Should the NCAA be Above the Law?: An Examination of the NCAA’s Antitrust Status

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Abstract

BRETT T. SMITH: Should the NCAA be Above the Law?: An Examination of the NCAA’s Antitrust Status
(Under the direction of Barbara Osborne)

The National Collegiate Athletic Association has grown from a small organization created to police football to a multi-billion dollar organization that regulates the lives of hundreds of thousands of people. Due to its huge growth, some critics wonder if the NCAA has spun out of control so far that it cannot save itself without government intervention. The intervention that they seek is an exemption from current antitrust laws so that the NCAA could legally restrain out of control spending. An exemption would provide the NCAA the freedom to curtail spending and potentially reform the current cost structure of major college athletics. This study analyzes antitrust law and whether the NCAA would receive an antitrust exemption based upon precedent and other exemptions granted by Congress. Based upon the research from this study, the NCAA deserves a partial exemption to regulate the member institutions, but not a total exemption due to parts of the NCAA being highly commercial.
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Chapter 1
Introduce

Every year that passes, college athletics drifts further and further away from its education origins. Today, major college athletics is a big-time business that is a multi-billion dollar industry.¹ Some say that as the financial stake is increasing, institutions of higher learning are increasingly willing to bend the rules or look the other way to increase the bottom line.² With so much money at stake, universities cannot afford to take a stand for academic integrity and continue to compete in major college athletics. The National Collegiate Athletic Association (NCAA) is an association of over 1200 educational institutions that regulates collegiate athletics.³ The NCAA would be the most likely candidate to restore college athletics to its original purpose or at least restrain the rapid growth. However, any attempt to restrain the growth of college athletics made by the NCAA would trigger immediate antitrust implications. Expecting the individual universities to scale back their athletic programs is unlikely because the public outcry from fans and donors could be crippling. The NCAA is perfectly situated to attempt to restore college athletics if they are granted relief from antitrust laws.⁴

⁴ Schaefer, supra note 2, at 564.
One critic has gone so far as to say that public interest and common sense require an antitrust exemption for the NCAA to effectively regulate college athletics. The NCAA has the responsibility of maintaining the tradition of amateurism in college sports. Because of this large responsibility, the NCAA needs tremendous flexibility to fulfill this obligation. However, the current antitrust laws do not grant the flexibility that is needed to exist and does not allow the NCAA to effectively deal with the serious issues it faces. This ineffectiveness should show Congress that a special exemption should be granted to the NCAA so that it can effectively serve its members.

While this argument makes sense, others argue that removing antitrust restraints would harm college athletics. Roberts argues that immunizing big-time intercollegiate athletics from the constraints of antitrust law will allow athletic programs to profit by the uncontrolled exploitation of student-athletes and consumers. He believes that such an exemption will do violence to the values of competition and consumer welfare because the NCAA is such a commercially driven enterprise and an exemption will allow too much free reign. Lazaroff believes that student-athletes are already being exploited while the NCAA is restricted by antitrust laws. Major college football and basketball players generate considerable revenue for schools and athletic conferences. Courts failing to recognize that there is a market for the student-athletes’ services arguably results in an unjustifiable restraint on competition and an

5 Id. at 567.
6 Id. at 568
8 Id.
illegal wealth transfer from student-athletes to their schools in his mind. This wealth transfer and restraint economically injures the student-athletes as sellers of sports talent and as consumers of higher education.

**Statement of Purpose**

The purpose of this study is to examine case law, statutes, congressional records, and legal journals to determine whether the NCAA should be granted an exemption from antitrust laws.

**Definitions**

Antitrust Law: The body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination. The principal federal antitrust laws are the Sherman Act and the Clayton Act.

Bowl Alliance: An arrangement between the ACC, Big East, Big 12, and SEC that attempted to match the top two teams against each other in a bowl game. None of the participating conference champions were committed to play in any bowl game as they had been in the past under the conference bowl affiliation arrangements. The arrangement lasted for three years and was replaced by the Bowl Championship Series.

Bowl Championship Series: The Bowl Championship Series (BCS) is a five-game showcase of

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10 *Id.*

11 *Id.*

12 *BLACK’S LAW DICTIONARY (7th ed. 1999).*

college football. The five bowl games are the Tostitos Fiesta Bowl, the FedEx Orange Bowl, the Rose Bowl Game presented by Citi, the Allstate Sugar Bowl and the BCS National Championship Game that is played at one of the bowl sites. The BCS is not an entity. Instead, it is an event managed by the 11 NCAA Football Bowl Subdivision conferences -- all of them "BCS Conferences" -- and the University of Notre Dame.14

Clayton Act: Deals with specific types of restraints including exclusive dealing arrangements, tie-in sales, price discrimination, mergers and acquisitions, and interlocking directorates, carries only civil penalties and is enforced jointly by both the Antitrust Division and the Federal Trade Commission.15

Primary Source: Publications which contain the original decisions and actions of legislative, judicial, and administrative bodies such as cases, statutes, or regulatory decisions.16

Secondary Sources: sources containing excerpts, reprints and discussions such as law review or legal journal articles, legal encyclopedias, or legal treatises.

Sherman Act of 1890: Prohibits contracts, combinations, and conspiracies in restraint of trade, and monopolization, includes criminal penalties when enforced by the government. Violation can result in substantial fines and, for individual transgressors, prison terms. In addition, court orders restraining future violations are also available. These provisions are enforced primarily by the Antitrust Division of the Justice Department.17

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17 Id.
Research Questions

1) What factors should the court consider in examining the antitrust status of the NCAA?

2) Under current United States antitrust law, does the NCAA deserve to be granted an exemption?

Significance

This study is important because the NCAA needs the ability to restrain the current growth of college athletics before college athletics in its current form ceases to exist. However, almost any attempt by the NCAA to slow the growth would be met with immediate scrutiny under antitrust laws. If the NCAA were granted an exemption from such laws, they would then be able to legally restrain the current growth and potentially guide college athletics back to its original educational mission. This also comes at an important time as the current presidential administration may examine the legality of the Bowl Championship Series.18 The Justice Department issued a letter to Senator Orrin Hatch that outlined the inequities of the BCS system and that it is considering investigating the BCS under antitrust laws.19 Such an investigation could provide insight into the NCAA’s antitrust status and change the college football postseason format drastically.


19 Id.
Chapter 2

Review of Literature

This chapter will examine the relevant literature involving the intersection of the NCAA, antitrust, and sports. It will begin with a general overview of the NCAA and legal issues that it has faced with antitrust challenges in the past. Next, a discussion of specific challenges that raise antitrust questions such as student-athletes’ transfer rules, recruitment guidelines, and the college football bowl system. Then, there will be a brief discussion of the researchers that have asked for Congress to become involved with the NCAA antitrust situation to help rectify the situation. After discussing the amateur issues involving antitrust, literature focusing on professional sports will be discussed to determine if any parallels can be drawn between amateur and professional issues. Finally, the labor antitrust exemption will be discussed as it is a legislative and judicial exemption from antitrust laws.

NCAA General Overview

The NCAA has become a very popular target for criticism because some Division I athletic departments now resemble medium-sized corporations, earning multi-million dollar profits each year. Critics argue that intercollegiate athletics is an extremely profitable commercial enterprise based on the blood, sweat, and tears of student-athletes. Others have said college

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21 *Id.* at 124.
sports are auxiliary businesses, with many administrative decisions being made primarily or exclusively for commercial motives. On the other hand, many of the student-athletes perceive college merely as a minor league training ground for professional leagues rather than an opportunity to gain an education.22 Some believe that juries would find that these sports are administered at most Division I institutions far more with an eye on their commercial performance than on their educational value.23 However, while the NCAA’s Division I members have operations that may be primarily driven by commercial motives, they are still strongly influenced by educational values that are often at odds with the Sherman Act’s value of promoting competition in the marketplace.24

Due to the NCAA’s unique status in athletics and commerce, it is often criticized for its special treatment. The NCAA is a non-profit organization, but the NCAA and related nonprofit organizations indeed possess a commercial aspect.25 Wallace thinks it should not be taken as an attack upon the amateurism of intercollegiate athletics for one to acknowledge that there is a business aspect in the providing of coaching for the athletes or in the providing of athletic events to an interested public.26 In 2002, in conjunction with a panel of Harvard University economists, Business Week magazine named the NCAA “The Best Little Monopoly in America.”27 To

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22 Roberts, supra note 7, at 2673.

23 Id.

24 Id.


26 Id.

achieve this dubious distinction, the NCAA beat out, among others, Microsoft, the U.S. Postal Service and OPEC.28

**NCAA Antitrust**

The NCAA is not exempt from antitrust laws, but it has had two considerations working in its favor. First, sports in the United States have historically been given a great deal of leeway in terms of their treatment under antitrust laws.29 Second, the NCAA is strongly linked to higher education and traditions of amateurism.30 Due to this current acceptance by the courts, college amateurism remains a legal lightning rod that could destroy the idea of big time athletics tied to an institution of higher education and leave only a pure minor league system to professional sports.31

The NCAA is no stranger to antitrust litigation: the Association and member institutions have dug a deep hole promulgating legislation solely to reduce costs.32 It has been noted that cost reduction by the NCAA is not a legally sufficient justification for an agreement to fix prices and save inefficient or unsuccessful competitors from failure.33 The NCAA has had mixed results when cases have actually made it to court. Dennie says the NCAA has been handedly defeated

28 Id.


30 Id.


32 Dennie, supra note 20, at 125.

33 Id.
in hotly contested litigation, which gives antitrust plaintiffs a window for success. The same author immediately follows that claim by saying that most courts give deference to NCAA rules. The NCAA was found in violation of antitrust laws in three cases and they have provided a framework in which to defeat NCAA rules and regulations. Courts have struck down NCAA regulations and policies pertaining to a restricted college football television plan, restricted coaches’ earnings, and restricted participation in post-season men’s basketball tournaments. Additionally, the NCAA has been forced to defend antitrust challenges to rules governing the equipment that may be used in NCAA football, baseball and lacrosse games and the number of games that basketball teams may play in a season.

In a symposium on antitrust and amateur sports, a summary of the problem in courts’ handling of antitrust challenges was presented. In recent years, courts have begun to address the question of how to apply the antitrust laws to nonprofit organizations and other entities which, although they operate in the commercial marketplace, assert noneconomic justifications for their

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34 Id. at 110.
35 Id.
36 Id.
38 Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).
43 Worldwide Basketball and Sports Tours, Inc. v. NCAA, 388 F.3d 955 (6th Cir. 2004).
behavior. This question is becoming increasingly important to the NCAA and similar amateur sports organizations. Such groups frequently engage in activities which, if engaged in by most commercial competitors, could be deemed illegal per se. In most circumstances, it just does not make sense to treat amateur sports organizations like commercial, profit-making enterprises. The organizations themselves are nonprofit, and have legitimate noncommercial goals. A court faced with the question of how to apply the antitrust laws to the activities of amateur sports organizations can take one of three approaches: (1) that noneconomic or “noncommercial” factors are not relevant at all; (2) that they justify a total exemption from the antitrust laws; or (3) that they justify application of the rule of reason in cases which would otherwise be subject to a per se test of illegality. In addition, if the court applies the rule of reason, it must determine what, if any, weight to give to noneconomic factors. Although it was generally assumed prior to 1970 that noncommercial activities were entitled to a total exemption from the antitrust laws, cases decided since then clearly show that the existence of noncommercial goals will not totally shield the NCAA or any other amateur sports organizations from antitrust liability. The relevant question, therefore, is to what extent, if any, courts will take noneconomic factors into account in applying the per se rule or the rule of reason.

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45 Id.
46 Id. at 32.
47 Id.
48 Id.
49 Id.
50 Id.
Recruiting Rules

Not only has the NCAA seen general challenges to its regulations and antitrust status, some have begun to point out specific issues that are affected by antitrust law. Pensyl argues that the NCAA has evolved into a highly commercialized entity that enacts regulations designed to promote its financial interests in the billion-dollar industry of college athletics. He continues by stating the NCAA enacts many of these policies with little regard for the well-being and education pursuits of its student-athletes. Further, he believes that the last thing the NCAA should be granted is an exemption from antitrust laws because the rules created by the NCAA are not promoting education and amateurism. Instead, the NCAA recruiting regulations should be subject to the same level of antitrust scrutiny that courts apply to the conduct of any other major commercial entity.

College Football Bowl System

Prior to the Bowl Championship Series being formed, the Bowl Alliance was created to enhance the opportunity to provide a national championship game each year in Division I-A football. The Bowl Alliance was never tried in a court of law as being in violation of the federal antitrust laws, so it is unclear how a court would have decided the complex issue. What is clear is that the Alliance’s arrangement produced several anticompetitive effects on college

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51 Id.

52 Pensyl, supra note 27, at 425.

53 Id.

54 Id. at 426.

55 Id.

football and its fans.\textsuperscript{57} While the Alliance offered the benefit of giving consumers a National Championship game, this benefit did not appear to be sufficient to justify an arrangement which reduced the output and product of college football.\textsuperscript{58} All the while, elite universities reaped the millions of dollars from the monopoly prices required by the Alliance.\textsuperscript{59} The detractors of the system believed that the procompetitive effect of producing a National Championship game would not have been sufficient to negate the anticompetitive impact on the product of college football.\textsuperscript{60}

Professor Roberts identified four possible challengers to the Alliance arrangement that could bring about change in the system. While these proposed challengers were referenced to the Bowl Alliance, they likely would be the same challengers to the current Bowl Championship Series. The potential challengers would be as follows: (1) the four Alliance bowls which are being forced to make monopoly payments, (2) media outlets, which are also being charged a monopoly fee in obtaining the media rights, (3) the excluded bowls, and/or (4) one or more of the excluded Division I-A schools who do not possess the equal access that other Alliance institutions maintain.\textsuperscript{61} However, Professor Roberts believes that none of these entities would choose to engage in such an expensive, time-consuming, and politically dangerous legal battle with the power and influence of the multimillion dollar Alliance.\textsuperscript{62} While he believes that the

\textsuperscript{57} Wallace, \textit{supra} note 25, at 82.

\textsuperscript{58} \textit{Id}.

\textsuperscript{59} \textit{Id}.

\textsuperscript{60} \textit{Id}.

\textsuperscript{61} \textit{Id} at 85.

\textsuperscript{62} \textit{Id}.
legal authority appears to rest with any challenger of this plan, reality dictates that such a challenge, and thus the results, will not become clear for quite some time.\(^6^3\)

College football has moved on from the Bowl Alliance to the Bowl Championship Series. The structure is similar to the Bowl Alliance and potential antitrust challengers still exists. Non-BCS universities have increasingly cried foul and are ready to challenge the BCS arrangement with an antitrust lawsuit.\(^6^4\) These universities contend that the BCS fails to provide all Division I-A programs with equal access to postseason opportunities, resulting in a system that stifles competition and runs contrary to federal antitrust law.\(^6^5\) The BCS conferences argue that the system does not violate the Sherman Act but rewards those universities with the winningest traditions in college football.\(^6^6\) In analyzing the BCS under current antitrust law, at least one commentator thinks filing an antitrust challenge is the wrong decision.\(^6^7\) Another examination of the BCS and antitrust laws came to the same conclusion.\(^6^8\) They determined that a rule of reason analysis of the BCS would likely result in the conclusion that the pro-competitive features of the BCS outweigh any alleged anti-competitive effects.

\(^{63}\) Id.


\(^{65}\) Id.

\(^{66}\) Id. at 335.

\(^{67}\) Id. at 379.

Transfer Restrictions

One of the more direct applications of antitrust law is the limitation upon transferring between schools by student-athletes. As with most other challengers, Konsky believes that today’s NCAA is a far cry from the organization’s humble beginnings and rhetorical focus on standards of academics and amateurism.\(^6^9\) She also argues that as the NCAA becomes increasingly commercialized, its rules and regulations should come under the same scrutiny as those of other commercial organizations.\(^7^0\) Konsky concludes that NCAA transfer rules are anticompetitive commercial restraints without significant procompetitive benefits.\(^7^1\) Further, the transfer rules minimal procompetitive benefits could be accomplished by less restrictive means.\(^7^2\) She argues that instead of restricting all athletes with few exceptions, that transfers could only be restricted when a move was athletically motivated and not based upon academic criteria.\(^7^3\) Given these effects, Konsky believes the current transfer rules implement a plainly illegal restraint on trade in violation of the Sherman Act.\(^7^4\) While the article makes an interesting argument, courts have heard the issue of transfer rules within the NCAA. In *Weiss v. Eastern College Athletic Conference*, the court would not issue an injunction against the NCAA because the plaintiff only offered speculative evidence of irreparable harm.\(^7^5\) It should be noted that this case was decided

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\(^{7^0}\) *Id.*

\(^{7^1}\) *Id.*

\(^{7^2}\) *Id.*

\(^{7^3}\) *Id.* at 1606.

\(^{7^4}\) *Id.* at 1607.

before Board of Regents and the Court in Weiss was unclear as to the applicability of the antitrust laws to athletic conferences.76

A more recent case, Tanaka v. University of Southern California, also did not find that amateur transfer rules are violations of antitrust laws.77 In Tanaka, a soccer player transferred from University of Southern California to University of California, Los Angeles, both schools within the Pacific 10 conference.78 A conference rule restricted intra-conference transfers and stated that the student-athlete must sit out two academic years.79 In deciding the case, the court declined to determine whether the rule was sufficiently commercial to be decided under antitrust laws.80 For argument sake, the court analyzed the issue under antitrust laws and found that even in the women’s soccer market in Los Angeles, the rule did not have an anticompetitive effect on the market.81 Additionally, there could be no harm to the national market because it only affected schools in the Pacific 10 conference.82

**Congressional Involvement**

While there are potential challengers in court, some believe that Congress should create a legal structure that best balances the values of both the academy and the free commercial

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76 Konsky, supra note 69, at 1592.

77 Tanaka v. University of Southern California, 252 F. 3d 1059 (9th Cir 2001).

78 Id. at 1061.

79 Id.

80 Id. at 1062.

81 Id. at 1064.

82 Id. at 1065.
marketplace, but the chances of legislative intervention are very remote.\textsuperscript{83} Others think that Congress may be the last resort for hope for NCAA reforms.\textsuperscript{84} The major problem with congressional intervention may be the political cross-currents that so often accompany the legislative process suggest the viability of this alternative might be criticized severely.\textsuperscript{85} While an actual legislative intervention may not be realistic, Congress could help by conducting hearings or merely threatening legislative action.\textsuperscript{86} One possible legislative solution would be for Congress to create an antitrust exemption for the NCAA. A solution offered is an antitrust exemption that could be limited to amateurism regulations, or it could be more extensive by treating the NCAA as a single economic entity and thereby removing much of its rulemaking from Section 1 of the Sherman Act.\textsuperscript{87} Lazaroff believes that this solution would satisfy the NCAA and perhaps some of its membership. However, he argues that this action would perpetuate the inequities that run rampant in the current system and make legal significantly anticompetitive conduct.\textsuperscript{88} He believes that any easing of the burden on the judicial system could be outweighed by the negative impact of allowing the NCAA to continue to engage in an unsupervised distortion of market forces.\textsuperscript{89}

\textsuperscript{83} Roberts, \textit{supra} note 7, at 2674

\textsuperscript{84} Lazaroff, \textit{supra} note 9, at 369.

\textsuperscript{85} \textit{Id}.

\textsuperscript{86} \textit{Id}.

\textsuperscript{87} \textit{Id}. at 370.

\textsuperscript{88} \textit{Id}.

\textsuperscript{89} \textit{Id}.
Professional Sports

Amateur sports have seen some antitrust challenges recently, but professional sports have been dealing with antitrust issues for much longer. Professional team sports have unique characteristics which distinguish them from most other business enterprises. In most industries and professions, each firm's success comes at the expense of other firms and firms are usually delighted when a competitor goes out of business. The professional sport model is set up much different than the regular business environment. The success of each franchise depends on the success of other franchises since they jointly produce a product which one of them cannot produce alone. In order to prosper and survive, therefore, members of professional sports leagues must work together to maintain a competitive balance between franchises and to ensure financial stability.

Section 1 of the Sherman Act focuses on restraints of trade imposed by combination, contract, or conspiracy and on joint activity. In other words, restraints of trade created by a single actor are immune from coverage under Section 1. Therefore, if the member teams of a professional sports league are regarded as a single entity for antitrust purposes, none of their joint decisions can be attacked under Section 1, since the requisite plurality of actors will be absent.

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91 Id.
92 Id.
93 Id.
95 Id.
96 Id.
If, on the other hand, the member teams are viewed as separate entities, then their collective actions are properly subject to Section 1 scrutiny.\textsuperscript{97} This single entity debate is at the heart of a Supreme Court case involving the NFL.\textsuperscript{98} The NCAA filed an amicus curie brief in the case and stated that “by affirming the Seventh Circuit’s ruling, and holding that sports leagues act as single entities when they promulgate or enforce league rules or engage in other league activities that do not eliminate actual or potential economic competition between league members, this Court will enable all sports leagues, including the NCAA, to go about their welfare-enhancing daily operations without self-imposed timidity over baseless antitrust litigation, will enhance the efficiency of the litigation that is filed, and will allow for early determinations that will minimize waste of both party and judicial resources.”\textsuperscript{99}

**National Football League.** The case being heard by the Supreme Court is *American Needle, Inc. v. National Football League*\textsuperscript{100} The legal doctrine at the center of the case is known as single entity theory. If the NFL manages to persuade the Supreme Court that the league is a single entity competing with other providers of entertainment rather than a group of 32 separate businesses competing with each other, the landscape of the sports industry will be transformed.\textsuperscript{101} If it is a single unit and not 32 separate, competing teams, any violation of

\textsuperscript{97} Id.

\textsuperscript{98} *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008).


\textsuperscript{100} *American Needle*, 538 F.3d at 735.

antitrust law would be impossible to establish. A violation of the Sherman Act begins with a combination, contract or conspiracy that restrains competition and hurts consumers. If the NFL is a single unit, it cannot be in combination, contract or conspiracy. It would be immune to the antitrust cases that have allowed player unions to establish and to protect free agency and other benefits. Under the rule of single entity suggested by the NFL, the league could be vulnerable to antitrust scrutiny only if it were to join with other leagues or other providers of entertainment in setting prices, a highly unlikely development. If the NFL is successful, then players, maverick owners, networks, paraphernalia manufacturers, fans and others will find themselves conducting business with what would be one of the most powerful cartels ever. If the NFL is determined to be a single entity, McCann thinks it will not affect the NCAA much because it is structurally different from professional sports and is already the recipient of an adverse court ruling in Board of Regents.

The NFL may be in a very important antitrust case currently, but one author believes the outcome of the case does not matter. Heintel believes antitrust law is not applicable to the unique circumstances of the NFL. He concluded that the League (NFL) is a natural monopoly under existing legal and economic principles and it achieved its position through the ability and

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102 Id.


104 Munson, supra note 101.

105 Id.

106 Id.


intelligence of its management. If the NFL is a natural monopoly, its status as a monopoly is not a violation of Section 2 of the Sherman Act. The only way the NFL could be liable under the Sherman Act is if it engaged in activity intended to unlawfully prevent another firm from trying to compete for the NFL’s natural monopoly.

Major League Baseball. Baseball has long been exempt from antitrust laws because of an early decision and two subsequent challenges that have been denied. In Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, the Supreme Court held that professional baseball was exempt from antitrust laws because baseball games were not interstate commerce. The Court found that giving exhibitions of baseball is a business of purely state affairs and the fact that people may cross state lines is “merely incident, not the essential thing” of the business. The Court subsequently affirmed Federal Baseball Club in Toolson v. New York Yankees, Inc. In Toolson v. New York Yankees, Inc., the Court noted that if there are evils which warrant antitrust laws to be applied to baseball, it is Congress’ responsibility to impose them. Most recently, Flood v. Kuhn adhered to earlier decisions that baseball is not

109 Id. at 1055.
110 Id. at 1060.
111 Id.
115 Hamilton, supra note 113, at 1230.
subject to federal antitrust laws. Courts have repeatedly cited Federal Baseball Club of Baltimore as the authority in cases attacking baseball on antitrust grounds.\textsuperscript{117}

In Piazza v. Major League Baseball, the court’s interpretation of Flood effectively removed the rule of stare decisis of Federal Baseball Club of Baltimore and Toolson by declaring that baseball is interstate commerce.\textsuperscript{118} The court also determined that the Supreme Court established a new rule that the exemption applies only to the reserve clause.\textsuperscript{119} Baseball’s exemption has allowed the owners to combine forces and restrict the free movement of existing major league franchises.\textsuperscript{120} All other sports are governed by the rule of reason analysis regarding efforts to restrict franchise movement.\textsuperscript{121} Despite over eighty years of Congressional inaction since the Supreme Court’s ruling in Federal Baseball Club of Baltimore, Hamilton thinks there is good reason to believe that Congress is poised to remove the exemption.\textsuperscript{122}

\textbf{Labor Exemption}

One other area that has been successful in being granted an antitrust exemption is in labor unions. In order to encourage the formation of labor unions for collective bargaining, Congress agreed that labor organizations are not to be considered combinations that restrain trade under the antitrust laws.\textsuperscript{123} Section 6 of the Clayton Act provides that the antitrust laws do not forbid

\begin{itemize}
\item \textsuperscript{117} Hamilton, supra note 113, at 1229
\item \textsuperscript{118} Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993).
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Hamilton, supra note 113, at 1247
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 1251.
\item \textsuperscript{123} Clayton Act, 15 U.S.C. §§ 6, 17 (1982).
\end{itemize}
the existence and operation of labor organizations and that these organizations and their members shall not "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." Because of this special treatment of labor unions, Congress has created an antitrust exemption. In addition to the statutory exemption, the court system has agreed with Congress and created a judicial exemption. This non-statutory exemption was designed by the Supreme Court to promote collective bargaining under the National Labor Relations Act, and exempts certain union-employer agreements which are the products of collective bargaining.

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124 Id.

125 Foraker, supra note 90, at 162.
Chapter 3

Research Methodology

Legal research begins with understanding the topic that you are attempting to research or framing the issues. The goal of this step in the process is to learn the language and key terms, basic statutes and cases, and identify the issues.\(^\text{126}\) One of the easiest ways to begin legal research is by reading law reviews, journal articles and other secondary sources. This activity will help one learn the language of the issue, identify primary sources, and provide an overview of the research that has already been completed in this area. LexisNexis, Westlaw and other similar legal databases are a great resource for finding law review articles. Legal encyclopedias also offer a broad overview of legal subjects to help researchers begin to understand the field. *American Jurisprudence* and *Corpus Juris Secundum* are the two main legal encyclopedias used in legal research. The research for this project was completed using LexisNexis Academic that was available through the University of North Carolina online library system. The initial step in the research was to understand the intersection of antitrust law and the NCAA. Therefore, the first search conducted was in the law review database using the keywords of “NCAA & antitrust.” This resulted in over 1100 articles. The search was refined using only results from the Marquette Sports Law Review and the Sports Lawyers Journal to limit the results to articles relating to sport. This limited the results to a more manageable 86 articles. This core of articles served as the path to understanding the basics of antitrust and its application to the NCAA.

In the process of reading the core group of articles, the next step in the research became clearer. Not only did the core articles provide insight into other articles that would be of assistance, but they helped determine the case law and legislation that needed to be examined. Before moving on to primary sources, it was important to evaluate the current research in the field. This involved determining what questions have already been answered, legal theories that needed to be modified, and the crucial facts for determining the issues. After evaluating the preliminary research, case law and statutes must be read to attempt to understand the logic behind decisions that have been made. The main cases were cited to in multiple journal articles making it easy to find the specific cases instead of trying multiple keyword searches in legal databases. Cases and legislation will be located using LexisNexis Academic and the law library at the University of North Carolina. After the cases and legislation are located and before the final analysis is made, it is critical to review the validity of the sources. This process can be completed using a citation service such as Sheppard’s or through updates provided for casebooks and legislative updates.

Once the cases are read and the law verified, the cases will be synthesized to provide the standard of review for an antitrust analysis. This action is completed by taking the many standards and tests established through the cases and combining them into one, comprehensive framework for analyzing the antitrust status of the NCAA. This process will answer the first research question that examines what factors should be considered in making an antitrust ruling on college sport. After it has been determined what factors are to be used in making the decision, the specific facts relating to the NCAA can be applied to determine whether the NCAA deserves an exemption from antitrust laws to answer the second research question.

127 Id.
Chapter 4

Research

The overall purpose of this study was to determine whether the NCAA should be granted an exemption from antitrust laws. This chapter will serve as the framework for making that decision. Legal research was conducted using law reviews, journals, case law, statutes and other research materials to put together an outline for analyzing the NCAA using current antitrust law. The relevant laws will be discussed in this chapter and the structure for examining the NCAA antitrust status in the final chapter will be presented.

Antitrust laws have twin goals of preventing collusion between competitors and preventing monopolistic and oligopolistic market structures.\(^\text{128}\) Section 1 of the Act deals with the prevention of collusion between competitors and Section 2 outlines the prevention of monopolistic and oligopolistic market structures. Section 1 has been the primary focus of antitrust challenges related to the NCAA.\(^\text{129}\) One author originally believed that Section 2 did not apply to the NCAA because it is an unincorporated association of independent universities\(^\text{130}\), but that assumption was proven wrong. In *In re NCAA I-A Walk-On Football Players Litigation*, the Court found enough facts for a Section 2 claim to escape a judgment on


\(^{130}\) Schaefer, *supra* note 2, at 556.
the pleadings.\footnote{In re NCAA I-A Walk-On Football Players Litigation, 398 F. Supp. 2d 1144, 1152 (W.D. Wash., 2005).} Due to this finding, Section 2 will be discussed briefly, but most of this Chapter will focus on Section 1.

**Sherman Act History and Interpretation**

The prohibitions of the Sherman Act were not stated in terms of precision, or of crystal clarity, and the Act itself did not define them.\footnote{Apex Hosiery Co. v. Leader et al., 310 U.S. 469, 489 (1940).} In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute. It is appropriate that courts should interpret the language of the statute in the light of its legislative history and of the particular evils at which the legislation was aimed.\footnote{Id.} The Sherman Act was enacted in the era of “trusts” and “combinations” of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern.\footnote{Id. at 493.} The objective sought was the prevention of restraints of free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.\footnote{Id.} The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that business competition was the problem considered and that the act was designed to prevent restraint of trade which had
a significant effect on such competition.\textsuperscript{136} However, the antitrust laws have their limits; they are not all-encompassing statutes that regulate every facet of human conduct. In a case involving unsavory business practices, the court noted that the Sherman Act may not be extended beyond its intended scope and used to police the morals of the marketplace.\textsuperscript{137} Finally, it should be noted that the Sherman Act protects competition, not competitors.\textsuperscript{138}

**Non-Profit Associations Applicability**

One of the first challenges that plaintiffs faced in attacking the antitrust status of the NCAA was establishing that the rules even applied to them because of their non-profit status. It is axiomatic that Section One of the Sherman Act regulates only transactions that are commercial in nature.\textsuperscript{139} Congress, however, intended this statute to embrace the widest array of conduct possible.\textsuperscript{140} Section One’s scope thus reaches the activities of nonprofit organizations, including institutions of higher learning.\textsuperscript{141} Nonprofit organizations are not beyond the purview of the Sherman Act, because the absence of profit is no guarantee that an entity will act in the best interest of consumers.\textsuperscript{142}

\textsuperscript{136} Id.

\textsuperscript{137} *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir. 1978).

\textsuperscript{138} *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989).


\textsuperscript{140} *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-7 (1975).


\textsuperscript{142} *U.S. v. Rockford Memorial Corp.*, 898 F.2d 1278, 1285 (7th Cir 1990).
While it is settled that good motives themselves will not validate an otherwise anticompetitive practice\textsuperscript{143}, courts often look at a party’s intent to help it judge the likely effects of challenged conduct.\textsuperscript{144} Thus, when bona fide, non-profit professional associations adopt a restraint which they claim is motivated by public service or ethical norms, economic harm to consumers may be viewed as less predictable and certain.\textsuperscript{145} In such circumstances, it is proper to entertain and weigh procompetitive justifications proffered in defense of an alleged restraint before declaring it to be unreasonable.\textsuperscript{146} Although nonprofit organizations are not entitled to a class exemption from the Sherman Act, when they perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation.\textsuperscript{147} This immunity, however, is narrowly circumscribed. It does not extend to commercial transactions with a public-service aspect.\textsuperscript{148} In \textit{Goldfarb}, the court was examining whether learned professions, such as being a lawyer, were exempt from Section One of the Sherman Act. The court could not find support for this notion, even if the professional practice involved a public-service aspect. Congress intended to strike as broadly as it could in Section One, and to read into it so wide an exemption as the plaintiffs urged on the court would be at odds with Congress’ purpose.\textsuperscript{149}

\textsuperscript{143} \textit{Board of Regents}, 468 U.S. at n.23.

\textsuperscript{144} \textit{U.S. v. Brown}, 5 F.3d 658, 672 (3\textsuperscript{rd} Cir. 1993).

\textsuperscript{145} \textit{Arizona v. Maricopa Co. Medical Society}, 457 US 332, 343 (1982).

\textsuperscript{146} \textit{Brown}, 5 F.3d at 672.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Goldfarb}, 421 U.S. at 787.

\textsuperscript{149} \textit{Id.}
Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances.\(^\text{150}\) In *Brown*, the court stated that the exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction.\(^\text{151}\) The exchange of a service for money is commerce in the most common usage of that word.\(^\text{152}\) Therefore, the payment of tuition in return for services constitutes commerce.\(^\text{153}\)

**Section One Claim**

In order to establish a claim under Section One, a plaintiff must demonstrate (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.\(^\text{154}\) The key to finding an antitrust violation is in measuring the impact upon competition in a definable market.\(^\text{155}\) The failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings.\(^\text{156}\)

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\(^\text{150}\) *Brown*, 5 F.3d at 666.

\(^\text{151}\) *Id.*

\(^\text{152}\) *Id.*

\(^\text{153}\) *Id.*


\(^\text{155}\) *McGlinch v. Shell Chemical Co.*, 845 F.2d 802, 812-13 (9th Cir 1988).

\(^\text{156}\) *Id.*
Contract, Combination, or Conspiracy. The first element of a Section One violation is that it involves some kind of concerted action with another person or company.157 These actions are "combinations, contracts or conspiracies" in restraint of trade prohibited by Section One of the Sherman Act. To allege a combination, contract or conspiracy, the compliant must identify co-conspirators, and describe the nature and effects of the alleged conspiracy.158 The plaintiff’s burden of proving concerted action will not be satisfied by insubstantial evidence or unsupported speculations.159 The fact that defendants did not have identical motives, or that one party to the agreement was coerced into participation does not absolve the defendants of liability.160

There are three types of agreements to consider when looking for a contract, combination or conspiracy: express agreements, agreements inferred from conduct, and agreements within a single entity. An express agreement can manifest itself in the form of a written contract, a handshake agreement, or a call to action followed by the action called for.161 Giving an agreement an innocent name, like “joint venture agreement” will not immunize it from violating antitrust laws.162 To infer a contract, combination, or conspiracy, the inference of concerted action must be more probable from the evidence than the inference of independent action.163

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158 In re Nine West Shores Antitrust Litigation, 80 F. Supp. 2d 181, 191 (S.D.N.Y. 2000).


other words, the court will look to the defendant’s motive to join a conspiracy and whether defendant’s conduct was consistent with independent interest.\textsuperscript{164} To prove an agreement, a plaintiff must show, at a minimum, conscious parallel conduct combined with other “plus” factors.\textsuperscript{165} The “plus” factors can include self-interest only served by similar conduct\textsuperscript{166}, artificial standardization of products\textsuperscript{167}, raising of prices during surplus\textsuperscript{168}, or extensive communications or opportunity for collusion.\textsuperscript{169} Finally, as discussed above, there must be a contract, combination, or conspiracy between two or more actors. However, the Supreme Court has held that activities of a parent corporation and a wholly-owned subsidiary are deemed to be within a single entity and therefore do not involve the real multiplicity of actors required by Section One.\textsuperscript{170}

**Unreasonable Restraint of Trade.** Section One of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is declared to be illegal.\textsuperscript{171} Courts long ago realized that the literal application of the Section would render virtually every business arrangement unlawful.\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{164} Id.
\item \textsuperscript{165} See, e.g., Blomkest Fertilizer, Inc. v. Potash Corp. or Saskatchewan, 203 F.3d 1028, 1032 (8\textsuperscript{th} Cir. 2000).
\item \textsuperscript{166} Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939).
\item \textsuperscript{167} C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 497 (9\textsuperscript{th} Cir. 1952).
\item \textsuperscript{168} American Tobacco Co. v. United States, 328 U.S. 781, 805 (1946).
\item \textsuperscript{169} Todd v. Exxon Corp., 275 F. 3d 191, 198 (2\textsuperscript{nd} Cir. 2001).
\item \textsuperscript{170} Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).
\item \textsuperscript{171} 15 U.S.C.A. § 1 (1890).
\item \textsuperscript{172} Chicago Board of Trade v. U.S., 246 US 231, 238 (1918).
\end{itemize}
Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. Because even beneficial business contracts or combinations restrain trade to some degree, Section One has been interpreted to prohibit only those contracts or combinations that are unreasonably restrictive of competitive conditions. The Supreme Court has defined trade or commerce to be commercial competition in the marketing of goods or services. In that light, the aim of the statute was to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchases or consumers of goods and services.

**Standards of Review**

**Per Se.** Three general standards have emerged for determining whether a business combination unreasonably restrains trade under Section One: Per Se, Quick Look, and Rule of Reason. There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable. Such plainly anticompetitive agreements or practices are deemed to be illegal per se. Business certainty and litigation efficiency are the principal salutary effects of per se rules. Such rules tend to

173 *Id.*

174 *Id.*

175 *Standard Oil Co. v U.S.*, 221 U.S. 1 (1911).

176 *Apex*, 310 U.S. at 493.

177 *Id.*


179 *Professional Engineers*, 435 U.S. at 692.

180 *Maricopa Co. Medical Society*, 457 U.S. at 344.
provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule of reason trials.\textsuperscript{181}

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an illegal per se approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when the “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”\textsuperscript{182} In such circumstances, a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.\textsuperscript{183} Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.\textsuperscript{184} But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition.\textsuperscript{185} Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.\textsuperscript{186}

The per se rule is applicable when the exclusionary or coercive conduct is a direct affront to competition, or naked restraint, rather than action that merely has an incidental effect on competition.\textsuperscript{187} However, certain products require horizontal restraints, including agreements in

\begin{footnotesize}
\begin{enumerate}
\item Continental TV, 433 U.S. at n.16.
\item Board of Regents, 468 U.S. at 98.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
which horizontal price fixing restraints are necessary for the product to exist.\textsuperscript{188} Since \textit{Goldfarb},
the Supreme Court has been avowedly reluctant to condemn rules adopted by professional
associations as unreasonable per se.\textsuperscript{189} Courts believe it would be inappropriate to apply a per se
rule.\textsuperscript{190} This decision was not based on a lack of judicial experience with this type of
arrangement or the fact the organization may be a nonprofit entity.\textsuperscript{191} Rather, what is critical is
that the cases involve industries in which horizontal restraints on competition are essential if the
product is to be available at all.\textsuperscript{192}

\textbf{Quick Look.} Courts have adopted an intermediate rule of reason analysis commonly known as
quick look or truncated analysis when a naked, effective restraint has an anticompetitive effect
on the price, volume, or output market.\textsuperscript{193} The abbreviated rule of reason is an intermediate
standard.\textsuperscript{194} It is applied in cases where per se condemnation is inappropriate, but where no
elaborate industry analysis is required to demonstrate the anticompetitive character of an
inherently suspect restraint.\textsuperscript{195} Because competitive harm is presumed, the defendant must
promulgate some competitive justification for the restraint, even in the absence of detailed
market analysis indicating actual profit maximization or increased costs to the consumer

\textsuperscript{188} See \textit{Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.}, 441 U.S. 1, 23 (1979).

\textsuperscript{189} \textit{Indiana Dentists}, 476 U.S. at 458.

\textsuperscript{190} \textit{Board of Regents}, 468 U.S. at 100.

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.} at 101.

\textsuperscript{193} See \textit{Board of Regents}, 468 U.S. at 109-10; \textit{Law}, 134 F.3d at 1019; \textit{Chi. Prof'l Sports Ltd. P'ship}, 961 F.2d at 674.

\textsuperscript{194} \textit{Board of Regents}, 468 U.S. at 101.

\textsuperscript{195} \textit{Id.} at 109.
resulting from the restraint.196 If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and the court condemns the practice without further review.197 If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full scale rule of reason analysis.198 The quick look analysis is preferable to per se treatment because it approximates real world consumer conditions and provides flexibility for courts to consider the defendant’s proffered justifications.199

**Rule of Reason.** Most restraints are analyzed under the traditional rule of reason.200 The rule of reason requires the fact finder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.201 The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets.202 The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output203, increase in price, or deterioration in

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196 *Id.* at 110.


198 *Brown*, 5 F. 3d at 669.


201 *Id.*


quality of goods or services.\footnote{Tunis Bros., 952 F. 2d at 723.} Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct.\footnote{Areeda, Paul, Antitrust Law P. 1503, at 376 (1986).} Accordingly, courts typically allow proof of the defendant’s market power instead.\footnote{Tunis Bros., 952 F. 2d at 727.} Market power is the ability to raise prices above those that would prevail in a competitive market and is essentially a surrogate for detrimental effects.\footnote{Indiana Dentists, 476 U.S. at 472.}

If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anticompetitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficient procompetitive objective.\footnote{Brown, 5 F. 3d at 669.} A restraint on competition cannot be justified solely on the basis of social welfare concerns.\footnote{Professional Engineers, 435 U.S. at 692.} To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.\footnote{Arreda at 367.}

Analysis under the rule of reason does not consider directly whether the challenged restraint is reasonable in the sense of being rationally related to a legitimate purpose.\footnote{Quinn v. Kent General Hospital, 617 F.Supp. 1226, 1244 (D. Del. 1985).} That would be a constitutional claim. The antitrust inquiry is whether the restraint is anticompetitive in light of its surrounding circumstances.\footnote{Board of Regents, 468 U.S. at 104.} Nonetheless, the rules relationship to their purpose
is not wholly immaterial.\textsuperscript{213} Analysis of the effect on competition entails examination of, among other things, circumstances peculiar to the business or industry and the reason for the restraint.\textsuperscript{214} Whereas in some cases, a defendant claims to have acted with a procompetitive purpose, the challenged restraint must bear some nexus to that purpose for the claim to be credible.\textsuperscript{215}

**Anticompetitive Effects.** When articulating the anticompetitive effect of a regulation, a party must establish the relevant market (product/service and geographic), whether reasonable alternatives exist, and the basis for the restraint on the market.\textsuperscript{216} In any rule of reason case, the threshold issue is market power, which is the ability to raise prices above competitive level by restricting output.\textsuperscript{217} As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output.\textsuperscript{218} To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.\textsuperscript{219} The court has never required proof of market power in such a case.\textsuperscript{220} This naked restraint on price and output requires some competitive justifications even in the absence of a detailed market analysis.\textsuperscript{221} Courts have explained that the term relevant market encompasses notions of geography as well as product use, quality, and

\textsuperscript{213} Id.

\textsuperscript{214} Chicago Board of Trade, 246 U.S. at 248.

\textsuperscript{215} Wilk v. American Medical Ass’n., 895 F.2d 352, 361 (7th Cir. 1990).

\textsuperscript{216} Dennie, supra note 20 at 112.

\textsuperscript{217} Id at 359.

\textsuperscript{218} Brown, 5 F. 3d at 664.

\textsuperscript{219} Professional Engineers, 435 U.S. at 701.

\textsuperscript{220} Brown, 5 F. 3d at 664.

\textsuperscript{221} Id.
The geographic market extends to the area of effective competition where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand. Reasonable interchangeability may be gauged by (1) the product uses (whether reasonable substitutes exist), or (2) consumer response to changes in price level (cross-elasticity). Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.

If the plaintiff establishes a relevant market, the defendant will likely argue there are sufficient alternative markets. Precedent indicates that exemptions to the market can be made when there are relevant differences that distinguish the proffered market. After establishing a market without reasonable alternatives, the plaintiff will be required to show the anticompetitive effect of the alleged restraint.

Once the plaintiff has established an anticompetitive effect on trade or commerce, the burden then shifts to the defendant to establish procompetitive justifications for the alleged restraint. If the defendant is successful in presenting procompetitive benefits that sufficiently outweigh its anticompetitive effects, then the court will have to examine whether there is a less
restrictive alternative. The plaintiff will bear the burden of proving that a viable less restrictive alternative exists.

Section Two Claim

To allege a claim for actual monopolization under Section Two of the Sherman Act, a plaintiff must show that (1) the defendant possess monopoly power in the relevant market; (2) the defendant willfully acquired or maintained its monopoly through exclusionary conduct; and (3) the defendant caused antitrust injury. Monopoly power consists of the power to control prices or exclude competition. After showing that a party possesses monopoly power in the relevant market, the plaintiff must show that the party has willfully acquired or maintained its monopoly power. In the case of an attempted monopolization the plaintiff must prove a specific intent to accomplish the forbidden objective; in the case of an actual monopolization, evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as exclusionary, anticompetitive, or predatory. An entity with monopoly power

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231 Id. at 123.

232 See Bhan, supra note 54 at 1413.


235 Id. at 570.

does not violate Section Two by refusing to deal with a competitor if there are valid business reasons for the refusal.\textsuperscript{237}

\textsuperscript{237} \textit{id.} at 597.
Chapter 5

Discussion

The following chapter will present a discussion of the research that was presented in Chapter 4 and apply the results to the NCAA. This application will lead to a determination of whether the NCAA would likely be granted an exemption from antitrust laws. The chapter will conclude with possible recommendations for future research and a final conclusion of the study.

NCAA Protection as Non-Profit Association

The NCAA is a non-profit association, and the first challenge the NCAA will present is that the Sherman Act does not apply to them because of their status. As discussed in Chapter 4, after courts’ initial reluctance to apply antitrust laws to non-profit associations, they have begun to apply the laws to associations that perform commercial activities. The District Court in Board of Regents found that the NCAA and its member institutions are in fact organized to maximize revenues; it is unclear why the NCAA argues that it is less likely to restrict output in order to raise revenues above those that could be realized in a competitive market than would be a for-profit entity.\textsuperscript{238} If that was not clear enough, the Court went on to say that Section One applies to non-profit associations, including institutions of higher learning.\textsuperscript{239} These statements along

\textsuperscript{238} Id.

\textsuperscript{239} Id.
with the other cases that have applied antitrust laws to the NCAA should serve as a strong enough precedent for any case against the NCAA to move forward with an antitrust analysis.

**Section One Claim**

In order to establish a claim under Section One, a plaintiff must demonstrate (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se test or a rule of reason analysis; and (3) that the restraint affected interstate commerce.\(^{240}\)

**Contract, Combination, or Conspiracy.** The NCAA could become involved in multiple types of agreements that could affect their antitrust status. The first way is through express agreements. The NCAA’s largest express agreement is their contract with CBS and its partners to broadcast the NCAA Men’s Basketball Tournament. The NCAA is involved in numerous other express agreements that could be challenged and would be easily identifiable in court. It is fairly well settled that express agreement with entities outside the NCAA should not be granted an exemption from antitrust laws simply because a non-profit association is involved in the agreement. This safeguard is reasonable to prevent the NCAA from being able to secure business deals that other entities would not be able to make because they were for-profit entities. The more interesting, and newly relevant, form of agreement that may affect the NCAA would be an agreement within a single entity.

For the purpose of the NCAA regulating its member institutions, the possibility of being a single entity would remove the Association from antitrust consideration. A violation of

\(^{240}\) See Bhan, 929 F.2d at 1413.
Section One requires a contract, combination, or conspiracy between two or more actors. If the member institutions that form the NCAA are considered a single entity, they cannot form a contract, conspiracy, or combination in violation of Section One. Teams within a sport league have been held to be more like a single entity than a multiplicity of actors.241 The First Circuit went the other direction by rejecting single entity status for sports leagues.242 However, there is a case being argued in front of the Supreme Court involving the Copperweld doctrine’s applicability to the National Football League.243 The NCAA submitted an amicus curiae brief in the case and argued that the Court should recognize sport leagues as single entities when they promulgate or enforce league rules that do not eliminate actual or potential economic competition between league members.244 Such recognition would grant the NCAA almost unlimited freedom to regulate its members. The recognition as a single entity for promulgating league rules makes sense and should be upheld. This decision would not provide a blanket exemption for the NCAA from antitrust regulation, but would provide an exemption when the NCAA is only legislating rules that regulate its members.

Unreasonable Restraint of Trade. The second element of a Section One claim involves showing that the alleged restraint of trade is unreasonable. There are three different tests that can be used to determine if a restraint is unreasonable: per se, rule of reason, and quick look rule of reason. The NCAA presents a unique problem for assessing the reasonableness of a restraint of


242 Fraser v. Major League Soccer, LLC, 284 F. 3d 47, 55 (1st Cir. 2002).

243 American Needle, Inc, 538 F.3d 736.

244 Brief for NCAA, supra note 99.
trade due to the structure of the entity. When the NCAA regulates its members’ actions, they are creating a classic horizontal restraint on trade that is often held unreasonable as a matter of law. A horizontal restraint of trade is an agreement among competitors on the way in which they will compete with one another. The NCAA clearly implements horizontal restraints that would give rise to a review using the per se test because they are direct affronts to competition. However, if the NCAA is to be of any value at all to its members, it must regulate how they interact with each other. Furthermore, courts have recognized that these restraints are necessary for an association to operate and have moved the review from the per se test to a rule of reason analysis to take other factors into consideration of the reasonableness of the restraints.

There are three main steps to an antitrust challenge using a rule of reason analysis: (1) the plaintiff must establish that the agreement produced adverse, anticompetitive effects within the relevant product market; (2) the defendant then argues that the adverse, anticompetitive effects are outweighed by the procompetitive objective; and (3) whether there is a less restrictive alternative. NCAA cases have usually not faced much opposition proving the first element of the test. Most agreements challenged against the NCAA are straightforward horizontal restraints that would be deemed illegal under a per se test, but they are being reviewed using rule of reason analysis because of the NCAA’s unique structure. Because they are generally straightforward horizontal restraints, proving that the agreements produced adverse, anticompetitive effects is usually fairly easy. Some NCAA challengers may run into problems identifying the relevant market, as seen in Tanaka. However, in Tanaka, the plaintiff attempted to argue an extremely

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245 Maricopa Co. Medical Society, 457 U.S. at 356.


247 See Dennie, supra note 20.
limited product market in that case and most other NCAA cases have not had issues proving the impact on a market that is national in scope. Additionally, while the NCAA benefits in some respects from its unique structure, it may be hurt in arguing the relevant product market. If the NCAA is as unique as it claims, professional sports cannot be argued as a reasonable alternative market. This limits the product market to amateur, collegiate athletics. This narrow market makes it easy for the plaintiff to establish that the product market has been illegally restrained.

The real fireworks in an antitrust challenge against the NCAA will come with the Association arguing that the procompetitive objective outweighs any adverse, anticompetitive effects. A plaintiff should be able to establish all parts of a proper challenge up to this point, so the case will be determined on whether the court will accept the NCAA’s rationale for establishing the challenged policies as justifiable for the adverse impact that they have on the plaintiff. The NCAA has been involved in numerous antitrust cases as discussed throughout and has proffered justifications for restraints such as protection of live attendance\textsuperscript{248}, maintaining competitive balance\textsuperscript{249}, and, primarily, preserving amateurism.\textsuperscript{250} While justifications that can be linked to commercial ideals, such as live attendance, have not been accepted as procompetitive reasons for restraint, other proffered reasons such as amateurism have been accepted by courts.\textsuperscript{251} This dichotomy between commercialism and amateurism is where an exemption from antitrust laws for the NCAA should be created, if it has not already been done.\textsuperscript{252}

\textsuperscript{248} Board of Regents, 468 U.S. at 93.
\textsuperscript{249} Id. at 94.
\textsuperscript{250} Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990).
\textsuperscript{251} See Board of Regents, 468 U.S. at 94.
\textsuperscript{252} Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).
The court in *Justice* was one of the first to expressly state the difference between the NCAA regulating to protect amateurism and the NCAA taking action with an economic purpose.\(^{253}\) The Court stated that the NCAA is now engaged in two distinct kinds of rulemaking activity.\(^{254}\) One type, exemplified by the rules in *Hennessey* and *Jones*, is rooted in the NCAA’s concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose.\(^{255}\) In that case, the Court found that the NCAA giving an institution a penalty was reasonably related to the NCAA’s central objective, and was not overbroad.\(^{256}\) Therefore, the action was not an unreasonable restraint under the Sherman Act.\(^{257}\)

The recognition of the dichotomy in *Justice* was important for the NCAA, but the ruling in *Gaines* may have been even more important. In *Gaines*, the Court stated that the NCAA is engaged in a business venture and is not entitled to a total exemption from antitrust regulation on the ground that its activities and objectives are educational and are carried on for the benefit of amateurism.\(^{258}\) However, the Court granted a preliminary injunction to the NCAA on the grounds that the eligibility rules are not subject to the scrutiny of antitrust analysis under the Sherman Act.\(^{259}\) The Court clarified that by holding that eligibility rules are not subject to antitrust analysis, they were by no means creating a total exemption, but rather a very narrow

\(^{253}\) *Justice*, 577 F. Supp. at 383.

\(^{254}\) *Id.*

\(^{255}\) *Id.*

\(^{256}\) *Id.*

\(^{257}\) *Id.*

\(^{258}\) *Gaines*, 746 F. Supp. at 744.

\(^{259}\) *Id.* at 745.
Most antitrust analysis of NCAA rules will not make it to the final aspect of the test to examine if there is a less restrictive alternative. If a case does make it this far, the outcome is hardly predictable. The less restrictive alternative doctrine is difficult to predict because it is extremely vague. This vagueness provides the court with a great deal of flexibility to create a judgment that fits the facts of the case. Such flexibility makes it impossible to speculate how a court would handle a challenge to the NCAA’s antitrust status because it would depend on the facts of each case and the matters challenged.

**Interstate Commerce.** There are two parts to determining whether a restraint affects interstate commerce: (1) the challenged activity involves “trade or commerce”; and (2) the effect of the activity is “substantial” or not “insubstantial.” The few challenges that have arisen involving the trade or commerce part of this test have involved universities. Courts have decided that the relevant inquiry is into the nature of the activity at issue rather than the status of the entity itself. While there may be a narrow exception for non-profit entities to the trade or commerce test, *Brown* explicitly stated that exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction. The exchange of a service for money

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260 *Id.*  
262 Yurko, *supra* note 160.  
263 *See, e.g., Brown*, 5 F. 3d.  
264 *Id.*
is commerce in the most common usage of the word, including the payment of tuition in return for services.\textsuperscript{265}

The more frequent challenge involves the second element in determining whether a restraint has substantially affected trade or commerce.\textsuperscript{266} Some courts only require a showing that the defendant’s general business activities in some way affect commerce\textsuperscript{267}, while others only require a showing that the activity is likely to affect commerce.\textsuperscript{268} In addition, the necessary effect on interstate commerce must be substantial or at least not insubstantial.\textsuperscript{269} However, this part of the antitrust analysis rarely stops a case from moving forward as it is not a rigorous test like identifying a market or weighing the effects of a restraint.\textsuperscript{270} This is mostly a jurisdictional element and the Supreme Court noted in \textit{McLain} that an antitrust complaint should not be dismissed on jurisdictional grounds unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of their claim which would entitle them to relief.\textsuperscript{271}

\textsuperscript{265} \textit{Id.}

\textsuperscript{266} \textit{See, e.g., McLain v. Real Estate Board of New Orleans}, 444 U.S. 232, 241 (1980).

\textsuperscript{267} \textit{See, e.g., United States v.ORS, Inc.}, 997 F. 2d 628 (9th Cir. 1993).

\textsuperscript{268} \textit{Wells Real Estate v. Greater Lowell Board of Realtors}, 850 F. 2d 803, 810 (1st Cir. 1988).


\textsuperscript{270} \textit{Id.}

\textsuperscript{271} \textit{McLain}, 444 U.S.at 241.
Future Research Opportunities

The future research opportunities in this area will be greatly dependent upon the *American Needle* outcome and the current Sam Keller and Ed O’Bannon lawsuit.\(^{272}\) When *American Needle* is decided, it could provide the NCAA a huge relief from the Sherman Act if they rule that the NFL is a single entity. If they rule in favor of American Needle and determine that the NFL is not a single entity, not much will change for the NCAA. The real change in the landscape could come from the Sam Keller and Ed O’Bannon case.\(^{273}\) In that case, former college football and basketball players are suing the NCAA and EA Sports for using their likeness for profit long after their college careers have ended without their consent. The case has made it past preliminary rulings and is currently in the early discovery process. It is noteworthy that the case even made it to discovery because very few cases of this nature advance this far. The discovery process should provide great insight into the NCAA and its financial operations that could lead to further research in this area. If the case goes all the way to a judgment, an examination of the case could lead to multiple research projects and the impact it will have on college athletics.

Conclusion

If a court is faced with analyzing an antitrust case involving the NCAA, the court must take a slightly different approach than it would with a normal antitrust case. The first step in determining if there is a contract, combination, or conspiracy is similar to a regular case, but may change soon. Depending on the outcome of the *American Needle* case, the NCAA could be treated significantly different as a single entity than other organizations. Currently, after


\(^{273}\) *O’Bannon*, supra note 275.
determining that there is a contract, combination, or conspiracy, the court must establish that the restraint was unreasonable. Most actions taken by the NCAA would fall under a per se test, but due to the NCAA’s unique organizational status, courts have determined that a rule of reason analysis is the appropriate standard. Under the rule of reason analysis, the court must weigh the anticompetitive effects against the procompetitive effects of the challenged activity. The NCAA will lean heavily on its preservation of amateurism as its procompetitive objective. The amateurism ideal will often carry a significant amount of weight in court, but will not always defeat an antitrust challenge. If the case makes it to the last portion of the test involving a significant impact on trade or commerce, the case will rarely get defeated. This last hurdle is not very stringent and will rarely be grounds for dismissal of a case.

The NCAA presents a unique problem for courts examining its antitrust status. The Association should not be granted a total exemption from antitrust laws because there are numerous highly commercial aspects of the NCAA. A total exemption would grant the NCAA the freedom to carry out business arrangements that would be immediately struck down by the courts if they were carried out by normal businesses. However, the NCAA requires a partial exemption from antitrust laws in order to operate as an effective organization. The exemption the NCAA should be granted, although it appears that it is already in effect through the common law, should cover all aspects that preserve the amateur status of collegiate athletics. This puts the court under some pressure as the dichotomy is not always a clear demarcation, but the courts have begun to establish precedent to guide their decisions as they move forward. Rules dealing with eligibility, amateurism, transfers, most recruiting rules, and other similar concepts should be granted immunity from antitrust scrutiny. However, television contracts, acquisitions, personnel salaries, and other commercial transactions should be monitored using current antitrust law.