Punt While You’re Ahead: A Review of Past and Potential Antitrust Challenges to the NCAA

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I. Brief overview of antitrust law
   a. NCAA-related antitrust litigation falls under Sherman Antitrust Act of 1890
      i. Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
      ii. Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or
commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . .

b. Analysis of Sherman Act cases is interpreted either under “per se” theory or “rule of reason”—the latter has been used in litigation against NCAA

i. Rule of reason:

1. Plaintiff must prove there is anticompetitive effect from the restraint in question

2. Defendant is allowed to show overriding procompetitive benefits

3. Plaintiff then must demonstrate that those procompetitive benefits can be achieved in a less restrictive manner.  

II. *NCAA v. Board of Regents of the University of Oklahoma* (1984)

a. The NCAA controlled how many times and for how much money college football games could be broadcast.

b. The NCAA was fearful that too many televised games would dilute the “product” and reduce ticket sales.

c. In 1976, frustrated with the restrictions prohibiting their teams from capitalizing on their popularity within the market, sixty-three college

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2 Stephanie M. Greene, Regulating the NCAA: Making the Calls under the Sherman Antitrust Act and Title IX, 52 Me. L. Rev. 81, 86 (2000). An example of a procompetitive argument by the NCAA would be that a particular restraint was aimed at maintaining competitive balance among teams. See Gregory M. Krakau, Monopoly and Other Children’s Games: NCAA’s Antitrust Suit Woes Threaten Its Existence, 61 Ohio St. L.J. 399, 410 (2000).
teams broke away from the NCAA and formed the College Football Association (CFA) and collectively began to negotiate its own contract with NBC.

d. At trial the district court ruled that the NCAA’s control over football television contracts violated Section 1 and Section 2 of the Sherman Act by fixing prices, creating boycotts through exclusive network contracts, and placing artificial limits on the number of televised games.

i. The court likened the actions of the NCAA to a “classic cartel” and found that the NCAA’s “output restriction” had the clear effect of raising the price the networks were forced to pay for television rights, creating a pricing structure that was unresponsive to consumer choice (viewer demand).

e. That decision was upheld by the 10th Circuit Court of Appeals and subsequently upheld by the U.S. Supreme Court in a 7-2 decision.

f. The decision in *Regents* arguably can be labeled as the start of an “arms race” in relation to salaries, recruiting, and conference realignments.

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6 See generally Porto, supra note 4, at 25-48 (chronicling the events that led to several universities filing this lawsuit against the NCAA). NCAA games up to that point had been broadcast exclusively through ABC and CBS.
8 Id. at 1295.
10 Bd. of Regents of Univ. of Oklahoma v. Nat’l Collegiate Athletic Ass’n, 707 F.2d 1147 (10th Cir. 1983).
11 More than 40 institutions changed conference affiliations in the 10 years following *Regents*. See Jude D. Schmit, A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act, 14 Sports Law. J. 219, 227 (2007). That problem continues today as in recent seasons once-steady conferences such as the Big 12 were diluted by the lure of mega television contracts.
While the NCAA had tried to keep exposure and revenue equal among its member teams, the changes after the decision in *Regents* began a clear bifurcation of the “haves” and “have nots.”


a. In 1991 the NCAA adopted the “Restricted Earnings Coach Rule” primarily in response to the sharply rising salaries among basketball coaches in intercollegiate athletics.

   i. The rule restricted institutions to four basketball coaches, one of whom could not earn more than $16,000 per year. Some of these coaches previously had been earning as much as $70,000 annually.

b. In their suit, the affected coaches argued that this rule constituted unlawful horizontal price fixing and artificially lowered the salaries of entry-level coaches.

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13 134 F.3d 1010 (10th Cir. 1998).

14 See Stephanie M. Greene, *Regulating the NCAA: Making the Calls under the Sherman Antitrust Act and Title IX*, 52 Me. L. Rev. 81, 85 (2000).

15 Id.

16 Krakau, supra note 2, at 412.

17 Greene, supra note 14, at 86. The plaintiffs challenged the compensation limits under Section 1 of the Sherman Act but chose not to challenge the restrictions on the number of coaches. See Hunter & Mayo, supra note 11, at 82.

18 See Greene, supra note 14, at 88.
c. The NCAA offered three justifications: “retaining entry-level coaching positions, reducing [overall athletic department] costs, and maintaining competitive equity.”

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d. A jury awarded the group twenty-two million dollars and that award was trebled pursuant to the Sherman Act to sixty-seven million dollars, making it at the time the largest settlement ever against the NCAA.

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e. On appeal the Tenth Circuit did not use a per se analysis, as the coaches had argued for, but instead used the rule of reason approach (as was also done in *NCAA v. Regents*).

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i. The court found that the NCAA could not meet its burden of proving the procompetitive effects of this restriction.

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f. The Supreme Court denied a request for certiorari review, and the litigation ended with a fifty-four and a half million dollar payout to 2000 coaches who were part of the certified class.

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IV. *National Invitation Tournament (NIT) v. NCAA* (2005)

a. In 1981, the NCAA passed a “Commitment to Participate Rule” that required NCAA-member institutions to accept a bid to its tournament over any other postseason tournament, including the NIT.

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b. The NIT commenced an antitrust suit against the NCAA, but the U.S. Department of Justice allowed the NCAA to settle out of court by acquiring the tournament for forty and a half million dollars and paying an additional sixteen million dollars to the NIT.\textsuperscript{26}

V. \textit{White v. NCAA} (2008)\textsuperscript{27}

a. A group of former collegiate football and basketball student-athletes filed a class action lawsuit claiming the NCAA created a hardship by capping the amount of financial aid student-athletes could receive.\textsuperscript{28}

i. The players claimed that they were responsible for as much as $2,500 per year in additional expenses because NCAA regulations restricted scholarship grants to only tuition, fees, books, and room and board.\textsuperscript{29}

b. The plaintiffs argued that without such a cap, institutions in the market for the top student-athletes would have to compete against each other to offer

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\textsuperscript{24} See Eric Thieme, You Can’t Win ‘Em All: How the NCAA’s Dominance of the College Basketball Postseason Reveals There Will Never Be and NCAA Football Playoff, 40 Ind. L. Rev. 453, 464 (2007).


\textsuperscript{26} This would be paid out over 10 years. Id. at 24-25. ESPN had a part in selecting the participants for March Madness, based on marketability, and deciding which teams had a greater following. See Brad Wolverton, In Settlement, NCAA Will Pay $56.5-Million to 5 Colleges for Rights to Competing Tournament, Chronicle of Higher Education, (Aug. 18, 2005), http://chronicle.com/article/In-Settlement-NCAA-Will-Pay/120964/.

\textsuperscript{27} 2006 U.S. Dist. LEXIS 101366 (C.D. Cal. 2006).


\textsuperscript{29} See Christian Dennie, Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics, 62 Syracuse L. Rev. 15, 24 (2012).
b. better athletic-based financial aid packages\textsuperscript{30} and that collusion among the colleges and universities was attributable to the cap on aid.\textsuperscript{31}

c. The NCAA agreed to a $228 million settlement—$218 million of which would be paid out over five years to more than 150,000 athletes whose scholarships did not cover the full price of attendance. The other ten million dollars will be utilized for career development and educational services for former Division I football and men’s basketball players.\textsuperscript{32}

d. Because the settlement in \textit{White} expired, with the plaintiffs no longer attending NCAA institutions, the practice of capping athletic scholarships continued on.\textsuperscript{33}

VI. \textit{Agnew v. NCAA} (2012)\textsuperscript{34}

a. After his sophomore year, because of a number of football-related injuries and the departure of the coach that recruited him, Agnew’s scholarship was not renewed.\textsuperscript{35}

i. He won an institutional-level appeal to keep his scholarship for his junior year, but during his senior year he was forced to pay the entire cost for the remainder of his college education.\textsuperscript{36}

\begin{enumerate}
\item Id. at 25.
\item See James Monks, Revenue Shares and Monopsonistic Behavior in Intercollegiate Athletics 6 (Cornell Higher Education Research Institute working papers, September 2013), available at https://www.ilr.cornell.edu/cheri/upload/cheri_wp155-2.pdf
\item See Brad Wolverton, In Settlement, NCAA Will Pay $56.5-Million to 5 Colleges for Rights to Competing Tournament, Chronicle of Higher Education, (Aug. 18, 2005), http://chronicle.com/article/In-Settlement-NCAA-Will-Pay/120964/
\item Agnew v. Nat’l Collegiate Athletic Ass’n, 683 F.3d 328 (7th Cir. 2012).
\item Nearly a quarter of Division I basketball scholarships were not renewed after the 2008-2009 season. Branch, supra note 1.
\item 683 F.3d 328 (7th Cir. 2012).
\end{enumerate}
b. Agnew filed suit, claiming that the NCAA’s prohibition on multi-year athletic scholarships was a violation of the Sherman Act and prohibited some students from receiving their “bargained for education”.  

c. The district court dismissed the claims, stating that Agnew failed to successfully identify a relevant market on which the NCAA’s regulations had an anticompetitive effect.  

d. On appeal, the dismissal was upheld by the Seventh Circuit.  

VII. *O’Bannon v. NCAA* (2014)  

a. In 2010 former UCLA basketball standout Ed O’Bannon took the lead in filing an antitrust lawsuit against the NCAA, challenging regulations that prevented student-athletes (both current and former) from profiting from the use of their image and likeness—mainly through videogames.  

i. Before matriculating, players were required to sign an agreement that capped the amount of aid they could receive and also were required to relinquish their rights to their image and likeness in perpetuity.  

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37 Id. at 333.  
39 683 F.3d at 348. In 2012 the U.S. Justice Department announced that it would investigate whether prohibitions on multi-year scholarships was a violation of antitrust laws. Dennie, supra note 42, at 35-37.  
b. The class of plaintiffs claimed that the NCAA regulations prohibiting student-athletes from ever monetizing on their likeness and image restrained trade within the “college education market” and the “group licensing market.”\(^4\) With respect to the group licensing market, the plaintiffs established that collegiate athletes are restricted from selling group licenses for use of their names and images in the markets, utilized by professional athletes, for (1) live game telecasts, (2) videogames and (3) “game re-broadcasts, advertisements, and other archival footage.”\(^4\)

c. In its analysis of the alleged harm to competition in the group licensing market, the court analyzed the effect of the NCAA’s restrictions on financial aid and compensation with respect to three submarkets: live telecasts, archival footage, and videogames.

i. In the submarket for group licenses for live game telecasts, the plaintiffs provided evidence to show that networks enter into agreements with member institutions wherein the school grants the networks the rights to the likeness of student-athletes. However, the court did not find the challenged regulations harmed competition in the potential submarket for group licensing for live telecasts, as, even if the restrictions were lifted “each school would still only be able to purchase group licenses from its own student-athletes because those are the only licenses that the school could

\(^4\) Id. at 993-94.
bundle with its own intellectual property rights for sale to a network.”

ii. Regarding the submarket for archival footage, the NCAA has negotiated a license with T3Media, a third-party licensing company.\textsuperscript{46} Though T3Media is not permitted to license the rights of current student-athletes, it retains those rights for later use while the student-athletes are still eligible for competition.\textsuperscript{47} Nonetheless, in denying that the restrictions imposed any harm to competition in the submarket for archival footage, the court stated “in order to license all of the footage in the NCAA’s archives, T3Media would have to obtain a group license from every team that has ever competed in FBS or Division I. These teams, once again, would have no incentive to compete against each other in selling their group licenses. Enjoining the NCAA from enforcing its challenged rules would not change that.”\textsuperscript{48}

iii. Similarly, the court found that a submarket would exist for videogame developers to buy rights to player likenesses in the absence of the challenged regulations.\textsuperscript{49} However, in this case the court again found that the NCAA restrictions did not have the effect of harming competition in this submarket, because even in

\textsuperscript{45} Id. at 996.
\textsuperscript{46} Id. at 971.
\textsuperscript{47} Id.
\textsuperscript{48} \textit{O’Bannon, 7 F. Supp. 3d} at 998-99.
\textsuperscript{49} Id. at 970.
the absence of the regulations, the teams would not compete with each other to sell group licenses.\textsuperscript{50}

d. In analyzing whether NCAA regulations unnecessarily restrict trade within the college education market, the court came to a different conclusion. The district court found that the “challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools. The procompetitive justifications that the NCAA offers do not justify this restraint and could be achieved through less restrictive means.”\textsuperscript{51}

i. To establish the relevant college education market, the court cited evidence that schools compete to “sell unique bundles of goods and services to elite football and basketball recruits” and that, in exchange, “recruits must provide their schools with their athletic services and acquiesce in the use of their names, images and likenesses.”\textsuperscript{52}

ii. Furthermore, only the institutions competing at the highest level of intercollegiate sport were able to offer the goods and services that would attract the best recruits: state-of-the-art facilities and coaches, television exposure, and opportunity to compete for a national championship.\textsuperscript{53}

\textsuperscript{50} \textit{O'Bannon}, 7 F. Supp. 3d at 998.
\textsuperscript{51} Id. at 963.
\textsuperscript{52} Id. at 965-66.
\textsuperscript{53} Id. at 966. The NFL and NBA do not allow players to enter the professional league right out of high school, so these institutions attract 100% of the top recruits. Id. at 967-68.
e. The plaintiffs proposed three alternatives that would allow the NCAA to “achieve the purposes of its challenged rules in a less restrictive manner”\textsuperscript{54}: (1) use revenue from licensing agreements to increase the amount of aid given to each student-athlete; (2) deposit revenues from licensing agreements into a trust fund for student-athletes to utilize after leaving school or upon graduation\textsuperscript{55}; or (3) permit student-athletes to share in the profits of endorsements brokered by their respective institutions.\textsuperscript{56}

i. The court did not find issue with the first proposed alternative, as a cost of attendance grant would not alter the amateur nature of intercollegiate sport.\textsuperscript{57}

ii. The court held a similar opinion regarding the second proposed alternative, noting that allowing student-athletes to earn money from their likeness after their college careers were over would not hurt “consumer demand”,\textsuperscript{58} contrary to the NCAA’s assertions that the public would be less interested in watching college athletics if the student-athletes were paid.

iii. The court did, however, reject the third proposal, finding that such an arrangement would promote “commercial exploitation” and erode the amateur ideals of the NCAA.\textsuperscript{59}

\textsuperscript{54} Id. at 982.
\textsuperscript{56} O’Bannon, 7 F. Supp. 3d at 982.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 983.
\textsuperscript{59} Id. at 984.
f. The district court ruling enjoined the NCAA from enforcing regulations restricting member institutions from offering recruits a share in the revenues generated from licensing their likenesses in addition to a full grant-in-aid, though the NCAA may limit the amount athletes can receive while enrolled in school.\(^6\) It also allowed for Division I basketball and FBS institutions to deposit in trust an amount payable to athletes in the future; while the NCAA can cap this amount, it may not set the cap at less than $5,000 for every year that each student-athlete is academically eligible for competition.\(^6\) The amount of money deposited in trust may fluctuate, but an institution may not offer a recruit more or less money than the amount offered to other student-athletes recruited for the same year for the same team.\(^6\)

g. In November 2014 the NCAA filed for appeal before the 9\(^{th}\) Circuit.\(^6\)

h. In November 2015, the 9th Circuit issued a ruling upholding the circuit court decision, finding that NCAA restrictions capping student-athlete scholarships violated antitrust law.\(^6\)

i. However, two of the three judges on the appellate panel agreed that the district court's ruling that FBS football and men's basketball

\(^6\) Id. at 1007-08.
\(^6\) Id. at 1008.
\(^6\) Id.
\(^6\) Brief for the National Collegiate Athletic Association, O'Bannon v. Nat’l Collegiate Athletic Ass’n, No. 09-cv-03329 (9\(^{th}\) Cir. filed Nov. 14, 2014), available at http://www.cbssports.com/images/collegefootball/NCAA-O-Bannon-Appeal.pdf. The brief heavily relies on an argument that NCAA v. Board of Regents of the University of Oklahoma explicitly preserves the amateur nature of intercollegiate athletics, while I would argue that it did just the opposite by creating a multi-billion dollar industry fueled by the services rendered by the student-athletes themselves.\(^6\)

programs should set aside $5000 per year per student-athlete in deferred compensation would irrevocably alter the nature of amateur collegiate athletics.

VIII. Contested History of the FBS and the new CFP: Panacea?

a. BCS

i. In an effort to identify a consensus national champion, an elite system of New Year’s bowls was created in 1992 through the Bowl Coalition. As part of that system, the champions of the five most elite conferences would play in the Fiesta, Cotton, Orange, and Sugar Bowls.

ii. To improve the chances of staging a true national championship game, the Bowl Alliance was created in 1994. This revised system would still include the Orange, Sugar, and Fiesta bowls, yet the NCAA would now require that bowl games relinquish any historical tie-ins they had with a particular conference. To compensate for the potential loss in revenue, the champions of the ACC, Big East, Big Twelve, and SEC received automatic bids to these bowls. The system also included two at-large slots. To qualify for an at-large bid, a team had to have a “minimum of

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66 Id. at 103.
67 E.g., the Sugar Bowl typically hosted the champion of the Southeastern Conference. Id at 104.
68 Id. at 104.
69 Id. at 105.
eights wins or [be] ranked higher than the lowest-ranked conference champion of the four Alliance conferences.”

iii. In 1996 the Bowl Alliance was expanded to become the “Super Alliance” and now would include the Rose Bowl and the champions of the Pac-10 and Big Ten conferences.

iv. In 1998, the system was revised yet again and renamed the Bowl Championship Series (BCS). The BCS established that each bowl would now host an additional national championship game every four years, on a rotating basis.

1. The attorney general of Utah at one point threatened antitrust litigation against the BCS system, and in 2003, the U.S. House of Representatives Judiciary Committee held hearings to investigate anti-competitive activities by the BCS.

2. The BCS system often created a diluted product for the customer by failing to create match-ups between the best teams, instead favoring certain conferences and quota

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70 Id. Preference was given to Notre Dame and the runners-up of the Pac-10, Big Ten, and remaining Alliance conferences.

71 Id. at 105-06.

72 Id. at 106. Automatic bids were given to the champions of the ACC, Big East, Big Ten, Big 12, Pac-10, and SEC. Id. at 106-9.


74 Id. at 351. There have been three such hearings held since the BCS began in 1998. Schmit, supra note 32, at 252.
systems. Hales noted, “[A]nytime we see a group of competitors, such as the conferences, agreeing with each other instead of competing with each other, that is a potential antitrust problem.”

3. In May 2011, the antitrust division of the United States Department of Justice issued a memo to NCAA president Mark Emmert indicating the government’s intent to investigate whether the BCS system violated federal antitrust laws. The memo asked why Division-I FBS football was the only NCAA sport lacking a playoff and whether the NCAA’s steps toward implementing a playoff system indicated a determination by the NCAA itself that “there are aspects of the BCS system that do not serve the interests of fans, colleges, universities, and players.”

b. CFP

i. In 2013, the NCAA announced that it had developed a playoff system consisting of two semifinal games that would determine the

75 While critics of the BCS point to decreased economic competition, Warmbrod points out that there are now more bowl games since the BCS was implemented. Warmbrod, supra note 73, at 372.

76 Hales, supra note 64, at 114 n.125. A pro-spectator perspective of the BCS system would argue that its elimination in favor of a playoff system would diminish the storied bowl system and make regular season games less meaningful. Suggs, supra note 4. Many spectators might argue that with the abundance of bowls today—35—the quality of the product has been diminished from the market twenty years ago featuring fewer, more elite bowls. See e.g., David L. Ricci, The Worst Form of Championship, Except for All of the Others That Have Been Tried: Analyzing the Potential Anti-Trust Vulnerability of the Bowl Championship Series, 19 Vill. Sports & Ent. L.J. 541, 545 (2012) (noting that 70 of 120 teams are now invited to participate in bowl games and that in some years there are actually not enough teams with a winning record to be eligible for all the bowl slots).

77 Memorandum from Christine A. Varney, Assistant Attorney General to Mark A. Emmert, President of the NCAA (May 3, 2011).

78 Id.
participants in a national championship game. The Sugar Bowl, Rose Bowl, Orange Bowl, Cotton Bowl, Chick-fil-A Bowl, and Fiesta Bowl would rotate hosting these semifinal games; the host of the national championship game would be put up for bid, similar to the process for selecting the Super Bowl site.

1. The four teams tapped to play in the semifinal games are chosen by a thirteen-member selection committee comprising former athletic directors, coaches and other athletic officials, much like the selection committee for March Madness and other championship tournaments. The committee also includes an athletic director from each of the five major FBS conferences.

2. The committee ranks the top four teams based on strength of schedule, conference championships, and regular season records. Committee members may not vote for or
participate in the discussion regarding the institution with which they are connected. The ballots are not made public.\textsuperscript{83}

\textbf{ii.} In the market defined as “high-level college football bowl games,”\textsuperscript{84} I would argue that the College Football Playoff continues to exhibit some of the anticompetitive features inherent in the old BCS system.

\textsuperscript{83} Id.

\textsuperscript{84} Ricci, supra note 75, at 569.