White v. NCAA: A Chink in the Antitrust Armor

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INTRODUCTION

As a football player at UCLA in the 1990s, Ramogi Huma found there was always more month than money when it came to the reality of daily living (Acton & Gazarik, 2007). His football scholarship did not completely cover his living expenses, and he made up the difference by incurring credit card debt. He owed credit card companies $6,000 at 19% interest rate at the time of his graduation (Acton & Gazarik). His disenchanting experience convinced Huma to found the College Athletes Coalition (CAC) in 2001. With support from the United Steelworkers union, the CAC organized a group comprised of 20,000 current and former NCAA Division I-A (now the Football Bowl Subdivision) football and Division I basketball players from major conferences for the purpose of advocating for student-athletes. On behalf of their members, the CAC filed a class-action lawsuit against the NCAA seeking to increase the benefits of the athletic scholarship to cover the true full cost of attendance.

The complaint was filed on September 8, 2006, for the class of Division I student-athletes represented by Jason White,[1] Brian Polak,[2] Jovan Harris,[3] and Chris Craig,[4] as a civil action lawsuit against the NCAA, pursuant to section 1 of the Sherman Act. The plaintiffs alleged that the NCAA and its member

1. White was a football player at Stanford University between 1999-2003.
2. Polak was a football player who graduated from the University of California, Los Angeles in 2004.
3. Harris played basketball at the University of San Francisco and left the USF in 2004.
4. Craig played basketball at the University of Texas at El Paso where he graduated in 2005.

institutions were parties to a horizontal agreement that denied the plaintiffs of their legitimate share of the financial benefits obtained through the business of "big-time college sports" (*White v. NCAA, Second Amended Complaint*, 2006, p. 3). The argument centered on the agreement between the NCAA and its member institutions to limit student-athlete compensation to that which is allowed under the NCAA's grant-in-aid policy. Grant-in-aid is the term given for the amount that a student-athlete can receive from their university in exchange for their athletic performance. In theory, the "full ride" grant-in-aid compensates a student-athlete for the cost of attendance at the university in which he is enrolled. However, a grant-in-aid, according to the NCAA, covers only tuition, fees, room and board, and course-related books (NCAA, Art. 15.02.5, 2010).

The plaintiffs in *White* argued that the grant-in-aid limitations unreasonably restrained trade through the imposition of a cap on athletic-based financial aid in violation of Section 1 of the Sherman Act (*White v. NCAA, Second Amended Complaint*, 2006). It was alleged that the cap prevented the plaintiffs from obtaining the funding necessary to cover the complete cost of attendance including additional expenses such as "school supplies, recommended textbooks, laundry expenses, health and disability insurance, travel costs and incidental expenses" (*White, Second Amended Complaint*, p. 3). The plaintiffs highlighted the disparity between the grant-in-aid calculation and the actual cost of attendance.

The plaintiffs argued that the NCAA-enforced cap on athletics-based financial aid imposed a horizontal restraint on competition that depressed, fixed, and stabilized the amount of the grant-in-aid that student-athletes can receive (*White, Second Amended Complaint*, 2006). The complaint defined two relevant markets, one major college football and the other major college basketball.[5] The plaintiffs wanted the court to enjoin the NCAA from enforcing its grant-in-aid policy so that student-athletes could receive financial aid up to the full cost of attendance. In addition, the plaintiffs sought actual monetary damages and requested that those damages be trebled.[6] If the plaintiffs had succeeded with claims against the NCAA, they could have been awarded an estimated amount of $300-$400 million (Dennie, 2007). With hundreds of millions of dollars and the status of its grant-in-aid policy at stake,

5. Major college football includes football programs that compete in the Football Bowl Subdivision. Major college basketball conferences includes all NCAA men's basketball programs sponsored by the Atlantic Coast Conference, Big East, Big 10, Big 12, Pac 10, South Eastern Conference, Mountain West Conference, Western Athletic Conference, Horizon League, Atlantic 10, Conference USA, Mid-American Conference, Sun Belt, West Coast Conference, Colonial Athletic Association, and Missouri Valley Conference.

6. The Clayton Act provides for treble damages in antitrust actions. 15. U.S.C.A. § 15 (2011).

the NCAA found itself caught in a legal battle that would have been very costly for it to lose.

Whether or not the grant-in-aid limits represent an antitrust violation was not determined, as the parties reached a settlement agreement before the case moved forward to trial. On January 29, 2008, the plaintiffs and the NCAA filed a Stipulation and Agreement of Settlement (settlement) with the U.S. Central District Court of California. The plaintiffs acknowledged that the expense and length of a complex litigation along with the uncertainty of the outcome and problems in proving a federal antitrust case made it desirable to reach a settlement (*White v. NCAA, Stipulation and Agreement of Settlement*, 2008). In consideration, the NCAA agreed to make available for the academic years of 2007-08 through 2012-13 a total of $218 million to NCAA Division I member institutions to use for the benefit of their student-athletes. While the plaintiffs publicly recognized the difficulties associated with their claims, the NCAA maintained its position that it had done nothing wrong by capping the amount student-athletes could receive to what is allowed under grant-in-aid. The plaintiffs bolstered the NCAA's position by stipulating that the settlement did not serve as a "presumption, concession, or admission" by the NCAA of any "violation of law, breach of duty, liability, default or wrongdoing as to any facts or claims alleged or asserted in the action" (*White, Stipulation and Agreement of Settlement*, p. 5).

For a three-year period the settlement also required the NCAA to make available a total of $10 million for distribution on a claims-made basis to qualifying former student-athletes. By filing a claim, former student-athletes would be able to seek reimbursement for "bona fide" educational expenses incurred "such as tuition, fees, books, supplies and equipment required for courses of instruction" (*White, Stipulation and Agreement of Settlement*, 2008, p. 10). Under the settlement the NCAA adopted a rule that permits, but does not require, Division I members to provide year-round comprehensive health insurance to athletes (NCAA, Art. 16.4(a), 2010). The settlement also allows members to provide basic insurance coverage against injuries to student-athletes stemming from their athletic participation (*White, Stipulation and Agreement of Settlement*, p. 11).

The settlement allowed the NCAA to maintain its existing grant-in-aid limitations. Thus, the plaintiffs did not achieve the objective stated in their complaint, a modification in NCAA regulations allowing student-athletes to receive athletics-based financial aid up to the full cost of attendance. With the grant-in-aid limitations still in effect, it is possible that other plaintiffs will pick up where the plaintiffs *White* left off. This begs the question, is the cap imposed by the NCAA on student-athlete athletics-based financial aid

vulnerable to antitrust challenge if another class of student-athlete plaintiffs file a complaint and actually see that complaint through the stages of litigation? There is no way to accurately predict how a court would answer this question, however, the arguments presented in *White* provide a framework that this article will use in analyzing the legal requirements that the plaintiffs must satisfy and the defenses on which the NCAA would probably rely.

This article will analyze the requirements that student-athletes must meet to prevail on an antitrust challenge based on the arguments presented in *White*. The following section will discuss antitrust law and its application to the NCAA. The next section will review an evaluation of antitrust cases under the Rule of Reason criteria, and its application to the arguments presented in *White*. A review of recent judicial opinions that bear directly on this issue will follow. Lastly, the paper will conclude with an assessment of the vulnerability of the NCAA to antitrust claims similar to those presented in *White* and a suggestion for how the NCAA can further protect its grant-in-aid restrictions from antitrust scrutiny.

ANTITRUST AND THE NCAA: THE BASICS OF THE *SHERMAN ACT SECTION 1*

The institutions that comprise the National Collegiate Athletic Association (NCAA) compete, often vehemently, for the services of student-athletes (*NCAA v. Board of Regents of the University of Oklahoma*, 1984). As is the case with their professional counterparts, there exists a direct correlation between the success of athletic teams and revenue generation in several sports sanctioned by the NCAA, in particular football and men's basketball. Since its inception the NCAA has maintained a core principle of amateurism, which in its purest form requires that participants receive no compensation for athletic performance (NCAA, Art. 2.9, 2010). Notwithstanding, NCAA sports are not amateur in the purist sense because the NCAA does allow member institutions to provide athletics-based financial aid (the grant-in-aid) in consideration for athletic performance (*McCormack v. NCAA*, 1988). The NCAA is an organization comprised of member institutions, which represent very separate legal entities. The NCAA collectively, through cooperative agreement among its members, determines exactly what constitutes the grant-in-aid, and a limit is set so that no member institution may offer more than the remuneration of the NCAA specified attendance costs.

Section 1 of the Sherman Antitrust Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" (15 U.S.C. § 1, 2011). The main purpose of Section 1 is

to prevent independent businesses from combining to interfere with the free market (Sullivan & Harrison, 1998). However, not all contracts that restrain competition will be found to violate Section 1, as the Supreme Court has long-since held that Section 1 prohibits only "unreasonable restraints of trade" (*Board of Trade of Chicago v. United States*, 1918, p. 238). Courts have fashioned two analytical approaches for determining whether a defendant's actions unreasonably restrain trade: the per se rule and the Rule of Reason (*Law v. NCAA*, 1998).

Courts use the per se rule to curtail inherently unreasonable practices. Inherently unreasonable practices are those from which courts cannot glean any redeeming competitive rationales (*SFC ILC, Inc. v. Visa USA*, 1994). Once determined that a practice is illegal per se, the court need not analyze the restraint's effect on the market (*Law v. NCAA*, 1998). In the absence of an inherently unreasonable practice, courts use the Rule of Reason test to assess and determine if the affected market would be better off with or without the restraint. The three-step test attempts to balance the anticompetitive harms caused by a restraint on trade against the pro-competitive justifications to determine the restraint's net competitive effect (Feldman, 2009).

Inapplicability of Per Se Rule to NCAA

The regulations imposed by sports leagues, including the NCAA, that restrict competition for the services of athletes and coaches represent horizontal agreements (e.g. *Smith v Pro Football Inc.*, 1978; *Mackey v. NFL*, 1977; *Law*, 1998). Horizontal restraints involve agreements between direct competitors, at the same level in a particular industry, to reduce competition (*Business Electronics Corp. v. Sharp Electronics Corp*, 1988). Horizontal restraints on trade typically trigger per se scrutiny (*Law*, 1998). However, courts are extremely reluctant to apply the per se rule to sports leagues, including the NCAA (Lazaroff, 2008). This reluctance stems from the argument that sports leagues must combine both collective cooperation and competition. The cooperative relationship between the clubs comprising professional and collegiate sports leagues, in regards to such matters as rules of play and eligibility requirements, render sport unique from most other types of business ventures. Moreover, in *NCAA v. Board of Regents of the University of Oklahoma* (1984) ("*Board of Regents*"), the United States Supreme Court refused to apply the per se rule to the NCAA because of the uniqueness of intercollegiate sports. Specifically, the court found that intercollegiate sport is an "industry in which horizontal restraints on competition are essential if the product is to be available at all" (*Board of*

Regents, 1984, pp. 100-01). Accordingly, Rule of Reason analysis is the appropriate analytical approach for resolving an antitrust case brought by student-athlete plaintiffs against the NCAA based on its regulations limiting athletics-based financial aid.

Rule of Reason

Rule of Reason analysis is broken down into three steps. The first step requires the plaintiffs to allege and prove an anticompetitive effect within a legally cognizable relevant market (*Law*, 1998). If the plaintiffs persuade the court to the unreasonableness of the proffered anticompetitive effect, then the analysis moves on to step two. At this point the burden shifts to the defendant to demonstrate that the pro-competitive qualities of the conduct outweigh its anticompetitive qualities (*Madison Square Garden, L.P. v. National Hockey League,* 2008). If the defendant succeeds in convincing the court that the net effect of the restraint is pro-competitive, rather than unreasonable, the third step requires the court to determine if the effect could be achieved through an alternative means that is less restrictive on competition (*Clorox Co. v. Sterling Winthrop, Inc.*, 1997). Each of these three steps will be discussed at length in application to the claims presented in *White*.

APPLICATION OF THE RULE OF REASON TO NCAA GRANT-IN-AID RESTRICTIONS

The following section will focus on the steps necessary under the Rule of Reason analysis for student-athletes to establish an antitrust claim against the NCAA based on the arguments presented in *White*. The section will also present the NCAA's possible defenses to those claims.

Step One- Anticompetitive Effect

The first step in rule of reason analysis requires the plaintiff to prove that the defendant's conduct produced "significant anticompetitive effects within the relevant product and geographic markets" (*National Hockey League Players' Association v. Plymouth Whalers Hockey Club*, 2003, p. 719). To satisfy this first step, a plaintiff must establish: (a) a relevant market (product/service and geographic), (b) the defendant's power in that market, and (c) the resulting anticompetitive effects caused by the defendant's exertion of market power in that relevant market (Dennie, 2007). Accordingly, student-athlete plaintiffs need to demonstrate that they comprise a relevant market over which the NCAA exercises power through the implementation of

regulations that limit athletics-based aid. The plaintiffs also must establish that the NCAA's legislative limitations on athletics-based aid produce significant anticompetitive effects within their relevant market.

To date, student-athlete plaintiffs have been stymied in their attempts to establish the existence of a relevant market for their services. The input "market" by which the student-athletes supply their (labor) services as athletes in exchange for a grant-in-aid is entangled with the product market where they are at once consumers of the universities' educational product. To be sure, student-athletes are required by NCAA rules to maintain academic eligibility standards (grades, semester hours carried, progress toward degree, etc.) to retain the athletic grant-in-aid, regardless of the value of the athletic contribution. The courts by-and–large have not been willing to recognize the relationship between the university and student-athlete as a relevant input market. However, should they change course and recognize the relevant input market, the NCAA's market power and the resulting anticompetitive effects caused by the exertion of that market power over this input market are quite obvious (e.g. *Law,* 1998).

(a) Relevant Market

While some courts have found relevant markets in cases brought against the NCAA that challenge regulations designed to serve an economic purpose (like those in *Law*, 1998, and *Board of Regents,* 1984), other courts have been less willing to find relevant markets in cases challenging NCAA regulations designed to promote and preserve the amateur status of student-athletes (like those in *Jones,* 1975 and *Banks,* 1992, *detailed below*). For decades, this dichotomous division in relevant market analysis has effectively fortified the NCAA from antitrust scrutiny in cases brought by student-athletes (Lazaroff, 2007). However, the dissenting opinion in *Banks* (1992), and two more recent cases, *Tanaka v. University of Southern California* (2001), and *In re NCAA I-A Walk-On Football Players Litigation* (2005), suggest that student-athlete plaintiffs might be able to breach the NCAA's defenses and establish a relevant market for their services in major college football and basketball.

The term relevant market describes the market in which one or more goods or services compete within a specific geographic area. The United States Supreme Court spoke to the existence of relevant markets in its *U.S. v. E.I. du Pont De Nemours & Co.* (1956) decision by stating that "no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal" (p. 395). Relevant

market determinations encompass geography along with product use, quality, and description (*Tanaka v. University of Southern California*, 2001). Geographic markets extend to areas of effective competition where consumers can obtain alternative sources. Product markets include the pools of goods or services that have reasonable interchangeability of use and positive cross-price elasticity of demand. Courts analyze reasonable interchangeability of use by focusing on the existence of reasonable substitutes for the product or service (*U.S.*, 1956). Courts gauge cross-price elasticity of demand by focusing on consumer sensitivity to price levels that would lead them to find substitutes for the product or service (*White & White, Inc., v. American Hospital Supply Corp.,* 1983). Plaintiffs bear the burden of defining a relevant market that is affected by the defendant's anticompetitive actions and if that burden is not met, then the plaintiffs' claims will be dismissed (*Tanaka*, 2001).

The plaintiffs in *White* argued the existence of a relevant input market for the services of student-athletes in major college football and major college basketball at universities in the United States (*White, Second Amended Complaint*, 2006). The plaintiffs defined major college football to include all of Division I-A (what is now known as the Football Bowl Subdivision of Division I). Major college basketball was defined to include all schools with basketball programs sponsored by the Atlantic Coast Conference, Big East, Big 10, Big 12, Pac 10, South Eastern Conference, Mountain West Conference, Western Athletic Conference, Horizon League, Atlantic 10, Conference USA, Mid-American Conference, Sun Belt, West Coast Conference, Colonial Athletic Association, and Missouri Valley Conference. The plaintiffs excluded Division I-AAA programs and schools that compete in the Ivy League Conference in Division I from the relevant markets because those schools do not provide grant-in-aids to student-athletes.

The plaintiffs argued that major college football and major college basketball provide an input market distinct from other programs in that they compete for the same student-athletes: those who want athletics-based financial aid to play at the NCAA's highest levels (*White, Second Amended Complaint*, 2006). The plaintiffs cited to the quality of coaching, training, and competition at major college football and basketball programs as making them superior to programs not in those markets. These markets also provide "a far greater prospect for advancement" to professional football and basketball (*White, Second Amended Complaint*, p. 11). For these reasons, the plaintiffs argued that there is no reasonably interchangeable substitute for major college football or major college basketball within the United States, the relevant geographic market.

The U.S. Supreme Court's decision in *Board of Regents* and the Tenth Circuit's decision in *Law v. NCAA* provide precedent for the establishment of relevant markets involving NCAA sports. In *Board of Regents* (1984), the Supreme Court found a relevant output market of college football telecasts in the United States that was unreasonably restrained by a horizontal agreement among competitors through the NCAA's placement of an artificial limit on the quantity of televised college football games available for broadcast. In *Law v. NCAA* (1998), the Third Circuit found a relevant input market in which the salaries of college basketball coaches were unreasonably restrained by a naked horizontal price restraint among competitors that negatively affected college basketball (an output market). Similarly, in *Metropolitan Intercollegiate Basketball Association v. NCAA* (2004), the district court denied a summary judgment motion to dismiss an antitrust challenge to NCAA rules that limited college basketball to one post-season tournament. In *Metropolitan Intercollegiate Basketball Association* (2004), the court recognized a relevant market for Division I men's college basketball and a submarket for the operation of Division I men's college basketball tournaments.

However, student-athlete plaintiffs have struggled in proving relevant markets in cases involving NCAA regulations. For example, in *Jones v. NCAA* (1975), a district court refused to recognize a relevant market in a case brought by a college hockey player challenging NCAA eligibility rules. The court in *Jones* found that student-athletes were neither businessmen, in the traditional sense of the word, nor competitors in regards to antitrust laws (p. 303). The court failed to find a commercial or business nexus to NCAA eligibility guidelines and concluded that the plaintiffs did not establish a cognizable market (*Id.*).

The Second Circuit also refused to find a relevant market for student-athlete services with its decision in *Banks v. NCAA* (1992). *Banks* involved an antitrust action brought by a college football player whose eligibility was terminated based on NCAA rules that prohibited student-athletes from retaining agents or declaring themselves eligible for the NFL draft. Relying on *Board of Regents*, the court supported the NCAA's goal of keeping a clear line of demarcation between amateur and professional sports as a justifiable objective (*Banks*, p. 1089). The court accepted the NCAA's view that college football players were student-athletes who were preparing themselves to enter the employment market in non-athletic occupations. The court explained that the no-draft rule had no more impact in the market for college football players than other NCAA eligibility requirements, which all constitute requirements essential to participation in NCAA sponsored amateur athletic competition (p. 1089).

Notwithstanding, there is perhaps a growing inclination to recognize a relevant labor market for student-athlete services. In his dissenting opinion in *Banks* (1992), Circuit Judge Flaum wrote

> As the NCAA concedes, Banks defined two markets in his complaint, only one of which it is necessary to address here: the nationwide labor market for college football playersFalseNCAA member colleges are the purchasers of labor in this market, and the players are the suppliers. The players agree to compete in football games . . . ., in exchange for tuition, room, board and other benefits (p. 1095).

In the *Walk-On Football Players Litigation* (2005), a district court addressed an antitrust claim made by Division I-A walk-on football players that NCAA scholarship restrictions prevented them from receiving athletics-based financial aid. The court found that schools compete for the services of amateur football players, who are necessary "inputs" to the production of Division I-A football (*Walk-On Football Players Litigation*, p. 1150). In this regard, the court found that the market for amateur football players was not unlike the market found by the Tenth Circuit in *Law* for the services of college basketball coaches. The court also recognized that the plaintiffs had presented proof of reasonable interchangeability of use and cross-price elasticity of demand in their pleadings. The plaintiffs satisfied these requirements by alleging that there is a dearth of viable substitutes for student-athletes who want to compete at the highest level of competition in amateur football (*Walk-On Football Players Litigation*). The *Walk-On Football Players Litigation* decision serves as the best, and thus far only, example of a court finding a relevant market in a case brought by student-athletes against the NCAA regulations affecting their athletics-based financial aid.

The Ninth Circuit's decision in *Tanaka v. University of Southern California* (2001) also provides some assistance to the argument for student-athlete plaintiffs in proving the existence of a relevant market for their services; despite that the outcome in *Tanaka* was not favorable to the student-athlete plaintiff. Where the courts in *Jones* and *Banks* centered their relevant market decisions on the preservation of amateur athletics, the court in *Tanaka* focused its finding on the plaintiff's failure to prove the existence of geographic and product markets.

Tanaka (2001) involved an antitrust action brought by a student-athlete who challenged an NCAA transfer rule that would requires student-athletes to sit out one full year of intercollegiate soccer (losing that year of eligibility) for transferring from one school to another. She wanted to transfer from the University of Southern California (USC) to the University of California, Los

Angeles (UCLA). Critical to the Ninth Circuit's decision to dismiss Tanaka's claims was the fact that the plaintiff limited her geographic market to the Los Angeles area and her product market to UCLA's women's soccer program (*Tanaka*, p. 1065). The Ninth Circuit in *Tanaka* found that Los Angeles did not serve as a functional geographic market for intercollegiate women's soccer athletes (p. 1063). Supporting the Ninth Circuit's decision was the fact that universities from across the country recruited Tanaka, but Tanaka preferred to remain in the Los Angeles area. The Ninth Circuit found that her personal preference did not create a geographic market for the purpose of Rule of Reason review (*Id.*). But the court did not stop there. In dicta, the court recognized that "Tanaka's own experience strongly suggests that the relevant geographic market is national in scope" (*Id.*).

The Ninth Circuit also found that Tanaka was too limited in her relevant product market (*Tanaka*, 2001, p. 1063). Tanaka argued that UCLA soccer was a product market unto itself because its uniqueness made it incapable of being interchanged with any other college soccer program in Los Angeles (*Tanaka*, p. 1064). The court rejected Tanaka's argument and found that a relevant market could not be limited to a single athletic program because intercollegiate athletic programs need other similar programs in order to exist (*Id.*). The Ninth Circuit recognized that similar intercollegiate athletic programs compete for the services of student-athletes and this competition precludes the existence of a relevant product market in any single university, no matter how unique (*Id.*). The court found that the Pac 10 Conference could have provided Tanaka with a definable relevant product market because she was recruited by a number of the conference's programs (*Id.*).

Even though it was possible to establish relevant geographic and product markets through proper pleading, the Ninth Circuit was unwilling to allow Tanaka to amend her complaint because she still would have failed in proving an anticompetitive effect. Specifically, the court rejected Tanaka's assertion that the transfer rule (which applied to all USC soccer players) singled her out in retaliation for her desire to transfer to a rival program (*Tanaka*, 2001, p. 1065).

What can be drawn from the *Banks* dissent, and the decisions in both *Walk-On Football Players Litigation* and *Tanaka*, is the possibility that courts may now be willing to recognize relevant markets for the services of student-athletes. Even though the court ruled against the student-athlete plaintiff, the *Tanaka* decision is important because it provides the first example of an appellate circuit recognizing the existence of relevant geographic and product markets for the services of student-athletes. Also significant is the fact that the court in *Tanaka* identified the possibility of those markets for women's college

soccer, a non-revenue producing sport. The reasoning used by this court to find a relevant market for women's soccer could extend to cover the relevant markets for the revenue-producing sports of major college football and major college basketball, as defined by the plaintiffs in *White*.

Unlike the plaintiff in *Tanaka*, the plaintiffs in *White* did not limit their product and geographic markets to one university. Instead, the plaintiffs in *White* included all major college football and major college basketball programs in the United States (*White, Second Amended Complaint*, 2006). Student-athletes who desire athletics-based financial assistance to compete at the highest levels of intercollegiate football and men's basketball must attend a major college football or major college basketball program as defined by the plaintiffs in *White*. Thus, the relevant markets asserted by the plaintiffs in *White* are consistent with the relevant market found in the *Walk-On Football Players Litigation*, as well as the market recognized by the Ninth Circuit in *Tanaka*. The question remains as to whether the *Walk-On Football Players Litigation* and *Tanaka* provide the basis for a growing trend, or serve as nothing more than two judicial anomalies. If courts are now willing to recognize the existence of relevant markets for the services of student-athletes, then this development increases the likelihood that student-athletes will be able to sustain an antitrust action against the NCAA by challenging its cap on athletics-based financial aid.

(b) Market Power

If student-athlete plaintiffs are able to establish a relevant market for their services, they must then demonstrate that the NCAA has power over that market. Market power exists when organizations have the power to affect the price its members pay for goods or services (Dennie, 2007). The NCAA is in possession of considerable market power in regulating the competition for the services of student-athletes (Dennie). The NCAA directly determines the price its members pay for the services of student-athletes through its grant-in-aid restrictions. College football and basketball players have few, if any, alternative markets for their athletic services. Professional football and basketball each proscribe players from entering their leagues directly after high school (*Clarett v. NFL,* 2004; NFL, 2006; NBA, 2005). Accordingly, if the relevant markets for student-athlete services for major college football and major college basketball are determined, the product market power of the NCAA in limiting those markets is straightforward (similar to how the NCAA's power to regulate the respective markets for college football telecasts

and basketball coaching salaries were straightforwardly established in *Board of Regents* and *Law* once relevant markets were determined in those cases).

(c) Anticompetitive Effect

Finally, the student-athlete plaintiffs would need to establish that NCAA grant-in-aid restrictions have an anticompetitive effect on the relevant market for their services. A restriction is by definition anticompetitive if it increases the price paid by the buyer of the product above the price that would be determined by a competitive market. A restriction is also anticompetitive if it reduces the price paid by the seller of the service below the price that would be determined by a competitive market. The decision in *U.S. v. Brown University* (1993) provides potential student-athlete plaintiffs with an effective anticompetitive effect argument. In *Brown*, the Antitrust Division of the U.S. Department of Justice brought a civil antitrust action against Massachusetts Institute of Technology and the members of the Ivy League conference based on their collective agreement to restrict and cap financial aid for students. The Third Circuit found that through the Ivy Overlap Agreement, member schools created a horizontal restraint that prevented students from pitting universities against each other in a competitive bidding process for student financial aid awards (*Brown University*, 1993).

The NCAA's grant-in-aid restrictions restrain athletics-based aid much in the same way that the Ivy Overlap Agreement restrained academic-based aid. To participate in NCAA events, member institutions must adhere to NCAA grant-in-aid restrictions. These restrictions cap the amount that NCAA member institutions can provide student-athletes for athletics-based aid in the same way that the Ivy Overlap Agreement capped academics-based aid. This horizontal cap on financial aid for student-athletes has eliminated price competition among member institutions in the competition for a limited supply of talented inputs (student-athletes) (Dennie, 2007). The NCAA will likely contest this position on the grounds that a grant-in-aid is more like a gift than compensation, and thus, there is no price competition for student-athlete services. However, in *McCormack v. NCAA* (1988), the Fifth Circuit provided plaintiffs with a counter to the NCAA's "gift" position by finding that the NCAA "permits some compensation [to student-athletes] through scholarships" (p.135). Further, if limitations on academics-based financial aid awards are subjected to antitrust scrutiny (*Brown University*, 1993), then that same scrutiny could apply to athletics-based financial aid limitations. Lastly, like the competition for talented students in *Brown*, NCAA members also compete for talented student-athletes in the recruitment process (Flaum

dissenting in *Banks*, 1992). Hence, the Third Circuit's reasoning for finding an economic effect in *Brown* could provide plaintiffs with a persuasive argument that NCAA grant-in-aid restrictions have a similar anticompetitive effect on the market for student-athlete services by preventing students from seeking the fair market value for the services they perform for their universities.

Step Two- Procompetitive Justifications

The second step shifts the burden to the NCAA to prove a net procompetitive effect for the restraint on trade caused by its grant-in-aid restrictions (*Board of Regents*, 1984). To prove a net procompetitive effect, the NCAA must proffer procompetitive justifications for its grant-in-aid restrictions that outweigh the anticompetitive effect imposed by the restrictions. It is probable that the NCAA would offer the two procompetitive justifications for restricting payment to student-athletes provided by the Court in *Board of Regents*. Even though student-athlete regulation was not before the Court, Justice Stevens, writing in *Board of Regents*, recognized justifications based on: (a) the preservation of amateurism in intercollegiate sports, and (b) the promotion of competitive balance in intercollegiate sports (pp. 119-120).

(a) Preserving Amateurism

It is probable that the preservation of amateurism is the deadliest weapon in the NCAA's antitrust arsenal. The foundation for the argument can be found in Justice Steven's statements in *Board of Regents* that the NCAA needs "ample latitude" in the "maintenance of a revered tradition of amateurism in college sports" (*Board of Regents*, 1984, p. 120). Justice Stevens recognized that the preservation of amateurism had economic value because it allowed the NCAA to market a football product with an academic tradition, which made it an alternative to professional football. Thus, both consumers (sports fans) and athletes had a widened choice of football products if the NCAA were allowed to preserve the amateur character of college football. It was this breadth of consumer choice that allowed Stevens and the Court to view the preservation of amateurism as a procompetitive justification.

Board of Regents is at the top of a long line of cases in which courts have used the preservation of amateurism as a justification for protecting NCAA regulation of student-athletes from antitrust law. That list includes a number of published US federal district court decisions regarding NCAA regulations implemented for the promotion of amateur athletics. The district court in

Jones v. NCAA (1975), upheld an NCAA determination that prohibited a student-athlete from playing intercollegiate ice hockey because he had once been compensated for playing the same sport in violation of NCAA amateur provisions. In *Justice v. NCAA* (1983), an Arizona district court denied an injunction sought by four football players to prevent the NCAA from sanctioning their school for recruiting violations. In *Gaines v. NCAA* (1990), a federal district court dismissed an antitrust challenge to an NCAA eligibility rule prohibiting student-athletes from participating in the National Football League (NFL) Draft. In *Pocono Invitational Sports Camp, Inc. v. NCAA* (2004), a district court used the promotion of amateurism to justify NCAA regulations that did not directly involve student-athletes. Specifically, the court held that antitrust laws do not apply to NCAA regulations concerning operators of for-profit summer basketball camps for children and teenagers (*Pocono Invitational Sports Camp, Inc.*, p. 584).

From these district court decisions, *Gaines* (1990) stands out because it is the only case in which a court recognized that the NCAA is engaged in economic endeavors, and that student-athlete regulations that provide the organization with an economic advantage should not receive protection from antitrust scrutiny (p. 744). Although the court in *Gaines* ruled in favor of the NCAA, it rejected the notion posited in *Jones*, that all NCAA eligibility rules were immune from antitrust application based on the protection of amateurism in intercollegiate athletics. The court stated that its ruling on the eligibility rule regulating student-athlete participation in the NFL draft "by no means" created a "total exemption" for NCAA eligibility rules, but rather a "very narrow one" (*Gaines*, p. 744).

The United States federal Courts of Appeals have also addressed the role of amateurism as a legitimate justification protecting NCAA eligibility regulations from the application of antitrust law. In *McCormack v. NCAA* (1988), the Fifth Circuit rejected an antitrust challenge brought against the NCAA by alumni, college football players, and even cheerleaders claiming that the organization's eligibility rules that limited "compensation" for college football players were price fixing measures and a boycott in violation antitrust law (*McCormack*, p. 1340). Like *Board of Regents*, the Fifth Circuit found that the NCAA marketed college football as a product distinct from professional football and this required an integration of athletics with academics (p. 1344). The court found NCAA regulations that limited student-athlete compensation furthered this integration, resulting in a net procompetitive effect (*Id.*). The court did observe that NCAA athletics was not a pure example of amateurism because student-athletes did receive some consideration for their services through grant-in-aid (p. 1345). However, it

held that the NCAA's attempts to "maintain a mixture" that included "some amateur elements" was not unreasonable under the Rule of Reason (*Id.*). In fact, the court stated that it is "reasonable to assume" that most NCAA regulations are "justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics" (p. 1344). However, this assumption did not result in a finding that antitrust laws did not apply to NCAA eligibility rules. Instead, the *McCormack* court determined that it did not have to decide whether antitrust laws applied to NCAA eligibility rules because the Sherman Act only prohibits unreasonable restrictions; and the restrictions at issue were reasonable (p. 1345). While the court ruled in favor of the NCAA and against the student-athlete plaintiffs, the decision did so on the basis that the regulations were reasonable. Thus, *McCormack* is important because it is the first example of a circuit court decision that applied a reasonableness standard to NCAA regulations that restricted student-athlete compensation.

In *Banks v. NCAA* (1992), the Seventh Circuit rejected an antitrust challenge to the NCAA's no-draft rule for college football that also included a challenge to its no-agent rule. The court dismissed the student-athlete's complaint for failure to establish a relevant market because the NCAA regulations at issue constituted eligibility requirements "essential to participation in NCAA sponsored amateur athletic competition" (*Banks*, p. 1089). The court held that NCAA eligibility rules were incapable of restraining trade in the marketplace for college football players "because the NCAA does not exist as a minor league training ground for future NFL players" (p. 1090). Instead, the Seventh Circuit found that the NCAA exists to provide student-athletes with the opportunity to simultaneously pursue academic degrees while competing against other amateur college students (*Id.*). In effect, the Seventh Circuit used a procompetitive justification (something considered in the second step in rule of reason analysis) to shoot down an antitrust action for failing to establish an anticompetitive effect within a relevant market (the first step in rule of reason analysis).

Six years after *Banks*, the Third Circuit in *Smith v. NCAA* (1998), denied an antitrust challenge involving an NCAA rule prohibiting graduate students from participating in intercollegiate athletics at any institution other than the student's undergraduate institution. The Third Circuit considered the Supreme Court's suggestion in *Board of Regents* that antitrust laws should be limited in application to commercial and business endeavors (*Smith*, p. 185). The court found that the rule did not involve commercial or business activities and did not provide the NCAA with a commercial advantage (p.185). The court added that the bylaw would survive as a reasonable restraint even if it were deemed

as economics-driven because it furthered the NCAA's procompetitive goals of fair competition and the survival of intercollegiate athletics (p. 186).

Consequently, analysis of existing case law demonstrates how the preservation and promotion of amateurism has greatly assisted the NCAA in successfully thwarting any and all antitrust challenges to its regulation of student-athletes. Notwithstanding, that success was met with a setback in 2005 with the district court decision in *Walk-On Football Players*, which was the first case that allowed an antitrust challenge to the NCAA's regulations of student-athlete athletics-based financial aid to proceed past the pleading stage. In *Walk-On Football Players*, the court recognized the line of cases preserving the role of amateurism and noted that the "law is clear that athletes may not be 'paid to play'" (*Walk-On Football Players*, 2005, p. 1148). In this case, the court distinguished the facts before it from those presented in *Jones*, *Justice*, *McCormack*, *Gaines*, *Banks*, and *Smith*. The court found that each of those cases involved regulations necessary for the preservation of amateurism. The court stated that an NCAA bylaw limiting the number of grant-in-aid scholarships "clearly" did not implicate student-athlete eligibility in the same way as the regulations at issue in *Justice*, *McCormack*, *Gaines*, *Banks*, and *Smith* (*Walk-On Football Players*, p. 1149). Instead, the court aligned the bylaw before it with the regulations discussed in *Law* and *Metropolitan Intercollegiate Basketball Association*, two decisions in which courts subjected NCAA regulations to antitrust scrutiny upon the finding that they were designed to serve an economic purpose (p. 1149).

The court in *Walk-On Football Players* also looked to the Third Circuit's holding in *Brown University* that financial aid award decisions are subject to antitrust scrutiny. Finding that this regulation also involved financial aid awards in that the bylaw limited the number of awards provided by Division I-A football programs, the court held that the plaintiffs proved that the bylaw was subject to antitrust scrutiny (*Walk-On Football Players*, 2005, p. 1149). In doing so, the court rejected the NCAA's attempt to "frame this case as challenging to amateurism of Division I-A football" as a "mis-characterization of the issues" (*Walk-On Football Players Litigation*, p. 1149). The court denied the NCAA's motion to dismiss, and ruled that a final determination on the Sherman Act's application to the NCAA's scholarship limitation depended on a factual inquiry (pp. 1149-50). The court added that a factual inquiry of the restraint on trade imposed by the NCAA's grant-in-aid scholarship limitation should include consideration of the totality of the circumstances (p. 1150).

It is unlikely that the decision in *Walk-On Football Players Litigation* will dissuade the NCAA from asserting the preservation of amateurism as a

justification in future antitrust actions that challenge the organization's regulations or bylaws. After all, *Walk-On Football Players Litigation* is a district court decision on a motion for judgment on the pleadings; thus, no court is bound to follow its holding or reasoning. However, the decision does provide a piece of persuasive authority that could assist student-athletes in formulating an antitrust argument against the grant-in-aid cap on athletics-based financial aid. Also, it should be noted that *Jones* was a district court decision, yet that did not stop Justice Stevens from citing it with approval in *Board of Regents*.

The *Walk-On Football Players Litigation* decision demonstrates that the best counter to the NCAA's amateurism justification is to convince the court that your prayer for relief does not threaten the revered tradition. The arguments presented in *White* provided another example for how to negate the amateurism justification. The plaintiffs in *White* did not ask the court to abolish the NCAA's cap on student-athlete grant-in-aid, thus freeing students to negotiate as professional athletes. The plaintiffs merely asked the court to broaden the NCAA's cap on grant-in-aid to cover the actual cost of attendance (*White, Second Amended Complaint*, 2006). In particular, the plaintiffs in *White* were asking the court to permit NCAA schools to adjust student-athlete financial aid allowance to better reflect the economic realities that exists for all students who attend college (*White, Second Amended Complaint*). Further, the plaintiffs never demanded that NCAA member institutions provide aid up to the cost of attendance. Instead, they asked the court to allow NCAA member institutions the option of providing aid up to the cost of attendance (*Id.*). Thus, the NCAA would still be able to preserve its academic tradition if it permitted member institutions the option of extending athletics-based aid to include all costs associated with college attendance. With the tradition of amateurism left intact, the NCAA could still claim to offer their customers sports products that are distinct from their professional counterparts.

(b) Promoting Competitive Equity

In *Board of Regents* Justice Stevens provided the second justification for NCAA regulations with his statement that "most of the regulatory controls of the NCAA are a justifiable means of fostering competition. . .because they enhance the public interest in intercollegiate athletics" (1984, p. 117). The NCAA may argue that allowing a cost of attendance option creates a competitive imbalance in intercollegiate sports because schools with smaller athletic budgets would be disadvantaged in the recruitment of student-athletes because they would lack the financial resources to offer financial assistance up

to the cost of attendance. An imbalanced playing field would disrupt parity amongst NCAA member institutions and lack of parity could affect the public's interest in intercollegiate sports.

However, similar arguments have failed the NCAA in the past. The Court in *Board of Regents* rejected the NCAA's competitive equity justification for regulating a television plan for college football because there was no indication that the plan was intended to equalize the strength of intercollegiate athletic teams (*Board of Regents*, 1984, p. 119). In *Law v. NCAA* (1998), the Tenth Circuit also refused a competitive equity argument from the NCAA concerning salary restrictions placed on assistant coaches. The Tenth Circuit stated that the NCAA failed to demonstrate that the regulation at issue in *Law* actually promoted competitive equity. Instead, the regulation merely prevented the exacerbation of "competitive imbalance" (*Law*, p. 1024). Thus, the NCAA must prove that its grant-in-aid cap creates a competitive balance that enhances the quality of intercollegiate athletics if it is to be justified based on competitive equity (Dennie, 2007). The cap must do more than just prevent an exacerbation of an already existing imbalance.

Step Three- Less Restrictive Alternatives

The third step in the rule of reason analysis focuses on the existence of a less restrictive alternative to accomplish the procompetitive justification. This third step is only necessary if the defendant is able to convince the court that the procompetitive justification for the restraint on trade outweighs its anticompetitive effect (*Clorox Company v. Sterling Winthrop, Inc.*, 1997). All 13 federal judicial circuits have adopted a less restrictive alternative inquiry into their rule of reason analysis and the majority of those jurisdictions place the burden of persuasion on the plaintiff (Feldman, 2009). Perhaps one of the best rationales for the test can be found in Justice Brennan's concurring opinion in *White Motor Co. v. United States* (1963). In his concurrence, Justice Brennan stated that the less restrictive alternative test is "pertinent" to rule of reason analysis because it requires the court to determine if the restraint is "more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests" (*White Motor Co.*, 1963, p. 270). Through this determination, Justice Brennan stated that courts could better glean the "real purpose" for the adoption of the restraint (p. 270).

If the NCAA were to convince the court that the grant-in-aid cap on student-athlete compensation resulted in a net procompetitive impact, the cap would still violate antitrust law if the impact could have been attained through a less restrictive alternative. As discussed in the previous subsection, student-

athlete plaintiffs could argue that the allowance of a cost-of-attendance option would serve as a less-restrictive alternative to the existing grant-in-aid restriction that would not jeopardize the preservation of amateurism justification. Extending athletics-based aid to cover the full cost of attendance would allow the NCAA to preserve the amateur nature of intercollegiate athletics, but in a way that is less restrictive to the market for student-athletes. The last subsection discussed problems with the NCAA's competitive equity argument. In this third step of antitrust analysis, the court must look to the "real purpose" for the grant-in-aid cap on athletics-based aid and why that cap could not be extended to cover the full cost of attendance. If the court determines that the primary function of the cap is to promote competition, then the NCAA will prevail. Conversely, if the court determines that the cap exists primarily to contain costs for NCAA member institutions, then the NCAA should fail. The NCAA even acknowledged that following the decision in *Law*, it is unlikely that cost-cutting measures would survive antitrust scrutiny (NCAA, 2006).

CONCLUSION

This article does not attempt to forecast the possibility of success that a future class of student-athlete plaintiffs would have in challenging the grant-in-aid cap on compensation. After all, the NCAA has never lost a case in which student-athletes have challenged NCAA amateurism provisions. However, the purpose of this article is to demonstrate the existence of compelling arguments that pose problems for the NCAA in defending against an antitrust challenge to its cap on grant-in-aid for student-athletes.

The extent of the NCAA's exposure to antitrust liability is subject to debate, but the dissent in *Banks* and the decisions in *Walk-on Football Players Litigation* and *Tanaka* demonstrate that courts may be increasingly willing to consider whether NCAA amateurism restrictions violate antitrust law. The relevant market requirement to the first step of the Rule of Reason analysis has proven to be too high a hurdle for student-athletes to clear in past antitrust challenges to NCAA regulations (*see Banks*, 1992). However, in *Walk-On Players Litigation* and *Tanaka*, courts did accept the claim that relevant markets exist for the services provided NCAA member institutions by student-athletes. If this is the case, then the arguments presented in *White* could threaten the NCAA in subsequent antitrust cases brought by student-athletes. Most importantly, these arguments could jeopardize the NCAA's control over student-athlete grant-in-aid.

Even if relevant markets are established, the NCAA's amateurism justification weighs heavy when balanced against restraints imposed by the organization's regulations (Nagy, 2004). There is a long list of cases that have relied on the preservation of amateurism to dismiss student-athlete antitrust complaints (Krakau, 2000). Further, court decisions like those found in *Jones*, *Justice*, *Gaines*, and *Smith* have relied on the amateurism justification to dismiss student-athlete complaints without any real analysis of the restraints at issue (Roberts, 1995). However, those cases can be distinguished from the facts in *White* because they all involved challenges to NCAA eligibility requirements while the plaintiffs in *White* wanted the court to address the reasonableness of the cap on grant-in-aid. In fact, an argument could be made that the plaintiffs in *White* did not challenge the role of amateurism in intercollegiate athletics. Instead, they challenged the financial limits of grant-in-aid and argued that schools should be allowed to offer athletics-based financial aid up to the cost of attendance (*White v. NCAA Second Amended Complaint,* 2006). As a result, the defense of preserving amateurism may not carry the same weight as in past cases challenging eligibility rules. Without this defense, the NCAA becomes more vulnerable to a challenge to its limitations on grant-in-aid and must rely on the less accepted defense of promoting competitive balance in intercollegiate athletics.

Rather than subject itself to further antitrust challenges concerning grant-in-aid restrictions, the NCAA should modify what is allowed through grant-in-aid to include the full cost of attendance. Their stated main purpose of amateurism is to keep education as the priority and main focus for student-athletes (NCAA, Art. 2.9, 2010). Costs for attendance are educationally-related expenses, and extending grant-in-aid to cover these costs would not derail the NCAA's mission of preserving amateurism. There was even support for such an extension within the NCAA's own ranks. In 2003, then NCAA President Myles Brand stated in a letter to the editor of the *Denver Post* that he favored the increase of the grant-in-aid amount to include the full cost of attendance (Brand, 2003). The plaintiffs in *White* mentioned Brand's position on the subject in their second-amended complaint (*White v. NCAA Second Amended Complaint,* 2006).

The NCAA has retained complete control over major college football and major college basketball in regard to the regulation of student-athletes. Courts provide the organization with "ample latitude" in maintaining its regulations out of deference to the goal of preserving amateur sports as a product distinct from professional sports (*Board of Regents*, 1984). That latitude could be limited by an antitrust challenge that does not threaten to disrupt the preservation of amateurism. The NCAA should address its vulnerability to the

antitrust claims presented in *White*. The availability of treble damages could cost the NCAA hundreds of millions if it lost such a case (Dennie, 2007). However, more significant to the NCAA is the potential loss of control over the direction of its grant-in-aid program. By modifying grant-in-aid to include the full cost of attendance, the NCAA will further fortify its regulations from antitrust scrutiny. If grant-in-aid included the full cost of attendance, the NCAA would have an educationally-related reason for the amount set for athletics-based aid. It would be extremely difficult for future classes of plaintiffs to challenge that amount without having to convince the court to reject decades of precedent, including *Board of Regents*, recognizing the preservation of amateurism as a justification for NCAA regulations. If plaintiffs were to win that legal battle, they would arguably be party to the greatest upset in the history of college sports.

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