-henry-alabama-crimson-tide-wins-heisman-trophy.
- ⁵ CBS Interactive, *Derrick Henry*, ROLLTIDE.COM, http://www.rolltide.com/sports/mfootbl/mtt/derrick_henry_844044.html (last visited Dec. 22, 2015).
- ⁶ College Football Fan Shop, *Derrick Henry - Alabama NCAA Jerseys*, COLLFOOTBALLFANSHOP.COM, <http://www.collfanshop.com/shop-by-players/derrick-henryjersey.html> (last visited Dec. 22, 2015) (link now disabled, PDF of website on file with author).

- 7 See generally CBS Interactive, *supra* note 5 (outlining Henry's football statistics over the years).
- 8 See Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1094 (2009-2010).
- 9 Edward H. Grimmer, *NCAA Amateurism and Athletics: A Perfect Marriage or a Dysfunctional Relationship?-An Antitrust Approach to Student-Athlete Compensation*, 30 TOURO L. REV. 823, 853 (2014).
- 10 O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).
- 11 *Id.*
- 12 See *infra* Section II-A, at 4.
- 13 See *infra* Section II-B, at 9.
- 14 See *infra* Section II-C, at 10; *infra* Section II-D, at 11.
- 15 See *infra* Section II-F, at 17.
- 16 See *infra* Section II-A, at 4-6 (explaining how the NCAA has defined "amateurism" over the years).
- 17 Dan Treadway, *Why Does the NCAA Exist?*, THE HUFFINGTON POST (Oct. 6, 2014), http://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility_b_3020985.html.
- 18 NCAA, *Who We Are*, NCAA.ORG, <http://www.ncaa.org/about/who-we-are> (last visited Oct. 5, 2014).
- 19 *Id.*
- 20 NCAA, *Membership*, NCAA.ORG, <http://www.ncaa.org/about/who-we-are/membership> (last visited Oct. 5, 2014).
- 21 *Id.*
- 22 *Id.*
- 23 NCAA, *About the NCAA*, NCAA.ORG, <http://www.ncaa.org/about> (last visited Oct. 5, 2014).
- 24 O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963-64 (N.D. Cal. 2014).
- 25 *Id.* at 964.
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*
- 29 *Id.*
- 30 O'Bannon, 7 F. Supp. 3d at 963-64 (stating that the Board is composed of various university presidents and chancellors from 18 colleges or universities around the country).
- 31 NCAA, *2014-2015 Division I Manual*, NCAA, Art. 1, § 1.2, at 1 (Aug. 1, 2014), available at <http://www.ncaapublications.com/productdownloads/D115.pdf>.
- 32 *Id.*
- 33 *Id.* at 4, §2.9.

- 34 *Id.* “Avocation” is defined as “an activity that you do regularly for enjoyment rather than as a job.” *Avocation Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/avocation> (last visited Mar. 12, 2015).
- 35 NCAA, *supra* note 31, at §12.1.2, at 59.
- 36 *Id.* (stating that examples of acts that strip student-athletes of their amateur status include: accepting a promise of pay even after termination of intercollegiate athletics competition, signing a contract or commitment of any kind to play professional sports, and/or entering into an agreement with an agent).
- 37 *Id.* at 59-61.
- 38 *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 972 (N.D. Cal. 2014); *see also* Grimmett, *supra* note 9, at 856 (“The thought of corporate advertisers dealing directly with student-athletes” could pose a threat to the NCAA’s amateurism concept.).
- 39 *O'Bannon*, 7 F. Supp. 3d at 972.
- 40 *Id.* at 971.
- 41 *Id.*
- 42 *Id.*
- 43 *Id.*
- 44 *Id.* at 971-72.
- 45 *O'Bannon*, 7 F. Supp. 3d at 971-72.
- 46 *Id.*
- 47 *Id.*
- 48 *O'Bannon v. NCAA*, 802 F.3d 1049, 1054-55 (9th Cir. 2015).
- 49 *See infra* Section II-C, Section II-D, and Section II-E.
- 50 *Id. See, e.g., NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984); *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).
- 51 I generally refer here to “student-athlete plaintiffs” over the years, but this reference also includes the Plaintiffs in the *O'Bannon* suit. Additionally, while the *O'Bannon* Plaintiffs were actually Appellees on appeal, I have opted to call them “Plaintiffs” for purposes of this article.
- 52 15 U.S.C.A. § 1 (West 2004).
- 53 *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (citing *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996)) (emphasis in original).
- 54 *Tanaka*, 252 F.3d at 1062.
- 55 *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014) (citing *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006))).
- 56 *O'Bannon*, 7 F. Supp. 3d at 985 (citing *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010) (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101, 104 (1984))).
- 57 *Tanaka*, 252 F.3d at 1063 (citing *Hairston*, 101 F. 3d at 1319).
- 58 *Id.*
- 59 *Id.*

- 60 *See, e.g., Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975).
- 61 *Id.*
- 62 *Id.* at 297-98.
- 63 *Jones*, 392 F. Supp. at 304.
- 64 *Id.*
- 65 *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983).
- 66 *Id.*
- 67 *Id.* at 363.
- 68 *Id.* at 371.
- 69 *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).
- 70 *Id.*
- 71 Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept. 7, 2011), available at <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.
- 72 *Id.*
- 73 *See Bd. of Regents*, 468 U.S. at 86.
- 74 Grimmett, *supra* note 9, at 829; *see also Bd. of Regents*, 468 U.S. at 120 (reasoning that “by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.”).
- 75 Grimmett, *supra* note 9, at 832.
- 76 *Bd. of Regents*, 468 U.S. at 102 (emphasis added).
- 77 Grimmett, *supra* note 9, at 833.
- 78 *See generally Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).
- 79 *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).
- 80 *Id.* at 1345.
- 81 *Id.* at 1344 (quoting *Bd. of Regents*, 468 U.S. at 117).
- 82 *Id.*
- 83 *Id.* at 1345.
- 84 977 F.2d 1081 (7th Cir. 1992).
- 85 *Id.* at 1083-1084 (stating that the NCAA's “no-draft” rule (Rule 12.2.4.2) maintains that “[a]n individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport” and that the NCAA's “no-agent” rule (Rule 12.3.1) maintains that “[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed ... to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport”).

- 86 *Id.* at 1098.
- 87 *Id.* at 1089-1090.
- 88 *Id.* at 1091; *see also* [Gaines v. NCAA](#), 746 F. Supp. 738, 746 (M.D. Tenn. 1990) (stating that “the ‘no-agent’ and ‘no-draft’ [r]ules have primarily procompetitive effects in that they promote the integrity and quality of college football and preserve the distinct ‘product’ of major college football as an *amateur* sport”) (emphasis added).
- 89 139 F.3d 180 (3d Cir. 1998).
- 90 *Id.*
- 91 *Id.* at 187 (stating that “the bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive”).
- 92 134 F.3d 1010 (10th Cir. 1998).
- 93 *See id.* at 1024.
- 94 *Id.* at 1013.
- 95 Grimmatt, *supra* note 9, at 843.
- 96 *Law*, 134 F.3d at 1022, n.14.
- 97 683 F.3d 328 (7th Cir. 2012).
- 98 *Id.*
- 99 *Id.* at 341; *see also id.* at 342-43 (stating that “when an NCAA bylaw is clearly meant to help maintain the ‘revered tradition of amateurism in college sports’ or the ‘preservation of the student-athlete in higher education,’ the bylaw will be presumed procompetitive, since we must give the NCAA ‘ample latitude to play that role’”) (citing [NCAA v. Bd. of Regents of Univ. of Okla.](#), 468 U.S. 85, 120 (1984)).
- 100 *Id.* at 343.
- 101 *Id.*
- 102 724 F.3d 1268 (9th Cir. 2013), *cert. dismissed sub nom. Elec. Arts Inc. v. Keller*, 135 S. Ct. 42 (2014).
- 103 Grimmatt, *supra* note 9, at 831.
- 104 Gamespot, *Bill Walsh College Football*, GAMESPOT.COM, <http://www.gamespot.com/bill-walsh-college-football/reviews/> (last visited Mar. 2, 2015) (showing that as early as 1993, video game developers were using student-athletes' NILs).
- 105 Grimmatt, *supra* note 9, at 853.
- 106 Steve Eder, *E.A. Sports Settles Lawsuit With College Athletes*, N.Y. TIMES (Sept. 26, 2013), *available at* http://www.nytimes.com/2013/09/27/sports/ncaafotball/ea-sports-wont-make-college-video-game-in-2014.html?_r=1&.
- 107 7 F. Supp. 3d 955 (N.D. Cal. 2014).
- 108 *Id.* at 965.
- 109 This Defendant (EA) is the same as in the previously mentioned litigation against EA.
- 110 *O'Bannon*, 7 F. Supp. 3d at 965.
- 111 *Id.* at 963.

- 112 *Id.* at 965; *see also* *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (holding that “video game developer’s use of the likenesses of college athletes in its video games was not protected by the First Amendment and therefore former college football player’s right-of-publicity claims against developer were not barred by California’s anti-SLAPP statute”), *cert. dismissed sub nom. Elec. Arts Inc. v. Keller*, 135 S. Ct. 42 (2014).
- 113 *O’Bannon*, 7 F. Supp. 3d at 985. As a reminder, the first element required a “contract, combination, or conspiracy”; the second required that the agreement unreasonably restrain trade under either a *per se* rule of illegality or a rule of reason analysis; and the third element required that the restraint affect interstate commerce. *Tanaka*, 252 F.3d at 1062 (citing *Hairston v. Pac. 10 Conference*, 101 F.3d at 1318).
- 114 *Id.*
- 115 *Id.* at 985 (quoting *Tanaka*, 252 F.3d at 1063).
- 116 *Id.* at 986 (stating that the “college education market” describes a market in which colleges and universities compete to recruit student-athletes to play FBS football or Division I basketball, and the “group licensing market” describes a market in which videogame developers, television networks, and others compete for group licenses to use the NILs of FBS football and Division I men’s basketball players in videogames, telecasts, and clips).
- 117 *Id.*; *see also* Michael Carrier, *U.S. Court Finds That an Athletics Ass’n’s Rules Restricting Payments to Student-Athletes Violate Antitrust Laws (O’Bannon v. NCAA)*, RUTGERS UNIV. SCHOOL OF LAW - CAMDEN, (e-Competitions [Bulletin](#), No. 68725) Sept. 2014, at 1-2.
- 118 Carrier, *supra* note 117, at 2. For example, non-Division I schools typically offer a lower level of athletic competition, inferior training facilities, and fewer opportunities to play in front of the largest crowds and television audiences. On the other end of the spectrum, professional sports leagues do not offer student-athletes the opportunity to earn an education. *Id.*
- 119 *Id.*
- 120 *O’Bannon*, 7 F. Supp. 3d at 993.
- 121 *Id.*
- 122 *Id.* at 993-98 (stating that the challenged rules do not hinder competition among any potential buyers or sellers of group licenses).
- 123 *Id.* at 991.
- 124 *Id.*
- 125 *Id.* at 988.
- 126 *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 998-99 (N.D. Cal. 2014).
- 127 *Id.* at 999.
- 128 *Id.*
- 129 *Id.* at 999-1004; *see also* Marc Edelman, *The District Court Decision in O’Bannon v. National Collegiate Athletic Association: A Small Step Forward for College Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2332 (2014); Carrier, *supra* note 117, at 3-5.
- 130 *O’Bannon*, 7 F. Supp. 3d at 1001.
- 131 *Id.* at 1003.

- 132 *Id.*; see also *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1157, 1159-60 (9th Cir. 2001) (explaining that the product here was a physician performing caesarian sections only after becoming certified); *Law v. NCAA*, 134 F.3d 1010, 1019-21 (10th Cir. 1998) (explaining that the product here was college basketball coaching).
- 133 *O'Bannon*, 7 F. Supp. 3d at 1003.
- 134 *Id.*
- 135 *Id.* at 1004.
- 136 *Id.* at 982, 1005.
- 137 *Id.* at 1004-05 (citing *Tuolumne*, 236 F.3d at 1159) (citation omitted).
- 138 *Id.* at 1005; see also *id.* at 1006, n.16 (stating that over the past two decades, various commentators have suggested that “the NCAA could hold payments in trust for its student-athletes without violating generally accepted understandings of amateurism used by other sports organizations”) (citing Sean Hanlon & Ray Yasser, “*J.J. Morrison*” and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 294 (2008)); Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 87-88 (2004); Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L. J. 133, 155 (1996); Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS L. J. 25, 44-45 (1996); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 25, 27 (1991).
- 139 *O'Bannon*, 7 F. Supp. 3d at 955.
- 140 *Id.* at 1007-08. The NCAA noted in its brief filed in the Ninth Circuit in the *O'Bannon* case that “[o]n August 7, 2014, the NCAA allowed conferences to permit their schools to increase the maximum grant-in-aid up to the cost of attendance.” Brief for Appellant at 10, n.1, *O'Bannon v. NCAA*, Docket No. 14-17068 (9th Cir. 2014). Thus, the main less restrictive alternative at issue here, since conferences *are* permitted to allow their schools to increase the grant-in-aid up to the cost of attendance, is the deferred trust system; however, without any court action, the NCAA could still rescind that rule.
- 141 *O'Bannon*, 7 F. Supp. 3d at 1007-08. The court arrived at the \$5,000 figure in part by relying on the NCAA's witnesses who stated that their concerns about student-athlete compensation would be lessened or negated if that compensation was capped at a few thousand dollars per year. *Id.* The NCAA also stated that that the amount was comparable to the amount the NCAA permits student-athletes to receive if they qualify for Pell grants, and the amount that NCAA tennis players may receive prior to enrollment. *Id.*
- 142 *Id.* at 1008.
- 143 *Id.*
- 144 *Id.*
- 145 *Jenkins v. NCAA*, No. 4:2014cv02758 (N.D. Cal. filed June 18, 2014).
- 146 Complaint and Jury Demand at 1-2, *Jenkins v. NCAA*, D. N.J., Civil Action No. 14-CV-01678, filed 03/17/14 (on file with author).
- 147 *Id.* at 2.
- 148 Sam Brodey, *The Latest Court Case Didn't End the NCAA As We Know It. The Next One Might*, MOTHER JONES (Aug. 13, 2014), <http://www.motherjones.com/mixed-media/2014/08/obannon-jenkins-ncaa-college-athletes-paid>.
- 149 *Id.*
- 150 See generally *Northwestern Univ. and Coll. Athletes Players Ass'n*, Case 13-RC-121359, NLRB (Mar. 26, 2014).

- 151 *Id.* at 14. The NLRB specifically found that football players receiving grant-in-aid performed valuable services for Northwestern, in that the football program generated nearly \$235 million from 2003-2012. *Id.* Additionally, the compensation the players receive comes in the form of scholarships they bargain for upon signing a “tender,” which serves as an employment contract and gives players detailed information concerning the duration and conditions under which the compensation will be provided to them. *Id.* Moreover, the players' scholarships can be reduced or canceled by the Head Coach for a number of reasons, clearly indicating that the players receive these scholarships in exchange for services performed. *Id.* at 15. The NLRB also found that Northwestern University exhibits significant control over these football players in that the players are required to attend numerous hours of practice a week, miss certain classes to participate in a game, and abide by other myriad restrictions. *See generally id.* at 15-17.
- 152 *Id.* at 18 (stating that football players spend 40-50 hours on football duties per week during the three to four-month football season).
- 153 NLRB, *Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NLRB.GOV (Aug. 17, 2015), <https://www.nlr.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case> (stating that “[b]y statute the Board does not have jurisdiction over state-run colleges and universities, which constitute 108 of the roughly 125 FBS teams”).
- 154 *Id.*
- 155 *Id.*
- 156 *O'Bannon v. NCAA*, 802 F.3d 1049, 1052-53 (9th Cir. 2015).
- 157 *See infra* Section III-A and Section III-B.
- 158 *See id.*
- 159 *O'Bannon*, 802 F.3d at 1049.
- 160 *Id.* at 1053, 1061, 1064-67.
- 161 *Id.* at 1072; *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014). The NCAA argued before the district court that the restrictions are necessary to: (1) preserve its tradition of amateurism; (2) maintain competitive balance among FBS football and Division I men's basketball teams; (3) promote the integration of academics and athletics; and 4) increase the total output of its product. *O'Bannon*, 7 F. Supp. 3d at 999.
- 162 Brief for Appellant, *supra* note 140, at ii-iii.
- 163 Grimmatt, *supra* note 9, at 832-833; *see also id.* at 836 (stating that “[c]ourts have consistently viewed the NCAA's regulatory powers as an axe against antitrust scrutiny, with the foundation established in *Board of Regents* acting as the handle”); Brief for Appellant, *supra* note 140, at 23-24.
- 164 *See Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983) (upholding NCAA-imposed sanctions on the University of Arizona for numerous occasions where university staff members and officials provided compensation or other benefits to members of the schools' football team or individuals being recruited by the school's football team); *see also id.* at 371 (stating that rules providing for sanctions when universities compensate certain student-athletes for participation in intercollegiate athletics were “rationally related to the NCAA's stated objective of promoting amateurism”); *Jones v. NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975) (stating that “[t]he N.C.A.A. eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding,” and also stating any limitation on college sports was merely an “incidental result” of the NCAA's pursuit of its “legitimate goals”).
- 165 Brief for Appellant, *supra* note 140, at 23.

- 166 *Id.* (citing *Bd. of Regents*, 468 U.S. at 117); *see also* Brief for Appellant, *supra* note 140, at 24 (citing *Bd. of Regents*, 468 U.S. at 120) (stating that “[t]here can be no question but that ... the preservation of the student-athlete in higher education is entirely consistent with the goals of the Sherman Act.”).
- 167 Brief for Appellant, *supra* note 140, at 21-25.
- 168 Grimmatt, *supra* note 9, at 842.
- 169 Marc Edelman, *The NCAA's “Death Penalty” Sanction-Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 LEWIS AND CLARK L. REV. 385, 417 (2014) (stating that “[a]ll [the *Board of Regents* decision] did was note that the argument could have been broached by the NCAA as a defense under the Rule of Reason.”).
- 170 *Id.*; *see also* Plaintiffs-Appellees' Opposition Brief in Response to NCAA's Opening Appellate Brief, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2014) [hereinafter Brief for Appellees].
- 171 *See generally* Brief for Appellees, *supra* note 170, at 3-9.
- 172 *See generally* Brief for Appellant, *supra* note 140, at 25-31 (citing *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *Smith*, 139 F.3d at 180; *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988)).
- 173 Brief for Appellant, *supra* note 140, at 26 (stating that if an NCAA rule is supportive of the “no-payment” and “student-athlete” models, then they are clearly procompetitive); *see also* *Agnew v. NCAA*, 683 F.3d 328, 342-43, n.7 (7th Cir. 2012).
- 174 Brief for Appellant, *supra* note 140, at 25 (citing *Agnew*, 683 F.3d at 343).
- 175 *Smith*, 139 F.3d at 187 (ruling that the NCAA's regulation was procompetitive by prohibiting post-graduate recruiting so student-athletes would not forgo eligibility at the undergraduate level to preserve athletic eligibility at the post-baccalaureate level); *see also* Brief for Appellant, *supra* note 140, at 26 (“[T]he bylaw at issue here is a reasonable restraint, which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive.”).
- 176 *McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (emphasizing the dividing line between intercollegiate athletics and professional sports and stating that “[t]he NCAA markets college football as a product distinct from professional football[,]” and that the NCAA's “eligibility rules create the product and allow its survival in the face of commercializing pressures); *see also* Brief for Appellant, *supra* note 140, at 26; Edelman, *supra* note 129, at 2349.
- 177 *McCormack*, 845 F.2d. at 1345 (stating that although “the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable”).
- 178 *Banks v. NCAA*, 977 F.2d 1081, 1089-90 (7th Cir. 1992) (stating that “the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education”).
- 179 *Id.* at 1091 (stating that the court “should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes' proper focus on their educational pursuits and direct their attention to the quick buck in pro sports”).
- 180 *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).
- 181 *Id.* at 1022, n.14; *see also* Edelman, *supra* note 129, at 2339-40 (“Presuming that the Tenth Circuit's ruling in *Law* was indeed good law, the same conclusion should logically have always extended to wage restraints for FBS football players and Division I men's basketball players, given that both categories ‘are closely akin in practice to traditional workers.’”).
- 182 *See* *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012); *Smith v. NCAA*, 139 F.3d 180, 186-87 (3d Cir. 1998); *McCormack v. NCAA*, 845 F.2d 1338, 1343-44 (5th Cir. 1988); *Banks*, 977 F.2d at 1089-90.
- 183 *O'Bannon v. NCAA*, 802 F.3d 1063-64 (9th Cir. 2015).

- 184 *Id.* at 1064
- 185 Brief for Appellant, *supra* note 140, at 32.
- 186 *Agnew*, 683 F.3d at 339-40 (stating “the Sherman Act applies to the NCAA bylaws generally”); *see also McCormack*, 845 F.2d at 1343-44 (assuming the Sherman Act applied to the NCAA’s promulgation of eligibility rules).
- 187 *O’Bannon v. NCAA*, 802 F.3d 1064-66 (9th Cir. 2015).
- 188 *Id.* at 1065.
- 189 Brief for Appellant, *supra* note 140, at 35.
- 190 *Id.* at 36-41.
- 191 *Id.* at 36-37.
- 192 *Id.* at 37-38.
- 193 *Id.* at 38.
- 194 Brief for Appellees, *supra* note 170, at 39, 41. Desser also stated that “[NIL] provisions like these are common and ... have economic value to the television networks. *Id.*
- 195 *See id.* at 41.
- 196 *O’Bannon*, 802 F.3d at 1066-67.
- 197 *Glen Holly Entm’t, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1007-08 (9th Cir. 2003) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)) (internal quotation marks omitted).
- 198 *O’Bannon*, 802 F.3d at 1067.
- 199 *Id.* at 1067-68.
- 200 Brief for Appellant, *supra* note 140, at 38-39.
- 201 Brief for Appellees, *supra* note 170, at 47 (stating also that “since the Court’s summary judgment ruling in April of 2014, there has been no disruption in or chilling effect upon college sports broadcasting”).
- 202 *See O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 993-99 (N.D. Cal. 2014), *aff’d in part, denied in part*, 802 F.3d 1049 (9th Cir. 2015). *See generally* Brief for Appellant, *supra* note 140, at 35-43.
- 203 *O’Bannon*, 7 F. Supp. 3d at 996-99.
- 204 *Id.* at 1068.
- 205 *Id.* at 1069.
- 206 Brief for Appellant, *supra* note 140, at 43.
- 207 *Id.* at 45 (stating that “competition in the relevant market is [actually] vigorous”).
- 208 *Id.* at 47.
- 209 *O’Bannon v. NCAA*, 802 F.3d 1049, 1070-72 (9th Cir. 2015).
- 210 *Id.* at 1071.
- 211 *Id.* at 1071-72.

- 212 Brief for Appellant, *supra* note 140, at 49-50.
- 213 *Id.* at 51.
- 214 *Id.* at 54 (“The willingness of an organization with such diverse membership to adjust its rules over time while at the same time adhering to a set of core principles provides no basis for condemnation.”).
- 215 *Id.* at 54-55.
- 216 *Id.* (arguing that now student-athletes can potentially receive \$30,000 over the years for use of their NILs: “\$5,000 per year in deferred compensation (via a trust) plus the difference between full grant-in-aid and cost of attendance (via a stipend), all paid from group NIL licensing revenue (if there is such a thing”).
- 217 *Id.* at 56 (“In adjusting the NIL price that NCAA members may agree on, the court thus ‘act[ed] as [a] central planner[], identifying the proper price, quantity, and other terms of dealing,’ ‘a role for which [courts] are ill suited.’”) (citing [Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP](#), 540 U.S. 398, 408 (2004)).
- 218 Brief for Appellant, *supra* note 140, at 57-58 (arguing also that “[e]ven if there were such doubt [that the NCAA's ban on pay-for-play is reasonably necessary], it should have been resolved in favor of the NCAA, which is entitled to ‘ample latitude’ in maintaining amateurism.”) (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).
- 219 Brief for Antitrust Scholars as Amicus Curiae Supporting Appellants at 2, *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (9th Cir. 2014) (Nos. 14-16601, 14-17068). Antitrust Scholars are 15 professors of antitrust law at leading United States universities. *Id.* at 1. Numerous other amicus briefs were also filed for this case; however, the brief of the self-titled Antitrust Scholars was one of the most useful.
- 220 *Id.* at i.
- 221 *Id.* at 2. Antitrust Scholars argue that, if accepted, the district court's rule “would authorize courts to substitute their judgments regarding the details of a restraint for the judgments made by the actual market participants seeking to achieve admittedly procompetitive goals.” *Id.* at 3.
- 222 *Id.* at 10; *see also id.* at 13-14 (“[P]reserving amateurism in college sports and promoting integration of student athletes with their academic communities are at the core of the NCAA's mission.” Further, “because the plaintiff class has failed to identify a substantially less restrictive alternative to capping payments to players for promoting those aims, the Court should be able to conclude that the procompetitive benefits outweigh any alleged competitive harms”).
- 223 *Id.* at 14-15 (arguing that antitrust courts could intervene in Little League baseball leagues or even kennel clubs).
- 224 *Id.* at 16.
- 225 *See* Brief for Appellant, *supra* note 140, at 56-58.
- 226 *See generally* Brief for Appellees, *supra* note 170.
- 227 *See* Brief for Appellees, *supra* note 170, at 56; *see also* Michael Marot, *NCAA Executive Backs Athlete Image Compensation*, AP SPORTS, Dec. 18, 2014, <http://collegefootball.ap.org/galaxgazette/article/ncaa-executive-backs-athlete-image-compensation> (quoting Oliver Luck, who stated, “[s]ome decisions by some institutions have already been made to provide the full trust fund payments for a student-athlete's names, image and likeness, and I think we'll see more and more of that”).
- 228 Marot, *supra* note 227.
- 229 Brief for Appellees, *supra* note 170, at 57.
- 230 *Id.* at 24.
- 231 *See generally* *Agnew v. NCAA*, 683 F.3d 328, 339 (7th Cir. 2012); *Smith v. NCAA*, 139 F.3d 180, 186 (3d Cir. 1998); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).

- 232 See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013), cert. dismissed sub nom. *Elec. Arts Inc. v. Keller*, 135 S. Ct. 42 (2014); Peter H. Hamner, *EA Settles with College Athletes for \$40 Million, NCAA Still in Suit*, THOMPSON REUTERS: THE KNOWLEDGE EFFECT (Oct. 2, 2013), <http://blog.thomsonreuters.com/index.php/ea-settles-suit-with-college-athletes-for-40-million-ncaa-still-in-suit/>.
- 233 Grimmett, *supra* note 9, at 831.
- 234 *Jenkins v. NCAA*, No. 4:2014cv02758 (N.D. Cal. filed June 18, 2014).
- 235 *Id.*
- 236 *Northwestern University & College Athletes Players Ass'n*, 362 N.L.R.B. 167 (2015); see also *supra* Section II-G, at 25-26 (discussing this issue in-depth).
- 237 *Id.* at 18 (stating that football players spend 40-50 hours on football duties per week during the three to four-month football season).
- 238 See NLRB, *supra* note 153.
- 239 *Id.*
- 240 Wong, *supra* note 8, at 1094.
- 241 Josh Levin, *The Most Evil Thing about College Sports*, SLATE MAGAZINE (May 17, 2012), http://www.slate.com/articles/sports/sports_nut/2012/05/ncaa_scholarship_rules_it_s_morally_indefensible_that_athletic_scholarships_can_be_yanked_after_one_year_for_any_reason_.html.
- 242 See *O'Bannon v. NCAA*, 7 F. Supp. 955 (N.D. Cal. 2014). As mentioned as a central thread throughout this article, refusing to allow schools the chance to compensate these student-athletes essentially constitutes an illegal price-fixing agreement that sets the value of the student-athletes' NILs at zero. This activity constitutes an unreasonable restraint on trade, justifying the Plaintiffs' proffered (and district court-approved) less restrictive alternatives.
- 243 Grimmett, *supra* note 9, at 853.
- 244 Wong, *supra* note 8, at 1070, 1086.
- 245 Grimmett, *supra* note 9, at 850.
- 246 See *id.* at 855.
- 247 *O'Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015); see also Grimmett, *supra* note 9, at 833 (explaining the rule of reason analysis).
- 248 *O'Bannon*, 802 F.3d at 1072.
- 249 *Id.* at 1072-73.
- 250 See Edelman, *supra* note 129, at 2340-41 (stating that *Board of Regents* does not stand for the proposition that "certain NCAA restraints are *per se* legal").
- 251 See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).
- 252 See *Agnew v. NCAA*, 683 F.3d 328, 342-43 (7th Cir. 2012); *Smith v. NCAA*, 139 F.3d 180, 186 (3d Cir. 1998); *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988).
- 253 See Brief for Appellees, *supra* note 170, at 12-17; Carrier, *supra* note 117, at 1; Edelman, *supra* note 129, at 2333; Grimmett, *supra* note 9, at 842; Wong, *supra* note 8, at 1094.

- 254 See Brief for Appellees, *supra* note 170, at 12-17; Carrier, *supra* note 117, at 1; Edelman, *supra* note 129, at 2333; Grimmett, *supra* note 9, at 842; Wong, *supra* note 8, at 1094.
- 255 *O'Bannon*, 802 F.3d at 1074.
- 256 724 F.3d 1268 (9th Cir. 2013), *cert. dismissed sub nom. Elec. Arts Inc. v. Keller*, 135 S. Ct. 42 (2014).
- 257 See *Jenkins v. NCAA*, No. 4:2014cv02758 (N.D. Cal. filed June 18, 2014).
- 258 See *Northwestern University & College Athletes Players Ass'n*, 362 N.L.R.B. 167, at 19 (2015).
- 259 *O'Bannon*, 802 F.3d at 1073 (quoting *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 986 (N.D. Cal. 2014)).
- 260 *O'Bannon*, 802 F.3d at 1073 (emphasis added).
- 261 *Id.*
- 262 *Id.* (internal quotation removed).
- 263 See Brief for Appellees, *supra* note 170, at 35; Wong, *supra* note 8, at 1070.
- 264 See *O'Bannon*, 7 F. Supp. 3d at 1007.
- 265 See *O'Bannon*, 802 F.3d at 1052-53.
- 266 *Id.* at 1074 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).
- 267 See *id.* at 1074-76.
- 268 *Id.* at 1075.
- 269 *Id.*
- 270 *Id.*
- 271 *Id.*
- 272 *O'Bannon*, 802 F.3d at n.18 (stating that while the NCAA now permits schools and conferences to choose to raise their scholarship caps to the full cost of attendance, it could still change its mind about that issue at any time. Further, “[t]he district court’s injunction prohibiting the NCAA from setting a cap any lower than the cost of attendance thus remains in effect, which means that the NCAA’s challenge to that portion of the injunction is not moot.”)
- 273 *Id.* at 1074, 1076.
- 274 *Id.* at 1076 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).
- 275 *Id.*
- 276 *O'Bannon*, 802 F.3d at 1077.
- 277 *Id.* at 1078.
- 278 *Id.* at 1078.
- 279 *Id.*
- 280 *Id.*

- 281 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 128 (1984); *O'Bannon*, 802 F.3d at 1076-77 (citing *Bd. of Regents*, 468 U.S. at 102) (stating that “the market for college football is distinct from other sports markets and must be ‘differentiate[d]’ from professional sports lest it become minor league [football]”).
- 282 *Id.*
- 283 *See id.* at 1076.
- 284 *Id.* at 1080 (Thomas, J., dissenting).
- 285 *Id.* at 1081.
- 286 *O'Bannon*, 802 F.3d at 1074 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).
- 287 *Id.* at 1082 (Thomas, J., dissenting) (citing *O'Bannon v. NCAA*, 7 F. Supp. 955, 1001 (N.D. Cal. 2014)) (stating that Stanford Athletic Director, Bernard Muir, and Mr. Pilson would not be bothered by smaller amounts of compensation to student-athletes).
- 288 *Id.* (quoting *O'Bannon*, 7 F. Supp. at 1000-01).
- 289 *O'Bannon*, 802 F.3d at 1081 (Thomas, J., dissenting).
- 290 *Id.* at 1083.
- 291 *Id.* (emphasis added).
- 292 *See generally Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (citing *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996)).
- 293 *See* Jon Solomon, *Ed O'Bannon plaintiffs ask Supreme Court to take NCAA case*, CBS SPORTS COM. (Mar. 15, 2016), <http://www.cbssports.com/college-football/news/ed-oban-non-plaintiffs-ask-supreme-court-to-take-ncaa-case/>.
- 294 *See* Steve Berkowitz and A.J. Perez, *Supreme Court will not consider the Ed O'Bannon antitrust case against the NCAA*, USATODAY.COM (Oct. 3, 2016), <http://www.usatoday.com/story/sports/college/2016/10/03/supreme-court-ed-obannon-ncaa-antitrust-case/91462090/>.
- 295 *See generally* ESPN, *NCAAF*, ESPN.GO.COM, <http://m.espn.go.com/nfl/> (last visited Jan. 3, 2016). While this is a website where consumers can stream various sports games, including NCAA FBS and Division I men's basketball, it is also available as a mobile application for cell phones. *Id.* *See also* ESPN (@ESPN), TWITTER (Dec. 31, 2015, 11:22 P.M.), <https://twitter.com/espn/status/682778999425265665>. The video clip embedded in this tweet depicts the Alabama Crimson Tide's Derrick Henry running for a touchdown during the 2015 Cotton Bowl game against the Michigan State Spartans. *Id.* The game was broadcast on ESPN, and this clip was posted directly to Twitter. *Id.*
- 296 Grimmett, *supra* note 9, at 859-60.

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