Who's Afraid of the Big Bad NCAA? . . . The *Ed O'Bannon v. NCAA* Decision's Impact on the NCAA's Amateurism Model

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I. INTRODUCTION

On August 8, 2014, the United States District Court for the Northern District of

* I would really like to thank my family and friends who support me unconditionally through everything that I do.

California issued its decision in the highly awaited *O'Bannon v. National Collegiate Athletic Association* (NCAA) case, where a group of current and former NCAA football and men's basketball players challenged an NCAA provision prohibiting compensation for use of their name, image, and likeness (NIL).[1] On September 30, 2015, the Court of Appeals for the Ninth Circuit affirmed the district court's ruling in part and reversing in part.[2] The case, filed in 2009 by the named plaintiff, Ed O'Bannon, along with 19 other student-athletes, challenged the NCAA's use of student-athletes' NIL in video games and live television broadcasts as a violation of antitrust law.[3] The *O'Bannon* decisions come in the midst of national debate and a number of student-athlete challenges to NCAA provisions about paying student-athletes above the current grant-in-aid scholarships offered by NCAA Division I schools.[4]

The debate regarding paying college football and men's basketball athletes engenders strong opinions on either side, but the near-billion dollar revenues generated by NCAA football and men's basketball raise the stakes and emotions surrounding this topic. Compensation for use of student-athletes' NIL creates a unique juxtaposition of a player's "right to publicity" and NCAA amateurism arguments. Student-athletes are unique participants in a commercial enterprise because they do not receive pay but contribute to the NCAA's success in commercializing college football and men's basketball. The *O'Bannon* decision introduces a new layer of complexity to the student-athlete "pay-for-play" debate because it supports student-athlete NIL compensation and seems to reject the historically successful NCAA amateurism defense.

This Note discusses the *O'Bannon v. NCAA* decisions and the impact on the NCAA's amateurism model. Part II of this Note addresses the history of the NCAA, its commercial growth, and the application of antitrust laws challenging NCAA provisions. Part II also distinguishes the details of *O'Bannon v. NCAA* and introduces the commercial/noncommercial test from *Adidas America, Inc. v. NCAA*.[5] Part III analyzes the *O'Bannon* facts in the context of applying the *Adidas* commercial/noncommercial test. Part IV recommends the application of the *Adidas* commercial/noncommercial test by the NCAA to amend its provisions regarding player amateurism. Part V concludes by suggesting that courts hearing antitrust challenges against the NCAA incorporate the *Adidas* commercial/noncommercial test for provisions restricting player compensation.

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1. *See generally* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014) (holding NCAA regulations that prohibit NIL compensation violate antitrust law).

2. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1052 (9th Cir. 2015).

3. Deborah Nathan, *Judge Says Student-Athletes Can Be Paid; NCAA Will Appeal* O'Bannon v. NCAA, 26 NO. 7 WESTLAW J. ENT. INDUSTRY 1, 1 (Aug. 13, 2014).

4. *See Judge Rules Against NCAA*, ESPN (Aug. 9, 2014), http://espn.go.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case ("The ruling comes after a five-year battle by O'Bannon and others on behalf of college athletes to receive a share of the billions of dollars generated by college athletics' huge television contracts."); *see also In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271 (9th Cir. 2013) (involving a lawsuit against Electronic Arts (EA), a video game developer, and the NCAA for use of the likeness of former Arizona State University quarterback, Sam Keller, in EA's NCAA Football videogame series); Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 332–34 (7th Cir. 2012) (involving a lawsuit by two former student-athletes, both having sustained career ending football injuries, challenging the NCAA provision preventing multi-year scholarships).

5. Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1277 (D. Kan. 1999).

II. BACKGROUND

A. History of NCAA Amateurism and Divisional Distinctions

1. History of the NCAA

Much of the debate that drives discussions about collegiate sports, particularly Division I football and men's basketball, is whether these widely popular endeavors are still truly amateur, wherein players receive no monetary remuneration. This debate centers around the NCAA, the non-profit governing body for the majority of intercollegiate athletic programs, whose basic purpose is "maintain[ing] intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports."[6] The NCAA's history is one that formed from a national concern, both social and political, to prevent the exploitation of collegiate athletes at the turn of the century.[7]

Since its inception, the NCAA upheld amateurism as its cardinal principle and purpose.[8] A primary concern in the early formation of the NCAA was to address the need "to ensure fairness and safety" and to counterbalance the growing commercialization and "extreme pressure to win" in intercollegiate sports.[9] During this time, intercollegiate sports faced major issues of cheating, unscrupulous recruiting practices, and severe—and even fatal—injuries to collegiate players.[10] However, in the decades following the NCAA's initial establishment, the growing popularity and commercialization of intercollegiate sports prompted stronger NCAA provisions seeking to maintain its amateurism model.[11] Public pushback to NCAA oversight and unscrupulous recruiting practices led to a relaxation of the strict no-compensation model of amateurism, which allowed collegiate institutions to offer prospective players educational scholarships known as grants-in-aid.[12]

Fast-forward to the present, where college sports are undoubtedly a tremendous commercial endeavor with football and men's basketball programs at the helm.[13] Despite

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6. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2014–2015 NCAA DIVISION I MANUAL 1 (2014) (stating the basic purpose of the NCAA according to article 1.3.1 of the NCAA constitution).

7. . *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 10, 10–12 (2000) (discussing the role of the White House and collegiate administrators in establishing a national regulating body for intercollegiate sports, the Intercollegiate Athletic Association, which would become the NCAA).

8. *See* Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 260 (2003) (citing the NCAA's early definitions and adherence to traditional ideals of amateurism, which prevented any compensation to collegiate players and non-student participation).

9. Smith, *supra* note 7, at 12.

10. *See id.* at 10–12 (discussing a rise in recruitment of players for intercollegiate sports and national attention to player fatalities resulting from collegiate sports injuries, which motivated the regulation of intercollegiate sports prior to formation of the NCAA).

11. *See id.* at 14 (discussing the NCAA enactment of the "Sanity Code" and creation of a Constitutional Compliance Committee after increased recruitment following World War II).

12. *See* Muenzen, *supra* note 8, at 260 (discussing the shift from the NCAA's Sanity Code barring student-athlete scholarships to allowing grants-in-aid to combat illegal payments to student-athletes); *see also* Smith, *supra* note 7, at 15–16 (discussing criticism of the NCAA's increased regulation and enforcement and the NCAA's response to that criticism); NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 187 (citing article 15.01.1 of the NCAA Bylaws about institutional financial aid permitted for student-athletes).

13. *See* Smith, *supra* note 7, at 21–22 (discussing the "highly commercialized world of intercollegiate

this tremendous growth in commercial success and popularity, the NCAA continues to champion the fight for the principles of amateurism in intercollegiate sports.[14] However, "[t]he commercial aspect of college athletics—television contracts and bowl game revenue, for example—counteracts the nonprofit, amateur motives of the [NCAA]."[15]

2. Division I Football and Men's Basketball

Since the first television broadcast of a college football game in the 1950s, the commercial success of the NCAA centers on controlling Division I college football and men's basketball programs.[16] Since the 1970s, the NCAA divisional classifications have separated 1100 member schools into three separate divisions, putting a particular emphasis on isolating football and men's basketball programs.[17] Division I NCAA distinguishes its athletic programs by the number of games scheduled within the division, attendance at sporting events, scholarships available, and number of sports offered.[18] The NCAA further classifies Division I NCAA football programs into two subdivisions, the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS).[19]

Division I FBS and men's basketball programs showed significant revenue growth even during the recent economic downturn in the United States.[20] Five powerhouse conferences (Power 5)[21] dominate the NCAA's Division I FBS and men's basketball programs and contribute the vast majority of the multimillion dollar annual revenues earned by the NCAA through television and marketing fees.[22] Although Power 5 Division

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athletics" and the increased pressure on NCAA regulations); *see, e.g.*, *Statistics and Facts on College Sports (NCAA)*, STATISTA (Mar. 2013), http://www.statista.com/topics/1436/college-sports-ncaa/ (reporting that around 45% of Americans follow college sports, with football and men's basketball being the most popular).

14. *See* Muenzen, *supra* note 8, at 261 ("[A]mateurism is still present to some extent in the college arena."); *see also* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 57–86 (outlining the numerous NCAA rules and regulations student-athletes must follow to comply with amateurism and remain eligible).

15. Muenzen, *supra* note 8, at 262.

16. *See* Smith, *supra* note 7, at 19 ("[A] group of powerful intercollegiate football programs were determined to challenge the NCAA's handling of the televising of games involving their schools . . . . This shift has effectively created a new division in football called the College Football Association, which is made up of the football powerhouses in Division I.").

17. *Divisional Differences and the History of Multidivisional Classification*, NCAA, http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification (last visited Feb. 7, 2016).

18. *Id.*

19. *Id.*

20. *See* Smith, *supra* note 7, at 19 (stating the Division I football powerhouse schools are able to "funnel more television revenues in their direction, which has led to increases in other forms of revenue . . . unbalanc[ing] the playing field in football and other sports"); *see also* Paula Lavigne, *College Sports Thrive Amid Downturn*, ESPN (May 1, 2014), http://espn.go.com/espn/otl/story/_/id/10851446/sports-programs-nation-top-public-colleges-thrived-economic-downturn-earning-record-revenues ("Total revenue from the nation's top-tier college sports programs—the NCAA's Football Bowl Subdivision—has increased by about a third, fueled by ticket sales, donations and lucrative television contracts that together resulted in about $8 billion.").

21. *See* Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBSSPORTS (Aug. 7, 2014, 1:41 PM), http://www.cbssports.com/collegefootball/writer/jon-solomon/24651709/ncaa-adopts-new-division-i-model-giving-power-5-autonomy (stating the Power 5 consists of five major conferences which include: the Southeastern Conference (SEC), Atlantic Coast Conference (ACC), Big Ten, Pacific 12 (Pac-12), and the Big 12).

22. *See* STATISTA, *supra* note 13 (stating in 2010–2011, 80% of the NCAA's earnings—roughly $700 million—came from television and marketing of college football and basketball).

I FBS and men's basketball programs are big revenue earners, the same sports in conferences outside the Power 5 (including lower divisions) and other NCAA sports do not share this same commercial success.[23] It is important to note that Title IX requirements to provide equal funding to support women's sports bear little effect on Division I FBS and men's basketball earnings, but commentators pinpoint the NCAA's rules governing the allocation of scholarships available for other sports as a key reason for an economic gap.[24]

B. NCAA and Antitrust Litigation

Given the NCAA's increased regulation of intercollegiate sports, the rapid commercial success of Division I FBS and men's basketball programs, and the historical criticism of NCAA's regulatory position, the NCAA has often run into litigation of whether its regulations violate federal antitrust laws.[25] Section 1 of the Sherman Antitrust Act of 1890 prohibits the "restraint of trade or commerce among the several States."[26] Litigation claiming NCAA violations of the Sherman Act rely on section 1, calling the NCAA's regulations of student-athletes or its member institutions into question.[27]

Those seeking to submit a claim against the NCAA for violating section 1 must show "(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."[28] The NCAA's non-profit nature and purpose of protecting the educational benefits flowing from amateurism often make litigation challenging NCAA rules, regulations, and conduct nefariously difficult to overcome.[29] Two primary rules are applied in determining violations of section 1: either the per se rule or the rule of reason.[30] In NCAA antitrust litigation, courts apply the rule of reason analysis to determine if there is an unreasonable restraint on trade in a case-by-case analysis.[31]

Application of the rule of reason in NCAA antitrust allegations provides ideal analysis because the approach seeks to balance the "procompetitive and anticompetitive effects of the restraints."[32] In cases where parties have a cooperative arrangement, which is most

23. *See* Lavigne, *supra* note 20 ("[T]here is growing economic disparity among schools, even within the FBS ranks, but especially if the field includes all 1,100 NCAA schools."); *see also NCAA College Athletics Statistics*, STATISTIC BRAIN (Apr. 26, 2015), http://www.statisticbrain.com/ncaa-college-athletics-statistics/ (reporting NCAA Division I football and men's basketball as the only revenue generating sports).

24. *See* Peter Keating, *The Silent Enemy of Men's Sports*, ESPNW. (May 23, 2012), http://espn.go.com/espnw/title-ix/article/7959799/the-silent-enemy-men-sports ("[T]he real enemy of men's sports isn't Title IX. . . . Put simply, scholarship limits protect and promote revenue sports. The NCAA allows individual schools to fund specific men's sports only to the degree that those sports make money nationally.").

25. Richard E. Kaye, Annotation, *Application of Federal Antitrust Laws to Collegiate Sports*, 87 A.L.R. Fed. 2d 43 § 1 (2014).

26. Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (1890).

27. *See* Kaye, *supra* note 25, § 1 ("[S]ection 1 of the Sherman Act in particular—apply to collegiate sports, primarily to the rules, regulations, and other conduct by the [NCAA].").

28. *Id.* § 2.

29. *See* Muenzen, *supra* note 8, at 262–63 (discussing that despite the NCAA's commercial activity many courts will uphold noncommercial restraints as falling outside the reach of antitrust law).

30. *Id.* at 264–65; *see also* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014) (outlining the elements a plaintiff must show to prove violation of section 1 of the Sherman Act and discussing the applicable rules of analysis).

31. *O'Bannon*, 7 F. Supp. 3d at 984.

32. Muenzen, *supra* note 8, at 264.

often the case in NCAA antitrust allegations, the Supreme Court held the rule of reason should apply.[33] The seminal case expressing this application of the rule of reason in NCAA antitrust challenges is *NCAA v. Board of Regents*, where the Board of Regents of Oklahoma and the University of Georgia Athletics Association brought an antitrust suit against the NCAA's control over televising contracts for college football games.[34] The dispute arose when NCAA member schools with major football programs, operating collectively as the College Football Association (CFA), sought to negotiate an alternative television broadcasting contract with the National Broadcasting Company.[35] For the previous 28 years, the NCAA implemented its own television plan for negotiating broadcasting contracts that, at the time the dispute arose, included a four-year exclusive contract with the American Broadcasting Company and Columbia Broadcasting System for nearly $132 million.[36]

The NCAA's television plan compensated member schools of any size and viewership equally according to the type of television broadcast (regionally or nationally) and limited the total number of televised games for any one school.[37] The NCAA's television plan also barred member schools from selling their own television rights.[38] When the CFA negotiated its own television broadcasting contract, the NCAA threatened to sanction any CFA member school complying with the CFA's contract.[39] The district court found the NCAA's television plan violated section 1, dismissing the NCAA's procompetitive justifications which included preserving amateurism.[40] The court of appeals affirmed the district court ruling stating the NCAA's television plan and member restrictions "constituted illegal per se price fixing."[41] The court reasoned that in NCAA antitrust challenges, courts should apply the rule of reason because the NCAA involves "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[42]

The district court in *O'Bannon* explained how it applies the rule of reason's burden-shifting framework.[43] Under the framework, "the plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'"[44] If the plaintiff satisfies this initial burden, "the defendant must come forward with evidence of the restraint's procompetitive effects."[45] Finally, if the defendant meets this burden, the plaintiff must show "any legitimate objectives can be achieved in a

33. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) (supporting *O'Bannon*, 7 F. Supp. 3d at 985).

34. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Okla., 468 U.S. 85, 85–86 (1984).

35. *Id.* at 94–95.

36. *Id.* at 93.

37. *Id.*

38. *Id.* at 94.

39. *See Bd. of Regents*, 468 U.S. at 95 ("In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA–NBC contract . . . . CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the threatened sanctions . . . .").

40. *Id.* at 98.

41. *Id.* at 97.

42. *Id.* at 101.

43. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).

44. *Id.*

45. *Id.*

substantially less restrictive manner."[46]

To summarize the rule of reason: once a party alleging Sherman Act violations proves it experiences economic restraint within a relevant market, the burden of proof shifts to the opposing party who must prove the restraint in the relevant market has a legitimate procompetitive effect.[47] If the opposing party can prove a procompetitive effect, the burden shifts back to the party alleging Sherman Act violations to prove there are less restrictive ways to achieve the opposing party's procompetitive effects in the relevant market. In *Board of Regents*, the Court found the NCAA imposed a restraint of trade in the market for televising collegiate football games through horizontal price-fixing and output restrictions on member institutions.[48] The Court then analyzed the NCAA's procompetitive justifications for imposing its restrictions, which included enhancing competitive balance in amateur athletics.[49] While finding the preservation of amateurism in college football was not a compelling procompetitive justification as it related to the disputed television broadcasting contracts, the Court opined that the NCAA's amateurism rules were generally a "justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[50]

Both *O'Bannon* courts' opinions provide in-depth analysis of the NCAA's NIL compensation rules under the rule of reason. The district court framed its opinion in *O'Bannon* by placing particular emphasis on identifying the "relevant markets" where plaintiffs alleged restraint and found the NCAA's procompetitive justifications were marginally compelling.[51] The court of appeals, affirming the district court's ruling that the NCAA's player NIL compensation rules violate the Sherman Act, addressed the commercial nature of the NCAA's rule.[52]

C. Defining a "Relevant Market"

Legal commentators have noted a "critical issue in many cases involving allegations of antitrust violations by the NCAA is the plaintiff's definition of the relevant market."[53] Two cases, *Agnew v. NCAA* and *Rock v. NCAA*, where student-athletes alleged NCAA antitrust violations are key to determining the relevant market in *O'Bannon*.[54] In its

46. *Id.* (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)).

47. *Id.*

48. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Okla., 468 U.S. 85, 99 (1984) ("By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint . . . .").

49. *Id.* at 117–19.

50. *See id.* at 117 (discussing how, while normal rules regulating NCAA member institutions were compelling to justify amateurism as a unique trait for college sports audiences, the nature of the television contracts were not justifiably related to preserving amateurism).

51. *O'Bannon*, 7 F. Supp. 3d at 985 (quoting Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1405 (9th Cir. 1986)); *see id.* at 999–1004 (analyzing the four NCAA's procompetitive justifications).

52. *Id.* at 1064–65. The court of appeals also addressed the NCAA's arguments that its amateurism rules were procompetitive as a matter of law and that the plaintiffs did not suffer an injury in fact. *Id.* at 1061.

53. Kaye, *supra* note 25, § 3.

54. *See* CORPORATE GUIDE TO LICENSING § 23:2 (Aug. 2014) (quoting Agnew v. Nat'l Collegiate Athletic

holding, the Seventh Circuit determined the plaintiffs in *Agnew* failed to properly identify the college market for attracting student-athletes to NCAA schools, and therefore, failed to show that NCAA scholarship rules unreasonably restrained competition, which the court determined would be a relevant market.[55] The plaintiffs in *O'Bannon* proposed two potential relevant markets where the NCAA's licensing of players' NIL restrains competition, the "College Education Market" and the "Group Licensing Market."[56]

D. Breaking Down the O'Bannon *Decisions*

1. The O'Bannon *District Court Decision*

Ed O'Bannon, a former collegiate athlete who played on UCLA's NCAA National Championship team in 1995, is the lead plaintiff filing suit after discovering his unauthorized image portrayed in a video game.[57] The current and former college football and basketball players argued that receiving a share of the revenues from the sale of their NIL violates the Sherman Act.[58] The *O'Bannon* court determined the plaintiffs identified a relevant market where the NCAA unreasonably restrained trade.[59] In the court's application of the rule of reason's burden-shifting framework, the court dismissed the plaintiffs' allegation of restraint in the "Group Licensing Market," reasoning the plaintiffs did not identify any injury to competition, which is an essential element to prove a section 1 violation.[60]

However, the *O'Bannon* court found the NCAA unreasonably restrained trade in the "College Education Market," because it forces students to forfeit rights to their NIL.[61] Relying on the Seventh Circuit's identification of the sale of a players' athletic ability as commercial behavior, the NCAA is essentially involved in price-fixing, because schools cannot offer student-athletes compensation from the sale of their NIL in multimillion dollar licensing agreements.[62] Under the burden-shifting framework, the court fully rejected two of the NCAA's four procompetitive justifications but namely challenged the NCAA's justification of preserving amateurism.[63] The NCAA presented evidence that maintaining

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Ass'n, 683 F.3d 328, 347 (7th Cir. 2012)) (discussing the Seventh Circuit's reasoning in dismissing the plaintiff's case for failure to identify a relevant market); *see generally* Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012) (holding the plaintiffs did not identify a labor market for student-athletes); Rock v. Nat'l Collegiate Athletic Ass'n, 928 F. Supp. 2d 1010 (S.D. Ind. 2013).

55. *Agnew*, 683 F.3d at 355.

56. *See O'Bannon*, 7 F. Supp. 3d at 963–70 (discussing the College Education Market—the market for NCAA schools to attract student athletes—and the Group Licensing Market— the market to license collective players' name, image, and likeness).

57. .ESPN, *supra* note 4..

58. *O'Bannon*, 7 F. Supp. 3d at 963.

59. *Id.* at 987–88.

60. *See id.* at 994 ("Plaintiffs have not identified any harm to competition . . . an 'essential element of a Section 1 violation under the rule of reason is injury to competition in the relevant market.'").

61. *Id.* at 988.

62. *See id.* at 988–89 (quoting Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012)) ("The Seventh Circuit recently observed that these 'transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.'").

63. *O'Bannon*, 7 F. Supp. 3d at 1000 ("The historical record that the NCAA cites as evidence of its longstanding commitment to amateurism is unpersuasive . . . . The association's current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism.").

the commercial popularity of college football and basketball requires the promotion of amateurism.[64] However, the court found such a sweeping prohibition on any compensation to student-athletes for the licensing of their NIL was limited.[65] A salient point of the court's criticism of the NCAA's amateurism defense is the NCAA's reliance on the Supreme Court's *Board of Regents* decision.[66] The court also found the NCAA's rule provided limited procompetitive justification in integrating academics and athletics because student-athletes would receive the same academic benefits whether they received NIL compensation or not.[67]

The court rejected the NCAA's remaining two procompetitive justifications (maintaining competitive balance and increasing output), determining the restriction is not necessary to maintain competitive balance and increase output because aggressive spending on athletic coaching, staff, and facilities mainly drives competition in FBS and Division I basketball, and because actions of top FBS and Division I basketball conferences to gain more autonomy dispels fears of reducing output of participating schools.[68] Lastly, the court relied on the plaintiffs' proposition that there are less restrictive alternatives to compensate players without damaging principles of amateurism—namely, holding funds in trust until a player is no longer eligible to play and compensating players up to a school's full tuition cost.[69]

The district court in *O'Bannon* made clear its ruling did not endorse paying players to play FBS and Division I basketball but limited student-athletes' compensation to a share of revenues from use of their NIL to go along with what is already received in grants-in-aid.[70] Specifically, the *O'Bannon* injunction allows colleges to offer a limited share of any revenues they earn in licensing players' NIL that are no less than $5000 and placed in trust until after a player's eligibility expires.[71] The implications from the ruling itself seemed minor, but at least some commentators on the subject of the NCAA's amateurism defense

64. *Id.*

65. *See id.* at 1001 ("The Court therefore concludes that the NCAA's restriction on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products.").

66. *Id.* at 999. The district court in *O'Bannon* cut straight to the heart of the NCAA's argument that the *Board of Regents* decision made preservation of amateurism a presumptive procompetitive justification. *See id.* (stating that the NCAA's "reliance on the case remains unavailing. . . . The Supreme Court's suggestion in *Board of Regents* that, in order to preserve the quality of the NCAA's product, student-athletes 'must not be paid,' was not based on any factual findings in the trial record and did not serve to resolve any disputed issues of law."); *see generally* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 S. Ct. 85 (1984) (discussing the district court's decision).

67. *See O'Bannon*, 7 F. Supp. 3d at 1003 (stating that "[l]imited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal. As with the NCAA's amateurism justification, however, the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation.").

68. *Id.* at 991–1003.

69. *See id.* at 1005 (asserting that courts may consider any less restrictive alternatives that are "based on actual experience in analogous situations elsewhere or otherwise fairly obvious.").

70. Steve Berkowitz, *Judge Releases Ruling on O'Bannon Case: NCAA Loses*, USA TODAY (Aug. 8, 2014, 11:29 PM), http://www.usatoday.com/story/sports/college/2014/08/08/ed-obannon-antitrust-lawsuit-vs-ncaa/13801277/.

71. *See O'Bannon*, 7 F. Supp. 3d at 1007–08 (stating that "the Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid").

believed the district court's *O'Bannon* ruling dealt a deadly blow.[72]

2. The O'Bannon *Court of Appeals Decision*

The Court of Appeals for the Ninth Circuit's highly anticipated split panel decision in *O'Bannon* affirmed the district court ruling in part and reversed in part.[73] The majority appellate opinion carefully unpacked each part of the district court's ruling and addressed each of the NCAA's arguments to clearly articulate its decision.[74] The court began by walking through the NCAA's history of amateurism and the lower court proceedings leading up to the district court's ruling in *O'Bannon*.[75]

The court first addressed the NCAA's three independent arguments alleging the court was precluded from making an antitrust ruling on the merits: "(1) The Supreme Court held in [*Board of Regents*] that the NCAA's amateurism rules were 'valid as a matter of law'; (2) the compensation rules . . . do not regulate commercial activity; and (3) the plaintiffs have no standing . . . because they have not suffered 'antitrust injury.'"[76] In rejecting the NCAA's first preclusion argument, the court determined the Court in *Board of Regents* did not deem the NCAA's preservation of amateurism rules presumptively procompetitive.[77] Furthermore, the court was unmoved by the NCAA's arguments that the court's sister circuits adopted the NCAA's view that *Board of Regents* blessed its amateurism rules as presumptively procompetitive.[78]

Next the court rejected the NCAA's argument that its NIL compensation rules do not regulate commercial activity and are simply eligibility rules.[79] The court determined while the NCAA's NIL compensation rules are termed eligibility rules, "the substance of the compensation rules matters far more than how they are styled. And in substance, the rules clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools . . . ."[80] The court relies on two decisions proffered by the NCAA from the

72. *See* Patrick Rishe, *NCAA Loses Ed O'Bannon Lawsuit, Opening Door to Increased Student-Athlete Monetary Benefits*, FORBES (Aug. 8, 2014, 8:03 PM), http://www.forbes.com/sites/prishe/2014/08/08/ncaa-loses-ed-obannon-lawsuit-opening-door-to-increased-student-athlete-monetary-benefits/ (writing "[k]aboom for the NCAA amateurism model. Kudos to Judge Wilken").

73. O'Bannon v. Nat'l Collegiate Athletic Ass'n., 802 F.3d 1049, 1053 (9th Cir. 2015).

74. *See generally id.* (reviewing and addressing the district court's decision).

75. *Id.* at 1052–61.

76. *Id.* at 1061.

77. *See id.* at 1064 (stating that while the court gives deference to the Supreme Court's dicta in *Board of Regents* related to the procompetitive justifications of the NCAA's amateurism rules, the validity of the NCAA's amateurism rules still "must be proved, not presumed" under the rule of reason).

78. *See O'Bannon*, 802 F.3d 1049, at 1064 ("The NCAA cites decisions of three of our sister circuits, claiming that each adopted its view of *Board of Regents*."). The court found each case the NCAA cited as unconvincing because two applied the NCAA's rules to "Rule of Reason scrutiny" in accordance to the court's present analysis, and the third case's "'procompetitive presumption' was dicta that was . . . unnecessary to the court's resolution of [the] case." *Id.*; *see generally* Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180 (3d Cir. 1998), *vacated*, 525 U.S. 459 (1999) (holding the NCAA is not subject to the requirements of Title IX because it receives dues from its members which receive federal financial assistance); McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1998) (holding the NCAA eligibility rules did not violate antitrust laws); Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012) (holding regulations capping the number of scholarships given per team and prohibiting multi-year scholarships were not deserving of procompetitive presumption at the motion-to-dismiss stage).

79. *O'Bannon*, 802 F.3d at 1081.

80. *Id.* at 1065.

Third and Sixth Circuits to arrive at its determination that the NCAA's NIL compensation rules are commercial activity.[81] In agreeing with the Third Circuit's ruling in *Smith v. NCAA*, the court supported the Third Circuit's reasoning that the NCAA's post-baccalaureate eligibility rule was noncommercial because it was not related to "the NCAA's commercial or business activities."[82] The court noted the NCAA's NIL compensation rules under the Third Circuit's reasoning would in contrast be commercial because "the rules at issue here are more like rules affecting the NCAA's dealings with its coaches or with corporate business partners."[83] However, the court disagreed fully with the Sixth Circuit's reasoning in *Bassett v. NCAA*, concluding "the NCAA's [NIL] compensation rules [do] not change the fact that the exchange they regulate—labor for in-kind compensation—is a quintessentially commercial transaction."[84]

Finally, the court rejects the NCAA's argument asserting there was no injury in fact because the court found that video game makers would likely pay the plaintiffs for their NIL rights.[85] Specifically, the court found the plaintiffs were injured in fact because the NCAA's rules "foreclosed the market for their NILs in video games."[86] The court notably does not address whether college athletes suffer an injury in fact in the use of their NIL for live television broadcast or archival footage.[87]

After rejecting the NCAA's preliminary arguments, the court went on to review the merits of the plaintiff's antitrust claim and the district court's finding that the NCAA's NIL compensation rules violate antitrust law under the rule of reason.[88] While the NCAA did not take issue with the district court's identification of a relevant market, the NCAA argued there was no significant anticompetitive effect in the college education market.[89] The court rejects the NCAA's arguments largely because it found the district court correctly concluded that the plaintiffs "met their burden at the first step of the Rule of Reason by showing the NCAA's compensation rules fix the price of one component (NIL rights) of the bundle that schools provide recruits."[90]

In reviewing the district court's findings of the NCAA's procompetitive justifications for its NIL compensation rules, the appellate court focused only on the NCAA's promotion of amateurism arguments.[91] The NCAA argued the district court erred in relying too heavily on NCAA consumer demand related to amateurism and the "NCAA's historical

81. *See id.* ("As the NCAA points out, two circuits have held that certain NCAA rules are noncommercial in nature.").

82. *Id.*

83. *Id.*

84. *O'Bannon*, 802 F.3d at 1065. The court struggles with the Sixth Circuit's finding that the NCAA's rules preventing schools from providing recruits with improper inducements were anti-commercial. *See id.* ("[W]e believe *Bassett* was simply wrong on this point. . . . We simply cannot understand this logic. Rules that are 'anti-commercial and designed to promote competitiveness surely affect commerce just as much as rules promoting commercialism.").

85. *Id.* at 1069.

86. *Id.* at 1067.

87. *Id.*

88. *O'Bannon*, 802 F.3d at 1069.

89. *Id.*

90. *Id.* at 1072.

91. *See id.* ("[T]he NCAA focuses its arguments . . . entirely on . . . promotion of amateurism. We therefore accept the district court's factual findings that the compensation rules do not promote competitive balance . . . do not increase output . . . and . . . play a limited role in integrating student-athletes with their school's academic communities. . . .").

commitment to amateurism."[92] While finding the NCAA's latter argument compelling in that "the district court probably underestimated the NCAA's commitment to amateurism," the court found this point has no bearing on showing a procompetitive effect.[93] Ultimately, the court determined the district court did not err in finding that the NCAA's compensation rules only served two of the NCAA's procompetitive justifications offered at trial.[94] The court went on to add the district court's findings were "largely consistent with the Supreme Court's own description" in *Board of Regents*.[95]

Finally, the court shifts its review to the district court's application of the final step of the rule of reason where it affirmed compensating student-athletes up to the full cost of attendance but reversed the injunction allowing schools to compensate student-athletes up to $5000 above the full cost of attendance in deferred payments.[96] In its reasoning, the court addresses arguments presented by the NCAA and amici briefs related to increasing the cap on student-athlete compensation from grant-in-aid to the full cost of attendance.[97] Despite the compelling arguments and the court's agreement with the NCAA and amici, the court affirmed the district court's decision to increase student-athlete compensation to the full cost of attendance because it is a "substantially less restrictive alternative means of accomplishing the NCAA's legitimate procompetitive purposes."[98] The court reasoned this less restrictive means falls in line with the NCAA's standards of amateurism because the "money paid to them goes to cover legitimate educational expenses."[99]

However, the court stops sharply at the notion of compensating student-athletes any amount "untethered to educational expenses" in determining the district court erred in ruling that deferred cash payments are a less restrictive alternative means under the rule of reason.[100] The court reasoned that the district court placed too much weight on offhand comments made by the NCAA's witness supporting a $5000 deferred compensation to student athletes as not being repugnant to the NCAA's preservation of amateurism.[101] The court determined any compensation to student-athletes not related to educational costs would constitute a "quantum leap" from the NCAA's principles of preserving amateurism, and the court should defer to the Supreme Court's "admonition that [courts] must afford the NCAA 'ample latitude' to superintend college athletics."[102] The dissenting opinion would affirm the district court's $5000 deferred cash payment to student-athletes, viewing the majority's decision as mischaracterizing the analysis of the last step under the rule of reason.[103] The dissent suggests the appropriate analysis should focus on whether the less

92. *Id.*
93. *O'Bannon*, 802 F.3d at1073–74 .
94. *Id.* at 1074.
95. *Id.*
96. *Id.*
97. *Id.* at 1075 ("The NCAA, along with fifteen scholars of antitrust law appearing as amici curiae, warns us that if we affirm even this modest of the two less restrictive alternative restraints . . . we will open the floodgates to new lawsuits.").
98. *O'Bannon*, 802 F.3d at 1075.
99. *Id.*
100. *Id.* at 1076–78.
101. *Id.* 1078 ("Pilson's offhand comment under cross-examination is the sole support for the district court's $5,000 figure. . . . But . . . his testimony cannot support the finding that paying student-athletes small sums will be virtually as effective in preserving amateurism as not paying them.").
102. *Id.* at 1079.
103. *O'Bannon*, 802 F.3d at 1081.

alternative means is virtually effective in preserving popular demand for college sports and not preserving amateurism.[104] While the appellate opinion offers several areas of clarification in NCAA antitrust lawsuits, determining whether a NCAA regulation is commercial or noncommercial offers room for clarity.

E. Adidas America, Inc. v. NCAA *and* NCAA's Appeal of O'Bannon

Like commentators noted following the district court's decision in *O'Bannon*, the appellate court breathed litigious life back into the NCAA's amateurism defense.[105] However, the Ninth Circuit rejected the NCAA's arguments on appeal that its NIL compensation provisions were not commercial in nature despite the Third and Sixth Circuit courts' decisions in *Smith* and *Bassett*, respectively.[106] The court of appeals identification of whether the NCAA's regulation is simply commercial or noncommercial behavior may find application of the *Adidas America, Inc. v. NCAA* framework. *Adidas* came from a challenge by the athletic apparel manufacturer claiming an NCAA rule limiting the size and placement of logos on athletic uniforms violated the Sherman Act.[107] The court settled on determining whether the regulation itself is commercial or noncommercial in light of identifying a relevant market under section 1 of the Sherman Act.[108] The court in *Adidas* held that in determining if a NCAA bylaw is "commercial, the court must look to the underlying purposes of the bylaw, the NCAA's reasons for creating the . . . regulation, and whether the bylaw confers a direct economic benefit on the NCAA."[109]

III. ANALYSIS

This Part will analyze the key points of the NCAA's amateurism argument and whether this argument will survive future antitrust challenges to NCAA rules. First, Section III.A will explain why the NCAA's amateurism argument typically wins in antitrust challenges, particularly on appeal. Second, Section III.B will examine why the *O'Bannon* district court's identification of a commercial market was key to finding the NCAA's challenged provision violates the Sherman Act. Last, Section III.C applies the *Adidas* commercial/non-commercial test to the NCAA provision challenged in *O'Bannon*.

A. Why Does Amateurism Usually Win?

The NCAA's amateurism argument remains its strongest defense to challenges

104. *Id.*

105. *See* Steve Berkowitz, *NCAA Filing Hints at Appeal Strategy in* O'Bannon *Case*, USA TODAY (Aug. 29, 2014, 8:03 AM), http://www.usatoday.com/story/sports/college/2014/08/28/ncaa-filing-appeal-strategy-in-obannon-case/14774763/ (hinting that the issues on appeal would "include . . . whether amateurism is presumptively procompetitive for an amateur sports league and whether plaintiffs' claims based on a property right in the use of their NILs in live broadcasts of sporting events are foreclosed by the First Amendment").

106. *O'Bannon*, 802 F.3d at 1065–66.

107. Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1277 (D. Kan. 1999).

108. *See id.* at 1283–84 ("[T]he Third Circuit adopted a . . . commercial/noncommercial analysis to determine whether the NCAA's eligibility requirements were subject to antitrust law.").

109. *Id.* at 1285.

alleging NCAA antitrust violations.[110] Under the rule of reason analysis,[111] once a challenger shows an NCAA provision has an anticompetitive effect, the NCAA's amateurism defense allows them to justify the restraint by showing a challenged provision's procompetitive purpose.[112] The most significant endorsement of the NCAA's amateurism argument—giving it some serious teeth—is the Supreme Court's decision in *NCAA v. Board of Regents*, stating: "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition . . . and therefore procompetitive because they enhance public interest in intercollegiate athletics."[113] One major concern is whether the *O'Bannon* decisions weaken the effectiveness of the NCAA's amateurism argument in future allegations of NCAA provisions violating the Sherman Act, particularly when it comes to Division I FBS and men's basketball players.[114]

B. Distinguishing the College Education Market and Restraint of Trade

Plaintiffs cannot simply identify a relevant market; failure to distinguish the identified market from others offering similar opportunities for trade is equally detrimental to a plaintiff's antitrust challenge against the NCAA.[115] The district court's *O'Bannon* decision unsettled the foundation of the NCAA's restraint on players' compensation for use of their NIL because the district court determined the NCAA sought an unfair commercial advantage in the College Education Market (CEM).[116] Unlike in past Sherman Act challenges, the district court's approach in defining the CEM is troublesome to the NCAA's amateurism defense in that it distinguishes CEM from other markets vying for athletes' services.[117] For example, the district court relied on evidence presented by the plaintiffs' expert which showed other NCAA Divisions and collegiate athletic associations do not compete successfully against Division I FBS and men's basketball schools for high school recruits.[118] The district court also agreed with plaintiffs' expert that professional football and basketball markets, even the minor leagues, do not compete with the CEM in

110. *See* Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of The NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 76 (2006) (explaining many courts under the rule of reason often find the NCAA's amateurism rules are noncommercial and wholly exempt from antitrust litigation).

111. *See supra* Section II.B (outlining the NCAA's history of antitrust litigation); Muenzen, *supra* note 8, at 264 (stating the rule of reason as one standard for antitrust allegations).

112. *See* Muenzen, *supra* note 8, at 264 (explaining the rule of reason analysis).

113. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Okla., 468 U.S. 85, 117 (1984).

114. *See, e.g.*, Nathan, *supra* note 3, at 2 (identifying the decision in *O'Bannon* as one that should garner extensive attention on appeal to address the strength NCAA's amateurism argument); *see also O'Bannon*, 802 F.3d at 1061–64 (discussing the court's reasoning that the Supreme Court did not deem the NCAA's preservation of amateurism presumptively procompetitive as a matter of law).

115. *See, e.g.*, Kaye, *supra* note 25, § 7 (discussing in *Pocono Invitational Sports Camp, Inc. v. NCAA* the plaintiffs' failure to distinguish the market for summer basketball camps from other summer camps or sports camps run during other times of the year).

116. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014) (explaining the *O'Bannon* plaintiffs established a restraint of trade in the college education market affecting schools' ability to compete for student-athletes' services).

117. *See id.* at 966 ("FBS football and Division I basketball schools are the only suppliers of the unique bundles of goods and services described [in the College Education Market]."); *see generally* Kaye, *supra* note 25 (discussing plaintiffs' failures to distinguish a relevant market where an NCAA provision restrained trade in alleged section one Sherman Act violations).

118. *O'Bannon*, 7 F. Supp. 3d at 966.

offering the same bundle of services to these same athletic recruits.[119]

This implies the NCAA has market power—"the ability of firms to raise price[s] above the competitive level for a sustained period"[120]—within the CEM, which is necessary to show whether the NCAA's provision violates antitrust law.[121] In general, courts analyzing allegations of anticompetitive practices will look at an alleged violator's market power.[122] The district court determined the NCAA exerts significant market power in the CEM.[123]

Even more nefarious to the NCAA's amateurism defense is the district court's support of the plaintiffs' argument that the NCAA restrains trade under a monopsony price-fixing theory.[124] A monopsony—in the NCAA's case a collusive monopsony—involves price-fixing on the buyer's side of a relevant market in violation of section 1 of the Sherman Act.[125] The district court determined the NCAA's provision restricting any player compensation from NIL licensing revenues, fixes prices for buyers (Division I FBS and men's basketball schools) in the market for recruits' athletic talent.[126] This creates a "cognizable" restraint of trade affecting sellers (student-athletes) in the CEM.[127] However, such a strong showing of restraint in a relevant market does not spell ultimate defeat of the NCAA's amateurism argument because courts will uphold NCAA provisions if such provisions are deemed noncommercial.[128] The *O'Bannon* court does not address the commercial nature of the challenged NCAA provision in its opinion.[129]

C. Applying the Adidas Commercial/Noncommercial Analysis to O'Bannon.

Given the NCAA's heavy reliance on the procompetitive justifications for NCAA restraints on player eligibility to protect amateurism, the model places a heavy burden on

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119. *See id.* at 967 (explaining that athletes cannot even participate in the National Football League or National Basketball Association immediately after high school, and too few athletes go to minor football and basketball leagues immediately after high school).

120. Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power* 14 (John M. Olin Program in Law and Econ., Stanford School of Law, Working Paper No. 328, 2006), http://ssrn.com/abstract=931225.

121. *See supra* Section II.B (discussing the elements required to prove violation of section 1 of the Sherman Act are a showing that "(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.").

122. *See* Baker & Bresnahan, *supra* note 120, at 15 ("Antitrust law at times relies upon presumptions that if the level of market power is high, various types of conduct will increase it, and if the level of market power is low, they will not. That is, in legal terms, anticompetitive effect is at times inferred from proof of market power.").

123. *See O'Bannon*, 7 F. Supp. 3d at 973 ("Plaintiffs' college education market is essentially a mirror image of the market for recruits' athletic services and licensing rights, the Court finds that the NCAA exercises market power, fixes prices, and restrains competition in both markets.").

124. *Id.* at 992.

125. Roger D. Blair & Jeffery L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 301–09 (1991).

126. *O'Bannon*, 7 F. Supp. 3d at 991.

127. *Id.*

128. *See* Muenzen, *supra* note 8, at 268–69 ("One of the primary distinctions made by courts between NCAA regulations is the commercial and noncommercial nature of various restraints. . . . Some courts have held that noncommercial restraints, such as those in the form of NCAA eligibility rules, are not subject to antitrust analysis.").

129. *See generally O'Bannon*, 7 F. Supp. 3d (stating only the NCAA mischaracterized the commercial nature of the transactions between schools and recruits).

determining the commercial/noncommercial nature of an alleged NCAA provision's violation of the Sherman Act. This is evident in one of the NCAA's preliminary arguments on appeal, that the NIL compensation provision did not regulate commercial activity.[130] While the Court of Appeals for the Ninth Circuit relied primarily on the Third Circuit's decision in *Smith* in finding a NCAA eligibility rule was noncommercial, the *Smith* opinion offers little insight into applying a concrete framework for finding a NCAA rule is commercial or noncommercial.[131]

In applying the *Adidas* test to the *O'Bannon* facts, the NCAA and courts can gain some important insight on whether any plausible arguments supporting amateurism rules will be fervent enough to remove an NCAA rule from antitrust scrutiny. The *Adidas* court approached the question of whether a challenged NCAA bylaw violated section 1 by first evaluating "the underlying purposes of the bylaw . . . and whether the bylaw confers a direct economic benefit on the NCAA."[132] Unlike the history of the provision in *Adidas* where the restriction on apparel manufacturers' logo sizes was meant to protect players from commercial exploitation,[133] the restriction on compensation for NIL licensure revenues in *O'Bannon* is not as clear on player protection in the CEM.

The *O'Bannon* decisions found the NCAA's compensation rules changed drastically over time much like its definition of amateurism.[134] In part, this change appears to be inevitable, given Division I FBS and men's basketball's commercialization in the era of nine-figure television and broadcasting market licensing revenues earned by the NCAA.[135] However, the NCAA's NIL compensation rules would not be able to overcome *Adidas*'s second prong of analysis, the conferring of a direct economic benefit to the NCAA.

The provision challenged in *O'Bannon* is a direct restriction of the commercial transaction between NCAA member schools and players in the CEM,[136] which is unlike the facially noncommercial provision challenged in *Adidas*.[137] Moreover, this particular prong of the *Adidas* commercial/noncommercial analysis proves the most detrimental to the NCAA's amateurism argument because the NCAA would have difficulty arguing the provision fails to provide a direct economic advantage—particularly the over $700 million in television and marketing licensing revenues for Division I FBS football and men's

130. *Id.* at 1064–65.

131. *See* Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 185–87 (3d Cir. 1998) (stating generally the NCAA's eligibility rules are not related to commercial or business activities, but offering no additional analysis of the rule at issue).

132. Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1285 (D. Kan. 1999).

133. *See id.* at 1286 (explaining the NCAA bylaw promotes amateurism principles by protecting commercial exploitation, preventing schools from using student-athletes to gain advertisement revenues, and avoiding excessive advertisement distracting from the utilitarian purpose of the players' uniform).

134. *See* O'Bannon, 7 F. Supp. 3d at 1000 ("[T]he NCAA has revised its rules governing student-athlete compensation numerous times over the years . . . [T]he NCAA does not consistently adhere to a single definition of amateurism."); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053–54 (9th Cir. 2015); *see also* Muenzen, *supra* note 8, at 259–62 ("The definition of amateurism has changed over time . . . [T]he NCAA's definition of amateurism deserves challenge primarily because of the presence of economic objectives in intercollegiate sports that conflict with the amateur ideal.").

135. *O'Bannon*, 7 F. Supp. 3d at 1000.

136. *See id.* at 988–89 (quoting Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012)) ("The Seventh Circuit recently observed these 'transactions between NCAA schools and student-athletes are, to some degree, commercial in nature . . . .'").

137. Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999).

basketball.[138] Legal scholars offer strong support for viewing the NCAA's amateurism restrictions on player compensation for NIL licensure as commercial activity, and this activity should fall squarely under antitrust scrutiny.[139]

IV. RECOMMENDATION

While the *O'Bannon* courts did not apply the *Adidas* commercial/noncommercial standard in its decisions, courts in future antitrust challenges to NCAA rules should address the nature of the rule by looking at whether the restraint in and of itself is commercial. However, this likely would not spell the end of amateurism for the NCAA. Allowing the smoke to clear may help put the *O'Bannon* decisions' effect on the NCAA's amateurism defense in some perspective.[140] Although some commentators on the topic are planning the funeral for the NCAA's definition of amateurism and predicting the "crushing" effect on the NCAA itself,[141] the *O'Bannon* decisions offer some support to the NCAA's desire to protect the commercial exploitation of college athletes through its amateurism model.[142] The *O'Bannon* appeallate decision, while highlighting the NCAA's lack of adherence to its own definition of amateurism historically, refused to cross the line of allowing even minimal payments to student-athletes.[143] The most important point to glean from the *O'Bannon* decisions as a whole is the decisions only limits the NCAA's commercial restrictions on players' NIL compensation up to the full cost of attendance while giving appropriate deference to the Supreme Court's reasoning that amateurism remains a justifiable procompetitive means. The *O'Bannon* decisions are not an endorsement of paying college players, but simply put, the decisions only prevent NCAA regulations that limit player compensation in violation of antitrust laws when it comes to the CEM and noting NCAA regulations are subject to full antitrust scrutiny under the rule of reason.[144]

The court should first evaluate the impact the *O'Bannon* decisions have on the

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138. *See* STATISTA, *supra* note 13 ((stating that in 2010–2011, 80% of the NCAA's earnings—roughly $700 million—came from television and marketing of college football and basketball).

139. *See* Kreher, *supra* note 110, at 77 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 262a (2d ed. 2000)) ("[C]onsistent with existing case law, there should be a strong presumption of commercial activity if 'the antitrust defendants are likely to receive direct economic benefit as a result of any reduction in competition in the [relevant] market . . . .'").

140. *See* Michael McCann, *What Ed O'Bannon's Victory Over the NCAA Means Moving Forward*, SPORTS ILLUSTRATED (Aug. 10, 2014), http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights (discussing how the *O'Bannon* court's decision only has a limited effect on the NCAA's restrictions on player compensation, and the effect would not have the sweeping implications many commentators perceived).

141. *See* Stewart Mandel, O'Bannon *Ruling Deals Crushing End to Amateurism in NCAA Athletics*, FOX SPORTS (Aug. 9, 2014, 12:08 AM), http://www.foxsports.com/college-football/story/o-bannon-decision-deals-decisive-end-to-amateurism-in-ncaa-athletics-080814 ("Wilken delivered a decisive and crushing end to the era of amateurism in college athletics and in doing so, opened the door for even more drastic attacks on the organization going forward.").

142. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 984 (N.D. Ca. 2014) ("Allowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes.").

143. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1078–79 (9th Cir. 2015) (stating that "[o]nce that line is crossed, we see no basis of returning to a rule of amateurism and no defined stopping point").

144. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1008–09; *see also O'Bannon*, 802 F.3d at 1055 ("[W]e reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason.").

NCAA's amateurism model. Looking closely at the *O'Bannon* decisions, the courts' decisions to compensate players for NIL licensing revenues does not impair the NCAA's amateurism model moving forward. While the *O'Bannon* courts allow schools to compensate players for revenues generated from their NIL to comply with federal antitrust laws, the court still allows the NCAA to restrict player compensation up to an individual school's full cost of attendance value.[145]

Even though the *O'Bannon* decision on appeal found the NCAA's NIL compensation rule constituted a regulation of commercial activity, future courts should apply the *Adidas*' commercial/noncommercial framework to the challenged provisions. This could possibly be beneficial to the NCAA moving forward by providing insight in restructuring the NCAA's amateurism requirements and supporting the NCAA's amateurism restrictions in pending litigations. The NCAA should consider restructuring its NIL compensation provisions to fit squarely into the *Adidas* framework. The *Adidas* court is clear about classifying whether an NCAA provision is commercial or noncommercial. This distinction is important, along with the Sherman Act requirements, to determine whether an antitrust violation occurred. The NCAA moving forward, between both the *Adidas* and *O'Bannon* decisions, has a new roadmap to rewrite its requirements for players to fit into its amateurism model without violating antitrust laws. A strong point, which the *Adidas* court noted, is that even if an NCAA provision has some level of commercial effect, an NCAA amateurism driven provision could still pass muster through an antitrust challenge if it classifies as noncommercial.[146]

The *O'Bannon* decisions could also be damaging to parties challenging the caps on player scholarships. Essentially, the *O'Bannon* courts gave the NCAA a blueprint to restrain player compensation within the CEM and avoid antitrust violation because the court only allows a lessened restraint on player compensation. The NCAA should design its player eligibility provisions on whether the provision gives it a "commercial or competitive benefit" in the CEM and imposes an anticompetitive effect. Thus, a provision that may impose some commercial restraint on student-athletes could be upheld if the purpose does not create an unfair economic benefit for the NCAA. In the end, the *O'Bannon* decision, although it deals a blow to the NCAA's amateurism defense, may not have the sweeping effect that the NCAA fears.

Finally, the *Adidas* court provides a basic commercial/noncommercial framework for the NCAA to follow, which, if applied independently, could render the fear of future antitrust challenges moot and benefit the overall structure of the NCAA's amateurism model. Specifically, the NCAA should apply the *Adidas* commercial/noncommercial framework to each provision in its amateurism model and make substantive changes accordingly—analyzing whether a potential antitrust violation could likely arise. The *O'Bannon* district court made this same assertion in its decisions providing only a limited

145. *See O'Bannon*, 7 F. Supp. 3d at 982–83 ("A stipend capped at the cost of attendance would not violate the NCAA's own definition of amateurism because it would only cover educational expenses.").

146. *See* Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999) ("[U]nder the foregoing test, Adidas must show that the NCAA or its member institutions are likely to receive a direct economic benefit as a result of the enforcement of . . . [its] restrictions. . . . Furthermore, if [an NCAA bylaw] places any restraint on [a] market, [the commercial restraint] is an incidental by-product of the NCAA's legitimate attempt to maintain the amateurism and integrity of college sports, and it does not economically benefit the NCAA or its member institutions.").

remedy through their antitrust challenge.[147] Given the rising number of challenges to the NCAA's current approach to amateurism in college athletics, substantive reform could only serve to preserve the primary mission and purpose of the NCAA.

V. CONCLUSION

Without change to the current NCAA provisions restricting player compensation for NIL revenues, future antitrust attacks to the NCAA amateurism model will continue. The *O'Bannon* decisions, although not dealing a knockout blow to the NCAA amateurism model, chip away at the strength of the amateurism defense in a number of related cases. The *Adidas* commercial/noncommercial test provides a clear framework for courts to apply in future Sherman Act challenges of NCAA provisions. Additionally, the NCAA can utilize the *Adidas* framework in developing amendments to the amateurism model, such that the history and pride of collegiate sports can continue to be part of our nation's great pastimes.

147. *See O'Bannon*, 7 F. Supp. 3d at 1009 ("It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here. Such reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress. Be that as it may, the Court will enter an injunction, in a separate order, to cure the specific violations found in this case.").