Notes

The Effect of NCAA v. *Board of Regents* on the Power of the NCAA to Impose Television Sanctions

I. Introduction

In *Goldfarb v. Virginia State Bar*,[1] the Supreme Court made it clear that the provisions of the Sherman Anti-Trust Act (Sherman Act)[2] are applicable to anticompetitive activities outside the normal business context.[3] The *Goldfarb* decision brought professional associations, as well as non-profit organizations, under the antitrust spotlight. Among the newcomers to antitrust scrutiny in the wake of *Goldfarb* was the National Collegiate Athletic Association (NCAA), a non-profit organization which regulates collegiate athletics.

After *Goldfarb*, the NCAA successfully weathered the initial antitrust challenges to a number of its regulations.[4] In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,[5] though, the Supreme Court held that the NCAA's college football television plan, whereby the NCAA collectively sold the television rights to member schools' football games while limiting the number of television appearances any member school could make, was an unlawful restraint of trade under section 1 of the Sherman Act.[6]

The Court's holding in *Board of Regents* has raised questions regarding the continued ability of the NCAA to regulate collegiate athletics. Specifically, the holding brings into question the continued ability of the NCAA to sanction member schools that violate the association's rules by

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[1]421 U.S. 773 (1975).

[2]15 U.S.C. §§ 1-7 (1982). This Note will primarily be concerned with § 1 of the Act, which provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1982).

[3]The Court in *Goldfarb* held that a fee schedule published by a county bar association was not immune to an attack under the Sherman Act. *Id.*

[4]Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (upholding NCAA rule limiting number of assistant football coaches member institutions could employ); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983) (upholding NCAA sanctions prohibiting University of Arizona football team from appearing on television and from participating in post-season bowl games); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975) (upholding NCAA eligibility guidelines); College Athletic Placement Service, Inc. v. NCAA, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D. N.J. 1974) (upholding NCAA rule forbidding use of athletic placement services).

[5]104 S. Ct. 2948 (1984).

[6]*See supra* note 2.

prohibiting them from appearing on television. The Court in *Board of Regents*, while holding that the television plan was violative of the Sherman Act, did not address the question whether the NCAA's television sanctions were also an illegal restraint of trade under section 1 of the Sherman Act.

This Note will examine the Supreme Court's decision in *NCAA v. Board of Regents* and analyze the ramifications of that decision with regard to the NCAA's power to levy television sanctions. The Note will subject the television sanctions to an antitrust analysis and suggest that, in light of the *Board of Regents* decision, the NCAA's television sanctions are a violation of section 1 of the Sherman Act.

II. Background of the *Board of Regents* Decision

A. The NCAA and the College Football Television Plan

In its constitution, the NCAA states that its basic purpose is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports."[7] The National Collegiate Athletic Association was founded in 1905 in response to a generally chaotic situation in intercollegiate athletics.[8] Since its inception, the NCAA has grown to include 991 member institutions[9] and has been judicially noticed as the "dominant" intercollegiate sports organization.[10] The NCAA sponsors seventy-four national championships in twenty sports for members in three separate divisions[11] and promulgates playing rules, standards for academic eligibility, athletic recruiting regulations, and rules governing the size of athletic teams and coaching staffs.[12]

The NCAA instituted the first of its college football television plans in 1951.[13] The original plan came into being because of a fear of the

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[7]Constitution and Interpretations of the NCAA, art. II, § 2(a), *reprinted in* [1984-85] Manual of the National Collegiate Athletic Association 7, 8.

[8]Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 Yale L.J. 655, 656 (1978).

[9]NCAA News, Sept. 10, 1984, at 1, col. 1.

[10]College Athletic Placement Service, Inc. v. NCAA, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D. N.J. 1974).

[11]Bylaws and Interpretations of the National Collegiate Athletic Association, art. V, § 6, *reprinted in* [1984-85] Manual of the National Collegiate Athletic Association, 98-101.

[12]104 S. Ct. at 2954.

[13]Hochberg, Horowitz, *Broadcasting and CATV: The Beauty and the Bane of Major College Football*, 38 Law & Contemp. Probs. 112, 114 (1973). College football is the only sport in which the NCAA has attempted to regulate its member schools' television appearances. Television arrangements for college basketball, which is the only other NCAA sport to attract national television coverage for regular season games, are made by the schools themselves

effect television would have on live attendance at games. The plan allowed only one game a week to be telecast in each area with a total television blackout on three of the ten Saturdays during the season.[14]

The NCAA's football television plan evolved into a multi-million dollar bonanza for the NCAA and its member institutions. The contract ruled invalid by the court of appeals in *Board of Regents* would have garnered the NCAA a total of $263.5 million from Columbia Broadcasting System (CBS) and the American Broadcasting Companies (ABC) over four years, plus $17.696 million from Turner Broadcasting System, Incorporated (TBS) over two years.[15]

The plan struck down by the Supreme Court contained the same essential features as the NCAA television plans which had preceded it.[16] The networks would pay to each participating school a recommended fee set by a representative of the NCAA for the different types of telecasts. Higher fees would be set for games to be telecast nationally and lower fees set for games to be telecast regionally or for games involving smaller schools (such as schools from NCAA Division II or Division III as opposed to Division I schools).[17] The total payments for all games would have apparently equaled the $263.5 million "minimum aggregate compensation" specified in the contracts.[18] Except for the difference in fees between regional and national telecasts or Division I, II and III games, the amount paid to any team participating in a televised game would not vary regardless of the size of the viewing audience, number of markets in which the game was telecast, or the potential interest in the game.[19] For example, a regional telecast airing in a limited number of markets of a game between two traditionally weak football schools would command the same fee as a regional telecast airing in a large number of markets between two traditional college football powerhouses.[20]

The NCAA's television plan also required the networks to schedule appearances for at least eighty-two different member institutions during

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or by the athletic conferences of which they are members. Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1284-5 (W.D. Okla. 1982).

[14]104 S. Ct. at 2955.

[15]Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1291-92 (W.D. Okla. 1982).

[16]104 S. Ct. at 2955.

[17]*Id.* at 2956.

[18]*Id.*

[19]*Id.*

[20]The district court described an occasion in which a game between little-known Appalachian State and Citadel was aired on four of ABC's affiliated stations while a game on the same day between the University of Southern California and the University of Oklahoma, both of which were rated among the top five teams nationally, was aired on over two hundred ABC affiliates. All four teams, however, received exactly the same fees for their television appearances. 546 F. Supp. at 1291.

each two-year period of the four-year contracts.[21] Each member institution was limited to a maximum of six televised games in a two-year period.[22] No NCAA member could make any independent sale of television rights except in accordance with the NCAA plan.[23]

B. Dissatisfaction with the NCAA Television Plan

Disenchantment with the NCAA plan and other aspects of the NCAA's regulation of college football prompted several of the NCAA members to form the College Football Association (CFA).[24] The CFA restricted its membership to football-playing schools which met certain standards of size and dominance. CFA membership eventually came to include every major football-playing school with the exception of the members of the Big 10 and Pacific 10 conferences.[25]

Beginning in 1979, the CFA members actively began to seek a greater voice in the formation of television football policy.[26] In 1981, the CFA developed an independent television plan and obtained a contract offer from the National Broadcasting Company (NBC) which would have increased revenues and the number of appearances for CFA members.[27] The CFA signed the contract and the NCAA took prompt action, threatening sanctions against any CFA member that participated in the CFA-NBC contract.[28] The NCAA's threats apparently worked because the CFA-NBC contract was never consummated.[29] Nonetheless, the University of Oklahoma and the University of Georgia, both CFA members, filed suit in United States District Court for the Western District of Oklahoma, challenging the NCAA television plan as violative of the Sherman Anti-Trust Act.[30]

III. *NCAA v. Board of Regents of the University of Oklahoma*

A. The District Court Decision

The district court held that the NCAA's football television controls

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[21] 546 F. Supp. at 1293.

[22] *Id.*

[23] "Any commitment by a member institution with respect to telecasting or cablecasting or otherwise televising its football games in a future season or seasons shall be subject to the terms of the NCAA football television principles and supporting plan provisions applicable to such season(s) for that institution's football division." Bylaws and Interpretations of the National Collegiate Athletic Association, art. VIII, § 2(d), *reprinted in* [1984-85] MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 115-16.

[24] 546 F. Supp. at 1285.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1286.

[28] *Id.* For a list of possible sanctions which could be imposed by the NCAA, *see infra* note 82.

[29] *Id.* at 1286-87.

[30] *Id.* at 1301.

were violations of sections 1 and 2 of the Sherman Act.[31] The court concluded that the NCAA's controls over college football made the NCAA a "classic cartel."

> This cartel has an almost absolute control over the supply of college football. . . . Like all other cartels, NCAA members have sought and achieved a price for their products which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products.[32]

The district court went on to find that the NCAA's college football plan constituted illegal *per se* price fixing and an illegal *per se* group boycott in violation of section 1 of the Sherman Act.[33]

Despite its finding of *per se* illegalities, the court went on to discuss the NCAA's restraints under the rule of reason.[34] Under a rule of reason analysis, the goals and purposes served by a challenged restraint (the restraint's procompetitive justifications) are balanced against the anticompetitive effects of the restraint in order to determine its legality.[35]

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[31] *Id.*

[32] *Id.* at 1300-01.

[33] *Id.* at 1311. Certain agreements are so clearly anticompetitive that they are deemed to be illegal *per se*. Such arrangements will be declared illegal without elaborate inquiry into the harm they have caused or the excuse for their use. *See generally* United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[34] 546 F. Supp. at 1314.

[35] The classic statement of the rule of reason appeared in an opinion written by Justice Brandeis in *Bd. of Trade of the City of Chicago v. United States*:

> [T]he legality of an agreement cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business. . . its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. 231, 238 (1918).

For a more detailed description of the rule of reason and *per se* doctrines, *see* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 165-86 (1977).

The district court concluded that the restraints in the NCAA's college football television plan were unreasonable.[36] "The controls are unreasonable by their very nature and character, and the history and circumstances surrounding the controls lead readily to the inference that they were intended to restrain and enhance prices."[37]

The court then analyzed the plaintiffs' charge of monopolization under section 2 of the Sherman Act and concluded that the NCAA had monopolized the market of college football television.[38] The court granted relief by declaring the NCAA's television contracts with ABC, CBS, and TBS illegal and by enjoining the NCAA from taking any part in the formation of agreements regarding the televising of member institutions' football games.[39]

B. The Appeals Court Decision

The court of appeals affirmed the district court's finding that the NCAA's television plan constituted *per se* illegal price fixing.[40] Nonetheless, the court noted the prospect of review by the Supreme Court and followed the lead of the district court by applying a rule of reason analysis to the NCAA's television plan despite the finding of *per se* illegality.[41]

In its rule of reason analysis, the appeals court first assessed the NCAA's market power in the relevant market of televised collegiate football.[42] After determining that the NCAA did possess market power and that its television plan produced anticompetitive results, the court turned to the NCAA's justification for the restraints.[43] The NCAA asserted that the television plan promoted athletically balanced competition, but the court found that the same result could be accomplished by means not violative of the antitrust laws.[44] The NCAA's second justification was that the restraints were necessary to penetrate the network programming market.[45] The court rejected this argument after noting that many of the schools whose games were televised to penetrate the market, i.e., the football powers of the CFA, were not pleased with the NCAA's restraints and that the NCAA had used its control of intercollegiate athletics to obtain

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[36]546 F. Supp. at 1315.

[37]*Id.*

[38]*Id.* at 1323.

[39]*Id.* at 1326-27.

[40]Bd. of Regents of University of Okla. v. NCAA, 707 F.2d 1147, 1156 (10th Cir. 1983).

[41]*Id.* at 1157.

[42]*Id.* at 1158.

[43]*Id.* at 1159.

[44]*Id.* at 1159-60.

[45]The court found that a properly drawn system of pass-over payments would be one way to ensure adequate athletic funding for schools not earning substantial television revenues. *Id.* at 1159.

control of broadcast rights to intercollegiate football.[46] "In these circumstances we are not particularly disposed to consider the plan's impact on competition within the larger network programming market to be redeemingly procompetitive."[47]

The court finally concluded that the district court had erred in holding the plan to be a group boycott illegal *per se* under section 1 of the Sherman Act and remanded the case to the district court in order for the NCAA to present its concerns regarding the breadth of the injunction issued by the court.[48] The court noted that part of the district court's injunction might be read so as to prevent the NCAA from imposing television sanctions on schools that violate regulations unrelated to the television plan, and that such an effect was not warranted by the violations found.[49]

Judge Barrett filed a dissent in which he labeled the majority's finding that the NCAA's television plan was illegal *per se* price-fixing.[50] Judge Barrett said that the primary purpose of the television plan was not anticompetitive. "Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institution."[51]

C. The Supreme Court Decision

The Supreme Court first found that the NCAA's television plan constituted forms of horizontal price-fixing[52] and output limitations.[53] The Court then went on to say that while such restraints were ordinarily condemned as illegal *per se*, the restraints should be analyzed under a rule of reason approach.

> This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized

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[46] *Id.* at 1160.

[47] *Id.*

[48] *Id.* at 1162.

[49] *Id.* Paragraph four of the district court's injunction reads:

> National Collegiate Athletic Association, its officers, agents or employees shall be and hereby are enjoined from prohibiting member institutions from selling or assigning their rights to telecast the college football games in which they participate, and from requiring as a condition of membership that those institutions grant to the National Collegiate Athletic Association the power to control those institutions' rights to telecast college football games.

Id.

[50] *Id.*

[51] *Id.* at 1163.

[52] Horizontal price-fixing occurs when competing sellers fix the prices of their products. *See* Columbia Broadcasting Sys. v. Am. Soc. of Composers, Authors and Publishers, 620 F.2d 930 (2d Cir. 1980).

[53] 104 S. Ct. at 2959-60.

> as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints are essential if the product is to be available at all.[54]

The Court found that the product marketed by the NCAA and its member institutions was competition, or, more specifically, contests between competing universities. Rules and regulations were necessary restraints which allowed the production of marketable competition. "Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable."[55]

The Court agreed with the district court's finding that the college football telecasts constituted a separate market in that they generated an audience uniquely attractive to advertisers which could not be generated by other programming alternatives.[56] The Court also agreed that the NCAA did possess market power, although it pointed out that no showing of market power is necessary to demonstrate the anticompetitive nature of agreements to restrict price or output.[57]

The Court then considered the NCAA's justifications for the restraints in the television plan. The NCAA relied on *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[58] to argue that its television plan constituted a joint venture which assisted in the marketing of television rights and was therefore procompetitive.[59] The Court rejected this argument, relying on the district court's finding that NCAA football could be marketed just as effectively without the television plan.[60] The Court also

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[54]*Id.* at 2960-61.

[55]*Id.* at 2961.

[56]*Id.* at 2966.

[57]*Id.* at 2965-66. *See* Nat'l Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[58]441 U.S. 1 (1979). The case involved a suit brought by CBS against licensing agencies for composers, writers, and publishers and their members and affiliates. CBS alleged that the agencies' issuance of blanket licenses to the broadcast rights of a large number of copyrighted musical compositions at fees negotiated by the agencies was illegal price-fixing under the antitrust laws. The Court held that while the license fee was set by the agencies rather than by competition in the market, the issuance of blanket licenses did not constitute price-fixing that was *per se* unlawful under the antitrust laws. The Court found procompetitive efficiencies created by the blanket licenses in integration of sales and the monitoring and enforcement against unauthorized copyright use, which would present difficult and expensive problems if left to the individual users and copyright owners. The Court also found that the blanket license had provided an acceptable mechanism for at least a large part of the market for performing rights to copyrighted musical compositions.

[59]104 S. Ct. at 2967.

[60]*Id.*

reasoned that if the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games.[61] Relying on the district court's finding that the plan had the opposite effect, the Court dismissed the NCAA's argument.[62]

The Court next dealt with the NCAA's argument that the television plan protected live attendance at college football games. The Court first noted that under the NCAA's plan, games were shown on television at all hours that college football was played. Thus, "the plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events."[63] The Court also rejected the argument on the grounds that it was based on a fear that the product would not be attractive enough to draw live attendance when faced with competition from televised games. "At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market."[64]

The final procompetitive justification proffered by the NCAA in support of its television plan was that it helped maintain competitive balance among amateur athletic teams.[65] The Court acknowledged that maintaining competitive balance was a legitimate justification for many of the restraints imposed by the NCAA on its member institutions. "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[66] However, the Court concluded that the NCAA's television plan did not serve the interest of balanced competition.

> The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising.[67]

The Court reinforced its conclusion by pointing out that maintenance of competitive balance is a procompetitive justification under the rule of reason based on the theory that equal competition maximizes consumer

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[61] *Id.*
[62] *Id.* at 2967-68.
[63] *Id.* at 2968-69.
[64] *Id.* at 2969.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 2970.

demand. "The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose."[68]

Justice White[69] was joined by Justice Rehnquist in the dissent. Justice White felt the Court had erred in treating intercollegiate athletics as a purely commercial venture, and that the justifications forwarded by the NCAA for its television plan were valid.[70] Along with accepting the NCAA's procompetitive justifications, Justice White agreed with the NCAA's position on the general ground that "the television plan reflects the NCAA's fundamental policy of preserving amateurism and integrating athletics and education."[71]

Justice White took issue with most of the findings of the majority as well as those of the lower courts. Justice White particularly objected to the lower courts' and majority's definition of the relevant market.[72] In Justice White's view, the proper market in which to analyze the NCAA's restraints was the entertainment market rather than the narrow market of college football television. Because college football was competing within the broad spectrum of the entertainment market, the television plan was a justifiable means of enhancing college football's ability to compete within that market.[73]

Justice White concluded by arguing that the majority and the lower courts failed to take into account "the essentially noneconomic nature of the NCAA's program of self-regulation."[74] Specifically, Justice White argued that "the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism."[75] According to Justice White, the television plan helped to encourage students to choose their schools on the basis of educational quality, ensured the economic viability of other athletic programs at schools with weaker football programs, and promoted competitive balance. "These important contributions . . . are sufficient to offset any minimal anticompetitive effects of the television plan."[76]

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[68] *Id.*

[69] It is interesting to note that Justice White was an All-American selection in football when playing for the University of Colorado in 1937. CLAASSEEN, ENCYCLOPEDIA OF FOOTBALL 10-5 (1963).

[70] 104 S. Ct. at 2971-73.

[71] *Id.* at 2973.

[72] *Id.* at 2976-77.

[73] *Id.* at 2977.

[74] *Id.*

[75] *Id.* at 2978.

[76] *Id.* at 2979.

D. Aftermath of the Board of Regents *Decision*

The decision in *Board of Regents* had immediate and sometimes confusing effects. The NCAA scrambled to put together an alternative television plan, but the plan was voted down by the NCAA membership on July 11, 1984, leaving the CFA, Big 10, and Pacific 10 conferences free to negotiate their own television contracts with the networks.[77] The CFA eventually entered into an agreement with ABC and the Entertainment and Sports Programming Network (ESPN) while the Big 10 and Pacific 10 signed an agreement with CBS.[78]

Those contracts quickly generated more litigation. The CFA's contract with ABC was an exclusive contract which prohibited CFA members from having their games aired on CBS or NBC. When CFA member Nebraska refused to allow CBS to televise its game with Pacific 10 member UCLA, UCLA, the Big 10, Pacific 10, and the University of Southern California (USC) filed an antitrust suit in district court in Los Angeles against ABC, ESPN, the CFA, Nebraska, and the University of Notre Dame.[79] Judge Richard Gadbois entered a preliminary injunction allowing the game between Nebraska and UCLA to be televised.[80]

Meanwhile, the Association of Independent Television Stations, Incorporated (INTV) filed two separate antitrust suits in Oklahoma City and Los Angeles. INTV alleged that the television contract entered into by the major football coalitions stifled competition and prohibited INTV members rightful access to certain contests.[81] While chaos reigned with regard to television rights, serious questions were being raised about the continued ability of the NCAA to levy television sanctions against member institutions that violated NCAA regulations.[82] The University of Southern California, which had been prohibited from appearing on television in 1983 and 1984, threatened to file suit against the NCAA to have the television sanctions lifted in light of the Supreme Court's decision in *Board*

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[77]Indianapolis Star, July 11, 1984, at 45, col. 2.

[78]The NCAA News, Aug. 1, 1984, at 1, col. 1.

[79]The NCAA News, Sept. 17, 1984, at 1, col. 3. (USC, a Pacific 10 member, was scheduled to have its game against CFA member, Notre Dame, televised on CBS.).

[80]*Id.*

[81]*Id.* at 12, col. 3.

[82]Among the disciplinary measures, singly or in combination, which may be adopted and imposed against an institution are:

> (6) Ineligibility for any television programs subject to the Association's control or administration, or any other television programs involving live coverage of the institution's intercollegiate athletics team or teams in the sport or sports in which the violations occurred.

Official Procedure Governing the NCAA Enforcement Program, § 7(b)(6), *reprinted in* [1984-85] MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 204.

of Regents.[83] The NCAA asserted that the Supreme Court's decision did not interfere with the NCAA's sanctioning power and petitioned the district court for a modification of its injunction in order to clarify the situation.[84] Despite the NCAA's assertion, the NCAA Committee on Infractions permitted member institutions that had been penalized with television bans to enter into commitments to have their 1984 games televised, pending the outcome of the modification hearing.[85] If the district court's injunction were to be modified clearly to give the NCAA permission to impose television sanctions, schools under sanction that chose to have their 1984 games televised would have the sanctions reimposed for 1985.[86] If the NCAA were to be put under a decree precluding television sanctions, the Committee on Infractions would determine whether a substitute penalty should be imposed.[87]

The district court handed down its modified injunction on October 31, 1984.[88] Noting that "it was surely not the Court's intention to have its injunction intrude into areas or activities which were not presented in the original litigation," the court partially granted the NCAA's motion to modify.[89] The court added a seventh paragraph to the injunction which read: "Nothing herein contained shall be construed as prohibiting the National Collegiate Athletic Association, its officers, agents and employees, from: "(b) Imposing sanctions restricting televising of a member's football games for violation of non-television rules and regulations."[90]

IV. Effect of the *Board of Regents* Decision on the NCAA's Power to Impose Television Sanctions

In light of the district court's modified injunction, the NCAA will probably attempt to reimpose its television sanctions for the 1985 college football season. The modified injunction, though, is hardly dispositive of the question regarding the legality of the television sanctions. The district court made it clear that it granted the modification not because it considered the television bans to be valid, but because the question of the

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[83]*Scorecard*, Sports Illustrated, 9, (July 23, 1984).

[84]The NCAA News, Aug. 1, 1984, at 1, col. 2. A hearing on the NCAA's motion to modify was scheduled for Oct. 11-12, 1984. The NCAA News, Sept. 17, 1984, at 1 col. 2. The University of Oklahoma and the University of Georgia opposed any modification in the district court's injunction. The plaintiff's attorney said that his clients would ask the trial court to "fence out" the NCAA's organizational structure from further college football television activities. The NCAA News, July 18, 1984, at 1, col. 3.

[85]The NCAA News, Aug. 1, 1984, at 1, col. 2.

[86]*Id.*

[87]*Id.*

[88]Bd. of Regents of Univ. of Okla. v. NCAA, 601 F. Supp. 307 (W.D. Okla. 1984).

[89]*Id.* at 309.

[90]*Id.* at 310.

validity of the sanctions had not been presented in the original litigation.[91]

Thus, if and when the NCAA attempts to reimpose its television sanctions, those sanctions will still be vulnerable to antitrust challenges. While the specific holding of the Supreme Court in *Board of Regents* does not apply to the NCAA's television sanctions, the rationale applied by the Court would be applicable to an antitrust analysis of the sanctions. The changing nature of the NCAA and intercollegiate athletics would also be relevant to any such analysis.

A. The NCAA and the Preservation of Amateurism

The Supreme Court's acknowledgement in *Board of Regents* of NCAA restraints other than the television plan as "restrictions designed to preserve amateurism"[92] mirrors the perception of lower courts which have upheld NCAA regulations and sanctions in the face of antitrust attacks.[93] The implication seems to be that if the NCAA could have somehow proven that its television plan was tailored to preserve "the integrity of the product"[94] (i.e., preserve amateurism), the plan would have been upheld.

This rationale is exemplified by a series of cases involving challenges to NCAA restraints. In *Justice v. NCAA*,[95] a case decided after the court of appeals' decision in *Board of Regents*, four members of the University of Arizona's football team sought a preliminary injunction to prevent enforcement of sanctions imposed by the NCAA which rendered the team ineligible to participate in post-season play or to make television appearances for two seasons. The court upheld the sanctions. The plaintiffs alleged that the NCAA's sanctions constituted *per se* illegal group boycott.[96] The court rejected the claim of *per se* illegality, distinguishing the NCAA's sanctions from the NCAA's television plan at issue in *Board of Regents*. "The regulations at issue here . . . pertain solely to the NCAA's stated goal of preserving amateurism."[97] The court then analyzed the sanctions under the rule of reason and concluded that the sanctions "have been shown to lack an anticompetitive purpose and to be directly

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[91] *Id.* at 309.

[92] 104 S. Ct. at 2970.

[93] *See* Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975); College Athletic Placement Service, Inc. v. NCAA, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D. N.J. 1974).

[94] 104 S. Ct. at 2961.

[95] 577 F. Supp. 356.

[96] *Id.* at 378. The court initially opined that the plaintiffs had no standing to assert claims of antitrust violations because their threatened injury was too remote to meet the standing requirement of section 16 of the Clayton Act. However, assuming *arguendo* that the plaintiffs had standing, the court evaluated the merits of the antitrust claim. *Id.*

[97] *Id.* at 379.

related to the NCAA objectives of preserving amateurism and promoting fair competition.''[98] Because the court found that the sanctions had no anticompetitive purposes, were reasonably related to the association's central objectives, and were not overbroad, it accordingly held that there was no unreasonable restraint under section 1 of the Sherman Act.[99]

In *Jones v. NCAA*,[100] a college athlete who had received compensation for playing hockey during two seasons while he was not a student sought an injunction preventing the NCAA from declaring him ineligible to play hockey for Northeastern University. Despite a finding that the Sherman Act was inapplicable to the facts of the case, the court subjected the NCAA's eligibility restrictions to an antitrust analysis.[101] The court found that the purpose underlying the NCAA's eligibility guidelines was not anticompetitive. ''The N.C.A.A. eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding.''[102] The court went on to deny the plaintiff's injunction.[103]

The NCAA's role in the preservation of amateurism was also cited as a procompetitive justification for NCAA-imposed restrictions in *Hennessey v. NCAA*.[104] In *Hennessey*, two assistant football coaches who had been employed by the University of Alabama challenged an NCAA bylaw which limited the number of assistant coaches certain NCAA member institutions could employ.[105] The court applied a rule of reason analysis to examine the restraint and found that ''[t]he fundamental objective in mind was to preserve and foster competition in intercollegiate athletics . . . and to reorient the programs into their traditional role as amateur sports operating as part of the educational process.''[106] The court went on to conclude that the restraint was valid under the Sherman Act.

B. The Legitimacy of Preservation of Amateurism as a Procompetitive Justification Under the Rule of Reason

With the exception of the district court and appeals court in *Board of Regents*, all of the courts which have undertaken an antitrust analysis of restraints imposed by the NCAA have determined that the restraints

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[98] *Id.* at 382.
[99] *Id.* at 383.
[100] 392 F. Supp. 295 (D. Mass. 1975).
[101] *Id.* at 303.
[102] *Id.* at 304.
[103] *Id.*
[104] 564 F.2d 1136 (5th Cir. 1977).
[105] *Id.* at 1141.
[106] *Id.* at 1153.

should be examined under the rule of reason.[107] In the Supreme Court's decision in *Board of Regents* and in the appeals court's decision in *Hennessey*, this determination was made despite the courts' acknowledgement of *per se* violations. In applying the rule of reason to NCAA-imposed restraints, the courts have demonstrated a willingness to accept the NCAA's stated goal of preservation of amateurism as a legitimate procompetitive justification for the restraints.

The courts' acceptance of preservation of amateurism as a procompetitive justification under the rule of reason is questionable, both as a matter of law and as a matter of fact. Preservation of amateurism indeed may be a noble goal, but it is difficult to see how the pursuit of that goal alone is procompetitive in terms of promotion of economic competition.

> The rule of reason is a standard which calls on courts to judge shades and graduations of competitive impact, a difficult enough inquiry. But the rule does not call on a court to judge whether a restraint of this or that precise degree is justified by its complementary tendency toward some transcendent good.[108]

Despite its apparent approval of NCAA restrictions designed to preserve amatuerism,[109] the Supreme Court in *Board of Regents* noted that "it is . . . well settled that good motives will not validate an otherwise anticompetitive practice."[110] In *National Society of Professional Engineers v. United States*,[111] the Supreme Court found that the purpose of any antitrust analysis "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry."[112]

The goal of preservation of amateurism clearly seems to fall within the categories of "transcendent good" or "good motives." It is a policy designed to serve the interests of the members of the NCAA and, standing alone, has no economically competitive significance. A similar justification was rejected by the court in *Denver Rockets v. All-Pro Management, Inc.*[113] In that case, the National Basketball Association (NBA) attempted

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[107]*See, e.g.*, College Athletic Placement Service, Inc. v. NCAA, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D. N.J. 1974).

[108]L. Sullivan, Handbook on the Law of Antitrust 187 (1977).

[109]104 S. Ct. at 2969.

[110]*Id.* at 2960. *See* United States v. Griffith, 334 U.S. 100, 105-06 (1948); Associated Press v. United States, 326 U.S. 1, 16 n.15 (1945); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

[111]435 U.S. 679 (1978).

[112]*Id.* at 692.

[113]325 F. Supp. 1049 (C.D. Cal. 1971).

to defend against an antitrust challenge to an NBA rule which prohibited a qualified player from negotiating with NBA teams until four years after his high school class graduation. The NBA attempted to justify the regulation by saying that each prospective basketball player should have the opportunity to complete four years of college before beginning his professional career. The court rejected the justification. "However commendable this desire may be, this court is not in a position to say that this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws."[114]

Even if the preservation of amateurism were a legitimate procompetitive legal justification, the fact is that the preservation of amateurism is no longer the primary purpose of the NCAA, especially in major college football. Courts have accepted the NCAA's claim of preservation of amateurism without applying the same scrutiny to the claim as that applied by the Supreme Court to the NCAA's proffered procompetitive justifications in *Board of Regents*. Such scrutiny would reveal that the true purpose of the NCAA is to ensure the production of a marketable product. As then United States Senator Marlow Cook of Kentucky said in 1973, "The NCAA is primarily designed to protect and defend its member institutions from the professional sports world and to make sure that collegiate sports gets it share of the sports business pie."[115]

The NCAA's bylaws permit major college football teams to award ninety-five "financial aid awards" (scholarships) each year to prospective players with a limit of ninety-five financial aid awards allowed to be in effect in the same year.[116] The awards may cover tuition and fees, room and board, and required course-related books.[117] "Although the colleges euphemistically label this compensation 'financial aid' there can be no question that this aid is, in fact, compensation: student athletes exchange their athletic skills, in a quid pro quo, for a package of goods and services."[118] In effect, the NCAA sets the maximum price which can be paid for intercollegiate athletics and regulates the quantity of athletes that can be "purchased" in a given time period.[119]

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[114]*Id.* at 1066.

[115]Washington Post, Mar. 29, 1973, § C at 1, col. 2.

[116]Bylaws and Interpretations of the National Collegiate Athletic Association, art. VI, § 5(c), *reprinted in* [1984-85] MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 107.

[117]CONSTITUTION AND INTERPRETATION OF THE NCAA, art. III, § 1(9)(1), *reprinted in* [1984-85] MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 12.

[118]Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis, supra* note 8, at 659, n.22.

[119]Koch, *A Troubled Cartel: The NCAA*, 38 LAW & CONTEMP. PROBS., 135, 136-37 (1973).

Even the administrators of the NCAA have come to recognize the fallacy of amateurism in major college football. Walter Byers, the executive director of the NCAA, recently stated that "[t]he structure we have in place as a means of controlling the activities of recruiting and financial aid must go through a dramatic change."[120] Byers suggested the creation of an open division in which athletes would be openly compensated in the form of salaries for their services.[121] Writer Jack McCallum commented, "Byers is essentially right in what he says. Many college sports programs are already semiprofessional, and he's merely suggesting that administrators end the hypocrisy and acknowledge as much."[122] At least one court has acknowledged as much. The Indiana Court of Appeals, in a decision which was later reversed by the state supreme court, awarded a seriously injured Indiana State football player workmen's compensation on the theory that, for purposes of football, he was an employee of the university.[123]

The NCAA's regulations and sanctions purportedly designed to preserve amateurism, then, are in reality designed to place limits on the compensation already received by players legally under NCAA rules. The procompetitive justification for such restraints is not preservation of amateurism but rather promotion of competitive balance. As the Supreme Court found in *Board of Regents*, "What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions."[124] In order to market its product, the NCAA must impose horizontal restraints to define clearly the competition.[125]

By imposing rules limiting the compensation payable to athletes, the NCAA defines its product in such a manner that it is distinguishable from professional football.[126] The restrictions also help to prevent a very few schools with sufficient resources from "buying up" all of the best talent, thus making their games uncompetitive and therefore unattractive to the majority of viewers.

If, then, the NCAA's television sanctions are to be examined under a rule of reason analysis, the courts should not accept the preservation

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[120]*Scorecard*, SPORTS ILLUSTRATED, 11 (Sept. 17, 1984).

[121]*Id.*

[122]*Id.*

[123]Rensing v. Indiana State Board of Trustees, 437 N.E.2d 78 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

[124]104 S. Ct. at 2961.

[125]*See* Brenner v. World Boxing Council, 675 F.2d 445, 454-55 (2d Cir. 1982); Neeld v. National Hockey League, 594 F.2d 1297, 1299 n.4 (9th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173, 1180-81 (D.C. Cir. 1978); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-54 (5th Cir. 1977); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976); Bridge Corp. of America v. The American Contract Bridge League, Inc., 428 F.2d 1365, 1370 (9th Cir. 1970).

[126]Professional football players receive salaries for their services.

of amateurism as a procompetitive justification for the restraint. Preservation of amateurism, or, more accurately, limitations on compensation, are merely a subsidiary means of achieving the NCAA's primary goal of promoting competitive balance and thus ensuring an attractive product for buyers in the college football television market. Promotion of competitive balance is the true procompetitive justification for the NCAA's restraints, including restraints limiting compensation.[127]

C. The NCAA's Television Sanctions Under a Rule of Reason Analysis

If the courts cannot rely on the NCAA's dubious claim of preservation of amateurism as a procompetitive justification for its television sanctions, a rule of reason analysis of the sanctions' standing under section 1 of the Sherman Act becomes a much simpler proposition. The pertinent questions become whether the television bans have an anticompetitive effect within the college football television market, whether the anticompetitive evils of the television sanctions are outweighed by the procompetitive virtue of promoting competitive balance, and whether less restrictive means could be employed by the NCAA to achieve its desired ends.[128]

1. *The Anticompetitive Effects of the NCAA's Television Sanctions.*— The first step in establishing an unreasonable restraint of trade is to show anticompetitive effect.[129] In *Board of Regents*, the district court examined the anticompetitive effects of the NCAA's television plan within the relevant market of live college football television.[130] The Supreme Court agreed with the district court's determination of the relevant market and found that the restraints in the NCAA's television plan had an anticompetitive effect in that they caused individual competitors to lose their freedom to compete,[131] prices were higher and output lower than they would otherwise be, and both price and output were unresponsive to consumer preference.[132]

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[127]It should be noted that the television bans are often imposed for violations of NCAA regulations limiting the compensation payable to athletes. The University of Illinois, the Big 10's 1983 Rose Bowl representative, was prohibited from appearing on television for the 1984 season for violations that included the purchase of airline tickets for prospective players, promises of round-trip airline transportation to Illinois games for the mother of a prospective player, and cash payments to prospective players. The NCAA News, Aug. 1, 1984 at 5, col. 3.

[128]*See infra* notes 129, 137, 142 and accompanying text.

[129]H&B Equipment Co., Inc. v. International Harvester, 577 F.2d 239, 246 (5th Cir. 1978).

[130]546 F. Supp. at 1297-1300.

[131]*See* Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 465 (1941); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 47-49 (1912); Montague and Co. v. Lowry, 193 U.S. 38 (1904).

[132]104 S. Ct. at 2963-64.

An examination of the television sanctions within the same relevant market of college football television reveals many of the same anticompetitive effects as those spawned by the television plan. The television bans are a form of a boycott in which the NCAA members act concertedly to prevent a fellow member institution from competing in the television market. Obviously, any NCAA members who have the television sanctions imposed against them lose their ability to compete within the live college football television market for the duration of the sanctions.

A strong argument can also be made that the television sanctions limit output. The University of Illinois and the University of Southern California, two of the schools which would have been prohibited from appearing on television for the 1984 season if the NCAA had not lifted the suspensions for the year, were both scheduled to appear on national telecasts in 1984.[133] While other games could have been substituted for the games involving USC and the University of Illinois, it is doubtful whether adequate substitutes could have been found for all of the games. For example, the USC-Notre Dame game annually draws national media attention. The two schools are perennial football powers with storied pasts and immense national followings.[134] The task of finding a game of comparable national interest that would be as attractive to viewers and advertisers alike would be difficult, if not impossible. Also, the television plans apply not only to national telecasts but to all telecasts. Under the *Board of Regents* ruling, a team like that of the University of Arkansas, with a strong statewide following and little competition within the state, could enter into a contract with a Little Rock television station to televise its games on a local basis.[135] If Arkansas were placed under an NCAA television sanction, there would be no adequate substitute for the Little Rock television station which had contracted to televise the Arkansas games.

The television sanctions also ignore consumer preference. The NCAA would have prohibited the University of Illinois from appearing on television in 1984 despite the fact that CBS found games involving the University of Illinois to be so attractive as to warrant five regional and three national telecasts during the 1984 season.[136] "A restraint that has the effect of reducing consumer preference in setting price and output is not consistent with the fundamental goal of antitrust law."[137]

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[133]NCAA News, Sept. 17, 1984, at 1, col. 3; Benner, *Big 10 Bows to TV's Dollars*, Indianapolis Star, Aug. 27, 1984, at 21, col. 1.

[134]The University of Notre Dame's games have been telecast on a delayed basis to nearly every major market in the country for the past five seasons and on a live basis during the 1984 season. 1984 NOTRE DAME MEDIA GUIDE.

[135]The Supreme Court endorsed the district court's finding that without the television plan, institutions appealing to essentially local markets would get more television exposure by means of local telecasts. 104 S. Ct. at 2966.

[136]Benner, *Big 10 Bows to TV's Dollars*, Indianapolis Star, Aug. 27, 1984, at 21, col. 1.

[137]104 S. Ct. at 2964.

2. *The NCAA's Procompetitive Justification for the Television Bans.*—The television sanctions cause competitors to lose their freedom to compete within the college football television market, limit output, ignore consumer preference, and therefore have an anticompetitive effect. The next step in the rule of reason analysis of the NCAA's television sanctions is to analyze the NCAA's procompetitive justification for the restraint.

> Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. . . . If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially reducing competition.[138]

As discussed, preservation of amateurism is not a legitimate procompetitive justification for the NCAA's television sanctions. Limitations on compensation are merely another type of restraint, imposed by the NCAA and enforced by the threat of sanctions such as the television bans, designed to further the NCAA's primary goal of competitive balance. Hence, promotion of competitive balance is the "procompetitive virtue" to be balanced against the "anticompetitive evils" of the television bans.

In *Board of Regents*, the Supreme Court recognized promotion of competitive balance as a legitimate procompetitive justification for many of the NCAA's restraints.[139] While the Court went on to find that the television plan was "not even arguably tailored to serve such an interest,"[140] the television sanctions are a means of enforcing NCAA rules and as such can be seen as promoting competitive balance. While the nexus between television bans and promotion of competitive balance seems logical, the assertion of promotion of competitive balance as a procompetitive justification for the television sanctions would still fall under the rationale employed by the Supreme Court in *Board of Regents.*

The Supreme Court in *Board of Regents* also found that "the hypothesis that legitimates the maintenance of competitive balance under the Rule of Reason is that equal competition will maximize consumer demand for the product."[141] In other words, competitive balance is supposed

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[138]Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978).
[139]104 S. Ct. at 2969.
[140]*Id.* at 2970.
[141]*Id.*

to lead to increased consumption. Therefore, restraints promoting competitive balance should also increase consumption. If removal of the restraints would result in increased consumption, the restraints do not promote competitive balance. The Court in *Board of Regents* then found that since consumption would, in fact, increase if the NCAA's television plan were removed, the argument that the plan promoted competitive balance was undermined. The NCAA's television sanctions fall into the same trap when proponents attempt to justify them as a means of promoting competitive balance. In the case of the University of Illinois, removal of the television bans resulted in the sale of the television rights to eight football games. Removal of the bans resulted in increased consumption, just as removal of the television plan was supposed to have resulted in increased consumption. Therefore, promotion of competitive balance can not be viewed as a legitimate justification for the NCAA's television plan.

3. *The NCAA's Television Plan and Less Restrictive Means.*—Even if a court were to find that promotion of competitive balance is a legitimate justification for the television bans, the bans would have to be examined to determine whether other less restrictive means could be employed to achieve the same desired ends.[142] Other sanctions which could be imposed by the NCAA include a reduction of scholarships which could be allotted, prohibition against recruiting athletes, and prohibition from participation in post-season play.[143] These sanctions are clearly sufficient to allow the NCAA to achieve its desired ends of promoting competitive balance, and they do not directly interfere with the NCAA member institutions' ability to participate in the college football television market. A school that has violated NCAA rules designed to promote competitive balance and consequently is punished by having its scholarships taken away, will have a difficult time persuading prospective athletes to attend, regardless

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[142] *Hennessey*, 564 F.2d at 1153.

[143] OFFICIAL PROCEDURE GOVERNING THE NCAA ENFORCEMENT PROGRAM § 7, *reprinted in* [1984-85] MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 204. The fact that nearly all bowl games are televised could lead to the argument that prohibiting post-season appearances is tantamount to prohibiting television appearances. In order to obtain injunctive relief under section 16 of the Clayton Act, the plaintiff would have to show threatened loss due to the alleged antitrust violation. 15 U.S.C. § 26 (1982). Specifically, a school would have to show that but for the NCAA sanctions, its team would go to a bowl game. Unlike television appearances contracts which are entered well before the football season begins, bowl game appearances are not determined until the season is nearly over. In order for the plaintiff school to obtain its desired injunctive relief, it would have to commence its action before the determination of bowl game participants. Therefore, any assertion of antitrust injury in the case of bowl game prohibitions would require speculation as to the probable fortunes of the plaintiff school's football team. The speculative nature of the injury would probably cause the court to find that the plaintiff had no standing to assert a claim of antitrust violations. *See* Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983).

of the number of television appearances the school may have. If the school is unable to attract quality athletes, then the competitive advantage it gained by breaching the rules will gradually be eliminated and competitive balance will be restored, thus preserving the integrity of the product of college football without prohibiting the school from competing in the television football market.

V. Conclusion

The Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma* eliminates the power of the NCAA to impose television sanctions. Under a rule of reason analysis, the television sanctions have significant anticompetitive effect in that they deny competitors the freedom to compete within the market of college football television, they limit output, and they ignore consumer preference. The use by the NCAA of the promotion of competitive balance as a procompetitive justification for the television sanctions would not be accepted by a court employing the rationale of *Board of Regents* because removal of the television sanctions would result in increased consumption within the college football television market.

But the real significance of the *Board of Regents* decision with regards to the NCAA's sanctioning power lies not in the rationale employed, but rather in the depth of the analysis employed to examine the NCAA's procompetitive justifications for its television plan. Rather than simply accepting the NCAA's justifications for its television plan, the Court closely examined each claim to test its validity. Prior to *Board of Regents*, courts faced with antitrust challenges to NCAA restrictions made no such examination when presented with the NCAA's procompetitive justification of preservation of amateurism, but instead accepted the claim on its face. The *Board of Regents* decision calls for a closer inspection, and such an inspection would reveal that the preservation of amateurism is not a valid procompetitive justification for the television bans or any other restraints imposed by the NCAA.

Such an interpretation of *Board of Regents* does not destroy the viability of the NCAA as a sanctioning body for collegiate athletics. Rather, it simply confines the scope of the NCAA's sanctioning power within the realm of the NCAA's true purpose: the promotion of competitive balance. The NCAA does have the power to impose sanctions, but those sanctions must be clearly designed to promote competitive balance, and they must be no broader than necessary to achieve that end.