Smoke, Mirrors, and NCAA Bylow 12.2.4.2.1: An Analysis of College Basketball's Thirty-Day Rule and the Continued Exploitation of College Cagers

John P. Gillard Jr.
COMMENT

SMOKE, MIRRORS, AND NCAA BYLAW 12.2.4.2.1: AN ANALYSIS OF COLLEGE BASKETBALL’S THIRTY-DAY RULE AND THE CONTINUED EXPLOITATION OF COLLEGE CAGERS

I. INTRODUCTION

Voshon Lenard starred for the University of Minnesota basketball team during the years 1991-94.1 Throughout the winter of 1993 and spring of 1994, Lenard maintained that he would return to Minnesota for his senior season.2 However, on May 10, 1994, Lenard had a change of heart and decided to enter the National Basketball Association ("NBA") draft.3 When Lenard announced his decision at a press conference on May 11, it appeared that his collegiate career was over.4

Draft prognosticators predicted that Lenard would be selected in the late first-round or early second-round.5 However, Lenard fell to the forty-sixth overall pick, late in the second round, where he was drafted by the Milwaukee Bucks.6 Milwaukee selected both Glenn Robinson of

1. Lenard’s statistics for his first three years at the university are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>FG%</th>
<th>FT%</th>
<th>Reb.</th>
<th>Ast.</th>
<th>Pts./gm.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991-92</td>
<td>.421</td>
<td>.812</td>
<td>118</td>
<td>8</td>
<td>12.8</td>
</tr>
<tr>
<td>1992-93</td>
<td>.481</td>
<td>.802</td>
<td>113</td>
<td>82</td>
<td>17.1</td>
</tr>
<tr>
<td>1993-94</td>
<td>.472</td>
<td>.844</td>
<td>123</td>
<td>74</td>
<td>18.9</td>
</tr>
<tr>
<td>Totals</td>
<td>.461</td>
<td>.818</td>
<td>354</td>
<td>242</td>
<td>16.3</td>
</tr>
</tbody>
</table>

In 1993, Lenard led his team to an NIT championship and was named MVP of the tournament. In 1994, Lenard led the Gophers to the second round of the NCAA tournament. Dennis Bracklin, Lenard Tells Bucks He Will Return to ‘U’, STAR TRIB. (Minneapolis), July 13, 1994, at 1C.

2. Id.

3. Lenard would not have had the choice of entering the draft after his junior season but for the actions of Spencer Haywood. Before 1971, NCAA rules prohibited players from entering the draft until their college class had graduated. In 1971 Haywood, who starred at the University of Detroit and won a gold medal with the 1968 Olympic basketball team, sued the NCAA for the right to enter the draft prior to the end of his senior season. Haywood v. NBA, 401 U.S. 1204 (1971). The court ruled in favor of Haywood, ruling that the NCAA’s restraint prevented him from earning a living. Id.

4. Lenard stated that playing in the NBA “is what I want to do.” Bracklin, supra note 1, at 1C.

5. Id.

6. Id.
Purdue University\(^7\) and Eric Mobley of the University of Pittsburgh\(^8\) prior to selecting Lenard. Both Robinson and Mobley signed multi-million dollar contracts, and Robinson's contract was the richest in NBA history.\(^9\) Lenard was offered a one-year contract at the NBA minimum salary of $150,000.\(^10\)

Had Lenard announced his eligibility for the NBA draft after his sophomore season, he would not have been able to return to school. He would have been forced to either accept the Bucks' offer, play basketball in the Continental Basketball Association ("CBA") or overseas, or wait for the next year's NBA draft in hopes of obtaining a better draft position and salary offer.\(^11\) However, in 1994 the NCAA offered Lenard a new alternative. The NCAA created a new rule under which underclassmen who enter the NBA draft are allowed to maintain their NCAA eligibility if they declare their intention to resume intercollegiate participation within thirty days after the draft\(^12\) and do not enlist the services of an agent.\(^13\) The NBA team drafting the player, however, retains the player's rights until one year after the exhaustion of his collegiate eligibility.\(^14\)

On July 12, 1994, Lenard told the Bucks that he

---

7. Robinson, known as the "Big Dog," was the first pick overall. *Id.*
8. Mobley, a center, was selected 18th overall. *Id.*
10. Bracklin, *supra* note 1, at 1C.
11. For example, Tony Farmer of the University of Nebraska decided to enter the 1991 NBA draft after his junior year, in which he averaged 12.4 points and 7.4 rebounds per game. Although Farmer was projected to be selected in the late first- or second-round, he was not drafted. Instead, Farmer pursued his pro dream in Europe and the CBA. Mike Terry, *For Many, The Pros Have Cons*, WASH. POST, May 21, 1994, at C1.
13. Specifically, NCAA bylaw 12.3.1 states:
   An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport of particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.
would return to the University of Minnesota for his final year of eligibility.\textsuperscript{15}

Many have criticized NCAA bylaw 12.2.4.2.1, which allows college basketball players to return to school after testing the NBA waters.\textsuperscript{16} Much of this criticism centers on the rule's effect on both the NBA teams that draft underclassmen\textsuperscript{17} and the college teams whose players declare their eligibility for the NBA draft before the end of their senior seasons.\textsuperscript{18}

The NCAA did not enact this legislation for the benefit of college coaches or NBA teams, however. The legislation is intended to benefit college basketball players who declare their eligibility for the NBA draft and are struck by the reality of their own basketball talents when the NBA either fails to draft them or drafts them at a lower position than anticipated.\textsuperscript{19} Although this legislation benefits some college basketball players, many still criticize the rule for its potential adverse affects on the players themselves.\textsuperscript{20}

Many who criticize the NCAA rule as harming players cry for its rescission. The players would be better suited, however, by other measures. The thirty day window for negotiating with the NBA does not allow a player to make an informed decision, and this problem is compounded because the NCAA does not allow the player to be represented by an agent when negotiating a contract.

Part II of this Comment will address the thirty-day rule's effect on both college and NBA teams. Part III will address the rule's effect on college basketball players. Finally, Part IV will argue that players should be allowed an unlimited time to negotiate with the NBA and propose the means by which players can challenge the NCAA's thirty-day rule. This

\textsuperscript{15} Bracklin, supra note 1, at 1C. Lenard was far from unwavering in his decision. As recently as June 30, 1994, Lenard told his college coach and father that he had no intention of returning to the Gophers, and planned to play for the Bucks in the fall. \textit{Id.}

Besides Lenard, Charles Claxton, a center for the University of Georgia, was the only other player to take advantage of the NCAA's 30-day rule. Claxton, unhappy being drafted 50th overall by the Phoenix Suns, returned to school for his senior season. David Nakamura, \textit{Giving College a Second Chance}, \textit{WASH. Post}, Dec. 26, 1994, at C7.


\textsuperscript{17} See infra notes 28-31 and accompanying text.

\textsuperscript{18} See infra notes 21-27 and accompanying text.

\textsuperscript{19} See Reinke, supra note 14, at 10.

\textsuperscript{20} See infra notes 32-46 and accompanying text.
Comment will conclude that the NCAA should change its rules to level the playing field for players when negotiating professional contracts.

II. Effect on College and NBA Teams

A. College Teams

When college coaches criticize the thirty-day rule with respect to its effect on their teams, most point to the adverse effect that it will have on recruiting. First, when an underclassman declares his eligibility for the draft, a coach does not know whether the player will return to school, and thus does not know whether to recruit a high school player to replace him. If a coach assumes that a player will not return and recruits another player to fill his scholarship spot, the school may not have a scholarship available for the player if he decides to return to school. Conversely, if a coach assumes that a player will return to school and does not recruit an athlete to replace him, the team will suffer if the player decides to sign a professional contract.

Second, the uncertainty about whether a player will return to school also may adversely affect a coach's ability to persuade a high school player to sign a letter of intent. If a coach is recruiting a prospect who plays the same position as the player who declared his eligibility for the draft, the coach is unable to tell the player whether he will start, come off the bench, or even play the next year because of the uncertainty at the position. As a consequence, the high school player might choose to attend another institution where his role is more certain.

Another concern of college coaches is the possibility that a player may decide to quit school in the middle of the college basketball season.

21. Despite an initial positive reaction to the rule, college coaches voted overwhelmingly against the 30-day rule at the 1994 National Association of Basketball Coaches' issues summit. Of approximately 100 Division I coaches attending the summit, only two (Kansas' Roy Williams and Notre Dame's John MacLeod) supported the measure. Steve Wieberg, Coaches Call for an End to NBA Draft Rules, USA TODAY, Oct. 5, 1994, at 10C.

22. Said Denny Crum, head coach of the Louisville Cardinals: "It obviously is not in the university's best interest because you can't tell until it is too late whether or not you can recruit someone else. Your recruiting will be over for that particular year." Jerry Wizig, NCAA Tournament, THE HOUSTON CHRON., Mar. 25, 1994, at 1.

23. "I think [the rule] creates a problem for your team," said Clem Haskins. "Now, all of a sudden, you've been out recruiting this kid to replace a guy who you think is going to the draft. So, you get this (recruit) to sign a national letter of intent and then the guy he was supposed to replace comes back. I think it creates a problem for your team." L.C. Johnson, Coaches Oppose Back-To-School Option, THE PLAIN DEALER, Oct. 5, 1994, at 2D.


25. See Reinke, supra note 14, at 10.
in order to join the team that drafted him. The probability that this would occur increases under several scenarios. First, a player could be struggling academically and, rather than working harder in school, drop out in order to avoid the problem of achieving passing grades. Second, a disgruntled player may decide to turn pro instead of resolving the problem with his coach.\textsuperscript{26} Third, the NBA team that drafted the player could experience injury problems at the player’s position, and therefore offer the player a more substantial salary to induce him to enter the NBA mid-season.\textsuperscript{27} Fourth, a player might develop his skills sufficiently to induce the NBA team to make him a suitable offer. Finally, the player may realize that although the NBA is not willing to pay him the millions of dollars for which he had dreamed of playing, even the NBA minimum salary is a substantial sum of money.

\textbf{B. NBA Teams}

The thirty-day rule does not have as dramatic an effect on the NBA as it does on college teams and players.\textsuperscript{28} The first reason for this is the difference in talent levels between the NCAA and the NBA. Every NBA team’s roster is composed mainly of players who starred at the intercollegiate level. College teams usually have very few “blue-chip” players. When a star collegian joins an NBA team, the team’s talent level usually does not change dramatically because there are a number of players with comparable ability on the team. However, when a star player leaves an NCAA team, the team’s talent level can be dramatically affected, especially when the team did not recruit a player to replace the departing star.

The second reason for the disparity involves the players that will take advantage of the thirty-day window. Most star players that will dramatically impact the success of an NBA team are drafted early in the first round. These players are ordinarily offered multimillion dollar contracts, and probably will accept them as a result. The players likely to take advantage of the thirty-day rule are those players who are disappointed that they were chosen late in the draft or not selected at all. NBA teams probably do not consider these players to be impact players,

\begin{thebibliography}{9}
\bibitem{26} Id.
\bibitem{27} Id.
\bibitem{28} “[The rule] is not going to have a dramatic effect on us,” said Pete Babcock, general manager of the Atlanta Hawks. Nick Canepa, \textit{New Basketball Rule Proves Once Again that NCAA is a Basket Case}, \textit{The S.D. Union-Trib.}, Jan. 18, 1994, at D1.
\end{thebibliography}
and therefore the teams will not be adversely affected by the players' decisions to return to school.

The rule has not avoided criticism by the NBA, however. The rule has mainly been criticized as helping elite NBA teams and harming the weak ones. Ordinarily the strong teams do not have an immediate need for a player at a particular position. Thus, these teams can draft players based on potential and refrain from signing the players immediately. This allows the player to develop in college while retaining his eligibility.\textsuperscript{29} Weaker teams, however, probably need a player to contribute immediately. The immediate need for a player's contribution, coupled with a player's ability to return to school, gives the player increased bargaining power in negotiations, and may force the team to pay the athlete more than it would need to without the rule.\textsuperscript{30}

The rule has also been criticized for giving additional leverage to players who do not wish to play for the team that drafted them. In this scenario, a player may coerce a team into trading him by threatening that he will return to school if forced to play for the drafting team.\textsuperscript{31}

\section*{III. Effect on Players}

Despite the thirty-day rule's effect on NCAA and NBA teams, most commentary on the rule concerns its impact on players. Many NCAA and NBA coaches as well as players have lobbied both in favor of and against the legislation because of its effect on players. This section will discuss the arguments both for and against this rule.

\subsection*{A. Proponents' Arguments}

Proponents of the rule cite several arguments when supporting the rule. First, players should be able to test the job market in their chosen profession without the NCAA forcing them to abandon their scholarships.\textsuperscript{32} Students with academic scholarships are allowed to solicit em-

\textsuperscript{29} According to Bob Whitsitt, president of the Seattle Supersonics, one of the NBA's more successful teams: "With respect to our situation, the ruling is only positive. I can't see it hurting us in any way. We're in a situation right now, where in the last couple drafts, we haven't relied on that player coming out and helping us immediately. We're in a developmental mode for our young players." Mike Kahn, \textit{Testing the NBA Waters: NCAA Rule Gives Players New Options}, News Trb., Feb. 1, 1994, at D1.

\textsuperscript{30} Again, according to Whitsitt: "If you're a team relying on one or two draft picks playing 25 minutes in the rotation, it may put you in a more difficult situation because you're counting on those rookies to make a difference right away." \textit{Id.}


\textsuperscript{32} "Student-athletes should have the opportunity to investigate professional sports opportunities in the same way other students have the right to explore employment options,"
ployment offers without losing their scholarships; students with athletic scholarships should be allowed to do the same. Second, the threat of returning to school will give players increased leverage when negotiating with NBA teams. 33 Third, the rule helps players who receive poor advice. Previously, a player could be advised that he would be drafted high in the first round, announce his eligibility for the draft, not get drafted, and be precluded from returning to school on his basketball scholarship. Now these same players are allowed to return to school and finish their degrees when they learn that a career in the NBA might not be in their future. 34

B. Opponents' Arguments

Those against the thirty-day rule cite a multitude of arguments in support of their position. Opponents argue that the rule will encourage more advisors and NBA teams to encourage players to turn pro than before. 35 Accordingly, opponents argue that more student-athletes will abandon their education than before. However, statistics from the 1994 NBA draft tend to refute this argument. In 1994, twenty underclassmen applied for early entry into the NBA draft, only one more than the number of underclassmen that applied for the 1993 draft. 36

Opponents also point to extenuating circumstances that might preclude a player from returning to school when the player wants to exercise his thirty-day option. First, when an underclassman declares his draft eligibility, his college team might recruit another player in anticipation of the draftee not returning to school. If the player decides to return to school, the university might not have a scholarship slot

---

34. According to Dean Smith, head coach at North Carolina: "[The rule] gives the student athlete leverage in dealing with the pros, and if he's not drafted, the fact that he can still play NCAA basketball might inspire him to return to college, finish his studies, and get his degree." Ken Davis, Denying the Entry Pass: Coaches Tired of Underclassmen Making Early Exits, THE HARTFORD COURANT, June 26, 1994, at D11.
35. According to John Thompson, head coach at Georgetown: "All that [the rule is] going to do is encourage the professional people to solicit the kids to come out of school, and we don't need anymore pressure than we already have on these kids." Kisha Ciabattari, Thompson Not a Proponent of New Eligibility Rule, WASH. TIMES, Jan. 12, 1994, at B5. "It introduces more people into support systems or advice systems who shouldn't be in there," said Mike Krzyzewski, head coach at Duke University. "I'm very concerned about its impact on college basketball." Davis, supra note 34, at D11.
36. Johnson, supra note 23, at 2D.
available. Second, players who decide to return to school must return any money they received from an NBA team for participating in any minicamps or summer leagues. Players who come from poor families may not be able to repay the NBA team and, therefore, might be required to forfeit their NCAA eligibility despite the thirty-day rule. Third, some players might abandon their academics when declaring themselves eligible for the draft, reasoning that their future is in the NBA and not in academics. In the event that a player is not drafted, he may be unable to catch up on his studies to remain academically eligible.

In addition, opponents point to the rule’s potential adverse effects on a player who improves in the years after he is drafted and returns to school. For example, an undeveloped player could turn pro after his sophomore year, be drafted in the late second-round, and return to school. In the player’s junior and senior seasons, the player could develop to the point where he would be a lottery selection in the NBA draft. However, the team that originally drafted him retains his rights for one year after his graduation. The team may try to negotiate the player’s salary based on the position in which he was originally drafted instead of on his present potential. The team’s negotiating position could cause the player to sign for a lower salary than if the player would have entered the draft after his senior year. Some argue that this position is overstated, however, and that the NBA will need to pay a player

37. See Gene Wojciechowski, NCAA Change Dumb to Some, L.A. TIMES, June 28, 1994, at Cl. NCAA Division I schools are only allowed to have 13 scholarship players.
38. See NCAA bylaw 12.1.2, reprinted in NCAA MANUAL, supra note 12, at 70. Voshon Lenard needed to return approximately $2,000 to the Milwaukee Bucks prior to returning to school. Johnson, supra note 23, at 2D.
39. Regarding the Voshon Lenard situation, coach Clem Haskins noted that “luckily, Voshon comes from a middle-class family who could afford to pay the money back. But what if he didn’t have the money? That would be another problem for the coaches.” Johnson, supra note 23, at 2D.
40. Of the 20 underclassmen that applied for the 1994 NBA draft, seven were not drafted, and none of these seven returned to school. Some of these seven were unable to return because of a lack of grades. Id.
41. See Kahn, supra note 29, at D1.
42. See Reinke, supra note 14, at 10.
43. “[I]f a player is going to go back to college because he either doesn’t like the team that drafted him or he was drafted lower than he anticipated, when he eventually does enter the NBA, the team that owns his rights will pay him the money at the spot where he got drafted even though, later on, he might be a lottery-type talent. ‘That’s the risk to the student-athlete,’” stated Stu Jackson, former head coach at the University of Wisconsin. Rob Schultz, NCAA Rule on NBA Draft Has Jackson Seething, CAP. TIMES (Madison), Jan. 24, 1994, at 4B.
44. “[S]tudents who may go out and get drafted low and then decide to come back to school are stuck with that low draft number when they do come out. It will cost them money
his present market value instead of the market value for the slot in which he was originally selected.\textsuperscript{45}

Finally, opponents argue that the rule adversely affects a player's bargaining power with the NBA. First, opponents argue that the thirty-day window does not give players a sufficient amount of time to negotiate a contract with an NBA team.\textsuperscript{46} As a result, some players will return to school without having a sufficient opportunity to negotiate a professional contract. Others may decide to not return to school before the end of the thirty-day period in hopes that they will negotiate a suitable contract with the NBA. These players will lose their bargaining leverage because they cannot threaten to return to school if an acceptable contract is not offered. Second, because players are not allowed to retain agents while negotiating with NBA teams, the players or their advisors may not know their present market value when negotiating a contract. The NBA might take advantage of this fact and sign players for less than their fair market value.

IV. POTENTIAL CHALLENGES TO THIRTY-DAY RULE

A. Thirty-Day Rule Should Be Expanded or Eliminated

The NCAA should not repeal the thirty-day rule for college basketball players, but should expand the rule to give players a greater opportunity to consider their NBA options while maintaining their NCAA eligibility. The NCAA should give players an unlimited time period to negotiate with the NBA while keeping their eligibility. The thirty-day time period does not give players sufficient time to negotiate a contract. At the expiration of the thirty days, players are forced to decide whether to continue to negotiate or return to school. Both decisions could have an adverse effect on players. Players who continue to negotiate lose the leverage that accompanies the option of returning to school, and may be forced to sign a less lucrative contract. Players who decide to return to school may be better suited for life in the NBA than life in the classroom, but may end up taking another year of "Mickey Mouse" courses because they were hindered by the thirty-day rule.

\textsuperscript{45} Said Michael McNeely, the NCAA's director of operations: "If a kid goes back to school and has a banner year, the market will be in place. He can hold out. I don't think he'll be penalized." Reinke, \textit{supra} note 14, at 10.

\textsuperscript{46} See Canepa, \textit{supra} note 28, at D1.
In addition, an expansion in the time period to negotiate with the NBA does not disadvantage college coaches. This Comment does not propose that a scholarship slot be left open indefinitely for a player who is deciding whether to pursue an NBA career. If a coach decides to sign a player to fill the scholarship slot left in limbo by the draftee, the player should be allowed to transfer to another university. This solution would benefit both the player's original university, the university to which he transfers, and the player himself.

Finally, the thirty-day rule serves little purpose because a player could still sign with the NBA team that drafted him after announcing his intention to return to school. The only student-athletes that the thirty-day rule harms are those athletes who abide by the letter and intent of the rule and cease negotiations with the NBA at the close of the thirty-day period. A player who returns to school but continues to negotiate with the NBA is not sanctioned.

College cagers should seek to change the NCAA’s thirty-day rule because they would benefit if they were allowed an unlimited amount of time to negotiate with the NBA without losing their college eligibility. Considering the fact that most college coaches want to return to the system in which draftees automatically lose their eligibility, players probably cannot look to the NCAA for help. The only recourse that players may have is to challenge the thirty-day rule through the court system.

The NCAA’s thirty-day rule is vulnerable to attack as an unreasonable restraint on college basketball players in violation of the antitrust

---

47. The term "cager" is slang for a basketball player. In 1896, five years after James Naismith invented basketball in Springfield, Massachusetts, the first professional basketball game took place in Trenton, New Jersey, in a court enclosed by a 12-foot high wire-mesh fence. The cage around the court was necessary because Naismith's original rules stated that when the ball went out of bounds, the first player who got to it could throw it back in. The cage kept the ball from going out of bounds, and thus prevented players from diving into the laps of front row spectators to wrestle for the ball. Although the out-of-bounds rule was changed in 1902 to eliminate sideline scrimmages, the cage was kept to keep the game faster and more entertaining because there were no delays to retrieve the ball when it went out of play. See Robert W. Peterson, When the Court Was a Cage, SPORTS ILLUSTRATED, Nov. 11, 1991, at 61.

48. See Wiebert, supra note 21, at 10C.

49. In response to the NCAA's exploitation of student-athletes, Reggie White of the Green Bay Packers, who has admitted accepting money while playing at the University of Tennessee, has suggested an alternative means of recourse for players: simply strike for money. Said White: "Some of these athletes are going to get mad and they're going to walk. They're not going to play. They're going to finally realize what the NCAA is doing to them. Is it fair for the university to keep making millions and millions of dollars off a kid? Everybody says, 'Well, they're getting a scholarship.' That's true. But do you have enough money to wash your clothes, which they don't? Do you have money to go to the movies, which they don't?" See Rick Teland, The Hundred Yard Lie 45 (1989).
laws. This section will discuss the legal theories premised on antitrust law that players could use to challenge the restraints that the NCAA places on their career choices.

B. Loss of Eligibility After Thirty Days: An Antitrust Attack Against the NCAA

The thirty-day rule is vulnerable to attack on antitrust grounds. Allegations that the NCAA rules restrain trade are ordinarily based on Section I of the Sherman Act, which forbids "[e]very contract, combination . . . or conspiracy, in restraint of trade." The NCAA is not exempt from antitrust liability as a non-profit organization. The Supreme Court ruled in Goldfarb v. Virginia State Bar that an organization is subject to antitrust scrutiny regardless of whether it is nonprofit or has noncommercial goals.

In NCAA v. Board of Regents of the University of Oklahoma, the Supreme Court confirmed that the NCAA is subject to antitrust scrutiny, and ruled that courts should use a "Rule of Reason" analysis when determining whether NCAA rules violate the Sherman Act. The Rule of Reason analysis was first introduced by the Supreme Court in Chicago Board of Trade v. United States, and was further defined by the Court in National Society of Professional Engineers v. United States. Under Rule of Reason analysis, a court must look to the "market impact" of the challenged restraint.

---

52. 468 U.S. 85, 104 (1984). See also McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983). Courts use either a "per se" or "rule of reason" approach when determining Section 1 liability. The per se rule labels certain restraints of trade as inherently illegal without further inquiry. The per se approach is applied, for example, to price fixing, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); and group boycotts, see Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).
53. 246 U.S. 231 (1918). In this opinion, the Court stated: The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant factors. Id. at 238.
55. Id. at 690, 692.
players must satisfy two requirements.\textsuperscript{56} First, players must prove that the thirty-day rule has anticompetitive effects on a discernible market.\textsuperscript{57} Second, players must demonstrate that the thirty-day rule is not a "justifiable means of fostering competition among amateur athletic teams and therefore [is not] procompetitive on the whole."\textsuperscript{58}

1. First Prong of Rule of Reason Analysis

The NCAA's thirty-day rule has an anticompetitive effect on the market for college basketball players.\textsuperscript{39} In this market, NCAA-affiliated universities are purchasers of labor. Basketball players, as the suppliers of labor, agree to compete in basketball games in exchange for tuition, room, board, and other benefits.\textsuperscript{60} Absent the thirty-day rule, universities also could offer players the opportunity to return to school more than thirty-days after the draft as part of the player's compensation. However, because the NCAA prohibits member institutions from allowing players to return to school more than thirty days after the draft, it has categorically ruled out a term of employment that players would find advantageous.\textsuperscript{61} Many courts have considered an agreement among employers to control a material term of employment as anticompetitive in the labor market at issue.\textsuperscript{62}

The NCAA has argued against categorizing rules restraining its players as terms of employment, arguing that "there is no price competition

\textsuperscript{56} A player must establish standing to sue the NCAA as a threshold issue. A player challenging the thirty-day rule can establish standing in two ways. First, he could show that he was harmed by the anticompetitive nature of the rule. Banks v. NCAA, 977 F.2d 1081, 1097 (7th Cir. 1992)(Flaum, J., concurring in part and dissenting in part)("Banks II") (citing Cargill, Inc. v. Monford of Colorado, Inc., 479 U.S. 104, 109-110 (1986)). Here, a player must show that he was either precluded from returning to college because of the thirty-day rule or at a disadvantage in contract negotiations because the thirty days had expired. See Banks II, 977 F.2d at 1097 (Flaum, J., concurring in part and dissenting in part).

As an alternative, a player can seek injunctive relief by showing "a threatened loss or injury cognizable in equity ... proximately resulting from the alleged antitrust violations." City of Rohnert Park v. Harris, 601 F.2d 1040, 1044 (7th Cir. 1979), cert. denied, 445 U.S. 961 (1980). Here, a player must show that he is considering entering the NBA draft, that he probably would be drafted, and that he may be forced to stay in school instead of declaring eligibility for the draft because of the potential adverse consequences of the rule. See NCAA v. Board of Regents, 468 U.S. 85, 104 (1984).

\textsuperscript{57} See id. at 117.

\textsuperscript{59} See Banks II, 977 F.2d at 1095 (Flaum, J., concurring in part and dissenting in part).

\textsuperscript{60} See id.

\textsuperscript{61} See id.

... for players because the 'price' is determined by the school's tuition, room, and board, not by the supply of and demand for players. The NCAA is misguided in its assertion, however. If the price a school paid for a player consisted solely of the value of the tuition, room, and board, high-priced private schools would dominate intercollegiate sports. High-priced private schools do not dominate intercollegiate sports, however, as evidenced by recent national championships by UCLA in basketball and the University of Nebraska in football. Therefore, the "price" that lures top players to attend a university does not consist solely of tuition, room, and board. The compensation that players evaluate in deciding which school to attend includes, among other things: (1) the school's or coach's reputation for sending players to the NBA or other professional leagues, (2) the school's or coach's commitment to academics, (3) the school's ability to find the student-athlete a high-paying job during the summer, and (4) the condition of the school's training facilities. Absent the thirty-day rule, the amount that schools offer players could also include allowing them to enter the NBA draft and return to school at any time, as this term would attract more quality players. Because the NCAA does not allow its members to offer this type of compensation to student-athletes, it is reducing the means by which member institutions can compete with other institutions in attracting basketball players; as a result, the thirty-day rule is anticompetitive.

63. Banks II, 977 F.2d at 1096 (Flaum, J., concurring in part and dissenting in part).
64. Id. at 1096.
65. On April 3, 1995, UCLA defeated Arkansas, 89 to 78, for its eleventh national championship but first in twenty years. J.A. Adande, Bruins Play Like Wizard's to Take Title 20 Years Later, UCLA Is the Champion Again, WASH. POST, Apr. 4, 1995, at C1.
66. On January 1, 1995, Nebraska wrapped up its first national championship under coach Tom Osborne with a 24 to 17 victory over Miami in the Orange Bowl, capping an undefeated season. Andrew Bagnato, HEARTBREAK. FRUSTRATION. THAT BEST DESCRIBES NEBRASKA'S PAST ORANGE BOWL EXPERIENCES. NO MORE. NOW IT'S . . . FIRST IN THE LAND, CHI. TRIB., Jan. 2, 1995, at 5.
67. See Banks II, 977 F.2d at 1096 (Flaum, J., concurring in part and dissenting in part).
68. See id. Although the NCAA was not originally organized to maximize the profits of its member institutions, the process of a trade or professional association evolving into an entity designed to reduce competition and therefore raise profits is not uncommon. Economists call this behavior the "by-product theory of cartel organization" because industries begin to cartelize as a by-product of their efforts to solve an industrywide problem. The NCAA, after forming to combat football violence and injuries, realized that athletic profits could be maximized by the cartelization of intercollegiate athletics. One of the most effective ways to cut costs was to decrease competition for athletes among universities; hence, out of NCAA efforts to reduce costs came restrictions on the enticements that an athlete could be offered. PAUL R. LAWRENCE, UNSPORTSMAKLIKE CONDUCT 39-40 (1987).
2. Second Prong of Rule of Reason Analysis

In their quest to satisfy the second element of the Rule of Reason test, players must demonstrate that anticompetitive aspects of the thirty-day rule outweigh any procompetitive aspects that the NCAA cites in support of the rule.\(^69\) In support of its restraints on student-athletes, the NCAA has argued that its rules are procompetitive because they: (1) preserve amateurism in college sports,\(^70\) (2) permit the marketing of college sports as a product distinct from the product of professional sports,\(^71\) and (3) prevent the professionalization of college sports at the expense of educational values.\(^72\) When looking at the reality of big-time college sports instead of the NCAA’s rhetoric, however, one can see that the NCAA’s arguments are fundamentally flawed.

First, the NCAA has long abandoned the ideals of amateurism.\(^73\) Many players attend college strictly to train for a professional sports career, and view games as showcases for professional scouts and not as a means to receiving an education.\(^74\) The revenues of Division I-A sports programs has been estimated at one billion dollars per year,\(^75\) and individual football programs have posted profits in excess of two million dollars.\(^76\) For the NCAA to extol the virtues of amateurism while at the same time profiting from the players they seek to limit is pure hypocrisy.\(^77\)

---


\(^70\) Banks v. NCAA, 746 F. Supp. 850, 860 (N.D. Ind. 1990)(“Banks I”).

\(^71\) See Board of Regents, 468 U.S. at 101-02; McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); Banks I, 746 F. Supp. at 861; United States v. Walters, 711 F. Supp. 1435, 1442 (N.D. Ill. 1989).

\(^72\) See Board of Regents, 468 U.S. at 123, 133 (White, J., dissenting); McCormack, 845 F.2d at 1344 (5th Cir. 1988); Banks I, 746 F. Supp. at 861; Walters, 711 F. Supp. at 1442 (N.D. Ill. 1989).

\(^73\) The definition of the word “amateur” is somewhat elusive. In the 1870s, the British Amateur Rowing Association declared that no person is an amateur “who is or ever has been by trade or employment for wages a mechanic, artisan, or labourer or engaged in any menial duty.” Amateurism has almost always been defined not in terms of what it is but in terms of what it is not, and therefore there probably never has been a successful, workable definition of the term. Ronald A. Smith, Sports and Freedom 166-67 (1988).


\(^75\) Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992)(“Banks II”)(citing National Collegiate Athletic Association, Revenues and Expenses of Intercollegiate Athletic Programs 15 (1990).

\(^76\) Id. (citing D. Devenzio, Rip Off U: The Annual Theft and Exploitation of Major College Revenue-Producing Athletes 106-08 (1985)).

\(^77\) Allan Sack has hypothesized that the NCAA’s hypocrisy is particularly evident to black athletes and athletes from lower socioeconomic backgrounds. Regarding poor athletes, Sack notes:
The NCAA is not even able to argue that amateurism is a time-honored tradition of university athletics. As far back as 1852, corporations were compensating the winners of intercollegiate athletic events. The first ever college football game featured four players whose academic eligibility was in question, and seven members of the University of Michigan football team of the 1890s had “absolutely no connection with the university.” In light of these early abuses, one might assume that the NCAA was formed to instill amateurism in intercollegiate sports. However, this is not the case. The NCAA was established in 1906 to combat violence in college football.}

Many athletes find it difficult to understand why universities, television networks, coaches, and many other people can make millions from college sport while athletes themselves are routinely sanctioned for rule infractions like selling game tickets for expense money. But it is poor and working-class athletes who are most likely to feel the direct economic impact of NCAA policies. An athletic scholarship covers room, board, tuition, and fees. It does not cover travel to and from school and other expenses incurred by the average college student. Athletes from less affluent backgrounds may view amateurism as a luxury they simply cannot afford.

Regarding black athletes, Sack states:

Over 30% of all black Americans live in poverty, and blacks have median incomes that are only half those of whites. For many black Americans, sport is viewed as one of the few avenues open for achieving financial success. Under these circumstances, it may be unrealistic to expect blacks to embrace a nineteenth-century aristocratic ideology that implies there is something morally suspect about accepting money for sport participation.


78. Montreal Railroad Company sponsored the first intercollegiate competition in the United States, a crew race between Harvard and Yale. The company paid the expenses of both teams and the winner received an expensive set of black walnut oars. In addition, college track athletes routinely received cash prizes, and winners of rowing competitions received cash prizes and silver goblets valued at twice what an average laborer might earn in a year. Christopher L. Chin, Note, Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete, 26 Loy. L.A. L. Rev. 1213, 1235 (1993). For a discussion of the commercialization of college crew in the 1800s, see SMITH supra note 73, at 26-51.

79. Chin, supra note 78, at 1235-36.

80. In 1892, Lorin F. Deland, who never actually played football but who had studied military strategy, introduced football’s most dangerous technique: the flying wedge. In this maneuver, seven players would lock arms to form a V formation with the ball-carrier shielded on the inside. These players would then get a 20-yard running start before blocking defenders out of the way. A radical departure from football’s habit of following English rugby, which prohibited blocking, the flying wedge caused game injuries to increase dramatically. LAWRENCE supra note 68, at 4-5. In 1905, 18 deaths and 149 serious injuries resulted from football-related activities. Frank W. Carsonie, Comment, Educational Values: A Necessity for Reform of Big-Time Intercollegiate Athletics, 20 Cap. U. L. Rev. 661, 666-67 (1991). Sixty-two schools formed the Intercollegiate Athletic Association of the United States in 1906, which changed its name to the National Collegiate Athletic Association (NCAA) in 1910. Id. at 667.
Second, the thirty-day rule does not advance the NCAA’s goal to offer a product that is distinct from professional sports teams. The appeal of NCAA athletics is derived from its association with individual schools and not from its reputation of amateurism. Alumni of schools support their teams because of a bond that they feel with the university and not because the players are not paid. Others support intercollegiate athletics because of the rule differences between college and pro teams, parity among teams, and the college atmosphere. If people supported sports teams based on ideals of amateurism, high school sports would enjoy the greatest amount of popularity because these players receive no compensation. If college teams were supported based on their amateur ideals, support of college athletics would have declined with the multitude of NCAA rules violations that have occurred in recent decades. Because support of college athletics has soared despite its re-

81. Our fascination with the Olympic ideal — that sports should be performed by amateur athletes strictly for the sheer love of sport — is misled. The Olympics, which started around 800 B.C., ended in 343 A.D., and resumed in 1892, had nothing to do with amateurism. Ancient Olympic champions were rewarded with prizes of astonishing value such as horses, oxen, vases of precious olive oil, pensions, and tripods. According to Olympic scholar Andrew Strenk: “The value of some awards would be in the hundreds of thousands of dollars today.” Rick Telander, The Hundred Yard Lie 49 (1989).

The concept of amateurism came not from the Olympics but from Victorian England, where “those who had the time and money to engage in friendly matches of tennis, croquet, archery, badminton, rowing, and the like certainly didn’t want the yammering lower classes participating with them and sullying the grandeur of their lawns, lakes, clubs, and universities.” Thus, the line between amateur and professional did not come into existence to delineate Olympic ideals, but rather, as stated by philosopher Paul Weiss, “the line between amateur and professional is mainly a line between the unpaid members of the privileged class and the paid members of an underprivileged class.” Id. at 50.

82. Commenting on the lack of correlation between amateurism and the attractiveness of intercollegiate athletics, Paul Lawrence notes:

Once, back at the turn of the century, professional athletes may have been so flagrantly unscrupulous and so, well, proletarian that those who played sports for the pure enjoyment of it needed recognition as a separate group or class. But this distinction, if it ever existed, has long since disappeared. What, after all, really separates a professional from a grand-in-aid athlete at a school with a major sports program? Both practice long hours, both receive compensation for their athletic skills, and both participate in multimillion dollar industries. The demarcation line blurs even more when NCAA rules allow a student-athlete to turn pro in one sport but remain an amateur in another. Thus, any difference between a student-athlete in a big-time sports program and a professional athlete lies only in the amount of their compensation, not in any special quality the amateur enjoys and the professional lacks.

Lawrence, supra note 68, at 145.

83. From October 1952 to October 1983, the NCAA infractions committee considered 1,334 cases, 272 of which resulted in public reprimand, probation, or censure. Private reprimands were issued in an additional 573 cases in which there were minor violations insufficient to warrant public reprimand. Wilford S. Bailey & Taylor D. Littleton, Athletics and
recent scandals, one can only conclude that amateurism is not the element of college sports that makes it attractive to the consumer.

Third, the NCAA has demonstrated that it has already sacrificed educational goals for athletic success. Therefore, its argument that the professionalism of college sports will compromise educational values flies in the face of its past actions. Schools place tremendous pressure on coaches to win, causing them to offer scholarships based on athletic and not academic abilities. The sacrifice of educational goals by universities is evidenced by several factors. First, the NCAA has rejected rules prohibiting freshman eligibility, making the academic transition from high school to college more difficult for entering athletes because of the time requirements of participating in a sport. Second, the

---

84. The hours that an athlete spends in promoting his team's success as opposed to the hours that he or she spends in the classroom are astounding. The NCAA's estimate, that "football and basketball players spend approximately 30 hours per week in their sports when they are in season—more time than they spend preparing for and attending class combined," has been criticized as being too low. Most others report that basketball and football players spend 50 to 60 hours per week on their respective sports. See Murray Sperber, College Sports Inc. 302-03 (1990).

85. The public's perception of the sacrifice of educational integrity for athletic achievement in big-time college athletics is evidenced by this well-worn joke in Stillwater, home of Oklahoma State University:

How many Oklahoma University football players does it take to screw in a light bulb? Only one, but he gets 3 hours of credit for it.


86. Goldman, supra note 74, at 241.

87. During World Wars I and II and for one year of the Korean War, the NCAA allowed freshman to compete in intercollegiate athletics to allow schools to complete their sports schedules free from interruption in revenue. After the Korean conflict and until 1968, freshmen were barred from competition. However, the number of athletes that each school supported increased by 1967, forcing scholarships for noncompeting freshmen to become a financial burden on schools. Universities concluded that if student-athletes were allowed to compete for four years instead of three, they could award fewer scholarships, but gain the same number of student-athlete years of participation. In 1968, universities voted to allow athletes in all sports but football and basketball to compete as freshman. In 1972, the NCAA expanded freshman eligibility to football and basketball. Lawrence, supra note 68, at 110-11.

A study of the issue of freshman eligibility in Division I men's basketball was proposed at the 1990 NCAA contention. This proposal was made by the Special Committee on Basketball Issues after a poll indicated that coaches heavily favored making freshmen ineligible. The committee thought that freshman ineligibility would emphasize the basketball community's commitment to educating student-athletes and provide players a better chance to adjust socially, culturally, and athletically to the college atmosphere. The committee thought that a study of the issue by the NCAA presidents commission and council would lead to legislation for consideration at the 1991 NCAA convention. However, only one day after the debate of
NCAA has prolonged football and basketball seasons, forcing athletes to spend more time playing in revenue-producing games and less time on academics. Third, coach's salaries ordinarily exceed professor's salaries, indicating that athletics are more important than academics. Fourth, successful coaches are ordinarily retained regardless of the academic performance of team members, indicating that success on the court is more important than success in the classroom. Fifth, many games start late to accommodate television and not the best interests of the players' academic performance. Finally, the NCAA has abandoned four-year scholarships for one-year renewable scholarships, allowing schools to not renew scholarships of players who are not performing acceptably in their particular sport.

The existence of other NCAA bylaws that are inconsistent with the thirty-day rule shows that the NCAA does not view these rules as indispensable. For example, the NCAA allows players that have been drafted by both Major League Baseball and the National Hockey League to retain their eligibility indefinitely while negotiating with the

the issue by members of the presidents commission, Division I members voted not to authorize the proposed study. Bailey & Littleton, supra note 83, at 122.

88. Goldman, supra note 74, at 241.

89. The average salary of a professor at a four-year institution is $50,420; the average salary of the top 75 NCAA Division I basketball coaches is $195,467 in total income. Francis X. Dealy, Jr., Win at Any Cost 165 (1990). The head football coach and men's basketball coach at Ohio State each earn about $400,000 a year. The average salary of a full professor at Ohio State, on the other hand, is $57,900 a year. Sperber, supra note 84, at 151. In justification of offering then football coach Jackie Sherrill $267,000 a year, the Texas A & M chairman of the board of trustees stated: "Higher education is a business, and I think Sherrill's contract is part of that process." Allen Guttman, The Anomaly of Intercollegiate Athletics, in Rethinking College Athletics, 17, 21 (Judith Andre & David N. James eds., 1991).

90. A refreshing exception to this rule was presented by Paul G. Pearson, president of Miami (Ohio) University, in defending his school's 0-7 football record. When asked if the head football coach's job was in jeopardy, Pearson responded: "The difference here, sir, is that even though people are upset about losing — I'm upset about losing — we don't fire coaches because they lose. Our coaches know that so long as they do the best they can with the talent they have, that they have a clean program and that their young men and women learn to study and be students, they are O.K. We like winning. But a win without integrity is not a win." Telander, supra note 81, at 56-57.

91. Goldman, supra note 74, at 241.

92. See Chin, supra note 78, at 1237. In 1973, the NCAA abandoned four-year scholarships for one-year renewable scholarships under pressure from coaches who wanted the ability to "fire" players for poor athletic performances. Sperber, supra note 84, at 7. This action has been characterized as "the most blatant example of college sport's disregard for the scholarship athlete's education." Davis Meggsey, Still Out of Their League, in The Rules of the Game 113, 121 (Richard E. Lapchick & John Brooks Slaughter eds., 1989).
respective professional leagues. This policy toward baseball and hockey players directly contradicts the policy of only allowing college basketball players a thirty-day window to negotiate with the NBA.

Even if the NCAA could show that it had an interest in preserving amateurism, providing a distinct product, or avoiding professionalism at the expense of educational values, the NCAA still cannot show that the thirty-day rule is designed to achieve these ends. Amateurism is protected by NCAA bylaws that prohibit athletes from being paid. As a result, the thirty-day rule is only an unnecessary restraint on college athletes.

After the NCAA’s argument that its rules are designed to promote amateurism has been refuted, it is obvious that the main purpose of the thirty-day limitation presented by bylaw 12.2.4.2.1 is to promote the NCAA’s financial empire by keeping star basketball players in school,

---


94. The NCAA rules are even harsher towards college football players. Under NCAA bylaw 12.2.4.2:

An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though:

(a) The individual asks that his or her name be withdrawn from the draft list prior to the actual draft;

(b) The individual’s name remains on the list but he or she is not drafted, or

(c) The individual is drafted but does not sign an agreement with any professional athletics team.


College basketball players are not governed by bylaw 12.2.4.2 because bylaw 12.2.4.2.1, which established the thirty-day rule, is an exception to 12.2.4.2. College baseball and hockey players do not lose their eligibility when drafted because Major League Baseball and National Hockey League rules provide that a player does not need to be placed on a draft list prior to being drafted, and therefore bylaw 12.2.4.2 is circumvented.

95. Under NCAA bylaw 12.1.1:

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

(a) Uses his or her athletic skill (directly or indirectly) for pay in any form in that sport;

(b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;

(c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;

(d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletic skill or participation, except as permitted by NCAA rules and regulations.

Reprinted in NCAA Manual, supra note 12, at 70. The forms of “pay” prohibited by bylaw 12.1.1 are enumerated in NCAA bylaw 12.1.2. Id. at 70-71.
and therefore, keeping the fans interest in college basketball at a high level. The difference between the draft rules in basketball as compared to the draft rules in baseball and hockey can be attributed to the revenues that the respective sports bring to the NCAA. Basketball, along with football, is one of its two cash cows, while baseball and hockey are traditionally non-revenue sports.\textsuperscript{96} The courts should see through the NCAA's rhetoric, strike down the NCAA's thirty-day rule, and allow college basketball players to make career decisions in the same manner as students who pursue non-athletic professions.

V. Conclusion

It's a [rule] that will allow college players to use the free enterprise system in the same way that the system has always used them, to capitalize on the entertainment value skilled athletes have in this sports-crazy society. It's a rule that will put athletes on a par with the computer-science whizzes, music students, drama majors and other collegians who can weigh pro careers without losing their scholarships or eligibility for student activities. It's a rule that can get some of those sham students who are simply using their schools as sports training camps out into the real world where they belong.\textsuperscript{97}

The NCAA's thirty-day rule is a positive step toward alleviating the restraints that the NCAA places on college basketball players. Now players are at least able to test the NBA waters in determining whether a step to the next level is a correct decision without immediately losing their NCAA eligibility. However, the thirty-day time period does not give players a sufficient time period to negotiate a contract, and the NCAA's interests in promoting amateurism and academics are not furthered by terminating a college basketball player's eligibility thirty days after being drafted. Hopefully, the NCAA will open its eyes to the interests of the athletes and allow college basketball players to negotiate with the NBA for an indefinite period of time. If the NCAA decides to protect its own pocketbook instead of the interests of the players, the courts should realize that the NCAA's cries in support of promoting amateurism are pure rhetoric, and should strike down the thirty-day rule on anti-


\textsuperscript{97} Rick Telander, Relaxing the Ties that Bind: At Last, Collegians May Be Able to Test the Waters, SPORTS ILLUSTRATED, Nov. 12, 1990, at 94.
trust grounds. Only then will athletes and non-athletes operate on a level playing field when making career decisions.

JOHN P. GILLARD, JR.