Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

The NCAA's Agent Certification Program: A Critical and Legal Analysis

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Introduction

On August 8, 2018, the National Collegiate Athletic Association ("NCAA") revised its rules to allow men's college basketball players, for the first time, to retain agents for representation in the National Basketball Association ("NBA") draft.[1] However, according to the NCAA's new rules, a men's college basketball player could only select an agent who first received NCAA approval subject to the association's new agent certification program.[2] The NCAA based its new agent certification program on the recommendations of an April 2018 report issued by the NCAA Commission on College Basketball, chaired by Condoleezza Rice, which states that "some" men's basketball players "needed earlier professional advice to determine

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[1] Nat'l Collegiate Athletic Ass'n, 2019–20 NCAA Division I Manual §§ 12.02.1.2–12.3.1.2.2 (2019) [hereinafter NCAA Manual], http://www.ncaapublications.com/productdownloads/D120.pdf [https://perma.cc/SAA7-FXK6].

[2] *Id.* § 12.02.1.2 ("In men's basketball, any individual who solicits a prospective or enrolled student-athlete to enter into an agency contract or attempts to obtain employment for an individual with a professional sports team or organization or as a professional athlete must be certified and maintain active certification per the policies and procedures of the NCAA agent certification program.").

whether it is in their best interests to declare for the league draft."[3] The NCAA's new agent certification program became operational in August 2019.[4]

One month later, in September 2019, the National Basketball Players Association ("NBPA"), on behalf of signed NBPA-certified player agents, sent a letter to the NCAA refusing to submit to the NCAA's proposed agent certification program.[5] The letter stated, among other things:

> While we refuse to subject ourselves to these regulations, our biggest concern is that the process itself undermines the ability of student-athletes to truly receive the most competent representation when they are testing the waters. By continuing to legislate in a manner that ignores the realities of the world that student-athletes with professional prospects live in, the NCAA is only entrenching an ecosystem that cultivates and fosters an atmosphere of distrust among the student-athletes whom the NCAA is supposed to protect, thus pushing these kids out of school far before they are ready.[6]

While, as a general matter, it may be better that the NCAA allow men's basketball players to work with some agents than none at all, the authors of this Article agree with the NBPA that the NCAA's attempts to regulate agents inappropriately limits the athletes' choice of agents, and thus undermines the interests of college athletes. In addition, one could make a reasonable argument that the NCAA's attempt, as a private trade association, to certify and regulate college basketball player agents runs afoul of various longstanding laws and social policies, including, perhaps most notably, § 1 of the Sherman Antitrust Act.[7]

This Article provides the first critical and legal analysis of the NCAA's agent certification program, and it concludes that the agent certification program violates laws and public policies fundamental to United States jurisprudence. Part I of this Article introduces the NCAA's new agent certification program, while providing a critical analysis of its policies and procedures. Part II explains why the NCAA lacks the legal authority to

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[3] *Agent Certification*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/enforcement/agents-and-amateurism/agent-certification {https://perma.cc/L7QU-HY8H].

[4] *Id.*

[5] Adrian Wojnarowski, *NBA Agents Reject NCAA's Certification Proposal*, ESPN (Sept. 14, 2019), https://www.espn.com/mens-college-basketball/story/_/id/27614802/nba-agents-reject-ncaa-certification-proposal [https://perma.cc/73GH-FKNL].

[6] *Id.*

[7] *See* 15 U.S.C. § 1 (2018).

regulate and certify basketball player agents under its new agent certification program. Finally, Part III explains why the NCAA agent certification program likely constitutes an illegal group boycott that violates federal antitrust law, specifically § 1 of the Sherman Act.

I. A Critical Analysis of the NCAA's Agent Certification Program

The NCAA's new agent certification program modifies the NCAA's longstanding rules related to player amateurism and seeking outside counsel. Specifically, Article 12.3 of the NCAA Division I Manual governs college athletes' use of agents. Article 12.3.1 (the "General Rule") states that "[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport."[8] The NCAA's new agent certification program, however, allows certain men's college basketball players to seek counsel from certified agents under certain circumstances while remaining eligible to participate in college.

Section A of this Part will introduce the new NCAA agent certification program. Section B will critically evaluate the prerequisites for becoming an NCAA certified agent under this new program. Section C will then analyze agent conduct that is subject to adverse actions and penalties, as well as the NCAA's procedure to enforce its new agent regulations.

A. The NCAA's New Agent Certification Program

On August 8, 2018, the NCAA adopted an exception to the General Rule against allowing college athletes to retain agents by allowing NCAA-certified agents to represent men's basketball players after their season, so long as each represented player has requested an evaluation from the NBA Undergraduate Advisory Committee, comprised of NBA team representatives.[9] For each player, the NBA Basketball Operations Department com-

[8] NCAA Manual, *supra* note 1, § 12.3.1.

[9] *See id.* § 12.3.1.2.2. A prospective men's college basketball player who is identified as an "elite senior" in accordance with established policies and procedures may also be represented by an NCAA-certified agent on or after July 1 immediately before his senior year in high school. *See id.* § 12.3.1.2.1. In baseball and men's hockey, prior to full-time collegiate enrollment, players who have been drafted may be represented by an agent provided the representation agreement with the agent is terminated prior to enrollment. *See id.* § 12.3.1.1.

piles evaluations submitted by NBA teams and provides these evaluations to the player before the NBA's early entry deadline.[10] A player's evaluation provides his most likely draft range (*i.e.*, whether he is likely to be selected in the draft, and if so, in which quartile of the draft he is most likely to be selected).[11] The player then receives updated written feedback from the NBA Undergraduate Advisory Committee before the NCAA's deadline to withdraw from the NBA Draft, which occurs ten days after the NBA draft combine.[12]

To become an NCAA-certified agent, an individual must meet six prerequisites. The prospective NCAA-certified agent must: (1) have a bachelor's degree or be currently certified and in good standing with the NBPA; (2) have been NBPA-certified for at least three consecutive years; (3) maintain professional liability insurance; (4) submit an online application by the appropriate deadline, which includes completion of a background check; (5) pay an annual application fee of $250 and an annual certification fee of $1,250 to the NCAA; and (6) pass an in-person exam.[13] The material covered on this in-person exam focuses on financial competency and NCAA rules pertaining to initial and continuing eligibility requirements, recruiting, agent certification, amateurism, and extra benefits.[14]

The NCAA's Agent Certification Requirements ("Requirements") describe two types of agent misconduct: "disqualifying conduct" and "impermissible conduct."[15] The NCAA defines disqualifying conduct as behavior warranting denial of the agent's original certification application.[16] According to the NCAA, the NCAA Enforcement Certification and Approvals Group has "the sole and final authority to determine" whether an agent has

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[10] *See* NBA Undergraduate Advisory Committee: Educational Guide, Nat'l Collegiate Athletic Ass'n (2018), https://www.ncaa.com/sites/default/files/public/files/NBA_UAC_Brochure%20(1).pdf [https://perma.cc/R73H-4EUU]. Under NCAA rules, a men's basketball player is allowed to "test the waters" by entering (or declaring for) the NBA draft if the player requests that his name be removed from the draft list not later than 10 days after the NBA draft combine. *See* NCAA Manual, *supra* note 1, § 12.2.4.2.1.1.

[11] *See* NBA Undergraduate Advisory Committee: Educational Guide, *supra* note 10.

[12] *Id.*

[13] *Agent Certification*, *supra* note 3.

[14] *Id.*

[15] *See* Agent Certification Requirements, Nat'l Collegiate Athletic Ass'n, (2018) [hereinafter Requirements], https://ncaaorg.s3.amazonaws.com/enforcement/ecag/agent/ECAG_AgentCertificationRequirements.pdf [https://perma.cc/B4JC-FEYG].

[16] *Id.* § 6-2-1.

engaged in disqualifying conduct.[17] Disqualifying conduct includes, but is not limited to: (1) failure to properly complete a certification application or meet any Enforcement Certification and Approvals Group deadline, (2) failure to cooperate with the NCAA in its processing of an application, (3) failure to meet the NCAA background check or educational requirements, which includes failing to achieve a passing score on the NCAA agent certification examination, (4) loss of NBPA certification, and (5) violation of state or federal laws governing athlete agents.[18]

The NCAA defines impermissible conduct as "conduct that is intentional, deceptive, contrary to the NCAA's core mission or which may adversely affect the interest or well-being of [student-athletes]," and may lead to withdrawal of certification and ineligibility to reapply for certification.[19] Impermissible conduct includes, but is not limited to: (1) failure to comply with the terms in the Requirements or NCAA legislation, (2) "[m]isappropriating funds or engaging in specific acts of financial malpractice such as embezzlement, theft or fraud, which would render him/her unfit," (3) "engaging in other conduct that significantly impacts adversely his or her credibility, integrity or competence to serve in a representative capacity on behalf of a [student-athlete],"[20] and (4) "[p]articipation and/or involvement with conduct detrimental to the integrity and public confidence in the NCAA."[21]

Under the Requirements, the Enforcement Certification and Approvals Group has wide discretion to sanction disqualifying conduct and impermissible conduct with fines, formal reprimand, suspension of certification for a prescribed period, withdrawal of current or denial of future certification with or without conditions, or a lifetime ban.[22] Adverse action and penalties imposed for violating NCAA legislation and impermissible conduct is limited to conduct occurring not earlier than four years before the agent was notified of the violation, but the four-year limitation does not apply to (a) conduct affecting an athlete's eligibility; (b) a pattern of willful violations on part of the agent that began before but continued into the four-year period; or (c) conduct that involves an effort to conceal the occurrence of the prohibited conduct.[23] The determination of whether an agent has engaged in impermissible conduct must be made in the first instance by the Enforcement

[17] *Id.*
[18] *Id.*
[19] *Id.* § 6-2-2.
[20] *Id.*
[21] *Id.* § 6-2-3.
[22] *Id.* § 6-3.
[23] *Id.* § 6-3-3-5.

Certification and Approvals Group.[24] But the agent may contest the violation or penalty, and the Enforcement Certification and Approvals Group will, after completion of a review, email the agent a final written decision.[25]

The agent may then file an appeal to the appropriate NCAA committee and request a telephonic hearing.[26] The filing of an appeal does not stay the penalty imposed.[27] An appeal will only succeed if the agent can show that "(a) [the Enforcement Certification and Approvals Group] made an erroneous determination of material fact that is clearly contrary to the information presented to the appeals committee; and (b) the facts found by [the Enforcement Certification and Approvals Group] do not constitute a violation of NCAA Bylaws, agent certification legislation or related policies and procedures."[28] If the committee affirms the Enforcement Certification and Approval Group's finding that a violation occurred, it cannot modify the penalty unless it determines that "the penalty was not authorized by or imposed in accordance with [Enforcement Certification and Approvals Group] policies and procedures."[29] The committee's decision "shall be final, binding and conclusive, and shall not be subject to further review,"[30] and the agent must disclose the violation and penalty to his or her clients within thirty calendar days.[31]

B. Analyzing the Prerequisites for Becoming an NCAA-Certified Agent

Although the NCAA seems to think highly of its new efforts to regulate player agents, there is quite troublingly no nexus between the NCAA's stated purpose for creating an agent certification program and any of the six prerequisites for becoming an NCAA-certified agent. The NCAA's stated purpose for creating a certification process is to "provide[ ] student-athletes with access to hundreds of qualified agents who can offer solid guidance but also protect[ ] those same students from unscrupulous actors who may not represent their best interests."[32] Yet the prerequisites imposed by the NCAA are far broader in their implications.

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[24] *Id.* § 6-4-4.
[25] *Id.* § 6-4-4-1.
[26] *Id.* § 6-4-6-3.
[27] *Id.* § 6-4-6-3-1.
[28] *Id.* § 6-4-6-3-1-5.
[29] *Id.*
[30] *Id.* § 6-4-6-3-1-6.
[31] *Id.* § 6-3-3-6.
[32] *NCAA Amends Agent Certification Requirements*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 12, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-amends-agent-certification-requirements [https://perma.cc/84J4-SYLX].

The NBPA already requires an agent to be certified by, and in good standing with, the NBPA to provide representational services to rookie players, services which include conducting individual contract negotiations and assisting or advising in connection with such negotiations.[33] Thus, the NCAA's first certification prerequisite, requiring an agent either to have a bachelor's degree or be currently certified and in good standing with the NBPA, is superfluous: any agent who seeks to represent any college men's basketball players necessarily satisfies the NCAA's first certification prerequisite.

The second prerequisite—the number of consecutive years an agent has been NBPA-certified—does not affect an agent's ability to represent players and does not protect players from "unscrupulous" actors who may not represent their best interests. To that end, the NBPA imposes no such prerequisite, and only insists that an agent negotiate and execute at least one player contract within a five-year period.[34] Even state bar associations, which regulate and certify lawyers, do not impose a similar prerequisite for a lawyer to practice law and represent clients.

Professional liability insurance, the third prerequisite, insures an agent against allegations of malpractice or breach of fiduciary duty, but it does not give the NCAA any assurance that an agent will give a player "solid guidance." Indeed, professional liability insurance is not even a certification requirement of the NBPA or many state bar associations, which, unlike the NCAA, have been granted licensure authority by law.

The fourth and fifth prerequisites—the completion of a background check and annual payment of $1,500 to the NCAA—neither address an agent's qualifications to represent basketball players in the draft nor protect players from unscrupulous agents. A background check does not disclose whether the agent ever failed to give a player solid guidance, and the NBPA's certification and good standing requirements provide a sufficient background check. Meanwhile, the $1,500 annual payment is excessive and serves primarily as a way for the NCAA to generate additional revenue.

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[33] NBPA Regulations Governing Player Agents, Nat'l Basketball Players Ass'n (2018) [hereinafter NBPA Regulations], https://cosmic-s3.imgix.net/e3bb4d60-7b1a-11e9-9bf5-8bad98088629-NBPAAgentRegulations.pdf [https://perma.cc/4TAZ-4TM6] ("These Regulations govern Player Agents who provide representational services to Players (including "rookies") by conducting individual contract negotiations with [NBA] teams, assisting or advising in connection with such negotiations, and/or administering, advising, or enforcing agreements reached as a result of those negotiations.").

[34] *See Becoming a Certified Agent*, Nat'l Basketball Players Ass'n, https://www.nbpa.com/agents/becoming-an-agent [https://perma.cc/3KP9-5AVQ].

Agents are already required to pay (i) annual dues to the NBPA to maintain certification, (ii) any registration/certification fees imposed by various states under their athlete-agent acts, and, (iii) if the agent is a lawyer, annual dues to the state bar association.

The sixth prerequisite—an exam covering NCAA bylaws associated with agents, student-athlete eligibility and recruiting—is unnecessary given that the NBPA requires its certified agents to know about, and act consistent with, those rules. The NBPA's agent regulations prohibit agents from:

(1) "Providing or offering a monetary inducement. . .to any [p]layer (including a rookie) or college athlete to induce or encourage that person to utilize his services";[35]
(2) "Providing or offering money or any other thing of value to a member of a [p]layer's family or any other person for the purpose of inducing or encouraging the [p]layer to utilize his services or for the purpose of inducing or encouraging that person to recommend that a [p]layer (including a rookie) or college athlete utilize the services of the Player Agent";[36]
(3) "Providing materially false or misleading information to any [p]layer (including a rookie) or college athlete in the context of seeking to be selected as a Player Agent for that individual or in the course of representing that [p]layer as his Player Agent";[37] and
(4) "Engaging in conduct which violates any NCAA regulations."[38]

An NCAA exam will thus either test agents on what they are already required to know, or test them on new topics unrelated to their jobs or ethical obligations. Either way, administering such an exam would be superfluous.

C. Analyzing the Conduct That Is Subject to Adverse Actions, Penalties, and Enforcement

In addition to there being no nexus between the NCAA's reasons for regulating agents and the substance of its rules, the NCAA's enforcement process of its agent certification program, in particular its appeals process, is procedurally flawed and lacks fundamental fairness in at least five respects.

First, it is unclear who will make up "an appropriate NCAA committee," but it should not consist of person(s) who work for, or on behalf of, the

[35] NBPA REGULATIONS, *supra* note 33, § 3(B)(2).
[36] *Id.* § 3(B)(3).
[37] *Id.* § 3(B)(4).
[38] *Id.* § 3(B)(5).

NCAA. A fair and impartial appeals process requires an independent neutral arbitrator, as the NBPA provides for its certified agents and applicants.[39]

Second, a "clearly erroneous" standard of review for appeals is a virtually impossible burden for the agent to overcome, particularly when the NCAA has sole discretion and authority both to interpret whether conduct or behavior satisfies any of the vaguely defined forms of impermissible conduct, and to decide whether an agent engaged in that conduct or behavior.[40] Contrast the NCAA's standard with the NBPA's, in which the disciplinary committee has the burden of proving the allegations of its complaint by "the preponderance of the evidence" in a hearing conducted under the Voluntary Labor Arbitration Rules of the American Arbitration Association.[41]

Third, the NCAA appeals committee cannot discretionarily modify or reduce a penalty imposed by the Enforcement Certification and Approvals Group when it is excessive or unreasonable in relation to the violation.[42] By contrast, in NBPA appeals, if the arbitrator "concludes that the proposed penalty is unreasonable, the [a]rbitrator shall issue an order modifying the penalty."[43]

Fourth, the NCAA's statute of limitations is four years, with no limitation period in some cases.[44] A shorter statute of limitations would help prevent stale claims from being brought fraudulently or spuriously when the agent is unable, from lapse of time, to form a defense.[45] The NBPA has a much shorter statute of limitations. Under NBPA agent regulations, a complaint must be filed against an agent within six months from the date of the occurrence which prompted the complaint, or within six months from the date on which the information sufficient to create reasonable cause became known or reasonably should have become known, whichever is later.[46]

Finally, the Requirements provide that the NCAA may, at any time (after granting certification), launch "enforcement proceedings" against an agent alleged to have engaged in impermissible conduct, and "[n]either NCAA nor [the Enforcement Certification and Approvals Group] is re-

[39] *See id*. § 5(C) ("The NBPA has selected skilled and experienced person(s) to serve as the outside impartial Arbitrator(s) for all cases arising hereunder.").

[40] *See* REQUIREMENTS, *supra* note 15, §§ 6-2-1 and 6-2-2.

[41] *See* NBPA REGULATIONS, *supra* note 33, § 6(F).

[42] *See* REQUIREMENTS, *supra* note 15, § 6-4-6-3-1-5.

[43] *See* NBPA REGULATIONS, *supra* note 33, § 6(F).

[44] *See* REQUIREMENTS, *supra* note 15, § 6-3-3-5.

[45] *See* Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1182 (1986) ("The longer the period between operative fact and legal judgment, the more likely it is that error will creep in: memories will fade, evidence will disappear or become unreliable.").

[46] NBPA REGULATIONS, *supra* note 33, § 6(B).

quired to provide advance notice to the agent of the fact or nature of the investigation."[47]

II. Exploring the Authority to Regulate and Certify Agents

Beyond the NCAA agent-certification program's public-policy flaws are legitimate questions about whether the NCAA possesses the power to regulate agents in the first instance. Courts generally defer to the actions and policies of private associations such as the NCAA.[48] That said, private associations' authority to adopt whatever rules and regulations they want is not unlimited.[49] In the letter sent to the NCAA by the NBPA on behalf of NBPA-certified agents, the agents refused to subject themselves to the NCAA's agent certification regulations.[50] To that end, the NCAA's authority to adopt an agent certification program is in question. Section A of this Part addresses the NBPA's legal authority to regulate and certify agents under federal labor law. Section B explains how the NCAA possesses no authority under any state or federal statute to regulate and certify agents, and how its authority over an agent is contractually obtained once the agent voluntarily participates in the NCAA's certification program. Finally, Section C explores whether the NCAA's certification process is arbitrary and capricious.

A. The NBPA's Legal Authority under the National Labor Relations Act

The NBPA's authority to regulate and certify agents in their capacity as advisors for players on their employment contracts with NBA teams or the league arises under Section 9(a) of the National Labor Relations Act (the "Act").[51] Under the language used in the Act, the NBPA is the "exclusive representative" of the players in negotiations with the NBA over wages, hours, and other conditions of employment. As the exclusive representative of the players, the NBPA has the right under the Act to decide whether, and to what extent, to delegate its exclusive representational authority. The NBPA has delegated to third-party agents the union's authority to negotiate

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[47] Requirements, *supra* note 15, § 6-4-1.

[48] *See* Stephen F. Ross, Richard T. Karcher & S. Baker Kensinger, *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79, 87 (2014).

[49] *See id.* at 88–92 (discussing the exceptions to the general rule of deference to private associations).

[50] *See* Wojnarowski, *supra* note 5.

[51] National Labor Relations Act of 1935 § 9(a), 29 U.S.C. 159(a) (2018).

individual employment agreements (*i.e.*, player contracts) with NBA clubs.[52] The NBPA also has the right to determine *who* may represent players.[53] The NBPA thus has the right and authority to require agents to be certified and in good standing with the NBPA, disclose certain personal and financial information, pay annual certification dues, attend seminars, and pass an exam that covers the NBA collective bargaining agreement and the NBPA regulations governing player agents. The union acts in this capacity because it has a legitimate interest and responsibility to ensure, among other things, that agents do not violate their fiduciary duties owed to the players. The union's interest in this regard can be analogized to a state's police power, which gives states the right to regulate by requiring a license as a prerequisite to carrying on certain occupations. Thus, the NBPA has adopted an agent regulatory program designed to protect the interests of current *and prospective* NBA players.[54]

Moreover, agents cannot challenge the NBPA's agent-certification process and regulations as an illegal restraint on trade under antitrust law. According to United States Supreme Court precedent, unions acting in their own self-interest and not in combination with non-labor groups—for example, by enacting agent regulations—are statutorily exempt from the antitrust laws under the Clayton and Norris-LaGuardia Acts.[55] In *Collins v. National Basketball Players Ass'n*,[56] a federal district court held that the statutory labor exemption precluded an agent's antitrust claim against the NBPA and, in doing so, explained the union's legitimate interest in enacting agent regulations:

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[52] *See* White v. Nat'l Football League, 92 F. Supp. 2d 918, 924 (D. Minn. 2000) ("Player agents are permitted to negotiate player contracts in the NFL only because the NFLPA has delegated a portion of its exclusive representational authority to them.").

[53] *See* Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1475 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992) ("The NBPA is legally entitled to forbid any other person or organization from negotiating for its members. Its right to exclude all others is central to the federal labor policy embodied in the NLRA." (citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967))).

[54] *See* NBPA Regulations, *supra* note 33.

[55] H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 719–22 (1981). In upholding restrictions on booking agents who were not involved in job or wage competition with union members, the Court noted that the booking agent restrictions had been adopted, in part, because agents had "charged exorbitant fees, and booked engagements for musicians at wages . . . below union scale." *Id.* at 718 (citation omitted).

[56] 850 F. Supp. 1468 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992).

> The NBPA regulatory program fulfills legitimate union purposes and was the result of legitimate concerns: it protects the player wage scale by eliminating percentage fees where the agent does not achieve a result better than the collectively bargained minimum; it keeps agent fees generally to a reasonable and uniform level, prevents unlawful kickbacks, bribes, and fiduciary violations and protects the NBPA's interest in assuring that its role in representing professional basketball players is carried out.[57]

Unlike the NBPA, the NCAA, as the national governing body of intercollegiate athletics, does not have a role in representing professional basketball players that needs or warrants protection. College athletes are not members of the NCAA. So, unlike the NBPA, the NCAA has no responsibility to ensure that agents represent college players' best interests in exploring NBA draft options. As a result, the NCAA has no legitimate interest in enacting an agent regulatory program and its program fulfills no legitimate purpose or concern. Unlike the NBPA, the NCAA cannot protect or understand the interests of men's basketball players in employment matters with NBA clubs.

B. The NCAA's "Contractual Authority" Created by the Agent's Voluntary Compliance with its Agent Certification Process

The NCAA also holds no right or authority under federal labor law to regulate or certify agents, and its agent regulatory program does not fulfill legitimate union purposes. Indeed, no state or federal statutes give the NCAA the authority to regulate or certify agents. The Uniform Athlete Agent Act ("UAAA"), adopted in at least forty-three states, is a model law that imposes a registration requirement and provides a uniform system for regulating agents in their dealings with college athletes. That said, the UAAA was drafted primarily for the protection and benefit of NCAA member institutions, and the NCAA depends on state agencies to enforce it. The Sports Agent Responsibility and Trust Act ("SPARTA") is a federal law that regulates agent solicitation and recruitment of college athletes under the guise of the Federal Trade Commission Act, which proscribes "unfair or deceptive practices."[58] As with state agent laws, the NCAA relies upon state attorneys general to enforce SPARTA under the jurisdiction of the Federal Trade Commission ("FTC").

Thus, the likely incentive for the NCAA to create an agent certification program (beyond the financial incentive to collect $1,500 from every agent

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[57] *Id.* at 1477.

[58] S. 1170, 108th Cong. (2003); H.R. 361, 108th Cong. (2003). Violations are to be regulated by the Federal Trade Commission under 15 U.S.C. § 57a(a)(1)(B).

annually) is to give the NCAA contractual authority over agents that it currently lacks once an agent voluntarily participates in the certification process. To that end, the Requirements contain the following provision:

> Because . . . agents are not NCAA members subject to its bylaws, by participating in the certification and approval process, all such individuals and/or entities are required to acknowledge and agree that they are voluntarily assuming the responsibility to: (a) *comply with NCAA legislation and ECAG policies and procedures*; (b) fully disclose information required by ECAG and operate in a financially transparent manner . . . .[59]

This "contractual authority" gives the NCAA many valuable rights that it does not otherwise possess, and creates an obligation for agents to comply with NCAA bylaws. For example, the Requirements state:

> It is not permissible for an . . . agent or any affiliated entity/individual to utilize the NCAA brand in association with the operation of an . . . agent/agency including, but not limited to, use of the name, NCAA trademarked terms (i.e., March Madness, Final Four, Big Dance, etc.) or use of the blue disk or other NCAA logos.[60]

The Requirements also provide that NCAA-certified agents must: (1) "authorize the NCAA to share information related to the agent's work, actions, operations, etc. unilaterally to any other party deemed appropriate by the NCAA"; (2) "[f]ully cooperate with the NCAA in connection with investigations of possible NCAA violations, even if the violations are unrelated to agent certification requirements, . . . and agree to be subject to applicable penalties for lack of cooperation or the provision of false and misleading information to the NCAA"; (3) "[p]romptly self-report potential NCAA rules violations as well as possible violations by member institutions, institutional personal and other individuals"; and (4) "[p]ermit a professional auditor or certified public accountant designated by the NCAA to conduct an independent review or audit of all relevant books and records relating to any services provided to a [student-athlete]."[61]

The NCAA's overly burdensome and costly certification process raises the following question: Why would agents voluntarily comply when the

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[59] REQUIREMENTS, *supra* note 15, § 1-5-1 (emphasis added).

[60] *Id.* §1-5-3-3.

[61] *Id.* §§ 5-2-2-4-2 to 5-2-2-5. *But see* Wojnarowski, *supra* note 5 (noting that letter from NBPA-certified agents' letter to NCAA charges it with trying to obtain a mechanism to "garner access to personal and private information of certified agents in what amounts to subpoena power to embark on investigations that are wholly unrelated to protecting the interests of men's basketball student-athletes in deciding whether to remain in school or to enter the NBA Draft").

NCAA has no legal authority to require compliance?[62] Quite simply, the NCAA is wielding its power and disciplinary authority over players to compel agents to comply. If non-members, such as agents, violate NCAA rules, the NCAA can only sanction its member institutions or declare that athletes of its member institutions are ineligible. The NCAA's "institutional control" principle provides that it is the obligation of member institutions to immediately withhold an athlete from competition if the institution determines that the athlete is ineligible under NCAA bylaws.[63] After the institution makes such a determination, the institution may immediately appeal to the Committee on Student-Athlete Reinstatement for "restoration" of the athlete's eligibility.[64] The committee then decides the number of games or events for which the athlete is ineligible.

As a result, a men's basketball player who decides to "test the waters" suffers ineligibility the following season if his agent violates NCAA bylaws by failing to maintain NCAA certification. In other words, a player who signs a standard representation agreement with an NBPA-certified agent after the season could keep his NCAA eligibility by removing his name from the draft within ten days after the NBA draft combine.[65] That said, if the player's agent violated the NCAA's certification process—even with just a "paperwork error"—then the player would be suspended the following season.[66] So the only incentive for an NBPA-certified agent to comply with the NCAA's agent certification program is to prevent the NCAA from imposing discipline on his or her client. Contrast this with an agent's failure to comply with the NBPA's agent-regulatory program in which a non-certified agent cannot represent players in contract negotiations with NBA clubs.[67]

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[62] *See* Wojnarowski, *supra* note 5 (noting that NBPA-certified agents letter states "Competent, established, and experienced agents have no incentive to subject themselves to this legislation, and its overly burdensome procedures and oversight").

[63] NCAA MANUAL, *supra* note 1, § 12.11.1.

[64] *Id.*

[65] *See id.* § 12.3.1.2.2.

[66] *See, e.g.*, Kyle Boone, *NCAA Suspends BYU's Leading Scorer for Nine Games Due to NBA Draft Paperwork Errors*, CBS SPORTS (Aug. 12, 2019), https://www.cbssports.com/college-basketball/news/ncaa-suspends-byus-leading-scorer-for-nine-games-due-to-nba-draft-paperwork-errors/ [https://perma.cc/RV7E-SLF8] ("Student-athletes with eligibility remaining are, under new NCAA rules, allowed to sign with agents, explore the NBA Draft process and still return to school so long as they submit paperwork prior to the early withdrawal deadline — so long as the agent is NCAA-certified. [Yoeli] Childs checked every box, but there may have been a snag with the certification of the agent he worked with.").

[67] *See* NBPA REGULATIONS, *supra* note 33, § 1 ("No person (other than a Player representing himself) shall be permitted to conduct individual contract negotiations on behalf of a Player (including a rookie) and/or assist in or advise with respect to

Similarly, an attorney's failure to be licensed by the state bar results in the attorney's inability to practice law or discipline.

C. *The NCAA's Agent Certification Process is Arbitrary and Capricious*

In theory, the purpose of an agent or attorney certification or licensing system is to protect the client. Thus, the players associations and state bar associations have a regulatory and certification process that disciplines a deviant agent or attorney for non-compliance. The NCAA's agent certification process is fundamentally flawed because it disciplines the client for the agent's non-compliance under the guise of protecting the client's best interests. Although the Requirements provide that the Enforcement Certification and Approvals Group may impose fines for certain violations committed by an NCAA-certified agent,[68] that penalty could only apply to agents who participate in the certification process, and it is unclear how such fines would be determined and whether they would be legally enforceable.

Unlike the NBPA, the NCAA has no authority to represent prospective NBA players; therefore, the NCAA cannot delegate to agents authority that it does not possess. The NCAA also does not possess a property interest in the right to represent basketball players in contract negotiations with NBA teams, so it does not have the right to sell or license to agents any representational rights it does not possess. Thus, the following question is raised: What is the *quid pro quo* for an agent to pay the NCAA $1,500 voluntarily in annual fees and give the NCAA all of the valuable rights and regulatory authority it does not possess? The *quid pro quo* cannot be to preserve the eligibility of the agent's client or to be given an "opportunity" to represent players in the draft, when the NCAA does not have the legal right to give that opportunity in the first place.

A private association's rule or policy is arbitrary and capricious if it is not rationally related to a legitimate purpose.[69] Recall the stated purpose of the NCAA's agent certification process: to "provide[ ] student-athletes with access to hundreds of qualified agents who can offer solid guidance but also

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such negotiations with NBA Teams after the effective date of these Regulations unless he (1) is a currently certified as a Player Agent pursuant to these Regulations, and (2) has a current Standard Player Agent Contract ("SPAC")). signed with the Player.").

[68] *See* REQUIREMENTS, *supra* note 15, § 6-3.

[69] *See*, *e.g.*, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 626 (Colo. App. 2004) (holding that NCAA bylaw prohibiting endorsements and media appearances is not arbitrary and capricious because the rule is "rationally related to the legitimate purpose of retaining the 'clear line of demarcation between intercollegiate athletics and professional sports' ").

protects those same students from unscrupulous actors who may not represent their best interests."[70] The NCAA's agent certification program is not rationally related to its stated purpose because it (1) presumes NBPA-certified agents will voluntarily participate with the NCAA certification process, (2) presumes that those who do voluntarily participate are not unscrupulous actors, and (3) inhibits access to hundreds of qualified, competent and experienced NBPA-certified agents who decide not to participate. Indeed, it is reasonable to assume that NBPA-certified agents would decline to participate given that the NCAA's agent regulatory program (i) imposes prerequisites and obligations unnecessary or not rationally related to an agent's representation of players, or the protection of their interests, in the NBA draft or contract negotiations with NBA clubs, and (ii) maintains a procedurally flawed and fundamentally unfair enforcement process. The NCAA's agent regulatory program is not protected from antitrust scrutiny because it does not stem from a right or authority under labor law and does not fulfill legitimate union purposes.

III. The Application of Federal Antitrust Law to the NCAA Agent Certification Program

Whereas an NLRB-certified players union's role in regulating sports agents as contract advisors is explicitly exempted from antitrust scrutiny under Supreme Court precedent,[71] the NCAA agent certification program is subject to the federal antitrust laws and very likely violates these laws. Indeed, the NCAA's agent regulatory program seems both to violate antitrust black letter law and to offend the pertinent principles that give rise to antitrust policy in the United States today. Part III explores in detail the potential challenges to the NCAA agent certification program's free market restraints under § 1 of the Sherman Act. Section A summarizes § 1 of the Sherman Act and its underlying public policy. Section B explores whether the NCAA agent certification program meets the threshold issues for violating § 1 of the Sherman Act. Section C analyzes the competitive effects of the NCAA agent certification program. Finally, Section D explores the possibility of the NCAA agent certification program being saved from antitrust liability either as a matter of preemption or based on another antitrust affirmative defense.

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[70] *See NCAA Amends Agent Certification Requirements*, *supra* note 32.

[71] *See supra* Section II.A.

A. Introduction to § 1 of the Sherman Act

Section 1 of the Sherman Act, the preeminent section of federal antitrust law related to collusive business activity,[72] states that "[e]very contract, combination . . . or conspiracy in the restraint of trade or commerce . . . is declared to be illegal."[73] Among the various behaviors that may run afoul to § 1 of the Sherman Act include concerted refusals to deal, which are sometimes described in antitrust jurisprudence by their more "evil-sounding" moniker—"group boycotts."[74] Concerted refusals to deal (or, if you prefer, group boycotts) are frowned upon by federal antitrust law because they "obstruct the free course of interstate trade,"[75] and replace the "invisible hand" that is a fundamental part of free market capitalism with an unauthorized form of "extra-governmental agency" that limits free trade while "trench[ing] upon the power of the national legislature."[76]

Among the many types of group boycotts that are disallowed by federal antitrust law include the group boycott of potential workers from a given labor market.[77] Group boycotts in the labor market are troubling from an antitrust perspective for several reasons, including because, in a free market, "[e]very man [is supposed to have] the liberty of employing and being employed, and every man must respect the like liberty in others."[78] Thus, when multiple businesses within an industry concertedly keep an individual or

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[72] *See generally* Maurice Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551, 553 (2012) (noting that the U.S. Supreme Court used to refer to the Sherman Act as the "magna carta of free trade").

[73] Sherman Antitrust Act, 15 U.S.C. § 1 (2018).

[74] Areeda, Kaplow & Edlin, Antitrust Analysis: Problems, Text and Cases 284 (7th ed. 2013); *see also* Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 Cath. U. L. Rev. 631, 639 (2009).

[75] E. States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600, 614 (1914).

[76] Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 465 (1941).

[77] *See, e.g.*, Mattison v. Lake Shore & M.S. Ry. Co., 3 Ohio Dec. 526, 527 (1895).

[78] *Id.* at 532; *see also* Denver Rockets v. All-Pro Mgmt., 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (explaining that the harm resulting from a group boycott of a worker in threefold: first, the victim of the boycott is injured by being excluded from the market he seeks to enter; second, competition in the market in which the victim attempts to sell his services is injured; and third, by pooling economic power, the perpetrators of the boycott have established their own private government).

class of individuals out of the workforce, they encroach on the freedom of independent decision-making that one would expect in free markets.[79]

To determine whether a potential group boycott violates § 1 of the Sherman Act, a federal court analyzes the restraint using a three-part test.[80] First, a court determines whether the restraint constitutes a contract, combination, or conspiracy among two or more parties that affects interstate commerce ("Threshold Issues").[81] Next, a court analyzes whether the restraint produces anticompetitive effects within a relevant market in a manner that harms consumers ("Competitive Effects Analysis").[82] Finally, a court must determine if the restraint should be preempted from antitrust liability by a different, pertinent body of law or a critical public policy ("Preemption and Affirmative Defenses").[83]

B. Threshold Issues

When analyzing the NCAA agent certification program under the three-prong test, the NCAA agent certification program easily meets the threshold requirements for a violation under the Sherman Act.[84] Although the NCAA agent certification program was implemented by the NCAA as a single-trade association, the agent certification program still, for antitrust purposes, constitutes a contract, combination, or conspiracy among two or more parties.[85] This is because each individual NCAA member school, for purposes of a proper antitrust analysis, constitutes a separate, legal actor[86]

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[79] *See* Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., concurring).

[80] *See* Marc Edelman, *The NCAA's 'Death Penalty' Sanction – Reasonable Self-Governance or an Illegal Group Boycott in Disguise?* 18 LEWIS & CLARK L. REV. 385, 394 (2014) (describing the three-part test); *cf. In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1091 (N.D. Cal. 2019) ("To establish a claim under Section 1 of the Sherman Act, Plaintiffs must show 1) that there was a contract, combination or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." (citation omitted)).

[81] *See* Edelman, *supra* note 80, at 394.

[82] *See id.*

[83] *See* Edelman, *supra* note 74, at 641 (describing the non-statutory labor exemption to antitrust law as the most common matter of public policy where sports league restraints are preempted from antitrust liability).

[84] *See infra* notes 88–96 and accompanying text.

[85] *See infra* notes 86–90 and accompanying text.

[86] *See* Am. Needle Inc. v. Nat'l Football League, 560 U.S. 183, 196 (2010) (explaining that each of the individual member teams of a traditionally organized

because each individual NCAA member school is a "substantial, independently owned, and independently managed business."[87] In the business context, each individual NCAA member college's actions "are guided or determined by separate corporate consciousnesses," and each independent member college has its own independent leadership that votes on NCAA policy referenda.[88] There are also myriad examples in which the economic interests of the individual NCAA member colleges are not aligned, such as on topics of whether NCAA members may limit the number of games that any particular school plays on television,[89] and whether NCAA members may implement financial sanctions against a school that allegedly engaged in bad acts.[90]

Besides the NCAA agent certification program constituting a "contract, combination or conspiracy," the NCAA's agent certification program also affects interstate commerce, specifically within the market for men's basketball players securing player agents.[91] While this second threshold issue is traditionally construed liberally,[92] specific examples of such interstate

sports league constitute separate legal parties for purposes of antitrust analysis under Section 1 of the Sherman Act because "[e]ach of the teams is a substantial, independently owned, and independently managed business); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99 (1984) (recognizing that "[t]he NCAA is an association of schools, which compete against each other"); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998) (noting that a rule implemented at the NCAA's national level, for antitrust purposes, "resulted from an agreement among its members," without any dispute from the NCAA).

[87] *See American Needle*, 560 U.S. at 196.

[88] *Id*.

[89] *Board of Regents*, 468 U.S. at 99 (recognizing that NCAA member colleges "compete against each other to attract television revenues").

[90] *See* Steve Eder, *Governor Sues Over Penalties to Penn State*, N.Y. Times (Jan. 3, 2013) https://www.nytimes.com/2013/01/03/sports/ncaafootball/governor-announces-lawsuit-against-ncaa-over-penn-state-penalties.html (noting to Penn State University's interests became unaligned from the majority NCAA's interests and the school sued the NCAA after other NCAA members attempted to implement financial sanctions against the university).

[91] *See infra* notes 91–92 and accompanying text.

[92] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1065 (9th Cir. 2015) (explaining that the NCAA's argument that restraints on the market for college athlete labor do not constitute interstate commerce is "not credible" and that "the modern legal understanding of "commerce" is broad, including almost every activity from which an actor anticipates economic gain"); *see also* Wickard v. Filburn, 317 U.S. 111 (1942) (recognizing that even the most tenuous of connections to "interstate commerce" meet the requirements for this federal jurisdictional hook under modern Constitutional analysis).

activity include player agents crossing state lines to represent men's basketball players who compete in different states, and players seeking to hire the services of agents based in various states.[93]

C. Competitive Effects of the NCAA Agent Certification Program

Aside from meeting the threshold issues for an antitrust violation, the NCAA agent certification program similarly seems to restrain trade in at least two separate, cognizable antitrust markets: (1) the market for individual member colleges to recruit men's college basketball players to their teams; and (2) the market for sports agents to sell their services to individual men's college basketball players.

In determining whether the NCAA agent certification program illegally restrains trade within any relevant economic market, a reviewing court could theoretically apply several different tests to the alleged restraint, with each test carrying a different legal burden on the respective parties.[94] On one end of the spectrum, if an agreement, upon first glance, seems so nefarious that it is unlikely to have any redeeming value, a court, in theory, could apply a *per se* test, in which the court simply condemns the underlying conduct as anticompetitive without conducting any further analysis.[95] On the other end of the spectrum, if an agreement were perceived by a court to yield some potential economic benefits, the court could instead apply a full Rule of Reason analysis, which places a burden on the plaintiff to prove that the parties to the alleged restraint have exercised power in some relevant economic market in a manner that restrains trade and harms consumers.[96] In

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[93] *Cf.* Cork Gaines, *The 10 Super Agents in the NBA Who Represent More than $1.5 Billon in Player Salaries*, BUS. INSIDER (Feb. 22, 2017), https://www.businessinsider.com/nba-most-powerful-agents-2017-2 [https://perma.cc/4NED-EX27] (providing examples of basketball agents who represent business with numerous players in numerous states and thus regularly engage in transactions that cut across state lines).

[94] *See infra* notes 116–117 and accompanying text.

[95] *See* Edelman, *supra* note 80, at 395; *see also* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Some type of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*."); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998) (explaining that the per se rule condemns practices that are entirely void of redeeming competitive rationales and thus one need not examine the effect of these practices on the market or any purported procompetitive justifications).

[96] *See* Edelman, *supra* note 80, at 395 (explaining that "if a restraint seems more benevolent a court will apply a full Rule of Reason test, in which the court investigates every aspect of a restraint including whether the parties to the restraint had

between these two scenarios, a court might also theoretically apply what is often described as a quick-look, truncated, or abbreviated Rule of Reason test, in which it places the burden on the plaintiffs to prove some, if not all, of these underlying market factors.[97]

Because of the unique nature of the college sports industry, in which some "horizontal restraints on competition are essential if the product is to be available at all,"[98] courts have traditionally placed the burden on plaintiffs seeking to challenge NCAA rules to prove the anticompetitive effect of these rules under a full Rule of Reason analysis,[99] or at least a truncated version of the Rule of Reason test.[100] This would make it both costly and

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the power to control any relevant market, where the restraint encourages or suppresses competition, and whether the restraint cause the marketplace antitrust harm" (internal quotations and citations omitted)).

[97] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999); United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 669 (3d Cir. 1993) (explaining that "[t]he abbreviated rule of reason is an intermediate standard" and it "applies in cases where *per se* condemnation is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint"); *Law*, 134 F.3d at 1020 ("[W]here a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a "quick look" rule of reason.").

[98] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100–101 (1984); *see generally Law*, 134 F.3d at 1019 (further explaining that "courts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product, even such restraints involve horizontal price-fixing agreements").

[99] *See, e.g.*, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1092 (N.D. Cal. 2019) (explaining that a class action challenge to the NCAA's rules that limit college athlete may "must be tested under a rule-of-reason analysis as opposed to under the per se rule," and that "where, as here, a certain degree of cooperation is necessary to market college sports, the Rule of Reason is appropriate) (internal citations and quotations omitted); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015) (explaining application of the Rule of Reason); *cf. Board of Regents*, 468 U.S. at 101 (recognizing that the NCAA's restraint on the number of college football games broadcast on television requires review under at least some form of the "Rule of Reason," rather than a *per se* test, because college sports is "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

[100] *See Board of Regents*, 468 U.S. at 109 (relieving the plaintiffs of the traditional Rule of Reason burden of proving that the NCAA has market power – finding that

time-consuming for a plaintiff to prevail in challenging the NCAA agent certification program under § 1 of the Sherman Act.[101] But if a plaintiff were to budget the appropriate time and money for such a challenge, the plaintiff is reasonably likely to succeed in showing all of the elements needed to prevail, even under a full Rule of Reason analysis.[102]

Under the Rule of Reason, it should not be too difficult to prove that there is a cognizable antitrust market for individual member colleges to recruit men's college basketball players to their schools and teams,[103] and that the NCAA member colleges combine for the vast majority of this market—a market share that far exceeds the minimum threshold for market power.[104] Indeed, courts have repeatedly recognized that college sports re-

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"when 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" (internal citations and quotations omitted)); *see also Law*, 134 F.3d at 1020 (explaining that "anticompetitive effect is established" without needing to determine the relevant market in which restricted-earning college basketball coaches sell their services because "the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than would have resulted from the operation of market forces").

[101] *See generally* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternatives Inquiry in Rule of Reason Analysis*, 581 Am. U. L. Rev. 561, 578 (2009) (explaining that the per se test to antitrust law serves as a "judicial shortcut").

[102] The actual burdens under a full Rule of Reason analysis have been laid out clearly by Rutgers Law School Professor Michael Carrier, who has analyzed the practical application of antitrust law's Rule of Reason in 738 cases, 222 of which involved a court's final determination under the Rule of Reason. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 829 (2009). This approach is consistent with how most courts have applied the Rule of Reason in cases where the NCAA has been a defendant. *See, e.g.*, *Law*, 134 F.3d at 1019 (explaining the proper steps to a Rule of Reason analysis).

[103] *See, e.g.*, *Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1070 (finding that there exists a relevant market among Division-I football and basketball schools to compete for the labor services of college athletes).

[104] Although no court has explicitly set forth an exact minimum share of the market that could constitute market power,"[t]ypically, a market share of more than 33% represents the minimum threshold for market power"). *See* Edelman, *supra* note 80, at 407 (citing Daniel Crane, Antitrust (2014)). Meanwhile, "monopoly power" as is required to trigger scrutiny under § 2 of the Sherman Act, requires a substantially greater share of the market than that. As Judge Learned Hand famously stated in *United States v. Aluminum Co. of America*, access to upward of 90% of the market is "enough to constitute a monopoly." 148 F.2d 416, 424 (2d Cir. 1945).

present a distinct antitrust market for certain activities.[105] Similarly, there is a strong argument that there is a relevant market for sports agents to sell their services to individual men's college basketball players, over which NCAA member colleges have virtually 100 percent market share.[106]

With the proper legal and economic analysis, a plaintiff also would likely be able to show that the NCAA agent certification program yields an overall net anti-competitive effect that harms consumers.[107] The anti-competitive effects of the NCAA agent certification program are explainable in a straight-forward manner: the rules limit the number of agents eligible to represent men's college basketball players by, in essence, banning from the market those player agents who the NCAA elects not to certify.[108] This barrier reduces men's college basketball players' choice of agents.[109] It also arguably increases the price of player-agent services by limiting the number of agents competing to work with men's college basketball players, and reduces the quality of agents by excluding from the marketplace some agents that may offer a high quality service.[110]

By contrast, there do not seem to be any bona-fide procompetitive benefits, in the antitrust sense, of the NCAA agent certification program.[111] Although the NCAA member colleges purport the societal benefits of implementing a singular national clearing house to vet and approve player agents, for example "[protecting] students from unscrupulous actors who

[105] *See, e.g.*, *Board of Regents*, 468 U.S. at 111 (upholding a district court finding that college sports is indeed a distinct market from professional sports in the context of television broadcasts); *Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1097 (noting that "[a]s discussed in the findings of fact, Plaintiffs produces sufficient evidence on summary judgment to establish the existence of a relevant market compromising national markets for Plaintiffs' labor in the form of athletic services of Division I basketball and FBS football").

[106] *Cf. Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1070 (recognizing a relevant market for the purchase of elite college athlete labor services, over which NCAA Division I member schools have nearly 100 percent market power).

[107] *See infra* notes 108–110 and accompanying text.

[108] *See, e.g.*, Denver Rockets v. All-Pro Mgmt., 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (recognizing that banning a class of workers from a relevant marketplace would yield an anticompetitive effect on a relevant economic market).

[109] *Cf.* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1073 (9th Cir. 2015) (acknowledging that stringent rules that limit college athletes' "range of choices" seems to go against the policy goals of antitrust law).

[110] *Cf.* Stucke, *supra* note 72, at 561 (explaining that, among the many historic purposes of antitrust law is to "promote consumer welfare, allocative efficiency, and price competition").

[111] *See infra* notes 115–117 and accompanying text.

may not represent their best interests,"[112] the Supreme Court has long held that an inquiry under the Rule of Reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason," but "focuses directly on the challenged restraint's impact on competitive conditions."[113] Thus, a proper antitrust analysis may explore only whether a restraint may benefit competition by increasing consumer choice, increasing the quality of the service or product, or decreasing price. This stage of the inquiry will not consider purported non-economic benefits to social welfare.[114]

Finally, there are several different ways to link the NCAA agent certification rules to consumer harm.[115] To the extent that the relevant market at issue is the market for individual member colleges to recruit men's college basketball players, the NCAA's requirement that these players limit themselves to working with NCAA-approved agents limits the choice of these athletes, as consumers, to select their preferred agent. In addition, consumers of men's college basketball may suffer harm as a result of the NCAA rules because at least a few prospective college basketball players who are denied by the NCAA of their first-choice agent may choose to forgo competing in college sports altogether, and either seek to turn professional at an earlier age or simply forgo playing in organized sports entirely. Similarly, if the NCAA were to suspend a college basketball player for choosing an agent that has not been certified, fans as consumers would lose the ability to watch games that would have included those players.

Similarly, if the relevant antitrust market is defined as the market for sports agents to sell their services to individual men's college basketball players, the athletes as potential consumers of agent services are harmed by the decrease in choice of representation. Indeed, some college basketball players may reasonably prefer to be represented by agents who are precluded

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[112] *NCAA Amends Agent Certification Requirements*, *supra* note 32.

[113] *See* Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 681, 688 (1978).

[114] *See id.* at 695–96 (rejecting safety as a procompetitive benefit for preventing competitive bidding for consulting engineers' services); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462–63 (1986) (rejecting quality of patient care as a procompetitive benefit under antitrust law); United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 675 (3d. Cir. 1993) (rejecting increased competition in curriculum development and over faculty-to-student ratio as a pro-competitive benefit for price-fixing in the market for student financial aid); Mackey v. Nat'l Football League, 542 F.2d 606, 621 (8th Cir. 1976) (rejecting the considering of increased on-field competitive balance, the recoupment of player recruiting costs and greater team cohesiveness as alleged procompetitive benefits under the Rule of Reason).

[115] *See infra* notes 116–117 and accompanying text.

from representing them by the NCAA's agent certification rules or who simply decide not to become certified because the NCAA has no legal authority to require it. For example, the NCAA agent certification rules mandate that college basketball players' prospective agents be certified and in good standing with the NBPA, which, subject to a special exception, requires the earning of a college degree. However, there are plenty of college basketball players who are from communities where few of their peers have college degrees, and may therefore feel more comfortable with representation by someone with whom they have a preexisting relationship.[116] In addition, some college basketball players may prefer to hire agents that are willing to take a more aggressive posture against the NCAA's no-pay rules and who may explain to men's college basketball players the benefit of turning professional even to play in the NBA G-League or in a foreign professional league.[117] The NCAA, however, has an economic self-interest to avoid licensing player agents who are likely to encourage athletes to leave college sports in favor of these lower-level professional leagues.

D. Preemption and Other Affirmative Defenses

Finally, when looking at case law, it would be difficult to argue that there is any reasonable, legal basis to rebut the finding of the NCAA's antitrust liability for its agent certification rules, presuming all elements have been met. Although some courts have misguidedly interpreted the Supreme Court's decision in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,[118] to create a narrow exemption to antitrust law for NCAA "amateurism rules" or "eligibility rules,"[119] the NCAA's new men's

[116] *Cf.* Tyler Horn, *5 Qualities Your Sports Agent Must Have*, PLAYERS TRIBUNE (Feb. 20, 2015), https://www.theplayerstribune.com/en-us/articles/hire-sports-agent-what-to-look-for [https://perma.cc/S3FN-P54F] (explaining, from the prospective of a professional athlete, that trust and recognizing the importance of the athlete as a person are necessary qualities for a player agent to have when representing a given player).

[117] *Cf.* Cindy Boren, *The NCAA Wants Agents to have a College Degree. LeBron James Thinks that's BS*, WASH. POST (Aug. 7, 2019), https://www.washingtonpost.com/sports/2019/08/07/rich-paul-rule-ncaa-lebron/ [https://perma.cc/KQU7-G35G] (discussing how NBA superstar LeBron James, who skipped playing college basketball, believes some of the NCAA's initially proposed rules intended to limit who can represent players, including the requirement that all agents have a college degree, do not serve the interests of the players themselves).

[118] 468 U.S. 85 (1984).

[119] *See, e.g.*, Deppe v. Nat'l Collegiate Athletic Ass'n, 893 F.3d 498, 503–04 (7th Cir. 2018) (finding that "[i]n sum, the year-in-residence rule is, on its face, a presumptively procompetitive eligibility rule"); Agnew v. Nat'l Collegiate Athletic

college basketball agent certification rules have nothing to do with "amateurism" or "eligibility."[120] Rather, the NCAA agent certification rules simply seek to limit men's college basketball players' choice of agents within the NCAA's own, amateur framework.[121] Indeed, even if one were to afford the NCAA the broadest possible latitude in defining its own Principle of Amateurism, the current NCAA rules allow men's college basketball players to maintain their amateur status if they are represented by an agent after the playing season, so long as the agent is "NCAA-certified." Thus, the NCAA's restraint here pertains to who men's college basketball players may choose to hire as an agent, and not a general classification as to player eligibility.[122]

Furthermore, an antitrust challenge to the NCAA's agent certification program can be reasonably differentiated from an earlier, failed legal chal-

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Ass'n, 683 F.3d 328 (7th Cir. 2012); Michael A. Carrier & Marc Edelman, *College Athletics: The Chink in the Seventh Circuit's "Law and Economics" Armor*, 117 MICH. L. REV. ONLINE 90, 93–96 (2019) (explaining that the Seventh Circuit in *Deppe* and *Agnew* misinterpreted the U.S. Supreme Court's decision in Board of Regents and thus came to the wrongful conclusion that NCAA amateurism or eligibility rules were exempt from antitrust law). *But see In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1098 (N.D. Cal. 2019) (explaining that restraints on trade imposed by the NCAA "cannot be deemed procompetitive simply because they promote or are consistent with amateurism"); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1063 (9th Cir. 2015) ("The *Board of Regents* Court certainly discussed the NCAA's amateurism rules at great length, but it did not do so in order to pass upon the rules' merits, given that they were not before the Court. Rather, the Court discussed the amateurism rules for a different and particular purpose: to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held illegal per se."); *id.* at 1065 ("The mere fact that a rule can be characterized as an 'eligibility rule,' however, does not mean the rule is not a restraint of trade; were the law otherwise, the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by renaming every rule governing student-athletes an 'eligibility rule'.").

[120] *See* United States v. Gatto, No. 17-cr-0686 (LAK), 2019 WL 266944, at *1 (S.D.N.Y. Jan. 17, 2019) (explaining that the NCAA principle of amateurism "states that student athletes' participation in college sports should be motivated primarily by education and by the physical, mental and social benefits to be derived," and that they lose their amateur status if they were to accept "financial assistance or other economic benefits, including inducements (other than an athletic scholarship) to attend a particular NCAA university" (internal citations and quotations omitted)).

[121] *See supra* notes 15–31 and accompanying text.

[122] *See generally* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1065 (9th Cir. 2015) (explaining that even if there were an NCAA exemption for amateurism rules or eligibility rules, the NCAA cannot simply give one of its rules that label to avoid antitrust scrutiny).

lenge to the NCAA's no-draft and no-agent rules in *Banks v. National Collegiate Athletic Ass'n* in several important ways.[123] First, the NCAA's no-agent rule in *Banks* states that "[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport,"[124] while the NCAA agent certification program seeks to limit basketball players' freedom of choice in terms of which agents to hire for purposes of gauging whether to turn professional.[125] Thus, under the NCAA agent certification program, an agent hired by a men's college basketball player can market the athlete's ability or reputation up until the athlete formally withdraws from the draft (an act that would have terminated Banks's eligibility under then-NCAA's rules).

Second, as a technical matter, the court in *Banks* dismissed the plaintiff's antitrust challenge to the NCAA's no-agent rule not because of the legal and economic substance of the plaintiff's claim, but because of the plaintiff's failure to allege an anti-competitive effect in any cognizable antitrust market as well as any harm to consumers; in essence, this amounted to a pleading error by the plaintiff's attorneys.[126] The plaintiff's attorneys compounded this error by then choosing to "appeal the judgment of the court rather than request leave to amend and reinstate [the] complaint," even though the lower court had granted leave for Banks's lawyers to amend and refile by adding pleadings pertaining to relevant markets, anti-competitive effects, and consumer harm.[127]

Finally, the Seventh Circuit's decision in *Banks* was potentially incorrect. A strong dissenting opinion in *Banks* concluded that while "the complaint [in *Banks*] was drafted somewhat inelegantly," it had enough legal and economic merit to survive a motion to dismiss when read more liberally.[128] Moreover, at least one Supreme Court justice seemed to agree. Even though the U.S. Supreme Court ultimately denied certiorari in *Banks*,[129] a review of Justice Harry A. Blackmun's papers reveals a pool memo on the

[123] *See* 977 F.2d 1081, 1088–94 (7th Cir. 1992).
[124] *Id.* at 1083–84.
[125] *See supra* note 122 and accompanying text.
[126] *See Banks*, 977 F.2d at 1093.
[127] *Id.* at 1087.
[128] *Id.* at 1094 (Flaum, J., concurring in part and dissenting in part).
[129] *See* Banks v. Nat'l Collegiate Athletic Ass'n, 508 U.S. 908 (1993) (denying certiorari).

certiorari issue, in which Justice Blackmun wrote on the memo that "CA7 got this one dead wrong."[130]

IV. Conclusion

It remains to be seen how often NBPA-certified agents will voluntarily participate in the NCAA's agent certification program. There are a few hundred NBPA-certified agents;[131] as of this writing, however, only twenty-four of them were NCAA-certified.[132] The low participation rate is likely attributed to various factors explained in this Article: unnecessary and overly burdensome prerequisites to become an NCAA-certified agent, an enforcement process that is procedurally flawed and lacks fundamental fairness in many respects, the NCAA's lack of a legitimate interest in enacting an agent regulatory program that fulfills no legitimate purpose or concern, and the NCAA's inability to protect or even understand the interests of men's basketball players in employment matters with NBA clubs. It also remains to be seen how the NCAA enforces agents' failure to comply with its agent certification program against men's college basketball players or their agents. Enforcement by the NCAA exposes the Association to litigation risk, given that it possesses no legal authority to regulate and certify agents, and a compelling argument can be made that its certification program is arbitrary and capricious. Moreover, the NCAA's agent certification program is subject to antitrust scrutiny because it does not receive the benefit of an antitrust labor exemption, as does the NBPA. In addition to meeting the threshold issues for an antitrust violation, the NCAA's agent certification program unreasonably restrains trade in both the market for individual member colleges to recruit men's college basketball players to their teams and the market for sports agents to sell their services to individual men's college basketball players.

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[130] Note by Harry Blackmun, Associate Justice, United States Supreme Court, on Preliminary Memorandum in Banks v. Nat'l Collegiate Athletic Ass'n, at 10 (Apr. 26, 1993), http://epstein.wustl.edu/research/blackmunMemos/1992/92Memo-pdf/92-1466.pdf [https://perma.cc/6MWF-C632].

[131] *See NBPA Certified Agent Directory*, Nat'l Basketball Players Ass'n, https://www.nbpa.com/agents/directory [https://perma.cc/VP9J-XZ8H].

[132] *See NCAA Certified Agents*, Nat'l Collegiate Athletic Ass'n, https://web3.ncaa.org/AgentCertification/#/AgentDirectory [https://perma.cc/Q5HB-HUXA]; *NCAA Limited Exception Agents - Certified with Conditions*, Nat'l Collegiate Athletic Ass'n, https://web3.ncaa.org/AgentCertification/#/LimitedDirectory [https://perma.cc/S2HD-ZJU8 [https://perma.cc/S2HD-ZJU8].