

NCAA STUDENT-ATHLETE HEALTH CARE:  
ANTITRUST CONCERNS REGARDING THE INSURANCE  
COVERAGE CERTIFICATION REQUIREMENT

Kyle R. Wood<sup>1</sup>

I. INTRODUCTION.....	562
II. THE NCAA, ATHLETIC CONFERENCES, MEMBER INSTITUTIONS, AND THE STUDENT-ATHLETES.....	566
A. The NCAA.....	566
1. The Early Years.....	567
2. The Modern Era.....	569
3. The NCAA Today.....	571
B. Athletic Conferences.....	574
C. Member Institutions.....	578
D. Student-Athletes .....	581
1. Financial Aid .....	582
2. Student-Athlete Groups .....	583
a. The National Collegiate Players Association.....	584
b. The Student-Athlete Advisory Committee .....	586
III. NCAA FINANCES .....	587
A. NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report 2004-2010 and Discussion of the Bowl Championship Series Revenues .....	587
B. NCAA Membership Report 2009-2010 .....	593
C. The “Scholarship Shortfall” Problem.....	596
IV. THE CURRENT STATE OF NCAA LEGAL AFFAIRS .....	598
A. Recent NCAA Regulatory Action.....	598
B. Antitrust Law .....	601
1. NCAA. v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association .....	602
2. The NCAA as a Monopsony.....	604
3. The Procompetitive Presumption and the Student- Athlete Labor Market.....	606
a. The Procompetitive Presumption.....	606
b. Student-Athlete Labor Market.....	609

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<sup>1</sup> J.D., Indiana University Robert H. McKinney School of Law, 2013. B.A., Indiana University – Bloomington, 2007.

C. Public Policy Concerns .....	615
V. ASSESSING THE MERITS OF NCAA HEALTH CARE INSURANCE REFORM .....	616
VI. CONCLUSION .....	626

## I. INTRODUCTION

In 2005, the National Collegiate Athletic Association (“NCAA” or the “Association”) promulgated a condition and obligation of membership that all member institutions “must certify insurance coverage for medical expenses resulting from athletically related injuries sustained [by student-athletes] while participating in a covered event.”<sup>2, 3</sup> This rule permits that the insurance coverage may be provided through three possible sources: a policy held by the student-athletes parent(s) or guardian(s), a policy held by the student-athlete personally, or through the institution’s insurance program.<sup>4</sup> The amount of coverage the institutions must certify shall be equal to or greater than the deductible amount of the catastrophic injury insurance provided by the NCAA.<sup>5</sup> That deductible amount is

<sup>2</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, 2011-2012 NCAA DIVISION I MANUAL § 3.2.4.8, at 10 (2011), *available at* <http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual-august-2011.aspx> (last visited Mar. 1, 2013) [hereinafter DIVISION I MANUAL].

<sup>3</sup> DIVISION I MANUAL, *supra* note 1, § 3.2.4.8.3, at 10-11 (“Covered Event. A covered event includes the following: (a) Any intercollegiate sports activity, including team travel, competition, practices and conditioning sessions during the playing season (as defined in Bylaw 17.1.1); (b) An NCAA-sanctioned competition in which the insured person is an official competitor; or (c) Practice and conditioning sessions that are authorized, organized or directly supervised by athletics department personnel at the member institution other than during the playing season. Such sessions must occur on campus or at approved off-campus facilities as part of an intercollegiate athletics activity. For insured student-athletes or prospective student-athletes who compete in individual sports, off-campus intercollegiate athletics activities must be authorized by athletics department personnel at the participating school and take place at approved locations.”).

<sup>4</sup> DIVISION I MANUAL, *supra* note 1, § 3.2.4.8.1, at 10.

<sup>5</sup> *Id.*

currently \$75,000 or \$90,000, depending upon whether the institution participates in the NCAA Group Basic Accident Medical Program.<sup>6</sup> In essence, a student-athlete must have health care insurance up to at least \$75,000 or \$90,000 for athletic-related injuries prior to participation in an NCAA sponsored event. NCAA member institutions may voluntarily provide health care insurance for their student-athletes, but there is no requirement to do so.

Despite this series of requirements, the rule in practice does not require that student-athletes have health care insurance that will actually cover any medical expenses incurred during participation in a “covered event.”<sup>7</sup> The overview of legislation accompanying bylaw 3.2.4.8 specifically states that insurance coverage that is subject to out-of-state coverage limitations would satisfy the requirements for certification even if the student-athlete attends an institution in a state in which the insurance coverage is void.<sup>8</sup> This is only one example of how, notwithstanding a series of rules intended to ensure the health and safety of student-athletes, those young adults who represent the institutions through athletic participation may not be adequately protected. Other potential roadblocks to adequate coverage include policy exceptions for injuries sustained during collegiate or

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<sup>6</sup> *Nat'l Collegiate Athletic Ass'n., Catastrophic Injury Insurance Program Benefit Summary for the Period 8/1/12 through 7/31/13*, NCAA (Jul. 30, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/NCAA+Insurance+Programs/Student+Athlete+Insurance+Programs/Catastrophic+Insurance+Program>; NCAA Group Insurance Programs, NCAA, <http://www.ncaainsurance.com/> (last visited Mar. 1, 2013).

<sup>7</sup> Kristina Peterson, *College Athletes Stuck With the Bill After Injuries*, N.Y. TIMES, Jul. 16, 2009, at A1, available at <http://www.nytimes.com/2009/07/16/sports/16athletes.html> (last visited Mar. 1, 2013).

<sup>8</sup> *Id.* (follow hyperlink “The N.C.A.A. explains to colleges how to comply with N.C.A.A. health insurance rules” to the NCAA Overview of Legislation; scroll to “Question 9”: “[Question:] If a student-athlete has coverage through an HMO that's only valid in the state they live in, does that satisfy the requirement if they are in a school outside that state? [Answer:] Yes. However, again it should be disclosed to the parent/guardian that they are responsible for any costs not paid by insurance if the university does not cover those costs.”).

intercollegiate athletic participation,<sup>9</sup> diagnosis of the ailment as an illness rather than an injury,<sup>10</sup> and the cost concerns of the individual student-athlete.<sup>11</sup> Without health care insurance provided by the member institution, there is a substantial burden for an inexperienced student-athlete to overcome in order to be assured any injury suffered during athletic participation will not leave them faced with significant medical debt.<sup>12</sup> This burden has led several

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<sup>9</sup> My alma mater, Indiana University, is one of several universities that excepts coverage for injuries sustained during college or intercollegiate sports participation from the basic student health care insurance offered by the university. *See* 2012-2013 INDIANA UNIVERSITY, STUDENT HEALTH INSURANCE PLAN FOR INDIANA UNIVERSITY UNDERGRADUATE AND GRADUATE STUDENTS (2012), *available at* [http://www.indiana.edu/~uhrs/benefits/pubs/books/student\\_voluntary\\_broch\\_201213.pdf](http://www.indiana.edu/~uhrs/benefits/pubs/books/student_voluntary_broch_201213.pdf) (insurance underwritten by Aetna Life Insurance Company). *See also* Peterson, *supra* note 6 (follow hyperlink “Student health care policies from SUNY Buffalo and Florida State showing that the default school plans exclude varsity sports injuries”) (showing both policies also underwritten by Aetna Life Insurance Company).

<sup>10</sup> Peterson, *supra* note 6 (Presenting the story of Erin Knauer, Colgate University student-athlete who sustained injury to her back and legs during training for the crew team. “Her symptoms were later diagnosed as postviral myositis, a muscular inflammation that can cause weakness and pain. Because Colgate officials deemed the condition an illness – not an athletic injury – they said financial responsibility [for approximately \$80,000 in medical bills] fell to Knauer.”).

<sup>11</sup> It should be noted that while recent changes under The Patient Protection and Affordable Care Act allow individuals to remain covered under insurance policies held by their legal guardian(s) until they reach twenty-six years old, there is no certainty that the policy held by a student-athlete’s guardian(s) will qualify for certification or adequately cover the health care needs of the student-athlete, assuming of course their guardian(s) in fact holds health care insurance. These student-athletes may be required to purchase policies for themselves requiring the student-athlete or their guardian(s) to pay a substantial monthly fee. The student health insurance offered by Indiana University – which excludes college and intercollegiate sports injuries – costs \$1,999.00 annually for a \$1000.00 deductible. *See Voluntary Student Health Insurance 2012-2013*, INDIANA.EDU, [http://www.indiana.edu/~uhrs/benefits/student\\_voluntary2012-13.html](http://www.indiana.edu/~uhrs/benefits/student_voluntary2012-13.html) (last visited Mar. 1, 2013).

<sup>12</sup> *See* Jacob Dirr, *College Athletes: Winners or Losers When It Comes to Health Insurance?*, INSURANCEQUOTES.COM, <http://www.insurancequotes.com/health-insurance-college-athletes/> (last visited Mar. 1, 2013) (explaining how between the years of 1988-89 through

individuals and organizations to call for the NCAA to mandate that its member institutions provide health care insurance coverage for all student-athletes.<sup>13</sup>

This note will set forth and analyze concerns facing the NCAA specifically related to health care coverage of student-athletes for athletically-related injuries. Those concerns implicate numerous public policy issues and potential antitrust liability. Initially, section II will examine the relationships between the NCAA, athletic conferences, member institutions, and the student-athletes (including active student-athlete representational groups), addressing the stated intents of the parties where applicable. Section III reviews the financial situations of the NCAA, member conferences and member institutions; specifically, brief audits of the NCAA Revenue Report for 2004-2010 and the NCAA Membership Report for 2009-2010 will be conducted, along with a review of recent financial developments for the membership, followed by an explanation of the “scholarship shortfall” problem. Section IV analyzes recent attempts at regulatory changes by the NCAA, NCAA antitrust jurisprudence including the recent development of student-athletes as a relevant labor market, and the increasing volume of public policy concerns over the Association’s governance. Section V assesses the merits of an antitrust challenge to the current NCAA bylaws regarding student-athlete health care coverage certification and voluntary coverage by member institutions, and the NCAA revenue

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2003-04, there were reported more than 182,000 student-athlete injuries sustained during competition and practice in fifteen major sports, citing data published in *The Journal of Athletic Training*).

<sup>13</sup> Press Release, Nat’l College Players Ass’n, California and Indiana Lawmakers to Push Athletes Bill of Rights (Feb. 12, 2012), *available at* [http://ncpanow.org/releases\\_advisories?id=0020](http://ncpanow.org/releases_advisories?id=0020) (NCPA Model Legislation seeks to mandate institutions with financial resources to provide for all student-athlete medical costs); *White v. NCAA*, No. CV06-0999 VBF (MANx) (C.D. Cal. 2008) (showing stipulation and agreement of settlement) (including plaintiffs’ claim for health care costs in complaint); *cf.* Peterson, *supra* note 6 (“The only way to increase coverage would be to make it mandatory,” said Joe D’Antonio, the chairman of the N.C.A.A.’s legislative council and associate commissioner of the Big East Conference. ‘It could be too demanding financially on some of our institutions.’”).

distribution formula. Section V also suggests measures for the NCAA and its membership to avoid potential litigation and possible financial strategies to fund the most accessible comprehensive health care program for student-athletes.

## II. THE NCAA, ATHLETIC CONFERENCES, MEMBER INSTITUTIONS, AND THE STUDENT-ATHLETES

It is a common misconception that NCAA regulations govern all of the structural aspects and decision-making processes of the athletic conferences and member institutions. To an unversed observer, conferences appear much like divisions in professional sporting leagues. This is not the case. While there is some overlapping of governance and indeed a hierarchy of command, both the athletic conferences and member institutions are left with a wide range of discretion in numerous facets of athletic operations. The most obvious difference is that the individual contract rights of the NCAA, the athletic conferences and the member institutions are restricted far less in relation to one another than the contract rights of similarly situated parties in professional sports leagues (imagine if you will the Atlanta Hawks contracting to move from the Southeast Division to the Atlantic Division of the Eastern Conference in the NBA, a move similar to the *en masse* conference realignments taking place in modern college sports). Beyond the respective contract rights of the parties, each have their own economic structures and make decisions based on individualized goals that may or may not conform with the goals of the other parties to a greater extent than is typical of professional sports leagues.

### A. *The NCAA*

[T]he National Collegiate Athletic Association[ ] is a voluntary, non-profit standard-setting association that promulgates the rules of competition for and operates annual national championships in [23] sports across three divisions. Its membership includes

over 1,200 educational institutions, athletic conferences, and related organizations. It promulgates rules of play, recruiting, length of season, amateurism, and equipment regulations, operates championships and maintains intercollegiate athletics records.<sup>14</sup>

The NCAA consists of over 440,000 student-athletes who compete in eighty-nine national championships.<sup>15, 16</sup>

### 1. *The Early Years*

In the beginning, college football was more reminiscent of ancient Roman gladiator games than the comparably docile contest it is today. Between the years 1890-1905, football game-related injuries resulted in the deaths of 330 players.<sup>17</sup> With national concern over the brutal nature of the sport generating an overwhelming call for reform or the total abolition of the sport, President Theodore Roosevelt convened collegiate athletic leaders to two White House conferences to discuss reform in 1905.<sup>18</sup> Later that same

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<sup>14</sup> In re NCAA I-A Walk-On Football Players Litigation, 398 F. Supp. 2d 1144, 1146 (W.D. Wash. 2005) (since publication, the NCAA has increased the operation of national championships from 22 sports to 23). See NAT'L COLLEGIATE ATHLETIC ASS'N, 2009-10 NCAA MEMBERSHIP REPORT 36 (2010) available at <http://catalog.proemags.com/publication/0affe96d#/0affe96d/1> (last visited Mar. 1, 2013) [hereinafter MEMBERSHIP REPORT].

<sup>15</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, 1981-82 – 2010-11 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 5 (2011), available at <http://ncaapublications.com/p-4243-student-athlete-participation-1981-82-2010-11-ncaa-sports-sponsorship-and-participation-rates-report.aspx> (last visited Mar. 1, 2013) [hereinafter SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT].

<sup>16</sup> *Who We Are*, NCAA, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last visited Mar. 1, 2013).

<sup>17</sup> Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332 (2007) (citing ANDREW ZIMBALIST, UNPAID PROFESSIONALS 8 (1999) [hereinafter ZIMBALIST]).

<sup>18</sup> *History*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/History> (last visited Mar. 1, 2013).

year, Chancellor Henry M. MacCracken of New York University convened a meeting of thirteen institutions to ratify the needed reformation of college football playing rules with a focus on the health and safety of student-athletes. At a subsequent meeting held on December 28, 1905 in New York City, less than a month after Chancellor MacCracken's initial meeting, sixty-two colleges and universities became charter members of the Intercollegiate Athletic Association of the United States (IAAUS).<sup>19</sup> On March 31, 1906, the IAAUS was officially constituted. It would operate under that name until 1910, when the Association took its present name, the National Collegiate Athletic Association.<sup>20</sup> From its formation, the overarching purpose of NCAA regulations was to protect the health and safety of student-athletes.

For the first fifteen years, the NCAA was almost exclusively a discussion group and rulemaking body. While football violence was the initial trigger for the creation of the NCAA, early NCAA rules turned their focus strongly toward regulations "relating to amateurism and eligibility rules."<sup>21</sup> These early amateurism and eligibility rules banned all institutions from awarding any scholarships or financial aid based on athletic rather than academic ability.<sup>22</sup> The NCAA officially defined "amateur athlete" in 1916 as "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom."<sup>23</sup> Beyond reforming the rules of college football and defining standards of eligibility, the NCAA did little more during this initial period.

The NCAA expanded its role in college sports in 1921, holding the first NCAA national championship: the National Collegiate Track and Field Championships. The

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Lazaroff, *supra* note 16, at 332 (citing ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE 33 (1998) [hereinafter SACK]).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE ELEVENTH ANNUAL CONVENTION 118 (1916)).



following year, the NCAA altered slightly its definition of “amateur athlete” to “one who engages in sport solely for the physical, mental, or social benefits he derives therefrom, and to whom the sport is nothing more than an avocation.”<sup>24</sup> This definition reaffirmed the restrictions barring athletes from receiving financial aid based on athletic abilities. Over the next three decades, the NCAA expanded further, creating more rules committees and forming additional national championships (most notably, the Men’s Basketball Championship in 1939).<sup>25</sup> Yet, with the tremendous growth in the popularity of college football it became exceedingly difficult to enforce the NCAA amateur code.<sup>26</sup> The NCAA had no enforcement powers. Policing of the regulations promulgated by the NCAA was left to the conferences and member institutions to self-enforce.<sup>27</sup> “Increasingly, it had become evident that reliance upon voluntary compliance by NCAA member institutions would not solve the myriad problems created by the dramatic expansion of intercollegiate athletics and the [financial] opportunities such growth presented.”<sup>28</sup> Absent a credible enforcement agency, the financial rewards associated with athletic success presented an enticement that led too many institutions and individuals to ignore NCAA regulations with tremendous regularity.<sup>29</sup> Voluntary compliance was an illusory agreement among the membership.

## 2. *The Modern Era*

In 1948, the NCAA adopted the “Sanity Code” in an attempt to effectuate compliance with its rules and

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<sup>24</sup> *Id.* (citing NAT’L COLLEGIATE ATHLETIC ASS’N, PROCEEDINGS OF THE SEVENTEENTH ANNUAL CONVENTION (1922)).

<sup>25</sup> *History, supra* note 17.

<sup>26</sup> Lazaroff, *supra* note 16, at 332 (citing ARTHUR A. FLEISHER III ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 42-45 (1992) [hereinafter FLEISHER]) (documenting the growth of college sports and its commercialization during the “golden age” for college football (i.e., 1920s-1950s)).

<sup>27</sup> *Id.* (citing SACK, *supra* note 20, at 35).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

regulations.<sup>30</sup> The Sanity Code established guidelines for recruiting and financial aid. The Sanity Code restricted the amount and type of financial aid student-athletes were eligible to receive by requiring that student-athlete “recipients utilize the ‘normal channels’ that other students were compelled to follow. Aid was restricted to tuition and fees and could not be awarded based on athletic ability.”<sup>31</sup>

The Sanity Code failed to curb abuses. The potential for economic gain remained too great. The commercial appeal of college football led to a sustained increase in the number of postseason contests and the new medium of television presented many issues which had never before been addressed by any industry. In response to the complexity of problems plaguing enforcement of its rules and regulations, the NCAA appointed Walter Byers as its first executive director in 1951 and established a national headquarters in Kansas City, Missouri in 1952.<sup>32</sup>

Over the course of the 1950s, the amateurism ideal evolved drastically. The NCAA adopted new regulations governing financial aid to student-athletes that replaced the original amateurism ideal. The Association abandoned its restriction that limited the basis of grant-in-aid awards solely to financial need or academic ability and “financial inducements could be used to entice gifted athletes to participate in sports . . . .”<sup>33</sup> In 1956, the NCAA began to permit full grants-in-aid based on athletic participation. The full grants-in-aid were calculated to include tuition, fees, room and board, books, and \$15 per month for “laundry money.”<sup>34</sup>

Yet, despite the liberalization of financial aid regulations, opportunities for generating high volume revenues from successful athletic programs continue to incentivize noncompliance.<sup>35</sup> Today, the temptations for institutions, players, and fans to ignore NCAA rules and

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<sup>30</sup> *Id.* (citing FLEISHER, *supra* note 25, at 47).

<sup>31</sup> *Id.* at 333.

<sup>32</sup> *History*, *supra* note 17.

<sup>33</sup> Lazaroff, *supra* note 16, at 333-34.

<sup>34</sup> Lazaroff (referencing ZIMBALIST), *supra* note 16, at 23-24.

<sup>35</sup> Lazaroff, *supra* note 16, at 334.

regulations is greater than ever before, continuing to demonstrate the importance of regulatory enforcement by the NCAA if the amateurism model of collegiate sports is to continue. NCAA regulations serve a legitimate function when they repel excessive commercialization and other potential distractions that may interfere with the primary purpose for which student-athletes are attending the institutions: their education.

### 3. *The NCAA Today*

Current NCAA regulations address a wide array of issues from rules for game play, defining the playing and practice season, employment of athletics personnel, student-athlete academic and amateurism eligibility standards, student-athlete benefits, employment of agents, and participation in professional league drafts, to highlight only a few. Current rules cap the amount of financial aid awards student-athletes can receive at “cost-of-attendance that normally is incurred by students enrolled in a comparable program at that institution,” regardless of the source from which the financial aid is provided.<sup>36</sup> The NCAA establishes limits on the number of athletics-based grants-in-aid each school may award.<sup>37</sup> Student-athletes may not be represented by an agent.<sup>38</sup> Student-athletes may not use their athletic skills, either directly or indirectly, for pay in any form in that sport, nor may the student-athlete sign any contract or commitment to play professional sports, even should the contract postpone its effective date until after that athlete has exhausted collegiate eligibility.<sup>39</sup> Compensation that student-athletes may earn from non-athletic employment is regulated heavily as well. “Compensation may be paid to a student-athlete . . . [o]nly for work actually performed . . . [a]t a rate commensurate with the going rate in that locality for similar services.”<sup>40</sup>

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<sup>36</sup> DIVISION I MANUAL, *supra* note 1, § 15.01.6, at 192.

<sup>37</sup> DIVISION I MANUAL, *supra* note 1, § 15.01.7, at 192.

<sup>38</sup> DIVISION I MANUAL, *supra* note 1, § 12.3.1, at 70.

<sup>39</sup> DIVISION I MANUAL, *supra* note 1, § 12.1.2, at 62-63.

<sup>40</sup> DIVISION I MANUAL, *supra* note 1, § 12.4.1, at 71.

Student-athletes cannot receive any compensation related to “the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.”<sup>41</sup> This denies student-athletes the opportunity to endorse any products even if that endorsement is not directly related to their participation in NCAA athletics.<sup>42</sup> “It is not permissible for a donor to contribute funds to finance a scholarship or grant-in-aid for a particular student-athlete.”<sup>43</sup> The receipt of any prohibited compensation (improper benefits) renders that student-athlete ineligible for NCAA competition.<sup>44</sup>

“The NCAA’s core purpose is to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”<sup>45</sup> The NCAA lists seven core values on its website NCAA.org:

- The collegiate model of athletics in which students participate as an avocation, balancing their academic, social and athletics experiences.
- The highest levels of integrity and sportsmanship.

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<sup>41</sup> DIVISION I MANUAL, *supra* note 1, § 12.4.1.1, at 71.

<sup>42</sup> *See* Bloom v. Nat’l Collegiate Athletic Ass’n, 93 P.3d 621 (Colo. Ct. App. 2004) (Jeremy Bloom gained fame as an Olympic freestyle mogul skier prior to enrollment at Colorado University, where he participated in intercollegiate football. Due to his success as a skier, Bloom was offered numerous paid entertainment and endorsement opportunities. The NCAA denied Bloom’s request for a waiver of the NCAA restriction on student-athlete endorsement and media activities. The court denied Bloom’s request for a preliminary injunction against the NCAA regulation, finding that he did not have a constitutionally protectable property interest in NCAA athletic participation and that the NCAA had not arbitrarily applied its restriction in denying Bloom’s request for a waiver.).

<sup>43</sup> DIVISION I MANUAL, *supra* note 1, § 15.01.4, at 191.

<sup>44</sup> DIVISION I MANUAL, *supra* note 1, § 15.01.2, at 191.

<sup>45</sup> NCAA, LINKEDIN.COM, <http://www.linkedin.com/company/ncaa> (last visited Mar. 1, 2013).

- The pursuit of excellence in both academics and athletics.
- The supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions.
- An inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds.
- Respect for institutional autonomy and philosophical differences.
- Presidential leadership of intercollegiate athletics at the campus, conference and national levels.<sup>46</sup>

These goals emphasize the important role of education in NCAA athletics. There is also specific mention of the goal to preserve institutional independent decision-making and leadership. Yet, there is an obvious absence of any attention to student-athlete well-being. One might draw the conclusion from the stated core values of the Association that the NCAA aims to operate as an association of multiple educational entities, attempting not to interfere with the independent decision making of those entities as much as possible. So long as the institutions equally encourage their student-athletes to succeed academically and athletically, do not discriminate, and do not pay the student-athletes as

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<sup>46</sup> *Core Values*, NCAA (June 29, 2010), <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/core+values+landing+page>. See also, Powerpoint: Division I Welcome to the World of Compliance, 2012 NCAA Regional Rules Seminars, [http://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=2&ved=0CDkQFjAB&url=http%3A%2F%2Ffs.ncaa.org%2Fdocs%2Fregional\\_seminars%2F2012%2FPowerPoint%2520Presentations%2FDivision%2520I%2FDivision%2520I%2520Welcome%2520to%2520the%2520World%2520of%2520Compliance.ppt&ei=tx4-UbDnKoSvygGbn4Bo&usg=AFQjCNESNjBYe7yPVoYrUeZAV\\_tbLPmGyg&sig2=OspFhuZ6X2NSFs21PF682w&bvm=bv.43287494,d.aWc](http://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=2&ved=0CDkQFjAB&url=http%3A%2F%2Ffs.ncaa.org%2Fdocs%2Fregional_seminars%2F2012%2FPowerPoint%2520Presentations%2FDivision%2520I%2FDivision%2520I%2520Welcome%2520to%2520the%2520World%2520of%2520Compliance.ppt&ei=tx4-UbDnKoSvygGbn4Bo&usg=AFQjCNESNjBYe7yPVoYrUeZAV_tbLPmGyg&sig2=OspFhuZ6X2NSFs21PF682w&bvm=bv.43287494,d.aWc) (scroll to slide twelve entitled “NCAA Core Values *Cont’d.*”).

professionals, there is no further duty to be met by the membership regarding the student-athletes.

### *B. Athletic Conferences*

As of 2010, there are 137 active athletic conferences supporting NCAA sponsored athletics across three divisions.<sup>47</sup> By contrast, in 1950 there were eleven active athletic conferences.<sup>48</sup> The modern trend in NCAA athletics demonstrates that the value of conference membership continues to increase dramatically for the individual member institutions as well as the NCAA as a whole. “Independent” member institutions, forsaking conference membership for greater contractual and financial autonomy, have decreased to virtual nonexistence save some notable exceptions, and even in those cases, independence is generally retained on a sport-specific basis.<sup>49</sup> The conference-based model has proved to provide greater financial security and potential for growth, especially in Division I. NCAA Division I revenue distributions are determined chiefly based on the cumulative economic statistics and the performance in the Men’s Basketball Championship of the member institutions in affiliated conferences.<sup>50</sup>

It will be important to observe what ultimately results from the extensive conference realignments currently taking place.<sup>51</sup> With dozens of teams abandoning traditional rivalries and geographical proximity to their conference foes for more lucrative competitive and economic scenarios, the driving force behind the realignment movement appears to be the potential to increase athletics revenue. It is likely

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<sup>47</sup> MEMBERSHIP REPORT, *supra* note 13, at 5.

<sup>48</sup> *Id.*

<sup>49</sup> For example, Army, Navy, Brigham Young University, and Notre Dame currently remain independent in the top-tier of college football. See *College Football Teams*, ESPN.COM, <http://espn.go.com/college-football/teams> (last visited Mar. 1, 2013).

<sup>50</sup> See discussion *infra* Part III.B. (internal cross-reference)

<sup>51</sup> *Conference Realignment*, COLLEGESPORTSINFO.COM, <http://collegesportsinfo.com/conference-realignment-grid/> (last visited Mar. 1, 2013).

that as the conference alignments begin to settle out over the next few years that there will be a corresponding proliferation in the number of conference-oriented television networks, similar to the highly successful Big Ten Network that was launched in late 2007.<sup>52, 53</sup> Projected figures show that the Big Ten Network will generate approximately \$2.8 billion for basketball and football broadcast rights over the twenty-five year period from 2007-08 through 2031-32.<sup>54</sup> For example, in 2010-11, the network paid the University of Illinois \$7.9 million for those broadcast rights.<sup>55</sup> That was a twenty one-percent increase over the previous year's figures.<sup>56</sup> These results demonstrate that it is more than likely financially irresponsible for a conference with viewership demand not to form a broadcast network.

Beyond the development of conference television broadcast networks, it will be important to observe other revenue sharing models employed by the newly arranged conferences. Revenue sharing plays a vital role in conference prosperity. In the words of Larry Scott, commissioner of the Pacific 12 conference, "[e]qual revenue sharing is the hallmark of any stable conference."<sup>57</sup> As we move forward in the new era of conference realignment, expanded revenue sharing will offer the potential to alter the state of the game for the better. Most notably, it will be

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<sup>52</sup> *Big Ten History*, BIGTEN.ORG, <http://www.bigten.org/trads/big10-trads.html> (last visited Mar. 1, 2013).

<sup>53</sup> Other conferences have recently entered into broadcast agreements/launched networks. See *Big XII Digital Network*, BIG12SPORTS.COM, [http://www.big12sports.com/ViewArticle.dbml?DB\\_OEM\\_ID=10410&ATCLID=1522821](http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=1522821) (last visited Mar. 1, 2013).

<sup>54</sup> Kristi Dosh, *Television Contract Breakdown*, THE BUSINESS OF COLLEGE SPORTS (May 5, 2012), <http://businessofcollegesports.com/2011/05/05/television-contract-breakdown/>.

<sup>55</sup> Adam Rittenberg, *Big Ten Schools See Increased Revenue*, ESPN.COM (Jul. 19, 2011, 1:00 PM), [http://espn.go.com/blog/bigten/post/\\_id/29356/big-ten-schools-see-increased-revenue](http://espn.go.com/blog/bigten/post/_id/29356/big-ten-schools-see-increased-revenue).

<sup>56</sup> *Id.*

<sup>57</sup> KIRK BOHLS, *PAC-12 COMMISSIONER SAYS ERA OF SUPER CONFERENCE FAST APPROACHING, BUT HIS LEAGUE WON'T BE THE CAUSE*, Austin American Statesmen (SEPT. 4, 2011, 10:28 PM), <http://www.statesman.com/sports/collegefootball/pac-12-commissioner-says-era-of-super-conference-1820070.html>.

important to focus on individual member institutions' apparel licensing and gate receipt revenues.

Collegiate apparel licensing currently generates around \$4.3 billion annually.<sup>58</sup> Conferences share some licensing revenue; however the amounts contributed for shared revenue distributions account for very little.<sup>59</sup> Furthermore, 155 member institutions are clients of the Collegiate Licensing Company ("CLC"), a company that provides clients with brand development, management, and protection.<sup>60</sup> CLC does not possess an exclusive license of its member institutions' trademarks, and a review of their website appears to indicate that revenues are not equally distributed among the clients, but rather that the member institution clients receive actual distributions of revenue generated by their particular products.<sup>61</sup> It appears that the vast majority of apparel licensing revenues are retained by the individual institutions. This can create enormous disparities between conference members due to the greater popularity and marketability of some members in comparison to others. For example, the University of Michigan received nearly \$1.5 million in royalties from apparel sales during the first quarter of fiscal year 2008.<sup>62</sup> In comparison, the University of Iowa received \$1.8 million

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<sup>58</sup> Kristi Dosh, *Cracking Down on Counterfeit Apparel*, ESPN.COM (Jan. 8, 2012 10:10 AM), [http://espn.go.com/blog/sec/post/\\_id/36685/cracking-down-on-counterfeit-apparel-2](http://espn.go.com/blog/sec/post/_id/36685/cracking-down-on-counterfeit-apparel-2).

<sup>59</sup> Tim Griffin, *How the Big 12 Teams Rank in Revenue-Sharing Funds*, ESPN.COM (May 26, 2009, 10:46 AM), [http://espn.go.com/blog/big12/post/\\_id/2094/how-the-big-12-teams-rank-in-revenue-sharing-funds](http://espn.go.com/blog/big12/post/_id/2094/how-the-big-12-teams-rank-in-revenue-sharing-funds) (showing in 2007-08, Big 12 member institution licensing revenue accounts for only \$434,623 of the \$103.1 million contributed to the conference revenue sharing funds).

<sup>60</sup> *Clients*, COLLEGIATE LICENSING COMPANY, <http://www.clc.com/Clients.aspx> (last visited Mar. 1, 2013).

<sup>61</sup> *CLC Services*, COLLEGIATE LICENSING COMPANY, <http://www.clc.com/CLC-Services.aspx> (last visited Mar. 1, 2013).

<sup>62</sup> Lara Zade, *Despite Rough Season and Rougher Economy, 'U' Apparel Sales Steady*, THE MICHIGAN DAILY (Nov. 13, 2008), <http://www.michigandaily.com/content/2008-11-14/even-rough-season-and-economy-michigan-apparel-sales-are-steady>.



in royalties from apparel sales during the entire 2008 fiscal year.<sup>63</sup>

Gate receipts generate a sizable portion of athletics revenue as well. According to the Knight Commission, ticket sales account for about twenty eight-percent of generated revenue by Football Bowl Subdivision institution athletic departments.<sup>64</sup> To use the Big Ten as an example again, in 2009-10, gate receipts accounted for over \$263 million, not accounting for Northwestern, a private institution not subject to open records requests.<sup>65</sup> The Big Ten is the only conference that currently engages in revenue sharing of gate receipts.<sup>66</sup> This practice greatly helps to improve the quality of athletic department services among the member institutions and helps to reduce the disparity that exists based upon the various levels of success of revenue generating sports, especially football.<sup>67</sup>

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<sup>63</sup> Ariana Witt, *UI Trademark Revenue Increases, Goes to Athletics*, THE DAILY IOWAN (Apr. 18, 2011, 7:20 AM), <http://www.dailyiowan.com/2011/04/18/Metro/22909.html>.

<sup>64</sup> *College Sports 101 – Chapter 3: Revenue*, KNIGHTCOMMISSION.ORG, [http://knightcommission.org/index.php?option=com\\_content&view=article&id=367&Itemid=87](http://knightcommission.org/index.php?option=com_content&view=article&id=367&Itemid=87) (last visited Mar. 1, 2013) (However there is a serious disparity between those FBS institutions at the top of the list in ticket revenue, producing over thirty-percent of their total revenue from ticket sale, and those at the bottom of the list, producing less than ten-percent of their total revenue from ticket sales. The lower revenue amounts generated from ticket sales force those institutions to rely more on allocated revenues, i.e., those revenues which come from student fees and institutional and governmental support.).

<sup>65</sup> Kristi Dosh, *Big Ten Ticket Revenue*, THE BUSINESS OF COLLEGE SPORTS (Apr. 20, 2011), <http://businessofcollegesports.com/2011/04/20/big-ten-ticket-revenue/>.

<sup>66</sup> *Id.* The Big Ten institutions share 35% revenues generated from ticket sales for all conference home games in football, up to a season maximum of \$4 million. For the 2009 football season, each Big Ten team received a \$2.95 million distribution from shared football ticket sales revenues, which resulted in a net loss for six institutions while producing a net gain for five institutions.

<sup>67</sup> In the Big Ten, three institutions have football stadiums with capacities greater than 100,000 (Michigan – 109,901, Penn State – 106,572, Ohio State – 102,329), while three institutions have football stadiums with about half those capacities (Northwestern – 47,130, Minnesota – 50,805, Indiana – 52,929). *Big Ten Conference*, WIKIPEDIA,

As the calls for greater athletic department services and student-athlete benefits intensify, it is likely that there will be the demand for greater intra-conference (and potentially inter-conference) revenue sharing as a means to finance the improved services and benefits. There are certainly lucrative revenue streams available that can be tapped to fund the improvements.

### *C. Member Institutions*

As of 2011, there are 1073 active and twenty-seven provisional member institutions participating in NCAA sponsored athletics across three divisions.<sup>68</sup> By contrast, in 1950 there were 362 active member institutions.<sup>69</sup> The three divisions generally offer different levels of competition and student-athlete benefits. The divisions are subjected to different governance structures and must meet different standards and minimum requirements.

Division I, which contains 335 member institutions, generally provides greater student-athlete financial benefits than the other two divisions.<sup>70</sup> Division I institutions may provide athletics-based grants-in-aid, which are provided in greater number and at greater values than by Division II or III institutions, thanks in large part to greater financial resources. In 2010-11, 169,037 student-athletes participated in NCAA Division I athletics,<sup>71</sup> an average of 507.6 student-athletes per institution.<sup>72</sup> On average, Division I member institutions sponsor 8.7 men's teams and 10.3 women's teams.<sup>73</sup>

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[http://en.wikipedia.org/wiki/Big\\_Ten\\_Conference#Football](http://en.wikipedia.org/wiki/Big_Ten_Conference#Football) (last visited Mar. 1, 2013).

<sup>68</sup> MEMBERSHIP REPORT, *supra* note 13, at 5

<sup>69</sup> *Id.*

<sup>70</sup> *Differences Among the Three Divisions: Division I*, NCAA (Dec. 7, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA+OLD/Who+We+Are/Differences+Among+the+Divisions/Division+I/About+Division+I>.

<sup>71</sup> SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT, *supra* note 14, at 73.

<sup>72</sup> *Id.* at 188.

<sup>73</sup> *Id.* at 178.

It is relevant to note that in the sport of football Division I is further subdivided into three classifications: the Football Bowl Subdivision (FBS), the Football Championship Subdivision (FCS), and those institutions that do not sponsor football. These subdivisions significantly affect the financial returns realized by the member institutions, discussed *infra* in section III.

Division II, which contains 302 active member institutions and twenty-one provisional member institutions, also provides athletics-based grants-in-aid, but there are far fewer occurrences of those grants equaling a full grant-in-aid award.<sup>74</sup> Generally, Division II student athletes receive partial athletics-based grants-in-aid and may also receive academic and/or need based financial aid. In 2010-11, 102,273 student-athletes participated in NCAA Division II athletics,<sup>75</sup> an average of 335.3 student-athletes per institution.<sup>76</sup> On average, Division II member institutions sponsor 6.8 men's teams and 7.8 women's teams.<sup>77</sup>

Division III, which contains 436 active member institutions and six provisional member institutions, does not provide athletics-based grants-in-aid.<sup>78</sup> Furthermore, a greater portion of the total student body of Division III institutions participate in NCAA sponsored athletics (on average about 20% of the student body).<sup>79</sup> In 2010-11, 172,767 student-athletes participated in NCAA Division III athletics,<sup>80</sup> an average of 396 student-athletes per institution.<sup>81</sup> On average, Division III member institutions sponsor 8.3 men's teams and nine women's teams.<sup>82</sup>

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<sup>74</sup> *Differences Among the Three Divisions: Division I*, *supra* note 69.

<sup>75</sup> SPORT SPONSORSHIP AND PARTICIPATION RATES REPORT, *supra* note 15, at 74.

<sup>76</sup> *Id.* at 188.

<sup>77</sup> *Id.* at 178.

<sup>78</sup> *Differences Among the Three Divisions: Division I*, *supra* note 69.

<sup>79</sup> *Id.*

<sup>80</sup> SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT, *supra* note 14, at 75.

<sup>81</sup> *Id.* at 188.

<sup>82</sup> *Id.* at 178.

Every member institution has its own independent goals based on its individual philosophy. The NCAA specifically encourages individualized philosophies among its member institutions. Some institutions do in fact fashion the focus of their student-athletes on academics or some other aspect of their collegiate experience to a greater extent than athletics, or even in spite of athletics. An obvious example of member institutions trumping athletics with academics is the members of the Ivy League, who compete at the FCS level of Division I in football. Since the league formed in 1954, the Counsel of Ivy Group Presidents has agreed to a rule that requires all members to decline participation in the FCS postseason championship tournament.<sup>83</sup> The stated reason for the rule is that the FCS tournament extends into the fall semester final exam period.<sup>84</sup> Beyond this measure of athletics focus, the Ivy League member institutions also decline to offer any athletics-based grants-in-aid to student-athletes.<sup>85</sup> This policy also dates back to the leagues establishment, the point in history when the NCAA abandoned its own prohibition of athletics-based scholarships.<sup>86</sup> It is argued this policy, like the policy foregoing postseason participation, is maintained so that the high academic standards of the member institutions will not be compromised.<sup>87</sup>

Other institutions balance athletics and academics more evenly. Duke University, an institution with a very well-respected academic history, specifically expresses its belief

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<sup>83</sup> David Burrick, *Ivy League Not Likely to See I-AA Playoffs*, THE DAILY PENNSYLVANIAN (Sept. 18, 2003, 5:00 AM), [http://thedp.com/index.php/article/2003/09/ivy\\_league\\_not\\_likely\\_to\\_see\\_iaa\\_playoffs](http://thedp.com/index.php/article/2003/09/ivy_league_not_likely_to_see_iaa_playoffs).

<sup>84</sup> *Id.*

<sup>85</sup> Stated Meeting of the Trustees, Ivy Group Agreement (Jan. 18, 1954), <http://www.archives.upenn.edu/histy/features/imagepenn/ivy1954.pdf> (Article IV(A)(f) states: "The members of the Group reaffirm their prohibition of athletic scholarships. Athletes shall be admitted as students and awarded financial aid only on the basis of the same academic standards and economic need as are applied to all other students.").

<sup>86</sup> *Id.*

<sup>87</sup> Michael Shapiro, *A Call for Ivy League Athletic Scholarships*, COLUMBIA SPECTATOR (Oct. 4, 2010), <http://www.columbiaspectator.com/2010/10/04/sports-column>.

that there is educational value in championship level competition, yet explicitly states that graduation is the goal for all student-athletes.<sup>88</sup> The individualized goals of each institution address the importance of athletics, academics, and various other values held to be instrumental to a complete college education.

#### *D. Student-Athletes*

During the 2010-11 academic year, 444,077 student-athletes participated in NCAA sponsored athletics.<sup>89</sup> Of those participants, 252,946 were men and 191,131 were women. Overall participation has experienced a ninety-two-percent increase since the 1981-82 level of 231,445. Participation by female student-athletes has nearly tripled during the same timeframe, up from 64,390.

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<sup>88</sup> *Mission Statement for Athletics at Duke*, DUKE UNIVERSITY ATHLETICS, [http://www.goduke.com/ViewArticle.dbml?DB\\_OEM\\_ID=4200&ATCLID=152723](http://www.goduke.com/ViewArticle.dbml?DB_OEM_ID=4200&ATCLID=152723) (last visited Mar. 1, 2013) (stating:

The guiding principle behind Duke's participation in Division I athletics is our belief in its educational value for our students. Intercollegiate athletics promotes character traits of high value to personal development and success in later life. These include the drive to take one's talents to the highest level of performance; embracing the discipline needed to reach high standards; learning to work with others as a team in pursuit of a common goal; and adherence to codes of fairness and respect.

...

Duke aims for a level of athletic performance that will frequently produce winning seasons and the realistic opportunity to compete for team or individual championships. Our mission also requires that Duke athletes be students first, that they be admitted with careful attention to their academic record and motivation, that they benefit from Duke's educational programs and make satisfactory progress toward a degree, and that their attrition and graduation rates be comparable to those of other students.).

<sup>89</sup> SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT, *supra* note 14, at72.

During the 2010-11 academic year the highest participation men's sports were football (67,887), baseball (31,264), outdoor track (26,118), indoor track (22,750), and soccer (22,573).<sup>90</sup> During the same period, the highest participation women's sports were women's outdoor track (25,295), women's soccer (24,671), women's indoor track (23,413), softball (18,188), and women's basketball (15,708).<sup>91</sup>

### *1. Financial Aid*

Student-athletes are allowed to receive several different forms of permissible financial aid. Certain forms of financial aid that student-athletes may receive are limited in aggregate to the amount of a full grant-in-aid. A full grant-in-aid is defined as encompassing only "financial aid that consists of tuition and fees, room and board, and required course-related books."<sup>92</sup> Forms of financial aid limited to the amount of a full grant-in-aid include athletics grants-in-aid, other institutional financial aid, and non-institutional financial aid from sources other than state government.<sup>93</sup> Other forms of financial aid are limited in aggregate to the amount of cost of attendance. "The 'cost of attendance' is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution."<sup>94</sup> Forms of financial aid limited to the cost of attendance include state government grants and summer school aid.<sup>95</sup> Student-athletes may also receive aid that is not subject to any amount limitations in the form of institutional honorary awards for outstanding academic achievement, federal government grants and loans,

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<sup>90</sup> *Id.* at 197-198.

<sup>91</sup> *Id.* at 189-190.

<sup>92</sup> DIVISION I MANUAL, *supra* note 1, § 15.02.5, at 193.

<sup>93</sup> MEMBERSHIP REPORT, *supra* note 13, at 90.

<sup>94</sup> DIVISION I MANUAL, *supra* note 1, § 15.02.2, at 192.

<sup>95</sup> MEMBERSHIP REPORT, *supra* note 13, at 90.

assistance from their parents or guardians, or income from employment.<sup>96</sup>

While student-athletes have several potential avenues to acquire financial assistance to cover the expense of their college educations, some of which is provided in exchange for athletic services, there has been an outcry by some that NCAA rules work to deny student-athletes fair compensation. Furthermore, the number of athletics-based grants-in-aid that a member institution may award is limited by NCAA rules on a sport specific basis. Member institutions are limited to a definite number of grants they may award per academic year. For example, while baseball accounts for the second highest participation total of all NCAA sponsored sports, with an average of 34.3 student-athletes participating on each Division I team,<sup>97</sup> Division I bylaws limit the number of athletics-based grants-in-aid that the institution can award to 11.7 per academic year.<sup>98</sup> Student-athletes that participate in baseball will potentially be required to participate in fifty-six contests<sup>99</sup> over the course of a 132-day season,<sup>100</sup> while simultaneously being required to fulfill the requirements of a full-time academic schedule, yet will receive an athletics-based grant-in-aid which amounts on average to a waiver of one-third of that student's cost of attendance (as calculated by the institution). This situation has led groups such as the National Collegiate Players Association (NCPA), a nonprofit advocacy group that seeks to improve the well-being of NCAA student-athletes, to demand greater benefits for student-athletes.

## *2. Student-Athlete Groups*

There are two major student-athlete groups; the NCPA, a private group, unaffiliated with the NCAA, and the

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<sup>96</sup> *Id.*

<sup>97</sup> SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT, *supra* note 14, at 211.

<sup>98</sup> DIVISION I MANUAL, *supra* note 1, § 15.5.4, at 208.

<sup>99</sup> *Id.* § 17.2.5.1, at 245.

<sup>100</sup> *Id.* § 17.2.1, at 244.

Student Athlete Advisory Committee (SAAC), a nonvoting group associated with the NCAA.

*a. The National Collegiate Players Association*

The NCPA (formerly known as the Collegiate Athletes Coalition) was formed in January of 2001 by a group of UCLA football players, led by linebacker Ramogi Huma.<sup>101</sup> Huma found himself compelled “to form a student group that would allow college athletes to voice their concerns and change NCAA rules” after witnessing his all-American teammate Donnie Edwards receive a suspension for accepting groceries when his financial aid funds were exhausted and he could not personally make the purchase.<sup>102</sup> The group was initially organized as a national group of college football players, but its membership has expanded to include over 17,000 current and former Division I athletes from various sports (although membership predominately represents men’s basketball and football, the revenue generating sports).<sup>103</sup> “The group [seeks to] bring about reforms by providing a strong voice for student-athlete concerns both publicly and in direct dealings with individual colleges and the NCAA.”<sup>104</sup>

In addition to a large membership base, the NCPA has the support of a major labor union: the United Steelworkers of America.<sup>105</sup> The Steelworkers provide the NCPA with legal and technical counsel and have helped the NCPA remain organized and focused on its goals.<sup>106</sup>

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<sup>101</sup> Jonathan L. H. Nygren, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359, 366 (2003).

<sup>102</sup> *About the NCPA President*, NAT’L COLLEGE PLAYERS ASS’N, <http://www.ncpanow.org/more?id=0005> (last visited Mar. 1, 2013).

<sup>103</sup> *About NCPA*, NAT’L COLLEGE PLAYERS ASS’N, <http://www.ncpanow.org/about/> (last visited Mar. 1, 2013).

<sup>104</sup> PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXTS, CASES, AND PROBLEMS* 921 (4th ed. 2011).

<sup>105</sup> *NCPA & USW – A Winning Team*, NAT’L COLLEGE PLAYERS ASS’N, [http://www.ncpanow.org/ncpa\\_usw?id=0003](http://www.ncpanow.org/ncpa_usw?id=0003) (last visited Mar. 1, 2013).

<sup>106</sup> *Id.*



The NCPA website currently lists eleven goals for the group. The goals are to (1) minimize college athletes' brain trauma risks; (2) raise the scholarship amount; (3) prevent players from being stuck paying sports-related medical expenses; (4) increase graduation rates; (5) protect educational opportunities for student-athletes in good standing; (6) to prohibit universities from using a permanent injury suffered during athletics as a reason to reduce or eliminate a scholarship; (7) establish and enforce uniform safety guidelines in all sports to help prevent serious injuries and avoidable deaths; (8) eliminate restrictions on legitimate employment and players ability to directly benefit from commercial opportunities; (9) prohibit the punishment of college athletes that have not committed a violation (i.e., declaring an institution ineligible for post-season play as a result of transgressions committed by former student-athletes or coaches); (10) guarantee that student-athletes are granted an athletic release from their institution if they wish to transfer; and (11) allow all college athletes of all sports the ability to transfer schools one time without punishment (currently, the "transfer rule" requires student-athletes that participate in football, basketball, baseball, or ice hockey to sit out a full season at the new institution prior to being eligible for athletic participation).<sup>107</sup>

Many of the stated goals of the NCPA have received attention recently from the media and the NCAA. In fact, one goal formerly listed on the NCPA website, to allow universities to provide multiple year grant-in-aid offers, was recently approved by the NCAA and survived a membership override vote in February 2012.<sup>108</sup> While the NCPA does not enjoy collective bargaining rights with the NCAA on behalf of student-athletes, it does appear that when the group takes issue with some facet of NCAA regulations, that facet

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<sup>107</sup> *Mission & Goals*, NAT'L COLLEGE PLAYERS ASS'N, <http://www.ncpanow.org/more?id=0004> (last visited Mar. 1, 2013).

<sup>108</sup> Michelle Brutlag Hosick, *Multiyear Scholarship Rule Narrowly Upheld*, NAT'L COLLEGE PLAYERS ASS'N, (Feb. 17, 2012), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/february/multiyear+scholarship+rule+narrowly+upheld> (last visited Mar. 1, 2013).

at least becomes a talking point among the membership of the Association.

*b. The Student-Athlete Advisory Committee*

“A student-athlete advisory committee (SAAC) is a committee made up of student-athletes assembled to provide insight on their experience. The SAAC also offers input on the rules, regulations and policies that affect student-athletes’ lives on NCAA member institution campuses.”<sup>109</sup> Each division has its own separate SAAC structure.<sup>110</sup> In each division, each conference elects one SAAC representative who in turn provides input to the regulatory bodies within the NCAA. “The mission of the National Collegiate Athletic Association Student-Athlete Advisory Committee is to enhance the total student-athlete experience by promoting opportunity, protecting student-athlete welfare and fostering a positive student-athlete image.”<sup>111</sup> SAAC representatives act in a purely advisory capacity, offering opinions on NCAA rules, regulations, and policies that affect the well-being of student-athletes as they attempt to acquire their education and participate in NCAA sponsored athletics. Unfortunately, SAAC representatives have no voting power, and while the representatives can offer opinions to NCAA regulatory bodies, those opinions can easily be discounted or disregarded without any redress for student-athletes.

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<sup>109</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, STUDENT ATHLETE ADVISORY COMMITTEE 2 (2011), *available at* <http://www.ncaapublications.com/p-4147-student-athlete-advisory-committee.aspx> (last visited Mar. 1, 2013).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 4.

### III. NCAA FINANCES

#### *A. NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report 2004-2010 and Discussion of the Bowl Championship Series Revenues*

In August 2011, the NCAA released the NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report, a study examining the generated revenues and operating expenses of member institutions over a seven-year period from 2004 through 2010.<sup>112</sup> The report subdivides the presentation of data by the Division I football subdivisions. To collect the data, the NCAA distributed surveys to every member institution at the conclusion of each fiscal year. The data presents the median amounts for each category based on the institutions responses, as well as the largest amount of institutional revenue and expense reported. The data is broken down into different degrees of specificity, including amounts categorized by individual sport, the revenue generating sports, source of expenses, and discloses the number of institutions with net surpluses and the number with net losses.

Some key findings of the study for the fiscal year 2010 are as follows: generated revenues increased for median FBS institutions (9.5 percent increase) and FCS institutions (14 percent increase) from 2009 to 2010, while generated revenues decreased over the same period for member institutions without football (5.1 percent decrease).<sup>113</sup> Median expenses increased at a slower rate for both FBS and FCS institutions during the same period.<sup>114</sup> FBS institutions reported median net revenues of \$1.61 million.<sup>115</sup> FCS institutions reported median net revenues of

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<sup>112</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, REVENUES AND EXPENSES 2004 – 2010: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT (2011), *available at* <http://ncaapublications.com/p-4237-2004-2010-revenues-and-expenses.aspx> (last visited Mar. 1, 2013) [hereinafter REVENUE REPORT].

<sup>113</sup> *Id.* at 8.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 17.

\$98,000 for 2010.<sup>116</sup> Division I institutions without football reported median deficits of \$485,000 for 2010.<sup>117</sup>

The greatest contribution to athletics expenses are salaries and benefits for coaching staffs and athletics personnel. Looking at 2010 as a representative year, FBS institutions reported median salaries and benefits amounted to \$15.88 million in athletics expenses.<sup>118</sup> FCS institutions reported median salaries and benefits amounted to \$4.16 million in athletics expenses.<sup>119</sup> Division I institutions without football reported median salaries and benefits amounted to \$3.65 million in athletics expenses.<sup>120</sup> In contrast, FBS institutions reported median grants-in-aid account for \$7.24 million and median medical costs account for \$545,000 in athletics expenses.<sup>121</sup> FCS institutions reported median grants-in-aid account for \$3.51 million and median medical costs account for \$177,000 in athletics expenses.<sup>122</sup> Division I institutions without football reported median grants-in-aid account for \$3.31 million and median medical costs account for \$118,000 in athletics expenses.<sup>123</sup> At every level of NCAA Division I athletics, the median institution spends more on coaching and athletics personnel salaries than on financial aid and medical benefits for student-athletes.<sup>124</sup>

One additional troubling finding is that only twenty-two of the 335 Division I institutions reported positive net revenues for 2010, which was an increase of eight institutions from 2009.<sup>125, 126</sup> Relaxed accounting principles

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 31.

<sup>119</sup> *Id.* at 57.

<sup>120</sup> *Id.* at 83.

<sup>121</sup> *Id.* at 31.

<sup>122</sup> *Id.* at 57.

<sup>123</sup> *Id.* at 83.

<sup>124</sup> FBS: \$15.88 million for coaches and administration compared to \$7.79 million for student-athletes; FCS: \$4.16 million for coaches and administration compared to \$3.69 million for student-athletes; DI without football: \$3.65 million for coaches and administration compared to \$3.43 million for student-athletes.

<sup>125</sup> *Id.*

may explain the low number of institutions reporting positive net revenues. Athletic departments often give portions of their revenues back to the institutions for other endeavors, such as construction or academic projects, and those revenues are treated as athletic expenses.<sup>127</sup> Nevertheless, true athletic expenses exceed generated and allocated revenues at many institutions, especially those institutions that do not experience high levels of athletics success in the revenue generating sports of football and men's and women's basketball.

Although not NCAA revenues (and therefore not discussed in the NCAA Revenue Report), FBS revenues are further affected by the Bowl Championship Series (BCS), a five-game postseason exhibition that is supposed to showcase matchups of the top college football teams, including a matchup of the top-two teams in the BCS Championship game, which serves as the FBS national championship.<sup>128</sup> The BCS is not affiliated with the NCAA, but rather it is an operation between the FBS member conferences.<sup>129</sup> The BCS was formed by the six "major conferences" and Notre Dame in 1998, intended to ensure that the top two football teams in the nation would meet for a national championship game at the season's end.<sup>130</sup> Today, the BCS is managed by the commissioners of the

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<sup>126</sup> Kristi Dosh, *Self-Sustaining Athletic Departments: More Than What Meets the Eye*, THE BUSINESS OF COLLEGE SPORTS (June 16, 2011), <http://businessofcollegesports.com/2011/06/16/self-sustaining-athletic-departments-more-than-what-meets-the-eye/> (last visited Mar. 1, 2013) (all twenty-two institutions that reported net revenues are members of "major conferences": *Atlantic Coast* – Virginia Tech; *Big East* – West Virginia, *Big Ten* – Indiana, Iowa, Michigan, Michigan State, Ohio State, Penn State, Purdue; *Big XII* – Kansas State, Nebraska, Oklahoma, Oklahoma State, Texas, Texas A&M; *Pacific 12* – Oregon, Washington; *Southeastern* – Alabama, Arkansas, Florida, Georgia, Louisiana State).

<sup>127</sup> *Id.*

<sup>128</sup> *BCS Background*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809699> (last updated Jan. 16, 2012, 5:06 PM) (last visited Mar. 1, 2013).

<sup>129</sup> *Id.*

<sup>130</sup> *The Bowl Championship Series Overview*, NATIONAL FOOTBALL FOUNDATION, <http://www.footballfoundation.org/Programs/BCS.aspx> (last visited Mar. 1, 2013).

eleven FBS conferences and the athletic director of Notre Dame.<sup>131</sup>

Currently, the BCS offers automatic qualification to the champions of the six “major conferences.”<sup>132</sup> The champions of the remaining five FBS conferences and Notre Dame may earn an automatic berth if their season-ending BCS ranking meets certain thresholds.<sup>133</sup> If any of the ten available BCS slots remain unfilled after all the automatic qualifiers receive invitations to BCS bowl games, and if a team from one of the “major conferences” is ranked third in the season-ending BCS rankings and that team did not receive the conference’s automatic bid (i.e., did not win the conference championship), then that team becomes an automatic qualifier. If the third place team did receive an automatic bid, then the invitation goes to the team ranked fourth if that team did not receive the conference’s automatic bid. If any slots remain after all automatic qualifiers are placed in BCS bowl games, then the BCS bowls may select any BCS eligible team as an “at large” selection.<sup>134</sup> A BCS eligible team is defined as a team that finishes the season with nine or more victories and is in the top fourteen of the season-ending BCS rankings, subject to a limit that no more than two teams from the same conference may participate in BCS bowl games.<sup>135</sup> If after selecting from the BCS eligible field slots still remain, then the BCS eligibility definition is expanded by four season-ending BCS rankings until all slot are filled, still subject to the limitation that no more than two teams from the same conference participate in BCS bowl games.

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<sup>131</sup> *BCS Governance*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809846> (last updated Feb. 8, 2013, 11:48 AM ET) (last visited Mar. 1, 2013).

<sup>132</sup> *BCS Selection Procedures*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM ET) (last visited Mar. 1, 2013).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* There is one exception to the two team limitation. If two teams from the same conference finish the season ranked number one and number two in the season-ending BCS rankings, but neither team receives the conference’s automatic bid, that conference may send three teams to BCS bowl games.

The BCS annually distributes revenue to the conferences and independent member institutions. For the 2010-2011 season, if a conference had a team that automatically qualified for a BCS bowl game, then that conference received a \$22 million distribution.<sup>136</sup> If an additional team participated in a BCS bowl game, that conference received an additional \$6 million distribution.<sup>137</sup> Notre Dame received a \$1.6 million distribution.<sup>138</sup> Army and Navy received \$100,000 distributions, respectively.<sup>139</sup> Each FCS conference received a \$250,000 distribution.<sup>140</sup>

However, on June 26, 2012, the FBS conference commissioners formally approved a four-team playoff to replace the current BCS structure beginning in 2014, which will run through at least 2025.<sup>141</sup> The new playoff format has already been informally dubbed the “national championship series” by new Big 12 commissioner Bob Bowlsby.<sup>142</sup> This imminent name change is likely an attempt to reduce the negative stigma that the BCS has garnered in past years for the several so-called snubs of potential national championship quality teams. More notable than the change in the name and format of the series is the increase in television revenues that the recently agreed upon contract between the former Bowl Championship Series and ESPN will produce. The twelve-year contract is reportedly worth \$5.64 billion total, or

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<sup>136</sup> *The BCS Is . . .*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809716> (last updated July 22, 2011, 1:09 PM ET) (last visited Mar. 1, 2013).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Heather Dinich, *Playoff Plan to Run Through 2025*, ESPN.COM, [http://espn.go.com/college-football/story/\\_/id/8099187/ncaa-presidents-approve-four-team-college-playoff-beginning-2014](http://espn.go.com/college-football/story/_/id/8099187/ncaa-presidents-approve-four-team-college-playoff-beginning-2014) (last updated June 27, 2012, 1:12 PM ET) (last visited Mar. 1, 2013).

<sup>142</sup> Tim Griffin, *New Leader Sees Big 12 in Power Formation*, MYSANANTONIO.COM, [http://www.mysanantonio.com/sports/college\\_sports/big\\_12/article/New-leader-sees-league-in-power-formation-3684738.php](http://www.mysanantonio.com/sports/college_sports/big_12/article/New-leader-sees-league-in-power-formation-3684738.php) (last updated July 5, 2012, 12:03 AM) (last visited Mar. 1, 2013).

roughly \$470 million annually,<sup>143</sup> an amount that is just over three times more than the current \$155 million paid per year for the broadcast rights to the five BCS bowl games.<sup>144</sup>

Another key feature of the new national championship series will be the abandonment of the automatic qualification for conference champions.<sup>145</sup> The new format will include six bowl games that will alternate as locations for the national semi-final games from year-to-year.<sup>146</sup> In the years those bowls are not semi-finals games, they will function much like the former BCS bowl games, inviting the top teams in the nation to participate.<sup>147</sup> Five of the traditional “major conferences” and Notre Dame have entered into contracts with three bowl games expected to be a part of the six top-tier bowl games that will alternately serve as the semi-final games, likely creating a de facto automatic qualification for those conference champions.<sup>148</sup>

The move from five top-tier bowl games to six will increase access for the top teams to compete in more lucrative bowl games. This could potentially increase access and revenues for the non-major conferences, however there is speculation that the distribution percentages will more than likely remain much the same as they have been under the BCS system.<sup>149</sup> A playoff revenue-split subcommittee

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<sup>143</sup> Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J. (Nov. 21, 2012, 1:46 PM), <http://online.wsj.com/article/SB10001424127887324851704578133223970790516.html> (last visited Mar. 1, 2013).

<sup>144</sup> Kristi Dosh, *NCAA Football Payouts May Stay the Same*, ESPN.COM (June 25, 2012, 3:56 PM ET), [http://espn.go.com/blog/playbook/dollars/post/\\_id/767/ncaa-football-payouts-may-not-change-much](http://espn.go.com/blog/playbook/dollars/post/_id/767/ncaa-football-payouts-may-not-change-much) (last visited Mar. 1, 2013).

<sup>145</sup> Dinich, *supra* note 140.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Brian Murphy, *College Football Playoffs Starting to Look Like BCS 2.0*, IDAHO STATESMAN, [http://voices.idahostatesman.com/2012/07/03/bmurphy/college\\_football\\_playoffs\\_starting\\_look\\_bcs\\_20](http://voices.idahostatesman.com/2012/07/03/bmurphy/college_football_playoffs_starting_look_bcs_20) (last updated July 3, 2012, 2:25 PM) (last visited Mar. 1, 2013) (stating that only the Big East has not entered into a contract with one of the expected top-tier bowl games).

<sup>149</sup> Dosh, *supra* note 143.



has been formed by the FBS conference commissioners to determine the appropriate distribution model.<sup>150</sup> The subcommittee is made up of a majority of commissioners from the former automatic qualification conferences and it seems hard to imagine that those commissioners will act contrary to their own conferences' financial interests. Yet, with an estimated additional \$350 million per year to divide between FBS conferences, even under the current distribution model all FBS institutions will see a large increase in athletic department revenues that may help to reduce athletic department deficits.

### *B. NCAA Membership Report 2009-2010*

The NCAA is a 501(c)(3) not-for-profit charitable organization so much of the Association's financial information is public record. The NCAA Membership Report is an annual report detailing the financial data of the Association and its membership. During the 2009-2010 year, the NCAA generated \$749,822,258 in revenue, 85.7 percent of which was generated from television and marketing rights.<sup>151</sup> <sup>152</sup> The majority of the revenue generated from television and marketing rights comes from the NCAA contract with CBS and Turner Broadcasting for the broadcast rights to the NCAA Division I Men's Basketball Championship.<sup>153</sup> The current fourteen-year agreement, which runs from 2011 through 2024, will earn the NCAA \$10.8 billion.<sup>154</sup>

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<sup>150</sup> Ben Kercheval, *Playoff Revenue-Split Subcommittee Features Four "Big Five" Commissioners*, NBCSPORTS.COM (June 28, 2012, 7:53 PM EST), <http://collegefootballtalk.nbcsports.com/2012/06/28/playoff-revenue-split-subcommittee-features-four-big-five-commissioners> (last visited Mar. 1, 2013).

<sup>151</sup> MEMBERSHIP REPORT, *supra* note 13, at 26.

<sup>152</sup> The total is estimated to be about \$871.6 million for 2011-12. *Revenue*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue> (last updated Feb. 13, 2013) (last visited Mar. 1, 2013).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

During the 2009-2010 year, the NCAA sustained \$707,224,333 in expenses, sixty-one percent of which was distributions to the Division I member institutions and nine percent which was spent on Division I championships and programs, four percent of which was distributed to Division II member institutions and spent on Division II championships and programs, and three percent of which was spent on Division III championships and programs.<sup>155</sup>

The Division I distributions are made directly to conferences from seven funds that base their distribution on the combined performance and student-athlete assistance statistics of conference member institutions.<sup>156</sup> These funds include the Basketball Fund (distributed based on the performance of member institutions in the NCAA Men's Basketball Championship tournament), the Academic Enhancement Fund (distributed "in response to proposals of innovative solutions and efforts to increase student athlete retention and progress-towards-degree success"), the Conference Grant Fund (distributed to conferences that employ a full-time administrator and are eligible for an automatic qualification to the NCAA Men's Basketball Championship tournament), the Special Assistance Fund (distributed based on the number of grants-in-aid awarded and the number of sports sponsored by a conference) the Sports-Sponsorship Fund (distributed based on the number of athletics grants-in-aid awarded and the number of sports sponsored by the member institutions individually), the Grant-in-Aid Fund (distributed on the same basis), and the Student-Athlete Opportunity Fund (distributed on the same basis).<sup>157</sup>

This distribution model may perpetuate the problem of athletics revenue disparity between member institutions. While it is seemingly reasonable that institutions that invest more money in their athletics programs should receive more returns, it is highly likely that the institutions receiving lower distributions from the NCAA are unable to compete on the same level with institutions that historically

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<sup>155</sup> MEMBERSHIP REPORT, *supra* note 13, at 27.

<sup>156</sup> *Id.* at 29-33.

<sup>157</sup> *Id.*

receive more financial distributions, and therefore are unable to increase grant-in-aid totals or improve the performance of the basketball program. The disparity also leads to inequalities between student-athletes at different institutions, which seemingly clashes with one of the stated core values of the Association, the goal of creating “[a]n inclusive culture that fosters equitable participation for student-athletes . . . from diverse backgrounds.”<sup>158</sup> The disparity is obvious when one reviews the conference distribution totals for 2009-2010. The six “major conferences” received \$206,670,709 of the \$434,648,083 Division I NCAA revenue distribution.<sup>159</sup> That means seventy-three of the 335 total Division I institutions received 47.5% of the Division I revenue distributed. That is an average of \$2.83 million for each of the seventy-three schools.<sup>160</sup> By contrast, the Atlantic Sun Conference, with a membership of ten institutions, received a total distribution of \$3,774,448.<sup>161</sup> When compared to the total \$544,010,933 revenue distributed to all 1073 active NCAA member institutions, the seventy-three “major conference” members received 38.0% of the total revenue distributed.<sup>162</sup> The “major conference” member institutions make up less than seven percent of the NCAA’s membership.<sup>163</sup> These percentages illustrate the economic incentives that are influencing the current conference realignment movement in college sports.

Yet, his distribution model is more than likely fair when viewed from a pure laissez-faire perspective, considering the value added to the NCAA product by each individual

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<sup>158</sup> *Core Values*, *supra* note 45.

<sup>159</sup> MEMBERSHIP REPORT, *supra* note 13, at 35.

<sup>160</sup> This average is not a clear reflection of the actual amount received by all institutions in the “major conferences.” Each conference received a different distribution amount and those conferences contain different numbers of member institutions; therefore, some “major conference” institutions averaged lower than this figure while others average above. However, all six “major conferences” received distributions in excess of \$30 million.

<sup>161</sup> MEMBERSHIP REPORT, *supra* note 13, at 35.

<sup>162</sup> \$206,670,709 divided by \$544,010,933 equals 37.99569%.

<sup>163</sup> 73 divided by 1073 equals 6.8%.

conference and its respective member institutions. The “major conferences” draw far greater fan support and therefore generate greater revenues. Yet, when the overarching goal is education, and not merely athletic success, it may be necessary to question whether perpetuating this disparity in revenues between educational institutions is appropriate.

Also, NCAA revenues (revenues which the Association itself generates) do not demonstrate the complete picture. NCAA research staff estimate that the institution athletic programs generate approximately \$6.1 billion annually from ticket sales, radio and television receipts, alumni contributions, guarantees, royalties and NCAA distributions.<sup>164</sup> The institutions receive an additional \$5.3 billion in allocated revenues, from sources such as student fees, institutional support, and governmental support.<sup>165</sup> In total, NCAA athletics was an \$11.4 billion industry in 2011.

### *C. The “Scholarship Shortfall” Problem*

A “scholarship shortfall” refers to the difference between a full athletics-based grant-in-aid and the cost of attendance for the student-athlete at the institution.<sup>166</sup> A full athletics-based grant-in-aid is limited to “financial aid that consists of tuition and fees, room and board, and required course-related books.”<sup>167</sup> This limitation leaves a gap between the financial aid that student-athletes receive and the costs required to attend the institution. The student-athletes are left responsible to account for the gap. Because the costs associated with attendance vary between institutions, this gap is a greater burden on some student-athletes than

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<sup>164</sup> *Revenue: Frequently Asked Questions*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue> (last updated Feb. 13, 2013) (last visited Mar. 1, 2013).

<sup>165</sup> *Id.*

<sup>166</sup> Press Release, Nat’l Collegiate Players Ass’n, *Scholarship Shortfall Study Reveals College Athletes Pay to Play*, NCPANOW.ORG, [http://www.ncpanow.org/releases\\_advisories?id=0009](http://www.ncpanow.org/releases_advisories?id=0009) (last visited March 1, 2013).

<sup>167</sup> DIVISION I MANUAL, *supra* note 1, § 15.02.5, at 193.

others. A joint study by the NCPA and the Ithaca College Graduate Program in Sports Management found that on average, the shortfall at Division I institutions is \$2,951 per year, or \$14,755 over five years (the maximum duration of an athletics-based grant-in-aid).<sup>168</sup> However, the shortfalls ranged from about \$200 up to \$10,962 per year.<sup>169</sup> At the upper end of the spectrum, student-athletes receiving full athletics scholarships are responsible for approximately \$55,000 over the course of their college education. That is inconsistent with the idea of a “free ride” that most people believe student-athletes enjoy.

Contributing further to this burden, due to the academic and athletic commitments embraced by student-athletes, there is often little or no time for student-athletes to earn any income through the channels allowed by NCAA regulations to cover extra expenses. In season, student-athletes put in near full-time hours in practice and competition participation. Teams are limited to twenty hours of athletics participation per week during the season,<sup>170</sup> however common sense suggests that this limit operates as a minimum number of practice hours per week.<sup>171</sup> Further, the NCAA interprets each competition to equal no more than three hours, irrespective of travel and pre- and post-game time requirements. Institutions are required to give student-athletes one day off per week during the season,<sup>172</sup> however travel days may be counted as off-days.<sup>173</sup> Given these realities, it is easy to see how student-athletes may dedicate in excess of forty hours per week to athletics participation during the season.

Student-athletes are also required “to be enrolled in at least a minimum full-time program of studies, be in good

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<sup>168</sup> Scholarship Shortfall Study Reveals College Athletes Pay to Play, *supra* note 165.

<sup>169</sup> *Id.*

<sup>170</sup> DIVISION I MANUAL, *supra* note 1, § 17.1.6.1, at 238.

<sup>171</sup> It is reasonable to assume that teams will use the full amount of practice time allowed. To use less would offer the team’s opponent an opportunity to gain an advantage in being more prepared for the contest.

<sup>172</sup> DIVISION I MANUAL, *supra* note 1, § 17.1.6.4, at 240.

<sup>173</sup> *Id.* § 17.1.6.4.1, at 240.

academic standing and maintain progress toward a baccalaureate or equivalent degree.”<sup>174</sup> Generally, this requires a student-athlete to enroll in a minimum of twelve credit hours per semester and maintain a 2.0 GPA.<sup>175</sup> Such a study regiment requires a significant time commitment from the student-athlete in addition to their athletic participation. At best, it would be an undue burden for student-athletes to handle the added time commitment of part-time employment necessary to earn the income required to compensate for any shortfall left by their full athletics-based grant-in-aid.

#### IV. THE CURRENT STATE OF NCAA LEGAL AFFAIRS

##### *A. Recent NCAA Regulatory Action*

On October 27, 2011, the Division I Board of Directors (the “Board”) of the NCAA adopted legislation that allows member institutions to provide student-athletes that “receive full athletic scholarships or get other school financial aid combined with athletic aid to equal a full scholarship” with either the difference between the amount of aid received and the institution’s calculation of full cost of attendance or with \$2,000, whichever is less (the “miscellaneous expense allowance”).<sup>176</sup> On January 14, 2012, following the objection of at least 160 of the 335 Division I institutions to the adoption of the miscellaneous

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<sup>174</sup> *Id.* § 14.01.2, at 143.

<sup>175</sup> It should be noted that these requirements are only the minimum necessary to continue athletics participation. They do not ensure that the student-athletes will be well-positioned following the exhaustion of their NCAA eligibility to succeed in the job market or continue their education. In fact, taking the minimum number of credit hours every semester may not even meet the required number of credit hours for graduation for some student-athletes, depending on their degree choice.

<sup>176</sup> Michelle Brutlag Hosick, *Latest News, Nat’l Collegiate Athletic Ass’n, DI Board Adopts Improvements in Academic Standards and Student-Athlete Support*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 27, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/October/DI+Board+of+Directors+adopt+changes+to+academic+and+student-athlete+welfare> (last visited Mar. 1, 2013).

expense allowance, the Board voted to delay implementation of the legislation and requested a modified proposal from the Student-Athlete Well-Being Working Group in April 2012.<sup>177</sup>

Following the 2013 NCAA Convention, which took place in January 16-19, now more than “ [a] year after the board delayed implementation of a \$2,000 miscellaneous expense allowance for student-athletes to help cover the full cost of attendance, there [has been] no new proposal for consideration on the issue.”<sup>178</sup> The initial decision to delay implementation by the Board was influenced by numerous concerns expressed by the member institutions; however the Association appears to remain determined to implement some form of the reform measure. Following the Board’s January 2012 delay and request for a modified proposal, NCAA President Mark Emmert told reporters that “[i]t would be very inaccurate to describe this as a setback for the \$2,000, but rather [it is] a clear attempt to get it right,” classifying the stipend as “obviously an important element of student well-being.”<sup>179</sup> Even so, it remains a possibility that the miscellaneous expense allowance will never realize enactment.<sup>180</sup>

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<sup>177</sup> Michael Marot, *NCAA Asks for New Proposal on \$2,000 Stipend*, ASSOCIATED PRESS, Jan. 14, 2012, available at <http://abcnews.go.com/Sports/wireStory/ncaa-asks-proposal-2000-stipend-15362463#.TxRVpYGwVLc>.

<sup>178</sup> Associated Press, *N.C.A.A. Changes Rules at Convention*, N.Y. TIMES, (Jan. 19, 2013), [http://www.nytimes.com/2013/01/20/sports/ncaa-changes-rules-at-convention.html?\\_r=0](http://www.nytimes.com/2013/01/20/sports/ncaa-changes-rules-at-convention.html?_r=0).

<sup>179</sup> Steve Wieberg, *NCAA to Modify \$2,000 Stipend Proposal*, USA TODAY, (Jan. 14, 2012), <http://www.usatoday.com/sports/college/story/2012-01-14/NCAA-stipend-money/52559576/1?csp=34sports>.

<sup>180</sup> *Id.* (Following adoption of legislation by the NCAA Division I Board of Directors, the member institutions can suspend implementation of the rule by forcing an override vote. This requires objections in writing from 125 of the 335 member institutions. This has occurred regarding the \$2,000 stipend. As it currently stands, after reevaluation of the legislation in April, the Board will again be charged with adopting or rejecting the legislation. Should the Board adopt the legislation, the member institutions will be granted another 60-day comment period and, once again, an opportunity to force an override vote, starting this stage of the process all over again. If the Board does not concede to the override vote, the legislation would then be put to issue by a vote of the 335 member institutions. At that point, in order to

The Student-Athlete Well-Being Working Group has considered and sought feedback on three options for implementing the miscellaneous expense allowance.<sup>181</sup> The first option would allow each institution to award up to the additional \$2,000 to any student-athlete, regardless of need or whether they receive a full grant-in-aid.<sup>182</sup> As part of this option, an institution can prorate the additional award for student-athletes receiving partial grants-in-aid to the percentage of their grant (i.e., a student-athlete receiving a 25% scholarship could receive \$500 of additional aid).<sup>183</sup> The second option would “[b]ase eligibility for the miscellaneous expense allowance on a student-athlete’s demonstrated ‘need’ as detailed through the Free Application for Student Financial Assistance (FAFSA).”<sup>184</sup> The third option would allow institutions to use the Student-Athlete Opportunity Funds to provide the miscellaneous expense allowance.<sup>185</sup> No further debate by the Division I membership is expected to take place prior to April 2013.<sup>186</sup>

Ramogi Huma, president of the National College Players Association, questions the effectiveness of the additional aid if a need-based model is accepted by the Division I Board.<sup>187</sup> Huma stated that he believes that “basing the stipend on financial need would be ineffective because most athletes have too much money to qualify for need-based aid through the NCAA.”<sup>188</sup> Huma supports one of the other two options

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override approval of the legislation, a five-eighths majority (209 of 335) would be required to vote against approval. If less than a five-eighths majority objects the legislation would then be approved and enacted.)

<sup>181</sup> Michelle Hosick, *DI Board Pledges to Move Forward With Feedback from the Membership*, NCAA.ORG (Ap. 26, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/April/DI+Board+pledges+to+move+forward+with+feedback+from+the+membership>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Associated Press, *supra* note 177.

<sup>187</sup> Jon Soloman, *NCAA Considers Scholarship Stipend for Athletes Based on Financial Need*, AL.COM (May 14, 2012, 9:00 AM), [www.al.com/sports/index.ssf/2012/05/ncaa\\_considers\\_more\\_scholarshi.html](http://www.al.com/sports/index.ssf/2012/05/ncaa_considers_more_scholarshi.html).

<sup>188</sup> *Id.*



more than a need-based model because it will make recruits aware in advance of signing a national letter of intent whether or not they will receive the additional aid.

If it's need based, no school can guarantee any recruit whether they can get anything because they wouldn't know if they qualify or not . . . . Two of the three proposals would be a small step in the right direction. It's not a solution. It's a Band-Aid, but there would still be bleeding.<sup>189</sup>

Despite these concerns, it appears that the need-based model appears to have more support from Division I membership. According to NCAA Division I Vice President David Berst, “[t]here’s probably more interest (by the membership) on some type of need-based option, if there’s a shortcut to determine what need is.”<sup>190</sup> The process must play out and to determine whether any of the options is adopted by the Division I Board in August and whether the option will be approved and enacted by the membership. At the earliest, a regulation could be enacted by the end of 2013.

### *B. Antitrust Law*

Antitrust law is the strongest weapon in student-athletes arsenal to challenge the impact of NCAA regulations. Student-athletes perform a service in exchange for benefits; the situation demands that student-athletes have a form of recourse should the actions of NCAA membership disrupt the reasonable and efficient exchange of services and benefits. Antitrust courts must inquire whether NCAA regulations work individually or in combination to restrict competition between the member institutions for student-athlete services. This inquiry assumes a student-athlete labor market, a market which has recently received explicit recognition from federal courts

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

presented with antitrust challenges to NCAA commercial regulations. By judging the reasonableness of NCAA restrictions on the student-athlete labor market, antitrust courts may ensure student-athletes are adequately protected from potential exploitation by institutions engaged in a multibillion-dollar industry.

*1. NCAA v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association*

Since the Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma*, the NCAA has been recognized as an association of competitors in "an industry in which horizontal restraints on competition are essential if the product is to be available at all."<sup>191</sup> In *Board of Regents*, Justice Stevens gave examples of the sort of restrictions that may justifiably be placed on NCAA member institutions without eliciting antitrust liability, such as "rules defining the conditions of the contest, 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."<sup>192</sup> Regardless of these allowances, Justice Stevens made it clear that NCAA regulations may not reduce "the importance of consumer preference in setting price and output."<sup>193</sup> Nor may the NCAA "blunt[ ] the ability of member institutions to respond to consumer preference."<sup>194</sup> For the purposes of antitrust review, the Court announced two potential procompetitive justifications for NCAA restrictive regulations: amateurism and competitive equity.

The Court reasoned that amateurism was the key feature that separated NCAA sponsored athletics from athletic competitions sponsored by professionalized leagues,

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<sup>191</sup> *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 101 (1984).

<sup>192</sup> *Id.* at 117.

<sup>193</sup> *Id.* at 107 (noting that "Congress designed the Sherman Act as a 'consumer welfare prescription.' ") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

<sup>194</sup> *Id.* at 120.

and therefore NCAA athletics were indeed a separate product. The Court concluded that:

In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement. . . . Thus, the NCAA plays a vital role in enabling college [athletics] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice – not only the choices available to sports fans but also those available to athletes – and hence can be viewed as procompetitive.<sup>195</sup>

Therefore, NCAA regulations tailored to preserve the “amateur” nature of the competition, such as prohibiting benefits in excess of the cost of attendance, do not upset the antitrust laws.

The Court further found that if the product was to succeed in the marketplace, competitive equity was reasonably necessary, because otherwise fans would not have interest in the product and NCAA athletics would fail.<sup>196</sup> However, regulations intended to maintain competitive equity must be narrowly tailored to achieve that purpose.<sup>197</sup> While the Court theorized that it might be reasonable to “regulate the amount of money that any college may spend on its football program, [ ]or the way in which the colleges may use the revenues that are generated

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<sup>195</sup> *Id.* at 102.

<sup>196</sup> *Id.* at 117 (accepting the NCAA’s argument “that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important.”).

<sup>197</sup> *Id.* (rejecting the NCAA’s argument that the regulation of all television broadcasts of intercollegiate football was necessary to maintain competitive equity because the plan was “not related to any neutral standard or to any readily identifiable group of competitors.”)

by their football programs,”<sup>198</sup> its ultimate finding that “consumption will materially increase if the controls are removed” dictated its holding that the NCAA’s regulation of all televised intercollegiate football games violated section 1 of the Sherman Act.<sup>199</sup>

## 2. *The NCAA as a Monopsony*

The competitive equity justification was further shaped by the Court of Appeals for the Tenth Circuit in *Law v. NCAA*.<sup>200</sup> The case dealt with the “Restricted Earnings Coach” rule (REC rule) that required one coach per coaching staff in a given sport to be classified as a “restricted earnings coach” with a salary limit set at \$12,000 during the academic year and \$4,000 during the summer. The NCAA argued that because athletics personnel salaries present the highest athletics expenses for member institutions, the REC rule was tailored to reduce institution athletics expenses and therefore promote competitive equity between the member institutions.<sup>201</sup>

The court rejected the NCAA’s argument, finding the REC rule operated as a price fix. The court approved the “quick-look” rule of reason approach, relieving the plaintiffs of their burden to specifically define the relevant market, and proceeded to find the NCAA could not demonstrate procompetitive justifications for the rule.<sup>202</sup> Finding the REC rule was nothing more than a cost-cutting measure, the court declared “cost-cutting by itself is not a valid procompetitive justification.”<sup>203</sup> The court concluded “[t]he NCAA’s cost containment justification [was] illegitimate because . . . ‘[i]f holding down costs by the exercise of

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<sup>198</sup> *Id.* at 119.

<sup>199</sup> *Id.* at 120.

<sup>200</sup> *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998).

<sup>201</sup> *Id.* at 1014.

<sup>202</sup> *Id.* at 1023 (“[T]he NCAA presents no evidence that limits on restricted-earnings coaches’ salaries would be successful in reducing deficits, let alone that such reductions were necessary to save college basketball.”).

<sup>203</sup> *Id.* at 1022.

market power over suppliers, rather than just by increased efficiency, is a procompetitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels.’ ”<sup>204</sup> The court implicitly suggested that the REC rule worked as an exercise of monopsony market power by NCAA member institutions to restrict competition in the coaching input market, thereby harming competition, not improving competitive equity.<sup>205</sup> The relevant market being NCAA coaching positions, the imposition of restrictions by the NCAA on the maximum salary for those positions, unifying the buying practice of all member institutions, created a “buyer’s monopoly” for the institutions to the detriment of competition in that market.

The principles expressed by in *Law* were later applied in the context of an antitrust challenge brought by players. In *In re NCAA I-A Walk-On Football Players Litigation*, a plaintiff class of walk-on football players at Division I institutions alleged NCAA regulations restricting the number of grants-in-aid for football at each school were an anticompetitive agreement in violation of the sections 1 and 2 of the Sherman Act.<sup>206</sup> The district court denied the NCAA’s motion to for judgment on the pleadings, finding that the plaintiff’s had “alleged a sufficient ‘input’ market in which NCAA member schools compete for skilled amateur football players.”<sup>207</sup> The court noted that other “courts have also found the award of financial aid to college students to be ‘trade or commerce’ and therefore subject to the Sherman Act.”<sup>208</sup> The court found the plaintiffs’ claim that NCAA football was the relevant market sufficient to survive the NCAA’s motion, accepting the plaintiff’s allegation that

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<sup>204</sup> *Id.* at 1023 (quoting Gary Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL L. REV. 2631, 2643 (1996)).

<sup>205</sup> *See id.* at 1022-1024. *See generally* *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320 (2007) (“Monopsony power is market power on the buy side of the market . . . and is sometimes colloquially called a ‘buyer’s monopoly.’”).

<sup>206</sup> *In re NCAA I-A Walk-On Football Players Litigation*, 398 F. Supp.2d 1144, (W.D. Wash. 2005).

<sup>207</sup> *Id.* at 1150.

<sup>208</sup> *Id.* at 1149 (citing *U.S. v. Brown Univ.*, 5 F.3d 658, 667 (3d Cir. 1993)).

there were no reasonable substitutes for student-athletes who desired to participate at the highest level football competition while simultaneously seeking a baccalaureate degree.<sup>209</sup> The court found, “[t]he fact that [NCAA football] is a single product market [was] not fatal to Plaintiffs’ claim.”<sup>210</sup> The court concluded that the market alleged was a monopsony and reasoned that the NCAA regulation at issue could indeed substantially harm economic competition in that market.<sup>211</sup> More recent cases have also found that “since the NCAA is the only purchaser of student athletic labor,” the regulations promulgated by the Association may in fact operate as an exercise of monopsony market power.<sup>212</sup>

### *3. The Procompetitive Presumption and the Student-Athlete Labor Market*

*NCAA I-A Walk-On Football Players* stands for the principle that in the context of engaging student-athletes to participate in NCAA sponsored athletics, the NCAA acts as a consumer and the student-athletes as a supplier. This does not lead to the conclusion that all NCAA regulations that restrict student-athletes are violative of the antitrust laws. Indeed, it appears that the Supreme Court in *Board of Regents* approved a procompetitive presumption for certain NCAA regulations. “NCAA bylaws that ‘fit into the same mold’ as those discussed in *Board of Regents* [may be found] to be procompetitive ‘in the twinkling of an eye,’ that is, at the motion-to-dismiss stage.”<sup>213</sup>

#### *a. The Procompetitive Presumption*

The recent case of *Agnew v. NCAA* expressly demarcated which regulations are to be presumed procompetitive and

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<sup>209</sup> *Id.* at 1150.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1151.

<sup>212</sup> *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 337 n.3 (7th Cir. 2012) (“This appears to be a clear monopsony case, since the NCAA is the only purchaser of student athletic labor.”).

<sup>213</sup> *Id.* at 341 (quoting *Board of Regents*, 468 U.S. at 110 n. 39).

those that are not based upon the commercial nature of the regulation at issue. The court elaborated on the scope of the procompetitive presumption:

[W]hen an NCAA bylaw is clearly meant to help maintain the “revered tradition of amateurism in college sports” or the “preservation of the student-athlete in higher education,” the bylaw will be presumed procompetitive, since we must give the NCAA “ample latitude to play that role.” But if a regulation is not, on its face, helping to “preserve a tradition that might otherwise die,” either a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness.<sup>214</sup>

The *Agnew* court explained that NCAA regulations regarding student-athlete eligibility are precisely the type of regulations to which the procompetitive presumption applies:

Beyond the obvious fact that the Supreme Court explicitly mentioned eligibility rules as a type that ‘fit[s] into the same mold’ as other procompetitive rules, they are clearly necessary to preserve amateurism and the student-athlete in college [athletics]. Indeed, they define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of the product of college [athletics].<sup>215</sup>

The court cited support for applying the procompetitive presumption to eligibility rules from other jurisdictions. The Court of Appeals for the Third Circuit held in *Smith v.*

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<sup>214</sup> *Id.* at 343 (quoting *Board of Regents*, 468 U.S. at 120.).

<sup>215</sup> *Id.* at 343.

NCAA that the Sherman Act does not apply to NCAA eligibility rules because those rules are not related to the NCAA's commercial interest.<sup>216</sup> The *Smith* court also found that even if the eligibility rules were commercial, they would nonetheless fail a rule of reason analysis because they "allow for the survival of the product, amateur sports, and allow for an even playing field," making them procompetitive.<sup>217</sup> Additionally, in *McCormack v. NCAA*, the Court of Appeals for the Fifth Circuit, while not holding that eligibility rules are noncommercial in nature, ruled that the eligibility rule at issue (bylaw restricting the acceptance of benefits by student-athletes) survived rule of reason analysis because the rule allowed for the preservation of amateurism in college football.<sup>218</sup>

The consistent reasoning of courts faced with challenged to NCAA eligibility rules underscores that the procompetitive presumption will apply to eligibility rules because the NCAA must be able to rule who may and may not participate in their events or else there will be no means to differentiate college athletics from professional sports. Without eligibility rules, the NCAA will not be able to define amateurism or enforce the standards of amateurism that prevent NCAA athletics from becoming a minor league sports organization.

Financial aid rules, in comparison, do not receive the benefit of the procompetitive presumption. "[F]inancial aid rules do not always assist in the preservation of amateurism or the existence of student-athletes, so the regulations . . . cannot be presumptively procompetitive simply because they relate to financial aid."<sup>219</sup> The *Agnew* court found that the financial aid rules at issue in that case, the bylaws restricting athletics grant-in-aid offers to only one-year terms and limiting the number of athletics grants-

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<sup>216</sup> *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds* *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999). *See also* *Gaines v. NCAA*, 746 F.Supp. 738, 743-44 (M.D. Tenn. 1990), which reached the same conclusion.

<sup>217</sup> *Smith v. NCAA*, 139 F.3d at 187.

<sup>218</sup> *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344-45 (5th Cir. 1988).

<sup>219</sup> *Agnew v. NCAA*, 683 F.3d at 345 (7th Cir. 2012).



in-aid that each institution may award per sport, were “not directly related to the separation of amateur athletics from pay-for-play athletics . . . [n]or [did] they help preserve the existence of the student-athlete.”<sup>220</sup> Rather, the court felt that the bylaws were more likely “aimed at containing university costs, not preserving the product of college football.”<sup>221</sup> Plaintiffs had not alleged that NCAA regulations at issue restricted student-athlete from realizing benefits beyond than those allowed within the NCAA amateurism model, but rather that the regulations operated to reduce benefits to a point below a level that was already permissible within the bounds of amateurism.<sup>222</sup> The court found that “[i]t is not until payment above and beyond educational costs is received that a player is considered a ‘paid athlete.’”<sup>223</sup> Therefore, financial aid rules that are not themselves eligibility rules (such as rules that limit financial aid to levels within the bounds of amateurism, i.e., the cost of attendance) cannot be presumptively assumed to promote amateurism. While it is possible that financial aid regulations may promote competitive equity and therefore be procompetitive, that determination cannot be made without a more probing antitrust analysis.

### *b. Student-Athlete Labor Market*

Beyond the discussion of the procompetitive presumption, the *Agnew* court expressly recognized a labor market for student-athletes as “a cognizable market under the Sherman Act.”<sup>224</sup> The district court had held that a player labor market “fails as a matter of law because the Seventh Circuit has already rejected the idea of a labor market in the amateur college sports context.”<sup>225</sup> The district court based this conclusion on the Seventh Circuit’s

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 344.

<sup>222</sup> *Id.* at 332-333.

<sup>223</sup> *Id.* at 344.

<sup>224</sup> *Id.* at 346.

<sup>225</sup> *Agnew v. Nat’l Collegiate Athletic Ass’n*, 2011 U.S. Dist. Lexis 98744, at \*23-24 (S.D. Ind., 2011), *aff’d*, 683 F.3d 328 (7th Cir. 2012).

two-to-one decision in *Banks v. NCAA* nearly two decades earlier.<sup>226</sup> *Banks* rejected a private antitrust challenge to the NCAA's "no-draft and no-agent rules" by a player declared ineligible after signing a representation agreement with an agent and taking part in the NFL draft. In *Banks*, the majority disagreed with the dissent's characterization of the NCAA member institutions as "purchasers of labor" because "the operation of the NCAA eligibility and recruiting requirements prohibits member colleges from engaging in price competition for players."<sup>227</sup>

Pervasive throughout the *Banks* majority and dissenting opinions are references to the poorly drafted pleadings by the plaintiff.<sup>228</sup> Both the majority and the dissent address the lack of an explicitly defined market.<sup>229</sup> Indeed, the majority even states that the plaintiff "might possibly have been able to allege an anti-competitive impact on a relevant market through a more carefully drafted complaint," however the court remained reluctant to essentially redraft the complaint for the plaintiff during appellate review.<sup>230</sup> The Court of Appeals for the Seventh Circuit upheld the dismissal in large part based upon plaintiff's inarticulate allegations.<sup>231</sup> The *Banks* court's finding that a player labor market failed under the facts as alleged was a secondary barrier that the plaintiff could not overcome; it did not make allegations of a player labor market per se invalid as a matter of law in all antitrust challenges to NCAA regulations as Judge Magnus-Stinson acquiesced to find at the district court level in *Agnew*.<sup>232</sup>

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<sup>226</sup> *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081 (7th Cir. 1992).

<sup>227</sup> *Id.* at 1091.

<sup>228</sup> *Id.* at 1088. ("[R]egardless of how charitably the complaint is read, it has failed to define an anti-competitive effect of the alleged restraints on the markets.")

<sup>229</sup> *Id.* at 1094 (Flaum, J., dissenting) ("Granted, the complaint was drafted somewhat inelegantly, but I nonetheless believe that it defines a market and describes how the NCAA rules harm competition in that market.")

<sup>230</sup> *Id.* (majority opinion).

<sup>231</sup> *Id.*

<sup>232</sup> *Agnew*, 2011 U.S. Dist. Lexis 98744, at \*23 ("As the NCAA points out, the Seventh Circuit, in upholding the grant of a motion to

In context, the *Banks* court declined to find the NCAA member institutions were “purchasers of labor” *in open-market competition with each other* for player talent in the relevant market. The institutions, by adhering to the “no-draft and no-agent rules,” did not restrict competition in the student-athlete labor market even though the rule limited the potential value of grant-in-aid awards. Key to the court’s conclusion was the fact that “the value of the [athletic] scholarship is based upon the school’s tuition and room and board, not by the supply and demand of players.”<sup>233</sup> The court implicitly reasoned that the “no-draft and no-agent rules” were not naked restraints on competition between the member institutions as the plaintiff implicitly alleged because the rules serve a legitimate purpose of maintaining amateurism in NCAA athletics, a valid procompetitive justification.<sup>234</sup> Any reduction in the potential financial value of a grant-in-aid alleged to be lost through the operation of the “no-draft and no-agent rules” was ancillary to the purpose of the regulations to maintain a product distinct from professional sports. That purpose would be significantly harmed absent the challenged restrictions. The regulations were specifically tailored to establish a sports league distinct from professional sports and the requirement that member institutions abide by the regulation did not unreasonably restrain the commercial relationship between member institutions and student-athletes. The loss of the potential increase in grant-in-aid value did not outweigh the NCAA objective to maintain a less commercialized athletic product. Greater anti-competitive effects were required to be alleged for the complaint to survive dismissal. At most, one can draw the conclusion from *Banks* that when an antitrust challenge alleges a student-athlete labor market is

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dismiss, has already rejected the claim that NCAA member schools could be purchasers of labor because the NCAA eligibility and recruiting requirements ‘prohibit member colleges from engaging in price competition for players.’”) (quoting *Banks*, 977 F.2d at 1091), *aff’d*, 683 F.3d 328 (7<sup>th</sup> Cir. 2012).

<sup>233</sup> *Banks*, 977 F.2d at 1091.

<sup>234</sup> *Id.* (“Elimination of the no-draft and no-agent rules would fly in the face of the NCAA’s amateurism requirements.”)

unreasonably restrained from realizing financial value greater than that due to an amateur, that market fails.<sup>235</sup> The procompetitive presumption standard is consistent with this conclusion.

Regardless, the Court of Appeals for the Seventh Circuit specifically rejected the argument that student-athletes are not a labor market for the reasons relied upon by the district court. Judge Flaum expressed two reasons why the argument fails. “First, the only reason that colleges do not engage in price competition for student-athletes is that other NCAA bylaws prevent them from doing so. . . . [and s]econd, colleges do, in fact, compete for student-athletes, though the price they pay involves in-kind benefits as opposed to cash.”<sup>236</sup> This establishes that financial aid benefits are commercial and that student-athletes, by providing athletic services in return for financial aid benefits, are engaged in commerce. NCAA financial aid regulations that restrict the market for student-athlete labor services so that student-athletes cannot efficiently allocate their athletic talents in exchange for benefits within the bounds of amateurism (i.e., grants-in-aid) do not conform to the mandate of the Sherman Act. Otherwise, NCAA regulations can operate to reduce all student-athlete benefits for the sake of increased profits for the member institutions and the student-athletes will have no adequate form of redress at law.

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<sup>235</sup> *Id.* (the plaintiff, Banks, failed to explicitly allege what anticompetitive effects were suffered due to the “no-draft and no-agent rule.” It appears that plaintiff suggested that the rules restricted the value of a grant-in-aid award as well as the student-athlete’s professional value by not allowing an athlete dissatisfied with their draft result to forego the professional leagues and return to college for further NCAA participation.); *see also* McCormack v. NCAA, 845 F.2d 1338 (5<sup>th</sup> Cir. 1988) (holding rules that restrict the source of student-athlete benefits and limit the amount of those benefits to cost-of attendance do not violate the Sherman Act); *In re NCAA I-A Walk-On Football Players Litigation*, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (“[C]ourts have . . . found the award of financial aid to college students to be ‘trade or commerce’ and therefore subject to the Sherman Act.”)

<sup>236</sup> *Agnew*, 683 F.3d at 346-47.

Unfortunately for the *Agnew* plaintiffs, their lawyers did not allege that the NCAA regulations at issue restrained the student-athlete labor market. Like their predecessor in *Banks*, while they “might possibly have been able to allege an anti-competitive impact on a relevant market through a more carefully drafted complaint,” the court refused to redraft their complaint during appellate review of a motion to dismiss.<sup>237</sup>

As the court explained, even though the regulations at issue were likely limitations on output and price and that the case was likely subject to quick-look rule of reason review, plaintiffs still bore “the burden of describing a relevant market on which the Bylaws have had an anticompetitive effect.”<sup>238</sup> The quick-look doctrine allows a plaintiff to reduce its initial burden when it can show that there is a horizontal agreement to fix prices or reduce output, but that showing will not be enough. Specifically, in a case such as *Agnew*, where the market is not obviously commercial, the court “believe[d] it is incumbent on the plaintiff to describe the rough contours of the relevant commercial market in which anticompetitive effects may be felt, even when a quick-look approach is all that is called for.”<sup>239</sup> It is not necessary that plaintiffs engage in a full market analysis and prove the exact measure of defendant’s market power in that relevant market. Yet,

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<sup>237</sup> *Id.* at 347. (“Unfortunately for plaintiffs, nothing resembling a discussion of a relevant market for student-athlete labor can be found in the amended complaint. Indeed, the word labor is wholly absent. Plaintiffs claim that they ‘allege[d] that there was ‘no practical alternative’ available for students wishing to pursue an education in exchange for their playing ability,’ but the paragraph that they cite to in their amended complaint explains the lack of ‘practical alternatives’ for colleges wanting to field teams outside of the NCAA’s framework, not the lack of ‘practical alternatives’ for student-athletes. Plaintiffs appear to have made the strategic decision to forgo identifying a specific relevant market. Whatever the reasons for that strategic decision, they cannot now offer post hoc arguments attempting to illustrate a buried market allegation. . . . By our count, plaintiffs had three opportunities to identify a relevant market in which the NCAA allegedly committed violations of the Sherman Act.”).

<sup>238</sup> *Id.* at 337.

<sup>239</sup> *Id.* at 345.

[t]he entire point of the Sherman Act is to protect competition in a commercial arena; without a commercial market, the goals of the Sherman Act have no place. If a plaintiff can show that a defendant has engaged in naked restrictions on price or output, he can dispense with any showing of market power until a procompetitive justification is shown – but the existence of a relevant market cannot be dispensed with altogether.<sup>240</sup>

Simply put, it appears that plaintiffs' counsel did not understand the full implications of the precedent regarding the quick-look doctrine relating to NCAA regulations found in *Board of Regents* and *Law*.<sup>241</sup>

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<sup>240</sup> *Id.* at 337.

<sup>241</sup> *Id.* (The *Agnew* court explained that despite a reduced burden on the plaintiff under a quick-look rule of reason analysis, a relevant market must still exist, explaining that:

The Supreme Court, in *Board of Regents*, stated that 'when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required,' and 'naked restraint[s] on price and output require[ ] some competitive justification even in the absence of a detailed market analysis.'"); see also *Law v. NCAA* ('Under a quick look Rule of Reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists. . . .').

Out of context, while these quotations seem to support plaintiffs' view of the quick-look doctrine, they are misleading. The quotes from *Board of Regents* and *Law* are not referring to the need for a relevant market to exist, but rather to the plaintiff's burden of showing that an agreement had anticompetitive effects on a particular market. . . . The quick-look doctrine permits plaintiffs to forego any strict showing of market power, and thus a specific definition of the relevant market. . . . This does not mean, however, that there need not be a relevant market on which actions have an anticompetitive effect.) (alterations in original) (citations omitted).

### *C. Public Policy Concerns*

The list of parties concerned about the effects of NCAA regulations on student-athlete well-being has grown significantly over the last several years, recently drawing the attention of state and federal government officials.<sup>242</sup> In January of 2012, NCPA model legislation was introduced by state representative William Crawford in Indiana, which is intended to serve as a student-athlete bill of rights.<sup>243</sup> The legislation aims to “guarantee college student-athletes basic protections, require colleges with lucrative TV revenues to pay for its student-athletes’ sports-related medical expenses, and invests in increasing graduation rates among football and basketball players and more.”<sup>244</sup> Crawford expressed his belief “that this an important piece of legislation that enhances the mission and mandate of state universities in regards to educating student athletes. This bill offers safety and education protections for student athletes that generate significant income for state supported universities.”<sup>245</sup> Other state officials have articulated similar sentiments. California state senator Alex Padilla said he is committed to introducing similar legislation in California.<sup>246</sup> Ohio state representative Clayton Luckie also introduced legislation in January 2012 which aims to allow Division I institutions to provide up to an \$8,000 stipend to student-athletes.<sup>247</sup> Unfortunately, for

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<sup>242</sup> Press Release, Nat’l College Players Ass’n, California and Indiana Lawmakers to Push Athletes Bill of Rights (Jan. 9, 2012), available at [http://ncpanow.org/releases\\_advisories?id=0020](http://ncpanow.org/releases_advisories?id=0020); Associated Press, *Congressman Rush compares NCAA to Mafia*, THEGRIO.COM, (Nov. 1, 2011), <http://www.thegrio.com/news/congressman-rush-compares-ncaa-to-mafia.php>.

<sup>243</sup> Press Release, Nat’l College Players Ass’n, California and Indiana Lawmakers to Push Athletes Bill of Rights (Jan. 9, 2012), available at [http://ncpanow.org/releases\\_advisories?id=0020](http://ncpanow.org/releases_advisories?id=0020).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Jim Siegel & Todd Jones, *Bill Proposes \$8,000 Stipend for Athletes*, COLUMBUS DISPATCH (Jan. 13, 2012), <http://www.dispatch.com/content/stories/local/2012/01/13/bill-proposes-8000-stipend-for-athletes.html>

constitutional reasons, even if these state-level bills were enacted, they would likely not have any effect on the national regulations of the NCAA. Still, they demonstrate the discomfort felt by many that NCAA regulations continue to disregard the rights of student-athletes.

Even at the federal level, Illinois Representative Bobby Rush recently compared the NCAA to the mafia, stating his opinion that the NCAA is “one of the most vicious, most ruthless organizations ever created by mankind,” at a forum examining the impact of scandals in college sports.<sup>248</sup> These sentiments demonstrate that despite the innumerable positive aspects of NCAA athletics, there still remains the widely held reservation that the Association and the member institutions ignore the main labor force so as to increase their own profit margins. These threats of external controls imposed on the NCAA should stand as a clear sign to the Association, the athletic conferences, and the member institutions that the mode of operation must change. Public policy concerns are continuing to side in favor of greater student-athlete benefits and the potential for external legislative and/or judicial decisions that follow this policy trend could undermine the autonomy of the NCAA.

#### V. ASSESSING THE MERITS OF NCAA HEALTH CARE INSURANCE REFORM

It is uncertain how many institutions provide student-athletes with health care coverage for injuries related to athletic participation. Nor is it certain what level of coverage is offered or to which student-athletes it is available. In 2008, the NCPA sent requests to all Division I member institutions seeking disclosure of “key medical policies that can affect . . . student athletes.”<sup>249</sup> The purpose

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<sup>248</sup> Associated Press, *Congressman Rush compares NCAA to Mafia*, THEGRIO.COM, (Nov. 1, 2011), <http://www.thegrio.com/news/congressman-rush-compares-ncaa-to-mafia.php> (noting that the Congressman’s comments were made following accounts from two mothers of former student-athletes who complained about how injuries sustained by their children were handled by the respective institutions).

<sup>249</sup> Nat’l College Players Ass’n, College Medical Policy Search (database), *available at* [http://apps.ncpanow.org/policy\\_search.asp](http://apps.ncpanow.org/policy_search.asp).



of the request was to provide prospective student-athletes with important information regarding the medical policies of the institutions that might attempt to recruit their athletic services. The NCPA graded all member institutions on a scale from A+ to F based upon the institutions' responses to the requests.<sup>250</sup> "About 90% of all Division I athletic programs refused to disclose the medical policies requested by the NCPA."<sup>251 252</sup> However, searches of public records will reveal relevant data for public institutions and suggest that some institutions do provide health care coverage for varsity student-athletes. The same year as the NCPA request, the University of Iowa received approximately 4,200 medical bills for its varsity student-athletes and paid \$776,454 on behalf of those athletes.<sup>253</sup> Nevertheless, in the absence of labor law protection, the unwillingness of some NCAA member institutions to cooperate with the NCPA regarding the 2008 survey, and their opposition to NCAA regulatory increases in student-

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<sup>250</sup> Nat'l College Players Ass'n, College Medical Policy Search (database), *available at* [http://apps.ncpanow.org/policy\\_search.asp](http://apps.ncpanow.org/policy_search.asp). (The NCPA does not present the searcher with any rubric for the grading scale except that failing to respond resulted in the grade of F for the institution).

<sup>251</sup> Press Release, Nat'l College Players Ass'n, NCPA Exposes Medical Policies at D-1 NCAA Colleges Grading System Will Help Recruits Avoid Abuse (Nov. 6, 2008), *available at* [http://www.ncpanow.org/releases\\_advisories?id=0007](http://www.ncpanow.org/releases_advisories?id=0007).

<sup>252</sup> I have conducted a search of all Big Ten institutions (twelve, in total) in the database and only Purdue University responded to the request. A link to the one-page response from athletic director Morgan Burke can be found at [http://apps.ncpanow.org/policy\\_detail.asp?grading\\_id=173](http://apps.ncpanow.org/policy_detail.asp?grading_id=173). However, Purdue's response did not answer the survey questions directly and the NCPA was apparently unable to grade the institution's medical policies in accordance with their grading scale. Nevertheless, Mr. Burke, does disclose some of the medical practices of the institution's athletics department, including that they employ a number of full-time medical personnel for student-athletes. A search of all Southeastern Conference institutions (fourteen, in total) reveals that only the University of Florida responded to the request, receiving the grade of D for the institution's medical policies. Twenty-four institutions did receive grades of A- or better, including two institutions from BCS conferences (University of Oregon and West Virginia University).

<sup>253</sup> Peterson, *supra* note 6 (noting the information was acquired by documents obtained through a Iowa Public Records Law request).

athlete in-kind benefits raises concerns whether the well-being of student-athletes is adequately protected.

It is best to address the issue of mandated health care coverage for NCAA student-athletes in very basic terms. Initially, continued justifications for limiting the benefits received by student-athletes appear more absurd with each subsequent legal challenge. This was firmly demonstrated by the stern disregard for the argument that student-athletes are not engaged in labor by the *Agnew* court. Amateurism, while a sound concern to be addressed by NCAA regulations, is not an ironclad justification for limiting student-athlete benefits at a monopsony level of compensation. Dean Gary Roberts illustrated the absurdity well, explaining that should:

[a]ll the members of the widget industry . . . agree to pay their employees a monopsony wage rather than a market wage, also agree to require each employee to spend a brief time every day at work studying transcendental meditation, and then justify the agreement on the ground that it enabled them to produce the unique product known as widgets made by students of transcendental meditation . . . [it] surely would not be lawful . . . .<sup>254</sup>

Eventually, the question will boil down to whether a multi-billion dollar industry that generates its revenue from high intensity performance productions and compensates the performer class solely with in-kind benefits may unilaterally restrict those benefits below the full cost of participation imposed on the performers (a large portion of that cost also set unilaterally by those in control of the industry). This question strikes at the core of both labor policy and antitrust law potentially hard enough to disrupt the status quo. It seems unwise for the NCAA to risk regulatory autonomy on precedent from a generation past when the decision of a court had far less potential for

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<sup>254</sup> Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2660 (1996).

economic impact. In 2011, NCAA sports generated an estimated \$11.4 billion,<sup>255</sup> an amount greater than any professional sports league in the North America.<sup>256</sup> Rather than take an adversarial approach, it is likely the best idea to improve student-athlete well-being standards through normal, yet progressive, NCAA regulatory means.

Following *Agnew*, the potential for antitrust liability is quite real. Current NCAA regulations likely in fact operate to restrict competition from non-“major conference” member institutions to the advantage of the “major conference” members and to the detriment of the majority of the student-athlete labor market. The current distribution measures for NCAA revenues award the bulk of the money to the “major conferences,” while essentially giving Division II and Division III member institutions no support whatsoever. It seems as though an industry that relies on the argument that its member institutions do not compete with each other economically in the player labor market should therefore aim to ensure that every member has adequate financial resources to provide the basic necessities for those student-athletes, especially when the governing body of that industry was founded for the purpose of promoting health and safety.

The current NCAA bylaws requiring that member institutions certify health care insurance to cover medical expenses from athletically related injuries for all student-athletes may upset the antitrust laws. The Sherman Act declares illegal “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce” in interstate commerce.<sup>257</sup> “[I]n restraint of trade” has been interpreted as unreasonable restraint of trade.<sup>258</sup> NCAA bylaws, as well

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<sup>255</sup> *Finances Revenue*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue> (last updated Feb. 13, 2013) (click “Is NCAA revenue different from money generated by member conferences and institutions?”).

<sup>256</sup> W.R. HAMBRECHT & CO., THE U.S. PROFESSIONAL SPORTS MARKET & FRANCHISE VALUE REPORT 22 (2012), available at [http://wrhambrecht.com/pdf/SportsMarketReport\\_2012.pdf](http://wrhambrecht.com/pdf/SportsMarketReport_2012.pdf).

<sup>257</sup> 15 U.S.C.A. § 1 (West 2004).

<sup>258</sup> See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (noting that “this Court has not taken a literal approach to this language, recognizing,

as the revenue distribution formula, are agreements among the membership subject to the Sherman Act. Now, following the express recognition of a student-athlete labor market by the Seventh Circuit, the in-kind benefits that student-athletes receive in exchange for their athletic services are commerce. If the health care coverage certification bylaw and the NCAA revenue distribution formula work in combination to unreasonably restrain the in-kind benefits received by student-athletes, then the NCAA membership have an agreement in violation of the antitrust laws.

The initial step in this inquiry will be for the complaining student-athlete to allege a restraint of trade in a relevant market. The relevant market should be pled as a student-athlete(s) performing athletic-labor services in exchange for in-kind benefits from an NCAA member institution(s) in the collegiate sports market in the United States. The restraint on that market will involve a much more detailed pleading.

Beginning from the premise that NCAA eligibility rules are presumed procompetitive,<sup>259</sup> it appears that the health care coverage certification rule is an eligibility rule. Student-athletes are not eligible to participate in NCAA events until the member institution certifies that the student-athlete has health care insurance coverage. It may be possible to rebut this presumption. The procompetitive presumption applies when the NCAA bylaw at issue “help[s] maintain the ‘revered tradition of amateurism in college sports,’ or the ‘preservation of the student-athlete in higher education.’”<sup>260</sup> The health care coverage certification rule does not on its face help maintain amateurism, nor is it clear that it preserves the student-athlete in higher education. Rather, it increases the cost of participation in NCAA athletics for student-athletes, a cost that is not adequately calculated in the cost of attendance formula for

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instead that Congress intended to outlaw only *unreasonable* restraints.”) (emphasis in original).

<sup>259</sup> *Agnew v. NCAA*, 683 F.3d 328, 342-43 (7th Cir. 2012).

<sup>260</sup> *Id.*

grant-in-aid purposes.<sup>261</sup> The health care coverage certification bylaw, therefore, decreases the net value of any grant-in-aid award received by a student-athlete.

It will be difficult to prove that by increasing the cost of participation for student-athletes that the health care coverage certification rule increases the student-athletes' cost of attendance. Concededly, student-athletes can attend the university at a lower cost of attendance by not participating in intercollegiate athletics. However, if the relevant market is defined as *student-athletes* then the cost of participation is the pertinent amount. Student-athletes are pursuing an education; however they are also seeking to simultaneously participate in high-level athletic competition. They are not in the same relevant market as other collegiate students who are not receiving in-kind benefits for athletic services. It is imperative that the market definition excludes students that are not student-athletes.

The health care coverage certification bylaw is more appropriately viewed as a hybrid eligibility-financial aid rule, especially when viewed in combination with bylaw 3.2.4.8.1(c) that allows for member institutions to voluntarily provide health care coverage for the student-athlete.<sup>262</sup> Initially, it is interesting to note that bylaw 3.2.4.8.1(c) possibly allows for benefits in excess of the cost of attendance for student athletes, as institutions do not calculate health care coverage in the cost of attendance. This raises questions about how amateurism is in fact defined by the NCAA. Regardless, the additional benefit to

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<sup>261</sup> See generally DIVISION I MANUAL (“§15.02.2.1. Calculation of Cost of Attendance. An institution must calculate the cost of attendance for student-athletes in accordance with the cost-of-attendance policies and procedures that are used for students in general.”); see also Office of Student Financial Aid, *Cost of Attendance*, INDIANA UNIVERSITY, <http://www.indiana.edu/~sfa/receiving/cost.html> (last visited Mar. 1, 2013) (showing that Indiana University calculates cost of attendance to include: tuition and fees; room and board; books and supplies; transportation; and personal categories; and that the personal category is estimated at \$2,522, an amount that cannot include the cost of health care insurance coverage, especially in light of the health insurance offered by the school exceeds that amount).

<sup>262</sup> See DIVISION I MANUAL.

student-athletes in the form of health care coverage is a form of financial aid, and therefore, the bylaw is a financial aid rule. Financial aid rules do not receive the benefit of the procompetitive presumption. Student-athletes that receive health care coverage from the member institutions receive a net increase in the value of their grant-in-aid awards.

Allowing member institutions to voluntarily provide health care coverage to student-athletes does not appear to be a problem at first blush. However, in combination with the NCAA revenue distribution formula, as agreed upon by the membership, the bylaw begins to appear more pernicious. The membership has agreed that student-athletes must be certified as having health care insurance coverage before the student-athletes can compete in NCAA events. Member institutions may provide the health care coverage for the student-athletes. The revenue distribution formula rewards less than seven-percent of the membership with thirty eight-percent of the revenue. It is highly unlikely that under the current revenue distribution formula, the remaining member institutions can afford to provide health care coverage for student-athletes. Bylaw 3.2.4.8.1(c), therefore, is a cost-cutting measure operating in practice as a monopsony price fix that sets student-athlete benefits below the actual cost of participation.

The legitimate procompetitive justifications that the NCAA could raise in rebuttal to these arguments should fail. The bylaws and revenue distribution formula do not operate to preserve amateurism. Therefore, the last viable argument for the NCAA would be that bylaw 3.2.4.8.1(c) maintains competitive equity by allowing member institutions with less revenue to remain economically viable. That argument should also fail. The revenue distribution formula and bylaw 3.2.4.8.1(c) disrupt competitive equity. The membership controls the revenue distribution formula and continues to promulgate a formula that rewards historically wealthy schools with more money while underfunding the historically poorer member institutions. This in turn creates greater disparity in the financial burdens that fall on student-athletes, resulting in a net increase in benefits (in excess of cost of attendance) for

some and a net decrease in benefits for others. When the agreement by the membership results in higher profits for some members at the expense of the majority of the student-athlete labor market, that agreement does not have a procompetitive justification.

Nor should the NCAA be able to argue that the revenue distribution model rewards the unequal contributions of the member institutions (such as their success in the NCAA Men's Basketball Championship) because student-athlete talent should not be a factor considered in the distribution model. NCAA athletics are not professionalized sports. The student-athletes participate as an "avocation" and as a result all should benefit equally. The main purpose of attending an institution of higher education is to obtain an education, not to participate in athletics. A student-athlete's decision to attend an institution should not be more heavily influenced by the potential for student-athlete in-kind benefits rather than potential opportunities for academic and professional development like that of others seeking a college education. The revenue distribution formula limits the ability of member institutions to provide full health care coverage to student-athletes, which in turn impacts the student-athletes choice of educational institutions by imposing potentially higher participation costs that reduce the value of a student-athlete's financial aid award and other in-kind benefits. That does not fit with the NCAA's core value of encouraging the pursuit of academic excellence.

In practice, this situation encourages institutions that are unable to provide coverage for student-athlete injuries to hide that information from recruits as much as possible. Member institutions do in fact compete with one another for student-athlete services during the recruiting process, and information related to the institutions ability to provide for a student-athlete in the event she should suffer an injury certainly plays a significant role in that student-athlete's decision regarding what institution to attend. Injuries are a part of athletics. A student-athlete should not suffer because her conference, and therefore her institution, receives a lesser share of the \$11.4 billion generated by the

industry in which she readily participates and represents with as much fervor as an athlete at a more financially stable institution.

The Supreme Court has impliedly stated it is permissible for the NCAA to regulate and dictate how the member institutions use the revenues generated from athletics.<sup>263</sup> NCAA regulations aimed to improve competitive equity by mandating member institutions to provide for health care coverage for all student-athletes will not violate antitrust principles and will further provide student-athletes with more appropriate benefits for their services, reducing concerns that NCAA regulations operate to reduce competition for student-athlete labor services. The lack of such a mandate continues to raise antitrust concerns that NCAA regulations fix student-athlete benefits below market value and stifle competition between member institutions for student-athlete labor services. The costs associated with instituting a mandate for full health care coverage for all student-athletes are likely far less than the costs associated with defending antitrust and other legal actions or lobbying legislative bodies in order to retain full autonomy.

The most obvious suggestion for financing full health care coverage for all student-athletes appears to be redirecting a portion of Men's Basketball Championship and the new College Football Playoff television revenues into a student-athlete health care coverage fund and other funds that address scholarship-shortfall problems.<sup>264</sup> In addition to mandating full health care coverage, the Association should further mandate that all member institutions participate in the Group Basic Medical Program in order to more effectively control expenses.<sup>265</sup> Beyond the Group

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<sup>263</sup> Nat'l Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 119 (1984).

<sup>264</sup> See *Aware of New TV Money, Players Petition NCAA to Invest in Reform This Week*, NCPANOW.ORG (Oct. 25, 2011), [http://www.ncpanow.org/news\\_articles?id=0034](http://www.ncpanow.org/news_articles?id=0034).

<sup>265</sup> See generally *Student Athlete Benefits*, NCAA.ORG, <http://ncaa.org/wps/wcm/connect/public/NCAA/Finances/Finances+Student+Athlete+Benefits> (last visited Mar. 1, 2013) (defining the Group Basic Medical Program as "[a] program that covers intercollegiate sports-



Basic Medical Program, institutions should attempt to design health care insurance policies that cover their student-athletes with “aggregate deductibles.”<sup>266</sup> These policies would allow for institutions to reach certain thresholds of expected claims expenses before requiring additional premium payments.<sup>267</sup> It also seems appropriate to mandate increased revenue sharing between member institutions to help fund institutional grants-in-aid and health care coverage, and institute greater control measures regarding the upward spiral of football and men’s basketball coaching salaries (such as requiring member institutions that eclipse certain salary amounts for coaches to provide additional grants-in-aid and other benefits for student-athletes participating in non-revenue generating sports). These measures might provide the economic means to finance more appropriate student-athlete benefits.

These measures must, of course, be adopted by the membership itself. Convincing several powerful member institutions to reduce the size of their slice of the pie may be difficult, but without such a sacrifice many continue to lose for the benefit of a few. The effects of these measures must not simply be viewed in the short-term. The potential increase in competitive equity and league-wide stability should increase the overall revenue generated by NCAA athletics. Increased student-athlete benefits at institutions that are currently unable to offer benefits such as health care coverage for all ailments may draw stronger athletic talent to those institutions, improving league parity and drawing greater fan support. Further, increased benefits may inspire the marginal professional-level athlete to

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related injuries and institution below the catastrophic insurance deductible of \$90,000 per injury. The program is intended to provide member institution the tools and resources necessary to control costs and reduce expenses related to athletics injuries, including a reasonable insurance solution, risk-management strategies, cost-containment solutions and administrative service.”).

<sup>266</sup> Libby Sander, *At Many Colleges, No Health Insurance Means No Playing Time*, CHRONICLE OF HIGHER EDUCATION (Jan. 13, 2011, 2:29 PM), <http://chronicle.com/blogs/players/at-many-colleges-no-health-insurance-means-no-playing-time/28004>.

<sup>267</sup> *Id.*

remain eligible for NCAA athletics longer, improving both the student-athlete's education and athletic abilities, and the overall quality of NCAA competition.

As another means of financial management, some consideration should be given to instituting requisite benchmarks student-athletes must meet to be eligible for certain benefits. Possible benchmarks could include linking awards to academic achievement, limiting the awards to upperclassmen (potentially encouraging student-athletes to remain in school longer), rewarding community service, or possibly even rewarding outstanding athletic performance.

These considerations affect more than just Division I student-athletes. The potential for an injury is just as great in Division II or III athletic events. Any potential regulatory reform must consider not only the revenue generating student-athletes, even though they may produce a greater share of the means, but must also account for the non-revenue generating student-athletes that make up the vast majority of the participants in NCAA competitions.

## VI. CONCLUSION

The NCAA is currently faced with a massive shift in public opinion regarding the nature and effects of its regulatory structure. This is the result of the enormous revenues now generated by NCAA athletics, specifically football and basketball. As revenues increase, player benefits have remained stagnant for more than half a century. Student-athletes believe when they receive a "full ride" they will avoid the worry about money and the financial hardships common among undergraduate students. Instead, they are left to discover, often without much warning that they will live in poverty like all other students, yet will be required to perform services for the institution that other students are not and, in some instances, their services will contribute to generating millions of dollars in revenues for the institution. It is unjust to continue this system of operation. In what other industry is it legal to require a labor force to pay the benefiting institution for the opportunity to generate annual

revenues in excess of \$11.4 billion, and in turn that industry forbids that labor force from receiving even their baseline costs of participation?

NCAA regulations are necessary if academics are to remain the priority for amateur student-athletes. However, the current regulations fail to adequately promote student-athlete well-being and instead create a cynical atmosphere among the student-athletes and the general public. Denying student-athletes benefits that do not offend amateurism encourages underhanded dealings and deemphasizes the core value of integrity and the mental development of the student-athletes. At a minimum, the NCAA must mandate that its institution provide student-athletes with full health care insurance coverage provided at no cost. Student-athletes risk their health and well-being for the benefit of their institutions. They must receive adequate protection.

