The Commitment to Participate Rule: The NCAA Fights to Keep the March Madness Ball in its Court

Paul Fellin

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/jcred/vol20/iss2/6

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
THE COMMITMENT TO PARTICIPATE RULE: THE NCAA FIGHTS TO KEEP THE MARCH MADNESS BALL IN ITS COURT

PAUL FELLIN*

INTRODUCTION

Every year, sports fans across the country sit in front of their television sets and watch one of sport's greatest events, the National Collegiate Athletic Association ("NCAA") Basketball Tournament. Played in front of huge crowds in arenas across the country, with billions of dollars in revenue produced, the NCAA Basketball Tournament is the crown jewel of NCAA athletics. At

* J.D. Candidate, St. John's University School of Law, June 2006; B.S. Finance, St. John's University, May 2003. The author would like to thank all of those who supported him throughout the writing of this Note, especially his friends and family, who always knew how to put him in his place. He would also like to thank Professor Cavanagh for being an inspiration to write this Note, and also for his wisdom and guidance. Last but certainly not least, thanks to the entire staff of St. John's Journal of Legal Commentary for doing an amazing editing job on this piece.

1 NCAA, 2005-06 DIVISION I MANUAL § 31.2.1.1 (2005) [hereinafter Manual]. “Eligible members in a sport who are not also members of the National Association of Intercollegiate Athletics will participate (if selected) in the NCAA championship or in no postseason competition in that sport.” See Federal Court Denies Summary Judgment Motions by Both Parties in Metropolitan Intercollegiate Basketball Association's Antitrust Suit Challenging NCAA's Postseason Competition Rules, ENT. L. REP., March 22, 2005 [hereinafter Federal Court Denies], for a discussion that the 'Commitment to Participate Rule' requires a team invited to participate in an NCAA championship tournament to play in that competition only and no other.

2 This Note was written prior to the settlement of the lawsuit between the MIBA and the NCAA. All arguments and analysis were constructed with no knowledge of any impending settlement. A Postscript is included at the conclusion of this Note to explain the terms of the settlement and the effects it will have on antitrust law in the future.

3 See Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563, 565 (S.D.N.Y. 2004) (explaining that sixty-five teams participate in the NCAA Tournament, which crowns a national champion for Division I Men's college basketball); see also Edward N. Matisik, NIT Sues Under Sherman Anti-Trust Act, CHN COLLEGE BASKETBALL, Feb. 4, 2005, http://www.collegehoopsnet.com/specials/050204.htm (noting there has been an explosion of interest in the NCAA basketball tournament in the past fifteen years).

4 See Sarah M. Konsky, Comment, An Antitrust Challenge to the NCAA Transfer Rules, 70 U. CHI. L. REV. 1581, 1584 (2003) (stating that the NCAA has signed a $6 billion
the same time, the rival National Invitational Tournament ("NIT") proceeds with much less fanfare. Due to the fact that the NCAA features the nation's premier college basketball teams and the NIT consists of schools that are not invited to the NCAA, most fans pay little attention to the NIT, except loyal alumni and college basketball fanatics. Fifty years ago, however, that was not the case. The NIT was the tournament every college strived for, and the winner was invariably crowned the mythical national champion of college basketball.

Over the last half century, the NCAA Tournament has surpassed the NIT in terms of popularity, revenue, and quality of play. The NCAA in that time has expanded from 24 teams to 65. This expansion was largely caused by a 1981 NCAA By-law, contract with CBS to broadcast the NCAA Tournament); see also Mark Alesia, Antitrust Case Puts NCAA on Defense; NIT Suit Over Tournament Will Go to Court Monday, INDIANAPOLIS STAR, July 31, 2005, at 1A (noting that in 1999, the NCAA signed a $6.2 billion, 11-year agreement with CBS for the tournament and marketing rights).

5 See Metro, 337 F. Supp. 2d at 566 (explaining that Postseason NIT has 40 participants and "is the only postseason Division I men's basketball tournament other than the NCAA Tournament"); see also Matisik, supra note 3 (noting commentators' joke that winning NIT nowadays means the team can only boast of being ranked #66).

6 See Metro, 337 F. Supp. 2d at 568 (noting that most participants in NIT are of lesser quality than participants in NCAA); Alesia, supra note 4 (stating that NIT has been greatly overshadowed by NCAA Tournament).

7 See Symposium, Maurice Clarett's Challenge, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391, 428 (Winter 2005) (noting that, in the 1950's, NIT was a much larger tournament than NCAA); see also Matisik, supra note 3 (stating that in the 1950's, NIT was much more prestigious than NCAA).

8 See Matisik, supra note 3. Some schools chose to play in both tournaments. Id. In 1950, the City College of New York actually won both the NIT and the NCAA. Id. Colleges continued to occasionally turn down the NCAA for the NIT up until 1970, when Marquette was the last school to do so. Id. See also Alesia, supra note 4, discussing that in the first few decades of the NIT's existence, the winner of the tournament was considered the national champion.

9 See Survey, 2004 Annual Survey: Recent Developments in Sports Law, 15 MARQ. SPORTS L. REV. 531, 535 (2005) [hereinafter 2004 Annual Survey] (noting that NIT's popularity has foundered over recent years, which NIT attributes to NCAA rules); see also Matisik, supra note 3 (explaining NCAA Tournament expansion to 65 teams has caused NIT to lose prestige over past 30 years).

10 See Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563, 566-68 (S.D.N.Y. 2004). The NCAA has enacted several rules over the year to limit the popularity of the NIT. In 1953, the NCAA prohibited colleges from participating in more than one postseason college basketball tournament. In 1961, the NCAA stated that it "expected" colleges to participate in the NCAA Tournament if they were invited. During the 1970's and 1980's, the NCAA Tournament continued to expand, and all restrictions on the number of teams that could participate from each conference were eliminated. The original 'Commitment to Participate Rule' was passed by the NCAA in 1981. See id. at 566-67. See 2004 Annual Survey, supra note 9, at 535-36, discussing that the NCAA rules that MIBA claimed were anticompetitive included NCAA's Commitment to Participate Rule, One Post-season Tournament Rule, the End of the Playing Season rule, the Automatic Qualification of Conference Champions Rule, and the 65 team bracket.
Whereas NCAA schools once had an option to play in the NCAA or the NIT, NCAA regulations now require teams invited to the NCAA Tournament to play there or not at all. As a result of this by-law, colleges invited to play in a sport’s official championship may not play in the NIT. Failing to comply with this rule is considered a major violation, but sanctions have not been determined or exacted since no school has ever violated the rule.

The NIT has been run by an association of five New York area colleges, known as the Metropolitan Intercollegiate Basketball Association (“MIBA”). Angry over the NCAA rule and dwindling interest in its tournament, the MIBA brought suit in the Southern District of New York against the NCAA, claiming violations of the Sherman Act. The MIBA looked to challenge certain rules promulgated by the NCAA which the MIBA argued were anticompetitive under the Sherman Act. The MIBA

---

11 See Manual, supra note 1, at by-law 31.2.1.1. The rule has been in place for every year other than 1991. It was eliminated in May of 1990 and not put back into place until August of 1991. See also Symposium, supra note 7, at 428 noting that because the NCAA did not like the competition of the NIT, it enacted rules that did not allow those invited to the NCAA Tournament to participate in any other tournaments.

12 See Manual, supra note 1, at by-law 31.2.1.1 (clarifying that schools no longer had an option); see also Federal Court Denies, supra note 1 (noting MIBA’s claim that NCAA’s by-law effectively requires any team invited to participate in NCAA’s Tournament to boycott NIT).

13 See Metro., 337 F. Supp. 2d at 567 (noting that the rule ended any controversy over whether colleges were required to play in the NCAA Tournament, or if they were only expected to participate); see also Matisik, supra note 3 (explaining that, in 1981, when NCAA adopted the ‘Commitment to Participation Rule,’ schools could no longer turn down an NCAA bid in favor of an NIT bid).

14 See Metro., 337 F. Supp. 2d at 567 (explaining that normal penalties for violating one of NCAA’s major rules are fines and/or playing sanctions such as limiting postseason participation or exposure on television); see also Matisik, supra note 3 (explaining that NIT ‘believes that in recent years several schools would have turned down their NCAA bids and accepted an NIT bid if that had not been for the CPR’).

15 See Alesia, supra note 4 (explaining that NIT has been run by MIBA since 1938); Matisik, supra note 3 (noting that the five New York area schools that run NIT include St. John’s, Fordham, Wagner, New York University, and Manhattan College).

16 See Rafael Hermoso, College Basketball; N.I.T. Organizers File Suit, Calling N.C.A.A. a Threat, N.Y. TIMES, January 5, 2001, at D5 (noting that organizers of NIT claim that NCAA’s proposed rules would destroy NIT tournaments and that the ‘Commitment to Participate Rule’ has transformed NIT into a second-class event); Matisik, supra note 3 (explaining that MIBA believes that NCAA is trying to drive NIT out of business, and therefore gain a monopoly in college basketball championships).


19 See Metro, 337 F. Supp. 2d at 565 (challenging NCAA rules).
claimed both unreasonable restraints of trade under § 1 of the Sherman Act, and monopolization under § 2 of the Sherman Act. Both parties moved for summary judgment, but both motions were denied in separate hearings. The case is proceeding towards trial.

This Note will focus on the upcoming trial between the NCAA and MIBA, with careful consideration of the role that antitrust law should play in regards to NCAA activity. Part I will focus on the history of antitrust regulation, with emphasis on particular tests that courts have applied. Part II will focus on past judicial regulation of NCAA activity and will also examine NCAA arguments for the need for deference in areas which it regulates. Part III will explain why the 'Commitment to Participate Rule' fails any tests of legality that courts have established in the past. Part IV will detail recommendations for future standards in regulating the NCAA in order to create bright-line rules and end the uncertainty that exists today.

---

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id.

22 See Metro., 337 F. Supp. 2d at 573 (denying MIBA's motion for summary judgment because of genuine issues of material fact regarding conduct of NCAA); see also Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545, 552 (S.D.N.Y. 2004) (denying NCAA's motion for summary judgment because MIBA raised genuine issues of material fact as to possible violations of Sherman Act by NCAA).

23 See Metro., 337 F. Supp. 2d at 573 (noting that MIBA's motion for summary judgment is denied because MIBA has not shown that NCAA had a specific intent to monopolize tournaments). But see supra note 2; discussion infra Postscript.
I. SHERMAN ACT ANALYSIS IN NON-TRADITIONAL BUSINESS AREAS

Section 1 of the Sherman Act forbids "every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." The Supreme Court, in several cases, has interpreted "every" to mean that only "unreasonable restraints of trade" are prohibited. The traditional test in analyzing restraints of trade involved an examination of 1) the history behind the restraint, 2) any evils existing because of the restraint, and 3) the purposes behind the restraint. This became known as rule of reason analysis.

Nevertheless, some conduct is so pernicious and so devoid of pro-competitive benefit that courts will condemn it on its face as a naked restraint of trade. Examples of such conduct include price fixing, horizontal territorial restraints, and tying agreements. Another area of conduct that the Supreme Court

26 See Standard Oil, 221 U.S. at 55 (explaining evils resulting from such restraints and why such evils need to be banned); see also Coca-Cola, 418 F. Supp. at 362 (stating that restraint of trade is required to be found unreasonable before it can violate Sherman Act).
29 See Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (stating that certain agreements are conclusively presumed illegal without detailed inquiry into the harm caused because of their destructive effects); see also Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 607 (1914) (describing wrongful activities of defendants who intended to restrain trade).
30 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (holding price fixing illegal per se under Sherman Act); see also United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (stating that price fixing is an unreasonable restraint of trade).
31 See United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972) (holding that agreements among competitors to allocate territories are illegal per se); see also White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (stating that horizontal territorial limitations only stifle competition).
32 See Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962) (stating that use of tying devices rarely coincides with purposes of competition); see also Standard Oil v.
has usually found *per se* illegal is group boycotts.\(^{33}\) Group boycotts involve some level of agreement among competitors to drive a rival from the market by denying them a source of customers or a source of supply.\(^{34}\) Due to the lack of pro-competitive benefits that these strategies have, the Supreme Court has held group boycotts to be *per se* illegal.\(^{35}\) However, not all restraints among competitors are illegal on their face. There are situations where the Supreme Court has found that an industry's characteristics are so unique that restraints might be necessary for that industry to succeed.\(^{36}\) While special circumstances will not save a defendant from antitrust scrutiny completely,\(^{37}\) the defendant in such cases will be allowed to offer justifications of its behavior.\(^{38}\)

Traditional rule of reason analysis involves three steps.\(^{39}\) The plaintiff first has the burden of proving adverse economic effects

United States, 337 U.S. 293, 306 (1949) (explaining that tying agreements are mainly used to limit competition).

\(^{33}\) See Klor's, Inc., v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) (holding that group boycotts have long been considered a category of conduct that is forbidden by Sherman Act); see also Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1063 (C.D. Cal 1971) (quoting *Northern Pac. Ry. Co.*, 356 U.S. at 5) (stating that group boycotts are among practices which courts have deemed unlawful).

\(^{34}\) See *Klor's*, 359 U.S. at 213 (noting that agreement involved many manufacturers and retailers in an effort to drive a retailer out of business); see also *Fashion Originators' Guild*, Inc., v. FTC, 312 U.S. 457, 468 (1941) (noting that petitioners' group boycott served to regulate and restrain interstate commerce).

\(^{35}\) See *Klor's*, 359 U.S. at 212 (describing effects of such agreements and noting that they cripple ability of sellers to compete); see also *Denver Rockets*, 325 F. Supp. at 1063 (stating that the Supreme Court has recognized group boycotts as *per se* illegal).

\(^{36}\) See *Broadcast Music*, Inc. v. CBS, 441 U.S. 1, 14–15 (1979) (noting that unique market conditions exist in music licensing industry that would make use of *per se* analysis highly inappropriate because in-depth analysis of market is needed to come to a just decision); see also *Matsushita Elec. Indus. Co. v. Cinram Int'l, Inc.*, 299 F. Supp. 2d 370, 376 (D. Del. 2004) (stating that in certain situations, competitors have been allowed to form pooled activities).

\(^{37}\) See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120, 126 (1984) (holding that NCAA had violated Sherman Act, even though it was a unique area of business where *per se* analysis would be inappropriate); see also *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) (holding that nonprofit organizations can be held liable under Sherman Act).

\(^{38}\) See *Broadcast Music*, 441 U.S. at 24 (holding that blanket license program should be analyzed by lower courts under rule of reason scheme rather than strict *per se* scrutiny); see also *Cont'l T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57–59 (1977) (holding that all vertical restrictions are not *per se* illegal but instead should be analyzed under rule of reason).

\(^{39}\) See *K.M.B. Warehouse Distrbs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (explaining three-step process that courts have applied when performing rule of reason analysis, which involves analyzing all relevant commercial circumstances); see also *GTE*, 433 U.S. at 49 (stating that under rule of reason, all circumstances of case are weighed in deciding whether restrictive practice should be prohibited).
from the defendant's activity. Once met, the burden shifts to the defendant to prove the pro-competitive benefits of its conduct. If the defendant carries this burden, the plaintiff must then show some less restrictive means to achieve these pro-competitive benefits. Plaintiffs faced with the Rule of Reason face an uphill battle, and therefore defendants will always push for this standard to be applied.

One area that traditionally has been subject to rule of reason analysis is that of professional and collegiate sports. Sports are a unique industry which requires some restraints on competition. The essence of sports requires each team to have a chance to succeed, and the enjoyment would be lost if one team was able to crush the competition. Much tension exists,

---

40 See K.M.B., 61 F.3d at 127 (stating that “[p]laintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.”); see also Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 96 F.2d 537, 543 (2d Cir. 1993) (stating that proof that plaintiff has been harmed as an individual competitor does not satisfy initial burden).

41 See K.M.B., 61 F.3d at 127 (stating that “[i]f the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive ‘redeeming virtues’ of the action”); see also Discon Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 159 (W.D.N.Y. 2000) (stating that if plaintiff satisfies initial burden, defendant must establish “pro-competitive ‘redeeming virtues’ of its conduct”).

42 See K.M.B., 61 F.3d at 127 (stating that “[s]hould the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.”); see also Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) (stating that if defendant meets his burden, plaintiff “must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner”).

43 See Mark C. Anderson, Self-Regulation and League Rules Under the Sherman Act, 30 CAP. U. L. REV. 125, 129–30 (2002) (noting that because plaintiff has initial burden of proof, defendants have a much better chance of winning the case than under per se analysis); see also Shlomi Feiner, Regulation of Playing Equipment by Sports Associations: The Antitrust Implications, 10 U. MIAMI BUS. L. REV. 585, 599 (2002) (noting that “a rule of reason analysis . . . tends to operate in favor of defendants in the sports industry”).

44 See Smith v. Pro Football, 593 F.2d 1173, 1179–80 (D.C. Cir. 1978) (holding that because NFL Draft is not a classic group boycott as teams are not “true” competitors in classic commercial sense, Draft should be judged under rule of reason standards); see also Mackey v. NFL, 543 F.2d 606, 619–20 (8th Cir. 1976) (holding “the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules,” and rule of reason should be applied instead).

45 See Smith, 593 F.2d at 1179 (noting that even though NFL teams compete on playing field, there needs to be some level of cooperation on many aspects of business in order to ensure a high level of quality to the entertainment product they put out on field); see also San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 965, 969–70 (C.D. Cal. 1974) (stating that even though National Hockey League teams compete athletically, the main purpose of the League is to produce “sporting events of uniformly high quality”).

46 See Smith, 593 F.2d at 1179 (explaining that no NFL team is looking to drive all other teams from competition because then fans will no longer have a rooting interest and the league will have to close down); see also NHL, 379 F. Supp. at 969–70 (stating that teams within National Hockey League are not competitors in an economic sense, and that
however, because sports are still a commercial enterprise that requires regulation.\textsuperscript{47} This tension has been particularly strong in the area of NCAA activity.\textsuperscript{48} To further cloud the situation, courts not only have to deal with the debate regarding whether NCAA regulation is commercial, but also whether policy concerns require the NCAA to be left alone to regulate as it sees fit.\textsuperscript{49}

Section 2 of the Sherman Act forbids monopolization and attempted monopolization.\textsuperscript{50} Proof of monopolization requires a two step inquiry.\textsuperscript{51} First, the court requires proof of monopoly power, which involves the power to restrain price or exclude competition, and may be inferred from a dominant share of the marketplace.\textsuperscript{52} Once monopoly power has been shown, plaintiffs need to show the defendant's willful acquisition and maintenance of that power.\textsuperscript{53} Therefore, in order to prove monopoly power, NHL's organizational structure does not restrain trade but rather "makes possible a segment of commercial activity which could hardly exist without it").

\textsuperscript{47} See Thomas Scully, NCAA v. Board of Regents of the University of Oklahoma: The NCAA's Television Plan is Sacked by the Sherman Act, 34 CATH. U. L. REV. 857, 867-68 (1985) (explaining that college and professional sports do make a lot of money and therefore are commercial enterprise); see also Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982) (explaining that NCAA is a business involving millions of dollars that seeks to "maximize revenue and minimize expense" like any other business).

\textsuperscript{48} See Scully, supra note 47, at 867 (detailing NCAA arguments that it is a self-regulating organization which does not need interference from antitrust regulation because it is largely a noncommercial organization); see also Hennessey v. NCAA, 564 F.2d 1136, 1149 (5th Cir. 1977) (holding that although NCAA is a voluntary, non-profit organization, it is not entitled to total exemption from anti-trust laws).

\textsuperscript{49} See Scully, supra note 47, at 867 (noting that traditional judicial history afforded much leeway to self-regulated organizations such as NCAA because their activities posed no threat to commercial competition); see also Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding Sherman Act does not reach actions of NCAA members in setting eligibility standards because it is not commercial activity).

\textsuperscript{50} See Sherman Act, 15 U.S.C. § 2 (2005) (stating that anyone found to be monopolizing shall be guilty of a felony and equating attempted monopolization as same level of offense as monopolization); see also Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1511 (D. Colo. 1992) (stating that "Section 2 of the Sherman Act forbids monopolization, combinations or conspiracies to monopolize, and attempts to monopolize").


\textsuperscript{52} See Grinnell, 384 U.S. at 570 (stating that the first element is "the possession of monopoly power in the relevant market"); see also American Tobacco Co. v. United States, 328 U.S. 781, 797-98 (1946) (finding over two-thirds of entire domestic field of cigarettes and over 80% of field of comparable cigarettes to amount to a monopoly).

\textsuperscript{53} See Grinnell, 384 U.S. at 570-71 (stating that the second element is "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"); see also
plaintiffs must prove that a defendant has both the requisite size, along with the presence of "bad acts." The key step to monopoly analysis is the identification of the relevant market and the determination of market share. If a large enough share of the market can be proven, courts will then often ask the defendant to prove that its power is obtained through legitimate means, such as the presence of a superior product.

II. ONGOING LEGAL BATTLES FOR THE NCAA

A. Past Victories for the NCAA

In the past, the NCAA has successfully defended a number of antitrust allegations leveled against it. In Jones v. NCAA, a federal district court in Massachusetts upheld NCAA eligibility requirements. In Jones, the plaintiff sought to play intercollegiate ice hockey, but was denied by the NCAA. The NCAA stated that plaintiff had violated its by-laws by playing in an amateur league in which he received compensation for living...

United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (holding a ninety percent production rate to constitute a monopoly within market).

See Grinnell, 384 U.S. at 571 (clarifying that monopoly power, which is "the power to control prices or exclude competition" may be inferred from a dominant share in market); see also American Tobacco, 328 U.S. at 811 (finding that authorities support view that, "the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so").

See Grinnell, 384 U.S. at 571. The Court gave several examples of market shares that would constitute monopoly power. It found 90% of the market, or even two-thirds of the market, to be a substantial monopoly. See also E.I. du Pont, 351 U.S. at 395, stating the rule for determining the control of price and competition within the relevant market.

See Grinnell, 384 U.S. at 571 (discussing percentages in market that would constitute a large enough share); see also Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-08 (2004) (holding that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers").

See, e.g., Hennessey v. NCAA, 564 F.2d 1136, 1154 (5th Cir. 1977) (holding that NCAA by-laws regulating assistant coaches did not violate Sherman Act); Gaines v. NCAA, 746 F. Supp. 738, 748 (M.D. Tenn. 1990) (holding that NCAA eligibility rules against a student who declared for NFL draft did not violate Sherman Act).


Id. at 304 (denying plaintiff's request for restraining order that would have allowed him to play intercollegiate ice hockey for Northeastern University).

See id. at 297-98 (explaining that after plaintiff filled out an "Ice Hockey Questionnaire" from the NCAA, the NCAA found he had violated amateurism rules and therefore was declared ineligible to play ice hockey for the 1974-75 season).
expenses. The court found no merits in plaintiff's Sherman Act claims. In holding this way, the court stated that the purpose of the NCAA was to promote amateurism in college sports, and these rules were needed to carry out that purpose. There was no conspiracy to keep professional athletes from playing, and NCAA purposes were reasonable. Also, plaintiff's claim of monopolization failed because the court found "no evidence presently on the record that the Association's current preeminence in the field is the result of anything other than its own skill, foresight and industry."

In 1977, the Court of Appeals for the Ninth Circuit upheld NCAA by-laws in *Hennessey v. NCAA*. Two assistant football coaches challenged an NCAA by-law limiting the number of full time assistant coaches that a college could employ. Plaintiffs had been full time coaches for over seven years. After the bylaw was enacted by the NCAA, plaintiffs were forced to take a part-time position with their respective schools. The court did not give the NCAA total exemption from antitrust laws, but did

---

61 See id. at 297. Plaintiff played for several amateur ice hockey teams before he went to college from 1969 to 1974. His compensation included: $500 for tuition expenses, $500 signing bonus, $25 for room and board, and $10 for living expenses. Id. at 297 n.1.

62 See id. at 303 ("The 'competition' which the plaintiff seeks to protect does not originate in the marketplace or as a sector of the economy but in the hockey rink as part of the educational program of a major university.").

63 See id. at 304 (explaining that NCAA's amateurism rules had legitimate goals that had been in effect since founding of the NCAA, and were not put in place with desire to reduce any student's access to intercollegiate athletics).

64 See id. (noting that even if there are some adverse effects of these rules, they are only incidental and often necessary for NCAA to accomplish its greater goals).

65 See id. (holding that there was no evidence to show that these rules were initiated by NCAA in order to create or sustain a monopoly in intercollegiate athletics).

66 564 F.2d 1136 (5th Cir. 1977).

67 See id. at 1141–42 (explaining that NCAA by-law 12-1 limited number of assistant football coaches that Division I colleges could have to eight, and number of assistant basketball coaches that Division I colleges could have to two).

68 See id. at 1142 (stating that Hennessey was assistant coach at University of Alabama for eighteen years, and that Hudson was assistant coach at Alabama for eight years).

69 See id. at 1141–42. Both coaches had one-year contracts that were automatically renewable at the end of the season. Id. at 1142. See id., discussing that while, in the past, neither coach had a problem getting their contracts renewed, after the by-law was enacted, their contracts were not renewed because Alabama had too many full time assistant coaches on its payroll.

70 See id. at 1152 (clarifying that this court has never given NCAA immunity under Sherman Act).
decide to apply a rule of reason, rather than a *per se* analysis.\textsuperscript{71} In performing its analysis, the court reasoned that even if there was some economic motive for the bylaw, the driving force was the improvement of academics.\textsuperscript{72} The NCAA was attempting to reign in college athletics and put more of an emphasis on academics.\textsuperscript{73} Because the underlying motive of the restraint here was largely non-commercial, it was held to be reasonable.\textsuperscript{74}

The NCAA was also victorious in holding up sanctions against universities.\textsuperscript{75} In *Justice v. NCAA*, four University of Arizona football players sued the NCAA regarding television and postseason bans the NCAA had instituted on Arizona.\textsuperscript{76} The players claimed that the ban was a group boycott and therefore *per se* illegal.\textsuperscript{77} The court held that the players had not made out a case on any elements of a group boycott claim.\textsuperscript{78} There was no purpose to reduce competition by banning Arizona; there was only a motive to protect amateurism and enhance *fair competition*.\textsuperscript{79} Even though Arizona would not be allowed to compete with other member institutions, this by-law lacked any

\textsuperscript{71} See *id.* ("Given the nature and purposes of the NCAA and its member institutions, this particular restraint, limiting the number of assistant coaches who may be employed at any one time by the institutions, is not a *per se* violation of the antitrust laws.").

\textsuperscript{72} See *id.* at 1153 (noting that NCAA by-laws were enacted after lengthy study into problems of NCAA, and that by-laws were consistent with goal of improving educational objectives of colleges).

\textsuperscript{73} See *id.* (explaining that NCAA was concerned with increasing influence revenues had on college athletics, and wanted to enact measures which would reign in amount of money spent to help preserve competition and amateurism).

\textsuperscript{74} See *id.* The court stated:

Bylaw 12-1 was, with other rules adopted at the same time, intended to be an 'economy measure'. In this sense it was both in design and effect one having commercial impact. But the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics—by curtailing, as it were, potentially monopolistic practices by the more powerful—and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes.

*Id.*


\textsuperscript{76} See *Justice*, 577 F. Supp. at 360 (explaining that NCAA had banned University of Arizona football team from participating in postseason bowl games for 1983 and 1984 seasons, and also banned any appearances on television for 1984 and 1985 seasons).

\textsuperscript{77} See *id.* at 361–63 (discussing plaintiffs' claims that NCAA ruling prevented players from competing against other schools, and denied them exposure they needed to compete with other players for professional contracts with NFL).

\textsuperscript{78} See *id.* at 379 (explaining that plaintiffs' had put forth no evidence to show that bans on Arizona were done by NCAA with purpose of lessening competition).

\textsuperscript{79} See *id.* (distinguishing these sanctions from other group boycotts in professional sports by pointing out that these sanctions help promote competition by punishing any colleges that try to get unfair advantage by breaking NCAA rules).
restraints on commercial competition, which is needed to find illegality for group boycotts.\textsuperscript{80}

Most recently, in \textit{Smith v. NCAA},\textsuperscript{81} the Court of Appeals for the Third Circuit upheld an NCAA by-law regarding post-baccalaureate eligibility of student athletes.\textsuperscript{82} This by-law permitted graduate students to participate in intercollegiate athletics only if they attended the same school in which they did their undergraduate studies.\textsuperscript{83} The Plaintiff was doing her graduate work at Hofstra, but was not allowed to play volleyball there because she had received her undergraduate degree from St. Bonaventure.\textsuperscript{84} Again looking at the purpose behind the by-law, the court noted that it was created to promote fair competition among the schools,\textsuperscript{85} further stating that eligibility requirements as such do nothing to further any economic advantages that the NCAA may have.\textsuperscript{86} Due to the fact that

\textsuperscript{80} See id. at 382 (stating that these sanctions were similar to those in \textit{Jones} and \textit{Hennessey}, and therefore were reasonably related to noncommercial goals of promoting amateurism).


\textsuperscript{82} See \textit{Smith}, 139 F.3d at 187 (holding that by-laws at issue here clearly survive any rule of reason analysis).

\textsuperscript{83} Id. at 184. The NCAA by-law provided:

[a] student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period . . . .

\textit{Id.}

\textsuperscript{84} See id. at 183–84 (noting that plaintiff had participated in intercollegiate volleyball for only two years at St. Bonaventure, and therefore thought she still had two years of eligibility remaining, regardless of whether she went to different college).

\textsuperscript{85} See id. at 185 (stating that this eligibility rule was not related to commercial activities because it was not enacted to provide NCAA with competitive advantage); see also \textit{Pocono Invitational Sports Camp, Inc. v. NCAA}, 317 F. Supp. 2d 569, 583 n.14 (E.D. Pa. 2004) (noting purpose of eligibility rules is to maintain amateur intercollegiate athletics as an "integral part of the educational program and the athlete as an integral part of the student body," thus maintaining clear distinction between intercollegiate and professional sports).

\textsuperscript{86} See \textit{Smith}, 139 F.3d at 186 (finding no "plainly anticompetitive" effects from NCAA eligibility requirements); see also \textit{Pocono}, 317 F. Supp. 2d at 583 (noting that purpose of eligibility requirements was not to give NCAA a commercial advantage, but rather to "prevent commercializing influences from destroying the unique 'product' of college football").
there were no commercial issues present,\textsuperscript{87} and the by-law helped the product of amateur sports to survive,\textsuperscript{88} the by-law was found reasonable.

These cases all highlight one line of judicial reasoning: that most NCAA controls are looking to promote competition and can therefore be justified.\textsuperscript{89} Also, when the goal of the NCAA is to protect the educational standards of its members, there should be very little antitrust scrutiny.\textsuperscript{90} The largest problem with this analysis is that most cases are not cut and dry, and the NCAA always has some economic motives for its by-laws, even if they are not obvious.\textsuperscript{91}

\subsection*{B. Setbacks for the NCAA}

Even though most courts have been lenient in applying antitrust standards to the NCAA,\textsuperscript{92} a number of courts have found antitrust violations in NCAA by-laws.\textsuperscript{93} The leading case

\begin{itemize}
\item \textsuperscript{87} See Smith, 139 F.3d at 186 (holding that Sherman Act does not apply to NCAA eligibility requirements because of limited scope that Act has in regulating organizations with noncommercial objectives); \textit{see also} Pocono, 317 F. Supp. 2d at 583 (discussing that purpose of eligibility requirements was not to provide NCAA with commercial advantage).
\item \textsuperscript{88} See Smith, 139 F.3d at 187 (explaining potential benefits of this by-law, including fact that undergraduate students will not forgo opportunities to participate in intercollegiate athletics because of the chance that they may be able to participate as graduate students); \textit{see also} McCormack v. NCAA, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (noting that eligibility rules create NCAA's product and allow for its survival in light of commercial pressures).
\item \textsuperscript{89} See Matthew J. Mitten, \textit{Applying Antitrust Law to NCAA Regulation of "Big Time" College Athletics: The Need to Shift from Nostalgic 19\textsuperscript{th} and 20\textsuperscript{th} Century Ideals of Amateurism to the Economic Realities of the 21\textsuperscript{st} Century}, 11 MARQ. SPORTS L. REV. 1, 4 (2000) (noting that courts have reasoned that most NCAA rules are only ancillary commercial restraints with main purpose of furthering higher education objectives); \textit{see also} Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545, 550 (S.D.N.Y. 2004) (noting that whether NCAA's restraints are reasonable depends on their effect on market and their "procompetitive justifications").
\item \textsuperscript{90} See Mitten, \textit{supra} note 89, at 4 (highlighting great deference that courts have given to NCAA when it can point out legitimate noncommercial objectives); \textit{see also} Hennessy v. NCAA, 564 F.2d 1136, 1153 (5th Cir. 1977) (noting that by-law designed to set cap on the amount of coaches NCAA members could hire was in line with educational objectives of member institutions).
\item \textsuperscript{91} See Mitten, \textit{supra} note 89, at 2 (explaining that certain "revenue generating" sports rule college landscape so much that intercollegiate athletics cannot be considered amateur educational diversions anymore). \textit{See generally} Adidas Am., Inc. v. NCAA, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999) (exploring effect of by-law 12.5.5 on NCAA and its members).
\item \textsuperscript{92} See, \textit{e.g.}, Gaines v. NCAA, 746 F. Supp. 738, 748 (M.D. Tenn. 1990) (holding that NCAA eligibility rules against student who declared for NFL draft did not violate Sherman Act); Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding NCAA amateurism rules did not violate Sherman Act).
\item \textsuperscript{93} See, \textit{e.g.}, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 113 (1984) (holding that NCAA television plan was restraint upon operation of free market); Law v.
against the NCAA was decided by the Supreme Court in *Board of Regents v. NCAA*. In that case, the University of Oklahoma and the University of Georgia sued the NCAA regarding its by-laws limiting the number of football games that could be televised. The NCAA claimed that the purposes of the restrictions were to reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.

The Court did not find any pro-competitive justifications for these rules. There was clear evidence that prices and output were being restrained. Under a free market system that allowed schools to contract for television rights, there would be many more games broadcast and therefore lead to more revenues for each school. The NCAA was not able to show how this plan would lead to an equalization of competition that would benefit college football as a whole. For those foregoing reasons, the

---

NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998) (barring NCAA from reenacting compensation limits for certain coaches).


95 See id. at 92–94. The plan had evolved over 30 years to become fairly complex at the time of trial. The essential elements of the plan were that a school could appear on television no more than six times in a given year and no more than four times on national television in a given year. Id. at 94. See id., noting there were also limits on the total amount of games that each network could televise in a given year.

96 Id. at 92 n.6.

97 See id. at 115–17. The Court rejected numerous defenses by the NCAA for its by-laws. Id. at 116–17. They included: the need to protect attendance at live games, protecting a competitive balance between all amateur athletic teams throughout the country, and maximizing consumer demand for the product of college football. Id.

98 See id. at 116 (noting that individual schools are not being helped by restrictions since there will always be some game televised while a live event is going on).

99 See id. at 119–20 (explaining that best way to increase competitive balance is to let schools enjoy higher revenues from greater exposure to television, and then reinvest those monies back into their programs).

100 See NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117–18 (1984). The Court stated:

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league. The plan is nationwide in scope and there is no single league or tournament in which all college football teams compete.
Court found the broadcast restrictions to be unlawful under rule of reason analysis.\textsuperscript{101}

More recently, the Court of Appeals for the Tenth Circuit struck down NCAA by-laws in \textit{Law v. NCAA}.\textsuperscript{102} Plaintiffs, two part-time college basketball coaches,\textsuperscript{103} challenged an NCAA by-law that limited the salaries of others in their position.\textsuperscript{104} The stated purpose behind the rule was to stabilize the costs of athletics while still promoting a balance in competition\textsuperscript{105} in the wake of Title IX.\textsuperscript{106} The court determined that these possible benefits were insufficient to outweigh the restraints that resulted from the basic price fixing scheme at work.\textsuperscript{107} Behind some of the non-commercial justifications for the law, there existed the real purposes of cost saving and increased profitability.\textsuperscript{108} Though companies are allowed to strive for higher profits, that goal alone is not a justification for restraints on price or output.\textsuperscript{109}

These cases look past the proffered motives of the NCAA to locate its true hidden desires.\textsuperscript{110} These cases have removed some

\begin{quote}
There is no evidence of any intent to equalize the strength of teams in Division I-A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools.
\end{quote}

\textit{Id.}

\textsuperscript{101} See \textit{id.} at 120 (clarifying that even though role of NCAA is to preserve tradition of amateurism, rules that restrict output do not coincide with this role).

\textsuperscript{102} 134 F.3d 1010 (10th Cir. 1998).

\textsuperscript{103} See \textit{id.} at 1015 (explaining that plaintiffs were part-time basketball coaches at Division I colleges, and therefore fell under scope of restricted-earnings coach rule).

\textsuperscript{104} See \textit{id.} at 1014 (stating that NCAA by-law limited salaries of restricted-earnings coaches in all intercollegiate sports other than football to only \$16,000 per year).

\textsuperscript{105} See \textit{id.} (noting that NCAA determined that \$16,000 annual salary was equivalent to tuition reimbursement that a graduate assistant would be paid if he had job of a restricted-earnings coach).

\textsuperscript{106} 20 U.S.C. § 1681(a) (2005). The pertinent portion of Title IX with respect to extracurricular activities states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” \textit{Id.}

\textsuperscript{107} See \textit{Law v. NCAA}, 134 F.3d 1010, 1020 (10th Cir. 1998) (holding that even though NCAA has accomplished its goals of lowering costs, REC Rule was horizontal price restraint which is completely anticompetitive).

\textsuperscript{108} See \textit{id.} at 1022 (highlighting NCAA’s goal of eliminating price competition of assistant coaches in order to keep costs down, thereby increasing profits for each school).

\textsuperscript{109} See \textit{id.} at 1023. The court stated “While increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws.” \textit{Id.}

\textsuperscript{110} See \textit{NCAA v. Board of Regents}, 468 U.S. 85, 115-17 (1984) (noting that the Court rejected proffered defenses of NCAA); see also Gregory M. Krakau, \textit{Monopoly and Other
of the arrogance that the NCAA has displayed over the years, believing itself immune from antitrust scrutiny.\textsuperscript{111} It appears courts have begun to recognize that the NCAA is no longer a non-profit entity, and is thus deserving of more scrutiny. Such heightened review is appropriate because the NCAA has structured itself in a manner to generate greater profits.\textsuperscript{112}

C. The NCAA: Model Educator or Fortune 500 Company?

Since its inception, the NCAA has claimed that its main goals are to promote education and amateurism.\textsuperscript{113} Accordingly, the mission statement of the NCAA states that it “strives to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”\textsuperscript{114} To promote education, the NCAA requires minimum test scores and grades in order to compete in intercollegiate athletics.\textsuperscript{115} As part of its plan to promote amateurism, the NCAA bans the paying of student athletes.\textsuperscript{116}

The NCAA argues that even though collegiate sports have become a billion-dollar industry, the NCAA has fought these developments every step of the way, and is still in the best


\textit{See Andrew Bagnato, NCAA Finishes Off a Moving Experience, CHI. TRIB., July 27, 1999, at 4, (commenting on “trademark arrogance” of NCAA); see also Krakau, supra note 110, at 438-40 (identifying several instances in past when NCAA refused to settle potential antitrust cases because it believed that it was under cloak of immunity from traditional Sherman Act scrutiny).

\textit{See Kevin E. Broyles, NCAA Regulation of Intercollegiate Athletes: Time for a New Game Plan, 46 ALA. L. REV. 487, 493 (1995) (noting that NCAA's operation resembles that of a corporation); see also Konsky, supra note 4, at 1582 (detailing transformation of NCAA from small rule-making organization to that of a large structure that resembles a corporation).

\textit{See Konsky, supra note 4, at 1584 (listing regulations that NCAA has enacted to protect amateurism, including limitations on grants to athletes, prohibitions of athletes holding jobs, and stopping eligibility once athletes hire an agent); see also Manual, supra note 1 (stating basic purpose of NCAA which is to ensure that athletics is an integral part of the educational system while still retaining clear distinction between intercollegiate athletics and professional sports).

\textit{See Konsky, supra note 4, at 1582.

\textit{See id. at 1583 (explaining that once in college, student-athletes must take a minimum number of credits in order to be able to compete in athletics); see also Manual, supra note 1 (detailing requirements to remain in good academic standing).

\textit{See Konsky, supra note 4, at 1584 (stating that colleges are not allowed to pay their student-athletes, even ones who participate in certain revenue generating sports); see also Manual, supra note 1 (describing various forms of prohibited pay).
position to promote academics and amateurism in the face of all the non-amateur influences.\textsuperscript{117}

In addition, the NCAA claims that it is not a professional corporation, but rather a voluntary association.\textsuperscript{118} By describing itself in those terms, the NCAA tries to paint a picture of an ethical charitable organization, seeking only fair play with little to no interest in commercial dealings.\textsuperscript{119} Therefore, the NCAA argues that it is not the type of organization that the Sherman Act was designed to protect against.\textsuperscript{120}

There are several problems with the academic, not-for-profit image that the NCAA attempts to project. The NCAA would like to describe the model student-athlete as one "who engages in a particular sport for the educational, physical, mental and social benefits he derives therefrom and to whom participation in that sport is an avocation."\textsuperscript{121} Unfortunately, but truthfully, the model student athlete may also be the one who draws thousands

\begin{footnotes}
\item See Lisa M. Bianchi & Bryan S. Gadol, \textit{When Playing the Game of College Sports, You Should Not be Playing "Monopoly,"} 1 CHAP. L. REV. 151, 155-56 (1998) (noting that NCAA had enacted regulations which have cost colleges millions of dollars in revenues in order to promote its ideals); Michael B. LiCalsi, Case Note, \textit{"The Whole Situation is a Shame, Baby!"— NCAA Self-Regulations Categorized as Horizontal Combinations Under the Sherman Act's Rule of Reason Standard: Unreasonable Restraints of Trade or an Unfair Judicial Test?}, 12 GEO. MASON. L. REV. 831, 865 (2004) (positing that "[t]here is . . . little doubt that the NCAA could ensure higher profits for the nation's more popular athletic programs if it wished to do so").
\item See Note, \textit{Sherman Act Invalidation of the NCAA Amateurism Rules}, 105 HARV. L. REV. 1299, 1305 (1992) [hereinafter \textit{Sherman Act Invalidation}] (noting that NCAA defines itself as a voluntary association, and therefore many judges have said that it is not their business to determine rules for it); see also NCAA v. Lasege, 53 S.W.3d 77, 83-84 (Ky. 2001) (stating that members of voluntary associations "should be allowed to 'paddle their own canoe' without unwarranted interference from the courts").
\item See \textit{Sherman Act Invalidation, supra} note 118, at 1305 (explaining that NCAA sees its regulations as necessary in order to maintain traditional amateur athletics); see also Gordon E. Gouveia, Note, \textit{Making a Mountain Out of a Mogul: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation under NCAA Amateurism Rules}, 6 VAND. J. ENT. L. & PRAC. 22, 23 (quoting NCAA's stated purpose to ensure that "athletic activities . . . may be maintained on an ethical plane in keeping with the dignity and high purpose of education").
\item See \textit{Sherman Act Invalidation, supra} note 118, at 1306 (discussing NCAA arguments that its actions are pro-competitive because they protect the product of college sports); see also Bd. of Regents of the Univ. of Okla. v. NCAA, 561 P.2d 499, 506 (Okla. 1977) (determining whether NCAA was the type of organization Sherman Act was designed to protect against).
\item See John Scanlan, \textit{Antitrust—The Emerging Legal Issue}, 61 IND. L. J. 1, 2 (1985) (quoting NCAA's Constitution); see also Philip J. Closius, \textit{Hell Hath No Fury Like A Fan Scorned: State Regulation of Sports Agents}, 30 U. TOL. L. REV. 511, 511-12 (1999) (noting that NCAA has "publicly nurtured ideal of 'amateur student-athlete'" and created rules to prevent students from receiving benefit from their athletic talent while they remain amateurs).
\end{footnotes}
of fans into an arena, and millions to their television sets. The athlete who is cheered for winning the Heisman Trophy does not receive the same accolades as the student who is garnering excellent grades in the classroom. In today's world, amateur sports have become a business. The abilities and talents of student athletes are the product that the NCAA sells to a widely competitive television market.

The notion of amateurism is surely moribund, if not dead in the area of "big time" college athletics. This area includes men's college basketball and football, where schools have become "farm systems" for the professional leagues. With so much money at stake, the NCAA basically functions as an economic

122 See Scanlan, supra note 121, at 3 (explaining that amateur sports are a highly valued commodity, and generate millions of dollars per year because spectators value watching these pure sporting events); see also Christian Dennie, Amateurism Stifles a Student-Athlete's Dream, 12 SPORTS LAW. J. 221, 221 (2005) (arguing that NCAA profits unfairly from the hard work and sweat of student-athletes).

123 See Scanlan, supra note 121, at 3 (detailing story of Doug Flutie, who was awarded Heisman Trophy in 1985 on live television and thereafter signed $6 million contract with NFL to play quarterback); see also Jeffrey M. Waller, Article, A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in the NCAA, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 189, 189–90 (2003) (stating that "while each school generally includes a minimum score requirement among its evaluation criteria, a low score is not always a death sentence, particularly for student-athletes").

124 See Scanlan, supra note 121, at 3 (stating that "amateur sports in many important respects is a business, a highly specialized industry which converts the raw material of athletic skill into a product which is customarily sold in the competitive television market"); see also Rodney K. Smith, The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others, 82 IND. L. J. 885, 994 (1987) (recognizing characterizations of intercollegiate sports as "big business masquerading as an educational enterprise").

125 See Scanlan, supra note 121, at 3 (noting that Supreme Court has treated NCAA like any business in reviewing its television contracts in Board of Regents); see also Dennie, supra note 122, at 221–23 (arguing that NCAA has benefited from hard work of athletes and "advent of television and media outlets").

126 See Mitten, supra note 89, at 2 (arguing that NCAA's idealistic goals are difficult to live up to in modern era of college athletics); John G. Weistart, Gender & Sports: Setting a Course for College Athletics: Can Gender Equity Find a Place in Commercialized College Sports?, 3 DUKE J. GENDER L. & POL'Y 191, 211–12 (describing incredible amounts of money now involved in intercollegiate sports).

127 See Bianchi, supra note 117, at 152 (arguing that colleges compensate athletes by providing scholarships and acting as de facto farm systems to push players toward professional careers); Mitten, supra note 89, at 2 (explaining that athletes who participate in Division I basketball and football are much more interested in developing their games for professional leagues, rather that trying to make the most out of their education).

128 See David W. Woodburn, College Athletes Should be Entitled to Worker's Compensation for Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01, 28 AKRON L. REV. 611, 611 (1995) (showing data of several contracts that NCAA has made with television networks, including $1 billion contract with CBS and $38 million contract between Notre Dame and NBC); see also Laura Freedman, Note, Pay or Play? The Jeremy Bloom Decision and
cartel, regulating just how much the free market can enter into college athletics.\textsuperscript{129} The power that this cartel wields can be seen in the fact that no college chooses to go out on its own.\textsuperscript{130} "[T]here is an economic necessity to remain a part of this national organization to reap the economic rewards of ‘big-time’ college sports."\textsuperscript{131}

For years, the NCAA successfully argued that its restraints were needed to maintain a competitive balance in college athletics.\textsuperscript{132} Recent history, however, illustrates that the removal of some of its restraints has actually helped the competitive balance.\textsuperscript{133} An examination of the effects of \textit{Board of Regents}, for example, demonstrates that the removal of television restrictions has greatly helped colleges in smaller markets.\textsuperscript{134} Smaller colleges have been able to contract for regional television deals, increasing their exposure to the local viewing area.\textsuperscript{135} This

\begin{wrapfigure}{r}{0.5\textwidth}


\textsuperscript{129} See Mitten, \textit{supra} note 89, at 3 (discussing role of NCAA members as "economic competitors that collectively possess monopsony power over the demand for college football and basketball players and monopoly power over the supply of college football and basketball games"); see also James V. Koch, \textit{The Economic Realities of Amateur Sports Organization}, 61 Ind. L.J. 9, 15–16 (defining NCAA as an economic cartel).

\textsuperscript{130} See Mitten, \textit{supra} note 89, at 3 (noting that even though colleges may gain some competitive advantage by disobeying NCAA rules, there must be some reason why no college chooses to follow this path); see also Broyles, \textit{supra} note 112, at 491–94 (describing incredible power NCAA holds over colleges).

\textsuperscript{131} See Mitten, \textit{supra} note 89, at 3 (explaining benefits of belonging to NCAA); see also Bd. of Regents of the Univ. of Okla. v. NCAA, 561 P.2d 499, 505 (Okla. 1977) (stating that it is "economic necessity" for member schools to belong to NCAA).


\textsuperscript{133} See Scully, \textit{supra} note 47, at 885-86 (discussing how unrestrained regional markets have helped small college basketball teams become more nationally competitive by enhancing regional appeal); see also William Taaffe, \textit{Too Much of a Good Thing}, \textit{Sports Illustrated}, Oct. 15, 1984, at 78-79 (noting that basketball is essentially a regional interest sport).

\textsuperscript{134} See Scully, \textit{supra} note 47, at 884 n.170 (providing example that "in the first year of increased regional broadcasts . . . Brigham Young, a lesser known school that played in a relatively weak conference with only a regional following, was able to climb to the top of the wire service polls and win the national championship"); see also Fred Barbash, \textit{Supreme Court Breaks NCAA Hold on Televised College Football Games}, \textit{Wash. Post}, June 28, 1984, at A1 (reporting that more games of local and regional interest were able to be broadcast after NCAA restraints were lifted).

\textsuperscript{135} See Scully, \textit{supra} note 47, at 886 (explaining that regional coverage will give smaller schools opportunity to be regularly seen on television, something that did not exist under NCAA's national television plans); see also Barbash, \textit{supra} note 134, at A1 (stating that local stations have freedom to negotiate for games not already booked by national networks).
greater exposure has helped them "draw more spectators, retain more local talent, and thus become more competitive nationally."

III. THE NCAA SHOULD GET SLAM DUNKED BY THE COURTS

A. Violations of § 1 of the Sherman Act

Section 1 of the Sherman Act governs concerted action by multiple firms. Section 2 governs the conduct of a single firm. Courts have consistently evaluated the conduct of the NCAA under § 1. Even though one could argue that the NCAA is a single firm, it is actually made up of many schools that are in competition with one another. Decisions are made by a vote by all the member institutions. Thus, actions by the NCAA can be properly judged to be horizontal restraints on competition.

As stated earlier in this Note, the NCAA has traditionally been subject to review under the rule of reason, even though other...
areas of sports have had group boycotts judged per se illegal.\textsuperscript{144} Under traditional rule of reason analysis, the MIBA must show adverse effects on competition because of NCAA actions.\textsuperscript{145} The MIBA must show more than mere harm to itself, because competition as a whole must be adversely affected.\textsuperscript{146} The most harmful effect on competition is the lack of choice that colleges have for postseason play.\textsuperscript{147} Though this may not greatly affect the ‘power schools’ of college basketball, it can have a large effect on smaller schools.\textsuperscript{148} The prime example is the young, inexperienced team who barely makes it into the NCAA Tournament,\textsuperscript{149} and will probably play only one game before having its season end abruptly.\textsuperscript{150} By not having an option to play in the NIT, a team such as this is unable to make a long run in the tournament, generating more fan interest and gaining important experience for the athletes.\textsuperscript{151}

\textsuperscript{144} \textit{See, e.g.}, M & H Tire Co. v. Hoosier Racing Tire Corp., 560 F. Supp. 591 (D. Mass. 1983), \textit{rev’d}, 733 F.2d 973 (1st Cir. 1984). The court stated that “[t]he evidence demonstrates, therefore, that a group of purchasers combined with two track promoters and a tire company to fix the maximum price of tires by eliminating competition from other sellers. I rule that this combination is in fact ‘within the undeniably anti-competitive per se boycott paradigm.’” \textit{Id.} at 602.

\textsuperscript{145} \textit{See K.M.B. Warehouse Distrib. v. Walker Mfg. Co.}, 61 F.3d 123, 127 (2d Cir. 1995) (explaining that plaintiffs must show adverse effects on competition in whole relevant market); Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993) (stating that plaintiff bears initial burden of showing that challenged action has had actual adverse effect on competition as a whole in relevant market).

\textsuperscript{146} \textit{See Brown Shoe Co. v. United States}, 370 U.S. 294, 320 (1962) (holding that Sherman Act was designed to protect competition, not competitors); \textit{Capital}, 996 F.2d at 543 (explaining that requirement of proving harm to whole market “fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors”).

\textsuperscript{147} \textit{See Metro. Intercollegiate Basketball Ass’n v. NCAA}, 339 F. Supp. 2d 545, 551 (S.D.N.Y. 2004) (stating that ‘Commitment to Participate Rule’ basically forces schools to boycott NIT if chosen to play in NCAA Tournament).

\textsuperscript{148} \textit{See id.} at 551 (explaining that low seeded teams in NCAA Tournament may want to choose NIT instead).

\textsuperscript{149} \textit{See id.} at 551 (noting that low seeded schools rarely advance past first round of NCAA Tournament, and therefore those schools are not able to develop much postseason experience); Jeff Zillgitt, \textit{Don’t Go Overboard With Upset Picks in NCAA Pool}, USA TODAY, Mar. 16, 2005, \textit{available at} http://www.usatoday.com/sportslcolumnist/zillgitt/2005-03-16-zillgitt_x.htm (noting that it is rare for a number 6 or lower seed to make it to the Final Four).

\textsuperscript{150} \textit{See Metro.}, 339 F. Supp. 2d at 551 (identifying fact that schools which exit early from NCAA Tournament are not allowed to then participate in NIT if they want to get more postseason experience); Mark Alesia, \textit{Antitrust Case Puts NCAA on Defense: NIT Suit Over Tournament Will go to Court Monday}, INDYSTAR, July 31, 2005, \textit{http://www.indystar.com/apps/pbcs.dll/article?AID=/20050731/SPORTS/507310500} (noting that even if NIT postponed its tournament until after NCAA’s Tournament, teams that participated in NCAA would still not be allowed to participate in NIT’s tournament).

\textsuperscript{151} \textit{See Metro.}, 339 F. Supp. 2d at 551 (stating that “facts tend to show that the Postseason Rules adversely affect competition by depriving colleges and fans of a
allows schools to host some of the early games on their home campuses, the NCAA restrictions prevent these schools from earning added revenues from ticket sales of NIT games.\textsuperscript{152}

If the MIBA proves these anticompetitive effects, the burden shifts to the NCAA to prove pro-competitive benefits of its rule.\textsuperscript{153} The NCAA puts forth two main justifications for the rule. First, it argues, as it has in the past, that it wants to limit the amount of tournaments that colleges participate in to keep the focus on academics.\textsuperscript{154} This was based on NCAA studies that took place in the 1980's which stated that the amount of time student athletes devoted to basketball interfered with the academic demands of college.\textsuperscript{155} By limiting the amount of tournaments that colleges can participate in, the NCAA can cut down on multiple time commitments, including practice, travel and actual game play.\textsuperscript{156} The second justification of the NCAA is that the rule is necessary to maintain the legitimacy of the NCAA championship.\textsuperscript{157} If one of the best teams in a given year chooses potentially attractive postseason tournament choice and possible participation in an additional tournament'); see also Tom Verducci, et al., \textit{Scorecard}, SPORTS ILLUSTRATED, Apr. 8, 2002, at 25 (discussing how wins in post-season tournaments generate fan interest).

\textsuperscript{152} See \textit{Metro.}, 339 F. Supp. 2d at 551 (relaying opinions of two Division I coaches who said they would consider playing in NIT if NCAA rules were changed to allow NIT to be more competitive); Nat'l Invitational Tournament Post-Season Overview, http://www.nit.org/main.cfm?area_id=130 (last visited Dec. 22, 2005) (stating that "[t]he opening rounds of the tournament were...moved from New York to campus sites in 1977").

\textsuperscript{153} See K.M.B. Warehouse Distrib. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995) (explaining that once plaintiff shows anticompetitive effects, burden then shifts to defendant); Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp 2d 545, 571 (S.D.N.Y. 2004) (stating that if "plaintiff carries its burden, the burden shifts [back] to the defendant").

\textsuperscript{154} See \textit{Metro.}, 339 F. Supp. 2d at 548 (noting that NCAA argues that "End of Playing Season Rule protects the welfare of student athletes because it prevents coaches from forcing their teams to play and practice all year long"); see also Worldwide Basketball and Sports Tours, Inc. v. NCAA, No. 2:00-CV-1439, 2002 WL 32137511, at *2 (S.D. Ohio July 19, 2002) (arguing that limiting amount of tournaments schools can participate in will help cure any interference with academics).


\textsuperscript{157} See \textit{Metro.}, 339 F. Supp. 2d at 552 (explaining NCAA's argument that number of postseason championships should be limited to only one); see also Mark Alesia, \textit{NIT Will
not to participate, then there will always be questions as to whether a 'true champion' had been crowned.\(^{158}\) It would appear that the NCAA shoots itself in the foot with this justification.\(^{159}\) While proclaiming the need for the rule to create a legitimate championship, the NCAA also notes that no team has chosen the NIT over the NCAA since 1970.\(^{160}\) Also, the NCAA often bans schools from competing in postseason tournaments, which would give rise to the same legitimacy concerns as a school's participation in the NIT.\(^{161}\) Therefore, the NCAA helps to make MIBA's argument that there is no need for the rule simply because the evidence shows that the NCAA should have no worries that a school will choose the NIT over the NCAA Tournament.\(^{162}\)

Giving the NCAA the benefit of the doubt, and assuming that limiting the amount of games played is a legitimate justification, the MIBA must then show less restrictive means for the NCAA to accomplish its goals.\(^{163}\) It would appear that limiting the amount of games in which teams play can be accomplished by a less restrictive rule, because the NCAA can

---

\(^{158}\) See Metro., 339 F. Supp. 2d at 552 (noting that NCAA argues that only one team should be crowned national champion in each sport); see also Alesia supra note 157, at 1D (stating that NCAA provides a service by establishing a single national champion).

\(^{159}\) See Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp 2d 545, 552 (S.D.N.Y. 2004) (detailing NCAA's alternative argument that its rule may in fact be unnecessary).

\(^{160}\) See Metro., 339 F. Supp. 2d at 552 (noting that the last school to choose NIT over NCAA was University of Marquette in 1970); see also Big East Profiles: Marquette, CINCINNATI ENQUIRER, Aug. 28, 2005, at 5K (discussing Marquette's choice to play in NIT over NCAA).


\(^{162}\) See Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp 2d 545, 552 (S.D.N.Y. 2004) (noting contradiction that NCAA creates when it argues that the rule has never been violated in over 30 years, but that it is still necessary anyway); see also Big East Profiles, supra note 160, at 5K (explaining that the last team to pick NIT over NCAA did so because it was upset with NCAA).

\(^{163}\) See NHL Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003) (stating that if defendant "is able to demonstrate pro-competitive effects, the plaintiff then must show that any legitimate objectives can be achieved in a substantially less restrictive manner"); K.M.B. Warehouse Distrib. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995) (stating that burden shifts back to plaintiffs once defendants can prove pro-competitive justifications).
eliminate the 'Commitment to Participate' and just enforce the rule limiting participation to only one postseason tournament. Therefore, schools would be allowed a choice as to which tournament they want to play in, while still not forcing their athletes to play in too many games. This accomplishes the NCAA's goals of promoting academics, while removing any boycott on the Postseason NIT. Because the MIBA can prove less restrictive means, it should be able to meet its burden of proof, and the NCAA should be in violation of § 1 of the Sherman Act.

B. Violations of § 2 of the Sherman Act

In order to prevail under § 2, the MIBA must prove two things. First, that the NCAA has monopoly power, and second, that there was "willful acquisition and maintenance" of that monopoly power by the NCAA. Market power can be proven by showing that the NCAA has a large enough share of the relevant market. The MIBA argues that the relevant market is "Division I men's college basketball postseason tournaments." There is considerable value to this argument. The NCAA Tournament is the showcase of college basketball, a sport unique from its professional counterparts, as fans often tune in to watch the purity of young student athletes who give it their all without being paid millions of dollars. 'March Madness' has become the marquee event of the spring, with millions watching on their televisions or otherwise, and filling out their office pools. This attraction, and the unique characteristics of 'March Madness,'

164 See United States v. Grinnell Corp., 384 U.S. 563, 570 (1966) (stating that the first element is "the possession of monopoly power in the relevant market"); see also Metro., 339 F. Supp 2d at 550 (stating that MIBA must first demonstrate that NCAA's actions have had substantial adverse effects on competition).

165 See Grinnell, 384 U.S at 570-71 (stating that the second element is "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"); see also Metro., 339 F. Supp. 2d at 551 (stating that MIBA must prove that challenged restraints are not reasonably necessary to achieve pro-competitive justifications).

166 See Grinnell, 384 U.S at 571 (discussing some examples of market share); see also United States v. Visa, 344 F.3d 229, 239 (2d Cir. 2003) (stating that presence of monopoly power can be presumed if it can be proven that defendants have an extremely large share of relevant market).

167 Metro., 339 F. Supp. 2d at 549.

168 See Scanlan, supra note 121, at 3 (explaining that amateur sports are a highly valued commodity, and generate millions of dollars per year); see also Matisik, supra note 3 (explaining explosion in interest in NCAA Tournament over the past 15 years).
prevents any other event from becoming a true substitute for postseason college basketball.\textsuperscript{169}

With the relevant market defined, the MIBA has made compelling arguments as to the power that the NCAA wields in said market. MIBA's expert, Professor Noll, calculated NCAA control over postseason tournaments in 2002.\textsuperscript{170} The NCAA had "over seventy percent of attendance, over ninety percent of game revenues, over ninety-eight percent of total revenues and over ninety-nine percent of television revenues."\textsuperscript{171} These large percentages give rise to the presumption that the NCAA possesses monopoly power.\textsuperscript{172}

"Willful acquisition and maintenance" of monopoly power can be shown by evidence of exclusion.\textsuperscript{173} The NCAA must prove that its dominance of postseason college basketball did not result from any unlawful practices.\textsuperscript{174} The history of the rivalry between the NCAA and MIBA shows that this is not so. During the 1950's, both tournaments were in fierce competition, with many observers proclaiming the NIT to be more prestigious.\textsuperscript{175} Many

\textsuperscript{169} See Grinnell, 384 U.S. at 571 (explaining that analysis of the product market involves inquiry as to whether substitutes exist which people will use if the main product becomes undesirable); see also Metro., 339 F. Supp. 2d at 550 (explaining that for antitrust cases, the relevant market "comprises products that consumers view as 'reasonably interchangeable' with the product which the defendant sells").


\textsuperscript{171} Id. at 550.

\textsuperscript{172} See United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (noting that the company did not hesitate to "wield" their monopoly power); see also United States v. Visa, 344 F.3d 229, 239 (2d Cir. 2003) (stating that presence of monopoly power can be presumed if it can be proven that defendants have extremely large share of relevant market).

\textsuperscript{173} See United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (stating that some exclusionary conduct must be shown in order to prove monopolization); see also Patterson v. United States, 222 F. 599, 620 (6th Cir. 1915) (explaining that in "perfect" monopoly there is exclusion of all persons but one).

\textsuperscript{174} See Aluminum Co., 148 F.2d at 429–30 (noting that it would be unjust to punish large companies who have performed no unlawful conduct); see also Metro., 339 F. Supp. 2d at 550 (stating that once MIBA meets its initial burden, NCAA must provide a pro-competitive justification for challenged restraints).

\textsuperscript{175} See Matisik, supra note 3 (explaining that competition started between the tournaments as soon as NCAA Tournament was founded in 1939, and noting, in early years, NIT was considered the elder tournament which drew better schools to participate); see also NCAA purchases NIT for $56.5 million CBS SPORTSLINE, (August 17, 2005), available at http://cbs.sportsline.com/collegebasketball/story/8745007 (distinguishing NIT as a year older and at one time the bigger event of the two tournaments).
schools turned down the NCAA for the NIT.\textsuperscript{176} However, the NCAA started to flex the muscle it had as the rulemaking body of college sports.\textsuperscript{177} It began to expand the number of teams in its tournament, from the original number of 8 to the current number of 65.\textsuperscript{178} It also added rules requiring schools to participate in only one tournament, which helped force the NIT into the background.\textsuperscript{179} The final salvo of the 'Commitment to Participate Rule' put the nail in the coffin for the NIT.\textsuperscript{180} As a result of the foregoing evidence, the NCAA cannot justify that a monopoly was thrust upon itself.\textsuperscript{181} History shows that the NCAA has consciously enacted rules over the past 50 years to turn the NIT from a worthy competitor to the afterthought that it is today.\textsuperscript{182} Since the NCAA has the requisite market power and intent to

\textsuperscript{176} See Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004) (stating that "until 1953, NCAA members who received an invitation to both tournaments could choose to participate in both."); see also Matisik, supra note 3 (claiming schools would choose to play in both tournaments rather than avoiding participation in NIT).

\textsuperscript{177} See Metro, 337 F.Supp.2d at 566 (discussing MIBA's claims that NCAA enacted various regulations to destroy Postseason NIT); see also Symposium, supra note 7, at 428 (noting that because NCAA did not like that NIT was a bigger tournament and did not like the competition, NCAA passed a rule that if a team was invited to participate in the NCAA Tournament, said team was not allowed to participate in any other post-season tournament).

\textsuperscript{178} See Metro, 337 F. Supp. 2d at 567 (stating that NCAA Tournament expanded to 48 teams in 1980, and then to 64 teams in 1985); see also Matisik, supra note 3 (commenting that "the NIT has lost much of its prestige during the past 30 years as the NCAA tournament expanded from 8 teams to its current 65-team field...").

\textsuperscript{179} See Metro, 337 F. Supp. 2d at 566 (stating that "in 1953, the NCAA adopted a rule which prohibited NCAA member institutions from participating in more than one postseason tournament (the 'One Postseason Tournament Rule'); see also Matisik, supra note 3 (noting that "[i]he NCAA also adopted the so-called "One Postseason Tournament Rule" which prohibits any NCAA member institution from competing in more than one post-regular season tournament, thereby preventing anyone school from duplicating CCNY's 1950 double-championship season").

\textsuperscript{180} See Metro, 337 F. Supp. 2d at 567 (explaining that 'Commitment to Participate Rule' was enacted in 1981 and evolved out of earlier Expected Participation Rule); see also Matisik, supra note 3 (stating that according to "the 'Commitment to Participate Rule' (CPR), if a team at NCAA-member school is invited to participate in a NCAA post-season tournament, that team must participate in that tournament or it may not participate in any post-season tournament whatsoever").

\textsuperscript{181} See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 390 (1956) (explaining that an exception to Sherman Act prohibitions on monopoly power is taken when monopoly is "thrust upon" defendant); see also United States v. Aluminum Co. of America, 148 F.2d 416, 429–30 (1945) (creating possible defense to § 2 of Sherman Act if defendants can prove that a monopoly had been thrust upon them).

\textsuperscript{182} See Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004) (proposing that "several statements by NCAA officials found in NCAA meeting minutes from the 1940's, 50's and 60's, support its theory that the NCAA adopted the challenged rules and expanded its Tournament in order to disadvantage the Postseason NIT"); see also Matisik, supra note 3 (stating that college basketball fans often forget about NIT while NCAA Tournament is going on).
monopolize, it should be found to be in violation of § 2 of the Sherman Act.

IV. A ROADMAP FOR THE FUTURE

The NCAA is no stranger to antitrust scrutiny by the courts, but all of the scrutiny unfortunately led to confusion over where the law stands today. Courts have struggled over how to evaluate the NCAA as it has transformed in recent years into more of a commercial entity. The aftermath of Board of Regents has led many to believe that only NCAA regulations with commercial undertones will be subject to antitrust scrutiny. The problem is that the NCAA has evolved to the point where all of its activity has distinctively commercial earmarks.

The courts must come to grips with the fact that the NCAA is now a commercial enterprise. The enormous revenues that the

183 See, e.g., Hennessey v. NCAA, 564 F.2d 1136, 1154 (5th Cir. 1977) (holding that NCAA by-laws should be analyzed under rule of reason); Gaines v. NCAA, 746 F. Supp. 738, 746 (M.D. Tenn. 1990) (holding that NCAA eligibility rules against a student who declared for the NFL draft should be judged under rule of reason analysis).


185 See Stephanie M. Greene, Regulating the NCAA: Making the Calls Under the Sherman Antitrust Act and Title IX, 52 ME. L. REV. 81, 95 (2000) (concluding that "[t]he coaches' successful challenge [in Law] should send a clear message to the NCAA that any regulations that have commercial overtones will not stand up to Sherman Antitrust analysis"); see also Konsky, supra note 4, at 1589 (detailing gradual shift of NCAA into a major commercial entity).

186 See Krakau, supra note 110, at 406 (noting that because of Board of Regents, "[t]he application of antitrust laws to the NCAA not only comports with the plain language of the Sherman Act and recognizes the revenue-maximizing goals of the NCAA, but also provides a key check on the organization's power, which would otherwise be effectively limitless"); see also Konsky, supra note 4, at 1589 (explaining that Board of Regents helped to forever end the debate that NCAA was immune to antitrust scrutiny).

187 See NCAA v. Board of Regents, 468 U.S. 85, 100 n.22 (1984) (determining that "the NCAA and its member institutions are in fact organized to maximize revenues"); see also Scanlan, supra note 121, at 3 (suggesting that the pure amateur sports model that NCAA puts forth was created to increase popularity and therefore revenue of college sports).

188 See Lindsay J. Rosenthal, From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition it has Taken Almost a Century to Create, 13 SETON HALL J. SPORTS L. 321, 321 (2003). The author suggests that "[t]he focus of the NCAA is no longer on education and amateurism, as the NCAA professes, but is rather on making the most money out of the product that the original focus on amateurism created." Id. The NCAA has been thus likened to an economic cartel: Cartel agreements typically restrict price competition and limit production to create above-average profits from outputs and to generate a flow of economic rents from inputs compensated below their market value. Ultimately, the NCAA maximizes
NCAA generates (in excess of $422 million) give plenty of evidence that college sports are no less commercial than professional sports. Too often has the NCAA been able to hide behind the image of academic promoter when promulgating its regulations. The NCAA cannot have it both ways. It cannot have conflicting mission statements of promoting the greater good for student athletes while also seeking the highest amount of profits possible.

CONCLUSION

Therefore, this Note recommends that courts ignore non-commercial justifications for NCAA conduct. Analysis should be focused on the effects that the regulations have on competition. There can still be some allowance for restrictions that are needed for the good of the industry, just like in professional sports. However, the NCAA should be limited in the justifications that it can claim. The NCAA, upon showing that its rules are harming competition, should be forced to come up with commercial justifications for its conduct. It may seem like a simple analysis, but the early purposes of the Sherman Act were not complicated. The Sherman Act sought to protect competition in all areas of commerce. In the past, the NCAA may have been a non-commercial entity, but not today. As soon as courts accept this simple premise, they can stop weeding through the non-commercial 'fluff' justifications that the NCAA throws out. This narrowing of the issues will hopefully lead to a much more consistent analysis in the future.

profits beyond a competitive rate and keeps the windfall in the hands of select few administrators, athletic directors, and coaches.

Konsky, supra note 4, at 1585.

189 See Marc Edelman, Note, Reevaluating Amateurism Standards In Men's College Basketball, 35 U. Mich. J.L. Reform. 861, 871 (2002). The NCAA no longer prevents commercialism and attempts to exploits its athletes through corporate athleticism. See Konsky, supra note 4, at 1584. The $422 million in revenues was reported by the NCAA for the fiscal year ending August 31, 2003. Id.

190 See Kristin R. Muenzen, Weakening Its Own Defense? The NCAA's Version of Amatuerism, 13 Marq. Sports L. Rev. 257, 257 (2003) (commenting that basic purpose of NCAA is to maintain clear line of demarcation between intercollegiate athletics and professional sports); see also Sherman Act Invalidation, supra note 118, at 1299 (stating that NCAA claims its primary purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, [and to] retain a clear line of demarcation between intercollegiate athletics and professional sports").
POSTSCRIPT

On August 17, 2005, while the NCAA/MIBA trial was in progress, both sides agreed upon a settlement. Under the terms of the settlement, the MIBA received $56.5 million over the next ten years from the NCAA. In return, the NCAA received ownership of the NIT. Even though the NCAA can seemingly do whatever it wants with the NIT, it has pledged to continue holding the tournament for at least the next five years. In the long run, this shortsighted decision by the MIBA will harm not only college basketball, but college athletics as a whole. What was shaping up to be an excellent case for the MIBA was quickly swept under the rug by the NCAA and its large pool of resources. That this suit was settled so easily only speaks to the unfair bargaining power that the NCAA has when going up against any competitors. The only positive thing that can come out of this settlement is that the NCAA can no longer argue that it does not hold a monopoly in the arena of college basketball. Now, they are truly the only game in town, despite the continuing existence of the NIT. The NCAA owns both tournaments, and, at any point in time, it can pull the plug on the NIT, or change eligibility rules to the point that the NIT becomes even less of a factor than it already is today. With a private suit now impossible, one can only hope that the Department of Justice can step up to the plate and see the big picture. If the NCAA is able to muscle out a plaintiff who had a

191 See Matisik, supra note 3 (explaining background of case when settlement was reached).
192 See Brad Wolverton, NCAA Settles Lawsuit Over the National Invitation Tournament, CHRON. OF HIGHER EDUC., Sept. 2, 2005, at 65 (explaining terms of settlement); see also After All That, NCAA Buys NIT, CHICAGO TRIB., Aug. 18, 2005, at 9 (noting that MIBA ran NIT since 1940).
193 See Wolverton, supra note 192 (noting that NCAA will now pick teams for participation in NIT); see also NCAA Digs Deep, Buys Rights to NIT; Texas, Oklahoma Seek Improvements to Cotton Bowl, HOUSTON CHRON., Aug. 18, 2005, at 14 (noting that NCAA will take control of NIT).
194 See Mark Alesia, NCAA’s Brand: $56.5M Settlement with NIT is “Good for the Game,” INDIANAPOLIS STAR, Aug. 18, 2005 (stating that settlement guarantees that next five NIT tournaments will take place in New York City); see also NCAA purchases NIT for $56.5 Million to End Legal Fight, PITTSBURGH TRIB. REV., Aug. 18, 2005 (noting that next five games will be held in Madison Square Garden).
195 See Wolverton, supra note 192 (stating that NCAA will have control over NIT tournament); see also Editorial, Hoops ’Win-Win’ Isn’t a Slam-dunk, INDIANAPOLIS STAR, Aug. 19, 2005, at 14A (noting that only time will tell whether NCAA monopoly solution will benefit college basketball).
very strong case just by the use of money, what other potential anticompetitive threats will it pose in the future?