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Journal of NCAA COMPLIANCE

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NCAA Adds, Then Modifies, Certification Requirements for Agents

By Doriyon C. Glass, of Jackson Lewis

In 2018, in response to a federal investigation into alleged corruption, the NCAA established the Commission on College Basketball to fully examine critical aspects of Division I men's basketball.

Among its recommendations, the Commission said student-athletes should be permitted to declare for the NBA draft but maintain their college eligibility if not drafted. This rule modification would replace the draconian rule that required student-athletes to remove their names from consideration for the NBA draft within 10 days of participating in the NBA combine or lose their remaining NCAA eligibility.

The Commission also recommended that student-athletes be permitted to receive "meaningful assessments of their professional prospects earlier" with the assistance of NCAA-certified agents.

In line with the recommendations, in August 2018, the NCAA announced a series of rule changes allowing male student-athletes to declare for the draft then return to college basketball if not drafted, as well as allowing them to be represented by National Basketball Players Association (NBPA) and NCAA certified agents.

The process and criteria for NCAA agent certification was not yet established, therefore, NBPA-certified agents were permitted to represent these athletes in the 2019 draft. The NCAA noted that the agents were required to become NCAA-certified no later than Aug. 1, 2020.

However, on Aug. 5, 2019, the NCAA launched its Agent Certification System and issued a memo to NBPA-certified agents explaining that they must become NCAA-certified to represent male athletes who wish to maintain their college eligibility. Available only through Sept. 30, 2019, the NCAA certification was in addition to the NBPA certification program and accordingly has its own requirements.

Initially, to be eligible to become an NCAA-certified agent, candidates were required to meet the following criteria:

- Have a bachelor's degree or are currently certified and in good standing with the NBPA;
- Have NBPA certification for a minimum of three consecutive years;
- Maintain professional liability insurance;
- Complete the NCAA qualification exam; and
- Pay the required fees ($250 application fee and $1,250 annual certification fee).

Following the announcement of these criteria, the NCAA faced immediate criticism, especially in relation to the first requirement — led by LeBron James and his reference to the NCAA rule requiring a bachelor's degree for NCAA certification as the "Rich Paul Rule," after his agent who does not have a bachelor's degree. The NCAA amended its rule within a week, noting that it had been "made aware of several current agents who have appropriately represented former student-athletes in their professional quest and whom the National Basketball Players Association has granted waivers of its bachelor's degree requirement."

Although the bachelor's degree requirements received most of the attention, agents also voiced concerns about requiring three years of NBPA certification as a basis for the NCAA certification. The NCAA did not make any amendments to this requirement and there is only one exception to the three-year NBPA certification requirement. The exception applies only to agents who represented a student-athlete in the 2019 draft who subsequently returned to college. They may continue to represent that same student-athlete, even if they have not been NBPA-certified for three years, so long as they meet all other requirements. ●

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UNC-Greensboro Continues to Struggle With NCAA Rules

By Stephanie Scamman & Jeff Birren, Senior Writer.

A scant four years ago, the NCAA sanctioned the University of North Carolina at Greensboro ("UNCG") for rule violations. This included a failure by the school to monitor both its initial eligibility process and squad list requirements, and that led to the improper eligibility certification of 57 athletes in 13 separate sports. The school also failed to require the athletic director or head coaches to review and sign squad lists, and the school failed to keep those lists on file (NCAA News Release, "UNC Greensboro improperly certified student-athletes" June 25, 2015). The school was consequently put on probation for two years, vacated wins in which ineligible athletes had competed, and was fined $5,000. The athletic department failed the school. Unfortunately, it did not learn its lesson.

In July 2019 the NCAA and UNCG announced that it had resolved yet another set of rule violations that began at least as early as 2017. This time the offenses included both gambling on college sports by two members of the athletic department, and a failure by six other athletic department employees to report that activity when the learned about it, a failure by a seventh employee who unduly delaying reporting the violations, and a suppression of that information when it was initially disclosed. UNCG negotiated a resolution with the NCAA, agreeing that it would go on probation for three years, pay a $15,000 fine, be publically reprimanded and censured, and take a number of internal steps to prevent this in the future (Negotiated Resolution, The University of North Carolina at Greensboro—Case No. 00951 ("Resolution") (July 25, 2019)). For most of the individuals involved, the penalties were far more severe.

Not So Anonymous Gamblers

The NCAA Gambling Rules: NCAA rules are often described as "Byzantine" (Theatlantic.com, Stephen A. Miller, "The NCAA Needs To Let Someone Enforce Its Rules" "…consistent enforcement of its byzantine rules is not one of them" (9-12-12); ScarinciniHollenbeck.com, Anthony R. Caruso, "Taking A Look At NCAA Transfer Rules," "…Some might describe these NCAA transfer rules as Byzantine in their complexity…" (11-22-15)). Perhaps, but the NCAA rules clearly prohibit gambling on sporting events.

Rule 10.02.1 Sports Wagering, defines sports gambling as "placing, accepting, or soliciting a wager (on a staff member's or student-athlete's own behalf or on the behalf of others) of any type with any individual or organization on any intercollegiate, amateur or professional team or contest." The rule includes a non-exclusive list of examples of such bets, including the use of a bookmaker, internet bets, fantasy league bets where an entry fee is required or parlay boards.

Rule 10.3 mandates that an institution's athletic department staff and nonathletic department staff members who have responsibilities within or over the athletic department "shall not knowingly participate in sports wagering activities." Rule 10.4 in turn serves notice that collegiate staff employees who are found to have violated that rule shall be subject to disciplinary or corrective action…"

NCAA rules also place responsibility of enforcement of the rules, and reporting violations of the rules, squarely on each school's president or chancellor. "It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The institution's president or chancellor is responsible for the administration of all aspects of the athletics program, including approval of the budget and audit of all expenditure" (Rule 2.1.1). Each school is required to monitor the conduct of its athletic programs "and to identify and report to the Association instances in which compliance has not been achieved" (Rule 2.8.1). That rule also imposes a duty on each member to "fully cooperate" with the NCAA in this regard, and the school is responsible for compliance.

Finally, Rule 10.1 bluntly states that it is unethical conduct for such an employee to refuse "to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual's institution."

Thus athletic department members may not gamble on sports and they have a duty to report such violations to the school's president or chancellor, since he or she is responsible to the NCAA for enforcing the rules. That, it would seem, is clear.

UNCG's Miscreants: By far the largest gambling offender was assistant women's basketball coach Phil Collins. Collins, an Australian, came to the U.S. to play college basketball, and spent his last three collegiate years at North Alabama, earning a degree in psychology. He was then an assistant coach at the University of Albany for a year. From there he returned to Australia where he coached for several years. In 2016 he came back to the U.S. as an assistant coach for the women's basketball team at the UNCG, working primarily with the low post players.

The other identified gambling offender at UNCG was Brian Sturgeon, the then assistant director of the Spartan Club, the school's non-profit athletics fundraising organization (AP, "Former UNCG assistant gets penalty for gambling" (7-25-19)). Neither gambler was identified in the NCAA Report however both men's positions at the school were identified, but left when the report was released.

Gambling on Games: Collins was gambling on sports by August 2017 (Resolution at 3). He subsequently agreed with the NCAA "that from August, 2017 through

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May 22, 2018" he was violating NCAA rules by participating in sports wagering (Id.). Collins admitted "that he wagered extensively on intercollegiate and professional sports," that he even had gambled on four single-game wagers "on games involving the institution's men's team," that "he included games involving the institution's men's basketball team in approximately 10 parlay wagers" and that "his sports wagering resulted in losses between $20,000 to $30,000" (Id. at 4).

Sturgeon also admitted his gambling activities to the NCAA. This included gambling on sports from December 2017 through April 2018. He stated that "on average, he made five or less wagers a week on a website and that the total amount wagered each week was $20 or less." At "least one wager on a game" involved "the institution's men's basketball team" (Id. at 3). His deposit and withdrawal history from the gambling website listed a $20 deposit into the account with no withdrawals" (Id., fn. 6).

Despite the very clear duty on the staff to report such violations, "six athletic department staff members knew that the assistant coach participated in sports wagering" and "they each failed to report the violations" (Id. at 3). Nothing indicates how those six learned of Collins' gambling: whether he told them or overheard him, or they saw it, or saw it on his computer, or learned in some other fashion. That is a large group to expect to remain silent, but in fact it did (Id.). A seventh member of the athletic staff also learned that Collins was gambling and chose to remain silent at the time (Id.). For the gamblers in the short run at least, things were copacetic, but not for long.

Exposure: For the gamblers and the staff members that were in on the secret, seven proved to be an unlucky number. In either December, 2017 or January 2018, the seventh knowing staff member reported the gambling violations to the compliance director (Id.). Yet that person did nothing and the gambling activities continued until May 22, 2018 (Id. at 3/4). On that day, "the then director of women's basketball operations disclosed to the head women's basketball coach that she knew the assistant coach places sports wagers. As a result, the institution commenced an internal investigation. Later, the institution and the (NCAA) enforcement staff conducted a collaborative investigation" (Id. at 1).

The Results of the Investigation

NCAA Violations: The parties at play here are UNCG's now former assistant women's basketball coach Collins, UNCG's former assistant director of the school's non-profit athletic fundraising organization, Sturgeon, and UNCG. (Id. at 1). Each party acknowledged their misconduct, leaving none of the violations in dispute. All parties agreed the "sports wagering activities detailed in this case are a severe breach of well-known and established NCAA core principles" and the party's actions "seriously undermined and threatened the integrity of the collegiate model" (Id. at 2).

From August 2017, to May 22, 2018, "the assistant coach" (Collins) knowingly "participated in impermissible sports wagering activities" violating numerous NCAA Manual Bylaws. (Id. at 1 & 3). As described above, during that time, he placed "an extensive number" of online bets, bidding on both professional and intercollegiate games of which at least four single game wagers and about 10 parlays were placed on the UNC men's basketball team (Id. at 3). The assistant coach garnered additional violations when he "refused to provide requested documentation regarding his involvement in violations of NCAA sports wagering legislation" thereby failing to cooperate with an NCAA investigation (Id.). The assistant coach completed initial interviews, only later refusing to cooperate.

The "assistant director" (Sturgeon) was also knowingly engaged in "impermissible sports wagering activities," but with less frequency; placing at least one single wager on a UNC men's basketball game. The NCAA only discovered the assistant director's sports wagers because the assistant coach reported him.

UNCG was guilty of violating the "NCAA principle of rules compliance when it failed to monitor and report the assistant coach's participation in sports wagering activities and to ensure compliance with NCAA legislation" (Id. at 3). After all, an astounding six UNC's athletic department staffers knew the assistant coach was engaging in sports wagering activities but failed to report the misconduct. It was not until the seventh staff member, who initially held it a secret for four months, learned of the coach's wagers and informed the assistant director for compliance. Yet that individual swept under the rug. Eventually, it was disclosed to the women's head basketball coach, and she immediately informed the appropriate authorities in May and then things took off in an accelerated fashion.

UNCG Penalties: UNCG acted with alacrity once the violations were revealed. Collins was "separated" "from employment effective May 31, 2018, for engaging in sports wagering activities" (Id. at Appendix 1). Sturgeon was likewise "separated" "from employment effective June 11, 2019, for engaging in sports wagering activities and failing to report his knowledge of (Collins') sports wagering activities" (Id.).

The assistant director of compliance was also subsequently "separated" from employment on October 25, 2018 (Id.) "for "failing to investigate the assistant coach's sports wagering when reported to compliance and failing to report said reports to other institutional officials" (Id.). The director of

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NCAA Transfer Rules: The Struggle for Power in College Athletics

By Eric Kramer, Troy University and Michael S. Carroll, Troy University

Abstract

The National Collegiate Athletic Association (NCAA) advocates for the well-being of student-athletes through a variety of efforts designed to reflect its core mission and priorities. One significant role of the NCAA is to facilitate the governance and legislative needs of its member institutions. One area of legislation that directly impacts the well-being of student-athletes is transfer requirements. Such requirements can often place restrictions on when and where a student-athlete may be eligible to compete in their sport immediately upon transferring to another NCAA member institution. These restrictions can be particularly harsh to the revenue generating sports that the NCAA and its member institutions so heavily rely upon to fund their operations. This paper will focus on NCAA transfer legislation from a historical and legal perspective, while also providing a logical and all too familiar, solution.

Introduction

Free agency is the term that some in the national media use to describe the current state of transfer regulations within the NCAA's primary revenue generating sports (Murphy, 2019; Rittenberg & VanHaaren, 2019). Conversely, an equally, if not more frequent, public point of view argues that the NCAA's transfer rules continue to be inherently unfair to the well-being of student-athletes (Nocera, 2016). In addition, the legality of such transfer rules has been challenged both in the courts and through published writings. In order to comprehensively examine the issue, both sides of the argument must be addressed, as well as consideration of continued legal challenges to NCAA transfer regulations. However, it would be ill-advised to proceed without first providing appropriate context

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regarding the NCAA and its key functions within college athletics.

NCAA Overview

As the main governing body of collegiate athletics in the US, the NCAA contains over 1,100 collegiate institutions and provided athletic opportunities to 492,000 student-athletes across three divisions during the 2016-17 academic year ("NCAA Recruiting Facts," 2018). Priorities of the NCAA include promoting student-athlete well-being and protecting the collegiate model for amateur athletics ("Office of the President," n.d.). What is not revealed in those priorities is a motive to generate revenue. However, for the 2017 fiscal year, the NCAA reported a net revenue of $1.1 billion (Axson, 2018). Many of the NCAA's harshest critics would claim that their operation is much more akin to professional athletics than the beacon of amateurism professed within the organization's constitution. The dichotomy of the NCAA's priorities and enhanced commercialism of sports such as basketball and football have led to staunch criticism (May & Seifried, 2012).

One such criticism is the approach that the NCAA takes in certain aspects of its governance of collegiate athletics. For example, the NCAA espouses strong academic requirements for student-athletes through implementation of initial-eligibility standards, progress toward degree requirements, and on-going tracking of overall team academic success, as measured through the Graduation Success Rate (GSR) and Academic Progress Rate (APR). Teams that fall short of NCAA standards for these scores can become ineligible for postseason play (Wolken, 2017). However, the expansion of year-round countable athletically related activities (CARA) and increased travel associated with larger geographical footprints in newly formed athletic conferences seems contrary to this focus, as it results in more class absences by student-athletes (Carter, 2017).

Another example of alleged hypocrisy within NCAA governance involves the very foundation on which the organization rests – Amateurism. Commonly referred to as the "bedrock principle" of college sport, amateurism can be traced all the way back to the original 1906 NCAA constitution, which stated that eligibility of student-athletes was contingent upon them not having received any money or other consideration for their athletic endeavors (Freedman, 2003). NCAA bylaw 12.01.1 specifies athlete eligibility and amateurism, stating "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport" (NCAA Manual, 2019, p. 60). Furthermore, NCAA bylaw 12.01.2 clearly specifies that student-athletes represent an integral part of the student body, "thus maintaining a clear line of demarcation between college athletics and professional sports" (p. 60). At its core, amateurism prohibits the paying of student-athletes, caps the maximum grant-in-aid package a student-athlete may receive, and restricts student-athletes from signing with an agent (Konsky, 2003). The construction of the amateurism principle has instigated a myriad of restraints placed on student-athletes not seen in the general student body. Despite a long history of legal battles, courts have generally deferred to the NCAA and protected the NCAA's tradition of amateurism, finding that NCAA bylaws fulfill a legitimate business purpose and have procompetitive effects (e.g., *Gaines v. National Collegiate Athletic Association*, 1990). As recently as 2016, the Supreme Court of the United States denied certiorari to *O'Bannon v. NCAA* (2015), not wanting to hear the case. While one can certainly

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understand some procompetitive effects of amateurism in college sport, it is difficult to reconcile the staggering revenue produced by big-time college sport in the US and still refer to those producing that revenue as amateur athletes. Increasing commercialism of college athletics and the NCAA's desire to keep its grip on managing the product under the guise of amateurism is becoming increasingly challenged with respect to public perception and perhaps in the courts. Therefore, it is inevitable that significant changes impacting the function and structure of the NCAA are on the horizon.

NCAA Transfer Rules

The NCAA bylaw 14.5.1 sets forth the basic transfer rule that applies to all transfer student-athletes, regardless of previous institution, and states, "[a] student who transfers to a member institution from any collegiate institution is required to complete one full academic year of residence at the certifying institution before being eligible to compete for or to receive travel expenses from the member institution, unless the student satisfies the applicable transfer requirements or qualifies for an exception set forth in this bylaw" (NCAA Manual, 2019, p. 187). A student-athlete's transfer profile, however, can impact transfer requirements and guidelines.

If a student-athlete is transferring from a two-year college, often referred to as a community college or junior college, there is a separate set of requirements to be eligible for financial aid, practice, and competition immediately upon transfer. As an example, NCAA bylaw 14.5.4.2.1 sets forth the requirements in such a case for non-qualifiers. A non-qualifier is an initial eligibility designation specified by the NCAA for a student who did not graduate from high school or did not satisfy the necessary core GPA or ACT/SAT test scores to be deemed a qualifier out of high school (NCAA Manual, 2019). In order for a non-qualifier two-year transfer student-athlete to be immediately eligible for competition at a Division I four-year destination school, the student-athlete needs to have (a) graduated from the two-year college, (b) successfully completed a minimum of 48 semester or 72 quarter hours of transferable-degree credit toward a baccalaureate degree at the certifying institution, including the necessary credits for English, math, and natural/physical science, (c) been in attendance at the two-year college as a full-time student for at least three semesters or four quarters, and (d) hold a cumulative 2.50 GPA. (NCAA Manual, 2019). In addition, transfer student-athletes entering their third year of collegiate enrollment must also fulfill percentage of degree requirements upon transfer, per NCAA bylaw 14.4.3.2 (NCAA Manual, 2019). For instance, a transfer student-athlete beginning their third year of enrollment would be required to have completed at least 40% of the course requirements toward their specific degree program in order to be eligible to compete.

Two-year transfer regulations are primarily focused on academic achievement at the previously attended two-year college(s). Although two-year transfer regulations are rather complex, the transactional nature of the rules do not lend themselves to the scrutiny found within four-year transfer regulations. If a two-year transfer student-athlete meets the academic requirements set forth within the rules, they are generally able to compete immediately upon transfer. Four-year transfer requirements extend beyond academic achievement, which has led to some contentious battles in the courts of law and the courts of public opinion.

Student-athletes that elect to transfer from one four-year school to another face separate guidelines and a different level of scrutiny than those transferring from a two-year school to a four-year school. Additionally, regulations for NCAA Division I, II, & III institutions are different, as well as the rules governing National Association of Intercollegiate Athletics (NAIA) institutions. Since much of the public and legal challenges regarding four-year transfers is focused on NCAA Division I institutions, it is the primary emphasis in this paper.

Historically, NCAA Division I member institutions maintained significant control over a student-athlete's ability to explore their opportunities to transfer to another four-year institution. This drastically changed with the implementation of the NCAA Transfer Portal in October 2018 (Rittenberg & VanHaaren, 2019). Since its inception, close to 2,900 Division I football student-athletes have submitted their names to the portal (NCAA Transfer Portal, 2019). The portal has replaced the permission to contact process, which previously required NCAA Division I and II institutions to request permission, usually via e-mail, from another institution prior to contacting a student-athlete about a potential transfer (NCAA Manual, 2019). Student-athletes are now able to request that their information be uploaded into the portal by their current institutions. Once they enter the portal, they are effectively free to receive inquiries from any institution about a possible transfer. The key change in this rule is the inability of institutions to restrict a current student-athlete from being added to the portal or inhibiting contact by other institutions for student-athletes in the portal, including an in-conference rival (NCAA, 2019).

The transfer portal seemingly sprung up following years of vocal criticism regarding NCAA transfer policies (Dodd, 2019). For example, student-athletes were required to sit out a year in residence, while students

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A Noisy Week of Quiet Period Activity Leads to Sanctions for Utah Men's Basketball

Self-reporting and history of compliance helped Utah avoid major penalties

By Jonathan Wynne

The University of Utah men's basketball program faces penalties for Level II violations stemming from a week of springtime recruiting that began with a simple calendar mistake. The week would evolve into a booster-funded impermissible official visit, although immediate self-reporting and substantial self-imposed penalties helped the University avoid major repercussions. A strong history of compliance also helped the school's situation. The punishments handed down still serve as an important reminder that a small scheduling mistake and insufficient communication can lead to major recruiting violations and penalties from the NCAA.

The Level II recruiting violations occurred during a one-week period in late spring of 2018. An assistant men's basketball head coach misread the recruiting calendar dates and arranged for impermissible activity during a designated quiet period under NCAA bylaw 13.02.5.4. This rule specifically forbids in-person off-campus recruiting contact and activities. Programs may still conduct these activities on campus. Acting on this mistake, the assistant coach evaluated a high school prospect at a two-year college in a neighboring state. The full Utah coaching staff then visited the prospect's high school the following day, also outside of Utah. This visit included contact with the prospect and his coach, contrary to bylaw 13.

Utah's troubles continued during this same week, when an associate head coach worked in conjunction with a local community college head coach to bring the prospect to Utah's campus for a visit. The coaches made a plan to have the community college pay for the prospect to visit its campus. They arranged that while the prospect was in the area, he would also visit the Utah campus. Crucially, Utah had exhausted its allotment of official visits by this time.

The interactions between the coaches of both institutions became the crux of the case. The respective coaches discussed visit timing, the activities Utah planned for the prospect, and arranged hotel reservations. Such activities can turn an outside coach into a booster in the eyes of the NCAA, and this is exactly what happened here.

The community college paying for the prospect to visit Utah transitioned the visit "official." Already at its official visit limit, Utah violated Bylaw 13 when the prospect arrived. The official nature of the visit resulted in additional violations when the community college coach and prospect visited Utah and the Utah staff knew of, and participated in, the contacts that occurred. Funding was also an issue in this case, as the money used to pay for what was an official visit came from an outside organization (the community college), rather than from the University.

The Buck Stops Here: Head Coach Responsible

NCAA legislation dictates that the head coach is essentially the captain of the ship. While the head coach must comply with every regulation, that person is also responsible for compliance from the entire program. A subordinate's violation in fact becomes the head coach's violation under Bylaw 11.

Utah's troubles started with a scheduling mistake and continued with an impermissible visit. The assistant's and associate coach's violations demonstrated compliance troubles that ultimately fell at the head coach's feet. The head coach took the assistant coach's word without checking the recruiting calendar or checking with the compliance office that the first off-campus evaluation was above board.

To Utah's credit, the head coach immediately reported the initial violation to its compliance officer. In the same conversation, the head coach discussed the upcoming prospect's upcoming visit to the University. However, the head coach failed to provide full details for the visit and thus failed to confirm that all circumstances of the visit complied with NCAA regulations. Based on what the head coach and compliance offer discussed, the visit was allowable. Based on what actually happened, the result was a booster-financed official visit, with impermissible contacts. The head coach's personal involvement and failure to monitor his staff's activities triggered Bylaw 11 violations.

Penalties

The case resolved via the summary disposition process after the NCAA and the university came to sufficient agreement of the facts and overall level of the case. The Committee on Infractions reviewed the case and initially proposed a two-game suspension for the head coach. The Committee walked the suspension back after an expedited penalty hearing, where the head coach successfully argued, and the Committee found, that the violations were unintentional, limited, and not indicative of systemic problems.

The University will now face two years of probation and a series of self-imposed penalties. In addition to a $5,000 fine, all four countable men's basketball coaches were prohibited from off campus recruiting for a five-day period in July of 2018. The

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Wilgus Discusses His Path to Success as a Compliance Pro

When Trace Wilgus was elected to the NAAC Board last spring, it sent a message to the outside world that the associate athletics director of compliance at Vanderbilt University had arrived.

No one had to convince his peers that Wilgus, who served on the NAAC Board as the Chair of the DI Reasonable Standards Committee for the past four years, was ready for the opportunity. They already knew.

Wilgus' career path has inspired that confidence. Prior to starting at Vanderbilt in October of 2018, Wilgus spent nine years in progressive compliance roles at the University of Texas at Austin, most recently as the assistant athletics director, athletics risk management & compliance services.

As for his academic background, Wilgus graduated from Purdue University with a bachelor's degree in finance. He then obtained a master's degree from the University of Louisville from its prestigious sports management program.

All of the above would serve as a solid foundation for his significant achievement in less than a decade in collegiate athletics. What follows is an interview with Wilgus, chronicling his path to success.

Question: *At what point did you know that working in the NCAA compliance area was something you wanted to do?*

Answer: I don't think anyone ever sets out to get into compliance in college athletics. You could ask twenty people this question and get fifteen to twenty different answers. I was a practice player with the women's basketball program during my undergraduate years at Purdue, and after developing a good relationship with the staff at the time, it was kind of my first eye opener to potential career opportunities in college athletics. My dad is a high school basketball coach, so I had that background, but knew coaching wasn't the exact path I wanted. It was a bit of trial and error for me while pursuing a graduate degree and

Trace Wilgus

various internship opportunities, but I eventually figured out that I enjoyed (the challenge of) working with coaches, and I'm not sure there is a department unit that works more closely with sport programs than compliance.

Q: *Who have been your major mentors?*

A: I don't know that I would say I have a "mentor(s)" in the traditional sense of the word, but I've been fortunate to develop a lot of great professional relationships with various people that I have been able to take things from–compliance administrators, head coaches, etc. I spent almost nine years at Texas, so it would definitely start there–Amy Folan, Lori Hammond, Blake Barlow. Candice Lee currently at Vanderbilt. Again, I've been fortunate to work for and with great people, but I've tried to be intentional about that as well.

Q: *You've lived in a lot of different areas during the past decade, how has that shaped you?*

A: I grew up in Indiana–in a basketball family nonetheless–so that always was and still is a big part of my background. But having my first full-time career opportunity coming at Texas–basically the state of Indiana for football–and getting to spend nine years there was pretty fortunate. To be really good at what we do, you better understand those two worlds (basketball and football) intimately, so that background definitely helped minimize my learning curve. It also gave me some immediate credibility when developing relationships with coaches–being able to speak their language, develop trust, etc.–so I was probably able to take on some responsibilities in those sports a bit earlier on in my career than one would normally get exposed.

Q: *What are the lessons learned as Chair of the DI Reasonable Standards Committee for the past four years?*

A: Our committee's charge is "…to establish "reasonable" norms to which all institutions should adhere when monitoring, providing education, and documenting an institution's compliance with NCAA rules..." We were intentional about ensuring our committee was diverse in every sense of the word because–getting to the biggest lesson learned–what is "reasonable" depends on the risks of your institution. Even being at a place like Texas–where I was predominantly during my time as chair of the committee–where you would expect to have the highest levels of monitoring, education, documentation, etc., sometimes other non-autonomy institutions would talk on our calls about things they were doing in two- or three-person shops and it exceeded what we were doing at Texas. And at the end of the day, that's fine–those issues just weren't areas of risk for us.

Q: *Vanderbilt is a Power Five school with an extraordinary emphasis on academics. What are the unique challenges in that?*

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university reduced in-person recruiting days from 130 to 113 for the 2018-19 academic year. Utah implemented a three-week ban on unofficial visits and complimentary admissions for men's basketball in November of 2018. The school also reduced the number of official visits by two for the 2018-19 recruiting cycle.

The associate head coach involved in the community college arrangement faced a show-cause order, involving a one-week suspension, attendance at the 2019 NCAA Regional Rules Seminar, and a restriction from any off-campus recruiting activities during July of 2019. The university was also disassociated from the community college head coach for one year. ●

Jonathan Wynne is a civil litigator with the law firm Lee, Myers & O'Connell in Boston, Massachusetts.

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A: The primary difference is it takes the talent pool of prospective student-athletes who could compete (athletically) at this level and squeezes it significantly. But our coaches and staff embrace the emphasis on academic excellence, don't believe the two–elite academics and athletics–are mutually exclusive, and use it to differentiate ourselves relative to peers/competition.

Q: *What advice would you give someone interested in a career in the NCAA compliance field?*

A: The cynic in me would say "don't" but I'm not there yet. Try different internships/opportunities to learn and expose yourself to as many areas as possible. And even if you take one and don't like it, great, that's progress–now you can cross it off the list. A lot of people also assume you need a J.D., but some of the best people I have worked with in this industry have varying educational backgrounds. And depending on what your end game is, I'm not sure there is a background that gives you a better foundation to become an AD than compliance–understanding how internal units operate, building relationships with coaches, communication skills, having difficult conversations, etc. ●

Judge Denies Athlete's Denial-of-Due-Process Claim

By Rachel A. Moore

A federal judge granted a motion to dismiss filed by Southeastern Louisiana University in a suit brought by a former volleyball player, who alleged the school's athletic department failed to provide due process concerning the non-renewal of her athletic scholarship.

Chloee Holden received an athletic scholarship from Southeastern's head volleyball coach, James Smoot, for the period of August 2016 to May 2017. Holden's athletic scholarship was renewed for the period of August 2017 to May 2018. In the fall of 2017, Holden and other teammates scheduled a meeting with Southeastern's Athletic Director, Jay Artigues, to discuss Smoot's alleged "emotionally abusive conduct."

Shortly after the scheduled meeting, Artigues notified Holden her scholarship would not be renewed and on Nov. 1, 2017, Artigues emailed Holden's mother stating the decision was final. Holden appealed the decision to co-defendant Justin Bice, but her request was denied. On Nov. 7, 2018, Holden filed suit in the 21st Judicial District Court for the Parish of Tangipahoa. The suit was filed collectively against Alejandro Perkins, Chair of the Board of Supervisors for the Louisiana System; John L. Crain, President of Southeastern University; Justin Bice; James Smoot; and Jay Artigues. The defendants removed the suit to federal court and filed a motion to dismiss under 12(b)(6) of the Federal Rules of Civil Procedure.

First, Holden claimed the defendants violated the due process clause of the United States Constitution under the Fourteenth Amendment because they failed to provide adequate notice and a hearing concerning the non-renewal of Holden's scholarship. The court notes to establish the due process clause, Holden must establish she was deprived of a protected property interest and the deprivation occurred without due process. The Supreme Court explained that under the due process clause, "protected property interest requires more than a person's abstract need, desire, or unilateral expectation of it; one must instead have a legitimate claim of entitlement to the property interest." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

In the present case, the court found that there is no protected property interest in a year-to-year scholarship. The fact that Holden's expectation her scholarship would be renewed because she did not violate Southeastern's Student-Athlete Code of Conduct or fail to meet the academic requirements does not constitute a claim in property interest. The court cited a Firth Circuit Court decision that "[t]he [United States Supreme] Court has not held college academic decisions implicate property or liberty interests, entitling a student to constitutional due-process protections ... our court has followed suit." *Smith v. Davis,* 507 F. App'x 359, 362 (5th Cir. 2013).

Even if there was precedent to support Holden's claims in property interest, the court found that since she was not barred from transferring and was invited back to attend school without a scholarship, Holden was not deprived of an education. The court stated that liability would only be imposed when a person's constitutionally secured rights were deprived, "not for breach of contract." *Braden v. Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981). Finding that Holden did not meet the requirements of her allegation, the court dismissed the claim.

Next, Holden alleged that the defendants failed to enforce the NCAA bylaws through the Southeastern athletic director which violated her Equal Protection Rights under the Constitution. Holden specifically quotes NCAA Bylaw 15.3.7 which states "a student athlete must receive written notice of a hearing opportunity if aid is reduced or cancelled during the period of award for any reason, or not renewed for the following academic year." Holden relied on the "class of one" theory because she did not claim to be discriminated against on the basis that she was a member of a particular class. According to the court, a "class of one" claim must prove "she was treated differently from others similarly situated and there was no rational basis for the disparate treatment." *Holden v. Perkins*, 2019 U.S. Dist. LEXIS 138071.

Holden alleged she did not receive notice or have a chance to be heard, despite the fact that the right was afforded to other student-athletes. However, Holden failed to reference any particular person, which the court found the lack of evidence was conclusory in nature and failed to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Holden further claimed the actions taken against her were vindictive, but again the court found otherwise. The email from Artigues to Holden's mother "suggests a rational reason why Defendants may have denied Plaintiff an opportunity for notice and a hearing prior to advising her of the decision not to renew her athletic scholarship." *Holden v. Perkins*, 2019 U.S. Dist. LEXIS 138071. Southeastern Louisiana University asserted the reason her athletic scholarship was not renewed was because of her athletic ability, her ability to be coached, her attitude, and her ability as a teammate. Therefore, the court also dismissed the equal protection claim.

Lastly, Holden urged the court to exercise supplemental jurisdiction over the remaining state claims in the event

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Why the NCAA Should Be Responsible for the Cost of a Division I Men's Basketball Scholarship

By Robert J. Romano, JD, LLM

On April 22, 2010, the National Collegiate Athletic Association (NCAA) reached a 14-year agreement, worth $10.8 billion (approximately $770 million annually), with CBS and Turner Broadcasting System wherein the two media companies received joint broadcasting rights to the NCAA Division I Men's Basketball Tournament known as March Madness. In April 2016, the NCAA and CBS/Turner extended their agreement for an additional eight years, through 2032, while increasing the payment from CBS/Turner to the NCAA by an additional $8.8 billion. The total amount the NCAA will receive this year from the broadcasting rights equals the 2019 installment amount of $804 million, together with the 'Advance to NCAA' amount of $7.5 million for a total realized gain of $811.5 million ($67.5 million is due, but is not realized, being held in escrow until 2025).

While the NCAA collects its annual multi-million dollar broadcasting rights fee, its member institutions, approximately 1,115 colleges and universities located throughout the United States, separately and individually award nearly $2.55 billion in Division I athletic scholarships. Of the 1,115 member institutions, 351 support a Division I men's basketball program. These 351 colleges and universities are allowed to offer up to 13 men's basketball scholarships,[1] with the total number of scholarships granted by Division I schools for the academic year 2018-2019, totaling 4,511. With the average cost of a Division I men's basketball scholarship being around $38,250 per year[2], the member institutions, separate and apart from the NCAA, individually paid out, on average, more than $497,250, and collectively, more than $174.5 million, to student-athletes to have them play basketball at their college or university for the 2018-2019 academic year.

Since the NCAA receives millions of dollars per year from CBS/Turner solely for the broadcasting rights to March Madness, (this dollar figure does not include ticketing, merchandising and branding, sponsorship, and other revenue generators associated with the event), should the NCAA be responsible for the cost of a Division I men's basketball scholarship and relieve its member institutions from the financial burden? Are the approximately 4,500 young men who receive Division I men's basketball scholarships receiving a fair value for their skills to participate at the highest level of college sports? If not, what would be a fair value for the student-athlete?

As stated, it is the individual member institutions, specifically the college and university athletic departments, that provide scholarships to young student-athletes and not the NCAA. This fact alone raises questions about the amount and method used by the NCAA in distributing the revenue from the CBS/Turner agreement. Instead of the current elaborate system wherein units are generated based upon tournament performance and a redistribution method that may or may not result in a conference team receiving an award, all money from broadcasting rights should be directed towards supporting the student-athlete. One way of doing this would be by eliminating the cost of granting Division I men's basketball scholarships from colleges and universities and instead making it the responsibility and obligation of the NCAA. The NCAA generates sufficient capital to cover this cost. Shifting scholarship costs to the NCAA would benefit the schools since they would be able to spend the saved money elsewhere. These savings could be reallocated to support worthy causes such as an athlete post-graduation fund, to promote women's sports and gender equity issues, or other forms of student enhancement. Combined with concerns about the cost of college tuition and the amount of debt students are burdened with, it is this author's opinion that the NCAA has focused too much of its attention on commercializing college sports and in so doing has failed in its primary obligation of supporting the student-athlete.

Note, however, that in order for a student-athlete to be eligible to compete at the college or university level, he or she must be deemed "an amateur" in accordance with how the term is defined by the NCAA. A student-athlete will lose his or her amateur status and will not be eligible for participation if any of the following occur:

- uses his/her athletic skill for pay in any form in that sport;
- accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- signs a contract or commitment of any kind to play professional athletics;
- receives a salary, reimbursement of expenses, or any other form of financial assistance from a professional sports organization based on athletic skill or participation, except as permitted by NCAA rules and regulations;
- competes on any professional athletics team even if no pay or remuneration for expenses was received, except as permitted by the NCAA;
- after initial full-time collegiate enrollment, enters into a professional draft; or

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1 http://www.scholarshipstats.com/average-per-athlete.html

2 Id.

Why NCAA Should Cover for Cost of a Div. I Basketball Scholarship

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- enters into an agreement with an agent."[3]

Article 15 of the NCAA Division I manual, in lieu of the above, permits a member institution to offer a student-athlete financial aid in the form of a scholarship so long as the scholarship terms comply with By-law 15.01.6 *Maximum Institutional Financial Aid to Individual*: "[A] n institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at the institution."[4] Additionally, any financial aid offered by a member institution will not violate By-law 12.2.1, supra, because 12.01.4 provides an exception for member schools: "A grant-in-aid administered by an educational institution *is not considered to be pay* or the promise of pay for athletic skill, provided it does not exceed the financial aid limitations set by the Association›s membership."[5]

Therefore, in accordance with the myriad of rules and by-laws implemented by the NCAA, the most a student-athlete can receive in exchange for his or her athletic talent is the value of a scholarship. For a Division I men's basketball player, that scholarship is worth, on average, $38,250 per year.[6] But is this amount reasonable? Is it enough to fairly compensate a Division I basketball player for his skills and talents, because in actuality, it is the talented student-athlete for whom the audience pays to watch? And most importantly, is it fair compensation based upon the revenue generated by the NCAA from its broadcasting agreement with CBS/Turner?

The NCAA maintains that it is and that (all) student-athletes are amateurs who should not be paid more than the worth of an athletic scholarship. NCAA president Mark Emmert has held firm that an education is well worth the efforts asked of student-athletes, calling a funded education a "game changer". Emmert was quoted saying, "[T]he game changer for a young person in life is that they get an education. We know that means they'll make a million dollars more than they would have otherwise."[7]

However, Emmert and the NCAA's position may be coming to an end. In March 2019, a federal district court found that the NCAA's position regarding "amateurism" is fundamentally flawed and its rules regarding student-athlete compensation violate federal antitrust law. In the case of *Alston v. NCAA,*[8] the district court found that the NCAA can no longer limit the scholarship packages offered to student-athletes and it must allow its member institutions the opportunity to offer their students education-related items. Educational-related items above the cost of a typical student-athlete scholarship, the district court found, include "computers, science equipment, musical instruments, art supplies, expenses for study-abroad programs, tutors, and other items not included in the cost of attendance but nonetheless related to the pursuit of academic studies."[9] Most importantly for antitrust reasons, the district court found that the defendant (NCAA) "did restrain trade in the relevant market" and its limitations on scholarships "produced significant anticompetitive effects."[10]

The federal district court's ruling does not force member institutions to change their student-athlete scholarship packages, nor direct them to pay traditional salaries; it holds that the NCAA may not be able to stop them from doing so. Interestingly, however, a reading of the district court's ruling does support the proposition that the student-athlete scholarship, $38,250 per year to a Division I men's basketball player, is not adequate compensation for those who compete at the college level.

Then what is the value of a Division I men's basketball player?

As a result of the court's ruling in *Alston*, what if the NCAA concedes that its concept of amateurism is 'fundamentally flawed' and its rules regarding student-athlete compensation violate federal antitrust law? What if a college or university decides to change its scholarship package, and how would it decide what is fair to a perspective student-athlete?

Member institutions may want to look to the professional sports leagues for assistance since within the various leagues there is a balance of equities as a result of collective bargaining. In the professional leagues there are two important concepts regarding player compensation that may lend guidance: 1) minimum salaries, and 2) equitable distribution of revenue. Each of the major U.S. sports properties has a set minimum salary that escalates for a player the longer he is part of the league. They also have a revenue-sharing structure, wherein league revenue is divided between the owners and the players, with the divide being on average around 50 percent each.

In the National Football League (NFL), as agreed upon by the NFL Players' Association through collective bargaining, an

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3 NCAA Division I Manual, Constitution Art. 12.1.2

4 NCAA Division I Manual, Constitution Art. 15.01.6

5 NCAA Division I Manual, Constitution Art. 12.01.4

6 http://www.scholarshipstats.com/average-per-athlete.html

7 https://www.deseretnews.com/article/865599978/Is-a-scholarship-fair-compensation-for-student-athletes.html

8 *Alston vs. NCAA,* Case 4:14-md-02541-CW Document 1162 Filed 03/08/19, U.S. District Court for the Northern District of California

9 Id.

10 Id.

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incoming rookie receives a salary of no less than $495,000.[11] Additionally, league revenue, which includes broadcasting rights fees, is divided and the players must share an average of no less than 47 percent.[12] The percentage does fluctuate, but has averaged around 48.5 percent. In dollar figures, the NFL owners share has been approximately $8 billion annually, with the players' share just under $8 billion annually.

In the National Basketball Association, per its Collective Bargaining Agreement with the Players' Association, its minimum rookie salary is $838,000 and a majority of revenue generated is classified as Basketball Related Income (BRI).[13] The BRI includes ticket purchases and concessions, broadcasting rights fees, and merchandising rights from jersey and apparel sales. In the NBA, as per their agreement with the owners, the players receive 51 percent of BRI.[14]

Using the professional model in determining a fair value for Division I men's basketball players, revenue received from the NCAA's agreement with CBS/Turner should be divided equitably with the student-athletes.

It is the author's position that the total amount the NCAA receives annually from the broadcasting rights with CBS/Turner for *March Madness*, including the 2019 installment amount of $804 million, the 'Advance to NCAA' amount of $7.5 million, and the escrowed amount of $67.5 million, even though not realized until 2025, (why should the current students be penalized and future students be rewarded), in following the model established by the professional sports leagues, should be equally divided between the NCAA and the 4,511 Division I men's basketball players. In light of such, the author proposes the following:

The NCAA will be responsible for the full cost of covering all Division I men's basketball scholarships, relieving its member institutions of this obligation.

Each member institution will retain control and decision-making power when deciding to whom it will offer a Division I men's basketball scholarship.

The NCAA will follow the professional sports league model and share the entire amount received from the rights fees with CBS/Turner per fiscal year including the installment amount, 'Advance to NCAA' amount, and the escrow amount. For the fiscal year 2019, the total amount of $879 million will be divided equally, with the NCAA retaining $439.5 million and the Division I men's basketball players retaining the balance of $439.5 million.

The NCAA will divide the balance of $439.5 million equally among all 4,511 Division I men's basketball players, with each player's share being $97,429.

From the $97,429 share, the NCAA shall be responsible for covering the cost of the student-athlete scholarships, an average of $38,250 per year (or the scholarship amount at each individual player's college or university). The balance, ($97,429–$38,250 = $59,179) will be held in trust/escrow for the benefit of the student-athlete and will become available to the student-athlete upon graduation or within one-year from the time the student-athlete leaves his college or university.

If the student-athlete decides to continue with his education, either to earn a bachelor degree or by enrolling in medical school, law school or other graduate program, the vested/escrowed amount will remain in trust, with proceeds being used to fund the student-athlete's continued education.

If a balance remains after graduation from a post-graduate program, the balance will become available to the student-athlete upon graduation or within one year from the time the student-athlete leaves his post-graduate program.

All amounts will increase annually at the same rate as the value of the NCAA's agreement with CBS/Turner.

For a Division I men's basketball player whose value to a team is considerably more than the $97,429 share, (Zion Williamson type of players), that athlete is entitled to additional compensation paid from other revenue-generating sources such as ticketing, merchandising, and/or in-season broadcasting rights fees.

All other intercollegiate sports shall follow this model. Example, money received from broadcasting rights to all FBS games and bowl games shall be pooled and distributed equally to all 11,350 Division I football players.

Therefore, the value of a Division I men's basketball player is $97,429 per year. ●

11 NFL/NFLPA Collective Bargaining Agreement, August 4, 2011.

12 Id.

13 NBA/NBPA Collective Bargaining Agreement, January 19, 2017. https://www.hoopsrumors.com/2018/06/nba-minimum-salaries-for-201819.html

14 NBA/NBPA Collective Bargaining Agreement, January 19, 2017.

Judge Denies Athlete's Denial of Due Process Claim

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the court dismissed her due process and equal protection claims. The court held that since Holden originally filed suit in state court and ended up in Federal court as a result of the defendants' actions, the Federal court would not hear the remaining issues. Moreover, the issues remaining after the dismissals were only state issues that could be resolved in a state court.

The court granted the defendants' motions to dismiss and remanded the case to the state court for further resolution. ●

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women's basketball operations and another assistant women's basketball coach were also "separated" from their employment "effective June 22, 2018 for failing to report their respective knowledge of the assistant coach's sports wagering activities" (Id.). Neither the NCAA or UNCG revealed the names of any of those fired, but the press identified Collins as the gambling assistant coach, Sturgeon as the gambling assistant director of the Spartan Club, Brooke Long as the fired director of women's basketball operations who knew of Collins' gambling but failed to report it and Asia Williams as the fired assistant women's basketball coach who knew of Collins' gambling and also failed to report it (*AthleticBusiness.com*, Andy Berg, "Greensboro Gets Probation, Fine Over Coach's Gambling" (July, 2019)).

NCAA Penalties: The assistant coach was issued a Level I-Aggravated Violation consisting of a15-year show-cause penalty. The show-cause penalty restricts the assistant coach "from all athletically related duties" until July 24, 2034, and gives the NCAA the ability to penalize any other collegiate institution that hires him until then (Resolution at 8). This, in effect, substantially eliminates the assistant coach's likelihood of working in the collegiate world ever again.

The assistant director faced a similar Level I-Aggravated Violation. "Based on the nature of the sports wagering," the assistant director received a 4-year show-cause penalty (Id.).

Unlike the assistant coach's and the assistant director's cases, UNCG's case received a mitigating classification. The NCAA took into consideration UNCG's "remedial measures and agreed that significant weight should be given to the: (1) Immediate and decisive actions by the Chancellor and director of athletics upon discovering the violations, (2) corrective actions enacted throughout the processing of the case; and (3) actions taken to ensure a prompt and quick resolution of the matter." Thus, the UNCG was issued the following Level I-Mitigated Violations: three years of probation, a $15,000.00 fine, and a public remand and censure (Id. at 5/6).

The NCAA also required that during UNCG's probationary period, the university has to "continue to develop and implement a comprehensive educational program" specifically on "NCAA sports wagering legislation" to all athletic faculty (Id. at 7). UNCG must provide the NCAA with a detailed schedule and annual progress reports of this plan (Id.) And to make sure the school's acts are not forgotten, UNCG must "inform prospect(s) . . . in writing that the institution is on probation for three years and detail the violations committed," as well as publish on its website, media guides, and alumni publication its violations with specific details of what occurred (Id.)

Conclusion

The NCAA's Zero Tolerance Policy: The NCAA is exhibiting zero tolerance policy on gambling. It severely punished both admitted gamblers, moreover, the law sides with the NCAA. So for those considering gambling, the dividends do not seem to add up. Betting on even one game is going to get one kicked out of a chosen profession, and the odds are that the gambling coach or administrator is not going to make enough money to retire. So one would need to bet a lot of money to make it even remotely worthwhile and the risks of getting caught and accruing losses only get higher.

Gambling As A Possible Uncontrollable Disorder: The fact that Collins was such an ardent and notorious gambler within the UNCG's women's basketball program suggests that he has or had compulsive gambling disorder. For one thing, he had to try to hide his gambling from his supervisors. He also admitted during the investigation, he lost between $20,000 and $30,000 dollars while gambling. So he continued to pursue an activity that was costing him money but one that jeopardized his entire chosen profession. As such, he might well qualify as one with the gambling disorder (www.mayoclinic.org.diseases-conditons/compulsive-gambling/symptons-causes; American Psychiatric Association, https://www.psychiatry.org/patients-families/gambling-disorder/what-is-gambling-disorder).

At least one law author has opined that "gambling disorder would qualify as a 'disability' under the ADA, were it not for the disorder's current statutory exclusion" (Kathleen V. Wade, "Challenging the Exclusion of Gambling Disorder as a Disability under the Americans with Disabilities Act" 64 Duke L.J. 947-89 (2015)) ("ADA"). The ADA is very direct in this regard. Disability "shall not include… (2) compulsive gambling…" (ADA, 42. U.S.C. 12211). Thus Collins may have had gambling disorder and thus been unable to control his need to gamble, risking his chosen profession, but in the U.S. at least, the law offered him no protection for this condition. Thus the NCAA can continue to severely punish discovered gamblers with nothing to fear from the ADA. The authors will leave it to others to decide if this condition should or should not be included in the ADA.

The 1919 Chicago Black Sox scandal severely tarnished major league baseball: Those involved were acquitted of criminal charges but were banned from major league baseball for life. Flash forward decades and it was manager Pete Rose who was also banned for life for gambling on baseball. College sports has often had to deal with basketball point shaving scandals, such as CCNY in 1950 or Tulane in 1985. The NBA once banned Jack Molinas for life for gambling (*Molinas v.* NBA, 190 F. Supp. 90 F. Supp.

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University of Illinois Faculty Claims University Violates NCAA Rule on Mascots

Faculty members at the University of Illinois at Urbana-Champaign have claimed that the university is violating NCAA rules regarding the use of offensive mascots. In a letter to the National Collegiate Athletic Association they wrote: "We have explored all known avenues within the University of Illinois to resolve these issues, yet they persist. We sincerely regret having to bring these violations to the NCAA, but we have no option but to refer this matter to you." Specifically, they cited the continuing use of a logo depicting Chief Illiniwek as well as the term "fighting Illini" in reference to athletic teams. They also charge the university continues to facilitate performances of the retired mascot at sporting events in blatant disregard of the NCAA's 2006 ban on using any "hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery."

Controversy Swirls About Whether Potential Contributions Played Part in UVA Recruiting

The Washington Post has reported a University of Virginia disclosure that some student-athletes were apparently recruited several years ago based on the possibility that their admission would result in financial donations to the school. Elaborating, the paper summarized the disclosure as follows: "fundraising goals might have compromised the sensitive process of athletic recruiting and admissions at the … university." Furthermore, the university revealed that some recruited athletes enrolled at the university, "but did not participate on their designated teams, for reasons that were unclear." UVA President James Ryan issued the following statement: "We have, however, taken remedial action where appropriate. We are also putting into place new procedures designed to strengthen our process for considering the admission of student-athletes and to adhere to best practices." Among the new procedures are that the university "will refrain from soliciting or accepting gifts from prospective student-athletes and their families during the recruiting and application process. The university said it will also:

- Independently verify information from coaches about recruited athletes.
- Audit team rosters to ensure recruits participate in athletic programs.
- Require student-athletes to pledge at the time of admission to participate in their designated sports programs. Admission offers could be revoked if student-athletes don't participate and UVA finds that their pledges were insincere.

Coach Resigns Amid Speculation He Violated NCAA Rules

Ohio State University women's basketball associate head coach Patrick Klein resigned in August amid speculation that an investigation into potential NCAA rules violations had been initiated. Klein wrote in a letter to the university that he had "not adhered strictly to NCAA rules." Further, "my communications with some student-athletes may have been too informal or in some cases even inappropriate, violating university policy." OSU confirmed the investigation with the following statement: "The university has notified the NCAA. … Klein was placed on administrative leave while the university investigates. Ohio State is working diligently to conclude its review of this matter." Klein began his tenure at the university in 2011.

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241 (S.D.N.Y. 1961), and this is barely a fraction of modern sports gambling scandals.

The reporting rules certainly presented the UNCG's women's basketball staff with a Hobson's choice. Those "in the know" either had to turn in a colleague, knowing it meant termination for that colleague as well as a potential life-long ban from that profession, or to remain silent and risk termination. Several of the coaches at UNCG chose that path and were terminated, but so was the person whose report caused the gamblers' house of cards to collapse. The NCAA's Resolution, albeit correct, does not seem to take into account this human part of the process.

It is hard to see how the NCAA can protect the integrity of its games if it was to lessen the penalties for gambling college sports officials. Until such time as the ADA were to give protection to admitted compulsive gamblers, the NCAA will severely punish those in college sports who gamble on games on the field or on courts, and such gamblers will not find protection in the law courts. ●

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NCAA Transfer Rules: The Struggle for Power in College Athletics

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from the general student body were free to transfer at any time and for any reason. Coaches were also allowed to freely leave for other coaching positions at other schools without penalty, and this often occurred after National Signing Day, leaving student-athletes "stuck" at their respective institutions. For example, Dodd (2019) reports that between December 2018 and February 2019, ten coaches left programs through firings, retirements, or taking other positions. Prior to the transfer portal, schools could effectively block transfers to destination schools of those coaches that left for other positions. Scholars have even likened NCAA transfer restrictions to non-compete covenants/clauses (Yasser & Fees, 2005). B. David Ridpath, president of the Drake Group, explained the NCAA's decision, stating that "[it] was forced because of public, media and legal pressure … It's easy for the NCAA to take a victory lap even though this should have happened years ago. It's a win for the athlete even though it does not go far enough" (Bauer-Wolf, 2018, para 2). Although conferences can still have some restrictions for intra-conference transfer, the creation of the transfer portal certainly loosened restrictions on student-athlete transfers in general.

Unlike two-year college transfers, the only way for a four-year transfer to compete immediately upon transfer is to meet the requirements of one of the legislated exceptions. There are a variety of exceptions for four-year transfers to utilize, including discontinued/non-sport, two-year non-participation, non-recruited student, etc., but most will not meet the requirements of such exceptions (NCAA Manual, 2019). The most commonly used exception is the one-time transfer exception. The one-time exception allows a student-athlete to transfer from a four-year institution one time in their college career without having to serve a year in residence before competing for their new institution, provided they are athletically and academically eligible at the time of transfer and the previous institution does not object to the student-athlete using this exception (Transfer terms, 2018). However, the one-time exception is only available to student-athletes who compete in sports other than baseball, men's or women's basketball, football (Football Bowl Subdivision), or men's ice hockey. The reasons for restricting transfers in those particular sports is interesting, and one in which we will examine closely in this paper.

We cannot discuss NCAA transfer regulations without addressing the graduate transfer exemption. Initially implemented in 2006, the NCAA allowed student-athletes who graduated with an undergraduate degree to transfer to another institution without having to serve a year in residence before competing, as long as they were seeking a graduate degree their current institution did not offer (McGrath, 2010). According to Greene (2019), only 15 student-athletes used this exemption during the 2010-11 academic year. The rule changed in 2012 to allow a graduate exemption for all graduate transfers, regardless of the degree program that the student-athlete planned to pursue at their new institution. This change has caused rapid growth in the graduate transfer market and led to 124 student-athletes utilizing the exemption this year (Greene, 2019).

If a student-athlete does not meet any of the transfer exceptions, their only remaining recourse within NCAA regulations is to seek a waiver. An NCAA waiver is traditionally meant to serve as a tool to supersede an existing rule based upon extraordinary circumstances out of the control of the student-athlete or egregious behavior by the previous institution. For the 2018-19 academic year, the NCAA's Division I Council altered the application of a transfer waiver for football student-athletes (Rittenberg & VanHaaren, 2019). Instead of using the threshold of extraordinary circumstances for a waiver, the NCAA was given the freedom to grant waivers "if there were mitigating circumstances outside the student-athlete's control while directly impacting the health, safety, and well-being of the student-athlete" (Russo, 2019, para. 7). There is data to suggest that the change made a difference. Of the 64 student-athletes who applied for a transfer waiver, 51 (79.7 %) have been approved (Rittenberg & VanHaaren, 2019).

The purported instability of the student-athlete transfer market due to that the transfer portal, graduate exemptions, and the relaxing of waiver standards created angst for many coaches across the country (Rittenberg & VanHaaren, 2019). In response to this concern, the NCAA Committee on Legislative Relief re-examined the transfer policies, including the recently revised waiver application guidelines (Murphy, 2019). As a result, four out of the 13 guidelines were altered for the 2019-20 academic year (Hosick, 2019). The key changes included requiring further proof for waiver claims that a student-athlete was "run off" by their previous institution, the NCAA providing a more specific set of circumstances related to egregious behavior of a staff member or student at a previous institution, and the requirement of additional documentation for transfers requesting to be closer to home due to an injury or illness inflicted on an immediate family member or the student-athlete themselves. In addition, the decision to re-insert the word extraordinary and adding the word extenuating to the standard waiver guideline language for the NCAA staff suggests that the NCAA has swung the pendulum back toward tightening transfer waiver policy.

In late 2018, the NCAA Division I

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Council met to discuss and introduce new legislation with respect to transfer waiver guidelines (Hosick, 2018). Two proposals sought to loosen transfer restrictions for student-athletes:

Allowing student-athletes who have enrolled in summer school and received athletics-based financial aid to transfer and play immediately if their head coach left the institution before the first day of classes for the fall term.

Allowing walk-on student-athletes on teams that provide athletics-based aid and non-recruited walk-ons to transfer and play immediately.

Two more seemed to increase transfer restrictions:

- Requiring schools to count financial aid for postgraduate transfers who receive athletics aid and have one season of eligibility remaining in football, women's basketball, and men's basketball against team limits for two years, regardless of whether they remained enrolled after exhausting athletics eligibility.
- Prohibiting student-athletes in all sports from competing during the championship season for two different schools in the same academic year.

In 2019, the Council adopted proposals one, two, and four but did not pass proposal three regarding financial aid counters past athletics eligibility (Hosick, 2019). These changes had the support of the Division I Student-Athlete Advisory Committee. These new developments from the NCAA highlight the challenges involved in this discussion and the struggle between various stakeholders involved. Through a legal challenge of the transfer regulations and a simple solution presented in this paper, such angst should be minimized.

The Legal Challenge

NCAA transfer regulations have been able to withstand various legal challenges. Cases such as *McHale v. NCAA* (1985) and *Collier v. NCAA* (1992) both pursued injunctive relief from transfer regulations, in part claiming a violation of the due process portion of the 14th Amendment of the United States Constitution. In the *McHale v. NCAA* (1985) case, the plaintiff challenged the NCAA transfer rule that would require him to spend a year in residence at the transferring school before being eligible to compete in football. McHale desired to transfer from the University of Maryland to Cornell University and be eligible to play football immediately. His transfer was solely due to academic reasons, and he was not recruited, nor did he receive any athletic aid at Cornell. Regardless of the mitigating circumstances, the NCAA indicated that he did not qualify for a waiver. Consequently, McHale filed a claim against the NCAA declaring that the NCAA's transfer rule violated both the Equal Protection Clause and the Due Process Clause of the 14th Amendment. The *Collier v. NCAA* (1992) case pursued a similar path in claiming that NCAA transfer rules violated due process rights contained within the Fourteenth Amendment. Collier wished to transfer from the University of Nebraska to Brown University and compete immediately in the sport of wrestling. Both cases were dismissed because the courts determined that the NCAA is not considered a "state actor" and thus could not be in violation of due process under the 14th Amendment. This reasoning stems back to the seminal Supreme Court decision in *Tarkanian v. NCAA* (1988). Jerry Tarkanian was the head men's basketball coach at the University of Nevada, Las Vegas (UNLV). Following a lengthy investigation, the NCAA Committee on Infractions (COI) found improper recruiting violations, including 10 directly related to Tarkanian. The committee imposed a number of sanctions on UNLV and made it clear more were imminent should UNLV choose not to suspend Tarkanian. Tarkanian thus sued the NCAA, alleging that he had been deprived of his 14th Amendment due process rights in violation of 42 USC § 1983 (*Tarkanian v. NCAA*, 1988). While he found success in a lower court, the Supreme Court found that the NCAA's conduct did not constitute "state action" and was not performed "under color of" law within the meaning of 1983. Under US law, a state actor is a person acting on behalf of a governmental entity and therefore subject to regulation under constitutional law, including the 14th Amendment, which prohibits the federal and state governments from violating certain rights and freedoms. Constitutional protections, however, do not regulate the conduct of private entities. The court reasoned that UNLV was the party that suspended Tarkanian and not the NCAA. Furthermore, the court reasoned that the NCAA has no powers to subpoena witnesses, impose contempt sanctions, or assert sovereign authority over an individual. As a voluntary athletic association made up with numerous institutions, the NCAA was deemed to not be a state actor and thus not subject to due process violations. This decision has historically served to shield the NCAA from allegations of constitutional rights violations in numerous cases.

Pugh. v. NCAA (2016) and *Deppe v. NCAA* (2017) were both cases against the NCAA in which plaintiffs claimed that NCAA transfer rules violate antitrust laws. Both lawsuits, however, failed because courts have generally determined that transfer regulations are considered procompetitive. In order to pursue an antitrust claim against NCAA regulations, there are three steps within the framework for a plaintiff to prove (Konsky, 2003). First,

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the plaintiff is responsible to show that the NCAA transfer rules can be considered a commercial act. The case of *Agnew v. NCAA* (2012) made it clear that any action involving high level intercollegiate football student-athletes would have significant economic impact for the institutions involved. This type of economic impact within recognized markets of major college basketball and football provide a clear picture of commercialization within the context of rules involving "big time" college sports (Baker, 2017). The second step requires the plaintiff to prove that the transfer rule is inherently unreasonable and thus considered anticompetitive within a specified market. The market that should be used to make this analysis is the student-athlete services market. There is a clear market for a student-athlete's athletic services to a university that is economically significant. The third step involves the analysis of the rule of reason. If the plaintiff proves the transfer rule causes an anticompetitive effect to the market, the defendant then must identify the procompetitive effects of the rule. If it is found that there are both procompetitive and anticompetitive benefits to the transfer rule, can there be an alternative solution that is less restrictive without completely eliminating the rule within the rule of reason? This is the fundamental question this article will attempt to answer.

This paper examines various cases and literature that provide reasoning to discredit previous legal rulings in the matter of NCAA transfer rules. We will examine the assertion that the NCAA should be subject to legal scrutiny through antitrust laws. Additionally, we will take a closer look at NCAA transfer rules and why the implementation of such rules should be considered a violation of the Sherman Act. Finally, we will provide a sensible solution to the transfer problem, and project the potential impact of such a solution.

In regard to legal proceedings involving the NCAA and its transfer regulations, the NCAA has received favorable rulings based on precedent from cases such as *NCAA v. Board of Regents* (1984) and *Tarkanian v. NCAA* (1988). A common component in both cases is that they are over 30 years old. During those 30 years the NCAA has transformed itself into a $1.1 billion-dollar annual revenue-generating commercial behemoth that does not resemble the once small association located in an unremarkable office building in Overland Park, KS. Just like the NCAA has evolved over the years, so must the legal analysis in association with their current status as an organization. One such issue that has suffered from arcane legal precedent is NCAA transfer regulations. This paper aims to re-examine that issue based upon a look at the NCAA as it currently operates, and how recent legal rulings may impact possible changes to transfer rules in the future.

Others have weighed in on the core issue of NCAA transfer rules and the antitrust implications that accompany such an issue. Konsky (2003), Jenkins (2006), May and Seifried (2012), and Blair and Whiteman (2017) have all supported the notion that the NCAA has been in violation of antitrust laws through their use of transfer regulations. While this paper will continue along similar lines, the dramatic change in NCAA transfer rules in recent years requires an updated examination of the issue.

Antitrust Law & the NCAA

This section is designed to review the positions outlined in various pieces of literature and examine relevant court cases in regard to antitrust law and its potential application to the NCAA. The first step to analyzing antitrust laws and the NCAA must be to clarify how the association's rules and regulations should receive sufficient legal scrutiny under the Sherman Antitrust Act (2004). "Section 1 of the Sherman Antitrust Act was created to authorize the Federal Government to dissolve trust or activities which unreasonably restrain trade by competitors who cooperate or conspire for their own economic benefit at the expense of others" (May & Seifried, 2012, p. 167). Prior to the U.S. Supreme Court decision in *NCAA v. Board of Regents* (1984), the NCAA had been considered immune to antitrust legal implications due to its nonprofit status and its mission to promote amateur athletics and academic achievement of its student-athletes (Fleisher, Goff, & Tollison, 1992). Although the Court's decision exposed the NCAA to legal scrutiny for antitrust cases, the Court also specified their decision was narrow in scope in relation to the NCAA's operations:

The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contests, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture (*NCAA v. Board of Regents,* 1984, p. 117).

It is this statement that has influenced future court decisions related to purported antitrust violations on behalf of the NCAA and its transfer regulations, since transfer rules are specifically related to a student-athlete's eligibility. However, there appears to be a shift in case law with some of the more recent court decisions.

While most of those court decisions do not look favorably on cases involving NCAA transfer rules, it should be noted that other recent antitrust challenges to the NCAA's operations have proved to be formidable. Most noteworthy is *O'Bannon v. NCAA* (2015), which resulted in the first federal court decision to render NCAA amateurism

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rules a violation of federal antitrust law via Section I of the Sherman Act. The NCAA illegally restricted revenue payments to student-athletes for the use of their name, likeness, and image (NIL) in videogames and game telecasts (Mitten, 2017). As a result, the Ninth Circuit in *O'Bannon v. NCAA* (2015) recommended that NCAA institutions be permitted to provide their student-athletes up to the full cost-of-attendance. This decision provided an alternative to the previous NCAA scholarship model by allowing for additional compensation to student-athletes but did not infringe upon the foundational principles of amateurism, as the additional compensation is still tied to educational costs (Mitten, 2017). The relevance of this case to this article is the court's acknowledgement that NCAA amateurism rules are subject to antitrust laws, and the application of the rule of reason, which analyzes an activity's anticompetitive effects with procompetitive justifications. Although transfer regulations are not on the same regulatory plane as amateurism, it is a significant shift in case law regarding antitrust laws and their application to the NCAA's rules.

The next step to challenging NCAA rules with respect to capping student-athlete cost-of-attendance will include attacking the procompetitive justifications identified in *O'Bannon v. NCAA* (2015) to eliminate a cap on student-athlete compensation. One of the justifications included an integration of athletics and academics is to supposedly provide a better educational experience for student-athletes. The justification espouses that student-athletes greatly benefit from an education and being connected to the student body at their institution. If they were provided uncapped compensation, they would effectively be placed in a silo due to their quasi-professional status and removed from the rest of the student population (Cinder, 2015). The other procompetitive justification is maintaining amateurism in college sports. Although little evidence has been presented to support this justification, courts have sided with the NCAA, claiming that fan support for major college sports would greatly suffer should student-athletes no longer be considered amateurs (Blair & Wang, 2018).

There are various options to counter those two procompetitive justifications. The integration of academics and athletics justification seems rather ignorant in today's world of major intercollegiate athletics. The NCAA has actually instituted legislation in the last few years that has only encouraged further separation of student-athletes from the rest of the student body. For instance, when the NCAA allowed for unlimited meals and snacks for student-athletes, new student-athlete exclusive dining halls were created across the country (Regan, 2019). How does that promote integration with the rest of the student body? Also, the benefits student-athletes receive for tutoring, academic support, mentoring, etc. were cited in the *O'Bannon v. NCAA* (2015) case as support for the procompetitive justification to restrain student-athlete compensation based on academic and athletic integration (Cinder, 2015). How does having student-athlete specific support services integrate them with the greater academic community?

The amateurism procompetitive justification is understandable based upon the support provided in *NCAA v. Board of Regents* (1984). However, Blair and Wang (2018) present the argument that amateurism is a myth because the NCAA decides who is considered an amateur in their world, and it has been a moving target for years. An amateur is someone who is supposed to participate in an activity without receiving payment. Is receiving full cost-of-attendance, free tutoring, mentoring, various athletic gear, unlimited food, travel costs, etc. not considered being paid? Furthermore, if receiving the aforementioned benefits allows a student-athlete to maintain their amateurism, and the additional benefits have not changed the popularity of major college sports, one has to wonder whether allowing an additional $5000 per year for NIL compensation would make a difference (Meyer & Zimbalist, 2017).

The NCAA as a Cartel

Blair and Whitman (2017), Blair and Wang (2018), Jenkins (2006), and Konsky (2003) all present arguments that depict the NCAA as operating akin to a cartel. While the NCAA is officially a non-profit organization, their operations behave much in the same way as a cartel (Jenkins, 2006) and can be seen through interactions with student-athletes. Blair and Whitman (2017) proclaim that the member institutions use the NCAA to control student-athlete conduct in order to increase structure and stability for those sports that generate significant revenue. In return, the member institutions agree to self-report violations within the defined agreements made with the NCAA (Blair & Whitman, 2017). The NCAA utilizes the input (student-athletes) far below their value and restricts competition by artificially limiting opportunities (e.g., scholarship limitations, transfer regulations, etc.) in order to enhance profits and distribute such profits to a small group of schools, coaches, and administrators (Konsky, 2003). Blair and Wang (2018) identify three factors that must be present for cartel activity:

First, the independent competitors must agree to collude and organize their collusive efforts. Second, they must reach agreement on the specific terms: price, quantity, and quality. Those terms must be articulated clearly, since ambiguity can lead to conduct

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that will destabilize the cartel. Third the behavior of the cartel members has to be monitored and departures from the terms of agreement have to be punished (p. 354).

By analyzing the NCAA structure and its operations it becomes apparent that the three aforementioned factors apply to the NCAA and their transfer rules. First, NCAA member institutions are all competitors for a product (student-athletes) within the transfer market. In addition, they all agree to use the NCAA as an organizational structure for which to facilitate their collusive efforts. Second, there is a specific set of transfer rules that all member institutions agree to obey. For instance, each four-year transfer student-athlete must spend a year-in-residence at their new institution before being able to compete, and specific exceptions are in place depending on the individual transfer student-athlete's circumstances. The rules are fixed for each member institution, as they do not have the freedom to utilize a different set of rules. The 2019 NCAA Manual provides a relatively unambiguous list of transfer rules and regulations for which institutions must adhere. Third, a failure to abide by the transfer rules set by the NCAA can result in punishment, which is overseen by an enforcement division within the NCAA national office. The confirmation of cartel-like behavior from the NCAA has exposed the association to further antitrust litigation.

The general consensus is that the NCAA is not a traditional cartel, rather their actions are more aligned with a monopsony, or a buyer cartel (Blair & Whitman, 2017). As a buyer cartel, the NCAA effectively acts as the only buyer for the services of student-athletes, specifically those at the highest level of competition, who attend autonomy (Power 5) institutions. Chief Judge Thomas in *O'Bannon v. NCAA* (2015) supported the notion that the NCAA acts like a monopsony, claiming that student-athletes have no other like alternatives for which to sell their services. The transfer regulations are set up to dissuade student-athletes from exploring other four-year options, thereby further limiting their options to utilize their services with another competitor (Blair & Whitman). "When viewed as a cartel, the NCAA seems more concerned with preventing member institutions from exploiting the NCAA than preventing the exploitation of student-athletes" (Jenkins, 2006, p. 457). This type of exploitation of student-athletes directly leads to the core issue of this article, which is to proclaim that NCAA transfer rules violate United States antitrust laws.

Why NCAA Transfer Rules Violate Antitrust Law

As outlined previously, there are three elements required to pursue an antitrust claim under the Sherman Act (Konsky, 2003). First, the plaintiff must show that the NCAA transfer rules are commercial in nature. Second, the plaintiff must define a relevant market for the claim. Third, the rule of reason will be used to analyze the balance between the procompetitive and anticompetitive effects of the NCAA transfer rules.

Commercialization.

Some clarity was provided through the decision in *Agnew v. NCAA* (2012) on the commercialization of NCAA eligibility rules, thus subjecting them to scrutiny in antitrust cases. The justifications behind the NCAA's transfer rules for Division I basketball, baseball, football, and men's ice hockey can be varied, depending on whose perspective you consider. Jenkins (2006) provided three rationales that the NCAA uses to justify their transfer rules. First, to prevent student-athletes from transferring for the sole purpose of increasing their athletic profile. The NCAA's push to preserve the amateur model would shun any effort to make the transfer process resemble free agency in professional sports. While a student-athlete may transfer for many reasons, only some of which allow for exceptions to the transfer rule, athletics will almost always play a significant role in determining where a student-athlete may transfer. It is simply ignorant to believe otherwise.

The second rationale Jenkins (2006) provides for the purpose of NCAA transfer rules is to avoid exploiting student-athletes. This assumes that having a student-athlete remain at the same institution for their entire college career is always in their best interests. There are a multitude of reasons why this rationale is fundamentally flawed. One, there could be legitimate athletic reasons why a student-athlete wants to transfer institutions without fear of exploitation. Why should member institutions or the NCAA be able to prevent a student-athlete from bettering their athletic situation, other than to restrict competition for their own stability and financial well-being? Two, there also could be personal or academic reasons behind a student-athlete's desire to transfer. While there are transfer waivers that could remedy these types of situations, the inconsistency of NCAA waiver guidelines makes it challenging for student-athletes to rely upon waivers when needed.

The third rationale Jenkins (2006) proposes is transfer students need time to adjust to their new surroundings. In order to debunk this rationale, one need only examine the NCAA's initial eligibility and two-year transfer regulations. Both incoming freshmen and two-year college transfer student-athletes have the ability to compete in their sport immediately upon transfer. Why are they not also required to spend a year in residence to give them

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time to adjust to their new surroundings? One could reasonably argue that freshman and two-year transfers face a more intense transition in their first year than four-year transfers, thus requiring as much, or maybe even more, time for adjustment. Since none of the rationales Jenkins presented have legitimate legs to stand on, what is the real reason behind these transfer rules?

We argue that the real reason behind the NCAA transfer rules is to maintain stability for NCAA member institutions to ensure their product (student-athletes) are highly discouraged to provide their skills to competitors (Jenkins, 2006). The transfer regulations provide assurances to institutions that their costs will not violently fluctuate due to an otherwise chaotic transfer environment that would allow other institutions to poach their current student-athletes. Through the use of anti-poaching agreements, also known as NCAA transfer rules, anticompetitive restrictions are placed on their products to maximize profits (Blair & Wang, 2017). Since profits are most prevalent in the sports most restricted by these rules, it should be very evident as to the real reason why these transfer rules have been implemented. That reason is undoubtedly commercial in nature.

Relevant market.

The relevant market associated with NCAA transfer rules should be the student-athlete services market (Konsky, 2003). Student-athletes provide an economically beneficial service through the use of their athletic abilities. This service generates billions of dollars in revenue annually for the NCAA and its member institutions. NCAA transfer rules control this market by discouraging student-athletes from transferring, thereby restricting their ability to financially capitalize on the athletic services they provide. For instance, what if a basketball student-athlete attended a lower level Division I institution that did not offer a cost of attendance allowance to their student-athletes and wanted to transfer to a Power 5 institution that does offer cost of attendance stipends? Since the transfer rules require the student-athlete to spend a year in residence prior to competing, many of those institutions may not want to invest in a student-athlete that will not play for a year. This could greatly restrict the ability of this student-athlete to transfer and receive greater financial compensation for his or her services. This does not even account for the more significant financial loss of potential future earnings as a professional athlete caused by the lesser athletic exposure the student-athlete would receive by staying at a lower-level Division I institution.

Rule of reason.

The rule of reason requires a thorough analysis of both the procompetitive and anticompetitive effects of the NCAA transfer regulations. Both in *Pugh v. NCAA* (2016) and *Deppe v. NCAA* (2017) the court only considered the procompetitive effects of the transfer rule. If there were any procompetitive effects to the NCAA's transfer rule, further analysis was not required. An argument previously referenced in this article was presented to dispel the notion that the procompetitive effects of athletic and academic integration and preservation of amateurism are valid. Those two procompetitive effects were identified as part of the decision in *O'Bannon v. NCAA* (2015). More likely than not, another procompetitive effect would be put forth in a case involving NCAA transfer rules – that of competitive balance. The idea of competitive balance being used as a procompetitive element would most likely receive the same response as it did in *O'Bannon v. NCAA* (2015). Unless the NCAA has empirical evidence that opening up the transfer rules would skew the competitive balance, they do not have a valid argument. In addition, one has to wonder why competitive imbalance has not been challenged in Division I non-revenue sports that already have more flexible transfer options.

If the plaintiff can successfully show the limits of any procompetitive effects presented by the NCAA, they must then identify the anticompetitive effects of NCAA transfer rules. Konsky (2003) provides two reasons transfer rules have an anticompetitive effect. The first is simply the restriction of player movement from one school to another. Just as the general student population should be able to transfer institutions without penalty, student-athletes should be no different. General students transfer institutions all of the time to better their financial, social, emotional, and psychological well-being without restriction. Employees in various areas of business are also allowed to freely change jobs in order to pursue better opportunities. While the exercise of classifying a student-athlete as an employee is a slippery slope, the student-athlete is highly discouraged from transferring to another institution because they will be prevented from competing for a year. This allows for a much more restricted transfer market for other institutions to recruit, as they may not even be interested in a transfer student-athlete who will not be eligible for a full year. This lack of a free market for transfer student-athletes should be deemed anticompetitive.

The other anticompetitive effect of the NCAA transfer rule to consider is a student-athletes exit from the transfer market altogether (Konsky, 2003). The NCAA has a five-year eligibility "clock" which requires all student-athletes to exhaust their eligibility within five years of initially enrolling as a full-time student at any college or university

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(NCAA, 2019). If a student-athlete uses a season of competition in three of their first four years in school, and then decides to transfer to another institution for their fifth year, they may have no option to utilize their fourth season of eligibility because they would not be eligible to compete in their fifth year at the new institution, thus exhausting their eligibility. This would effectively take them out of the transfer market altogether and would ultimately cause damage to the market by eliminating a viable product and decreasing the value of the overall transfer market.

In applying the rule of reason, a court would attempt to balance both procompetitive and anticompetitive effects on the NCAA transfer market. Through this analysis, it is recommended that a solution is presented that would be less restrictive, but not a complete ban of the transfer rule. Such a solution is not foreign to the NCAA membership, and should be instituted for the betterment of the association.

Proposed Solutions

On two different occasions in the past 16 years, the NCAA strongly considered aligning transfer regulations in revenue sports (i.e., football, baseball, basketball, and men's ice hockey) with transfer regulations in all other sports by allowing student-athletes in revenue sports to use the one-time transfer exception (Cali, 2014; May & Seifried, 2012). A legislative proposal in 2003 attempted to permit the one-time transfer exception to be utilized by all NCAA-sponsored sports in Division I. The rationale behind the proposal included references to student-athletes' well-being and that such a change would better align with the philosophical foundation of the NCAA principles of equity and fair play (May & Seifried, 2012). Concerns raised from membership included fear of a free agency system in these sports and instability within programs, which could encourage poaching of student-athletes from other programs. Various prominent coaches, including Jimbo Fisher of Texas A&M University (Kubena, 2019) and Nick Saban (Caron, 2019) of the University of Alabama have decried the transfer portal as pseudo free agency. We would argue that the real reason institutions and coaches are have concerns regarding the transfer portal is that they no longer control the opportunities their respective student-athletes are given. Concerns were also raised regarding what changes in legislation would do to the image of those sports and the academic ramifications of student-athletes having more freedom to transfer institutions. Again, these concerns seem specious.

More recently, the President of the NCAA, Mark Emmert, established a committee to further study the impact of a potential change in transfer rules. In 2012, this committee developed a framework of four principles designed to deregulate a portion of the NCAA's transfer rules. First, permission to contact would still be required for institutions, but such permission would only be tied to practice and competition and not athletic aid. Second, student-athletes who met the requirements of the one-time transfer exception would be allowed to compete immediately upon transfer, provided they have at least a 2.6 cumulative GPA prior to the transfer. Third, student-athletes who do not qualify for the one-time transfer exception would automatically receive an extension of their five-year eligibility clock to allow them to compete a full four seasons. Fourth, any impermissible tampering by institutions would result in Level I violations, the strongest level imposed by the NCAA Committee on Infractions (Cali, 2014).

The foundation of a logical and reasonable solution for NCAA transfer rule reform was established in these two attempts to enact change. As stated in the 2003 proposal, the current system of NCAA transfer rules is unfairly inequitable to revenue sports. Therefore, the question must be asked, why would the NCAA create and sustain these inequities? The answer to that question can be found in the legal arguments made in this article. The reasons are simply because the NCAA operates as a buyer cartel that attempts to restrict player movement in order to provide stability in the market, which helps member institutions to sell their products at a premium to increase revenue. For example, how much money did the University of Florida make directly from the seasons that Tim Tebow played for their football program? What if Tim Tebow decided to leave after his sophomore year to attend a different institution? Florida would have most likely lost a significant amount of revenue from such a transfer. To avoid such instability and revenue loss, the NCAA implements transfer rules that make it very unlikely that this type of transfer would occur, thus creating a sense of economic stability at their member institutions at the expense of freedom of student-athletes.

The NCAA would likely put forth the following arguments to defend their current transfer regulations. One, allowing revenue sports to use the one-time transfer exception would create a free agency-type system that resembles professional sports, thereby damaging the image of amateur sports. This argument holds little weight, as the one-time transfer exception is already in place for all other sports at the NCAA level. Additionally, how transferring institutions a single time in a student-athlete's career has any relevance to jeopardizing their image as an amateur athlete is illogical. Student-athletes already transfer for a variety of other reasons, whether it be from a two-year institution, using the graduate

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transfer exception, or utilizing the student-athlete friendly waiver process. While loosening regulations on the one-time transfer exception may upset the current college sport system, it can be argued that the benefit to the student-athlete outweighs this concern (Gerace, 2019). Additionally, as noted previously, regular students are free to transfer institutions at any time without any penalty and for any reason. For example, a talented musician may decide they have better opportunities at a different school, or a talented Biologist may decide to take advantage of a new lab opening at a different institution. We believe the onus should be on the NCAA to explain what makes the realm of college sport somehow different that this, other than the obvious answer that it benefits the NCAA and its member institutions to maintain control over those whose labor they use for revenue generation. Other scholars have likened NCAA anti-transfer rules as illegal covenants not to compete (Yasser & Fees, 2005) and college scholarship agreements as contracts of adhesion (Hanlon, 2006).

Another argument is the concern over a transfer student-athlete's academic performance. While the potential challenges a transfer student-athlete may face with re-establishing themselves in a new environment and making sure all of their transfer credits apply at their new institution are valid, there is a simple solution that was suggested in the NCAA's transfer working group in 2012. If a student-athlete would like to use the one-time transfer exception, they must have at least a 2.6 cumulative GPA to compete immediately at their new institution. The NCAA conducted their own research on transfer student-athlete academic success and determined that a transfer student-athlete with at least a 2.6 cumulative GPA will have the same chance at academic success at their new institution as they would at their original institution (Cali, 2014). If the new transfer rules would incorporate a 2.6 cumulative GPA into their requirements, the concerns over academic success for transfer student-athletes should be deemed inconsequential. One has to wonder, however, whether a GPA requirement should even be required. It is not required (across the board) for the general student body to transfer, and this seems yet again like the NCAA desiring to exert as much control as possible over the labor used in creating college sport and the bevy of riches that comes with it, all the while refusing to treat such laborers as employees and thus entitled to the benefits associated with such an arrangement.

The firestorm of legal challenges the NCAA is currently facing, along with the potential for many more in the future, is only going to create an environment of increased deregulation of NCAA rules. The NCAA has already taken steps to deregulate the transfer market by implementing the NCAA Transfer Portal and easing requirements for transfer waivers. Continued steps appear to be on the horizon with the aforementioned proposals in the pipeline for the 2019-20 legislative cycle. However, the steps that have been implemented and most recently proposed are not sufficient.

We believe that the best solution would be to simplify the process by adopting the one-time transfer exception for all NCAA Division I athletic programs. Student-athletes in revenue sports should be afforded the same opportunity to transfer from a four-year institution one time in their career without being penalized. Furthermore, competitive balance questions should be quelled because there is no evidence to show that easing transfer regulations would decrease competitive balance. This does not even consider the fact that competitive balance does not really exist in major college sports anyway. Football has the same programs compete for a national title every year, much like both men's and women's basketball. Perhaps loosening the regulations on the transfer market would actually increase competitive balance throughout the NCAA.

Despite belief that that the Transfer Portal and the rules that accompanied its arrival, the graduate transfer rule, and the loosening of waiver requirements would completely alter the transfer market, it does not appear that it has created the chaotic atmosphere some envisioned. With all of these changes in place that effectively allow most student-athletes to transfer and compete immediately upon transfer, why not just go forward with the one-time transfer exception? It would streamline the transfer process even more by eliminating the need for extensive waivers and appeals. It also clarifies the transfer process for everyone involved by simply stating that student-athletes have one time in their collegiate career to transfer from a four-year institution and compete immediately. If they decide to transfer more than once, they will be required to spend a year in residence, barring a rare and extraordinary circumstance. The notion that opening transfer restrictions would see a student-athlete jump from school to school over the period of 4-6 years is simply hyperbole and yet another diversion from the real issue of providing more power to student-athletes to control their own destiny.

For all of the reasons mentioned in this article, both legal and logical, it is only appropriate to implement the one-time transfer exception for all sports in Division I. The only change we suggest to the current one-time transfer exception rule would be to include a 2.6 cumulative GPA requirement, as it should satisfy any concern about academic preparedness of transfer student-athletes. Student-athletes

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should be afforded the opportunity, at least once in their college career, to take their talents to another institution without being hampered by restrictive policies designed to restrain trade.

Limitations and Future Research

This article is not without limitations. Here, we argue for a number of changes to the existing college sport transfer system involving NCAA student-athletes. We recognize that our suggested changes do not represent the only way to "fix" the problems we see in college sport. Additionally, legal challenges are shaping NCAA policy rapidly, with student-athlete name, image, and likeness (NIL) rights set to be the next large shock to the NCAA system. States are passing bills to allow student-athletes to profit of their NIL rights, led by California's Fair Pay to Play Act (2019). The changing legal landscape may make some recommendations moot. In terms of future scholarship, more research is needed comparing the success of student-athlete transfers to those of the general student body, as this would help inform decision-making and what is best for student-athletes in terms of their overall success. Additionally, more research focusing on the impact of transfers on college sports programs (both positive and negative) may reveal whether fears regarding "free agency" in college sport is real or imagined.

Conclusions and Recommendations

It should be no surprise that both *Pugh v. NCAA* (2016) and *Deppe v. NCAA* (2017) attempted to challenge the legality of the NCAA's transfer rules in the wake of *O'Bannon v. NCAA* (2015). Although the plaintiffs in those cases did not receive the legal decision they had hoped, their cases were not without merit. As outlined in this article, the NCAA is losing their grip on their reliance on the Supreme Court decision in *NCAA v. Board of Regents* (1984). The 35-year old case simply does not reflect the values and the operations of the current NCAA behemoth that operates within the context of big-time college sport. This seems to be part of a larger trend involving challenges to traditional NCAA organization, structure, and policy. After years of court battles decided in favor of protecting the sanctity of the NCAA model of college sport, chinks in the armor have been appearing for some time now. For example, *White v. NCAA* (2006) saw student-athletes challenge NCAA restrictions on the value of athletic scholarships. After failing to get the case dismissed and a class certification determination by the presiding judge, the NCAA settled, with an agreement worth just under $230 million (Berkowitz, 2017). *Alston v. NCAA* (2014) picked up where *White* left off, arguing that the NCAA and five major conferences violated antitrust laws by engaging in price-fixing and limiting an athletic scholarship below the full cost of attendance, simply to contain costs. Again, the NCAA chose to settle, resulting in the second-largest settlement in the NCAA's history, totaling $207.8 million. In this article, we argue that the antiquated transfer system utilized by the NCAA has to change. It already has changed with the addition of the transfer portal, amid both support as well as opposition, but we believe it must change further, and that this change will be to the benefit of student-athletes and college sport as a whole. Reasonable challenges to the alleged procompetitive effects of these rules were provided in this article. Such challenges will continue to gain traction as the NCAA's grip on unreasonable commercial business practices lessens through both recently settled as well as on-going legal challenges. It is our contention that there is no reasonable basis for refusing to extend the one-time transfer exception for all sports. Arguments to the contrary rest rely primarily on fear-mongering and an antiquated view of college sport. In an industry where competitive balance is a charade, allowing more freedom to student-athletes to chase their dreams can only benefit both them as well as college programs as a whole. ●

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