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# ISSUES IN ANTITRUST, THE NCAA, AND SPORTS MANAGEMENT

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## I. INTRODUCTION — THE CONTEXT

The National Collegiate Athletic Association or NCAA is a voluntary unincorporated association made up of approximately 1,100 universities and colleges, both public and private, from across the United States. The NCAA “coordinates the intercollegiate athletic programs of its members by adopting and promulgating playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of student athletes, [and] rules governing the size of athletic squads and coaching staffs. . . .”<sup>1</sup> The primary purpose of the NCAA is to maintain intercollegiate athletics as an integral part of a member institution’s overall 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.”<sup>2</sup>

The Sherman Antitrust Act was enacted by Congress in 1890 “in response to public agitation against such giant business monopolies as the Standard Oil Company and the American Tobacco trust.”<sup>3</sup> The original draft of Section 1 of the Act contained the following language, still relevant today:<sup>4</sup>

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any

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1. *Law v. National Collegiate Athletic Ass’n*, 134 F.3d 1010, 1012 (10<sup>th</sup> Cir. 1998), cert. denied, 119 S. Ct. 65 (Oct. 5, 1998). See also 1998-1999 NCAA DIVISION I MANUAL, CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS (hereinafter 1998-1999 NCAA Div. I MANUAL).

2. NCAA CONST. art. 1, §1.3.1, reprinted in 1998-1999 NCAA Div. I MANUAL, *supra* note 1, at 1. See also Kevin MacGillivray, Comment, *The Confidentiality of NCAA Investigation Files: A Policy Worthy of Protection*, 8 SETON HALL J. SPORT L. 629, 638 (1998).

3. PATRICK J. CIHON & JAMES O. CASTAGNERA, LABOR & EMPLOYMENT LAW 14 (1993). See also *Standard Oil Co. v. United States*, 221 U.S. 1, 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 106 (1911).

4. See 15 U.S.C. § 1 (1890).

such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine of \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.<sup>5</sup>

Because nearly every contract that binds parties to an agreed upon course of conduct is a "restraint of trade" in a technical sense, the United States Supreme Court has traditionally limited the restrictions contained under Section 1 to bar only "unreasonable restraints of trade" and unreasonable conduct.<sup>6</sup> Section 8 of the Sherman Act states that the word "person," or "persons," wherever used, includes corporations and associations existing or authorized by the laws of the United States, the laws of any of the American Territories, the laws of any State, or the laws of any foreign country.<sup>7</sup> Thus, the NCAA, even as a voluntary association of its members, is clearly a "covered party" within the contemplation of the Sherman Act and can potentially act in violation of any of its provisions.

#### A. "State Action" and the NCAA

However, the NCAA generally operates under a system of rules which are very different from those applied to many traditional "players" in the legal system, especially many of its own members who are state-supported colleges and universities. The actions of the NCAA, even as the preeminent regulatory board in collegiate athletics, are not considered to be "state-action." It is recognized that for the purposes of the state-action requirement of the due process clause of the Federal Constitution's Fourteenth Amendment, and the statutory requirement of 42 U.S.C. Section 1983, an action or activity must either be that of an instrument of the state (i.e., an action directly undertaken by a state funded college or university) or must be accomplished under color of state law.<sup>8</sup> Where an overriding function of a voluntary unincorporated association like the NCAA is the fostering of amateur athletics at the collegiate level, the Supreme Court noted that even though such a function may be critical and involve an important "public function," such a

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5. The fine for violation of the Act was increased from \$5,000.00 to \$50,000.00 by the Act of July 7, 1955, 69 Stat. 282, and increased again to \$1 million for a corporation and \$100,000.00 for other persons by the Antitrust Procedures & Penalties Act, Pub. L. No. 93-528, 88 Stat. 1708 (codified as amended at 15 U.S.C.A. § 1 (1976)).

6. *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1012 (10<sup>th</sup> Cir. 1998), *cert. denied*, 119 S. Ct. 65 (Oct. 5, 1998). See also *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 98 (1984); *Standard Oil Co.*, 221 U.S. at 52-60.

7. See 15 U.S.C. § 7 (1999).

8. See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 193 (1988).

function is neither a traditional nor an exclusive state function.<sup>9</sup> Thus, since the United States Supreme Court's decision in *National Collegiate Athletic Ass'n v. Tarkanian*, courts have generally held that the NCAA is a "private" organization which operated independently of its members—in this case, a state supported university, the University of Nevada-Las Vegas (UNLV), when UNLV sought to discipline its ubiquitous coach.<sup>10</sup> The facts of the *Tarkanian* case are fairly well known to the American sporting public.

After a lengthy investigation of allegations of improper recruiting (and other) violations by UNLV, the NCAA's Committee on Infractions found thirty-eight separate violations, including ten directly attributable to Coach Tarkanian, affectionately termed "Tark the Shark" by friends and admirers.<sup>11</sup> The NCAA imposed several sanctions on UNLV, and demanded that "it show cause why additional penalties should not be imposed if [UNLV] failed to suspend Tarkanian from its athletic program."<sup>12</sup> Facing demotion and a drastic cut in pay,<sup>13</sup> Tarkanian filed suit in a Nevada state court, alleging that he had been deprived of his due process rights under the Fourteenth Amendment of the United States Constitution.<sup>14</sup> Tarkanian was successful in obtaining injunctive relief and an award of attorney's fees against both the NCAA and UNLV at the state level.<sup>15</sup> The Nevada Supreme Court concluded that the NCAA's conduct constituted state action for both jurisdictional and constitutional purposes and affirmed the decision of the trial court in relevant part.<sup>16</sup> The NCAA appealed to the United States Supreme Court.<sup>17</sup>

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9. *See id.* at 198.

10. *See id.*

11. *See id.* at 185.

12. *Id.* at 179.

13. Coach Tarkanian was annually paid \$125,000.00, plus 10% of the net proceeds received by UNLV for participation in post-season competition, plus fees for basketball camps and clinics, product endorsements, income from writing a newspaper column, speaking on the "JERRY TARKANIAN (Radio) SHOW," and appearing on a television program by the same name. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 180 n.1 (1988).

14. *See* 42 U.S.C. § 1983 (1994). During any NCAA investigation, all representatives are required to cooperate fully with the NCAA enforcement staff, the Committee on Infractions, and the Infractions Appeals Committee and Council, providing full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA enforcement staff, Committee on Infractions or Infractions Appeals Committee during the course of an "inquiry." NCAA CONST. art. 32 § 32.5.9 at 437. However, "the NCAA does not [possess] subpoena power and therefore must rely on voluntary information or upon information obtained pursuant to the mandates of its constitution, bylaws, and executive regulations." MacGillivray, *supra* note 2, at 639 n.43.

15. *See Tarkanian*, 488 U.S. at 179.

16. *See Tarkanian v. National Collegiate Athletic Ass'n*, 741 P.2d 1345 (1987).

Justice Stevens, who delivered the opinion of the United States Supreme Court, noted that the liability of the NCAA could be upheld only if its participation in the events that led to the suspension of Coach Tarkanian constituted "state action" prohibited by the Fourteenth Amendment and was performed "under color of" state law within the meaning of Section 1983.<sup>18</sup> In the absence of state action, courts would be powerless to intervene on due process grounds.

The United States Supreme Court disagreed with the Nevada Supreme Court and held that "[t]he NCAA's participation in the events that led to [Coach] Tarkanian's suspension did not constitute 'state action'. . . and was not performed 'under color of' state law. . ."<sup>19</sup> The Court found that the NCAA was an "agent" of its member institutions, which as competitors of UNLV and of each other had an interest in fair and evenhanded enforcement of the NCAA's recruitment and disciplinary standards.<sup>20</sup> The NCAA's investigation, enforcement proceedings, and recommendations to UNLV did not constitute state action since UNLV had delegated no power to the NCAA to take specific action against any UNLV employee (in fact, the UNLV and the NCAA had acted as clear adversaries throughout the proceedings); the NCAA enjoyed no governmental powers to facilitate or carry out the investigation; and that the NCAA did not, nor could it, directly discipline Tarkanian, but could only threaten additional sanctions against UNLV if the university chose not to suspend its coach.<sup>21</sup> The source of the rules promulgated by the NCAA, and thus the basis for the actions taken against Tarkanian by UNLV, was not the state of Nevada, but the collective membership of the NCAA, the vast majority of which was located in other states.<sup>22</sup> Finally, the adoption of the NCAA's rules by UNLV did

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17. *See Tarkanian*, 488 U.S. at 179.

18. *See id.* at 182. The Nevada Supreme Court stated that "the 'under-color-of-law' requirement of 42 U.S.C. § 1983 and the 'state action' requirement of the Fourteenth Amendment are equivalent." *Id.*

19. *Id.* at 179.

20. *See id.* at 180.

21. *See id.* at 183. Among the sanctions that the NCAA may impose against an institution are: reprimand and censure; probation for one year; probation for more than one year; ineligibility for one or more National Collegiate Championship events; ineligibility for invitational and post season meets and tournaments; ineligibility for any television programs subject to the Association's control or administration; ineligibility of the member to vote or its personnel to serve on committees of the Association, or both; and prohibition against intercollegiate sports team or teams participating against outside competition for a specified period; prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period. *Id.*

22. *See id.* at 180.

not transform them into state rules and the NCAA into a state actor, since at anytime UNLV had the power to withdraw from the NCAA and adopt its own standards of conduct for its athletic program or any of the members of its coaching staff.<sup>23</sup> Thus, even assuming the truth of Tarkanian's argument that the power of the NCAA is so great the UNLV had no real choice but to comply with the NCAA's demands, it still did not follow that the NCAA was a "state actor."<sup>24</sup>

### B. Sherman Act Implications

For decades, the NCAA had been immune from close scrutiny under the Sherman Act. Courts and commentators uniformly agreed that col-

23. See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 194-95 (1988).

24. See *id.* at 198. The Court noted: "It would be more appropriate to conclude that UNLV has conducted its athletic programs under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." *Id.* at 199. See also John Kitchin, *The NCAA and Due Process*, 5 KAN. J.L. & PUB. POL'Y 71 (1996.) Kitchin comments that "[n]o longer can plaintiffs bring a cause of action predicated on alleged violations of the several amendments to the United States Constitution." *Id.* at 76.

The saga continued through the spring of 1998 when Tarkanian finally accepted an offer of \$2.5 million from the NCAA to settle his \$14.1 million suit against the NCAA filed in state courts in the state of Nevada. See *Tarkanian Timeline*, FRESNO BEE, Apr. 3, 1998, at A7. The NCAA apparently decided to settle the matter after the Nevada Supreme Court denied its motion for a change of venue from Las Vegas and set a trial date for May 1998. See *id.*; *NCAA Loses Appeal to Move Suit In Dispute with Former Vegas Coach*, LEGAL INTELLIGENCER, Dec. 16, 1997, at 4. See also Joe Arace, *NCAA Pays Tarkanian to End Suit*, USA TODAY, Apr. 2, 1998, at 1C. CNN reported that "[t]he NCAA regrets the 26-year ongoing dispute with Jerry Tarkanian and looks forward to putting it to rest." ESPN SPORTS ZONE, *Reports: NCAA to Pay Jerry Tarkanian in Settlement* (visited Sept. 12, 1999) <<http://archive.espn.go.com/gen/news/980401/00645912>>.

In *Tarkanian*, the Supreme Court was following a series of cases which were decided pursuant to *Arlosoroff v. National Collegiate Athletic Ass'n*, 746 F.2d 1019 (4<sup>th</sup> Cir. 1984). The Circuit Court of Appeals stated that while the NCAA may be said to perform a public function in overseeing the nation's collegiate athletics, the regulation of athletics is not a function "traditionally exclusively reserved to the state." *Id.* at 1021 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1975)). *Graham v. National Collegiate Athletic Ass'n* adopted the same analysis as did the court in *Arlosoroff* in holding that the NCAA is not a "state actor" for purposes of a Section 1983 claim. See 804 F.2d 953, 954 (6<sup>th</sup> Cir. 1986). In *Blum v. Yaretsky* the Supreme Court stated that "a State has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to that of the state." 457 U.S. 991, 1004 (1982) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). The Fourth Circuit also cited the Supreme Court's decision in *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), in which it held that a private school, which derived most of its income from public sources, was not a state actor because there was no symbiotic relationship established between the school and the state. See *Arlosoroff*, 746 F.2d at 1021. For a series of cases holding a contrary view see MacGillivray, *supra* note 2, at 640 n.51 (citing cases from the Fifth, Eighth, and Ninth Circuits).

lege sports were more concerned with the twin aspects of amateurism and education rather than commercialism. Yet, it was also recognized the more the NCAA lurched into commercial endeavors (negotiating association-wide TV or endorsement contracts, for example) or commercial regulation, a clear challenge might be mounted to the NCAA's general immunity. Gary Roberts, a law professor at Tulane University, and its faculty representative to the NCAA, commented, "the more you commercialize what you do, the more you make judges think that anti-trust laws should apply to you."<sup>25</sup>

## II. CURRENT CONTROVERSIES DEFINED

In this context, four separate controversies with potential antitrust implications have recently arisen under the NCAA's more than nearly 500-page rulebook.<sup>26</sup>

### A. *Limitations on the Number of Athletic Scholarships*

The NCAA places limitations on the number of athletic scholarships that an individual institution can award in a particular sport in one year or during any particular four-five year period. For example, in Division 1-A (major college) football, an individual college or university is limited to eighty-five full scholarships; in basketball, thirteen scholarships for men, fifteen for women; and in soccer, almost ten scholarships for men, twelve for women.<sup>27</sup>

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25. Jim Naughton, *Antitrust Suits Could Poke Holes in NCAA's Rulebook, Some Predict*, CHRON. HIGHER EDUC., June 19, 1998, at A46.

26. The relevant portions of the NCAA "Rule Book" may be found in App. 80 of the Court's decision in *Tarkanian*.

27. The Division I Maximum Equivalency Limits for men's and women's sports are found in NCAA Bylaw 15.5.3.1-3. NCAA CONST. art. 15 § 15.5.3.1-3, *reprinted in* 1998-99 NCAA DIV. I MANUAL, *supra* note 1, at 195. In addition to the overall limitation of eighty-five scholarships in Division 1-A Football, there is an annual limit of twenty-five "initial counters." *Id.* at 195-96 (football limitations are found in Bylaw 15.5.5, equivalency computations are found in Bylaw 15.5.3.3). Certain "government grants" such as Pell grants, or those received pursuant to the AmeriCorps Program, Disabled veterans, ROTC Program, Montgomery GI Bill, Special U.S. Government Entitlement Programs, Veterans Educational Assistance Program, Vocational Rehabilitation Program, and certain welfare benefits are generally excluded when determining the permissible amount of full grant-in-aid for student athletes. *See id.*, at 185 (located in Bylaw 15.2.4.1-2 a-h).

### B. *Limit on Per-Season Wages*

The NCAA places a limit on per-season wages of athletes who hold jobs during their sport seasons.<sup>28</sup> This limitation was part of a package, which took effect in August of 1997 that permitted scholarship athletes to work in order to earn spending money.<sup>29</sup>

### C. *Limitations on the Size of Coaching Staffs*

The NCAA placed limitations on the size of coaching staffs.<sup>30</sup> Currently, Division 1-A football teams are restricted to one head coach and nine assistant coaches.<sup>31</sup> Division I men's and women's basketball teams are permitted to employ one head coach and three assistant coaches.<sup>32</sup>

### D. *Dollar Limitations on the Amount of Athletic Scholarships*

The NCAA places dollar limitations on the amount of athletic scholarships.<sup>33</sup> A "full grant-in-aid" (commonly referred to as an athletic scholarship) covers tuition, fees, room and board, and required course-related books.<sup>34</sup> At most institutions, the athletic grant-in-aid does not cover the full cost of attendance at an institution because the grant-in-aid does not provide for any additional "spending money" for any of the athletes. (This issue is closely associated with the work limits described above.)

Will these rules survive close judicial scrutiny?

## III. THE ANTITRUST CONTEXT

In 1984, the United States Supreme Court decided the case of *National Collegiate Athletic Ass'n v. Board of Regents*.<sup>35</sup> This case involved the NCAA's "football television package" rule, which had restricted the ability of individual schools to sell the rights to contests individually to

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28. See NCAA CONST. art. 15 § 15.2.6 at 187.

29. See *id.*

30. See *id.* art. 11 § 11.7 at 62.

31. See *id.* at 63.

32. See *id.* at 65.

33. See *id.* at 183.

34. See NCAA CONST. art. 15 § 15.2.1-3 at 183-85.

35. 468 U.S. 85 (1984). The NCAA derives its revenue from three primary sources: membership dues, assessments on television gross rights fees, and championship games and tournaments. See *Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224, 226 (5<sup>th</sup> Cir. 1988) (Court of Appeals reversal of the District Court's decision). The majority of NCAA revenues come from championship games and tournaments, especially the basketball tournament, now universally known as "March Madness." See *id.*



network or cable television.<sup>36</sup> The plan had limited the total number of football games that any NCAA member could televise and restricted NCAA members from selling its TV rights except through compliance with NCAA regulations.<sup>37</sup> [The original rule, known as the "Notre Dame Rule," had its origins in the 1950s. It was designed to open up the new TV market at a time when Notre Dame live football broadcasts, as well as Sunday morning highlights, dominated the nascent market.]

By 1981, the NCAA had adopted a comprehensive plan for televising college football games for its member institutions.<sup>38</sup> The NCAA had negotiated separate agreements with both ABC and CBS, granting these two networks the exclusive right to televise contests described in the plan.<sup>39</sup> The NCAA justified its plan on the basis that only a comprehensive plan could reduce the adverse effect of live television upon football game attendance and spread television among as many NCAA member colleges as possible, thus prompting "balance" in intercollegiate athletic programs.<sup>40</sup> Two universities, the University of Oklahoma and the University of Georgia, were members of the Collegiate Football Association (CFA), an organization originally created to promote the unique interests of "major college football."<sup>41</sup> The CFA had demanded a greater voice in determining the NCAA's policy concerning televising of collegiate football games.<sup>42</sup> Rebuffed by the NCAA, the CFA negotiated its own contract with NBC that would have permitted appearances in excess of the NCAA's limitations and would have substantially increased the revenues realized by CFA members.<sup>43</sup> In response to this action, the NCAA announced that it would take disciplinary action against any CFA member who participated in the CFA-NBC arrangement.<sup>44</sup> The NCAA made it clear that the sanctions which would be imposed "would

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36. See *Board of Regents*, 468 U.S. at 85.

37. See *id.* at 85.

38. See *id.* at 91.

39. The total for the ABC/CBS contracts under the 1981 plan amounted to \$131,750,000. See *id.* at 93.

40. See *id.* at 96.

41. See *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 89 (1984).

42. See *id.* at 85.

43. See *id.*

44. The history of the NCAA activity in televising college football games is chronicled in *Board of Regents*, 468 U.S. at 90-95. Even though a number of schools were successful in obtaining a preliminary injunction preventing the NCAA from initiating disciplinary actions against CFA members, "most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the threatened sanctions and therefore the agreement was never consummated." *Id.* at 95 (citing *Board of Regents v. National Collegiate Athletic Ass'n*, 546 F. Supp. 1276, 1286-87 (W.D. Okla. 1982)).

not be limited to the football programs, but would apply to other sports” (presumably basketball, which both the NCAA and member schools were only beginning to recognize as a source of major revenues) as well.<sup>45</sup>

After trial, the District Court for the Western District of Oklahoma ruled that the controls exercised by the NCAA over the televising of college football games violated Section 2 of the Sherman Act, defining the relevant market as all “live college football television.”<sup>46</sup> The District Court further ruled that the NCAA unlawfully restrained trade in violation of Section 1 by fixing the price for particular broadcasts, boycotting or threatening to boycott potential broadcasters through its “exclusive” network football-broadcast contracts, and by placing an artificial limit on the production of televised collegiate football.<sup>47</sup> The District Court also concluded that the NCAA’s controls over college football were those of a “classic cartel” with an:

almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members. . . who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products.<sup>48</sup>

The District Court specifically rejected the NCAA’s twin contentions or justifications concerning attendance and balance because the evidence presented by the NCAA “did not support the claim that televising live football adversely affected gate attendance.”<sup>49</sup> The District Court also found that the evidence failed to show that the wide range of NCAA regulations on matters such as recruitment and amateurism “were not sufficient to maintain the competitive balance the NCAA sought in collegiate athletic programs.”<sup>50</sup>

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45. See *Board of Regents*, 468 U.S. at 95.

46. See 15 U.S.C. § 2 (1997) (stating “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce. . . .”)

47. See *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 96 (1984).

48. *Id.* at 96 (quoting *Board of Regents v. National Collegiate Athletic Ass’n*, 546 F. Supp. 1276, 1300-01 (W.D. Okla. 1982)).

49. *Id.* at 96.

50. *Id.*

The District Court had also determined that if members were free to sell their own television rights, many more games would appear on television.<sup>51</sup> The District Court stated that the NCAA's "output restriction" had the clear effect of raising the price the networks were forced to pay for television rights, creating a pricing structure that was unresponsive to consumer choice (viewer demand).<sup>52</sup>

The NCAA appealed to the Court of Appeals for the Tenth Circuit. The Court of Appeals rejected the boycott and monopolization (cartel) aspects of the District Court's opinion, but held that the NCAA television plan constituted illegal per se price fixing under a Section 1 analysis.<sup>53</sup> In doing so, the Court of Appeals specifically rejected each of the arguments that the NCAA had advanced in order to establish the "procompetitive" character of the plan.<sup>54</sup> The Court of Appeals noted with approval the District Court's finding that "any contribution the plan made to athletic balance could be achieved by less restrictive means."<sup>55</sup> The Court of Appeals also noted that even if the television plan was not per se illegal, it would still fail. It held that under a "rule of reason" analysis, "its anticompetitive limitation[s] on [both] price and output [were] not offset by any procompetitive justification to save the plan even when the totality of circumstances was examined."<sup>56</sup> The NCAA again appealed, this time to the United States Supreme Court.

The United States Supreme Court agreed that in general, a system of rules and regulations accompanied by reasonable enforcement mechanisms was essential to the conduct of intercollegiate athletics and to achieving the goal of fostering competition among amateur athletic teams.<sup>57</sup> The Courts, however, distinguished between broad categories or types of rules: those where the NCAA legislated in the area of "rules of the game" so-called playing or competition rules, defining the conditions of the contest, the eligibility of contest participants, or the manner in which the "members of a joint enterprise shall share the responsibili-

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51. See *Board of Regents v. National Collegiate Athletic Ass'n*, 546 F. Supp. 1276 (W.D. Okla. 1982).

52. See *id.*

53. See *Board of Regents v. National Collegiate Athletic Ass'n*, 707 F.2d 1147, 1152 (10<sup>th</sup> Cir. 1983).

54. See *id.* at 1153-58.

55. *Id.* at 1154.

56. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 97-98 (1984). The Court's examination of these circumstances appears at *Board of Regents*, 707 F.2d at 1157-1160.

57. See *Board of Regents*, 468 U.S. at 117.

ties and the benefits of the total venture,"<sup>58</sup> and those where the NCAA and its members were acting in a "purely commercial capacity."<sup>59</sup> The Supreme Court noted that in the absence of any special circumstances,<sup>60</sup> "competition rules" would be uniformly upheld by a court, but those dealing with "commercial issues" would come under careful judicial review.<sup>61</sup>

Based upon this critical distinction between competition and commerce, and an application of the "rule of reason" to the facts, the Supreme Court ruled 7-2 that the NCAA's limit on the number of times a team could appear in a televised game violated the Sherman Act.<sup>62</sup> The Court held that the plan was not intended to equalize competition, that it did not regulate the money that individual schools spent on their football programs, and that it gave effective control of the packaging to schools that either did not have football or would not be affected by the restrictions ("small time" collegiate football).<sup>63</sup> Justice Stevens stated 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."<sup>64</sup>

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58. *Id.*

59. *Id.*

60. It is argued that NCAA procedures afford parties at least minimal due process, that is, both notice and hearing. *See id.* In the absence of such a finding, it would be possible for a court to carefully review a wide array of competition rules or at least the manner in which the NCAA has adjudicated a violation.

61. *See id.* A current controversy concerns an NCAA proposal of August 12, 1998, which would substantially modify the use of aluminum bats in collegiate baseball games on "safety grounds." *See* Patrick Hruby, *With the College World Series Underway, The Hottest Debate in the Sport Comes Front and Center . . . Bat Power; Ping! Aluminum Bats and College Baseball*, WASH. TIMES, June 13, 1999, at A1. The proposal changes the specifications for metal bats to make them respond more like wooden bats. *See id.* The NCAA cited several incidents of serious injury from the use of metal bats. *See* Randall W. Dick, *Sports Sciences NewsLetter, A Discussion of the Baseball Bat Issue Related to Injury From a Batted Ball*, NCAA NEWS, April 12, 1999. Balls hit by metal bats currently in use travel from 103-113 m.p.h. *See id.* The average time needed by a pitcher to react to a ball traveling at 93 m.p.h. is 0.4 seconds. *See id.* Metal bat manufacturers have vowed to challenge this potential change. It appears that the NCAA proposal would clearly fall within the area of "playing or competition" rules. However, the NCAA may have inadvertently created a legal issue by declaring such bats to be dangerous. Might universities or athletic conferences face liability if a player gets injured because of a bat that has been declared dangerous?

62. *See* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 86 (1984).

63. *See id.* at 118-19.

64. *Id.* at 120. The dissent was equally as strong. Justice White wrote: "When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism." *Id.* at 135.

Since the decision of the United States Supreme Court in *Board of Regents*, it has been difficult to create a "bright line" in this area. The distinction between "competition" and "commerce" has become increasingly blurred. It has become more difficult to distinguish between NCAA rules and regulations that promote intercollegiate competition (the original official justification behind the television appearance rule) and those rules that violate the rights and prerogatives of individual institutions, coaches, or athletes. C. Peter Goplerud III, Dean of Drake University's School of Law, and a prominent commentator on NCAA matters, argues that while courts have generally been more tolerant of NCAA restrictions on athletes (especially regarding academic eligibility, drug testing, booster activities, agents, pay for play, etc.), regulations concerning member institutions or athletic department employees will receive careful review.<sup>65</sup> The recent case of *Law v. National Collegiate Athletic Ass'n* provides such an example.<sup>66</sup>

#### IV. DISCUSSION

In January of 1998, the United States Court of Appeals for the Tenth Circuit handed down its opinion in *Law*.<sup>67</sup> The Court upheld an anti-trust verdict against the NCAA in a class action suit brought by assistant basketball, baseball and other coaches whose annual institutional wages had been limited to \$16,000.00.<sup>68</sup> This policy had come to be known as the "restricted-earnings" rule and had been adopted ostensibly as a result of increasing concerns about the steadily rising costs of maintaining competitive athletic programs.<sup>69</sup>

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65. See Naughton, *supra* note 25, at A46. See also C. Peter Goplerud III, *Pay for Play for College Athletes: Now More Than Ever*, 38 S. TEX L. REV. 1081 (1997); C. Peter Goplerud III, *Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal*, 5 KAN. J.L. & PUB. POL'Y 125 (1996).

66. See *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10<sup>th</sup> Cir. 1998), *cert. denied*, 119 S. Ct. 65 (Oct. 5, 1998).

67. See *id.*

68. See *id.*

69. The basis for the proposed rule was contained in the "Raiborn Report" which found that in 1985, 42% of NCAA Division I schools had reported deficits. *Id.* at 1012-13. The *Chronicle of Higher Education* reported that the financial health of Division I and II athletic programs "took a sharp turn for the worse from 1995 to 1997" with expenditures growing at significantly faster rate than revenues, resulting in smaller profits or larger deficits. Joshua Rolnick, *Finances of Big-Time College Sports Take a Sharp Turn for the Worse*, CHRON. HIGHER EDUC., Oct. 23, 1998, at A59. An NCAA study found that "29 percent of programs that lost money had an average deficit of slightly more than \$1 million, an increase from \$969,000 in 1995." *Id.* The report indicated that expected revenues from ticket sales and television have not kept pace with increasing costs. See *id.*

Prior to the mid-1980s, the NCAA permitted Division I basketball teams to employ “three full-time coaches, including one head coach and two assistant coaches, and two part-time coaches. . . . The NCAA had imposed salary restrictions on all of the part-time positions. . . . A ‘volunteer’ coach could not receive any compensation from the institution’s athletic department.”<sup>70</sup> A graduate assistant coach was required to enroll in a bona fide graduate program and could only receive a compensation equal to the value of the cost of a grant-in-aid.<sup>71</sup> The NCAA limited compensation to part-time assistants to the full grant-in-aid based on the value of out-of-state graduate studies.<sup>72</sup>

Despite these cost-cutting measures, the District Court noted that [a]thletic departments circumvented the compensation limits by employing these part-time coaches in lucrative summer jobs at profitable sports camps . . . by hiring them for part-time jobs in the physical education department . . . . [M]any of these positions were filled with seasoned and experienced coaches, not the type of student assistant envisioned by the rule.<sup>73</sup>

In January of 1989, the NCAA established a Cost Reduction Committee which “proposed Bylaw 11.6.4 that would limit Division I basketball coaching staffs to four members—one head coach, two assistant coaches, and one entry-level coach [termed] a ‘restricted-earnings’ coach [(REC)].”<sup>74</sup> This “category was [designed] to replace the positions of part-time assistant, graduate assistant, and volunteer coach.”<sup>75</sup>

A second proposed rule, Bylaw 11.02.3, limited the “compensation of restricted-earning coaches in all Division I sports other than football to a total of \$12,000 for the academic year and \$4,000 for the summer months. . . .”<sup>76</sup> The rule did permit “restricted earning coaches to receive additional compensation for performing duties for another department of the [university]” under certain specific circumstances.<sup>77</sup> The NCAA

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70. See *Law v. National Collegiate Athletic Ass’n*, 134 F.3d 1010, at 1013 (10<sup>th</sup> Cir. 1998), *cert. denied*, 119 S. Ct. 65 (Oct. 5, 1998) (emphasis added).

71. *Id.*

72. See *id.* at 1013.

73. *Id.* at 1013 (emphasis added).

74. *Id.*

75. *Law v. National Collegiate Athletic Ass’n*, 134 F.3d 1010, 1014 (10<sup>th</sup> Cir. 1998), *cert. denied*, 119 S. Ct. 65 (Oct. 5, 1998).

76. *Id.*

77. *Id.* at 1014.

adopted the proposed rules in January of 1991 and the rules became effective on August 1, 1992.<sup>78</sup>

Plaintiffs in the District Court were "restricted-earnings men's basketball coaches at NCAA Division I institutions," which challenged the restrictions in a class action, initially seeking \$30 million in damages.<sup>79</sup> They challenged the compensation limitations under Section 1 of the Sherman Act, but chose not to challenge restrictions on the number of coaches.<sup>80</sup> On January 5, 1996, the District Court for the District of Kansas "permanently enjoined the NCAA from enforcing or attempting to enforce any restricted-earnings . . . salary limitations. . ."<sup>81</sup> The NCAA appealed.<sup>82</sup>

The United States Court of Appeals for the Tenth Circuit first discussed the implications of applying either a *per se* or "rule of reason" analysis. "Once a practice is identified as illegal *per se*, a court need not examine the practice's impact on the market or the procompetitive justifications for the practice advanced . . . . Rule of reason analysis, on the other hand, requires an analysis of the restraint's effect on competition."<sup>83</sup> Under a "rule of reason" analysis, which the District Court had applied, the inquiry requires a determination whether the challenged restraint has a "substantially adverse effect on competition," evaluating whether "the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts."<sup>84</sup> The Circuit Court noted that under a *Board of Regents* analysis, some horizontal agreements might be necessary for sports competition (for example, regulations forbidding payments to athletes, requiring athletes to attend class, certain "no-draft," "no agent," and non-eligibility rules).<sup>85</sup> Thus, horizontal agreements among NCAA members generally would not be judged *per se* illegal but would be subject to a "rule of reason" analysis.<sup>86</sup>

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78. *See id.* at 1014. Other cost-saving measures included limitations on: the number of coaches who could recruit off-campus; off-campus contacts with prospective student-athletes; visits by prospective student-athletes; printed recruiting materials; the number of practices before the first scheduled game; the number of games and duration of seasons; team travel and training table meals; and financial aid grant to student athletes. *See id.*

79. *Id.* at 1015.

80. *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1015 (10<sup>th</sup> Cir. 1998), *cert. denied*, 119 S. Ct. 65 (Oct. 5, 1998).

81. *See id.*

82. *See id.* at 1015.

83. *Id.* at 1016. *See also* *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

84. *Law*, 134 F.3d at 1017.

85. *See id.* at 1018.

86. *See Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10<sup>th</sup> Cir. 1998), *cert. denied*, 119 S. Ct. 65 (Oct. 5, 1998). *See also* *National Collegiate Athletic Ass'n v. Board*

The Circuit Court reviewed the three justifications advanced by the NCAA in order to prove the reasonableness of their rules concerning restricted earnings coaches: "retaining entry-level coaching positions; reducing [overall athletic department] costs; and maintaining competitive equity."<sup>87</sup> The Circuit Court specifically rejected these contentions because the NCAA was unable to establish evidence of "sufficient

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of Regents, 468 U.S. 85, 101-03 (1984); *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738, 744, 746 (M.D. Tenn. 1990) (holding that antitrust law cannot be used to invalidate NCAA eligibility rules, but noting in dicta that the "no agent" and "no draft" rules have primarily procompetitive effects); *Jones v. National Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that antitrust law does not apply to NCAA eligibility rules); *College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n*, 1975 Trade Cas. (CCH) 60, 117 (holding that the NCAA's adoption of a rule furthering its noncommercial objectives, such as preserving the educational standards of its members, is not within the purview of antitrust law), *aff'd*, 506 F.2d 1050 (3d Cir. 1974); *Justice v. National Collegiate Athletic Ass'n*, 577 F. Supp. 356, 379 (D. Ariz. 1983) (holding that NCAA sanctions imposed for violations of a rule against providing for compensation of student-athletes did not violate antitrust law because the sanctions were reasonably related to the goals of preserving amateurism and promoting fair competition).

The Third Circuit ruled in March of 1998 that an NCAA bylaw prohibiting a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an institution other than the student-athlete's undergraduate institution was not unreasonable and did not violate Section 1 of the Sherman Act. *See Smith v. National Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998). The District Court for the Western District of Pennsylvania had originally dismissed the claim "for failure to state a claim upon which relief could be granted," holding that "the actions of the NCAA in refusing to waive the Post baccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is *not the type of action* to which the Sherman Act was meant to be applied." *Smith v. National Collegiate Athletic Ass'n*, 978 F. Supp. 213, 218 (W.D. Pa. 1997) (emphasis added). The Third Circuit, however, did reverse the District Court's denial of her motion to amend her complaint with regard to Title IX claim. *See Smith*, 139 F.3d at 187. *See also* 20 U.S.C. § 1681(a) (providing that "no person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.") Intercollegiate athletics is an educational program or activity under the statute. *See* 20 U.S.C.A. § 1687(2)(A). It has been argued that the NCAA may be held to be subject to Title IX provided that it receives federal financial assistance within the meaning of § 1681(a). *See Smith*, 139 F.3d at 187. A decision in Ms. Smith's favor would significantly expand the application of Title IX by extending its reach to cover not only educational institutions that receive federal funds, but also those associations, such as the NCAA, to which these institutions might belong. In terms of Ms. Smith, the issue may be moot. Since she filed her suit, the NCAA has changed its rules to permit student athletes to transfer their eligibility. *See also* *Grove City College v. Bell*, 465 U.S. 555, 563 (1984) (holding that Title IX was program specific). The Civil Rights Restoration Act of 1987 returned Title IX to its intended broad university-wide coverage. *See* 29 U.S.C.A. § 1687.

On February 23, 1999, the Supreme Court held that dues payments from federal funds did not in itself suffice to subject the NCAA to suit under Title IX. *See National Collegiate Athletic Ass'n v. Smith*, 119 S. Ct. 924, 925 (1999).

87. *Law*, 134 F.3d at 1021.



procompetitive benefits.”<sup>88</sup> Thus, the Tenth Circuit affirmed the District Court’s order granting a permanent injunction barring the NCAA from reenacting compensation limits as those contained in the “restricted earnings” rule.<sup>89</sup> In May of 1998, a jury determined that damages applied to all classes in the lawsuit and awarded at least 1,900 coaches nearly \$67 million in damages (including punitive damages) against the NCAA, and \$10 million in court costs. (Basketball coaches won \$11.2 million; \$1.6 million went to baseball coaches; and \$9.5 million to coaches in other sports. These amounts were automatically tripled.)

On October 5, 1998, the United States Supreme Court unanimously denied the NCAA’s motion for a writ of certiorari without comment.<sup>90</sup> The NCAA initially indicated that it would appeal the damage portion of the case, asserting that “mistakes [were] made in the (damages) trial that had an effect on the jury’s ability to hear our arguments . . . .”<sup>91</sup> The NCAA offered a belated \$44 million settlement in the treble damage case. Representatives for the victorious coaches were disinclined to listen to settlement offers. The issue was finally resolved in April of 1999.

The NCAA finally settled the REC case for \$54.5 million in April of 1999.<sup>92</sup> Under a plan approved by the NCAA’s Management Council, each of the 310 Division I member schools will share in the settlement.<sup>93</sup> Payments would range from a low of about \$77,000.00 for small schools, to around \$200,000.00 (or more) for each of the “big-time” institutions.<sup>94</sup> This amounts to \$18.125 million. The NCAA itself will use \$18.25 million from its cash reserves, with the rest (\$18.125 million) coming from its lucrative CBS television contract for its men’s basketball tournament.<sup>95</sup> On May 12, 1999, the NCAA transferred the \$54.5 million into

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88. *Id.* at 1024

89. *See id.*

90. *See National Collegiat Athletic Ass’n v. Law*, 119 S. Ct. 65 (1998) (decision was unanimous).

91. Jack Carey & Dick Patrick, *Supreme Court Decision May Speed NCAA Settlement*, USA TODAY, Oct. 6, 1998, at 12C. *See also* Peter Monaghan, *U.S. Supreme Court Rejects NCAA Appeal on Coaches’ Pay*, CHRON. HIGHER EDUC., Oct. 16, 1998, at A66. The NCAA claimed that it had less than \$10 million in its reserve fund and the \$77 million in penalties amounted to more than a quarter of its annual operating budget. Mark Conrad writes that Title IX compliance may have been a major factor in promulgating the REC Rule. *See* Mark Conrad, *Latest Jury Award Slam-Dunks the NCAA*, N.Y. L.J., May 15, 1998, at 5.

92. *See Paying Up*, WASH. POST, May 12, 1999, at D8.

93. *See NCAA Establishes Account to Pay Off Settlement*, CHARLESTON GAZETTE, May 12, 1999, at 4b.

94. *See id.*

95. *See id.*

an account controlled by the lawyers for the RECs.<sup>96</sup> Smaller schools, many of which never employed a REC, were required to join in the settlement because most had voted for the rule. The money was expected to be distributed within six months of the April settlement.

#### V. CONCLUSION AND OBSERVATIONS

Closely associated with the "restricted earnings" ruling found in *Law* may be a revisiting of the NCAA's limitation on the number of coaches an individual team can employ, although the plaintiffs in *Law* chose not to raise this issue. The *Law* ruling also calls into question current NCAA limitations on the number of athletic scholarships and on the monetary value of scholarships. It might be argued, for example, that scholarship limitations, rules that limit "pay for play," or the \$2,000-a-year limit on the wages of athletes who work during their sports seasons operate as a restraint of trade on the relevant market, the market of "otherwise eligible college-bound athletes," who except for their status as scholarship athletes, would see their earnings limited in an arbitrary or unreasonable manner.

However, the NCAA and others (most notably, the legions of teams that do not regularly compete on the national championship level in either football or basketball, the major "revenue producing" sports, or who can not realistically compete in the "elite" grouping, generally considered to include the Atlantic Coast Conference, the Big East, the Big Ten, the Big 12, the Pacific (PAC) 10, and the Southeastern Conference) would argue that these limitations are absolutely necessary to assure the ability of smaller institutions and conferences to compete with larger ones and to preserve the image of amateurism in collegiate sports. Can such a justification, however, be used to trammel the rights of individual coaches or athletes or member institutions?

With literally billions of dollars at stake in the age of big time media sports, many of these issues will no doubt seek resolution in the near future. While it is certainly true that, "the NCAA is the law when it comes to all college athletics," and "the authoritative force with which it sweeps can be broad and punishing,"<sup>97</sup> its powers are no longer absolute or its authority unquestioned.

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96. *See id.*

97. *Phillip v. National Collegiate Athletic Ass'n*, 960 F. Supp. 552, 553 (D. Conn. 1997).

