University of St. Thomas Law Journal

Volume 18
Issue 1 *Protests and Reform: How Lawmakers and the Legal Community are Responding to the Killing of George Floyd*

Article 7

April 2022

Antitrust Implications of the NCAA's Restrictions on the Use of Name, Image, and Likeness of Student-Athletes

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NOTE

ANTITRUST IMPLICATIONS OF THE NCAA'S RESTRICTIONS ON THE USE OF NAME, IMAGE, AND LIKENESS OF STUDENT-ATHLETES

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ABSTRACT

Since its founding, the National Collegiate Athletic Association's ("NCAA") principle of amateurism has drawn a bright line between collegiate and professional sports for the sake of protecting the priority of higher education and the college experience. For years, the NCAA has weaponized amateurism to prevent student-athletes from profiting off their name, image, and likeness ("NIL"). As a result, student-athletes have sought judicial remedies by bringing suit against the NCAA and its member institutions. Student-athletes argue that the NCAA and its members are in violation of federal antitrust laws by conspiring to prevent third parties from competing in an open and free marketplace and restricting student-athletes from compensating from their NIL, an infringement on student-athletes' right of publicity ("ROP"). Consequently, in the past year, state legislatures including California, Colorado, and Florida have all signed bills into law which would allow third-party compensation to student-athletes for use of

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their NIL. Such laws will inevitably present antitrust questions as the NCAA continues to adhere to a strict concept of amateurism by implementing measures to restrict pay-for-play scenarios between third parties and student-athletes.

INTRODUCTION

Intercollegiate athletics bring about invaluable opportunities for student-athletes each year. Primarily, student-athletes receive an opportunity to pursue a bachelor's degree in a variety of fields and disciplines.[1] More than eight out of ten student-athletes will earn a bachelor's degree, and more than 35 percent earn a postgraduate degree.[2] Student-athletes also receive an opportunity to compete at a high level of competition in varsity athletics at member schools across three divisions of the National Collegiate Athletic Association ("NCAA").[3] Still, student-athletes are deprived of business and commercial opportunities which has sparked ongoing controversy in the NCAA and state legislatures. The legal implications that will arise from issues around compensation to student-athletes for use of their name, image, and likeness ("NIL") will surely leave a lasting impact on the world of college athletics as we know it.

NIL are the three components that make up the legal concept known as "right of publicity" ("ROP").[4] ROP involves instances where permission is required of a person to use their NIL.[5] For example, permission is not required for a sports blog to publish a photo of a student-athlete competing in a sport. The legal copyright belongs to the photographer, not the student-athlete pictured.[6]

The regulations on how student-athletes may use their NIL have garnered attention from lawmakers and have fueled controversy amongst the NCAA and its stakeholders in the past year. In 2020, student-athlete NIL has been an issue at the forefront of the NCAA Board of Governors—the NCAA's highest governing body who ultimately determines what changes the NCAA can and should make to better support student-athletes.[7] The Board of Governors is comprised of college administrators including university presidents, conference commissioners, athletic directors, and other

1. *See Student-Athletes*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/student-athletes (last visited Sept. 2, 2021).

2. *Id.*

3. *Id.*

4. *See* Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, https://rightofpublicity.com/brief-history-of-rop (last visited Sept. 28, 2021).

5. *Id.*

6. *Id.*

7. *See* Stacey Osburn, *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 29, 2020), http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions.

relevant stakeholders.[8] At its meeting in April 2020, the Board of Governors supported rule changes to allow student-athletes to receive compensation for third-party endorsements both related to and separate from athletics.[9] The Board of Governors also supported compensation for other student-athlete opportunities, such as social media businesses and personal appearances within the "guiding principles" originally outlined by the board in October 2019.[10] Some of the NCAA's guiding principles include:

- Protecting the recruiting environment by prohibiting inducements to select, remain at, or transfer to a specific member school;
- Assuring student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate;
- Maintaining the priorities of education and the collegiate experience to provide opportunities for student-athlete success;
- Making clear that compensation for athletic performance or participation is impermissible;
- Reaffirming that student-athletes are students first and not employees of the university; and
- Making clear the distinction between collegiate and professional opportunities.[11]

While student-athletes would be permitted to identify themselves by sport and school, the use of conference and school logos, trademarks, or other involvement would not be allowed in any endorsements with third parties.[12] The board has also emphasized that at no point should a university or college pay student-athletes for NIL activities, a model the NCAA fiercely opposes, referred to as "pay-for-play."[13]

As of the date of publication, the NCAA's three divisions have adopted new NIL rules for the 2021–22 academic year pursuant to the Board's recommendations.[14] The Board is requiring "guardrails"—or restrictions—around several NIL activities. Such restrictions may include barring NIL activities that would be considered pay-for-play, restricting school or conference involvement in securing endorsement deals for student-athletes, prohibiting the use of NIL for recruiting purposes by schools or boosters, and regulating the use of agents and advisors.[15]

8. *See NCAA Board of Governors*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/governance/committees/ncaa-board-governors (last visited Sept. 2, 2021).

9. Osburn, *supra* note 7.

10. Osburn, *supra* note 7.

11. Osburn, *supra* note 7.

12. Osburn, *supra* note 7.

13. Osburn, *supra* note 7.

14. Osburn, *supra* note 7.

15. *See Questions and Answers on Name, Image and Likeness*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/questions-and-answers-name-image-and-likeness (last visited Sept. 2, 2021).

Ultimately, when the NCAA's proposal regarding student-athletes compensated for third-party use of their NIL takes effect, one key question will be analyzed: whether the NCAA's adoption of broad or undefined restrictions on businesses seeking to compensate student-athletes for use of their NIL would make them vulnerable to federal antitrust lawsuits brought by student-athletes and third parties. Broad or undefined restrictions may be too ambiguous and burdensome in determining what class of businesses are excluded from doing business with student-athletes and may create an unreasonable restraint of trade.[16] Therefore, student-athletes and third parties are likely to challenge such restrictions as a violation of federal antitrust laws, particularly the Sherman Antitrust Act of 1890 ("Sherman Act").

Considering federal law, binding and persuasive authority, and the competitive interests of all market participants on the two key issues of student-athlete NIL, the NCAA will not be allowed to implement broad or undefined restrictions on businesses seeking to compensate student-athletes for use of their NIL.

ANALYSIS

Antitrust implications are the most imperative legal challenge the NCAA faces in its battle to preserve amateurism and restrict student-athletes from profiting from use of their NIL. The operative question is whether the NCAA's implementation of broad or undefined restrictions to exclude businesses seeking to compensate student-athletes for use of their NIL will be too burdensome on competition and an unreasonable restraint of trade. The Sherman Act is the governing federal antitrust statute enacted to prohibit activities that restrict interstate commerce and competition in the marketplace.[17] Under Section One of the Sherman Act, "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[18] "The main purpose of Section One is to disallow conspiracies between businesses that would ultimately harm consumers by causing higher prices in connection with goods and services and the creation and dissemination of inferior products and services that result from illegal restraints of trade."[19]

In a Section One Sherman Act claim, if the alleged antitrust violation is not per se illegal, the challenged violation is analyzed under the rule of

16. *See* PRACTICAL L. ANTITRUST, SECTION 1 OF THE SHERMAN ACT: OVERVIEW (2021), Westlaw W-016-3376.

17. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Sept. 2, 2021).

18. *See* 15 U.S.C.A. § 1 (West, Westlaw through Pub. L. No. 117-38); *see also* DARREN HEITNER, HOW TO PLAY THE GAME: WHAT EVERY SPORTS ATTORNEY NEEDS TO KNOW 151 (1st ed. 2014).

19. HEITNER, *supra* note 18, at 151–52; *see also* 15 U.S.C.A. § 1.

reason.[20] The rule of reason is a legal doctrine of antitrust law the courts use to analyze Section One to determine whether an activity unreasonably restrains trade or otherwise has an anticompetitive effect. Under the rule of reason, a burden-shifting test is utilized to evaluate whether a challenged antitrust violation substantially suppresses or destroys competition.[21] After the rule of reason is applied through the burden-shifting test, courts determine whether "the anticompetitive effect of the conduct outweighs any procompetitive benefit."[22]

I. In Order to Prove a Section One Violation, It Must Be Established That the NCAA's Restrictions Involve Interstate Commerce and Two or More Parties

In order to determine whether a given activity can be challenged under antitrust law, two threshold prongs must be met:[23] "First, because antitrust is governed under federal law, the initial step to any antitrust analysis should begin with a determination that the issue in question involves interstate commerce."[24] Second, there must be a showing that there are two or more parties involved with the alleged antitrust violation.[25] Applying the two prongs to the NCAA's broad or undefined restrictions on businesses seeking to compensate student-athletes for use of their NIL, excluded third parties and student-athletes will likely be successful in bringing a valid antitrust claim against the NCAA for excluding certain businesses from doing business with student-athletes.

A. The NCAA's broad or undefined restrictions on businesses involve interstate commerce.

The first step in the analysis is to determine whether the NCAA's restrictions on third parties involve interstate commerce. In other words, the alleged antitrust violation must involve an economic activity that involves two or more states. The rationale behind the first prong "is that Congress is not at liberty to regulate activities that take place solely within the borders of one state."[26] The Commerce Clause generally confers Congress with the exclusive power to regulate interstate commerce.[27] The Supreme Court gives an unequivocally broad scope to the government's regulation under

20. Practical L. Antitrust, Antitrust Rule of Reason (2021), Westlaw 9-522-6396 (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).

21. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 691 (1978).

22. Practical L. Antitrust, *supra* note 20 (citing Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997)).

23. Heitner, *supra* note 18, at 152.

24. Heitner, *supra* note 18, at 152.

25. Heitner, *supra* note 18, at 152; *see* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

26. Heitner, *supra* note 18, at 152.

27. *See* U.S. Const. art. 1, § 8, cl. 3.

the Commerce Clause.[28] The commerce power of Congress is limited to three broad categories: (1) the channels of interstate commerce (e.g. interstate shipment of goods), (2) the instrumentalities of interstate commerce (e.g. railroads), and (3) activities that substantially affect interstate commerce (e.g. agriculture).[29] Regarding the third category, the Supreme Court has ruled that courts only need to determine whether Congress has a "rational basis" for concluding that an activity has substantially affected interstate commerce.[30] The key question then is whether an activity in the aggregate—the whole class of instances—rationally affects interstate commerce.[31]

With respect to the NCAA's broad or undefined restrictions on businesses seeking to compensate student-athletes for their NIL, the alleged antitrust violation would involve interstate commerce because such an activity would be regulated under the Commerce Clause as it substantially affects interstate commerce. Businesses seeking to contract with student-athletes for use of their NIL may operate in a myriad of industries across the United States. Similarly, the NCAA has over a thousand member schools all across the country with at least one member school in every state.[32] Further, the NCAA is an organization that regulates intercollegiate athletics.[33] Intercollegiate athletics by its very nature affects interstate commerce as member schools from all around the United States compete against each other in various sporting events each year, many of which are nationally broadcast or otherwise involve economic activities.

Lastly, applying the rational basis standard, courts would likely construe the NCAA's broad or undefined restrictions on businesses as an activity that substantially affects interstate commerce. The rational basis standard considers whether Congress acts rationally in determining a class of activities to be an essential part of a larger regulatory scheme.[34] Congress would act rationally in determining that the broad or undefined restrictions on businesses from compensating student-athletes is a class of activities that is an essential part of a larger regulatory scheme. There are more than 480,000 NCAA student-athletes.[35] By implementing broad or undefined restrictions on businesses, the NCAA excludes companies from accessing a large potential market. Such a restriction would be harmful to businesses

28. *See* Wickard v. Filburn, 317 U.S. 111, 121–22 (1942).

29. United States v. Lopez, 514 U.S. 549, 558–59 (1995).

30. Gonzales v. Raich, 545 U.S. 1, 2 (2005).

31. *See Lopez*, 514 U.S. at 557.

32. *See What is the NCAA?*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Sept. 3, 2021).

33. *Id.*

34. *See Lopez*, 514 U.S. at 556–57.

35. *See* 2020-21 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE, NAT'L COLLEGIATE ATHLETIC ASS'N 2 (2020), http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf#:~:text=there%20are%20more%20than%20480%2C000,less%20than%202%25%20go%20pro.

and consumers in a free market. Additionally, the broad or undefined restrictions on businesses would adversely affect student-athletes by barring opportunities for them to profit from the use of their NIL. Thus, because the alleged antitrust violation involves economic activities between two or more states, and because the courts would reasonably have a rational basis for concluding that the alleged antitrust violation substantially affects interstate commerce, the first prong is satisfied.

B. The broad or undefined restrictions on businesses involve two or more parties.

The purpose of antitrust law is to prevent organizations from colluding to create a state of unfair competition in the marketplace that harms consumers and employees.[36] Yet, it is impossible for an organization to collude with itself.[37] Thus, the second prong that must be met—in order to determine whether the NCAA's broad or undefined restrictions on businesses can be challenged as an antitrust violation—is whether such an activity involves two or more parties. It is quite apparent that the NCAA's broad or undefined restrictions on businesses involves more than two parties. The most relevant stakeholders in the alleged antitrust violation may include the NCAA, third-party businesses, student-athletes, and consumers. Because there is an apparent showing of two or more parties involved in the alleged antitrust violation, the second prong is satisfied. Thus, excluded third parties and student-athletes can challenge the alleged antitrust violation under antitrust law.

II. Under the Rule of Reason Analysis, the Broad or Undefined Restrictions on Businesses Unreasonably Impairs Competition

Since a showing of a Section One violation has been established, the next step in the antitrust analysis of the NCAA's broad or undefined restrictions on businesses is an analysis under the rule of reason.[38] Courts apply the rule of reason through a burden-shifting test: (1) The plaintiff bears the initial burden of showing that the challenged restraint harms competition; (2) If the plaintiff succeeds, the burden shifts to the defendant to show that its behavior has procompetitive justifications; (3) If the defendant can establish a justification, the plaintiff has the opportunity to show that; (a) the restraint is not necessary to achieve the procompetitive goal; or (b) the goal can be achieved in a less restrictive way.[39]

36. *See* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997).
37. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 764 (1984).
38. *See* Practical L. Antitrust, *supra* note 20.
39. *See* Practical L. Antitrust, *supra* note 20.

A. Through a market analysis, excluded businesses and student-athletes would establish that the NCAA's broad or undefined restrictions harm competition.

The rule of reason analysis begins with the "harm of competition" factor.[40] A plaintiff bears the burden of proving that a defendant's action has or will substantially impair competition.[41] In this case, excluded third parties and student-athletes will bear the burden of proving that the NCAA's broad or undefined restrictions on businesses will substantially impair competition. A plaintiff can establish harm to competition through a "market analysis."[42] The market analysis requires: (1) defining the relevant market, (2) demonstrating the defendant had market power in the relevant market, and (3) showing the challenged restraint had a substantial adverse effect on competition.[43]

First, "[a] relevant market has a product component and a geographic component."[44] We begin with the product component. To define the relevant product market, excluded third parties and student-athletes must identify both the NCAA's product at issue and all the products that substantially compete with it.[45] Here, the "product" at issue is not necessarily a product offered in the sense of a traditional marketplace. Rather, the product at issue is the NIL of NCAA student-athletes. Moreover, the products that substantially compete with the NIL of NCAA student-athletes would be those products that are reasonably interchangeable with it.[46] Therefore, some may argue that the NIL of student-athletes competing in other college athletic associations such as the National Junior College Athletic Association ("NJCAA"), the National Association of Intercollegiate Athletics ("NAIA"), and the United States Collegiate Athletic Association ("USCAA") would be deemed products that substantially compete with the NIL of NCAA student-athletes. However, this argument is rather weak. The NCAA has a far greater number of student-athletes than any other college athletic association, which translates to a larger market share.[47] Additionally, NCAA student-athletes compete at higher levels of competition and NCAA member schools are significantly more recognizable than their counterparts in the NAIA or USCAA.[48] Because NCAA student-athletes compete at schools that are significantly more recognizable, with higher levels of competition,

40. *See* PRACTICAL L. ANTITRUST, *supra* note 20.

41. *See* PRACTICAL L. ANTITRUST, *supra* note 20.

42. Tops Mkt., Inc. v. Quality Mkts. Inc., 142 F.3d 90, 96 (2d Cir. 1998).

43. *Id*. at 96–97.

44. PRACTICAL L. ANTITRUST, *supra* note 20.

45. PRACTICAL L. ANTITRUST, *supra* note 20 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).

46. *See* PRACTICAL L. ANTITRUST, *supra* note 20; *see also Brown Shoe Co.*, 370 U.S. at 325.

47. *See generally* Christina Gough, *College Sports (NCAA) – Statistics & Facts*, STATISTA (June 29, 2021), https://www.statista.com/topics/1436/college-sports-ncaa.

48. *Id.*

an objective argument could be made that the NIL of NCAA student-athletes is more valuable because of the marketability of the NCAA student-athlete.

Second, in defining the relevant market, a plaintiff must define the relevant geographic component. To define the relevant geographic market, excluded third parties and student-athletes should identify the area in which the NCAA operates and where customers can obtain the product at issue.[49] Here, although the NCAA is headquartered in Indianapolis, Indiana, the NCAA is a member-led organization with 1,098 member schools across the United States.[50] Therefore, because the NCAA operates in every U.S. state, student-athletes' NIL is also located in every U.S. state. Next, third parties are market participants for the use of the NIL of student-athletes, it can be reasonably concluded that they are customers for the sake of this analysis.[51] Thus, because there is a presence of NCAA student-athletes in every U.S. state, it can be concluded that third parties can obtain the use of the NIL of student-athletes in every U.S. state. Therefore, the first element has been defined here.

The second element of the market analysis is demonstrating the defendant had market power in the relevant market. "Courts require a showing of market power because unless the defendant has the power to profitably raise prices or reduce output, it will not be able to harm consumer welfare."[52] "Market share is often considered a proxy for market power" in a market analysis.[53] "The higher a defendant's market share, the more likely the courts will find that the defendant has market power in a market analysis."[54] "Courts generally do not find market power for Section One purposes if a defendant has less than 30 percent of the relevant market."[55]

Here, the NCAA undoubtedly has a substantial market share of student-athletes. The NCAA is the largest collegiate athletic association with more than 500,000 student athletes competing across nearly 1,100 colleges and universities.[56] The next largest collegiate athletic association is the NAIA, with approximately 60,000 student athletes across 525 athletic pro-

49. *See* PRACTICAL L. ANTITRUST, *supra* note 20 (citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 (1963)).

50. *See* 2020-21 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE, *supra* note 35.

51. *See* Ross Dellenger, *NCAA NIL Proposal Prohibits College Athletes from Using School Logo, Endorsing Certain Businesses and More*, SPORTS ILLUSTRATED (Sept. 14, 2020), https://www.si.com/college/2020/09/14/ncaa-survey-proposal-name-image-likeness.

52. PRACTICAL L. ANTITRUST, *supra* note 20 (citing New York v. Anheuser-Busch, Inc., 811 F. Supp. 848, 871 (E.D.N.Y. 1993)).

53. PRACTICAL L. ANTITRUST, *supra* note 20 (citing Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 318 (8th Cir. 1986)).

54. PRACTICAL L. ANTITRUST, *supra* note 20.

55. PRACTICAL L. ANTITRUST, *supra* note 20 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26–29 (1984)).

56. *See* 2020-21 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE, *supra* note 35, at 2.

grams.[57] The substantial number of NCAA student-athletes across the United States practically dwarves the number of student-athletes in other collegiate athletic associations like the NJCAA and the NAIA. Additionally, because third parties seek to compensate student-athletes for use of their NIL due to the high marketability of some NCAA student-athletes, the value of the NIL of a student-athlete may be directly related to their level of marketability.[58] Because NCAA student-athletes attend significantly more popular, prestigious, and recognizable institutions, NCAA student-athletes are more marketable than student-athletes of other collegiate athletic associations.[59] Thus, the courts would reasonably conclude that the NCAA has a significantly higher market share and that the NCAA has far greater than 30 percent of the relevant market. Excluded third parties and student-athletes would reasonably establish that the NCAA possesses market power in the relevant market. The second element is clearly present here.

The third element of the market analysis requires a plaintiff to show that the challenged antitrust violation has or will have a substantial adverse effect on competition.[60] Generally, harm to a competitor is not sufficient. Rather, a plaintiff must show that the defendant's conduct diminishes overall competition and decreases consumer welfare.[61]

Here, the broad or undefined restrictions on businesses diminishes overall competition and decreases consumer welfare. The NCAA's broad or undefined restrictions on businesses diminishes overall competition in the marketplace because authorized third parties may be permitted to utilize the NIL of student-athletes while excluded businesses may not because of arbitrary restrictions. This will create an unfair competitive advantage in the marketplace for authorized third parties.

The NCAA will counter by arguing that overall competition will not be affected because the broad or undefined restrictions on businesses will have no effect on the sales of products or services. However, this argument will fail as the relevant market defined in the first element pertains to the use of the NIL of student-athletes as the product at issue. The product at issue is not defined as the innumerable products and services that third parties offer consumers, but rather the use of a student-athlete's NIL. Also, since the exclusions of certain businesses will not necessarily be limited to any particular industry, there is potential for unfair competitive advantages for authorized third parties in a wide range of industries. Thus, overall competition in many different industries could potentially be diminished if the

57. *See College USA*, ATHLETES ABROAD, https://athletesabroad.se/college-athletics (last visited Sept. 7, 2021).

58. *See* HEITNER, *supra* note 18.

59. *See 25 Best Colleges for Student Athletes*, AFFORDABLE SCHOOLS (Feb. 2019), https://affordableschools.net/25-best-american-colleges-student-athletes.

60. K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128 (2d Cir. 1995).

61. *Id.*

NCAA were to implement broad or undefined restrictions on businesses seeking to compensate student-athletes for use of their NIL.

Although NCAA Division I student-athletes often receive athletic scholarships, many could use the additional earning power from compensation for use of their NIL to financially assist themselves and their families. For instance, NCAA student-athletes reportedly do not have enough pocket money to afford food outside of their meal plans, and will at times go to bed hungry, while the NCAA and its affiliates profit from collegiate competition.[62] Athletic scholarships offer a large discount to student-athletes financing an education that can total hundreds of thousands of dollars, yet athletic scholarships still do not cover all of the expenses and costs of living for a college student.[63]

Consumer welfare will also decrease given the broad or undefined restrictions on businesses seeking to compensate student-athletes for use of their NIL. The consumer experience will unduly be affected with the NCAA's broad or undefined restrictions on certain businesses and the authorization of others. Many NCAA student-athletes, and college sports more generally, have a large impact and influence in the various regions, states, cities, towns, and communities across the United States.[64] The perceived economic and non-economic impact of student-athletes and college sports have been measured through job creation, infrastructure improvement, image promotion, crime and deviancy reduction, and other relevant measures.[65] Student-athletes are generally familiar and relatable to consumers in the community because they *are* consumers in their respective communities.

Further, the influence of student-athletes in endorsements and promotions will more than likely have a profound effect on consumers given the billions of dollars that are already pumped into NCAA athletics each year.[66] This is evidenced by celebrity endorsements and other highly recognized people being a very common marketing technique. "When a familiar face promotes a product, it makes it seem as if the product itself is familiar, which makes people more likely to buy it."[67] "Because of the concept of

62. *See* Sara Ganim, *UConn Guard on Unions: I Go to Bed 'Starving'*, CNN (Apr. 8, 2014), https://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html.

63. *Id.*

64. *See* David Larimore, Ph.D. & George Chitiyo, Ph.D., *Non-Economic Societal Impacts of Intercollegiate Athletics*, THE SPORT J. (Mar. 14, 2008), https://thesportjournal.org/article/non-economic-societal-impacts-of-intercollegiate-athletics.

65. *Id.*

66. *See* Colin Dwyer, *NCAA Plans to Allow College Athletes to Get Paid for Use of Their Names, Images*, NPR (Oct. 29, 2019), https://www.npr.org/2019/10/29/774439078/ncaa-starts-process-to-allow-compensation-for-college-athletes#:~:text=the%20NCAA%20has%20reported%20annual,Division%201%20men's%20basketball%20tournament.

67. Jeff Stibel, *Brain Science: Here's Why You Can't Resist Celebrity Endorsements*, USA TODAY (Nov. 3, 2017), https://www.usatoday.com/story/money/columnist/2017/11/03/brain-science-heres-why-you-cant-resist-celebrity-endorsements/827171001.

familiarity, seeing a celebrity arouses our emotions. It connects us to the product and makes it memorable."[68] Since student-athletes may become "celebrities" in their own respect in their college towns and communities, people become familiar with student-athletes which allows their endorsements and promotions to be more effective. Therefore, the NCAA's broad or undefined restrictions on businesses would adversely impact the welfare of the average consumer by restricting the number of opportunities for consumers to engage with student-athletes and the businesses and brands that contract with student-athletes for use of their NIL.

The NCAA will refute this argument by suggesting that consumer welfare will only increase with authorized third parties permitted to use the NIL of student-athletes. The NCAA will argue that the broad or undefined restrictions on businesses would have either a positive or no effect on consumer welfare because consumers in the market of those excluded businesses would not have alternative opportunities to engage with student-athletes via endorsement and promotion. However, the NCAA fails to recognize that by excluding businesses through the implementation of broad or undefined restrictions, the NCAA is reducing the output and potential sales of excluded businesses as well as decreasing the welfare of student-athletes who are also consumers. Still, even if the NCAA keeps its ban, the players might have ROP interests to sue and stop businesses from using their NIL without consent. Student-athletes couldn't demand compensation for their consent. But, if student-athletes were going to school in a state where they have a ROP, they could still stop such NIL use. Consequently, the NCAA's restrictions do not necessarily ensure that businesses will be able to use their NIL. Still, if not for the NCAA's broad or undefined restrictions on businesses, excluded businesses may lose out on the opportunity to engage with consumers in the community in a wide range of industries.

For the reasons above, the broad or undefined restrictions on businesses results in reduced opportunities for student-athletes to be compensated for their NIL. The potential loss of compensation decreases the welfare of student-athletes as consumers. Thus, because the NCAA's broad or undefined restrictions on businesses will likely diminish overall competition in the marketplace and decrease consumer welfare, the challenged antitrust violation will have a substantial adverse effect on competition. Hence, excluded businesses and student-athletes will likely make a sufficient showing of the three elements of the market analysis.

68. *Id.*

B. The NCAA would likely establish a procompetitive justification for the implementation of broad or undefined restrictions on businesses.

If the plaintiff succeeds in showing that the challenged antitrust violation harms competition, the second factor under the rule of reason analysis shifts the burden to the defendant to provide a procompetitive justification for the restraint.[69] Therefore, the NCAA bears the burden of showing a procompetitive justification for the broad or undefined restrictions on businesses seeking to compensate student-athletes for use of their NIL. As a general rule, the justification must relate to competition. The exception to the rule is that explanations dealing solely with public safety or public interest are generally not sufficient.[70] Courts have found various justifications acceptable including enhanced efficiency,[71] increased output, and reduced price.[72] Courts generally require defendants to produce evidence that the restraint actually achieves the procompetitive benefit claimed.[73]

The NCAA must make a showing that its broad or undefined restrictions on businesses would enhance procompetitive efficiencies, increase output, and reduce the price of the use of student-athletes' NIL. Still, the NCAA must proffer evidence that shows that the NCAA's exclusions actually achieve the procompetitive effects described.

A key procompetitive justification promulgated by the NCAA is the assertion that by excluding certain businesses from doing business with student-athletes, a procompetitive purpose is served by preserving the popularity of college sports as a product distinct from professional sports.[74] The integration of academics and athletics enables the NCAA to preserve its character while uniquely marketing itself.[75] Additionally, this procompetitive purpose is reflected in the NCAA's strict concept of amateurism which courts have recognized and favored.[76] The courts have found that the NCAA's current rules serve a procompetitive benefit by promoting the understanding of amateurism, which in turn helps preserve consumer demand for college sports.[77] Therefore, because the courts have ruled in favor of this procompetitive justification, the NCAA would likely succeed in arguing that the broad or undefined restrictions on businesses promote this goal.

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69. Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993).

70. *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695.

71. Paladin Assocs. v. Mont. Power Co., 328 F.3d 1145, 1157 (9th Cir. 2003).

72. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979).

73. Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 938 (7th Cir. 2000).

74. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1073 (9th Cir. 2015).

75. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984).

76. *Id.* at 103.

77. *O'Bannon*, 802 F.3d at 1059.

The NCAA would also argue that the broad or undefined restrictions on businesses would enhance the procompetitiveness of various industries that third parties operate in because the exclusions would encourage excluded businesses to seek alternative means of promotion and endorsement. The NCAA would show that this creates a procompetitive effect of efficiency as consumers in smaller markets will receive opportunities to engage with NCAA student-athletes contracted with authorized third parties, as well as student-athletes from other collegiate athletic associations contracted with excluded businesses. The NCAA would likely go on to argue that such exclusions would create opportunities for student-athletes in other collegiate athletic associations, such as the NAIA, to be compensated for use of their NIL by excluded businesses. Further, the NCAA would argue that the broad or undefined restrictions on businesses would generally increase output, measured by the amount of total student-athlete promotion and endorsement deals. The NCAA would also show that because the exclusions would serve to "open up the market" for the use of a student-athlete's NIL, the exclusions would naturally reduce the price of the use of a student-athlete's NIL, measured by the fair market value of compensation. The NCAA's argument is based on the trend of other collegiate athletic associations' legislation.[78]

On October 6, 2020, the NAIA passed the first legislation of its kind in college sports to allow its student-athletes the opportunity to be compensated for use of their NIL.[79] The NAIA legislation allows a student-athlete to receive compensation for promoting any commercial product, enterprise, or for any public or media appearance.[80] The NCAA would likely use the NAIA's recent legislation regarding student-athlete compensation for use of NIL as evidence of this procompetitive effect. In light of the recent NAIA legislation, the NCAA would argue that because other collegiate athletic associations are now permitting their student-athletes to be compensated for use of their NIL, the NCAA's broad or undefined restrictions on businesses enhance procompetitive efficiencies in the market as excluded businesses could seek to contract with student-athletes from other collegiate athletic associations.

However, the NCAA's potential argument ignores the fact that NCAA student-athletes are far more marketable than student-athletes of other collegiate athletic associations due to the number of resources and exposure NCAA student-athletes receive. For instance, an NCAA student-athlete's NIL may carry far more value than the NIL of a student-athlete from an NAIA institution. The NCAA's argument is grounded in the assumption

78. *See NAIA Passes Landmark Name, Image and Likeness Legislation*, NAT'L ASS'N OF INTERCOLLEGIATE ATHLETICS (Oct. 6, 2020), https://www.naia.org/general/2020-21/releases/NIL_Announcement.

79. *Id.*

80. *Id.*

that the NIL of all student-athletes is equal, yet it can be reasonably argued that the NIL of NCAA student-athletes carry much more weight and value due to larger athletic budgets, resources, and national exposure.

Ultimately, the NCAA may provide a reasonable procompetitive justification that the broad or undefined restrictions on businesses enhance market efficiency for the use of NIL of student-athletes and increases the number of opportunities for student-athletes of all athletic associations to be compensated for use of their NIL. The courts have held that "in order to preserve the character and quality of the 'product,' student-athletes must not be paid, must be required to attend class, and the like."[81] Except, "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."[82] The NCAA, therefore, plays a vital role in enabling collegiate athletics to preserve its character. As a result, it enables a product to be marketed which might otherwise be unavailable.[83] Thus, the NCAA would establish a legitimate procompetitive justification for the alleged antitrust violation.

C. The broad or undefined restrictions on businesses can be achieved in a less restrictive way.

Under the rule of reason, once a defendant has established a legitimate, procompetitive justification, the burden shifts back to the plaintiff to show that the procompetitive goal could be achieved by a less restrictive alternative.[84] As a general rule, a plaintiff must show that the less restrictive option would have a substantially lesser impact on competition.[85] The exception to the rule is that the practice need not be the least restrictive option to be legal.[86] If the challenged conduct is necessary to achieve the procompetitive goal, it is upheld.[87] The Supreme Court has held that the NCAA preserving competitive balance within its own members does not make restrictions on business with third parties tailored to such a procompetitive goal.[88] Moreover, assuming that the justification is legitimate, the courts generally view "that any contribution . . . made to athletic balance could be achieved by less restrictive means."[89] In *NCAA v. Univ. of Oklahoma*, the Court held that the NCAA's television plan on its face constituted a restraint of the operation of a free market, and the restraints were not justified on the basis

81. McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1344 (5th Cir. 1988) (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 102).

82. *Id.*

83. *Id.*

84. *Clorox Co.*, 117 F.3d at 56.

85. Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991).

86. *Id.*

87. Nat'l Bancard Corp. v. VISA, U.S.A., Inc., 596 F. Supp. 1231, 1257 (S.D. Fla. 1984).

88. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 97.

89. *Id.* (citation omitted)

of procompetitive effect.[90] Therefore, excluded businesses and student-athletes would be required to prove that the procompetitive effects of the broad or undefined restrictions on businesses could be achieved by less restrictive alternatives that would have a substantially lesser impact on competition.

The NCAA's procompetitive goals of efficiency, increased output, and reduced price could be achieved by less restrictive means. The NCAA's broad or undefined restrictions on businesses can be achieved by less restrictive options, such as limiting their restrictions to companies that conduct business in industries that are problematic by nature and companies that have been involved in prior NCAA recruiting infractions.[91] Limiting the NCAA's restrictions to these categories of businesses would have substantially less of an impact on competition. The NCAA's broad or undefined restrictions on businesses are too broad, burdensome, and unnecessary to achieve its procompetitive goals. Also, limiting the NCAA's restrictions to this class of businesses will achieve the NCAA's procompetitive goals. Although not the least restrictive option, barring such companies from doing business with student-athletes would preserve the NCAA's adherence to its guiding principles while still being able to achieve its procompetitive goals.

Industries that are problematic by nature may include gambling/sports-betting, alcohol and tobacco, and adult entertainment. Companies operating in these industries conduct business that is problematic by nature because of the implied conflicts with ethics, morality, and religion.[92] However, these industries also have legal implications as they are generally governed by differing state laws and regulations regarding legalization and minimum age requirements for participating and conducting business in such industries.[93]

Gaming law continues to evolve with many states expanding legalized gaming. But each state has different gambling laws, with some banning gambling in its entirety and others fully legalizing and regulating casinos and gambling.[94] Federally, the minimum legal drinking age is twenty-one years.[95] Moreover, some states restrict the sale of certain tobacco products or implement tobacco bans such as smoke-free laws prohibiting smoking in certain public areas.[96] In addition, regulation of the adult entertainment in-

90. *Id.*

91. *Id.*

92. *See* Jeffrey Moriarty, *Business Ethics*, STANFORD ENCYC. OF PHIL. (Nov. 17, 2016), https://plato.stanford.edu/entries/ethics-business/#VariBusiEthi.

93. *See Gambling Law: An Overview*, L. INFO. INST., https://www.law.cornell.edu/wex/gambling (last visited Sept. 7, 2021).

94. *See Nevada Casinos*, ONLINE U.S. CASINOS, https://www.onlineunitedstatescasinos.com/states/nevada-gambling (last visited Sept. 14, 2021).

95. *Age 21 Minimum Legal Drinking Age*, CDC, https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm (last updated Sept. 3, 2020).

96. *See Smokefree Air Laws*, AM. LUNG ASS'N, https://www.lung.org/policy-advocacy/tobacco/smokefree-environments/smokefree-air-laws (last updated Dec. 10, 2020).

dustry has generally been limited to prevent child pornography, and the failure to abide by such regulation may result in civil and criminal prosecutions.[97] Still, adult entertainment may be perceived as obscene and indecent under society's standards.[98] Thus, the NCAA may achieve its procompetitive goals in a less restrictive manner by limiting its exclusions to companies that operate in problematic industries.

Instead of potentially excluding a broad category of businesses by implementing undefined restrictions to achieve its procompetitive goals, the NCAA could achieve those goals by narrowly excluding those companies who have committed NCAA recruiting infractions in the past. This less restrictive alternative would increase competition in the market by allowing more businesses to compensate student-athletes for use of their NIL while also barring companies that have violated NCAA's recruiting rules in the past. As a result, limiting the NCAA's restrictions in this way would have the same procompetitive effects that the NCAA proffers including enhanced efficiency, increased output, and reduced price.

Limiting restrictions to those companies involved in past recruiting infractions would have a substantially lesser impact on competition because it narrows the broad scope of businesses, and more concretely, specifies a category of businesses that may be excluded from compensating student-athletes for use of their NIL. In addition, considering whether a business has been involved with NCAA recruiting infractions in the past, in conjunction with whether the business operates in an industry problematic in nature, creates a more "bright-line rule" for the NCAA and businesses seeking to contract student-athletes for use of their NIL. The less restrictive alternative also eliminates arbitrary case-by-case determinations of whether broad or undefined restrictions apply to certain businesses in violation of the NCAA's guiding principles. Therefore, considering all the factors in the burden-shifting test under the rule of reason analysis, the broad or undefined restrictions on businesses seeking to compensate student-athletes for use of their NIL unreasonably impairs competition.

III. The Supreme Court's Ruling and Dicta from NCAA v. Alston Rejected the Proposition That the NCAA Is Immune from Federal Antitrust Law

On June 21, 2021, the United States Supreme Court unanimously ruled that the NCAA's attempt to limit compensation to student-athletes to preserve their amateur status violates antitrust law and is subject to the normal

97. *See* Corita R. Grudzen & Peter R. Kerndt, *The Adult Film Industry: Time to Regulate?*, NCBI (June 19, 2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1892037.

98. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

rule of reason analysis applied in antitrust cases.[99] However, the Court's ruling was perceived as rather narrow, as it only overturned those NCAA rules that restrict the amount that schools can compensate student-athletes for education-related benefits.[100] Still, the implications of *Alston* have called into question the NCAA's ability to limit compensation to student-athletes in other areas, particularly NIL, and will continue to influence the course of NCAA amateurism rules in the coming years.

In *Alston*, the Court held that the district court did not err in finding that the NCAA violated the Sherman Act by limiting the education-related benefits schools could offer student-athletes, such as rules limiting scholarships for graduate or vocational school, payments for academic tutoring, or paid post-eligibility internships.[101] The Court went on to hold that the district court properly applied a rule of reason analysis and nowhere required the NCAA to show that its compensation rules constituted the least restrictive means of preserving consumer demand, and it was only after finding that the restraints were stricter than necessary to achieve demonstrated procompetitive benefits that the district court declared a violation of the Sherman Act.[102] The Court sustained the district court's analysis of the impact of the NCAA's restrictions on education-related benefits because the analysis was based upon "an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility."[103]

Notably, in Justice Kavanaugh's concurrence, he powerfully maintained that "the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges every year."[104] Justice Kavanaugh stressed the importance of the Court's holding that the normal rule of reason analysis be applied to NCAA rules restricting the compensation of student-athletes.[105] Justice Kavanaugh took his antitrust analysis further, concluding that "the NCAA's business model would be flatly illegal in almost any other industry in America [because] [n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate . . . The NCAA is not above the law."[106]

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99. Samuel Estreicher & Zachary Fasman, *NCAA v. Alston: A Brave New World for College Sports*, VERDICT (June 25, 2021), https://verdict.justia.com/2021/06/25/ncaa-v-alston-a-brave-new -world-for-college-sports.

100. *Id.*

101. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166 (2021).

102. *Id.*

103. *Id.*

104. *Id.* at 2168 (Kavanaugh, J., concurring).

105. *Id*. at 2167.

106. *See NCAA v. Alston Signals Peril for the NCAA's Amateurism Defense But Implications for Antitrust Go Well-Beyond Collegiate Sports*, CROWELL & MORING, LLP (June 23, 2021), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/NCAA-v-Alston-Signals-Peril-for-

Although *Alston* was not about NIL rights, the impact of *Alston* will likely influence the application of the Sherman Act. Not only will *Alston* likely become a go-to decision for framing the Sherman Act's rule of reason analysis, but, for the first time, the Court recognized that restraints can also be exonerated with a "quick look" approach—a lower antitrust standard of review.[107] The Court explained, for example, that agreements which are needed to produce a sports league—such as the number of players and the time of play, but not wages—could pass muster with a quick look, providing an especially powerful tool to joint venture participants.[108] Yet, a quick-look analysis does not extend to restrictions on "pay-for-play," which requires a more detailed analysis of the impact of those rules on the product or consumer market.[109]

The Court also suggested that precedent may be flexible in antitrust cases to reflect industry changes over time. In *Alston*, the NCAA relied in part on *NCAA v. Board of Regents of Univ. of Okla.*, the Supreme Court's 1984 NCAA case in which the Court stated that "the preservation of the student-athlete in higher education . . . is entirely consistent with the goals of the Sherman Act."[110] "After dismissing the comment as dicta, the Court added that the analysis of whether conduct is an antitrust violation may change as 'market realities' change."[111] In *Alston*, the Court concluded that market realities had changed, noting in part the astronomical increase in revenue associated with the NCAA's athletic programs without explaining how changes in revenue are relevant to the antitrust analysis.[112]

Lastly, on June 30, 2021, the NCAA's Board of Directors adopted an interim rule change that opened the door for student-athletes to begin engaging in NIL activity.[113] The temporary rule change instructs schools to set their own policy for what should be allowed regarding NIL rights with minimal guidelines. Accordingly, on July 1, 2021, six state laws pertaining to student-athlete NIL compensation went into effect.[114] As a result, some prominent NCAA student-athletes have begun to sign endorsement deals in those states with active NIL legislation.

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the-NCAAs-Amateurism-Defense-But-Implications-for-Antitrust-Go-Well-Beyond-Collegiate-Sports.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 120.

111. *See* CROWELL & MORING, LLP, *supra* note 106.

112. *See* CROWELL & MORING, LLP, *supra* note 106.

113. *See* Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

114. *Id.*

CONCLUSION

Congress enacted the Sherman Act to disallow conspiracies between businesses that would ultimately harm competition by causing higher prices in connection with goods and services and creating unreasonable restraints on trade in the marketplace. Student-athletes and third parties would likely be successful in bringing a suit against the NCAA under Section One of the Sherman Act because the NCAA's implementation of broad or undefined restrictions involves interstate commerce and two or more parties. In addition, under the rule of reason analysis, the NCAA's broad or undefined restrictions unreasonably harms competition. Even though the NCAA is likely to establish procompetitive goals in implementing such restrictions, student-athletes and third parties will likely show that such procompetitive goals can be achieved in a less restrictive way. There are several less restrictive alternatives the NCAA could implement to achieve its procompetitive effect, including limiting its exclusion of businesses permitted to compensate student-athletes for use of their NIL to companies operating in industries that are problematic by nature and to companies who have been cited for violating NCAA recruiting rules in the past. Broad or undefined restrictions are too ambiguous and burdensome in determining what category of businesses are excluded from contracting with student-athletes. Therefore, by limiting restrictions, the NCAA will achieve its procompetitive goals while also having less of an adverse effect on competition in the marketplace. The Supreme Court's ruling in *Alston* will also impact future antitrust analysis and provides a blueprint for potential plaintiffs seeking additional litigation regarding NIL rights for student-athletes.