Alleged antitrust violations in collegiate athletics

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Abstract

The previous four decades have witnessed numerous suits brought against the National Collegiate Athletics Association. Plaintiffs have included student athletes, coaches, broadcasters, tournament organizers, and more, all allegedly impacted by the NCAA's enforcement of eligibility and similar regulations. All cases discussed in this piece alleged violations of the Sherman Antitrust Act, America's first "trust-busting" statute to eliminate unreasonable restraints on trade, often taking the form of monopolies and trusts. While numerous plaintiffs have alleged violations of the Sherman Act, only few have been awarded relief after an extensive process fought every step of the way by the NCAA. After taking the first step of defining activities as commercial to pave way for application of the Sherman Act, several cases have certified a class action and argued for the application of one of the three primary methods of determining antitrust violations: per se, quick-look, and the rule of reason. This paper includes a case-specific analysis of each step in the litigation process of alleged violations of the Sherman Antitrust Act. Its primary goal is to educate legal representatives of NCAA member universities and legal professionals planning to or in the process of representing student athletes.

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Background

Overview: National Collegiate Athletic Association

The National Collegiate Athletic Association (NCAA), a non-profit organization and the governing body over all collegiate athletics, was formed in 1906 under the guidance of President Theodore Roosevelt (Byers & Hammer, 1995; Ncaa, 2018). The collegiate athletics governing body was created because of a problem in college athletics at the time, especially college football, where deaths and severe injuries were on the rise. The NCAA was created by officials from universities across the country that were charged with rule creation for college football to limit the number of deaths and injuries (Vanderford, 2015). Over time, however, the NCAA began to take on more responsibilities to create "rules committees and conduct national championships for other sports, such as track and field, basketball and hockey" (Byers & Hammer, 1995). One guiding principle for the NCAA from President Roosevelt was that "it is first-class, healthful play, and is useful as such, but play is not business, and it is a very poor business indeed for a college man to learn nothing but sport" (Byers & Hammer, 1995). This led to the implementation of rules limiting compensation, described as follows:

"No Student shall represent a college or university in any intercollegiate game or contest… who has at any time received, either directly or indirectly, money, or any other consideration." (Byers & Hammer, 1995)

After a few decades, the NCAA encountered its first major challenge to President Roosevelt's guiding principle. During a case in 1953, the NCAA was ordered to award workers compensation to an injured athlete because he was considered an "employee" (University, 1953). This became an immediate threat to the NCAA and forced the association to respond in order to keep the nature of college athletics "not business". This resulted in the NCAA developing the principle of amateurism which is outlined as follows:

"An individual who does not receive pay in any form in that sport, does not accept a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; and does not sign a contract or

commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received." (Byers & Hammer, 1995)

This statement along with the concept of one-year renewable scholarships has allowed the NCAA to protect itself from a variety of cases regarding student employment and compensation over the course of its existence (Walter, 2017).

While this setup was originally intended to eliminate the issue of compensation, it has caused current and former student athletes to argue for compensation and recognition of employment through other means. Most notably in the past thirty years, cases alleging antitrust violations have been the most frequent and concerning to the NCAA. The cases are argued on diverse grounds, including but not limited to: the market of recruitment for student athletes, event broadcast rights, coach number and salary limits, and the rights to the likeness, images, and licensing of student athletes. Cases regularly are based on arguments to identify impacted markets and decide which NCAA regulations are subject to antitrust scrutiny.

As a result of the frequency of antitrust cases being filed, this piece will specifically be summarizing which methods the plaintiffs use to argue and the courts use to decide various antitrust claims. The primary methods to be highlighted include: rule of reason, illegal *per se*, and quick-look. This piece will analyze whether alleged activity should be classified as commercial or non-commercial; the NCAA's ability to shield their current regulations with procompetitive justifications will then be considered, analyzing whether they are anticompetitive by nature or design. Several cases will be discussed under each section to demonstrate how the primary concept of the section was utilized and connected to the overarching application of the Sherman Antitrust Act.

Overview: Sherman Antitrust Act of 1890

The Sherman Antitrust Act, passed in 1890 as a sweeping response to the rapid growth in influence of the nation's most powerful trusts and monopolies, served as the first major United States statute to outlaw business activities which restricted interstate commerce and suppressed competition (Law.Cornell, 2010). The Sherman Act (15 U.S.C. §§ 1-7) was originally written to outlaw all significant restraints of trade which included "every contract, combination, or conspiracy in restraint of trade" as well as any "monopolization, attempted monopolization, or conspiracy or combination to monopolize". The United States Supreme Court has since interpreted the statute to restrict only those activities whose detrimental impact on trade was deemed unreasonable by the Court, decided on a case by case basis (Federal, 2017). Although trusts are defined as providing a single set of beneficiaries with shares from stockholders of several companies, regulatory intervention is still required for their detrimental impact similar to monopolies. A monopoly is an arrangement where a single supplier of a good exerts significant control over a market; this control could potentially allow the supplier to raise prices, provide inferior product, and suppress innovation by competitors (Linfo, 2004).

Standard Oil attorney Samuel Dodd conceived the idea of a trust and designed the most notorious trust in history, which rose to control more than 90% of the country's oil refining capacity. Nine trustees received all profits, decided dividends, appointed officers and set corporate strategy for all of Standard Oil's component companies throughout the country. Similar trusts were established in the tobacco, railroad, steel, meatpacking, and sugar industries (Law.Cornell, 2010). Standard Oil and numerous other infamous trusts and monopolies were impacted by the Sherman Act, including Microsoft as a notable recent example.

Violations of the Sherman Act can be prosecuted as civil or criminal, with the majority of cases treated as civil and the remainder reserved for those who deliberately attempt to price fix or engineer bids. Penalties of up to $1 million and incarceration of up to ten years for individuals and $100 million for corporations can be imposed by the Department of Justice for violations of the Act (Federal, 2016). Parties injured by violations of the Sherman Act who are seeking damages are entitled to treble damages, or three times the injury amount, even if this amount exceeds the $100 million threshold (Law.Cornell, 2010). Application and violation of the Sherman Act are determined by a common series of steps which will be discussed in this article. Activities which are deemed *per se* violations are not open to justification or defense. Those not deemed *per se* will be subject to either a "quick-look" analysis or be judged by the rule of reason which considers market impact and justifications to determine if the activities can continue.

The Sherman Act, though extensive in scope and impact, failed to address several trade-restraining activities discovered by corporations in the decades following its passing. The subsequent Clayton Act (15 U.S.C. §§ 12-27) implemented in 1914 filled significant loopholes, specifically addressing mergers and interlocking directorates. Section 7 of the Act thereby outlawed mergers and acquisitions which act "substantially to lessen competition." Section 8 of the Act "prohibits the same individual from serving as an officer or director of two competing corporations" (Law.Cornell, 2010). Also enacted in 1914 was the Federal Trade Commission Act, the statute authorizing the creation of today's Federal Trade Commission in addition to outlawing "unfair methods of competition" and "unfair or deceptive acts or practices." Violations of the Sherman Act are also violations of the FTC Act, the Supreme Court has ruled. The FTC Act outlaws some conduct not categorized by the Sherman Act, so violations of the FTC Act are handled specifically by the Federal Trade Commission (Federal, 2016).

Initial Stages of Antitrust Litigation

Defining Commercial Activity

The cases discussed in the following content all center around the antitrust claims made against the National Collegiate Athletics Association regarding a variety of reasons including: employment, unreasonable restraint of market, horizontal price-fixing, or group boycott. However, "in order to state claim under the Sherman Act, there must be a commercial activity implicated" (Bassett, 2008). A commercial activity is defined as:

"Either a regular course of commercial conduct or a particular commercial transaction or act."

Another way to think of this concept is that a party must prove injury not only to itself, but also to a relevant market in which the commercial activity took place. Therefore, the inability to assign an anticompetitive activity to a relevant commercial market results in the failure to make an antitrust claim (US, 2016). The following cases will attempt to provide clarification on what courts have characterized as a commercial activity or market in terms of the NCAA product.

In the case of *Basset v NCAA,* the United States Court of Appeals for the Sixth Circuit heard the challenge of plaintiff Claude Basset who sought appeal of judgment in favor of defendants NCAA and University of Kentucky Athletic Association. The plaintiff "alleges NCAA, the UKAA and the SEC conspired to prevent [Bassett] from coaching at any NCAA member school in violation of the Sherman Antitrust Act" (Law.Cornell, 2010). Plaintiff was a former assistant coach for the UKAA football program but resigned due to allegations of NCAA rule infractions. The district court originally held that the activities of the NCAA were not commercial in nature and no antitrust case could therefore be made. In the appeal case, Basset stated that he originally intended to challenge the NCAA's "standards for defining improper conduct" and transitioned his case to challenge the enforcement of the NCAA's standards (Law.Cornell, 2010). He alleged that the NCAA allowed schools to divert allegations of code violations onto their coaches, thereby detrimentally impacting a specific market, the market for collegiate athletics coaches.

In determining potential antitrust violations arising from the NCAA's "enforcement program and the imposed sanctions arising therefrom" (Bassett, 2008), the court looked to precedent cases involving the NCAA. The court considered cases including *NCAA v. Smith* (1999) which found that the NCAA's enforcement rules were not commercial in nature as they did not provide a commercial advantage and ensured fair competition (NCAA, 1999). On the contrary, *Worldwide Basketball and Sports Tour, Inc. v NCAA* (2004) determined that several of the NCAA's code enforcement activities were in fact commercial in nature because they directly impacted revenue generation by Worldwide (Worldwide, 2004). In the *Bassett* case, the court questioned whether the plaintiff was making a claim against the NCAA's enforcement rules as these were the reasons for his unemployment (Bassett, 2008). Despite the ruling from *Worldwide Basketball and Sports Tours*, the court chose to follow the *Smith* decision and ruled that Bassett's claims were not commercial because the nature of a coach's job relies heavily on recruitment and academic fraud determination activities, which had nothing to do with the commercial classification of conspiring against an individual for the benefit of the NCAA. While boycotts are considered *per se* violations and were present in the Bassett case, the court could still not apply the Sherman Act as the base activities were not deemed commercial.

In the case of *Agnew v NCAA,* the United States Court of Appeals for the Seventh Circuit heard an appeal from the Southern District of Indiana. In the original ruling, the plaintiffs Joseph Agnew and Patrick Courtney argued that NCAA bylaws created a restraint on trade in both the market for bachelor's degrees and the labor market for student athletes. Both plaintiffs had been former collegiate athletes who were no longer able to compete because their one-year scholarships were not renewed by their corresponding universities. The plaintiffs therefore argued that the NCAA was restricting their rights to play by limiting the number of scholarships schools could offer for a specific sport. The defendant, NCAA, argued that plaintiffs did not identify a market whose trade was restrained by caps on the number of scholarships. Even if the bachelor's degree and labor markets were restrained markets, the plaintiffs didn't show that the specific markets were even commercial, so no antitrust claim could be made (Agnew, 2012). The district court agreed with the defendants' claims and dismissed the case based on the fact that the plaintiffs "failed to identify a cognizable market in which trade was improperly restrained, and that even if plaintiffs did adequately allege there is a product market…those markets are not cognizable in the context of the Sherman Act" (Worldwide, 1999).

The plaintiffs then filed for appeal and the court of appeals upheld and affirmed the decision by the district court. Although the courts have not decided whether they recognize the student athlete recruitment market as a commercial market at all, both the district court and the appeal court ruled that the plaintiffs' alleged markets were not markets at all. The court rejected the bachelor's market for two reasons: 1- one cannot outright pay for a bachelor's degree but must meet requirements to earn one; and 2- the students are not given a bachelor's degree solely for competing in athletics (Worldwide, 2004). The court then referenced *Banks v NCAA* to reaffirm its doubt that the relationship between universities and college athletes represented a labor market as scholarships, which are used as the means exchanged, are "based upon the school's tuition and room and board, not by the supply and demand for the players" (Banks, 1993). These decisions in turn led to no market being identified and dismissal at both the district and appellate levels.

The following cases in the subsequent sections were all initially deemed to involve commercial activities in district courts which allowed courts to move forward with application of the Sherman Act. The appellate courts, however, disagreed with the district courts in some instances described below.

Instituting Class Action

Numerous cases argued against the NCAA have had their motion granted by the Court to certify the case as a class action lawsuit. By no means have all cases against the NCAA been argued as class action suits, but those which have were required to follow a series of steps to define the class and determine its size. Four key prerequisites must be met before certification of a class which allow the plaintiff to sue as a representative of all alleged parties. According to the Federal Rules of Civil Procedure Rule 23, Part 1, plaintiff can represent class if: 1- gathering of all members of the class would be impracticable; 2- there exist common questions of law or fact among members of the class; 3- defenses and claims of the plaintiff are similar to those of members of the class; and 4- the representative plaintiff will protect the interests of class members (Legal, 2011). These four prerequisites are commonly referred to as numerosity, commonality, typicality and adequacy. Adequacy has several sub-requirements regarding conflicts of interest and protection of the class. The two most common prerequisites challenged by the NCAA are typicality and adequacy, with the NCAA attempting to limit the size of the class to minimize potential damages.

In the case of *Jenkins v NCAA* decided in December 2015 by the District Court for the Northern District of California, plaintiffs included student athletes who played NCAA Division 1 football and NCAA basketball between March 4, 2015, and December 2015 (Jenkins, 2015). Jenkins and other members of the class challenged NCAA regulations limiting grant-in-aid monies (GIA) to only value of tuition, fees, room and board and textbooks, less than the total cost of attendance. The plaintiffs alleged that the NCAA violated the Sherman Antitrust Act by limiting compensation provided to student athletes. They sought damages for the difference between the monies given as GIA and the total cost of attendance, arguing they would likely be given more compensation in the form of GIA if NCAA regulations did not enforce a limit (Legal, 2011). After filing the initial complaint, the plaintiff filed a motion requesting certification of class to include the numerous other football and basketball athletes who allegedly suffered damages as a result of these NCAA regulations. Beginning with numerosity, the plaintiffs stated the class comprised "thousands of potential members" from collegiate football and basketball programs and the hundreds of GIA awards limited by the regulation. With numerosity satisfied, they moved to satisfy commonality by listing several common questions and concepts from all plaintiffs in the class. These included "whether "NCAA rules have harmed competition in those markets" and "whether the NCAA's procompetitive justifications for its conduct are legitimate." Commonality was also undisputed by the NCAA, which requires all members of the class to have suffered the same injury; specific to antitrust cases, all plaintiffs must have suffered from the same antitrust violation (Legal, 2011).

With the prior three prerequisites satisfied by the class, the NCAA disputed the plaintiffs' claims to typicality, which requires the named plaintiff to vigorously yet fairly defend the class and its interests. Two sub-questions which must be answered regarding the plaintiffs and their counsel to determine if legal adequacy is present include: whether conflicts of interest exist and whether the case will be prosecuted vigorously for the benefit of the entire class. The NCAA provided two theories to allege conflicts of interest within the class, arguing that litigation of class magnitude to lift GIA caps would force member schools to decrease the number of additional players for economic reasons which would in turn harm current and potential members of the class. In addition, as the number of students who turn down current scholarships with the GIA cap is very small, those students who turn down GIA scholarships totaling less than the cost of attendance would likely receive a lesser amount without the cap than initially offered. Witnesses for the plaintiffs and the court found these arguments were either invalid or did not affect members of the class and certified that adequacy existed. With numerosity, commonality, typicality and adequacy established, the court certified the class and allowed the case to move forward as a class action suit (Jenkins, 2015).

Arguing Violations of the Sherman Antitrust Act
Per Se Method

When attempting to determine if violations of antitrust law have occurred, courts typically use a combination of three methods after determining the activity does have an impact on commercial activities. These three methods include: the *illegal per se* method, the quick-look method, and the rule of reason method. Applying these methods involves a series of steps, and not all three methods must be used together. The *per se method* seeks to determine if certain practices are "entirely void of redeeming competitive rationales". Once it has been determined that a practice is *per se* illegal in fact, a court does not have to determine the effects on a market or whether they are procompetitive measures (Law, 1998). A procompetitive practice is one that generally promotes competition in the marketplace. *Per se* rule applies to a list of specific alleged violations, including naked horizontal price-fixing agreements or group boycotting. Horizontal price fixing is a generally illegal arrangement among competitors to charge the same, normally higher, price for an item, although in the context of antitrust it can be generalized as an attempt to control prices across a market (Merriam 2018). Group boycotting is an agreed-upon, or forcefully implemented, refusal by competitors to deal with a business or individual for committing a specified action which could include upsetting price controls or allegedly violating corporate regulations. Relating to collegiate athletics, while these activities are commonly associated with *per se,* the courts have specified an important exception:

"The U.S. Supreme Court recognizes that certain horizontal restraints are justifiable under antitrust laws because they are necessary to create the product of competitive college sports." (Law, 1998)

This principle of allowing anticompetitive activities which must exist for the product to be produced is a crucial exception which has been mentioned in several cases argued against the NCAA. In the following cases, the issue of *per se* illegal activities was applied by the court or argued by the plaintiffs. The focus will be on how the court applied and interpreted the *per se* activity.

In the case of *Law v. NCAA,* the United States Court of Appeals for the Tenth Circuit ruled on a dispute involving the plaintiff-appellee, the National Collegiate Athletic Association, and defendantappellant William Hall (Law, 1998). The case involved a bylaw passed by the NCAA which capped the earnings a coach could receive if they did not qualify as a head or assistant coach. As a result, the two defendants were classified as restricted earnings coaches (REC) and filed suit to challenge the new REC rule's limitation on compensation using Section 1 of the Sherman Act, arguing that it was an unlawful "contract, combination… or conspiracy in restraint of trade." (Law, 1998). The district court in the original case found that the NCAA did violate section 1 of the Sherman Act. The NCAA appealed the decision, and the appeals court initially applied the rule of reason to determine if the REC rule constituted an "unreasonable restraint of trade" under Section 1 to allow the NCAA to present justifications. The defendant-appellants argued, however, that the *per se* rule should be used because a horizontal price fixing agreement was present which is considered to be an unredeemable *per se* violation. They argued that the REC rule was anticompetitive because it enforced a limit on the cost incurred by all member schools which is crucial in producing the product of collegiate athletics. Citing precedent from the *National Collegiate Athletic Association v. Board of Regents (National 1984)*, the court refused to apply *per se* and opted for rule of reason; in that case, the court came to the conclusion that:

"On the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics… it is critical that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." (National, 1984)

This principle therefore allowed the NCAA to practice some anticompetitive horizontal price-fixing activities in the interest of ensuring the continued existence of its product. Using the *Board of Regents* decision further, the court deemed it necessary to apply the rule of reason to determine if this price agreement served a procompetitive purpose.

Rather than set limits on coach compensation, *Hennessey v. National Collegiate Athletic Association* ruled on an NCAA regulation limiting the number of coaches of specified types (Hennessey, 1977). The United States Court of Appeals for the Fifth Circuit heard the case between plaintiff-appellants Lawrence Hennessey and Wendell Hudson versus defendant-appellee NCAA. The case originally dealt with the REC rule discussed above, but this time focused on the aspect of the rule which limited the number of full-time coaches a team could have, forcing some previously full-time coaches to be classified as part-time coaches (Hennessey, 1977).

This REC bylaw caused both Hennessey and Hudson to be classified as part-time coaches, which in turn also limited their compensation. The district court originally found in favor of defendant, NCAA, but after appeal, the plaintiffs argued that the bylaw instituted a "group boycott" and was therefore *per se* illegal. The plaintiffs argued that by distinguishing a certain group of individual coaches out of the whole group, they are boycotting their previous business relationship and preventing them from getting higher coaching jobs with any team under the NCAA (Hennessey, 1977). The court chose not to apply *per se* because of the precedent set by *Goldfarb v Virginia State Bar* which stated:

"The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the profession antitrust concepts which originated in other areas." (Goldfarb, 1975)

The court decided to apply rule of reason instead because it was inappropriate to interchange the restraint of losing a job in a profession with the business of collegiate athletics, ruling that the regulation was therefore not *per se* illegal in fact. The court highlighted that although it chose to apply an exception to this case and several others, the NCAA must realize that its regulations are by no means above the scrutiny of antitrust law for *per se* violations. It then transitioned to applying the rule of reason (Hennessey, 1977).

In the case of *Smith v NCAA*, the United States Court of Appeals for the Third Circuit heard a dispute between plaintiff-appellant Renee M. Smith and defendant-appellee NCAA (Smith 1998). In the original case prior to appeal, the plaintiff's claim against an NCAA regulation banning her participation in athletics while in a graduate school program at another university was dismissed, with the court stating that her antitrust claim was invalid. The plaintiff made these arguments on the grounds of a violation of

Sherman Act 1, along with other claims as well that aren't relevant to the discussion at hand. Specifically, the argument is that the bylaw of NCAA unreasonably restrains trade and has an adverse anticompetitive effect. The courts dismissed the case because it believed that antitrust laws did not apply to the NCAA's eligibility rules because these eligibility rules served the purpose of making NCAA's unique product competitive (Smith, 1998).

It made this decision based on rulings in other cases including but not limited to: *McCormack v. National Collegiate Athletic Association (McCormack, 1988)*, *Gaines v National Collegiate Athletic Association (Gaines, 1990)*, *Jones v. National Collegiate Athletic Association (Jones, 1996)*. The court therefore ruled that: "The NCAA's eligibility requirements are not plainly anticompetitive and therefore are not *per se* unreasonable" (Smith, 1998). This further solidified the point that courts were not willing to deem NCAA bylaws subject to *per se* antitrust scrutiny, but instead applied the rule of reason due to the unique nature of the NCAA's product.

"Quick-Look" Analysis

As previously mentioned under the section titled *per se* method, quick-look analysis is one of the three methods to analyze the impact of activities which are alleged to unreasonably restrain business activities. Rather than being a completely separate analysis method, quick-look, applicable only under specific circumstances, is also defined as an abbreviated Rule of Reason analysis. To be applicable, the market which was impacted by the alleged market-restraining activities must be readily apparent so that:

"An observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets." (National, 1984)

If the market definition reasonably meets this threshold and the violation is not deemed *per se*, quick-look analysis allows the court to come to a conclusion without sophisticated market analysis. This rapid analysis is also known as applying "the rule of reason...in the twinkling of an eye" as referenced by *National Collegiate Athletic Association v. Board of Regents*, allowing the rule of reason to be applied only:

"Where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition." (National, 1984)

This abbreviated analysis tool was misapplied in the case *Worldwide Basketball & Sport Tours, Inc. v. NCAA (Worldwide, 2004)* decided in November 2004 by the United States Court of Appeals for the Sixth Circuit. NCAA regulations of the time instituted what became known as the "Two in Four" rule which barred student athletes from participating in more than two certified non-NCAA basketball tournaments in a four-year period. The association was concerned about the "inherent recruiting and competitive advantages" provided to schools which had the geographic and financial ability to participate in outside certified tournaments. The plaintiff is an organization which organizes the outside tournaments and derives revenue from tickets sales and broadcast contracts.

Upon determining that these activities constituted commercial activities and fell under the rule of reason for instituting horizontal restraints on competition, the court determined that no involved industry analysis was necessary following precedent from *Board of Regents* holding that "naked restraints on output" require justification even without such analysis (National, 1984).This ruling also followed *FTC v Indiana Federation of Dentists* stating that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of such activities (FTC, 1976). The district court originally held that quick-look was inappropriate but eventually ruled in favor of it, but upon appeal ruled its application was again inappropriate. The court concluded that the relevant market was not only unapparent, but also was inadequately defined in the first place by the plaintiffs; the plaintiffs had not satisfied their burden of proof to define the relevant impacted market. Application of the quick-look method must be accompanied by a relatively apparent definition of the market and consumer. As the quick-look rule can potentially be applied after bypassing *per se*, cases which are inappropriate for application of the quick-look rule for requiring market analysis or requiring justification are immediately sent to be analyzed further by the rule of reason (Worldwide, 2004).

Rule of Reason

The rule of reason is the final and most involved analysis tool to determine if activities are unreasonable restraints on trade and therefore violations of the Sherman Antitrust Act. After determining that application of the *per se* and quick-look (abbreviated rule of reason) methods are inappropriate for requiring justification or in-depth market analysis, the rule of reason gives both parties in the suit the opportunity to expand further upon allegations of anticompetitive activities while also offering procompetitive justifications.

Several anticompetitive activities fall immediately under the rule of reason, most often those considered horizontal restraints on competition (horizontal price fixing condemned under *per se* rule). Cases are judged to determine whether procompetitive justifications outweigh the anticompetitive effect; even if some activities are found to be violations under the rule of reason, they may still be allowed to continue if they can be redeemed by procompetitive arguments. One crucial exception to this balance is for anticompetitive activities which are absolutely necessary if the product is to exist at all.

A critical aspect of hearing arguments about anticompetitive and procompetitive activities is the shifting burden of proof between plaintiff and defendant. Initially in the application of rule of reason, the plaintiff possesses the burden of proof to demonstrate that an activity has a substantially adverse effect on competition. Upon satisfying this burden, the defendant must present evidence of "procompetitive virtues" to counteract the anticompetitive activities. If legitimate procompetitive justifications can be argued by the defendant, the plaintiff must demonstrate that the activity "is not reasonably necessary" to achieve the same desired outcome. The plaintiff could also argue that a less restrictive version of the activity can still achieve the same outcome. As long as procompetitive benefits of alleged antitrust violations can be shown to outweigh their anticompetitive impacts or be necessary for the survival of the product, significantly anticompetitive activities can be allowed to persist the marketplace (Law, 1998).

One of the first and most significant cases involving the NCAA and the rule of reason was decided by the Supreme Court of the United States in 1984 under *National Collegiate Athletic Association v Board of Regents, 468 U.S. 85.* NCAA regulations limited the number of football games universities were allowed to air on television networks by outside broadcasters. Several NCAA member universities contracted with networks to air more than the allowed number of games and filed suit after the NCAA threatened disciplinary action. After the district court found that the NCAA's regulations violated the Sherman Act, a court of appeals determined the NCAA regulations were a per se violation of price fixing. The Supreme Court reversed the *per se* classification and deemed the regulations a horizontal restraint of trade to be judged under the rule of reason; the price with the existing regulation is higher while output is lower than without it, part of the very definition of a restraint on trade or an act designed to prohibit (National, 1984).

Extensive market analysis by both parties led to the conclusion that the sport broadcasting market is a separate market upon which the NCAA had the ability to exert extensive control. The NCAA offered several procompetitive justifications including classifying their relationship with the broadcasting industry as a joint venture which achieves "otherwise unattainable efficiencies." The association also argued that its primary goal is to facilitate competition and that its organizing of television contracts did not eliminate the competition's presence in the market. Both the District Court and the Supreme Court found these justifications to be insufficient; the specific market into which the NCAA was selling its product was by design non-competitive, and while it may have been promoting competition in other sports, the anticompetitive impact on the football market outweighed this competition. The Court acknowledged the potential necessity of some anticompetitive practices to allow for the creation of the NCAA's very specialized product, but its grip on related markets was unacceptable (National, 1984).

Another important suit settled recently involving the NCAA is the *NCAA Student-Athlete Name & Likeness Licensing Litigation (In re, 2013)*. Originally arguing individually in 2010 against the NCAA with the same complaint under *O'Bannon v NCAA*, O'Bannon transitioned his lawsuit into a larger class action suit under the above final title (O'Bannon, 2014). The plaintiffs alleged that the NCAA misappropriated their names, images, and likenesses in violation of their statutory and common law rights of publicity. They described how NCAA regulations fostered anticompetitive activities, namely antitrust conspiracy with sports advertising companies and video game manufacturers, which limited the right to utilize these aspects of their identity, resulting in unjust enrichment in the form of profits (In re, 2013). Using the *Board* *of Regents* case as precedent, the court applied the rule of reason to analyze market impact and justifications (National, 1984). Market analysis found that the NCAA regulations restrained competition in two relevant markets: the Division I student athlete education market and the group licensing rights market. However, the NCAA offered several procompetitive justifications the court deemed legitimate to protect the unique competitive foundation of the product. After the NCAA demonstrated that legitimate procompetitive justifications existed, the plaintiffs argued against the degree of strictness stemming from the regulations. The court ultimately decided that individual advertising rights do not constitute commercial activities and therefore cannot fall under antitrust arguments, although the anticompetitive activities were deemed justified. The class subsequently succeeded in altering the regulations to require outside entities to contact players individually to request rights to their identity rather than receiving these rights directly from the NCAA. The NCAA still today does not allow athletes to contract out their identity in this manner (In re, 2013).

Conclusion

The previous four decades have witnessed numerous suits brought against the National Collegiate Athletics Association. Plaintiffs have included student athletes, coaches, broadcasters, tournament organizers, and more, all allegedly impacted by the NCAA's enforcement of eligibility and similar regulations. All cases discussed in this piece alleged violations of the Sherman Antitrust Act, America's first "trust-busting" statute to eliminate unreasonable restraints on trade, often taking the form of monopolies and trusts. While numerous plaintiffs have alleged violations of the Sherman Act, only few have been awarded relief after an extensive process fought every step of the way by the NCAA. After taking the first step of defining activities as commercial to pave way for application of the Sherman Act, several cases have certified a class action and argued for the application of one of the three primary methods of determining antitrust violations: *per se*, quick-look, and the rule of reason. One fact has remained clear throughout decades of litigation since 1984 when the ruling from *NCAA v Board of Regents* opened the door to a series of antitrust cases which continue to this day: the NCAA and its numerous regulations are not shielded from antitrust scrutiny. Though few have succeeded in the past, future cases will decide whether the NCAA's regulations will withstand the test of time and relentless scrutiny.

References

Agnew v. NCAA [2012]683 F.3d 328 (United States Court of Appeals for the Seventh Circuit).
Banks v. NCAA [1993]508 U.S. 908 (Supreme Court of the United States).
Bassett v. NCAA [2008]528 F.3d 426, (United States Court of Appeals for the Sixth Circuit).
Byers, W., & Hammer, C. (1995). Unsportsmanlike Conduct: Exploiting College Athletes. Retrieved February 20, 2018, from http://www.jstor.org.ezproxy.lib.purdue.edu/stable/10.3998/mpub.14486
Federal Trade Commission. (2016). Federal Trade Commission Act. [online] Available at:
https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act [Accessed 22 Feb. 2018]
Federal Trade Commission. (2017). The Antitrust Laws. [online] Available at: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [Accessed 22 Feb. 2018].
FTC v. Indiana Federation of Dentists [1976]476 U.S. 447 (Supreme Court of the United States)
Gaines v. National Collegiate Athletic Ass'n [1990]746 F . Supp. 738 (United States District Court for the Middle District of Tennesse).
Goldfarb v. State Bar [1975]421 U.S. 773 (Supreme Court of the United States).
Hennessey v. National Collegiate Athletic Asso. [1977]564 F.2d 1136 (United States Court of Appeals for the Fifth Circuit).
In re NCAA Student-athlete & Likeness Licensing Litig [2013]108 U.S.P.Q.2D (BNA) 1795 (United States District Court for the Northern District of California).
Jenkins v. NCAA [2015]311 F.R.D. 532 (United States District Court for the Northern District of California).
Jones v. NCAA [1996]679 So. 2d 381 (Supreme Court of Louisana).
Law v. NCAA [1998]134 F.3d 1010 (United States Court of Appeals for the Tenth Circuit).
Law.Cornell.edu. (2010). Sherman Antitrust Act. [online] Available at:
https://www.law.cornell.edu/wex/sherman_antitrust_act [Accessed 22 Feb. 2018].
Legal Information Institute. (2011). *Rule 23. Class Actions*. [online] Available at:
https://www.law.cornell.edu/rules/frcp/rule_23 [Accessed 22 Feb. 2018].
Linfo.org. (2004). Sherman Antitrust Act and monopolies. [online] Available at:
http://www.linfo.org/sherman.html [Accessed 22 Feb. 2018].

McCormack v. National Collegiate Athletics Asso. [1988]845 F.2d 1338 (United States Court of Appeals for the Fifth Circuit).
Merriam-webster.com. (2018). *Legal Definition of HORIZONTAL PRICE-FIXING*. [online] Available at: https://www.merriam-webster.com/legal/horizontal%20price-fixing [Accessed 21 Feb. 2018].
National Collegiate Athletic Ass'n v. Board of Regents [1984]468 U.S. 85 (Supreme Court of the United States).
NCAA v. Smith [1999]525 U.S. 459 (Supreme Court of the United States).
Ncaa.org. (2018). Finances. [online] Available at:
http://www.ncaa.org/about/resources/finances [Accessed 20 Feb. 2018].
O'Bannon v. NCAA [2014]7 F. Supp. 3d 955 (United States District Court for the Northern District of California).
Smith v. NCAA [1998]139 F.3d 180 (United States Court of Appeals for the Third Circuit).
University of Denver v. Nemeth [1953]No. 257 P.2d 423 (Supreme court of Colorado).
US Legal, I. (2016). Commercial Activity Law and Legal Definition. [online] Definitions.uslegal.com. Available at: https://definitions.uslegal.com/c/commercial-activity/ [Accessed 21 Feb. 2018].
Vanderford, R. (2015). Note: Pay-for-Play; An age-old Struggle For Appropriate Reform in a Changing Landscape Between Employer and Employee. Southern California Interdisciplinary Law Journal, [online] Available at: https://advance-lexis-com.ezproxy.lib.purdue.edu/document/index?crid=fd833631-c18e-400e-9cd4-41549439794c&pdpermalink=fe10885a-2e54-45a1-aa97-2375e493a21b&pdmfid=1516831&pdisurlapi=true# [Accessed 21 Mar. 2018].
Walter, C (2017) Fair compensation for student-athletes. Unpublished piece, Purdue University.
Worldwide Basketball & Sport Tours, Inc. v. NCAA [2004]388 F.3d 955 (United States Court of Appeals for the Sixth Circuit).