Heading Down the Wrong Road?: Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA

Benjamin A. Menzel

Follow this and additional works at: http://scholarship.law.marquette.edu/sportslaw

Part of the Entertainment and Sports Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/sportslaw/vol12/iss2/9

This Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
COMMENTS

HEADING DOWN THE WRONG ROAD?:
WHY DEREGRULATING AMATEURISM
MAY CAUSE FUTURE LEGAL
PROBLEMS FOR THE NCAA

The National Collegiate Athletic Association (NCAA), organized in 1905 to protect the safety of football players, has enjoyed outstanding achievement and development throughout the twentieth century. With this success has come a multitude of rules designed to protect the "amateur" nature of collegiate athletics. However, in January 2001, NCAA Division II passed a proposal that drastically changed the association's longtime stance on what it meant to be an "amateur" athlete. As opposed to the NCAA's long established view that an amateur athlete was one who has never received payment for participation in a sport, under NCAA Division II's new Bylaws, this is no longer the case.

For the first time in its history, the NCAA will allow former professional athletes to participate in intercollegiate sports. While unlikely to ever occur, under Division II's new Bylaws, players like Kobe Bryant or Tracy McGrady, who entered the professional ranks directly from high school, could play professional basketball for up to three years, yet attend college and have at least one year of intercollegiate eligibility remaining. While the NCAA cites several reasons for the change that may have good intentions behind it, one must ask if the change may have some later, unintended consequences.

This article discusses the possible legal impact these measures may have on the NCAA. Section One will address the radical move that Division II initiated, which was passed with overwhelming support at its 2001 Convention. Section Two discusses the amateurism deregulation proposals

3. According to the 2000-01 NCAA Division I Manual, any person who receives pay for athletic performance, signs a contract to play a professional sport, or signs a contract with an agent, among other things, loses his amateur status. NCAA DIVISION I MANUAL, supra note 2, § 12.1.1.
that Division I is considering and notes the key differences between these proposals and the Bylaws passed by Division II. Section Three will include outlines of two legal concepts—the law of private associations and antitrust law—and will discuss how courts have historically applied each to challenges of NCAA regulations promoting amateurism. Section Four will apply both the law of private associations and antitrust law to Division I’s amateurism deregulation proposals to show what potential impact these proposals may have on the NCAA. Included within Section Four will be an antitrust analysis of the proposed regulations for Division I as compared to the regulations passed by Division II. Finally, in Section Five this article concludes by recommending that Division I should either not change its Bylaws, or enact a proposal similar to Division II so future legal problems are avoided.

I. THE MOVE TO DEREGULATE AMATEURISM: WHY DIVISION II CHANGED AMERICA’S PERCEPTION OF AMATEURISM IN COLLEGE ATHLETICS

A. The Changing Face of Amateurism

The idea of amateurism began in England and was originally a way to distinguish participants in sports among social classes. This definition carried on to the United States as the nation developed and was first synonymous with the “elite establishment,” a meaning that carried through the Civil War. Therefore, an athlete’s status was determined by his personal wealth and social class—athletes who were members of the “leisure class” were considered amateurs whereas those of the “working class” were thought of as professionals.

However, since that time, America’s perception of amateurism has been altered. Today, the concept of amateurism in America is directly linked with money; if you are paid to participate in athletics, you are considered a professional. Only those who participate for “free” maintain their amateur status. Division I’s current definition for amateurism is found in the NCAA Division I Manual, which states:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student

5. Id. (quoting Letter from Bobby Dodd, President, Amateur Athletic Union).
6. Id.
participation in intercollegiate athletics is an avocation and student-athletes should be protected from exploitation by professional and commercial enterprises.\textsuperscript{8}

B. Division II's Historic Decision

By enacting a series of changes to its Bylaws, NCAA Division II (Division II) defined amateurism in a way much different than that which had been used for many years. The changes made at the Division II level will allow prospective student-athletes (PSAs)\textsuperscript{9} to accept prize money, as well as sign and play professionally before entering college, yet still be able to compete in intercollegiate athletics.\textsuperscript{10} The Bylaws, which were passed by a vote of 217-29 (with two abstaining votes),\textsuperscript{11} moved away from the NCAA's prior focus on money in determining an athlete's amateur status\textsuperscript{12} and moved towards rules focusing on the "[w]elfare of the [p]rospective [s]tudent-[a]thlete" and "[c]ompetitive [e]quity."\textsuperscript{13} In justifying the change, Division II believed that since a PSA does not receive a competitive advantage by being drafted, accepting prize money based on finish, or signing a professional

---

\textsuperscript{8} NCAA DIVISION I MANUAL, supra note 2, § 2.9.

\textsuperscript{9} For purposes of this paper, "PSA" is defined as a prospective student-athlete who is not yet enrolled in college. This paper focuses on the proposed regulations for pre-enrollment and will not discuss any proposed changes for post-enrollment regulations.

\textsuperscript{10} Steve Wieberg, Div. II Opens Its Doors to Ex-pros; D-I Not Ready, USA TODAY, Jan. 9, 2001, at SC.


Division II's former Bylaws state that an athlete will lose amateur status if he:

(a) Uses his . . . athletics 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 on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team and knows (or had reason to know) that the team is a professional athletics team . . . , even if no pay or remuneration for expenses was received; or (f) Enters into a professional draft or an agreement with an agent.


contract, rules dealing with these types of situations should be "liberalized." A final justification for its move was that by changing its Bylaws, the NCAA would be able to treat foreign and domestic participants equally.

C. Division II's Plan

Under Division II's new Bylaws, after graduating from high school a PSA can play professionally, sign a professional contract, and even accept prize money from competition. However, for each year that the PSA participates professionally or accepts prize money, one year of college eligibility is lost. In addition, if and when the PSA decides to enter college, he must sit out the first year while attending classes in order to become eligible for intercollegiate participation. Therefore, a PSA has a three-year window to play professionally and still retain eligibility. The new Bylaws state that this window begins when, at the PSA's "first opportunity" to enroll in college after graduating from high school, the PSA participates in "organized competition." If a PSA chose to play professionally for three years, the PSA would only have one year of eligibility remaining.

Division II believed that by enacting these Bylaws it, as well as the PSA, would be better off. The advantages achieved would be that: 1) the NCAA would "no longer have to determine if a PSA is a professional or amateur;" 2) "[the supported changes would allow a PSA to make a more informed decision in that the consequences for choosing to participate in organized competition after high school are stated clearly;" and 3) by causing the PSA to lose a year of eligibility for each year he participates professionally, and then requiring the student-athlete to sit out the first year of college enrollment, the PSA "is showing a clear and informed commitment to pursue academics." The latter of these advantages reiterates the connection between college athletics and education, which, as will be discussed later, is key to the NCAA's defense against antitrust suits.

---

14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id. Organized competition is defined the same as professional competition. The two will be used interchangeably throughout this article.
20. Id.
21. Id.
22. Id.
II. DIVISION I’S PROPOSALS—A MODIFIED APPROACH

A. The Proposals

Division I’s current definition for an amateur athlete is identical to Division II’s former definition. However, while the original Division I proposals were very similar to the newly enacted Bylaws of Division II, the NCAA Academics/Eligibility/Compliance (AEC) Cabinet amended the proposals because of concerns raised by members of Division I, such as athletic directors, coaches, and conference commissioners. Because of the amendments, a very different rule than that passed by Division II is now under consideration. While Division II will allow a PSA to participate in professional competition for up to three years after high school graduation, the amended Division I amateur deregulation proposals only allow a PSA to participate in organized athletics for one year or less. Nonetheless, Division I, similar to Division II, would still require the PSA to complete an “academic year in residence” before gaining eligibility. Other lesser changes include removing both men’s and women’s basketball from the proposals for two years and not allowing high school athletes to receive compensation for participation in a sport until after graduating from high school if their high school sponsors the sport. Other than these differences, Division I’s amended proposals closely mirror those overwhelmingly approved by


25. These concerns are addressed later in this article.


29. Id.

30. Id. See also Gary T. Brown, Councils Set Stage for Policy Changes in Each Division, NCAA News, Apr. 23, 2001, available at http://www.ncaa.org/news/2001/20010423/active/3809n01.html. The AEC Cabinet determined that the issues men’s and women’s basketball were faced with were unique and therefore required more time to “develop appropriate measures for that sport.” Id.

31. Id.
Division II.\(^{32}\)

B. The Purpose Behind the Proposals

Division I's reasoning behind its proposals is two-fold. First, the proposals are intended to reaffirm "the link between education and sport."\(^{33}\) By doing so, Division I seeks to "maintain a commitment to 'what is best for the prospective student-athlete,'"\(^{34}\) and allow itself to approach amateurism "without compromising [its] commitment to education."\(^{35}\) Division I feels that a PSA's goal should be to obtain a college education and that a PSA should stay on a path to do so.\(^ {36}\) Christine Grant, former chairperson of the Division I AEC Cabinet's Agents and Amateurism subcommittee, stated that an amateur athlete is one "who is pursuing an education as a first priority and who is participating in sport as an avocation."\(^ {37}\) She further explained that receiving money does not make a person a better athlete, but rather the "competitive experience you've had when you're not doing anything but sport."\(^ {38}\) However, under the proposals if the PSA strays from that path, then he suffers the consequence of losing at least some eligibility.\(^ {39}\) In addition, Division I attempts to open the doors of intercollegiate sports to others while still tackling competitive inequity, which the NCAA feels is the "true concern of amateurism."\(^ {40}\)

Second, Division I attempts to correct some of the difficulties caused by its current rules. Some of the internal problems that are trying to be resolved include the difficulty of investigating PSAs prior to enrollment, the difficulty of tracking the preenrollment activities of domestic PSAs, and even more so, foreign PSAs, and the fact that current NCAA rules penalize PSAs for actions

\(^{32}\) Division I's proposals also include certain exceptions for ice hockey and recruiting minor league baseball players. NCAA DIVISION I PROPOSALS, \textit{supra} note 4, at 6, 10. Ice hockey players would be permitted to play on USA Hockey or Canadian Hockey Association teams, excluding Major Junior A teams for up to two years after high school without losing any eligibility. \textit{Id.} at 6. College baseball coaches would not be allowed to recruit a PSA who is playing minor league baseball unless that PSA initiates the first contact. \textit{Id.} at 10.

\(^{33}\) \textit{Id.} at 2.

\(^{34}\) \textit{Id.} at 1.

\(^{35}\) \textit{Id.}

\(^{36}\) \textit{Id.}

\(^{37}\) See generally \textit{id.}


\(^{39}\) \textit{Id.}

\(^{40}\) NCAA DIVISION I PROPOSALS, \textit{supra} note 4, at 2-3.
that do not give them a competitive advantage.\footnote{41}

\section*{C. Fears of Division I Membership}

As stated above, the original proposals set out by Division I were nearly identical to those passed by Division II. However, at its annual conference, many Division I members, including athletic directors and conference commissioners, expressed concerns over the amateur deregulation proposals.\footnote{42} One concern was the creation of a third party relationship between players and coaches, which may result when a player's professional team decides that the player's best interest would be to play collegiately, then pay for that athlete's tuition, by allowing PSAs to "pay for play."\footnote{43} Another concern was that the proposals would force high school athletic associations to enact new regulations to protect high school athletes that the associations may not have the ability to enforce.\footnote{44} The Division I AEC Cabinet responded to these concerns by amending the amateur deregulation proposals to include the provisions mentioned above.

While the NCAA may very well have good intentions with its proposals, by changing its definition of "amateurism," there may be some risks involved. This paper now changes its focus to what the consequences may be should Division I pass their amateurism deregulation proposals.

\section*{III. Two Legal Theories for the NCAA to Be Concerned With}

Over the past decade, with more and more universities and colleges recruiting foreign athletes, the NCAA has run into problems determining athletes' eligibility.\footnote{45} Because some athletes are recruited overseas and

\footnote{41} Id. at 4. See also Fred Delcomyn, \textit{Guest Editorial—Let's Give Amateurism Deregulation a Chance}, NCAA NEWS, Feb. 26, 2001 (noting that deregulating amateurism will help simplify NCAA rules), available at \url{http://www.ncaa.org/new/2001/20010226/comment.html}; David Goldfield, \textit{Comment—Proposals Alleviate Hypocrisy in Athletics}, NCAA NEWS, Mar. 26, 2001, available at \url{http://www.ncaa.org/news/2001/20010326/comment.html}. Goldfield is in favor of deregulation because of the opportunities that PSAs can benefit from if they are allowed to try their hand in professional sports. He states that "[t]he chance to fail is one of the greatest gifts we can give to youngsters because imbedded in that is also the chance that they might succeed." \textit{Id.}

\footnote{42} Brown, \textit{supra} note 26, available at \url{http://www.ncaa.org/news/2001/20010115/active/3802n03.html}.

\footnote{43} \textit{Id.}


\footnote{45} \textit{NCAA Division II Overview}, \textit{supra} note 12, available at \url{http://www.ncaa.org/agents_amateurism/amateurism/2/overview.html}. \textit{See also NCAA DIVISION I PROPOSALS, \textit{supra} note 4, at 4}. 


receive money from teams who do not consider it payment for participation, the NCAA often has difficulty determining the eligibility of foreign PSAs.\textsuperscript{46} This has led to many legal battles, all of which have been won by the NCAA. However, in 2001, the NCAA had its closest call, nearly losing an important legal battle over the eligibility of a foreign athlete.

Muhammed Lasege was a 6-foot 11-inch center from Nigeria who signed a letter-of-intent with the University of Louisville. Before coming to the United States, however, Lasege participated on what the NCAA considered to be a professional team, where he received a minimal amount of compensation.\textsuperscript{47} The NCAA alleged that he not only signed a professional contract, but also was represented by an agent, and for that reason determined that Lasege was ineligible.\textsuperscript{48} Lasege brought a lawsuit against the NCAA alleging "arbitrary" decision making by the NCAA.\textsuperscript{49} A Kentucky Circuit Court held in favor of Lasege and granted an injunction permitting him to play.\textsuperscript{50} The Kentucky Court of Appeals affirmed the decision, noting that there have been similar instances where the NCAA reinstated an athlete's eligibility.\textsuperscript{51} Nonetheless, a highly divided Kentucky Supreme Court reversed, and upheld the NCAA's determination.\textsuperscript{52}

Lasege is a classic example of the type of difficult situation the NCAA is faced with when determining a PSAs initial eligibility. The NCAA itself admits that its amateurism Bylaws are currently inconsistent\textsuperscript{53} and has had difficulty determining the eligibility of PSAs.\textsuperscript{54} It uses these inconsistencies and difficulties as reasons for its amateurism deregulation proposals.\textsuperscript{55}

\textsuperscript{46} Id.

\textsuperscript{47} Christine Vasconez, Player's Twisting Journey Ends in Court, DAYTON DAILY NEWS, Mar. 15, 2001, at 6A.

\textsuperscript{48} Id.


\textsuperscript{50} Lasege, No. 2001-CA-000048-I, slip op. at 1.

\textsuperscript{51} Id. at 2-3.

\textsuperscript{52} Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77, 89 (Ky. 2001).

\textsuperscript{53} NCAA DIVISION I PROPOSALS, supra note 4, at 4. See also Alexander Wolff, Scorecard: Hit the Road, Jacques, SPORTS ILLUSTRATED, Sept. 10, 2001, at 29. In his article, Wolff notes that the NCAA's inconsistency has only gotten worse. He uses Duke University's Carlos Boozer as an example, who, along with other members of Team USA's World Championship for Young Men team, collected $5000.00. Conversely, the NCAA has denied eligibility to foreign athletes who "received compensation from club teams back home," or suspended those foreign athletes who play with professionals. Id.

\textsuperscript{54} NCAA DIVISION I PROPOSALS, supra note 4, at 4.

\textsuperscript{55} Id.
Although men's basketball is not currently included in Division I's amateur deregulation proposals, if it were, the fact that Lasege signed a contract, as long as an agent was never involved, would not have mattered. He would have been eligible to participate in Division I athletics under the proposals.

In this section, this article discusses two legal theories—the law of private associations and antitrust law—through which lawsuits have been and could potentially be brought against the NCAA's amateurism eligibility proposals. Included in this discussion will be an analysis of important court holdings in cases involving each theory. Finally, this section will conclude with the introduction of a hypothetical, which will be used to show the impact the amateur deregulation proposals may have.

A. The Law of Private Associations

The United States Supreme Court has held that the NCAA is not a state actor. Therefore, the NCAA, made up of over 1000 members, is a private association. As such, judicial review of its decisions comes under only very limited circumstances. Generally speaking, courts will only overturn the decisions of a private association if it is proven that such decisions are made arbitrarily and capriciously or are procedurally unfair.

The NCAA has not been immune to such cases. For example, in Lasege, mentioned above, Muhammed Lasege sought an injunction against the NCAA barring him from playing at the University of Louisville. Lasege alleged three things: 1) that the NCAA's denial of his eligibility was arbitrary because it was inconsistent with other situations where student-athletes "had their eligibility restored after signing professional contracts and receiving benefits under those contracts," 2) "that the 'sports agency contract' did not actually

60. Brinkworth, 680 So. 2d at 1083. Here, a University of Miami student-athlete alleged that the NCAA acted "arbitrarily and unfairly" when it denied his application for a sixth year of eligibility. Id. The trial court granted Brinkworth an injunction that allowed him to play. Id. However, on appeal, the Florida Court of Appeals reversed and held that it did not have the authority to review the NCAA's decision, stating: "It is up to the NCAA to interpret its own rules, not the judiciary." Id. at 1084.
create an agency relationship,” 62 and 3) that if an injunction was denied, Lasege would face “serious potential harm,” such as loss of scholarship, education, and opportunity, along with possible deportation. 63

After noting that Lasege did not have a constitutional right to play intercollegiate athletics, the Kentucky Court of Appeals stated that he had the right to be treated fairly and have his “eligibility determined in a matter consistent with other individuals similarly situated.” 64 Based on these findings, the Court of Appeals agreed with the Circuit Court’s holding and denied the NCAA’s motion to have the injunction set aside. 65

However, on June 14, 2001, a divided Kentucky Supreme Court, by a 4-3 decision, reversed the appellate court’s holding. 66 The reasons given by the majority, along with the dissenting opinion’s stern language, show exactly how close the NCAA came to losing this case and being dealt a devastating blow.

The majority held “that the trial court abused its discretion by: (1) substituting its judgment for that of the NCAA on the question of Lasege’s intent to professionalize; [and] (2) finding that the NCAA has no interest in this case which weighs against injunctive relief. . . .” 67 Further, the court held that the appellate court erred by not reversing the trial court’s decision, even though doing so requires the trial court to have “made clearly erroneous findings unsupported by substantial evidence.” 68

While the majority’s decision was made purely on procedural grounds, in a very sternly written dissent, Chief Justice Johnstone strongly believed that the trial court had heard all arguments, and after weighing each side’s argument, came to a conclusion of law that was supported by the evidence. 69 He then stated: “I would agree that there has been a substitution of judgment in this case, but it has been the majority substituting its judgment for the trial judge.” 70

From this language, combined with the fact that the court was split 4-3, it can easily be seen that the NCAA was very fortunate to have won. The NCAA has, on the other hand, consistently won cases brought against it under

62. Id. at 3.
63. Id.
64. Id. at 2.
65. Id. at 3.
66. Lasege, 53 S.W.3d at 89.
67. Id. at 84.
68. Id
69. Id. at 90-91 (Johnstone, J. dissenting).
70. Id at 91 (Johnstone, J. dissenting).
antitrust law.

B. Antitrust Law

While the law of private associations has been used in some cases against the NCAA, antitrust law has emerged as the law of choice for parties seeking relief from NCAA actions. The remaining portion of this section discusses antitrust law and gives an overview of the cases brought against the NCAA under the Sherman Act.

1. The Sherman Act and its interpretation

In 1890, realizing that competitive markets were better for consumers, Congress passed the Sherman Act, designed with the intent to protect and further competition. At first glance, the Sherman Act broadly prohibits “[e]very contract, combination... or conspiracy, in restraint of trade or commerce among the several States....” However, realizing that there are many instances where contracts or combinations restrain trade, courts have developed the law into a two-pronged concept, using either a “per se” approach or the “rule of reason.”

Applying the Sherman Act first requires the plaintiff to establish that he has standing to bring such a claim. This can be done by showing an “antitrust injury” that is “direct.” In order to accomplish this, the plaintiff must first show that there was an agreement among parties to restrain trade. Next, the plaintiff must show that the restraint in question involves commercial activity, and that he has suffered economic harm because of the restraint. The plaintiff then must show that the alleged restraint is

71. Brown v. Pro Football, 50 F.3d 1041, 1044 (D.C. Cir. 1995) (stating that Congress’ intent in passing the Sherman Act was to promote competitiveness). This paper will limit itself to section one of the Sherman Act, which relates to restraints of trade.


74. Id. at 568-569.

75. Id. at 568 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)).


78. Goldman, supra note 1, at 215.

79. Carstensen & Olszowka, supra note 73, at 568.
There are two ways to determine whether a defendant's conduct unreasonably restrains trade. First, under the per se approach, a defendant's conduct will be found to violate the Sherman Act if it is "entirely void of redeeming competitive rationales." If the court decides the conduct in question falls under the per se approach, there is no need to look into any positive impact on the market or procompetitive effects. However, the Supreme Court has expressed reluctance to "impose a bright line per se rule." Instead, even if what are commonly thought of as per se violations exist, such as horizontal restraints and cartels, if those restraints are essential to the industry in order for the product to be available, courts will apply the rule of reason.

Under the rule of reason, there are three steps used to determine whether a restraint is unreasonable. First, the plaintiff must show that an anticompetitive effect exists. The plaintiff can establish this either directly by showing that the defendant had control over output or price, or indirectly "by proving that the defendant possessed the requisite market power within a defined market." If the indirect route is chosen, the plaintiff should define the market as narrowly as possible to ensure that the defendant has sufficient market power.

If the plaintiff successfully shows that an unreasonable restraint exists, the burden then shifts to the defendant, who must prove that the restraint in question actually provides a procompetitive effect. As long as the defendant

---

80. Id. See also Goldman, supra note 1, at 225.
81. Law, 134 F.3d at 1016.
82. Id. (quoting SCPC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995)).
83. Id.
86. Law, 134 F.3d at 1019.
87. Id.
88. Id.
89. Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 27 (1984). The courts have generally held that anything less than 30% market share is insufficient to show market power in a Sherman Act section 1 case. Id. at 26-27.
90. Law, 134 F.3d at 1019.
succeeds here, the burden shifts back to the plaintiff, who is required to show that a "less restrictive means" exists to accomplish the same economic effect, or that "the challenged conduct is not reasonably necessary to achieve the legitimate objectives. . . ." If both parties successfully meet their burdens of proof, the fact finder must then weigh each argument to determine the reasonableness of the "challenged behavior."  

2. Antitrust law applied to the NCAA

Although plaintiffs have had difficulty establishing that the NCAA’s player eligibility rules involve commercial activity, the NCAA is no stranger to antitrust litigation. Its history in this context began in 1974 when a company that assisted PSAs find athletic scholarships brought an antitrust suit alleging that the NCAA’s “no agent” rule violated sections one and two of the Sherman Act. Nonetheless, the court held that since the NCAA’s rule was designed “to promote amateurism in college sports as it relates to education on a national scale,” the antitrust rules did not apply because this was not a commercial activity.

Since 1974, the NCAA has faced various antitrust challenges to its rules, none more famous than the Supreme Court’s 1984 ruling in NCAA v. Board of Regents. The Court was forced to decide whether the NCAA’s limitation on the number of college football games that could be televised in a season violated the Sherman Act. The Court first held that although the NCAA was, in effect, a cartel, its horizontal price fixing structure was essential to its ability to provide intercollegiate athletics, and therefore, used the rule of reason. In its decision, the Court then indicated that the NCAA had two key defenses to an antitrust claim. First, the Court stated that the “preservation . . . of . . . amateurism” and “academic tradition” of college athletics were procompetitive effects. Secondly, the Court recognized that “maintaining a competitive balance among amateur athletic teams” was also a valid

91. Id.
92. Id.
95. Id. ¶ 65,266.
96. Id. ¶ 65,267.
98. Id. at 101-03.
99. Id. at 101.
procompetitive effect.\textsuperscript{100} It is important to note that while the Court made these findings in dicta, the NCAA has since used these procompetitive effects in defending antitrust cases brought against it. Nonetheless, the Court held that the NCAA’s restraint was indeed a violation of the Sherman Act since none of these defenses related to the limitation imposed upon the number of games to be televised.\textsuperscript{101}

While \textit{Board of Regents} is the most recognized challenge to the NCAA’s rules, the NCAA has been faced with other antitrust challenges relating to its rules on amateurism, winning each one.\textsuperscript{102} The first of these challenges arose in \textit{Jones v. NCAA},\textsuperscript{103} where a hockey player that played five years of Canadian “[A]mateur” Hockey sought an injunction allowing him to play collegiately after the NCAA deemed him to be ineligible since he received payments from the team.\textsuperscript{104} The court concluded that the Sherman Act did not apply to the NCAA since the plaintiff was not a competitor, and therefore, could not bring a claim.\textsuperscript{105} Nonetheless, the court still went through a Sherman Act section one and two analysis and concluded that such a claim would fail first because no group boycott existed, and second because the NCAA’s purpose was to promote amateurism and not to create a restraint from allowing students to participate in intercollegiate athletics.\textsuperscript{106}

Following \textit{Jones} is a wide array of cases, all of which come to the same general conclusion—courts will give a great deal of deference to the NCAA when the case involves the NCAA’s eligibility rules.\textsuperscript{107} For example, in \textit{Justice v. NCAA}\textsuperscript{108} several University of Arizona football players alleged that the NCAA acted concertedly when it banned the university’s football team

\textsuperscript{100} Id. at 117.

\textsuperscript{101} Id. at 120.


\textsuperscript{104} Id. at 297.

\textsuperscript{105} Id. at 303. The court also recognized the NCAA as a state actor, a ruling that was subsequently changed in \textit{Tarkanian}, 488 U.S. at 199.

\textsuperscript{106} \textit{Jones}, 392 F. Supp. at 304.


The court held that the NCAA’s sanctions were “directly related to the NCAA objectives of preserving amateurism and promoting fair competition,” and therefore were reasonable restraints. Similarly in *Gaines v. NCAA*, the court held that an NCAA rule declaring an athlete who entered a professional draft ineligible was a reasonable restraint since its intention was to further the NCAA’s goal of “retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports.” Finally, in *Hairston v. Pacific 10 Conference*, which dealt with the sanctions imposed on the University of Washington by the Pacific 10 Conference, the court went through a rule of reason analysis and ultimately held that the sanctions imposed on the university outweighed any anticompetitive effect since the plaintiffs failed to show any less restrictive means.

However, many of the courts in these earlier cases found that NCAA eligibility rules were not subject to antitrust laws because they “have ‘purely or primarily noncommercial objectives,’” and therefore only go through rule of reason analyses in dicta. As will be shown later in this paper, the courts may not be able to ignore the commercial impact of these rules much longer.

For reasons to be discussed in the following section of this article, it is important to summarize what have been recognized as the NCAA’s key defenses to antitrust suits. First, as *Board of Regents* and *Gaines* noted, as long as the NCAA’s rules are created to preserve amateurism by “retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports,” such rules serve a procompetitive effect. In addition to this, protecting the “unique atmosphere of competition between ‘student-athletes’” and the “integrat[ion] [of] athletics with academics” have been recognized as strong defenses against federal antitrust claims. Finally, courts have recognized the concept of maintaining competitive balance as a valid

---

109. Id. at 360.
110. Id. at 382.
111. Id. at 382-83.
113. Id. at 744 (quoting NCAA DIVISION I MANUAL, supra note 2, §§ 1.2-1.3).
114. 101 F.3d 1315 (9th Cir. 1996).
115. Id. at 1319.
117. Id. (quoting NCAA DIVISION I MANUAL, supra note 2, §§ 1.2-1.3).
118. Id.
defense for the NCAA.\textsuperscript{120}

IV. LIBERALIZING AMATEURISM

From the examples above, it is clear that the NCAA's rules on amateurism have frequently been challenged. Nonetheless, the NCAA's defense has been successful. Because of the difficulty in determining eligibility and the inconsistency of its eligibility rules, Division I is attempting to ensure that lawsuits involving these rules no longer occur by enacting its amateur deregulation proposals. However, because of the amendments made to the original proposals, Division I's goals may not be met. As will be seen in the following examples, there may still be difficulties and inconsistencies in determining a PSA's eligibility under Division I's proposals.

A. The "Amateur" Soccer Player

According to Division I's amateurism deregulation proposals, as amended, any PSA that plays up to one full season of organized athletics after graduating from high school still retains three years of eligibility.\textsuperscript{121} In addition, for the first year that the PSA attends college, the PSA "must fulfill an academic year in residence"\textsuperscript{122} and not participate in intercollegiate athletics. It follows that if a PSA plays on an organized team for one full season and then decides to attend college, as long as the PSA sits out the first year, the PSA can receive a scholarship and play intercollegiate athletics for three seasons.\textsuperscript{123}

The same cannot be said, however, about a PSA who plays organized athletics for more than one season. It must first be made clear how such a scenario could take place. Considering that Division I excluded men's and women's basketball from its amended proposals,\textsuperscript{124} to show a possible claim against the NCAA it would be inappropriate to consider a high school basketball player who jumps to the NBA, plays two years and then decides to go to college. It would be equally inappropriate to consider the validity of the

\begin{footnotes}
\textsuperscript{120} Id. at 1344.
\textsuperscript{122} Id.
\textsuperscript{123} It is important to note, however, that under Division II's new Bylaws, this PSA would be able to play organized athletics for up to three seasons, with his eligibility being reduced by one full year for each year the PSA participates in organized athletics. NCAA Division II Overview, supra note 12, available at http://www.ncaa.org/agents_amateurism/amateurism/2/overview.html.
\textsuperscript{124} AEC Cabinet, supra note 26, available at http://www.ncaa.org/news/2001/20010312/active/3806n01.html. The NCAA decided to "study the sport's unique issues and develop appropriate regulations." Id.
\end{footnotes}
proposals under a scenario involving a high school athlete going directly to the NFL upon graduation and then trying to enter college because this has never been done. However, the case of a foreign PSA that graduates from his country’s equivalent to high school and then plays two seasons for an advanced level “amateur” soccer team is a situation in which potential problems may arise. Similar to Lasege, such a PSA may receive some benefits that the NCAA could find to be improper, although the PSA may not be aware of such a determination. Examples of possible benefits may include housing or competition with professionals.

Under Division I’s amended amateurism deregulation proposals, if the NCAA would find that the PSA indeed received some form of improper payments or benefits, this PSA, because he played longer than the allowed one season, could possibly lose all eligibility and be unable to compete in intercollegiate sports. However, by the time the NCAA made its determination, the PSA may have already accepted a scholarship offer or even began collegiate competition. Comparatively, the same PSA would still be eligible to compete at the Division II level for two seasons as long as the PSA does not participate in intercollegiate athletics during the first year, while attending classes throughout that year. Such an athlete, if of Division I caliber, may feel slighted and for one reason or another choose to bring a lawsuit against the NCAA and attempt to regain Division I eligibility through an injunction by bringing a claim under either the law of private associations or antitrust law.

The following is an analysis of exactly this situation. Now that a legal foundation has been established, applying the two legal theories to Division I’s proposals, as well as a comparison to the new Bylaws enacted by Division II, is necessary to see what benefit the NCAA may gain by liberating amateurism as well as what consequences and problems may arise. This section analyzes this scenario under each legal theory according to Division I’s amended amateurism deregulation proposals and then compares this result to the likely result under Division II’s new Bylaws.

B. Law of Private Associations

As the court noted in Lasege and based on the NCAA’s own findings, determining a foreign PSA’s eligibility can be a difficult task that may result in inconsistent findings.\(^{125}\) If Division I’s amateurism deregulation proposals

were enacted, the chance of such a case being brought against the NCAA would be somewhat diminished. This is because the proposals would not require the NCAA to determine whether the PSA is an amateur or a professional. As long as the PSA did not participate in organized athletics for over a year or have agent representation, the PSA would be eligible to participate in intercollegiate athletics. In this sense, enacting the proposals would be a wise move for the NCAA.

However, some questions may exist in the case of the soccer player described above. This athlete may indeed have received minimal housing expenses, a per diem and other "living expenses," which may be difficult for the NCAA to discover. As has been shown in the past, the NCAA has had difficulty determining the eligibility of athletes in this situation. Such a scenario could put the NCAA in the same position as it was in Lasege, where both the trial and appellate courts held that the NCAA acted arbitrarily in determining Lasege's eligibility.

In this sense, Division I's proposals do not solve the problem they originally intended to. The main reason behind the proposal was to create a rule for the NCAA, its member schools, and athletes to follow so that determining eligibility would become much easier. However, by limiting the proposals to PSAs who play just one season of organized athletics, the NCAA keeps the door open for potential claims against it. Meanwhile, although the same problems could arise under the Division II rule, which gives a PSA up to three years to play organized athletics, it would be more unlikely for such a suit because after three years, it would be easier to determine whether or not the PSA had an intent to professionalize.

Based on this discussion, it appears as if the NCAA may alleviate some of the headaches it has faced in determining a PSA's eligibility if it passed its proposals. By doing so, it would eliminate potential inconsistencies in its rulings. For that reason, bringing suit against the NCAA under the law of private associations would be much more difficult because it would be harder to argue that the NCAA's decisions were "arbitrary and capricious." However, while more liberal, the new Division II Bylaw may be even more useful to prevent any further allegations of arbitrary decision-making. Nonetheless, the NCAA's primary concern regarding its proposals is found within the Sherman Act.

126. NCAA DIVISION I PROPOSALS, supra note 4, at 4.
C. Antitrust Law

As discussed above, the NCAA has been faced with antitrust challenges to its amateurism rules in the past, winning each of them. The amateurism deregulation proposals, however, bring more questions into what could become an area of concern for the NCAA. The remainder of this section will discuss how a potential suit could be brought against the NCAA under antitrust law and the possible outcomes. First, an analysis using Division I’s proposals will be given. Next, a discussion and evaluation of the strength of each of the NCAA’s recognized defenses to antitrust will be given under Division I’s proposals. This paper then discusses the strength of a PSA’s argument that the way Division I intends to accomplish its intended goals is overly restrictive. To do so, a comparison between these results and those of a suit being brought under Division II’s new Bylaws will be made to show any differences.

1. Bringing the suit under Division I’s amateurism deregulation proposals

In order to successfully bring a claim against the NCAA, a plaintiff must “prove that the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.” Applying these requirements to the “amateur” soccer player discussed above, in order to bring an antitrust claim involving Division I’s amateurism deregulation proposals, the PSA must first show that there was a concerted action by the NCAA. Because the NCAA is comprised of its member schools, if Division I would approve its proposals, a PSA would have no difficulty showing that concerted action exists. This is similar to what occurred in Law, where Division I passed a Bylaw that restrained the salaries of entry-level coaches. In that case, because the members of Division I passed the disputed Bylaw, the NCAA did not dispute that an agreement among its members existed.

A PSA must then be able to show that the disputed rule involves commercial activity. As evidenced by a variety of cases, this could very well be the most difficult portion of the PSA’s claim since some courts in the past have held that the NCAA’s eligibility rules were not believed to be involved in interstate commerce. However, given the Ninth Circuit’s holding in NCAA v. Miller, it is clear that the NCAA is involved in interstate commerce.

129. Law, 134 F.3d at 1016.
130. Id. at 1012.
131. Id. at 1016.
132. Smith, 139 F.3d at 185-186.
133. 10 F.3d 633 (9th Cir. 1993).
In *Miller*, the court held that the NCAA’s dealings in interstate commerce include marketing intercollegiate competitions, “transportation of teams across state lines,” overseeing nationwide recruiting, and controlling national broadcast bids for its major sporting events. In addition, it can be argued that NCAA member schools compete against each other for athletes’ services, and therefore are involved in commercial activity. In this sense, because of the nationwide competition between schools recruiting PSAs, combined with the value of a full scholarship, the PSA would be able to show the alleged restraint involved commercial activity.

Next, the PSA must show that he suffers economic harm. To do so, the PSA most likely must have been offered an athletic scholarship that he accepted. If this PSA played on such an “amateur” team for two seasons, it is entirely possible that the NCAA may eventually declare him ineligible, even under its amateur deregulation proposals. However, this determination may come after the PSA accepted a scholarship offer from the school. Once accepted, this scholarship creates a contract between the PSA and the university, and has an economic value attached to it. It follows that if the NCAA later determines that the PSA is ineligible, the PSA would be able to argue that his economic harm is the loss of scholarship.

If the PSA is successful in showing that the NCAA actedconcertedly in commercial activity resulting in his economic harm, the PSA then must show that the restraint in question is unreasonable. As noted above, there are two ways for a plaintiff to accomplish this, either through the per se rule or the rule

---

134. *Id.* at 640.
135. *Id.* at 638 (citing *Board of Regents*, 468 U.S. at 101-102).
136. *Id.*
137. *Id.*
138. 10 F.3d at 638.
140. This value can reach in excess of $30,000.00 (including tuition, room, board, meals and books). Take, for example, the total cost of one-year’s education at the University of North Carolina and the University of Notre Dame. The in-state cost for tuition, books, fees, etc. (not including housing) at North Carolina, a public institution, is approximately $7288.00, whereas out-of-state students pay approximately $22,540.00. *Cost and Financial Aid*, UNC.EDU, available at http://www.ais.unc.edu/sis/ssa/cost/ssa_ug_general.html (last visited Mar. 21, 2002). Comparatively, Notre Dame, a private institution, costs approximately $33,100.00 for tuition, fees, room, board, books, personal expenses and transportation. *Office of Financial Aid, Cost of Attendance*, ND.EDU, available at www.nd.edu/~finaid/cost_of_attendance.htm (last visited Apr. 9, 2001).
143. As noted above, this value can reach over $30,000.00. See *supra* note 140.
of reason. According to the Supreme Court's holding in *Board of Regents*, although the NCAA operates as a cartel, it is safe to assume that any alleged antitrust violation on the part of the NCAA would be viewed under the rule of reason.

The rule of reason would require the PSA to establish that the NCAA either had control over output or price or that the NCAA had sufficient market power within the relevant market. It is unlikely that a PSA could show that the NCAA had control over output or price, so to make an effective claim, the PSA should seek to establish a market over which the NCAA has significant power. This could be accomplished if the PSA described the relevant market as American college soccer. To this extent, it could reasonably be shown that the NCAA has well over fifty percent of market power. The only other competitors in this market would be either junior college or National Association of Intercollegiate Athletics (NAIA) teams, to which there are not nearly as many that offer soccer as those that do in the NCAA. The NCAA could counter and argue that the appropriate market is soccer worldwide or even soccer in America. To each of these, many more opportunities exist than those simply confined to the college market. For example, soccer worldwide, even in a true amateur setting would consist of a huge number of opportunities. Similarly, amateur opportunities in the United States are plentiful considering the opportunities that exist within various soccer clubs and other organizations that offer amateur teams, such as the United Soccer League.

If the PSA is able to establish the relevant market as college soccer within the United States and succeeds in showing that there is an economic harm, he satisfies the first step in bringing a successful antitrust claim. The burden would then shift to the NCAA to show that its disputed regulations have

---

144. [*Law*, 134 F.3d at 1016.]
145. [*Board of Regents*, 468 U.S. at 101.]
146. [*Law*, 134 F.3d at 1019.]

147. In the NCAA, between Divisions I, II and III there are approximately 725 teams competing in men's soccer. *NCAA Sport Listing by Institution*, NCAA.ORG, available at https://goomer.ncaa.org/rwows?hidden_run_parameters=p_sport_institution&P_Sport_Code=MSO&P_DIVISION=ALL (last visited Apr. 17, 2001). By comparison, the NAIA has approximately 225 men's soccer teams. E-mail from Scott McClure, Men's Soccer Administrator, NAIA, to Ben Menzel (Apr. 17, 2001, 10:55 CST) (on file with author). The resulting market share is approximately 81.5% for the NCAA and 18.5% for the NAIA. If the comparison was limited to just Division I soccer, the NCAA, which has about 195 Division I men's soccer teams would still have approximately 46.4% market share. If junior colleges were to be included in this calculation, 179 men's teams would be added. If all divisions of NCAA men's soccer were included, the NCAA would have a market share of 64.2%. If only NCAA Division I were included, the NCAA would have market share of 32.5%. Therefore, regardless of how the NCAA's market share was calculated, they would possess the requisite market share needed to have market power.
procompetitive benefits.\textsuperscript{148}

2. Procompetitive effect

As stated above, the procompetitive effects that have been historically used by the NCAA are (1) the preservation of amateurism by maintaining the connection between education and athletics, and (2) sustaining competitive balance.\textsuperscript{149} Taking the amateurism deregulation proposals into consideration, arguing that both of these still exist may pose problems for the NCAA.

\textit{a. Preservation of amateurism}

First, it is important to note that the NCAA can, more or less, define amateurism in whatever way it wants to.\textsuperscript{150} With this in mind, it could be reasonably argued that through its amateurism deregulation proposals, combined with the way in which the NCAA intends to redefine amateurism (limiting the definition to strictly whether an athlete is paid while in college), the NCAA continues to preserve amateurism. However, since the courts in previous cases have used the NCAA's own language of "retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports,"\textsuperscript{151} this "clear line" may become a bit blurred.

While a potential claim against the NCAA has thus far been focused on a foreign soccer player, to illustrate how the NCAA's "clear line" between amateurism and professionalism will be diminished under Division I's proposals, consider the result of a minor league baseball player in America attempting to enter college after failing at the professional level. If that athlete signs a contract and plays for a minor league team, he is obviously then a professional baseball player. Yet, under the proposals, the athlete would be allowed to play at the college level as long as he does not play professionally for more than one season. Therefore, the "clear line" separating \textit{amateur} from \textit{professional} that the NCAA has so frequently relied on becomes a very gray line, at best. If the NCAA passes the proposals, this argument will be weakened and lack the power and effectiveness that it once had.

The "clear line" is blurred even more when trying to link the proposals to maintaining the connection between education and athletics. Professor Carstensen has made the argument that changes made in the NCAA's rules on

\begin{thebibliography}{10}
\bibitem{148} Law, 134 F.3d at 1019.
\bibitem{149} See generally Board of Regents, 468 U.S. 85.
\bibitem{151} Gaines, 746 F. Supp. at 744.
\end{thebibliography}
eligibility no longer are designed "to achieve the objective of reasonable education opportunity" but instead are done to control the market. He argues that preservation of amateurism is no longer the goal of the NCAA and states that the NCAA's goal "has been transformed into a cartel restraining competition for the benefit of all its members. . . ." Applying this argument to the proposals makes the NCAA's situation even more tenuous.

Finally, a strong argument could be made that because more and more PSAs are making the decision to go pro instead of going to college, the quality of intercollegiate athletics has suffered. By allowing such a PSA to later enter the collegiate ranks, the NCAA could contend that they are creating a more competitive environment and actually enhancing the quality of college sports. However, if an antitrust suit is brought against the NCAA under Division I's amateur deregulation proposals, an equally, if not more persuasive argument could be made that the NCAA's intention for deregulating amateurism was for its own economic interests instead of the student-athlete's educational goals. For these reasons, while the NCAA's preservation of amateurism defense may still exist, the strength of this defense has been sufficiently weakened.

b. Competitive balance

The second defense available to the NCAA is that the regulation in question helps maintain competitive balance within intercollegiate athletics. Courts have recognized this defense in the past when applied to other situations. However, as will be shown, because the NCAA is willing to allow PSAs to play organized athletics for a full season, this defense will be less effective.

An example of how this defense helped the NCAA can be shown in Banks v. NCAA, where a student-athlete left college early to enter the NFL draft. The player subsequently went undrafted and attempted to regain eligibility. The NCAA denied the athlete's appeal, stating that by declaring for the NFL draft he forfeited all remaining eligibility. The Seventh Circuit upheld the NCAA's decision, stating that the rule helped "foster fair competition among

---

152. Carstensen & Olszowka, supra note 73, at 586.
153. Id.
154. Id.
155. Law, 134 F.3d at 1023-1024.
156. Board of Regents, 468 U.S. at 117. See also Law, 134 F.3d at 1023-1024; Smith, 139 F.3d at 187.
157. 977 F.2d 1081 (7th Cir. 1992).
158. Id. at 1083-84.
the participating amateur college students.\textsuperscript{159}

If the NCAA passes its amateurism deregulation proposals, this defense may no longer exist for several reasons. First, under the proposals, if the same athlete mentioned in Banks had played baseball instead of football, entered the professional ranks after high school and even \textit{played} professionally, he would be allowed to compete intercollegiately provided the other requirements of the proposals are met. The courts may very well be reluctant to find that by allowing this to happen, the NCAA continues to “foster fair competition.”\textsuperscript{160} Second, although Division I would require the PSA to “sit out” a year and take classes, whether this would minimize any competitive advantage the PSA gained while playing organized athletics, as the NCAA contends doing so would,\textsuperscript{161} is hard to imagine. An athlete who is able to fully concentrate on gaining skills in a particular sport will likely be able to retain such skills for longer than one year. In addition, if the PSA is only barred from intercollegiate competition, yet is still able to practice with his college team, the PSA will be even more likely to retain those skills.

3. Less restrictive means

In case a court holds that the NCAA still has procompetitive benefits that outweigh the anticompetitive effects of the regulation, the PSA could still make a strong argument that there is a less restrictive way to further the same goals. Quite simply, the PSA could argue that the one-year limitation placed on an athlete’s ability to participate in organized athletics after high school graduation is not the least restrictive means available. To this end, the NCAA may have a hard time rebutting such an argument since its original proposal was nearly identical to the Bylaws passed by Division II.\textsuperscript{162}

\textit{a. Antitrust law applied to Division II’s Bylaws}

As mentioned above, under the Bylaws enacted by Division II, a PSA would be eligible to participate in organized athletics for up to three years.\textsuperscript{163}

\textsuperscript{159} Id. at 1090.
\textsuperscript{160} Id. (citing Justice, 577 F. Supp. at 382).
\textsuperscript{162} Compare \textit{NCAA Division I Proposals}, supra note 4, at 5, with \textit{NCAA Division II Overview, supra} note 12, available at http://www.ncaa.org/agents_amateurism/amateurism/2/overview.html.
\textsuperscript{163} \textit{NCAA Division II Overview, supra} note 12, available at
For each year the PSA chose to do so, he would lose one year of intercollegiate eligibility. Once the PSA decided to enroll in college, to be eligible to participate in intercollegiate athletics, the PSA would have to take part in a “year in residence” and not compete in intercollegiate athletics.

Under these Bylaws, it would be very difficult for a PSA to succeed in an antitrust claim against the NCAA. First, to bring the suit the PSA would need to go through the same steps discussed above dealing with the PSA at the Division I level. However, while the PSA would be able to show the NCAA had the requisite market power if the accepted market were college soccer, the PSA would have a hard time rebutting the NCAA’s showing of procompetitive effects. This is because under the Division II Bylaws, while the NCAA’s likely defenses would be the same, even if they are not as strong as they have been historically, the PSA would have a great deal of difficulty meeting his final burden of proof—that a less restrictive means of accomplishing the intended goals exist.

Division II had two goals in mind when enacting its new Bylaws. First, they sought to rid themselves of the difficulties inherent in determining the status of PSAs, especially those from other nations. With its new Bylaws, determining eligibility would be the same for both domestic and foreign PSAs. The second goal was to give more individuals the opportunity to pursue a college education. By allowing an athlete who has failed as a professional to enter college keeps a door open to him that in the past has been locked shut the instant the athlete shows an intent to play organized athletics.

While these goals are consistent with those of Division I, because Division II allows a three-year “window of opportunity” for a PSA to enroll in college, arguing that a less restrictive means exists would be a difficult task. To force


164. Id.

165. Id.

166. There are approximately 170 colleges and universities that offer men’s soccer at the Division II level. NCAA Sport Listing by Institution, supra note 147, available at https://goomer.ncaa.org/rwows?hidden_run_parameters=p_sport_institution&P_Sport_Code=MSO& P_DIVISION=ALL. This results in a market share of about 43% for the NCAA, as compared to 57% for NAIA.


168. Id.


170. In this sense, “intent to play professional athletics” includes allowing one’s self to be drafted, signing a contract, or even simply playing on team that has professional athletes.
the NCAA to allow a PSA who has participated in the professional ranks greater than three years to play in the same sport intercollegiately, yet still maintain competitive balance, would most likely be unreasonable in the eyes of a majority of citizens. Therefore, the Division II’s Bylaw allowing this three-year window would, in all likelihood, be viewed as a reasonable restraint.

b. Division I’s Proposals—Does a less restrictive means exist?

As discussed above, while the NCAA’s defenses to an antitrust claim—its procompetitive effects—still exist, the strength of these defenses under Division I’s amateurism deregulation proposals has been weakened. However, unlike a PSA alleging that Division II’s new Bylaws are unreasonable, and partially because of the Division II Bylaws themselves, a PSA alleging that the amateurism deregulation proposals are unreasonable may be able to meet his final burden of proof by showing that a less restrictive means exists.

Division I’s proposals, much different from Division II’s Bylaws, only allow a PSA to play organized athletics for one season. If the PSA enters college after one season, he is treated the same as under Division II’s new Bylaws. However, if the PSA takes part in organized athletics for more than one season, the PSA loses all eligibility. A PSA attempting to show that this one-year restraint is unreasonable can make a strong argument that a less restrictive means exists. As originally drafted, Division I’s amateurism deregulation proposals called for the same three-year window as was passed by Division II.171 This shows at least some willingness on the part of Division I to allow for a more accommodating rule.

D. Tying It All Together

To summarize, if Division I’s amateur deregulation proposals are enacted, unlike years past, a PSA may have a strong case against the NCAA under antitrust law for the following reasons. First, the competition among NCAA schools combined with a PSA’s accepted scholarship creates economic harm related to commercial activity. Next, Division I’s proposals may significantly weaken the procompetitive effects the NCAA has historically relied upon to outweigh any anticompetitive effect. Finally, a PSA may very well be able to contend that the amended proposals are not the least restrictive means available. Because the fact finder would have to balance the NCAA’s diminished procompetitive effects against the anticompetitive effects shown

171. NCAA DIVISION I PROPOSALS, supra note 4, at 5.
by the PSA, the NCAA's success in litigation may be in danger.

V. CONCLUSION

In January of 2001, NCAA Division II overwhelmingly approved proposals deregulating amateurism. The same proposals were considered by Division I, causing much debate. While Division I amended its rules to be more stringent than those passed by Division II, it appears as if Division I may follow the lead of Division II and deregulate amateurism in its own way.

As this paper shows, however, doing so may not be such a good move for Division I. By deregulating amateurism, Division I may be setting itself up for attack. While the NCAA has made its proposals with good intentions in mind, this paper has shown that if passed, these measures may create complications the NCAA would rather not face. Not only do Division I's amateurism deregulation proposals fail to rectify the problems the NCAA has had in determining the eligibility of foreign PSAs, but its recognized defenses to antitrust law may be weakened because of the proposals, which may result in further problems down the road.

Courts have previously been more than willing to side with the NCAA in such disputes. However, as this article has shown, the NCAA would still be prone to lawsuits under the law of private associations, and may see the outcome of antitrust suits brought against its eligibility rules turn out much differently than they have in the past. For this reason, the NCAA may want to rethink its amended amateurism deregulation proposals and either enact proposals more similar to those passed by Division II or not deregulate amateurism at all.

BENJAMIN A. MENZEL