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ABSTRACT

In the *O'Bannon* antitrust case against the National Collegiate Athletic Administration, federal courts rules that the NCAA's restrictions on compensating student-athletes for the use of their names, images and likenesses were an illegal price-fixing agreement among horizontal competitors. This essay summarizes the economic arguments and evidence that were presented by both sides in the case, and explains how and why the *O'Bannon* decision did not fully resolve the issue of the limitations to the scope of the NCAA's ability to regulate compensation of athletes in intercollegiate sports.

* An abridged version of this essay is forthcoming in John E. Kwoka, Jr., and Lawrence J. White (editors), *The Antitrust Revolution: Economics, Competition, and Policy,* 7th Edition, Oxford University Press. The author was an expert witness for the plaintiffs in this litigation. This chapter is based on his expert reports and the reports of Daniel Rascher, who also served as an economic expert for the plaintiffs. The author also is grateful to Andrew Schwartz for collaborating on the research that formed the basis for his expert reports.

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INTRODUCTION

On July 21, 2009, Ed O'Bannon, the star of UCLA's 1995 men's national champion basketball team, sued the National Collegiate Athletic Association (NCAA) and its principal licensing agent, the Collegiate Licensing Company (CLC), on behalf of a class of college athletes for including the "likeness and image" of class members in Electronic Art's (EA) college football and men's basketball video games and other products without their consent. The *O'Bannon* complaint alleged that the NCAA and CLC violated the antitrust laws by fixing the fee for the commercial use of the images and likenesses of college athletes at a price of zero and by organizing a group boycott of students who might receive payment for the use of their names, images, and likenesses (NILs).

A few weeks before *O'Bannon* was filed, Samuel Keller, who played college football at Arizona State and Nebraska, sued EA and the NCAA on behalf of a class of college athletes for essentially the same conduct. The *Keller* complaint claimed that EA and the NCAA had violated the athletes' "right of publicity," which refers to the right of persons to control the commercial use of their names and images. Over the next few years, numerous cases that were similar to either *O'Bannon* or *Keller* were filed by other athletes, including former basketball superstars Oscar Robertson and Bill Russell. Soon the antitrust and right-of-publicity cases were consolidated into a single case.[1]

[1] After the cases were combined, plaintiffs filed a 213 page complaint that covered both the antitrust and right-of-

Although the motivation for these cases was the NCAA's practice of licensing video games that use the images of both present and former college players, these cases had broader significance. Also at stake was the revenue that colleges derive from selling the rights to televise college games without paying the players for the rights to use their NILs. At the heart of the case was NCAA rules that limit the compensation for participating in college sports.

Keller and the other right-of-publicity cases were settled before trial. The consolidated antitrust cases were renamed *O'Bannon* and tried in 2014, and the appeal decision was issued a year later.[2] The significance of *O'Bannon* is that it is the first case in which a district court and a court of appeals found that the NCAA's cap on payments to college athletes violated the antitrust laws. But the *O'Bannon* decision also found that a limit on the compensation of a college athlete had two pro-competitive benefits, the preservation of amateurism and the integration of athletes into the college community, and that the NCAA did not violate the antitrust laws by capping the value of an athletic scholarship at the full cost of attending college.

THE BUSINESS OF COLLEGE SPORTS

Whereas intercollegiate sports exist in a few other nations, only in the United States does sports constitute an important and rapidly growing line of business for colleges. In the academic year 2014-15, 345 colleges and universities participated in Division I (DI), the group of colleges that places the greatest emphasis on athletics. Within DI, 125 schools were members of the

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publicity issues: "Third Consolidated Amended Class Action Complaint," *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation*, July 18, 2013, United States District Court, Northern District of California, Oakland Division, Case No. C 09-01967 CW (henceforth *Consolidated Complaint*).

[2] The trial court issued its opinion on August 8, 2014 ("Findings of Fact and Conclusions of Law," *Edward O'Bannon, et al., v, National Collegiate Athletic Association, et al.*, United States District Court for the Northern District of California, Case No. C 09-3329 CW). The appeal decisions was issued on September 30, 2015 ("Opinion," *Edward C. O'Bannon, et al., v. National Collegiate Athletic Association, et al.*, United States Court of Appeals for the Ninth Circuit, Cases No. 14-16601 and 14-17968. Plaintiffs' petition for *certiorari* to the Supreme Court was denied on October 3, 2016 (see http://www.scotusblog.com/case-files/cases/obannon-v-ncaa/).

Football Bowl Subdivision (FBS), which competes at the highest level in football. Among FBS schools, median total revenue from athletics in the same year was $63.7 million, compared to $28.2 million in 2003-04, implying annual growth between these years of about eight percent.[3]

Another 124 DI schools played football in 2014-15 in the Football Championship Subdivision (FCS). The principal difference between FBS and FCS is that the maximum number of football scholarships is 85 in FBS but only 63 in FCS. FBS teams usually are much better than FCS teams, and games between FBS and FCS schools usually end in a one-sided victory for the FBS team. Among FCS schools median athletic revenues are about one-fourth of median revenues in FBS, although FCS revenues also more than doubled between 2004-05 and 2014-15 from $7.8 million to $16.3 million (about seven percent annual growth). During the same period median athletic revenues of the remaining 96 DI schools that did not play football in 2014-15 increased from $7.3 to $15.2 million (also about seven percent annual growth).

As is apparent from these data, schools that play big-time college football account for most of the revenue of DI athletics programs. Twenty FBS programs had more than $100 million in total revenues in 2014-15. Revenues for the FBS athletic programs are comparable to the revenues of teams in the National Hockey League, for which in 2014-15 estimated average revenue per team was $133 million, median revenue was $128 million, and the four teams with the least revenue all took in about $100 million (Forbes Staff, 2015).

The NHL comparison is useful because it provides an indicator of the stake of college

[3] The data reported here are from Fulks (2016), p. 19. The NCAA does not report the average revenue of colleges in Division I or any of its component subdivisions. The NCAA separates the total revenues of an athletics program into two components: "generated" (accruing from outside the college directly to the department of athletics) and "allocated" (transfers from other components of the university). Because some of the revenues created by an athletics program are paid to other parts of the university (e.g., student athletic fees, sales of licensed athletic products at the campus bookstore, incremental tuition and fees arising from the admission of athletes at schools not at their enrollment cap), neither allocated revenue nor total revenue is an accurate measure of the gross income from the athletics program. Nevertheless, trends in total revenue are a reasonable approximation of the trends in true gross revenues from athletics.

athletes in the litigation against the NCAA. The NHL collective bargaining agreement establishes a cap and a floor on total payments to players for salaries, bonuses and benefits of approximately 50 percent of total revenues.[4] In 2014-15, the guaranteed floor for payments to players was approximately $66 million per team. Had FBS schools paid half of their total athletic revenues to their athletes in 2014-15, the median expenditure on athletic scholarships would have been about $32 million, but in fact it was $9.3 million.[5]

In 2014-15 the median number of athletes participating in all sports at FBS schools was 609.[6] Many of these athletes received either no financial aid or partial scholarships. Among FBS athletes who received financial aid, the median value of a full athletic scholarship at a public university was $28,000 for in-state students and $43,000 for out-of-state students.[7] Had public FBS schools paid half of median total athletic revenues to college athletes, the average payment to each of the 609 college athletes would have been $52,500.

FBS football produces more revenue than any other sport, followed by men's basketball. Of the revenue that can be attribute to a specific sport, median total revenue among FBS schools

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[4] *Collecting Bargaining Agreement between the National Hockey League and the National Hockey League Players' Association* (2013), Article 50, pp. 223-309, sets forth the extremely complicated procedures for calculating total player compensation for the league and maximum and minimum team expenditures on player compensation.

[5] Fulks (2015), p. 31.

[6] *Ibid*., p. 17.

[7] *Ibid*., p. 18. The median value of a full athletic scholarship at a private university was $59,000. The face value of an athletic scholarship is not a good measure of the true opportunity cost of a scholarship. Most of the value of a scholarship covers the sticker prices of services provided by the college, such as tuition, fees, and room and board charges. These prices can be above or below the true cost of admitting one more college athlete. At colleges where enrollment is below capacity, the marginal cost of a student may be much less than the value of a scholarship, whereas at colleges that are at their enrollment cap, the marginal cost of a college athlete is the opportunity cost of not admitting another student who is not an athlete. If the next admitted student would receive financial aid, the opportunity cost to the college of not admitting this student is less than the sticker prices of the services that the college provides. For this reason, the claim that athletics programs are subsidized if their revenues are not sufficient to cover total tuition, fees, and room and board charges for scholarship athletes is true only in an accounting sense. For a more thorough discussion of this issue, see Goff (2000).

in 2014-15 was $22.8 million for football and $6.1 million for men's basketball.[8] Applying the NHL standard for payments to athletes, had the 85 scholarship players on an FBS football team shared half of attributed revenues, the average payment per athlete would have been $134,000, and among the 13 scholarship players on an FBS men's basketball team, the average payment would have been $235,000. The only other sport that generates significant revenue in FBS is women's basketball, for which median revenue is $0.8 million. At some DI schools, baseball, men's ice hockey, and men's lacrosse also have attributed revenues comparable to women's basketball. Other sports produce little revenue, usually less than the salary of the head coach.

The History of Commercialized College Sports

Although revenues for college sports have increased dramatically in the past two decades, college sports became commercialized in the middle of the 19th Century. The first intercollegiate athletic competition in the U.S., a regatta between the student boat clubs of Harvard and Yale, took place in 1852 on Lake Winnipesaukee in New Hampshire.[9] The event was a distinctly commercial enterprise. The regatta was organized by the Boston, Concord and Montreal Railroad, which gave the members of the two boat clubs an eight-day excursion to the site of the race and then scheduled a special train that transported several hundred spectators to the event.

After this regatta, colleges regularly participated in intercollegiate boat races and track meets. The pinnacle of popular appeal was achieved by a boat race between Harvard and Oxford on the Thames in 1869 that drew an estimated one million spectators (Pope, 1996, p. 295).

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[8] *Ibid.*, p. 26. The NCAA financial reports attribute only about 2/3 of total athletic revenues to a specific sport. An increasing fraction of athletic revenue is accounted for by conference television networks. These networks televise the full range of college sports, so the revenues from these networks are not attributed to specific sports, even though as a practical matter nearly all of the revenue is generated by basketball and football telecasts.

[9] Smith (1988), pp. 3-4.

Meanwhile, in the 1860s and early 1870s, baseball teams from Harvard and Yale played and won several games each year against the top professional baseball teams (Pope, 1996, p. 295).

In the 1880s football became the most important college sport. College students began to organize games resembling football between classes or residences in the 18th Century, but the first intercollegiate football match took place in 1869, pitting Rutgers against Princeton in a game that was more like soccer than contemporary football. After Walter Camp, a player at Yale and then, simultaneously, the coach at Yale and Stanford,[10] formalized the rules for the modern game of football in the 1880s, the sport became a commercial success. By the 1890s Walter Camp's budget for intercollegiate sports at Yale was nearly as large as the combined budgets of the schools of divinity, law and medicine (Pope, 1996, p. 298).

In the 19th Century intercollegiate sports were organized by student clubs that were neither controlled nor overseen by colleges.[11] Teams were run by an elected captain, usually a student, who appointed a team manager, also usually a student, to tend to day-to-day operations. Initially the costs of a team were financed by dues from members and appropriations from student government, but some teams also generated revenues by selling tickets and soliciting donations. Eventually gate receipts began to exceed costs, and the profits were shared among team members. Because better teams generated more revenues, clubs began offering financial inducements to prospective athletes. For example, Yale's football club recruited a player by offering him a free trip to Cuba and the rights to sell programs at home games.[12]

In the 1890s, the financial success of college football and, to a lesser extent, baseball and basketball, led colleges to wrest control of intercollegiate athletics from student clubs and to

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[10] At the time, eastern colleges played football in the fall and western colleges played in the winter.

[11] Smith (1988), p. 119.

[12] Zimbalist (1999), p. 7.

form associations that eventually became conferences to establish common rules and policies for the governance of college sports. Some colleges sought to impose strict amateurism, banning not only payments to athletes but also paid professional coaches. Despite many meetings that issued proclamations supporting such policies, most colleges did not adopt strict amateurism.[13] When colleges created departments of athletics to replace student clubs in organizing and managing intercollegiate teams, the practice of using gate receipts to pay coaches and team members was replaced by hiring coaches as college employees and paying students in the form of athletic scholarships plus wages for on-campus jobs that were conditional on participation in a sport.

Intercollegiate football created still another problem for colleges. Widespread violence and numerous serious injuries came close to causing colleges to abandon the sport (Smith, 1981). In 1906, injuries and even deaths from playing football led President Theodore Roosevelt to call the leaders of college football powers to a meeting in Washington, D.C., at which the President threatened to ban college football if colleges did not make the game safer. This meeting led to the creation of the Intercollegiate Athletic Association of the United States (IAA), which became the NCAA in 1910. The IAA quickly adopted new playing rules for football that made the game safer and for other sports as well.

From the beginning the IAA advocated a policy of strict amateurism for college athletes. The IAA proposed that colleges be banned from recruiting athletes and offering any form of compensation that was based on athletic participation, including athletic scholarships.[14] But adherence to this rigorous definition of amateurism was not made a condition of membership in the organization or of eligibility for students to participate in college sports, and few colleges

[13] For accounts of some of these meetings, see Fleischer, Goff and Tollison (1992), p. 38, Pope (1996), p. 299, Smith (1988), p. 6, and Smith (1981), p. 6.

[14] Fitt (2009), pp. 160-61.

adopted it. To the extent that financial aid to college athletes was regulated, the entities establishing and enforcing these regulations were conferences, not the NCAA, and the rules differed substantially among conferences.

By the 1920s, intercollegiate football was extremely popular and highly commercialized. A 1929 study of college sports under the auspices of the Carnegie Foundation documented that, at most colleges, football players were actively recruited and then compensated for participation in sports with athletic scholarships, on-campus employment, and payments from third parties that colleges neither monitored nor controlled (Savage, *et al*., 1929, Chapter II).

NCAA Financial Aid Rules

When the *Keller* and *O'Bannon* cases were filed, the NCAA set upper bounds on the value of an athletic scholarship (the "grant-in-aid cap") and the total number of scholarships that a college could award in each sport. The value of an athletic scholarship was limited to the sum of tuition, fees, room and board, and required books. The number of students who could receive athletic scholarships was limited to 85 for football, 13 for men's basketball, 15 for women's basketball, and lesser numbers for each of the other sports.[15] These restrictions are of a relatively recent origin, having been adopted by the NCAA in the 1970s.

From its founding in 1906 until 1956, the NCAA advocated but did not enforce a strict definition of amateurism that would have banned all financial aid that was conditional on athletic participation. The NCAA's position was that financial aid for students who participate in college sports should be awarded through the same process by which financial aid was given to other students. The NCAA formally adopted this policy in the "sanity code" in 1948, but quickly

[15] The NCAA allows scholarships to be shared in all sports other than football and basketball, so in other sports the number of students receiving some financial aid was substantially greater than the limit on the number of full athletic scholarships.

withdrew this policy because most NCAA members refused to abide by it. A similar rule was adopted in 1956, but was rescinded a year later.

The NCAA abandoned this strict definition of amateurism in 1957. The NCAA's new policy was to permit scholarships that were conditional on athletic participation as long as the total amount of financial aid did not exceed the sum of tuition, fees, room and board, books, educational supplies, and allowances for travel costs to and from school and for incidental expenditures (euphemistically called "laundry money"). Initially, the NCAA rules permitted athletes to hold campus jobs that brought their total payments above this ceiling and to earn outside income from endorsements and appearances, but in the 1960s the NCAA adopted rules limiting income from on-campus employment and prohibiting income that was derived from a student's identity as an athlete. Thus, the NCAA policy that was challenged in the *Keller* and *O'Bannon* cases was not adopted until the 1960s.

The NCAA first restricted the number of athletic scholarships in 1973, when the number of scholarships was capped at 105 for football and 18 for men's basketball. These limits were gradually reduced until, in 1993, men's basketball was limited to 13 scholarships and, in 1994, football was limited to 85 scholarships. Both limits are still in force.

In 1976 the NCAA substantially reduced the permitted value of an athletic scholarship by eliminating the allowances for educational supplies other than required books, travel to and from school, and incidental expenses. At the time of the *O'Bannon* litigation, the difference between the NCAA's cap on the value of an athletic scholarship and full reimbursement of all expenses associated with attending college (the NCAA's original 1957 cap on scholarships) varied between $2000 and $6000, depending on the college and the circumstances of the athlete.

Soon after the NCAA's 1976 limits on the value of an athletic scholarship were imposed,

a conflict arose between the NCAA's scholarship rules and the federal Pell Grant program that provides financial aid to low-income students. The Pell Grant program was enacted in 1972 but did not become available to all low-income students until 1976,[16] the same year that the NCAA cut the maximum value of an athletic scholarship. The Pell Grant program bases the total amount of financial assistance that a student can receive on the student's financial ability to pay and the "cost of attendance" (COA) for a full-time student at the college in which the student is enrolled. Each school calculates its own COA, but the calculation must be consistent with the definition of COA by the federal government. According to the federal definition, COA includes all of the items that were included in the NCAA's original list of expenditures that could be covered by an athletic scholarship. In addition, a Pell Grant can reimburse students for other costs that a student must pay to attend college, such as child care for a student who has children.[17] Consequently, in 1976, the maximum amount of financial aid that a low-income student could receive exceeded the NCAA's cap on financial aid for college athletes and even the more generous cap that the NCAA imposed from 1957 to 1976.

Originally the NCAA did not permit athletes to benefit from a Pell Grant. If an athlete was awarded both an athletic scholarship and a Pell Grant, the college was required to deduct the amount of the Pell Grant from a student's athletic scholarship, thus making the college, not the student, the beneficiary of the grant. In 1984, the NCAA changed its policy to permit a college athlete to receive up to $900 more than the athletic grant-in-aid cap from a Pell Grant for "miscellaneous expenditures" that were included in the school's cost of attendance but not in the

[16] "Pell Grant Funding History (1976-2010)" (2012) at http://www.acenet.edu/news-room/Pages/Pell-Grant-Funding-History-1976-to-2010.aspx. The original name of the program was the Basic Educational Opportunity Grant, but the program was renamed to honor Senator Claiborne Pell in 1980.

[17] The manual for calculating cost of attendance is updated annually, and the version that was current at the time of the *O'Bannon* trial was Chapter 2 of Volume 3 of the *2014-15 Federal Student Aid Handbook* (2014).

NCAA's cap on athletic scholarships. This amount was gradually increased until, in 1995, an athlete was permitted to keep both an athletic scholarship and a Pell Grant up to a maximum total grant equal to the school's cost of attendance. Finally, in 2004, the rule was changed again to allow students to receive a full athletic scholarship and to keep the full amount of the Pell Grant, even if the total exceeded the direct cost of attending college.

The significance of the NCAA's grant-in-aid policy derives from the fact that many college athletes receive Pell Grants. For example, a survey of DI Alabama colleges in 2014 (Solomon, 2014) found that 131 athletes at the University of Alabama, 67 of whom were football players, received Pell Grants totaling $566,495 (over $4300 per athlete). At Auburn, 112 athletes (no breakdown by sport) received $539,327 (over $4800 per athlete), and at Troy 200 athletes (106 of whom were football players) received $849,143 (over $4200 per athlete). Of the seven DI schools in Alabama that reported the number of Pell Grant recipients for each sport, the average number of football players receiving Pell Grants was 70 per college, which is well over half of the number of players on a college football team.[18] By comparison, in 2014 (the year of the survey) 37 percent of all college undergraduates received Pell Grants.[19]

Just before the *O'Bannon* case was tried, the NCAA initiated a process that, in January 2015, ended in another significant change in the value of athletic scholarships. In early 2014 the most successful conferences in FBS (the "Power Five") plus independent Notre Dame[20] proposed that conferences be permitted to raise the grant-in-aid cap to COA, beginning in the fall

[18] The NCAA does not restrict the number of players on a team, but some conferences impose such limits. Among the eight Alabama DI colleges, football roster sizes vary between 90 and 130.

[19] College Board, "Undergraduate Enrollment and Percentage Receiving Pell Grants Over Time," *Trends in Higher Education*, at https://trends.collegeboard.org/student-aid/figures-tables/undergraduate-enrollment-and-percentage-receiving-pell-grants-over-time.

[20] Atlantic Coast (ACC), Big Ten, Big Twelve, Pac-12, and Southeast Conference (SEC). Since the end of World War II, the only school to win the NCAA national championship in football that was not a member of one of these conferences or Notre Dame was BYU in 1984. At the time of the *O'Bannon* litigation, the Big East also was regarded as a power conference in football, although its football playing members left the conference a year later.

of 2015. This proposal was endorsed by FBS schools in 2014 and approved by the full NCAA membership in January 2015.

THE ISSUES IN THE ANTITRUST CASE

The *Consolidated Complaint* alleged that the NCAA, EA and CLC violated Section I of the Sherman Act by colluding to fix the price for licensing the NILs of FBS football players and DI men's basketball players at zero and by engaging in a group boycott and a refusal to deal with respect to college athletes concerning compensation to athletes for the commercial use of their NILs. In essence, the *Consolidated Complaint* alleged that the NCAA is a cartel of horizontal competitors that has agreed to cap on compensating athletes for participating in sports.

Normally a horizontal price fixing agreement that is enforced by a group boycott/refusal to deal is a *per se* antitrust violation because price collusion among horizontal competitors cannot plausibly produce a pro-competitive benefit. Hence, in a standard price-fixing case, the plaintiff need only show that the defendants attempted to fix prices to secure an injunction against the price-fixing agreement. But the team sports industry has convinced the courts that price fixing sports should be analyzed under the rule of reason.

Court Precedent Affecting *O'Bannon*

While many sports antitrust cases have been litigated under the rule of reason, the prior case that is most relevant to *O'Bannon* is *Board of Regents v. NCAA*.[21] In *Board of Regents*, the University of Oklahoma and the University of Georgia sued the NCAA over its rules that restricted televising college football games. Oklahoma and Georgia were two of 63 members of

[21] The Supreme Court's decision that established important precedents for the *O'Bannon* case is *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, et al.*, 468 U.S. 85 (1984).

the College Football Association (CFA), an organization that included most college football powers of that era.[22] At the time this case was filed, NCAA rules gave the NCAA the exclusive right to license telecasts of live games. The NCAA contracted with the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS) to allow each network to offer 14 live college football telecasts per season in each local television market and limited the number of times that any school could appear in a live game telecast to six games over two years, with no more than two games on a single network in a single season.

In 1982, the CFA signed a contract with the National Broadcasting Company that would have led to additional live telecasts of games of CFA members. The NCAA responded by threatening to punish any CFA member that allowed a game to be televised under this agreement. Oklahoma and Georgia then sued the NCAA on behalf of all CFA members, alleging that the NCAA violated the antitrust laws by: (1) fixing the price of live game telecasts for all NCAA members; (2) engaging in a group boycott of schools that the NCAA did not include in the package of games that it allowed to be televised; and (3) artificially restricting output by limiting the number of games that could be televised. The first two elements of *Board of Regents* are essentially the same as the allegations in the *Consolidated Complaint*, and the third is analogous to a complaint against limitations on the number of scholarships that a school can offer in any sport.

The NCAA did not deny these allegations, but instead argued that restrictions on live telecasts were pro-competitive because they prevented erosion of attendance at college football games and promoted "competitive balance" among NCAA members. Competitive balance refers

[22] The members of the CFA were all of the schools in the Atlantic Coast Conference, the Big Eight (now the Big 12), the Southeast Conference, the Southwest Conference (now defunct), and the Western Athletic Conference (no longer a football conference, having been replaced by the Mountain West Conference in FBS), plus many colleges that were not members of a conference, including Army, Navy and Notre Dame. The Big 10 and the Pac-10 (now Pac-12) were not members.

to the difference in the quality of teams. The NCAA argued that greater competitive balance is pro-competitive because it causes the outcome of a game to be more uncertain, which in turn increases the demand for the sport. The NCAA also argued that the relevant market in which it competed included all other sports and entertainment programs on television, and that more balanced competition enabled the NCAA to compete more effectively in this market.

The trial court accepted the premise that the complaint should be evaluated under the rule of reason, but nonetheless ruled that the NCAA had violated the Sherman Act. The District Court concluded that the relevant product market was live telecast of college football games because of the greater audience appeal of college football over other programming alternatives during the day on Saturdays. The District Court rejected the NCAA's procompetitive justifications, finding no evidentiary support for the claim that televising games reduced live attendance or that the NCAA's television policies affected competitive balance.

The Court of Appeals upheld the decision of the District Court, finding that under the rule of reason the NCAA television rules violated the Sherman Act, but also concluded that the NCAA's television policy was a *per se* antitrust violation. The Appeals Court decision offered additional reasons to reject the NCAA's pro-competitive justifications. The protection of live attendance was rejected because it ignored the much greater audience for live telecasts, and the promotion of competitive balance was rejected because it was a *de facto* repudiation of the policy of promoting economic competition that is established in antitrust statutes.

The Supreme Court upheld the conclusion that the NCAA's television rules were an antitrust violation, but rejected the Court of Appeals conclusion that these rules were illegal *per se*. The crucial passage of the Supreme Court's decision is as follows (emphasis added).

> "[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all. … A

> myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football - college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order **to preserve the character and quality of the 'product,' athletes must not be paid**, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by mutual agreement; **if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed**. 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**. In performing this role, **its actions widen consumer choice - not only the choices available to sports fans but also those available to athletes - and hence can be viewed as procompetitive**."[23]

The highlighted parts of this passage not only dictate that the *O'Bannon* case had to be tried under the rule of reason, but that the plaintiffs had to deal effectively with three assertions by the Supreme Court that directly pertain to restrictions on payments to college athletes. First, the Supreme Court seems to have decided that, by definition, college sports cannot exist if athletes are paid. Second, an individual college acting alone cannot preserve its own college sports product by refusing to pay its athletes because it would then be unable to field a competitive team. Thus, college sports can only exist if NCAA members engage in collusion to fix prices (payments to college athletes). Third, the NCAA requirement that athletes must not be paid benefits athletes because otherwise college sports would not exist.

After reading this passage from *Board of Regents*, the obvious question is why a plaintiff would bother to file an antitrust complaint against the NCAA's restrictions on payments to college athletes if the pro-competitive nature of these restrictions already has been decided by the Supreme Court. The answer is in the nature of the *Board of Regents* opinion, which was about

[23] *Ibid*, pp. 101-02.

live telecasts of football games and involved plaintiffs that were colleges. Payments to college athletes were not an issue in this case, and the plaintiffs had no interest in attacking restrictions on payments to athletes. Thus, neither side presented evidence pertaining to the arguments that college sports would not exist if college athletes were paid. Thus, the quoted passage in *Board of Regents* is what lawyers call "dicta" – statements in a court opinion that are unrelated to the decision in the case, are not based on evidence that was presented in that case, and, as a result, are not binding as legal precedent. This passage nevertheless is useful because it articulates issues that the *O'Bannon* plaintiffs had to address successfully: what is the relationship between the NCAA's restrictions on payments to athletes and the popularity of college sports, and is collusion over payments to college athletes necessary to preserve college sports?

Applying the Rule of Reason to *O'Bannon*

Due the anomaly of applying the rule of reason to price-fixing agreements in sports, a plaintiff in a sports case must show: (1) defendants possess market power in a relevant market; (2) defendants' market power was acquired, enhanced or maintained by anticompetitive conduct (here, the NCAA's price-fixing agreement regarding athletic scholarships); and (3) defendants' anticompetitive conduct caused harm to competition (here that the NCAA was effective in restricting payments to athletes). If plaintiffs succeed in proving these three claims, the defendants must then prove that their anticompetitive conduct created pro-competitive benefits that offset the anticompetitive harm. If defendants succeed in this showing, then plaintiffs bear the burden of proof to show that defendants' anticompetitive conduct was not reasonably necessary because the pro-competitive benefits could have been achieved through conduct that was less anticompetitive. That is, plaintiffs must identify a "less restrictive alternative" that

would deliver the same pro-competitive benefits while causing less anticompetitive harm.

Market Definition

In *O'Bannon*, the plaintiffs alleged two relevant markets: "the student-athlete Division I college education market in the United States" and "the market for the acquisition of group licensing rights for the use of student-athlete names, images and likenesses in the broadcasts or rebroadcasts of Division I basketball and football games and in videogames featuring Division I basketball and football in the United States," with the latter "a submarket of the broader collegiate licensing market in the United States..."[24]

The higher education market was defined in a way that emphasized the role of athletes as consumers of higher education services as well as suppliers of athletic skills. A price in this market is the net cost of attending college for a student who has an athletic scholarship. Defining the market in this way recognizes that college athletes are not just workers who are hired in a labor market, but must be students as a condition for participating in college sports. This way of defining the relevant market clarified that the plaintiffs did not seek to weaken the NCAA's academic eligibility requirements. Thus, *O'Bannon* did not conflict with the element of the dicta in *Board of Regents* about "identification of this 'product' with an academic tradition."

In proving the relevant market for higher education services, the plaintiffs acknowledged that athletes who are sufficiently skilled to play FBS football rarely are close economic substitutes for athletes who are sufficiently skilled to play DI men's basketball. Thus, the plaintiffs further segmented the higher education market into submarkets for each college sport. As a result, submarkets played a role in analyzing both alleged markets.

[24] *Consolidated Complaint, op. cit.,* pp. 121-22.

The concept of a submarket was first described in detail in *Brown Shoe v. U.S.* "The boundaries of … a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[25] Antitrust economists have long struggled with bringing clarity and concreteness to the concept of a submarket. The problem is that a properly defined relevant market consists of the smallest number of products that profitably could be monopolized; that is, the smallest group of products that would capture greater profits if they jointly implemented a "small but significant, non-transitory increase in price" (the SSNIP test) above the level that would prevail in a competitive market. Thus, a relevant submarket – a smaller set of products that also could be profitably monopolized – cannot exist if the larger market that includes it is accurately identified.

Notwithstanding this inconsistency, antitrust scholars have identified conditions under which the concept of a submarket can be useful.[26] For example, the same firms may sell products and engage in the same anticompetitive conduct in all submarkets. In this circumstance prices in different submarkets are not the result of independent decisions, so no examples can ever arise in which one can test whether an attempt to increase price in one potential submarket leads to a substantial loss of sales to products in another potential submarket. This condition was satisfied in *O'Bannon* because the NCAA rules restricting the compensation of college athletes are the same for all sports.

The standard approach to defining a relevant market is to observe the effect of changes in relative prices between two products that are candidates to be economic competitors. But in the

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[25] *Brown Show Co. v. United States*, 370 U.S. 294 (1962) at p. 325.

[26] For a comprehensive discussion of the usefulness of submarkets in antitrust, see Baker (2000).

case of athletic scholarships, all members of DI pegged the value of a scholarship at the maximum that the NCAA allowed, so variation in relative prices did not arise. That is, if one school raises tuition in relation to tuition at other DI colleges, the value of the athletic scholarship adjusts to absorb the tuition increase, thereby keeping the relative net prices of attending all DI schools the same. Likewise, NCAA rules prevent the price for the right to commercialize the NILs of college athletes from varying among colleges. Thus, plaintiffs had to rely on other evidence to establish the relevant markets.

The plaintiffs' proof that the both geographic markets were only the U.S. consisted of evidence that colleges outside of the U.S. are not close competitive substitutes for DI colleges because colleges outside of the U.S. do not field teams that compete at the level of FBS football and DI men's basketball and that capture significant licensing income from television and videogames. Athletic scholarships in football and men's basketball are offered only in Canada and the U.S. In other nations, including Australia, which has produced several players who played professional sports in the U.S., students pay to participate on college teams. Recruiting records show that players from the U.S. do not turn down athletic scholarships at DI colleges to play college sports in another nation, but many athletes from other nations, including Australia and Canada, accept athletic scholarships to play for a U.S. college.[27] Likewise, while the U.S. professional football and basketball leagues employ many foreign nationals, nearly all of these players who attended college attended college in the U.S.[28]

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[27] Several web publishers report the recruiting activities of all DI schools, including each college's scholarship offers, on-campus recruiting visits, and acceptances. The data reported here come from one of these sources, Rivals.com, supplemented by Internet searches of the players who were offered at least one FBS football or DI men's basketball scholarship but did not commit to attend an FBS school in football or a DI school in basketball.

[28] The National Basketball Association (NBA) has not employed a player who attended a college outside of the U.S. since the NCAA adopted its scholarship rules in 1957. All foreign NBA players who did not attend a U.S. college were professional players when they were of college age. The National Football League has employed a few players who attended Canadian universities. In 2014-15, 20 Canadians were signed to an NFL contract, 16 of whom

Recruiting patterns among U.S. colleges and universities also show that very few athletes turn down a scholarship to a DI college in order to participate in college sports at another U.S. college, whether a member of another NCAA division, a four year college that is not a member of the NCAA, or a junior college. Indeed, among those who do not play DI men's basketball or FBS football, the most common outcome is that the athlete elects not to play a varsity college sport of any kind.

During the period 2007-11, 6,481 athletes were offered scholarships to play DI men's basketball. Of these, 464 did not accept any DI offer in the same year, of which 138 eventually played in DI. Among the 326 who never played in DI, 154 did not play college basketball at any level, 58 played for a four-year college outside of DI, and 114 played at a junior college or a college preparatory school but not beyond that level.

Among football players, 16,922 recruits were offered scholarships to play for an FBS school during the same period, of which 1,984 did not accept an FBS offer. Among these, 293 eventually played in FBS, 252 played for a U.S. four-year college that was not a member of FBS, 350 played for a junior college or a college preparatory school but did not subsequently play in FBS, 57 accepted an offer to play another sport in college, and 1,032 could not be identified as having played college sports at any level.

In FBS football and DI basketball, colleges in the power conferences (including Notre Dame) win most recruiting battles with other FBS or DI schools, but schools outside of these conferences nevertheless recruit athletes who have offers from schools in power conferences and sometimes succeed in recruiting them. For example, the SEC's recruiting experiences are broadly similar to the other power conferences. In men's basketball during 2007-11, among 68

attended college in the U.S. and four of whom attended a Canadian college ("Canadians in the NFL," 2014). No NFL player from the U.S. attended a Canadian college before playing in the NFL.

athletes who were offered scholarships to play in at least one SEC school and at least one non-SEC school, 30 committed to an SEC school, 11 were lost to members of the other power conferences, 14 were lost to the four strongest of the remaining conferences,[29] and 13 were lost to one of the other D1 conferences. In FBS football, SEC members successfully recruited 1,563 athletes who had a scholarship offer from at least one non-SEC school, but lost 1,617 recruits to schools in the other power conferences or Notre Dame and another 359 recruits to FBS schools that were not in power conferences or Notre Dame. Hence, the recruiting data show that schools outside the power conferences are much closer competitive substitutes for power conference members than are colleges that do not play FBS football or DI men's basketball.

The group licensing submarket focused on one of two ways that the NILs of college athletes can be licensed for commercial use, which is to acquire rights to the NILs of an entire team. That is, telecasts of college games and videogames that simulate college games potentially involve all players on the roster.[30] In addition, other products may require a license to use the NIL of a single player. The *Consolidated Complaint* cites several examples of products that are licensed by colleges that bear the NILs of a current or former player: trading cards, team jerseys, bobble-head dolls, and action photos of plays. While products that feature one athlete or even a small number of athletes are part of the broader collegiate licensing market, plaintiffs focused on the narrower group licensing market because television rights and videogames generate almost all of the revenues that are derived from the commercial use of the NILs of college athletes.

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[29] Atlantic 10, Conference USA, Mountain West, and West Coast.

[30] The rights acquired to create television broadcasts differ from the rights acquired to make videogames in that the latter does not include the right to use the name or a photographic image of the players. EA college videogames include avatars that physically resemble, and have the same playing statistics as, a team's actual players. Colleges often put the names of players on team jerseys, but EA agreed not to mimic this practice in its videogames. But EA did include, without objection from the NCAA or CLC, an interface in college videogames that allowed consumers to insert player names on uniforms, and third-party vendors sold files of player names to insert in EA's videogames. These products were commercially available shortly after EA introduced each new version of a college videogame.

The *O'Bannon* plaintiffs did not attempt to define the relevant markets in which licensed products are sold. Instead, the focus was on the process by which the NCAA and its members acquire an essential input to licensing these products, which is the right to make commercial use of the NILs of college athletes. The products that are sold in the collegiate licensing market sometimes require obtaining only one intellectual property right, such as the name and logo of a college on an article of clothing or a coffee cup. But other products require at least two intellectual property rights: the NILs of players and the names and logos of their college.

For products that are based on images or accounts of a game, such as broadcasts or videogames, a license for the rights to both the NILs of the players and the name and logo of the college is essential, for otherwise the licensed product cannot be produced. For example, if the product is a video of the 1966 NCAA men's basketball national championship game, a television network that seeks to rebroadcast this game needs the rights to the commercial use of the game, which includes the names and logos of the colleges that were involved (Texas Western, now UTEP, and Kentucky) plus the NILs of all of the players on both teams, including three named plaintiffs in the *Consolidated Complaint* (Harry Flournoy, Thad Jaracz, and David Lattin). No other property rights are substitutes for any of these rights. For example, one cannot substitute the name and logo of 1995 National Champion UCLA for the name and logo of Texas Western, nor the NILs of the 1995 UCLA players, including Ed O'Bannon, for the NILs of the Texas Western players, including Harry Flournoy and David Lattin. The only plausible substitution would be to telecast another game of similar stature and interest, such as the 1995 national championship between UCLA and Arkansas.

If the creator of the licensed product must acquire the rights to players and colleges separately, a likely result is "double marginalization." Because each intellectual property right is

an essential component of the licensed product, each seller has an incentive to seek to extract all of the value of the licensed product in the price for its input. When several monopolists provide inputs, independent attempts by each to maximize their profit causes the sum of the prices of all inputs to exceed the amount that would maximize the joint profits of all input suppliers, thereby harming all parties – input suppliers, the creator of the licensed product, and consumers. To avoid this problem, the way that product licensing frequently works is that one entity (here the college, conference, or NCAA) first acquires the rights to license all of the relevant intellectual property, and then sells the bundle of rights to a licensee to create a licensed product, like a telecast or a videogame. In the first stage in the process, the owners of the bundled intellectual property rights agree to a formula for sharing the licensing revenue.

The group license at issue in *O'Bannon* was part of this first stage in which a college acquires the rights to the NILs of its athletes, which are then bundled with the college's intellectual property for the purpose of licensing products that use them both. This process is governed by NCAA rules that impose two restrictions. The first is that a student is ineligible to compete unless the student signs a document that gives the college the right to the commercial use of the student's NIL. The second is that the student cannot be paid for assigning this right to the university. These rules transfer the value of the NILs of college athletes to colleges. But this process would not succeed if the relevant market in which college athletes supply their NILs were broader than the colleges for which they play. Thus, the submarket in which colleges acquire the rights to the NILs of their players is linked to the submarkets in which colleges sell higher education services to athletes. In both cases, the NCAA's rules cannot benefit the NCAA and its members unless colleges that play football and men's basketball at the highest level constitute the full scope of the relevant markets.

The defendants did not offer a detailed critique of the plaintiffs' economic analysis of market definition. The defendants observed that many schools play football and men's basketball other than FBS and DI colleges, and that colleges offer scholarships in many other sports. But the defendants did not actually offer any economic analysis to support the conclusion that the relevant market includes either all colleges that play football or men's basketball, or the sale of higher education services to all athletes in DI.

Market Power

The plaintiffs' analysis of market power in the relevant markets began with the observation that both the higher education market and the collegiate licensing market are structurally competitive. At the time *O'Bannon* was litigated, FBS had 125 members and DI had 351 members, all of which compete in the higher education and licensing markets. The collegiate licensing market is somewhat more concentrated because most licensing income is derived from products that are licensed by conferences, but even in FBS ten conferences operated at the time of the *O'Bannon* case.

Market power is the ability profitably to sustain prices above the competitive level and/or to exclude competitors from the market. The market power of the members of the NCAA in both markets arises from the agreement among the members to delegate to the NCAA the authority to regulate the value and number of athletic scholarships and to impose sanctions on members that violate these rules. By controlling membership in the NCAA and eligibility to participate in college sports that involve NCAA members, the NCAA has the power to exclude colleges from participation in college sports at the highest level. Complete exclusion of a college from NCAA sports is rare, but exclusion from the most lucrative college events – football bowl

games in FBS and the NCAA DI national championship basketball tournament – and the authority to weaken a team by reducing the number of athletic scholarships it can offer are powerful tools to induce compliance with the NCAA's restrictions on competition for athletes.

The evidence pertaining to the ability of NCAA members controlling price is found in the history of the NCAA's scholarship limits. The first example is the reduction in the cap on athletic scholarships that was implemented in 1976. The second example is the extraction of all or part of the value of Pell Grants from low-income college athletes by reducing the value of an athletic scholarship for Pell Grant recipients between 1976 and 2004. The third example is the requirement that FBS schools obtain the approval of the NCAA before implementing their proposal to increase the value of athletic scholarships to COA. The fact that many schools awarded full COA scholarships before 1976 and after 2015 demonstrates that NCAA members were effective in profitably exercising market power during the period from 1976 to 2015 when the scholarship cap was lower.

Additional evidence about market power is the gap between the value of an athletic scholarship and the revenue generated by a college athletes. In a competitive market, college athletes would be paid their marginal revenue product (MRP) – that is, the increment to revenues that an athlete creates. Several economists have published research studies that estimate the MRP of FBS football players and DI men's basketball players.[31] This research concludes that the average MRP among college athletes is substantially above the value of an athletic scholarship, even scholarships equal to COA.

Finally, the frequency of serious violations of the NCAA's financial aid rules and harsh punishments of both colleges and athletes for these violations indicates that the NCAA's limits

[31] Brown (1993, 1994, 2011), Brown and Jewell (2004), Leonard and Prinzinger (1984), Kahn (2007), Lane, Nagel and Netz (2014), and other articles referenced in these studies.

on payments to athletes are binding constraints on colleges. Each year, several DI schools are determined to have committed "major infractions" of NCAA rules.[32] The range of penalties for such violations includes substantial fines, loss of athletic scholarships, loss of eligibility to compete by the athletes involved in the infraction, and loss of eligibility of the college to play in post-season bowl games and tournaments. A willingness to risk severe punishment in order to pay a recruit more than the rules allow indicates that, left to act independently, colleges would offer more generous scholarships than the rules allow.

The plaintiffs argued that the source of substantial market power in the higher education and licensing markets was the NCAA's rules regarding compensation for college athletes and licensing of products that make commercial use of the NILs of athletes. This market power is derived from the fact that all colleges that play commercially significant intercollegiate sports are members of the NCAA. As a result, a school that seeks to compete in these markets in a way that the NCAA does not approve is doomed to failure because it will be unable to schedule games against opponents of comparable quality.

The defendants did not directly challenge the analysis that the NCAA and its members operate as an effective price-fixing cartel that collectively possesses substantial market power in determining the compensation of FBS football and DI men's basketball players. But the defendants did offer a business justification for their conduct that implies that a scholarship that was greater than the NCAA's grant-in-aid cap would exceed an athlete's MRP. This argument is that the demand for college sports would disappear or be dramatically lower if college athletes were not amateurs. The essence of this argument is that the MRP of a college athlete may

[32] The categories of infractions that the NCAA considers major include unauthorized benefits, other violations of recruiting rules, academic fraud in either admitting athletes or keeping them academically eligible, and illegal activities by athletes and/or coaches that are not adequately dealt with by the college. The list of major infractions and the penalties imposed by the NCAA is available on the NCAA's web site at: https://web3.ncaa.org/lsdbi/search?types=major&q=.

exceed the GIA cap if the value of a scholarship equals the GIA cap, but that if a college athlete receives a scholarship slightly above the GIA cap, the MRP of a college athlete will fall below the GIA cap because of the adverse effect of professionalism on demand. The evidence regarding whether the preservation of amateurism enhances demand is discussed in the section of this chapter that examines the NCAA's business justifications for its conduct.

Harm to Competition

Plaintiffs argued that the NCAA's rules regarding compensation to college athletes caused two types of anticompetitive harm. The first harm was a transfer of wealth from college athletes to colleges through suppression of the amount that college athletes are paid. This harm also is the damages to athletes as a result of the NCAA's scholarship rules. The second harm is the loss of efficiency caused by suppressing compensation for athletes, consisting of three components: dead-weight loss in the higher education markets for college athletes in FBS football and DI men's basketball, loss of quality in consumer products that use the NILs of college athletes, and inefficient substitution of other inputs to college athletics arising from the cap on the value of athletic scholarships.

Wealth Transfer from Students to College

To estimate the wealth transfer from college athletes to their schools requires a model of how the licensing market would work in the absence of the NCAA's anticompetitive restrictions on the compensation for college athletes but the continuation of restrictions that are not anticompetitive. The latter refers to the requirements that college athletes be students and not be paid individually negotiated salaries, but instead be paid equal shares of the total compensation

budget. Plaintiffs proposed three procedures for estimating the outcome in this market: the economic theory of bargaining, the outcomes in professional sports, and the outcomes in other entertainment products.

As explained above, the licensed products at issue in *O'Bannon* involve the use of the NILs of athletes and the intellectual property of the colleges for which they play. The most efficient way to organize such a market is for colleges and their athletes to agree to sell their combined rights to the creator of a licensed product after agreeing on how the licensing revenue will be shared between them. The economic theory of bargaining, derived from the work of John Nash, begins by calculating the net benefits to each party with and without an agreement. In the case of the most important licensed product, telecasts of games, the rights of both the college and the players are worthless if both parties do not agree to the license because college games cannot be staged without both the colleges and their athletes. The Nash bargaining solution for this circumstance is for the parties to share the licensing revenue equally. Hence, the implied harm to college athletes arising from restrictions on sharing revenues from telecasts is half of the income that colleges earn from all uses of telecasts of games: live programs, rebroadcasts, and clips.

For videogames the Nash bargaining solution is less clear because one can imagine that alternative versions of college football or basketball could have some value if only one party granted a license. That is, a football game might include FBS colleges, but with genuinely anonymous players who have names, images and playing statistics that are wholly invented. Or a football videogame might include players who are clearly identified by their names, images and playing statistics, but who are organized into arbitrary teams that have no connections to any colleges by the videogame consumer. The Nash bargaining solution to this negotiation can be identified only if the relative values of these two types of videogames, neither of which has ever

been sold can be estimated.

The second method for estimating the harm to college athletes from the NCAA's restrictions is to examine the facts regarding the division of revenues from licensed products that use both the NILs of professional players and the names and logos of their teams. The collective bargaining agreements in the four major professional sports (baseball, basketball, football and hockey) set forth the rules for player markets, including a "luxury tax" on spending above a ceiling in baseball and a cap on total spending on salaries, bonuses and benefits for players. The effect of these restrictions is that in all sports player compensation includes between 50 and 55 percent of revenues.

The major exception to roughly equal sharing of revenues is for videogames. In professional sports, videogame creators license both the identifiers of teams and the NFL and the NILs of the players. The outcome from this process is that players receive only 1/3 of the total licensing revenue. In the context of Nash bargaining theory, this outcome implies that games featuring only the identifiers of teams without the NILs of players are substantially more valuable than games featuring only the NILs of players without identifiable teams.

The third method for estimating the harm to college athletes from the NCAA's compensation restrictions is the outcome of the process for dividing royalties for musical performances. To play recorded music in public can require two types of licenses. The first is a license to a public performance of the musical composition, and the second is the license to a public performance of the particular rendition of the song. The entities involved in granting the first license are the music publishing company and the composer of the musical composition. The entities involved in granting the second license are the record company and the artist performing the song.

In both circumstances, the parties can directly negotiate licenses, but as a practical matter most licenses are issued through a formal legal process, the goal of which is to set the licensing fee that would be negotiated in a competitive market. For licenses for the public performance of compositions, licensing fees are determined by the U.S. District Court for the Southern District of New York. This process was established in consent decrees in antitrust cases against two entities, ASCAP and BMI, which are licensing agents for millions of compositions.[33] For licenses to broadcast recorded performances, license fees are set by the Copyright Royalty Board, a three-person regulatory body that sets fees for blanket licenses to play recorded music for the public for all media except over-the-air broadcasting.[34] The licensing agent for the record companies is SoundExchange. In both cases, the licensing fee is split equally between the artist (composer, performer) and the distributor (publisher, record company).

Based on this evidence, plaintiffs concluded that in a competitive market, college athletes would receive half of the revenue derived from telecasts and one third of the revenues derived from videogames. By comparison, the public financial records of NCAA members indicate that the fraction of revenues that is spent on athletic scholarships is less than 20 percent for FBS football and less than ten percent for DI men's basketball. These data imply that in the absence of restrictions on compensation, FBS football players would be paid roughly 2.5 times as much, and DI men's basketball players would be paid roughly five times as much.

To calculate damages for individual college athletes requires adopting a model of how

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[33] The antitrust cases against ASCAP and BMI were based on the fact that each jointly licenses nearly half of all musical compositions, thereby inhibiting competition among compositions in setting licensing fees. These cases ended in consent decrees that created a process by which the district court sets blanket license fees for access to all compositions that are controlled by each entity in order to avoid requiring that broadcasters and publishers negotiate millions of licenses to individual compositions.

[34] Over-the-air broadcasters are not required to have the second license unless they also distribute their broadcasts over other media. Performances that are distributed over the Internet (e.g., Pandora and Spotify), cable television systems (e.g., Music Choice), or direct broadcast satellite services (e.g., Sirius XM) are required to obtain both licenses.

the compensation of each athlete would be determined if the NCAA's restrictions on the value of a scholarship were eliminated. Here plaintiffs produced evidence about how other amateur sports organization regulate the earnings of athletes in their sport for amateur athletes who are not college students. Amateur sports organizations normally prohibit compensation on the basis of performance, but commonly they do not prohibit athletes from earning income from appearances. In some cases these organizations allow athletes to be paid the opportunity cost of participating in an event, which means reimbursement of all the cost of attending the event, the costs of coaches and trainers, and the foregone income from employment arising from participating in an event. The latter provision allows an amateur athlete essentially to be paid a salary over participation costs, which in fact occurs in some cases in which amateur athletes become members of the U.S. Olympic team. Thus, payments to college athletes that are substantially in excess of cost of attendance are consistent with the definition of amateurism in other sports.

The plaintiffs did not challenge all of the NCAA's rules that limit payments to college athletes. For example, the NCAA requires that all players who have athletic scholarships in FBS football and DI men's basketball be counted as full scholarship students, which means that all scholarship athletes at the same college receive the same scholarship as long as they are full-time students. If this policy were retained after the cap on the value of a scholarship were lifted, then one of two allocations among team members would be feasible – equal sharing by all members of the team, including non-scholarship athletes, or equal sharing among just scholarship athletes.

Dead-Weight Loss

The NCAA's limitations on the amount of an athletic scholarship have the effect of

increasing the cost to athletes of attending college. In a market without further restrictions, the increase in the net price of a product would be expected to reduce sales. The decline in sales is a loss of efficiency, and its value is approximately the area of the dead-weight loss triangle: $1/2(\Delta P)(\Delta Q)$, where ΔP is the price increase and ΔQ is the reduction in sales.

This approach to measuring the direct efficiency loss is not applicable to the submarkets for football and basketball players because of the NCAA's limits on the number of FBS football and DI men's basketball scholarships. DI colleges do not always use all of their football and basketball scholarships, but the reason is that during the course of an academic year some scholarship athletes leave the team unexpectedly. As a practical matter, schools try to award all of their scholarships, so that a reduction in the value of an athletic scholarship, even if it reduces the number of athletes who are willing to accept a scholarship, does not reduce the number of scholarships that are awarded. Hence, the form that the efficiency loss takes is a reduction in the quality of athletes who accept a scholarship, primarily in the form of athletes who leave college early to play professionally. Likewise, the reduction in scholarships did not lead to a reduction in the number of games played and televised in FBS football and DI basketball.

The defendants argued that because the restrictions on the value of athletic scholarships did not reduce the number of scholarships awarded, or output in downstream market, their conduct did not create anticompetitive harm. That is, according to one of the defendants' economic experts, the anticompetitive harm arising from collusion to raise prices is only the reduction in output and does not include the transfer of wealth from college athletes to colleges. This argument reflects a dispute among academic antitrust scholars that has persisted for decades about whether antitrust law should focus exclusively on economic efficiency or whether it should also take into account distributional effects of conduct that reduces competition but has creates

no efficiency benefits.

The resolution of this issue is not within the scope of an economist's testimony in an antitrust case because the answer depends on the correct (or most plausible) interpretation of antitrust statutes, which courts regard as exclusively within the domain of lawyers and outside the scientific competence of an economist or any other technical expert. If one interprets the Sherman Act as intended to protect consumers from exploitation from conduct that raises prices without delivering to them an offsetting benefit, then the wealth transfer arising from that conduct is part of anticompetitive harm (Salop 2010). Moreover, the standard practice in antitrust litigation is to calculate damages by estimating the wealth transfer due to anticompetitive conduct. In particular, in price-fixing cases, damages always include (and normally are limited to)[35] the elevation in price due to collusion multiplied by the quantity sold at the collusive price (Connors 2008).

Even though the NCAA's restrictions on compensation of college athletes did not reduce the number of athletic scholarships in FBS football or DI men's basketball, plaintiffs did identify an efficiency loss in these submarkets. As discussed above, a small number of athletes turn down a scholarship to play FBS football or DI men's basketball. A few athletes each year reject these offers for the purpose of playing minor league sports (including baseball). In addition, roughly 27 percent of all DI men's basketball players leave their college teams before exhausting their eligibility. A few of these (much less than one percent) abandon their athletic scholarships

[35] In principle, antitrust damages can include the dead-weight loss due to the price increase and a reduction in product quality arising from the anticompetitive conduct. Calculation of the cost arising from lower quality requires estimating the dollar value of improved quality to consumers, which is always difficult and sometimes impossible due to data limitations. Calculation of the dead-weight loss requires quantifying the reduction in output due to the price increase, which also is at best difficult and often impossible owing to the lack of data on competitive prices and outputs. Moreover, normally the magnitude of the dead-weight loss is much smaller than the wealth transfer. For example, if the collusive overcharge is 25 percent and the elasticity of demand is one, the dead-weight loss is approximately ½(.25P)(.25)Q = (0.0325)PQ, where P and Q are price and output under collusion, whereas the wealth transfer is (0.25)PQ.

before their college eligibility is exhausted in the hope of entering the NFL or NBA, but are unsuccessful and end up either playing minor league sports or not playing professionally at all. In a random sample of 500 college basketball players who left their college team before their eligibility was exhausted during the period 2008-11, 459 were neither injured nor dismissed, and of these 23 played in the NBA, 21 played professionally in a U.S. minor league or a foreign professional league, 161 did not play again for a college or pro team, and 254 either transferred to play basketball at another school or subsequently returned to their original college team. The players who never played again or who played in minor professional leagues are those moist likely to have been influenced by the value of an academic scholarship, and collectively account for about five percent of all DI men's college basketball players.

The transition from high school and college sports to major league professional sports is governed by both NCAA rules and the rules of the professional leagues. NBA rules prohibit athletes from signing an NBA contract until after their freshman season, and the NFL prohibits athletes from signing an NFL contract until they complete their junior season.[36] NCAA rules prevent college athletes from hiring an agent to assist them in assessing their likely success as a pro and declare athletes to be ineligible if they allow their names to remain in the pool of draft-eligible players at the time the draft is held.[37] The effect of these rules is to discourage players with an uncertain professional future from attempting to enter professional sports before their college eligibility has expired, but nevertheless each year a few players declare for the draft, lose their college eligibility, and are not signed by the pro league.

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[36] These rules pertain solely to athletic participation, not academic progress. The NBA does not require that college athletes complete their freshman year, and the NFL does not require that college athletes complete their junior year. To the contrary, in both sports many athletes who have decided to enter the draft drop out of college as soon as their college season is over.

[37] Baseball players do not lose their eligibility for college baseball if they are drafted by a major league team while still in high school; however, players who enter college are not eligible for the draft again until the end of their junior year. As with football and basketball players, baseball players lose their eligibility if they hire an agent.

Because compensation of minor league athletes is comparable to the value of an athletic scholarship, and much less than the value of an athletic scholarship in the absence of the NCAA cap, a plausible inference is that some of these unsuccessful early leavers would stay in college if the value of an athletic scholarship were substantially higher, or if the NCAA did not strip the eligibility of players who declare for the draft but do not succeed in making a major-league team.

Other Efficiency Losses

Plaintiffs provided evidence that the NCAA's scholarship restrictions were the cause of other inefficiencies in other product markets.

One inefficiency was the reduction in the popularity of videogames for college basketball and football. Two companies, 2k Sports and EA, obtained licenses from the NCAA to sell men's college basketball videogames, but 2K exited the market in 2008 and EA exited the market in 2009. The problem was that the games were not particularly popular, and documents and testimony in the *O'Bannon* case stated that EA believed that the game would be more successful if the NCAA would enable EA to place greater emphasis on the identities of the players beyond having the avatars in the game physically resemble actual players. In the end, the NCAA did not permit EA to make all of the changes that it sought, and so EA cancelled the game after releasing the version for the 2009-2010 season. Thus, all parties – consumers, NCAA DI schools, and DI men's basketball players – suffered harm because of the NCAA's videogame policies.

The plaintiffs also argued that college sports suffered from other inefficiencies that consisted of compensating actions to substitute for the inability to compete for athletes on the basis of the value of an athletic scholarship. Examples were expenditures on recruiting, athletic facilities, and coaches. The economic argument was that collusion to suppress compensation of

college athletes had two effects. First was to increase the profitability of other inputs to the production of college football and men's basketball games, such as football stadiums, basketball arenas, and coaches. Second was to increase the profitability of other expenditures that made a college more attractive to athletes. This category also included coaches and facilities, plus the intensity of recruiting.

Plaintiffs presented evidence about the rapid growth of expenditures in these categories in response to the rapid growth in the gap between the revenues from college football and men's basketball and the cost of athletic scholarships in these sports.

For example, college coaches create value in two ways. One source of value is that a better coach wins more games from a given roster of players, thereby generating more revenue. If payments to the players are suppressed, the net revenue after subtracting player costs is greater, thereby increasing a college's willingness to pay for a better coach. The other way is that athletes prefer better coaches, in part because they prefer to play for a winning team, and in part because they are more likely to succeed in a professional career if they play for a better coach. Thus, better coaches also generate value by attracting better players, which also increases the college's willingness to pay for a better coach. Together these two factors intensify the demand for high-quality coaches, thereby driving up compensation of coaches. Consequently, the NCAA rules cause a transfer of wealth from college athletes to coaches.

An economic study on compensation of university employees reveals how coaches benefitted from rapidly increasing revenues combined with NCAA cost controls on scholarships. Between 1985-86 and 2009-10, the average salary of football coaches at a sample of 44 FBS colleges, measured in constant 2009 dollars, rose from $273,300 to $2,054,700.[38] In the same

[38] Data are from Clotfelter (2011), pp. 105-06, 239-40.

time period, the average salary of the college president rose from $294,400 to $559,700, and the average salary of a professor rose from $107,400 to $141,600.

An analysis of expenditures on facilities – stadiums and arenas for playing games, training and living facilities for athletes – yielded qualitatively similar results. Plaintiffs identified over 100 new facilities that were opened at DI schools between 1997 and 2015 at a total cost of over $5 billion dollars. Half of these, accounting for more than half of the total cost, were opened in the last five years of the period. College coaches and athletic directors stated that one purpose of these facilities was to enhance the ability of the college to attract high-quality athletes.

The response of the defendants to this information was to argue that these expenditures benefitted athletes, and so should be counted as expenditures by colleges on improving the welfare of their athletes. This argument is partially correct, especially with respect to training and housing facilities, although even here it is economically inefficient for colleges to decide how the compensation of athletes shall be divided among expenditure categories and to provide some benefits as in-kind payments. In the case of playing facilities, athletes may receive some benefit, but the main beneficiaries are the fans what get to attend games in a nicer facility and colleges that generate more net revenue from these facilities. College athletes do not benefit if the same college coach – a coach who already has revealed a willingness to enter a college coaching career at a lower salary – receives a huge pay raise because the net revenues generated by the team have grown. Thus, the defendants' argument does not vitiate the fact that suppression of compensation to college athletes leads to excessive, inefficient spending elsewhere in the athletics budget.

Class Definitions

The consolidated antitrust cases were class actions that involved two classes of plaintiffs, an injunctive class and a damages class. In a class action, plaintiffs are required to show that all elements of the rule-of-reason case can be established on the basis of proof that is predominantly common to all class members.[39]

The "Antitrust Declaratory and Injunctive Relief Class" included all present and past participants in Division I men's basketball or FBS football whose names, images and likenesses (NILs) were or could have been licensed or sold after the conclusion of their career as a college athlete. The relief sought for this class was an injunction prohibiting the NCAA from licensing or selling these NILs without the permission of the athletes. For example, the proposed injunction would have prevented the NCAA from licensing the use of the images of Ed O'Bannon and his 1995 UCLA teammates in EA's college basketball video game unless the college had obtained the rights to these NILs from these players without being constrained by the NCAA's rule preventing payment for this use. The "Antitrust Damages Class" consisted of all former student athletes whose names, images and likenesses were licensed or sold after July 21, 2005. The members of this class sought compensation for the unauthorized sale of their NILs both during and after their college careers, but the class did not include current players. The damages to the plaintiffs were the fraction of licensing revenue that would have been paid to these athletes in the absence of the NCAA rules that prohibited payments to them in excess of the cap on the value of an athletic scholarship. As in all antitrust cases, these damages would have been tripled.

[39] Class actions must satisfy other legal requirements, such as the absence of significant conflicts of interest among class members, the representativeness of the named members of the class with respect to other members, and the manageability of the class in terms of identifying its members and calculating their damages, if any.

Pro-Competitive Benefits

The defendants argued that the NCAA's restrictions on the value of an athletic scholarship provided four pro-competitive benefits: (1) preservation of amateurism as an essential component of intercollegiate sports; (2) promotion of competitive balance in intercollegiate sports; (3) integration of athletes into the academic and social life of the college; (4) generation of surplus funds to send on women's sports and minor men's sports; and (5) increased output in FBS football and DI men's basketball.

Amateurism

Defendants argued that the popularity of intercollegiate sports was so heavily dependent on the preservation of amateurism that college sports would be unlikely to survive if college athletes were paid for participating in sports. The premise of this argument was that the structure of the industry that the plaintiffs sought as the alternative to amateurism was one in which college athletics operated like professional sports, with athletes being paid employees of the college who were not students.

The defendants presented two types of evidence to support this argument. The first was a survey of 2,455 consumers on their views about paying college athletes. The second consisted of statements by NCAA and university administrators asserting the belief that fans and alumni would not support college sports if college athletes were paid professionals.

The survey found that 69 percent of respondents opposed paying college athletes. The survey also asked consumers whether they would be more or less likely attend, watch or listen to college football and basketball games if colleges paid athletes $20,000 per year and $50,000 per year. The results were that 38 percent would be less likely to watch, attend or listen to games if

college athletes were paid $20,000 and 47 percent would be less likely to watch, attend or listen to games if college athletes were paid $50,000.

The plaintiffs offered three criticisms of the survey.

First, the opening question asked what the respondent had heard about paying college athletes, and many responded by referencing illicit payments that were violations of NCAA rules. Thus, plaintiffs argued that at least some of the responses expressed opposition to cheating on the agreed rules, rather than on how generous those rules ought to be.

The second criticism was that the questions about paying athletes were too vague in that they did not identify the reason for the payment. For example, the survey did not address whether college athletes should be paid for the commercial use of their NILs or should be allowed to earn money from appearances and endorsements, nor did the survey ask about what an scholarship should be allowed to cover, such as whether a college athlete should be allowed to receive the full cost of attendance instead of the lower cap that had been imposed after 1976.

The third criticism was that many respondents gave inconsistent answers to question. Some respondents opposed payments to athletes but stated that they would watch, attend or listen to more games if athletes were paid. Others favored paying athletes, but said that if athletes were paid, they would watch, attend or listen to fewer games. The plaintiffs interpreted inconsistent responses as indicating that respondents were confused by the vague wording of the questions.

With respect to the statements of NCAA and college administrators, plaintiffs noted that none of these opinions was based on a systematic study of the demand for college sports, either generally or at a specific university. Plaintiffs also presented evidence showing that strict adherence to amateurism did not have an important effect on the popularity of sports. Plaintiffs reviewed the popularity of college teams immediately after a team member had been punished

for receiving unauthorized benefits or otherwise violating NCAA scholarship rules and found that, notwithstanding the publicity and punishments arising from these violations, these colleges did not suffer any loss as measured by game attendance and television ratings.

Plaintiffs also cited statements by leaders of the Olympics that made the same defense of amateurism and predicted that the Olympics would disappear if professionals were permitted to play. These statements were consistent with contemporaneous surveys finding that consumers generally opposed letting professionals participate in the games. Yet when professionals were permitted to play, the popularity of the Olympics increased. Finally, plaintiffs cited other surveys in which respondents expressed opposition to higher pay for athletes in other sports in which salaries have continued to rise to far higher levels than the value of an athletic scholarship without any adverse effect on demand for the sport.

Plaintiffs presented evidence that the NCAA's definition of amateurism, though changing over its history, was never based on an explicit consideration of the relationship between the popularity of college sports and the rules regarding compensation of athletes. As mentioned above, a survey of numerous governing bodies for amateur sports found that these organizations generally did not adopt amateurism rules that restricted compensation to athletes as much as the limits imposed by the NCAA. Based on this evidence, plaintiffs argued that the NCAA's rules were not based on the relationship between compensation rules and the popularity of college sports, but on the desire to control costs.

Competitive Balance

The NCAA argued that restrictions on the value of athletic scholarships made athletic competition among college teams more equal. The essence of the argument is that restrictions on

the value of scholarships prevent colleges with high revenues from college sports simply hiring all of the best players by offering them greater compensation than other schools can afford. An economic expert for the NCAA testified that competitive balance was important to the financial viability of sports. Moreover, all professional sports leagues have adopted rules such as salary caps, revenue sharing, and player drafts to achieve greater competitive balance, which constitutes evidence that some sort of restrictions are necessary to achieve competitive balance. In addition, the NCAA's expert argued that the rising popularity of college football and men's basketball indicated that the NCAA was achieving sufficient competitive balance to make these sports attractive to consumers.

The plaintiffs' response was to show that this argument was inconsistent with research on the economics of sports. No topic has been more exhaustively studied by sports economists than the effect of the institutional rules of sports on the extent of competitive balance and consumer welfare. The most important insights from this research pertain to identifying the economically optimal level of competitive balance and then understanding how institutions for organizing the market for players affect competitive balance.

In general, the extent of competitive balance that maximizes consumer welfare is not for all teams to be of equal strength. The demand for sports depends on the closeness of competition among contestants, but it also depends on the absolute quality of each team (especially the home team) and the intensity of demand for winning among fans of each team (see Fort and Quirk 2010). The fact that powerful FBS teams play sell-out games against weak FCS teams that are almost always lopsided victories for the FBS team, and that FCS teams are willing to accept substantial payments to schedule essentially unwinnable games, demonstrates that balanced competition is not the only factor affecting consumer demand and the financial viability of a

team. Thus, even if a player market rule could be shown to cause competition to be more balanced, this result would be insufficient to show that the rule improves consumer welfare.

Even if more balanced competition would improve consumer welfare, restrictions on payments to players are not an effective means for achieving competitive balance.[40] Research in sports economics concludes that the distribution of the quality of players among teams in a sports league does not depend on the extent to which direct payments to players are restricted as long as the restrictions do not place binding limits on the amount that teams can spend on other things that influence the allocation of players among teams. Specifically, if college players are paid the same amount regardless of which college they attend, their decisions will be influenced by the quality of coaches, playing facilities, student living accommodations, and the recruiting efforts of colleges (Dumond, Lynch and Platania 2008). Thus, if a player has a high MRP at a college with high revenues, the college cannot offer this player a more valuable athletic scholarship, but can still with the competition for that player by spending more on these other things that the player values. Only by capping all expenditures on these other things (including the requirement that living accommodations be the same at every college) could the NCAA achieve competitive balance among all FBS football and DI men's basketball programs.

Integration of College Athletes into Campus Life

The NCAA argued that an essential element of college sports is that college athletes be

[40] The claim that greater revenue sharing leads to greater competitive balance also is incorrect. See Quirk and El Hodiri (1974) and Szymanski and Kesenne (2004). The key insight is the every team hires players until the wage of the next player equals the player's MRP. The wage of a player of given skill is determined by the market and so is the same for all teams. If teams agree that each will pay the a fraction, *f*, of its revenues into a pool to be shared by all teams, the net MRP of the next player for each team becomes *f*MRP, so that no team has an enhanced incentive to hire a player from another team. Thus, the principal effect of revenue sharing is to reduce salaries and the number of players that are employed, and thereby to increase the profits of teams. Whether competitive balance is affected depends on whether the relative values of *f*MRP remain unchanged among the teams after fewer players are hired.

regular students working towards a degree, that college athletes benefit from being students, and that its restrictions on payments to athletes are pro-competitive because they facilitate the integration of athletes into student life on campus. The NCAA presented no evidence to support the first point, but the plaintiffs neither challenged this assertion nor sought to change the NCAA's rules regarding academic eligibility for athletes. On the second issue, the NCAA presented evidence about the value of a college education and the academic performance of college athletes, which generally is as good as or better than the academic performance of other students. Again, this argument was not disputed by the plaintiffs.

The crucial element of this issue was the third claim – that limitations on payments to athletes enhance the educational experience of athletes by causing them to be better integrated into campus life. The evidence that the defendants presented n this point was corroborating statements by college and NCAA officials that was based on their personnel experiences and views, but not be any systematic study of the relationship between the value of athletic scholarships and the academic performance of athletes.

Plaintiffs argued that the claim about academic integration of athletes was implausible for two reasons. First, scholarly research shows that academic success is enhanced by increased financial security, including greater financial aid, and that this research provides no support for the conclusion that this benefit hinges on keeping the amount of financial aid below the NCAA's cap on athletic scholarships or, for that matter, any cap on the earnings of students. Second, the amount that a student can receive from an athletic scholarship is not the only, or even the most important, source of differences among college students in either on-campus financial aid plus other earnings. Many students have on-campus jobs, ranging from research assistants in laboratories to leaders of the student government and the managerial staff of student

publications, and some students have substantial opportunities for outside earnings in the entertainment industry. Even among athletes, financial aid differs substantially between students who qualify for Pell Grants (and can receive more than cost of attendance) and those who receive only the standard athletic scholarship. Plaintiffs noted that there is no evidence that any of these sources of differences in the earnings of students affects academic performance.

Support for Other Sports

The NCAA argued that suppressing expenditures on athletic scholarships in FBS football and DI men's basketball generates cost savings that allow schools to provide more financial support for other sports that do not generate sufficient revenues to cover their costs. The essence of the argument is that if FBS football and DI men's basketball had to pay more for athletic scholarships, spending cuts in other sports would be needed to balance the athletics budget.

One premise of this argument is that the use of monopoly profits from anticompetitive conduct somehow matters in determining antitrust liability. As non-profit entities, colleges, conferences and the NCAA always spend their excess profits from men's basketball and football on other activities, so the argument about the use of these excess profits amounts to claiming that non-profit institutions are exempt from antitrust laws. This argument is clearly incorrect, but is beyond the scope of economic testimony.

The economic issue at the heart of this argument is that the amount of spending on FBS football and DI men's basketball affects pending on other sports. Other than corroborating assertions by NCAA and college officials, the evidence to support this claim consisted of data from the NCAA's annual financial statements (Fulks 2016 is an example) and statistics on athletic participation at NCAA member institutions.

The NCAA's financial reports show that the vast majority of DI schools balance the budget of the athletics program with allocations from the general operating budget of the university and contributions from student associations (usually from student fees). The latter revenues are commonly called subsidies. The NCAA's argument is that because the budgets of nearly all DI athletics programs do not show an operating profit, to keep expenditures within the budget requires that an increase in one cost item (say, football scholarships) requires cutting other expenditures (say, track and field scholarships). This conclusion is unwarranted for two reasons.

First, the allocations to athletics from other university funds are not necessarily subsidies. Instead, these allocations may be more or less than other revenues that are generated by the athletics program that accrue to the university, as discussed above. In addition, payments to the college for the tuition charges to athletes may be more or less than the marginal cost of a student. Thus, the extent to which the athletics department generates a surplus of true revenues over true costs cannot be determined from the NCAA's financial reports.

Second, an unstated premise of the argument is that the costs of FBS football and DI men's basketball programs are independent of the amount spent on athletic scholarships. As explained elsewhere, the costs of these programs are determined in part by revenues or are means for attracting athletes by some means other than paying them. Thus, if the value of an athletic scholarship were to increase, these other costs would fall. That is, in response to an increase in the value of scholarships, spending on coaches, facilities and recruiting would be cut.

The NCAA presented several data series on participation in sports from the various dates in the 1980s through 2011. These data show that total participation increased during this period. But further disaggregation of the data reveal that, while participation in football and men's

basketball increased in DI, participation in other men's sports fell, indicating that growing revenue from FBS football and DI men's basketball was not used to increase opportunities in men's sports. Moreover, the NCAA's participation data show that participation by all students and by women students increased more rapidly in Divisions II and II of the NCAA, which did not experience massive revenue growth from football and men's basketball, than in DI. Thus, the participation data do not support the conclusion that the rapid growth in revenues from FBS football and DI men's basketball was used to expand other sports.

Output Expansion in FBS Football and DI Men's Basketball

The argument that the NCAA's restrictions on athletic scholarships increase output in FBS football and DI men's basketball is similar to the argument that these rules expand opportunities in other sports. Both the NCAA and the plaintiffs agreed that, since the creation of the current divisional structure in the NCAA, the number of schools playing FBS football and DI men's basketball had increased somewhat. The issue is the extent to which this growth was attributable to rules that caused expenditures on scholarships to grow more slowly than revenues in these sports.

The NCAA's claim is that restrictions on the value of an athletic scholarship reduce the amount that a college must spend on FBS football and DI men's basketball, which in turn allows more colleges to be able to afford to field a team. The evidence in support of this claim consisted of statements by college, conference and NCAA officials that a significant number of colleges, and perhaps even the entire Big Ten, would leave FBS or DI if the NCAA's restrictions on the value of athletic scholarships were removed.

The counter-argument to this claim also is similar. If the other costs of an FBS football

and DI men's basketball program are driven by net revenues after the cost of scholarships, then an increase in scholarship payments will be offset by reductions in other expenditures, with no net effect on the attractiveness of an FBS football or DI men's basketball program.

Less Restrictive Alternatives

In arguing that the restrictions on the value of athletic scholarships create pro-competitive benefits, the defendants compared the circumstances under the then-current rules (scholarships that could not exceed the GIA cap, which was below COA except for Pell Grant recipients) with an unrestricted market in which payments to players were the result of individual bargains between a college and an athlete. The plaintiffs claimed that they did not seek an outcome of this form. For example, plaintiffs did not challenge the policy that all scholarship athletes at the same school in FBS football and DI men's basketball would receive the same payment – in essence, an athletic scholarship plus an equally shared payment for a group license from revenues from telecasts, video clips, highlight films, and videogames.

The plaintiffs proposed a less restrictive alternative set of NCAA rules that, they argued, would allow more competition for college athletes without significant loss of pro-competitive benefits. The three elements of this alternative approach were: (1) raise the amount a college could pay an athlete above the GIA cap by allowing colleges to pay an additional stipend that is based on licensing revenue; (2) allow schools to place a share of licensing revenue in a trust fund that is paid at the end of the athlete's college career; and (3) allow athletes to receive limited compensation from third parties for other licenses and appearances.

The Outcome

The outcome in the district court was determined by three separate rulings on class certification, summary judgement, and the final opinion after trial.

Class Certification

The district court certified the injunctive class but did not certify the damages class.[41] The grounds for this decision was that the damaged members of the class could not adequately be identified.

The first problem identified by the court was that videogame makers did not include in a videogame images of all of the players on a team. For example, EA's college game included 68 players, but college teams average about 105 players. The plaintiffs had argued that group licenses are prospective and that videogame companies would have licensed the rights to the NILs of the team before its members were clearly identified and the game maker had decided which players to include. Hence, according to plaintiffs, all players should be included in the group license. The court did not accept this argument, and ruled that the alternative – inspecting every team in every game to determined which players were included – was unworkable..

The other basis for the latter decision was the substitution effect arising from the NCAA's scholarship restrictions. The court accepted plaintiffs argument that some athletes who had declined an initial offer of an athletic scholarship plausibly would have accepted a more generous scholarship offer, and some athletes who abandoned their college athletic careers before exhausting their eligibility plausibly would have continued to play longer had their scholarship been more valuable. The court decided that the athletes who would have played longer than they did, and the athletes who would have been denied scholarships had these

[41] "Order Granting in Part and Denying in Part Motion for Class Certification," November 8, 2013, *In Re NCAA Student-Athlete Name and Likeness Licensing Litigation*, Case No. C 09-1967 CW

athletes played longer, cannot be identified, and concluded from this finding that the class cannot be certified.

The ruling on class certification was never appealed, so a controversial aspect of this decision was never resolved. The issue is whether damages should be awarded to athletes who actually would have been part of a group license and who received a scholarship that has been found to have been suppressed by anticompetitive conduct, or should the damages be awarded to the athletes who would actually appeared in games or videogames or would have been on the team under rules that were not anticompetitive. In an employment discrimination case, for example, defendants cannot defeat certification of a class by claiming that had they offered higher salaries to the workers who suffered discrimination, higher quality candidates would have applied for their jobs and would have been hired instead of the workers that were hired.

Summary Judgment

Both plaintiffs and defendants moved for summary judgment on essentially every important issue in the case. The district court granted summary judgment on only one issue: the NCAA's argument that suppressing the value of athletic scholarships in FBS football and DI men's basketball enabled NCAA members to offer more athletic opportunities in other sports.[42] The court ruled that, as a matter of law, anticompetitive conduct in one market cannot be justified by the purported benefit of increasing competition in some other market of the defendants' choosing. Thus, the court did not reach the issue of whether yjr NCAA's restriction on the value of FBS football and DI men's basketball scholarships delivered benefits to athketes in other sports.

[42] "Order Resolving Cross-Motions for Summary Judgment; Granting Motion to Amend Class Definition; Denying Motion for Leave to File Motion for Reconsideration," April 11, 2014, *In Re NCAA Student-Athlete Name and Likeness Licensing Litigation*, Case No. C 09-1967 CW.

Final Opinion

The district court's final opinion found for the plaintiffs on essentially every element of the case.[43] The court accepted the plaintiffs' definition of the relevant markets, and that the NCAA's restrictions on the compensation of athletes in FBS football and DI men's basketball reduced the amount that scholarship athletes received for participating in their sports. The court explicitly found that agreeing to refuse to pay more than zero for the commercial use of NILs was anticompetitive, regardless of its effects on output in any market.

Regarding pro-competitive justifications, the court rejected all of evidence that defendants presented about the benefits arising from limiting compensation of FBS football and DI men's basketball players. For two issues, the court rejected defendants' arguments without qualification, stating that the restrictions do not promote competitive balance and do not increase output in FBS football and DI men's basketball. But the rejection of the other two arguments was qualified without explanation or citation to supporting evidence.

The court rejected the NCAA's argument that the preservation of amateurism increased demand for college football and basketball. Nevertheless, without stating the basis in the record, the court concluded that "consumer preferences might justify certain limited restraints on student-athlete compensation," but that they "do not justify the rigid restrictions challenged in this case."[44]

The court also rejected the NCAA's argument that restricting payments to athletes led to greater integration of athletics and academics. The court agreed with the plaintiffs that greater financial security is beneficial to academic performance and that other categories of students also

[43] "Findings of Fact," *op. cit.*

[44] *Ibid.*, p. 34.

differ in their financial status and the compensation that they received from their college, and found that the challenged restraints "do not serve to enhance college outcomes for student-athletes."[45] But the court nevertheless stated that "certain limited restrictions on student-athlete compensation may help to integrate student-athletes into the academic communities of their schools, which may in turn improve the quality of the college education product."[46]

The court also accepted two of the three less restrictive alternatives that were proposed by the plaintiffs, but again with unexplained qualification. The court accepted the notion that the cap on stipends could be raised above the GIA cap, but issued the qualification "provided that the stipends do not exceed the cost of attendance as that term is defined in the NCAA's bylaws."[47] The court also accepted the plaintiffs' proposal to allow schools to put some portion of licensing revenues into a trust to be paid after an athlete stops playing college sports. Again, the court added the qualification "provided that the compensation was limited and distributed equally among team members."[48] Here the court cited testimony by former CBS executive Neil Pilson and Stanford Director of Athletics stating that their concerns were about large payments (Pilson opined that $5000 was not too much).

The court rejected the proposal to allow college athletes to earn endorsement income from third parties. The reason was the stated purpose of the NCAA to protect athletes from commercial exploitation. The court concluded that "the NCAA has not always succeeded in protecting student-athletes from commercial exploitation, this failure does not justify expanding

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[45] *Ibid.*, p. 40.

[46] *Ibid.*, p. 39.

[47] *Ibid.*, p. 44.

[48] *Ibid.*, p. 45.

opportunities for commercial exploitation of student-athletes in the future."[49]

The remedy adopted by the district court was to enjoin the NCAA from capping the value of an athletic scholarship at less than COA and from prohibiting member schools from paying up to $5000 from the college's licensing income to be paid when a student leaves school.

Court of Appeals Decision

The Ninth Circuit Court of Appeals unanimously upheld the district's court's decision finding that the NCAA's scholarship rules unreasonably restricted trade and the element of the injunction that prohibited the NCAA from capping the value of athletic scholarships below the cost of attendance. But the court of appeals rejected, by a vote of 2-1, the element of the injunction that would have allowed colleges to pay college athletes up to an additional $5000 after leaving school.

The rejection of the $5000 licensing bonus by the appeals court was based on the qualifications by the district court in its rejection of the arguments by the NCAA that the protection of amateurism and the integration of athletes into academic life. The court of appeals began with the conclusion that a less restrictive alternative must preserve all of the pro-competitive benefits of the anticompetitive restriction without imposing any significant costs. Although the district court did not explain the basis for the qualification that each of these arguments justified some limit on compensation to athletes, the fact that the court reached the conclusion that some limit was justified led the court of appeals to reject the entire $5000 bonus. The appeals court states that any payment above COA, however small, is inconsistent with amateurism and so sacrifices some pro-competitive benefit. No matter how small this sacrifice, a

[49] *Ibid*., p. 47.

less restrictive alternative must be rejected unless the entire pro-competitive benefit is retained.

Aftermath

The district court decision was rendered after the power conferences proposal to raise the cap on athletic scholarships to COA was on its way to approval, and the appeals court decision was released after this change had been approved and implemented. Hence, the decision by the court of appeals essentially blessed the system that the NCAA had already put in place.

Nevertheless, the *O'Bannon* case did not fully resolve the issue of the legality of the NCAA's regulation of athletic scholarships for three reasons. First, *O'Bannon* focused on licensing the commercial use of an athlete's NILs, not the more general issue of the NCAA's rules limiting compensation of college athletes. Second, while *O'Bannon* concluded that a restriction on the compensation of college athletes provided pro-competitive benefits, the decision did not clearly identify the nature and magnitude of these benefits or the line that separates anticompetitive and pro-competitive restrictions. Third, the *O'Bannon* plaintiffs did not propose alternative institutional arrangement for capping compensation of athletes other than a change in NCAA rules. One such alternative is to return to the system before 1956 in which each conference set its own scholarship rules.

Other antitrust complaints that challenge the rules about compensating athletes that the NCAA adopted after the *O'Bannon* decision have been consolidated into another case: *In Re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*. As of the date on which this chapter was completed, this case had not yet gone to trial.

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