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AYER

## ANTITRUST AND THE NCAA: Pay for play.

### I. INTRODUCTION.

Amateur athletics at the major college level is a big business producing billions of dollars of revenue each year. It is marketed, packaged and sold the same way as many other commercial products. Last year's National Collegiate Athletic Association's ("NCAA") basketball tournament generated millions in gross receipts. Final four recipients received direct payments in excess of \$200,000.00. Simply being one of the 64 teams selected for the tournament earned invited schools tens of thousands of dollars.<sup>1</sup> Football revenues in major conferences are similarly lucrative.

Nevertheless, the NCAA prohibits payments beyond educational scholarships and specified expenses, to the athletes who are responsible for generating those revenues. NCAA rules also restrict the ability of college-athletes to earn outside income.<sup>2</sup> As a result, in a study sponsored by the NCAA, football and basketball players reported having less money available to them after expenses than the

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<sup>2</sup> See NCAA Const. Art 15 sec 15.2.6 at 187.

average college student.<sup>3</sup> Due to these facts the NCAA's rules regarding amateurism are ripe for attack. It is hypocritical for the NCAA to restrict payments to student-athletes when its member universities continue to seek new ways to increase revenues, often at the expense of the athletes' educational opportunities. Finally, the restrictions on amateurism have resulted in inevitable rules violations<sup>4</sup> which breed disrespect for member institutions and create a black market for the services of star players. For example, the University of Michigan's men's basketball program has been under investigation for the last several years due to the alleged illegal activity of one of its boosters, Ed Martin, and whether the head coach knew of these activities. The University launched an internal investigation, which raised questions about Martin's relationship with former Michigan and current NBA players. Coach Steve Fisher was fired in October 1997 after a report called into question Fisher's role in arranging tickets for Martin and alleged payments to his players. After a raid by federal authorities of Martin's home, Michigan officials were told evidence was discovered that Martin made payments to Wolverine basketball players

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<sup>3</sup> See Center for the study of athletics, Report No. 1: Summary results from the 1987-88 National study of intercollegiate athletics 32-33 (Nov. 1988).

in violation of NCAA rules. <sup>5</sup>As recently as April 14, 2000 "an amateur basketball coach was indicted for defrauding UCLA, Duke, Missouri and Oklahoma State by paying high school players on his summer league team. The indictment charged that . . . the players were paid for a portion of there future professional earnings as well as which college they were to attend."<sup>6</sup> With cases such as these being reported on a regular basis there can be no mistake NCAA rules violations are rampant and occur on almost every major college campus in this country.

The NCAA is operating as a classic cartel and many of its rules on amateurism constitute antitrust violations. Athletes' compensation should be controlled by the free market system and they should be paid according to their fair market value. The elimination of the economically inefficient amateurism restraints would lessen the inequity and hypocrisy that now exists and help eliminate the black market for players' services.

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<sup>4</sup> During the 1998-99 NCAA basketball season a record number of players were suspended for accepting money from outside sources in violation of NCAA restraints on amateurism.

<sup>5</sup> [www.espn.com](http://www.espn.com), Martin expected to detail relationships. Friday April 7, 2000.

## II. THE NCAA

The National Collegiate Athletic Association is a voluntary unincorporated association made up of approximately 1,500 member colleges and universities. Regular members are classified into divisions to reflect differences in size and scope of their athletic programs. The NCAA "coordinates the intercollegiate athletics of its members by adopting and promulgating playing rules, standards for academic eligibility, regulations concerning recruitment of student-athletes, and rules governing the size of athletic squads and coaching staffs . . ." <sup>7</sup> The stated purpose of the NCAA is to maintain college athletics as a integral part of its member institution's overall educational program, and the athlete as an integral part of the student body, and by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports. <sup>8</sup> Organized in 1905, the NCAA's original purpose was to prevent the escalating violence in college football from destroying the sport. Since that time, the NCAA has expanded its operation and goals. In addition to the supervisory roles stated above, the NCAA conducts

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<sup>6</sup> The Chicago Tribune, Friday April 14, 2000 section 4 pg. 12.

<sup>7</sup> Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1012.

<sup>8</sup> NCAA Const. Art 1, sec 1.3.1.

numerous championships, negotiates television rights,<sup>9</sup> and controls the marketing of its name and insignia. Despite its growing commercialism the NCAA maintains its function is to monitor college sports as part of the overall educational process. To that end, the NCAA has enacted guidelines for recruiting students,<sup>10</sup> principles of amateurism,<sup>11</sup> limitations on financial aid,<sup>12</sup> academic and other eligibility rules,<sup>13</sup> size of coaching staffs<sup>14</sup> and restrictions on playing and practice sessions.<sup>15</sup> NCAA members, "employers" of student-athletes, compete with each other for the services of those who possess enough talent to compete at the major college level. The competition for these individuals is intense, with literally hundreds of schools courting a handful of top high school athletes. Recruitment of student-athletes requires constant contact with athletes, their high school coaches as well as very carefully orchestrated campus visits. In addition, top prospects constantly receive phone calls from coaches, and sometimes-improper promises, from famous alumni.<sup>16</sup> The

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<sup>9</sup> The NCAA controls the television rights to its own annually sponsored championships. The NCAA's control over the television rights for intercollegiate football games was halted by the Supreme Court in *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

<sup>10</sup> See NCAA Manual.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Berry & G. Wong, *Law and Business of the Sports Industries* xviii (1986).

NCAA's amateurism rules seek to restrain this competition between its member institutions. In essence the NCAA acts as a classic cartel, eliminating virtually all price competition among all its members. Compensation for student-athlete employees is agreed upon and is limited to tuition and fees, room and board, and required course-related books.<sup>17</sup> The NCAA also has an extensive set of rules to ensure that member institutions do not increase athlete "compensation" indirectly through awards, benefits or covered expenses.<sup>18</sup> Furthermore, the NCAA places a limit on per-season wages of athletes who hold jobs during their seasons.<sup>19</sup> To ensure that the price for athletes remains fixed the NCAA maintains an elaborate enforcement mechanism to monitor and punish noncomplying members.<sup>20</sup> The market consequences of these rules are the reduction in wages to student-athletes, greater profits for colleges, and a transfer of income from low-income athletes to highly paid coaches. Michigan State University head basketball coach Tom Izzo, who has led his basketball team to Two Final Four appearances and one NCAA Championship receives a salary of \$780,800.00 from the university.<sup>21</sup> Izzo also receives a

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<sup>17</sup> See NCAA Manual.

<sup>18</sup> Id.

<sup>19</sup> See NCAA Const. art. 15 sec 15.2.6 at 187.

<sup>20</sup> Id.

<sup>21</sup> [www.espn.com](http://www.espn.com) High coaches pay irks some Michigan State U. officials.

substantial amount of money from television appearances as well as money for having his players wear a certain brand of shoes. The NCAA, its member universities and its coaches all benefit financially from college athletics. The only group left out of the proverbial pie is the players who generate all the money involved in college sports. This price fixing is accomplished through NCAA rules and a compliance system, which is both hypocritical and illegal.

The NCAA rules and system for compliance, however, do not always run smoothly. With the substantial amounts of money at stake for successful coaches and universities the incentive to cheat is great. If a school pays athletes, or allows them to be paid more than the agreed upon NCAA rate they may attract better athletes, larger attendance, more lucrative television contracts<sup>22</sup> and greater national publicity. Consequently cheating appears rampant across the country. However, NCAA rules violations have not leveled the playing field and numerous athletes are still paid below their fair market value, for many schools and athletes act scrupulously and follow NCAA rules and regulations. Even schools that do violate NCAA rules pay

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<sup>22</sup> After years of success the University of Notre Dame was able to secure an exclusive deal with a major television station to broadcast all of its football games. This deal was worth millions to the university and is a prime example of the stakes involved in succeeding in major college sports.

players below fair market value in an attempt to avoid being caught and punished by the NCAA. There is no doubt that NCAA rules restrain competition among member institutions and depress student-athlete wages. However, not all restraints on trade are necessarily illegal, therefore, an analysis of the Sherman Act and its application to the NCAA is necessary.

### III. THE SHERMAN ACT

The Sherman Act prohibits "[e]very contract combination. . . or conspiracy, in restraint of trade or commerce among the several states."<sup>23</sup> However, it was recognized that the Act could not be construed literally, since every commercial agreement in some form restrains trade in the sense that it binds the parties to it.<sup>24</sup> Thus the United States Supreme Court has traditionally limited the restrictions contained under section 1 of the act to bar only "unreasonable restraints on trade" and unreasonable conduct.<sup>25</sup> The basic requirement for application of the Sherman Act is that the activity in

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<sup>23</sup> 15 U.S.C. sec 1 (1988).

<sup>24</sup> Board of Regents v. NCAA, 546 F. Supp 1276, 1304 (W.D Okla 1982), aff'd, 707 F.2d 1147 (10<sup>th</sup> Cir. 1983), aff'd, 468 U.S. 85 (1984).

<sup>25</sup> See NCAA v. Board of Regents, 468 U.S. 85 1984; Chicago Board of Trade v. United States, 246 U.S. 231, 238. (1918).

question affects interstate commerce.<sup>26</sup> The NCAA restraint on competition for student-athletes satisfies this requirement. Athletes are recruited on a nationwide basis; the Michigan State University men's basketball team has players from five different states. Furthermore, the schools for who they play compete nationally, with their games often being televised to a national audience. For these reasons courts addressing issues involving NCAA restraints on amateurism have found that interstate commerce has been affected.<sup>27</sup> The NCAA has tried to argue that it is not involved in commerce at all, stating that the Sherman Act applies to commercial organizations, not nonprofit organizations pursuing noncommercial goals. However, In *Goldfarb v. Virginia State Bar*<sup>28</sup> the Court in sweeping language held that there was no implied exemption for non-profit organizations. The Court stated "Congress intended to strike as broadly as it could in section 1 of the Sherman Act, and to read into it so wide an exemption as that urged . . . would be at odds with that purpose."<sup>29</sup> Following *Goldfarb*, courts repeatedly have applied the Sherman Act to restraints imposed by nonprofit regulatory

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<sup>26</sup> *McClain v. Real Estate Bd.*, 444 U.S. 232, 242 (1980).

<sup>27</sup> *Hennessy v. NCAA*, 564 F.2d 1136,1150 (5<sup>th</sup> Cir. 1977); *Justice v. NCAA*, 577 F.Supp 356 (D. Ariz 1983).

<sup>28</sup> 421 U.S. 773 (1975).

<sup>29</sup> *Id.* At 786-87.

groups in general, and the NCAA in particular.<sup>30</sup> However, the NCAA may still try and argue that its restrictions on payments have only noncommercial, public interest justifications. The NCAA could also argue that its restrictions on amateurism are procompetitive as part of a successful joint venture or to enhance the image of the NCAA and increase its ability to compete in the market place. Although under a rule of Reason analysis both these arguments should fail.

#### **IV. Violations of the Sherman Act: Per Se and the Rule of Reason**

While only unreasonable restraints of trade are illegal under the Sherman Act, there are two complementary categories of antitrust analysis used to make such a determination. In this regard, the Supreme Court has applied either a per se or a rule of reason doctrine to determine the reasonableness of a restraint in antitrust cases.

##### **A. The Per Se Doctrine.**

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<sup>30</sup> See NCAA v. Board of Regents, 468 U.S. 85 (1984).

Under the per se doctrine, a court can find certain practices to be illegal under the Sherman Act without a formal determination of their reasonableness.<sup>31</sup> This standard emerged as courts found that some business practices, because of their severe anti-competitive impact and lack of countervailing economic benefit, should be conclusively presumed to result in an undue or unreasonable restraint of trade.<sup>32</sup> Courts apply this doctrine to a few select forms of restraint perceived as fundamentally inimitable to the functioning of a full and free competitive process.<sup>33</sup> Generally five broad categories of restraints are subject to the per se doctrine: (1) horizontal price fixing; (2) vertical price maintenance; (3) group boycotts; (4) tying arrangements; and (5) horizontal market division.<sup>34</sup> This conclusive presumption of unreasonableness allows courts to curtail further inquiry into the reasonableness of such activity once the fact of the restraint is established.<sup>35</sup> As the Supreme Court has explained, the practices reviewed under this standard "are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of

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<sup>31</sup> See *White Motor Co. v. United States*, 372 U.S. 253, 259-260 (1963).

<sup>32</sup> See I Earl W. Kitner, *Federal Antitrust Law*. (1980).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

the industry is needed to establish their illegality . . . They are 'illegal per se.'" <sup>36</sup> Accordingly, certain business practices by reason of their nature and effect on competition are held to be unreasonable per se.

### **B. The Rule of Reason**

All conduct that is attacked under section 1 of the Sherman Act that is not analyzed under the per se doctrine is reviewed under the rule of reason. Courts apply this doctrine when the effects of the conduct in question on full and free competition are not readily apparent.<sup>37</sup> As its name suggests, the rule of reason requires the finder of fact to determine whether the restrictive practice imposes an unreasonable restraint on competition under all the circumstances of the case.<sup>38</sup> In short the purpose of the rule of reason inquiry is to determine if the challenged practice constitutes actual, as opposed to presumed, unreasonable restraint of trade. Although the rule of reason has been part of the Sherman Act since Standard Oil, the specific analytical framework applied in a reasonableness determination remains somewhat

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<sup>36</sup> National Soc'y of professional Engineers v. United States, 435 U.S. 679, (1978).

<sup>37</sup> See Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, (1986).

indistinct.<sup>39</sup> The Supreme Court articulated the general contours of the rule of reason analysis in *Chicago Board of Trade v. United States*.<sup>40</sup> In this case, the Court explained "[t]he 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 my suppress or even destroy competition."<sup>41</sup> The Supreme Court refined this general statement of the rule of reason standard with its decision in the late 1970's in *Continental TV, Inc v. GTE Sylvania Inc.*<sup>42</sup> and *National Society of Professional Engineers v. United States*.<sup>43</sup> In *Sylvania*, the Court explained that under the rule of reason standard "the fact finder weighs all of the circumstances of a case deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."<sup>44</sup> In *Professional Engineers*, however, the Court explained that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."<sup>45</sup> Rather, the inquiry under the rule of reason analysis is limited to

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<sup>38</sup> See *Sun & Daniel*.

<sup>39</sup> See I ABA Section of Antitrust Law.

<sup>40</sup> 246 U.S. 231 (1918).

<sup>41</sup> *Id.* at 238.

<sup>42</sup> 433 U.S. 36 (1977).

<sup>43</sup> 435 U.S. 679 (1978).

<sup>44</sup> 433 U.S. at 49.

<sup>45</sup> I ABA Section of Antitrust Law.

whether the restraint "is one that promoted competition or one that suppresses competition."<sup>46</sup> Accordingly, (as opposed to competitive) objectives are normally excluded from the rule of reason framework.<sup>47</sup> With this confusion in the Supreme Court, lower courts have sought to impose greater structure on the rule of reason analysis by casting it in terms of shifting burdens of proof.<sup>48</sup> Although the precise formulation varies somewhat among the circuit courts, these formulations do not generally lead to contrary analyses and results.<sup>49</sup> Under the traditional rule of reason approach, the plaintiff bears the burden of proving that an agreement has had, or is likely to have, a substantial anti-competitive effect.<sup>50</sup> Once the plaintiff meets this burden, the burden shifts to the defendant to demonstrate the offsetting procompetitive virtues of the allegedly wrongful conduct.<sup>51</sup> If the defendant is able to satisfy this burden, the plaintiff must then demonstrate that the challenged conduct is not reasonably necessary to achieve legitimate business objectives or that those objectives can be reached through a substantially less

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<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id.

restrictive means.<sup>52</sup> If these alternating burdens are met, and then the court must ultimately weigh the competitive harms and benefits of the arrangement in order to determine whether, on balance, the challenged conduct is reasonable.<sup>53</sup> It would appear that a rule which restricts player wages and eliminates all forms of price competition among member schools for the services of athletes is illegal per se price fixing. However, the courts have been reluctant to use that form of analysis when dealing with the NCAA. In *Board of regents v NCAA*<sup>54</sup> a landmark NCAA antitrust case, the NCAA limited the number of college football games that could be televised creating a horizontal restraint, but the court instead of holding this practice per se illegal ruled horizontal restraints on competition essential to produce college athletics. Since *Board of Regents* no NCAA rule has been invalidated using the per se analysis. Instead the court used the rule of reason and subsequently found the rule to be an illegal restrain on trade.

## V. Judicial Application

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 468 U.S. 85

The Courts have found that the NCAA acts in two different markets.<sup>55</sup> The first a purely commercial market where the purpose of the regulation is to maximize profits.<sup>56</sup> Regulations in the commercial market have generally been subject to a high level of antitrust scrutiny.

For example in *LAW V NCAA*<sup>57</sup> a rule was set forth by the NCAA where a designated group of coaches, deemed restricted earnings coaches, were allowed a salary of only \$12,000.00 during the season and \$4,000.00 for work performed during the summer. The stated Purpose of this rule was to cut costs an obvious commercial goal, as a result the court found this rule to violate the act and it was struck down.

Conversely the courts have been lenient in applying the rule of reason scrutiny to NCAA regulations in the non-commercial educational market. Regulation in this market is directed at preserving amateurism and maintaining the identity of college athletics.

However, by showing a court that the NCAA has given up the goal of combining education with athletics, a student-

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<sup>55</sup> *Gaines v. NCAA* 746 F. Supp 738, 743 (M.D. Tenn 1990).

<sup>56</sup> See *Id.*

<sup>57</sup> 902 F. Supp. 1394 (D. Kan. 1995).

athlete may convince a court that rules regarding amateurism are invalid. If the student-athlete can prove the goal of the NCAA's restrictions on student-athlete wages is to maximize profits the rule as that in Law will be struck down.

## VI. The Student-athlete cause of action.

The student-athlete must first show anti-competitive affect on the relevant geographic area and product market.<sup>58</sup> However, due to the difficulty of showing actual anti-competitive affects the courts have required plaintiffs to show the defendant has market power.<sup>59</sup> Courts have defined the NCAA's market power as its ability to affect the price its members pay for the services of student-athlete's.<sup>60</sup> The NCAA has a complete monopoly over the student-athlete labor market for the revenue producing sports of men's football and basketball. The student who wishes to participate in these sports must abide by NCAA rules, as there are no other alternate leagues for the student-athlete.

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<sup>58</sup> See Jay P. Yancey, *Is the Quick Look Too Quick? Potential Problems With the Quick Look Analysis of Antitrust Litigation*, 44 U. Kan. L. Rev 671 674-81 (1996).

<sup>59</sup> *Brown Univ.*, 5 F.3d at 668.

<sup>60</sup> *Id.*

NCAA regulations may also affect the price a student-athlete is paid at the professional level. If a student-athlete declares for the draft and signs with an agent they are prohibited from participating in NCAA competition. The affect of this is the players have no leverage to bargain with the professional team. He simply cannot use the threat that he will return to the college ranks and therefore in many cases may receive less compensation at the professional level due to NCAA regulations.

*if he is good enough to leave early, would he still have leverage?*

The NCAA's unmitigated control over college athletics not only proves the NCAA has market power, but also that restraints on compensation have anti-competitive effects.

Once the anti-competitive affects are proven, the burden shifts to the NCAA to show pro-competitive benefits outweigh these negative effects.<sup>61</sup> The Court in NCAA v Board of Regents implied that restrictions that promote education and amateurism are reasonable regardless of their anti-competitive effects.<sup>62</sup> As a result the NCAA has historically tried to create a connection between college sports and education. They have argued that limits on compensation are said to encourage student-athletes to choose a college based on educational quality not economic reward.

This is simply not true in the world of college athletics today. Over two thirds of athletes at some schools never graduate.<sup>63</sup> The hectic schedule of the college athlete prevents them from regularly attending class.<sup>64</sup> To further show the goal of the NCAA is not to promote academics is the fact that every major school lowers its admission standards for athletes. The reality is players choose schools that will give them TV exposure and put them in the NBA or NFL.

In 1972 the NCAA passed a rule that would allow universities to revoke the scholarships of unproductive athletes.<sup>65</sup> If education was the goal scholarships would be guaranteed regardless of athletic success. The NCAA and its member institutions clearly place their own financial goals ahead of player education.

The NCAA's second pro-competitive objective, preserving amateurism also cannot be supported. The NCAA argues that preserving amateurism is essential to further historic traditions and and enhance the demand for college sports by enhancing their image. Student-athletes are simply not amateurs they are paid to play via scholarships

*Don't they also require a minimum GPA to remain eligible?*

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<sup>61</sup> Yancy, supra

<sup>62</sup> Board of Regents, 468 U.S. at 120.

<sup>63</sup> See Stephen M. Schott, Give Them What They Deserve, 3 SPORTS LAWS. J. 25. (1996).

<sup>64</sup> Id.

<sup>65</sup> See NCAA Manual..

and related expenses. At many schools this compensation is valued at over \$10,000.00, to say limitations on compensation is to support amateurism is illogical. The only justification for the rule is to eliminate competition between its members and in crease revenue for the NCAA.

In McCormak V NCAA<sup>66</sup> the only case dealing with the compensation of athletes and antitrust laws, the court held these restrictions, relying on Board of Regents, did not violate the Act. However, the court in McCormak relied on the Board of Regents conclusion that most NCAA regulatory controls were assumed reasonable. However, the court in Board of Regents found anti-competitive restrictions reasonable only if they furthered education and amateurism in college sports. As stated earlier restraints on compensation do not promote education or amateurism. This leaves room for a future court, applying McCormak and paying attention to the decision in Board of regents, to overturn NCAA rules which restrict the amount of compensation for student-athletes.

College sports today is simply a big business and the NCAA's arguments of promoting education and amateurism simply do not hold up.

Exam # 890

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<sup>66</sup> 845 F.2d 1338 (5<sup>th</sup> Cir. 1988).