# THE NCAA: A CARTEL IN SHEEPSKIN CLOTHING


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1 We owe this description to Nobel Laureate Gary S. Becker. Gary S. Becker, *The NCAA: A Cartel in Sheepskin Clothing*, Business Week, Sep. 14, 1987, p. 24. Professor, Department of Economics, University of Florida and Affiliate Faculty. Levin College of Law, University of Florida. Assistant Professor, Sport Management, University of Michigan.

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## The NCAA: A Cartel in Sheepskin Clothing

*By Roger D. Blair & Wenche Wang*


In spite of enjoying substantial commercial success, the National Collegiate Athletic Association ("NCAA") continues to limit the compensation of student-athletes through collusive monopsonistic restraints. The NCAA benefits from an antitrust exemption that can be traced to the *Board of Regents* (468 U.S. 85 (1984)) decision in 1984. In this paper, we examine the NCAA's unique buyer cartel operation when antitrust attack is no longer a concern, including its organization structure and implementation of a wide array of restrictions. We further analyze the vitality of the antitrust exemption and the NCAA's recent antitrust challenges.

# I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) is a 1200-member cartel that exercises considerable monopsony power in the market for collegiate athletes. Ordinarily, buyer cartels are unlawful *per se*, but the NCAA enjoys a peculiar antitrust exemption when it comes to its employment of collegiate athletes. This exemption can be traced to the Supreme Court's misguided decision in its *Board of Regents* opinion.[2] As a result of this antitrust exemption, the NCAA cartel operates openly for all the world to see. Since its operations need not be clandestine, organizing and implementing the cartel is less complicated. Moreover, since the cartel rules are spelled out in its *Operations Manual*, cartel communication is facilitated.[3]

In this article, in Section II, we begin with a brief discussion of the Supreme Court's blunder in its *Board of Regents* opinion, which granted antitrust immunity to the NCAA in the athlete labor market. In Section III, we present the standard, bare bones model of monopsony and explain the adverse economic consequences. In Section IV, we explore the NCAA as a buyer cartel and examine the wide array of restrictions aimed at improving cartel profit. In Section V, we analyze the current vitality of the antitrust exemption along with current antitrust challenges. In Section VI, we close with some concluding remarks.

# II. ANTITRUST EXEMPTION

President Theodore Roosevelt's concern over the safety of college athletes resulted in the formation of what has become the NCAA. From its somewhat humble beginnings, the NCAA has flourished over the last century. Currently, there are over 1,200 member institutions. These colleges and universities are divided into Division I, II, and III. The rules vary a bit across the three divisions in ways that reflect each institution's emphasis on athletics. Our focus is on Division I, which contains the largest and most prominent athletic programs.

The NCAA is a reasonably big business. The colleges and universities vary considerably in their size and profitability. Collectively, however, their budgets amount to several billion dollars. In Table 1, we set out the 10 athletic departments with the highest revenue in 2019.

**Table 1. Top Ten Athletic Budgets**

| Rank | School | Revenue |
|---|---|---|
| 1 | University of Texas | $223,879,781 |
| 2 | Texas A&M University | $212,748,002 |
| 3 | Ohio State University | $210,548,239 |
| 4 | University of Michigan | $197,820,410 |
| 5 | University of Georgia | $174,042,482 |
| 6 | Pennsylvania State University | $164,529,326 |
| 7 | University of Alabama | $164,090,889 |
| 8 | University of Oklahoma | $163,126,695 |
| 9 | University of Florida | $159,706,937 |
| 10 | Louisiana State University | $157,787,782 |

Note: Data were obtained from USA Today. https://sports.usatoday.com/ncaa/finances

2 *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). The central antitrust issue in *Board of Regents* involved NCAA restraints on television contracts. The Court found these restraints to be impermissible, but then went on to permit collusive monopsony in the athlete labor market.

3 NCAA (2020). 2020-2021 NCAA Division I Manual. The Manual is available to the public at https://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx. There are similar manuals for Divisions II and III.

Coaches and administrators are paid handsomely. For example, Mark Emmert, president of the NCAA, enjoyed a salary of $2.7 million for the 2018 calendar year[4]; Grey Sankey, the Commissioner of the Southeast Conference, earned $2.6 million in the 2019 fiscal year[5]. Football coaches can earn multi-million dollar salaries.[6] Everyone — well, almost everyone — associated with college sports is paid well. The most prominent exception is the athletes. Due to the monopsonistic collusion of the NCAA and its members, employment has been limited[7] and the wage paid has been depressed.[8] In other labor markets, this conduct would amount to a *per se* violation of Section 1 of the Sherman Act. But the NCAA enjoys an antitrust exemption, which can be traced to the Supreme Court's unfortunate ruling in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.[9] The NCAA had been controlling football television rights since the 1950s.

It limited the number of football games aired on TV over the concern of a shift away from game attendance. In 1977, a group of universities with prominent football programs formed the College Football Association ("CFA") in order to negotiate better TV contracts to televise college football games. In 1981, the CFA negotiated a more favorable contract with NBC. In response, the NCAA threatened to sanction any school that participated in the NBC deal and the punishment would extend beyond the football program. This led to the *Board of Regents* antitrust suit. The district court found that the NCAA's restrictive TV plan raised prices, reduced quantity, and was unresponsive to consumer demand. Accordingly, the court found that the plan was a *per se* violation of §1 of the Sherman Act. On appeal, the circuit court agreed with the district court. The NCAA appealed the rulings to the Supreme Court, which granted *certiorari*. In reviewing the lower court decisions, the Supreme Court found that the NCAA's TV plan restrained competition by restricting the number of televised games and eliminating price competition. In most circumstances, such agreements would be unlawful *per se*. However, the Supreme Court found that the NCAA's restraints warrant rule-of-reason treatment.[10]

In its attempts to justify a clearly unreasonable restraint, the NCAA argued that it was necessary to protect amateurism. While the Supreme Court did not excuse the NCAA's conduct with regard to television contracts, it did agree that the NCAA had to preserve the "revered tradition of amateurism" in intercollegiate athletics. Thus, the Supreme Court conferred an antitrust exemption for the NCAA's dealings in the athlete labor market.

> Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics… The 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, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die…[11]

4 S. Berkowitz, (2020, June 2). NCAA president Mark Emmert credited with $2.7 million in total pay for 2018 calendar year. *USA Today*. Retrieved from: https://www.usatoday.com/story/sports/2020/06/02/mark-emmert-total-pay-2018-calendar-year/3123547001/.

5 S. Berkowitz, (2020, July 12). Power Five conferences had over $2.9 billion in revenue in fiscal 2019, new tax records show. *USA Today*. Retrieved from: https://www.statesman.com/story/sports/college/2020/07/12/power-five-conferences-had-over-29-billion-in-revenue-in-fiscal-2019-new-tax-records-show/113870976/.

6 There are 82 football coaches in Division I who were paid at least $1.0 million in 2020. At the top is Alabama's Nick Saban with a salary of $9.3 million per year. NCAA Salaries. USA Today. Retrieved from: https://sports.usatoday.com/ncaa/salaries/.

7 Employment (with grant-in-aids) by sport is spelled out in detail in NCAA Bylaws 15.5.

8 The maximum payment is spelled out in detail in NCAA Bylaws 15.0.

9 *Ibid.*

10 For a critical look at the Court's reasoning, see Herbert Hovenkamp, *The NCAA and the Rule of Reason*, 52 Review of Industrial Organization 323. (2018)

11 *Board of Regents* at 117, 120.

The NCAA alleges that it has a pro-competitive justification for its panoply of restraints that limit the compensation of student-athletes.[12] Specifically, the NCAA claims that these restraints preserve amateurism, which it argues is crucial to the success of the intercollegiate athletic programs of its members. The Supreme Court has thus far agreed with the NCAA's position and held that the NCAA could require student athletes to be amateurs but failed to recognize that an amateur apparently is anyone so designated by the NCAA.[13]

The scholarship student athletes are not amateurs. They are paid in kind: tuition and fees, room and board, and books. It is also permissible to include additional money to bring the scholarship up to "full cost of attendance." At private schools, the full cost of attendance may exceed $70,000, which is $10,000 above the median household income in the United States. The benefits also expand to preferential registration to accommodate practice schedules, tutoring as needed, and supervised strength and conditioning in and out of season. Student athletes are still considered amateurs simply because the NCAA says so. With the legal protection provided by the Supreme Court's *Board of Regents* decision, the NCAA and its members could safely restrict competition in the market for student-athletes in a variety of ways, such as restrictions on the number of employees, limitations on grants-in-aid, limits on contract duration, onerous transfer rules, and bans on sports agents.

## III. THE ECONOMICS OF BUYER CARTELS

For many years no one paid much attention to employer cartels. Recently, however, they have attracted a good deal of attention from the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") as well as classes of underpaid employees. In fact, the DOJ and the FTC issued *Antitrust Guidance for Human Resource Professionals*[14] to alert employers that collusion in the labor market will be challenged as a *per se* violation of Section 1 of the Sherman Act. The Agencies underscored their competitive concerns with an admonition that they would file criminal, rather than civil, suits. In addition to government actions, there have been numerous antitrust class actions filed on behalf of employees who have been injured.

Employer cartels have emerged in the markets for temporary duty nurses,[15] hospital nurses,[16] hardware and software engineers,[17] digital animators,[18] au pairs,[19] fashion models,[20] medical school personnel,[21] and mixed martial arts fighters.[22]

The economic effects of these employer cartels are easily understood with a simple model of collusive monopsony.

In Figure 1, D represents the demand for labor services and S represents supply. If this labor market is competitive the equilibrium wage and employment level would be $w_1$, and $L_1$, respectively.

Employer surplus is the triangular area $abw_1$, while employee surplus is captured by the triangular area $w_1bc$. Social welfare (or total welfare) is the sum of employer and employee surplus, which is area $abc$ in Figure 1. Given the supply and demand in this labor market, social welfare is maximized at the competitive equilibrium. The maximization of social welfare is the economic rationale for protecting and promoting the competitive process.

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12 Indeed, the term "student athlete" was invented in 1964 by Walter Byers (the first executive director of the NCAA) to avoid liability for workers' compensation. Under the guise of amateurism, they can restrict compensation below the competitive level to reduce their costs and thereby improve their profits.

13 According to Google's Online Dictionary, an amateur is a person who engages in a pursuit – especially a sport – on an unpaid basis.

14 Department of Justice and Federal Trade Commission. *Antitrust Guidance for Human Resource Professionals.* (2016). Available at: https://www.justice.gov/atr/file/903511/download.

15 *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital* 135 F. 3d 740 (11th Cir. 1981).

16 *Cason-Merenda. v. Detroit Medical Center*, Case No. 2:06-cv-15601.

17 *United States v. Adobe Systems, Inc.* 10-cv-01629-RBW (2011).

18 *United States v. Lucas Film, Ltd.* 10-cv-02220-RBW (2010).

19 *Beltran v. InterExchange Inc.*, No. 17-1359 (10th Cir. 2018).

20 The Council of Fashion Designers of America, Docket C-3621. (1995)

21 *Seaman v. Duke University*, 15-cv-00462 (2019).

22 *Le et al. v. Zuffa, LLC, d/b/a/ Ultimate Fighting Championship and UFC* Case No. 2:15-cv-01045 RFB-BNW (D. Nev. 2018)

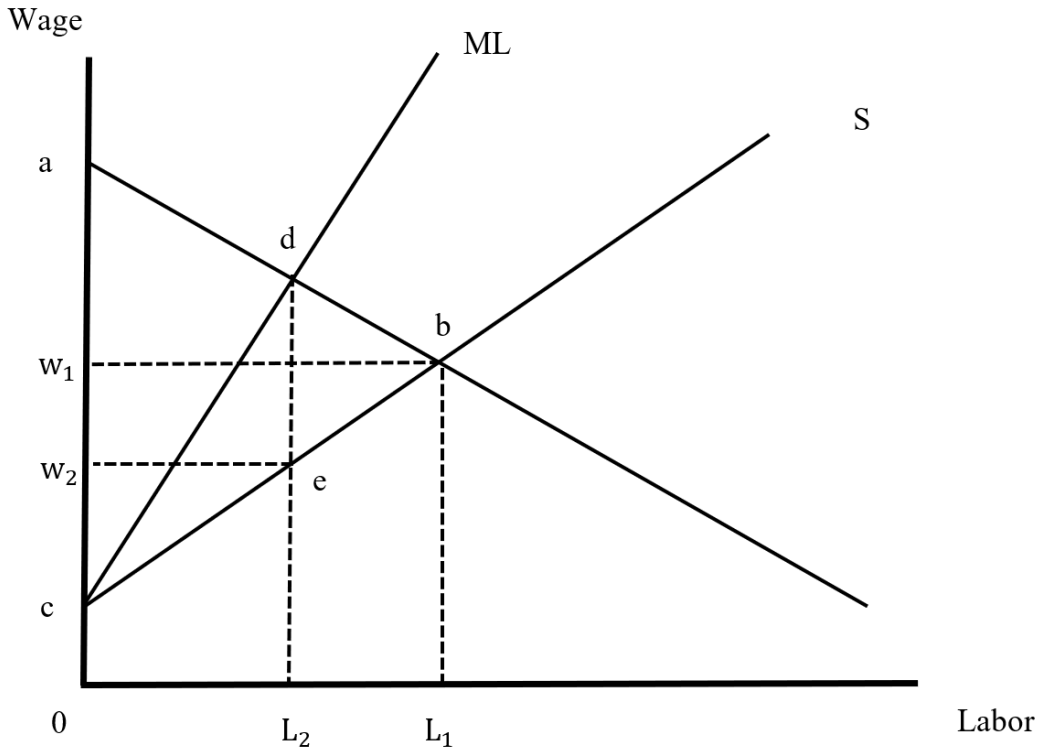


Figure 1: Competition and Monopsony in the Labor Market

If the employers join forces in an employer cartel, undesirable economic effects emerge. In order to maximize cartel profits, the cartel members must restrict total employment to the point where the demand is equal to the marginal expenditure on labor.[23]

In order to maximize profit, the collaborators will reduce employment from $L_1$ to $L_2$ and reduce the wage paid from $w_1$ to $w_2$. The employer surplus then rises from area $abw_1$ to $abew_2$. Employee surplus falls from $w_1bc$ to $w_2ec$. The triangular shaded area $deb$ represents the loss in social welfare. Employee surplus equal to $(w_1 - w_2)L_2$ is converted into employer surplus. The main economic objection to buyer cartels is the loss in social welfare. But the importance of the wealth redistribution from labor to the firms should not be ignored. With these economic principles in mind, we turn our attention to a more detailed examination of the NCAA cartel as it pertains to intercollegiate athletes.

## IV. THE NCAA CARTEL

In most cases, organizing and implementing a buyer cartel is no mean feat. First, the prospective cartel members must agree to settle on a scheme to reduce employment in order to reduce wages and thereby improve profits. Second, they have to work out the details of the collusive arrangement and a plan for implementation. Finally, they have to monitor one another to correct any misunderstandings and detect any cheating that may occur. Ordinarily, buyer cartels are *per se* violations of the Sherman Act and, therefore, the cartel must proceed in a clandestine fashion. This last problem is of no concern to the NCAA and its members.

Since the NCAA enjoys an antitrust exemption, it can operate openly, which reduces the dangers of miscommunication or misunderstanding. The members meet once a year, but the work of committees and sub-committees goes on all year long. Proposals for changes in the rules are debated and votes are taken. The current rules governing the business of intercollegiate athletics are spelled out in the Operations Manual. With respect to the athletes, the rules appear to be aimed at maximizing the cartel profit.[24]

23 For the technical details, see Roger D. Blair and Christine Piette Durrance, *The Economics of Monopsony* in W. Dale Collins, ed. Issues in Competition Law and Policy (2008).

24 Our focus is on Division I where athletics, especially football and men's basketball, are big business.

### *A. Employment and Wages*

In the previous section, we have seen that both employment levels and wages must be restricted in order to maximize cartel profit. In football, a school may not employ more than 85 players. In men's basketball, the limit is 13. In both sports, the school may pay the athletes in kind — room, board, tuition, fees, and books, which is referred to as a "grant-in-aid." The school may add to this sum an amount that raises the payment to the estimated full cost of attendance. Consequently, it is simply not true that the athletes are amateurs.[25]

Although this payment seems like pretty hefty compensation, it is still a binding constraint on the schools. Left to their own devices, the compensation for at least some of the athletes would be higher than the prescribed maximum. If a school is caught paying more than the total cost of attendance, the NCAA can impose some heavy sanctions: loss of bowl revenue, loss of TV money, ban on championships, loss of scholarships, among others.

### *B. Revenue Sharing*

In our bare bones model of collusive monopsony, we ignored an extremely important issue: dividing the spoils. Most schools are members of conferences, which are configured and occasionally rearranged for economic reasons. The Big Ten, for example, used to include natural, regional rivalries. Its members included Illinois, Indiana, Iowa, Michigan, Michigan State, Minnesota, Northwestern, Ohio State, Purdue, and Wisconsin. Now, the Big Ten also includes Maryland, Nebraska, Penn State, and Rutgers.

There is substantial revenue sharing within conferences. For example, bowl revenues, television revenues, play-off revenues, and the revenues generated by March Madness are shared according to some agreed upon formula.[26] For members of the major conferences, the shared revenues are substantial. The University of Florida, a member of the Southeast Conference, was awarded $44.6 million for the 2018 - 2019 fiscal year[27] and $45.5 million for the 2019-2020 fiscal year[28] as its share of television agreements, post season bowl games, the College Football Playoff, the SEC Football Championship, the SEC Men's Basketball Tournament, and NCAA championships. Additionally, member schools that participated in football bowl games retained a combined total of $26.8 million for 2018-2019 and $20 million for 2019-2020 to "offset travel and other related bowl expenses."

### *C. Non-Price Competition*

Many years ago, George Stigler pointed out that non-price competition could raise cartel costs and dissipate cartel profits.[29] In other words, it does no good to restrict employment and reduce the wage to profit-maximizing levels without similarly restricting non-wage competition. It is clear that the NCAA and its members have taken this economic lesson to heart. In addition to obvious limits on wage and employment levels, the NCAA's rules restrict non-price competition in an effort to minimize costs and thereby maximize cartel profits.

Cartel profit can be enhanced through other cost cutting measures, i.e. further restraints on competition in the athlete labor market. We examine a few of the additional restraints here.

25 The athletes are amateurs simply because the NCAA says that they are amateurs. It revises its definition of "amateur" when it is convenient for the NCAA and its members to do so.

26 Not all revenue is shared. Stadium revenue, concessions, and endorsement money are not.

27 SEC announces 2018-2019 revenue sharing. Retrieved from: https://www.secsports.com/article/28600022/sec-announces-2018-2019-revenue-distribution.

28 SEC announces 2019-2020 revenue sharing. Retrieved from: https://www.secsports.com/article/30834010/sec-announces-2019-20-revenue-distribution.

29 George J. Stigler, Price and Non-price Competition, 76 Journal of Political Economy 149 (1968).

### *D. Transfer Rules*

Until recently, once an athlete committed to playing for a school, he or she faced major difficulties in transferring to another school, since they required permission from the school. The coach who signed the player could change jobs, but the player was stuck. Additionally, schools may not compete for talent by encouraging another school's athletes to transfer. In other words, the receiving school may not initiate the process. The extent to which the transfer rules restrained mobility was revealed by the extensive activity in the new transfer portal.[30]

### *E. Contract Duration*

In spite of restrictive transfer rules, between 1973 and 2012, the NCAA rules allowed only one-year contracts for the players. If a player was injured and could not perform, he or she could have been denied a scholarship for the next year.[31] The benefit of the one-year rule to the school is obvious. It shifts the financial risk of a career-ending injury from the employer to the employee. With a one-year contract that can be renewable for up to four additional years, if a player is injured and can no longer compete, the contract may not be renewed. If the athlete had received a multi-year contract, even if the player cannot compete, the school will still be responsible for the student's tuition and other stipends. Therefore, the expected costs for renewable one-year contracts are much lower than multi-year contracts.

In the traditional labor market, renewable short-term contracts may work in the employees' favor. A competitive employee may be able to negotiate for a better contract at renewal, which may not have happened with a long-term contract. But, better terms are not possible with the NCAA contracts. The grant-in-aids provided to the student-athletes are always capped at tuition and cost of living. Therefore, student athletes are always better off if they were at least guaranteed a long-term contract, with no hope of gaining a better contract after their one-year contract.

### *F. Limits on Recruiting*

Recruiting can be expensive, so it is in the economic interest of the NCAA's members to keep down those costs. They do this in a variety of ways. The number of fully paid official visits for each athlete is limited. Although the limit varies by sport, each athlete's total number of official visits is limited. Perhaps more importantly the duration of an official visit is restricted to 48 hours. While the prospective recruit does not have to stay at the "Sleep Cheap Motel," the accommodations must be modest and the meals may not be lavish. The visiting athlete does not have to take a bus, but he or she must fly coach rather than first class[32].

### *G. Extraordinary Benefits*

There are numerous ways in which a student athlete might receive extra benefits. Cash payments from coaches or supporters are strictly forbidden. Less obvious are things like free game tickets, jerseys and other athletic gear. The NCAA bylaws clearly lays out the restriction on such non-monetary benefits. For example, during a perspective student's official visit, there is a $75 dollar limit a day to cover the entertainment costs of the visitor. Additionally, this $75 cannot be used to buy T-shirts or any other school mementos[33].

30 Roger D. Blair and Wenche Wang. *The NCAA's Transfer Rules: An Antitrust Analysis*. 11 Harvard Journal of Sports & Entertainment Law 1 (2020).

31 The NCAA now permits multi-year contracts, but it is up to the school and the coach.

32 The NCAA Bylaws 13.6 Official (Paid) Visit details policies and restrictions on official visit during the recruiting process.

33 See NCAA Bylaw 13.6 for more detailed restrictions.

# V. ANTITRUST TROUBLES ON THE HORIZON

The NCAA has been able to fend off several antitrust challenges over the past three decades by pointing to its *Board of Regents* decision. But there are cracks in the foundation. The larger cases may do some serious damage to NCAA's antitrust immunity.

### *A. O' Bannon v. NCAA*[34]

Ed O'Bannon was a star player on UCLA's NCAA Champion team in 1995. In fact, he was the tournament's most outstanding player. Years later, O'Bannon discovered that his image and likeness were being used without his permission. O'Bannon could see his likeness in a sports video game *NCAA Basketball 09* by Electronic Arts[35]. In July 2009, O'Bannon filed a lawsuit against the NCAA and the Collegiate Licensing Company for denying him a share of the profits earned by the NCAA through sale of television, online reruns, jerseys, video games and other paraphernalia. He alleged that the NCAA had violated the Sherman Act due to the agreement of the NCAA and its members to withhold from the athletes any returns on the use of his or her name, image, and likeness. This lawsuit was soon joined by NBA legends Oscar Robertson and Bill Russell, eight former college football and basketball players, as well as six active college football players. The named plaintiffs filed an antitrust class action against the NCAA to challenge its restriction on compensation for student athletes for their name, image, and likeness. The Electronic Arts and Collegiate Licensing Company settled with the class for $40 million but the trial against the NCAA lasted till 2014.

On August, 2014, District Court Judge Claudia Wilken from the Northern District Court of California ruled that NCAA's rule forbidding compensation to the athlete for the use of his or her name, image, and likeness violated Section 1 of the Sherman Act. She suggested that the NCAA's practice had a significant anticompetitive effect on the college education market. In 2015, the Ninth Circuit Court of appeals affirmed the District Court's ruling in part. The NCAA was ordered to pay the plaintiffs $42.2 million in fees and costs. The NCAA subsequently appealed to the Supreme Court arguing that Judge Wilken did not apply the ruling from *Board of Regents*. The Supreme Court denied the NCAA's appeal.

### *B. Alston v. NCAA*[36]

Following *O'Bannon*, a number of class action lawsuits were filed by student athletes against the NCAA to challenge its restrictions on compensation. Led by Shawne Alston and Justine Hartman, these cases were combined with *Alston v. NCAA* at the Northern District Court of California.

In March 2019, Judge Wilken found that the NCAA's restrictions on "non-cash education-related benefits" violated the Sherman Act and required that the NCAA allow certain types of academic benefits beyond full scholarships that was established from *O'Bannon*. The NCAA appealed to the Ninth Circuit. Though the Ninth Circuit panel agreed that the NCAA had a necessary interest in "preserving amateurism and thus improving consumer choice by maintaining a distinction between college and professional sports," their practices still violated antitrust law, thus upheld the District Court's decision. The NCAA and the American Athletic Conference filed petitions to the Supreme Court in October 2020 to hear their appeal. The Supreme Court granted *certiorari* to both petitions in December 2020. The oral arguments were heard on March 21, 2021 and the Court's ruling is still pending.

### *C. Implications*

In May 2019, the California Assembly passed the Fair Pay to Play Act[37] that will allow student athletes to secure compensation from sponsors and endorsers. This means that student athletes will no longer be banned from collaboration with companies to promote their products, earn income from selling their autographs or photos. They may even be able to hire agents to help with their career. This bill will take effect in 2023.

Subsequently, in October 2019, the National Football League Players Association (NFLPA) announced a collaboration with the College Players Association to discuss how athletes can receive compensation for their name, image, and likeness, ensure licensing representation, and receive reimbursement for their medical expenses.

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34 *O'Bannon et al. v. National Collegiate Athletic Association, 802 F.3d 1049 (9th Cir.2015).*

35 The game featured an unnamed forward from UCLA that matches O'Bannon's height, weight, skin stone, No. 31 jersey, and left-handed shot.

36 *Alston v. National Collegiate Athletic Association, No. 19-15566 (9th Cir. 2020).*

37 This Act is mis-named. It does not involve pay for play. Instead, it deals with third party payment to athletes for their names, images and likenesses.

The NCAA responded to California's Fair Pay to Play Act by threatening to ban all schools in California. But it quickly altered its course, when Colorado, Florida, New York, New Jersey and Illinois also introduced similar bills. In the meantime, the NCAA has outlined a plan to allow student-athletes to make endorsement bills starting from the 2021-2022 academic year. The new NCAA plan would allow student-athletes to be social media influencers, appear in commercials, and get paid for autograph sessions, and endorsements. All payments must come from third parties rather than the colleges and universities. Although all of the details have not been ironed out, this development seems to be a step in the right direction.

## VI. CONCLUDING REMARKS

The goal of antitrust policy is elusive. It could be the promotion and protection of competition as a means of allocating scarce resources. Or it could be the protection of consumer welfare or social welfare. When it comes to buyer cartels, however, it does not matter because the competitive process is impaired and both labor surplus and social welfare decline. Both the DOJ and the FTC have condemned employer cartels. In the *Antitrust Guidance for Human Resource Professionals*, the Agencies have taken the position that collusion in labor markets is a *per se* violation of Section 1 of the Sherman Act. Moreover, they have decided to file criminal, as opposed to civil, suits. This, of course, means that some conspirators may be facing prison time. In our view, there is no principled reason for treating the NCAA and its members more leniently than any other employer.

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