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## The NCAA and the Rule of Reason

Herbert Hovenkamp\*

### Introduction

Today antitrust law assesses most collaborative practices under the rule of reason. The few exceptions that are still subject to “per se” treatment include naked price fixing, naked market division, a few boycotts, and an increasingly narrow, idiosyncratic, and widely criticized rule for some tying arrangements.<sup>1</sup> The per se rule continues to have significant policy value, however, even though its domain is smaller than it once was. Most importantly, per se analysis can produce large resource savings, provided that the rule is kept within proper bounds. For example, once a practice such as a price fix is properly characterized as “naked,” which means that it is not accompanied by any form of integration in development, production, or distribution, then the practice can be condemned simply on proof that it has occurred, without elaborate, costly, and sometimes inconclusive inquiries into market power or anticompetitive effects.<sup>2</sup> A significant limitation is that in private damages actions a plaintiff may still have to prove these things because damages are typically based on an overcharge, which may require proof of market power. So the per se rule has its biggest bite in government criminal or civil cases or in private cases seeing only an injunction. In the latter, some “threatened loss or damage” must still be proven, but it need not be quantified.<sup>3</sup>

In sharp contrast to the per se rule, antitrust’s rule of reason requires an assessment of anticompetitive effects. Typically, this requires, first, a showing that the defendants have market power, which means that they have the power to profit by holding output below the competitive level and increasing the price. Market power is traditionally estimated by defining a “relevant market,” or grouping of sales such that cross elasticities between those things inside and those things outside the group is sufficiently low. Then one computes the defendants’ aggregate market share. More direct, econometric measures are undoubtedly superior in many circumstances where the data are available, but these methodologies are still used in only a minority of antitrust cases. Once sufficient power is shown the tribunal must assess the challenged practice’s impact on competition. The plaintiff generally makes out a prima facie case by finding an anticompetitive effect, which means either a restraint that tends to reduce output or that excludes a significant firm or firms. At that point the burden of proof shifts to the defendant to offer a justification. If the defendant succeeds, then the burden shifts yet again back to the plaintiff to show that similar effects could have been achieved by a “less restrictive alternative,” meaning an alternative that is effective for the purpose at hand but which does not impose the same threats to competition.<sup>4</sup>

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<sup>1</sup>See 9 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1720 (3d ed. 2011).

<sup>2</sup>7 Id. ¶¶1509-1510.

<sup>3</sup>15 U.S.C. § 26

<sup>4</sup>Id., ¶¶1504-1507. See also Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Col. L. Rev. 927 (2016).

This elaborate process of initial assignment and subsequent shifting of the burden of proof is sometimes referred to as “balancing.” In fact, however, the nature of issues typically make “balancing” little more than a metaphor.<sup>5</sup> Frequently the things to be measured are incommensurate or do not come in convertible units of measurement. Most often the courts state the requirement as balancing, but then never really balance anything.<sup>6</sup> Fortunately, only a very small portion of litigated antitrust cases ever get to the point that serious balancing becomes necessary. The per se rule does not require balancing because it relies on what we presume to be a collective judicial judgment that, once a particular practice falls within a particular class, its social value is almost certainly nil or very small, so any amount of harm counts in favor of condemnation.

Many of the cases developing the contours of antitrust’s rule of reason have been challenges to rule making by the members of the NCAA. The NCAA is an elaborate joint venture of roughly 1200 members governing collegiate sports. Most of its important decisions are made collaboratively. Through such rule making the NCAA regulates such things as player eligibility standards; disciplinary standards;<sup>7</sup> player compensation; including compensation from third parties for such things as licensing of names and likenesses;<sup>8</sup> number of games to be played and the ability of member schools to play unscheduled games; TV advertising contracts;<sup>9</sup> and other things.

### **The Rule of Reason for Essential Networks**

In the *Oklahoma Board of Regents* case the Supreme Court held that certain classes of joint ventures, including the NCAA, involve situations where collaboration among multiple actors is essential before the product can be produced at all.<sup>10</sup> In these situations, the Court held, the rule of reason must apply regardless of the nature of the restraint. The Supreme Court adheres to this approach in its 2010 decision in *American Needle*, which involved a professional rather than amateur sports league.<sup>11</sup>

This rule does not withstand careful analysis. First of all, the premise must be that the ordinary criteria for applying the rule of reason do not work when some kind of collaborative activity is necessary to make the product in question. In the very first per se cartel case to come

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<sup>5</sup> Herbert Hovenkamp, *Antitrust Balancing*, 12 NYU J. L. & Bus. 369 (2016).

<sup>6</sup> *Id.* at 371-371. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (stating a balancing requirement under Section 2 of the Sherman Act, but then deciding the case without doing any balancing).

<sup>7</sup> E.g., *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416 (M.D. Pa. 2013) (NCAA's imposition of severe penalties on Penn State football program in the wake of sexual abuse scandals was noncommercial, and thus not reachable under the antitrust laws).

<sup>8</sup> See *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996 (N.D. Cal. 2013).

<sup>9</sup> *National Collegiate Athletic Assn. v. Board of Regents of the University of Oklahoma (NCAA)*, 468 U.S. 85 (1984).

<sup>10</sup> *Id.* at 101 (“Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all”).

<sup>11</sup> *American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 (2010).

before the Supreme Court, collaboration was necessary.<sup>12</sup> The defendants, an association of railroads, was created in order to make national shipment possible in a world in which nearly all of the railroads were chartered by individual states. The Trans-Missouri Freight Association was a network which organized a national system by coordinating schedules, providing for exchange of cars, and coordinating rates for multistate shipments that necessarily involved more than a single road. The Eighth Circuit discussed the need for this coordination in an opinion upholding the agreement, which the Supreme Court reversed, condemning the restraint without any inquiry into market power.<sup>13</sup> To be sure, there may be one operative difference: perhaps the defendants should have a chance to prove that the price fix or other naked restraint in question was essential to the operation of their venture. Barring that, there seems to be no good reason for the requirement of a universal rule of reason that covers even naked restraints. If the NCAA schools should fix the price of admission tickets or for hot dogs purchased in the stands and cannot show a reasonable relationship between this price fix and the functioning of the venture, there is little purpose in requiring a rule of reason analysis.

Second, the class of situations to which the *NCAA* mandatory rule of reason applies is often not “mandatory” at all. Rather, it is determined by the choice of an organizational structure. For example, if all of the *NCAA*’s teams were owned by a single entity, then collaboration would not be necessary. One example of this is the *Visa* case of 1994. Relying on *NCAA*, the Tenth Circuit held that access restraints imposed by the *Visa* payment systems organization must be addressed under the rule of reason, because collaboration among the member banks was essential to production of the product, which was retail credit as between card holders and merchant banks.<sup>14</sup> In this case, however, both American Express and Discover stood out as living examples of alternative systems that were organized as single entities and that largely achieved the same results. Indeed, subsequent to that decision both *Visa* and *Mastercard* reorganized themselves as single entities, with the banks appearing as licensees rather than managing participants.<sup>15</sup> The discussion below briefly considers such a possibility for the *NCAA*.

Another problem with the Supreme Court’s mandatory rule of reason is that it is excessively structural, in that it looks at the nature of the organization rather than the nature of the challenged rule. For example, suppose that the members of the *NCAA* should fix the price of sports teams tee-shirts sold in authorized *NCAA* retail shops. Price-fixing of products, even of products protected by intellectual property rights, is generally unlawful per se, and in this case

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<sup>12</sup> *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

<sup>13</sup> See *United States v. Trans-Missouri Freight Ass’n*, 58 F. 58, 79-80 (8th Cir. 1893), rev’d, 166 U.S. 290 (1897):

The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject. . .

<sup>14</sup> *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 962 (10<sup>th</sup> Cir. 1994).

<sup>15</sup> Joshua D. Wright, *Mastercard’s Single Entity Strategy*, 12 *Harv. Negot. L. Rev.* 225 (2007)

each team owns its own intellectual property rights individually.<sup>16</sup> Even in the NCAA case itself the Supreme Court described the NCAA's severe limitation on national broadcasts of NCAA football games as "naked" after rejecting several proffered justifications.<sup>17</sup> "Naked" can only mean that it was not ancillary to the lawful operations of the joint venture, because if that were the case it would not be naked. So then why could the court not segregate the naked restraint for per se treatment, knowing that doing so would not impair the operation of the venture?

The structural nature of the approach taken by the NCAA Court can make antitrust enforcement more costly in complex networks that produce collateral products. For example, the market for cellular phones contains elaborate networks that set standards and protocols for 3G/LTE and 4G/LTE network operation as well as the devices that operate on them. The devices themselves are a part of this system because they must be made to send and receive the signals. Does this mean that price fixing in devices requires rule of reason treatment? There is no observable connection between device price fixing and the successful operation of the venture.

### **"Balancing" and Less Restrictive Alternatives**

As noted above, the plaintiff in a rule of reason case makes out a prima facie showing of illegality by showing market power and an anticompetitive effect. At that time the burden of proof shifts at least once, through a process that the courts often describe as "balancing." If both prima facie competitive harm and a reasonable justification are found, then the court considers whether the same benefits could be achieved by a less restrictive alternative.

The requirements of "balancing" and less restrictive alternatives in antitrust rule of reason cases exist in considerable tension with one another. If we really could balance, then an inquiry into less restrictive alternatives would not be necessary. For example, once we knew that a practice harmed competition by 10 units while providing only 9 units in benefits we could simply condemn it. On the other hand, if it harmed competition by 9 units while providing 10 units in benefits then we would already know that the practice is, on balance, beneficial and there is no obvious reason the law would require us to seek out an alternative that is even less restrictive.

The courts almost never engage in anything that can be meaningfully described as "balancing." The factors in need of balancing typically do not come in readily definable units.<sup>18</sup> Even if they did, measurement would be close to impossible in most situations. So what we really mean is that at a certain point market power and a competitive threat are significant, offsetting efficiencies also seem plausible, so we must find out a way to assess *without* having to

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<sup>16</sup> Cf. *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), where each team owned its intellectual property individually but the court relied on *NCAA* for the proposition that rule of reason should apply.

<sup>17</sup> *Oklahoma case*, 468 U.S. at 109-110 ("This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis).

<sup>18</sup> E.g., *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 902 (9th Cir. 2008) (antitrust challenge to liquor price posting statute, requiring balancing of state's interest in promoting temperance with federal interest in promoting competition).

balance. In that case we look for a less restrictive alternative that either reduces or eliminates our concerns about competition.

For example, in the *Wilk* case the Seventh Circuit condemned the AMA's policy of denying accreditation to hospitals who continued to provide support services such as radiology to chiropractors.<sup>19</sup> The court found exclusion, but presumed at least some minimal legitimacy to the AMA's concerns about inadequate health care and its long held belief that chiropractic was not a legitimate form of medicine. The court ultimately held that an AMA policy of simply informing the hospitals about its concern, rather than denying them accreditation, would be a "less restrictive alternative." This justified condemnation of the accreditation practice.

Clearly, no "balancing" in any usual sense is going on here. First of all, such balancing would require a quantitative assessment about the merits of chiropractic. That is, the social value of the practice would be on the plus side. Against that would be the social cost of excluding chiropractors from hospital facilities, which could range from zero if they were entirely useless, to a positive number. In addition would be the social cost of the higher prices that physicians could charge with chiropractors removed from competition. Or to state it differently, in order to balance the interests at stake the court, through a jury trial, would have to do a complete evaluation of a form of alternative medicine that has been popular for more than a century and controversial among the mainstream medical profession just as long. By identifying the simple provision of information stating the AMA's position on chiropractic as a less restrictive alternative, the court was effectively kicking the can down the road, but that is all that antitrust could possibly achieve in a case such as this, unless we think its function is to solve every technical controversy where competitive concerns are also in issue.

A better way to think about balancing is as a series of switches intended to get us to a result that preserves whatever positive features the defendant's conduct provides, while minimizing the harm. That form of decision making requires much less information. The downside, of course, is that it may not always work. If no less restrictive alternative is available, the court may have no choice but to weigh harmful and beneficial effects against one another. If they are at all close, most of the time the court will be outside its competence.

### **Limits on the Domain of NCAA Antitrust Actions: Amateurism and Noncommercial Activities**

Under current law, two factors serve to limit the reach of antitrust law to NCAA rule making. One is the universally accepted view that college athletes are "amateurs," and that this status significantly limits their individual right to be compensated for athletic play. The second factor is the extent to which many of the NCAA's governing rules are "noncommercial."

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<sup>19</sup> *Wilk v. AMA*, 895 F.2d 352 (7<sup>th</sup> Cir. 1990).

In its *Oklahoma* decision the Supreme Court recognized amateur status as an essential characteristic of the NCAA athlete,<sup>20</sup> and other courts have followed,<sup>21</sup> generally equating “amateurism” with play that is uncompensated beyond the expenses of education.<sup>22</sup> The Supreme Court even recognized the need for regulations that represent “a desirable and legitimate attempt ‘to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.’”<sup>23</sup> The difference between an amateur and a professional athlete is that the amateur athlete does not earn a salary. The plaintiffs in *O’Bannon v. NCAA* challenged this assumption, by asking the court to hold that NCAA rules intended to limit student compensation to the cost of their education are antitrust violations. Of course, amateurism in collegiate athletics is a contingent and not a universal truth. It could be changed and we might instead have a world in which universities hire professional athletes.

A second unique feature of NCAA rule making is that only a portion of it counts as “commercial” for purposes of antitrust. The United States antitrust laws apply only to restraints on commerce.<sup>24</sup> That limited reach is forced by the Constitution’s Commerce Clause, which authorizes Congress to regulate “commerce among the several states.”<sup>25</sup> Today collegiate sports, particularly football and basketball, are heavily commercial enterprises that generate significant revenue for some, although hardly all, participating NCAA schools. That was not always the case, however, and even today numerous intercollegiate sports are not significant revenue generators.

More importantly, the individual colleges and universities in the NCAA wear multiple hats. First, they act *in loco parentis*, supervising the lives of their young athletes, many of whom are living away from home for the first time in their lives. They also make and enforce academic standards and have the difficult job of determining how these standards apply to collegiate athletes. Competitive pressures might force schools to relax these standards, and one of the things that the NCAA does is set floors. Finally, of course, the NCAA schools manage the revenue producing commercial operations of their sports, including the administration of games, ticket sales, production contracts, sales or licensing of logoed paraphernalia, player likenesses, and so on. Only the last of these categories truly involves “commerce,” as several decisions have held.<sup>26</sup> The activities deemed to be noncommercial are generally not reachable under the

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<sup>20</sup> *Oklahoma* 468 U.S. 85 at 120 (“NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role....”)

<sup>21</sup> See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) (“[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics.”).

<sup>22</sup> For a good analysis see Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 *Or. L. Rev.* 329 (2007).

<sup>23</sup> *NCAA*, 468 U.S. at 123, quoting *Kupec v. Atlantic Coast Conference*, 399 F.Supp. 1377 (D.N.C. 1975).

<sup>24</sup> 15 U.S.C. 1 (condemning contracts, combinations or conspiracies “in restraint of trade or commerce....”).

<sup>25</sup> U.S. Const., Art. I, Section 8, Cl. 3.

<sup>26</sup> See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (rule limiting compensation of basketball coaches was commercial and could be an antitrust violation); *NCAA I-A Walk-On Football*

antitrust laws.<sup>27</sup> For example, even though the requirement of a 2.0 grade point average reduces the number of available players -- ordinarily a sure sign of a cartel -- such rules are not addressable under the antitrust laws because they are regulations of academic standards, not regulations of commerce.<sup>28</sup> To be sure, this dividing line is not always clear, and it was disputed in the *O'Bannon* case.<sup>29</sup> The Ninth Circuit considered but rejected that NCAA's argument that the challenged compensation rules "are not covered by the Sherman Act at all because they do not regulate commercial activity...."<sup>30</sup>

### **The Role of "Amateurism" in NCAA Rule Making**

#### *Is the NCAA a Cartel?*

Structurally, the answer to that question is yes. The NCAA is a group of purchasers competing for student athletes, and they both have and exert the power to limit student compensation by agreement among themselves. As a result, this is a monopsony, or buyers' cartel. But that question is really a red herring. Many networks consist of actors bound by joint rule making who sell their product together and agree with each other on at least some of their inputs. For example, large joint venture standard setting organizations must continuously make decisions about which proffered technologies to license from others. When they collectively decide not to adopt a particular technology they may lay themselves open to an antitrust claim.<sup>31</sup>

The more serious question is whether the NCAA has any right at all under the antitrust laws to limit athlete compensation by agreement, and if so what are those limits? The most obvious limitation is provided by the definition of amateur status and the NCAA's power, recognized and approved by the courts, to make rules protecting that status.

Should we jettison this largely unquestioned acceptance of amateurism as a legitimate NCAA concern? If that were to happen, then student athletes would be able to bargain for

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*Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (alleged agreement among NCAA schools restricting the number of scholarships given to walk-on athletes could have been a commercial).

<sup>27</sup> E.g., *Bleid Sports, LLC v. NCAA*, 976 F. Supp. 2d 911 (E.D. Ky. 2013) (NCAA enforcement of student recruiting rules noncommercial); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), vacated on other (title IX) grounds, 525 U.S. 459 (1999) (similar; eligibility rules); *Gaines v. NCAA*, 746 F. Supp. 738, 744-746 (M.D. Tenn. 1990) (NCAA rule forbidding players from having agents is noncommercial); *Adidas America, Inc. v. National Collegiate Athletic Assn.*, 40 F. Supp. 2d 1275, 1285-1287 (D. Kan. 1999) (NCAA restriction on advertising on student athlete uniforms very likely noncommercial); *College Athletic Placement Service v. NCAA*, 1975-1 Trade Cas. ¶60,117 (D.N.J. 1974), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974) (rules governing educational standards of NCAA members noncommercial); *Bassett v. NCAA*, 2005-2 Trade Cas. ¶75,027 (E.D. Ky. Nov. 8, 2005) (coach excluded from NCAA games for recruiting violations could not challenge NCAA under Sherman Act because the policy pertained to noncommercial objective of ensuring fair competition in intercollegiate athletics).

<sup>28</sup> See *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998) (Sherman Act does not apply to NCAA eligibility rules pertaining to grades).

<sup>29</sup> *O'Bannon v. NCAA*, 802 F.3d 1049 (9<sup>th</sup> Cir. 2015).

<sup>30</sup> *Id.* at 1061.

<sup>31</sup> E.g., *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266 (5<sup>th</sup> Cir. 2008) (no antitrust violation where cell phone standard setting organization declined to adopt plaintiff's technology).

compensation as other employees. Given the network nature of this market the likely result would be unionization, and then a multi-employer collective bargaining agreement resembling those in professional sports.<sup>32</sup> Under such an arrangement the NCAA schools would still be able to negotiate salaries collectively, across the table from players' representatives. "Amateur" would no longer be the baseline, and one might presume that at least for star athletes compensation would be significantly higher than it is now. It might not be significantly higher for the vast majority of student athletes, however. It is worth noting that fewer than 2% of college football players ever make it to the NFL, and about 1% of college basketball players make it to the NBA. The percentage for baseball is 10%, which is a little higher.<sup>33</sup> Further, there are many other sports for which the percentages are even lower and many secondary collegiate sports that require an influx of capital in order to survive. So a few salaries in the dominant sports could be quite high, although most would probably not be.

For our purposes, more important than the question whether amateur status for collegiate athletes should be reconsidered is whether that it should be reconsidered by a court interpreting the antitrust laws? The basic questions about amateurism go to the heart of our ideas about the nature of student athletes and the role of universities in educating them and giving them a venue for athletic competition. Those questions are every bit as complex as the questions about the merits or demerits of chiropractic, discussed above. Further, they go beyond economics and into other areas of educational concern. As a result, antitrust law is not an appropriate vehicle for reconsidering the proper role of amateurism in collegiate sports. A shift this broad in our conception of what is a student athlete is not suitable for resolution by a federal court interpreting a statute concerned entirely with commercial restraints on trade and totally lacking in any detail about such an issue. That does not mean that antitrust has no role to play in policing athlete compensation. But it does suggest that that role be limited to addressing restraints on trade that occur *within* the rubric of amateur status -- at least until such time as a more competent body decides whether amateurism in collegiate athletics is worth preserving. This broader policy judgment whether we want colleges and universities to become owners of professional teams ought to belong to either the NCAA itself or else, if they are too self-interested, to Congress or an appropriate body that Congress might name.

#### *"Less Restrictive Alternatives" and Price Regulation*

This discussion assumes that cases like *O'Bannon* must be resolved without disturbing the amateur status of student athletes.

In *O'Bannon* the Ninth Circuit considered the district court's resolution of two issues. First, was an NCAA rule that prohibited individual colleges from giving student athletes financial aid or other scholarship support up to the full cost of college attendance, including tuition, room, board, and collateral expenses.<sup>34</sup> Second was a rule that forbade student athletes from receiving compensation for licensing their names, images, or likenesses to manufacturers of

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<sup>32</sup>E.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

<sup>33</sup> The NCAA keeps these statistics at <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics>.

<sup>34</sup> 802 F.3d 1074.

products such as videogames.<sup>35</sup> The district court condemned both. On the second issue, it required the NCAA schools to set up a trust fund into which licensing proceeds would be placed, up to a maximum of \$5000 per student per year of eligibility.

The Ninth Circuit agreed that both rules fell within the class of restrictions that have been held prima facie unlawful under the Sherman Act, but then also concluded that NCAA concerns about amateurism provided at least a partial justification.<sup>36</sup> It then set out to find a possible “less restrictive alternative.” On the suppression of compensation below full reimbursement it found one: the line provided by amateurism prevented the schools from compensating the students beyond their full costs, but any decision to pay less than full costs must be made individually rather than collusively. As a result, a horizontal agreement among the member schools to pay less than full cost was not justified by amateurism concerns and could be condemned under the antitrust laws.<sup>37</sup> On the second issue the Ninth Circuit held, in essence, that the district court’s \$5000 trust fund solution improperly crossed the amateurism line by permitting the students to be compensated.

The Ninth Circuit’s resolutions of both issues seem correct, provided we stick with our presumption that “amateurism” is the established goal that antitrust should not disturb, and that a defining characteristic of amateurism is uncompensated play.

Antitrust is not price regulation by another name and it has never functioned well in that role. One way to deal with monopoly is to regulate the monopolist’s prices, and we do that for public utilities and some other firms all the time. But such regulation usually occurs under the oversight of a specialized agency with jurisdiction to collect the data it needs to set prices. Further, prices are frequently adjusted based on changing costs, sometimes annually or even more frequently. These are not suitable tasks for a federal court of general jurisdiction.

That is why the rule of reason in antitrust should not turn into price regulation by another name. The district court’s resolution of the *O’Bannon* compensation issue committed this error. Its trust fund solution sought to provide the right amount of compensation – a task befitting a regulatory agency but not an antitrust court. It is roughly akin to a court’s using antitrust to punish a cartel by requiring the cartel to charge a lower (but nevertheless cartel) price.

### **The Problem of Undercompensated College Athletes**

To be sure, the analysis offered here does not address a widely perceived problem, which is that universities make a great deal of money from elite athletes in high viewership sports (particularly football and basketball), and athletes do not receive a large enough share.

Conceding that point, most of the concerns about the level of amateur athlete compensation lie outside the competence of an antitrust tribunal. For example, a pure antitrust solution might be to permit student athletes to negotiate their salaries with no artificial limits. One likely result of that is that they would unionize, just as has occurred in professional athletics.

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Id. at 1075.

At that point the elaborate set of rules governing the relationship between antitrust and collective bargaining would kick in, including tolerance for multi-team agreements limiting athlete compensation. Those rules might very well result in higher compensation for at least a portion of student athletes than they currently receive. They would also entail a complete reconceptualization of the student athlete. In effect, we would have converted the NCAA into a set of owners of professional sports teams.

## Conclusion

Assuming that the Ninth Circuit decision stands, there are some ways that the compensation problem could be addressed.

First, the history of the medical school lottery for assigning residencies is useful. Historically, residencies for recent medical grads were set by a lottery in which most medical Schools participated, until an antitrust decree determined that this was an unlawful market allocation scheme. At that time Congress intervened with a statute that created an antitrust immunity for the medical schools to the extent of permitting them to continue their lottery.<sup>38</sup>

Such an approach would require legislation, but Congress could do something constructive. For example, it might disaggregate amateurism and collegiate sports to a limited extent by permitting a limited amount of compensation per athlete. Within the limit, NCAA schools could provide alternative rules setting higher limits than the current definition of amateurism permits.

Another alternative, which probably would not require legislation, would be for the NCAA to restructure itself as a franchise. As noted previously, Visa and MasterCard attempted to address some of their joint venture antitrust problems by restructuring themselves as single entities. The NCAA could do a version of the same thing. For example, it could establish itself as a separate entity that set up college football, made its rules, imposed academic and related qualifications, imposed rules to preserve amateurism, scheduled games, and negotiated broadcast contracts. Then it could license this system out to willing individual colleges as its franchisees. In that structure, provided it is kept sufficiently pure, the individual colleges would not be bargaining with each other. Rather each would bargain individually, and vertically, with its licensor. That system would look a little more like the Visa and Mastercard systems that exist today, with the central firm making the decisions about issuance, fees, and the like, while individual retailers license these rights individually. So instead of numerous horizontal decisions

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<sup>38</sup> 15 U.S.C. Sec. 37b, Confirmation of antitrust status of graduate medical resident matching programs: It shall not be unlawful under the antitrust laws to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program. Evidence of any of the conduct described in the preceding sentence shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws.

See *Jung v. Assoc. of Am. Medical Colleges*, 184 Fed. Appx. 9 (D.C.Cir. June 1, 2006) (applying this provision).

we have a set of vertical decisions, all of which are treated quite leniently under the antitrust laws.

Major League Soccer has an organizational form that roughly resembles this. The League actually owns all the teams and the putative “owners” are actually licensed managers.<sup>39</sup> This structure would have to be modified where the teams are parts of colleges and universities that have many other functions, but that is largely a problem in drafting the appropriate franchise agreement.

While both of these solutions are ways of getting around the antitrust laws, they are not antitrust solutions in the sense that a court would be within its powers to impose them.

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<sup>39</sup> Fraser v. Major League Soccer, LLC, 284 F.3d 47 (1<sup>st</sup> Cir. 2002).