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Daniel, Rascher and Andrew, Schwarz

University of San Francisco, OSKR, LLC

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Neither Reasonable nor Necessary: “Amateurism” in Big-Time College Sports

Daniel A. Rascher¹

Andrew D. Schwarz²

“Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”

-- NCAA Bylaws, Article 12

As the financial stakes in intercollegiate sports continue to rise, the issue of the NCAA’s efforts to restrain the compensation of college athletes – particularly those in football and men’s basketball – grows increasingly important. The NCAA has long maintained that amateurism is an essential component of the product it sells and that its rules regulating the compensation of athletes are procompetitive because they preserve amateurism and thereby maintain competitive balance. Yet, if amateurism is what consumers of college sports demand, there ought to be no need to collude to preserve it. If fans prefer high-quality university affiliated sports, amateurism is neither a reasonable nor necessary restraint to creating a product, and concerted action to preserve amateurism is mere wage fixing.

In 1992, Arthur Fleisher, Brian Goff, and Robert Tollison published a book examining the NCAA through the lens of cartel economics.¹ They concluded that the NCAA was indeed a cartel with monopsony power in the labor market for athletes. Revenues have doubled since the time they drew their conclusions. Not only does the

NCAA have monopsony power over athletes, but athletes' forgone rents² are huge and increasing rapidly.³

The NCAA and its member schools generate very large revenues, even by professional sports leagues standards. NCAA accounting takes great pains to mask profit as expenses (by allowing schools to charge their athletic programs high prices for self-supplied services, by funneling surpluses into premium facilities, which are charged against the athletic program, but which benefit the campus as a whole, and other ruses). Yet even by their own creative standards, NCAA data shows that revenues, which stood far above expenses in 1989, have outstripped costs over the last decade, and promise to grow even faster with the NCAA's new basketball contract for 2002 – 2013.⁴

Despite the profitability of the NCAA, the term "cartel" may not perfectly describe the NCAA and its member institutions, primarily because an individual athletic team cannot produce an athletic event by itself. The NCAA is more appropriately described as a joint venture that has, like other joint ventures, certain aspects that must be agreed upon.

While it is necessary for the NCAA to set rules regarding scheduling and safety and the like, an agreement among all of its members not to compete for its most important resource, the athletes, is unnecessary and unreasonable. It lowers the quality of the game and exploits the athletes. This unjustified activity should not be legalized simply by defining it as an essential component of the product being offered, especially without that claim being rigorously scrutinized by the courts. From the point of view of antitrust economics, the NCAA's claims ultimately rest on an unproven assumption: fans

preference for amateurism is a *sin qua non* of college sports. If this is not true, the NCAA has no reasonable defense for its otherwise collusive wage fixing.

The NCAA and Cartel-like Actions

Per se or Rule of Reason Analysis. In most industries, the courts would normally view a joint venture of almost all major suppliers or purchasers in the market as an illegal cartel. An agreement to set the wages of an entire class of employees would be ruled per se illegal.⁵ However, in sports, the courts have also ruled that certain types of otherwise per se illegal horizontal restraints are necessary to allow the product to exist at all and have adjudicated these cases using rule of reason analysis.⁶

This special application of rule of reason analysis to sports joint ventures has been developed through a substantial body of case law. These cases generally have held that sports leagues are procompetitive joint ventures necessary to create a product, such as NFL football, so that some level of what would otherwise be labeled collusion is accepted as a procompetitive activity necessary to create the product.⁷ Consequently, the courts have given these procompetitive joint ventures fairly wide latitude in creating what are deemed to be reasonable ancillary restrictions to maintain the procompetitive joint venture. Thus, the concerted effort of the NCAA schools to restrict wages would certainly be tried under the rule of reason.

Market Definition Under the Rule of Reason. In traditional rule of reason analysis, determining whether the NCAA has market power and can thus effectively act like a cartel first involves defining a relevant geographic and product market. Second, an examination of whether the NCAA has market power (often measured through market

share and concentration) and the impact from any potential entrants is required. Finally, positive and adverse effects are weighed against each other to determine whether the conduct is pro- or anticompetitive on the whole.

Geographic and Product Markets. The relevant geographic market is generally accepted to be the United States, given the general lack of university-based “big-time” sports outside the United States, and the primarily national recruiting market for premier college athletes.

Previous cases have determined that the product produced by the NCAA is collegiate sports, thus making the NCAA a de facto monopolist/dominant supplier of the product. The only other competitor is the National Association of Intercollegiate Athletics (NAIA), an association of schools with very small athletic programs that do not generate any significant revenues and do not compete for premier college athletes. The NCAA’s market share is most likely in the upper 90 percent range for college athletics. As noted by Fleisher et al., “For all practical purposes, the NCAA today directs and controls all major revenue-producing collegiate athletic events.”⁸

Of course, when it comes to acquiring talent, the likely product market would be the market for the playing services of college-age athletes, perhaps more narrowly defined to cover the two revenue generating sports, football and men’s basketball. In this market, the NCAA is also a dominant purchaser. However, a handful of athletes eligible for NCAA play elect to forgo one or more years of collegiate eligibility (sometimes all four) to play professionally, and in this respect, professional sports leagues do compete for talent with the NCAA.⁹

If this sliver of competition were sufficient to discipline the wage regime in the NCAA, the NCAA might be able to argue that it is not able to exercise market power, despite its dominant market share. If this were true, we would see wage competition on the fringes for the very best talent, with schools offering a player like Stephon Marbury financial inducements to remain in college rather than turning pro after one year at Georgia Tech. Instead, we see efforts by the NCAA to impede whatever competition might be afforded by the professional leagues by such actions as the no-agent rule, whereby a player will be banned from the NCAA for life for merely asking an agent to determine whether professional leagues potentially compete for his services.¹⁰

The NCAA is also trying to insulate itself from competition from the NBA by non-compete agreements, as in a recent meeting among the NCAA, the NBA, and the National Basketball Players Association to discuss methods to prevent underclassmen from entering the professional basketball draft.¹¹ In any other setting, an agreement among employers not to hire college students who have not attended four years of school would certainly be illegal. The NCAA's efforts to hoard skilled athletes may show that the two leagues do compete on the margin for the very best talent, but it is even stronger evidence that the NCAA has actively sought to restrain trade in this market.

By this reasoning, the small market share exercised by explicitly professional leagues does not constrain the NCAA's ability to translate its 99 percent market share into market power. Whether or not the market is defined to include athletes who enter professional sports before they exhaust their college eligibility, the NCAA is a de facto monopsonist in the relevant product market for college-age athletes.

Potential Entry. Antitrust authorities also look to the possibility of new entry into a market when evaluating market power. In this market there are at least two leagues in the planning stage, and so the market may see future competition.¹² However, even if these leagues become viable, the NCAA will almost certainly remain the dominant firm in this market. Therefore, the possibility of new entry into the market is unlikely to change the general conclusions that the NCAA is a de facto monopolist in the market for collegiate-level athletics and a de facto monopsonist in the market for purchasing talent.

Liability and the NCAA's Defenses: Can Agreement on Wages Be Justified?

To establish liability, it would be necessary to show that the NCAA has the ability and incentive to commit anticompetitive acts, and further that the NCAA's actions have caused harm to competition or consumers. In previous cases alleging cartel behavior, the NCAA has relied upon the fact that the courts generally consider the NCAA to be a procompetitive joint venture, capable of imposing reasonable and necessary ancillary restraints to create a valued product. In these cases, the NCAA has offered the need to preserve amateurism as evidence of the necessity and reasonableness of its rules preventing the payment of players. However, this line of argument has never been subject to full rule of reason scrutiny.

Full Rule of Reason Analysis Needed: Is Amateurism Reasonable and Necessary? If the NCAA's concerted agreement on athletes' wages were challenged in court, it is likely that the response would be that amateurism is a necessary and reasonable ancillary restraint needed to keep the joint venture (and thus the product) alive, both by creating a product differentiated from the NFL's or NBA's product, and to maintain competitive

balance. The argument in favor of amateurism is formidable in part because it is so commonly and uncritically accepted.

Ironically, *NCAA v. Board of Regents*, 468 U.S. 85; 194 S. Ct. 3948 (1986), which established that the NCAA, despite generally being a procompetitive joint venture, was nevertheless capable of anticompetitive acts, has become the foundation of a body of case law insulating the NCAA from antitrust scrutiny with respect to amateurism. The Court found that “the NCAA seeks to market a particular brand of football -- college football. The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.” The Court stated, without analysis, that the fact that “athletes must not be paid” was necessary “to preserve the character and quality of the ‘product.’”

There is a subtlety here that seems to have been missed by later interpreters of *NCAA v. Board of Regents*. In essence, the *NCAA* Court said one thing: academic affiliation is what differentiates NCAA football from NFL football, and thus creates a market – i.e., this differentiation is procompetitive. The court then went on to assume that a particular restraint used to achieve that differentiation – amateurism – is both reasonable and necessary. In *NCAA*, there was no need to determine if amateurism was actually a reasonable and necessary restraint; the Court merely sought to highlight the comparative lack of justification for the NCAA’s TV restraints.

However, in later cases, particularly *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1340-41 (5th Cir. 1988), *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738, 744 (M.D. Tenn.1990), and *Banks v. NCAA*, 977 F.2d 1081,

1088-94 (7th Cir. 1992), the courts have used *NCAA* as a starting point, reading Supreme Court dicta as evidence that amateurism itself has passed the reasonableness test, moving forward to evaluate specific follow-on rules designed to support amateurism.¹³ These cases analyze whether the NCAA's rules are reasonable and necessary for preserving amateurism, not if amateurism itself is reasonable and necessary. Since *NCAA* did not perform this formal analysis (because this question did not apply to the matter at hand), it remains an open issue for the courts.¹⁴

The necessity for a formal full-scale rule of reason analysis of the reasonableness and necessity of amateurism is highlighted in the trial history of *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993). The district court found that MIT (as the sole non-settling defendant) had conspired with the eight Ivy League schools to prevent competition for talented students through merit scholarships. According to the district court, MIT and the Ivy League “created a horizontal restraint which interfered with the natural functioning of the marketplace by eliminating students’ ability to consider price differences when choosing a school and by depriving students of the ability to receive financial incentives which competition between those schools may have generated.” It was an “inescapable truth” that “by entering into the Ivy Overlap Agreements, the member institutions purposefully removed, by agreement, price considerations and price competition for an Overlap school education.”

MIT had countered that this concerted action was necessary to advance the cause of affirmative action, by ensuring that merit scholarship competition for the best students did not lower the pool of money available to those most deserving of need-based aid. The district court rejected these arguments, saying they were insufficient to justify ignoring

the basic premise of the Sherman Act, which is that “the unrestrained interaction of competitive forces will yield the best allocation of our economic resources...” However, on appeal, the Third Circuit determined that the court had not properly weighed MIT’s procompetitive arguments, and remanded the case for retrial under the full rule of reason standard. The case eventually settled, with MIT retaining the right to compare information on students with other schools but agreeing not to collaborate on financial aid offers, similar to the settlement reached with the other eight members of the Ivy Overlap group.

The original district court decision in *Brown University* contains strong parallels to the NCAA’s role in the joint determination of maximal remuneration for college athletes. In both cases, the universities point to redeeming social benefits of the system, benefits generated, in part, on behalf of those other than those directly affected by the restraint in question. For the same reasons that the circuit court in *Brown University* insisted that these benefits be analyzed fully under the rule of reason, so too should the courts analyze the pro- and anticompetitive effects of amateurism before assuming it is necessary for the creation of the product. The final settlement prevented MIT from acting in concert on making financial inducements to students to attend MIT. This is very different from the current NCAA practice on financial inducements offered to student-athletes.

If Amateurism Is Necessary, Why Are NCAA Sports So Professional? In all respects save one, major-college sports are not amateur. The NCAA rules have been considered an attempt “to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives” and that “the no-

draft rule and other like NCAA regulations preserve the bright line of demarcation between college and ‘play for pay’ football.” In fact, they have not kept college sports from becoming professional; they have simply prevented players from receiving direct cash payments for their efforts.

On the supply side, the significant fact is that college sports are indistinguishable from “professional” sports on a wide variety of measures: stadiums are now covered with advertisements; bowl games now have sponsors’ names; players now wear Nike “swoosh” insignia on their uniforms; games are rescheduled in order to coincide with broadcast and cablecast wishes; and coaches now get paid premiums for signing exclusive contracts with shoe manufacturers if their athletes will wear those shoes on the court. The very best athletes now often leave college before their last year of eligibility (sometimes even right out of high school) as the only way to cash in on their market value with the pros, since they have no cash-paying option at the college level; teams choose their schedules to maximize their chances to participate in multi-million dollar post-season events; and head coaches now earn up to \$2 million per year (Steve Spurrier, head football coach at Florida) to coach amateur sports, in largest part based on their ability to successfully recruit and sign the best high school talent. This is rent-seeking behavior by those in power.¹⁵

Furthermore, athletes do get “paid,” but in mostly non-monetary equivalents, and a relatively small amount compared to their revenue-generating ability. That payment consists of tuition and room and board scholarships. Now, in keeping with the recently increased commercialization of college sports, the competition for talented athletes includes such non-price elements as lavish training facilities, enhanced assistant coach

instruction, exposure to future employers (professional teams and advertisers in search of spokesmen) through television, and heavy marketing and promotion of the individual stars. For example, football colleges now “nominate” their Heisman trophy “candidates” at the start of the season, followed by elaborate promotions and nationwide TV exposure. All of these are benefits given to players in exchange for their services, but, the bulk of the marginal revenue product and all of the cash flow that the athletes generate goes to the universities and their non-athlete employees (coaches, administrators, the NCAA, etc.), not to the athletes themselves.

Does the NCAA Really Sell Amateurism? Is it Necessary? The NCAA’s claim that amateurism is an essential component of its product offering rests on the assumption that there is demand for “amateur sports” as opposed to “collegiate sports in general, regardless of whether the athletes get paid.” This is an open question. Furthermore, the college game is no longer broadly perceived to be “amateur.” Audiences do not view the players as “student-athletes,” but rather as athletes who happen to attend class (sometimes). Fans accept the commercialization of college sports; the \$3.5 billion in NCAA revenue attests to that acceptance and cannot reasonably be perceived simply as infatuation with amateurism.¹⁶

It is doubtful that colleges will lose a significant portion of their audience or their revenue if the athletes were paid. In fact, the biggest supporters of college sports, the booster clubs and alumni at each school, are also the ones who are often caught professionalizing the sport by paying their alma mater’s athletes under the table. Again, college sports has had increasing success despite (perhaps because of!) the recent commercialization of the product since the *NCAA* decision in 1986. Whether a

significant block of fans would be turned off if athletes were paid is an essential component of a rule of reason antitrust analysis, not simply a fact for the NCAA to assert without critical evaluation.¹⁷

There are many examples of amateur sports that have become professional without a serious decrease in the popularity of the product. In golf and tennis, the traditional majors were once amateur-only events. Rugby Union has recently made the transition to professional status.¹⁸ Even the most hallowed amateur endeavor of all, the Olympics, has increased its appeal and revenue generation, even though it no longer requires that its athletes be amateurs.¹⁹

It would be presumptuous to argue that professionalization directly caused the increase in popularity, but it is this same untested logic that the NCAA uses to defend amateurism. Fans may prefer college sports because they are “amateur,” but they may prefer them instead because there is a long tradition of interscholastic rivalry. The two concepts can be separated, and to date, the NCAA has not been asked to substantiate its claims that it is amateurism rather than school rivalry as just one example, that truly differentiates its offering from NFL football or NBA basketball.

A Reasonable Alternative: Conference-Level Decisions. A resolution for properly solving the problems associated with the NCAA’s cartel power put forth by Gary Becker is simply to break the monopsony power of the cartel by enforcing the antitrust laws and allow each university to independently decide what it wants to do.²⁰

What Becker’s solution lacks, though, is a recognition of the necessity of some general agreement among sports competitors in order for the product to exist. Therefore, a more

viable alternative, that recognizes the necessity of coordination among teams to create league sports, is to devolve power from the NCAA to the various collegiate conferences. Conferences can play the procompetitive joint-venture role accepted by the courts in their treatment of sports leagues, creating the necessary competitive framework for the existence of the product. Each conference, then, could choose a common wage regime, and within that conference, the necessary balance for the creation of a team sport would be maintained, without the need for an overarching super-cartel to control the entire market for college-aged athletes.²¹ Moreover, the NCAA would still have a procompetitive role, ensuring that on-field or on-court rules remain standardized, and establishing rungs of competition, so that each conference could align itself for on-field competition with other similar conferences, avoiding a fragmentation of the sport into too many different games.²²

Some conferences might choose to allow their members to pay market rates to athletes in order, as procompetitive joint ventures, to attract top-notch talent and yet maintain competitive balance among the conference members. Other conferences might seek to create salary minima and maxima, which, in the context of the conference as procompetitive joint venture, might survive a similar rule of reason inquiry. Some conferences might choose to remain at the current level of in-kind-only payments, i.e., current NCAA-style amateurism, and seek to differentiate themselves in the market, not by attracting the top talent, but instead by offering the “real thing” to those fans who truly prefer this method of compensation. Finally, an Ivy League structure, where there are no athletic scholarships, might be adopted by some conferences.

Fans would be offered a wide variety of college sports options. The players would also be able to choose among programs and compensation schemes. There would be a diversity of offerings in the market, and these offerings could compete, on the field/court as before, and off the court in the hearts (and wallets) of the fans. The NCAA might argue that this would be chaos, but this chaos is typically defined in the antitrust literature as a competitive marketplace.

Would Conference Level Restraints Ruin Competitive Balance? Any analysis of the impact of a change in the NCAA's rules on amateurism must recognize that the current NCAA structure allows for significantly unbalanced matches. When Georgetown University plays Bethune-Cookman in basketball, two widely imbalanced programs operating under very different financial conditions square off. If compensation systems were to vary by conference, the Georgetown players would still win easily but now would also earn more money. Moreover, the current structure already pits teams that are compensated (those that offer athletic scholarships) against teams that are not (e.g., Ivy League schools).

At the very least, it remains to a trier of fact to determine if competitive balance is supported by the NCAA's rules on amateurism. In *Law v. NCAA*, the NCAA made the parallel argument that collusion to fix wages for assistant coaches was necessary to preserve competitive balance.²³ In *Law*, the Court stated that despite whatever procompetitive role the NCAA plays in general, when it comes to concerted action regarding the hiring of inputs, its actions were naked price fixing. In fact, the Court stated the NCAA had to prove "that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities."²⁴ Similarly, the NCAA has yet to

demonstrate that the current level of competitive balance would be harmed by the addition of wage competition to the options currently available for attracting top talent to college athletic programs.

A Conference-based college sports market would most likely become more competitive and competitive balance might be enhanced.²⁵ Leagues would compete for fans by choosing the wage structure that brought them the best combination of talent and fan appeal. If amateurism really sells tickets, then few schools will find it profitable to pay their athletes openly, and conferences that choose a paid regime will fail in the marketplace. If instead, talent sells tickets, and some conferences choose to pay for talent, they would likely gain market share at the expense of amateur conferences, etc.²⁶ Fans would also likely see higher quality contests as the top athletes might continue to play college sports instead of jumping prematurely to the professional leagues (where often their talent languishes at the end of the bench for the years they would have been playing, and stalling, collegiately, and perhaps receiving an education). The end result of this inter-brand competition should be a more attractive and more profitable college sports market.²⁷

Would Conference Level Restraints Destroy the Product? Would certain elements of the product cease to exist if the NCAA no longer imposed a single wage regime across all of Division 1? The most obvious candidate is the NCAA end-of-season championships, which some might argue would be threatened by a fragmentation of the wage regime in the NCAA. However, this assumes the current system requires that most conferences face an equal chance of competing in earnest for the championship. This assumption ignores the fact that since 1967, teams from eight conferences have won the thirty-three

NCAA men's basketball championships, with five of those conferences capturing twenty-eight of those wins.²⁸ There is no reason to suspect that a tournament matching dominant (well-paid) conferences against underdogs with lower (or no) compensation would be any less appealing than the current system which pits dominant conferences against underdogs at a common wage level.

A more troublesome negative externality is that the non-revenue-generating sports would have to get more of their funding from sources other than the two major sports programs. It is worth noting that the estimated surpluses the NCAA generates as a whole include the cost of this cross-subsidization, so there are sufficient profits to absorb some of these increased costs.²⁹ The question of whether the success of women's college athletics since the passage of Title IX has been financed by the exploitation of certain male athletes is worthy of its own body of literature.³⁰ This question does, however, raise important social questions, parallel to those raised in *Brown University*, beyond the scope of this article. It is worth noting, however, that the cross-subsidization in *Brown* was by affluent students admitted to Ivy League universities for the benefit of poor, primarily minority students. In the case of the NCAA, the revenue is generated disproportionately by African-Americans and the cross-subsidized sports are predominantly white. The issue is by no means clear-cut.³¹

Conclusion

The quote from the NCAA bylaws given at the beginning of this article harkens back to an era in college sports when the flow of dollars to and within athletic departments was simply a necessary function in order to allow sporting events to occur. Today, the NCAA rivals MLB, the NHL, the NBA, and the NFL in terms of its revenue

size, and so the question remains: is amateurism a necessary and reasonable restraint? The answer must be no. College sports need not include amateurism to prosper. National on-field and on-court competition can thrive in a system of conference-level wage regimes, with the added benefit of off-court competition.

In truth, if the NCAA took its mission to be that “student-athletes should be protected from exploitation by professional and commercial enterprises,” the first and worst offender with which the NCAA should grapple would be the \$3.5 billion NCAA itself. A way to prevent the exploitation of the athletes is to allow competition among teams to pay players a salary in exchange for their services.

⁽ Daniel A. Rascher, Ph.D., is a Senior Economist at LECG, Inc. and an Adjunct Professor of Sport Management at the University of San Francisco. Andrew D. Schwarz is a Senior Economist at LECG, Inc. The views expressed in this article are solely those of the authors and do not necessarily reflect the views of LECG, Inc., or the University of San Francisco. We would like to thank Ernie Nadel for his valuable input.

¹ See Arthur A. Fleisher, Brian L. Goff, and Robert D. Tollison, *The National Collegiate Athletic Association: A Study in Cartel Behavior*, (1992). More recently, Andrew Zimbalist has discussed the role of the NCAA and the exploitation of college athletes. He does not advocate paying the athletes unless they are removed from the student population and essentially become minor league players. See Andrew S. Zimbalist, *Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports*, (1999).

² “Rents” is the term used by economists to refer to profits above the competitive return on the invested capital. In other words, rents are unearned economic profits.

³ This growing disparity has even caused some beneficiaries of the current structure to question its fairness. Without directly advocating that college athletes be paid, Kelvin Sampson, men’s basketball coach for the University of Oklahoma, recently asked: “We’re talking \$6 billion [in TV revenue over eleven years]. Why can’t some of that go back to the student-athlete?” See the December 15, 1999 Associated Press article, Sampson: *Players Deserve Something*.

⁴ In 1989, expenses for Division 1 football were 72% of revenues. By 1997, expenses stood at 58%. For the same time period, D1 men’s basketball expenses dropped from 58% of revenue to 46%. For the quantitative details of this growth in revenues relative to expenses, contact the authors.

⁵ The per se standard is laid out in *Northern Pacific Railway. Co. v. U.S.*, 356 U.S. 1 (1958), where the Court stated “there are certain agreements or practices which because

of their pernicious effect on competition and lack of any redeeming feature are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”

⁶ See *NCAA v. Board of Regents*, and *Law v. NCAA*.

⁷ See Michael A. Flynn & Richard J. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, *Economic Journal* (forthcoming) for more on professional sports leagues as joint ventures.

⁸ Arthur A. Fleisher, Brian L. Goff, and Robert D. Tollison, *The National Collegiate Athletic Association: A Study in Cartel Behavior*, The University of Chicago Press, Chicago, 1992, p. 68.

⁹ Nevertheless, a professional league would employ about twenty players per year in basketball, where Division IA teams “employ” well over 3000 players, and even fewer in football, where Division 1A teams retain the services of well over 10,000 players. Consequently, if the market were defined to be sufficiently broad to capture explicitly professional demand for these early jumpers, the NCAA would still have about 99 percent of the market.

¹⁰ In this effort, the NCAA has had a willing ally in the state legislatures, twenty-eight of which have passed laws making it illegal for an agent to approach a college athlete in an effort to induce him to test if there is competition for his services. Violation of these laws, in some states, constitutes a felony! The fact that the NCAA has so woven itself into the American system that states can criminalize one adult helping another adult to explore employment opportunities is astounding. Imagine a law preventing a college recruitment office from helping students find paid internships during the school year.

¹¹ See <http://www.sportsmapnews.com/060199.htm>.

¹² The likely size of these leagues (6 or 8 teams) will potentially have a significant, but small, impact on the market for these athletes services. See www.cpbl.com and www.aba2000.com.

¹³ *Banks* contains particularly tortured logic: “We fail to understand how the dissent can allege the NCAA colleges purchase labor through grant-in-aid athletic scholarships offered to players when the value of the scholarship is based upon the school’s tuition and room and board, not the supply and demand for players.” If *Banks* had directly alleged concerted action by the NCAA to prevent supply and demand from applying in this market, the court might have seen the circularity of its reasoning.

¹⁴ There were pre- *NCAA v. Board of Regents* cases such as *Hennessey v. NCAA*, 564 F.2d 1136, 1146 (5th Cir. 1977), and *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983), that presumed amateurism to be a legitimate goal of the NCAA. *Justice*, citing *Hennessey*, draws a distinction between NCAA rules that are “increasingly accompanied by a discernable economic purpose” (and thus subject to antitrust scrutiny), and those designed “for the protection of amateurism” (and thus not subject to antitrust scrutiny). Almost fifteen years after *Justice* it is difficult to see how an agreement among 90+% of all competitors in a market to fix the wages paid to their primary input can be anything but “economic” in purpose.

¹⁵ Rent seeking is activity designed to garner a share of unearned economic profits, i.e., rents.

¹⁶ In fact, the NCAA does allow professional athletes to play in NCAA sports. Current rules allow for a player to retain amateur status in one sport while playing as a professional in another.

¹⁷ From a theoretical perspective, the NCAA's argument about amateurism as a "product quality" flies in the face of generally accepted theory. It is inappropriate to consider price of an input as a factor in the consumer's utility function, except for the alleged "luxury" or "demonstration" goods.

¹⁸ "The professional era has helped revitalise the game in England, which, it has to be said, was getting a little stagnant." See Ian Malin, *Mud, Blood and Money: English Rugby Union Goes Professional*, p. 13 (1997).

¹⁹ Regarding this change, Mike Moran, Director of Public Information for USOC, said as in college sports, Olympics fans knew that some athletes were paid under the table, and this led the organizers to make the change: "We wanted to rid ourselves of the hypocrisy. Sponsors put up large amounts of money to support the Olympic Games and we think our athletes should share in that." See *USA Today*, 9/18/96.

²⁰ See Gary Becker, *College Athletes Should Get Paid What They Are Worth*, Bus. Wk., Sept. 30, 1985, at 18.

²¹ Some might note with irony that we are suggesting collusion at the conference level, an activity that was effectively barred by the various settlements in *United States v. Brown University*. However, this is just another example of a case where sports need cooperation that other activities might not. Concerted action may not be necessary for the Ivy League to provide financial aid to students, but it is necessary, at the appropriate level, for the Ivy League to exist as a distinct sports league.

²² The NCAA might also facilitate the transfer of schools from one conference to another if they found themselves out of step with their conference's decision of payment for athletes.

²³ The NCAA lost this case (affirmed by the Tenth Circuit) on summary judgment. On March 9, 1999, the NCAA settled, agreeing to pay \$54.5 million (an estimate of lost wages) to the approximately 2000 D1 entry-level assistant coaches who had been harmed by this agreement to fix wages.

²⁴ [[*Law v. NCAA*, <http://laws.findlaw.com/uscircs/10th/963034.html> for page]]

²⁵ The idea of creating competing joint ventures in sports is not new. Stephen Ross has advocated breaking up monopoly sports leagues, claiming that the increased competition will ultimately benefit consumers. See Stephen Ross, *Break up the Sports League Monopolies*, in P. Staudohar & J. Mangan, eds. (1991), *The Business of Professional Sports*.

²⁶ This would give lower prestige conferences an additional recruiting tool when competing for talent with the current dominant conferences: the ability to pay higher salaries. Compare this with the court's theory in *Law v. NCAA*, footnote 15.

²⁷ In fact, if the courts were to find that conferences are at the correct level for ensuring the various benefits of common structure on wages, the likely result would be a differentiated market for products, similar to the markets for branded goods. Consequently, the law on these two types of markets would both encourage reasonable intrabrand restraints, with the aim of promoting interbrand competition. This

harmonization of two aspects of the antitrust law would be a welcomed side effect of revisiting the NCAA's status as a wage fixing joint venture.

²⁸ Teams from the Big-10, Pac-10, ACC, SEC, and Big East. Louisville (the Metro Conference) won in 1980 and 1986. Kansas (then Big-8) won in 1988 and UNLV (then the Big West) won in 1990. The fifth win, from Marquette (1977) was when Marquette was unaffiliated with any conference.

²⁹ Quantitative details of these estimated surpluses are available from the authors.

³⁰ Fifty two percent of NCAA football players and 61% of NCAA men's basketball players are African-American, compared with a percentage of 12.5% for the general U.S. population. Evidence that a higher percentage of the premier players are African-American comes from noting that the NBA and NFL are comprised of 79% and 66% of African-American players, respectively.

³¹ A worst case scenario might be that some schools cancel the bulk of their sports programs. As discussed above, this has important social and policy implications, which cannot be wished away. Generally issues such as taxation of one group of workers to subsidize the wages of another group are addressed at the legislative level, where the affected workers have input through the democratic process. Here, we see unilateral action by a cartel replacing taxation with representation.