

5-23-2013

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Recommended Citation

Drew N. Goodwin, *Not Quite Filling The Gap: Why the Miscellaneous Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 54 B.C. L. Rev. 1277 (2013), <https://lawdigitalcommons.bc.edu/bclr/vol54/iss3/16>

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NOT QUITE FILLING THE GAP: WHY THE MISCELLANEOUS EXPENSE ALLOWANCE LEAVES THE NCAA VULNERABLE TO ANTITRUST LITIGATION

DREW N. GOODWIN*

Abstract: Throughout its history, the National Collegiate Athletic Association (NCAA) has been repeatedly accused of violating antitrust law in a range of different ways—restricting television broadcasts, limiting coaches’ salaries, and capping the amount of athletic scholarships. Most recently, in the case of *White v. NCAA*, a class of plaintiffs argued that the NCAA’s artificial limitation on student-athlete compensation violated antitrust law. Although this case settled before trial, it represented a major victory for student-athletes. The NCAA is now considering a proposal—the Miscellaneous Expense Allowance (“MEA”)—that would raise the NCAA’s artificial cap on athletics-related financial aid by \$2000. This legislation is partially aimed at protecting the NCAA from further antitrust liability, but it does not quite fill the gap. After providing a brief history of college athletics and student-athlete compensation, this Note then examines the mechanics of antitrust law and how courts have applied antitrust law in the context of the NCAA. This Note then argues that a hypothetical class of student-athletes could still bring a viable antitrust claim against the NCAA, even if the MEA is passed. Subsequently, this Note analyzes the arguments on both sides that would arise in such a hypothetical lawsuit.

INTRODUCTION

In the 2011–2012 fiscal year, the football program at the University of Texas at Austin reported more than \$77 million in profit.¹ With 120 players comprising the team’s 2012 team roster, each football player generated, on average, over \$640,000 for the university during that season.² Surprisingly, however, an English major at the University of Texas can receive more money under a full academic scholarship than the

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¹ *Institution Data, The University of Texas at Austin*, U.S. DEP’T. OF EDUC. OFFICE OF POSTSECONDARY EDUC., ope.ed.gov/athletics/GetOneInstitutionData.aspx (click “Get data for one institution” in the right-hand column; enter “University of Texas” for Name of Institution; enter “Austin” for Institution City; then search) (last visited May 16, 2013).

² *See id.*; *Texas Longhorns Roster—2012*, ESPN.COM, http://espn.go.com/college-football/team/roster/_/id/251/texas-longhorns (last visited May 14, 2013).

starting quarterback of the Longhorns' football team can receive under a full athletic scholarship.³ If a student receives a full academic scholarship from the University of Texas, he will receive a maximum of \$51,998 per year; if a student receives a full athletic scholarship, conversely, he will receive a maximum of only \$48,246 per year.⁴

For decades, the National Collegiate Athletic Association (NCAA) has limited the amount of athletics-based financial aid that universities can provide to student-athletes to a level below that allowable for academic scholarships.⁵ The NCAA has limited athletics-based financial aid to the "full grant-in-aid," which covers tuition and fees, room and board, and required course-related books.⁶ At the same time, universities provide academic scholarships and need-based financial aid up to the "full cost of attendance," which includes not only tuition and textbooks, but also miscellaneous expenses, such as school supplies, laundry expenses, health and disability insurance, travel costs, and incidental expenses.⁷ For the 2012–2013 academic year, the average amount of these miscellaneous expenses was approximately \$3201 per year for public universities and \$2527 for private colleges.⁸

³ See NAT'L COLLEGIATE ATHLETIC ASS'N, 2011–2012 NCAA DIVISION I MANUAL: OPERATING BYLAWS art. 15.1 (2011) [hereinafter NCAA DIVISION I BYLAWS] ("A student-athlete may receive institutional financial aid based on athletics ability . . . up to the value of a full grant-in-aid," which covers tuition, fees, room and board, and required course-related books); *Forty Acres Scholars Program*, TEXASEXESCHOLARSHIPFOUNDATION.ORG, <http://www.texasexescholarshipfoundation.org/scholarships/forty-acres/> (last visited May 14, 2013) (describing a four-year merit scholarship for students at the University of Texas at Austin that covers tuition, fees, housing, food, books, and a living stipend).

⁴ See NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.1 (excluding personal and living expenses from allowable athletics-based financial aid); *Forty Acres Scholars Program*, *supra* note 3 (detailing the elements of a full academic scholarship, which includes a stipend for living expenses); *2012–2013 Undergraduate Cost of Attendance (COA)*, FINAID.UTEXAS.EDU, <http://finaid.utexas.edu/costs/120undergradcosts.html> (last visited May 14, 2013) (showing the full cost of attendance for a non-resident student to be \$51,998 per year with \$3752 allocated to personal and transportation expenses).

⁵ See 20 U.S.C. § 108711(1)–(3) (2006); NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.1 ("A student-athlete may receive institutional financial aid based on athletics ability . . . up to the value of a full grant-in-aid.").

⁶ NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.02.5.

⁷ 20 U.S.C. § 108711(1)–(3) (authorizing students to receive need-based and merit-based aid up to the full cost of attendance, including miscellaneous living expenses); *Forty Acres Scholars Program*, *supra* note 3 (exemplifying how some undergraduate institutions will provide full academic scholarships that include a "living stipend").

⁸ COLL. BD., TRENDS IN COLLEGE PRICING 2012, at 11 fig. 1 (2012), <http://trends.collegeboard.org/sites/default/files/college-pricing-2012-full-report-121203.pdf>. In 2012–13 the average student at a four-year public college who lived on campus spent \$2091 on "personal" expenses and \$1110 on transportation. *Id.* By combining these totals, the average gap between a "full grant-in-aid" and the full cost of attendance was \$3201 at public universities. *See*

On October 27, 2011 the NCAA increased the limit of athletics-based financial aid through a piece of legislation known as the Miscellaneous Expense Allowance (“MEA”).⁹ This legislation allowed universities to provide student-athletes receiving full athletic scholarships with additional financial aid “up to the institution’s calculation of full cost of attendance or \$2000, whichever is less.”¹⁰ Nearly two months after the legislation passed, 160 schools signed onto override legislation to block the MEA.¹¹ The NCAA has suspended the legislation for now, and is currently still considering different proposals from the Student-Athlete Well-Being Working Group.¹² If passed, legislation would likely impose the same \$2000 cap as originally proposed.¹³

The push to increase compensation for student-athletes has been gaining momentum in recent years, most notably after the 2006 case in the U.S. District Court for the Central District of California, *White v. NCAA*.¹⁴ In *White*, the court ruled that a class of former student-athletes sufficiently alleged an anticompetitive agreement among NCAA members, allowing the plaintiff class to survive summary judgment.¹⁵ The plaintiffs argued that in a free market student-athletes would receive athletics-based aid up to the full cost of attendance—the same amount

id.; NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.02.5. In 2012–2013 the average student at a four-year private college who lived on campus spent \$1570 on “personal” expenses and \$957 on transportation. COLL. BD., *supra*, at 11 fig. 1. By combining these totals, the average gap between a “full grant-in-aid” and the full cost of attendance was \$2527 at private colleges. *See id.*; NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.02.5.

⁹ See Michelle Brutlag Hosick, *DI Board Adopts Improvements in Academic Standards and Student-Athlete Support*, NCAA.ORG (Oct. 27, 2011), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2011/october/di+board+of+directors+adopt+changes+to+academic+and+student+athlete+welfare>; see also *Student-Athlete Benefits*, NCAA.ORG (last updated Feb. 13, 2013), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Finances+Student+Athlete+Benefits>. (referring to the legislation as the Miscellaneous Expense Allowance).

¹⁰ See Hosick, *supra* note 9.

¹¹ See Lee Davis, *NCAA Rescinds \$2000 Stipend to Athletes*, CHATTANOOGAN, Jan. 18, 2012, http://www.chattanooga.com/articles/article_217572.asp.

¹² See Michelle Brutlag Hosick, *Directors Support Reform Efforts*, NCAA.COM (Apr. 26, 2012), <http://www.ncaa.com/news/ncaa/article/2012-04-26/directors-support-reform-efforts>.

¹³ See *id.* (“The Division I Board of Directors reaffirmed Saturday its support for a \$2,000 miscellaneous expense allowance . . .”).

¹⁴ See Second Amended Complaint for Plaintiff at 24–26, *White v. NCAA*, No. CV-06-0999 RGK (C.D. Cal. Sept. 15, 2006), ECF No. 75. In October of 2011, more than 300 college football and basketball players signed a petition asking the NCAA for a cut of television revenue generated from college sports along with a higher cap on athletics-based aid. See Alan Scher Zagier, *College Athletes Press NCAA Reform*, YAHOO! NEWS (Oct. 25, 2011), <http://news.yahoo.com/apnewsbreak-college-athletes-press-ncaa-reform-211844071.html>.

¹⁵ Denial of Defendant’s Motion to Dismiss Plaintiffs’ Amended Complaint at 1, *White v. NCAA*, No. CV-06-0999 RGK (C.D. Cal. Sept. 20, 2006), ECF No. 72.

granted through full academic scholarships.¹⁶ Although this case was settled before trial, it provided future litigants with a blueprint for an antitrust suit against the NCAA that would at least survive a motion to dismiss.¹⁷

Even if the NCAA addresses the problem highlighted in *White* by enacting the MEA, the NCAA would continue to be vulnerable to antitrust suits.¹⁸ Yet, enactment of the MEA would reduce the amount of antitrust damages awarded to a successful plaintiff class.¹⁹ The terms of the MEA would set a higher cap to compensation, but it would still be an artificially created cap below the full cost of attendance at more than half the universities in the country.²⁰ Until the NCAA permits universities to grant athletics-based aid up to the full cost of attendance without any artificial caps or restrictions, the NCAA remains vulnerable to antitrust suits from student-athletes.²¹

Part I of this Note briefly outlines the history of the NCAA and the history of student-athlete compensation and explains how that compensation structure would change under the MEA.²² Part II explores the line of cases involving antitrust challenges to the NCAA.²³ Part III then argues that if the NCAA were to pass the MEA, it would still be vulnerable to an antitrust suit by student-athletes.²⁴ Part III also evaluates the arguments that would be posed in such a hypothetical suit.²⁵

¹⁶ Second Amended Complaint for Plaintiff, *supra* note 14, at 15.

¹⁷ *See id.*; Stipulation and Agreement of Settlement at 2, *White v. NCAA*, No. CV-06-0999 RGK (C.D. Cal. Jan. 29, 2008), ECF No. 253.

¹⁸ *See* Second Amended Complaint for Plaintiff, *supra* note 14, at 15.

¹⁹ *See* Hosick, *supra* note 9. *See generally* Second Amended Complaint for Plaintiff, *supra* note 14 (seeking damages for the difference between the NCAA's artificial cap on attendance and the full cost of attendance as defined by Congress).

²⁰ COLL. BD., *supra* note 8, 11 fig. 1 (showing that the average student at a public university pays \$3201 per year in miscellaneous and living expenses and that the average student at a private university pays \$2527 per year in miscellaneous and living expenses); Hosick, *supra* note 9 (proposing an increase to the NCAA's cap on athletics-based aid that takes into account \$2000 for miscellaneous and living expenses).

²¹ *See* 20 U.S.C. § 108711 (2006); Second Amended Complaint for Plaintiff, *supra* note 14, at 24–26; COLL. BD., *supra* note 8, 11 fig. 1; Hosick, *supra* note 9.

²² *See infra* notes 26–77 and accompanying text.

²³ *See infra* notes 78–185 and accompanying text.

²⁴ *See infra* notes 186–302 and accompanying text.

²⁵ *See infra* notes 186–302 and accompanying text.

I. A BRIEF HISTORY OF THE NCAA AND ATHLETE COMPENSATION

Today the NCAA is a behemoth organization whose growth has transformed college athletics into a multi-billion dollar industry.²⁶ Universities, athletic conferences, and television networks have increased their profits exponentially over the last few decades.²⁷ Student-athletes, however, have not increased their compensation beyond the value of their athletic scholarships.²⁸

Section A of this Part provides a brief history of the NCAA, and focuses on the influx of money and scandals in college sports.²⁹ Section B then details how student-athletes are currently compensated for their work on the field and how the proposed MEA would affect this compensation structure.³⁰

A. *The Rise of the NCAA*

The NCAA was formed in the early twentieth century, in the words of the NCAA itself, “to protect young people from the dangerous and exploitive athletics practices of the time.”³¹ College football was the major source of said danger and exploitation.³² Serious injuries and deaths on the field increased at an alarming rate, while illegal inducements and recruiting violations off the field became the norm.³³ Much of the

²⁶ See Rachel Bachman & Matthew Futterman, *College Football's Big-Money, Big-Risk Business Model*, WALL ST. J., Dec. 10, 2012, <http://online.wsj.com/article/SB10001424127887324024004578169472607407806.html> (finding that the total amount of money spent by television networks for contracts to televise games in the top college football conferences over the next 15 years has risen to approximately \$25.5 billion); *Time Warner Joins CBS in \$10.8 Billion March Madness TV Deal*, FOXBUSINESS (Apr. 22, 2010), <http://www.foxbusiness.com/markets/2010/04/22/time-warner-joins-cbs-billion-march-madness-tv-deal/> (finding that Time Warner and CBS paid \$10.8 billion to gain exclusive rights to televise the NCAA men's basketball tournament for a 14-year period); *infra* notes 45–51 and accompanying text.

²⁷ See *infra* notes 31–57 and accompanying text (describing the rise of college athletics).

²⁸ See *infra* notes 58–77 and accompanying text (describing the structure of student-athlete compensation).

²⁹ See *infra* notes 31–57 and accompanying text.

³⁰ See *infra* notes 58–77 and accompanying text.

³¹ *History*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history> (last visited May 14, 2013).

³² See Joanna Davenport, *From Crew to Commercialism—The Paradox of Sport in Higher Education*, in *SPORT AND HIGHER EDUCATION* 5, 7 (Donald Chu et al. eds., 1985) (observing, in reference to football, that “[n]o other sport, especially in the big universities, was received with such enthusiasm, created more controversy, or caused more meetings”).

³³ See *id.* at 11. According to college football records, eighteen players were killed in 1905, with at least 149 other serious injuries. JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA'S FIRST CENTURY* 43 (2006).

public was outraged and wanted to abolish college football altogether.³⁴ President Theodore Roosevelt met with leaders of college athletics to urge sweeping changes, and in December 1905, sixty-two major institutions became charter members of the Intercollegiate Athletic Association of the United States (IAAUS).³⁵ The IAAUS was renamed as the NCAA in 1910.³⁶

The NCAA did not begin as the massive organization that it is today.³⁷ Originally, the NCAA played mostly an advisory role—pushing for greater institutional control of intercollegiate athletics and providing a forum for discussion of all issues involving college sports.³⁸ In the 1950s, however, the NCAA transformed itself into a powerful regulatory body with full authority to police and penalize member universities.³⁹ The rise in popularity of television coincided with the end of World War II to create a period of booming growth for college athletics.⁴⁰ College sports became paramount as athletic departments evolved into machines capable of generating significant revenue for universities.⁴¹

Unsurprisingly, a series of recruiting abuses and scandals soon followed.⁴² The need for institutional control and leadership became clear, so member schools authorized the NCAA to fill this void.⁴³ Almost immediately after being named executive director of the NCAA in 1951, Walter Byers delegated enforcement powers to the NCAA's Council, officially authorizing the NCAA to levy sanctions against member institutions for rules violations.⁴⁴

³⁴ See CROWLEY, *supra* note 33, at 43. For example, after the death of a player during a football game in November of 1905, the Chancellor of New York University sent a telegram to the President of Harvard University to “address the football problem.” *Id.* at 44. When Harvard's President declined, the Chancellor of New York University gathered with students and faculty to call for either the abolition of football or drastic reforms to the game. *Id.*

³⁵ *History*, *supra* note 31.

³⁶ *Id.*

³⁷ See Matthew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 788–89 (2010) (describing the limited role of the “nascent NCAA”).

³⁸ See Davenport, *supra* note 32, at 12; Mitten et al., *supra* note 37, at 788–89.

³⁹ See Davenport, *supra* note 32, at 12; Mitten et al., *supra* note 37, at 791 (explaining that in the 1950s the NCAA became authorized “to censure, penalize, expel, and enforce sanctions against institutions”).

⁴⁰ See Mitten et al., *supra* note 37, at 790.

⁴¹ See Davenport, *supra* note 32, at 12.

⁴² See Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 992 (1987) (noting two serious incidents: (1) gambling scandals involving point shaving by athletes in 1945, and (2) agreements to fix games by athletes in 1951).

⁴³ See Davenport, *supra* note 32, at 12–13.

⁴⁴ See Mitten et al., *supra* note 37, at 791; *History*, *supra* note 31.

For the next sixty years, the NCAA and college athletics expanded into enormous, monolithic industries.⁴⁵ Currently, the NCAA regulates more than 400,000 student athletes at over 1000 colleges and universities.⁴⁶ College football programs have ballooned into cash cows for many universities—the programs at Texas, Florida, Georgia, Michigan, and Penn State, for example, each earn between \$40 million and \$80 million in profits per year.⁴⁷ In 2011, the Big Ten, a major athletic conference within the NCAA, gave each of its member schools a record \$22.6 million—a large portion of which was earned from its own television network, the Big Ten Network.⁴⁸ On August 26, 2011, ESPN launched the Longhorn Network, a television network entirely devoted to University of Texas athletics.⁴⁹ As part of its agreement with ESPN, the University of Texas is guaranteed an average of \$15 million per year for the next twenty years, for a total of \$300 million.⁵⁰ The University of Oklahoma is considering creating its own television network, and other universities may soon follow suit.⁵¹

A wide river of money has been flowing to college athletic departments, but it has been followed by a constant stream of cheating scandals and recruiting violations.⁵² In the fall of 2010, rumors swirled around Auburn University's star quarterback Cam Newton that Newton's father had used a recruiter to extract up to \$180,000 from Missis-

⁴⁵ See Mitten et al., *supra* note 32, at 791 (providing an overview of the economic success of the NCAA over the past sixty years).

⁴⁶ *Differences Among the Three Divisions*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA+OLD/Who+We+Are/Differences+Among+the+Divisions/> (last updated Dec. 7, 2011) (explaining that the NCAA contains 1079 member institutions—335 in Division I, 302 in Division II, and 442 in Division III); *Who We Are*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are+landing+page> (last visited May 14, 2013) (stating that more than 400,000 student-athletes compete within the NCAA's three divisions).

⁴⁷ See Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, at 80, 82 (detailing a multitude of recent scandals in college sports and explaining the hypocrisy in a system of college sports that generates hundreds of millions of dollars for universities but does not compensate athletes beyond the cost of tuition).

⁴⁸ See *College Notebook: Big Ten Schools Make Record Money*, COLUMBUS DISPATCH (July 20, 2011, 6:44 AM), <http://www.dispatch.com/content/stories/sports/2011/07/20/0720-college-notebook.html>.

⁴⁹ See Michael Hiestand, *How Texas Is Steering College TV Sports; Longhorn Network, First of its Kind for a School Sparks Questions, Debate, as Others Ponder Move*, USA TODAY, Aug. 12, 2011, at 1A.

⁵⁰ See Aaron Kuriloff & David Milkenberg, *ESPN Longhorn Network Cash Tips U.S. College Sports Leagues into Disarray*, BLOOMBERG (Nov. 3, 2011, 12:01 AM), <http://www.bloomberg.com/news/2011-11-03/espn-longhorn-network-cash-tips-u-s-college-sports-leagues-into-disarray.html>.

⁵¹ See *id.*

⁵² See Branch, *supra* note 47, at 82.

issippi State University in exchange for his son to play there.⁵³ In May of 2011, Jim Tressel resigned as head football coach of Ohio State University after information leaked that many of his players had exchanged team memorabilia for cash at a tattoo parlor.⁵⁴ And in the summer of 2011, the NCAA investigated allegations that a University of Miami booster had provided more than seventy football players with millions of dollars in cash and services over the course of eight years.⁵⁵ Although these are the most high-profile scandals in recent memory, countless other violations litter the landscape of college athletics.⁵⁶ As one commentator explained, “when you combine so much money with such high, almost tribal, stakes . . . corruption is likely to follow.”⁵⁷

B. *The Compensation, or Lack Thereof, for NCAA Athletes*

I. NCAA Compensation Rules Prior to 2011

The NCAA Bylaws consist of rules and regulations that cover a multitude of issues, including ethical conduct, amateurism, recruiting, academic eligibility, and practice and playing seasons.⁵⁸ One of these bylaws governs the financial aid compensation to student-athletes.⁵⁹ For decades, student-athletes have been limited to a “full grant-in-aid,” which the NCAA defines as “financial aid that consists of tuition and

⁵³ *See id.*

⁵⁴ *See* George Dohrmann, *The Fall of Jim Tressel*, SPORTS ILLUSTRATED, June 6, 2011, at 40, 42.

⁵⁵ *See* Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2009, 5:37 PM), http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611.

⁵⁶ *See* Branch, *supra* note 47, at 82. For example, in 2010 the University of Southern California football program was banned from post-season play for two years along with other sanctions because Heisman Trophy winner Reggie Bush received improper benefits. *See* Gary Klein, *Bush Beleaguered; The High Price USC Is Paying for NCAA Sanctions Goes Well Beyond the Diminishment of Its Football and Basketball Programs, to Revenue Losses Running Into the Tens of Millions*, L.A. TIMES, June 22, 2011, at C1. In 2009, the University of Memphis was forced to vacate its record thirty-eight basketball victories and national title game appearance from 2007–2008 because star point guard Derrick Rose’s former high school teammate fraudulently took his SAT’s for him. *See* Luke Winn, *Calipari Not Implicated in Another Scandal, but He’s Far from Clean*, SI.COM (Aug. 20, 2009, 12:55 PM), http://sportsillustrated.cnn.com/2009/writers/luke_winn/08/20/memphis/index.html. In 2009, the Florida State University football team was forced to vacate wins and serve four years of probation from an academic cheating scandal. *See* Heather Dimich, *NCAA Penalties Extend to 10 FSU Sports*, ESPN.COM (Mar. 7, 2009, 12:32 PM) <http://sports.espn.go.com/ncf/news/story?id=3958292>.

⁵⁷ Branch, *supra* note 47, at 82.

⁵⁸ NCAA DIVISION I BYLAWS, *supra* note 3, art. 10–17.

⁵⁹ *Id.* art. 15.

fees, room and board, and required course-related books.”⁶⁰ Although in 1986 Congress authorized students to receive need-based or merit-based aid up to the “full cost of attendance,” which includes additional coverage for miscellaneous personal expenses and travel, the NCAA did not authorize its member institutions to do so for athletics-based aid.⁶¹

Despite these restrictions, student-athletes have been able to receive additional financial aid through other means.⁶² By receiving assistance through Pell Grants, the Special Assistance Fund, the Student-Athlete Opportunity Fund, and other forms of financial aid unrelated to athletic ability, students can receive financial aid up to the “full cost of attendance” as defined by Congress.⁶³ These alternative routes to receive financial aid demonstrate that student-athletes can, under certain circumstances, receive the “full cost of attendance,” regardless of NCAA restrictions.⁶⁴ Unlike athletic scholarships, however, these forms of compensation are not available to all student-athletes, and they cannot be used by universities to recruit potential athletes.⁶⁵

2. The New Miscellaneous Expense Allowance

On October 27, 2011 the NCAA changed its policy regarding athletics-based financial aid, but it was short-lived.⁶⁶ Specifically, the Division I Board of Directors adopted legislation allowing student-athletes

⁶⁰ *Id.* art. 15.02.5.

⁶¹ Compare 20 U.S.C. § 108711 (2006) (authorizing students to receive need-based and merit-based financial aid up to the full cost of attendance, which includes miscellaneous and travel expenses), with NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.02.5 (authorizing NCAA student-athletes to receive athletics-based aid up to a “full grant-in-aid,” which does not include miscellaneous and travel expenses).

⁶² NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.1.

⁶³ *Id.*; see 20 U.S.C. § 108711. The Federal Pell Grant program provides need-based grants to low-income undergraduate and certain graduate students. See *Federal Pell Grant Program*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/fpg/index.html> (last visited May 15, 2013). Pell Grants are distributed based on financial need and not based on athletic ability. See *id.* The grant amount depends on the student’s financial needs, the cost of attendance at the school, and other factors. *Id.* The Special Assistance Fund is most typically used to supply student-athletes with clothing, necessities, and dental examinations. See Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 102 n.36 (2007). The Student-Athlete Opportunity Fund is generally used for overall athletic department development, including computers, summer school tuition, and events for student-athletes. See *id.* at 102 n.37.

⁶⁴ See NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.1.

⁶⁵ See *id.*

⁶⁶ See Hosick, *supra* note 12 (announcing in January of 2012 that the NCAA had suspended the MEA but would vote on it again in April of 2012); Hosick, *supra* note 9 (announcing in October of 2011 that the NCAA would allow student-athletes to receive a stipend for living expenses up to a maximum of \$2000 per year).

receiving full athletic scholarships, or full scholarships that combine financial aid with athletics-based aid, to receive additional athletics aid “up to the institution’s calculation of full cost of attendance or \$2000, whichever is less.”⁶⁷ This legislation, deemed the Miscellaneous Expense Allowance (“MEA”), allowed schools to provide student-athletes with extra money to pay for personal expenses that were previously not taken into account.⁶⁸ The \$2000 figure was to be adjusted based on the Consumer Price Index, so the NCAA would not need to approve new figures as the cost of living changed.⁶⁹

Although an additional \$2000 might not seem like much when compared to the billions of dollars generated in the college sports industry, this legislation would greatly impact the lives of student-athletes.⁷⁰ Due to the cap on athletics-based financial aid, student-athletes have difficulty paying for basic necessities, such as school supplies, laundry expenses, health and disability insurance, travel costs, and incidental expenditures.⁷¹

Many universities strongly opposed this new rule from the outset.⁷² In fact, 160 schools signed onto override legislation by late December 2011 to block the MEA.⁷³ Consequently, the NCAA suspended the rule until the Board of Directors convened on January 14, 2012 at the NCAA Convention.⁷⁴ At the Convention, the Board reaffirmed its support for the MEA, but directed the Student-Athlete Well-Being Group (“SAWBG”) to alter the legislation and come back to the presidents in April of 2012 with a modified proposal.⁷⁵ Consequently, in April 2012, the SAWBG submitted three different options for implementing the MEA, all of which involved an additional \$2000 provided to student-

⁶⁷ See Hosick, *supra* note 9.

⁶⁸ See *id.*; *Miscellaneous Expense Allowance*, *supra* note 9; see also NCAA DIVISION I BY-LAWS, *supra* note 3, art. 15.1 (failing to authorize NCAA institutions to include costs for miscellaneous and travel expenses within athletics-based aid).

⁶⁹ See Hosick, *supra* note 9. Furthermore, the Division I Board of Directors decided not to revisit the \$2000 figure for three years. See *id.*

⁷⁰ See Second Amended Complaint for Plaintiff, *supra* note 14, at 3; Thomas A. Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 75 (2011) (illustrating how Ramogi Humu, a football player at UCLA in the 1990s, incurred \$6000 of credit card debt at a 19% interest rate because his so-called full athletic scholarship did not cover his living expenses).

⁷¹ See Second Amended Complaint for Plaintiff, *supra* note 14, at 3; Baker et al., *supra* note 70, at 75; Dennie, *supra* note 63, at 103.

⁷² See Davis, *supra* note 11.

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ See Hosick, *supra* note 12.

athletes above traditional NCAA limits.⁷⁶ Currently, more than a year later, NCAA members are still debating the merits of the MEA, and it has not yet been passed.⁷⁷

II. THE NCAA AND ANTITRUST

Because of its wide reach within collegiate sports, the NCAA has been a prime target for antitrust litigation.⁷⁸ Many paradigmatic antitrust cases stem from the creation of large associations that engage in horizontal price-fixing agreements.⁷⁹ By promulgating rules and creating across-the-board standards for over 1200 universities, the NCAA became especially vulnerable to antitrust scrutiny.⁸⁰

Section A of this Part articulates the fundamental mechanics of antitrust law.⁸¹ Section B then outlines the antitrust case law pertaining to the NCAA.⁸²

⁷⁶ See *id.* The three different proposals from the SAWBG include: (1) allowing each school to provide student-athletes with \$2000 of additional aid, as originally proposed; (2) basing eligibility for the MEA on the student-athletes' individual financial needs; and (3) allowing each school to provide student-athletes with \$2000 of additional aid from the Student-Athlete Opportunity Fund. See *id.*

⁷⁷ See *NCAA Changes Rules at Convention*, N.Y. TIMES, Jan. 19, 2013, <http://www.nytimes.com/2013/01/20/sports/ncaa-changes-rules-at-convention.html>.

⁷⁸ See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984) (holding that the NCAA's restricted television plan for college football violated the Sherman Act as a horizontal output restriction on college football telecasts); *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding that the NCAA regulation limiting the salaries of certain coaches to \$16,000 annually violated the Sherman Act as horizontal price-fixing); *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988) (holding that NCAA regulations restricting athletes from being compensated beyond the cost of attendance are not a violation of the Sherman Act because it is necessary to preserve amateurism in college athletics).

⁷⁹ See, e.g., *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 356–57 (1982) (holding that an agreement by physicians to set maximum prices with insurance companies constituted a per se violation of the Sherman Act); *Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 21, 24–25 (1979) (reasoning that by selling blanket licenses to copyrighted musical compositions at negotiated fees, petitioners had not committed unlawful price-fixing because a blanket license was a necessary component of an efficiency-enhancing joint venture).

⁸⁰ See, e.g., *Bd. of Regents*, 468 U.S. at 120; *Law*, 134 F.3d at 1024; *McCormack*, 845 F.2d at 1345.

⁸¹ See *infra* notes 83–134 and accompanying text.

⁸² See *infra* notes 135–185 and accompanying text.

A. Antitrust Fundamentals

1. The Sherman Act and U.S. Antitrust Law

The two primary concerns of antitrust law are (1) agreements among competitors that restrict competition, and (2) the willful acquisition or maintenance of monopoly power.⁸³ Anticompetitive agreements among competitors in a market allow firms to raise prices or restrict output, and thereby increase profits to supracompetitive levels.⁸⁴ Price-fixing agreements, output restrictions, and market divisions are classic examples of such behavior.⁸⁵ Attempts to acquire or maintain monopoly power can take many forms; dominant firms with monopoly power might exclude rivals from the market, impair rivals' efficiency, or impede the entry or expansion that would restore competition.⁸⁶ These two types of conduct are undesirable from an economic standpoint because they reduce efficiency in the marketplace and harm consumers.⁸⁷ The Sherman Act was designed to thwart these anticompetitive practices, and it governs all organizations, including the NCAA.⁸⁸

The Sherman Act forms the basis for most antitrust claims in the NCAA context.⁸⁹ Section 1 of the Sherman Act, particularly as applied

⁸³ See EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 2 (2d ed. 2011).

⁸⁴ *Id.* at 2–3. “Supracompetitive” profits are profits above what can be expected in a competitive market. See *Bd. of Regents*, 468 U.S. at 111–13. High profits may indicate that a business either has a unique legal or competitive advantage, or is engaging in anticompetitive behavior designed to eliminate competition. See *id.*; see also 2B PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 532 (3d ed. 2007) (discussing market power and market definition).

⁸⁵ ELHAUGE, *supra* note 83, at 2; see *Bd. of Regents*, 468 U.S. at 120; *Law*, 134 F.3d at 1024; *McCormack*, 845 F.2d at 1345. “Price-fixing” is a practice whereby competitors agree to buy or sell a product, service, or commodity at a fixed price, usually at supracompetitive levels. See *Maricopa*, 457 U.S. at 345–48. “Output restrictions” arise when a single firm or a group of competitors artificially control the supply of a certain product in the marketplace to maintain the price at a certain level. See *Bd. of Regents*, 468 U.S. at 99–101. “Market divisions” occur when competitors agree to avoid competing with each other and by staying within certain fixed territories, thus removing competition within these given areas. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

⁸⁶ ELHAUGE, *supra* note 83, at 2–3.

⁸⁷ See *id.* at 2–3.

⁸⁸ See 15 U.S.C. §§ 1–2 (2006); ELHAUGE, *supra* note 83, at 10; see also Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 557–68 (2012) (explaining the current and historical goals of antitrust law and economic policy in the United States).

⁸⁹ 15 U.S.C. § 1; see, e.g., *Bd. of Regents*, 468 U.S. at 88, 120 (holding that the NCAA violated Section 1 of the Sherman Act through its restrictions on televising football games); *Law*, 134 F.3d at 1012, 1024 (stating that the NCAA violated Section 1 of the Sherman Act by restricting compensation for entry-level coaches); Second Amended Complaint for Plaintiff, *supra* note 14, at 6 (alleging that the NCAA had violated Section 1 of the Sherman Act by fixing the amount of financial aid to Division I student athletes).

to horizontal price-fixing agreements, is the focus of this Note.⁹⁰ Section 1 declares “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations” to be illegal.⁹¹ Nearly every contract that binds two parties to an agreed course of conduct restricts trade, however, and the Supreme Court has accordingly limited the Sherman Act to forbid only *unreasonable* restraints of trade.⁹² To prevail on a Section 1 claim, a plaintiff must prove that the defendant (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.⁹³

One notable feature of U.S. antitrust law is that it provides compensation to injured plaintiffs in the form of treble damages.⁹⁴ Consequently, private suits are a prominent method of enforcement.⁹⁵ Typically the damage suffered by one individual defendant in an antitrust case is small, but the prospect of treble damages combined with class action litigation helps deter anticompetitive behavior.⁹⁶ In addition to monetary damages, plaintiffs can also seek injunctive relief to prevent or undo anticompetitive conduct.⁹⁷

2. Horizontal Price-Fixing Is Usually Per Se Illegal

A group of student-athletes could bring a private suit against the NCAA, and argue that the Miscellaneous Expense Allowance (MEA) acts as a horizontal price-fixing agreement that unreasonably restrains trade because it artificially caps financial aid to student-athletes below the full cost of attendance.⁹⁸ Certainly the MEA restrains trade—just

⁹⁰ 15 U.S.C. § 1. Some of the other main sources of antitrust law include the Clayton Act of 1914, the Federal Trade Commission Act of 1914, and the Robinson-Patman Act of 1936. 2 AREEDA ET AL., *supra* note 84, ¶¶ 301–302 (discussing the relationship of antitrust laws to the common law and to each other).

⁹¹ 15 U.S.C. § 1.

⁹² *Bd. of Regents*, 468 U.S. at 98 (“[E]very contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.”); *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (explaining that the plain meaning of the Sherman Act is “broad enough to embrace every conceivable contract” and therefore it must be interpreted to forbid only unreasonable restraints on trade).

⁹³ *See* 15 U.S.C. § 15; *Law*, 134 F.3d at 1016.

⁹⁴ *See* 15 U.S.C. § 15.

⁹⁵ *See* ELHAUGE, *supra* note 83, at 14.

⁹⁶ *See id.*

⁹⁷ *See* 15 U.S.C. § 26; ELHAUGE, *supra* note 83, at 24–25.

⁹⁸ *See* Hosick, *supra* note 9; *infra* notes 186–302 and accompanying text.

like any contract between two parties—but the key question is whether it *unreasonably* restrains trade.⁹⁹

To determine whether a defendant's conduct unreasonably restrains trade, courts use two different approaches: the *per se* rule and the rule of reason.¹⁰⁰ The *per se* rule condemns practices that are entirely void of redeeming competitive rationales.¹⁰¹ Once a practice is identified as *per se* illegal, the analysis ends and the court need not examine the practice's impact on the market or the procompetitive justifications advanced by the defendant before finding a violation of anti-trust law.¹⁰²

Horizontal price-fixing is normally condemned as *per se* illegal.¹⁰³ Horizontal price-fixing occurs when firms competing at the same level of the market, such as a group of manufacturers or distributors, agree to fix or otherwise stabilize the prices that they will charge for their products or services.¹⁰⁴ For example, in 1982 in *Arizona v. Maricopa County Medical Society*, the U.S. Supreme Court declared that an agreement among physicians setting the maximum fees that participating physicians could claim in full payment for health services provided to policyholders was *per se* unlawful.¹⁰⁵ Although the defendants alleged procompetitive justifications for the agreement, the Court explained

⁹⁹ See *Bd. of Regents*, 468 U.S. at 98; *Standard Oil*, 221 U.S. at 60; Hosick, *supra* note 9.

¹⁰⁰ See *Law*, 134 F.3d at 1016.

¹⁰¹ See, e.g., *N. Pac. Ry. Co.* 356 U.S. at 5 (holding that certain practices can be conclusively presumed to be unreasonable without any elaborate inquiry “because of their pernicious effect on competition and lack of any redeeming virtue”); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) (holding that analyzing whether a certain practice is reasonable is irrelevant when experience shows that the practice is “entirely void of redeeming competitive rationales”).

¹⁰² See *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (“This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive.”); *Maricopa*, 457 U.S. at 344 (“Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.”); Ernest Gellhorn & Teresa Tatham, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. L. REV. 155, 156–57 (1985) (explaining that courts treat some anticompetitive practices as illegal *per se* without considering their purpose, justification, or effect on the market). If a practice is considered *per se* unlawful, a defendant may still argue that a *per se* rule should be reevaluated. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (holding that the application of the *per se* rule to minimum resale price maintenance agreements was erroneous).

¹⁰³ See, e.g., *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 436 n.19 (1990) (“Horizontal price-fixing . . . has been consistently analyzed as a *per se* violation for many decades.”); *Maricopa*, 457 U.S. at 348.

¹⁰⁴ See *Maricopa*, 457 U.S. at 345–48.

¹⁰⁵ *Id.* at 335, 356–57.

that the “anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation.”¹⁰⁶ By not allowing the insurance companies to deal directly with individual physicians, the defendants had unlawfully thwarted free-market competition.¹⁰⁷ Accordingly, the Court refused to even consider the procompetitive justifications for the defendants’ behavior and instead declared the practice per se illegal.¹⁰⁸

3. The Ancillary Restraints Doctrine, the Rule of Reason, and the “Quick-Look” Rule of Reason

Despite the fear of abuse, the Supreme Court has held that horizontal restraints are a necessary component of certain industries under the ancillary restraints doctrine.¹⁰⁹ For example, in 1979 in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*, the Court found that the issuance of blanket licenses to copyrighted musical compositions at fixed rates was not a per se violation.¹¹⁰ BMI represented thousands of copyright owners in licensing negotiations with CBS and charged set fees for the use of all licensed works.¹¹¹ Although this practice was a paradigmatic example of price-fixing, the Court refused to apply the per se rule because the blanket licenses stemmed from practical necessity.¹¹² The Court held that the blanket licenses were necessary because they significantly reduced transaction costs associated with individual negotiations and potentially reduced costs to consumers as well; the blanket licenses themselves, furthermore, could not exist without a set fee arrangement.¹¹³ Here, the Court established what would later be deemed the ancillary restraints doctrine, which holds that if a restraint on trade is incidental to the legitimate and competitive purposes of a business venture, then it is not per se illegal.¹¹⁴

Accordingly, when an industry requires some restraints on competition in order to exist at all, courts instead apply the rule of reason analysis.¹¹⁵ Rule of reason analysis requires a court to analyze the prac-

¹⁰⁶ *Id.* at 351.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 354–55.

¹⁰⁹ *BMI*, 441 U.S. at 21; *see also Law*, 134 F.3d at 1017 (“[T]he Supreme Court recognized [in *BMI*] . . . that certain products require horizontal restraints, including horizontal price-fixing, in order to exist at all.”).

¹¹⁰ 441 U.S. at 24–25.

¹¹¹ *Id.* at 5.

¹¹² *See id.* at 21.

¹¹³ *Id.*

¹¹⁴ *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7–8 (2006); *BMI*, 441 U.S. at 21.

¹¹⁵ *See, e.g., BMI*, 441 U.S. at 23–24.

tice's effect on competition in three steps.¹¹⁶ First, the plaintiff must demonstrate that the agreement has a substantially adverse effect on competition within the relevant product and geographic markets.¹¹⁷ Anticompetitive effects are often difficult to prove, however, because it is sometimes nearly impossible to analyze the market effects of the challenged conduct in a vacuum.¹¹⁸ Therefore, a plaintiff may establish anticompetitive effects indirectly by proving that the defendant possessed "market power"—the ability to raise prices above those that would prevail in a competitive market.¹¹⁹

Proving market power requires the plaintiff to define the relevant market by evaluating demand elasticity, that is, how quickly consumers will respond to increased prices by purchasing substitute products.¹²⁰ The way a market is defined will ultimately determine whether reasonable alternatives to the defendant's product or services exist in the market.¹²¹ If there are few reasonable alternatives for a defendant's product within a properly defined antitrust market, the defendant will

¹¹⁶ *See id.*

¹¹⁷ *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986); United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (holding that agreements between Ivy League institutions regarding financial aid packages for prospective students violated antitrust laws because they lowered the students' ability to receive the highest possible compensation and therefore adversely affected competition).

¹¹⁸ *See Brown Univ.*, 5 F.3d at 668.

¹¹⁹ *See Ind. Fed'n of Dentists*, 476 U.S. at 460–61; Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 (1984).

¹²⁰ *See Bd. of Regents*, 468 U.S. at 111; *see also* U.S. DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 4.1.1 (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (explaining the hypothetical price increase methodology for defining a product market). A product becomes its own market in a given region if a hypothetical monopolist controlling the entire product could impose a "significant" price increase above competitive levels. *See id.*; 2B AREEDA ET AL., *supra* note 84, ¶¶ 536–537 (summarizing the hypothetical price increase methodology for defining a product market). The government's merger guidelines suggest finding a market only if a hypothetical monopolist could implement a "small but significant and nontransitory increase in price" ("SSNIP"). *See* HORIZONTAL MERGER GUIDELINES, § 4.1.1. The SSNIP is typically presumed to be a 5% increase in prices that is maintained for one year, but this number could increase or decrease depending on the nature of the industry and the firm's position in the industry. *See id.* § 4.1.2.

¹²¹ *See id.*; ELHAUGE, *supra* note 83, at 183–93. For example, in *Board of Regents*, the Court determined that college football games are inherently unique as a sporting event and attract a certain demographic of fans that cannot be replicated with similar forms of entertainment. *See* 468 U.S. at 111. Thus, according to the Court, college football broadcasts constituted their own market, distinct from a broader market that might include professional football broadcasts, or even sporting event broadcasts generally. *See id.* Consequently, with the market defined as college football broadcasts, it necessarily followed that the NCAA possessed power in this market because the NCAA had complete control over these broadcasts. *See id.* at 112.

be found to possess market power.¹²² Market power acts as “a surrogate for detrimental effects” by determining whether the plaintiff has the potential to distort competition.¹²³

On the other hand, a plaintiff may establish anticompetitive effects directly by proving the existence of actual anticompetitive effects, such as an increase in price or a reduction in output.¹²⁴ Where a practice has obvious anticompetitive effects, there is no need to prove that the defendant possesses market power because the absence of market power does not justify a naked restriction on price or output.¹²⁵ Accordingly, if competitors form an agreement to fix prices, then the anticompetitive effects of this behavior are assumed without proof of market power.¹²⁶

If the plaintiff meets this initial burden of establishing anticompetitive effects, then the defendant must present some evidence that the procompetitive virtues of the conduct outweigh the anticompetitive effects.¹²⁷ Subsequently, if the defendant is able to establish a procompetitive justification, the plaintiff then must show that the challenged conduct is not reasonably necessary or that those objectives can be achieved in a substantially less restrictive manner.¹²⁸

In addition to the aforementioned “traditional” rule-of-reason analysis, courts have adopted an intermediate analysis, commonly re-

¹²² See *Ind. Fed'n of Dentists*, 476 U.S. at 460–61; *Brown Univ.*, 5 F.3d at 668.

¹²³ *Ind. Fed'n of Dentists*, 476 U.S. at 460–61.

¹²⁴ See *id.*; *Brown Univ.*, 5 F.3d at 668.

¹²⁵ See *Bd. of Regents*, 468 U.S. at 109; *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692–93 (1978) (holding that the canon of ethics prohibiting competitive bidding among professional engineers was not justified under the rule of reason and therefore violated the Sherman Act).

¹²⁶ *Bd. of Regents*, 468 U.S. at 109.

¹²⁷ See *Nw. Wholesale Stationers*, 472 U.S. at 294–98 (explaining that although wholesale purchasing cooperatives may seem to reduce competition, such arrangements allow participants to achieve economies of scale, maintain readily accessible inventories, lower prices, and consequently increase competition); *Bd. of Regents*, 468 U.S. at 101–02 (holding that some NCAA rules, such as requiring athletes to attend class and to remain unpaid, preserve the unique amateurism within college sports, make the contests more attractive to viewers, and consequently increase competition); *BMI*, 441 U.S. at 18–23 (holding that blanket licenses within the music industry may increase efficiency, increase the sellers' aggregate output, and consequently increase competition).

¹²⁸ See *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545, 550–51 (S.D.N.Y. 2004) (denying summary judgment for a claim alleging that the NCAA's Postseason Rules regulating college basketball games reduced competition in non-association-sponsored tournaments in violation of the Sherman Act because the court found genuine questions of fact about whether the rules were the least restrictive means of accomplishing the NCAA's goals).

ferred to as the “quick-look” rule of reason.¹²⁹ Courts frequently use this method when confronted with a naked market restraint like price-fixing but find that the typical per se rule is improper under the circumstances.¹³⁰ Under the “quick-look” rule of reason, anticompetitive effects are assumed if the challenged activity is inherently suspect, but the court will not apply the per se rule because there could be potential procompetitive justifications for the activity.¹³¹ Thus, the court is justified to proceed directly to the second step of the rule-of-reason analysis to evaluate whether the defendant’s procompetitive justifications outweigh the anticompetitive effects.¹³² If the defendant offers legally cognizable procompetitive justifications for the alleged restraint, then the court proceeds to the third and final step of the rule-of-reason analysis.¹³³ Here, the burden shifts to the plaintiff to demonstrate either that the challenged restraints are not necessary to achieve the defendant’s procompetitive justifications, or that the defendant’s objectives may be achieved in a substantially less restrictive manner.¹³⁴

B. Antitrust Cases Against the NCAA

For the most part, plaintiffs have been unsuccessful in bringing antitrust challenges against the NCAA because courts have provided great deference to the NCAA to promulgate and enforce the rules it deems

¹²⁹ See *Bd. of Regents*, 468 U.S. at 109 (“[W]hen there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”); *Law*, 134 F.3d at 1020 (“[W]here a practice has obvious anticompetitive effects . . . the court is justified in proceeding . . . under a ‘quick look’ rule of reason.”).

¹³⁰ See *Bd. of Regents*, 468 U.S. at 109–10; *Law*, 134 F.3d at 1020.

¹³¹ *Law*, 134 F.3d at 1020; see 7 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1508 (2d ed. 2003) (discussing the fundamentals of applying the quick-look rule of reason); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2639 (1996) (explaining that an agreement among horizontal competitors that sets prices at a level different from what each would charge in a free market is sufficient evidence of anticompetitive conduct).

¹³² *Law*, 134 F.3d at 1020–21.

¹³³ See *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997). There are certain justifications for anticompetitive conduct that courts will not recognize, such as promoting social welfare or protecting the integrity of a learned profession. See *Superior Trial Court Lawyers Ass’n*, 493 U.S. at 423–24 (holding that a court-appointed lawyers group could not avoid liability by arguing that their boycott would help increase the quality of representation by increasing pay); *Nat’l Soc’y of Prof’l Eng’rs* 435 U.S. at 694–95 (holding that a group of engineers could not avoid antitrust liability for a ban on competitive bidding among its members by arguing that competitive bidding among engineers threatens the public safety and the integrity of the profession).

¹³⁴ *Clorox*, 117 F.3d at 56.

necessary to protect the “amateurism” of college athletics.¹³⁵ Plaintiffs have garnered some recent success, however.¹³⁶ This Section outlines the basis for antitrust claims against the NCAA and then explains the reasoning and results of different challenges to the NCAA’s authority.¹³⁷

1. The Framework for Antitrust Challenges Against the NCAA

Although the Sherman Act, by its plain terms, applies only to commercial transactions, the Court has held that the statute was intended to encompass the widest range of conduct.¹³⁸ Consequently, Section 1 of the Act reaches even the activities of nonprofit organizations, such as universities and the NCAA, because the absence of a profit motive is no guarantee that an entity will act in the best interest of consumers.¹³⁹ Indeed, the U.S. Court of Appeals for the Third Circuit has explicitly held that the payment of financial aid by universities and colleges to students can be characterized as a commercial transaction and therefore falls within the reach of the Sherman Act.¹⁴⁰

Courts have consistently applied the rule of reason analysis or the “quick look” rule-of-reason analysis when analyzing the rules and regulations of the NCAA.¹⁴¹ Much like the plaintiffs in *Maricopa* and *BMI*,

¹³⁵ See, e.g., *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (“[T]here are significant procompetitive effects of punishing football programs that violate . . . amateurism rules.”); *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992) (“[T]he regulations of the NCAA were designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students.”); *McCormack*, 845 F.2d at 1345 (“That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable.”).

¹³⁶ See *Law*, 134 F.3d at 1024 (holding an NCAA rule limiting coaches’ salaries unreasonably restrained trade); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1152 (W.D. Wash. 2005) (denying the NCAA’s motion for summary judgment because plaintiffs sufficiently alleged anticompetitive effects of NCAA limits on the number of athletic scholarships available to each institution); Denial of Defendant’s Motion to Dismiss Plaintiffs’ Amended Complaint, *supra* note 15, at 1.

¹³⁷ See *infra* notes 138–185 and accompanying text.

¹³⁸ See 15 U.S.C. §§ 1–2 (2006); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787–88 (1975) (“Congress intended to strike as broadly as it could in § 1 of the Sherman Act.”).

¹³⁹ See 15 U.S.C. §§ 1–2; *Brown Univ.*, 5 F.3d at 666 (holding that the exchange of tuition payments for educational services, even by a nonprofit institution, constitutes a commercial activity covered by the Sherman Act); *United States v. Rockford Mem’l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990) (holding that a nonprofit hospital was just as likely to compete as vigorously as profit-making hospitals and therefore a proposed consolidation of nonprofit hospitals violated the Sherman Act).

¹⁴⁰ *Brown Univ.*, 5 F.3d at 666 (“[T]he payment of tuition in return for educational services constitutes commerce.”).

¹⁴¹ See *Bd. of Regents*, 468 U.S. at 117 (refusing to apply a per se analysis to the NCAA’s plan for televising college football because rules are essential to the NCAA’s existence);

plaintiffs typically have alleged that the NCAA has engaged in literal price-fixing since its inception.¹⁴² By establishing a set of guidelines and hard rules for its member institutions, the NCAA requires universities to abide by certain procedures that might be different if universities could compete with each other in a free market.¹⁴³

Unlike in *Maricopa*, however, the courts have declined to condemn NCAA rules as per se unlawful.¹⁴⁴ Using reasoning similar to that in *BMI*, courts have uniformly rejected applying the per se rule to sports associations, including the NCAA.¹⁴⁵ For example, in 1984 in *NCAA v. Board of Regents of the University of Oklahoma*, the U.S. Supreme Court analyzed NCAA restrictions limiting the number of football games each member institution could televise.¹⁴⁶ Although the practice was literally horizontal output restriction, the Court declined to condemn it as per se illegal because the NCAA must impose certain restrictions to facilitate its operations.¹⁴⁷ According to the Court, the NCAA markets competition itself, in the form of athletic events, and uniform rules for matters, such as “the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed,” are necessary for effective competition to exist at all.¹⁴⁸ Accordingly, the Court engaged in a rule-of-reason analysis to consider the procompetitive justifications of the activity.¹⁴⁹ The Court reasoned that the NCAA had produced anticompetitive effects by limiting the number of televised college football games below the level that would be supplied in a free market of single universities acting independent-

Law, 134 F.3d at 1018 (refusing to apply a per se analysis to NCAA regulations limiting the compensation for entry-level coaches because certain horizontal restraints are essential to the NCAA’s existence); see also *supra* notes 109–134 and accompanying text (discussing rule of reason and “quick-look” rule of reason).

¹⁴² See *Bd. of Regents*, 468 U.S. at 88; *Maricopa*, 457 U.S. at 332; *BMI*, 441 U.S. at 4; Second Amended Complaint for Plaintiff, *supra* note 14, at 24–26.

¹⁴³ See *Bd. of Regents*, 468 U.S. at 113 (“[T]he NCAA television plan on its face constitutes a restraint upon the operation of a free market.”).

¹⁴⁴ See *id.*; *Maricopa*, 457 U.S. at 348.

¹⁴⁵ *Bd. of Regents*, 468 U.S. at 98–104 (applying the rule of reason because the NCAA needs some restrictions to exist at all); *Chi. Prof’l Sports Ltd. v. NBA*, 961 F.2d 667, 673 (7th Cir. 1992) (applying the rule of reason because the NBA is a joint venture and requires some restrictions to exist at all); *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1389–91 (9th Cir. 1984) (applying the rule of reason because the NFL needs to implement certain rules in order to function).

¹⁴⁶ See *Bd. of Regents*, 468 U.S. at 88.

¹⁴⁷ *Id.* at 100–01.

¹⁴⁸ *Id.* at 101.

¹⁴⁹ *Id.* at 113.

ly.¹⁵⁰ Moreover, this limitation did not further a legitimate procompetitive justification, such as maintaining competitive balance among NCAA member's football teams.¹⁵¹ In the end, the Court held that antitrust laws do in fact regulate the NCAA and that this limitation on televising games was illegal.¹⁵²

2. Two Defenses: Amateurism and Competitive Balance

Although the *Board of Regents* Court struck down the NCAA regulation of the number of televised games, the ultimate effect of the opinion was to provide the NCAA with a strong legal defense to future antitrust suits brought by student-athletes.¹⁵³ This decision provided the NCAA with two specific defenses to antitrust claims: (1) amateurism, and (2) competitive balance.¹⁵⁴ Regarding amateurism, the Court explained, in dicta, that the connection between college athletics and academics separates college from professional sports.¹⁵⁵ Consequently, the NCAA was justified in imposing certain rules, such as not paying players a market wage, to preserve amateurism in college sports, even though these rules would violate antitrust law in other settings.¹⁵⁶ Regarding competitive balance, the Court explained that healthy competition among universities was necessary to pique public interest in college sports.¹⁵⁷ Therefore, the Court could assume that most NCAA regulations were justifiable because they enhanced competition.¹⁵⁸

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 114–15.

¹⁵² *Bd. of Regents*, 468 U.S. at 120.

¹⁵³ *See id.* at 101–02, 117; Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 *HAMLIN L. REV.* 24, 39 (2000) (identifying dicta in the *Board of Regents* decision that has had an “unfortunate” impact on future litigation against the NCAA).

¹⁵⁴ *See Bd. of Regents*, 468 U.S. at 101–02, 117; Pekron, *supra* note 153, at 39.

¹⁵⁵ *See Bd. of Regents*, 468 U.S. at 101–02. In dicta, the *Board of Regents* Court observed:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might be otherwise comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” *athletes must not be paid*, must be required to attend class, and the like.

Id. (emphasis added).

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* at 117 (“It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in collegiate athletics.”).

¹⁵⁸ *Id.*

Although these defenses were explained in dicta, they still shape the landscape for antitrust cases against the NCAA—especially the amateurism defense.¹⁵⁹ Courts have used the amateurism defense to hold that the NCAA's compensation limits are per se legal for purposes of antitrust law, regardless of any adverse effects on the economic interests of student-athletes.¹⁶⁰ For example, in 1988 in *McCormack v. NCAA*, the U.S. Court of Appeals for the Fifth Circuit deferred to the NCAA's amateurism defense when it allowed the NCAA to levy severe sanctions against Southern Methodist University for compensating players beyond approved limits.¹⁶¹ The court held that the NCAA has the power to maintain a system of athletics “containing some amateur elements” and thus could not be subject to scrutiny in those areas.¹⁶²

Traditionally, student-athlete plaintiffs have struggled even to prove a relevant market for their services in cases involving NCAA regulations because of an adherence to the amateurism defense.¹⁶³ For example, in 1992 in *Banks v. NCAA*, the U.S. Court of Appeals for the Seventh Circuit failed to find a relevant market for the services of student-athletes.¹⁶⁴ *Banks* involved a college football player who challenged the NCAA rules prohibiting student-athletes from retaining agents or declaring themselves eligible for the NFL Draft.¹⁶⁵ The court found that the NCAA exists to provide student-athletes with the opportunity to pursue academic degrees while simultaneously competing against other amateur athletes.¹⁶⁶ Ultimately, the court used the procompetitive justification of amateurism to explain that the plaintiff failed to establish a relevant market, which is the first step in the rule-of-reason analysis.¹⁶⁷

¹⁵⁹ *Id.* at 101–02, 117; see Pekron, *supra* note 153, at 39 (“Many courts have relied on the dicta from *Board of Regents* to decide cases challenging one aspect or another of NCAA amateurism rules.”).

¹⁶⁰ See *McCormack*, 845 F.2d at 1343–45; *Justice v. NCAA*, 577 F. Supp. 356, 383 (D. Ariz. 1983); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); NCAA DIVISION I BYLAWS, *supra* note 3, art. 15; Mitten et al., *supra* note 37, at 832 (“This body of precedent holds that [NCAA amateurism] rules are essentially per se legal for purposes of antitrust law.”).

¹⁶¹ 845 F.2d at 1340.

¹⁶² *Id.*

¹⁶³ See *Bd. of Regents*, 468 U.S. at 101–02, 117; *Banks*, 977 F.2d at 1089–91 (finding no relevant market for student-athletes because they were not university employees); Pekron, *supra* note 153, at 39.

¹⁶⁴ 977 F.2d at 1089–91.

¹⁶⁵ *Id.* at 1083–84.

¹⁶⁶ See *id.* at 1089–90.

¹⁶⁷ See *Bd. of Regents*, 468 U.S. at 101–02, 117; *Banks*, 977 F.2d at 1089–91; see also *Jones*, 392 F. Supp. at 303–04 (holding that the plaintiff, a college hockey player challenging NCAA eligibility rules, had failed to establish a cognizable market that would be protected

Courts consistently have found markets to exist for certain products or services that are necessary within college athletics.¹⁶⁸ For example, in 1998 in *Law v. NCAA*, the U.S. Court of Appeals for the Tenth Circuit recognized a market for the services of college basketball coaches, and held that the NCAA's compensation restrictions on college basketball coaches were illegal restraints of trade.¹⁶⁹ The Tenth Circuit acknowledged that coaches are a necessary part of college sports, and universities compete for these coaches' services.¹⁷⁰ Therefore, the court found that a market for coaches exists in the context of collegiate athletics.¹⁷¹

Recently, courts have been more willing to recognize a relevant labor market for student-athlete services.¹⁷² Most notably, in 2005 in *In re NCAA I-A Walk-On Football Players Litigation*, the U.S. District Court for the Western District of Washington found an input market for the services of student-athletes.¹⁷³ This case involved a claim by Division I-A walk-on football players that NCAA restrictions on the number of scholarships provided to each university prevented these players from receiving athletics-based financial aid.¹⁷⁴ The court determined that schools compete with each other for the services of amateur football players, who are necessary "inputs" for the production of college football.¹⁷⁵

Building on the momentum gained by plaintiffs in *Walk-On Football Players*, one group of plaintiffs achieved further success regarding student-athlete compensation by putting a new twist on an old argument.¹⁷⁶

by antitrust laws because the eligibility rules were designed to preserve amateurism and had no commercial elements).

¹⁶⁸ See *Bd. of Regents*, 468 U.S. at 111; *Law*, 134 F.3d at 1019–20.

¹⁶⁹ See 134 F.3d at 1019–20, 1024.

¹⁷⁰ See *id.* at 1019–20.

¹⁷¹ See *id.*

¹⁷² See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063–64 (9th Cir. 2001) (holding that NCAA athletic programs do compete in the recruiting of student-athletes but dismissing petitioner's challenge to NCAA transfer rules because petitioner limited the relevant market to UCLA instead of all interchangeable schools across the country); *Walk-On Football Players*, 398 F. Supp. 2d at 1150 (finding a relevant input market for the services of student-athletes).

¹⁷³ 398 F. Supp. 2d at 1150. An "input" is something that a firm uses to produce a final good or service—glass is a necessary input to produce light bulbs, for example. See *id.* These courts have recognized that student-athletes are inputs in the production of college football and that colleges compete with each other for the services of the best student-athletes. See, e.g., *Tanaka*, 252 F.3d at 1063–64; *Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1150.

¹⁷⁴ See *Walk-On Football Players*, 398 F. Supp. 2d at 1146–47.

¹⁷⁵ *Id.* at 1150; see *Tanaka*, 252 F.3d at 1063–64.

¹⁷⁶ See *McCormack*, 845 F.2d at 1343–45; Second Amended Complaint for Plaintiff, *supra* note 14, at 3; Mitten et al., *supra* note 37, at 834.

In 2006 in *White v. NCAA*, the U.S. District Court for the Central District of California considered a challenge by a group of former NCAA football and men's basketball players to an NCAA bylaw limiting the maximum value of their athletic scholarships to the value of tuition, fees, room and board, and books.¹⁷⁷ The plaintiffs in *White* established the relevant market as U.S. colleges and universities that compete in Major College Football and Major College Basketball within the NCAA's Division I.¹⁷⁸

The plaintiffs carefully drafted the complaint to avoid the NCAA's amateurism defense.¹⁷⁹ The plaintiffs could have argued that student-athletes should be paid wages on top of their scholarships because in a free market the top universities would compensate student-athletes far above the cost of attendance.¹⁸⁰ But, the dicta within the *Board of Regents* decision stated that the NCAA's amateurism defense would defeat this argument—the NCAA cannot pay players a market wage and maintain the amateurism that makes college athletics distinctly attractive to consumers.¹⁸¹ Instead, the plaintiffs in *White* wisely argued that they should merely be paid the full cost of attendance.¹⁸² By framing the argument in this manner, the plaintiff-athletes were not requesting to be paid like professional athletes but rather to be given as much aid as students with full academic scholarships.¹⁸³ The plaintiffs intentionally remained within Congress's definition of what constitutes the full cost of attend-

¹⁷⁷ Second Amended Complaint for Plaintiff, *supra* note 14, at 3.

¹⁷⁸ *Id.* at 10–11. The plaintiffs in *White* specifically limited the market for football to NCAA Division I-A and the market for basketball to NCAA Division I because the NCAA itself defines these divisions as the highest level of competition for these sports. *Id.* at 11–12. There are no reasonable substitutes for student-athletes to consider and they are forced to deal with the NCAA's restrictions. *Id.* at 11–13. The plaintiffs argued that universities within these divisions provide prospective student-athletes with the opportunity to compete at the highest level of athletics while obtaining a degree. *Id.* Furthermore, they provide a far greater prospect for advancement to a professional career in athletics than is available elsewhere. *Id.*

¹⁷⁹ See *McCormack*, 845 F.2d at 1343–45; Second Amended Complaint for Plaintiff, *supra* note 14, at 15; Mitten et al., *supra* note 37, at 834.

¹⁸⁰ See *McCormack*, 845 F.2d at 1343–45; Second Amended Complaint for Plaintiff, *supra* note 14, at 15; Mitten et al., *supra* note 37, at 834.

¹⁸¹ See 468 U.S. at 101–02.

¹⁸² Compare Second Amended Complaint for Plaintiff, *supra* note 14, at 15 (claiming that student-athletes are entitled to athletics-based aid up to the full cost of attendance), with *McCormack*, 845 F.2d at 1340, 1343–45 (rejecting the plaintiffs' argument that student-athletes should have no restrictions on compensation and should be paid a market wage).

¹⁸³ See Second Amended Complaint for Plaintiff, *supra* note 14, at 15; Dennie, *supra* note 63, at 119 (“*White* poses a different query. The *White* class attempts to remain within the confines of federal financial aid policies as established by federal regulations.”).

ance.¹⁸⁴ Consequently, the NCAA could not argue that this increase in pay would undermine amateurism because the student-athletes would only be receiving money for the costs of being a student and nothing more.¹⁸⁵

III. THE NEW MISCELLANEOUS EXPENSE ALLOWANCE LEAVES THE NCAA VULNERABLE TO ANTITRUST SUITS

The NCAA's Miscellaneous Expense Allowance ("MEA") attempted to fill the gap in student-athletes' financial aid that served as the basis for the complaint filed in 2006 in *White v. NCAA*.¹⁸⁶ The new regulation, if passed, would only partially fill this gap, however.¹⁸⁷ The NCAA would simply be raising the cap on athletics-based aid without addressing the price-fixing behavior at issue in *White*.¹⁸⁸ By using the framework established by the plaintiffs in *White*, a group of student-athletes could challenge the \$2000 cap on miscellaneous expenses and receive financial aid up to the full cost of attendance.¹⁸⁹

The MEA is a paradigmatic example of horizontal price-fixing.¹⁹⁰ Courts have consistently refused to condemn NCAA regulations as per

¹⁸⁴ *McCormack*, 845 F.2d at 1343–45; Second Amended Complaint for Plaintiff, *supra* note 14, at 15; *see* Dennie, *supra* note 63, at 119.

¹⁸⁵ *McCormack*, 845 F.2d at 1343–45; Second Amended Complaint for Plaintiff, *supra* note 14, at 15; *see* Dennie, *supra* note 63, at 119. Although the court ruled that the plaintiffs' complaint sufficiently alleged an anticompetitive agreement among NCAA member universities to fix the economic value of their athletic scholarships, the case was settled before trial. Denial of Defendant's Motion to Dismiss Plaintiff's Amended Complaint, *supra* note 15, at 1; Stipulation and Agreement of Settlement, *supra* note 17, at 2. Pursuant to the terms of the settlement, the NCAA provided a total of \$218 million to Division I institutions to give aid to current student-athletes with financial needs, academic needs, or both, and established a \$10 million fund to reimburse plaintiffs' future education expenses. Stipulation and Agreement of Settlement, *supra* note 17, at 10–11. This settlement, however, does not preclude future antitrust litigation. *See id.*; Mitten et al., *supra* note 37, at 834.

¹⁸⁶ Second Amended Complaint for Plaintiff, *supra* note 14, at 3 (plaintiffs estimated that students on "full" athletic scholarships must cover \$2500 per year in miscellaneous living expenses); *see* Hosick, *supra* note 9.

¹⁸⁷ *See* Second Amended Complaint for Plaintiff, *supra* note 14, at 3; COLL. BD., *supra* note 8, at 6 fig.1 (according to the College Board, the average amount spent by students on miscellaneous expenses is approximately \$3200 per year at public universities and \$2500 per year at private universities); Hosick, *supra* note 9 (allowing NCAA member schools to grant student-athletes up to \$2000 per year to cover miscellaneous expenses).

¹⁸⁸ *See* Second Amended Complaint for Plaintiff, *supra* note 14, at 3; Hosick, *supra* note 9.

¹⁸⁹ *See* Second Amended Complaint for Plaintiff, *supra* note 14, at 10–15; *infra* notes 196–302 and accompanying text.

¹⁹⁰ *See* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984); *McCormack v. NCAA*, 845 F.2d 1338, 1343–45 (5th Cir. 1988).

se antitrust violations, however, and thus a court interpreting this hypothetical claim would most likely apply the rule of reason.¹⁹¹ This Part walks through a rule-of-reason analysis for a hypothetical claim by a class of current and former student-athletes (“claimants”) challenging the NCAA’s cap on athletics-based financial aid.¹⁹² Section A examines indirect and direct proof of the MEA’s anticompetitive effects.¹⁹³ Section B then analyzes possible procompetitive justifications for the MEA.¹⁹⁴ Finally, Section C considers less restrictive alternatives to the MEA.¹⁹⁵

A. *The Anticompetitive Effects of the Miscellaneous Expense Allowance*

Under the rule of reason, a plaintiff must first prove that the defendant’s conduct created an anticompetitive effect.¹⁹⁶ A plaintiff can establish anticompetitive effects indirectly, by proving “market power,” or directly, by proving the anticompetitive effects of the defendant’s actions.¹⁹⁷ Proving market power requires the plaintiff to: (1) define the relevant market, and (2) show the defendant’s power in the market through a lack of reasonable alternatives.¹⁹⁸ Alternatively, a plaintiff can directly prove anticompetitive effects caused by the defendant’s conduct if the conduct is a naked restraint on trade.¹⁹⁹ The claimants could establish anticompetitive effects both indirectly and directly in this case.²⁰⁰

1. Indirect Proof Through Market Power

a. *Does a Market Exist for Student Athletes*

As in *White*, the claimants should argue that the relevant market is the input market for the services of student-athletes at U.S. colleges and universities within Major College Football and Major College Bas-

¹⁹¹ See *Bd. of Regents*, 468 U.S. at 117; *Law v. NCAA*, 134 F.3d 1010, 1017–18 (10th Cir. 1998); *McCormack*, 845 F.2d at 1343–45.

¹⁹² See *infra* notes 196–302 and accompanying text.

¹⁹³ See *infra* notes 196–252 and accompanying text.

¹⁹⁴ See *infra* notes 253–291 and accompanying text.

¹⁹⁵ See *infra* notes 292–302 and accompanying text.

¹⁹⁶ *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); see *supra* notes 110–134 and accompanying text.

¹⁹⁷ See *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986); *Brown Univ.*, 5 F.3d at 668; *supra* notes 115–128 and accompanying text.

¹⁹⁸ See *Ind. Fed’n of Dentists*, 476 U.S. at 460–61; *Brown Univ.*, 5 F.3d at 668.

¹⁹⁹ See *Brown Univ.*, 5 F.3d at 668; *Baker et al.*, *supra* note 70, at 80; *Dennie*, *supra* note 63, at 112.

²⁰⁰ See *infra* notes 201–252 and accompanying text.

ketball.²⁰¹ In other words, the claimants should argue that universities compete with each other for the services of the best student-athletes by recruiting them with athletic scholarships.²⁰²

Courts have changed course in the last twenty years and have begun to recognize a market for student-athletes.²⁰³ Although only two courts have found that an input market for student-athletes exists, other courts have tackled this question in analogous situations.²⁰⁴ Courts have explained that college athletics is a business with certain inputs that are necessary for its existence.²⁰⁵ Most comparably, in 1998 in *Law v. NCAA*, the U.S. Court of Appeals for the Tenth Circuit recognized a market for the services of college basketball coaches, and held that the NCAA's compensation restrictions on college basketball coaches were illegal restraints of trade.²⁰⁶ Student-athletes, like coaches, are necessary for college athletics to exist, and therefore a court would likely find that a market exists for their services.²⁰⁷

The NCAA would likely argue that it exists to provide student-athletes with academic degrees along with athletic competition, not merely to provide student-athletes with compensation for their athletic services.²⁰⁸ NCAA student-athletes are students first and athletes second—that is, they are not hired guns brought in by universities to raise revenues.²⁰⁹ Thus, the NCAA will likely use the amateurism defense to argue that no market exists for the services of student-athletes.²¹⁰

²⁰¹ See Second Amended Complaint for Plaintiff, *supra* note 14, at 10–11; see also *In re Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (finding a relevant input market for the services of student-athletes).

²⁰² See *Walk-On Football Players*, 398 F. Supp. 2d at 1150; Second Amended Complaint for Plaintiff, *supra* note 14, at 10–11.

²⁰³ Compare *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063–64 (9th Cir. 2001) (finding an input market for student-athletes because universities do compete with each other in recruiting), and *Walk-On Football Players*, 398 F. Supp. 2d at 1150 (finding an input market for the services of student-athletes), with *Banks v. NCAA*, 977 F.2d 1081, 1089 (7th Cir. 1992) (finding no relevant market for the services of student-athletes because they were not employees of the university), and *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (finding no relevant market for student-athletes because they were not traditional businessmen).

²⁰⁴ See *Bd. of Regents*, 468 U.S. at 111; *Tanaka*, 252 F.3d at 1063–64; *Law*, 134 F.3d at 1019–20; *Walk-On Football Players*, 398 F. Supp. 2d at 1150.

²⁰⁵ See *Bd. of Regents*, 468 U.S. at 111; *Law*, 134 F.3d at 1019–20.

²⁰⁶ See *Law*, 134 F.3d at 1019–20, 1024; *Dennie*, *supra* note 63, at 112.

²⁰⁷ See *Tanaka*, 252 F.3d at 1063–64; *Law*, 134 F.3d at 1019–20; *Walk-On Football Players*, 398 F. Supp. 2d at 1150.

²⁰⁸ See *Banks*, 977 F.2d at 1089; *Jones*, 392 F. Supp. at 303.

²⁰⁹ See *Banks*, 977 F.2d at 1089; *Jones*, 392 F. Supp. at 303.

²¹⁰ See *Banks*, 977 F.2d at 1089; *Jones*, 392 F. Supp. at 303.

A court would likely find a relevant input market for the services of student-athletes because of the economic realities pervading the landscape of college sports.²¹¹ Major college football and basketball programs generate tens of millions of dollars for their universities.²¹² As the courts in *In re NCAA I-A Walk-On Football Players Litigation* and *Tanaka v. University of Southern California* have recognized, student-athletes are necessary inputs to create these products.²¹³ Universities with major football and basketball programs offer financial compensation, in the form of athletic scholarships, to recruit the best athletes and generate the most profit.²¹⁴ Therefore, a court would likely find that an input market exists for the services of student-athletes.²¹⁵

b. *Establishing Market Power*

After defining the relevant market, a plaintiff must demonstrate that the defendant has market power by showing a lack of reasonable alternatives to the defendant's services.²¹⁶ Once the market is defined as the input market for the services of student-athletes, it becomes evident that no reasonable alternatives exist.²¹⁷ The colleges and universities that compete in Major College Football and Major College Basketball are the only institutions willing to provide financial aid to student-athletes and still allow them to play athletics at the highest level.²¹⁸

²¹¹ See *Tanaka*, 252 F.3d at 1063–64; *Walk-On Football Players*, 398 F. Supp. 2d at 1150; Second Amended Complaint for Plaintiff, *supra* note 14, at 10–15; see also WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 7–13 (1995) (arguing that, given the explosive growth of college athletics, student-athletes should be paid above the full grant-in-aid); Branch, *supra* note 47, at 82 (“With so many people paying for tickets and watching on television, college sports has become Very Big Business.”); *supra* notes 31–57 and accompanying text (discussing the economics of college sports and the resulting scandals).

²¹² See Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011) (magazine), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html> (explaining that college football and men's basketball generate more than \$6 billion in annual revenue, but that players cannot receive as much financial aid as a student receiving a full academic scholarship).

²¹³ *Tanaka*, 252 F.3d at 1063–64; *Walk-On Football Players*, 398 F. Supp. 2d at 1150.

²¹⁴ See *Tanaka*, 252 F.3d at 1063–64; *Walk-On Football Players*, 398 F. Supp. 2d at 1150; Second Amended Complaint for Plaintiff, *supra* note 14, at 13–15.

²¹⁵ See *Tanaka*, 252 F.3d at 1063–64; *Walk-On Football Players*, 398 F. Supp. 2d at 1150; Baker et al., *supra* note 70, at 86; Dennie, *supra* note 63, at 112–13.

²¹⁶ See *supra* notes 119–122 and accompanying text.

²¹⁷ See *Walk-On Football Players*, 398 F. Supp. 2d at 1150 (“[T]here are no other viable options for students wishing to make full use of their skills at the highest level of competition.”).

²¹⁸ See *Tanaka*, 252 F.3d at 1063–64; *Walk-On Football Players*, 398 F. Supp. 2d at 1150; Second Amended Complaint for Plaintiff, *supra* note 14, at 14–15; Baker et al., *supra* note 70, at 86.

Theoretically, if the NCAA wanted to decrease the amount of athletics-based aid to student-athletes, student-athletes would have no alternative buyers and would be at the mercy of the NCAA.²¹⁹

Ivy Group institutions are not alternatives because they only provide academic scholarships, not athletic scholarships, and they therefore cannot recruit the services of student-athletes through financial aid awards.²²⁰ Similarly, military academies are not alternatives because they also do not provide student-athletes with athletic scholarships—these academies provide all students with full scholarships and stipends in exchange for military service after graduation.²²¹ Although these institutions field teams that compete with the schools in Major College Football and Major College Basketball, they do not represent a reasonable alternative to NCAA institutions because they do not offer compensation for the services of student-athletes, but rather for academic or military service.²²²

Nor does access to other forms of financial aid unrelated to athletic ability constitute a reasonable alternative.²²³ By definition, these forms of financial aid do not compensate student-athletes for athletic service.²²⁴ They do not present student-athletes with an opportunity to exchange their services for financial compensation, and therefore they are not reasonable alternatives to athletic scholarships.²²⁵

Additionally, professional sports leagues are not reasonable alternatives for student-athletes to receive additional financial aid.²²⁶ As the Supreme Court observed in 1984 in *NCAA v. Board of Regents*, professional sports are inherently distinct from collegiate athletics because of

²¹⁹ See *supra* notes 119–122 and accompanying text (discussing the market definition procedure under the Horizontal Merger Guidelines).

²²⁰ *Prospective Student-Athlete Information*, IVY LEAGUE, <http://www.ivyleaguesports.com/information/psa/index> (last visited May 15, 2013) (noting that Ivy Group institutions only offer financial aid based on need, not based on academics or athletics).

²²¹ *United States Military Academy*, STATEUNIVERSITY.COM, http://www.stateuniversity.com/universities/NY/United_States_Military_Academy.html (last visited May 15, 2013) (noting that military academies provide all students with full scholarships in exchange for five years of military service).

²²² See *id.*

²²³ See *Federal Pell Grant Program*, *supra* note 63; *Student-Athlete Benefits*, *supra* note 9.

²²⁴ See *Federal Pell Grant Program*, *supra* note 63; *Student-Athlete Benefits*, *supra* note 9.

²²⁵ See *Federal Pell Grant Program*, *supra* note 63; *Student-Athlete Benefits*, *supra* note 9. Although these programs would not represent reasonable alternatives for the services of student-athletes, they would potentially lower the amount of damages. See *Federal Pell Grant Program*, *supra* note 63; *Student-Athlete Benefits*, *supra* note 9.

²²⁶ See *Bd. of Regents*, 468 U.S. at 101–02; NCAA DIVISION I BYLAWS, *supra* note 3, art. 12.1; *Dennie*, *supra* note 63, at 113 (“It is disingenuous for the NCAA to argue that a professional market is a reasonable substitute for amateur athletics.”).

the unique nature and appeal of amateur athletics.²²⁷ Thus, it would be hypocritical for the NCAA to argue that it is necessary to not pay players in order to preserve amateurism while simultaneously arguing that professional athletics would be an alternative, if not interchangeable, experience.²²⁸ If the distinction between amateur collegiate athletics and professional athletics is what makes college sports so attractive, then professional sports must be considered an entirely different product.²²⁹ The NCAA cannot have it both ways; either amateur college athletics is something unique for which professional athletics would not be a reasonable alternative, or college athletics is not special and unique and there is no reason to limit the compensation awarded to student-athletes.²³⁰

Moreover, both the National Football League (NFL) and National Basketball Association (NBA) do not allow players to join the league directly from high school.²³¹ This essentially forces many athletes to play in college before having a chance to reap the financial rewards of professional athletics.²³² Even if a student-athlete wanted to seek professional athletics as an alternative, he could not do so directly out of high school, and therefore these professional leagues are not a reasonable alternative to student-athletes graduating from high school.²³³

²²⁷ See *Bd. of Regents*, 468 U.S. at 101–02.

²²⁸ See *id.* at 102; *McCormack*, 845 F.2d at 1344–45.

²²⁹ See *Bd. of Regents*, 468 U.S. at 102; *McCormack*, 845 F.2d at 1344 (“The NCAA markets college football as a product distinct from professional football.”).

²³⁰ See *Bd. of Regents*, 468 U.S. at 102; *McCormack*, 845 F.2d at 1344–45; *Dennie*, *supra* note 63, at 113–14.

²³¹ NAT’L FOOTBALL LEAGUE & NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. 6, § 2(b) (2011) [hereinafter NBA COLLECTIVE BARGAINING AGREEMENT] (requiring NFL players to wait at least three years after graduating high school to become eligible, but not explicitly requiring that students play in college); NAT’L BASKETBALL ASS’N & NAT’L BASKETBALL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. X, § 1(b)(i) (2011) [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT] (requiring NBA players to be at least nineteen years old and to have had at least one NBA season elapsed since the player’s graduation from high school).

²³² See *Clarett v. Nat’l Football League*, 369 F.3d 124, 125–26 (2d Cir. 2004) (upholding the NFL’s eligibility rules and not allowing Ohio State running back Maurice Clarett to declare for the NFL Draft after his freshman season); NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 231, art. X, § 1(b)(i); NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 231, art. 6, § 2(b).

²³³ See *Clarett*, 369 F.3d at 125–26; NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 231, art. X, § 1(b)(i); NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 231, art. 6, § 2(b). Interestingly, some American basketball players have begun to offer their services overseas as an alternative to college athletics. See Chris Broussard, *Exchange Student*, ESPN MAG., Oct. 5, 2009, at 85, 86. Thus, there may be an alternative market for professional basketball players overseas, and therefore the claimants should limit the geographic

2. Direct Proof of Anticompetitive Effects

Alternatively, the claimants could offer direct proof of the MEA's anticompetitive effects.²³⁴ Although the new MEA raises the ceiling, it is still a cap on athletics-based financial aid.²³⁵ As explained in 1993 by the U.S. Court of Appeals for the Third Circuit in *United States v. Brown University*, artificial caps placed on financial aid put a restraint on competitive bidding among different universities.²³⁶ In turn, this deprives prospective students of the ability to receive higher financial aid packages when selecting a college or university.²³⁷ The NCAA is a cartel that limits competition between universities for the valuable services of student-athletes.²³⁸ And the NCAA has developed monopsony power²³⁹ over the input market for student-athletes, which it has used to create a horizontal price restraint on athletics-based financial aid.²⁴⁰ By implementing rules that limit competition for the services of student-athletes, universities reduce their transactional costs to produce sporting events, which in turn generates tens of millions of dollars in revenue.²⁴¹ The claimants should argue that without any artificial cap, some institutions would offer student-athletes financial aid that would cover

market to the United States. See Second Amended Complaint for Plaintiff, *supra* note 14, at 15; Broussard, *supra*, at 86.

²³⁴ See *Brown Univ.*, 5 F.3d at 668; Hosick, *supra* note 9.

²³⁵ See Hosick, *supra* note 9; *supra* notes 66–77 and accompanying text.

²³⁶ 5 F.3d at 673 (holding that the agreement between Ivy League Schools to coordinate financial offerings to students restrained competitive bidding and deprived the students of the opportunity to compare offerings among schools in an open market); see Second Amended Complaint for Plaintiff, *supra* note 14, at 14.

²³⁷ See *Brown Univ.*, 5 F.3d at 673; Second Amended Complaint for Plaintiff, *supra* note 14, at 14.

²³⁸ See Dennie, *supra* note 63, at 114 (“In effect, the NCAA is a cartel that eliminates price competition among its member institutions in competition for a limited supply of talented inputs (student-athletes).”); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 226–27, 229 (1990) (detailing how the NCAA has established a cartel that controls the compensation of student-athletes).

²³⁹ A “monopsony” is a market condition when one buyer faces multiple sellers. See 2A PHILIP E. AREEDA ET AL., ANTITRUST LAW ¶ 395e (3d ed. 2007) (explaining the mechanics of collusive monopsonies). The monopsonist may dictate terms to its suppliers in the same way that a monopolist may dictate terms to its buyers. See *Walk-On Football Players*, 398 F. Supp. 2d at 1151 n.4.

²⁴⁰ See NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.1; Dennie, *supra* note 63, at 114 (“The NCAA has developed complete monopsony power over the student-athlete input market”); Goldman, *supra* note 238, at 227 (“The NCAA has almost complete monopsony power over the student-athlete labor market”).

²⁴¹ See Mitten et al., *supra* note 37, at 833; Branch, *supra* note 47, at 82.

the full cost of attendance—the same amount that universities can offer students with full academic scholarships.²⁴²

Although the MEA raises the ceiling by \$2000, this does not quite fill the gap for student-athletes attending universities where the average personal and miscellaneous expenses exceed \$2000.²⁴³ For a student-athlete at the University of Michigan, which calculates the cost of undergraduate students' personal and miscellaneous expenses to be \$2054 per year, the \$2000 limitation imposed by the NCAA would be nearly sufficient to achieve parity with a full academic scholarship.²⁴⁴ Thus, if Michigan could implement the MEA, its student-athletes would suffer only negligible harm.²⁴⁵

By contrast, for a student-athlete at Clemson University, which calculates the cost of undergraduate students' personal and miscellaneous expenses to be approximately \$3700 per year, the \$2000 cap would have serious ramifications.²⁴⁶ Clemson would be limited to granting \$2000 of additional athletics-based aid to its student-athletes, which would cover slightly more than half of the students' additional living expenses.²⁴⁷ Thus, the MEA would put student-athletes at schools located in areas with high costs of living, such as those at Clemson, at a significant disadvantage in terms of possible financial aid packages.²⁴⁸

Because the MEA imposes a burden on student-athletes at universities with higher costs of living, the claimants should be able to establish anticompetitive effects and damages.²⁴⁹ For student-athletes attending universities where personal and miscellaneous expenses exceed \$2000, the MEA prevents them from receiving the compensation they would receive in a competitive market.²⁵⁰ Indeed, if the NCAA allowed it, some university administrators would likely provide athletic scholar-

²⁴² See 20 U.S.C. § 108711(1)–(3) (2006); Second Amended Complaint for Plaintiff, *supra* note 14, at 15; NCAA DIVISION I BYLAWS, *supra* note 3, art. 15.1.

²⁴³ See Hosick, *supra* note 9; *infra* notes 244–252 and accompanying text.

²⁴⁴ *Cost to Attend U-M*, UNIV. OF MICH., <http://www.finaid.umich.edu/TopNav/AboutUMFinancialAid/CostofAttendance.aspx> (last visited May 15, 2013) [hereinafter *Michigan COA*]; see Hosick, *supra* note 9.

²⁴⁵ See Hosick, *supra* note 9; *Michigan COA*, *supra* note 244.

²⁴⁶ *Estimated Cost of Attendance*, CLEMSON, <http://www.clemson.edu/financial-aid/costs/COA.html> (last visited May 15, 2013) [hereinafter *Clemson COA*]; see Hosick, *supra* note 9.

²⁴⁷ See Hosick, *supra* note 9; *Clemson COA*, *supra* note 246.

²⁴⁸ See Hosick, *supra* note 9; *Clemson COA*, *supra* note 246; *Michigan COA*, *supra* note 244.

²⁴⁹ See *Brown Univ.*, 5 F.3d at 673 (holding that agreements among universities to set limits on financial aid offerings create anticompetitive effects); Hosick, *supra* note 9; *Clemson COA*, *supra* note 246; *Michigan COA*, *supra* note 244.

²⁵⁰ See *Brown Univ.*, 5 F.3d at 673; Second Amended Complaint for Plaintiff, *supra* note 14, at 3; Hosick, *supra* note 9; *Clemson COA*, *supra* note 246.

ships up to the full cost of attendance.²⁵¹ Therefore, the MEA sets a limit to student-athlete compensation below that which would prevail in a free market, and thus creates anticompetitive harm.²⁵²

B. *The Procompetitive Justifications of the Miscellaneous Expense Allowance*

In a rule-of-reason antitrust case, once the plaintiff has established an anticompetitive effect in the relevant market, the burden shifts to the defendant to offer a legally cognizable procompetitive justification for the restraint.²⁵³ Simply put, the defendant has the opportunity to give good reasons for implementing a particular restraint.²⁵⁴ The NCAA has consistently raised two arguments to defend itself against antitrust claims—preserving amateurism and maintaining competitive equity.²⁵⁵ Consequently, it is likely that the NCAA will raise both these defenses in potential MEA litigation.²⁵⁶ This Section addresses both arguments in the context of a challenge to the MEA.²⁵⁷

²⁵¹ See Interview with Carlene Pariseau, Assoc. Athletics Dir. for Compliance, Boston College Athletic Dep't, & Robert Taggart, Professor of Finance, Carroll School of Mgmt. and Faculty Athletic Representative for Boston College, in Chestnut Hill, Mass. (Feb. 29, 2012) (on file with author). Robert Taggart, the Faculty Athletic Representative for Boston College, explained that if the MEA passed "then the schools in the BCS Conferences, just to take a set, will probably pretty much all go along because they will want to compete. The ones for whom it is tough will just bite the bullet and just do it." *Id.*

²⁵² See *Brown Univ.*, 5 F.3d at 673; Second Amended Complaint for Plaintiff, *supra* note 14, at 3; Hosick, *supra* note 9.

²⁵³ See *Bd. of Regents*, 468 U.S. at 113 ("[H]allmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the free market."); see also note 133 (discussing social welfare justifications).

²⁵⁴ See *Bd. of Regents*, 468 U.S. at 113.

²⁵⁵ See, e.g., *id.* at 101–02 (accepting the NCAA's argument that in order to preserve amateurism in college athletics, student-athletes cannot be paid); *id.* at 117 (accepting the NCAA's argument that it is "reasonable to assume" that most NCAA regulations are "justifiable means of fostering competition among amateur athletic teams"); *Law*, 134 F.3d at 1023–24 (rejecting the NCAA's argument that NCAA regulations concerning salary restrictions placed on entry-level coaches were designed to promote competitive equity); *McCormack*, 845 F.2d at 1343–45 (accepting the NCAA's argument that the NCAA has the power to maintain a system of athletics "containing some amateur elements").

²⁵⁶ See *Bd. of Regents*, 468 U.S. at 101–02; *Law*, 134 F.3d at 1023–24; *McCormack*, 845 F.2d at 1343–45.

²⁵⁷ See *infra* notes 258–291 and accompanying text.

1. Still Operating Within Amateurism

The claimants can argue that the court could still recognize the NCAA's amateurism defense, but allow antitrust law to operate within the artificial limits imposed by the full cost of attendance.²⁵⁸

The claimants can argue that a limit on athletics-based financial aid below the full cost of attendance is similar to the rule in *Walk-On Football Players* and nearly identical to the rule in *White*.²⁵⁹ The MEA gives colleges the ability to grant students extra financial compensation for miscellaneous and personal items.²⁶⁰ The \$2000 limit, however, forbids some student-athletes from receiving the full cost of attendance.²⁶¹ If the NCAA were to allow some student-athletes to receive the full cost of attendance, then it would be illogical for the NCAA to then argue that it would destroy amateurism to provide all student-athletes with compensation up to the full cost of attendance.²⁶² If a student-athlete at Clemson University, for example, were to receive \$3700 in miscellaneous expenses, then this athlete would still be within the limitations established by Congress and would be no less an amateur than if the athlete received \$2000.²⁶³ Therefore, the claimants could argue that exchanging the \$2000 cap imposed by the MEA for the full cost of attendance will simultaneously preserve amateurism and accomplish the goals of antitrust law.²⁶⁴

²⁵⁸ See 20 U.S.C. § 108711 (2006); *Bd. of Regents*, 468 U.S. at 101–02; *McCormack*, 845 F.2d at 1344–45; *Baker et al.*, *supra* note 70, at 92; *Dennie*, *supra* note 63, at 119; *Hosick*, *supra* note 9.

²⁵⁹ See *Walk-On Football Players*, 398 F. Supp. 2d at 1149 (reasoning that the NCAA rule artificially restricting the number of football scholarships allowed at each school was designed to cut costs for universities and not to preserve amateurism); Second Amended Complaint for Plaintiff, *supra* note 14 (arguing that the NCAA's grant-in-aid limitation cuts costs for universities and prevents student-athletes from being compensated up to the full cost of attendance).

²⁶⁰ See *Hosick*, *supra* note 9.

²⁶¹ See *id.* (explaining that the MEA gives student-athletes “the opportunity to receive additional athletics aid up to the full cost of attendance or \$2,000, whichever is less.”); *Clemson COA*, *supra* note 246 (calculating the average Clemson undergraduate student's miscellaneous expenses to be approximately \$4400 per year).

²⁶² See *Bd. of Regents*, 468 U.S. at 101–02; *McCormack*, 845 F.2d at 1344–45; *Baker et al.*, *supra* note 70, at 92; *Dennie*, *supra* note 63, at 119; *Hosick*, *supra* note 9.

²⁶³ See 20 U.S.C. § 108711 (2006); *Clemson COA*, *supra* note 246; see also *supra* notes 243–248 (explaining how the different costs of attendance at the University of Michigan and the University of Clemson would result in unfair treatment of some students under the MEA).

²⁶⁴ See *Walk-On Football Players*, 398 F. Supp. 2d at 1149 (holding that an increased availability of scholarships for schools to give to student-athletes would preserve amateurism and better serve the goals of antitrust law).

The NCAA could successfully establish an amateurism defense by arguing that the MEA falls within a category of cost-cutting regulations that are inherently designed to promote amateurism—rules limiting the amount of compensation available to individual student-athletes.²⁶⁵ In 1988 in *McCormack v. NCAA*, the U.S. Court of Appeals for the 5th Circuit was willing to recognize the NCAA's amateurism defense when a group of student-athletes at Southern Methodist University (SMU) challenged the NCAA's sanction of SMU for compensating players beyond approved limits.²⁶⁶ Applying dicta from the *Board of Regents* decision, the court held that although cutting costs was a byproduct of the "cap on compensation" rule, the rule was necessary to preserve amateurism within college athletics.²⁶⁷ By extending the rationale of *McCormack*, the NCAA could argue that all "cap on compensation" rules, including the new MEA, are designed to promote amateurism.²⁶⁸

The NCAA can further strengthen its position by distinguishing the MEA from the regulation in one particularly unfavorable case.²⁶⁹ In 2005 in *In re NCAA Walk-On Players Litigation*, the U.S. District Court for the Western District of Washington was unwilling to recognize the NCAA's amateurism defense for a regulation that limited the number of athletic scholarships available at each university.²⁷⁰ The "total scholarships" rule regulated the total amount of scholarships available at each school and not the amount of compensation provided within the scholarships.²⁷¹ The court found that this rule was aimed at cutting costs for universities, not promoting amateurism.²⁷² Providing more scholarships would not undermine amateurism, but providing more compensation to each student-athlete could undermine amateurism.²⁷³ Unlike the "total scholarships" rule, the MEA does fall into the category of regulations limiting the amount of compensation to student-athletes and thus a court could recognize the NCAA's amateurism defense.²⁷⁴

²⁶⁵ See *McCormack*, 845 F.2d at 1340, 1343–45; *supra* notes 153–162 (explaining the origins of the amateurism defense).

²⁶⁶ See *McCormack*, 845 F.2d at 1344–45.

²⁶⁷ See *id.* (citing *Bd. of Regents*, 468 U.S. at 102).

²⁶⁸ See *id.*; Hosick, *supra* note 9.

²⁶⁹ See *In re NCAA Walk-On Players Litig.*, 398 F. Supp. 2d at 1149; *supra* notes 172–175 and accompanying text.

²⁷⁰ See *In re NCAA Walk-On Players Litig.*, 398 F. Supp. 2d at 1149.

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ See *McCormack*, 845 F.2d at 1343–45; *In re NCAA Walk-On Players Litig.*, 398 F. Supp. 2d at 1149.

²⁷⁴ See *In re NCAA Walk-On Players Litig.*, 398 F. Supp. 2d at 1149; Hosick, *supra* note 9.

This appears to be the NCAA's strongest argument, and a court might accept it.²⁷⁵ If the court does not accept this argument, however, it will likely rule that the MEA's cap on athletics-based aid is designed to cut costs, which is not a valid procompetitive justification.²⁷⁶

2. Maintaining Competitive Equity

Alternatively, the NCAA could argue that the MEA was designed to maintain competitive equity in college athletics.²⁷⁷ The NCAA has repeatedly argued in antitrust cases that particular regulations are designed to level the playing field by limiting the amount of funds used by member institutions on athletics programs.²⁷⁸

Although these concerns might be legitimate, courts have been unwilling to accept this justification without evidence from the NCAA that competitive equity was the main justification supporting a rule's adoption.²⁷⁹ In *Board of Regents*, the Court observed that most NCAA rules are likely intended to foster competition; the Court dismissed this justification, however, because the NCAA offered no evidence that the plan restricting television broadcasts was intended to level the playing field in college football.²⁸⁰ Similarly, in *Law*, the Tenth Circuit reasoned that the NCAA salary restrictions on entry-level coaches were not designed to equalize the strength of intercollegiate athletic teams because there was no evidence that the regulation at issue actually equalized competition.²⁸¹ Rather, the court held that the salary restrictions were merely structured to avoid exacerbating any existing competitive imbalance.²⁸²

Based on the reasoning in *Board of Regents* and *Law*, the NCAA must show that its rule was designed to promote competitive equity, not

²⁷⁵ See *Bd. of Regents*, 468 U.S. at 101–02; *McCormack*, 845 F.2d at 1343–45; Hosick, *supra* note 9.

²⁷⁶ See *Law*, 134 F.3d at 1022 (“[C]ost-cutting by itself is not a valid procompetitive justification.”); *Walk-On Football Players*, 398 F. Supp. 2d at 1149; Hosick, *supra* note 9.

²⁷⁷ See *Bd. of Regents*, 468 U.S. at 119 (rejecting the NCAA's argument that the plan restricting television broadcasts was designed to enhance competitive equity); *Law*, 134 F.3d at 1024 (rejecting the NCAA's argument that rules limiting compensation for entry-level coaches were designed to promote competition).

²⁷⁸ See, e.g., *Bd. of Regents*, 468 U.S. at 119; *Law*, 134 F.3d at 1024.

²⁷⁹ See *Bd. of Regents*, 468 U.S. at 117–19; *Law*, 134 F.3d at 1024.

²⁸⁰ 468 U.S. at 119. The Court noted that there was no evidence that the restriction of television broadcasts would promote equality more so than rules regarding alumni donations, tuition rates, or other revenue-producing activities. See *id.*

²⁸¹ 134 F.3d at 1024.

²⁸² *Id.* (“[T]he only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance.”).

merely to limit inequity that already exists.²⁸³ The NCAA's strongest argument on this point is that an artificial cap is necessary because without some cap, universities might artificially inflate their cost of attendance to increase the amount that they could provide to student-athletes.²⁸⁴ Consequently, a school like the University of Texas could increase its estimate for miscellaneous expenses in order to offer more money in athletic scholarships, and thereby gain a competitive advantage.²⁸⁵

This argument would most likely fail, however.²⁸⁶ When the legislation was passed in October 2011, there was no indication that the MEA was designed to promote competitive balance.²⁸⁷ There is currently no evidence that the MEA will have any influence on competitive balance.²⁸⁸ For instance, the MEA would permit some universities to pay an additional \$2000 to hundreds of student-athletes that other universities simply cannot afford.²⁸⁹ This, in turn, could create recruiting advantages for universities with larger budgets, ultimately making the rich richer and the poor poorer.²⁹⁰ Until the NCAA submits evidence that the MEA will actually improve competitive balance, a court will most likely reject this potential procompetitive justification.²⁹¹

C. *Less Restrictive Alternatives to the Miscellaneous Expense Allowance*

The third and final step in the rule-of-reason analysis is only necessary if the defendant succeeds in convincing the court that the

²⁸³ See *Bd. of Regents*, 468 U.S. at 119; *Law*, 134 F.3d at 1024.

²⁸⁴ See Hosick, *supra* note 9; Interview with Pariseau & Taggart, *supra* note 251 (explaining that a major reason the NCAA created the \$2000 limitation was "because there was concern that institutions would all of a sudden inflate the cost of attendance, and some institutions would have five, six thousand dollar costs of attendance").

²⁸⁵ See Hosick, *supra* note 9; Interview with Pariseau & Taggart, *supra* note 251.

²⁸⁶ See Hosick, *supra* note 9; *Bd. of Regents*, 468 U.S. at 119; *Law*, 134 F.3d at 1024.

²⁸⁷ See Hosick, *supra* note 9; *Bd. of Regents*, 468 U.S. at 117-19; *Law*, 134 F.3d at 1024 ("Nowhere does the NCAA prove that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities.")

²⁸⁸ See Hosick, *supra* note 9; *Bd. of Regents*, 468 U.S. at 117-19; *Law*, 134 F.3d at 1024. In fact, the MEA will likely worsen competitive balance within the NCAA if it has any effect at all. See Ivan Maisel, *Full Cost of Attendance Gains Traction*, ESPN (July 14, 2011), http://espn.go.com/college-sports/story/_/id/6765762/full-cost-attendance-student-athletes-gaining-traction; Interview with Pariseau & Taggart, *supra* note 251.

²⁸⁹ See Maisel, *supra* note 288; Interview with Pariseau & Taggart, *supra* note 251. Robert Taggart, the Faculty Athletic Representative for Boston College, emphasized that "for schools that don't have that kind of revenue, they are going to have a hard time competing, and those are just the facts." Interview with Pariseau & Taggart, *supra* note 251.

²⁹⁰ See Maisel, *supra* note 288; Interview with Pariseau & Taggart, *supra* note 251.

²⁹¹ See Hosick, *supra* note 9; *Bd. of Regents*, 468 U.S. at 119; *Law*, 134 F.3d at 1024.

procompetitive justification creates a net benefit beyond the harms caused by the anticompetitive conduct.²⁹² At this step, the burden shifts back to the plaintiff to prove that the defendant could accomplish its objectives in a less restrictive manner.²⁹³

If a court were to accept the NCAA's amateurism defense, then the claimants should argue that raising the MEA's limit to the full cost of attendance would be a less restrictive alternative.²⁹⁴ This argument is the same as the argument against applying the amateurism defense to the MEA.²⁹⁵ If student-athletes received the full cost of attendance then amateurism would still be fully maintained, but this would be a less restrictive alternative because student-athletes would receive higher amounts of athletics-based compensation.²⁹⁶ Consequently, a court would likely hold that a limit set at the full cost of attendance for each institution would be less restrictive than the MEA's artificial \$2000 cap.²⁹⁷

If a court were to accept the NCAA's competitive equity justification, then the claimants should argue that the NCAA could set the cap at the full cost of attendance and then simply impose sanctions on schools that artificially inflate their cost of attendance.²⁹⁸ This system would accomplish the same goals as the artificial cap because schools would be deterred from granting impermissible benefits.²⁹⁹ By setting a cap at the full cost of attendance, it would be possible for a university's financial aid office to inflate the cost of attendance, but the threat of

²⁹² *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997).

²⁹³ *White Motor Co. v. United States*, 372 U.S. 253, 270 (1963) (Brennan, J., concurring) (stating that the less restrictive alternative test is relevant to the rule-of-reason analysis because it requires the court to determine if the restraint is "more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests"); see *Baker et al.*, *supra* note 70, at 93 (explaining that Justice William J. Brennan's concurring opinion in *White Motor Co. v. United States* provides one of the best arguments for the less restrictive alternative test).

²⁹⁴ See *Bd. of Regents*, 468 U.S. at 101–02; *McCormack*, 845 F.2d at 1343–45; *Baker et al.*, *supra* note 70, at 93–94; *Dennie*, *supra* note 63, at 124; *Hosick*, *supra* note 9.

²⁹⁵ See *Bd. of Regents*, 468 U.S. at 101–02; *McCormack*, 845 F.2d at 1343–45; *Baker et al.*, *supra* note 70, at 93–94; *Dennie*, *supra* note 63, at 124; *Hosick*, *supra* note 9; *supra* notes 258–276 and accompanying text.

²⁹⁶ See 20 U.S.C. § 108711(1)–(3) (2006); *Bd. of Regents*, 468 U.S. at 101–02; *Brown Univ.*, 5 F.3d at 668; *McCormack*, 845 F.2d at 1343–45; Second Amended Complaint for Plaintiff, *supra* note 14, at 15; *Hosick*, *supra* note 9.

²⁹⁷ See 20 U.S.C. § 108711(1)–(3); *Bd. of Regents*, 468 U.S. at 101–02; *McCormack*, 845 F.2d at 1343–45; *Hosick*, *supra* note 9.

²⁹⁸ See NCAA DIVISION I BYLAWS, *supra* note 3, art. 10 (detailing sanctions for unethical conduct, such as fixing games and using drugs); *Hosick*, *supra* note 9.

²⁹⁹ See NCAA DIVISION I BYLAWS, *supra* note 3, art. 10; *Hosick*, *supra* note 9.

NCAA sanctions would serve a deterrent function, and thus maintain competitive equity.³⁰⁰ Yet, increasing the cap to the full cost of attendance is less restrictive than the MEA's artificial cap because student-athletes will be able to receive greater compensation for their services.³⁰¹ Therefore, a court would likely hold that setting the cap at the full cost of attendance and imposing sanctions for artificially inflating the cost of attendance would be less restrictive than the MEA's \$2000 cap.³⁰²

CONCLUSION

For decades the NCAA has limited athletics-based financial aid to a level below the full cost of attendance, which it defines as a "full grant-in-aid." In October 2011, the NCAA imposed the Miscellaneous Expense Allowance, which raised the cap on athletics-based financial aid by \$2000. Shortly thereafter, the MEA was overturned. NCAA members will vote on a new proposal later this year. If passed, this legislation will likely impose the same \$2000 cap as originally proposed.

Even if the MEA is adopted, the NCAA will remain vulnerable to antitrust litigation by a class of current student-athletes. By adopting the framework in *White v. NCAA*, this group of claimants could successfully argue that the NCAA is engaging in horizontal price-fixing. Although the MEA would provide a better option for student-athletes than the previous "full grant-in-aid," it would not quite close the gap required to avoid potential antitrust liability. Until the NCAA sets the cap on athletics-based aid at the full cost of attendance, student-athletes will continue to have a strong case that the NCAA is in violation of antitrust law.

³⁰⁰ See NCAA DIVISION I BYLAWS, *supra* note 3, art. 10.

³⁰¹ See *Brown Univ.*, 5 F.3d at 678; Second Amended Complaint for Plaintiff, *supra* note 14, at 15; Hosick, *supra* note 9.

³⁰² See *Brown Univ.*, 5 F.3d at 678; Second Amended Complaint for Plaintiff, *supra* note 14, at 15; NCAA DIVISION I BYLAWS, *supra* note 3, art. 10; Hosick, *supra* note 9.

