

2013

The Myth of the "Full Ride": Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform

Christopher Davis Jr.

Dylan Oliver Malagrino

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Education Law Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Christopher Davis Jr. & Dylan O. Malagrino, *The Myth of the "Full Ride": Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform*, 65 OKLA. L. REV. 605 (2013), <https://digitalcommons.law.ou.edu/olr/vol65/iss4/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

THE MYTH OF THE “FULL RIDE”: CHEATING OUR COLLEGIATE ATHLETES AND THE NEED FOR ADDITIONAL NCAA SCHOLARSHIP-LIMIT REFORM

CHRISTOPHER DAVIS, JR.* & DYLAN OLIVER MALAGRINÒ**

Abstract

The National Collegiate Athletic Association should amend Bylaw 15.1 and allow institutions to award athletic scholarship monies up to the institutionally set, estimated cost of attendance. NCAA Bylaw 15.1 limits an individual student-athlete's athletic scholarships and other financial aid based on athletic ability to the value of a full grant-in-aid. The individual student-athlete scholarship limit is an arbitrary price cap and an unreasonable restraint of trade in violation of section 1 of the Sherman Act because it prevents student-athletes from receiving financial aid up to the institutionally set, estimated cost of attendance, which includes the additional expenses an institution deems necessary to meet the cost of living at the school. Setting the permissible athletic scholarship limit at the institutionally set, estimated cost of attendance is a less restrictive alternative that still protects the pro-competitive virtues the NCAA has frequently proffered in support of its price cap. The NCAA has settled previous antitrust complaints brought by student-athletes alleging that athletic scholarship limits were unreasonable restraints of trade. And recently, the NCAA recognized that settlement was not enough to fulfill the NCAA's educational mission and preserve the rights of student-athletes in Division I programs. But instead of retiring the deficient limit, the NCAA designated a new, arbitrary cap. However, the NCAA suspended implementation of this change so the Division I Board of Directors could

* Christopher Davis, Jr. is a Los Angeles-based civil litigator and an expert in sports business administration. Mr. Davis would like to thank his frequent collaborator, Professor Dylan Malagrino. The Hermantown, Minnesota, native also thanks his friends and family for their endless support in each of his endeavors; additional thanks are due to Christopher Cawfield and Kelly Matney for their contributions.

** Dylan Oliver Malagrino is an associate professor of law at the University of Massachusetts School of Law—Dartmouth. From 1999 to 2004, Professor Malagrino served on the committees of the NCAA as an expert in prospective and collegiate student-athlete welfare, working personally to solve the problems addressed by this article. Professor Malagrino thanks Mr. Christopher Davis for his collaboration. Thanks also are due to Tom Cordova-Caddes, Hajar Ghazian, Elizabeth Jacobs, Kelly Klinko, John Richardson, and Robert Wiegand for their contributions. And, special thanks to Michael Buonocore, Brett Butz, Lesley Chan, Scott Frey, and Lei Zhang for their assistance.

reconsider the amendment. In reconsidering the amendment, and in light of the recent settlement in the *White v. NCAA* lawsuit, the NCAA should fully liberalize Bylaw 15.1 and allow institutions to award athletic scholarship monies up to the institutionally set, estimated cost of attendance. This is the only way to ensure that all future Division I student-athletes will not be financially disadvantaged even with the hard work these athletes perform for their institutions' athletic programs; further, anything less is an unreasonable restraint of trade.

Table of Contents

Introduction	607
I. The NCAA Settlement Agreement Addressing the Needs of Student-Athletes Does Not Address the Needs of Student-Athletes	610
II. Current Grant-in-Aid Financial Aid Programs and the Differences in Costs of Attendance at Division I Universities	615
A. Bylaw 15.1 and Its Limitations	615
B. Differences in Costs of Attendance at Division I Universities	616
III. Student-Athlete Struggles Created by Financial-Aid Gaps and the Standards of Living for Intercollegiate Athletes	618
A. The NCAA's Purpose and Goals of Amateurism	618
B. The Real Cost of College Living.....	619
IV. Revenue-Producing and Non-Revenue-Producing Conferences and the Impact of Raising Costs on Member Institutions	621
V. Settlement Is Not the Answer for Meaningful Change in Collegiate Athletics	622
VI. What if These Antitrust Challenges to the NCAA Scholarship Limits Were Fully Litigated? A Hypothetical Antitrust Challenge to NCAA Bylaw 15.1	623
A. Overview.....	623
B. Threshold Issues: Is the NCAA's Conduct Within a Potential Antitrust Argument?	625
C. Scholarship Caps as a Form of Price Fixing	627
D. Is Bylaw 15.1 an Unreasonable Restraint of Trade?.....	628
E. Rule of Reason Analysis	630
1. Under the Rule of Reason Test, Bylaw 15.1 Is an Unreasonable Restraint of Trade in Violation of Section 1 of the Sherman Act.....	631
2. Bylaw 15.1 Has a Substantially Adverse Effect on Competition	633
3. Because of the Direct and Readily Measurable Anticompetitive Effect of Bylaw 15.1, the NCAA Must Show Pro-competitive Virtues of Such a Restriction.....	637

4. The Anticompetitive Effect of Bylaw 15.1 Outweighs the Pro-competitive Rationales for the Price Cap	639
VII. Potential Issues that May Arise Due to the Liberalization of the NCAA’s Bylaws.....	640
Conclusion.....	642

Introduction

The National Collegiate Athletics Association (NCAA) Division I membership should liberalize Bylaw 15.1¹ because the regulation is an unlawful restraint of trade, in violation of the Sherman Act² and because the NCAA’s guiding principles call for institutions to have the option of providing to their student-athletes comprehensive scholarship packages that will best lead toward degree completion.³ According to the NCAA’s mission statement, the NCAA exists “to govern competition in a fair, safe, equitable and sportsmanlike manner and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”⁴

However, if the student-athlete’s educational experience is of paramount importance to the NCAA, then the NCAA Division I member institutions should not prevent student-athletes from receiving the scholarship monies that students need for the additional cost of living expenses attributed to attending college.⁵ The offer for a “full ride” promised to a prospective

1. NCAA, 2012–13 NCAA DIVISION I MANUAL § 15.1, at 202 [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D113.pdf>. Bylaw § 15.1 provides the maximum limit on financial aid for an individual:

A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2. A student-athlete may receive institutional *financial aid based on athletics ability* (per Bylaw 15.02.4.1) and *educational expenses* awarded per Bylaw 15.2.6.4 up to the value of a full grant-in-aid, plus any other financial aid up to the cost of attendance.

Id. (emphasis added).

2. 15 U.S.C. § 1 (2006).

3. See NCAA MANUAL, *supra* note 1, §§ 2.01, 2.13, at 3, 5; see also *id.* § 15.01.1, at 199. The NCAA’s purpose is to promote education and maintain amateurism. *Id.* §§ 2.5, 2.9, at 4.

4. *Eye on the Money*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Eye+on+the+Money> (last visited May 27, 2013) (internal quotation marks omitted).

5. NCAA MANUAL, *supra* note 1, § 2.13, at 5.

collegiate student-athlete during the college recruitment process is nothing more than a ploy to hide the actual financial risk of attending college and to lure high school students to play Division I athletics at that school.⁶ While attending college, students have many costs to consider, including housing, utilities, food, transportation, insurance, books, and school supplies.⁷ And, although one can identify many of these expenses in advance of matriculation, a college student also needs to consider the costs of incidental personal items and miscellaneous expenses for living in the particular city or town where the institution is located.⁸ When recruiting prospective student-athletes to play for an institution, a school ought to be able to offer a comprehensive package to these prospects because the school's central administration financial aid office has already calculated the necessary cost of living expenses associated with attending the particular school.⁹ The "full ride" scholarship offer should include those costs.

Therefore, the NCAA should amend Bylaw 15.1 and allow institutions to award athletic scholarship monies up to the institutionally set, estimated cost of attendance.¹⁰ NCAA Bylaw 15.1 limits an individual student-athlete's athletic scholarships and other financial aid based on athletic ability to the value of a full grant-in-aid.¹¹ And, recognizing the need for a change to this limitation, on October 27, 2011, the NCAA Division I Board of Directors amended Bylaw 15.1, permitting institutions to award scholarship monies to student-athletes up to \$2000 beyond the full grant-in-aid level.¹² Then, on December 15, 2011, the NCAA suspended

6. During the recruiting process many high school athletes are lured to collegiate institutions through promises of "full ride" athletic scholarships without understanding that the full scholarships do not actually cover all costs of attending the school.

7. CARL I. FERTMAN, *STUDENT-ATHLETE SUCCESS: MEETING THE CHALLENGES OF COLLEGE LIFE* 208 (2009).

8. *Id.*

9. See NCAA MANUAL, *supra* note 1, § 15.02.2, at 200 (calculating the "cost of attendance").

10. See, e.g., *Cost of Attendance and Expected Family Contribution*, STUDENT LOAN NETWORK, <http://www.studentloannetwork.com/financial-aid-101/costs-and-efc.php> (last visited May 27, 2013) ("The cost of attendance (COA) is an estimate of how much it costs to attend college for one year, including all reasonable expenses.").

11. NCAA MANUAL, *supra* note 1, § 15.1, at 202.

12. See Report of the October 27, 2011, Meeting of the National Collegiate Athletic Association Division I Board of Directors (Oct. 27, 2011, 11:32 PM), 3-4, http://fs.ncaa.org/Docs/AMA/legislative_council/Jan%2012/Agenda%20and%20Supplement%20s.pdf [hereinafter Division I Report]; Andy Gardiner, *NCAA Enacts Broad Academic, Scholarship Reforms*, USA TODAY (Oct. 27, 2011, 11:32 PM), <http://www.usatoday.com>.

implementation of this change so the Division I Board of Directors could reconsider the amendment after 160 NCAA Division I member institutions objected to the change.¹³ If eventually allowed to be implemented, this change would allow athletic conferences to give their member institutions the opportunity to award more scholarship monies to individual student-athletes.¹⁴

However, this change is still not enough.¹⁵ It is an arbitrary price cap and an unreasonable restraint of trade in violation of section 1 of the Sherman Act¹⁶ because it prevents student-athletes from receiving financial aid up to the institutionally set, estimated cost of attendance, which includes the additional expenses an institution deems necessary to meet the cost of living at the school.¹⁷ Setting the permissible athletic scholarship limit to the institutionally set, estimated cost of attendance is a less restrictive alternative that still protects the pro-competitive virtues the NCAA has frequently proffered in support of this price cap.¹⁸

The NCAA previously settled antitrust complaints brought by student-athletes alleging that athletic scholarship limits were unreasonable restraints of trade.¹⁹ Now, the NCAA has recognized that settlement is not enough to fulfill its educational mission and preserve the rights of student-athletes in Division I programs. But, instead of retiring the deficient limit, the NCAA designated a new, arbitrary cap: \$2000 above the full grant-in-aid limit.²⁰

com/sports/college/story/2011-10-27/NCAA-board-approves-wide-range-of-reforms/50967250/1.

13. Steve Wieberg, *NCAA to Modify \$2,000 Stipend Proposal*, USA TODAY (Jan. 14, 2012, 8:10 PM), <http://www.usatoday.com/sports/college/story/2012-01-14/NCAA-stipend-money/52559576/1>.

14. See Gardiner, *supra* note 12 (noting that athletic conferences will have authority to voluntarily apply the increase in scholarship monies).

15. The proposed stipend passed on Oct. 27, 2011, would not alter this analysis; the estimated cost of attendance would still be greater than the proposed stipend fund, which ultimately only grants the athlete a maximum amount of \$2000. See Division I Report, *supra* note 12, at 3.

16. See 15 U.S.C. § 1 (2006).

17. Division I Report, *supra* note 12, at 3.

18. See, e.g., Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 116 (2007) ("Courts have advanced amateurism as a procompetitive justification for a restraint on 'trade or commerce' . . .").

19. See, e.g., Amended Order, *White v. NCAA*, No. CV 06-0999 VBF (MANx) (C.D. Cal. Aug. 4, 2008).

20. Division I Report, *supra* note 12, at 3.

In reconsidering the amendment to Bylaw 15.1, and in light of the recent settlement in *White v. NCAA*,²¹ the NCAA should fully liberalize Bylaw 15.1 and allow institutions to award athletic scholarship monies up to the institutionally set, estimated costs of attendance because it is the only way to ensure all future Division I student-athletes are not financially disadvantaged simply for the hard work they undertake for institutions' athletic programs, and because anything less is an unreasonable restraint of trade.²² This article provides recommendations in the following order. Part I explores the background of *White* and subsequent cases leading to the most-recent NCAA settlement agreement, which is still in operation. This agreement was the NCAA's way of addressing student-athlete needs regarding scholarship monies' deficient limit. Part II describes the current state of grant-in-aid programs and how this creates disadvantage among student-athletes because there is often great disparity in costs of attendance at Division I universities. Part III further describes the effects of this gap in financial assistance and the cost of living of student-athletes. Part IV discusses revenue and non-revenue-producing conferences and recognizes the impact of raising costs for member institutions in NCAA Division I. Part V explains that legislative change is necessary because settlement is insufficient to address the fundamental problem with the arbitrary price cap. Finally, Parts VI and VII culminate in a discussion of an antitrust challenge to the arbitrary price cap and the potential outcome of such a case if it were fully litigated, and how this outcome would affect the future of financial assistance for student-athletes in Division I athletics. Ultimately Parts VI and VII conclude that the NCAA should amend Bylaw 15.1 and allow institutions to award athletic scholarship monies up to the institutionally set, estimated cost of attendance because anything less would be an unreasonable restraint of trade.

I. The NCAA Settlement Agreement Addressing the Needs of Student-Athletes Does Not Address the Needs of Student-Athletes

In 2008, the NCAA reached a \$10 million settlement agreement with the plaintiffs in an antitrust class action lawsuit which challenged the individual student-athlete scholarship limits set in NCAA Division I Bylaw 15.1.²³

21. Stipulation and Agreement of Settlement at 1-3, *White v. NCAA*, No. CV 06-0999 VBF (MANx) (C.D. Cal. Jan. 29, 2008).

22. See 15 U.S.C. § 1 (2006).

23. Stipulation and Agreement of Settlement, *supra* note 21, at 10; see also Amended Order, *supra* note 19, at 1 (approving the settlement); Dennie, *supra* note 18, at 102-04;

This settlement was a response to a class action suit on behalf of former student-athletes: Jason White of Stanford University;²⁴ Brian Polak of the University of California, Los Angeles (UCLA);²⁵ and other football and basketball students from revenue-producing Division I conferences.²⁶ After a thorough review of the Stipulation and Agreement of Settlement,²⁷ it is clear that this resolution was merely a baby step toward providing all student-athletes the opportunity to receive the athletic scholarship monies they need, deserve, and were promised.²⁸ Furthermore, had the parties fully litigated this case on the merits of the claim, NCAA Bylaw 15.1 would

Settlement in White Case Adds Flexibility to Distribution of Funds, NCAA (Aug 7, 2008, 11:07 AM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2008/division+i/settlement%2Bin%2Bwhite%2Bcase%2Badds%2Bflexibility%2Bto%2Bdistribution%2Bof%2Bfunds%2BB-%2B08-07-08%2B-%2Bncaa%2Bnews.html> (summarizing the settlement figures, distribution of funds, and the identities of the affected class in *White*). According to the class allegations, the individual student-athlete scholarship limit set in NCAA Division I Bylaw 15.1 was an unlawful restraint of trade. Dennie, *supra* note 18, at 103. Therefore, the plaintiffs claimed that the aid restriction should be amended to allow athletic-based financial aid up to the cost of attendance. *Id.*

24. See *Jason White Profile*, GOSTANFORD.COM, http://www.gostanford.com/sports/m-footbl/mtt/white_jason00.html (last visited May 27, 2013).

25. See *Brian Polak Profile*, UCLABRUINS.COM, http://www.uclabruins.com/sports/m-footbl/mtt/polak_brian00.html (last visited May 27, 2013).

26. Stipulation and Agreement of Settlement, *supra* note 21, at 6; see also Jack Carey & Andy Gardiner, *NCAA Agrees to \$10M Settlement in Antitrust Lawsuit*, USA TODAY (Jan. 30, 2008, 12:03 PM), http://www.usatoday.com/sports/college/2008-01-29-ncaa-settlement_N.htm; Steve Wieberg, *Concerns About NCAA Scholarship Settlement Raised*, USA TODAY (Feb. 28, 2008, 10:27 PM), http://usatoday30.usatoday.com/sports/college/other/2008-02-28-scholarship-settlement_N.htm (“[T]he settlement require[d] the NCAA to make \$10 million available to football and basketball players over a three-year period—up to \$7,500 a player—to cover future educational expenses.”).

27. See Stipulation and Agreement of Settlement, *supra* note 21, at 10-12.

28. See *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005). In that case, the plaintiffs were walk-on football players at Division I-A schools. *Id.* at 1146-47. The plaintiffs alleged that but for NCAA Bylaw 15.5.5, which restricted the number of football scholarships awarded by each school to eighty-five, they would have received full grant-in-aid scholarships. *Id.* at 1147. Therefore, the plaintiffs argued that the bylaw constituted an “unlawful horizontal restraint of trade” and violated the Sherman Act. *Id.*; see also Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 350-52 (2007) (describing *In re NCAA I-A Walk-On Football Players Litigation* and discussing its possible implications on the NCAA); Tibor Nagy, *The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 332 (2005) (“College athletes have repeatedly brought suit to challenge the NCAA’s bylaws, principally on antitrust grounds, and they will undoubtedly continue to do so.”).

likely have been found to be an unreasonable restraint of trade in violation of section 1 of the Sherman Act.

The *White* plaintiffs alleged that Bylaw 15.1 was an unlawful restraint of trade in violation of the Sherman Act²⁹ because it was unreasonable for the NCAA Division I member institutions to agree to set the limit on the amount of money a Division I institution from a revenue-producing conference could offer its football and basketball student-athletes to an amount less than it *actually* cost to attend the institution.³⁰ This price cap remains set at the value of a “full grant-in-aid,” which covers tuition cost, school fees, room and board, books, and other university required costs.³¹ This amount does not currently include the “estimated cost of attendance”³² at an institution. The difference between the estimated cost of attendance³³ and the full grant-in-aid is approximately \$3000 annually, depending on the institution.³⁴ As a result, a student-athlete who was offered a “full ride” receives, on average, \$3000 less per year than the actual “full ride” promised because the NCAA forbids institutions from providing those monies to the student-athlete.³⁵ Hence the “full ride” is illusory because the student-athlete must still find other means of financing this gap.³⁶

29. 15 U.S.C. § 1 (2006).

30. Stipulation and Agreement of Settlement, *supra* note 21, at 10-12.

31. NCAA MANUAL, *supra* note 1, § 15.02.5, at 201.

32. See Stipulation and Agreement of Settlement, *supra* note 21, at 2-3 (explaining that the athletic-based “grants-in-aid,” which restricted the financial aid that a student-athlete could receive, were below the amount of the full cost of attendance).

33. NCAA MANUAL, *supra* note 1, § 15.02.2, at 200 (“The ‘cost of attendance’ is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”).

34. See Associated Press, *Study: ‘Free Ride’ Still Costs Athletes*, ESPN (Oct. 26, 2010, 1:08 PM), <http://sports.espn.go.com/ncaa/news/story?id=5728653>; see also Tom Farrey, *NCAA Might Face Damages in Hundreds of Millions*, ESPN (Feb. 21, 2006, 3:01 PM), <http://sports.espn.go.com/ncaa/news/story?id=2337810>. Mr. Farrey discusses how the NCAA’s full grant-in-aid for “full-ride” athletes places an artificial cap on a university’s estimated cost of attendance using Ramogi Huma, a former UCLA football player, as an example. Farrey, *supra*. As a UCLA linebacker in the late 1990s, Huma came from a lower-income family and was promised a “full ride.” *Id.* But he received only the full grant-in-aid amount and left college with \$6000 in credit card debt from the incidental expenses of attending college, such as phone bills and travel expenses. *Id.*

35. Associated Press, *supra* note 34.

36. See Virginia A. Fitt, Note, *The NCAA’s Lost Cause and the Legal Ease of Defining Amateurism*, 59 DUKE L.J. 555, 586 (2009) (discussing student-athletes’ financial dependence and the need for the NCAA and member institutions to liberalize their rules on accepting financial help). Ms. Fitt proposes liberalizing these rules to “reduce the athletes’

This gap in scholarships is harmful because it creates a serious misperception of the actual financial risk associated with choosing to attend college.³⁷ The financial risk is a disadvantage that student-athletes bear. However, other scholarship-receiving students do not bear this burden from receiving their financial assistance because these non-athlete students may receive scholarship monies and other financial aid awards up to the estimated cost of attendance.³⁸ If student-athletes are receiving even one dollar in athletically related support from an institution, any other monies provided by the school, even awards not related to athletics, count toward the student-athlete's individual scholarship limit, and are capped at an amount less than it actually costs to go to college.³⁹ So, as expected, some student-athletes unwisely, but perhaps desperately, resort to violations of NCAA amateurism rules,⁴⁰ such as accepting money from agents to help provide assistance to themselves and their families.⁴¹ This outcome is unfortunate, and is not an ideal way of financing the college experience because it may lead to serious problems for some student-athletes.⁴²

Under the terms of the settlement in *White*, the NCAA was required to make a total of \$10 million available for three years to qualifying members

financial dependence upon the NCAA and its member institutions," citing one example of a student-athlete who was sanctioned for accepting free groceries. *Id.* Her example highlights the economic dependency that the student-athlete has on the NCAA. *Id.* She also notes that the relationship between an institution and its athlete resembles an employer-employee relationship. *Id.* at 587. But "[b]y giving student-athletes the economic autonomy that most college students enjoy, the NCAA can remove itself from the role of financial dictator and eliminate the appearance of an employer-employee relationship." *Id.*

37. See, e.g., Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 199-200 (1996) (examining how NCAA restrictions on scholarships create a void between actual cost and real cost, and the impact to African American student-athletes).

38. See NCAA MANUAL, *supra* note 1, § 15.1, at 202 (indicating that the NCAA's rules governing financial aid limits apply only to "student-athletes" as opposed to students in general).

39. *Id.*

40. See *id.* §§ 12.01-12.6, at 59-75.

41. See George Dohrmann, *Confessions of an Agent*, SPORTS ILLUSTRATED, Oct. 18, 2010, at 62, 62-67, available at <http://sportsillustrated.cnn.com/2010/magazine/10/12/agent/index.html>. Former NFL agent Josh Luchs described payments he made to college players. *Id.* at 64. When Luchs asked one player why the player did not sign with him after not receiving payment from Luchs, the athlete stated, "Sorry, I gotta do what is best for me and my family." *Id.* at 67. Likewise, other players confirmed that they accepted payments from agents "because their scholarship didn't provide enough money for rent and food." *Id.* at 64.

42. See Farrey, *supra* note 34.

of the class, to be distributed on a claims-made basis of up to \$2500 per year per class member.⁴³ This fund was for a maximum of three years per class member for future bona fide educational expenses incurred in connection with a program at an accredited institution.⁴⁴ Also, there was a single payment from the NCAA available to student-athletes of up to \$500 to cover career development expenses incurred by members of the class.⁴⁵ Furthermore, the NCAA allowed individual institutions to use a pool of \$218 million to address permissible, additional needs of student-athletes.⁴⁶ Although these terms, at the time, seemed to mend the problem of covering the harmful gap caused by not awarding student-athletes the value of the complete estimated cost of attendance, the terms did not prevent financial injury to future generations of football and basketball student-athletes at Division I member institutions,⁴⁷ nor did the settlement terms address the disadvantages of other full-scholarship student-athletes who played neither football nor basketball.⁴⁸

The \$218 million pool will eventually run out, but the claims brought by student-athletes will continue until a permanent remedy is in place.⁴⁹ The real solution must include an appropriate amendment of Bylaw 15.1.⁵⁰ The NCAA Division I Board of Directors has begun the process by attempting to amend Bylaw 15.1, perhaps compromising on the issue;⁵¹ however, the new \$2000 stipend,⁵² if allowed to take effect, remains insufficient and

43. Stipulation and Agreement of Settlement, *supra* note 21, at 10–11.

44. *Id.*

45. *Id.*

46. *Id.* at 10.

47. See Doug Lederman, *Settlement Raises Questions for NCAA*, INSIDE HIGHER ED (Feb. 4, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/02/04/ncaa>. Mr. Lederman notes that under the NCAA settlement, the NCAA would adopt a new rule permitting Division I schools to provide health and injury insurance. *Id.* He postulates that the ability to provide health and injury insurance may create tension between wealthier and less wealthy academic institutions because wealthier athletic programs might be able to afford these programs whereas the less wealthy might not. *Id.*

48. Stipulation and Agreement of Settlement, *supra* note 21, at 2 (including in the class of plaintiffs only persons who received athletic-based grants-in-aid from football and men's basketball programs).

49. Matthew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 835 (2010) (discussing that, although the NCAA is willing to settle claims, the underlying issues such as antitrust claims remain at large).

50. See NCAA MANUAL, *supra* note 1, § 15.1, at 202.

51. See Division I Report, *supra* note 12, at 3.

52. See *Agenda: National Collegiate Athletic Association Division I Legislative Council*, STUDENT-ATHLETE WELL-BEING GROUP, 9 (Oct. 17-18, 2011) [hereinafter

arbitrary. Instead, the NCAA member institutions should make meaningful, permanent changes to benefit all student-athletes.⁵³

II. Current Grant-in-Aid Financial Aid Programs and the Differences in Costs of Attendance at Division I Universities

The current grant-in-aid financial aid programs available to student-athletes leave too many students in precarious positions. Bylaw 15.1, as it currently stands, falls short by creating a discrepancy in funding available to student-athletes from different schools depending on factors such as the cost of living in the city in which the school is located. Even the recent proposed change of adding a \$2000 stipend for student-athletes does not adequately address the problem so long as the total amount is still below the institutionally set, estimated cost of attendance.

A. Bylaw 15.1 and Its Limitations

The NCAA's settlement in *White* sounded great at the time. But in reality it was merely a temporary remedy because such a settlement was not enough to tackle the fundamental issues underlying the lawsuit. The NCAA should not limit the amount of scholarship money a college may offer a student-athlete to a value less than the institutionally set, estimated cost of attending the school.⁵⁴ It simply does not make logical sense to limit scholarship monies to a deficient amount, especially for student-athletes who likely would not be able to afford matriculating on their own accord at Division I member institutions.

NCAA Bylaw 15.1 limits an individual student-athlete's athletic scholarships and other financial aid based on athletic ability to the value of a full grant-in-aid.⁵⁵ Institutions set the estimated cost of attendance, which averages \$3000 more than a full grant-in-aid,⁵⁶ based on the particular cost

STUDENT-ATHLETE WELL-BEING GROUP], available at http://fs.ncaa.org/Docs/AMA/legislative_council/Oct%2011/Agenda%20and%20Supplements.pdf.

53. See generally Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 50–53 (2006) (discussing the NCAA legislative process in the amendments of bylaws).

54. Although "[c]ourts have advanced amateurism as a precompetitive justification for a restraint on 'trade or commerce,'" the principle of amateurism should not limit the athlete to receive less scholarship money than the institutionally set, estimated cost of attending the school. See Dennie, *supra* note 18, at 116. (discussing the NCAA's pro-competitive justifications for a restraint of trade).

55. NCAA MANUAL, *supra* note 1, § 15.1, at 202.

56. Associated Press, *supra* note 34.

of living expenses every student will face when arriving on campus.⁵⁷ The NCAA press release following the *White* settlement stated: “The NCAA believes the full-ride scholarship currently offered is appropriate for the majority of student-athletes.”⁵⁸ That sentiment might have been true at the time, but legislative reform was necessary to achieve a more equitable result.⁵⁹ And, by attempting to permit conferences to allow member institutions to award \$2000 stipends above the full grant-in-aid, the Division I Board of Directors recently recognized that the “full ride” scholarship award then-available is no longer appropriate.⁶⁰ Yet, what is even more apparent now is that further reform is still necessary to avoid future lawsuits by other student-athletes who both were not members or potential members of the *White* class and attend schools where the \$2000 stipend option is still insufficient to cover the costs of college attributed to the gap between the full grant-in-aid and the institutionally set, estimated cost of attendance.⁶¹

B. Differences in Costs of Attendance at Division I Universities

The NCAA oversees athletics at member institutions across the United States.⁶² The cities and towns where NCAA member institutions are located can be quite different from one another, and these differences result in a

57. Compare NCAA MANUAL, *supra* note 1, § 15.02.5, at 201 (defining full grant-in-aid), with *id.* § 15.02.2, at 200 (defining cost of attendance).

58. Press Release, NCAA, NCAA Statement in Settlement of White Case (Feb. 5, 2008), available at <http://fs.ncaa.org/Docs/PressArchive/2008/Official%2BStatements/NCAA%2BStatement%2Bin%2BSettlement%2Bof%2BWhite%2BCase.html>.

59. See generally Lazaroff, *supra* note 28, at 361-71. Professor Lazaroff discusses trends within modern antitrust litigation that the NCAA has encountered, focusing on courts' dichotomous approaches in deciding these cases. *Id.* at 332-37. He notes that in antitrust cases that do not involve players, the courts tend to reach similar results to those in professional sports, but that courts reach significantly different conclusions (generally in favor of the NCAA) when student-athlete restraints are being challenged. *Id.* at 340. Professor Lazaroff further discusses the blurring of these standards in light of the economic realities of a true market for college athletics and offers solutions to this problem that include changes in judicial philosophy, NCAA regulatory reform, or legislative reform. *Id.* at 350, 361-71; see also Michael Aguirre, Comment, *From Locker Rooms to Legislatures: Student-Athletes Turn Outside the Game to Improve the Score*, 36 ARIZ. ST. L.J. 1441, 1453-59 (2004) (reviewing legislative attempts by student-athletes to reform the current standards of duration and amount of scholarships offered to student-athletes and explaining that the financial ramifications of including an extra \$2000 for additional expenses are unknown).

60. STUDENT-ATHLETE WELL-BEING GROUP, *supra* note 52.

61. See *id.*; Associated Press, *supra* note 34.

62. See NCAA Map, COLLEGE SPORTS INFO.COM, <http://collegesportsinfo.com/ncaa-map/> (last visited May 27, 2013).

vast array of actual costs to the individual student-athletes throughout the NCAA member institutions. These costs range from food and utilities to transportation and housing. These costs are very real to each student-athlete, and the differences in cost can be dramatic.

As an example, Iowa State University, which competes in the Big 12 Conference,⁶³ is located in Ames, Iowa.⁶⁴ Meanwhile, UCLA, which is a member of the Pac-12 Conference,⁶⁵ is located in Los Angeles, California.⁶⁶ Ames is 32% less expensive to live in than Los Angeles.⁶⁷ The biggest difference is that housing and associated utilities and fees in Ames are 54% less expensive than in Los Angeles.⁶⁸ These are costs that students in more expensive cities will be forced to take on themselves because the NCAA does not allow member institutions to provide coverage for expenses like housing (other than on-campus room and board) and utilities. Therefore, \$2000 worth of incidental living expenses in Los Angeles would only cost \$1354 in Ames.⁶⁹

There are even examples of disparities in costs within the same state. Both St. John's University and Syracuse University are members of the Big East Conference⁷⁰ and both schools are in New York. St. John's University is located in Queens, New York City,⁷¹ and Syracuse University is located in Syracuse.⁷² The City of Syracuse is 39% less expensive to live in than Queens.⁷³ The cost of housing and associated utilities and fees in Syracuse is 74% less expensive than Queens.⁷⁴ Therefore, \$2000 worth of incidental

63. See BIG 12 CONFERENCE, <http://www.big12sports.com/> (last visited May 27, 2013).

64. See *Contact Us*, IOWA STATE UNIV., <http://www.iastate.edu/contact/> (last visited May 27, 2013).

65. See PAC-12, <http://pac-12.com/> (last visited May 27, 2013).

66. See *Contact*, UCLA, <http://www.ucla.edu/contact.html> (last visited May 27, 2013).

67. *Cost of Living Comparison: Los Angeles, California – Ames, Iowa*, SPERLING'S BEST PLACES, <http://www.bestplaces.net/col/?salary=2000&city1=50644000&city2=51901855> (last visited May 27, 2013).

68. *Id.*

69. See *id.*

70. See *Big East Member Schools*, BIG EAST CONFERENCE, <http://www.bigeast.org/AbouttheBIGEAST/MemberSchools.aspx> (last visited May 27, 2013).

71. See *Contact Us*, ST. JOHN'S UNIV., <http://www.stjohns.edu/contact.stj> (last visited May 27, 2013).

72. See *Contact Us*, SYRACUSE UNIV., <http://www.syr.edu/contact/index.html> (last visited May 27, 2013).

73. *Cost of Living Comparison: Queens (Queens), New York – Syracuse, New York*, SPERLING'S BEST PLACES, <http://www.bestplaces.net/col/?salary=2000&city1=43608100&city2=53673000> (last visited May 27, 2013).

74. *Id.*

living expenses in Queens would only cost \$1229 in Syracuse.⁷⁵ These are real expenses that demonstrate the inadequacy of the NCAA settlement in *White* and any potential amendment to Bylaw 15.1 that tries to set a universal price cap.

III. Student-Athlete Struggles Created by Financial-Aid Gaps and the Standards of Living for Intercollegiate Athletes

The NCAA needs to demonstrate that one of its top priorities is access to the opportunities that collegiate athletics offer. If the NCAA's mission truly is to make the educational experience paramount,⁷⁶ change is necessary because it presently hinders the educational experience⁷⁷ by not allowing student-athletes to obtain athletic scholarship monies that they do not just need, but deserve. According to a recent study by Ithaca College Researchers, the average Division I athlete receiving a full-ride scholarship pays \$2951 in school-related expenses not covered by grants-in-aid.⁷⁸ The study found that describing scholarships as "full" or "free rides" was a deceptive practice on the part of recruiters because the "price tag . . . falls short of the scholarship amount."⁷⁹ Some coaches tend to be more careful about detailing the financial aid package to athletes; however, this diligence does not remedy the issue.⁸⁰

A. The NCAA's Purpose and Goals of Amateurism

Perhaps part of the resistance to increasing the individual student-athlete scholarship limit to the estimated cost of attendance is a fear that such a scholarship award would jeopardize the public perception of amateurism in college sports, as the NCAA is the great protector of college sports remaining a realm of amateur athletics. The NCAA Division I Manual explains: "Student-athletes shall be amateurs in an intercollegiate sport, and

75. *See id.*

76. *Eye on the Money*, *supra* note 4.

77. Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 344-45 (1998) (stating that NCAA amateur rules are promulgated to promote revenue for the schools, not to preserve the educational experience of players). Mr. Acain also notes that student-athletes' performances create substantial revenue for their institutions, but the student-athletes are not allowed to receive even a portion of this revenue. *Id.*

78. Associated Press, *supra* note 34.

79. *Id.* (quoting Ramogi Huma, Nat'l Coll. Players Ass'n) (internal quotation marks omitted).

80. *Id.*

their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”⁸¹

Thus, the NCAA’s purpose in this regard is not only “to maintain intercollegiate athletics as an integral part of the educational program,” but also to “retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁸² And a crucial factor distinguishing the amateur athlete from the professional athlete is that the professional athlete is paid for his or her athletic ability. However, the NCAA operates in complete contradiction to its purpose as stated above because it engages in commercial enterprises⁸³ and generates significant revenues from the big business of “amateur collegiate athletics.”⁸⁴ Yet, the NCAA requires student-athletes to retain their amateur statuses and prevents institutions from offering their student-athletes shares of the collegiate athletics revenue pie to fill the gaps in necessary expenses for degree completion.⁸⁵

B. The Real Cost of College Living

With this article, we are not advocating for offering student-athletes more than the estimated cost of attendance because doing so would contravene our own understandings of “amateur” athletics⁸⁶ and the

81. NCAA MANUAL, *supra* note 1, § 2.9, at 4.

82. *Id.* § 1.3.1, at 1; *see also* Bloom v. NCAA, 93 P.3d 621, 626 (Colo. App. 2004).

83. Acain, *supra* note 77, at 343-45; *see also* Video: Panel III: NCAA as a Commercial Enterprise (Boston College Law School 2010), *available at* http://www.bc.edu/schools/law/newsevents/events/conferences/ncaa_symp_video.html.

84. *See* Fritz G. Polite et al., *Social Accountability and Responsibility in Sport: An Examination of the National Collegiate Athletic Association*, 20 SPORT SCIENCE REV. 111, 122-29 (2011), *available at* <http://www.degruyter.com/view/j/ssr.2011.xx.issue-1-2/v10237-011-0050-7/v10237-011-0050-7.xml?format=INT> (select “Full Text PDF”).

85. *See* Orion Riggs, Note, *The Facade of Amateurism: The Inequities of Major College Athletics*, 5 KAN. J.L. & PUB. POL’Y 137, 138-41, 144 (1996) (discussing both the NCAA operating as a big business while giving little money in scholarships to student-athletes and that student-athletes must be permitted to receive a share of the profits they generate to achieve equity).

86. *See* Christian Dennie, *Amateurism Stifles a Student-Athlete’s Dream*, 12 SPORTS LAW. J. 221, 225-33 (2005) (discussing the policy and rationale behind amateur athletics). The authors concur in Mr. Dennie’s explanation of the meaning of “amateurism” within the world of college athletics. “‘An amateur athlete is one who participates in competitive physical sports only for the pleasure and the physical, mental, moral, and social benefits directly derived therefrom.’” *Id.* at 225 (quoting Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS (Jan. 3, 2000, 4:07 PM), <http://fs.ncaa.org/Docs/NCAA>

traditional spirit of college sports.⁸⁷ However, if “full-ride” athletes pay on average \$3000 per year⁸⁸ for such out of pocket expenses as health insurance, phone and cable bills, transportation, laundry, toiletries, food, and entertainment,⁸⁹ then some student-athletes will still be unable to bear the financial burden of degree completion. “Full-ride” athletes have graduated from college with thousands of dollars in credit card debt⁹⁰ because they had no other resources to cover those expenses not included in a full grant-in-aid.⁹¹ Even worse are the instances of full scholarship athletes who have incurred such significant financial debt in their first two years of college that they are unable to continue their educations because of the actual costs of going to college and their inability to stay ahead of their debts.⁹²

Many “full-ride” athletes come from low-income households⁹³ and are only able to go to college because of their athletic abilities and the near-comprehensive athletic scholarships some institutions can offer.⁹⁴ Low-income amateur athletes should not be expected to pay to play collegiate sports when the agreed-upon goal is degree completion and all that students have to offer are their athletic abilities to see them through four years of education. These students would most likely not be able to attend Division I institutions without full athletic scholarships.⁹⁵ So, it is logical to let institutions offer comprehensive aid packages.

NewsArchive/2000/association-wide/debate%2Bon%2Bamateurism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html).

87. *Id.* at 225-33. Justice Stevens noted the role of the NCAA in maintaining a distinction between amateur and professional sports, stating that the United States Supreme Court recognized the NCAA “as the guardian of an important American tradition”: amateurism in intercollegiate athletics. *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 n.23 (1984). Justice Stevens also stated that collegiate athletes must not be paid so as “to preserve the character and quality of the ‘product.’” *Id.* at 102.

88. Associated Press, *supra* note 34.

89. Compare NCAA MANUAL, *supra* note 1, § 15.02.5, at 201 (defining full grant-in-aid to cover “tuition and fees, room and board, and required course-related books”), with *id.* § 15.02.2, at 200 (defining cost of attendance to cover the full grant-in-aid amount and “other expenses related to attendance at the institution”).

90. See Farrey, *supra* note 34.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Marc Jenkins, Comment, *The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate*

Even if we were to look at these expenses as frivolous and unnecessary, and suggest that "full-ride" athletes need not have a car, or enjoy pizza with friends, or see a movie at the cinema,⁹⁶ by limiting athletic scholarships NCAA Bylaw 15.1 imposes a lower standard of living on the many "full-ride" athletes who do not have the ability to pay for these things than on members of the general student body. And student-athletes already have less time to earn money through part-time employment⁹⁷ than members of the general student body might have.⁹⁸ Student-athletes already "work" twenty hours per week training and competing on behalf of their colleges;⁹⁹ they should not have to go into debt to do so if they have been promised elusive "full rides."

IV. Revenue-Producing and Non-Revenue-Producing Conferences and the Impact of Raising Costs on Member Institutions

The class members in the *White* case were football and basketball athletes.¹⁰⁰ However, we can look beyond the financial chasm of the "full-ride" football and basketball student-athletes from Division I revenue-producing conferences¹⁰¹ and see that all "full-ride" student-athletes should have the ability to secure comprehensive scholarship packages up to the estimated costs of attendance. Problems caused by the scholarship gap are not limited to football and basketball players; rather, some "full-ride" field

Athletics?, 5 VAND. J. ENT. L. & PRAC. 39, 41 (2003) (discussing the organization of student-athletes to help protect their rights and give them a greater voice in amateur athletics).

96. See Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 26-27 (2000) (discussing the issues athletes face compared to non-athletes or non-students).

97. Dennie, *supra* note 86, at 247 n.207.

98. See Eric J. Sobocinski, *College Athletes: What Is Fair Compensation?*, 7 MARQ. SPORTS L.J. 257, 262 (1996) (arguing that being a student-athlete amounts to "two full-time jobs: full-time student and big-time athlete").

99. See NCAA MANUAL, *supra* note 1, § 17.1.6.1, at 244; Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 99 & n.127 (2006).

100. See *NCAA to Pay \$228 Million for Male Athletes*, WOMEN HIGHER EDUC., Mar. 2008, available at 2008 WLNR 25418044 (discussing how the *White* settlement might not apply comprehensively to all student-athletes, namely women, in the future, and the possibility of future problems with covering the incidental expenses after the funds from the *White* settlement run out).

101. Revenue-producing conferences are the main focus in the business of NCAA Division I athletics; much of the revenue is generated by the football and basketball programs. But whether a sport generates revenue does not matter because the scholarship gap is a problem that can affect all student-athletes in all conferences.

hockey, soccer, and volleyball players have to pay out-of-pocket for living expenses too. Likewise, some “full-ride” swimmers, rowers, and gymnasts undoubtedly come from low-income households. The argument suggesting that, because these are not revenue-producing sports,¹⁰² these athletes should not be able to tap into institutional resources up to their estimated costs of attendance because this money probably was generated by the successful football and basketball teams is not persuasive.¹⁰³ The standout swimmer or track athlete represents an institution honorably at the highest level both on the field and in the classroom, regardless of whether she brings in revenue for the institution. Schools know of this value, which is why they offer these sports to their students.¹⁰⁴ If an institution has the money and wants to offer athletics scholarship money up to the estimated cost of attending that institution, it should be able to do so.¹⁰⁵

V. Settlement Is Not the Answer for Meaningful Change in Collegiate Athletics

Settlement is not the answer for meaningful change in collegiate athletics. Instead, changing the NCAA bylaws to reflect the best interests of the student-athletes will lead to a better future for Division I athletics. Indeed, the NCAA will continue to face scrutiny if the current system of collegiate athletic scholarships is not changed. As recently as 2010, in a federal antitrust class action, college athletes filed a complaint stating, “[T]he NCAA and its member colleges ‘unlawfully conspired to maintain the price of bachelor’s degrees for NCAA student-athletes at artificially high levels,’ by agreeing never to offer multi-year athletics scholarships, and capping the number of athletics scholarships that schools can offer.”¹⁰⁶

102. See Pekron, *supra* note 96, at 29 (noting that universities value sports differently). In particular, football and basketball are viewed differently from other sports offered because these are two of the highest producing sports in terms of revenue. *Id.*

103. See generally *Fund-Raising Is Part of the Game for Some College Athletes*, N.Y. TIMES (Aug. 24, 2007), <http://www.nytimes.com/2007/08/24/sports/24iht-WBECASH.7241256.html?pagewanted=all> (discussing how non-revenue-producing sports teams are trying to keep their programs afloat).

104. See DOMINIC J. BREWER ET AL., IN PURSUIT OF PRESTIGE: STRATEGY AND COMPETITION IN U.S. HIGHER EDUCATION 135 (2002) (discussing how winning sports teams generate prestige for universities).

105. See Jenkins, *supra* note 95, at 40-41 (discussing the college athletics industry and the money gained by member institutions).

106. Maria Dinzeo, *Student-Athletes Strike at Heart of NCAA Scholarship Restrictions*, COURTHOUSE NEWS SERVICE (Oct. 27, 2010, 5:09 PM), <http://www.courthousenews.com/2010/10/27/31394.htm> (discussing a newly filed complaint in *Agnew v. NCAA* by student-

And we posit that, had an antitrust challenge to Bylaw 15.1 been fully litigated, the restriction on scholarship monies would likely fail the rule of reason test and be an unreasonable restraint of trade in violation of section 1 of the Sherman Act.¹⁰⁷

*VI. What if These Antitrust Challenges to the NCAA Scholarship Limits
Were Fully Litigated? A Hypothetical Antitrust Challenge
to NCAA Bylaw 15.1*

A. Overview

Under section 1 of the Sherman Act, any contract or conspiracy to cause an "unreasonable restraint[] of trade" is illegal.¹⁰⁸ For a hypothetical plaintiff class of "full ride" student-athletes to prevail on a section 1 Sherman Act challenge to Bylaw 15.1, even with the \$2000 stipend over the full grant-in-aid amount, the plaintiff class would need to show that the NCAA member institutions colluded to "unreasonably restrain[] trade in the relevant market" through Bylaw 15.1.¹⁰⁹ Under Bylaw 15.1, the conduct that restrains trade is the direct input price cap a school may offer in scholarships for prospective and continuing student-athletes.

By setting such a price ceiling, the NCAA is acting to protect the amateur image of intercollegiate athletics and, perhaps, attempting to protect less successful schools from having to compete in an open market with more financially-successful schools that might be willing and able to pay for all the costs associated with degree completion for student-athletes.¹¹⁰ "Full ride" student-athletes have challenged and will continue to challenge this scholarship limit because they pay, on average, the \$3000 in collegiate expenses which some schools might otherwise be willing to offer them.¹¹¹

athletes and the issues regarding the NCAA and student-athlete based scholarships); *see also* *In re NCAA 1-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 WL 1207915, at *1 (W.D. Wash. 2006) (plaintiffs of an attempted class action alleged that limiting the number of available scholarships was an illegal restraint of trade).

107. *See infra* Part VI.

108. *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984); *see also* 15 U.S.C. § 1 (2006).

109. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

110. *See* Andy Staples, *Regardless of Motives, Addressing Scholarship Shortfall a Good Thing*, SPORTS ILLUSTRATED (May 20, 2011, updated 12:40 PM), http://sportsillustrated.cnn.com/2011/writers/andy_staples/05/20/paying-players-attendance-cost/index.html.

111. *See, e.g.*, Stipulation and Agreement of Settlement, *supra* note 21, at 2-3; *see also* Associated Press, *supra* note 34.

As such, Bylaw 15.1 amounts to “classic cartel”¹¹² control by the NCAA that violates section 1 of the Sherman Act because: (1) the scholarship limit amounts to a horizontal restraint among member institutions that compete for the best student-athletes,¹¹³ and (2) it is unreasonable to place a cap on scholarship amounts that is less than the estimated cost of attendance because the anticompetitive effect outweighs the pro-competitive virtues of such a restraint.¹¹⁴

The NCAA rule prevents the numerous buyers and sellers (colleges and universities) from acting independently and rationally, and turns the NCAA into a price (scholarship amount) setter.¹¹⁵ Although combining to form an athletic association in general reduces independence because the schools are dependent on the association to establish rules and guidelines,¹¹⁶ establishing scholarship caps is an additional barrier to independence in an area where schools would otherwise compete for student-athletes.¹¹⁷ In an antitrust challenge to Bylaw 15.1, the NCAA might argue that by standardizing scholarship calculations it is encouraging student-athletes to select schools based on factors other than financial packages; however, this “educational” goal will not remove the price cap from antitrust scrutiny.

Applying these principles here, by dictating the amount of athletic scholarship monies available the NCAA becomes a price setter.¹¹⁸ The product is collegiate athletics, and placing an individual student-athlete scholarship limit is an unnatural input restriction in creating the product. To establish a natural equilibrium price, the market participants should instead base their decisions on the supply of student-athletes and the demand for student-athletes driven by available scholarship funds. That being said,

112. *Bd. of Regents*, 468 U.S. at 96 (quoting *Bd. of Regents v. NCAA*, 546 F. Supp. 1276, 1300-01 (W.D. Okla. 1982)).

113. *See, e.g., Law*, 134 F.3d at 1017-19.

114. *See, e.g., id.* at 1019-21.

115. *See Bd. of Regents*, 468 U.S. at 105-06, 120.

116. *See id.* at 117-18.

117. For example, when a group of universities shared information regarding calculating need-based scholarships, the government challenged the practice. *United States v. Brown Univ.*, 805 F. Supp. 288, 289 (E.D. Pa. 1992), *rev'd*, 5 F.3d 658 (3d Cir. 1993). The Massachusetts Institute of Technology, a defendant, argued that the universities were not competing for students in “trade or commerce” and should be permitted to share need-based calculations to encourage students to select schools based on factors other than cost. *Id.* at 296, 302. However, the district court held that even providing a public service of education was insufficient to allow anticompetitive effects. *Id.* at 307. The court of appeals reversed and remanded because the district court applied a truncated “rule of reason analysis.” *Brown Univ.*, 5 F.3d at 661.

118. *See Bd. of Regents*, 468 U.S. at 105-06, 120.

unlike professional sports, there is already an external “cap” on the equilibrium price because it is historically accepted that the amount of scholarship monies a student-athlete receives should not exceed the costs of collegiate education (because it would contravene notions of amateurism).¹¹⁹ Because we value the “amateur” nature of college sports, we allow the market to be influenced by this external constraint. Because of this value judgment, the impact of price fixing by the NCAA enforcing Bylaw 15.1 is limited, but still impactful, and requires antitrust scrutiny.

In response to such a challenge, the NCAA might also, initially, argue that the system of amateur athletics is a public good that cannot exist in a perfectly competitive market and that Bylaw 15.1 is just one part of the NCAA’s broad program of self-regulation that exists for the purpose of maintaining a line of demarcation between amateur and professional sports. However, moving the cutoff from not allowing student-athletes to be paid for their participation to not being able to support their full educational costs needs antitrust scrutiny and must be supported by the NCAA’s pro-competitive rationale for the rule.

Therefore, the real issue underlying a hypothetical lawsuit would be: Why limit the amount of scholarship money a college can offer a student-athlete to a value less than the cost of attendance? This choice is difficult for the NCAA to justify.

B. Threshold Issues: Is the NCAA’s Conduct Within a Potential Antitrust Argument?

A threshold issue is whether by enforcing Bylaw 15.1 the NCAA’s questionable conduct affects interstate commerce and therefore must comply with the Sherman Act.¹²⁰ Another threshold question regarding a section 1 Sherman Act challenge to Bylaw 15.1 is whether there was the requisite duality: that there was an agreement made between economic rivals, and not solely the conduct of a single entity, to unreasonably restrain trade in the relevant market.¹²¹

The NCAA represents a group of universities joining together to create cooperative agreements.¹²² This coming-together makes each NCAA bylaw a type of horizontal agreement. Here, the NCAA and its member institutions entered into a horizontal agreement to impose the scholarship

119. Whether the state of NCAA Division I athletics truly is amateur, professional, or quasi-professional is a dialogue beyond the scope of this article.

120. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911).

121. *See Bd. of Regents*, 468 U.S. at 99.

122. *Id.*

restraint by a majority vote to pass Bylaw 15.1. Thus, the section 1 duality requirement is met.

The conduct susceptible to antitrust scrutiny is the NCAA's implementation and enforcement of a rule that limits athletic scholarships to a value of tuition, fees, room and board, and books. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."¹²³ This conduct fits section 1 because the NCAA Division I member institutions made an agreement in the form of NCAA rules, including Bylaw 15.1, to which all NCAA Division I members agreed to abide by, thus making a conspiracy legally feasible.¹²⁴

The NCAA would, however, likely allege that there is no collusion because member institutions are acting as a single entity with respect to Bylaw 15.1 within the context of determining student-athlete scholarship limits for the purpose of maintaining amateur competition. And, in protecting the value of amateurism in college sports, all NCAA member institutions have a unity of interest and thus are a single entity.¹²⁵ However, this would be a far stretch of the "unity of interest" theory and courts historically have not agreed.¹²⁶

Bylaw 15.1 clearly affects interstate commerce, thus subjecting it to section 1 scrutiny in an antitrust suit. The NCAA is a national association of universities and colleges and their sports teams that operate on a mutually dependent level by means of games, competitions, or events which take place across state borders and are broadcast nationally.¹²⁷ Further, NCAA

123. 15 U.S.C. § 1 (2006).

124. *See Bd. of Regents*, 468 U.S. at 99.

125. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770-71 (1984).

126. *See, e.g., Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2212, 2214 (2010) (stating that *Copperweld* is narrowly applied).

127. Of course, the NCAA also could argue that by imposing athletic scholarship limits under Bylaw 15.1, it is not subject to section 1 Sherman Act liability because it imposes such limits to achieve the legitimate and noncommercial goal of making education the highest priority in amateur athletics. The NCAA could further argue that such limits are not an unreasonable restraint of trade, but rather a small part of the NCAA's wide-ranging scheme of self-regulation that is implemented for the purpose of preserving the line of distinction between amateur and professional athletics. The Supreme Court recognized this argument in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 698-99 (1978). The NCAA would likely add that it has the legitimate and noncommercial goals of preserving the distinction between amateur and professional athletics, providing the public with the public good of amateur athletics, and maintaining the line of distinction between amateur and professional athletics in order to provide a unique product.

Division I athletic programs compete for, recruit, offer financial aid to, and admit prospective student-athletes from across the United States. Bylaw 15.1 affects the amount and terms of financial aid available to these individual prospective student-athletes because institutions' offers to these prospects are capped at the full grant-in-aid amounts, and the institutions are prevented from covering the additional costs associated with matriculation.

C. Scholarship Caps as a Form of Price Fixing

A firm may partake in price fixing by affecting its supply.¹²⁸ Here, it can be alleged that the NCAA (the "firm") is restricting the supply of financial aid money to student-athletes by capping scholarships at an amount below the actual cost of attending college. However, in *United States v. Socony-Vacuum Oil Co.*, the Court held that there is no such thing as a reasonable price cap so long as it is artificially set, and that such conduct is thus a per se violation of the Sherman Act.¹²⁹ In sports litigation, however, the per se analysis is almost always abandoned in favor of the more subjective burden-shifting review of the rule of reason.¹³⁰ In *Board of Trade of Chicago v. United States*, the Court held that if "the restraint imposed [was] such as merely regulate[d] and perhaps thereby promote[d] competition," then such restraint was not unlawful under the Sherman Act.¹³¹ The factors considered included: the facts peculiar to the business to which the restraint was applied; its condition before and after the restraint was imposed; and the nature of the restraint and its effect, actual or probable.¹³² Other factors included the history of the restraint and the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained.¹³³

128. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940).

129. *Id.* at 223.

130. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

131. 246 U.S. 231, 238 (1918).

132. See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 691 (discussing *Board of Trade of Chicago*). A conclusion that a restraint of trade is unreasonable may:

[B]e based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Id. at 690 (footnotes omitted) (describing the test for reasonableness set forth in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58 (1911)).

133. *Id.* at 692.

Applying those factors here, the facts peculiar to the business are that the NCAA is an amateur sports association and it intends to maintain the amateur status of collegiate athletics. There are no facts to indicate the condition of the NCAA or its students before the scholarship rule was put into place, but the conditions after include that students are damaged by not receiving enough money to cover their college costs.¹³⁴ Another condition is that the NCAA has successfully remained an amateur association because it has kept the financial aid arms race at a fundamental level. The nature of the effect and the history of the restraint show a legitimate reason for which the NCAA has opted to keep scholarship limits at a level that ensures amateurism in college sports.

D. Is Bylaw 15.1 an Unreasonable Restraint of Trade?

The purpose of the Sherman Act is to prevent an unreasonable restraint of trade.¹³⁵ Of course, all economic activity restrains trade in some way, but the Sherman Act forbids restraints of trade that harm the public consumer.¹³⁶ The consumer of collegiate athletics has an interest in the product being produced—that is, the games. But this consumer interest does not directly reduce the availability of college athletics. Because student-athletes will face, on average, the same \$3000 cost increase at all schools that were able to offer full scholarships previously, the impact on the product will be limited to any student-athletes who are unable to attend any university because of the cost increase.

On its face, Bylaw 15.1 directly imposes a price cap on the amount of financial aid any student-athlete may receive in the form of an athletic scholarship.¹³⁷ Under the rule of reason test, a plaintiff must first establish the anticompetitive effect of the suspect action.¹³⁸ A plaintiff would cite to the price ceiling, which restrains a school's ability to compete for student-athletes. A plaintiff also would allege that the NCAA had arbitrarily set the price ceiling at an amount lower than the actual cost of collegiate education as an indication that the price ceiling is unreasonable, preventing schools from paying for the full cost of education for athletes that generate more revenue than they are rewarded with in scholarship monies.

134. See FERTMAN, *supra* note 7, at 208.

135. See 15 U.S.C. § 1 (2006).

136. See *Standard Oil Co.*, 221 U.S. at 62.

137. See NCAA MANUAL, *supra* note 1, § 15.1, at 202.

138. *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

The burden would then shift to the NCAA to proffer the pro-competitive virtues that the rule is intended to accomplish.¹³⁹ The NCAA would insist Bylaw 15.1 is part of a broad range of rules that maintain the amateur aspects of collegiate athletics, and that this price ceiling is important to protect smaller schools and to allow them to compete for student-athlete talent. Although amateur athletics is based on the notion that players are not paid to compete,¹⁴⁰ this ideal is useless without a concrete standard. Therefore, the NCAA will point to the need for a clear guideline for schools to follow. By tying the scholarship limit to objectively measurable numbers—that is, the full grant-in-aid—Bylaw 15.1 provides the needed certainty to all institutions.

But a plaintiff would likely be able to establish that the anticompetitive effects outweigh the alleged pro-competitive virtues¹⁴¹ because either: (1) the rationale behind Bylaw 15.1 is not legitimate, or (2) the rule is not sufficiently narrowly-tailored to achieve these pro-competitive objectives because there is a less restrictive alternative. A plaintiff in the hypothetical case would argue that the same pro-competitive goals could be achieved by a rule that simply forbids scholarships that compensate a student-athlete beyond the necessary educational expenses to achieve degree completion, which is the amount the central administrative financial aid office at the institution sets as the yearly estimated-cost-of-attendance amount. Although the NCAA could set forth a guideline that stated that tuition, fees, room and board, and books are established expenses that will be accepted in all instances, thereby providing clarity to institutions, the additional expenses that cost on average \$3000 can be reimbursed by the institutions if they are properly documented. None of the pro-competitive virtues are enabled by setting the scholarship limit at about \$3000 below the institutionally set, estimated cost of attendance. Because the pro-competitive rationales do not address this contention, the rule should fail as not narrowly-tailored to the desired benefits.¹⁴²

139. *Id.*

140. *See* Dennie, *supra* note 86, at 225-33.

141. *Law*, 134 F.3d at 1020.

142. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 119 (1984) (requiring the NCAA's interest to be tailored specifically to further said interest). Of course, the dissenting Justices from *Board of Regents* would likely hold that this restriction is justified under the general powers of the organization. *See id.* at 123-24 (White, J., dissenting). To achieve the goal of bringing together universities from around the country to participate in these games, the NCAA needs the authority to make rules and limitations. Unlike a restriction on the number of televised games available to a particular school, the NCAA does not regulate, nor could it regulate, the quality (and therefore price) of education that can be provided under the tuition

Therefore, because there is a less restrictive means to accomplish the pro-competitive virtues of protecting the amateur status of collegiate athletics, a court will likely hold that this rule is an unreasonable restraint of trade in violation of section 1 of the Sherman Act.

E. Rule of Reason Analysis

By their nature, almost all contracts restrain trade to some extent: “Every agreement concerning trade, every regulation of trade, restrains.”¹⁴³ In fact, sometimes “certain products require . . . restraints . . . in order to exist at all,” and thus there must be some agreements by the member institutions.¹⁴⁴ Because sports leagues and the teams therein rely on each other in a mutually dependent manner to produce the product of collegiate sports entertainment, there must be some level of agreement, or collusion, by the member institutions of the NCAA. For this reason, the rule of reason analysis is almost always applied in determining whether there has been an unreasonable restraint of trade in violation of section 1 of the Sherman Act, instead of per se analysis. Because there are almost always pro-competitive virtues, such as scheduling, skills rules, and playing conditions, which would make the restraint of trade reasonable, there is no per se violation of the Sherman Act.

Therefore, whether the agreement between the NCAA member institutions represented by Bylaw 15.1 causes an unreasonable restraint of trade will depend almost entirely on whether a plaintiff class can prove that the restraint is unreasonable. To determine if the restraint is unreasonable, a court will apply either the per se rule or the rule of reason test.¹⁴⁵ Despite these schools competing for students, for fans, for donor support, etc., the courts generally have not treated the horizontal agreements of the NCAA members institution as per se violations of the Sherman Act, even when they involve price fixing, because college sports is “an industry in which

component. By leaving this and other areas for competition, the NCAA could convince a court to accept its pro-competitive rationales as justified because there are other areas within which schools may compete. In Justice White’s dissent, he mentioned how the NCAA regulates compensation. *Id.* at 123. Although this formula decreases the amount of aid that can be given to a student-athlete to below the amount that would be available under a rule that allowed full compensation of collegiate expenses, it is applied equally to all schools that are competing with full scholarship athletes.

143. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

144. *Law*, 134 F.3d at 1017 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979)).

145. *Id.* at 1016–17.

horizontal restraints on competition are essential if the product is to be available at all.”¹⁴⁶

Because of *Board of Regents*, a court would not analyze Bylaw 15.1 as a per se violation of the Sherman Act.¹⁴⁷ The NCAA is the “great protector” of amateur athletics¹⁴⁸ and, therefore, is given deference to pass regulations that would not otherwise be permissible.¹⁴⁹ For example, even when the NCAA limited annual compensation for Division I basketball coaches, the Tenth Circuit held that the proper standard for analyzing such a limit was the rule of reason test.¹⁵⁰ The per se standard, which declined in usage after *Standard Oil*,¹⁵¹ is only appropriate when the anticompetitive conduct is so obvious that it negates any evidence of pro-competitive virtues.¹⁵² Thus, the court must determine whether there is a pro-competitive rationale for the allegedly anticompetitive action.¹⁵³

1. Under the Rule of Reason Test, Bylaw 15.1 Is an Unreasonable Restraint of Trade in Violation of Section 1 of the Sherman Act

The rule of reason analysis under section 1 requires the finder of fact to partake in a burden-shifting analysis by weighing the pro-competitive virtues of the conduct at issue against the conduct’s anticompetitive effects.¹⁵⁴ And “[u]nder a rule of reason analysis, an agreement to restrain trade may still survive scrutiny under section 1 if the procompetitive benefits of the restraint justify the anticompetitive effects.”¹⁵⁵ Justifications offered under the rule of reason analysis may be considered only to the extent they show that, on balance, “the challenged restraint enhances competition.”¹⁵⁶ In *Law*, the Tenth Circuit said that “the only legitimate rationales that we will recognize . . . are those necessary to produce competitive intercollegiate sports.”¹⁵⁷

146. *Bd. of Regents*, 468 U.S. at 101.

147. *Id.*

148. Joe Nocera, Op.-Ed., *The College Sports Cartel*, N.Y. TIMES, Dec. 31, 2011, at A23, available at <http://www.nytimes.com/2011/12/31/opinion/nocera-the-college-sports-cartel.html>.

149. *Bd. of Regents*, 468 U.S. at 102.

150. *Law*, 134 F.3d at 1012, 1019.

151. This is especially true in the sports realm. See, e.g., *Bd. of Regents*, 468 U.S. at 100.

152. *Law*, 134 F.3d at 1016.

153. *Id.* at 1016-17.

154. *Id.* at 1019.

155. *Id.* at 1021.

156. *Bd. of Regents*, 468 U.S. at 104.

157. *Law*, 134 F.3d at 1021 (referencing *Bd. of Regents*, 468 U.S. at 117).

In *Board of Regents*, the Court held that sometimes horizontal restraints are necessary to create certain commodities,¹⁵⁸ and thus a per se test is inappropriate unless the restraint on its face is completely void of any pro-competitive rationales.¹⁵⁹ Thus, the rule of reason balancing test is employed to determine whether a restraint is an *unreasonable* restraint of trade.¹⁶⁰ In *Board of Regents*, the Court applied the rule of reason test and held that the NCAA output market restriction regarding televised college football games constituted a violation of the Sherman Act.¹⁶¹ The Court explained that a restraint of trade could be unreasonable “based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.”¹⁶² Justice Stevens, writing for the majority, also reasoned that the restraint of trade did not promote a pro-competitive effect.¹⁶³

Therefore, the NCAA in this hypothetical challenge must demonstrate that the pro-competitive virtues of the conduct or practices either (1) make the availability of the product possible or efficient, or (2) act to counter some great evil the defendant seeks to protect against, such as nonmonetary values.¹⁶⁴ The burden then shifts back to the plaintiff, who must show that the defendant’s conduct is not reasonably necessary to achieve those pro-competitive virtues.¹⁶⁵ Here, the NCAA would likely allege that its scholarships only cover the fundamental financial requirements of a college education, a valid justification because it seeks to protect its core value of keeping college sports amateur,¹⁶⁶ which requires not allowing college athletes to benefit unfairly in a financial manner from playing collegiate sports. The NCAA would likely allege that allowing scholarships to provide student-athletes with financial aid beyond that which is fundamentally necessary to their educations would constitute payments for services and thus contravene the amateur nature of college sports. The importance of this

158. *Bd. of Regents*, 468 U.S. at 101-02.

159. *Law*, 134 F.3d at 1016.

160. *Bd. of Regents*, 468 U.S. at 103.

161. *Id.* at 120.

162. *Id.* at 103 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 690 (1978)) (internal quotation marks omitted).

163. *Id.* at 113-20.

164. *See Law*, 134 F.3d at 1019.

165. *See id.*

166. *See NCAA MANUAL*, *supra* note 1, § 1.3.1, at 1 (stating that a basic purpose of the NCAA is to “retain a clear line of demarcation between intercollegiate athletics and professional sports”).

value has been evidenced repeatedly in the past by the NCAA,¹⁶⁷ which takes very seriously any violation of the rule prohibiting receipt of payment while a player is still an NCAA athlete.¹⁶⁸

2. Bylaw 15.1 Has a Substantially Adverse Effect on Competition

Under the rule of reason test, a plaintiff shows that the restraint is unreasonable by demonstrating that the challenged restraint has a substantially adverse effect on competition.¹⁶⁹ A plaintiff may show anticompetitive effects either through thorough market analysis or, when the restraint is direct and readily measurable, a quick look analysis.¹⁷⁰

The potential plaintiff class’s argument showing that Bylaw 15.1 has a substantially adverse effect on competition would be that Bylaw 15.1 is a horizontal restraint amounting to an illegal price cap. The horizontal restraint here is that the NCAA’s limit on the amount of scholarship money that may be offered to a student-athlete is fixed at the value of a full grant-in-aid, which is approximately \$3000 less than the estimated cost of attending the university. Alternatively, it could be arbitrarily capped at \$2000 above the full grant-in-aid if the NCAA adopts the stipend.

Either way, this discrepancy in funds creates a horizontal restraint effect between the member institutions and student-athletes because the member institutions are unable to offer comprehensive scholarship packages that cover all costs of the athletes’ educations and the student-athletes are forced to accept scholarships insufficient to cover the costs of their educations. Thus, Bylaw 15.1 binds the institution from competing for the best athletes by offering the best scholarship packages; and, as a consequence, student-athletes are subject to \$3000 gaps in funds.

Fixed prices without regard to differing quality amount to a “classic cartel.”¹⁷¹ Through Bylaw 15.1, the NCAA imposes a limit on scholarship funds without regard to the fact that the estimated cost of attending member institutions is, on average, approximately \$3000 more than the limit under Bylaw 15.1. This conduct amounts to NCAA “cartel control” under *Board*

167. See, e.g., Mark Schlabach, *NCAA Sends Message to Ohio State*, ESPN (Dec. 20, 2011), http://espn.go.com/college-football/story/_/id/7373708/ncaa-sends-message-sanction-s-ohio-state-buckeyes (describing NCAA sanctions imposed on the Ohio State University after players sold autographs and memorabilia).

168. See NCAA MANUAL, *supra* note 1, § 12.1.2(b), at 60 (removing amateur status if the athlete “[a]ccepts a promise of pay”).

169. *Law*, 134 F.3d at 1016, 1019.

170. *Id.* at 1019-20.

171. *NCAA v. Bd. of Regents*, 468 U.S. 85, 96 (1984) (quoting *Bd. of Regents v. NCAA*, 546 F. Supp. 1276, 1300-01 (W.D. Okla. 1982)).

of *Regents*, when “[t]he cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality . . . for these various products.”¹⁷² With Bylaw 15.1, the NCAA imposed a fixed amount of money available to student-athletes without any regard for the fluctuating costs of attendance at various schools and without regard for the hardship this gap in funds would impose on the student-athlete.

Furthermore, the NCAA imposes a punishment¹⁷³ for any athletes who receive funds in excess of the deficiently-set scholarship limits, so the student-athletes have practically no way to alleviate the financial burdens imposed on them due to the differences in the grant-in-aid amounts and the estimated cost of attendance amounts. Combining all of these factors—that is, horizontal price fixing and fixing price without regard to differing quality of the product—the NCAA’s level of control by its implementation of Bylaw 15.1 should be per se illegal because it is a direct restraint of trade and, arguably, entirely void of redeeming competitive rationales.¹⁷⁴

A plaintiff class would first examine whether the challenged rule has a direct effect on competition, like price fixing or output caps, and determine if the anticompetitive effect is readily measurable.¹⁷⁵ Under *Albrecht v. Herald*, price ceilings may constitute unreasonable restraints of trade because they reduce the ability of market participants to engage in supply-and-demand based pricing.¹⁷⁶ However, the Court of Appeals in *United States v. Brown University* recognized that for schools sharing scholarship information, the pro-competitive virtues were sufficient to warrant balancing with the anticompetitive effects and thus applied the full rule of reason test.¹⁷⁷

172. *Id.* (quoting *Bd. of Regents*, 546 F. Supp. at 1300-01) (internal quotation marks omitted).

173. NCAA MANUAL, *supra* note 1, § 12.1.2(b), at 60 (removing amateur status if the athlete “[a]ccepts a promise of pay”).

174. Compare this hypothetical law suit with *Law*. 134 F.3d 1010. In *Law*, the alleged restraint of trade was a limit on coaches’ pay. *Id.* at 1012. The court analyzed this restraint under a rule of reason analysis and held that the compensation limit was an unlawful restraint of trade. *Id.* at 1024. The analogous argument is that student-athletes receive compensation in the form of athletic scholarships. And if the NCAA limits this compensation, then it has unlawfully restrained trade.

175. *See id.* at 1019.

176. *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968) (citing *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)), *overruled by State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997).

177. 5 F.3d 658, 678 (3d Cir. 1993).

Although the court in *Law* acknowledged that horizontal price fixing was usually illegal per se, it also recognized the NCAA, and amateur sports as a whole, as a unique market that may require horizontal restraints such as Bylaw 15.1 in order for the market to exist at all.¹⁷⁸ Similarly, because some horizontal agreements are necessary to even create the product of amateur athletics, a court would likely perform a full rule of reason analysis to make sure all factors were considered when determining if the restraint was unreasonable.¹⁷⁹

The plaintiff-student-athletes would show that Bylaw 15.1 places a direct cap on the scholarship monies that institutions may provide to student-athletes. The effect of this direct restraint requires student-athletes to cover the additional costs represented by the gap between the full grant-in-aid and the institutionally set, estimated cost of attendance. Because the student-athletes are not allowed to benefit from NCAA member institutions competing with one another for their athletic abilities,¹⁸⁰ Bylaw 15.1 has imposed a lower standard of living and significant hardships on many student-athletes. Student-athletes already have very full schedules and do not have a lot of time to work part-time jobs to cover additional costs.¹⁸¹

To prove that the defendant's conduct has a substantially adverse effect on competition, a plaintiff may establish the effect of the defendant's conduct indirectly by showing the defendant "possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price."¹⁸² The NCAA would argue that the plaintiffs could not prove whether the NCAA has power in the market for scholarships offered to student-athletes because the member institutions are the ones who choose which athletes to offer scholarships to and in what amounts. However, this argument will likely fail under *Board of Regents* because "the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no

178. See *Law*, 134 F.3d at 1017.

179. *Id.* at 1021.

180. See NCAA MANUAL, *supra* note 1, § 12.1.2(b), at 60 (removing amateur status if the athlete "[a]ccepts a promise of pay").

181. See Sobocinski, *supra* note 98, at 262 ("[T]he student-athlete is faced with the demands of two full-time jobs: full-time student and big-time athlete . . .").

182. *Law*, 134 F.3d at 1019.

elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”¹⁸³

In *Law*, the court explained:

[A]nticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces.¹⁸⁴

In our hypothetical case, the NCAA will likely argue that it adopted Bylaw 15.1 to reduce the high cost of funding expensive revenue-producing sports like basketball and football. As a matter of common sense, the NCAA is not likely to argue that the cap on scholarship funds has no effect on reducing the amount needed to fund football and basketball programs at Division I member institutions. Thus, because Bylaw 15.1 is successful in artificially lowering the price of scholarships offered to athletes to a deficient amount, a court is most likely to skip the relevant market analysis and move straight to the question of whether the pro-competitive justifications advanced for the restraint outweigh the anticompetitive effects.

Further, absent this gap, the plaintiffs may also show that the NCAA member institutions and student-athletes would be able to compete even more. Because the NCAA controls every member institution, and all Division I programs belong to the NCAA,¹⁸⁵ this produces an anticompetitive effect. If a member institution does not belong to the NCAA then it may miss out on valuable opportunities for endorsement contracts, championship or tournament events, and funding for its programs. The NCAA may rebut this argument, however, because it can claim to be a voluntary organization made up of member institutions that voluntarily agree to bylaws resulting in these effects on financial aid.¹⁸⁶

183. *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

184. *Law*, 134 F.3d at 1020.

185. See NCAA MANUAL, *supra* note 1, § 20.9, at 340.

186. See *id.*, § 3.1, at 8.

3. Because of the Direct and Readily Measurable Anticompetitive Effect of Bylaw 15.1, the NCAA Must Show Pro-competitive Virtues of Such a Restriction

Once the plaintiffs have shown the anticompetitive effect of Bylaw 15.1, the NCAA must justify its restraint as “reasonable” by proffering sufficient pro-competitive virtues for the anticompetitive restriction.¹⁸⁷ This is where the plaintiffs have their strongest argument because it will be very difficult for the NCAA to show how it is reasonable to *limit the amount of scholarship money a college may offer a student-athlete to a value less than the institutionally set, estimated cost of attending school*. This is the real issue underlying the entire (hypothetical) lawsuit.

The NCAA will most likely argue that it is in the unique market of amateur sports and that its role is to foster the best environment for amateur sports to flourish and continue.¹⁸⁸ It will also argue that it has a legitimate and noncommercial goal of maintaining the line of distinction between amateur and professional sports,¹⁸⁹ and that Bylaw 15.1 is simply one rule in a grand scheme that has the goal of self-regulation, not commercial profit.

The NCAA may be able to show that Bylaw 15.1 fosters competition in an open market, especially among member institutions that have large football and basketball programs. Bylaw 15.1 levels the playing field between wealthier and less wealthy institutions because it prevents wealthier institutions from offering “extra” monies to prospective student-athletes. However, the plaintiffs can refute this claim by questioning why the difference between the full grant-in-aid and the estimated cost of attendance is “extra” when a school’s central financial aid office deems these estimated expenses necessary costs for attending the specific school.

Additionally, the NCAA will most likely advance several justifications for scholarship limits. The first likely justification advanced is that Bylaw 15.1 preserves a competitive balance among the member institutions because, without it, competition between the schools for the best athletes would lead to unlimited scholarship amounts offered to students, and those schools with less money would not be able to compete.¹⁹⁰ Yet, the plaintiff class could rebut this argument because, as was the case in *Law*, the court

187. See *Law*, 134 F.3d at 1019.

188. See *Bd. of Regents*, 468 U.S. at 120.

189. See NCAA MANUAL, *supra* note 1, § 2.9, at 4.

190. See *Bd. of Regents*, 468 U.S. at 117 (recognizing the NCAA’s argument that there is a legitimate interest in maintaining competitive balance).

will have to question whether “cost reductions can serve as a legally sufficient justification . . . even if such cost reductions are necessary to save inefficient or unsuccessful competitors from failure.”¹⁹¹ Furthermore, “[r]educing costs for member institutions, without more, does not justify the anticompetitive effects of the . . . [r]ule.”¹⁹² Likewise, “mere profitability or cost savings [do] not qualif[y] as a defense under the antitrust laws”¹⁹³ because this argument “[i]mproperly assumes that antitrust law should not apply to condemn the creation of market power in an input market.”¹⁹⁴ Indeed, “[i]f holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a pro-competitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels.”¹⁹⁵ The main inquiry a court will consider is whether this objectively serves as a legitimate pro-competitive end, and the NCAA must present evidence that limits on scholarships offered to student-athletes are both successful in reducing costs and deficits and necessary to save the commodity: amateur college athletics.

The second likely attempted justification is that without Bylaw 15.1, wealthier schools will manipulate their university-set cost of living estimates to values higher than are real for the purpose of being more competitive and enticing blue-chip recruits to sign with their schools because they can offer more money. However, this concern is unfounded. The institutionally set, estimated cost of attendance is the ceiling for financial aid for every student who matriculates at a school and those numbers must comply with Department of Education parameters because they also serve as the upper limits for students receiving federal student loans.¹⁹⁶

Finally, the NCAA is likely to argue that Bylaw 15.1 is necessary for maintaining competitiveness. In *Law*, the court recognized that a “team must try to establish itself as a winner, but it must not win so often and so convincingly that the outcome will never be in doubt, or else there will be

191. *Law*, 134 F.3d at 1023.

192. *Id.*

193. *Id.*

194. *Id.* (quoting Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2643 (1996)) (internal quotation marks omitted).

195. *Id.*

196. See *How Much Can I Borrow?*, FED. STUDENT AID, <http://studentaid.ed.gov/types/loans/subsidized-unsubsidized#how-much-can-i-borrow> (last visited May 27, 2013).

no marketable competition.”¹⁹⁷ The NCAA will likely assert that Bylaw 15.1 helps to maintain competitive equity by preventing wealthier schools from offering higher scholarships to the most talented athletes. However, the rule is “nothing more than a cost-cutting measure.”¹⁹⁸ It would appear that “the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance.”¹⁹⁹ This interest alone is not a valid antitrust defense. If the caps were lifted, then member institutions could compete amongst each other for the best talent for their athletic programs, and lesser-known schools might be able to attract prospective talent away from the more-widely known programs to create better parity in collegiate athletics. Therefore, the arbitrary cap only serves to lessen the competition amongst member institutions.

4. The Anticompetitive Effect of Bylaw 15.1 Outweighs the Pro-competitive Rationales for the Price Cap

Should the NCAA offer legitimate pro-competitive rationales for Bylaw 15.1 which create pro-competitive virtues based on its enforcement, then the plaintiffs must prove it is still not reasonable, even considering those virtues.²⁰⁰ The plaintiffs would be able to show that Bylaw 15.1, even with the \$2000 stipend above the full grant-in-aid amount, is not reasonably necessary to obtain the objectives that the defendant put forward. Conversely, the plaintiffs could argue that the NCAA’s “objectives [could] be achieved in a substantially less restrictive manner.”²⁰¹ First, the plaintiff-student-athletes could show that it is unreasonable for the NCAA to enforce an arbitrary cap to save costs and to increase revenues²⁰² because even if those revenues generated are fed back to the member institutions, purportedly for the student athletes’ welfare, this arbitrary method of benefitting the institutions has an overly broad impact.

Second, the plaintiffs could show that there are less restrictive means to obtain the objectives than the defendant has put forward.²⁰³ If the NCAA

197. *Law*, 134 F.3d at 1024 (quoting Michael Jay Kaplan, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489, § 2(a) (1974) (internal quotation marks omitted)).

198. *See id.*

199. *Id.*

200. *Id.* at 1019.

201. *See id.*

202. *See id.*

203. *See id.*

seeks to protect the sheen of amateurism, there are other considerations in preserving amateurism that could be implemented instead of having a cap of a grant-in-aid. For example, a plaintiff class could contend that a less restrictive means might include assigning each student-athlete a financial counselor to evaluate his or her individual financial needs. This would enable the NCAA member institution to subjectively determine the actual cost of attending college for each student-athlete and allow its scholarship to include only those costs. Of course, the NCAA would rebut this argument by asserting that this task would be too tedious, costly, and inefficient, and thus capping the scholarships at a rate which covers only the fundamental needs of the student-athletes is more efficient and less vulnerable to manipulation.²⁰⁴

So, instead, the less restrictive alternative offered here would be that the objective, institutionally set, estimated cost of attendance, which still limits athletically-related scholarship monies, but only to the amount that the school deems necessary for the student to attend that college in that locale, better serves the NCAA's objective of protecting amateurism.

Overall, amateurism can be preserved by other means than the current Bylaw 15.1 so long as student-athletes are not being paid to play in their respective sports amounts above what is necessary for degree completion. But, when student-athletes are at severe disadvantages and are not allowed to receive enough money to survive in their respective college programs, the restriction is not reasonable.

VII. Potential Issues that May Arise Due to the Liberalization of the NCAA's Bylaws

We acknowledge some concerns if NCAA Bylaw 15.1 is liberalized. Institutions can argue that raising the scholarship limit to the cost of attendance will be very expensive for some colleges,²⁰⁵ particularly those

204. As an example, there are 335 total member schools participating in Division I sports alone. See *Differences Among the Three Divisions: Division I*, NCAA (last updated Dec. 7, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/about+the+Ncaa+OLD/Who+We+Are/Differences+Among+the+Divisions/Division+I/About+Division+I>. Of those schools, 238 have football programs. See *id.* This means that the athletic department at each school has over 100 students. Thus, at least 23,800 students, the minimum for Division I programs alone, would need individual counseling. *Id.*

205. See generally Keith Dunnavant, *Where Athletic Scholarships Fall Short*, BUSINESSWEEK (Oct. 15, 2003), http://www.businessweek.com/bwdaily/dnflash/oct2003/nf20031016_9968.htm (discussing the high costs associated with raising scholarship limits). For example, adding a yearly stipend to make up the difference between the cost of

with higher costs of living. The backlash of such liberalization could be destructive. Although there would be no requirement to offer the full amount, no college would want to put itself at a competitive disadvantage by not fully funding its football program. Such a rule change at some Division I schools will make football, for example, much more expensive to field.²⁰⁶ And, in the short term we can presume, unfortunately, that this money will be stripped from the non-revenue-producing programs and perhaps will take away some opportunities from other student-athletes.²⁰⁷

Division I institutions and the NCAA make large amounts of money on the likenesses and images of their players—whether it be in apparel or video games.²⁰⁸ Student-athletes ought to be entitled to at least be able to finance their educations if these parties are going to make such large profits.²⁰⁹

What is the real concern here? We are not persuaded by the argument that the big money schools will manipulate their university-set cost of living estimates to values higher than reality for the purpose of being more competitive and enticing blue-chip recruits to sign with their schools

attendance and full grant-in-aid could amount to a massive new expenditure of about \$100 million for Division I schools. *Id.*

206. As one example, if the average increase required to close the gap is \$2500, a new cost of \$212,500 will be added to a Division I football program alone ($\$2500 \times 85 = \$212,500$). Currently, NCAA member institutions are prohibited from offering more than 85 full-ride football scholarships per year. See NCAA MANUAL, *supra* note 1, § 15.5.6, at 215. Plus, to comply with Title IX, additional monies funding men's sports would compel an institution to provide equality in funding for women's programs, perhaps doubling this cost. See *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last modified Mar. 14, 2005).

207. For an example of a university cutting scholarships from non-revenue-producing sports as a result of cost saving legislation, see Paul McMullen, *Terps Will Have to Cut Scholarships in 6 Sports*, BALT. SUN, Jan. 10, 1991, at B5, available at 1991 WLNR 714423. See also Mike Weaver, *Stanford Cuts Scholarships for Track and Field by 25*, SAN JOSE MERCURY NEWS, Feb. 13, 1990, at 1E, available at 1990 WLNR 1082008 (demonstrating similar cuts to funding and scholarships to the non-revenue-producing sport of track and field); cf. *NCAA to Pay \$228 Million for Male Athletes*, *supra* note 100, at 3 (discussing that athletic departments might move monies from women's programs to fully fund men's revenue-producing programs).

208. See generally Andy Latack, *Quarterback Sneak*, LEGAL AFFAIRS (Jan./Feb. 2006), http://www.legalaffairs.org/issues/January-February-2006/review_latack_janfeb06.msp (discussing the similarities of Division I athletes in video games and NCAA revenue resulting from those video games).

209. See *College Athletics Revenues and Expenses—2008*, ESPN, espn.go.com/ncaa/revenue (last visited May 27, 2013).

because they can offer more money. We should not continue to prematurely punish student-athletes for the potential wrongdoings of schools.

But, despite that small risk, the NCAA should still allow those noble schools with financial ability the opportunity to choose to do the right thing because it is for the student-athletes' beneficial welfare, whether only one institution offers to fill the gap or 300 institutions offer to do so.²¹⁰

Conclusion

If the NCAA truly wishes to enhance the potential benefits available for student-athletes by emphasizing education and degree completion, it should start by allowing institutions to fully pay for student-athletes' educations.²¹¹ The NCAA should eliminate the scholarship gap by liberalizing Bylaw 15.1 to allow for individual scholarship limits up to the estimated costs of attendance.

The alternative to liberalizing Bylaw 15.1 is to turn the *White* settlement into a permanent fixture, whereby the NCAA sets up a fund to address future claims by all student-athletes to assist in covering the expenses represented by the gap. As a general framework, the NCAA would have to establish the new fund, which would mirror the terms of the *White* settlement, and allow member institutions to use a set pool of money to address the permissible and additional education needs of students; and this pool should be replenished when depleted so as to accommodate claims by future student-athletes. Of course, there are many issues that must be addressed if the NCAA implements the new fund. How much should the base amount of the fund be? And how many claims will there be per year? And who should handle the processing of these claims—the NCAA, the athletic conference, or the institution? The innumerate number of issues further demonstrates that an amendment to Bylaw 15.1 is most appropriate.

There is no easy answer to this serious dilemma and, in the end, it is the student-athletes disadvantaged because of this restriction; they alone must shoulder the on-average \$3000 per year burdens placed on them by the gap between the value of the grant-in-aid and the institutionally set, estimated cost of attendance. In sum, we are certain that the *White* settlement and the

210. See, e.g., Greg Skidmore, *Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319, 320-21 (2004).

211. See Dennie, *supra* note 86, at 246 n.202 (quoting Memorandum from Jim Delany, Comm'r of the Big 10 Conf., to the Council of Presidents/Chancellors 2 (June 3, 2001) (on file with *Sports Lawyers Journal*) (stating that the Big 10 is “committed to closing the gap between the cost of grants-in-aid and the full cost of attendance”)).

stipend amendment signify that the NCAA is willing to throw money at the situation.

Thus, though it might be possible to come to a compromise by establishing the new fund mirroring the terms of the *White* settlement so that future claims by student-athletes could be addressed and alleviated without the need to go through an entire class action lawsuit (or equally harrowing battle), the best solution is an alteration to Bylaw 15.1.