

# When Playing the Game of College Sports, You Should Not Be Playing “Monopoly”

*Lisa M. Bianchi & Bryan S. Gadol*

## I. INTRODUCTION

College sports appeal to a variety of individuals for a multitude of reasons. From ambitious young athletes and their loyal fans packing the stadiums, to television producers and sponsors who bring the games into people’s homes, society as a whole has a special affinity for collegiate competition. Associated with any competition, however, is the need for rules and regulations to establish a cohesive structure, designate uniform rules, and promulgate fairness.

The National Collegiate Athletic Association (NCAA)<sup>1</sup> is the organization responsible for setting the standards for collegiate athletics throughout the country. The NCAA tries to establish a balance between the athletic and educational experiences of student athletes. Every college and university becomes a member if they wish to compete in intercollegiate athletics. The NCAA functions as a centralized regulatory authority with the power not only to set its own standards, but also to enforce its rules through a variety of sanctions. Sanctions range from simple reprimands to multiyear bans from competition.<sup>2</sup>

The NCAA’s ability to regulate every facet of college sports has far-reaching consequences. For example, the NCAA may ap-

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<sup>1</sup> The NCAA is a national association of universities and colleges that has “adopted and promulgated playing rules, standards for amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staff.” *National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 88 (1984) (hereinafter *Board of Regents*). The NCAA national headquarters are located at 6201 College Boulevard in Overland Park, Kansas. Steve Rushin, *Inside the Moat*, *SPORTS ILLUSTRATED*, Mar. 3, 1997, at 68.

<sup>2</sup> In 1985, the NCAA placed SMU on three years’ probation, stripping the school of 45 football scholarships for rule violations. Jim Lassiter, *Alumni Bucks Are Creating Big Problems*, *THE DAILY-OKLAHOMAN*, Sept. 26, 1985, available in 1985 WL 4385954. The NCAA “handed the University of Miami’s football program a post season bowl ban and three years of probation.” Alan Schmadtke, *NCAA Clears FSU Football Program of Major Rules Violation*, *FORT LAUDERDALE SUN-SENTINEL*, Jan. 24, 1996, at A1. “The [University of Washington] Huskies were outlawed from bowl games for two years while Miami, Texas A&M and Alabama lost one year. Washington lost revenue from TV games for one season and was limited to four appearances in another while Miami lost no revenues or exposure.” Blaine Newham, *Recent Penalties Against Peers Stoke UW’s Fire*, *THE SEATTLE TIMES*, Dec. 7, 1995, at C1.

ply sanctions at its discretion that potentially could destroy an entire athletic program. Teams in contention for a national championship in a major sport generate enormous revenues for their universities. In addition, the NCAA allows universities to make money that might otherwise go in part to the players. The problem is the student athletes are not offering their services in a free market, unlike professional athletes, but to a cartel that substantially restricts the compensation for their services. In general, the same package of benefits is offered to recruit athletes, while the universities reap tremendous revenues and prestige from their athletic performances.<sup>3</sup> Instead of receiving high-priced contracts, exceptional college athletes receive a tradeoff. Schools supply scholarships and act as a de facto farm system to catapult players to professional sports instead of compensating the individual athletes for their performance. However, with control should come responsibility. Any time a nongovernmental organization completely controls an industry, the potential for abuse is dramatically increased. In the case of the NCAA, the organization serves as the investigator, judge, jury and executioner.

In recent years, both the Pacific 10 Conference (Pac-10)<sup>4</sup> and the NCAA have been attacked on antitrust grounds. The application of antitrust laws to associational agreements among the NCAA member colleges and universities has created much controversy. The courts balance the procompetitive aspects of organized collegiate competition against the restraints imposed by extensive regulation. Courts recognize the NCAA is necessary to bring amateur sports to the market and give deference to its decisions accordingly.

In *Hairston v. Pacific 10 Conference*,<sup>5</sup> former and current University of Washington (UW) football players sued the conference alleging violations of § 1 of the Sherman Antitrust Act<sup>6</sup> after the NCAA sanctioned the university for rule violations. The sanctions imposed included a two-year ban from college football bowl games. The United States District Court for the Western District of Washington summarily dismissed the action because the players

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<sup>3</sup> The University of Michigan athletic department revenue for football in 1995-96 was \$20,731,000. David Shepardson and Wayne Wooley, *U-M Gridiron Success Felt Far Beyond the Football Field*, THE DETROIT NEWS, Dec. 8, 1997, at A1. It was estimated that an Orange Bowl game against Notre Dame could make the University of Miami as much as \$3 million profit. *Sports*, THE BOSTON GLOBE, Nov. 29, 1995, available in 1995 WL 5964098.

<sup>4</sup> The Pac-10 is a member institution of the NCAA. Its constituents are 10 western universities: the University of Washington, Washington State University, University of Oregon, Oregon State University, University of California, Berkeley, Stanford University, University of California, Los Angeles, University of Southern California, Arizona State University and the University of Arizona. *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1317 n.1 (9th Cir. 1996).

<sup>5</sup> *Hairston*, 101 F.3d at 1317.

<sup>6</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (1996).

failed to show the NCAA's procompetitive objectives could be achieved in a substantially less restrictive manner. The court held the sanctions did not constitute an unreasonable restraint of trade under § 1 of the Sherman Antitrust Act.<sup>7</sup> On appeal, the Ninth Circuit considered if the sanctions imposed were disproportionate to the rule violations and thus constituted an unreasonable restraint. The court examined the restraint at issue and balanced whether the procompetitive objectives outweighed the restraint's harm. Ultimately, the court decided that, although there was a contract, combination, or conspiracy affecting interstate commerce, the players failed to provide sufficient evidence the Pac-10 objectives could have been achieved in a "substantially less restrictive manner."<sup>8</sup>

The Ninth Circuit and other courts have recognized the necessity of the NCAA to bring amateur sports to the market. However, the courts have been unwilling to provide a forum to rectify problems with the current organization without legislative direction. Part I of this note focuses on the history of the antitrust laws as applied to the NCAA. Emphasis will be on the NCAA by analogy, since the Pac-10 operates as a division member of the organization. Part II examines the facts and opinion of *Hairston*. Part III analyzes the rule of reason approach as applied to NCAA sanctions. The courts' current preference is to focus on the procompetitive effects of the extensive NCAA regulations instead of on the restraints imposed. *Hairston* illustrates the judicial reluctance to closely scrutinize the powerful role of the NCAA. This note concludes with a description of the problems associated with this type of judicial deference and proposes athletes with legitimate claims should have antitrust legal recourse to voice their grievances.

## II. ANTITRUST LAWS AND THE NCAA

### A. The Sherman Antitrust Act and Sports

The Sherman Antitrust Act was enacted to protect trade and commerce against monopolies. Section 1 of the Sherman Antitrust Act outlaws contracts, combinations, or conspiracies that result in an unreasonable restraint of trade in interstate commerce.<sup>9</sup> Every contract, to a greater or lesser extent, restrains trade. However, in order to establish a claim under § 1 of the Act, plaintiffs must demonstrate the existence of a contract, combination, or conspiracy which unreasonably restrains trade. An essential step

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<sup>7</sup> *Hairston v. Pacific-10 Conference*, 893 F. Supp. 1495, 1496 (W.D. Wash. 1995).

<sup>8</sup> *Hairston*, 101 F.3d at 1318-19.

<sup>9</sup> Section 1 of the Sherman Antitrust Act provides: "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 declared to be illegal." 15 U.S.C. § 1 (1996).

in antitrust analysis is to determine whether an alleged violation constitutes a per se<sup>10</sup> rule of illegality or falls into the rule of reason<sup>11</sup> category. In a rule of reason analysis, the fact-finder examines the restraint at issue to determine whether the restraint's harm to competition outweighs the restraint's procompetitive effects.<sup>12</sup>

A restraint of trade is per se unreasonable,<sup>13</sup> as a matter of law, for any contract or agreement that involves price fixing,<sup>14</sup> horizontal division of the market,<sup>15</sup> vertical price fixing,<sup>16</sup> group boycotts,<sup>17</sup> or tying arrangements.<sup>18</sup> Per se violations are inherently pernicious and considered illegal by their very nature. Typically, these types of agreements are found to be anticompetitive without conducting any further inquiry into the industry and its practices.<sup>19</sup> If an activity does not constitute a per se violation, the rule of reason approach is applied.

Although distinguishing between per se and rule of reason cases may seem clear, problems arise in applying labels to practices which do not clearly fit into either category, or which are novel. Courts recognize that, if § 1 of the Sherman Act is read literally, all private contracts could be outlawed.<sup>20</sup> Therefore, in non per se cases, the rule of reason analysis is applied to scrutinize the impact on competition to determine if the restriction is valid. In these cases, the agreements are analyzed with consideration given to the particular industry and the historical implications of the imposition.<sup>21</sup>

The distinct characteristics of amateur and professional sports do not neatly fit into the per se categories. Professional baseball is favored with a complete exemption from antitrust

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<sup>10</sup> See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972); 7 PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1510, at 414 (1986); THOMAS V. VAKERICS, *ANTITRUST BASICS* ¶ 1.03[3] (1997); Susan Marie Kozik, Note, National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla. and Univ. of Georgia Athletic Ass'n, 104 S. Ct. 2948 (1984), 61 CHI-KENT L. REV. 593, 595 nn.19-25 (1985); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student Athlete*, 26 LOY. L.A. L. REV. 1213, 1219-20 (June 1993).

<sup>11</sup> The Supreme Court developed the rule of reason analysis in *Standard Oil v. United States*, 221 U.S. 1, 94 (1911).

<sup>12</sup> *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

<sup>13</sup> *Supra* note 10. See also, Chin *supra* note 10, at 1220; Kozik, *supra* note 10, at 595.

<sup>14</sup> "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil, Co., Inc.*, 310 U.S. 150, 218 (1940).

<sup>15</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

<sup>16</sup> *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>17</sup> *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

<sup>18</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).

<sup>19</sup> *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. at 692.

<sup>20</sup> *Id.* at 687-88.

<sup>21</sup> *Id.* at 692.

laws. In a famous 1922 decision written by Justice Holmes, the Supreme Court held baseball could not be considered interstate commerce.<sup>22</sup> In spite of substantial criticism, this decision has never been overturned. As late as 1972, in *Flood v. Kuhn*,<sup>23</sup> the Court followed precedence and left the issue for Congress to decide. Yet, no other professional sport receives exemption from the antitrust laws without a specific congressional exemption. The courts have consistently held professional sports constitute trade or commerce subject to the antitrust laws.<sup>24</sup>

Collegiate sports, however, operate in a distinctly different environment from professional organizations. Amateur players are not paid for their performances. Therefore, teams have recognized that, in order to play on a level playing field, they must abide by an agreement to determine the rules of amateur competition.<sup>25</sup>

## B. The NCAA

The NCAA was formed to regulate the interscholastic athletic departments of its member universities. The organization is run as a nonprofit institution comprised of 902 colleges and universities.<sup>26</sup> The purpose of the association<sup>27</sup> is to create rules for amateur<sup>28</sup> athletic programs to facilitate fair competition. The members within the divisions<sup>29</sup> have the ability to compete pursuant to uniform rules applicable to all competitors. In recent years, the NCAA has been subject to criticism for the precise reasons it was formed. Many member institutions have been sanctioned for rules violations, which have resulted in severe restraints on the competitiveness of their athletic programs.<sup>30</sup> Although harsh sanctions have stifled many programs and resulted in millions of

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<sup>22</sup> Federal Baseball Club v. National League, 259 U.S. 200 (1922).

<sup>23</sup> *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). The Court relied on *stare decisis* and upheld baseball's exemption from antitrust. Only Congress may now change baseball's antitrust status.

<sup>24</sup> For a detailed list of the analysis of professional sports and antitrust litigation see Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263 n.19 (Winter 1993).

<sup>25</sup> Due to dishonorable activities and brutally violent competitions, the Intercollegiate Athletic Association of the United States was formed in 1906. The name was changed to the NCAA in 1910. See Chin, *supra* note 10, at 1215.

<sup>26</sup> Rushin, *supra* note 1.

<sup>27</sup> According to the 1992-93 NCAA Manual, Article 1 of the Constitution states the organizations purpose is "to promote and develop educational leadership, physical fitness and sports participation as recreational pursuit." Chin, *supra* note 10, at 1213 n.6.

<sup>28</sup> Rule 2.9 states the principle of amateurism as "participation [which] should be motivated primarily by education and the physical, mental and social benefits to be derived." *Gems from the NCAA Manual*, SPORTS ILLUSTRATED, Mar. 3, 1997.

<sup>29</sup> The members are separated into divisions based upon their size and scope of their athletic departments. Division I-A and I-AA, are colleges with major athletic programs. Division II and III have less extensive athletic programs. *Board of Regents*, 468 U.S. at 89.

<sup>30</sup> *Supra* note 2.

dollars in lost revenues, few sanctioned universities have filed suit against the NCAA. Some of the NCAA's rules restricting competition have been found violative of the antitrust laws.<sup>31</sup>

Most of the response to the harsh sanctions has come from affected players, coaches, cheerleaders, fans, concessionaires, alumni, and boosters who brought actions against the NCAA.<sup>32</sup> Courts invariably use the rule of reason analysis to evaluate the justifications for the restraint, followed by a dismissal of the claims. The courts reason the NCAA sanctions do not violate the antitrust laws because the rules are procompetitive and the applied sanctions are reasonable.

One of the most significant decisions against the NCAA resulted when two universities challenged the NCAA's control of television broadcasting of football games in the 1984 United States Supreme Court case of *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.<sup>33</sup> The NCAA required its members to abide by a television contract with two major broadcast networks that limited the number of games any given team could televise and the amount of revenue each member could receive per game. When the petitioning universities contracted with another broadcaster, the NCAA threatened sanctions if the universities proceeded with the contract.<sup>34</sup> The Court held the NCAA restrictions involved horizontal price fixing and output limitations, which are characteristics of a traditional cartel deemed illegal per se.<sup>35</sup>

However, the Court refused to apply a strict per se analysis. The rule of reason approach was deemed more appropriate than the per se test because horizontal restraints were essential for the

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31 In *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1152 (5th Cir. 1977), the court recognized the NCAA is not granted a total exemption from the antitrust laws; however, it did not find the imposed restraint unreasonable. Yet, in *Board of Regents*, 468 U.S. 85 (1984), the Court found the NCAA unreasonably restrained trade for the broadcasting rights of member football games.

32 See *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) (group of alumni, football players, and cheerleaders); *Hennessey*, 564 F.2d 1136 (coaches); *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738 (M.D. Tenn. 1990) (football player); *Jones v. National Collegiate Athletic Ass'n*, 392 F. Supp. 295 (D. Mass. 1975) (hockey player); *Banks v. National Collegiate Athletic Ass'n*, 746 F. Supp. 850 (N.D. Ind. 1990) (football player); *Justice v. National Collegiate Athletic Ass'n*, 577 F. Supp. 356 (D. Ariz. 1983) (student athlete players).

33 The University of Oklahoma and University of Georgia entered into a separate contract with another network to broadcast their football games. Since the NCAA required broadcasting games within their approved plans, they threatened sanctions on the universities if they complied with the contract. The universities filed suit alleging violations of the Sherman Antitrust Act. *Board of Regents*, 468 U.S. 85 (1984).

34 One of the arguments the NCAA advanced in support of the regulation was the adverse effect on live attendance at the games. However, this argument has been disproved. In 1994, football fans set a record attendance of 36,459,896. Ray Waddell, *College Football Attendance Tops 36 Million for 1<sup>st</sup> Time*, AMUSEMENT BUS., Feb. 13, 1995, at 14.

35 See *Chin*, *supra* note 10, at 1220; *Kozik*, *supra* note 10, at 595. See also *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1984).

existence of amateur athletics.<sup>36</sup> The Court recognized the special nature inherent in collegiate sports and reasoned that a governing organization such as the NCAA is necessary to provide rules and agreements among competitors in order to bring the unique product of college football to the marketplace.<sup>37</sup> Since the NCAA plays a vital role in the market for consumer choices as well as the market for college athletes, the benefit of the procompetitive effects outweighed the restraints.

The Supreme Court in *Board of Regents* focused on the commercial aspect of NCAA rules. It did not decide whether any specific noncommercial rule was subject to antitrust analysis.<sup>38</sup> Rather, the Court expressly distinguished the television contract restrictions from eligibility rules, contest rules, and the manner in which the joint venture operates.<sup>39</sup> The procompetitive effects were deemed insufficient to justify the restraint on the free market.<sup>40</sup> The Court stated the restrictions on game broadcasting were not essential to creating a competitive field and ultimately decided the restraint was inconsistent with the goal of antitrust law. Members in a competitive marketplace could have individually responded to consumer demand. Instead the number of games was restricted while prices were inflated.

The Fifth Circuit followed this distinction in *McCormack v. National Collegiate Athletic Association*, by indicating there is "some support in the case law"<sup>41</sup> that the NCAA's rules, which have primarily noncommercial objectives, are not subject to antitrust analysis. The Court directed its inquiry to the NCAA rules enforcing the benefits awarded to student athletes. Without deciding whether the rules were amenable to antitrust analysis, the

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<sup>36</sup> The Court stated, "[W]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." *Board of Regents*, 468 U.S. at 101.

<sup>37</sup> *Id.* at 117. "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."

<sup>38</sup> In *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988), the court assumed the eligibility rules are subject to antitrust laws, applied the rule of reason analysis and found the restrictions imposed were reasonable under the circumstances. On May 4, 1998, a jury awarded \$22 million in back wages, penalties and legal fees to 1900 assistant coaches. The verdict was then trebled to \$66 million under antitrust law. Kirk Johnson, *Assistant Coaches Win N.C.A.A. Suit; \$66 Million Award*, N.Y. TIMES, May 5, 1998, at A1.

<sup>39</sup> *Board of Regents*, 468 U.S. at 117.

<sup>40</sup> A 1995 statistical analysis of the effects of the *Board of Regents* decision suggested the universities and the consumer benefited from the free marketability of televised games. D. Kent Meyers and Ira Horowitz, *Private Enforcement of the Antitrust Laws Works Occasionally: Board of Regents of the University of Oklahoma v. NCAA, A Case in Point*, 48 OKLA. L. REV. 669 (Winter 1995).

<sup>41</sup> *McCormack*, 845 F.2d at 1343 (citing *Justice*, 577 F. Supp. at 383 and *Jones*, 392 F. Supp. at 303).

Fifth Circuit found the rules were reasonable and did not constitute an antitrust violation.

Most case law alleging restraint of trade against the NCAA primarily involves plaintiffs other than the member colleges or universities. Traditionally, parties other than actual members have not been able to establish an antitrust claim because the parties who are directly harmed, if at all by the NCAA's actions, are the universities and colleges,<sup>42</sup> not the athletes or the fans. The universities are acutely aware of the NCAA's powerful role and its ability to shut down their athletic programs. Their reluctance to make a claim may possibly be due to a fear of repercussions.<sup>43</sup> The attacks on NCAA sanctions have, therefore, been brought indirectly by third parties rather than by the directly impacted institutions.

The courts have consistently applied a rule of reason analysis with regard to noncommercial restraints.<sup>44</sup> In the past, the courts

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<sup>42</sup> When alumni, football players and cheerleaders challenged the NCAA suspension penalty, the court noted it was a worthwhile college try, however, "SMU. . . remains the party most directly harmed by the NCAA's actions." *McCormack*, 845 F.2d at 1342-43.

<sup>43</sup> Sanctioned colleges and universities may not sue because of a fear that it is unwise to further upset a regulatory body, whether private or governmental, which possesses tremendous control over their fate. Consequently, in a famous case, coach Jerry Tarkanian of the University of Nevada at Las Vegas sued his employer seeking injunctive relief to preclude it from enforcing the proposed NCAA sanctions. He alleged violations of his federal civil rights and subsequently added the NCAA to the complaint. In 1977, the NCAA initially concluded coach Tarkanian committed several rules violations. The United States Supreme Court held in 1988 the NCAA could not be held liable under 42 U.S.C. § 1983 because its actions did not constitute state action. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988). Tarkanian filed a second suit alleging unfair prosecution when he was forced to resign from UNLV. In 1998, the NCAA agreed to pay Tarkanian \$2.5 million dollars to settle the dispute. The press considered the settlement a victory for Tarkanian and a blow to the NCAA, "whose authority over college sports has eroded over the last several decades." The association's executive director, Cedric Dempsey, stated "it 'regrets the 26-year ongoing dispute' with Tarkanian." Additionally, Dempsey said "the settlement was made for practical reasons: the cost of trial, the likelihood of appeals, the failure to remove the case out of Las Vegas and losses during several mock trials." However, Dempsey stated, "All of us need to recognize that our investigative procedures are continually evolving." "Nevertheless, Dempsey acknowledged that the long case had produced changes in the association's investigative procedures." Richard Sandomir, *Maverick Coach Wins Battle and Collects From N.C.A.A.*, N.Y. TIMES, Apr. 4, 1998, at A1. Tarkanian made the statement, "I learned you never want to fight an organization that powerful. They control the press. They spend more money on public relations in one month than I make in a lifetime." Tarkanian felt the settlement signified that the NCAA did not have any evidence to substantiate their claim. He stated, "We had some minor violations, which everybody has, things we weren't aware of. The way the rules are, they're so complex, everybody has violated them." Larry Stewart, *Tarkanian, NCAA Settle for \$2.5 Million*, L.A. TIMES, Apr. 2, 1998, at C1.

<sup>44</sup> Courts applying the rule of reason analysis to § 1 antitrust claims for NCAA rule sanctions include: *Banks v. National Collegiate Athletic Ass'n*, 746 F. Supp. 850 (N.D. Ind. 1990) (Notre Dame football player seeking an injunction for reinstatement after becoming ineligible to play because of entering the pro-football draft); *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977) (rule requiring reduction of particular coaches to part-time status with severe reduction in pay); *McCormack*, 845 F.2d at 1338 (SMU alumni, players and cheerleaders protesting penalties imposed for scholarship violations).

have focused on whether the procompetitive effect in promoting college sports outweigh the anticompetitive effects in the market.<sup>45</sup> In looking at the noncommercial rules, the lower courts have applied antitrust regulations to the NCAA's involvement in interstate business.<sup>46</sup>

The results of litigation have allowed the NCAA to promulgate and regulate its own rules free of substantive judicial review.<sup>47</sup> Plaintiffs have been hard-pressed to overcome the burden of proving that the rules' adverse effects on the free competitive market outweigh their procompetitive benefits. The inability to overcome this hurdle is reflected by the courts' reluctance to enter into the arena of college sports unless there is substantial evidence of an abuse of commercial power. The Ninth Circuit's 1996 decision in *Hairston v. Pacific 10 Conference* exemplifies this trend.

### III. *HAIRSTON V. PACIFIC 10 CONFERENCE*

#### A. The Facts of the Case

Appellants are former and current University of Washington football players. Appellee, the Pacific-10 Conference,<sup>48</sup> is an unincorporated association of ten universities situated in California, Arizona, Oregon and Washington. Newspaper reports by the *Se-*

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<sup>45</sup> Courts have found the restrictions are reasonable in deciding whether the restraint enhanced competition under the rule of reason analysis. *See, e.g., McCormack*, 845 F.2d at 1338. The NCAA mandated a new by-law where assistant football coaches were relegated to part-time status with a drastic decrease in pay. Two coaches brought an action to invalidate the new by-law. The court held the rules were not an unreasonable restraint of trade. *Hennessey*, 564 F.2d at 1149. *See also supra* note 38.

<sup>46</sup> Although the NCAA is a nonprofit organization, "when presenting amateur athletics to a ticket-paying, television-buying public, [it is] engaged in a business venture of far greater magnitude than the vast majority of 'profit making' enterprises." *Hennessey*, 564 F.2d at 1149. The *Gaines* court is in agreement with the position of the *Hennessey* court and recognized the NCAA had an annual multimillion dollar budget. Citing *Hennessey*, the court noted the business function of the NCAA, recognizing they are not exempt from antitrust regulation simply because their "objectives are educational and . . . carried on for the benefit" of amateur sports. *Gaines*, 746 F. Supp. at 744.

<sup>47</sup> A football player requested an injunction to enjoin the NCAA from enforcing a rule which made him ineligible to play football in his senior year because he entered the professional draft. The court stated, "[T]he NCAA rules benefit both players and the public by regulating college football so as to preserve its amateur appeal. Moreover, this regulation makes a better 'product' available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs." The court denied the player's claim because the NCAA had legitimate business justifications for the rules in question. The case involved a § 2 monopolization claim. The court likened its analysis to the rule of reason approach for a § 1 claim. *Gaines*, 746 F. Supp. at 746.

<sup>48</sup> The Pac-10 is a member of the NCAA. The conference is composed of 10 universities on the west coast. The association establishes athletic programs, administers athletic events, and stages conference tournaments. The primary purpose of the conference is to make certain the members abide by the rules which are promulgated by the NCAA and the Pac-10. *Hairston v. Pacific 10 Conference*, 893 F. Supp. 1485, 1488 (W.D. Wash. 1994).

attle Times and the *Los Angeles Times*<sup>49</sup> caused an investigation to be initiated into the football program at UW.<sup>50</sup> The Pac-10 and UW began investigating the alleged infractions of the NCAA rules.

The *Seattle Times* reported on November 5, 1992 that star quarterback Billy Joe Hobert received \$50,000 in loans from an Idaho businessman.<sup>51</sup> Within the following month, the *Los Angeles Times* followed up with a series of reports exposing various other NCAA rules violations.<sup>52</sup> After the eight-month investigation by the UW<sup>53</sup> and the Pac-10, officials found violations had occurred. Hobert was suspended by the university and subsequently barred from eligibility to play amateur football.<sup>54</sup>

The investigation<sup>55</sup> resulted in the Pac-10 sanctioning the UW football team for recruiting violations. The following penalties were imposed: "(1) a two-year bowl ban covering the 1993 and 1994 seasons; (2) a one-year television revenue ban; (3) a limit of 15 football scholarships for the 1994-95 and the 1995-96 academic years; (4) a reduction in the number of permissible football

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49 For a chronological listing of the events leading to the Pac-10 penalties, see *Pacific 10 Sanctions Washington*, L.A. TIMES, Aug. 23, 1993, at C8.

50 The UW football team is known as the Huskies. *Washington Penalties May be Compounded*, L.A. TIMES, May 7, 1994, at C1.

51 Charles Rice, a nuclear engineer with no affiliation to the UW, made the loan to Hobert. He was asked by his son-in law to help out a friend. A contract was formed without assets as collateral or a regular payment schedule, but a full demand payment could be called at any time. Hobert blew the money in three months on paying existing bills, entertaining friends, and purchasing a stereo system, cars and guns. Although Hobert had led the team to a Rose Bowl victory at the time he signed the loan, the ensuing year's performance was mediocre. Tom Farrey and Eric Nadler, *Huskies' Hobert Got \$50,000 Loan—Money from Businessman Spent in Spree*, THE SEATTLE TIMES, Nov. 5, 1992, at A1.

52 The major violations found were: "Improper employment of football and basketball players by boosters during summers and holidays. Improper unsecured loans of \$50,000 received by then starting quarterback Billy Joe Hobert, now a rookie with the Los Angeles Raiders. Free meals and excessive wages provided to football players by boosters. Illegal recruiting inducements by boosters. Illegal recruiting contracts by boosters. Improper use of meal expenses by student hosts on official recruiting visits." Therefore, the allegations evidenced "a lack of institutional control over the football program." Elliott Almond, *Washington Huskies Get Tough Pac 10 Penalties*, L.A. TIMES, Aug. 23, 1993, at A1.

53 The UW hired attorneys Mike Glazier and Rick Evrard, from Overland Park, Kansas, to conduct an independent review. Glazier and Evrard formerly worked in the NCAA enforcement department. Danny Robbins and Elliot Almond, *Washington Admits to Violations*, L.A. TIMES, Aug. 6, 1993, at C1.

54 The loan Hobert received was a violation of the rule that did not allow athletes to obtain benefits that were not available to other students. The rule states "a student-athlete may not receive preferential treatment, benefits or services for his or her athletics reputation or skill or payback potential as a future professional athlete." Farrey and Nadler, *supra* note 51.

55 The conference alleged 24 violations. Tom Farrey, *No Bowl Play for Huskies*, THE SEATTLE TIMES, Aug. 22, 1993, at A1. The Pac-10 reviewed the violations and imposed their own sanctions. The NCAA conducted its own review of the case to determine if it would impose stricter penalties. Although, the NCAA cannot reduce the sanctions it usually ratifies the conference penalties. Almond, *supra* note 52.

recruiting visits from 70 to 35 in 1993-94 and to 40 in 1994-95; and (5) a two-year probationary period."<sup>56</sup>

In an attempt to have the sanctions lifted, players and fans filed a complaint against the Pac-10. The players' complaint alleged violations of the antitrust laws under § 1 of the Sherman Act and breach of contract. The players asked the court for injunctive relief and damages, arguing the sanctions imposed were not proportionate to UW's violations of the NCAA rules. Additionally, the players claimed the sanctions were based on a conspiracy by the Pac-10 to shut down the UW football program, thereby creating a competitive edge for the remaining teams.

The Pac-10 filed a motion to dismiss on the grounds that the players lacked constitutional and antitrust standing. The district court disallowed the breach of contract claim because the "players were not intended third-party beneficiaries of the contract between and among Pac-10 member schools."<sup>57</sup> However, the court denied the Pac-10's motion on the standing issue.<sup>58</sup>

The Pac-10 subsequently moved for summary judgment, claiming there was insufficient evidence of the players' conspiracy allegation. In support of its motion, the Pac-10 claimed the players lacked antitrust standing to bring the lawsuit. Because the players had failed to establish an antitrust violation, the court found it unnecessary to decide the antitrust standing issue.<sup>59</sup> The ruling relied on the players' failure to state specific facts of an anticompetitive conspiracy between the member teams or the Pac-10 and the NCAA. The district court dismissed the players' claim, granting the Pac-10's motion for summary judgment. The court held, after completion of discovery, the players failed to provide any evidence the penalties were excessively harsh.<sup>60</sup>

## B. The Majority Opinion

The Ninth Circuit Court of Appeals affirmed the lower court's decision on the grounds that the players had failed to establish a violation of the antitrust laws. The court based its ruling on its earlier decision in *Bhan v. NME Hospitals*, which held a § 1 claim requires: "1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under

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<sup>56</sup> *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1317 (9th Cir. 1996).

<sup>57</sup> *Id.* at 1318.

<sup>58</sup> *Hairston v. Pacific 10 Conference*, 893 F. Supp. 1485, 1492 (W.D. Wash. 1994).

<sup>59</sup> Areeda and Hovenkamp have observed: "When a court concludes that no violation has occurred, it has no occasion to consider [antitrust] standing." 2 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 360f (rev. ed. 1995).

<sup>60</sup> *Hairston*, 893 F. Supp. at 1496.

either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce."<sup>61</sup>

A horizontal restraint exists when the NCAA members create an agreement as to how they will compete against each other.<sup>62</sup> The court cited the Supreme Court decision in *Board of Regents* to support its conclusion. The contract, combination, or conspiracy requirement is the agreement between the member schools. The parties also did not dispute the restraint affected interstate commerce, therefore fulfilling another requirement. Thus, the court focused on the final requirement: whether the penalties imposed constituted an unreasonable restraint of trade.

The rule of reason analysis was applied to analyze the sanctions imposed on the UW. The harm to competition by the sanctions was balanced against the procompetitive effects of the rules. Initially, the plaintiff bears the burden of showing that the restraint produces significant anticompetitive effects within the relevant sport and geographic markets. If the plaintiff meets this burden, the defendant must then come forward with evidence of the restraint's procompetitive effects. Upon a reasonable showing by the defendant, the plaintiff must prove legitimate objectives could have been achieved in a substantially less restrictive manner.<sup>63</sup>

Initially, the players showed the restraint of being banned from participating in future bowl games had significant anticompetitive effects on college football and the geographic market. However, the Pac-10 produced evidence to support the procompetitive effects of requiring certain guidelines and sanctions for rule violations. Therefore, it was up to the players to produce evidence the sanctions could have been imposed in a substantially less restrictive manner.

Even if the penalties were grossly disproportionate to the UW's violations, the players could not meet their burden by showing the penalties were disproportionate. They were further required to provide an appropriate alternative solution. The players relied on evidence from a report by Robert Aronson, a University of Washington professor, who conducted an analysis of the sanctions in comparison to other institutions. However, the court concluded his testimony actually supported the premise that the penalties were appropriate. In addition, when the NCAA subsequently reviewed the violations, they reported the Pac-10 sanctions were too lenient. The court concluded the players failed to

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<sup>61</sup> *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991).

<sup>62</sup> The Court found the members of the NCAA formed a horizontal restraint, since there was an agreement among competitors. *Board of Regents*, 468 U.S. at 99.

<sup>63</sup> *Bhan*, 929 F.2d at 1413.

show how the sanctions imposed on the UW amounted to an unreasonable restraint of trade.

The players' claim for breach of contract as third-party beneficiaries also failed. In order for the players to have been considered third-party beneficiaries to the contract, Washington law requires a showing that the Pac-10 "intended" to assume a direct obligation to the players at the time the contract was formed.<sup>64</sup> "[T]he test of intent is an objective one; the key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather 'whether [the] performance under the contract would necessarily and directly benefit' that party."<sup>65</sup> The players also relied on the Pac-10 Constitution in support of their argument that a contract was formed. The court cited to the Pac-10 Constitution which states its purpose is "to enrich and balance the athletic and educational experiences of student-athletes at its member institutions, [and] to enhance athletic and academic integrity among its members."<sup>66</sup> Relying on the district court's conclusion that the language of the league Constitution was "vague, hortatory pronouncements,"<sup>67</sup> the court concluded the contract was created between the conference and its members, not between the conference and the players.

### C. The Concurring Opinion

The majority opinion concluded there was no evidence of an antitrust violation. Judge Trott argued, although the majority was correct in its analysis of the failed antitrust claim, the issue of the players' standing was not resolved.<sup>68</sup> The concurring opinion stated that leaving the district court decision as it stood would encourage antitrust lawsuits "every time a player feels injured by a conference sanction."<sup>69</sup> Judge Trott did not want to invite lawsuits from those who argued the Pac-10 should have imposed different penalties. Although the players were unable to play in the bowl games, the UW incurred the direct injury inflicted by the sanctions. Therefore, only the UW should have been allowed to assert the claim.

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<sup>64</sup> *Postlewait Constr. Inc. v. Great Am. Ins.*, 720 P.2d 805, 806 (Wash. 1986).

<sup>65</sup> *Id.* at 806-7.

<sup>66</sup> *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996).

<sup>67</sup> The vague and hortatory language referred to is in the Pac-10's general statement extolling the values of academics along with the high standards for the mission of achieving the reputation and integrity of the athletic programs. *Id.*

<sup>68</sup> The concurrence relied on the district court's conclusion. *Id.* at 1320-21.

<sup>69</sup> *Id.* at 1321.

## IV. RULE OF REASON

## A. The Court Defers to the Pac-10 Rules as Reasonable

The Ninth Circuit dismissed the antitrust issue with perfunctory ease. The court offered no precedence to support its determination regarding the NCAA and similar amateur associations.<sup>70</sup> Instead, the decision is indicative of the judicial reluctance to meaningfully balance the positive objectives of the NCAA with the possible resulting erroneous harms. As in many previous decisions, the judiciary views the Pac-10 as a traditional organization vital to collegiate sports.

The Ninth Circuit succinctly concluded the sanctions were reasonable. The court neither analyzed the role of the Pac-10 or the NCAA, nor supported its ruling with an analysis of the procompetitive effects of the association. Instead, the court relied on the established premise of the association's procompetitive effects in a footnote reference to *Board of Regents*.<sup>71</sup> In analyzing the issue, the court cited the *Board of Regents*' conclusion, "the integrity of the 'product' cannot be preserved except by mutual agreement . . . ."<sup>72</sup> The Supreme Court recognized cooperation is essential if the competition the "member institutions seek to market is to be preserved."<sup>73</sup>

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<sup>70</sup> See, e.g., *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) (SMU alumni, players and cheerleaders failed in antitrust claim under rule of reason analysis); *Justice v. National Collegiate Athletic Ass'n*, 577 F. Supp. 356 (D. Ariz. 1983) (court did not find the group boycott amounted to a per se antitrust claim, but must be looked at by the rule of reason analysis because rules are essential if sports are to survive); *Jones*, 392 F. Supp. 295 (players suit against the NCAA eligibility rules failed where the rules were held not subject to antitrust scrutiny); *Banks v. National Collegiate Athletic Ass'n*, 746 F. Supp. 850 (N.D. Ind. 1990) (rules were found to have procompetitive effects since they promote college football as an amateur sport); *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738 (M.D. Tenn. 1990) (although players claims were based on § 2 of the Sherman Act, the rules were deemed overwhelmingly procompetitive); *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1152 (5th Cir. 1977) (assistant coaches reduced to part-time status did not establish an unreasonable restraint).

<sup>71</sup> The quote cited in footnote 4 has been used in similar cases involving the NCAA. See *Hairston*, 101 F.3d at 1319 n.4 and *McCormack*, 845 F.2d at 1344. The Court in *Board of Regents* stated:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

*Board of Regents*, 468 U.S. at 101-2.

<sup>72</sup> 468 U.S. at 102.

<sup>73</sup> *Id.* at 117.

When a claim is based on an analysis of the NCAA noncommercial rules and sanctions, courts have not found an unreasonable restraint of trade. The Supreme Court expressly addressed this issue when it stated, "[I]t is reasonable to assume that most of the regulatory controls of the NCAA are [a] justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."<sup>74</sup> Therefore, noncommercial regulatory rules, such as contest conditions and participant eligibility, are justifiable since they fit into the procompetitive mold of enhancing the appeal of college sports to the public.<sup>75</sup>

There are several reasons why the courts defer to the NCAA. Procompetitive effects are evidenced in the organization of rules, which brings the game of college football to the marketplace. The NCAA is recognized as promulgating the rules of competition by which members must abide. In *McCormack v. National Collegiate Athletic Association*, the Fifth Circuit stated the NCAA would not be able to market the "contests between competing institutions" without defining and agreeing upon rules.<sup>76</sup> Without a means of bringing these teams together on a level playing field, there would be chaos in intercollegiate competitions. The court focuses on the NCAA's goal of creating similar competitive advantages for divisional teams, so that there will not be a dominant faction created by unfair advantage.

In *Hairston*, the court should have analyzed the Pac-10 situation in greater depth than that of the NCAA. The Pac-10 has more potential than the NCAA for actually violating the antitrust laws by using league discipline as a screen to disadvantage successful competitors. Unlike the NCAA, the Pac-10 member schools directly benefit by having the sanctions applied. Prior to the sanctions, the UW was a ranking champion. Once the sanctions were imposed the remaining teams had a greater likelihood of achieving a Rose Bowl bid or possibly a national championship, because the UW would be temporarily ineligible and would be at a competitive disadvantage for years to come.<sup>77</sup> Instead, the court analogized the Pac-10 to the NCAA without any further inquiry.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> In *McCormack*, 845 F.2d at 1342, the court cited *Board of Regents*, 468 U.S. at 101.

<sup>77</sup> The NCAA sanctions have an impact on competitions for years to come. "NCAA would better serve college football by making disparate judgments. For instance, Miami, with its loss of 24 football scholarships for the next two years, is paying a much higher price than Auburn did for its transgressions two years ago, which resulted in a loss of only six scholarships in three years. To be sure, Auburn was collared with a two-year bowl ban and a one-year TV moratorium, in contrast to Miami's lesser sanctions in these areas. But the heart of college football's future is new recruits." Thomas V. DiBacco, *Apply Rules Evenly*, USA TODAY, Dec. 6, 1995 at A10.

The court examined the restraint to determine whether the "harm to [the] competition outweighs the restraint's procompetitive effects."<sup>78</sup> The Ninth Circuit placed the burden of proof upon the plaintiff to show the anticompetitive effects of the restraint. The players successfully showed the Pac-10 sanctions imposed anticompetitive effects on the UW. However, the Pac-10 highlighted the procompetitive effects of the rules. The Ninth Circuit summarily accepted the significant advantages of the Pac-10's procompetitive effects without conducting further analysis or offering additional support for its conclusion.

#### B. Overcoming the Sanctions' Reasonableness

The court recognized the Pac-10 sanctions had an anticompetitive impact. Nevertheless, the plaintiff still could not overcome the procompetitive effects argument. The Pac-10 had little difficulty showing the significant procompetitive effects of the agreement with the member teams. Unless the sanctions had unreasonable economic implications or could have been achieved in a less restrictive manner, the procompetitive effects were recognized as reasonable. The plaintiff was unable to show the sanctions were unreasonable or could have been applied in a substantially less restrictive manner.

Following the application of the rule of reason analysis, the court narrowed the issue to decide whether the sanctions created an unreasonable restraint of trade. The Ninth Circuit required evidence to support the proposition the sanctions may be imposed in a substantially less restrictive manner. This requirement has effectively created an insurmountable burden for plaintiffs bringing suit against the NCAA. The courts have consistently been unwilling to look at the way the NCAA governs without a clear indication the rules are directed at the individual plaintiffs.

In order to bring a viable antitrust claim, plaintiffs need to establish how the sanctions could have been applied in a less restrictive manner. The Ninth Circuit's ruling typifies the plaintiff's difficulty in overcoming the burden because the claim would require substantial evidence of alternative means to achieve the NCAA's purpose. In effect, the court is asking for evidence supporting an organizational overhaul of the NCAA system.<sup>79</sup> The Ninth Circuit's ruling once again shows the court's reluctance to seriously question the NCAA's operations.

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<sup>78</sup> *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996).

<sup>79</sup> "It is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules." *Shelton v. National Collegiate Athletic Ass'n*, 539 F.2d 1197, 1198 (9th Cir. 1976). See, e.g., Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1305 (April 1992).

### C. Piercing the Role of the NCAA

The judicial decisions consistently support the NCAA's position by deferring to the association when noncommercial restrictions are involved. The court has effectively allowed the NCAA to hide behind the traditional purpose of the association, insulating the organization from meaningful judicial scrutiny. However, due to the increased commercialization and popularity of college sports, it is questionable whether the regulations exist solely for the purpose of protecting the student athletes.<sup>80</sup>

By simply adhering to the recognized advantages of the NCAA, the court has not been willing to look at whether the NCAA has become too powerful an association. The courts are refusing to accept this challenge, particularly in claims that do not involve the member universities or colleges. A definitive statement of the antitrust implications of noneconomic NCAA regulations will require suit by its members. However, since athletic departments bring in millions of dollars in revenue,<sup>81</sup> the universities and colleges are reluctant to change the status quo unless they can foresee a more equitable alternative approach.

Assuming the NCAA possesses market power, those challenging any restraint will still need to prove the harmful effects of the restraint outweigh its procompetitive benefits. In a district court case where a player tried to restore his eligibility status, the court stated that, when a defendant "claims to have acted with a procompetitive purpose, the challenged restraint must bear some nexus to that purpose for the claim to be credible."<sup>82</sup>

The call for reform has initiated the creation of numerous models for changing the existing college athletic system.<sup>83</sup> The NCAA is painfully aware of the public's negative perceptions of its overpowering role in college sports.<sup>84</sup> As an attempt to ward off government imposed regulations, the NCAA has recognized the

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<sup>80</sup> In order to prevail on an antitrust claim, student athletes must prove the NCAA has commercial motives and is not an organization with educational goals. "[W]ithout the NCAA's educational rationale to fall back on, courts would not apply relaxed scrutiny, and would find many regulations to be per se invalid." Chin, *supra* note 10, at 1244.

<sup>81</sup> *Supra* note 3.

<sup>82</sup> *Bank v. National Collegiate Athletic Ass'n*, 746 F.Supp. 850, 860 (N.D. Ind. 1990).

<sup>83</sup> As a proponent of NCAA academic and financial reforms, academic and economic areas should be targeted for changes. Chin, *supra* note 10, at 1245. The NCAA options consist of three plans: Plan A: entering the free-enterprise system; Plan B: Calling for the student athletes having the same rights to loans and gifts as other students; Plan C: Reserving a percentage of the gross for the players. No matter which plan is adopted in order to make any significant improvements, the universities need simply limit the number of scholarships and eligible players with a good-sportsmanship code. Bob Oates, *The Big Steal*, L.A. TIMES, Oct. 3, 1993, at C9.

<sup>84</sup> Some of the public perceptions include: there are special admittance standards for student athletes, coaches are overpaid and cheat, and there is a lack of due process for eligibility rules. Linda Deckard, *NCAA Exec Director Urges Preparation for Dramatic Changes*, AMUSEMENT BUS., Jan. 13, 1992, at 1. The NCAA bureaucracy is "widely per-

importance of implementing drastic changes.<sup>85</sup> However, the Ninth Circuit's ruling makes it clear the court will not provide the forum for reassessing the NCAA's role in collegiate sports.

These cases create an interesting anomaly under antitrust law. Courts have generally closely scrutinized extrajudicial private regulatory agencies, which set rules affecting competition and then enforce them through internal disciplinary proceedings.<sup>86</sup> Yet, the courts currently defer to a private agency, giving it carte blanche authority to regulate intercollegiate sports in the United States. Instead of viewing the case of *Board of Regents* as a warning sign indicating the NCAA warrants closer judicial scrutiny, the courts have treated the NCAA as a commercial aberration and defer to the agency's regulatory activities. Yet, the NCAA is acting like a traditional cartel by fixing prices and limiting output. Such power can easily be abused without adequate judicial review.<sup>87</sup>

## V. CONCLUSION

The Ninth Circuit's ruling in *Hairston* foreclosed a challenge to the association governing collegiate sports. Relying on the reasoning that the NCAA plays an important role in bringing the competitions between collegiate teams to the consumer fans, the court deferred to the procompetitive effects of the association instead of focusing on the restraints. This judicial deference is understandable in light of the need for an organization to promulgate and enforce the rules of amateur athletics. These organizations face a perhaps insurmountable task in attempting to curb the activities of overzealous coaches, fans, unscrupulous agents, and young impressionable athletes. Yet, courts should recognize the sanctions by the supervisory bodies might have a disproportionate impact on otherwise innocent schools, athletes, and fans. There needs to be a balance between the laudable efforts of the NCAA and the rights of the universities and athletes. The current rules essentially provide no weight to the claims of the innocent athletes.

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ceived to be cold, vindictive and bungling." William F. Reed, *It's the Rules, Stupid!*, SPORTS ILLUSTRATED, May 24, 1993, at 72.

<sup>85</sup> Sports Illustrated reported that Executive Director Cedric Dempsey seems "determined to bring the NCAA rule book into a closer relationship with reality, to 'take a hard look at deregulation and rais[e] the sensitivity level of our group to some of the contradictions in our rules.'" Kostya Kennedy, *Hopeful Signs in the NCAA*, SPORTS ILLUSTRATED, June 24, 1996, at 19.

<sup>86</sup> See especially *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465 (1941). "[This] combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'"

<sup>87</sup> Cf. *Allied Tube & Conduct Corp. v. Indian Head*, 486 U.S. 492 (1988).

The interplay between college and professional athletes and the excitement of intercollegiate competition continues to attract a variety of spectators. Enormous revenues are generated by the collegiate athletic arena. The NCAA's decisions may have a dramatic impact on the athlete and financial success of a college's athletic program. However, the judiciary views the Pac-10 as a traditional organization vital to collegiate sports. Consequently, courts have been unwilling to entertain antitrust disputes involving the NCAA, in effect granting a private organization *carte blanche* authority over substantial commerce. Antitrust claims against the NCAA require sufficient evidence the sanctions could be imposed in a substantially less restrictive manner. This burden has proven impossible to overcome.

There are two possible solutions. Congress could take the initiative and establish clear regulations in the area. Otherwise, the judicial system could remedy the current problem itself by providing athletes access to bring a legitimate claim. In the meantime, aggrieved parties, such as athletes, do not have a day in court to assert their claim that the NCAA penalties may be arbitrary, capricious, discriminatory, disproportionate or vindictive.

