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Loyalty v. *Laissez Faire*: The Coaching Contract Conundrum and Antitrust Implications of a No-Tampering Policy in College Sports

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LOYALTY V. *LAISSEZ FAIRE*: THE COACHING CONTRACT CONUNDRUM AND ANTITRUST IMPLICATIONS OF A NO-TAMPERING POLICY IN COLLEGE SPORTS

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I. INTRODUCTION

The Wisconsin Badger community was stunned to learn of its beloved Bret Bielema's resignation as head football coach at the University of Wisconsin just days before the Badgers participated in the coveted Rose Bowl.[1] Fostered by a lucrative salary increase and the potential to coach in the prestigious Southeastern Conference (SEC), one cannot fault Bielema for making the jump.[2] However, the Bielema move illustrates an ever-increasing problem in college sports—the "coaching carousel."[3]

While many employers have responded to the recent economic downturn by executing mass layoffs and making cutbacks, National Collegiate Athletic Association (NCAA) institutions continue to hire new coaches and open their checkbooks to do so. In the midst of the recession, universities continue to entice high-profile coaches to leave their current schools for more promising positions, by offering lucrative contracts as incentives.[4] In the last decade, nearly all of the coaches employed by members of the "Big Six"[5] conferences

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1. Martin Greenberg, *Behind the Bielema Jump*, MILWAUKEE J. SENTINEL (Dec. 19, 2012), http://www.jsonline.com/news/opinion/behind-the-bielema-jump-dq814pe-184178781.html [herein after Greenberg, *Behind the Bielema Jump*]; *see also* Offer Letter from Jeff Long, Vice Chancellor and Director of Athletics, Univ. of Ark., to Bret Bielema (Dec. 4, 2012) [hereinafter Bielema Letter], *available at* http://posting.arktimes.com/images/blogimages/2012/12/05/1354725209-bret_bielema_offer_letter.pdf.

2. Greenberg, *Behind the Bielema Jump, supra* note 1.

3. *Id.*

4. *Id.*; *see also* C.N., *Coaching in College Football: Round We Go*, ECONOMIST (Dec. 11, 2012, 11:31 PM), http://www.economist.com/blogs/gametheory/2012/12/coaching-college-football.

5. The "Big Six" refers to the following six conferences: the American Athletic Conference (formally the Big East), the Atlantic Coast Conference (ACC), the Big Ten, the Big 12, the Pacific 12

increased their salaries above the million dollar mark, with a handful of coaches making over $5 million.[6] Universities are often powerless to stop the continual movement of coaches between member schools. As University of California's Athletic Director Sandy Barbour points out, "[i]f we let [a coach] go because we're not willing to pay market, we'll pay a huge price."[7]

Thus, a conundrum exists for universities: either pay the ever-increasing market price to keep a quality coach in the hopes that the benefits of a successful program will outweigh the costs, or lose the chance of obtaining the notoriety, five-star recruits, and accomplishments that a high-profile coach yields. Perhaps the solution to this problem lies not with the member schools, but with a "higher power," the NCAA. Were the organization to implement a no-tampering policy, similar to that already in place in the National Football League (NFL), which prevents universities from speaking to a coaching candidate before the season is over, the lack of loyalty among coaches and universities, as well as the outrageous salary provisions, may come to a halt.[8] Sports commentators and media reporters have discussed implementing a no-tampering policy as a solution to the escalating number of coaches taking a ride on the coaching carousel, though no policy is currently in place.[9] However, no good deed goes unpunished. A no-tampering policy promulgated by the NCAA may subject the organization to liability under federal antitrust law.[10]

This Article discusses the potential antitrust liability the NCAA may face for implementing a no-tampering policy similar to that currently employed by the NFL. Part II illustrates the background of the current economic climate in college sports, including the escalation of coaching salaries and examples of the coaching carousel problem. Part III provides the options available to universities to prevent a coach from breaching his contract by leaving his

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(Pac-12), and the SEC. *See Fall Practice Dates, Schedule for Big Six Conferences*, SPORTING NEWS (July 31, 2013), http://www.sportingnews.com/ncaa-football/story/2013-07-31/fall-practice-schedule-start-dates-sec-acc-big-ten-big-12-pac-12-alabama.

6. *USA TODAY Sports College Football Coaches Salaries Database*, USATODAY.COM (July 1, 2013), http://www.usatoday.com/story/sports/ncaaf/2012/11/19/ncaa-college-football-head-coaches-salary-database/1715543/.

7. Steve Wieberg et al., *Pay Booms in Hard Times*, USATODAY.COM, http://usatoday30.usatoday.com/printedition/news/20091110/1acoachpay10_cv.art.htm (last visited Nov. 4, 2013).

8. *See* Bob Duckens, *NCAA Needs to Stop Coaches from Jumping Ship*, BLEACHER REPORT (Dec. 21, 2009), http://bleacherreport.com/articles/312161-ncaa-needs-to-stop-coaches-from-jumping-ship.

9. *Id.*

10. *See* Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 77 (2009).

member school prior to the contract's termination. Part IV discusses the potential of implementing a no-tampering policy in the NCAA as a measure to prevent "jumping." Part V outlines the proper analysis for an antitrust violation in college athletics and analyzes the possibility of antitrust liability against the NCAA for the implementation of a no-tampering policy. Finally, Part VI assesses the NCAA's potential liability for implementing a no-tampering policy against coaches.

II. BACKGROUND OF THE CURRENT ECONOMIC CLIMATE IN COLLEGE SPORTS

Sometime in the last few decades, college sports transitioned from a time-honored tradition, respected for its rivalries and cherished for its pure, inspiring nature, to an economic commodity. With this transition came a lack of loyalty among players, coaches, and universities. Moreover, the new economic climate created further disparity between the haves and have-nots, establishing clear winners and losers, both in terms of universities and coaches.

A. The Sky's the Limit—Coaching Salary Escalation in College Sports

In the current coaching climate, "staying power" assumes new meaning, as coaches continually breach their existing contracts in return for higher salaries, bonuses, and other additional perks, while universities are left to determine their economic fate. The exponential escalation of coaching salaries came swiftly. In 2006, forty-two coaches made over $1 million annually;[11] in 2013, the average salary for a head football coach at a Division I school was $1.6 million.[12] This constitutes a 60% increase over seven years.[13]

Over the past decade, the escalation in college coaches' pay even outpaces corporate executives who receive their fair share of criticism for their staggering compensation packages and outlandish bonuses.[14] An article in *USA Today* states, "[b]etween 2007 and 2011, CEO pay—including salary, stock, options, bonuses and other pay—rose 23% . . . . In that same period, coaches' pay increased 44%."[15] As the CEOs of college football programs are

11. Erik Brady et al., *College Football Coaches Continue to See Salary Explosion*, USATODAY.COM (Nov. 20, 2012), http://www.usatoday.com/story/sports/ncaaf/2012/11/19/college-football-coaches-contracts-analysis-pay-increase/1715435/.

12. *See USA TODAY Sports College Football Coaches Salaries Database*, *supra* note 6. This information is based on a poll conducted by USA Today that analyzes the salaries of 124 head football coaches, collected via annual public records requests. *Id.*

13. *See id.*; Brady et al., *supra* note 11.

14. *See* Brady et al., *supra* note 11.

15. *Id.*

enticed by the prospect of multi-million dollar contracts and increased notoriety, it is no wonder coaches feel little guilt in taking a ride on the coaching carousel, leaving their former universities and players to fend for themselves.

B. Taking a Spin on the Coaching Carousel

In the past year, several coaches left their current schools prior to the conclusion of their contracts: some as a result of better pay, others for the potential to work at a more esteemed program, and many for a combination of the two. According to *ESPN*, thirty-two coaches, including assistants and other football personnel, left the Big Ten in 2013.[16] That constitutes nearly one-quarter of the coaches gainfully employed by Big Ten universities.[17] A number of these mass defections came as a direct result of the departure of notable head coaches, such as Bret Bielema. Consequently, one cannot ignore the significance of such movements and the intra-institutional tampering that causes such upheaval.[18]

1. Tampering—Bret Bielema and the Horse He Rode in On

Bret Bielema amassed a 73.9 win percentage in seven seasons at Wisconsin, including a Big Ten Championship win and three Big Ten regular-season titles.[19] Yet, the prospect of coaching for the most prestigious conference in college football, the SEC—not to mention a substantial salary increase, plus bonuses—proved too much for Bielema to turn down, and to do so with urgency.[20] It was announced just days before the 2012 Rose Bowl that Bielema accepted a position as the newest head coach of the Arkansas Razorbacks,[21] a team that finished fifth in the rankings just one year before.[22] Coupled with a $3.2 million annual salary over a period of six years and an

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16. Adam Rittenberg, *Another Active Year for B1G Coaches Changes*, ESPN (Feb. 27, 2013, 3:30 PM), http://espn.go.com/blog/bigten/post/_/id/72260/another-active-year-for-b1g-coach-changes; *see also* Adam Jacobi, *Big Ten Football: Coaching Suddenly Unstable Once Again*, BLEACHER REPORT (Mar. 1, 2013), http://bleacherreport.com/articles/1549718-big-ten-football-coaching-suddenly-unstable-once-again.

17. Jacobi, *supra* note 16.

18. *See id.*

19. *See* Greenberg, *Behind the Bielema Jump*, *supra* note 1 (stating Bielema's record at Wisconsin).

20. *See id.*

21. *See* Bielema Letter, *supra* note 1.

22. *Arkansas to Pay Bielema $3.2M Per Year, Cover $1M Buyout from Wisconsin*, CBSSPORTS.COM (Dec. 5, 2012), http://www.cbssports.com/collegefootball/story/21277254/arkansas-to-pay-bielema-32m-per-year-cover-1m-buyout-from-wisconsin.

additional $700,000 annually in possible incentives, the Arkansas Razorbacks agreed to cover the nearly $1 million exit fee owed to Wisconsin.[23] As a result, Bielema not only gained a significant salary increase and heightened notoriety by leaving for Arkansas, but he left his former institution virtually unscathed.[24]

The same cannot be said of Wisconsin, whose administrators, coaches, and fans witnessed their football coach stolen right from under their noses. Like most tampering cases, Arkansas took advantage of the early end to its season, hiring Bielema while Wisconsin prepared for its upcoming bowl game.[25] In doing so, Arkansas managed to secure a contract with Bielema without the knowledge of the Badger community and without obtaining permission from Wisconsin.[26] In a press conference discussing the move, Wisconsin Athletic Director, Barry Alvarez, noted Bielema's failure to inform him of his decision to move.[27] When Bielema offered to fulfill his obligations and coach the Badgers in the upcoming bowl game, Alvarez relayed his contempt for the manner in which the move took place, stating, "no, Bret, you need to go to Arkansas now."[28] Alvarez also did not hesitate to express his animosity towards Arkansas's tampering efforts, stating, "I know the business. I know people move. I was surprised . . . and surprised no one . . . contacted me for permission. There's some protocol in this."[29]

The *Bleacher Report* attributes Bielema's departure to two factors.[30] First, members of the Big Ten struggled as a whole during the 2012 football season.[31] It notes, "[i]t's just a lot easier to listen to other job opportunities when you're not having fun, and Big Ten football wasn't a lot of fun in 2012."[32] Second, the *Bleacher Report* observed the Big Ten's failure to keep pace with the rest of college football in terms of paying assistant coaches.[33]

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23. *Id.*

24. *Id.*

25. *See* Tom Lea, *Alvarez Not Happy with Lack of Protocol*, ESPN WIS. (Dec. 6, 2012), http://www.espnmilwaukee.com/common/more.php?m=49&post_id=16381.

26. *Id.*

27. *See id.*

28. *Id.* Alvarez, a seasoned football affiliate, took no time mourning the loss of Bielema; mere minutes after learning of the move, Alvarez contacted a potential candidate to fill Bielema's position. *Id.*

29. *Id.*

30. Jacobi, *supra* note 16.

31. *Id.*

32. *Id.*

33. *Id.* To illustrate, Dabo Sweeney, head football coach at Clemson, recently transferred several raises triggered by clauses in his contract to his assistants, making the Clemson assistant coaches the highest paid assistant coaching staff in college football, with a cumulative price tag of nearly $4.2

While this factor alone may not be enough to sway a coach to leave for another school, it is, undoubtedly, a point of contention rival schools will address in their offers to coerce a coach to make a switch.

Bielema's departure from Wisconsin evidences the growing problem of intra-institutional tampering in college athletics. Not only are universities eager to secure replacements for terminated coaches, but coaches are also more than willing to confront potential offers. As was the case with Bielema, these contacts are often made without obtaining permission from the current employer university. This practice lends itself to a lack of respect between universities, as well as a lack of loyalty between the individual universities and coaches. Anyone, it seems, can speak with whomever, whenever they so choose. Further, prestigious schools in their respective sports, such as Alabama in football and Indiana in basketball, will spare no dime in attempting to entice coaches away from their current schools and into the arms of their suitors, allowing lower revenue-generating schools very little recourse in maintaining high-level coaches.

2. Dangling the Carrot: The Tom Crean Deal and the Use of Lucrative Contract Offers by Rival Universities to Entice Coaches to Flee

In 2008, Tom Crean left his position as head basketball coach at Marquette University for one of basketball's coveted blue-blood schools, Indiana University.[34] Crean's move came as a great shock to the Golden Eagles community, as the former head coach had just signed a new contract, and specifically assured his former employer of his commitment to stay with Marquette for the duration of his contract term.[35] In addition, Crean did not even wait to let the dust settle in Milwaukee before making the move to Indiana. As the *Journal Sentinel* notes, Crean alerted Marquette Athletic Director, Steve Cottingham, of his decision to leave while Cottingham was away for another sporting event.[36] Furthermore, Crean's decision to leave broke many promises made to potential players during recruiting, as the move would prevent Crean from coaching his highly touted recruits for the duration of their careers at Marquette.[37]

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million. Brady et al., *supra* note 11.

34. Second Amendment to Emp't Agreement between Ind. Univ. & Thomas Crean, Head Men's Basketball Coach (Nov. 28, 2012) (on file with author); Associated Press, *Crean Signs Deal with Hoosiers That's Worth $23.6 Million Over 10 Years*, ESPN, http://sports.espn.go.com/ncb/news/story?id=3542762 (last updated Aug. 19, 2008) [hereinafter *Crean Signs Deal with Hoosiers*].

35. Todd Rosiak, *Crean Becomes a Hoosier*, MILWAUKEE J. SENTINEL (Apr. 2, 2008), http://www.jsonline.com/sports/goldeneagles/29396684.html.

36. *See id.*

37. *Id.*

Enticed by the opportunity to join the ranks of legendary coaches such as Bobby Knight, Crean accepted the Indiana position with little hesitation[38] and the University welcomed Crean to Indiana basketball in true blue-blood fashion, offering him $23.6 million over a period of ten years.[39] Additionally, Indiana offered Crean $685,000 as a potential bonus for bringing home a national championship, $125,000 for a Big Ten regular-season title, and $125,000 for a Final Four appearance.[40] Notwithstanding the monetary perks, Crean's contract also affords travel expenses for his family to road games and season tickets to both men's basketball and football games.[41] Lastly, the contract extends over almost a decade, providing Crean with job security, something Crean claims was a deciding factor in signing a new contract in such a tumultuous industry.[42]

Indiana's methods to lure Crean away from Marquette are not uncommon.[43] Most universities use similar ploys to fill a vacant coaching position with a highly sought after coach.[44] The trend will likely not subside anytime soon, as universities continue to offer increasing salaries, bonuses, and additional perks. This creates an increasing level of instability[45] in the realm of college coaching positions, a problem universities struggle to overcome.[46] Therefore, those involved in college sports are left wondering what options remain for a university to prevent a prominent head coach from leaving an institution for "greener pastures."

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38. *Crean Signs Deal with Hoosiers*, *supra* note 34.

39. *Id.* In late 2012, Indiana extended Crean's contract through the 2020 season, increasing his annual salary from $2.52 million to $3.16 million. Associated Press, *Indiana Extends Tom Crean to 2020*, ESPN, http://espn.go.com/mens-college-basketball/story/_/id/8612449/indiana-hoosiers-sign-tom-crean-contract-extension (last updated Nov. 10, 2012).

40. *Crean Signs Deal with Hoosiers*, *supra* note 34.

41. *Id.*

42. It is yet to be determined whether Crean's emphasis on job security will hold true, as most coaching contracts offer little solace to coaches when the university decides to suddenly terminate their agreement. Further, while it is unlikely that Crean would leave such a coveted position in the near future, it is foreseeable that he would "jump" again were the right terms placed on the bargaining table. *Id.*

43. *See* Paul Myerberg, *What Quirks Are in College Football Coaches' Contracts?*, USATODAY.COM (Nov. 20, 2012), http://www.usatoday.com/story/gameon/2012/11/20/fbs-head-coaches-contracts-quirks/1716693/.

44. *Id.*

45. While the instability in college coaching positions does not amount to the automatic downfall of a sports program, it does affect recruiting, and it requires coaches and players to take additional time to familiarize themselves with their respective positions, as well as one another. Because of the short duration of college sports' seasons, the additional time requirement can "negative[ly] [a]ffect . . . the amount of time spent . . . actually improving the team's level of play," and in turn, may negatively affect the success of both the program and the university. Jacobi, *supra* note 16.

46. *See generally* Karcher, *supra* note 10.

III. Options Available to Universities to Keep Their Current Head Coach

Despite any prior contractual commitments, college coaches are virtually free to leave their employment at will.[47] However, universities often include certain clauses in the coaching contract that inhibit a coach's ability to leave, such as strenuous exit clauses and large buyouts.[48] Further, where a contractual provision fails to secure the coach's employment with a university, schools can take remedial action, seeking an injunction to prohibit a coach from jumping his contract, or liquidated damages when he does.[49]

A. Contractual Provisions Involved When a Coach Leaves

At the execution of a coaching contract, the parties involved usually establish leave provisions in the event a coach does not fulfill the full term of his contract, either by termination or dismissal. Two common provisions include exit clauses and buyouts.

Buyout provisions are standard for college coaching contracts.[50] A buyout provision affords a coach the right to compensation, in the form of damages, when a university terminates employment without cause.[51] Due to the specified term for which college coaches are employed, coaches are not considered at-will employees.[52] Thus, any termination of a contract by the school without cause entitles a coach to compensation, recognized in most industries as severance pay.[53]

For example, in 2005, Notre Dame signed the illustrious Charlie Weis to a six-year deal as head football coach, and later extended the term of the contract through 2015.[54] As a result of Notre Dame's termination of Weis in 2009 due to poor performance, the Fighting Irish owed Weis a hefty buyout, to the tune of $27.7 million.[55] While the massive figure owed to Weis seemed as though it would weigh down the economic capabilities of the Irish to find a replacement, and ultimately lead to another series of down years for Notre

47. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW §16:8 (2012).

48. *Id.*

49. *Id.*

50. *See* Karcher, *supra* note 10, at 23–24.

51. *Id.* at 23.

52. *Id.*

53. *Id.*

54. Chris Smith, *The 10 College Football Coaches Who Should Be Fired in 2012*, FORBES (Nov. 16, 2012), http://www.forbes.com/sites/chrissmith/2012/11/16/the-10-college-football-coaches-who-should-be-fired-in-2012/.

55. *See id.*

Dame football, it may be a blessing in disguise.[56] By firing Weis, Notre Dame allowed itself to bring in Cincinnati's Brian Kelly.[57]

In his first two years at Notre Dame, Kelly amassed two winning seasons, and went 1–1 in bowl games. In 2012, the Irish finished with a 12–1 record and made an appearance in the Bowl Championship Series (BCS) National Championship game.[58] This national showing afforded Notre Dame a $6.2 million payday, which the university is not required to share among other teams in its conference like most bowl game winners, because Notre Dame is notably unaffiliated with a conference in college football.[59] Therefore, Notre Dame's performance boost during the Kelly years makes the buyout of Weis seem all the more worth it, as Notre Dame will easily recoup the $27.7 million owed to Weis as long as they continue to succeed on the field.[60]

On the other hand, an exit clause provides that a coach wishing to cut short his contractual agreement must provide written notice of the termination to the university and must pay an exit fee.[61] To illustrate, in the employment agreement between Matt Painter and Purdue University, the University retains a protective option in the event Painter wishes to exit his contract and leave the University.[62] Section 5.2 of the employment agreement affords each party to the contract the ability to terminate the contract without cause, requiring the electing party to purchase the right to terminate for a mutually-agreed-upon price.[63] As a result, Painter would be required to pay Purdue University a specified sum to leave his contract before the contract's termination.[64]

While the exit fee may, on its face, seem substantial enough to prevent a coach from leaving, the common practice in the current climate is for the interjecting university to help its new hire by covering the cost of his exit

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56. *Id.*

57. *Id.*

58. *Notre Dame Football Archive*, UND.COM, http://www.und.com/sports/m-footbl/archive/nd-m-footbl-sched-2012.html (last visited Nov. 4, 2013).

59. Samuel Chi, *2013 Notre Dame Football*, *BCS Rewards and the Value of Independence*, SBNATION.COM (Jan 7, 2013), http://www.sbnation.com/college-football/2013/1/7/3833196/notre-dame-football-2013-bcs-national-championship-game/

60. *See id.* Notre Dame is the second-most valuable team in college football, making it substantially easier for them to take such large financial risks than a more middle-of-the-pack program. *Id.*; *see also* Chris Smith, *College Football's Most Valuable Teams*, FORBES (Dec. 22, 2011), http://www.forbes.com/sites/chrissmith/2011/12/22/college-footballs-most-valuable-teams/.

61. Greenberg, *Behind the Bielema Jump*, *supra* note 1.

62. Emp't Agreement between Matt Painter, Head Men's Basketball Coach, & Purdue Univ. § 5.2.2 (July 1, 2009) (on file with author).

63. *Id.* at § 5.2.

64. *Id.* Urban Meyer is another example; his exit fee for leaving Ohio State is $2 million. Greenberg, *Behind the Bielema Jump*, *supra* note 1.

fee.[65] Consequently, a provision calling for an exit fee upon early termination of the contractual agreement by a breaching coach does nothing to prevent a coach from leaving his current university for another opportunity. Therefore, it may be necessary for the harmed university to resort to legal action to protect itself and its program against potential contractual breaches by its coaches.

B. Remedies for Breach of the Contractual Agreement

No formal union exists to represent college coaches, nor do coaches benefit from the use of a standard employment contract.[66] Thus, "[t]he crux of the [coaching] contract is whether the coach agrees to perform all duties and responsibilities that accompany the position."[67] A coach's main duty is to fulfill the term of his contract, as universities need to ensure a secure, stable program.[68] Therefore, when a coach leaves the university where he is currently employed, a school may seek remedial measures to recoup its losses or to prevent or inhibit the move.[69]

Universities increasingly seek compensation when a coach breaches his contract by leaving prior to the expiration of the agreed upon terms.[70] Typically, this compensation arises pursuant to a liquidated damages provision, negotiated at the outset of the contract and, in more recent years, paid by the breaching coach's new institution.[71] The amount of a liquidated damages clause, similar to a buyout clause, is often greatest when the breach occurs early in the coach's contract term and decreases incrementally as the date of the breach approaches the end of the term.[72] Normally, the amount owed is calculated at the time of the termination using the coach's base salary multiplied by the years remaining on the contract.[73] However, courts have found the amount calculated under this formula unenforceable when it was

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65. Greenberg, *Behind the Bielema Jump*, *supra* note 1.

66. CHAMPION, *supra* note 47.

67. *Id.*

68. *See generally* Martin J. Greenberg, *Representation of College Coaches in Contract Negotiations*, 3 MARQ. SPORTS L. J. 101, 105 (1992) [hereinafter Greenberg, *Representation of College Coaches in Contract Negotiations*]. Some schools utilize an annuity method for salary payments with the possibility of a balloon to ensure longevity. *Id.* at 107. For example, if a coach stays at a school for ten years he will receive a $1 million bonus. *Id.*

69. Karcher, *supra* note 10, at 47.

70. *Id.*

71. *Id.* at 48.

72. *Id.*

73. *Id.*

determined to constitute a penalty.[74] A penalty exists when a school attempts to coerce performance by threatening outlandish fines when a coach fails to perform.[75] Conversely, no penalty exists when the provision is deemed "reasonable in relation to the anticipated damages for [the] breach."[76]

To illustrate, the Court of Appeals for the Sixth Circuit held that a contractual provision executed between Vanderbilt University and its head football coach, Gerry DiNardo, was an enforceable liquidated damages provision and did not constitute a penalty under Tennessee law.[77] The provision required the resigning coach to pay an amount equal to the number of years remaining under his contract and multiplied by his annual salary.[78] In making its determination, the court noted the damage the university would suffer beyond the cost of hiring a replacement coach due to his resignation.[79] Further, the court held that Vanderbilt did not waive its contractual right to liquidated damages by granting DiNardo permission to speak with a competitor university.[80] Consequently, it is even more likely that a court would find a liquidated damages provision enforceable where the harmed university did not grant the breaching coach permission to speak with a competitor university. On the other hand, even when a school succeeds in receiving liquidated damages from a breaching coach's new institution, it does not prevent the overarching problem—that the coach left in the first place—and the university will undoubtedly have to scramble to find a replacement.

To this end, universities sometimes seek injunctions to prevent a coach from negotiating with a competitor and jumping his contract.[81] Courts will often refuse to grant specific performance as a method of injunctive relief where personal service contracts are involved, which include employment agreements.[82] For example, courts will not order an individual to perform a contract because of: (1) the difficulty of supervising and enforcing performance; (2) the undesirable nature of compelling continued association once loyalties vanish and disputes arise; and (3) the potential violation of the

74. Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 755 (6th Cir. 1999). *See generally* Richard T. Karcher, *Redress for a No-Win Situation: Using Liquidated Damages in Comparable Coaches' Contracts to Assess a School's Economic Damage from the Loss of a Successful Coach*, 64 S.C. L. REV. 429 (2012) (discussing liquidated damages in the college sports context more in-depth).

75. *See Vanderbilt Univ.*, 174 F.3d at 755.

76. *Id.*

77. *Id.* at 753.

78. *Id.* at 753–54.

79. *Id.* at 756.

80. *Id.* at 757.

81. *Id.*

82. Karcher, *supra* note 10, at 57.

Thirteenth Amendment's prohibition of involuntary servitude by judicially compelling services.[83] "However, 'where an employee refuses to render services to an employer in violation of an existing contract, and the services are unique or extraordinary, an injunction may issue to prevent the employee from furnishing those services to another person for the duration of the contract,'" known as a negative injunction.[84]

Nevertheless, due to its low success rates, the case law analyzing specific performance of contracts through negative injunctions in the sports context is limited.[85] For example, the City of Seattle filed a lawsuit seeking a negative injunction that would prevent its professional basketball team, the Sonics, from cashing out early and moving to Oklahoma.[86] Experts noted it was the tradition of the court to allow money damages as a substitute for performance and that to overcome this presumption, the City must prove the Sonics' uniqueness—namely that the team brings certain "benefits to the city that cannot be calculated in dollars and cents."[87] The parties later signed a settlement agreement under which the owners were required to pay the city $45 million as consideration for termination of their lease.[88] As this case illustrates, significant limitations are placed on the current remedies for breach of contractual agreements; consequently, the NCAA and its member schools must take more drastic steps to ensure effective options exist to remedy a coach's breach of contract prior to termination.

Moreover, the ease with which one can side step these legal provisions evidences the lack of respect for coaching contracts in the college context. As Kevin O'Neill, former head basketball coach at Marquette University, stated in regards to his sophisticated contract, "I won't wipe my nose on the contract. It's not worth the price of the paper."[89] Consequently, it may be necessary for schools to look to the NCAA to establish or update its rules to further protect universities against the harm caused by a coach who breaches his contract prior to its termination.

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83. *Id.*

84. *Id.* (quoting Am. Broad. Cos. v. Wolf, 420 N.E.2d 363, 367 (N.Y. 1981)).

85. *See* City of Seattle v. Prof'l Basketball Club, LLC, No. C07-1620MJP, 2008 WL 539809, at *3 (W.D. Wash. Feb. 25, 2008).

86. *Id.*

87. Jim Brunner, *Sonics Trial: What's Under All the Drama?*, SEATTLE TIMES, June 22, 2008.

88. Settlement Agreement between Prof'l Basketball Club, LLC & City of Seattle (Aug. 18, 2008).

89. Greenberg, *Representation of College Coaches in Contract Negotiations*, *supra* note 68, at 109.

IV. RESTRICTING COACHES' MOVEMENT AMONG MEMBER SCHOOLS: A NO-TAMPERING POLICY INVOLVING COACHES IN THE NCAA

The NCAA has yet to establish a rule directly prohibiting tampering between coaches and member universities.[90] However, recent discussions regarding the current landscape in college sports suggest that the implementation of a no-tampering policy by the NCAA may not be far off.[91] Further, the NCAA already promulgated a no-tampering rule in regards to its players; therefore, it is reasonably conceivable that the NCAA would implement a similar policy prohibiting tampering with coaches in the near future.

A. Current Tampering Restrictions and the Potential for a No-Tampering Policy for Coaches

Were the NCAA to implement a no-tampering policy in regards to its coaches, it should model its rule based on the current no-tampering policy employed by the NFL,[92] as well as the NCAA's transfer rule regulating tampering among universities for players.[93]

The NCAA's current transfer rule prohibits a university from contacting a player without the express permission of the university that the athlete is currently attending.[94] Moreover, an athlete who chooses to transfer schools must sit out one season of competition, unless he obtains a waiver due to one of the rule's limited exceptions.[95] The rationale behind this rule is to encourage student-athletes to make the decision to transfer based on academics, instead of making a decision motivated solely by athletics.[96] The overall goal of the transfer rule is to assure that athletes make rational decisions about the best place to receive an education and to compete in their

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90. *See generally* 2012–2013 NCAA DIVISION I MANUAL (2012) [hereinafter NCAA MANUAL].

91. *See* Duckens, *supra* note 8.

92. *See* Robert H. Lattinville & Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review*, 17 MARQ. SPORTS L. REV. 109, 126–34 (2006).

93. NCAA MANUAL, *supra* note 90, art. 13.1.1.3.

94. *Id.*; *see also* Michelle Brutlag Hosick, *Membership Modifies Transfer Waiver Guidelines*, NCAA.ORG (Nov. 2, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/November/Membership+modifies+transfer+waiver+guidelines; *Get the Facts About Transfers*, NCAA.ORG (May 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/May/Get+the+facts+about+transfers.

95. *See* NCAA MANUAL, *supra* note 90, art. 14.1.8.1.

96. *Transfer Rules: Basic Guidelines*, NCAA.ORG (Nov. 6, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/Transfer+Rules+Basic+Guidelines.

respective sport free from interference by on-going recruiting attempts.[97]

A no-tampering rule regulating contact between currently employed coaches and other member universities should be promulgated to reach a similar end that coaches would make the decision to switch schools based on the best environment to cultivate and portray their coaching skills, rather than a decision motivated by financial gain. The NCAA could even include a non-compete clause, requiring leaving coaches to refrain from coaching for a year; the same penalty placed on players who decide to transfer.[98] The result: a college sports environment that appropriately balances the realistic advancement opportunities for coaches, while protecting the rights of individual member universities to maintain and operate a stable, successful program, the same result arguably achieved by the NFL in establishing its no-tampering policy.[99]

The NFL's current no-tampering policy establishes the framework for NFL teams to consider candidates for coaching jobs.[100] The policy applies to both players and coaches.[101] The NFL rule regulating player-tampering states, "[n]o club, nor any person employed by or otherwise affiliated with a club, is permitted to tamper with a player who is under contract to or whose exclusive negotiating rights are held by another club."[102] According to the NFL, tampering includes "any interference by a member club with the employer-employee relationship of another club or any attempt by a club to impermissibly induce a person to seek employment with that club or with the NFL."[103] For example, any statement of interest, made publicly or privately, to another club's player, to that player's agent or representative, or to a

97. *Id.* However, the transfer rule does not eliminate all problems with tampering, as universities often block the transfer of student-athletes by prohibiting contact with players solely to tamper with another university's prospects, especially at the Division I level. *See Coaches Say Only Reason to Block Transfer is Tampering*, SPORTING NEWS (Apr. 20, 2012), http://www.sportingnews.com/ ncaa-basketball/story/2012-04-20/bo-ryan-jarrod-uthoff-john-calipari-mark-few-jim-boeheim-coaches-say-only-reason; *Missouri Denies Allegation of Khem Birch Tampering*, SPORTING NEWS (Dec. 29, 2011), http://www.sportingnews.com/ncaa-basketball/story/2011-12-29/ex-pitt-center-khem-birch-narrows-transfer-list; John Infante, *Transfer 101*, NCAA.ORG (Jan. 14, 2012), http://www.ncaa.org/blog/2012/01/transfer-101/. Moreover, much discussion has existed in recent years about the potential elimination of the transfer rule. Dana O'Neil, *NCAA: It's Time to Look at Transfers*, ESPN (July 13, 2012), http://espn.go.com/mens-college-basketball/story/_/id/8157631/ncaa-turns-attention-transfers-eye-penalties-tampering.

98. NCAA MANUAL, *supra* note 90, art. 13.1.1.3.

99. *See* Lattinville & Boland, *supra* note 92, at 127.

100. *Id.*

101. *Id.* at 126.

102. NFL ANTI-TAMPERING POLICY 2 (2009), *available at* http://www.dawgtalkers.net/uploads/2009%20NFL%20Anti-Tampering%20Policy.pdf.

103. *Id.*; *see also* Lattinville & Boland, *supra* note 92, at 127.

member of the news media, is a violation of this policy.[104] The goal of the policy is "to protect member clubs' contract and negotiating rights [while allowing] the intra-League competitive systems devised for the acquisition and retention of player talent (e.g., college draft, waiver system, and free-agent rules under an operative collective bargaining agreement) to operate efficiently."[105]

Moreover, the NFL prohibits tampering with head coaches. The pertinent language states:

> During a club's playing season, including postseason if applicable, . . . the following actions are prohibited concerning a head coach who is under contract, unless . . . [previously] dismissed by his club: (1) [n]o head coach may discuss or accept employment for the current or a future season with another club in the [NFL]; (2) no club may request permission to discuss employment with a head coach for the current or a future season; and (3) no . . . club may grant another club permission to discuss employment with its head coach for the current or a future season.[106]

The goal here is to provide realistic opportunities for advancement in the workplace, while protecting the success of an individual member.[107]

The fact that the NFL rule applies to both players and coaches becomes more significant when one considers that the NCAA already has a no-tampering policy that applies to players through its transfer rule.[108] The purpose for promulgating a no-tampering rule in the NFL applies with equal weight to coaches and athletes; thus, it seems the NCAA's current rule misses the mark in leaving out protections against tampering with coaches. It seems obvious that, to slow the coaching carousel, the NCAA must include a no-tampering rule for coaches. However, antitrust principles may dictate that a no-tampering policy acts as an unreasonable restraint on trade.

V. ANTITRUST ANALYSIS IN COLLEGE SPORTS

Section 1 of the Sherman Antitrust Act prevents concerted action that acts

104. Mike Sando, *West Mum on Peyton; Did Chiefs Cross Line?*, ESPN (Feb. 25, 2012, 5:12 PM), http://espn.go.com/blog/nflnation/tag/_/name/anti-tampering-policy.

105. NFL ANTI-TAMPERING POLICY, *supra* note 102, at 1; *see also* Lattinville & Boland, *supra* note 92, at 127.

106. NFL ANTI-TAMPERING POLICY, *supra* note 102, at 6.

107. Lattinville & Boland, *supra* note 92, at 127.

108. NCAA MANUAL, *supra* note 90, art. 13.1.1.3.

as an unreasonable restraint on interstate trade or commerce.[109] The "purpose of the antitrust laws is to preserve a competitive marketplace to ensure that consumers receive the benefits of economic competition."[110]

The NCAA plays an important role in the regulation of collegiate sports, adopting and promulgating rules that influence facets of college athletics such as the rules of play, the standards of amateurism and eligibility, the recruiting regulations, and the rules controlling the size of coaching staffs and athletics squads.[111] However, the NCAA is also involved in many commercial aspects of college sports, including the regulation of expenditures at member institutions.[112] Therefore, despite the amateur nature of intercollegiate athletics, any institutional rule that limits or regulates a commercial aspect of college sports is subject to antitrust laws.[113]

A. Background of Antitrust Law in College Sports

To satisfy a claim for an antitrust violation, the claimant must show that the restriction came as a result of concerted action, the effect of which is an unreasonable restraint on interstate trade or commerce.[114] The NCAA is comprised of 1066 member schools, spanning from coast to coast.[115] As a result, any economic interaction between the NCAA and its member schools constitutes interstate commerce.[116] Moreover, concerted action exists where parties that would otherwise be competitors agree to a given restraint.[117] The NCAA promulgates its rules through the concerted decision-making of its competing member schools;[118] therefore, as long as the NCAA is viable, concerted action will exist between the NCAA and its member schools.

Next, to succeed in finding an antitrust violation, a claimant must establish that the regulation creates an unreasonable restraint on trade.[119] Two cases,

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109. NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984); *see also* Sherman Antitrust Act, 15 U.S.C. § 1 (2013).

110. Matthew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 829–30 (2010).

111. Marc R. Leduc, Note, Law v. National Collegiate Athletic Association*: A Guide to How Courts Will Treat Future Antitrust Challenges to NCAA Regulations*, 26 J.C. & U.L. 139, 140 (1999).

112. NCAA MANUAL, *supra* note 90, art. 16.01.

113. Mitten et al., *supra* note 110, at 829–30.

114. *Bd. of Regents*, 468 U.S. at 98; *see also* 15 U.S.C. § 1.

115. *About the NCAA*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+NEW (last updated Aug. 13, 2012).

116. *See generally* U.S. CONST. art. I, § 8, cl. 3.

117. *See Bd. of Regents*, 468 U.S. at 98.

118. *Id.* at 88–89.

119. *Id.* at 98; *see also* 15 U.S.C. § 1.

NCAA v. Board of Regents and *Law v. NCAA*, establish the proper analyses for determining whether a restriction constitutes an unreasonable restraint on trade in college sports.[120] These analyses include: per se, rule of reason, and quick look.[121]

A per se analysis is appropriate where an alleged restraint is entirely void of redeeming competitive rationales.[122] Under this approach, horizontal restraints and limitations on output are condemned as a matter of law because "the probability that these practices are anticompetitive is so high . . . [that] 'the practice [on its face] appears to be one that would always or almost always tend to restrict competition and decrease output.'"[123] When a practice is deemed per se illegal, a court does not need to examine the impact of the practice on the market, or any pro-competitive justifications of the practice advanced by the defendant, before finding a violation of Section 1 of the Sherman Act. Instead, a conclusive presumption exists that the practice is unreasonable.[124]

However, in *Board of Regents*, the Court noted that the essence of sports is competition itself; thus, a rule of reason analysis must be utilized in antitrust claims involving college sports, as horizontal restraints on competition are essential if the product is to be available at all.[125] The rule of reason requires an analysis of the restraint's effect on competition.[126] First, the court must determine whether competition was substantially adversely affected by the challenged restraint.[127] If shown, the inquiry shifts to "an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts."[128] If a defendant meets this burden of proof, the burden is placed back on the plaintiff to prove that the challenged conduct is not reasonably necessary to achieve the stated objectives, or that the legitimate objectives can be achieved in a substantially less restrictive manner.[129]

A plaintiff may show adverse effects on competition "indirectly by

120. *See generally Bd. of Regents*, 468 U.S. 85; Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

121. *See generally Bd. of Regents*, 468 U.S. 85; *Law*, 134 F.3d 1010.

122. *Bd. of Regents*, 468 U.S. at 103–04.

123. *Id.* at 100 (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979)).

124. *Bd. of Regents*, 468 U.S. at 103–04.

125. *Id.* at 100–01.

126. *Law*, 134 F.3d at 1016.

127. *Id.* at 1017.

128. *Id.*

129. *Id* at 1019.

proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price."[130] The best way to show actual anticompetitive effects is by comparing what would happen in the free market to what is currently happening with the restraints in place.[131] In a free market, outputs and prices change in response to consumer supply and demand.[132] In college sports, however, anticompetitive effects sometimes exist where the NCAA imposes horizontal restraints, including reduced individual freedom to compete, higher prices, and lower output.[133] These consequences exist not as a response to consumer preference, but as a direct result of the regulation.[134]

For instance, in *Board of Regents*, the Court found that "if member institutions were free to sell television rights, many more games would [be televised]"; consequently, the restriction on output by the NCAA had the effect of raising the price networks paid for these television rights.[135] Moreover, the Court found that by setting a fixed price for the television rights to college football games, the NCAA created a price structure unresponsive to viewer demand and unrelated to prevailing prices in a freely competitive market.[136] Furthermore, the NCAA must approve all participating members; as a result, member institutions have no choice but to adhere to NCAA rules and controls.[137] Additionally, the court in *Law* held that a restricted-earnings rule limiting compensation of certain entry-level coaches was an unreasonable restraint because it constituted impermissible price-fixing.[138] There are other factors that are considered in determining whether the effects of a given regulation were a result of consumer supply and demand or whether other forces were at work.[139] For instance, courts often look to a defendant's geographical market, a defendant's market share, and any other reasonable

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130. *Id.*

131. NCAA v. Bd. of Regents, 468 U.S. 85, 104 (1984).

132. *See generally* Koshy Mathai, *Monetary Policy: Stabilizing Prices and Output*, IMF, http://www.imf.org/external/pubs/ft/fandd/basics/monpol.htm (last updated Mar. 28, 2012).

133. *Bd. of Regents*, 468 U.S. at 106–07.

134. *Id.* The NCAA has argued that its horizontal regulations create "no significant anticompetitive effect since the record indicates that . . . [the institution] has no market power—no ability to alter the interaction of supply and demand." *Id.* at 109. However, the Court noted that "the absence of proof of market power does not justify a naked restriction on price or output." *Id.*

135. *Id.* at 105.

136. *Id.* at 106.

137. *Id.*

138. Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998).

139. *See id.* at 1019.

substitutes available.[140]

The NCAA is the premier governing body in college athletics, regulating all Division I, II, and III member schools.[141] The "product" made available by the NCAA is college athletics.[142] Through its regulation of numerous aspects of college sports, ranging from competition to media rights, and its control over all major college athletic programs, the national governing body retains the entire market share for its "product."[143] Moreover, NCAA member schools span from coast to coast; as a result, the governing body monopolizes the college sports product within its relative market, which in this instance is nationwide.[144] Therefore, the NCAA's premiere status in college athletics nationwide, coupled with its ever-increasing share of the product market, creates indirect adverse effects on competition, unresponsive to consumer demand.

The NCAA has argued that its horizontal regulations create "no significant anticompetitive effect since . . . [the institution] has no market power—no ability to alter the interaction of supply and demand in the market."[145] However, the Court in *Board of Regents* noted "the absence of proof of market power does not justify a naked restriction on price or output."[146] Therefore, the burden shifts to the defendant to show that the restraint has significant or actual pro-competitive redeeming effects.[147]

The NCAA may survive antitrust scrutiny if it can justify the anticompetitive effects of the restraint with the pro-competitive benefits.[148] As previously stated, the Court in *Board of Regents* recognized that certain horizontal restraints by the NCAA are justified under antitrust law because the product, college sports, would not exist without them.[149] Legitimate rationales for a given restraint, supported by the courts, include amateurism

140. *Id.*

141. *About the NCAA*, *supra* note 115.

142. *See Law*, 134 F.3d at 1018.

143. Two other governing bodies, the National Association of Intercollegiate Athletics (NAIA) and the National Junior College Athletic Association (NJCAA), regulate college athletics; however, the NCAA remains the premier governing body, regulating all of the major Division I-III programs across the country. *See National Association of Intercollegiate Athletics*, NAIA, http://www.naia.org (last visited Nov. 8, 2013); *National Junior College Athletic Association*, NJCAA, http://www.njcaa.org (last visited Nov. 8, 2013).

144. *Who We Are*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page (last visited Nov. 8, 2013).

145. NCAA v. Bd. of Regents, 468 U.S. 85, 109 (1984).

146. *Id.*

147. *Law*, 134 F.3d at 1019.

148. *Id.* at 1021.

149. *Bd. of Regents*, 468 U.S. at 101.

and competitive balance.[150] If pro-competitive effects are shown, the burden shifts back to the plaintiff to show that the challenged conduct is not reasonably necessary to achieve the stated objectives, or that the legitimate objectives can be achieved in substantially less restrictive manner.[151]

Lastly, a quick look analysis is used when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[152] Where these obvious anticompetitive effects exist, the court will dispense of the elaborate market analysis.[153] For example, the Seventh Circuit Court of Appeals held that a league's television plan expressly limiting output so clearly demonstrated anti-competitive effects that it dispensed with market definition and assessment of market power determining the restraint was unreasonable.[154]

B. Analysis of a No-Tampering Rule Under Antitrust Rules

The NCAA, reluctant to enact cost-control legislation following the decision in *Law*,[155] delegates to its member institutions the responsibility of making financially responsible decisions regarding the expenditures of their athletic programs.[156] However, seeing the explosion of salaries in college coaching contracts, the NCAA may soon be compelled to enact restrictions to better monitor and impede these large expenditures and intra-institutional tampering. Yet, the implementation of a no-tampering policy by the NCAA will likely yield effects that create a horizontal restriction on output, a clear restraint on trade in violation of antitrust law.

To prove an antitrust violation, a claimant must show that the restraint was the result of concerted action that unreasonably restrains interstate trade or commerce.[157] Concerted action exists when otherwise would-be competitors agree to a restraint.[158] If implemented, the NCAA would promulgate its

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150. *Id.* at 118.

151. *Law*, 134 F.3d at 1019.

152. Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999).

153. *Id.*

154. *See generally* Chi. Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667 (7th Cir. 1992).

155. *See generally* Leduc, *supra* note 111 (describing NCAA procedure).

156. *See generally* Christopher Schnaars et al., *USA Today Sports' College Athletics Finances*, USATODAY.COM, http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1 (last visited Nov. 8, 2013).

157. NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984); *see also* Sherman Antitrust Act, 15 U.S.C § 1 (2013).

158. *See Bd. of Regents*, 468 U.S. at 98.

restriction against tampering through the concerted decision-making of its member schools.[159] Moreover, NCAA member schools constantly compete with one another on and off the field. Therefore, concerted action exists. Further, the restraint must affect interstate commerce.[160] As previously stated, NCAA member schools span from coast to coast; thus, any economic regulation imposed by the institution on its members affects interstate commerce.[161]

Most importantly, a party bringing an antitrust claim must prove that the restraint unreasonably restrains trade.[162] As previously stated, the Court, in *Board of Regents*, elicited that all antitrust analyses involving collegiate sports should fall under the rule of reason.[163] Therefore, the burden initially falls on the claimants, most likely the coaches themselves, to prove that the no-tampering restriction creates anti-competitive effects.[164] In this instance, a no-tampering policy, promulgated by the NCAA, would result in anticompetitive effects because the prohibition on contacting coaches without consent of the current employer would undoubtedly result in a restriction on output, a direct anticompetitive effect.[165]

To illustrate this restriction on output, it is helpful to determine what result would occur in a free market, absent the restriction. Were market forces free to function in response to consumer supply and demand, coaches would be free to entertain countless offers by competing member schools, leaving a saturated product market.[166] To the contrary, a no-tampering policy would limit the number of available coaches in the product market. Without the ability of competing member schools to speak freely to coaches, schools will be forced to wait until the end of the season to compete for the coaches' services, if the services are available at all due to the requirement of consent. This effect is clearly unresponsive to consumer demand, as the demand for

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159. *Id.* at 88–89.

160. *See generally* 15 U.S.C. § 1.

161. *About the NCAA*, *supra* note 115.

162. *Bd. of Regents*, 468 U.S. at 98; *see also* 15 U.S.C. § 1.

163. *Bd. of Regents*, 468 U.S. at 101–03; *see also* Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998).

164. *See Law*, 134 F.3d at 1017.

165. *Id.* at 1019.

166. *See* Eye on College Football Staff, *CFB Coaching Carousel One-Stop Shop*, CBSSPORTS.COM (Nov. 5, 2012), http://www.cbssports.com/collegefootball/blog/eye-on-college-football/20838606; *see also Coaches Say the Only Reason to Block Transfer is Tampering*, *supra* note 97. The only incentive for blocking a transfer is to tamper with another school's prospects. *Id.* The same would be true of coaches; therefore, without the restriction, coaches are free to engage in communications regarding employment with an unlimited number of schools. *Id.*

high-profile college coaches is at an all-time high.[167]

Consequently, the burden must shift to the NCAA to prove significant pro-competitive, redeeming effects of the no-tampering policy.[168] Here, the NCAA's most effective argument relies on the goal of competitive balance between member schools. To provide an equal-playing field for all of its member schools, the NCAA must promulgate legislation that places some horizontal restrictions on its members. To reiterate the Court's sentiments in *Board of Regents*, certain horizontal restraints, such as restrictions on eligibility, are justified under antitrust law because the product, college sports, would not exist without them.[169] Allowing schools with higher payrolls to monopolize the most talented coaches provides these high revenue-generating schools with the recruiting benefits, notoriety, and skill associated with high-profiles coaches, to the disadvantage of lower revenue-generating institutions. Furthermore, the Court, in *Board of Regents*, specifically listed competitive balance as a legitimate rationale for these types of restraints.[170] Accordingly, the NCAA can satisfy its burden of proving pro-competitive effects of the alleged restraint, and the burden can shift back to the plaintiff coaches to show that the legitimate objectives sought by the NCAA can be achieved through less restrictive means.[171]

Although the NCAA has a legitimate interest in preventing these lucrative salary offers and reinstating some loyalty back into college sports, a no-tampering policy is likely too restrictive a means of reaching its goals. For example, a much less restrictive method of achieving the NCAA's goals would be to prevent interfering schools from paying their newly acquired coach's exit fees, placing a more significant burden on coaches for breaching their current contract and potentially preventing the coaching carousel from spinning at such a swift pace.

Due to the ability of the NCAA to achieve its goals of reduced coaches' movement and lucrative salary offers through less restrictive means, the claimant coaches effectively meet their burden of proof. Therefore, a no-tampering policy implemented by the NCAA against its member coaches will result in a violation of antitrust law.

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167. *See generally* Brady et al., *supra* note 11.
168. *See Law*, 134 F.3d at 1019.
169. *Id.* at 1021.
170. NCAA v. Bd. of Regents, 468 U.S. 85, 118 (1984).
171. *See Law*, 134 F.3d at 1017.

VI. CONCLUSION

Many schools may not be as fortunate as Wisconsin to quickly substitute a legend, such as Barry Alvarez,[172] to coach in one of the most coveted football games in college sports. If the NCAA neglects to put measures in place to stop the coaching carousel, institutions will continue to pay increasingly large salaries to obtain or keep high-profile coaches. To prevent these movements and excessive salaries, some have hinted that the NCAA should implement a no-tampering policy, prohibiting member schools from interfering with an existing contractual coaching relationship until the playing season is complete, or the contract is terminated.

Based on the decisions in *Board of Regents* and *Law*, it is likely that a no-tampering policy would result in a violation of antitrust law. Although the limitation on coaches' salaries effectively restricts output, the NCAA can justify its restriction through legitimate pro-competitive interests, namely competitive balance. However, coaches may successfully argue that the objectives sought by the NCAA could be achieved through less restrictive means.

As a result, the current problem of coaches jumping to other member schools before the termination of their contracts will continue, and the NCAA will undoubtedly remain helpless to stop it. The only foreseeable solution to this problem may come if individual member schools decide not to partake in tampering activities. However, the continued pressure on university athletic departments and officials to produce and maintain a successful, self-sustaining athletic program makes any possibility of individual university's compliance minimal at best. Consequently, the era of hefty coaching contracts and fictional loyalty from coaches will continue well into the future.

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172. *See* Greenberg, *Behind the Bielema Jump*, *supra* note 1.