JSEL Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Volume 11, Number 2
Spring 2020

Contents

ARTICLES

Harvard Journal of Sports & Entertainment Law
Student Journals Office, Harvard Law School
1585 Massachusetts Avenue, Suite 3039
Cambridge, MA 02138
(617) 495-3146; jsel@law.harvard.edu
www.harvardjsel.com
U.S. ISSN 2153-1323

The *Harvard Journal of Sports & Entertainment Law* is published semiannually by Harvard Law School students.

Submissions: The *Harvard Journal of Sports and Entertainment Law* welcomes articles from professors, practitioners, and students of the sports and entertainment industries, as well as other related disciplines. Submissions should not exceed 25,000 words, including footnotes. All manuscripts should be submitted in English with both text and footnotes typed and double-spaced. Footnotes must conform with *The Bluebook: A Uniform System of Citation* (20th ed.), and authors should be prepared to supply any cited sources upon request. All manuscripts submitted become the property of the JSEL and will not be returned to the author. The JSEL strongly prefers electronic submissions through the ExpressO online submission system at http://www.law.bepress.com/expresso or the Scholastica online submission system at https://harvard-journal-sports-ent-law.scholasticahq.com. Submissions may also be sent via email to jselsubmissions@gmail.com or in hard copy to the address above. In addition to the manuscript, authors must include an abstract of not more than 250 words, as well as a cover letter and resume or CV. Authors also must ensure that their submissions include a direct e-mail address and phone number at which they can be reached throughout the review period.

Volume 11 of the *Harvard Journal of Sports and Entertainment Law* is generously sponsored by:

Premium Partners

O'Melveny

PAUL HASTINGS

Proskauer

General Partners

LATHAM & WATKINS LLP

SULLIVAN & CROMWELL LLP

Weil

Limited Partners

ROPES & GRAY

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Volume 11, Number 2
Spring 2020

Dear Readers,

I am Professor Peter Carfagna '79, the Harvard Law School Faculty Advisor to the *Harvard Journal of Sports and Entertainment Law* (JSEL). JSEL had another tremendous year, and I am incredibly proud to write the preface to Volume 11.

In the Fall Issue, JSEL published four excellent articles.

- Professors Roger Blair and Wenche Wang's article, *The NCAA's Transfer Rules: An Antitrust Analysis* argues that the Seventh Circuit erred in its *Deppe v. NCAA* decision in 2018. Indeed, the authors assert that the NCAA's transfer rules and non-solicitation rules are both anticompetitive and that neither would survive a rule of reason analysis.
- Professor Roberto Corrada's article, *The Northwestern University Football Case: A Dissent* critiques the NLRB's decision in the well-known *Northwestern University v. College Athletes Players Association* case, which stemmed from the Wildcat players' unionization attempt.
- *Transfixed in the Camera's Gaze: Foster v. Svenson* and the Battle of Privacy and Modern Art, written by Michael Goodyear, explores the conflict between First Amendment expression and privacy rights, ultimately arguing that New York law should allow for unjust enrichment claims to better balance these interests.
- And finally, *You Can Bet On It: The Legal Evolution of Sports Betting*—winner of the 2019 Paul C. Weiler Writing Prize at Harvard Law and written by Kendall Howell '19—rounded out our Fall Issue. Howell's article explores gambling policies in professional sports, analyzes the Bradley Act and the Supreme Court's *Murphy v. NCAA* decision on its constitutionality, and offers policy recommendations for the sports-betting industry.

In the Spring Issue, JSEL published four more articles, the first of which I am honored to have written:

- In *Reexploring the Esports Approach of America's Three Major Leagues*, I survey the respective esports strategies of MLB, the NBA, and the NFL. I then use the NBA 2K League as an example to detail a number of legal issues facing esports leagues today.
- In *The NCAA's Agent Certification Program: A Critical and Legal Analysis*, Professors Marc Edelman and Richard Karcher offer the first critical and legal analysis of the NCAA's newly launched agent certification program. The authors contend that this new initiative runs afoul of fundamental laws and policies, including § 1 of the Sherman Antitrust Act.

- Next, *Well-Intentioned but Counterproductive: An Analysis of the NFLPA's Financial Advisor Registration Program*—winner of the 2020 Paul C. Weiler Writing Prize at Harvard Law and written by JSEL Editor-in-Chief Ross Evans '20—argues that the NFLPA's unique attempt to regulate players' financial advisors has done more harm than good.
- Finally, Jayma Meyer and Professor Andrew Zimbalist's article, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics* articulates specific policy proposals—including an antitrust exemption—to enable college athletes to benefit from their NIL rights.

Moreover, the JSEL Online team worked throughout the academic year to publish a number of highlights and short articles with updates on the latest legal news in sports and entertainment, covering topics such as the impact of COVID-19 on the NBA's broadcasting deals, collective bargaining between the NFL and NFLPA, and Disney's attempts to mitigate "Baby Yoda" copyright infringement among vendors on e-commerce websites like Etsy.

I thank the students involved in JSEL, who worked tirelessly to ensure its success. Specifically, I would like to thank Sarah Edwards '20 and Ross Evans '20 for their dedication and excellence as Editors-in-Chief. I would also like to convey my thanks to other graduating members of JSEL's Executive Board: Sameer Aggarawal '20 (Executive Editor of Production), Lolita de Palma '20 (Executive Editor of Submissions), Jenna El-Fakih '20 (Executive Editor of Online Entertainment Content), Dan Alford '20 (Executive Editor of Online Sports Content), and Adele Zhang '20 (Head of Online Strategy & Operations). Finally, I would also like to welcome the incoming JSEL Masthead for Volume 12, including our new Editors-in-Chief Madison Martin and Will Lindsey.

With another fantastic year in the books, I look forward to next year's volume!

—Peter A. Carfagna

JSEL Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Exploring the Esports Approach of America's Three Major Leagues

Peter A. Carfagna*

* Visiting Professor, Harvard Law School teaching three Sports Law courses since 2006, each of which has been published as a regularly updated casebook; Faculty Advisor to the Harvard Law School's Committee on Sports and Entertainment Law, *Journal on Sports and Entertainment Law*, and Sports Law Clinical Program; CEO at Magis LLC, a sports marketing, consulting and investment firm; previously Chief Legal Officer & General Counsel of International Management Group (IMG), and Senior Partner at Jones Day LLP.

This Article is written as an addendum to my casebook entitled SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA'S THREE "MAJOR LEAGUES" (West, 3d ed. 2017), and will be used in teaching the Fall Term 2020 Sports Law course of the same name.

I would like to express my personal thanks to the editors of the *Journal on Sports and Entertainment* Law for helping me finalize this Article for publication. I would also like to thank Aaron Caputo (member of the LL.M. Entertainment, Arts & Sports Law Program at the University of Miami School of Law) and Kyle Stroup (Attorney at Kohrman, Jackson & Krantz LLP) for their significant contributions to this Article. Without Aaron and Kyle's hard work and diligence, this Article would not have been possible.

I. INTRODUCTION

Esports is a global phenomenon that is rapidly gaining traction with adolescent teens and young adults in the United States. Given esports' meteoric growth over the last decade, the potential legal issues and complications stemming from the National Football League's ("NFL"), National Basketball Association's ("NBA"), or Major League Baseball's ("MLB") (collectively, the three "Major Leagues") venture into esports are ripe for discussion.

Some would-be traditional "stick and ball" players have dropped their gloves to pick up joysticks, controllers, and keyboards. Rather than compete on the field, these esports players compete over the internet and from behind a screen.[1] Most esports players receive compensation through salaries, prize money, college scholarships, living expenses, or a combination of the four.[2] Often, players contract with an esports organization, similar to Major League Baseball players contracting with a Major League club.

An umbrella term, "esports" broadly encompasses video games played professionally (i.e., for money or other compensation). Esports is best defined as ultra-competitive video-game competitions where prizes are at stake and/or the competitors are compensated for participating. Some of these competitions are structured much like the Major Leagues, while others are structured as tournaments. The leagues and tournaments range in levels of sophistication in both their structure and the legal issues that plague them. Though some competitions are televised like Major League games, people predominately consume esports competitions through the internet. Streaming services, such as Twitch.tv or YouTube, broadcast these competitions with play-by-play analysis, player interviews, and even pre-match lead-in

[1] Similarly, both esports players and traditional professional players compete in sold-out arenas to loyal, cheering fans.

[2] An esports organization will usually require the esports players to live and practice in what is known as a "gaming house." Here, the esports athlete spends the vast majority of his or her time practicing and perfecting their video game skills.

shows that rival the production quality of television networks' Sunday-morning NFL kickoff shows.

No matter one's opinion as to whether this activity constitutes a "sport," esports continues to attract investors willing to pay millions of dollars for a piece of the evasive esports-pie.[3] Beyond attracting fan and investor attention, some esports endeavors have successfully obtained lucrative advertisement deals with Fortune-500 companies.[4] Esports players, meanwhile, have leveraged their burgeoning popularity to both raise money for charity[5] and supplement their incomes by commentating on their personal gaming-sessions, otherwise known as "streaming."[6] Given this investment of time, resources, and money, it is no surprise that many esports organizations employ analytics teams to parse statistics, analyze data, and scout opponents to improve performance.[7]

Though more entities continue to enter the fray—looking to capitalize on esports's emergence—video game publishers maintain control over not

---

[3] *See, e.g.*, Adam Fitch, *Esports Partnerships and Sponsorships Highlights for December 2019*, ESPORTS INSIDER (Jan. 1, 2020), https://esportsinsider.com/2020/01/partnerships-and-sponsorships-december-2019/ [https://perma.cc/6FQM-HWTC]; Jacob Wolf, *Cloud9 Receives $25 Million in Series A Funding from WWE, Hunter Pence and Others*, ESPN (Oct. 24, 2017), http://www.espn.com/esports/story/_/id/21125519/esports-cloud9-receives-25-million-series-funding-wwe-hunter-pence-others [https://perma.cc/ZTD4-9PLC]; Jacob Wolf, *Lynch, Strahan, J.Lo Part of $15 Million Investment in NRG Esports*, ESPN (Sept. 28, 2017), http://www.espn.com/esports/story/_/id/20851460/marshawn-lynch-rod-part-15-million-investment-round-nrg-esports [https://perma.cc/VTA9-UMFQ]; Imad Khan, *Joe Montana, Hunter Pence and More Invest in Esports Organization Cloud9*, ESPN (Oct. 22, 2017), http://www.espn.com/esports/story/_/id/18970231/joe-montana-hunter-pence-more-invest-esports-organization-cloud9 [https://perma.cc/4VHN-JPDT].

[4] Press Release, The Overwatch League, Overwatch League Unveils Brand Sponsors Ahead of 2019 Season: Coca-Cola, Toyota, T-Mobile, HP and Intel (Mar. 1, 2019), https://esports-marketing-blog.com/overwatch-league-unveils-brand-sponsors-ahead-of-2019-season-coca-cola-toyota-t-mobile-hp-and-intel/ [https://perma.cc/XE9R-2LTV].

[5] *See, e.g.*, James Hale, *DrLupo Raises Record $2.3 Million for St. Jude With 24-Hour #BuildAgainstCancer Livestream*, TUBEFILTER (Dec. 23, 2019), https://www.tubefilter.com/2019/12/23/drlupo-st-jude-buildagainstcancer-twitch-livestream-record-fundraising/ [https://perma.cc/X6FR-758U].

[6] Tae Kim, *Tyler 'Ninja' Blevins Explains How He Makes More Than $500,000 a Month Playing Video Game 'Fortnite'*, CNBC (Mar. 19, 2018), https://www.cnbc.com/2018/03/19/tyler-ninja-blevins-explains-how-he-makes-more-than-500000-a-month-playing-video-game-fortnite.html [https://perma.cc/8CNS-U39S].

[7] Andrew Wooden, *How Big Data is Revolutionising the Future of Esports*, INTEL, https://www.intel.co.uk/content/www/uk/en/it-management/cloud-analytic-hub/big-data-powered-esports.html [https://perma.cc/5BBU-M5DY].

only the product (i.e., the video game itself) but also esports organizations, esports players, and the esports competitions. As the esports sector has matured over the years, legal issues stemming from this control have concomitantly emerged.

This Article focuses on the NBA's, MLB's, and the NFL's forays into esports through the popular video games NBA 2K, MLB The Show, and Electronic Arts' Madden NFL franchise, respectively.[8] In turn, this Article details MLB's MLB China eSports League, the NFL's Madden Championship Series, and the NBA's NBA 2K League, which represents the most sophisticated approach of the trio. This article then uses the NBA 2K League as a model to analyze the myriad legal issues facing esports leagues as a whole.

II. COMPARATIVE ESPORTS SYSTEMS OF AMERICA'S THREE MAJOR LEAGUES

A. Major League Baseball

Major League Baseball ("MLB") has been hesitant to enter the esports industry. In February 2019, Rob Manfred, the Commissioner of Major League Baseball, stated that entering the esports industry was a priority for the MLB.[9] Then in July 2019, the MLB announced its splash in the esports market with the formation of the MLB China eSports League.[10] Up to that point, it was the only one of the three Major Leagues not to have an esports operation.[11] Before the MLB China eSports League, MLB's only involvement with esports came in the form of the virtual reality Home Run Derby held

[8] Each Major League has taken a different approach to esports. For example, the NBA has a sophisticated set-up that mirrors its own professional basketball teams, while MLB is in the planning stage of its overseas esports league. While these represent the traditional Major Leagues' endeavors, other grassroot tournaments occur across the United States, ranging in size, sophistication, and relationship to either the video game publisher or the Major League itself. Along with the three Major Leagues, the National Hockey League ("NHL") and Major League Soccer ("MLS") have also dipped their toes into these murky waters through their popular games NHL 2K and Electronic Arts' FIFA, respectively.

[9] Will Strickland, *MLB Likely to Enter Esports in 2019*, DOT ESPORTS (Mar. 1, 2019), https://dotesports.com/business/news/mlb-likely-to-enter-esports-in-2019 [https://perma.cc/CHL4-BQMC].

[10] Ed Dixon, *MLB Makes First Esports Venture with Chinese Tournament Launch*, SPORTSPRO MEDIA (July 8, 2019), http://www.sportspromedia.com/news/mlb-first-esports-venture-chinese-tournament-launch [https://perma.cc/PY7W-B4TU].

[11] Diamond Leung, *How Major League Baseball Is Approaching Future Entry into Esports*, SPORTTECHIE (Feb. 15, 2018), https://www.sporttechie.com/how-mlb-approaching-future-entry-esports/; *see also* Strickland, *supra* note 9.

at the MLB's All-Star Game and the Little League World Series each year.[12] That said, to date, MLB has released few details of its MLB China eSports League. After its announcement in July 2019, MLB has reported no other updates, so it seems MLB has postponed its launch of the MLB China eSports League.

If the MLB China eSports League moves forward, the players will be competing on the video game MLB The Show ("The Show").[13] While MLB and its Players Association license its intellectual property to Sony for use in The Show, and now other video game platforms,[14] MLB publishes its own competing video game—R.B.I. Baseball.[15] Thus, the MLB China eSports League will be played on a competitor to R.B.I. Baseball. That said, The Show has been considered the objectively superior baseball video game, and most of the local tournaments in the competitive baseball simulation video game market are played on The Show.

The League will comprise eight teams,[16] and eight different esports organizations have partnered with the League to field each team.[17] Players will compete over three months, and the League will consist of a regular season and playoffs,[18] similar to the Major Leagues. The regular season will be played in Chongqing, Chengdu, Xi'an, Beijing, Hangzhou, and Suzhou,

---

[12] Dixon, *supra* note 10.

[13] *See id.* Similar to both NBA 2K and Madden, MLB The Show is a sports simulation video game. NBA 2K, Madden, and MLB The Show simulate NBA basketball, NFL football, and MLB baseball, respectively. Also, until recently, MLB The Show has only been available on the PlayStation consoles, but in December 2019, MLB, MLBPA, Sony, and San Diego Studios reached partnerships that will bring MLB the Show to console platforms beyond PlayStation. Chris Bengel, *MLB The Show is no longer a PlayStation exclusive, will be released on other consoles*, CBS (Dec. 10, 2019), https://www.cbssports.com/mlb/news/mlb-the-show-is-no-longer-a-playstation-exclusive-will-be-released-on-other-consoles/ [https://perma.cc/J8E8-HWAZ].

[14] *MLB, MLBPA, Sony Extend Video Game Partnership*, MLB.COM NEWS (Dec. 9, 2019), https://www.mlb.com/news/mlb-mlbpa-sony-extend-video-game-partnership [https://perma.cc/6RCK-LF3K].

[15] R.B.I. Baseball is published by Major League Baseball Advanced Media ("MLBAM"), which is Major League Baseball's internet and interactive arm. Prior to MLBAM's 2014 release of R.B.I. Baseball, the video game had not been published since 1995.

[16] Dixon, *supra* note 10.

[17] *MLB Announces an Esports League in China*, 71 REPUBLIC (July 23, 2019), https://71republic.com/2019/07/23/mlb-announces-esports-league-china/ [https://perma.cc/EA4H-ARJS].

[18] Anthony DiMoro, *Major League Baseball Announces MLB China eSports League*, GAMACTICA (July 9, 2019), https://gamactica.com/news/2019/07/09/major-league-baseball-announces-mlb-china-esports-league/ [https://perma.cc/JN68-NB48].

and the playoffs will be held in Shanghai.[19] For those unable to participate in the League, MLB plans to host an MLB Experience carnival to help fans experience China's baseball culture.[20] As the first of the three Major Leagues to launch an entirely international esports league, the MLB China eSports League will carry a unique dynamic that other esports entities will surely follow closely. Through the MLB China eSports League, the MLB likely aims to both (i) grow the game of baseball in China, and (ii) engage a younger fan base.

First, the MLB China eSports League should help expand baseball's international market. Along with the MLB China eSports League, MLB has engaged in additional efforts to grow baseball in China. In late 2017, MLB partnered with Beijing Enterprises Real Estate Group to build 20 baseball facilities in China.[21] In 2018, MLB reached a multi-year deal with Tencent[22] to live stream 125 MLB games on various platforms.[23] Most recently, MLB signed an agreement with the Chinese Baseball Association to relaunch the China National Baseball League.[24] Given its size, China represents a market with great growth potential, and MLB is likely seeking to use esports to capitalize on that potential.

Second, as for reaching a younger fan base, Shao Yinxin, MLB China's Director of Marketing and Media, said, "By appealing to a younger demographic with games that they enjoy, this will help increase the penetration of baseball into their lives."[25] It is no secret that the average esports viewer is much younger than the average baseball viewer.[26] It seems as though the

---

[19] Matt Traub, *Major League Baseball to Launch Esports League in China*, SPORTSTRAVEL (July 10, 2019), https://www.sportstravelmagazine.com/major-league-baseball-to-launch-esports-league-in-china/ [https://perma.cc/2FV8-2CN7].

[20] Chenglu Zhang, *Major League Baseball Announces Chinese Esports League*, ESPORTS INSIDER (July 9, 2019), https://esportsinsider.com/2019/07/mlb-china-esports-league/ [https://perma.cc/H7EG-2FSK].

[21] Dixon, *supra* note 10.

[22] Tencent is a behemoth technology corporation and a leading provider of comprehensive Internet Services in China. Additionally, Tencent owns Riot Games, the publisher of one of the most popular esports video games, League of Legends.

[23] Dixon, *supra* note 10.

[24] Ed Dixon, *MLB Agrees to Chinese Baseball League Collaboration*, SPORTSPRO MEDIA (Aug. 19, 2019), http://www.sportspromedia.com/news/mlb-chinese-baseball-league-collaboration [https://perma.cc/3VQ8-6J5C].

[25] Dixon, *supra* note 10.

[26] As of 2017, the average esports fan was 31 years old and the average Major League Baseball fan was 57 years old. *See* Zorine Te, *The average age of the esports fan is 31, according to latest Nielsen report*, YAHOO SPORTS (May 10, 2017), https://sports.yahoo.com/average-age-esports-fan-31-according-latest-nielsen-report-002654718.html [https://perma.cc/JN7L-WGM4]; Jason Notte, *The sports with the*

MLB is trying to remedy this problem by supplanting Major League Baseball into China, which is considered the most potent esports market in the world. And because of China's strong esports market, it is generally understood that MLB believes that the League will be able to have long-term success.

Only time will tell if MLB's esports ventures will grow the game of baseball. And what might prove equally interesting is whether MLB will use The Show, or even R.B.I. Baseball, to develop a domestic esports league to grow its American fanbase and cut into the other, more popular esports leagues' market share.

B. The NFL and EA Sports' Madden Championship Series

The NFL's esports approach has differed from that of the NBA and MLB. Indeed, while the NBA created and operates an esports league[27]—and MLB is attempting the same[28]—the NFL has partnered with Electronic Arts ("EA")[29] to establish a series of Madden Tournaments dubbed the Madden Championship Series.[30] EA, as part of its Competitive Gaming Division, is the operator of the Madden Championship Series ("MCS"), but the NFL remains involved. Because the NFL's esports operation differs from MLB's and the NBA's, it provides a different perspective into a sports league's esports operation.

The Madden NFL video game franchise ("Madden")[31] has existed since 1988, with new versions of the game released annually.[32] In its simplest

---

oldest – and youngest – TV audiences, MARKETWATCH (June 30, 2017), https://www.marketwatch.com/story/the-sports-with-the-oldest-and-youngest-tv-audiences-2017-06-30 [https://perma.cc/K7RM-CPPT].

[27] The NBA created the NBA 2K League along with Take-Two Interactive, NBA 2K's publisher. *See also infra* Part II.C.

[28] *See supra* Part II.A.

[29] Similar to Take-Two in the NBA 2K League, EA Sports is the publisher of the Madden NFL series.

[30] For background regarding the Madden Championship Series, see generally *Madden Nation 4*, ESPN (Oct. 22, 2008), https://web.archive.org/web/20081109041116/http://sports.espn.go.com/videogames/news/story?id=3047668; *Madden NFL 06 Madden Nation*, EA SPORTS, https://web.archive.org/web/20080923211738/http://www.easports.com/madden06/maddennation.jsp; *Madden NFL 07*, EA SPORTS, https://web.archive.org/web/20070516034701/ http://www.easports.com/madden07/index.jsp?ncc=1.

[31] The game is named after former Oakland Raiders head coach, broadcasting legend, and NFL Hall of Famer, John Madden.

[32] James Brady, *Exploring the (Weird) Story of the Very First 'John Madden Football' Game*, SB NATION (Aug. 7, 2018), https://www.sbnation.com/2018/8/7/17599240/

form, Madden NFL is a football simulation video game where an individual plays as an NFL team against an opponent who plays as another NFL team.[33] Madden's popularity has led to gaming competitions and local tournaments, usually operated by grassroots organizers.[34] Besides these local tournaments, EA Sports, a division of EA, remains active in competitive Madden, having introduced the Madden Challenge in 2001.[35]

The Madden Challenge may well be one of the earliest esports ventures. In 2005, EA partnered with ESPN Original Entertainment to create a reality television show, Madden Nation, that documented the lives of top-ranked Madden players.[36] Madden Nation featured a tour-bus full of Madden competitors and NFL players traveling across the United States to a final tournament with a $100,000 grand prize.[37] Madden Nation lasted four seasons, through 2008,[38] and each season culminated in the Madden players competing in New York City's Times Square.[39]

In 2015, EA Sports, likely realizing the paradigm shift and increasing popularity in esports, created the EA Sports Competitive Gaming Division.[40] As part of EA's Competitive Sports Division, the MCS was created.

The MCS is a video game competition to determine the best Madden player in the country, with each season comprising four tournaments.[41] The

---

john-madden-football-apple-ii-genesis-original-story-trip-hawkins [https://perma.cc/AF9S-KY9S]. In 1988, the game was titled *John Madden Football*. Madden NFL video games have evolved so much that early versions most likely would not be recognized as the same game if played today.

[33] The video game contains other game modes, but the most popular game mode is players competing head-to-head.

[34] Madden did have brief stints of media attention, including the rise and fall of the American reality television series *Madden Nation*. *See Madden Nation*, IMDB, https://www.imdb.com/title/tt0758421/ [https://perma.cc/6F7A-DPEL].

[35] *2008 EA Sports Madden Challenge Presented by Best Buy Kicks Off a New Season*, IGN (June 14, 2012), https://www.ign.com/articles/2008/09/17/2008-ea-sports-madden-challenge-presented-by-best-buy-kicks-off-a-new-season [https://perma.cc/X95G-65XX].

[36] *See Madden Nation 4*, *supra* note 30.

[37] *See id.*

[38] *See Madden Nation*, *supra* note 34.

[39] *See Madden Nation 4*, *supra* note 30.

[40] *Announcing the EA Competitive Gaming Division, Led by Peter Moore*, ELECTRONIC ARTS (Dec. 10, 2015), https://www.ea.com/news/announcing-the-ea-competitive-gaming-division-led-by-peter-moore [https://perma.cc/729V-JUUS].

[41] *The Madden NFL 20 Championship Series*, ELECTRONIC ARTS, https://www.ea.com/games/madden-nfl/madden-nfl-20/compete/overview [https://perma.cc/R298-CRVR]; *Madden Championship Series Official Rules*, EA SPORTS [hereinafter *MCS Rules*], https://www.ea.com/games/madden-nfl/madden-nfl-20/com-

MCS launched in 2016 with the Madden NFL 17 Championship Series.[42] Shortly after its inception, the MCS began evolving. In 2017, the NFL became more involved with the MCS by partnering with EA to create the expanded version of the NFL Club Championship.[43] The NFL Club Championship is a tournament that provides fans the chance to represent their favorite NFL team and compete against one another in Madden.[44] Before this initiative, only a select number of NFL franchises participated in the Club Series (now known as the NFL Club Championship).[45] Today, all 32 NFL teams participate in the Club Championship, as one Madden player represents each team in a 32-player tournament.[46]

The MCS continues to develop and, today, awards $1.255 million in total prize money for the Madden NFL 20 Championship Series.[47] The MCS has also landed notable sponsors, including Snickers, Starbucks, and Pizza Hut.[48] Pizza Hut has a unique sponsorship deal with the MCS, as MCS

---

pete/madden-nfl-20-championship-series-official-rules [https://perma.cc/86X7-XJRA].

[42] Joe Bartel, *Madden Continues to Cultivate a Community Over a Year into Esports Initiative*, ESPN (May 12, 2017), https://www.espn.com/esports/story/_/id/19366979/madden-continues-cultivate-community-year-esports-initiative [https://perma.cc/4JUX-A9EC]; *Madden Bowl: Schedule, How to Watch, and Live Stream*, EA SPORTS (Jan. 20, 2017), https://www.easports.com/madden-nfl/news/2017/where-to-watch-madden-bowl [https://perma.cc/PY3X-44T2].

[43] Eric Fisher & Ben Fischer, *NFL, EA Team for Esports*, SPORTS BUS. J. (Aug. 21, 2017), https://www.sportsbusinessdaily.com/Journal/Issues/2017/08/21/Leagues-and-Governing-Bodies/Madden.aspx [https://perma.cc/WK2B-GS4H].

[44] *Madden Club Championship*, ELECTRONIC ARTS, https://www.ea.com/games/madden-nfl/madden-nfl-20/compete/events/madden-nfl-20-madden-club-championship [https://perma.cc/4HRJ-3GKC].

[45] *NFL Partners with EA for Dive Into the World of 'Madden NFL' Competitive Gaming*, NAT'L FOOTBALL LEAGUE, https://nflcommunications.com/Pages/NFL-Partners-With-EA-for-Dive-Into-the-World-of-%27Madden-NFL%27-Competitive-Gaming.aspx [https://perma.cc/Q25H-9T2Y]. Some of the original participating teams included: Minnesota Vikings, New England Patriots, Buffalo Bills, Seattle Seahawks, Jacksonville Jaguars, Pittsburgh Steelers, San Francisco 49ers, and the Kansas City Chiefs. *EA SPORTS Madden 17 Club Series Bring the Competition to Markets Around the NFL*, NAT'L FOOTBALL LEAGUE, https://nflcommunications.com/Pages/EA-SPORTS-Madden-17-Club-Series-Brings-the-Competition-to-Markets-Around-the-NFL.aspx [https://perma.cc/LA4N-87W5].

[46] Fisher & Fischer, *supra* note 43; Tom Huddleston, Jr., *The NFL and EA Sports Are Launching a 'Madden NFL' E-Sports Tournament*, FORTUNE (Aug. 21, 2017), https://fortune.com/2017/08/21/nfl-ea-madden-esports-tournament/ [https://perma.cc/3YHY-6W5S].

[47] *MCS Rules*, *supra* note 41.

[48] *Madden NFL 20 Championship Series Announced by EA*, ESPORTSNOW (Aug. 2, 2019), https://www.esportsnow.bet/madden-nfl-20/ [https://perma.cc/7ERL-

tournaments will be held in Pizza Hut Stadium—a virtual stadium. This marks the first virtual stadium-rights deal in esports.[49]

As stated, the MCS comprises four major tournaments: Madden Classic, Madden Club Championship, Madden Challenge, and Madden Bowl ("Majors").[50] By competing in the first three Majors—the Madden Classic, Madden Club Championship, and Madden Challenge—players can earn not only cash prizes, but, more importantly, points that can qualify them for the Madden Bowl.[51] The Madden Bowl is the last Major of the season, and the winner of the Madden Bowl is recognized as the winner of the competition and the champion of the MCS.[52] For the Madden NFL 20 MCS, the NFL and EA have decided to host each Major alongside a key moment in the NFL season, with one Major partnered with the start of the NFL season, the NFL Playoffs, the Super Bowl, and the NFL Draft, respectively.[53]

This illustrates a difference between the NBA 2K League and the MCS. The MCS seems to be a mechanism used to increase fan engagement with

---

WPQ6]; Richard Lawler, *Madden 20 Championship Series Ties Its Schedule to NFL Events*, ENGADGET (July 26, 2019), https://www.engadget.com/2019/07/26/madden-esports-nfl/ [https://perma.cc/23XB-2PVJ].

[49] Lawler, *supra* note 48.

[50] *The Madden 20 Championship Series*, *supra* note 41.

[51] Will Partin, *What Is the Madden Championship Series*, VARIETY (Aug. 27, 2018), https://variety.com/2018/gaming/features/what-is-the-madden-championship-series-1202917409/ [https://perma.cc/23AE-Z4LF].

[52] *MCS Rules*, *supra* note 41. Sixteen players compete in the Madden Bowl. In order to qualify, one must finish in first or second in the Madden Classic, the Madden Challenge, or the Last Chance Qualifier (while not a "major," it is another tournament to help players qualifier for a spot in the Madden Bowl); finish in one of the top four sports in the Madden NFL Club Championship; or be one of the top six MCS point earners at the conclusion of the first three major events. *Ways to Qualify for the Madden Bowl*, ELECTRONIC ARTS, https://www.ea.com/games/madden-nfl/madden-nfl-19/compete/events/madden-nfl-19-bowl#qualify [https://perma.cc/F8NA-HLBY].

[53] Adam Fitch, *Madden NFL 20 Championship Series Announced*, ESPORTS INSIDER, (Aug. 1, 2019), https://esportsinsider.com/2019/08/madden-nfl-20-championship-series/ [https://perma.cc/8P8L-N4UD]; *Electronic Arts and NFL Announce EA Sports Madden NFL 20 Championship Series*, (July 26, 2019), https://www.businesswire.com/news/home/20190726005187/en/Electronic-Arts-NFL-Announce-EA-SPORTS-Madden [https://perma.cc/94D4-5SZV]. This year, the Madden NFL 20 Classic was hosted from August 30, 2019 to September 1, 2019 in conjunction with the start of the NFL season. The Madden NFL Club Championship took place from December 18, 2019 to December 20, 2019, near the NFL Playoffs. The Madden Challenge took place between January 30, 2020 and February 1, 2020, in association with the Super Bowl. Lastly, the Madden Bowl is scheduled be held from April 23, 2020 to April 25, 2020, in connection with the NFL Draft.

the NFL—similar to the MLB's venture into esports—while the NBA and the NBA 2K League focus on the promotion and sustainability of the NBA 2K League itself.[54] The NFL has its eyes set on possibly becoming a more developed esports league, with the NFL Club Championship representing its first test for potential viability.[55]

As for development and involvement in esports, it may help to think of America's three Major Leagues on a spectrum. On the "lack of involvement" end of the spectrum is Major League Baseball and the MLB China eSports League; toward the middle of the spectrum is the NFL and the MCS; and on the "heavy involvement" end of the spectrum is the NBA, with its NBA 2K League.

C. The NBA 2K League

1. League Structure

The NBA 2K League is a professional esports league in which players, and, collectively, teams, compete against each other in the NBA 2K video game.[56] The NBA 2K League is a joint venture between the NBA and Take-Two Interactive ("Take-Two").[57] The NBA and Take-Two announced plans to launch the NBA 2K League ("League") in February 2017, with its inaugural season taking place in 2018.[58] With this initiative, the NBA 2K

---

[54] *See NFL, EA Launch 'Madden NFL 19' Championship Series*, NAT'L FOOTBALL LEAGUE (Aug. 6, 2018), http://www.nfl.com/news/story/0ap3000000945212/article/nfl-ea-launch-madden-nfl-19-championship-series [https://perma.cc/R6Y8-KTWL] ("We view esports as a key accelerant to growing the NFL as it enables new ways for young fans to engage in the sport through Madden NFL competition.").

[55] Fisher & Fischer, *supra* note 43.

[56] *League Info*, NBA 2K LEAGUE, https://2kleague.nba.com/league-info/ [https://perma.cc/HM9E-N6QL]. NBA 2K is a basketball simulation video game. The user is able to play with actual NBA teams and rosters against either the game itself or another person, whether in person or online. NBA 2K is a video game like any other; it is owned by millions of people around the world—it is not only professional gamers that play NBA 2K but casual fans as well. Other than professional gamers, individuals play NBA 2K for fun or competitively in tournaments against one another. NBA 2K is not the only form of organized competition in the NBA 2K world, either.

[57] *Id.* Take Two Interactive is the company that publishes (creates) the game NBA 2K.

[58] *Id.*; *Timeline of Key Dates in NBA 2K League History*, NBA 2K LEAGUE (Feb. 9, 2019), https://2kleague.nba.com/news/timeline-of-key-dates-in-nba-2k-league-history/ [https://perma.cc/9DYH-BPKZ].

League became the first official esports league operated by a United States professional sports league.[59]

The League consists of teams operated by NBA organizations, with one exception for a global team.[60] For example, the Cleveland Cavaliers operate the NBA 2K team Cavs Legion GC, the Celtics operate Celtics Crossover Gaming, and so on. The League saw 17 teams take the virtual court in its inaugural 2018 season.[61] By 2019, the League added four new teams.[62] And in the offseason before the 2020 season, two more teams joined the League: Hornets Venom GT and Gen. G,[63] which is a global esports organization based in Shanghai that is partnering with the NBA 2K League to provide the first NBA 2K team outside the United States.[64] Gen. G is not affiliated with any NBA franchise. With the addition of Hornets Venom GT and Gen. G, the League will feature 23 teams in the 2020 season. Notably, a

---

[59] *League Info*, *supra* note 56.

[60] *Frequently Asked Questions*, NBA 2K LEAGUE, https://2kleague.nba.com/frequently-asked-questions/ [https://perma.cc/7ZB7-EZXS]. Gen G., the League's first international team, is the only team not affiliated with an NBA franchise.

[61] *17 NBA Teams to Take Part in Inaugural NBA 2K Esports League in 2018*, NAT'L BASKETBALL ASS'N (May 4, 2017), https://www.nba.com/article/2017/05/04/nba-2k-esports-league-17-nba-teams-participate-inaugural-season [https://perma.cc/LHN2-A2MR]. The teams that participated in the inaugural season, with respective NBA franchise listed in parenthesis, were: Celtics Crossover Gaming (Boston Celtics), Cavs Legion GC (Cleveland Cavaliers), Mavs Gaming (Dallas Mavericks), Pistons GT (Detroit Pistons), Warriors Gaming Squad (Golden State Warriors), Pacers Gaming (Indiana Pacers), Grizz Gaming (Memphis Grizzlies), Heat Check Gaming (Miami Heat), Bucks Gaming (Milwaukee Bucks), Knicks Gaming (New York Knicks), Magic Gaming, (Orlando Magic) 76ers GC (Philadelphia 76ers), Blazer5 Gaming (Portland Trail Blazers), Kings Guard Gaming (Sacramento Kings), Raptors Uprising GC (Toronto Raptors), Jazz Gaming, (Utah Jazz) and Wizards District Gaming (Washington Wizards).

[62] The four additional teams included: Hawks Talon GC (Atlanta Hawks), Lakers Gaming (Los Angeles Lakers), NetsGC (Brooklyn Nets), and T-Wolves Gaming (Minnesota Timberwolves). *See* Jacob Wolf, *NBA Welcomes Hawks, Nets, Lakers, Wolves Franchises to NBA 2K League*, ESPN (Aug. 15, 2018), https://www.espn.com/nba/story/_/id/24381282/nba-welcomes-4-new-franchises-nba-2k-league [https://perma.cc/Z46Q-XGNW].

[63] Adam Fitch, *Charlotte Hornets Enters NBA 2K League as Hornets Venom GT*, ESPORTS INSIDER (June 30, 2019), https://esportsinsider.com/2019/06/nba-2k-league-hornets-venom-gt/ [https://perma.cc/S8P6-FT6H]; Kathryn Kuchefski, *The NBA 2K League Is Expanding Internationally With A Team In Shanghai*, MEDIUM (Nov. 5, 2019), https://medium.com/instant-sponsor/the-nba-2k-league-is-expanding-internationally-with-a-team-in-shanghai-63d86cecc7e1 [https://perma.cc/69SG-M6ZX].

[64] Kuchefski, *supra* note 63.

spot in the League comes at a price—in each of the League's first two years, the entrance fee totaled $750,000 for three years of participation.[65]

The League was created with hopes of great potential, with the NBA hoping that the League would be mutually beneficial for itself as well as for the NBA as a whole.[66] The NBA and its affiliated teams saw the NBA 2K League as a "win-win": either the League would be a large success or the NBA teams would gain an increasingly elusive younger market demographic.[67]

While the NBA 2K League is the most popular esports venture of America's three Major Leagues, it still faces challenges. The League is not widely popular outside active fans of the NBA 2K video game, probably both because traditional sports fans would prefer to watch NBA games instead and because traditional esports fans do not consider sports video games to be on the same esports-level as other video games, such as League of Legends and Overwatch.

2. Gameplay

On its surface, the concept of individuals playing video games against each other may seem simple, but the gameplay is more intricate than that. The gameplay is analogous to that of an NBA game. Two teams compete against each other in a five-player-versus-five-player (five-on-five) basketball game. Structurally, each team consists of six players—five starters and a sixth player.[68] Like the NBA, the five starters include a point guard, a shooting guard, a small forward, a power forward, and a center.[69] The sixth player is a reserve who begins the game on the bench.[70]

In stark contrast with the NBA, the NBA 2K League does not feature any NBA players' names, images, or likenesses on the court. Instead, players create their own personal player based on pre-existing archetypes with spe-

---

[65] Wolf, *supra* note 62. It has been stated that the fee is not set to change for teams who will be entering the league for its third season. *See id.*

[66] *See e.g.*, Imad Khan, *Adam Silver vows to develop esports entity as 'fourth league in our family'*, ESPN (Apr. 4, 2018), https://www.espn.com/esports/story/_/id/23029042/nba-commissioner-adam-silver-welcomes-fourth-league-nba-2k-esports-league [https://perma.cc/YY22-CCUE].

[67] Telephone Interview with NBA 2K Employee(s) (Oct. 12, 2019).

[68] Alex Kennedy, *FAQ: Everything You Need to Know About the New NBA 2K League*, HOOPS HYPE (Apr. 4, 2018), https://hoopshype.com/2018/04/04/faq-everything-you-need-to-know-about-the-new-nba-2k-league/ [https://perma.cc/H2XM-SPDQ].

[69] *Id.*

[70] *Id.*

cific attributes and trait variations.[71] For example, players can choose a point guard who is either a Shot-Creating Slasher, Shot-Creating Sharpshooter, Slashing Playmaker, Sharpshooting Playmaker, or Playmaking Shot Creator.[72] Similar trait variations exist for the remaining positions.[73] To level the playing field, all of these archetypes have the same overall rating so certain players will not have an inherent advantage over others.[74] This allows the game to be strategic as teams can create mismatches and game plans, just as teams do in the NBA. Much like the NBA, both traditional and advanced stats are used to evaluate these players and scheme for future matchups.

3. Competition and Playoff Structure

The NBA 2K League season includes regular-season matchups, tournaments, the NBA 2K League Playoffs ("Playoffs"), and the NBA 2K League Finals, all played over a three-month period.[75] The 2018 and 2019 season schedules were very similar, with only a few changes implemented in the 2019 season.[76] Both seasons included weekly matchups between squads.[77] Besides the Playoffs, the League has hosted three intra-season tournaments throughout each of the first two seasons: THE TIPOFF, THE TURN, and THE TICKET.[78] These tournaments do not count toward a team's regular

---

[71] *Id.*

[72] *Id.*

[73] *Id.* A shooting guard can be a Playmaking Slasher, Sharpshooting Defender, Slashing Shot Creator, Sharpshooting Shot Creator or Pure Sharpshooter. A small forward can be a Shot-Creating Slasher, Sharpshooting Shot Creator, Pure Sharpshooter, Slashing Defender or Sharpshooting Slasher. A power forward can be a Slashing Rim Protector, Rebounding Athletic Finisher, Slashing Post Scorer, Two-Way Rebounder or Sharpshooting Rim Protector. Lastly, a center can be a Post-Scoring Athletic Finisher, Slashing Rebounder, Pure Rim Protector, Slashing Stretch Five or Rebounding Post Scorer.

[74] *Id.*

[75] *NBA 2K League Introduces Competition Structure For Inaugural Season*, NBA 2K LEAGUE (Apr. 6, 2018), https://2kleague.nba.com/news/nba-2k-league-introduces-competition-structure-for-inaugural-season/ [https://perma.cc/6VFA-BE8D]. The 2018 season ran from May to September, while the 2019 season ran from April to August.

[76] The 2019 season increased League play from seventeen weeks to eighteen weeks, but the season started in early April instead of early May. Three bye weeks were also added, and the playing time for regular season games was also adjusted. *See NBA 2K League Tips Off 2019 Season on Tuesday, April 2*, NBA 2K LEAGUE (Feb. 25, 2019), https://2kleague.nba.com/news/nba-2k-league-tips-off-2019-season-on-tuesday-april-2/ [https://perma.cc/GLD4-BL2D].

[77] *Id.*

[78] *Id.*

season records, but serve as tiebreakers for the Playoffs.[79] After the regular season concludes, eight teams begin preparing for the Playoffs.

Playoff teams are decided as follows: the seven teams with best regular season records, as well as the winner of THE TICKET make the Playoffs. If the winner of THE TICKET has one of the seven best records in the League, then the teams with the eight best regular season records will make the Playoffs.[80] The Playoffs proceed with the quarterfinals, the semifinals, and the NBA 2K League Finals. The inaugural season saw Knicks Gaming, the New York Knicks' NBA 2K League affiliate, take home the first ever NBA 2K League championship. T-Wolves Gaming, the Minnesota Timberwolves NBA 2K League affiliate, took home the hardware for the 2019 season.[81]

4. Joining the League

It is not easy for players to enter the NBA 2K League. First, a player must meet certain eligibility requirements: a player must (1) be at least 18 years old; and (2) have graduated high school or, if the player did not graduate from high school, the class with which the player would have graduated had he graduated from high school has graduated.[82] One must also be extremely talented to find his or her way into the League. Individuals looking to enter the League must compete in a qualifier with thousands of participants.[83] Qualifiers then compete in the NBA 2K League Combine ("Com-

---

[79] *Id.*

[80] *Id.*

[81] Brian Mazique, *NBA 2K League Finals Recap, Prize Money: Knicks Gaming Complete Cinderella Run to Win Championship*, FORBES (Aug. 25, 2018), https://www.forbes.com/sites/brianmazique/2018/08/25/nba-2k-league-finals-recap-prize-money-knicks-gaming-complete-cinderella-run-to-win-championship/#62d75b37710c [https://perma.cc/W267-7MDF]; Kyle Newport, *NBA 2K League Finals 2019: T-Wolves' Top Highlights, Prize Money*, BLEACHER REP. (Aug. 4, 2019), https://bleacherreport.com/articles/2848350-nba-2k-league-finals-2019-t-wolves-top-highlights-prize-money [https://perma.cc/8URE-NU9W].

[82] *Introducing The NBA 2K League Combine*, NBA 2K LEAGUE (Feb. 9, 2018), https://2kleague.nba.com/news/introducing-the-nba-2k-league-combine/ [https://perma.cc/52WV-HCCU].

[83] In 2019, the League held international qualifying events for potential draft eligible players in London (European Invitational) and Hong Kong (APAC Invitational), in addition to U.S. based qualifying tournaments. *See NBA 2K League To Host First International Qualifying Event*, NBA 2K LEAGUE (Jan. 23, 2019), https://2kleague.nba.com/news/nba-2k-league-to-host-first-international-qualifying-event/ [https://perma.cc/YV88-2237]; *NBA 2K League to Host First Qualifying Event in Europe*, NBA 2K LEAGUE (Nov. 14, 2019), https://2kleague.nba.com/news/european-invitational/ [https://perma.cc/FB5P-2KA9].

bine").[84] Following the Combine, the top 200 players must complete a 30-minute interview with a League representative.[85] The League will then narrow down the number of players based on these interviews and extend conditional offers to those who will be eligible for the upcoming draft.[86] Even after a player is drafted to a team, a player may be cut or traded during designated transaction windows, much like those in the NBA.[87]

5. Compensation

Beyond the glory that comes with being a professional video game player, NBA 2K players also receive salaries, benefits, and chances to win prize money from a $1 million purse.[88] The combination of these three forms of compensation can provide a player with a respectable source of income.[89] The income a player receives is also secure, as all salaries in the NBA 2K League are guaranteed.[90] Notably, the NBA—not individual teams—pays players' salaries.[91] That said, players' salaries are paid from the franchise dues that each participating team must pay to the League.[92] Each player is signed to a six-month contract, but not all salaries are uniform.[93] Players that were taken in the inaugural draft were subject to different sala-

---

[84] *NBA 2K League Combine Info*, NBA 2K League, https://2kleague.nba.com/combine-info/ [https://perma.cc/E59P-CPD2].

[85] Brian Mazique, *NBA 2K League Should Share Combine Statistics for Top 200 Players*, Forbes (Jan. 6, 2019), https://www.forbes.com/sites/brianmazique/2019/01/06/nba-2k-league-should-share-combine-statistics-for-top-200-players/#516f52d3f6a5 [https://perma.cc/B9XB-29M4].

[86] For the 2019 Draft, the League extended 150 conditional offers. *See NBA 2K League Combine Info*, *supra* note 84.

[87] *See generally* Kohrman Jackson & Krantz LLP, *Hacking Esports Investment and the Law*, Facebook (Feb. 26, 2020), https://www.facebook.com/kjklaw/videos/559949294617928/.

[88] *$1 Million Prize Pool for Inaugural NBA 2K League*, NBA 2K League (Feb. 9, 2018), https://2kleague.nba.com/news/1-million-prize-pool-for-inaugural-nba-2k-league-season/ [https://perma.cc/9ZLZ-Z3SC].

[89] Eder Campuzano, *Which NBA 2K League player made the most in 2018? Top earner won nearly $100,000*, Oregonian (Aug. 29, 2019), https://www.oregonlive.com/life-and-culture/erry-2018/08/386c1a1b9b4020/which-nba-2k-league-player-mad.html [https://perma.cc/C7ZZ-RPXW]. Dayvon Curry, known as Goofy757, collected nearly $100,000 in the first year of the NBA 2K League as a member of Knicks Gaming. *See id.*

[90] *League Info*, *supra* note 56.

[91] Telephone Interview, *supra* note 67.

[92] *Id.*

[93] *$1 Million Prize Pool for Inaugural NBA 2K League, supra* note 88.

ries based on their draft status.[94] Players taken in the first round of the NBA 2K League Draft received a base salary of $35,000 and all other players received a $32,000 base salary.[95] It is also important to note that these salaries are fixed and little to no negotiation occurs between a player or his agent (if the player is represented) and the team.[96]

After the inaugural season in 2018, the League likely realized that if new players were unable to join the League and rosters were to be clogged with players from the first League year, it would not see the best new 2K players in the League, diminishing quality of play. Moreover, four new teams entered the League after the first season, creating 24 new roster sports to be filled.[97]

In response, the League implemented an expansion draft similar to those that have been conducted by the traditional Major Leagues.[98] Existing teams were allowed to "protect" two players, which prevented the specified players from being selected in the expansion draft.[99] After the expansion draft, existing teams had the option to retain two other players from their first year's roster who were not selected in the expansion draft.[100] But this came at a price: to retain additional players, teams had to forfeit their draft picks in the 2019 NBA 2K League Draft ("2019 Draft").[101] Teams were also allowed to trade draft picks in a designated trade window during this time.[102] Players who were not protected by their teams or selected in the expansion draft then fell into the draft eligible pool for the 2019 Draft, along with the new players who made it through the qualifier and the combine.[103] Players who were retained by an NBA 2K team after their first year were awarded a six-month contract with a base salary of $37,000.[104] Players who were selected in the first round of the 2019 Draft received a base salary

---

[94] *Id.*

[95] *See id.*

[96] Telephone Interview, *supra* note 67.

[97] *NBA 2K League Announces Four Expansion Teams for 2019 Season*, NBA 2K League, https://2kleague.nba.com/news/nba-2k-league-announces-four-expansion-teams-for-2019-season/ [https://perma.cc/4MYN-859F].

[98] *NBA 2K League Expansion*, NBA 2K League, https://2kleague.nba.com/expansion/ [https://perma.cc/W8R8-99L9].

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *NBA 2K League Increases Prize Pool to $1.2 Million for 2019 Season*, NBA 2K League (Feb. 14, 2019), https://2kleague.nba.com/news/nba-2k-league-increases-prize-pool-to-1-2-million-for-2019-season [https://perma.cc/2WNT-6PWP].

of $35,000, and all others received a base salary of $33,000.[105] These salaries are very similar to those of NBA G-League players, who receive a salary of $35,000 for a five-month contract.[106]

While NBA 2K salaries may seem paltry, these salaries are supplemented by benefits. Besides a guaranteed, albeit fixed, salary, players received the same benefits—e.g., health insurance, 401k, and some travel expenses—that NBA players receive.[107] These benefits can be quite robust and help offset a players' expenses. NBA 2K League teams must also provide housing to their players.[108] Often times, the players will live together in a gaming house throughout the season, which facilitates practices.[109] Xavier Vescovi, an NBA 2K player for Warriors Gaming Squad, stated, "If it was just the base salary and no other sources of income, I'm not sure if I could live in the Bay Area."[110] Vescovi and the rest of the NBA 2K players have found the supplemental benefits very helpful.[111]

Subject to its guidelines, the League also permits its players to enter into streaming and endorsement deals.[112] The League's guidelines prohibit a team or player from receiving endorsements in protected categories such as soft drinks, energy drinks, or salted snacks, for example.[113] This prohibition severely narrows a player's ability to supplement his or her income. Teams are also subject to these same prohibitions but have found endorsement success in local products and businesses.[114] For example, the Cavs Legion GC is sponsored by Goodyear, a business headquartered in the Cleveland area.[115]

---

[105] *Id.*

[106] Scooby Axson, *G League Players To Receive Salary Increase*, SPORTS ILLUSTRATED (Apr. 17, 2018), https://www.si.com/nba/2018/04/17/g-league-salary-increase [https://perma.cc/9EP8-2J3X].

[107] *See Frequently Asked Questions*, *supra* note 60; Telephone Interview, *supra* note 67.

[108] *$1 Million Prize Pool for Inaugural NBA 2K League*, *supra* note 88.

[109] Telephone Interview, *supra* note 67.

[110] Eric Ting, *The Warriors Pay Him $35k a Year to Play NBA 2K and He Can Still Afford the Bay Area. Here's How*, SFGATE (July 24, 2019), https://www.sfgate.com/warriors/article/Warriors-35K-a-year-play-NBA-2K-Xavier-Vescovi-14120097.php [https://perma.cc/T793-SKEG].

[111] *Id.*

[112] Jack Holmes, *At the NBA 2K League Draft, I Witnessed the Surreal Future of What It Means to Go Pro*, ESQUIRE (Mar. 7, 2019), https://www.esquire.com/sports/a26684917/nba-2k-league-draft-esports/ [https://perma.cc/CWU2-SX57].

[113] Telephone Interview, *supra* note 67.

[114] *Id.*

[115] *See Partners*, CAVS LEGION GC, https://cavslegion.nba.com [https://perma.cc/ZT7N-S9QM].

While these added benefits are enticing, most NBA 2K League players are content simply playing video games for a living.

Prize money is another major component to the compensation equation for NBA 2K players. When prize money is won, it is split evenly among team members.[116] In 2018, prize money available for NBA 2K players totaled $1 million.[117] The second season saw the prize pool money increase $200,000, bringing the total to $1.2 million.[118] Players have four opportunities to win prize money throughout the NBA 2K season.[119] They can win money through each of the three intra-season tournaments and the NBA 2K League Finals.[120] The prize money between 2018, 2019, and 2020 broke down as follows:

	2018 prize money ($1 million total)[121]	2019 prize money ($1.2 million total)[122]
THE TIPOFF	$100,000	$120,000
THE TURN	$150,000	$180,000
THE TICKET	$150,000	$180,000
NBA 2K League Playoffs: 1st place	$300,000	$360,000
NBA 2K League Playoffs: 2nd place	$100,000	$120,000
NBA 2K League Playoffs: 3rd and 4th place	$50,000	$60,000
NBA 2K League Playoffs: 5th-8th place	$25,000	$30,000

[116] Eder Campuzano, *Six guys made over $50,000 playing 'NBA 2K' for the Blazers this summer*, OREGONIAN (Aug. 25, 2018), https://www.oregonlive.com/trending/2018/08/blazer5_gaming_trail_blazers_esports_team_made_50000_each.html [https://perma.cc/HSK2-GAVP].

[117] *NBA 2K League adds $200,000 to prize pool*, ESPN (Feb. 16, 2019), https://www.espn.com/esports/story/_/id/26012847/nba-2k-league-adds-200000-prize-pool [https://perma.cc/7UZS-2ENY].

[118] *NBA 2K League Increases Prize Pool to $1.2 Million for 2019 Season*, *supra* note 104.

[119] *Id.*

[120] *Id.*

[121] *NBA 2K18*, ESPORTS EARNINGS, https://www.esportsearnings.com/games/538-nba-2k18 [https://perma.cc/2HVH-F3Z7].

[122] Doyle Rader, *Mavs Gaming Enters NBA 2K League Playoffs With A Shot At $360,000*, FORBES (July 24, 2019), https://www.forbes.com/sites/doylerader/2019/07/24/mavs-gaming-nba-2k-league-playoffs-shot-at-360000-prize-money/#70188d721a0a [https://perma.cc/KHV9-H6X5]; *NBA 2K League Increases Prize Pool to $1.2 Million for 2019 Season*, *supra* note 104.

As stated earlier, Knicks Gaming and T-Wolves Gaming won the first two championships in league history.[123] As a result, Knicks gaming took home $300,000 for their championship victory in 2018, and T-Wolves gaming won $360,000 in August 2019.[124]

The NBA 2K League is the most developed esports league to be established by any of America's three Major Leagues. Moreover, while different in many ways, the NBA 2K League resembles a traditional sports league in its early stages. As a result, it provides an opportunity for analysis through the many legal doctrines that have molded traditional sports leagues into their current forms.

III. LEGAL EVOLUTION OF THE NBA 2K LEAGUE

Of the esports initiatives launched by America's three Major Leagues, the NBA 2K League is most analogous to America's traditional sports leagues.[125] This section will explain the legal issues facing the formation and development of an esports league. It will compare the legal evolution of the NBA 2K League to that of America's three Major Leagues by analyzing, in turn, the following topics through the lens of the NBA 2K League: Commissioner and League Authority; Uniform Player Contracts; Antitrust Challenges; Age Eligibility Restrictions; Injury Grievances; Intellectual Property Rights; and Franchise Relocation and Expansion.

A. Commissioner and League Authority

Similar to the traditional Major Leagues, the NBA 2K League and its Managing Director Brendan Donahue have enacted rules and policies to form the building blocks and catalyze the success of the NBA 2K League. As Managing Director, Donahue holds a position much like that of the Commissioner in traditional sports leagues, as he and his management team oversee League governance.[126] Donahue and his management team, conse-

---

[123] *See* Mazique, *supra* note 81.

[124] *See* Newport, *supra* note 81.

[125] Other more prominent esports leagues exists such as the League of Legends Championship Series, The Overwatch League, and the Call of Duty League, but for effective educational purposes, this chapter will solely focus on an analysis of the NBA 2K League.

[126] *Career Opportunities—Brendan Donohue*, NAT'L BASKETBALL ASS'N, https://careers.nba.com/executive/brendan-donohue/ [https://perma.cc/3SSC-G8LH]. Prior to his position as Managing Director of the NBA 2K League, Donahue served as the Senior Vice President of the NBA's Team Marketing and Business Operations Department.

quently, maintain the authority to implement rules and policies as the League's governing body.[127] The policies that the League has implemented are much like those of traditional sports leagues, and include policies on gambling, conduct occurring "on and off the court," and more.

To control the conduct, or more appropriately, the misconduct of the players, the NBA 2K League enacted its Code of Conduct.[128] Like the policies enacted in the NFL, MLB, and NBA to control the conduct of their players, this set of rules describes prohibited conduct and corresponding discipline.[129] All players are subject to this policy because, to play in the League, each player must sign a copy of the Code of Conduct, warranting that they have read the policy and agree to its terms.[130] It is important to clarify that all of these policies are directed toward the conduct of the players, not the conduct of the player-controlled avatar.[131] For example, a player will not be suspended for a flagrant-2 foul that his or her avatar commits during a game; it is more likely that the player will be punished for using offensive language during a stream.[132] The Code of Conduct is most like the NFL's Personal Conduct Policy in that virtually all "off-court" conduct is governed by the policy.[133]

Teams, like individual players, also have obligations under the League's Code of Conduct.[134] Similar to traditional sports leagues, if a team is aware of conduct attributable to a player that may violate the policy, it must report that conduct to the League.[135] In response, the League will decide whether an investigation is justified.[136] If the League decides to investigate,

---

[127] It is important to note that the NBA 2K League is run solely by the management team that the NBA has assigned to oversee the League. There is virtually no involvement by Take-Two Interactive, the publisher of the game. The structure functions more similarly to a licensing agreement between the NBA and Take-Two in which Take-Two provides a non-exclusive license to the NBA to use NBA 2K for commercial use.

[128] Andre2K, *Why The NBA 2K League Needs A Player Union*, SPORTS GAMERS ONLINE (Nov. 27, 2018), http://www.sportsgamersonline.com/why-the-nba-2k-league-needs-a-player-union/ [https://perma.cc/642Y-4N44].

[129] This is similar to the NFL's "conduct detrimental" and the MLB's and NBA's "best interest" standards.

[130] Telephone Interview, *supra* note 67.

[131] *Id.*

[132] *Id.*

[133] *See* PERSONAL CONDUCT POLICY, NAT'L FOOTBALL LEAGUE, https://nfl-labor.files.wordpress.com/2013/06/personal-conduct-policy.pdf [https://perma.cc/GEU6-4DH5].

[134] Telephone Interview, *supra* note 67.

[135] *Id.*

[136] *Id.*

it will make factual findings and decide either to discipline the player or to dismiss the conduct.[137]

If a player is disciplined for his or her conduct under the Code of Conduct, then the player has the right to appeal the decision.[138] The right to appeal has never been exercised by any players in the League.[139] This is because the League is not as developed and successful as the traditional sports leagues. Because of this, players' salaries fall within the $35,000 range, a salary that would not make retaining representation a financially wise decision.[140] Players do not have agents or lawyers, leaving them unprepared and disadvantaged in navigating the appeal process. What's more, NBA 2K players are not unionized and thus, unlike the NFL, MLB, and NBA players, have no union representatives to advise them in these proceedings.[141] Players would most likely rather accept the disciplinary action and return to playing as soon as possible, rather than waste time appealing a decision that they are unfit to challenge.

There have been a few notable examples of players disciplined under the League's Code of Conduct. One player was suspended under the Code of Conduct for posting inappropriate and offensive videos on social media.[142] In April 2019, three players were suspended as a result of a physical altercation that occurred following a match.[143] Lastly, Boo Painter, the League's leading scorer at the time, was dismissed and disqualified from the League for violating the Code of Conduct for an undisclosed reason.[144]

Beyond the League's Code of Conduct, the League has also grappled with other issues faced by traditional sports leagues—namely, gambling and diversity. As for gambling, NBA 2K Players are subject to the same anti-

---

[137] *See, e.g.*, Bill Cooney, *NBA 2K League players fined and suspended following on stage brawl*, DEXTERO (Apr. 12, 2019), https://www.dexerto.com/nba-2k/nba-2k-league-players-fined-suspended-following-brawl-540510 [https://perma.cc/2GVD-NQJE].

[138] Telephone Interview, *supra* note 67.

[139] *Id.*

[140] *See NBA 2K League Increases Prize Pool to $1.2 Million for 2019 Season*, *supra* note 104.

[141] Derek Helling, *Time is Right for NBA 2K League Players to Unionize*, BASKETBALL WRITERS (Feb. 18, 2020), https://bballwriters.com/nba-2k/the-time-is-right-for-nba-2k-league-players-to-unionize/ [https://perma.cc/K9XB-XE9B].

[142] *Eric Donald Suspended for 2019 NBA 2K League Season*, NBA 2K LEAGUE (Mar. 5, 2019), https://2kleague.nba.com/news/eric-donald-suspended-for-2019-nba-2k-league-season/ [https://perma.cc/86VN-7C8A].

[143] Cooney, *supra* note 137.

[144] Sam Bishop, *The NBA 2K League bans its first player*, GAMEREACTOR (Nov. 14, 2018), https://www.gamereactor.eu/the-nba-2k-league-bans-its-first-player/ [https://perma.cc/C3V8-CWRE].

gambling guidelines as NBA players.[145] Action was taken under this policy for the first time in September 2019 when Basil Rose, known as "24K Dropoff," was dismissed and disqualified from the League for providing inside information to gamblers.[146] The NBA 2K League's ban of Basil Rose is much like punishments rendered in the three Major Leagues, most notably to Pete Rose and Jack Molinas, who received bans from the MLB and NBA, respectively, for gambling.[147] This shows the NBA 2K League's concern for competitive balance and preventing match-fixing.

Another issue that permeates the esports industry and is exemplified by the NBA 2K League is females' underrepresentation. It was not until the NBA 2K League's second season that a woman was available in the NBA 2K League Draft pool when both Chiquita Evans and Brianna Novin were eligible.[148] And only Evans was selected by an NBA 2K team, with Warriors Gaming selecting her in the fourth round of the 2019 NBA 2K League Draft.[149] Contrastingly, over one-hundred men are drafted into the League each year.[150]

B. Uniform Player Contracts

To participate in the NBA 2K League, players need to sign a standard contract with the League.[151] These contracts are analogous to the Uniform Player Contracts ("UPCs") of America's three Major Leagues and detail the provisions of each player's employment with the League. But the specific

---

[145] Telephone Interview, *supra* note 67.

[146] Owen S. Good, *NBA 2K League bans player for gambling association*, POLYGON (Sept. 12, 2019), https://www.polygon.com/2019/9/12/20863301/nba-2k-league-player-banned-gambling-inside-information-24k-dropoff-esports [https://perma.cc/9LAP-RY6N].

[147] PETER A. CARFAGNA, SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA'S THREE MAJOR LEAGUES 20–21 (West, 3d ed. 2017).

[148] Jake Seiner, *1st female gamers qualify for NBA 2K League draft pool*, SEATTLE TIMES (Mar. 4, 2019), https://www.seattletimes.com/business/1st-female-gamers-qualify-for-nba-2k-league-draft-pool/. Two women were eligible to be taken in the 2019 NBA 2K League Draft: Chiquita Evans and Brianna Novin.

[149] *Warriors draft first woman player into NBA 2K esports league*, NAT'L BASKETBALL ASS'N (Mar. 6, 2019), https://www.nba.com/article/2019/03/06/warriors-draft-first-woman-nba-2k-league [https://perma.cc/9W7X-SXVS].

[150] *2019 NBA 2K League Draft Board*, NBA 2K LEAGUE, https://2kleague.nba.com/2019-nba-2k-league-draft-board/ [https://perma.cc/5UE4-YBSS].

[151] Telephone Interview, *supra* note 67. This is dissimilar from traditional sports, as in the NFL, MLB, and NBA, players sign contracts with the individual team, not the League.

provisions of the standard contracts used in the NBA 2K League differ from the UPCs in many ways.

The salary structure for an NBA 2K player is vastly different to that of an athlete in one of the three Major Leagues.[152]

NBA 2K League Salaries		
	2018 (inaugural) season salary	2019 season salary
1st round draft choice	$35,000	$35,000
Subsequent draft choice	$32,000	$33,000
Returning players	N/A	$37,000

While average salaries for those in the three Major Leagues range from about $2.5 million to $6.5 million, the NBA 2K League's are 50-100 times lower.[153] The salaries in the League are most comparable to the salaries of a player in the NBA G-League, the minor league system for the NBA, in which a player receives, on average, a salary of $35,000 for a five-month regular season.[154] This is understandable because revenue generally dictates player salaries, and the League has not generated even a fraction of the revenue of the MLB, NFL, and NBA.

Moreover, NBA 2K players' salaries are slotted, meaning that the League has a take-it-or-leave-it, non-negotiable compensation system, with salaries following the above player designations. So if a player is a first-round draft choice, he or she must either choose to accept a $35,000 salary or refuse to sign the contract. The salary structure is very simple in comparison to America's three Major Leagues. First, draft picks in the League will immediately know their salary, which is even simpler than the collectively bargained salary-slotting draft systems of the NBA and NFL. Returning players cannot negotiate contracts, either. If a player was protected in the expansion draft or later retained, he or she will receive a $37,000 salary. Team expenditures are also not as developed and complex as the NBA and the NFL. For example, there is no salary cap, salary cap exceptions, or minimum and maximum salary windows, among others.

Another distinction of the League is that players are employed and salaries are paid by the NBA 2K League itself. By contrast, in the MLB,

---

[152] *See supra* Section I.C.5.

[153] CARFAGNA, *supra* note 147, at 79.

[154] *NBA G League Announces Player Salaries For 2018-2019 Season*, NAT'L BASKETBALL ASS'N G LEAGUE (Apr. 17, 2018), https://gleague.nba.com/news/nba-g-league-announces-player-salaries-2018-2019-season/ [https://perma.cc/A6JB-NVC3].

NFL, and NBA, all players are employed and contracts are paid by the respective teams. For example, a member of the Cleveland Cavaliers will be paid by the Cleveland Cavaliers, while a member of Cavs Legion GC will be paid by the NBA 2K League. Even though salaries are paid by the League, the majority of the money used to pay these salaries comes not from League-generated revenue but from the pool of team participation fees discussed earlier.

Beyond base salary, another form of monetary income for a player is prize money from the League's tournaments.[155] Prize money is split evenly among the players on a team. Players also receive benefits from both the League and individual teams to help supplement their income. The League provides medical benefits,[156] a retirement plan,[157] and travel expenses to all players.[158] Moreover, each team must provide certain benefits to players, while providing other benefits is optional. For instance, teams must house the players, but it is optional for teams to provide players with food and training facilities.[159]

As for player transactions and assignment of contracts, the NBA 2K League is more basic than traditional sports. The League implemented two trade windows for teams to execute trades with each other.[160] This is like a trade deadline in traditional sports league in that there is a certain period in which trades must be completed. But in the NBA 2K League, this time frame is shorter than in traditional sports leagues. What's more, in the first years of the League, the trades must have a one-to-one trade asset ratio, with

---

[155] *See supra* Section II.C.5.

[156] This includes dental coverage, vision coverage, and more. *See Frequently Asked Questions*, *supra* note 60.

[157] The NBA 2K League establishes a 401K plan for players. *See $1 Million Prize Pool for Inaugural NBA 2K League, supra* note 88; Telephone Interview, *supra* note 67.

[158] Every game is played at the NBA 2K League Studio in Long Island City, NY but the teams are based in their host cities. Therefore, the teams have to fly to and from Long Island City to play their games. *See Frequently Asked Questions*, *supra* note 60.

[159] Evan Dammarell, *Cleveland Cavaliers Continue To Grow Esports Brand With New Training Facility*, FORBES (Aug. 7, 2019), https://www.forbes.com/sites/evandammarell/2019/08/07/cleveland-cavaliers-continue-to-grow-esports-brand-with-new-training-facility/ [https://perma.cc/3NMB-D4AK]; Imad Khan, *Sacramento Kings create esports facility for 2K League*, ESPN (Dec. 8, 2017), https://www.espn.com/esports/story/_/id/21712910/sacramento-kings-create-esports-facility-2k-league [https://perma.cc/6G9V-S3KJ]. For example, both Cavs Legion GC and Kings Guard Gaming opened esports facilities for their teams.

[160] *Transactions*, NBA 2K LEAGUE, https://2kleague.nba.com/transactions/ [https://perma.cc/Q3P8-XP8C].

players and draft picks constituting "assets."[161] Thus, teams can trade any combination of players and draft picks as long as they receive the same number of players and draft picks, collectively, in return. As a result, player movement is much more restricted in the League. Furthermore, the structure of the transaction for the assignment of contracts is unique. For example, if an MLB player is traded to another team, his respective contract is assigned to that team. In the NBA 2K League, because players are employed by the League, if a player is traded, his contract would not be assigned to the other team. Instead, he would remain under contract with the League, just playing for a different franchise. Additionally, due to League expansion, player movement is volatile, as detailed in Section II.C.5. This volatility has created a high turnover rate for players in the NBA 2K League.

Lastly, the advertisement and sponsorship opportunities for NBA 2K players are highly regulated by the League. Players are subject to League restrictions with regard to which brands they can engage with for advertisement and sponsorship opportunities.[162] For example, the League partnered with Champion Athleticwear ahead of the 2019 Draft.[163] If another apparel company approached a player for an advertising opportunity, he or she would be prohibited from doing so. What's more, players are limited not only by the League's current sponsors, but also by its future sponsors.[164] The League has carved out over 20 exclusive sponsorship categories for itself to preserve League revenue.[165] As a result, teams and players are not allowed to execute sponsorship deals in these categories. Most of the preempted categories are endemic to the esports industry, which leaves players and teams searching for niche regional sponsorship deals.[166] While these carveouts seem like a significant restriction on player marketability, most NBA 2K players likely do not have the popularity or following to generate sponsorships or advertisements that would conflict with League carveouts. Yet the question remains whether the League will eventually interfere with players economic rights if the League grows at the rate that the NBA hopes.

---

[161] *Id.*

[162] Telephone Interview, *supra* note 67.

[163] *NBA 2K League Announces Partnership With Champion Athleticwear Ahead Of March 5 Draft*, NBA 2K LEAGUE (Feb. 12, 2019), https://2kleague.nba.com/news/nba-2k-league-announces-partnership-with-champion-athleticwear-ahead-of-march-5-draft/ [https://perma.cc/2LAP-CBUH].

[164] Telephone Interview, *supra* note 67.

[165] *Id.*

[166] *Id.*

C. Antitrust Analysis of the NBA 2K League

In the legal background of every Major League sits a breadth of antitrust jurisprudence. Given that sophisticated esports leagues are fairly new, there is no antitrust jurisprudence specifically pertaining to esports. For example, unlike Major League Baseball,[167] there is no judicially created antitrust exemption for esports. In fact, there are few legal disputes in the court systems related to esports in general. But because esports' league structures are similar to—and sometimes indistinguishable from—those of the traditional Major Leagues, general sports-focused antitrust jurisprudence could be applied by a court that decides an esports antitrust issue. Of course, it is unknown whether a court would interpret an esports league the same way as a traditional Major League. But one can make a compelling case for antitrust enforcement in esports under both § 1 and § 2 of the Sherman Antitrust Act.[168]

As mentioned above, the nonstatutory labor exemption does not apply to today's non-unionized esports environment.[169] Though strides have been made in recent years to create a collective bargaining unit in some esports,

---

[167] *See* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

[168] 15 U.S.C. §§ 1–2 (2018).

[169] The non-statutory labor exemption is a judge-made doctrine that was created to give employers the same protections and incentives that employees have in negotiations over mandatory subject of collective bargaining with employer(s). The exemption recognizes that collective bargaining imposes some otherwise anticompetitive restraints, but that the restraints are necessary to give effect to labor laws. *See* CARFAGNA, *supra* note 147, at 129. The scope of the non-statutory labor exemption is not fully defined, but in its simplest terms, it provides that mandatory subjects of collective bargaining that are lawfully imposed under labor law are preempted from antitrust scrutiny (*i.e.* where there is a conflict between collective bargaining and antitrust law, the result of the collective bargaining process will govern and preempt an antitrust challenge). *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676 (1965); Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004); Caldwell v. Am. Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995); Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976). Because the NBA 2K League is not unionized and therefore does not have the power to compel collective bargaining on behalf of the League, antitrust claims are not preempted by the non-statutory labor exemption.

there are currently no collective bargaining units in the industry.[170] There are thus no collective bargaining agreements that could forbid an antitrust claim under the nonstatutory labor exemption.

Because § 1 of the Sherman Antitrust Act bars any "combination" or "conspiracy" in restraint of trade,[171] the League's players would need to claim that the NBA 2K League is restraining their trade, i.e., the players' right to traverse freely from team to team or wage suppression. If the players made such allegations, the court would then need to determine whether an unreasonable restraint of trade exists. An unreasonable restraint of trade can be shown in two ways: (1) an illegal per se restraint of trade[172]; or (2) through a rule of reason analysis.[173] In a typical business structure, competition is essential to success, but the League's structure differs greatly, similar to the traditional Major Leagues. It is essential for the League, like the traditional Major Leagues, to horizontally restrain competition if the product is to be available at all.[174] Therefore, acts by the League would rarely be considered illegal per se.[175] As a result, a court would likely proceed to a rule of reason analysis.

Under § 1, a court would likely proceed through the rule of reason analysis in the following way. The court would first define the market.[176] This definition is important because esports is very broad globally, but the NBA 2K League could be considered part of a smaller, NBA 2K esports league-specific market. This market may include not only the League but also other NBA 2K leagues and tournaments that have emerged in recent years. The NBA 2K League, however, is the predominate NBA 2K esports league in terms of its sophistication, prize winnings, and player compensation; its competitors may be considered akin to independent baseball leagues competing with Major League Baseball or the various upstart professional

---

[170] *See NA LCS Players Association Announces Results of Inaugural Executive Officer Election*, ESPORTS OBSERVER (June 14, 2018), https://esportsobserver.com/na-lcs-players-association-president/ [https://perma.cc/N9ET-A5PJ].

[171] 15 U.S.C. § 1 (2018).

[172] CARFAGNA, *supra* note 147, at 120.

[173] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); CARFAGNA, *supra* note 147, at 121.

[174] *See* CARFAGNA, *supra* note 147, at 124.

[175] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984) (declining to apply per se rule to NCAA because some "horizontal restraints on competition are essential if the product is to be available at all").

[176] *Cf. id.* at 111 (discussing market definition).

football leagues competing with the National Football League.[177] An argument against broadening the market to other grassroots leagues would be that the League is played on an iteration of NBA 2K not available to the public, meaning that these other leagues are not actually playing the same video game.

Beyond simply an NBA 2K-specific market, a court may look to other esports leagues pertaining to sports video games. An even broader market definition exists by arguing that all of esports co-exist in the same esports environment. A plaintiff may argue against these broader market definitions by proving that the viewing audience between the League and other esports leagues do not overlap, and the skills needed to play NBA 2K at a professional level differ from that of other esports. Moreover, the objective and gameplay of NBA 2K differs from other esports, including the sport-based video games. Overall, sport-based video games are thought of differently, and even looked down upon, in the esports environment; some fans of other esports leagues, such as League of Legends' League Championship Series, may scoff at the thought of considering League of Legends and NBA 2K as competitors in the market. In any event, the market definition analysis of esports may prove to be the most important step in an antitrust dispute given how broad the market can become or how narrowly it can be defined.[178]

After the market is defined, the court would likely next weigh any anticompetitive effects against any procompetitive effects to determine whether the challenged conduct is an unreasonable restraint of trade. If the anticompetitive effects outweigh the procompetitive effects, an unreasonable

---

[177] Brian Mazique, *"NBA 2K20' MyTeam Unlimited $250k Esports Contest Heads Into Its 2nd Year*, FORBES (Oct. 10, 2019), https://www.forbes.com/sites/brianmazique/2019/10/10/nba-2k20myteam-unlimited-250k-esports-contest-heads-into-its-2nd-year/#7782bd1a3f29 [https://perma.cc/52PR-LJVM]; Jonno Nicholson, *2K Games Announces NBA 2K20 Global Championship*, ESPORTS INSIDER (Sept. 22, 2019), https://esportsinsider.com/2019/09/nba-2k20-global-championship/ [https://perma.cc/Y5AX-9X8X]. It is important to note that while the other NBA 2K leagues are played with NBA 2K, the NBA does not sponsor or organize these other leagues. Some esports leagues have exclusive intellectual property agreements with the video game publisher and developer to not allow other, similar leagues, but the NBA and Take-Two Interactive, NBA 2K's publisher, have no such agreement. The lack of exclusive agreement between the two may be due to the fact that the League is played on a different iteration of NBA 2K not available to the public.

[178] Although there is no formula to determine how a court may analyze and define a market, esports is fairly new and the wide array of esports leagues means that educating a court on the differences and similarities between and among the esports may be the most important factor in an esports antitrust dispute.

restraint of trade has occurred and § 1 of the Sherman Act has been violated. For example, because the player acquisition window in the League is limited and not collectively bargained, if a plaintiff can show that the player acquisition window restricts the players' ability to obtain fair and competitive compensation for their skills, the League has created an anticompetitive effect. Then, the defendant—presumably the League—would likely need to show procompetitive effects of the restraint. If no procompetitive effects are offered, the conduct will be determined a naked restraint of trade, and thus a violation of § 1. After the defendant establishes the procompetitive effects of the restraint, the plaintiff will need to show that there are less restrictive means available for achieving the same effect. The court will then weigh the procompetitive effects with the anticompetitive effects. The same analysis applied in other § 1 antitrust disputes regarding the Major Leagues would likely be applied in an esports antitrust § 1 dispute.

To defend a § 1 claim, a defendant can claim that it is a single entity. After all, how can one conspire to restrain trade with oneself? This is called the single entity defense. The NFL unsuccessfully asserted this defense in *American Needle, Inc. v. National Football League*,[179] and the NBA 2K League would likely suffer the same fate. From *American Needle*:

> [A] parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. . . . [A]lthough a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not "depriv[e] the marketplace of independent centers of decisionmaking."[180]

This test puts an emphasis on the substance of the entities over the form of the entities:

> [T]he question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . or conspiracy" amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.[181]

---

[179] 560 U.S. 183 (2010).
[180] *Id.* at 194 (citations omitted).
[181] *Id.* at 195 (citations omitted).

In the League, the teams are controlled by their NBA counterparts. Similar to the NFL teams in *American Needle*, a court would likely decide that there is no single entity, i.e., the League office or even the NBA itself, controlling the League teams. That said, because player salaries are paid by the League and not the individual teams, the argument for the single entity exception may be more viable for the League than it was for the NFL in *American Needle*.

Given that NBA teams own their counterparts in the NBA 2K League, a court could view the ownership structure as concerted activity, which is per se illegal under § 1 antitrust jurisprudence. The NBA, however, is enacting the rules and is doing so on behalf of the League teams as economic actors distinct from their NBA counterparts. Given the NBA's relationship with Take-Two Interactive, the publisher of NBA 2K, an argument for concerted activity between them may also exist.[182] That said, Take-Two and the NBA do not compete over the same market. Instead, the NBA and the NBA 2K League compete over the viewership of their respective audiences, while Take-Two competes for customers looking to purchase the actual video games it publishes. This is an important distinction because not all of NBA 2K's casual, non-professional players consume the League. Given the similarities between playing an NBA-based video game and watching the League or NBA games, there may be some overlap. In fact, the traditional Major Leagues could be using the esports leagues to create more of an audience for NBA, MLB, and NFL games both in the United States and overseas, where esports is much more popular and accepted in mainstream society. Moreover, the market for the sports-based video games is a younger age demographic than the viewing audience of the traditional Major Leagues' actual games.[183]

Beyond the § 1 restraint of trade and concerted activity antitrust claims that have traditionally been brought against the Major Leagues, § 2 claims have been theorized with regards to esports.[184] Although from the above esports-market discussion it would be difficult to determine that any one entity has a monopoly, a tying claim may be viable because the developer and publisher are usually associated with the esports league.[185] These tying claims also implicate § 3 of the Clayton Act,[186] but are often brought under §§ 1–2 of the Sherman Act as well. In essence, a tying claim begins

---

[182] NBA 2K is a joint venture between the NBA and Take-Two Interactive.

[183] *See* Te, *supra* note 26; Notte, *supra* note 26.

[184] *See* Max Miroff, *Tiebreaker: An Antitrust Analysis of Esports*, 188 COLUM. J.L. & SOC. PROBS. 177 (2019).

[185] *See id.*

[186] *See* 15 U.S.C. § 14 (2018).

by alleging that one product is intricately tied to another product, and this relationship has helped the tied product gain a monopoly in the marketplace.[187] In esports, this scenario could occur when the publisher controls the intellectual property rights of the video game and only allows one esports league to use its video game. The publisher controls who can and cannot have an esports league in that video game. Meaning that the publisher, here Take-Two, could be liable under a tying claim.

These types of claims do not occur in the traditional Major Leagues because the NBA does not control who can and cannot play basketball. Major League Baseball cannot march out to an Independent League ballclub and demand that the game be stopped. And the NFL cannot send credible cease and desist letters to the XFL and the like. In esports, on the other hand, a publisher can forbid the unauthorized use of the video game under intellectual property rights. This crucial detail may be an integral part in an antitrust challenge in esports in the future. A court may have to decide whether to prioritize a competitive market or intellectual property rights.

D. Age Eligibility

Like the traditional Major Leagues, the League requires its players to meet certain eligibility requirements. A player must first be at least 18 years old and have graduated high school, or, if the player did not graduate from high school, the class with which the player would have graduated had he graduated from high school must have graduated.[188] For example, a player who left high school as a junior in the spring of 2018 would meet the high school graduation requirement that following spring, in 2019, when the player's high school class would graduate, so long as that player in our example is also 18 in the spring of 2019. This is similar to a high school baseball player being drafted by an MLB team following high school or a high school basketball player like LeBron James being drafted by an NBA team before implementing the "one and done" rule.[189]

---

[187] *See* United States v. Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001) (en banc) ("There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.").

[188] *Introducing the NBA 2K League Combine*, NBA 2K League (Feb. 9, 2018), https://2kleague.nba.com/news/introducing-the-nba-2k-league-combine/ [https://perma.cc/CZG5-58CB].

[189] *First Year Player Draft Rules*, Major League Baseball, http://mlb.mlb.com/mlb/draftday/rules.jsp [https://perma.cc/U6L9-8S3T].

International players are also eligible for the NBA 2K League. To search for elite talent, League qualifying events were held in Hong Kong and London for potential draft eligible players in 2019.[190] Similar to the NBA, international players are drafted into the League. This differs from MLB, where international players do enter not through the draft system but through free agency.[191] Four international players were selected in the 2019 NBA 2K League Draft.[192]

There are no other formal requirements to becoming a professional NBA 2K player in the League. Even so, one has to be extremely talented to find his or her way into the League. Individuals looking to enter into the League must compete in a qualifier with thousands of participants. If the player can pass through the qualifier, he or she then advances to the NBA 2K League Combine, where the person's NBA 2K skills are put to the test much like an NBA or NFL draft participant. After the combine, the top 200 players must complete a 30-minute interview with one of the League's representatives.[193] The League then narrows down the number of potential players based on these interviews and extends conditional offers to those players who will be eligible for the upcoming draft.[194]

Age eligibility presents interesting legal issues for the League, and antitrust laws are the most likely to be implicated. In the Major Leagues, age eligibility rules are collectively bargained for and therefore exempt from antitrust scrutiny under the nonstatutory labor exemption.[195] However, as previously stated, the League's age eligibility rules are not collectively bargained for and therefore not protected by the nonstatutory labor exemption. As a result, these rules are subject to antitrust scrutiny as referenced in Section III.C.

---

[190] *See NBA 2K League Expansion*, *supra* note 98.

[191] *International Amateur Free Agency & Bonus Pool Money*, MAJOR LEAGUE BASEBALL, http://m.mlb.com/glossary/transactions/international-amateur-free-agency-bonus-pool-money [https://perma.cc/6KWE-B7J6].

[192] *2019 NBA 2K League Draft: Four International Players Make The League*, ONE ESPORTS (Mar. 6, 2019), https://www.oneesports.gg/nba2k/2019-nba-2k-league-draft-four-international-players-make-the-league/ [https://perma.cc/6444-BUAJ].

[193] Mazique, *supra* note 85.

[194] For the 2019 NBA 2K League Draft, the League extended offers to 150 players. *See NBA 2K League Expansion*, *supra* note 98.

[195] *See* CARFAGNA, *supra* note 147, at 153; *see also* Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004).

E. Injury Grievances

Although NBA 2K players do not sustain many injuries, the League still has an injury policy in place.[196] For example, if a player suffers an injury, his or her NBA 2K team may designate him or her as "injured" and prevent him or her from playing.[197] Players are also required to provide accurate information to the team regarding injury, and in turn, all teams must accurately report any injury to the League.[198] This helps provide transparency throughout the League.

NBA 2K players also have provisions in their standard players contracts relating to injuries, which resemble those of players in the three Major Leagues.[199] For example, players are prohibited from engaging in certain "extreme activities."[200] This clause reduces the risk of injury by limiting dangerous activities. Even so, all NBA 2K player contracts are guaranteed against injury, meaning if a team terminates the contract of a player because of injury, the player will still receive his or her allotted salary.[201] This is much like the guarantees seen in most MLB and NBA contracts. Ultimately, the League has modeled its injury policy to that of America's three Major Leagues, despite injuries rarely occurring.

F. Intellectual Property Rights

The issues of intellectual property rights in the NBA 2K League can be complex based on the different rights and parties involved. Under copyright law, the game publisher—here, Take-Two—owns the copyright to the game that it creates or publishes, here, NBA 2K.[202] As a result, it has the right to control the reproduction, distribution, and licensing, among other rights, of its product at its discretion.[203] This is an aspect of esports unseen

---

[196] Telephone Interview, *supra* note 67.

[197] *Id.*

[198] *Id.*

[199] *Id.* For an analysis of the Uniform Player Contracts in the Major Leagues, see CARFAGNA, *supra* note 147, at 53.

[200] The UPC in the NFL, NBA, and MLB all have clauses that prohibited players from participating in certain ultrahazardous or dangerous activities. Specifically, § 5.b of the MLB UPC, § 12 of the NBA UPC, and § 3 of the NFL UPC. *See* MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT 340 (2017); NAT'L BASKETBALL ASS'N COLLECTIVE BARGAINING AGREEMENT A-11 (2017); Nat'l Football League Collective Bargaining Agreement 334 (2020).

[201] Telephone Interview, *supra* note 67.

[202] 17 U.S.C. § 102 (2018).

[203] 17 U.S.C. § 106 (2018).

in traditional sports. As mentioned previously, no person or entity owns baseball, football, or basketball, and therefore cannot prohibit another from establishing a respective sports league. This dynamic creates many differences vis-a-vis intellectual property rights.

Traditionally, because the game publisher creates the game, it owns all intellectual property rights in the game.[204] But the NBA 2K League is slightly different in that the League has broad intellectual property rights. If an esports league is not run by the game publisher, a league's rights will be dictated by the licensing agreement with the publisher.[205] Take-Two Interactive is the publisher of NBA 2K but, per the licensing agreement between the NBA and Take-Two, Take-Two relinquishes all game-related intellectual property rights to the League.[206] First, the League owns the rights to the gameplay.[207] With regard to game broadcasts, the League has struck a deal with Twitch, the preeminent streaming service for esports, for exclusive live streaming rights for all NBA 2K games in the United States.[208] While Twitch owns the right to broadcast the games, the League owns the rights to the footage.[209] Also, for the second season, the League expanded its international reach and partnered with Tencent, a Chinese technology conglomerate, to broadcast NBA 2K League games in China.[210] Still, the League owns the rights to the broadcast footage.[211] The NBA 2K League's practices resemble traditional media rights agreements. For example, the NFL sells the rights to broadcast NFL games to television networks such as CBS, Fox, ESPN, and NBC, but the NFL still owns the rights to the game footage.[212]

However, the licensing agreement executed between Take-Two and the League discussed above is not exclusive.[213] For that reason, Take-Two is not

---

[204] 17 U.S.C. § 102 (2018).

[205] Telephone Interview, *supra* note 67.

[206] *Id*.; *see also* Kohrman Jackson & Krantz LLP, *supra* note 87.

[207] Telephone Interview, *supra* note 67.

[208] Todd Spangler, *Twitch Locks Up NBA 2K League Exclusive Live-Streaming Esports Rights*, VARIETY (Apr. 18, 2018), https://variety.com/2018/digital/news/twitch-nba-2k-league-exclusive-esports-streaming-1202757037/ [https://perma.cc/4EYH-CRKH].

[209] Telephone Interview, *supra* note 67.

[210] *NBA 2K League, Tencent Sign Deal for Chinese Broadcasts*, ABC NEWS (July 23, 2019), https://abcnews.go.com/Entertainment/wireStory/nba-2k-league-tencent-sign-deal-chinese-broadcasts-64505975 [https://perma.cc/Y2BM-6FPB].

[211] Telephone Interview, *supra* note 67.

[212] *See* Jabari Young, *With Football Ratings on the Rise, NFL Officials Look to Raise TV Broadcast Fees on Multiyear Media Deals*, CNBC (Dec. 30, 2019), https://www.cnbc.com/2019/12/30/nfl-ratings-recovering-new-media-deals-could-be-on-the-2020-agenda.html [https://perma.cc/BG5N-GBZV].

[213] Telephone Interview, *supra* note 67.

prohibited from licensing the NBA 2K game to other parties for use in a competitive landscape. As a result, other NBA 2K leagues and tournaments may enter the market to compete with the currently existing League. In fact, in September 2019, the NBA and the NBPA partnered with the Esports League ("ESL") to create the NBA 2K20 Global Championship.[214] This is a global head-to-head NBA 2K tournament separate from the NBA 2K League that ran from October 2019 to February 2020.[215]

The League also owns the intellectual property rights to the logos created by the League.[216] When the League was established, it created a new logo to differentiate itself from the rest of the NBA properties, and each individual team also created a distinct logo for itself.[217] As in traditional sports, the League owns the NBA 2K League logo and the right to monetize the logos created and owned by each of the teams, while the individual teams own their own logos.[218] The League's management of its marks, resembling that of America's three Major Leagues, seeks to promote the League and generate revenue for it.

As discussed in sections II.C.5 and III.B above, the League allows players to license their individual intellectual property rights. These rights, however, extend to attributes distinct to the players themselves—namely, their gamertags. Unlike traditional sports, where players are identified by their names, NBA 2K players are identified by their gamertags. A gamertag is essentially an in-game name that a player creates on his or her behalf. For example, two rostered players on Cavs Legion GC were "All Hail Trey" and "Lykapro."[219] But this has not gone without controversy. Sometimes, gamertags are inappropriate or offensive, and if the League believes they are, it can veto them.[220] The League also has the right to veto gamertags that resemble any current or former NBA players.[221] Additionally, NBA 2K players were prohibited from wearing the number of any rostered player on the NBA affiliated team.[222] For example, a player on Lakers Gaming, the Los Angeles Lakers esports team, could not suit up in a number 23 jersey

---

[214] *2K announces inaugural NBA 2K20 Global Championship*, NAT'L BASKETBALL ASS'N (Sept. 17, 2019), https://pr.nba.com/2k-announces-inaugural-nba-2k20-global-championship/ [https://perma.cc/6ZH2-GZLP].

[215] *Id.*

[216] Telephone Interview, *supra* note 67.

[217] *See League Info*, *supra* note 56.

[218] Telephone Interview, *supra* note 67.

[219] Roster, CAVS LEGION, https://cavslegion.nba.com/roster/ [https://perma.cc/P2T8-M5N5].

[220] Telephone Interview, *supra* note 67.

[221] *Id.*

[222] *Id.*

because LeBron James wears that number for the Los Angeles Lakers. The League also controls the players' marketability.[223] As stated, the League restricts individual players from capitalizing on their rights of publicity through advertisement and sponsorship preemption to the point where the rights are virtually hollow. As a result, the majority of NBA 2K players have failed to capitalize on their individual publicity rights, but if the League continues to garner strength and popularity, players may be able to become marketable.

Finally, as stated in Section II.C.2, NBA 2K players compete as avatars instead of as current or former NBA players. While it may seem as though the League is doing this to create its own marketable players, the reason comes back to collectively bargained policies. The NBA 2K game played by the League is a different model than one a customer would play if he or she bought NBA 2K from the store.[224] The group licensing rights that Take-Two secures when creating NBA 2K do not extend to the model of the game used in the League. Thus, if the NBA 2K League wanted to use the likenesses of current or former NBA players, they would have to pay the National Basketball Players Association for those rights under the group licensing program of the Collective Bargaining Agreement.[225] To avoid this cost, the League decided not to license the likenesses of current and former NBA players.[226]

G. Franchise Relocation and Expansion

While the NBA 2K League is still in its infancy stages, expansion has occurred rapidly, while relocation has not yet occurred.[227] The inaugural NBA 2K season saw 17 teams take the court. The entrance fee was $750,000 for three years of participation in the League.[228] Following the first year, four more teams joined the League at the same entrance fee.[229] The League's 22nd and 23rd teams have entered the League for the its third season.[230] The League seems to be more focused on expansion rather than relocation. Eventually, the League hopes to have all NBA teams participate

---

[223] *Id.*
[224] Telephone Interview, *supra* note 67.
[225] *Id.*
[226] Kohrman Jackson & Krantz LLP, *supra* note 87.
[227] *See supra* Section II.C.1.
[228] The players' salaries are paid by the League from these fees. Telephone Interview, *supra* note 67.
[229] *See supra* Section II.C.1.
[230] *Id.*

in the League, each with an esports team of its own.[231] What's more, the NBA intends to grow the League internationally with teams in different countries competing in international competitions. In fact, the League took its first step into international expansion when it partnered with Gen G., an esports organization based in Shanghai, to create its first international and 23rd overall team to compete in the League.[232] International competition is not uncommon in the esports industry. Esports have a more global presence than traditional American sports, so the market is more prime for international expansion.[233]

The unique structure of the League affects team relocation and expansion. As stated, all NBA 2K teams, except one, are owned by an NBA-affiliated team.[234] Because of this, the League has found itself primarily limited to domestic expansion. And, with regard to relocation, almost all of the League teams are tied to their respective NBA affiliate.[235] As a result, League teams will most likely have trouble relocating to another city. Using the Cleveland Cavaliers and Cavs Legion GC as an example, Cleveland Cavaliers and Cavs Legion GC owner Dan Gilbert is unlikely to relocate Cavs Legion GC to another city as long as the Cavaliers play in Cleveland. League teams will be tied to their NBA affiliate and follow it wherever it goes.

Questions surround the relocation process for a League team. For example, if an NBA affiliate and the NBA 2K team try to relocate but the League does not let them, could the two teams possibly challenge both the NBA and the League on antitrust grounds? Could the NBA 2K team stay if the NBA team relocates? The questions to these answers are not yet known. Sometime in the future, however, these questions could be answered, developing a body of law around this area of esports.

---

[231] *See* Kohrman Jackson & Krantz LLP, *supra* note 87.

[232] Kuchefski, *supra* note 63; While international expansion has been discussed with regard to traditional sports, no international teams outside Canada participate in the NFL, MLB, or NBA. Also, while the three Major Leagues engage in activities and initiatives in other countries, and are even affiliated with sports leagues in other countries, an NFL, MLB, or NBA franchise has not been established in those countries.

[233] It is generally understood that esports has hundreds of millions of viewers worldwide which outshines traditional American sports, such as football, viewership numbers overseas. *See* ROUNDHILL INVESTMENTS, *Esports Viewership vs. Sports in 2019*, ROUNDHILL BLOG, https://www.roundhillinvestments.com/blog/esports-viewership-vs-sports [https://perma.cc/8AYZ-XJUN].

[234] *See supra* Section II.C.1.

[235] *See supra* Section II.C.1.

IV. CONCLUSION

The world of esports is developing exponentially. A recent report projected that the esports industry is likely to reach three billion dollars by 2022.[236] To capitalize on this popularity, MLB, the NFL, and the NBA have each established an esports league. The MLB China eSports League is a China-based esports league that will see players compete on MLB The Show. The NFL partnered with Electronic Arts to establish a series of tournaments called the Madden Championship Series, which is run by EA's Competitive Gaming Division. Lastly, The NBA has taken the most aggressive approach to esports by creating a league, in connection with Take-Two Interactive, and managing the entire operation.

While the development and sophistication of these respective leagues differ greatly, core similarities exist. The most important similarities, and yet also some of the biggest unknowns, are the legal issues surrounding each of the leagues. The legal landscape of esports has yet to develop, but America's three Major Leagues help explain the issues that may face these esports leagues. Notably, a dissection of the NBA 2K League illuminates the potential issues and solutions confronted when forming and developing an esports league, including those related to Commissioner and League Authority; Uniform Player Contracts; Antitrust Challenge(s); Age Eligibility Restrictions; Injury Grievances; Intellectual Property Rights; and Franchise Relocation and Expansion.

---

[236] Darren Heitner, *Goldman Sachs Says Media Rights Will Boost Esports Industry To $3B In Revenue By 2022*, THE SPORTS BIZ (Nov. 9, 2018), https://www.thesports.biz/goldman-sachs-esports-report/ [https://perma.cc/K4RV-LF7D].

JSEL Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

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

Marc Edelman* & Richard Karcher**

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

* Professor of Law, Zicklin School of Business, Baruch College, City University of New York. Professor Edelman may be reached by email at Marc@MarcEdelman.com or MarcEdelman@aol.com.

** Associate Professor, Eastern Michigan University. Professor Karcher may be reached by email at rkarcher@emich.edu.

[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

---

[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

---

[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.

---

[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.

---

[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

---

[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:

---

[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

---

[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

---

[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]

---

[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

---

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.

---

[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

---

[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]

---

[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

---

[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

---

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-

---

"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

---

[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-

---

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.

---

[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].

JSEL Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Well-Intentioned but Counterproductive: An Analysis of the NFLPA's Financial Advisor Registration Program*

Ross N. Evans**

ABSTRACT

In an October 17, 2019 story for *The Athletic*, Alicia Jessop and Daniel Kaplan reported that the National Football League Players Association ("NFLPA") was, for the first time, registering institutions in its Financial Advisor Registration Program ("Registration Program").[1] This announcement represented the latest in a series of changes[2] to the Registration Program since its launch in 2002.[3]

---

* An earlier draft of this Article won a 2020 Paul C. Weiler Writing Prize at Harvard Law School. Any errors or oversights are the author's.

** The author received his J.D., *cum laude*, from the Harvard Law School in May 2020. He received his B.S. from Cornell University in May 2014, ranking first (tied with one other student) in the School of Industrial & Labor Relations.

The author thanks: *Sarah Edwards* and *Sameer Aggarwal* for their shared commitment to making JSEL Volume 11 a success, their incisive editing, and their friendship throughout law school; *Ryan Gribbin-Burket* for his indefatigable commitment and all-around excellence as this Article's Senior Article Editor; *Alex Blutman*, *Becky Hval*, and *Eli Nachmany* for their superb and outsized editing contributions; *Ali Nayfeh*, *John Ellis*, *Jonathan Kuang*, *Kimberly Everett*, and *Larson Ishii* for their conscientiousness and diligence as editors; and *Professor Peter Carfagna* for his continued support and mentorship.

[1] *See* Alicia Jessop & Daniel Kaplan, *NFLPA brings Goldman Sachs into fold to aid players as part of work stoppage planning*, ATHLETIC (Oct. 17, 2019), https://theathletic.com/1296300/2019/10/17/nflpa-brings-goldman-sachs-into-fold-to-aid-players-as-part-of-work-stoppage-planning/ [https://perma.cc/UZD9-LBAY].

[2] *See infra* Section I.B.

[3] *See* Christopher R. Deubert, I. Glenn Cohen & Holly Fernandez Lynch, *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, 7 HARV. J. SPORTS & ENT. L. (SPECIAL ISSUE) 1, 267 (2016) ("[T]he

This Article seeks to evaluate the Registration Program comprehensively. Part I outlines the Registration Program, detailing its origins and examining its evolution over its eighteen-year history. Part II offers a critical analysis of the Registration Program. More specifically, it argues that the Registration Program has failed to protect players in three main ways: first, by giving players a misleading sense of trust (which can ultimately facilitate players' exploitation); second, by potentially damaging—rather than improving—players' likelihood of retaining an ethical, qualified financial advisor; and third, by failing to ensure that players victimized by Registration Program financial advisors ("Registered Advisors") can recover their losses. Part III recounts the Article's main points, concluding that the Registration Program—though well-intentioned—is ultimately counterproductive.

I. The Origins and Evolution of the Registration Program

A. Origins of the Registration Program

In its February 11, 2002 investigative cover story, *U.S. News & World Report* analyzed more than twenty investment schemes that caused catastrophic losses for National Football League ("NFL") players including Fred Taylor ($3.6 million lost), Robert Brooks ($2.5 million lost), Simeon Rice ($2.4 million lost), Eric Dickerson ($1.8 million lost), Antoine Winfield ($1.35 million lost), and Ike Hilliard ($1.1 million lost).[4] While perhaps shocking to some, this story could not have surprised the NFLPA, as the union had recently reached similar conclusions in its own in-depth investigation, finding that seventy-eight NFL players suffered at least $42 million in fraud-related losses from 1999 to 2002.[5] Even worse, then-NFLPA Executive Director Gene Upshaw believed that $42 million in losses represented only "the tip of the iceberg" because players were often "too embarrassed to report" losses from fraud.[6]

To protect players from similar fraud and exploitation in the future, the NFLPA launched its Financial Advisor Registration Program in 2002,

---

NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . ." (endnotes omitted)).

[4] *See* Edward T. Pound & Douglas Pasternak, *Money Players*, U.S. News & World Rep., Feb. 11, 2002, at 30.

[5] *See id.*

[6] *Id.*

becoming (and remaining) the only major sports union to regulate players' financial advisors.[7]

1. Agent Certification Versus Financial Advisor Registration

The creation of the Registration Program was not the first time the NFLPA spearheaded an initiative to regulate those offering professional services to its player-members: in 1983, the NFLPA implemented an agent-certification process ("Certification Program"), becoming the first major sports union to regulate players' contract-negotiation agents ("Certified Agents").[8] Other major sports unions—the Major League Baseball Players Association, the National Basketball Players Association, and the National Hockey League Players Association—soon followed suit and today maintain their own certification programs.[9] Similarly, in 1999, the NFLPA became the first union to mandate that its current and prospective Certified Agents pass a written examination to maintain Certification Program eligibility.[10]

Both these examples, however, represent regulations imposed on players' *agents*. Because the NFLPA's Registration Program regulates players' *financial advisors*—not agents—it differs from the Certification Program in at least two important respects. First, the "NFLPA has the legal authority to certify, regulate and discipline"[11] Certified Agents—unlike financial advisors—because it "is the exclusive collective bargaining representative of

---

[7] *See* Deubert, Cohen & Fernandez, *supra* note 3, at 267. ("[T]he NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . . The NFLPA's financial advisor program was, and remains, the only one of its kind among the major American sports unions . . . ." (endnotes omitted)).

[8] *See id.* at 243 ("The NFLPA has been certifying contract advisors [i.e., agents] in at least some fashion since 1983."); Lori J. Lefferts, *The NFL Players Association's Agent Certification Plan: Is It Exempt from Antitrust Review?*, 26 ARIZ. L. REV. 699, 699–700 (1984) ("The NFLPA was the first sports union to impose a formal method of regulating the conduct of agents representing its players.").

[9] *See* ROBERT H. RUXIN, AN ATHLETE'S GUIDE TO AGENTS 108–109 (5th ed. 2010).

[10] *See id.* at 110 ("The NFLPA was the first union to require both entering and active agents to pass a written exam."); DOYICE J. COTTON & JOHN T. WOLOHAN, LAW FOR RECREATION AND SPORT MANAGERS 660 (3d ed. 2003) ("In 1999 . . . the NFLPA started testing anyone who registers to become an NFL player's agent . . . . The NFLPA also requires current agents to take that same test every year . . . .").

[11] Deubert, Cohen & Fernandez, *supra* note 3, at 267.

NFL players pursuant to Section 9(a) of the National Labor Relations Act"[12] and therefore "may delegate some of its exclusive representational authority."[13] By contrast, the NFLPA lacks the legal authority to regulate financial advisors. As explained in a Harvard University report:

> Neither the NLRA nor any other law confers any status on the NFLPA that gives it the right to regulate financial advisors. More specifically, financial advisors are not involved in the labor dynamics that create the NFLPA's legal authority over contract advisors, *i.e.*, financial advisors do not negotiate contracts and generally have no contact with the NFL or NFL clubs.[14]

Because the NFLPA lacks the legal authority to regulate financial advisors, its Registration Program—unlike its Certification Program—must operate on a voluntary basis.[15] This means that, unlike non-Certified agents, non-Registered financial advisors can still work with players, and players can freely retain a non-Registered financial advisor.[16]

Second, the Registration Program, by regulating financial advisors, maintains much closer proximity to, and potentially raises more issues with, securities law than the Certification Program. As explored more fully below, the Registration Program's adjacency to securities law presented a significant enough legal concern that the NFLPA contacted the Securities and Exchange Commission ("SEC") a month before launching the Registration Program to request a "No-Action Letter" confirming that operating the Registration Program would neither expose the union to regulation under

---

[12] Black v. Nat'l Football League Players Ass'n, 87 F. Supp. 2d 1, 2 (D.D.C. 2000).

[13] 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).

[14] Deubert, Cohen & Fernandez, *supra* note 3, at 267.

[15] Indeed, unlike the NFLPA's regulation of agents—which is protected from antitrust scrutiny by a statutory labor law exemption—if the NFLPA attempted a non-voluntary regulation of financial advisors, it would almost certainly be found to violate the Sherman Antitrust Act. *See, e.g.*, *Collins*, 850 F. Supp. 1468 at 1475 (finding that if not for Sherman Act exemption, "then all collective bargaining by labor unions would be a violation of the antitrust laws, because in all collective bargaining other potential bargaining agents are entirely excluded from the relevant market. As the exclusive representative for all of the NBA players, 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.").

[16] *See* Deubert, Cohen & Fernandez, *supra* note 3, at 268 ("[W]hile contract advisors [i.e., agents] are *required* to be certified by the NFLPA to perform their duties, financial advisors are under no obligation to register with the NFLPA.").

the Investment Advisers Act of 1940 nor lead the SEC to take enforcement action against the NFLPA or participating financial advisors.[17]

2. The NFLPA's Request to the SEC for a No-Action Letter

a. Overview of the Planned Registration Program

The NFLPA detailed relevant facts and background information about its plans for the Registration Program in its January 2002 request to the SEC for a No-Action Letter, offering preliminary insight into the Registration Program's fundamental tenets and policies:

- **the impetus for the Registration Program**: a "history of [NFL] players being systemically defrauded," including seventy-eight players losing $42 million from fraud over "the past three years alone";[18]
- **the goal of the Registration Program**: "to protect former, current and prospective NFL players . . . from fraud by certain 'financial advisers'";[19]
- **how the Registration Program plans to achieve its goal**: by providing players with a "continuously updated"[20] list of NFLPA-Registered Financial Advisors, featuring "both individuals and companies"[21] whom the NFLPA (i) has "pre-screen[ed] . . . as to their character, reputation and integrity"[22] (among other minimum qualifications) and (ii) will continue to monitor to ensure ongoing compliance with the Registration Program;[23]
- **the process for becoming a Registered Advisor**: any applicant may become a Registered Advisor if he or she (i) meets the Registration Program's "published . . . 'eligibility requirements,'"[24] (ii) pledges "to comply with the [Registration] Program's published"

---

[17] *See* National Football League Players Association, SEC No-Action Letter, 2002 WL 100675 (Jan. 25, 2002) [hereinafter SEC No-Action Letter to NFLPA]; *see also infra* Section I.A.2.

[18] SEC No-Action Letter to NFLPA, *supra* note 17, at *8.

[19] *Id.* at *1.

[20] *Id.* at *3.

[21] *Id.* at *1.

[22] *Id.* at *25.

[23] *See id.* at *2.

[24] *Id.*

rules for Registered Advisors,[25] and (iii) pays a $1,000 initial application fee and $500 first-year annual fee;[26]

- **the Registration Program's eligibility requirements**: among other things, a bachelor's degree, designated professional licensing, at least three years of relevant professional experience, and a record clear of disqualifying conduct (for example, fraud-related crimes, fraud-related civil judgments, felonies within the past decade, regulatory discipline, or insolvency within the past seven years);[27]
- **the Registration Program's rules for Registered Advisors**: among other things, complying with relevant regulations, laws, licensing rules, and the Registration Program's disciplinary processes; maintaining sufficient professional liability insurance or fidelity bonding; informing "the NFLPA of any change in professional status"; and continuing to "compl[y] with fiduciary standards."[28]

b. The Legal Issues on Which the NFLPA Sought SEC Guidance

After detailing its vision and plans for the Registration Program, the NFLPA dove deeper into the legal issues in its No-Action Letter request, seeking guidance from the SEC on two issues relating to the Registration Program and the Advisers Act.[29]

First, the NFLPA requested that the reviewing SEC staff member "concur with [the NFLPA's] view that the NFLPA would not be an investment adviser as defined in Section 202(a)(11) of the [Advisers] Act as a result of its operation of the [Registration] Program."[30] Under 202(a)(11) of the Advisers Act, one is an investment adviser if he or she (i) provides securities advice (ii) for compensation and (iii) "is engaged in the business of providing these services."[31] In response, the SEC staff member focused her analysis on the first prong of the three-part test: whether the NFLPA would be providing securities advice by operating the Registration Program.[32] In previous guidance, the SEC had interpreted this first prong broadly, stating that "a person providing advice to another person as to the selection or

---

[25] *Id.*
[26] *See id.* at *12.
[27] *See id.* at *9–*12.
[28] *See id.* at *2.
[29] *See id.* at *23.
[30] *Id.* at *8.
[31] *See id.* at *5.
[32] *See id.* at *4–*6.

retention of an investment adviser or advisers, under certain circumstances, *would* be deemed to be 'advising' others within the meaning of section 202(a)(11)."[33] And here, the SEC staff member observed that NFLPA would be doing exactly that through its proposed Registration Program:

> [G]iv[ing] advice to players concerning the selection or retention of an investment adviser . . . because the NFLPA will be implicitly recommending that players use [Registered Advisors] . . . rather than [non-Registered financial advisors] . . . and will be implicitly suggesting that players not use [Registered Advisors] who have been disciplined under the Program.[34]

Yet the SEC staff member ultimately concluded that "the NFLPA would *not* be 'advising' others through the [Registration] Program within the meaning of section 202(a)(11) and, therefore, would *not* be an investment adviser under the [Advisers] Act."[35] While the staff member based her conclusion "upon all of the facts and representations set forth in [the NFLPA's] letter,"[36] she stated that it hinged "particularly" on the NFLPA's representations that the Registration Program, among other things, would *not*:

- "recommend any [Registered Advisor] over any other [Registered Advisor], other than indicating whether a [Registered Advisor] has been subject to disciplinary action for violating Program regulations";[37]
- use "highly selective" criteria for its eligibility requirements because "highly selective" criteria would be less likely to yield the desired result of "a broad cross-section and large number of [Registered Advisors]";[38]
- consider a Registration Program applicant's financial performance;[39]
- regulate a Registered Advisor's financial performance;[40]
- "advise players as to the merits or shortcomings of any particular [Registered Advisor]";[41]

---

[33] *See id.* at *5 (emphasis added).
[34] *See id.*
[35] *Id.* (emphasis added).
[36] *Id.*
[37] *Id.* at *6.
[38] *See id.*
[39] *See id.*
[40] *See id.*
[41] *Id.*

- prohibit players from retaining non-Registered financial advisors or have any "role in the dealings or transactions between players and [Registered Advisors], except in connection with monitoring . . . compliance with [Registration] Program regulations and disciplining [Registered Advisors] who violate [Registration] Program regulations";[42]
- "tailor[ ]" its list of Registered Advisors "to particular players" or try "to match particular [Registered Advisors] to particular players";[43]
- earn profits for the NFLPA or charge non-flat registration fees;[44] or
- receive applications from anyone who is "affiliated in any way" with the NFLPA.[45]

Receiving this concurrence from the SEC was critical. If the SEC had not concurred, then the NFLPA could have faced SEC regulation (and future liability, potentially) by operating the Registration Program, perhaps damaging the Registration Program's economic feasibility.

Second, the NFLPA requested that the reviewing SEC staff member:

> [C]onfirm that [the staff] would not recommend enforcement action to the Commission under Section 206(4) of the [Advisers] Act and Rule 206(4)-3 thereunder against the NFLPA and investment advisers participating in the [Registration] Program if those investment advisers make cash payments to the NFLPA and do not treat the NFLPA as a solicitor for purposes of Rule 206(4)-3.[46]

In other words, the NFLPA sought assurance that an investment adviser could pay Registration Program fees to the NFLPA without either party facing SEC enforcement for violating any of the myriad requirements of Rule 206(4)-3.

In the end, even though "[p]roviding a pre-screened list of [Registered Advisors] to players could be viewed as referring clients and prospective clients,"[47] the SEC staff member concluded that it:

> [W]ould not recommend enforcement action . . . under section 206(4) . . . and rule 206(4)-3 . . . against the NFLPA and investment advisers participating in the [Registration] Program if those investment

---

[42] *See id.*
[43] *Id.*
[44] *See id.*
[45] *See id.*
[46] *Id.* at *8.
[47] *Id.* at *7.

> advisers make cash payments to the NFLPA as described in your letter and do not treat the NFLPA as a solicitor for purposes of rule 206(4)-3.[48]

In her analysis, the SEC staff member cited the NFLPA's "particular" representations that:

- "the [Registration] Program is designed to help players locate investment advisers, rather than serving as a means of soliciting clients for specific investment advisers";[49]
- players would be "provided with a list of pre-screened investment advisers to choose from, rather than . . . steered toward any one investment adviser";[50] and
- "fees paid by the investment advisers to the [Registration] Program are flat fees and are not related to the number of referrals to or clients obtained by the investment adviser, and that such fees are disclosed to the players."[51]

Receiving a concurrence from the SEC on this issue was also pivotal for the NFLPA. Without it, the NFLPA could not have charged a Registration Program fee to investment advisers—which the NFLPA had planned to do to offset the Registration Program's operational costs[52]—without potentially subjecting itself and participating investment advisers to either the costs of compliance with Rule 206(4)-3's extensive requirements or the risk of SEC enforcement. Either of those outcomes could have changed the NFLPA's calculus around the Registration Program's viability.

c. Implications for the NFLPA and Its Registration Program

By addressing these two issues, the SEC's No-Action Letter essentially greenlit the Registration Program, which the NFLPA then launched later in

---

[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See id.* at *12 ("The applicant (or the applicant's firm) must pay the NFLPA the required application and annual fees as established from time to time by the NFLPA. The initial application fee shall be $1,000 and the annual fee for the first year shall be $500 per individual applicant. A financial advisor will pay an additional annual fee after the first year. An additional fee may be charged to an applicant who the NFLPA determines requires further investigation prior to acceptance in, or once admitted to, the Program. *All the fees collected by the NFLPA will be used exclusively to defray the costs of the non-profit Financial Advisors Program*." (emphasis added)).

2002.[53] Yet the SEC staff member significantly caveated her favorable response on both issues in the No-Action Letter. Indeed, on the first issue, she stated: "Our position is based upon all of the facts and representations set forth in [the NFLPA's] letter."[54] And on the second issue, she stated:

> Because [our] position is based on all of the facts and representations made in your letter, you should note that any different facts or circumstances might require a different conclusion. Further, this position expresses our position only with respect to enforcement action, and does not express any legal conclusion on the issue presented.[55]

The SEC also caveats its No-Action Letters categorically on its website: "SEC staff reserves the right to change the positions reflected in prior no-action letters."[56] So while the SEC's No-Action Letter significantly mitigated the securities-law risk facing the Registration Program, it did not altogether eliminate any possibility of future securities law conflict, particularly if the NFLPA were to promulgate Registration Program provisions that differed from those detailed in its No-Action Letter request.[57]

B. Evolution of the Registration Program

1. The Registration Program's Code

Since its 2002 launch, the Registration Program has administered the NFLPA's Regulations and Code of Conduct Governing Registered Player

---

[53] *See* Deubert, Cohen & Fernandez, *supra* note 3, at 267 ("[T]he NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . ." (endnotes omitted)).

[54] SEC No-Action Letter to NFLPA, *supra* note 17, at *5.

[55] *Id.* at *7.

[56] *See No Action Letters*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/fast-answers/answersnoactionhtm.html [https://perma.cc/86BQ-HLHY].

[57] *See* Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1042 (1986) ("The Commission has repeatedly cautioned that it is not bound by staff no-action letters. As a practical matter, however, the recipient of a favorable no-action response can be fairly certain that the assurance provided by the letter will be treated as binding by the Commission, although the estoppel effect of a no-action letter has not been judicially determined. *This is true, of course, only if the facts and circumstances of the transaction actually implemented are as were represented in the request*. . . . [And] a favorable no-action letter does not insulate the recipient from a private litigant who wishes to argue that the same transaction constitutes a violation of the law." (emphasis added) (footnotes omitted)).

Financial Advisors ("Code"),[58] which "set[s] forth the [Registration] Program in detail."[59] And while the NFLPA has amended the Code several times since the Registration Program's incipience,[60] today's Code remains similar overall to the policies detailed in the No-Action Letter.

a. Amendments to the Registration Program's Code

At some point before June 2008, the NFLPA increased the required relevant work experience for Registered Advisors from three to five years.[61] The union implemented most other major amendments to the Code, however, after 2011.

Indeed, the NFLPA tightened the Registration Program's Code in 2012 by:

- increasing the minimum relevant work experience for Registered Advisors from five years to eight years;[62]
- mandating Registered Advisors maintain at least $4 million of professional liability insurance or fidelity bonding;[63]
- requiring Registered Advisors to indemnify the NFLPA if they face a lawsuit from a player-client;[64]
- inflating the fee for first-time Registered Advisors from $1,500 to $2,500;[65] and

---

[58] *See* Deubert, Cohen & Fernandez, *supra* note 3, at 267 ("[T]he NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . ." (endnotes omitted)).

[59] NFLPA, NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors 3 (Oct. 2017) [hereinafter 2017 NFLPA Registered Advisors Code of Conduct], https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/FinancialAdvisors/Final%20Financial%20Advisors%20Regs%20October%2024.pdf [https://perma.cc/TD72-ZZVT].

[60] *See* Deubert, Cohen & Fernandez, *supra* note 3, at 268 ("The Financial Advisor Regulations have been amended from time to time . . . .").

[61] *See* Mike Tierney, *Hedge Fund Manager's Death Does Not Halt Suit Against N.F.L. and Players Union*, N.Y. Times (June 2, 2008), https://www.nytimes.com/2008/06/02/sports/football/02wright.html [https://perma.cc/MH5P-CXA5] ("The only change in criteria since the program's inception is that advisers must have five years of experience, above the original minimum of three.").

[62] *See* Liz Mullen, *NFLPA reopens adviser program*, Sports Bus. J. (Aug. 6, 2012), https://www.sportsbusinessdaily.com/Journal/Issues/2012/08/06/Labor-and-Agents/NFLPA-advisers.aspx [https://perma.cc/W3EW-RA3D].

[63] *See id.*

[64] *See id.*

[65] *See id.*

- tripling the fee for renewing Registered Advisors from $500 to $1,500.[66]

Four years later, in 2016, the NFLPA broadened its definition of "Applicants Deemed Unqualified" for the Registration Program by disqualifying any applicant who has "breached the payment/repayment terms of a promissory note, loan agreement or [has] otherwise been in default on any financial instrument or obligation within the last ten years."[67]

And most recently, in 2017, the NFLPA amended the Registration Program's Code by:

- requiring new Registration Program applicants to be either a Certified Financial Planner or a Chartered Financial Analyst;[68]
- mandating existing Registered Advisors become either a Certified Financial Planner or a Chartered Financial Analyst by November 1, 2020; and[69]
- establishing that Registered Advisors must maintain *both* professional liability insurance *and* fidelity bonding at minimum levels, determined by a Registered Advisor's assets under management.[70]

---

[66] *See id.*

[67] *Compare* NFLPA, NFLPA REGULATIONS AND CODE OF CONDUCT GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS 12 (June 2016) [hereinafter 2016 NFLPA REGISTERED ADVISORS CODE OF CONDUCT], https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/FinancialAdvisors/Regulations%20Revised%206.10.2016.pdf [https://perma.cc/JC6F-Y5HV] (includes quote above; includes section entitled "Breach of Promissory Note or Default on Financial Instrument"), *with* NFLPA, NFLPA REGULATIONS AND CODE OF CONDUCT GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS (June 2012) [hereinafter 2012 NFLPA REGISTERED ADVISORS CODE OF CONDUCT], http://docplayer.net/11110941-As-amended-in-march-of-2012-and-edited-in-june-of-2012.html [https://perma.cc/Y9QP-B4PJ] (does not include quote above; does not include section entitled "Breach of Promissory Note or Default on Financial Instrument").

[68] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 7.

[69] *See id.* Reportedly, the NFLPA asked for SEC approval on this rule change, presumably to avoid violating the SEC's 2002 No-Action Letter on the Registration Program. *See* Marus DiNitto, *NFL Players Association Cracks Down on "approved" Advisor List*, ADVISORHUB (July 24, 2017), https://advisorhub.com/nfl-players-association-cracks-approved-advisor-list/ [https://perma.cc/AWK9-DTBE] ("The [NFLPA] board in March proposed a rule that would restrict the list to candidates that have Certified Financial Planner or Chartered Financial Analyst designations, according to Dana Hammonds, senior director of player affairs and development at NFLPA. *The rule is pending approval from the Securities and Exchange Commission.*" (emphasis added)).

[70] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 8; *see also infra* Table 1; Section I.B.1.b.

b. Current State of the Code

Though its provisions have changed over the years, the Code has served the same four main functions since 2002.[71] First, the Code states that participation in the Registration Program is voluntary.[72] As explained in Section I.A.1, unlike non-Certified agents (who are legally precluded from representing players), non-Registered financial advisors can financially advise players, and players can freely hire non-Registered financial advisors.[73] And though the NFLPA prohibits its Certified Agents from referring player-clients to non-Registered financial advisors, this stems not from the Code governing Registered Advisors, but from the NFLPA's rules for Certified Agents.[74]

Second, the Code establishes the application and eligibility requirements for becoming a Registered Advisor.[75] Today, these requirements include, among other things:

- a bachelor's degree;[76]
- eight years of relevant work experience;[77]
- certification as a Certified Financial Planner or Chartered Financial Analyst;[78]
- a record clear of criminal, civil, or regulatory fraud;[79]
- a record clear of pending felony indictments and felonies convictions within the past decade;[80]

---

[71] *See generally* 2017 NFLPA Registered Advisors Code of Conduct, *supra* note 59; 2016 NFLPA Registered Advisors Code of Conduct, *supra* note 67; 2012 NFLPA Registered Advisors Code of Conduct, *supra* note 67; SEC No-Action Letter to NFLPA, *supra* note 17.

[72] *See* 2017 NFLPA Registered Advisors Code of Conduct, *supra* note 59, at 6.

[73] *See supra* Section I.A.1; Deubert, Cohen & Fernandez, *supra* note 3, at 268 ("[W]hile contract advisors [i.e., agents] are required to be certified by the NFLPA to perform their duties, financial advisors are under no obligation to register with the NFLPA.").

[74] *See* NFLPA, Regulations Governing Contract Advisors 8–10 (Aug. 2016) [hereinafter Regulations Governing Contract Advisors], https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/RegulationsAmendedAugust2016.pdf [https://perma.cc/Z4VW-YPMV].

[75] *See* 2017 NFLPA Registered Advisors Code of Conduct, *supra* note 59, at 6–11.

[76] *See id.* at 6.

[77] *See id.*

[78] *See id.* at 7.

[79] *See id.* at 9–10.

[80] *See id.* at 10.

- a record clear of insolvency (within the past seven years) and loan defaults (within the past decade);[81]
- an application without misrepresentations;[82]
- a successful background check;[83]
- a $2,500 fee for new applicants ($500 of which is refundable if the applicant is rejected);[84]
- a $1,500 fee for renewal applicants ($500 of which is refundable if the applicant is rejected);[85] and
- both professional liability insurance and fidelity bonding, at minimum levels determined by a Registered Advisor's assets under management, as shown in Table 1 below.[86]

TABLE 1[87]

Total Assets Under Management	Required Limits: Professional Liability (E&O)	Required Limits: Crime/Fidelity Bond
$1 Billion+	$10,000,000 Occurrence/ $10,000,000 Policy Aggregate	$10,000,000 Occurrence/ $10,000,000 Policy Aggregate
$500,000,000– $999,999,999	$5,000,000 Occurrence/ $5,000,000 Policy Aggregate	$5,000,000 Occurrence/ $5,000,000 Policy Aggregate
$250,000,000– $499,999,999	$3,000,000 Occurrence/ $3,000,000 Policy Aggregate	$3,000,000 Occurrence/ $3,000,000 Policy Aggregate
$0– $249,999,999	$2,000,000 Occurrence/ $2,000,000 Policy Aggregate	$2,000,000 Occurrence/ $2,000,000 Policy Aggregate

Third, the Code defines the rules, requirements, code of conduct, and dispute-resolution procedures that govern Registered Advisors.[88] Today, these rules mandate that Registered Advisors, among other things:

- send quarterly financial statements to player-clients;[89]

---

[81] *See id.* at 11.

[82] *See id.*

[83] *See Apply to Be a Financial Advisor*, NFLPA, https://nflpa.com/financial-advisors/new-applications [https://perma.cc/SV37-VCNR].

[84] *See id.*

[85] *See Financial Advisor Renewal Applications*, NFLPA, https://www.nflpa.com/financial-advisors/renewal-applications [https://perma.cc/ZMT8-NR5K].

[86] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 8.

[87] *See id.* (publishing original version of this table).

[88] *See generally* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59.

[89] *See id.* at 14.

- notify player-clients and the NFLPA within thirty days of violating the Code or enduring a professional-status change (for example, termination, notice of arbitration or other action, bankruptcy);[90]
- assume a fiduciary duty[91] and act in player-clients' best interests at all times;[92] and
- comply with the Registration Program's procedures for arbitration and discipline.[93]

Fourth, the Code clarifies that the NFLPA neither endorses nor makes any representations about any Registered Advisors, disclaiming any liability and responsibility for their conduct.[94] Relatedly, the Code also forbids Registered Advisors from implying that their inclusion in the Registration Program suggests integrity or expertise, let alone any sort of NFLPA endorsement.[95]

2. Registered Advisors' Benefits from the Registration Program

The benefits enjoyed by Registered Advisors seem to have changed little throughout the Registration Program's history. For example, before launching the Registration Program, the NFLPA made known its intent to prohibit its Certified Agents from referring player-clients to non-Registered financial advisors,[96] effectively monopolizing Certified Agents' financial-advisor referrals for those in the Registration Program—a significant competitive advantage. Other tangible benefits enjoyed by Registered Advisors include:

- a listing on the NFLPA's searchable, password-protected online database[97] that prospective players, former players, active players, Certified Agents,[98] and Registered Advisors can access;[99]

---

[90] *See id.*
[91] *See id.* at 18.
[92] *See id.* at 16.
[93] *See id.* at 14.
[94] *See id.* at 19–20.
[95] *See id.* at 17.
[96] *See* SEC No-Action Letter to NFLPA, *supra* note 17, at *17 ("A Certified [Agent] may not . . . refer players to financial advisors who are not registered in the Program.").
[97] *See How do I find a qualified financial advisor on the NFLPA's website?*, NFLPA, https://nflpa.com/active-players/faq/how-do-i-find-a-qualified-financial-advisor-on-the-nflpas-website [https://perma.cc/V9V7-NQYP].
[98] *See* NFLPA, Financial Advisor Frequently Asked Questions 2 [hereinafter Registration Program FAQs], https://nflpaweb.blob.core.windows.net/website/PDFs/financial-advisor-FAQs.pdf [https://perma.cc/38N8-Q57D] ("Active

- the NFLPA's promotion of the Registration Program to players and Certified Agents;[100]
- access to "unique information on NFL players, their benefits, and compensation structure";[101] and
- inclusion in educational events (for example, an annual NFLPA conference).[102]

Intangibly, Registered Advisors also often enjoy a presumption of legitimacy and competence among player-clients and prospective player-clients.[103]

3. Newly Announced Institutional Registration

Finally, any overview of the Registration Program's evolution would be incomplete without mention of *The Athletic*'s October 17, 2019 report ("*The Athletic Report*"), which revealed that the NFLPA was signing up financial firms—Goldman Sachs and Bessemer Trust—for the Registration Program, unchartered territory for a union that had previously registered only individuals.[104]

Little has been written about this change to the Registration Program beyond *The Athletic Report,* which quotes senior NFLPA and Goldman Sachs officials, and established, among other things, that:

- the union's desire to ensure player members' preparedness for a then-potential labor stoppage[105] upon the 2021 expiration of the

---

and former NFL players, as well as Certified Contract Advisors have access to the Registered Player Financial Advisor web-based list. Prospective NFL players are provided information regarding advisors on the list upon request.").

[99] *See* SEC No-Action Letter to NFLPA, *supra* note 17, at *19 ("Access to the electronic or printed version of the directory will be limited to players, registered advisors, and Certified Contract Advisors . . . .").

[100] *See Will I have direct access to the players and contract advisors to introduce myself and my services?*, NFLPA, https://nflpa.com/financial-advisors/faq/will-i-have-direct-access-to-the-players-and-contract-advisors-to-introduce-myself-and-my-services [https://perma.cc/FM6Z-J76Q].

[101] 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 1.

[102] *See Why did the NFLPA create a registration program for financial advisors?*, NFLPA, https://nflpa.com/agents/how-to-become-an-https://nflpa.com/active-players/faq/why-did-the-nflpa-create-a-registration-program-for-financial-advisors [https://perma.cc/FAH2-SHWW].

[103] *See infra* Section II.A.

[104] *See* Jessop & Kaplan, *supra* note 1.

[105] Of course, preparing for a labor stoppage is no longer a near-term concern of the NFLPA, as it agreed with the NFL Management Council on a new CBA in March 2020 that runs through 2030. *See* Grant Gordon, *NFL player vote ratifies new*

2011 collective bargaining agreement ("CBA") catalyzed the partnership between the NFLPA and Goldman;[106]

- Bessemer and Goldman plan to register "about six" and "up to 20" advisors, respectively;[107]
- besides Goldman and Bessemer, the NFLPA had already interviewed five other prospective institutions for the Registration Program and anticipated further interviews;[108]
- the NFLPA employed an "invitation only process based on institutions that had a great brand and reputation."[109]

And the NFLPA apparently did not announce the Registration Program's expansion to its Certified Agents until a few weeks after *The Athletic Report* had been published.[110] Indeed, a leaked memorandum, sent from an NFLPA official to Certified Agents in November 2019, stated:

> As you are aware, our mission as the players union is to make sure our player members #StayReady for any situation, particularly when it comes to their finances in the event of a work stoppage. In our latest effort to give them peace of mind and flexibility with their money, we have launched an enhanced suite of financial services. Here are the platform's new features . . . .
>
> The Financial Advisor Registration Program has been expanded to include institutions. Goldman Sachs and Bessemer are the first two institutions to enter into an agreement with the NFLPA to designate advisors for participation in the [Registration] Program. This expansion provides players with greater access to trustworthy options. . . .[111]

But neither *The Athletic Report* nor the NFLPA memorandum addressed *why* the NFLPA had never registered firms ("Registered Firms") in the Registration Program before. Curiously, as early as the NFLPA's No-Action Letter request to the SEC—before the NFLPA had even launched the Regis-

---

CBA through 2030 season, NAT'L FOOTBALL LEAGUE (Mar. 15, 2020), http://www.nfl.com/news/story/0ap3000001106246/article/nfl-player-vote-ratifies-new-cba-through-2030-season [https://perma.cc/D4M5-ENUV].

[106] *See* Jessop & Kaplan, *supra* note 1.

[107] *See id.*

[108] *See id.*

[109] *Id.*

[110] *See* Memorandum from Dana Shuler, Senior Director, Player Affairs, NFLPA, to NFLPA Certified Contract Advisors [i.e., Certified Agents] (Nov. 5, 2019), appended to Darren Heitner (@DarrenHeitner), TWITTER (Nov. 6, 2019, 8:57 AM), https://twitter.com/DarrenHeitner/status/1192123849590132737 [https://perma.cc/6VBL-PNYQ].

[111] *Id.*

tration Program—the union accounted for the possibility of entering bespoke agreements with financial institutions, writing, "a Firm may be permitted to enter into a separate agreement with the NFLPA *under which the Firm will not be subject to the {Registration} Program regulations*."[112] Moreover, today's Code, last updated in 2017, similarly allows for unique institutional agreements:

> The NFLPA may, *in its sole discretion*, request proposals for, and authorize qualified firms to participate in, the Institutional Financial Advisors Program. Firms participating in the Institutional Financial Advisors Program must meet all of the requirements established by the NFLPA from time to time, *which requirements may include any or all of the requirements enumerated . . . below . . . .*[113]

Given that the NFLPA has carved out such broad flexibility to accommodate Registered Firms since the Registration Program's inception, it is surprising that the NFLPA did not welcome institutions into the Registration Program earlier.

Equally surprising is how significantly the Code's application process for Registered *Firms*—based on the NFLPA's "sole discretion"[114] and proceeding on an "invitation only" basis for firms with "a great brand and reputation"[115]—contrasts with its rigidly meritocratic application process for Registered *Advisors*. Under the latter process, the union accepts any applicant who "meets the {Registration} Program's published requirements . . . and agrees to comply with the {Registration} Program's published regulations."[116] To be sure, the Code's requirements for Registered Firms are not completely devoid of the bright-line rules that govern Registered Advisors: the Code suggests that Registered Firms must designate employees ("Designated Employees") to advise players, and that these Designated Employees must have a bachelor's degree and at least eight years of relevant work experience, just like Registered Advisors.[117] The Code also requires Designated Employees, like Registered Advisors, to have a record clear of disqualifying conduct, which includes, among other things, fraud-related crimes, fraud-related civil judgments, felonies within the past dec-

---

[112] *See* SEC No-Action Letter to NFLPA, *supra* note 17, at *12 (emphasis added).

[113] 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 11 (emphasis added).

[114] *Id.*

[115] Jessop & Kaplan, *supra* note 1.

[116] SEC No-Action Letter to NFLPA, *supra* note 17, at *2.

[117] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 13.

ade, regulatory discipline, and insolvency within the past seven years.[118] Unlike Registered Advisors, however, Designated Employees need not necessarily be a Certified Financial Planner or Chartered Financial Analyst, so long as at least one Designated Employee per Registered Firm maintains one of the two certifications.[119] The Code also tasks each Registered Firm with vetting its Designated Employees.[120]

All in all, though, much remains unknown about this expansion of the Registration Program ("Institutional Registration"). For example, it remains unclear whether Goldman and Bessemer have actually established any Designated Employees yet: *The Athletic Report* stated that "Bessemer *will* add about six . . . and Goldman up to 20" advisors to the Registration Program,[121] and, what is more, the NFLPA had already closed the application window for new Registration Program applicants by late July 2019,[122] more than two months before *The Athletic Report*[123] was published and more than three months before the NFLPA sent its memorandum to Certified Agents.[124]

It is also unclear whether any other institutions since Goldman and Bessemer have signed-on as Registered Firms. In February 2020, Daniel Kaplan, co-author of *The Athletic Report*, characterized the NFLPA's agreement with Goldman and Bessemer as "a pilot program,"[125] perhaps imply-

---

[118] *See id.* at 9–11

[119] *See id.* at 13.

[120] *See id.* at 11–12; Jessop & Kaplan, *supra* note 1 ("The Difference with Goldman and Bessemer is they now will be responsible for monitoring *their* advisers in the program.").

[121] *See* Jessop & Kaplan, *supra* note 1 (emphasis added) (suggesting, by using "will," that neither firm had established Designated Employees at the time of publication).

[122] *See Financial Advisors Application and Renewal*, NFLPA (July 27, 2019), https://web.archive.org/web/20190727202555/https://www.nflpa.com/financial-advisors/financial-advisors-application-and-renewal [https://perma.cc/6PPT-JRFR] (memorializing NFLPA webpage stating, as of July 27, 2019, that "[t]he 2019 Application window [for non-renewal applicants] is closed and will open again in the Spring of 2020"); *see also Apply to Be a Financial Advisor*, NFLPA (Apr. 22, 2020), https://web.archive.org/web/20200422171718/https://nflpa.com/financial-advisors/new-applications [https://perma.cc/5MA6-3ZG9] (memorializing NFLPA webpage stating, as of April 22, 2020 that "[t]he application window [for non-renewal applicants] will open in the Spring of 2020").

[123] *See* Jessop & Kaplan, *supra* note 1 (establishing October 17, 2019 date of *The Athletic Report*).

[124] *See* Memorandum from Dana Shuler, *supra* note 110 (establishing November 5, 2019 date of memorandum).

[125] Daniel Kaplan, *Redskins' Adrian Peterson in arbitration with Morgan Stanley in latest money dustup*, ATHLETIC (Feb. 12, 2020), https://theathletic.com/1600748/

ing a "wait-and-see" approach that seems inconsistent with the aggressive interview strategy detailed a few months earlier in *The Athletic Report*.

Finally, the NFLPA's website offers some limited information on Institutional Registration, beyond what is in the Code. One relevant web page states:

> The NFLPA has agreements in place with certain reputable financial institutions. These institutions select and monitor financial advisors who meet specific criteria and follow a code of conduct when dealing with NFL players.
>
> If you are looking for a *concierge-like experience*, consider selecting a financial advisor who is part of the Institutional Program. You will work with an established point of contact to help you identify the appropriate advisor or team to suit your needs. The participating institutions and their advisors offer financial advisory services that are *tailored to players' goals*.
>
> We also have an individual financial advisors program. This diverse group of well-established advisors are vetted and meet the NFLPA's educational, experiential, and regulatory standards. They also abide by a code of conduct and we do due diligence checks on them on an ongoing basis.[126]

Furthermore, a second relevant web page explains that both Registered Advisors and Registered Firms must "meet NFLPA criteria and abide by our code of conduct."[127] But while Registered Advisors meet "standards of education, experience and regulations as established by the NFLPA," Registered Firms not only meet "the same standards" but also "provide a *concierge-like experience for clients*, with an *added layer of evaluation* done by their institution *for your protection*."[128]

Notably, the language on both of these webpages arguably conflicts with one of the NFLPA's key representations on which the SEC based its No-Action Letter: that the union "will not advise players as to the merits or shortcomings of any particular [Registered Advisor]."[129] Indeed, one could argue that describing the Institutional Program as a "concierge-like experi-

---

2020/02/12/redskins-adrian-peterson-in-arbitration-with-morgan-stanlatwatey-in-latest-money-dustup/ [https://perma.cc/SB9R-YSRF].

[126] *How can the NFLPA's financial advisor programs benefit me?*, NFLPA (emphasis added), https://nflpa.com/active-players/faq/how-can-the-nflpas-financial-advisor-programs-benefit-me, [https://perma.cc/UV76-DGFH].

[127] *Find a Financial Advisor*, NFLPA, https://nflpa.com/active-players/find-a-financial-advisor [https://perma.cc/6KEY-37XW].

[128] *See id.* (emphasis added).

[129] SEC No-Action Letter to NFLPA, *supra* note 17, at *6.

ence"[130]—that offers both "tailored"[131] services and "an added layer of evaluation . . . for [players'] protection"[132]—constitutes "advis[ing] players as to the merits"[133] of using a Registered Firm (rather than a Registered Advisor). This seems to be a risky choice of language from the NFLPA, particularly given that some Registered Advisors are reportedly "quite displeased that NFLPA has cozied up to . . . Goldman Sachs [and] Bessemer," and have "express[ed] concern that NFLPA is impliedly telling players that they should be switching to those companies."[134]

II. Analysis of the Registration Program

As mentioned, the NFLPA launched the "[Registration] Program to protect former, current and prospective NFL players . . . from fraud."[135] Unfortunately, however, in many respects, the Registration Program has failed to accomplish this goal. In 2016, a leading investment-fraud attorney to athletes, Chase Carlson,[136] estimated that Registered Advisors have swindled athletes out of hundreds of millions of dollars.[137] Similarly, sports-busi-

---

[130] *How can the NFLPA's financial advisor programs benefit me?*, *supra* note 126; *Find a Financial Advisor*, *supra* note 127.

[131] *How can the NFLPA's financial advisor programs benefit me?*, *supra* note 126.

[132] *Find a Financial Advisor*, *supra* note 127.

[133] SEC No-Action Letter to NFLPA, *supra* note 17, at *6.

[134] Darren Heitner (@DarrenHeitner), Twitter (Nov. 6, 2019, 8:57 AM), https://twitter.com/DarrenHeitner/status/1192123849590132737 [https://perma.cc/6VBL-PNYQ].

[135] SEC No-Action Letter to NFLPA, *supra* note 17, at *1.

[136] Mr. Chase Carlson is a Miami-based attorney who focuses a "significant portion of [his] practice . . . [on] representing professional athletes and entertainers who are victims of investment fraud or mismanagement." *See About*, Carlson Law, https://www.carlsonlaw.com/about/ [https://perma.cc/LX6C-B52P]. A *Washington Post* profile from last year describes Mr. Carlson as "the guy athletes hire to find their money when the people they've trusted to watch that money instead have made it disappear." *See* Patrick Hruby, *Athletes Hire Him When They Think They've Been Swindled*, Wash. Post (May 9, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/05/09/feature/athletes-hire-him-when-they-think-theyve-been-swindled/ [https://perma.cc/A79H-3YKS].

[137] *See* Chase Carlson (@ChaseACarlson), Twitter (Oct. 25, 2016, 12:50 PM), https://twitter.com/ChaseACarlson/status/791004138242998272 [https://perma.cc/5ESS-ZGFF] ("estimat[ing] athletes have lost $150,000,000 investing with NFLPA Registered Advisors since the Program was created in 2002"); Chase Carlson (@ChaseACarlson), Twitter (Oct. 25, 2016, 2:34 PM), https://twitter.com/chaseacarlson/status/791030110208069632 [https://perma.cc/4TR6-KZLH] (confirming that his estimate of athletes suffering $150,000,000 in "losses" from investments with Registered Advisors "exclusively" comprised losses from "defrauding/fraud,"

ness journalist Darren Rovell has asserted that "more money has been lost by NFL players since the advent of the financial advisor program than any time in NFLPA history,"[138] a claim which at least one economist evidently agrees.[139]

Empirical data on fraud among professional athletes also suggests that the Registration Program has failed to protect NFL players from fraud. In 2019, Ernst & Young published a study ("EY Study"), in which it used publicly available information to compile a database on the fraud-related losses alleged by professional athletes from 2004 to 2018.[140] On the whole, the EY Study found that, across all sports—including boxing, baseball, basketball, football, hockey, running, and soccer—"professional athletes alleged almost $600 million in fraud-related loss" during the fifteen-year span.[141] What is more, because of "the difficulty in detecting fraud and the reluctance of victims to acknowledge it publicly," the EY Study suggested this figure is "likely not the half of it."[142] The EY Study also analyzed their

---

and thus did not include non-fraudulent investment losses); Chase Carlson (@ChaseACarlson), TWITTER (Oct. 26, 2016, 11:39 AM), https://twitter.com/chaseacarlson/status/791348529184772096 [https://perma.cc/TUT9-NWME] (acknowledging that he "[w]ouldn't be surprised if the real number [of fraudulent losses suffered by athletes investing with Registered Advisors] is much higher [than $150,000,000]" and that he "[j]ust used a number [that he] can prove"); Chase Carlson (@ChaseACarlson), TWITTER (Oct. 25, 2016, 12:58 PM), https://twitter.com/chaseacarlson/status/791006006625050625 [https://perma.cc/6B6Q-K834] (explaining that his $150,000,000 estimate was "[m]ostly" based on "publicly available records and court findings" and that a "[s]maller amount" reflected "personal knowledge").

[138] Darren Rovell (@darrenrovell), TWITTER (Apr. 6, 2017, 8:51 AM), https://twitter.com/darrenrovell/status/850013154042150914 [https://perma.cc/HH62-BDCP]. Mr. Rovell has also contended that the Registration Program has failed to meet its stated fraud-protection goal. *See* Darren Rovell (@darrenrovell), TWITTER (Oct. 23, 2016, 4:16 PM), https://twitter.com/darrenrovell/status/790331116376862720 [https://perma.cc/DF7R-DDVQ] ("The NFLPA financial advisers program needs to end . . . . Its goal to curb fraud has supremely failed.").

[139] *See* Ted Tatos (@TedTatos), TWITTER (Apr. 6, 2017, 4:21 PM), https://twitter.com/TedTatos/status/850126446953549824 [https://perma.cc/CRL3-KKP9] (replying "[n]o dispute from me there" to Darren Rovell's claim that "more money has been lost by NFL players since the advent of the financial advisor program than any time in NFLPA history").

[140] *See* STEVE SPIEGELHALTER & JESSE SILVERTOWN, ATHLETES TARGETED BY FRAUD, ERNST & YOUNG 2, 3 n.1 (2019), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/assurance/ey-forensics-athletes-targeted-by-fraud-june-2019.pdf [https://perma.cc/J8LB-5AGF].

[141] *Id.* at 2.

[142] *Id.*

database on a sport-specific basis, finding that NFL players alone accounted for about one-fourth (a plurality) of fraud losses alleged by all professional athletes during the fifteen-year period.[143] And when considering just the "Big Four" professional sports leagues[144]—the NFL, Major League Baseball ("MLB"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL")—NFL players also accounted for a disproportionate percentage of alleged fraud losses. Indeed, though NFL players earn about 33 percent of all compensation earned by players across the "Big Four" professional sports leagues,[145] they accounted for a signi-

[143] *Id.*

[144] *See*, *e.g.*, *Behind the Numbers: Professional sports and the merits of being big and connected*, DELOITTE (Aug. 8, 2015), https://www2.deloitte.com/us/en/insights/economy/behind-the-numbers/us-professional-leagues-sports-and-technology.html [https://perma.cc/FR9T-KTMM] (establishing the "Big Four" American professional leagues: "The NBA is the only major professional sports league that has set an attendance record over the last couple of years, *but the big 4—NFL, NHL, NBA, and MLB*—continue to enjoy impressive growth." (emphasis added)).

[145] Salary data across the "Big Four" professional leagues is not readily available for most years during the period from 2004 to 2018, so this 33 percent figure (which was calculated by the author) stems only from players' combined salaries in 2018—i.e., players' salaries for the season in which their league's championship game occurred in 2018. *See* GLOBAL SPORTS SALARY SURVEY 2018, SPORTING INTELLIGENCE 48 (Nick Harris ed., Nov. 2018), https://www.globalsportssalaries.com/GSSS%202018.pdf [https://perma.cc/EKZ2-3W6Q] (establishing that MLB players would earn salaries totaling $3,957,697,825 for the 2018 season); GLOBAL SPORTS SALARY SURVEY 2017, SPORTING INTELLIGENCE 66 (Nick Harris ed., Nov. 2017), https://www.globalsportssalaries.com/GSSS%202017.pdf [https://perma.cc/4332-W48Y] (establishing that NBA players would earn salaries totaling $3,159,069,802 for the 2017–2018 season); *id.* at 82 (establishing that NHL players would earn salaries totaling $2,218,110,771 for the 2017–2018 season); *id.* at 86 (establishing that NFL players would earn salaries totaling $4,580,501,744 for the 2017–2018 season). The total salaries earned across the four leagues in 2018, then, sum to $13,915,380,142—of which NFL players' share, $4,580,501,744, is 33 percent. That said, for the years for which salary data was readily available across the "Big Four" professional leagues, NFL players' share of earnings is similar to—indeed, even lower than—its 33 percent share in 2018: 32 percent in 2017, 31 percent in 2015, and 32 percent in 2014 (salary data from *Sporting Intelligence* was not readily available for 2016—i.e., the 2015–2016 NFL, NBA, and NHL seasons). *See id.* at 70 (providing MLB players' combined salaries for the 2017 season); GLOBAL SPORTS SALARY SURVEY 2016, SPORTING INTELLIGENCE 20 (Nick Harris ed., Nov. 14, 2016) https://www.globalsportssalaries.com/GSSS%202016.pdf [https://perma.cc/CSB2-NW5Z] (providing NBA players' combined salaries for the 2016–2017 season); *id.* at 28 (providing NHL players' combined salaries for the 2016–2017 season); *id.* at 30 (providing NFL players' combined salaries for the 2016–2017 season); *id.* at 22 (providing MLB players' combined salaries for the 2016 season); GLOBAL SPORTS SALARY SURVEY 2015, SPORTING INTELLIGENCE 28

ficantly greater share—*44 percent*—of alleged fraud losses from 2004 to 2018.[146]

Taken together, one could persuasively argue that the Registration Program has failed to achieve its goal of protecting NFLPA player-members from fraud. For that reason, it should come as no surprise that none of the other professional sports unions have followed the NFLPA's lead—that is, launched its own initiative to regulate their player-members' financial advisors.[147]

The rest of Part II analyzes three main ways that the Registration Program has failed to protect players. Section A explores how the Registration Program can give players a misleading sense of trust, putting players at greater risk of suffering financial exploitation. Section B examines how the Registration Program may actually damage—rather than improve—players' likelihood of retaining an ethical, qualified financial advisor. And finally, Section C details how the Registration Program fails to ensure that players victimized by predatory Registered Advisors can recover losses.

A. Giving Players a Misleading Sense of Trust

Notably, the EY Study did *not* just examine the extent of fraud alleged by professional athletes. It also considered *how* perpetrators defraud athletes, concluding that while "[f]raud schemes vary . . . there is a common theme:

(Nick Harris ed., May 18, 2015), https://www.globalsportssalaries.com/GSSS%202015.pdf [https://perma.cc/A2DN-WB2W] (providing NBA, NHL, and NFL players' respective combined salaries for the 2014–2015 season); *id.* at 42 (providing the average salary and number of MLB players for the 2015 season, which the author multiplied together to calculate MLB players' combined salaries for the 2015 season); GLOBAL SPORTS SALARY SURVEY 2014, SPORTING INTELLIGENCE 17–18 (Nick Harris ed., Apr. 14, 2014), https://www.globalsportssalaries.com/GSSS%202014.pdf [https://perma.cc/EF3U-CMH2] (providing each of MLB's the NBA's, the NHL's, and the NFL's average salaries and number of players for the 2013–2014 season, which the author multiplied together to calculate each league's combined salaries for the 2013–2014 season).

[146] *See* SPIEGELHALTER & SILVERTOWN, *supra* note 140, at 2. (The authors of the EY study generously provided the exact numbers from the bar chart on page 2—which is entitled "Alleged fraud losses by athletes' sports"—by email to this Article's author, with whom they remain on file. Using these figures, the author of this Article calculated that NFL players account for 44 percent of fraud losses alleged by professional athletes across the "Big Four" sports leagues from 2004 to 2018.)

[147] *See* Deubert, Cohen & Fernandez, *supra* note 3, at 267 ("The NFLPA's financial advisor program was, and remains, the only one of its kind among the major American sports unions . . . .").

the fraud perpetrator *gains the athlete's trust* . . . and *leverages the relationship of trust* into the fraudster's own financial windfall."[148]

It is unfortunate, then, that, in at least four ways, the Registration Program can give players a misleading sense of trust, rendering them more vulnerable to financial exploitation.[149]

1. Constant Contradiction: The NFLPA's Relationship with the Registration Program

Publicly, the NFLPA insists that a financial advisor's inclusion in the Registration Program does *not* constitute a union endorsement. Indeed, its Code makes clear that the NFLPA does not endorse, claim responsibility for, or make any representations about "the skill, honesty, or competence of any Registered . . . Advisor."[150] Furthermore, since 2011, the NFL-NFLPA CBA has waived the NFLPA's liability for the Registration Program with the following language: "[P]layers and any advisors who [the players] select will bear sole responsibility for any investment or financial decisions that are made."[151] And prior CBAs, beginning in 1993, employed similar language

---

[148] SPIEGELHALTER & SILVERTOWN, *supra* note 140, at 4 (emphasis added).

[149] One notable individual who reached a similar conclusion (well before the author) about the Registered Program perhaps giving players a misleading sense of trust is retired-NFL-player-turned-Certified-Financial-Planner Tyler Horn, who wrote an insightful piece in 2016 about the Registration Program for *The Player's Tribune*. *See* Tyler Horn, *Ballers: Season 2, Episode 5 Recap*, PLAYERS' TRIBUNE (Aug. 16, 2016), https://legacy.theplayerstribune.com/ballers-season-2-episode-5-recap/ [https://perma.cc/CM39-P67V] ("I think it can be argued that the union is providing a false sense of trust [with the Registration Program]—and that's potentially dangerous [for players]. . . . I have seen friends and former teammates who have lost their fortunes and their futures due to [such] a false sense of trust in their advisors."). *See also* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 1:18 PM), https://twitter.com/ChaseACarlson/status/790648637357424641 [https://perma.cc/V8ZU-VWXB] ("There are some good advisors in the program, but players [are] given a false sense of security & aren't made aware of the program's shortcomings"); Darren Rovell (@darrenrovell), TWITTER (July 23, 2019, 7:16 PM), https://twitter.com/darrenrovell/status/1153851316822847489 [https://perma.cc/4QSW-XD2R] ("The problem is that the NFLPA Financial Advisors program is an awful idea. It allows advisors to pass a test to get a license to gain immediate credibility that is overstated.").

[150] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 19–20.

[151] NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL AND NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT 2011–2020, NFL LABOR (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [https://perma.cc/3DZ6-S664].

vis-à-vis the NFL-NFLPA "Career Planning Program," in which the parties agreed "that players shall be solely responsible for their personal finances."[152]

Of course, these disclaimers do not change the fact that the NFLPA designed, launched, and continues to operate the Registration Program.[153] Or that the NFLPA still "routinely promotes the [Registration] Program to players and [Certified Agents]."[154] Or that the NFLPA still prohibits Certified Agents from recommending non-Registered financial advisors to their player-clients.[155] Or that the NFLPA, among other things:

- admitted to the SEC in 2002 that "[p]roviding a pre-screened list of registered financial advisors to players could be viewed as referring clients and prospective clients to the registered financial advisors";[156]
- "vigorously encourag[ed]" players to use only Registered Advisors in 2004;[157]

See also NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL AND NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT 2020–2030, NFL LABOR 289 (Mar. 15, 2020), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/NFL-NFLPA%20CBA%20March%205,%202020.pdf [https://perma.cc/4TDZ-CSYZ] (establishing that identical language remains in the newly negotiated CBA). This extra layer of protection for the NFLPA was incorporated into the next CBA after *Atwater v. National Football League Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010). And because the Registration Program arises directly from the CBA, players' common-law claims stemming from the Registration Program against the NFLPA are generally preempted under § 301 of the Labor Management Relations Act. *See Atwater*, 626 F.3d at 1174, 1179–1185 (holding that § 301 of the Labor Management Relations Act preempts claims of negligence, negligent misrepresentation, and breach of fiduciary duty against the NFLPA for conducting allegedly insufficient background checks on two Registered Advisors who defrauded the plaintiffs—six retired NFL players—of the collective $20 million they unknowingly invested in the Registered Advisors' Ponzi scheme).

[152] *Atwater*, 626 F.3d at 1174–75.

[153] *See generally* SEC No-Action Letter to NFLPA, *supra* note 17 (establishing that the NFLPA designed the Registration Program); 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59 (establishing that the NFLPA launched and continues to run the Registration Program).

[154] *See Will I have direct access to the players and contract advisors to introduce myself and my services?*, *supra* note 100.

[155] *See* REGULATIONS GOVERNING CONTRACT ADVISORS, *supra* note 74, at 8–10.

[156] SEC No-Action Letter to NFLPA, *supra* note 17, at *28.

[157] *See* Amended Complaint ¶ 42, Atwater v. Nat'l Football League Players Ass'n, No. 1:06-CV-1510, (N.D. Ga. July 14, 2006).

- touted a survey purportedly finding that "players won't even consider [hiring] an advisor unless he or she is part of the [P]rogram" in its March 2005 newsletter for its player-members;[158]
- boasted that "[t]he [Registration] Program creates a 'safe zone'" for players in the same March 2005 newsletter for player-members;[159]
- publicly explained an applicant's acceptance into the Registration Program to *The New York Post* in March 2006 as the NFLPA "basically tell[ing] players looking for financial advice that these folks have been vetted by us and that they can be reasonably assured of their background and education";[160]
- reportedly doubled down on the Registration Program in their communications with Certified Agents, instructing them in a December 2012 memorandum to tell their player-clients that they "are encouraged to use *only* those financial advisors who are NFLPA-Registered Financial Advisors";[161]
- "trumpeted the fact,"[162] in a November 2013 NFLPA-issued fraud alert, that a Phoenix-based financial advisor with "more than 60 current or former NFL players as clients"—who had just been arrested on eleven financial-fraud-related felony charges—was not in the Registration Program;[163]
- characterized its 2019 expansion of the Registration Program as "provid[ing] players with greater access to *trustworthy options*";[164] and
- continues to champion Registered Advisors on its website as "tried and tested"[165] and "well-established."[166]

It is thus easy to see how the Registration Program can give players a misleading sense of trust: despite the NFLPA's disclaimers to the contrary,

---

[158] *See id.* ¶ 44.

[159] *See id.* ¶ 46.

[160] *Id.* ¶ 49.

[161] *See* Jason Cole, *NFLPA Financial Advisor Program Fatally Flawed*, NAT'L FOOTBALL POST, https://nationalfootballpost.com/nflpa-financial-advisor-program-fatally-flawed/ [https://perma.cc/5B8W-UY3L] (emphasis added).

[162] *Id.*

[163] *See* Letter from NFLPA Security Department, to NFLPA player-members (Nov. 18, 2013), https://images.nflplayers.com/mediaResources/lyris/pdfs/SCAA%20Signals/11-19-13_Marchiol_Fraud.pdf [https://perma.cc/2333-B5CJ].

[164] *See* Memorandum from Dana Shuler, *supra* note 110 (emphasis added).

[165] *See Why did the NFLPA create a registration program for financial advisors?*, *supra* note 102.

[166] *See How can the NFLPA's financial advisor programs benefit me?*, *supra* note 126.

players continue to understand a Registered Advisor's inclusion in the Registration Program as an endorsement from their trusted union. Indeed, All-Pro tight end Vernon Davis and All-Pro running back Fred Taylor each admitted as much in a 2016 *60 Minutes* exposé that was highly critical of the Registration Program.[167] Davis, previously unaware of how little the NFLPA vetted its Registered Advisors, stated: "It's very troubling. Here I am putting my trust in a registered financial adviser, and I'm thinking that I can at least go to sleep at night without worrying."[168] Similarly, Taylor said that he "definitely would gain a sense of security with every registered adviser that's . . . on [the NFLPA's] list."[169] Davis and Taylor were two of more than thirty NFL players, including recent NFLPA president Eric Winston,[170] who collectively lost more than $40 million after Jeff Rubin, then a Registered Advisor, persuaded them to invest in a rural-Alabama electronic-Bingo development[171]—even though NFL rules proscribed gambling investments by players.[172] Even worse, Rubin, who reportedly received 10 per-

---

[167] *See* Armen Keteyian, *Thrown for a Loss*, 60 MINUTES (Oct. 23, 2016), https://www.cbsnews.com/news/60-minutes-nfl-players-lose-millions-in-risky-investment/ [https://perma.cc/R4SX-PQTC].

[168] *Id.*

[169] *Id*.

[170] *See id.* ("We wanted to talk to the NFL Players Association and its current president, Cincinnati offensive tackle Eric Winston, about its financial advisers program. But after repeated requests the union declined to put anyone on camera, including Winston, who was once a client of Jeff Rubin's and invested around a million dollars in Country Crossing."); Kevin Patra, *Browns center JC Tretter elected next NFLPA president*, NAT'L FOOTBALL LEAGUE (Mar. 10, 2020), https://www.nfl.com/news/browns-center-jc-tretter-elected-next-nflpa-president-0ap3000001105741 [https://perma.cc/7FWC-SY3X] ("The NFLPA voted to replace sitting president Eric Winston, who was not up for re-election after not playing in 2019.").

[171] *See* Keteyian, *supra* note 167. *See also* Jessop & Kaplan, *supra* note 1 ("In one of the most wide-reaching cases, *NFLPA registered financial adviser Jeff Rubin defrauded 35 NFL players of $43.6 million* by having them invest in an electronic bingo resort venture in Alabama . . . ." (emphasis added)). Among the NFL players who invested in the Alabama electronic-bingo development with Rubin "included Fred Taylor, Frank Gore, Jevon Kearse, Edgerrin James, Terrell Owens, Plaxico Burress, Duane Starks, Devin Thomas, Santana Moss, Greg Olsen, Greg Jones, Roscoe Parrish, Eric Winston, Hanik Milligan, Jerome McDougle, Chris Myers, Lito Sheppard, Jabar Gaffney, Jacob Bell, Sinorice Moss, Damione Lewis, Kenard Lang, Clinton Portis, Drew Stanton, Gabe Watson, and Peter Warrick." Chase Carlson, *The History Of Troubled NFLPA Registered Financial Advisors*, CARLSON-LAW.NET (Oct. 21, 2016), https://www.carlson-law.net/the-history-of-troubled-nflpa-registered-financial-advisors/ [https://perma.cc/DB9G-E2LA].

[172] *See* Jason Cole & Rand Getlin, *Raucous lifestyle leads to fall of Jeff Rubin, former financial adviser to NFL players*, YAHOO! SPORTS (Sept. 4, 2012), https://sports.yahoo

cent of the money his player-clients invested in the development as a "finder's fee,"[173] did not inform players of another significant risk of the investment: that state authorities could well determine electronic Bingo was illegal under Alabama's "byzantine gambling laws," and then shut down the operation.[174] Unfortunately, this is exactly what happened just two weeks after the development's official opening.[175]

And Davis and Taylor are hardly the only players who have contended that the Registration Program gives players a misleading sense of trust; indeed, even among the most financially sophisticated players feel this way. For instance, Tyler Horn, a retired NFL player who is now a Certified Financial Planner, aptly characterized the Registration Program as a "paradox": "[A]ny reasonable person would probably conclude that [Registered A]dvisors have been vetted and recommended by the NFLPA."[176] In fact, Horn specifically accused the "union [of] providing [players with] *a false sense of trust* in their [Registered Advisors]."[177] Moreover, retired linebacker Scott Fujita, a University of California-Berkeley graduate who also served as an NFLPA representative, opined: "The message the NFLPA is sending to the players with the program is that these financial advisors are relatively safe. If that's not the case, why do we have it?"[178] Similarly, retired player Matt Birk, who also served as an NFLPA player representative,[179] graduated from Harvard with an Economics degree, and later landed a post-retirement job with the NFL as Director of Football Development,[180] stated that he understood Registered-Advisor status "to mean that they're OK, that the

---

.com/news/nfl—raucous-lifestyle-leads-to-fall-of-jeff-rubin—former-financial-adviser-to-nfl-players-.html [https://perma.cc/6JDE-5L3Y].

[173] *See id.* (internal quotation marks omitted) ("Rubin [received] a 4 percent stake in the casino operation for bringing in investors, according to bankruptcy documents. In addition, . . . Rubin [received] a 10 percent 'finder's fee' on any money he brought in. In essence, Rubin was getting a polite version of a kickback on what the players put in . . . .").

[174] *See* Keteyian, *supra* note 167.

[175] *See id.*

[176] Horn, *supra* note 149.

[177] *Id.* (emphasis added).

[178] Cole, *supra* note 161.

[179] *See id.* (establishing that Birk served as an NFLPA player representative).

[180] *See NFL names Matt Birk Director of Football Development*, NAT'L FOOTBALL LEAGUE (July 10, 2014), https://www.nfl.com/news/nfl-names-matt-birk-director-of-football-development-0ap2000000364349 [https://perma.cc/2F88-M3RL] (establishing that Matt Birk both became the NFL's Director of Football Development after retiring from the NFL and "graduate[d from] . . . Harvard University with a degree in economics").

union has done its due diligence."[181] Birk concluded that if the NFLPA is not going to conduct "thorough" vetting, then "the union shouldn't be in the business of endorsing any people in the financial advisor industry."[182]

2. Mistaking Registration for Certification

The widespread conflation of the NFLPA's Registration Program with its Agent Certification Program represents another way the Registration Program can give players a misleading sense of trust. Indeed, when journalist Jason Cole contacted fifteen Certified Agents for his investigative piece on the Registration Program, twelve of the Certified Agents "used the word 'certified' when referring to financial advisors," highlighting the pervasive "confusion over exactly what . . . NFLPA [Registration] means."[183] This confusion persists among industry insiders, academics, and players, too. Law review articles,[184] textbooks,[185] reputable online publications,[186] and players

---

[181] Cole, *supra* note 161.

[182] *Id.*

[183] *Id.*

[184] *See*, *e.g.*, Walter T. Champion Jr., *The Rise and Fall of Kirk Wright: The NFLPA's Fiduciary Obligation as Third-Party Guarantor of Certified Financial Advisors*, 4 MISS. SPORTS L. REV. 1 (2014) (using "certified" to describe NFLPA-Registered Financial Advisors despite author's credentials as sports law professor and prolific author on sports law); Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the Exclusive Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 747 (2006) (mistakenly identifying NFLPA-Registered advisors as "certified"); Timothy L. Kianka, Atwater v. NFLPA*: Casting Doubt on the Effect of Exculpatory Language in Collective Bargaining Agreements*, 21 JEFFREY S. MOORAD SPORTS L.J. 125, 149–150 (2014) (referring to financial advisors becoming "certified" under the NFLPA's Financial Advisors Program); James Masteralexis, Lisa Masteralexis & Kevin Snyder, *Enough is Enough: The Case for Federal Regulation of Sports Agents*, 20 JEFFREY S. MOORAD SPORTS L.J. 69, 80 n.55 (2013) (noting the NFLPA's voluntary financial-advisor "certification" program); Damon Moore, *Proposals for Reform to Agent Regulations*, 59 DRAKE L. REV. 517, 526–27 (2011) (explaining how the NFLPA "certifies" financial advisors).

[185] *See, e.g.*, KENNETH L. SHROPSHIRE, TIMOTHY DAVIS & N. JEREMI DURU, THE BUSINESS OF SPORTS AGENTS 77–81 (3d ed. 2016) (detailing the NFLPA's financial-advisor "certification" program); ADAM EPSTEIN, SPORTS LAW 13 (2012) ("No certified agent can recommend use of [a] non-NFLPA *certified financial advisor*." (emphasis added)).

[186] *See, e.g.*, Mullen, *supra* note 62 (discussing "NFLPA-certified" financial advisors); Darren Rovell, *The NFL's financial advisory program*, ESPN (Oct. 4, 2012), http://www.espn.com/blog/playbook/dollars/post/_/id/1835/does-nfls-financial-advisory-program-work#correx [https://perma.cc/JCL2-V29K] (analyzing the NFLPA's "certified financial advisory program").

themselves[187] erroneously reference the NFLPA's "certification"—rather than "registration"—of financial advisors.

The distinction between NFLPA Registration and Certification constitutes much more than a semantic quibble, as the Registration Program provides players "far less protection than the NFLPA [A]gent [C]ertification [P]rogram."[188] Indeed, the Certification Program's eligibility requirements are much more rigorous than the Registration Program's, requiring participants, among other things, to have:

- earned a graduate degree[189] (about 62 percent of Certified Agents are attorneys[190]);
- passed the rigorous NFLPA-proctored entrance exam[191] (more than 61 percent failed in 2015 after the NFLPA raised the minimum passing grade;[192] before 2015, about 30 percent failed in a typical year[193]);
- attended a two-day in-person NFLPA seminar for new agents.[194]

And the Certification Program's heightened protections extend beyond its exacting eligibility requirements; it also imposes tighter regulations after an

---

[187] *See, e.g.*, Nathan Beaucage, *The NFLPA drops the ball yet once again with flawed financial adviser program*, SB NATION: BALTIMORE BEATDOWN (June 30, 2016), https://www.baltimorebeatdown.com/2016/6/30/12059600/the-nflpa-drops-the-ball-yet-once-again-with-flawed-financial-adviser [https://perma.cc/DL57-ETK5] (quoting retired NFL punter Chris Kluwe who seems to conflate Registration with Certification: "My financial adviser told me a couple years ago that he was no longer taking the training to be *NFLPA certified* because they were using it as a moneymaking scheme (charging like a couple grand to *get certified*, no matter if you actually were capable or not) [emphasis added].") Kluwe's quote showcases how misinformation persists about the Registration Program, even among NFLPA members and Registered Advisors themselves. After all, as explained in Section I.A.2.b, *supra*, the NFLPA's No-Action Letter from the SEC turned on several critical union representations, including that "[t]he NFLPA will operate the [Registration] Program on a *non-profit* basis." *See* SEC No-Action Letter to NFLPA, *supra* note 17, at *6 (emphasis added).

[188] SHROPSHIRE, DAVIS & DURU, *supra* note 185, at 79.

[189] *See* REGULATIONS GOVERNING CONTRACT ADVISORS, *supra* note 74, at 3 ("To be eligible for certification, the applicant must have received . . . a post-graduate degree from an accredited college/university.").

[190] *See* Deubert, Cohen & Fernandez, *supra* note 3, at 242.

[191] *See Becoming an Agent*, NFLPA, https://nflpa.com/agents/how-to-become-an-agent [https://perma.cc/G62K-FPY7].

[192] *See* Liz Mullen, *Pass rate plummets for agent certification exam*, SPORTS BUS. J. (Aug. 6, 2012), https://www.sportsbusinessdaily.com/Journal/Issues/2015/10/19/Labor-and-Agents/Agent-exam.aspx [https://perma.cc/F9G6-PXVB].

[193] *See* RUXIN, *supra* note 9, at 110.

[194] *See Becoming an Agent*, *supra* note 191.

applicant is accepted by the NFLPA. Indeed, unlike the Registration Program, the stricter Certification Program:

- sets default (1.5 percent) and maximum (3 percent) agent-compensation fees;[195]
- requires that Certified Agents inform the NFLPA of any criminal charges within ten business days (save for traffic fines of $100 or less);[196]
- enables players to seek monetary damages from Certified Agents through arbitration;[197]
- empowers the NFLPA to discipline Certified Agents with monetary fines, among other things;[198] and
- prohibits non-Certified agents from representing players.[199]

Given how much more thorough the Certification Program's player protections are than the Registration Program's, it is easy to see how mistaking the Registration Program for the Certification Program could give players a misleading sense of trust.

To its credit, the NFLPA has shown it understands and appreciates the importance of the Certification-Registration distinction. Indeed, in 2012, the NFLPA felt so strongly about distinguishing its Certification Program from its Registration Program that it sent a "Letter to the Editor" to ESPN, which the union also published on its own website,[200] after then-ESPN journalist Darren Rovell penned a column in which he called the Registration

---

[195] *See* Darren Heitner, *Why NFL Agents Are Furious With New Regulations*, INC. (Sept. 20, 2016), https://www.inc.com/darren-heitner/why-nfl-agents-are-furious-with-new-regulations.html [https://perma.cc/5GGR-ARHA].

[196] *See* REGULATIONS GOVERNING CONTRACT ADVISORS, *supra* note 74, at 8.

[197] *See id.* at 13.

[198] *See id.* at 16–18.

[199] *See id.* at 1–2. In other words, unlike the voluntary Registered Advisor Program, the Agent Certification Program is mandatory—i.e., only Certified Agents can represent players, and players can hire only Certified Agents. Though this is perhaps the most critical distinction between NFLPA Certification and Representation, misinformation persists: many players, reportedly—and at least one author of a law-review article, seemingly—remain unaware that players can hire financial advisors outside the Registration Program. *See* Darren Rovell (@darrenrovell), TWITTER (Apr. 6, 2017, 9:53 AM), https://twitter.com/darrenrovell/status/850028715853709312 [https://perma.cc/3E3V-7BXQ] ("Many players are unaware that they can choose outside who is certified. This has been documented heavily."); Noam Silverman, *Regulation of Sports Agents and College Football: Perception or Reality?*, 7 FIU L. REV. 187, 198 n.95 (2011) (purporting erroneously that "there is a separate certification needed to become a financial advisor for an NFL Player").

[200] *See* Letter from NFL Players Ass'n, to Editor, ESPN (Oct. 3, 2012) [hereinafter Letter from NFL Players Ass'n], https://web.archive.org/web/20121103082710/

Program "a certified financial advisory program."[201] In its letter, the NFLPA wrote:

> Rovell has repeatedly lumped together Financial Advisors and Agents and described them as "certified." NFLPA Registered Financial Advisors are not certified by the NFLPA[;] they are registered after meeting requirements and passing a background check. This is entirely different than the certification process for Certified Contract Advisors (agents). Rovell was made aware of this distinction, yet no correction has been issued. The correct information is available on the NFLPA website.[202]

The NFLPA has also proven willing to punish Registered Advisors who mischaracterize themselves as "Certified." About a year ago, the *Austin American-Statesman* reported that,[203] in May 2017, the NFLPA had "immediately and indefinitely suspend[ed]" then-Registered Advisor Joseph Feste "with the intention of revoking [his] registration."[204] Among other reasons for the suspension, the NFLPA contended that Feste:

- made a "false or misleading statement about [his] ability, degree, or area of competence in violation"[205] of what is now Section 5(II)(A)(9)[206] of the Code by "[i]mproperly claiming to be 'NFLPA Certified'" on his firm's website;[207]
- improperly suggested that he was endorsed by the NFLPA, a violation of what is now Section 5(II)(A)(11)[208] of the Code;[209] and

---

https://www.nflplayers.com/Articles/Public-News/Letter-to-the-Editor-ESPN/ [https://perma.cc/8DK3-7Y5M].

[201] *See* Rovell, *supra* note 186.

[202] Letter from NFL Players Ass'n, *supra* note 200.

[203] *See* Ryan Autullo, *NFL union split with Austin financial adviser in Drew Brees diamonds case*, AUSTIN AMERICAN-STATESMAN (Mar. 10, 2019), https://www.statesman.com/news/20190310/nfl-union-split-with-austin-financial-adviser-in-drew-brees-diamonds-case [https://perma.cc/MHV8-WCWZ].

[204] *See* Letter from Ned Ehrlich, Associate General Counsel, NFL Players Ass'n, to Joseph Feste (May 12, 2017) [hereinafter NFLPA Letter to Feste], https://www.documentcloud.org/documents/5764652-1038-001.html [https://perma.cc/F83X-FVSR].

[205] *Id.* (internal quotations omitted).

[206] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17. *See infra* Section II.A.3, for Code Sections 5(II)(A)(9)'s definition. What is now Section 5(II)(A)(9) was then Section 4(II)(A)(9). *See* NFLPA Letter to Feste, *supra* note 204.

[207] *See* NFLPA Letter to Feste, *supra* note 204.

[208] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17. *See infra* Section II.A.3, for Code Sections 5(II)(A)(11)'s definition. What is now Section 5(II)(A)(11) was then Section 4(II)(A)(11). *See* NFLPA Letter to Feste, *supra* note 204.

- engaged in the "[u]unathorized inclusion and usage of the NFLPA logo" on his firm's website, a violation of what is now Section 8[210] of the Code.[211]

At the same time, the fact that the NFLPA understands and appreciates the importance of the Certification-Registration distinction renders the union's insufficient efforts to clarify this confusion all the more disappointing. For example, *Internet Archive* shows that Feste's firm had both claimed to be "NFLPA Certified" and used the NFLPA logo on its website since at least November 2014.[212] Yet the NFLPA presumably did nothing until sending its May 2017 letter to Feste. Better (two-and-a-half years) late than never, to be sure. But the NFLPA should have uncovered this Code violation much earlier—not only because of Feste's elite clientele,[213] but also because the NFLPA both mandates that Registered Advisors renew their application each year (requiring an annual background check)[214] and purports to "do due diligence checks on [Registered Advisors] on an ongoing basis."[215]

Similar confusion, conflation, and mischaracterization seems to persist today. As of this writing, a Google search for the exact phrase "NFLPA certified financial" returned hundreds of results.[216] Second among these search results was the firm biography webpage of a financial advisor who

---

[209] *See* NFLPA Letter to Feste, *supra* note 204. The union evidently based this charge on the fact that Feste claimed to be "NFLPA Certified," on the fact that he used the NFLPA logo without permission, or both.

[210] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 19–20. *See infra* Section II.A.3, for Code Sections 8's definition. What is now Section 8 was then Section 7. *See* NFLPA Letter to Feste, *supra* note 204.

[211] *See* NFLPA Letter to Feste, *supra* note 204.

[212] *See KM Core*, KM CAPITAL MGMT., https://web.archive.org/web/20141107044707/http://kmcapitalmgt.com/km-advantage [https://perma.cc/4XJ8-DT2V].

[213] *See* Autullo, *supra* note 203 ("Along with [Drew] Brees, who last season became the NFL's all-time leader in passing yards, Feste represents many of the sport's biggest names. Photos on his Instagram page show him with reigning NFL MVP Patrick Mahomes, past Super Bowl MVPs Nick Foles and Von Miller, veteran quarterback Matt Schaub and 2018 first-round draft pick Marcus Davenport. Most of the photos include captions indicating the players are Feste's clients at KM Capital Management.").

[214] *See Financial Advisor Renewal Applications*, NFLPA, https://nflpa.com/financial-advisors/renewal-applications [https://perma.cc/35JT-RLAL].

[215] *See How can the NFLPA's financial advisor programs benefit me?*, *supra* note 126.

[216] *See* Search for "NFLPA certified financial", GOOGLE, https://www.google.com/search?q=%22NFLPA+certified+financial%22&rlz=1C1LOQA_enUS839US841&oq=%22&aqs=chrome.2.69i59j69i57j69i59l3.4127j0j7&sourceid=chrome&ie=UTF-8 [https://perma.cc/Q786-FDKY] (searching on Google for "NFLPA certified financial" with the quotation marks included).

holds himself out[217] not just as an "NFLPA Certified Financial Advisor" but as "the only NFLPA certified financial advisor in the state of Nevada."[218] What is more, the financial advisor's same web page also displays the NFLPA's logo[219]—like Feste's did[220]—presumably without the union's permission.[221] Assuming this financial advisor is indeed a Registered Advisor, then, much like Feste, his firm biography webpage seems to violate Code Sections 5(II)(A)(9), 5(II)(A)(11), and 8.[222]

Likewise, third among these search results was the firm biography webpage of another financial advisor who also holds himself out[223] as "a[n] NFLPA-Certified Financial Advisor."[224] Like Feste, this individual has reportedly advised elite clientele (such as Dak Prescott[225] who, as of this writing, is set to be the NFL's fifth-highest paid player in 2020,[226] making over $31.4 million in total cash). Again, if this financial advisor is indeed part of

---

[217] Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

[218] *See NFLPA Certified Financial Advisor*, BUDIN GROUP, https://www.thebudingroup.com/nflpa-certified-financial-advisor [https://perma.cc/Z93S-CK5Z].

[219] *See id.*

[220] *See* NFLPA Letter to Feste, *supra* note 204.

[221] This presumption stems from the implausibility of the NFLPA approving use of its logo or name on a webpage where one holds himself out as an "NFLPA Certified Financial Advisor." After all, the union considers this a Code violation, per its 2017 letter to Joseph Feste. *See* NFLPA Letter to Feste, *supra* note 204.

[222] *See infra* Section II.A.3 for full definitions of Code Sections 5(II)(A)(9), 5(II)(A)(11), and 8.

[223] Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

[224] *See Peter J. Wright*, DELPHI PRIVATE ADVISORS, https://www.delphiprivate.com/team-members/peter-j-wright [https://perma.cc/FR95-D3LW]; *see also Peter J. Wright*, LOURDMURRAY, https://www.lourdmurray.com/peter-wright.html [https://perma.cc/SB5X-Z2JT].

[225] *See* Jori Epstein, *Team-friendly deal? Dak Prescott explains why Cowboys shouldn't need to go that way*, USA TODAY (July 11, 2019, 2:31 PM), https://www.usatoday.com/story/sports/nfl/cowboys/2019/07/11/dak-prescott-cowboys-contract-extension-team-friendly/1698941001/ [https://perma.cc/2X2Z-N9TW] ("Prescott hired CAA agent Todd France last summer [in 2018] to join a team that included NFLPA-certified agent Peter Miller and *NFLPA-certified financial adviser Peter Wright*." (emphasis added)).

[226] *See NFL Salary Rankings*, SPOTRAC, https://www.spotrac.com/nfl/rankings/cash/ [https://perma.cc/2C5C-S2KG].

the Registration Program, then his firm biography webpage seems to also violate Code Section 5(II)(A)(9) (and arguably 5(II)(A)(11) and 8, too).[227]

Finally, among the other results generated by this Google search include several sports-agency websites boasting of their expertise in helping clients hire "NFLPA certified" financial advisors[228] and episodes of "The Business of Sports Insider" podcast, which has often purported[229] to host a "NFLPA Certified Financial Advisor,"[230] who, in his April 30, 2019 appearance on the podcast, said "correct" when the podcast host described him as a financial advisor who is "certified through the NFLPA."[231]

In sum, the Registration Program can give players a misleading sense of trust because it is so often mistaken for the more protective Certification Program. And the NFLPA has failed to mitigate this confusion by insuffi-

---

[227] *See infra* Section II.A.3 for full definitions of Code Sections 5(II)(A)(9), 5(II)(A)(11), and 8.

[228] *See, e.g.*, *Financial Planning & Management*, PRO SOURCE SPORTS AGENCY, https://www.prosourcesports.com/financial-planning [https://perma.cc/NT2S-NC9R] ("ProSource Sports assist their clients in hiring a qualified *NFLPA certified financial management planer* to help clients establish a long term plan for their retirement and invest their money wisely." (emphasis added)); *Services*, PFENNINGER REPRESENTATION GROUP, https://www.prgagency.net/services [https://perma.cc/GHK9-GFX7] ("For our NFL clients, we will help identify an *NFLPA certified financial advisor* to help with asset management." (emphasis added)).

[229] Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

[230] *See, e.g.*, *The Business of Sports Insider: Paul Krumenacker (NFLPA Certified Financial Advisor) & Keith Kirkwood (New Orleans Saints WR)*, APPLE PODCASTS (Jan. 26, 2019), https://podcasts.apple.com/us/podcast/paul-krumenacker-nflpa-certified-financial-advisor/id1445573918?i=1000428513837 [https://perma.cc/HVP9-XQUM]; *The Business of Sports Insider: Paul Krumenacker (Wealth Advisory Services) and Warren Schmidt (Pro Star Sports)*, APPLE PODCASTS (Dec. 3, 2018), https://podcasts.apple.com/us/podcast/business-sports-insider-paul-krumenacker-wealth-advisory/id1445573918?i=1000425117889 [https://perma.cc/DLS4-9PG8] ("Colin Thompson, the host of the Business of Sports Insider, sits down with Paul Krumenacker (*NFLPA Certified Financial Advisor*) and Warren Schmidt (NFL Agent)" (emphasis added)). Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

[231] *See The Business of Sports Insider: Paul Krumenacker – Wealth Advisory Services & NFLPA Certified Financial Advisor* at 1:09–1:22, APPLE PODCASTS (Apr. 30, 2019), https://podcasts.apple.com/us/podcast/paul-krumenacker-wealth-advisory-services-nflpa-certified/id1445573918?i=1000436948171 [https://perma.cc/EG8D-Z9ZW]. Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

ciently monitoring and correcting those who confuse, conflate, or mischaracterize the Registration and Certification Programs.

3. Credentializing NFLPA Registration

Even if the Certification-Registration distinction were clear to all, the mere existence of the Registration Program would still give Registered Advisors the chance to misleadingly "credentialize" their Registration—that is, to frame or exaggerate their inclusion in the Registration Program as a credential. Not only does this credentialization give players a misleading sense of trust, but it could also violate up to four Code provisions:

- Section 5(II)(A)(8), which prohibits Registered Advisors from "Providing false or misleading information to any Player, or concealing material facts from any Player, in the course of recruiting the Player as a client, or in the course of representing or consulting with that Player as a Registered Player Financial Advisor";[232]
- Section 5(II)(A)(9), which prohibits Registered Advisors from "Making any false or misleading statement about his or her ability, degree, or area of competence";[233]
- Section 5(II)(A)(11), which prohibits Registered Advisors from "Representing or suggesting to anyone that his/her status as a Registered Player Financial Advisor constitutes an endorsement or recommendation by the NFLPA of the Registered Player Financial Advisor, or his/her qualifications, or services";[234] and
- Section 8, which prohibits Registered Advisors from using "the NFLPA's name or likeness in any advertising or promotional material, without prior express written consent of the NFLPA."[235]

Despite these Code provisions, past Registered Advisors have still credentialized their inclusion in the Registration Program. For example, according to 2017 SEC proceedings, Aaron Parthemer[236] and Sylvester King,[237] two formerly Registered Advisors and business partners who "participated in selling more than $5 million of unregistered, illiquid securities

---

[232] 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17.
[233] *Id.*
[234] *Id.*
[235] *Id.* at 19–20.
[236] *See* Aaron R. Parthemer, Respondent., Exchange Act Release No. 4756, 2017 WL 3634137 (Aug. 23, 2017).
[237] *See* Sylvester King, Jr., Respondent., Exchange Act Release No. 4757, 2017 WL 3634138 (Aug. 23, 2017).

to certain of [their] professional athlete brokerage customers and investment advisory clients,"[238] each:

> [A]ctively marketed [their] status[es] as . . . registered NFLPA Advisor[s] when recruiting new NFL player advisory clients and serving current ones. [Their respective] business cards, email signature block[s], and marketing materials all highlighted [their respective] NFLPA Financial Advisor registration. The marketing materials contained internet addresses/links to the NFLPA website and invited . . . clients to verify [their respective] credentials. The NFLPA website contained, among other things, the NFLPA Code. The NFLPA Code provides that "[b]y joining the NFLPA Financial Advisor Registration Program, all financial advisors agree to abide by rules which are designed to both protect and inform players" and "[a] Registered Player Financial Advisor shall have the duty to act in the best interest of his/her Player-clients." The NFLPA Code places importance on the special relationship between an NFLPA Advisor and a player by recognizing the advisor as a fiduciary to the player.[239]

Parthemer and King, according to the SEC, "had approximately 40 active or retired professional athletes as brokerage customers and/or investment advisory clients, most of whom [we]re members of the [NFLPA]."[240] Ultimately, among other violations, the SEC found that Parthemer and King "*willfully violated* Sections 206(1) and 206(2) of the Advisers Act, which *prohibit fraudulent conduct* by an investment adviser."[241]

A quick online search confirmed that similar credentializing seems to persist as of this writing, at least among those holding themselves out as Registered Advisors ("Self-Described Registered Advisors").[242] In particular, Self-Described Registered Advisors seem to credentialize their purported inclusion in the Registration Program in two main places: (a) their respective firm's websites and (b) their personal LinkedIn profiles.

a. Credentializing NFLPA Registration on Firm Websites

Examples of ongoing credentialization on the respective firm websites of Self-Described Registered Advisors include:

---

[238] Aaron R. Parthemer, *supra* note 236; Sylvester King, Jr., *supra* note 237.
[239] Aaron R. Parthemer, *supra* note 236; Sylvester King, Jr., *supra* note 237.
[240] Aaron R. Parthemer, *supra* note 236; Sylvester King, Jr., *supra* note 237.
[241] Aaron R. Parthemer, *supra* note 236 (emphasis added); Sylvester King, Jr., *supra* note 237 (emphasis added).
[242] Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm a given Self-Described Registered Advisor's current or past membership in the Registration Program.

- In March 2019, one wealth-management firm issued a still-available press release stating that its "founding partner . . . has been formally *recognized* by the National Football League Players Association (NFLPA) as a Registered Player Financial Advisor,"[243] arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8.
- A second wealth-management firm, with at least one Self-Described Registered Advisor,[244] states on its website that "As a[n] NFLPA Registered Player Financial Advisor, we not only meet but *exceed the appropriate qualifications* to participate in the program,"[245] arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(9), 5(II)(A)(11), and 8.
- A third wealth management firm, also with at least one Self-Described Registered Advisor,[246] holds itself out on its website as "an NFLPA Financial Advisor,"[247] arguably violating Code Sections 5(II)(A)(8) and 5(II)(A)(11). This same firm also uses the NFLPA's logo[248]—presumably without the union's permission,[249] like Feste's firm reportedly did[250]—thus probably also violating Code Section 8.

---

[243] *See CrossleyShear Wealth Management's Evan Shear Recognized as an NFL Players Association Registered Financial Advisor*, CROSSLEYSHEAR WEALTH MGMT. (Mar. 13, 2019) (emphasis added), https://crossleyshear.com/crossleyshear-wealth-managements-evan-shear-recognized-as-an-nfl-players-association-registered-financial-advisor/ [https://perma.cc/28AH-9UWK].

[244] *See Home*, 2ND OPINION PARTNERS, https://www.2ndpartners.com/ [https://perma.cc/2MTT-ULHW] (stating that the firm's "Founding Partner . . . is an NFLPA Registered Player Financial Advisor with the NFL Players Association.").

[245] *See NFLPA Registered Player Financial Advisor*, 2ND OPINION PARTNERS (emphasis added), https://www.2ndpartners.com/nflpa-registered-financial-advisor/ [https://perma.cc/G48A-L5T2].

[246] *See NFL Players*, PROSPERWELL FINANCIAL, https://prosperwell.com/nfl-players/ [https://perma.cc/MVF6-H7G9] (identifying one individual in particular as a Self-Described Registered Advisor).

[247] *See id*. ("As an *NFLPA Financial Advisor*, we offer a player centric approach with authenticity." (emphasis added)). One could argue that holding oneself out *not* as an "NFLPA *Registered* Advisor" *but* as an "*NFLPA Financial Advisor*" suggests employment or some other NFLPA affiliation that is more substantial than inclusion in the Registration Program.

[248] *See id*. (displaying NFLPA logo).

[249] It seems implausible that the NFLPA would approve the use of its logo or name on a webpage where one claims to be not an "NFLPA Registered Advisor"—but an "NFLPA Financial Advisor"—the latter of which suggests employment or some other NFLPA affiliation that is more substantial than inclusion in the Registration Program.

[250] *See* NFLPA Letter to Feste, *supra* note 204.

- Likewise, another individual holds himself out[251] on his firm's website as an "NFLPA® financial advisor,"[252] again, arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8.
- As a final example, yet another individual holds himself out[253] as "a member of the NFL Players Association (NFLPA),"[254] arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8. This same individual then adds that this "NFLPA *credential* includes an *exclusive list of financial advisors* across the country who have *access to the NFL association*,"[255] perhaps independently violating Code Sections 5(II)(A)(8) and 5(II)(A)(11). Moreover, characterizing the Registration Program as "exclusive" is inherently problematic, given that a key premise on which the SEC issued its No-Action Letter was that the NFLPA use eligibility criteria that "are *not* highly selective"[256] because "highly selective" criteria would be less likely to lead to "a broad cross-section and large number of [Registered Advisors]."[257]

All in all, given the high likelihood that a player would visit the website of a prospective financial advisor's firm to gather initial information, and given that a Registered Advisor's website address is one of the few pieces of information on the NFLPA's password-protected list,[258] it stands to reason that such Registration credentialization could facilitate a misleading sense of trust among players.

b. Credentializing NFLPA Registration on LinkedIn

Equally problematic is Self-Described Registered Advisors credentializing their inclusion in the Registration Program on LinkedIn. For instance,

---

[251] Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

[252] *See The Seiler Group of Raymond James*, RAYMOND JAMES, https://www.raymondjames.com/theseilergroup/about_us.htm [https://perma.cc/6FTK-YWAZ].

[253] Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

[254] *Michael H. Olivia, CFP® CExP™*, WESTPAC WEALTH PARTNERS, https://www.westpacwealth.com/team/michael-h-olivia-cfp-cexp [https://perma.cc/GRY3-DDYN].

[255] *Id*. (emphasis added).

[256] SEC No-Action Letter to NFLPA, *supra* note 17, at *6 (emphasis added).

[257] *Id.*

[258] *See How do I find a qualified financial advisor on the NFLPA's website?*, NFLPA, https://nflpa.com/active-players/faq/how-do-i-find-a-qualified-financial-advisor-on-the-nflpas-website [https://perma.cc/V9V7-NQYP].

as of this writing, at least seven Self-Described Registered Advisors include some variation of the title "NFLPA Registered Financial Advisor" in the work experience section of their publicly available LinkedIn profiles.[259] This misleadingly suggests employment, rather than Registration, with the NFLPA, arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8.[260]

This unforced error is particularly ironic because LinkedIn profiles specifically feature at least two designated spaces where one could more appropriately identify his or her inclusion in the Registration Program: the "Organizations" section, as well as the "Licenses & Certifications" section. As the popular "For Dummies" series explains, the "Organizations" section of LinkedIn profiles represents:

> [T]he place to record the real-world associations and clubs to which you belong. Listing professional membership organizations on your profile proves you are . . . an involved member within your industry. . . . To determine the organizations to list in your profile, answer the following questions: Do you belong to any industry organizations? Do you belong to any user groups? Are you a member of a networking group? Do you pay dues to any association? Are you a part of a local government organization? Do you sit on a board of directors?[261]

Alternatively, one could identify his or her inclusion in the Registration Program in the "Licenses & Certification" section. Though the title of the section risks exacerbating the pervasive confusion surrounding the Certification-Registration distinction,[262] using the "Licenses & Certification" section is still far more appropriate than suggesting employment with the NFLPA. And it is not as if nobody uses the "Organizations" or "Licenses & Certifications" profile sections on LinkedIn. For example, of the seven individuals whose LinkedIn pages suggest employment with the NFLPA as a Registered Financial Advisor,[263] four already list information in their "Organizations" section, and four list information in their "Licenses & Certifications" section.[264]

---

[259] Publicly available LinkedIn Profile records on file with author.

[260] *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17, 19–20. On LinkedIn, when a user adds a position with the NFLPA under work experience, the NFLPA's logo seems to then automatically display. Publicly available LinkedIn Profile records on file with author.

[261] DONNA SERDULA, LINKEDIN PROFILE OPTIMIZATION FOR DUMMIES 163–64 (2017).

[262] *See supra* Section II.A.2.

[263] Publicly available LinkedIn Profile records on file with author.

[264] Publicly available LinkedIn Profile records on file with author.

On balance, using LinkedIn to credentialize one's purported Registered Advisor status (and NFLPA affiliation) seems particularly likely to give players a misleading sense of trust: not only because it suggests employment with the NFLPA but also because of LinkedIn's present-day ubiquity. Indeed, for six of the seven individuals, a Google search of their first name, last name, and "financial advisor" (for example, "John Doe Financial Advisor"), generated their LinkedIn profile as the second, third, or fourth non-advertisement result.[265] It is thus easy to imagine a scenario where a player ends up looking at a potential financial advisor's LinkedIn and gaining a misleading sense of trust from the misrepresentation that the NFLPA is the potential advisor's employer.

Despite the risk of players gaining a misleading sense of trust from LinkedIn credentializaiton, the NFLPA has either failed to monitor such misrepresentations or simply made little effort to correct them. Either is hard to justify. In terms of monitoring, because the NFLPA maintains its own publicly available LinkedIn "company page," which is followed by over 40,000 LinkedIn users and automatically maintains a list of all its "employees,"[266] it would require little effort to detect seven individuals holding themselves out on LinkedIn as Registered Advisors *employed with* the NFLPA.[267] And in terms of corrective action, the NFLPA could simply ask the seven individuals to fix their profiles,[268] bring disciplinary proceedings

---

[265] Records of the first page of results for each of these seven Google searches are on file with author.

[266] Publicly available NFLPA LinkedIn Page records on file with author.

[267] As Sun River IT Partners, a technology services company, explains on their website: "When LinkedIn members add or edit a position on their profile, they specify the company they work for. If they select your company from the LinkedIn list, the employee will automatically show up on your Company Page." *See How to Remove Rogue Employee Profiles from Your LinkedIn Company Page*, SUN RIVERS IT PARTNERS, https://www.sunriverit.com/how-to-remove-rogue-employee-profiles-from-your-linkedin-company-page/ [https://perma.cc/4QWP-Y3K8].

[268] A closer look into the seven Self-Described Registered Advisors whose public LinkedIn profiles suggest employment with the NFLPA yielded—for three of the seven individuals—relevant information ranging from substantial red flags to a minor disclosure:

- Most relevantly, one Self-Described Registered Advisor has been the subject of two FINRA customer complaints: an ultimately denied claim from 2005, and a pending $10 million claim from retired NFL defensive end Charles Johnson, who "allege[d] that the [advisor]" both "recommended risky and unsuitable investments in various outside business ventures where his wife was a partial owner in janitorial businesses, second hand clothing stores, hair cut establishments, housing developments and venture capital enterprises. . . . [and] . . . diverted funds from these outside invest-

under the Code (assuming that the individuals are, indeed, current participants in the Registration Program), or contact LinkedIn directly to remedy the issue through the website's page specifically dedicated to explaining how to report inaccurate employment, aptly titled "Removing People from a LinkedIn Page."[269]

4. Counterproductive Compliance: Botched Background Checks, Misleading Monitoring, and Perverse Policy

Finally, the NFLPA has repeatedly failed to execute on the Registration Program's core function: ensuring not only that applicants meet the Code's minimum requirements,[270] but also that, once in the Registration Program, they maintain ongoing compliance with those requirements.[271] In any event, even if the NFLPA had successfully executed on its core function over the years, the Code's compliance program would still be fundamentally flawed because of perverse underlying policy that prohibits the NFLPA from informing players about Registered Advisors' non-disqualifying red flags.[272]

a. Botched Pre-Registration Background Checks

As mentioned, applicants to the Registration Program must pass a background check before becoming a Registered Advisor.[273] Yet several

---

ments and accounts for their personal gain." *See* BROKERCHECK REPORT: CRD # 1777599, FINRA 11–14, https://files.brokercheck.finra.org/individual/individual_1777599.pdf [https://perma.cc/73D2-EWN9]; *see also* Chase Carlson (@ChaseACarlson), TWITTER (May 11, 2020, 1:59 PM), https://twitter.com/ChaseACarlson/status/1259951229402255360 [https://perma.cc/9KHQ-B2XB] (identifying "[f]ormer NFL DE Charles Johnson" as the customer who filed the complaint).

- A second Self-Described Registered Advisor was once reportedly (i) charged with several crimes (including burglary) and (ii) convicted on simple-assault charges. *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 9:14 AM), https://twitter.com/ChaseACarlson/status/790587388200382464 [https://perma.cc/9ETE-HVLS]; *infra* Section II.A.4.c.
- A third Self-Described Registered Advisor's FINRA BrokerCheck report includes a disclosure from 2014. *See* BROKERCHECK REPORT: CRD# 2268259, FINRA 9, https://files.brokercheck.finra.org/individual/individual_2268259.pdf, [https://perma.cc/9ZE5-35DT].

[269] *See Removing People from a LinkedIn Page*, LINKEDIN, https://www.linkedin.com/help/linkedin/answer/1589 [https://perma.cc/X7LK-7VMS].

[270] *See infra* Section II.A.4.a.

[271] *See infra* Section II.A.4.b.

[272] *See infra* Section II.A.4.c.

[273] *See Apply to Be a Financial Advisor*, *supra* note 83.

NFL players, reportedly, have been victimized by Registered Advisors whose backgrounds never should have passed muster, such as

- Kurt Barton—"who ran a $50 million Ponzi scheme" and "swindled money from [several] Philadelphia Eagles" players—yet never earned a bachelor's degree, as required by the Registration Program;[274]
- Sylvester King, who, according to the SEC, sold $5 million of unregistered, illiquid securities to his client base comprising 40 current or former professional athletes,[275] reportedly also never earned a bachelor's degree as required by the Registration Program;[276]
- Ash Narayan, who reportedly "robbed" $33 million from clients, including $7.8 million from quarterback Mark Sanchez alone, was approved for and remained in the Registration Program until 2016 despite,[277] according to the SEC, "h[o]ld[ing] himself out as a Certified Public Accountant ("CPA") even though he is not and never has been a CPA";[278]

---

[274] *See* Rovell, *supra* note 186.

[275] *See* Sylvester King, Jr., *supra* note 237.

[276] *See* Carlson, *supra* note 171.

[277] *See* Ahiza Garcia, *Jake Peavy and Mark Sanchez ripped off in $33 million scheme*, CNN (June 22, 2016), https://money.cnn.com/2016/06/22/news/ponzi-scheme-ash-narayan-sanchez-peavy/index.html [https://perma.cc/YAB4-S5WG] ("Jake Peavy and Mark Sanchez are just two of the pro athletes robbed in a $33 million Ponzi-like scheme. Ash Narayan is being investigated by the SEC for 'secretly siphoning millions of dollars' from the athletes' accounts 'using forged or unauthorized signatures.' . . . Among the documents in the SEC's lawsuit was a ledger that contained a list of athletes and how much they lost[, which included] . . . Denver Broncos quarterback Mark Sanchez[, who lost] $7.8 million."); Nathaniel Vinton, *NFLPA cuts ties with Ash Narayan who's accused of stealing more than $30M from pro athletes*, N.Y. DAILY NEWS (June 22, 2016), https://www.nydailynews.com/sports/football/nflpa-cuts-ties-adviser-accused-stealing-athletes-article-1.2684133 [https://perma.cc/925L-RG4Y] (suggesting that Narayan remained in the Registration Program until June 2016 by writing: "The NFLPA notified agents Wednesday it had immediately suspended Narayan, who was charged by the Securities and Exchange Commission with defrauding the former Jets quarterback and other pro ballplayers.").

[278] First Amended Complaint, SEC v. Narayan, No. 3:16-cv-1417-M, 2018 WL 1210809 (N.D. Tex. Jan. 4, 2018) ("Narayan's clients trusted him—not only because of their fiduciary relationship, but also because of his professional qualifications and experience. Narayan knowingly or recklessly represented to these clients that he was a certified public accountant ("CPA"). For instance, *both his . . . email signature block and his letterhead* [at RGT, Narayan's employer since 1997, before the advent of the NFLPA Financial Advisor Registration Program] *read 'Ash Narayan, J.D., CPA.'* His claim that he was a CPA boosted Narayan's credibility. It served as

- Nelson "Keith" Bond, who reportedly was "responsible for players . . . losing roughly $20 million" in a Ponzi scheme, became a Registered Advisor even though one investment-fraud attorney's investigation "could not find any investment licenses for Bond," suggesting he lacked the financial training and licensing required by the Registration Program.[279]

And these examples represent only the reportedly unqualified Registered Advisors who have been exposed through public proceedings.[280] Because experts estimate that most fraud suffered by professional athletes likely goes undetected or unreported,[281] the NFLPA might well have approved other unqualified applicants who have managed to remain unexposed by

---

a basis on which his clients . . . believed he was capable of managing their money conservatively and in accordance with the law. *In reality, however, Narayan is not—and never has been—a CPA*." (emphasis added)); *see also* Aaron Gordon, *NFLPA Approved Financial Advisor Stole $30 Million From Mark Sanchez, Jake Peavy, and Roy Oswalt*, VICE (June 21, 2016), https://www.vice.com/en_us/article/9apv38/nflpa-approved-financial-advisor-stole-30-million-from-mark-sanchez-jake-peavy-and-roy-oswalt [https://perma.cc/F6KP-XQSD] ("Despite being a registered financial advisor in the NFLPA database, he did not hold a CPA, although he claimed to have one in his email signature.").

[279] *See* Carlson, *supra* note 171; *see also* SEC No-Action Letter to NFLPA, *supra* note 17, at *2 ("Any financial advisor must be legally authorized to engage in his or her profession. *Any person or entity that provides Broker, Dealer, Investment Advisory, Financial Planning, insurance, tax, accounting, and/or legal functions that should be, but is not, registered with the SEC, and/or licensed by appropriate state jurisdictions, is not eligible to be a Registered Player Financial Advisor*. Any person or entity that performs any of the above-described functions and is exempt from such registration and/or licensing is also not eligible to be a Registered Player Financial Advisor." (emphasis added)).

[280] *See* Press Release, U.S. Attorney's Office for the Western District of Texas, Triton President and CEO Kurt Barton Sentenced to Federal Prison (Nov. 4, 2011), https://archives.fbi.gov/archives/sanantonio/press-releases/2011/triton-president-and-ceo-kurt-barton-sentenced-to-federal-prison [https://perma.cc/U8QS-QA98] (announcing Kurt Barton's federal conviction on dozens of counts of fraud, leading to his seventeen-year prison sentence); Sylvester King, Jr., *supra* note 237 (finding that Sylvester King, Jr. "willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser"); Ash Narayan, Respondent, Exchange Act Release No. 79991, 2017 WL 526392 (Feb. 8, 2017) (announcing settlement with Ash Narayan, which, among other things, bars him from practicing as an accountant or lawyer before the SEC); Amended Complaint, *supra* note 157, ¶¶ 1–2, (alleging $20 million in losses after investing with Nelson "Keith" Bond and his business partner, Kirk Wright).

[281] *See* SPIEGELHALTER & SILVERTOWN, *supra* note 140, at 2 ("[F]rom 2004 through 2018, professional athletes alleged almost $600 million in fraud-related loss. *In light of the difficulty in detecting fraud and the reluctance of victims to acknowledge it publicly, that's likely not the half of it*." (emphasis added)).

avoiding union, regulatory, and public scrutiny. In short, the Registration Program's propensity to botch background checks can give players a misleading sense of trust. Indeed, players would be much more likely to vet Registered Advisors if they believed that the NFLPA had *not* already thoroughly done so and consequently issued its seal of approval.

b. Misleading Monitoring

The NFLPA's failure to enforce the Code's minimum requirements is not limited to negligence when registering first-time applicants; the NFLPA has also failed to sufficiently monitor participants' compliance with the Code after accepting them into the Registration Program. For example, in 2004, NFL player Johnny Rutledge brought a Financial Industry Regulatory Authority ("FINRA")[282] customer complaint against the above-mentioned Jeff Rubin (of Alabama Bingo infamy) for "forging signatures on . . . Rutledge's life insurance application,"[283] allegedly costing Rutledge $119,000.[284] Rubin ultimately paid Rutledge $40,000 to settle the dispute. But the NFLPA never notified their player-members about this,[285] even though the settlement was publicly available and Rutledge "didn't stay quiet" and "warned other . . . former NFL players about Rubin."[286] And this settlement with Rutledge was hardly the only red flag that arose while Rubin was a Registered Advisor. In April 2008, the month after Rubin started recruiting player-clients to invest in the Alabama electronic-Bingo operation,[287] the IRS imposed a tax lien against Rubin for $440,000.[288] At the time, he was already "underwater on his $3 million house"[289] amid a

---

[282] "FINRA is the largest self-regulatory organization that is authorized by Congress with protecting investors in the United States." Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct*, 127 J. OF POL. ECON. 233, 233 n.1 (2019).

[283] Chase Carlson (@ChaseACarlson), TWITTER (Oct. 23, 2016, 5:38 PM), https://twitter.com/ChaseACarlson/status/790351811488149504 [https://perma.cc/KL52-RW5B].

[284] Cole & Getlin, *supra* note 172.

[285] Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 9:23 AM), https://twitter.com/chaseacarlson/status/790589533398134784 [https://perma.cc/DB7A-7Q63].

[286] Donna Gehrke-White, *Ex-NFL player Rutledge tells how he warned players about Broward financial adviser*, SUN SENTINEL (Mar. 28, 2013), https://www.sun-sentinel.com/business/fl-xpm-2013-03-28-fl-nfl-rutledge-20130326-story.html [https://perma.cc/FG7E-LKHV].

[287] Cole & Getlin, *supra* note 172.

[288] Keteyian, *supra* note 167.

[289] *Id.*

collapsing real estate market and global economy.[290] But Rubin's player-clients remained unaware of his crumbling personal finances,[291] even though (i) IRS tax liens are matters of public record,[292] (ii) the Code disqualified individuals "generally unable to pay [their] debts" from the Registration Program,[293] and (iii) the NFLPA had pledged to "monitor the compliance of [R]egistered [A]dvisors with the [Registration] Program's eligibility requirements and regulations."[294]

Altogether, it seems that the NFLPA probably never knew about Rubin's red flags, which suggests that the union maintained insufficient monitoring processes. Had the NFLPA alerted players about Rubin's red flags—or, better yet, banned Rubin from the Registration Program—players would have known about Rubin's exploitative tendencies and crumbling personal finances before collectively committing tens of millions of dollars to an electronic-Bingo investment that, as it turns out, was already $41 million in the red when Rubin began recruiting his player-clients as investors.[295] Said differently, had the NFLPA and its Registration Program just done what it purports to do, the union could have mitigated, or altogether prevented, the tens of millions of dollars in losses incurred by the NFL players who invested with Rubin.

But perhaps most discouraging is the NFLPA's apparent failure to learn from these mistakes. A decade after the NFLPA failed to inform players about Rutledge's settlement with Rubin, the NFLPA continued to monitor insufficiently its Registered Advisors' compliance with the Code. For example, as of October 2016, the NFLPA's password-protected list of Registered Advisors included several individuals who no longer should have ap-

---

[290] *See generally* Kimberly Amadeo, *2008 Financial Crisis Timeline*, BALANCE (Nov. 20, 2019), https://www.thebalance.com/2008-financial-crisis-timeline-3305540 [https://perma.cc/J4BN-WLGT].

[291] *See* Ryan Williamson, *Fred Taylor, other prominent NFL players say they lost $43 million thanks to financial adviser*, COMEBACK (Oct. 25, 2016), https://thecomeback.com/nfl/fred-taylor-other-prominent-nfl-players-say-they-lost-43-million-thanks-to-financial-adviser.html [https://perma.cc/48L6-7QKL] ("Rubin wanted the players to invest in electronic bingo . . . . [But l]ittle did the players know that Rubin was in a bad financial situation and was doing this to try and overcome other financial problems. . . . [And a]side from not disclosing his financial problems, Rubin failed to inform the investors of the risks that came along with this investment.").

[292] *See Understanding a Federal Tax Lien*, U.S. INTERNAL REVENUE SERVICE, https://www.irs.gov/businesses/small-businesses-self-employed/understanding-a-federal-tax-lien, [https://perma.cc/D97A-WY9Q].

[293] SEC No-Action Letter to NFLPA, *supra* note 17, at *11.

[294] *Id.* at *20.

[295] Cole & Getlin, *supra* note 172.

peared there. Indeed, that list included one Registered Advisor whose broker and investment-advisor licenses, at least one of which was required to remain in the Registration Program, had expired more than six weeks earlier,[296] and, worse still, another whose broker and investment-advisor licenses had expired about nine months earlier.[297] This same list even included a Registered Advisor who had tragically died in a widely reported plane accident in March 2016, more than seven months earlier.[298] We simply cannot know how long the NFLPA would have included these individuals on its list of Registered Advisors had *60 Minutes* not rhetorically asked on national television: "how vigilant can the [NFLPA] be in monitoring its [Registered Advisors] when Kevin Carreno is still listed on its online directory" despite having died "in a plane crash seven months ago[?]"[299]

It is again self-evident here how the NFLPA's promises to monitor Registered Advisors' compliance with the Code can give players a mislead-

---

[296] Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:42 AM), https://twitter.com/chaseacarlson/status/790549106938839040 [https://perma.cc/5VWL-C93C] (establishing that Registered Advisor remained in Registration Program as of October 24, 2016 yet no longer maintained his broker's license); BROKERCHECK REPORT: CRD # 3221193, FINRA 2, 4 (2020), https://files.brokercheck.finra.org/individual/individual_3221193.pdf [https://perma.cc/QV4T-6W9D] (establishing that Registered Advisor's broker license expired in September 2016 and was not renewed until April 2017); INVESTMENT ADVISER PUBLIC DISCLOSURE: CRD # 3221193, U.S. SEC. & EXCHANGE COMM'N 1 (2020), https://reports.adviserinfo.sec.gov/reports/individual/individual_3221193.pdf [https://perma.cc/4E9M-H79P] (establishing that Registered Advisor's investment adviser license expired on September 8, 2016).

[297] Carlson, *supra* note 296 (establishing that Registered Advisor remained in Registration Program as of October 24, 2016 yet no longer maintained his broker's license); BROKERCHECK REPORT: CRD # 3115604, FINRA 1 (2020), https://files.brokercheck.finra.org/individual/individual_3115604.pdf [https://perma.cc/WK32-9229] (establishing that Registered Advisor's broker license expired in January 2016); INVESTMENT ADVISER PUBLIC DISCLOSURE: CRD # 3115604, U.S. SEC. & EXCHANGE COMM'N 1 (2020), https://reports.adviserinfo.sec.gov/reports/individual/individual_3115604.pdf [https://perma.cc/HR8T-3VAR] (establishing that Registered Advisor's investment adviser license also expired in January 2016 and was not renewed until October 2019).

[298] Chase Carlson (@ChaseACarlson), TWITTER (Oct. 23, 2016, 5:23 PM), https://twitter.com/ChaseACarlson/status/790348002594619393 [https://perma.cc/R93J-L6UU] (establishing that Registered Advisor remained in Registration Program as of October 23, 2016); *see, e.g.*, Margie Manning, *Former FINRA governor, executive at Raymond James one of two killed in Friday's plane crash*, TAMPA BAY BUS. J. (Mar. 21, 2016), https://www.bizjournals.com/tampabay/news/2016/03/21/former-finra-governor-executive-at-raymond-james.html (providing example of press coverage around fatal plane crash).

[299] Keteyian, *supra* note 167.

ing sense of trust: the NFLPA causes players to reasonably assume that the union not only thoroughly vets Registration Program applicants, but also continues to monitor such applicants' compliance with the Code once admitted into the Registration Program as Registered Advisors.

c. Perverse Policy

The Registration Program also maintains a questionable approach to handling cases in which an applicant's background check both meets the Code's eligibility requirements and simultaneously raises potential red flags. Problematically, the NFLPA neither informs players of such non-disqualifying red flags nor offers any distinctions among the broad spectrum of "passing" background checks.

Indeed, consider the case of former Registered Advisor Kirk Wright. Even though Wright's Registration Program background check showed (i) two recently released federal tax liens against him totaling over $400,000, (ii) two prior civil judgments against him totaling over $20,000, and (iii) a pair of non-fraud-related criminal counts, the Code's eligibility requirements did not disqualify him from the Registration Program.[300]

And that the NFLPA allegedly failed to inform players about Wright's non-disqualifying red flags[301] should not surprise anyone who has read the SEC's No-Action Letter to the NFLPA: as mentioned, this letter hinged on several critical stipulations, including that the union would neither recommend nor "advise players as to the merits or shortcomings of any particular" Registered Advisor, "other than indicating whether a [Registered Advisor]

---

[300] *See* Atwater v. Nat'l Football League Players Ass'n, Civ. A. No. 1:06-CV-1510-JEC, 2009 WL 3254925, at *2 n.2 (N.D. Ga. Mar. 27, 2009), *aff'd*, 626 F.3d 1170 (11th Cir. 2010) ("The 2005 background check on Wright reported two federal tax liens in the amounts of $383,680 and $20,605, which were released as of November 1, 2004, and November 21, 2002 respectively. It also reflected two civil judgments in the amounts of $11,132 and $10,944, a judgment for $.80, and a state tax lien against IMA for $2,088. There were also two criminal counts against Wright, both of which were misdemeanors and unrelated to fraud, *which were not disqualifiers for the Program*." (citations omitted) (emphasis added)); *id.* at *2 ("A review of their records revealed a number of tax liens and civil judgments against Wright and Bond. However, *existence of these liens and judgments would not automatically disqualify an applicant from registration in the Program*, and almost all of the liens were released." (citations omitted) (emphasis added)).

[301] *See* Amended Complaint, *supra* note 157, ¶ 77 ("Had Plaintiffs been aware of any of these 'red flag' issues [e.g., tax liens], they would not have invested their monies with Wright . . . .").

has been subject to disciplinary action for violating" the Code.[302] In other words, the NFLPA probably could not have informed its player-members about Wright's discomforting-but-not-disqualifying red flags without sidestepping the No-Action Letter it received from the SEC.

This perverse policy is perhaps the Code's fundamental flaw. For instance, in Wright's case, the Registration Program—on some level—worked as designed: the NFLPA's 2005 background check on Wright successfully uncovered red (albeit non-disqualifying) flags.[303] But the Registration Program still failed: Wright perpetrated a $150 million Ponzi scheme for which he was ultimately "convicted . . . of 47 counts of fraud and money laundering."[304] And among Wright's defrauded victims were six retired NFL players, who collectively lost $20 million investing in the Ponzi scheme.[305] Facing a prison sentence of up to 710 years, Wright hung himself in his jail cell before receiving his sentence.[306]

Unfortunately, the fundamental flaw that prohibited the NFLPA from disclosing Kirk Wright's non-disqualifying red flags to players remains an issue today. For example, as of October 2016, the Registration Program reportedly included Registered Advisors who, allegedly, had been:

- both (i) convicted of a felony drug conspiracy charge and (ii) suspended by a state regulatory agency for making a misrepresentation on an application for a license to sell financial products;[307]
- both (i) charged with crimes including burglary, aggravated assault, reckless endangerment, terroristic threats, criminal conspiracy, and criminal trespassing and (ii) convicted of simple assault;[308]

---

[302] SEC No-Action Letter to NFLPA, *supra* note 17, at *6; *see supra* Section I.A.2.b.

[303] *See* Atwater v. Nat'l Football League Players Ass'n, Civ. A. No. 1:06-CV-1510-JEC, 2009 WL 3254925, at *2 n.2 (N.D. Ga. Mar. 27, 2009), *aff'd*, 626 F.3d 1170 (11th Cir. 2010).

[304] Tierney, *supra* note 61.

[305] *See id.*

[306] *See id.*

[307] *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), https://twitter.com/ChaseACarlson/status/790546431136395264 [https://perma.cc/8PQL-NSNX] (establishing that this "current NFLPA registered financial advisor, has a felony drug conviction and suspension by the Florida Department of Insur[ance]"); BROKERCHECK REPORT: CRD # 2026394, FINRA 9–12, https://files.brokercheck.finra.org/individual/individual_2026394.pdf [https://perma.cc/3PWK-YHKK] (providing more details about the two disclosures on the Registered Advisor's record).

[308] *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 9:14 AM), https://twitter.com/ChaseACarlson/status/790587388200382464 [https://perma.cc/9ETE-HVLS].

- both (i) fired from his previous employer for "not disclosing private securities transactions, including transactions alongside clients, and not being forthcoming during an initial review"[309] and (ii) named co-defendant in a then-pending arbitration complaint filed by FINRA's Department of Enforcement alleging he invested in several private companies without his firm's approval, including one investment where the firm had instructed him not to invest;[310]
- both (i) fired from his previous employer for violating the firm's annuity policy and (ii) accused in a FINRA customer complaint of selling a client an unsuitable annuity;[311]
- both (i) held jointly and severally liable (along with his firm) at arbitration for $50,000 in damages stemming from a FINRA customer complaint where a client alleged, among other things, fraud, violation of federal and state securities laws, breach of fiduciary duty, and breach of contract[312] and (ii) named in five other FINRA customer complaints;[313] and
- named in ten FINRA customer complaints from 1999 to 2014.[314]

Again, though all of this non-disqualifying conduct raises red flags, were the NFLPA to disclose such red flags to prospective player-clients, it would risk

---

[309] Chase Carlson, *New NFLPA Registered Financial Advisor Is The Subject of a FINRA Disciplinary Proceeding*, CARLSON-LAW.NET (Mar. 31, 2017), https://www.carlson-law.net/new-nflpa-registered-financial-advisor-is-the-subject-of-a-finra-disciplinary-proceeding/ [https://perma.cc/WK37-JM5V].

[310] Though the case was likely pending when the NFLPA approved this Registered Advisor into the Program, FINRA ultimately suspended and fined this Registered Advisor $25,000 in August 2017. *See* Dep't of Enforcement v. Brown, No. 2014042690502, 2017 FINRA Discip. LEXIS 36, at *5; *see also* Carlson, *supra* note 309 ("It appears that [he] became registered with the NFLPA as a financial advisor while [this] FINRA Disciplinary Proceeding was pending.").

[311] *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), https://twitter.com/chaseacarlson/status/790546463176663040 [https://perma.cc/UYL8-JLL7]; BROKERCHECK REPORT: CRD # 2352216, FINRA 8–10, https://files.brokercheck.finra.org/individual/individual_2352216.pdf [https://perma.cc/M6P7-2T4R].

[312] *See In re* Arbitration Between: Dubicki Living Tr. v. Merrill Lynch, No. 02-07575, 2004 WL 433842, at *1 (N.A.S.D. Feb. 25, 2004).

[313] *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), https://twitter.com/chaseacarlson/status/790546495531585537 [https://perma.cc/L7ZC-C76A].

[314] *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), https://twitter.com/chaseacarlson/status/790546479169564672 [https://perma.cc/BR8J-ZBF4].

compromising the terms of its SEC No-Action Letter.[315] All in all, these examples highlight yet another way that the Registration Program—even when it works as designed—can still manage to give players a misleading sense of trust.

B. Potentially Damaging Players' Likelihood of Retaining an Ethical, Qualified Financial Advisor

The primary way that the Registration Program seeks to protect players from fraud is by "ensur[ing] the integrity of"[316]—and providing "access to"—a "qualified group of financial advisors."[317] But evidence suggests that the Registration Program has perhaps had the opposite effect, potentially damaging players' likelihood of retaining an ethical, qualified financial advisor.

1. Discomforting Data

In fall 2016, almost a quarter (24 percent) of Registered Advisors reportedly had a disclosure on their FINRA BrokerCheck report,[318] nearly

---

[315] Unless, of course, the conduct in question occurred while the Registered Advisor in question was a member of the Registration Program and faced disciplinary proceedings under the Registration Program. *See* SEC No-Action Letter to NFLPA, *supra* note 17, at *6 ("The . . . List [of Registered Advisors] will be organized and presented in a manner that does not recommend any [Registered Advisor] over any other [Registered Advisor], *other than indicating whether a {Registered Advisor} has been subject to disciplinary action for violating Program regulations*. . . . [And t]he NFLPA will not advise players as to the merits or shortcomings of any particular Listed Adviser." (emphasis added)).

[316] *Id.* at *20 ("The Program is designed to help ensure the integrity of those who handle a player's money, not how they invest—or not invest—that money.").

[317] *See* REGISTRATION PROGRAM FAQs, *supra* note 98, at 1 ("The principal intent of the [Registration] Program is to benefit the players themselves by providing them access to a qualified group of financial advisors that have met certain eligibility criteria.").

[318] *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 5:54 PM), https://twitter.com/chaseacarlson/status/790718052400848896 [https://perma.cc/3ZP5-MFBK] ("Just ran the numbers: at least 24% of the NFLPA advisors were not 'squeaky clean.' That is only using Brokercheck, not full background check"); Chase Carlson (@ChaseACarlson), TWITTER (Nov. 18, 2016, 3:25 PM), https://twitter.com/chaseacarlson/status/799755562347020288 [https://perma.cc/F2JU-ZSRZ] ("About 24% of NFLPA Registered Advisors have a black mark [on their record].") The author reached out and subsequently spoke to Mr. Carlson to better understand his underlying analysis; the author's understanding is as follows. After receiving the NFLPA's Registered Advisor list, Mr. Carlson searched for each Registered Advisor

double the 12.7 percent national rate for financial advisors.[319] Notably, disclosures on one's FINRA BrokerCheck report reflect "customer disputes, disciplinary events, and certain criminal and financial matters on the broker's record."[320] So, overall, the frequency with which Registered Advisors'

---

on FINRA's BrokerCheck database. Of all the Registered Advisors on the NFLPA's list, roughly 24 percent had a disclosure on their FINRA BrokerCheck record. But this 24 percent figure represented the percentage of Registered Advisors who had a disclosure on their FINRA BrokerCheck record, *not* the percentage of Registered Advisors who were registered as a Broker with FINRA who had a disclosure on their FINRA record. Indeed, there were Registered Advisors on the NFLPA's list who were *not* registered with FINRA. Telephone Interview with Chase Carlson (May 7, 2020). At the time, if one were a registered investment adviser, licensed insurance broker/agent, Certified Public Accountant, or attorney, then he or she did not need to maintain registration with FINRA to become a Registered Advisor with the NFLPA. *See* 2016 NFLPA Registered Advisors Code of Conduct, *supra* note 67, at 9–10. So, because not all NFLPA Registered Advisors were registered with FINRA at the time of Mr. Carlson's analysis, it should follow that the percentage of those with a disclosure on their FINRA BrokerCheck records would have been even higher than 24 percent had Mr. Carlson limited his analysis to *only* those NFLPA Registered Advisors who were also registered with FINRA. Consider this simplified hypothetical example to illustrate: if there were one hundred NFLPA Registered Advisors when Mr. Carlson conducted his analysis, then twenty-four would have had disclosures on their FINRA BrokerCheck records (24 percent). But if, say, ten of the NFLPA Registered Advisors were lawyers and CPAs—and thus had never registered with FINRA—then, of the one hundred NFLPA Registered Advisors, only ninety would have been registered with FINRA. Yet twenty-four still would have had a disclosure on their BrokerCheck record. Thus, the percentage of FINRA-registered NFLPA Registered Advisors with a disclosure on their BrokerCheck record would be about 27 percent. Telephone Interview with Chase Carlson (May 7, 2020).

[319] *See* Egan, Matvos & Seru, *supra* note 282, at 233 n.1, 241 n.8 (finding that, from 2005 to 2015, the share of "financial adviser[s]"—whom the authors define as "representatives registered with the Financial Industry Regulatory Authority (FINRA)"—with a disclosure on his or her FINRA BrokerCheck report was 12.7 percent. As explained in note 318, *supra*, Mr. Carlson's 24 percent constituted the percentage of *all* NFLPA Registered Advisors who had a disclosure on their BrokerCheck record, *not* the percentage of FINRA-registered NFLPA Registered Advisors who have a BrokerCheck disclosure. In other words, that NFLPA Registered Advisors were almost twice as likely as the average financial advisor to have a FINRA BrokerCheck disclosure in fall 2016 likely *understates* what would be the true "apples-to-apples" comparison—that is, how much likelier *FINRA-registered NFLPA Registered Advisors* were to have such a disclosure than the average financial advisor.

[320] *About BrokerCheck*, FINRA, https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck [https://perma.cc/Y4DG-QZY2].

BrokerCheck reports included these disclosures suggests that—at least in fall 2016—the Registration Program may have given players access to a group whose integrity and qualifications were collectively worse, *not* better, than those of the general population of financial advisors.

What is more, the number of Registered Advisors in the Registration Program dropped from roughly 500 in May 2010[321] to about 165 in October 2019,[322] representing a decline of about 67 percent. One could devise rationales explaining why the Registration Program's shrinking roster is not necessarily an inherently negative development—or is perhaps even a positive development. But recall the NFLPA's No-Action Letter, which the SEC issued based on several key union representations, including that the NFLPA design the Registration Program "to result in a broad cross-section and large number of [Registered Advisors]."[323] Thus, the Registration Program's contracting size might—by itself—also risk infringing on the No-Action Letter the SEC issued to the NFLPA.

2. Sidelined Agents

The Registration Program might also damage players' likelihood of retaining an ethical, qualified financial advisor by prohibiting Certified Agents from recommending non-Registered financial advisors to their player-clients. Presumably, the NFLPA theorized that this policy would cause Certified Agents who had once referred their player-clients to non-Registered financial advisors to begin referring their player-clients to Registered Advisors instead. In practice, however, this theory hinges on a critical—but perhaps incorrect—assumption: that Certified Agents would sooner recommend a Registered Advisor to their clients than make no financial-advisor recommendation at all.

When journalist Jason Cole contacted fifteen Certified Agents for his investigation into the Registration Program, only four (27 percent) "regularly recommend[ed] financial advisors," and when they did, they only "recommended advisors they know personally."[324] One Certified Agent held the Registration Program in such low regard that he counseled his own financial advisor *against* applying to the Registration Program: "I told him it wasn't

---

[321] Robert Margolis, *How the NFL Players Association brought financial advisors to Florida to better marry them to its members*, RIABIZ (May 19, 2010), https://riabiz.com/a/2010/5/19/how-the-nfl-players-association-brought-financial-advisors-to-florida-to-better-marry-them-to-its-members [https://perma.cc/4ABE-CJMC].

[322] Jessop & Kaplan, *supra* note 1.

[323] SEC No-Action Letter to NFLPA, *supra* note 17, at *6.

[324] Cole, *supra* note 161.

worth the money he would spend. It's not worth being lumped in with guys who have ripped off players."[325] Other Certified Agents expressed similar sentiments, too, calling the Registration Program "a joke,"[326] "perfunctory," "for (public relations) sake,"[327] an invitation for "potential liability," and "ridiculous"—indeed, as one Certified Agent lamented: "Think about it, based on what the NFLPA is doing, I couldn't recommend Warren Buffet."[328]

This misguided policy creates a situation in which many Certified Agents, despite often being "players' most trusted and important resources and allies,"[329] feel they cannot advise their clients on one of the most consequential decisions of their career: retaining a financial advisor. What is more, this policy seems doubly counterproductive given that, in fall 2016, Registered Advisors proved disproportionately likely to have a disclosure on their FINRA BrokerCheck record.[330] In the end, how could a policy that leaves a player to navigate such circumstances without his Certified Agent *not* damage his chances of retaining an ethical, qualified financial advisor?

C. Providing for Insufficient Recovery

Finally, the Registration Program also fails to ensure that players exploited by a Registered Advisor can recover losses. Section II.C.1 analyzes how the Registration Program's arbitration process provides players with minimal recourse. Section II.C.2 explains how the Registration Program's required minimums for professional liability insurance and fidelity bonding coverage offer insufficient protection. And Section II.C.3 explores how Institutional Registration might help mitigate this issue.

---

[325] *Id.*

[326] *Id.* ("[The Registration Program is] a joke. Put it this way, how good a program can it be if Jeff Rubin and Hodge Brahmbhatt were registered?").

[327] *Id.* ("[The Registration Program is] *perfunctory*. The union does it for (*public relations*) sake so that they can say they're at least doing something. They don't have the staff to really check out what's going on and they're not following up with who any of these people are." (emphasis added)).

[328] *Id.* ("The program is *ridiculous*. Think about it, based on what the NFLPA is doing, I couldn't recommend Warren Buffet. Instead, we're supposed to tell a player only use someone from the list the union puts out. I'm not taking the *potential liability*." (emphasis added)).

[329] Deubert, Cohen & Fernandez, *supra* note 3, at 242.

[330] *See supra* Section II.B.1.

1. Toothless Enforcement: The Code's Arbitration Regime

Though the Code binds Registered Advisors to its "arbitration and disciplinary procedures,"[331] this protection is virtually meaningless for players. This is because the NFLPA's disciplinary authority vis-à-vis Registered Advisors is limited to either sending them "a letter of reprimand," or revoking their registration.[332] Thus, even if a Registered Advisor defrauds a player of millions of dollars, the Code's arbitration process cannot award the player damages. Nor can it prohibit those expelled from the Registration Program from advising other players: because the Registration Program is voluntary, revoking one's registration does not bar him or her from working with other players.

Beyond failing to make players whole, this toothless enforcement regime suffers at least two other problems. First, because the NFLPA can impose only limited punishments, the threat of NFLPA sanctions offers little deterrence value. If Code violations warranted harsher punishments, perhaps fewer Registered Advisors would violate the Code. Second, for the players who know that the Code does indeed provide for arbitration, the existence of the current inconsequential disciplinary mechanism could be worse than not having any mechanism at all: players can fall into a trap of believing that this built-in arbitration system protects them when, in reality, it does not, representing yet another way the Registration Program can give players a misleading sense of trust.[333]

2. Patchy Protection: The Code's Professional Liability Insurance and Fidelity Bonding Requirements

As outlined above in Section I.B.1, the Registration Program's eligibility requirements mandate that a Registered Advisor:

> [B]e covered by fidelity bonding and professional liability insurance in an amount sufficient to protect against theft and fraud, and also against any errors, omissions, or other conduct by the Financial Advisor which causes financial damage to any Player. The minimum coverage amounts are determined by AUM, as reflected in the chart below.

---

[331] *See* 2017 NFLPA Registered Advisors Code of Conduct, *supra* note 59, at 14.

[332] Deubert, Cohen & Fernandez, *supra* note 3, at 277.

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

Total Assets Under Management	Required Limits: Professional Liability (E&O)	Required Limits: Crime/Fidelity Bond
$1 Billion+	$10,000,000 Occurrence/ $10,000,000 Policy Aggregate	$10,000,000 Occurrence/ $10,000,000 Policy Aggregate
$500,000,000–$999,999,999	$5,000,000 Occurrence/ $5,000,000 Policy Aggregate	$5,000,000 Occurrence/ $5,000,000 Policy Aggregate
$250,000,000–$499,999,999	$3,000,000 Occurrence/ $3,000,000 Policy Aggregate	$3,000,000 Occurrence/ $3,000,000 Policy Aggregate
$0–$249,999,999	$2,000,000 Occurrence/ $2,000,000 Policy Aggregate	$2,000,000 Occurrence/ $2,000,000 Policy Aggregate

> In order to remain eligible, the [Registered] Financial Advisor must maintain at all times fidelity bonding and professional liability insurance in the amounts determined in accordance with the table [below], and with coverage terms and in a form consistent with industry standards and best practices for firms engaged in activities comparable to [a Registered] Financial Advisor.[334]

To be sure, these coverage minimums do add some value for players. Mandating that Registered Advisors maintain professional liability insurance (often called errors-and-omissions insurance) ensures that players can recover damages (up to the specified amount) if their Registered Advisor is negligent, breaches fiduciary duties, or makes other mistakes.[335] Similarly, requiring Registered Advisors to maintain a fidelity bond ensures that players can recover damages (up to the specified amount) if their Registered Advisor's employee defrauds or steals from the player (or if their Registered Advisor defrauds or steals from the player and their Registered Advisor is covered by his or her employer's fidelity bond).[336]

For at least three reasons, however, these insurance requirements insufficiently protect players who suffer losses from an exploitative Registered Advisor. First, professional liability insurance does not cover losses stemming from the fraudulent activity of a Registered Advisor.[337] Indeed, professional liability insurance not only "typically do[es] not cover fines, penalties, and punitive damages" but also "typically exclude[s] . . . claims arising

---

[334] 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 8.

[335] *See Do RIAs Need Liability Insurance?*, ADVISOR HUB (Sept. 4, 2019), https://advisorhub.com/resources/do-rias-need-liability-insurance [https://perma.cc/J8WH-PUPC].

[336] James Chen, *Fidelity Bond*, INVESTOPEDIA (Mar. 5, 2020), https://www.investopedia.com/terms/f/fidelity-bond.asp [https://perma.cc/3FCP-T977].

[337] Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:51 AM), https://twitter.com/ChaseACarlson/status/790551375683944448 [https://perma.cc/2FTL-R7DQ].

from the advisor's intentional fraud or dishonesty, willful or intentional failure to act prudently, or guarantees made regarding performance, as well as any claims that go beyond the firm's advisory services."[338] And while fidelity bonding covers losses caused by a fraudulent employee, this would presumably apply only if the employer of the predatory Registered Advisor—rather than the Registered Advisor him or herself—purchased the fidelity bond.[339]

Second, most professional liability insurance policies do not cover alternative investments, including investments in "hedge funds, limited partnerships, private equity funds, REITs, exchange-traded notes, derivatives, foreign securities and private placements."[340] Indeed, "[a]lmost every insurance policy for financial advisors excludes private deals."[341] Yet it is precisely these private investments "that always get players in trouble."[342]

Third, even if professional liability insurance or fidelity bonding does apply, the Code's coverage minimums are far too low to sufficiently cover losses commensurate with those suffered under the Registration Program to date. Take the case of Jeff Rubin, who, according to the SEC, violated several fraud-related laws stemming from his role in the Alabama Bingo debacle.[343]As shown in Table 2 below, even if Rubin had maintained professional liability insurance and fidelity bonding coverage at the levels required by today's Code, players would have still incurred massive losses, regardless of Rubin's assets under management.

---

[338] *Do RIAs Need Liability Insurance?*, *supra* note 335.

[339] *See* David T. DiBiase & David J. Billings, *"Loss? What Loss?": Unique Claims on Crime Policies/Fidelity Bonds*, 14 FIDELITY L.J. 271, 271 (2008) ("Fidelity bonds . . . indemnify an insured from loss of or to covered property sustained as a direct result of 'theft' of 'employee dishonesty.' . . . Indemnity is available only for covered *losses* resulting directly from the dishonesty of the insured's employee.").

[340] *See Do RIAs Need Liability Insurance?*, *supra* note 335.

[341] Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 7:00 AM), https://twitter.com/ChaseACarlson/status/790553536673280000 [https://perma.cc/T4EL-6QKZ].

[342] *Id.*

[343] The SEC specifically found that Rubin "willfully violated" (i) "Sections 17(a)(1) and 17(a)(3) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities," (ii) "Section 206(1) of the Advisers Act, which prohibits any investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client," and (iii) "Section 206(2) of the Advisers Act, which prohibits an investment adviser from, directly or indirectly, engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." *See* Jeffrey B. Rubin, Respondent., Exchange Act Release No. 4196, 2015 WL 5352653 (Sept. 15, 2015).

TABLE 2[344]

Total Assets Under Management	Coverage from Professional Liability Insurance/ Fidelity Bonding	Player Losses[345]	Losses Not Recoverable from Professional Liability Insurance/ Fidelity Bonding	Percentage of Losses Recoverable from Professional Liability Insurance/ Fidelity Bonding
$1B	$10M	$43M	$33M	23%
$500M–$999M	$5M	$43M	$38M	12%
$250M–$499M	$3M	$43M	$40M	7%
$0–$249M	$2M	$43M	$41M	5%

In fact, even if Rubin had managed over $1 billion in assets, his player-clients would have recovered just twenty-three cents on the dollar from either the Registration Program's mandated professional liability insurance or its fidelity bonding coverage. The much likelier scenario, however, is that Rubin had fewer than $250 million under management: although Pro Sports Financial (Rubin's company) had upwards of 100 clients at its peak,[346] given that many of these clients were NFL players, a group for whom "median career earnings . . . are about $3 million,"[347] it seems improbable that the firm managed $25 million per client, on average. It stands to reason, therefore, that Rubin's clients almost certainly would have recovered just five cents on the dollar from either of the Registration Program's minimum professional liability insurance or fidelity bonding coverage.[348]

[344] For information about the assumptions underlying Table 2, *see infra* note 348.

[345] Forty-three million dollars lost among NFL players reflects the amount reported by *60 Minutes*. *See* Keteyian, *supra* note 167 ("Several of the NFL's biggest stars have lost a total of $43 million in a risky venture brought to them by a financial adviser registered by their own union.").

[346] *See* Cole & Getlin, *supra* note 172 ("Former Pro Sports Financial vice president Mike McIntyre said the company represented more than 100 clients at its peak.").

[347] Stan Jastrzebski, *NFL players are having trouble making their million dollar salaries last into retirement*, BUSINESS INSIDER (Sept. 5, 2017), https://www.businessinsider.com/nfl-players-having-trouble-making-salaries-last-into-retirement-2017-9 [https://perma.cc/WL2P-F6FJ].

[348] This conclusion (and Table 2) assumes, *arguendo*, that either professional liability insurance or a fidelity bond would have applied in this case. But it is quite

On the whole, then, the Code's required professional liability insurance and fidelity bonding coverage, like its arbitration mechanism, not only fails to protect players adequately, but can also give players a misleading sense of trust.[349]

3. Institutional Registration and Recovery

All that said, the recent expansion of the Registration Program to include Registered Firms could improve players' chances of recovering losses from fraud, assuming it causes them to retain Registered Firms over Registered Advisors at small and medium-sized firms. This is because the NFLPA seems focused on registering large, name-brand banks, as evidenced by their initial registration of Goldman Sachs and Bessemer Trust, who boast $1.77 trillion ($198 billion in private wealth management alone) and $105 billion in assets under management, respectively.[350]

Admittedly, there are excellent financial advisors at boutique firms, and poor financial advisors at large, name-brand institutions. From a fraud-protection standpoint, however, all else equal, it is safest to retain a financial advisor at a large institution. Why? Because a defrauded client can file a

---

possible neither would have applied. Indeed, professional liability insurance likely would not have applied because the Alabama electronic-bingo project was a private investment, and, as explained, professional liability insurance seldom covers losses stemming from private investments. A second, independently sufficient reason that professional liability insurance may not have applied here is because the SEC found Rubin to have violated several fraud-related laws stemming from his role in the Alabama electronic-Bingo project (*see supra* note 343), and, as explained, professional liability insurance seldom covers losses caused by fraud. Finally, because Rubin owned his own firm (as established in Section II.C.3, *infra*), he may not have been considered an "employee" for the purposes of fidelity bonding. In any event, it seems implausible that professional liability insurance and fidelity bonding coverage would have *both* applied. Thus, Table 2 above shows what the losses would have been if just one of these two policy types applied. Again, to reiterate, because these insurance requirements were not in effect at the time, this merely represents an *illustrative* hypothetical.

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

[350] Becca Stanek, *Goldman Sachs Private Wealth Management Review*, SMARTASSET (Oct. 21, 2019), https://smartasset.com/financial-advisor/goldman-sachs-private-wealth-management-freview [https://perma.cc/NH8W-JBR7] ("[Goldman Sachs's] investment management division . . . oversees about $1.77 trillion for clients. Goldman Sachs Private Wealth Management, which has offices across the U.S., currently has $198 billion in assets under management."); *Bessemer Group Inc.*, GURUFOCUS, https://www.gurufocus.com/guru/bessemer+groupϱc/profile [https://perma.cc/FQ29-U3RC] ("[Bessemer] now oversees over $105 billion in total assets under management for over 2,300 clients.").

lawsuit or FINRA customer complaint against a well-capitalized institution without risk of a judgment-proof defendant. As Mr. Carlson explained in a quote for *The Athletic Report*: "[Institutional registration] can solve one issue, which is, in the past, there's been some [Registered Advisors] who . . . ripped off players, and there was no money to recover. By only registering . . . really large firms, there will be money [to recover], if someone makes a mistake."[351] To illustrate, compare the fate of Jeff Rubin's clients—for whom recovery was "nearly impossible" because Rubin owned his own small firm[352]—with the fate of two of Aaron Parthemer's clients, former NFL players Asante Samuel and John St. Clair. Because Parthemer worked at one of the largest and most well-resourced financial institutions in the world, Morgan Stanley, Samuel and St. Clair were able to recover their losses—collectively more than $1 million—at FINRA arbitration proceedings.[353]

III. Conclusion

Admittedly, only time will tell how the Registration Program fares moving forward. This is especially true given the Program's recent expansion to include Registered Firms and its upcoming November 2020 cutoff date for all Registered Advisors to become a Certified Financial Planner or Chartered Financial Analyst. All things considered, however, the NFLPA's Registration Program—though undoubtedly well-intentioned—seems counterproductive overall.[354]

Indeed, the discussion above highlighted three main ways the Registration Program has failed to protect players. First, the Registration Program

---

[351] Jessop & Kaplan, *supra* note 1.

[352] *See* Carlson, *supra* note 171 ("Rubin, . . . owned [his] own firm, making it nearly impossible for [his player-clients] to recover money after the downfall.").

[353] *See* Ashley Portero, *Mega Millions winner, former NFL player win $4.2M arbitration from Morgan Stanley*, South Fla. Bus. J. (Dec. 31, 2018), https://www.bizjournals.com/southflorida/news/2018/12/31/mega-millions-winner-former-nfl-player-win-4-2m.html.

[354] Even so, reasonable minds can—and, indeed, have—disagreed with this conclusion. *See*, *e.g.*, Deubert, Cohen & Fernandez, *supra* note 3, at 278 (concluding that even though "the NFLPA financial advisor registration system does not guarantee a player will receive sound financial advice and assistance, it increases the odds as compared to non-registered financial advisors"); Shropshire, Davis & Duru, *supra* note 185, at 79 (concluding that the Registration Program and the Code "are certainly steps in the right direction" and reasoning that "given . . . no other major American sports league's players' union has to date established such a program, the NFLPA . . . [should] be applauded" for its efforts).

can give players a misleading sense of trust in a number of ways.[355] Players naturally understand a Registered Advisor's inclusion in the Registration Program as an endorsement from their trusted union, even though this is not the case.[356] In addition, players, among many others—including Certified Agents, academics, and other industry experts—conflate the NFLPA's Registration Program with its Certification Program, despite the former lacking the protections provided by the latter.[357] Further, the Registration Program enables Registered Advisors to mislead players by "credentializing"—that is, exaggerating—their affiliation with the NFLPA,[358] often on their firm's websites[359] or publicly available LinkedIn profiles.[360] Finally, and perhaps most troubling, the Registration Program has repeatedly failed not only to ensure that Registered Advisors (and applicants) meet[361] and maintain[362] compliance with the Registration Program's minimum requirements, but also to inform players when Registered Advisors' background checks turn up *non-disqualifying* red flags.[363]

Second, the Registration Program might not improve—and indeed, may even damage—players' likelihood of retaining an ethical, qualified financial advisor.[364] Indeed, available data, though limited and slightly dated, suggests that Registered Advisors are nearly twice as likely to have a disclosure on their FINRA BrokerCheck record than the average financial advisor nationwide.[365] What is more, the size of the Registration Program has reportedly decreased from about 500 Registered Advisors in 2010 to about 165 in 2019—almost a 67 percent drop in less than a decade.[366] Lastly, because some Certified Agents do not have a Registered Advisor whom they feel comfortable recommending to their player-clients, and because the NFLPA prohibits Certified Agents from recommending non-Registered financial advisors, some Certified Agents simply decide to make no recommendation at all to their player-clients, leaving players-clients alone to make one of the biggest decisions of their career: retaining a financial advisor.[367]

---

[355] *See supra* Section II.A.
[356] *See supra* Section II.A.1.
[357] *See supra* Section II.A.2.
[358] *See supra* Section II.A.3.
[359] *See supra* Section II.A.3.a.
[360] *See supra* Section II.A.3.b.
[361] *See supra* Section II.A.4.a.
[362] *See supra* Section II.A.4.b.
[363] *See supra* Section II.A.4.c.
[364] *See supra* Section II.B.
[365] *See supra* Section II.B.1.
[366] *See supra* Section II.B.1.
[367] *See supra* Section II.B.2.

Third, the Registration Program fails to ensure that players exploited by a Registered Advisor can recover losses.[368] Because the Registration Program's arbitration mechanism does not provide for monetary awards, it is virtually meaningless to defrauded players, lacks deterrence value, and fosters a misleading sense of trust.[369] And the Registration Program's minimum professional liability insurance and fidelity bonding coverage, though better than nothing, may not cover a player's losses if the Registered Advisor commits fraud or if the loss stems from an alternative investment (such as a private deal), two of professional athletes' biggest sources of investment loss.[370] And even if a Registered Advisor's professional liability insurance or fidelity bonding coverage does apply, the minimum required coverage under the Code is insufficient to cover losses of the magnitude that have been suffered under the Registration Program to date.[371] That said, if the recent expansion of the Registration Program to include Registered Firms leads players to retain Registered Firms over Registered Advisors at small and medium-sized firms, then this development could improve players' chances of recovering losses from fraud; this is because the NFLPA seems intent on registering large institutions that are well-resourced and thus less likely to become a judgment-proof defendant.[372]

All in all, it is clear that the NFLPA simply seeks to help its player-members achieve and maintain financial security. But if the union is going to meet this lofty aspiration, then the NFLPA needs to find a better solution than the current version of the Registration Program.

---

[368] *See supra* Section II.C.
[369] *See supra* Section II.C.1.
[370] *See supra* Section II.C.2.
[371] *See supra* Section II.C.2.
[372] *See supra* Section II.C.3.

JSEL Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics

Jayma Meyer* and Andrew Zimbalist**

ABSTRACT

California Governor Gavin Newsom signed the Fair Pay to Play Act (SB 206) into law on September 30, 2019. The bill made it illegal for California's universities to prohibit college athletes from receiving compensation for use of their Names, Images, and Likenesses ("NILs"). Lawmakers soon introduced similar bills in other states[1] and in Congress.[2]

The National Collegiate Athletic Association ("NCAA") lobbied vigorously against SB 206 after its introduction in the California state legislature, threatening to prohibit all of the state's fifty-eight member colleges

* Counsel, Simpson Thacher & Bartlett LLP and Visiting Clinical Professor of Sports Law, O'Neill School of Public and Environmental Affairs, Indiana University, Bloomington, IN, USA.

** Robert A. Woods Professor of Economics, Smith College, Northampton, MA, USA.

The authors thank Loren Shokes and David Balme for their outstanding research assistance and Donna Lopiano and the editors of JSEL for their helpful comments on an earlier draft of this article. Further, we thank the editors of the JSEL for their editorial support.

[1] Through March 2020, thirty-six states have introduced similar bills to the one passed in California. *See* Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes be Paid For Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019, 5:43 PM), https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/ [https://perma.cc/66SE-6G68].

[2] *See infra* note 13; *Future of College Sports: Government's Role in Athletic Pay*, THE ASPEN INSTITUTE (Dec. 17, 2019), https://www.aspeninstitute.org/events/future-of-college-sports-governments-role-in-athlete-pay/ [https://perma.cc/8Y3F-ZX2J].

from postseason play if the bill went into effect at the specified date in 2023. The NCAA also threatened to sue to block the law[3] based on the Commerce Clause of the U.S. Constitution,[4] which prohibits states from enacting legislation that unduly impacts commerce beyond its borders.[5]

The Fair Pay to Play Act collides with the NCAA's long-time insistence that college athletes be amateurs and thus not receive pay for playing or their athleticism.[6] Indeed, payments to college athletes for NILs could blow up its amateurism model, which prohibits athletes, unlike other students, from receiving pay for activities including signing endorsements, permitting video games to use their likeness, sponsoring athletic camps, selling jerseys and other apparel, and monetizing social media.

Confronted with snowballing legislation and lawsuits, along with a growing public consensus that the status quo exploits high-profile college athletes, the NCAA sought to regain control by forming a nineteen-member committee to examine the feasibility of NIL payments to student-athletes ("NIL Committee").

After California passed SB 206, the NIL Committee gave the NCAA Board of Governors ("Board") an interim report that tentatively greenlit NIL benefits for athletes but also recommended myriad guidelines and restrictions. Specifically, on October 29, 2019, the Board announced that it had voted to allow athletes generally to receive NIL benefits "in a manner

---

[3] Jon Brodkin, *NCAA Fights California Over New Law That Helps Athletes Get Paid,* ARS TECHNICA (Sept. 30, 2019), https://arstechnica.com/tech-policy/2019/09/ncaa-athletes-could-be-paid-for-being-in-video-games-under-new-calif-law/ [https://perma.cc/3UWP-28CF].

[4] U.S. CONST. art. I, § 8, cl. 3.

[5] In *National Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476 (D. Nev. 1992), Nevada enacted a statute that would have "impose[d] certain minimum 'due process' procedural standards on the NCAA when the NCAA is investigating a Nevada NCAA member institution." *Id.* at 1483. Although the court found that the statute did "not facially or directly discriminate against interstate commerce," it held that the statute was unconstitutional under the Commerce Clause because it impaired the contractual relationship between the NCAA and its Nevada member institutions. *Id.*

[6] A fundamental tenet of the NCAA is the "principle of amateurism" which, under the NCAA's bylaws, is the theory that "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NAT'L COLLEGIATE ATHLETIC ASS'N ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, 2019–20 NCAA DIVISION I MANUAL ¶ 2.9 (2019) [hereinafter DIVISION I MANUAL].

consistent with the collegiate model"[7] and requested that each of the NCAA's three Divisions[8] draw up plans for implementation by January 2021.

Part of the NCAA's concern with SB 206 and other state initiatives around NIL payments is that it would be unworkable to have a national organization with rules and regulations that differ on a state-by-state basis. Indeed, the bills introduced in the South Carolina and New York state legislatures allow for schools to pay athletes directly,[9] while SB 206 allows schools to make NIL payments to current students (not prospective students) and for payments from third parties.[10] The New York bill also stipulates that fifteen percent of a school's athletic department revenues go to pay for its student athletes.[11] Florida's NIL bill would go into effect on July 1, 2021, much earlier than other states.[12] Fortunately, the prospect of a patchwork of varying state laws appears unlikely to eventuate because Representa-

---

[7] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, REPORT OF THE NCAA BOARD OF GOVERNORS OCTOBER 29, 2019 MEETING 4 (2019) [hereinafter NCAA NIL REPORT], https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf [https://perma.cc/R3CF-J8UQ].

[8] The NCAA's three divisions are Division I, Division II and Division III. *Our Three Divisions*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sites/default/files/18-00037%20NCAA%20101%20-%20Our%20Three%20Divisions%20Updates%20_WEB.pdf [https://perma.cc/3CYW-SGR3]; *see Divisional Differences and the History of Multidivision Classification*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification [https://perma.cc/78FM-E7J2] (explaining the differences between the NCAA's three divisions).

[9] *See* Jenna West, *South Carolina Lawmakers to File Proposal Similar to California's Fair Pay to Play Act*, SPORTS ILLUSTRATED (Sept. 13, 2019), https://www.si.com/college/2019/09/13/south-carolina-proposal-pay-college-athletes-fair-pay-play-act [https://perma.cc/652W-XUSC]; Joseph Nardone, *New York Senator Proposes Bill To Have College Athletes Paid Directly By Schools*, FORBES (Sept. 18, 2019, 4:28 PM), https://www.forbes.com/sites/josephnardone/2019/09/18/new-york-senator-proposes-bill-to-have-college-athletes-paid-directly-by-schools/#415a854a4d17 [https://perma.cc/XHT9-ZBX6]. *Cf.*, Colorado SB-123 signed on March 20, 2020, prohibiting schools from paying current or prospective athletes for NILS. SB20-123, 2020 Reg. Sess. (Colo 2020), https://leg.colorado.gov/bills/sb20-123.

[10] J. Brady McCollough, *News Analysis: What's Next for NCAA and College Athletics Now That SB 206 Is Law?*, L.A. TIMES (Sept. 30, 2019, 5:40 PM), https://www.latimes.com/sports/story/2019-09-30/what-next-for-ncaa-college-athletics-now-that-sb-206-is-law [https://perma.cc/EXC8-VH6J].

[11] Nardone, *supra* note 9.

[12] *See, e.g.*, *Florida Gov. Endorses Proposed NIL Bill That Would Take Effect in '20*, SPORTS BUS. J. (Oct. 24, 2019), https://www.sportsbusinessdaily.com/Daily/Issues/2019/10/24/Colleges/Florida-NIL.aspx [https://perma.cc/6JLX-FXWY].

tive Mark Walker, R-North Carolina, has introduced a NIL bill in the U.S. House of Representatives that would create a uniform federal system.[13] Similarly, Senators Chris Murphy, D-Connecticut, Mitt Romney, R-Utah, and Marco Rubio, R-Florida, have discussed introducing a NIL bill in the U.S. Senate and the Senate's Commerce Committee held a hearing on the matter in February 2020.[14]

In this Article, we explain the history and role of amateurism in college athletics (Part I); the legal landscape of amateurism and paying college athletes, including NIL payments (Part II); the potential scope of NIL payments (Part III); and the NCAA NIL Committee's recommendations (Part IV). We conclude by offering a public policy proposal for implementing circumscribed NIL rights for college athletes (Part V).

I. The History of Amateurism[15]

A. The Evolution of Amateurism

Whether amateurism rules are necessary for intercollegiate athletics has been the subject of longstanding academic debate and legal challenges. It is instructive to follow the evolution of the NCAA's definition of amateurism from its origins, at which time it prohibited all financial aid based on athletic ability, to its current stance, in which it embraces athletic scholarships and benefits with values generally exceeding those afforded non-athletes.

The NCAA, in its early days, did not enforce many of its policies, rendering definitions and principles of amateurism inconsequential. Article VI of the NCAA's 1906 bylaws burdened each member institution with enforcing violations of its amateurism principles, such as "the offering of

---

[13] Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

[14] Alex Daugherty & Brian Murphy, *Marco Rubio Leads Senate Effort to Compensate College Athletes*, Tampa Bay Times (Nov. 8, 2019), https://www.tampabay.com/florida-politics/buzz/2019/11/09/marco-rubio-leads-charge-to-compensate-college-athletes/ [https://perma.cc/FN2S-76AT]. Also, U.S. Representative and former Ohio State football player, Anthony Gonzalez, announced a plan to propose a federal law to allow college athletes the opportunity to earn a profit from endorsements. Dan Murphy, *Congressman to Propose Federal Legislation for Paying College Athletes*, ESPN (Oct. 2, 2019), https://www.espn.com/college-sports/story/_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes [https://perma.cc/8Y9G-PGES].

[15] Portions of this section are based on one of the author's previous work. *See* Gerald Gurney, Donna A. Lopiano & Andrew Zimbalist, Unwinding Madness: What Went Wrong with College Sports and How to Fix It 13–15 (2017).

inducements to players to enter colleges or universities because of their athletic abilities or maintaining players while students on account of their athletic abilities."[16] Thus, athletic scholarships, as we know them today, violated amateurism rules of the time, while need-based financial aid unrelated to athletics did not.

Not until 1916 did the NCAA define the term "amateurism." Article VI(b) of the bylaws at that time provided that an amateur is "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits derived therefrom."[17] The NCAA amended this definition in 1922: "An amateur sportsman is one who engages in sport solely for the physical, mental, or social benefits he derives therefrom, and to whom the sport is nothing more than an avocation."[18]

Because the NCAA had no enforcement power during this time, its members ignored and violated these amateurism rules with impunity. Indeed, a 1929 Carnegie Foundation report on intercollegiate athletics found that three-quarters of the 112 colleges investigated had violated the NCAA's amateurism code and principles.[19] After declining during the Depression and much of World War II, college sports' commercialization accelerated as the war ended. At the end of 1946, the sports editor of the *New York Herald Tribune* wrote:

> When it comes to chicanery, double-dealing, and undercover work behind the scenes, big-time college football is in a class by itself . . . . Should the Carnegie Foundation launch an investigation of college football right now, the mild breaches of etiquette uncovered [in the 1920s] . . . would assume a remote innocence which would only cause snickers among the post-war pirates of 1946.[20]

The de facto payrolls of several college teams reached $100,000 and the football coach at Oklahoma State estimated that its rival Oklahoma annually spent over $200,000 ($2.86 million in today's dollars) on players.[21]

---

[16] PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 22 (Dec. 29, 1906).

[17] PROCEEDINGS OF THE ELEVENTH ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 118 (Dec. 28, 1916).

[18] PROCEEDINGS OF THE SEVENTEENTH ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 118 (Dec. 29, 1922).

[19] GURNEY ET AL., *supra* note 15, at 12.

[20] MURRAY SPERBER, ONWARD TO VICTORY: THE CREATION OF MODERN COLLEGE SPORTS 168 (1998).

[21] ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 9 (1999).

After the situation had gotten sufficiently out of control, the NCAA finally attempted both to ratify the reality of financial aid to athletes and to enforce its code of amateurism.[22] First, in 1948, the NCAA passed its so-called "Sanity Code," allowing schools to award athletically-related financial aid if the student-athlete qualified for need and the aid was limited to tuition and incidental expenses. Aid exceeding tuition could be granted if it stemmed from superior academic scholarship. In 1950, however, the NCAA effectively abandoned the Sanity Code—which also prohibited schools from withdrawing aid if a student quit participating in athletics—when its membership voted not to expel violating schools.[23]

In 1956, the NCAA finally addressed allowable non-need-based compensation to athletes when it permitted athletic scholarships to cover commonly accepted educational expenses. In 1957, an "Official Interpretation" defined such expenses to include costs for room, board, tuition, books, fees, and $15 a month for "laundry money,"[24] equal to $140 a month, or $1,680 annually, in today's dollars. Few who attended the NCAA's first convention in 1906 could have conceived that, by 1957, NCAA rules would allow a university to use these types of financial inducements to recruit high school athletes.[25]

---

[22] Arguably, this effort began at the 1939 NCAA Convention when the Association passed a rule enabling athletes to receive financial aid based on need, but the aid could not be conditioned on athletic participation. Hence, in principle, it was not a form of athletic aid, rather it was need-based aid that could be allocated to all students, including athletes.

[23] NAT'L COLLEGIATE ATHLETIC ASS'N, 1947-48 YEARBOOK 212–13.

[24] NAT'L COLLEGIATE ATHLETIC ASS'N, 1956-57 YEARBOOK 4–5. It is notable that in its 1957 rules the NCAA did not prohibit payment to athletes for appearances and endorsements. This prohibition did not come until 1964. Of course, the amount of money available for athlete NILs at the time was diminutive. *See* Roger Noll, *Collusion in College Sports:* Edward O'Bannon, et al. v. NCAA, et al., *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY (John Kwoka & Lawrence White eds., 7th ed. 2018); Corrected Direct and Rebuttal Testimony of Dr. Roger G. Noll to Reflect Final Trial Exhibit Numbers, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541).

[25] Walter Byers, the executive director of the NCAA from 1951 to 1987, has characterized the awarding of athletic scholarships as the beginning of a nationwide money laundering scheme whereby boosters who formerly gave money directly to athletes could now funnel it to athletes through legitimate university channels. *See* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 73 (1995). Significantly, the schools in the Ivy League do not permit scholarships for athletic participation. *Prospective Athlete Information*, IVY LEAGUE, https://ivyleague.com/sports/2017/7/28/information-psa-index.aspx [https://perma.cc/8X3H-DWLH].

The 1957 NCAA rules contained provisions specifically meant to counter a possible argument that athletic scholarships constituted "pay for play," which would have exposed its members to workers' compensation claims and social security contributions. Financial aid could not be "reduced (gradated) or canceled on the basis of an athlete's contribution to team success, injury, or decision not to participate."[26] Adding form to substance, the NCAA mandated the use of the term "student-athlete."[27]

Then, in 1967, the NCAA drifted further from its original amateurism concept in its response to member-school complaints about athletes who accepted four-year scholarships then decided against participating. One athletic director opined that this was "morally wrong," adding that "regardless of what anyone says, this is a contract and it is a two-way street."[28] In response, the NCAA passed rules that allowed the immediate cancelation of an athlete's scholarship should he or she voluntarily withdraw from sports or fail to follow a coach's directives.

The NCAA departed still further from its model of amateurism in 1973 by requiring schools to replace athletic scholarships' four-year guarantees with annually renewable terms, effectively empowering coaches to discontinue scholarships for virtually any reason, including injury, performance, fit, or availability of more favorable talent.[29] The contingent contractual nature of this relationship and the control it gave to the coaches over the players' behavior had many trappings of an employment contract.[30]

---

[26] BYERS, *supra* note 25, at 69.

[27] *Id.* at 75.

[28] Letter from Clyde Smith to Walter Byers (July 6, 1964), *in* WALTER BYERS PAPERS, LONG RANGE PLANNING FOLDER, NCAA HEADQUARTER, OVERLAND PARK, KANSAS, 163–64.

[29] *Id.* at 164.

[30] Robert A. McCormick & Amy Christian McCormack, *The Myth of the Student Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006). Further control was afforded by the longstanding rule that required any athlete changing schools to sit out a year of competition once enrolling at the new school. This rule, dating back to the NCAA's original constitution in 1906, was intended to deter the use of tramp athletes, i.e., athletes who were not matriculated students and were paid under the table to play for school teams. With an exception in a few sports, the rule was still in place as of March 20, 2020 and enforces an asymmetry wherein coaches can jump from school to school without a year of ineligibility but athletes cannot. For transfer terms, see *Transfer Terms*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/student-athletes/current/transfer-terms [https://perma.cc/2EGN-TQAF]. Athletes who do not like playing for a coach or who are not playing as regularly as they would likely face the penalty of a year's ineligibility if they choose to transfer to a new school. Of course, on some occasions the athlete may want to

B. The Modern Treatment of Amateurism

In response to cries of athlete exploitation and an increasing amount of litigation brought under antitrust and labor laws, the NCAA has sought to tweak its treatment of amateurism in recent years to provide athletes with more protection and expanded benefits. In 2012, for example, the NCAA approved a new rule giving Division I schools the option to award multiyear scholarships.[31] In 2014, the Association started allowing expanded food service for athletes, beyond that available to non-athlete students.[32] More significantly, in 2015, for Division I, the NCAA began allowing four-year scholarships and cost of attendance ("COA") stipends to the traditional grant-in-aid that covered only the cost of tuition, room and board fees, and required books.[33] The COA stipends aimed to cover items like cost of transportation to and from school, recommended books, and other items that vary from school to school and are set by each school's maximum financial package, but athletes could use the cash payments however they pleased.[34] Depending on the school, the COA stipends, as dictated by the application of federal guidelines, vary, equaling between $2,000 and $6,000.[35] For low

---

transfer due to an issue with the academic program and would face a similar disincentive.

[31] *See* Michelle Brutlag Hosick, *Multiyear Scholarship Rule Narrowly Upheld*, NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 17, 2012, 12:00 AM), http://www.ncaa.org/about/resources/media-center/news/multiyear-scholarship-rule-narrowly-upheld [https://perma.cc/83R8-EPF5].

[32] This tweak was widely seen to gain public support when a star University of Connecticut basketball player very publicly asserted that he went to bed hungry every night. Rodger Sherman, *Shabazz Napier: 'There's Hungry Nights Where I'm Not Able To Eat'*, SB NATION (Apr. 7, 2014, 7:23 PM), https://www.sbnation.com/college-basketball/2014/4/7/5591774/shabazz-napier-uconn-basketball-hungry-nights [https://perma.cc/CYV7-T3CS]; *see* Zach Schonbrun, *N.C.A.A Ensures Athletes Will Get All They Can Eat*, N.Y. TIMES (Apr. 24, 2014), https://www.nytimes.com/2014/04/25/sports/ncaa-ensures-athletes-will-get-all-they-can-eat.html [https://perma.cc/3AZT-6662].

[33] These COA stipends are basically a reincarnation of the so-called laundry money, which was ended in 1973.

[34] Given that there are no controls on how the money is spent or even that it be related to education, there are reports that athletes use the COA money to buy things like video games and hoverboards. *See* Nina Mandell, *Jokes About NCAA Athletes Buying Hoverboards Show That College Sports Still Have A Big Problem*, FOR THE WIN USA TODAY (Dec. 10, 2015, 9:11 AM), https://ftw.usatoday.com/2015/12/jokes-about-ncaa-athletes-buying-hoverboards-show-that-college-sports-still-have-a-big-problem [https://perma.cc/R9E6-3BND].

[35] 20 U.S.C. § 1087-1 (2018).

income athletes, these newly allowed COA stipends can supplement Pell Grants,[36] which amounted to $6,195 in 2019–20.[37]

The NCAA has permitted many other modifications to its amateurism rules aimed at particular sports or at individual athletes' situations—particularly successful athletes. For example, it permits athletes who win Olympic medals to receive cash prizes from the United States Olympic & Paralympic Committee under a program called Operation Gold.[38] The amount has increased over the years; today, gold medalists receive $37,500, silver medalists $22,500, and bronze medalists $15,000, while team members split the prize money equally.[39] The NCAA also permits tennis players to receive up

[36] Federal Pell Grants are awarded to low income undergraduate students with exceptional financial need. Unlike a loan, federal Pell Grants do not have to be repaid. The maximum grant awarded for the 2019-2020 academic year is $6,195 and the amount recipients are awarded vary depending upon their contribution, attendance costs, whether they are full or part time students and if they plan to be enrolled in school for the full academic year. *See Federal Pell Grants*, FEDERAL STUDENT AID – AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, https://studentaid.ed.gov/sa/types/grants-scholarships/pell [https://perma.cc/5TRH-ATB5].

[37] Kevin Allen, *Here Are Some Benefits NCAA Athletes Already Are Eligible For That You Might Not Know About*, USA TODAY (Oct. 1, 2019, 4:06 PM), https://www.usatoday.com/story/sports/college/2019/10/01/ncaa-football-basketball-benefits-college-athletes-now-can-receive/2439120001/ [https://perma.cc/S8UU-5VGV]; *see* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d. 955, 974 (N.D. Cal. 2014).

[38] *See* Steve Berkowitz, *Olympic Swimmer Joseph Schooling Scores Big In Butterfly With $740,000 In Win Over Phelps*, USA TODAY (Aug. 13, 2016, 6:14 AM), https://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/12/singapore-olympic-swimming-texas-ncaa-cash-bonuses-butterfly/88647594/ [https://perma.cc/Q3HV-T77B].

[39] The NCAA also permits college athletes to receive awards for medaling in world championships and foreign swimmers to receive what their respective countries award them. For example, the NCAA permitted a swimmer at the University of Texas to accept $740,000 from Singapore, the country for which he competed at the Rio 2016 Olympic Games. *See* Berkowitz, *supra* note 38. Given this paper's focus on athlete publicity rights, it is noteworthy that in October 2019, the United States Olympic and Paralympic Committee ("USOPC") announced that it would interpret the IOC's Rule 40 (that does not allow athletes to publicize any endorsement agreements with companies they may have during the Olympic Games) to allow athletes to publicize their corporate ties in most circumstances as long as the company in question first registered with the USOPC. The traditional IOC concern with such situations (often referred to as "ambush marketing") was that the exercise of athlete publicity rights would diminish the value of exclusive IOC sponsorship arrangements.

to $10,000 annually in prize money before they enter college while retaining amateur status.[40]

Additionally, the NCAA now allows student-athletes to receive gifts for participating in bowl games or championships. For instance, athletic participation awards provide cash and merchandise (such as video games and jewelry, among other prizes) to players in football bowl games and the March Madness basketball tournament. A March 2012 article in *Sports Business Journal* provided some details:

> For example, a senior on a team that runs the table and wins championships for the regular season, postseason conference tournament and NCAA tournament could secure gifts valued at up to $3,780. Last year's comparable total was $3,380. Up to 25 gift packages can be provided to a team by its school and by its conference for participating in this month's conference tournaments, according to NCAA bylaws.[41]

The total amount of the awards granted are now estimated at $5,600 yearly per athlete.[42] The NCAA also permits athletes' families to receive payments of up to $4,000 to cover the cost of attending the men's and women's Final Four championship games as well as the College Football Playoffs.[43]

A modification that has particularly large implications for high-profile athletes, especially in basketball and football, is that cash from two funds

---

[40] DIVISION I MANUAL, *supra* note 6, ¶ 12.1.2.4.2 (stating that "[i]n tennis, prior to full-time collegiate enrollment, an individual may accept up to $10,000 per calendar year in prize money based on his or her place finish or performance in athletics events").

[41] David Broughton, *Higher Limits Bring Gift Package Upgrades*, SPORTS BUS. J. (Mar. 5, 2012), https://www.sportsbusinessdaily.com/Journal/Issues/2012/03/05/Colleges/College-gifts.aspx [https://perma.cc/SZ6F-ZJ86]. In 2012, the NCAA allowed each bowl to award up to $550 worth of gifts to 125 participants per school. In addition, participants were allowed to receive awards worth up to $400 from the school and up to $400 from the conference for postseason play, covering both conference title games and any bowl game. *See* David Broughton, *Players Share the Wealth With Bowl Gifts*, SPORTS BUS. J. (Dec. 3, 2012), https://www.sportsbusinessdaily.com/Journal/Issues/2012/12/03/In-Depth/Bowl-gifts.aspx [https://perma.cc/QU5K-5QXZ].

[42] *See* Redacted Plaintiffs' Response Brief and Opening Brief on Cross-Appeal at 15, 17–18, *In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 2019 WL 5598019 (9th Cir. Oct. 23, 2019) (Nos. 19-15566, 19-15662) ("Jenkins' Appeal Brief").

[43] Michelle Brutlag Hosick, *Council Adopts Final Four Family Travel Proposal*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jan. 23, 2019, 5:27 PM), http://www.ncaa.org/about/resources/media-center/news/council-adopts-final-four-family-travel-proposal [https://perma.cc/D2SH-GK4N].

created by the NCAA—the Student Assistance Fund ("SAF")[44] and Academic Enhancement Fund ("AEF")[45]—can be given to athletes.[46] Though the NCAA created these resources to help student-athletes cover costs related to personal emergencies (e.g., bereavement-related travel), universities can now allocate these funds discretionarily for their student-athletes' benefit. One highly visible example is schools' provision of funds to athletes to pay premiums on loss-of-value insurance. Indeed, Zion Williamson would have been entitled to collect on an $8 million loss-of-value insurance policy—that Duke University paid $50,000 in premiums for—if he slipped past the number sixteen overall pick in the 2019 National Basketball Association ("NBA") draft.[47]

C. The NCAA's Current Bylaws Regarding Amateurism

Today, the NCAA views its amateurism principles as integral to its educationally-focused mission. In its bylaws, the NCAA states that it seeks to "provid[e] student-athletes with exemplary educational and intercollegiate-athletics experiences in an environment that recognizes and supports *the primacy of the academic mission* of its member institutions, while enhancing the ability of male and female student-athletes to earn a four-year degree."[48]

The NCAA has several bylaws that address amateurism, including NIL payments.[49] These bylaws restrict athletes in specific ways:

---

[44] *See generally* David McCoy, *NCAA's Little-Known Student Assistance Fund*, CBS MINN. (Jan. 12, 2014, 11:17 PM), https://minnesota.cbslocal.com/2014/01/12/ncaas-little-known-student-assistance-fund/ [https://perma.cc/Z22T-XTUY].

[45] *See* Michelle Brutlag Hosick, *DI To Distribute Revenue Based on Academics*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 27, 2016, 12:36 PM), http://www.ncaa.org/about/resources/media-center/news/di-distribute-revenue-based-academics [https://perma.cc/NMJ8-3DV5].

[46] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2019 DIVISION I REVENUE DISTRIBUTION PLAN (2019), https://ncaaorg.s3.amazonaws.com/ncaa/finance/d1/2019D1Fin_RevenueDistributionPlan.pdf [https://perma.cc/5GPY-L7UL].

[47] Mike Chiari, *Report: Zion Williamson's $8M Insurance Policy Revealed After Injury vs. UNC*, BLEACHER REP. (Feb. 21, 2019), https://bleacherreport.com/articles/2821748-report-zion-williamsons-8m-insurance-policy-revealed-after-injury-vs-unc [https://perma.cc/CDU4-SYV2]; *see also* Jenkins' Appeal Brief, *supra* note 42, at 15.

[48] DIVISION I MANUAL, *supra* note 6, ¶ 14.01.4 (emphasis added).

[49] Prior to 2015-16, the NCAA required athletes to explicitly release claims for the NILs to their schools, conferences and the NCAA for live-in-game broadcasts. *See* Greg Lush, *Reclaiming Student Athletes' Rights to Their Names, Images and Likenesses, Post* O'Bannon v. NCAA*: Analyzing NCAA Forms for Unconscionability*, 24 S. CAL. INTERDISC. L.J., 767, 767–69 (2015).

- Financial aid is "not considered to be pay or the promise of pay for athletics skill."[50]
- Payments to athletes for athletic services are prohibited.[51]
- Athletes who accept payments may be subject to revocation of their amateur status and eligibility under severe conditions.[52]
- Athletes are prohibited from receiving money for promoting any "commercial product."[53]
- Athletes who start a business may not use their "name, photograph, appearance or athletics reputation" to promote the business.[54]

Perhaps inconsistent with the NCAA's stated mission (along with modifications to the amateurism policy addressed in the previous sections) are two particular bylaws:

- The NCAA and its member institutions may use athletes to endorse their products and activities in a wide variety of circumstances.[55]

---

[50] DIVISION I MANUAL, *supra* note 6, ¶ 12.01.4.

[51] *Id.* ¶ 12.1.2.

[52] *Id.* ¶ 12.1.2. This bylaw revokes amateur status and NCAA eligibility where a student-athlete: (1) "[u]ses his or her athletic skill (directly or indirectly) for pay in any form in that sport;" (2) "[a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;" (3) "[s]igns a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1;" (4) "[r]eceives directly or indirectly, a salary, reimbursement of expenses, or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;" (5)"[c]ompetes on any professional athletics team per Bylaw 12.02.11, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1;" (6) "[a]fter initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4);" or (7) "[e]nters into an agreement with an agent." *Id.*

[53] *Id.* ¶ 12.5.2.1.

[54] *Id.* ¶ 12.4.4.

[55] *Id.* ¶ 12.5.1.1; *see also* Mike McIntire, *The College Sports Tax Dodge*, N.Y. TIMES (Dec. 28, 2017), https://www.nytimes.com/2017/12/28/sunday-review/college-sports-tax-dodge.html [https://perma.cc/F49X-RAXB]. Non-profit educational institutions have a special tax status such that athletic department revenues from commercial activities like sale of tickets and apparel are not subject to the Unrelated

- While athletes may receive certain performance awards for athletics, they generally may not for academic achievement.[56]

D. The Proper Role of Amateurism

Given its history of extensive modifications of what acts do and do not run afoul of being an amateur athlete, it is reasonable to conclude that amateurism in college sports is whatever the NCAA dictates it to be at the time. With regularly shifting goal posts, it seems problematic to argue that this morphing concept of amateurism is necessary for college sports. We believe, however, that amateurism, properly understood, is an important feature of intercollegiate athletics.

The word amateurism derives from the Latin word "amator" which means lover. In common English, an amateur is someone who engages in activity for pleasure or love rather than for extrinsic reward or money. Ergo, Division I college basketball players remain amateurs so long as long as they do not receive pay for their participation. So, under this line of reasoning, a Division I college basketball player should be able to receive pay for endorsing a local car dealership because the underlying performance is for executing the endorsement, not for playing basketball. That is, NIL payments do not violate the core meaning of amateurism. Nevertheless, such payments are prohibited under the current NCAA rules.

In our view, as long as playing a college sport remains an extracurricular activity rather than a standalone commercial activity, amateurism should play a role. Many athletes in high profile college football and basketball programs already are cheated out of a proper learning experience. They may be admitted without adequate academic achievement or ability and hustled

---

Business Income Tax ("UBIT") because college athletics are an integral part of the education program of educational institutions (i.e. such revenues are substantially related to the educational program). *See infra* note 205 and accompanying text. If an educational institution pays athletes with its revenues instead of using them for educational purposes, it could lose its special tax status. In fact, in 2018, Congress tightened tax exempt status for college athletics by imposing an excise tax on salaries above $1 million and eliminating a partial deduction for booster donations tied to the sale of game tickets. *See* Associated Press, *College Coaches' Salaries Increase Despite Threat of New Tax*, USA TODAY (Dec. 13, 2017, 2:48 AM), https://www.usatoday.com/story/sports/ncaaf/2017/12/13/college-coaches-salaries-increase-despite-threat-of-new-tax/108562894/ [https://perma.cc/W5RH-ZYKP].

[56] *See* Brief of Amici Curiae, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 4:14-md-02541). *But see* DIVISION I MANUAL, *supra* note 6, ¶ 15.02.5.4 (listing "honorary award for outstanding academic achievement" as one exempted institutional financial aid).

into phantom courses and majors. Most are required to spend well in excess of forty hours weekly preparing for and engaging in competition.[57] If their amateur status is lifted and they begin to receive compensation, they will face more pressure to perform for their coaches, who, in turn, will be less restricted by the exigencies of the educational process. This will inevitably create a greater separation between student-athletes and the normal student body. Athletes would also have to pay taxes on their income, introducing a cadre of lawyers, financial advisors, agents, and tax accountants.

For those who believe that athletes must receive pay to avoid exploitation, the only complete solution is the professionalization of major college sports. But this would present problems for both the schools and athletes. Significantly, athletic programs in the NCAA's Division I Football Subdivision ("FBS") run a median deficit of $16.3 million,[58] according to the latest NCAA financial report.[59] This deficit, moreover, does not include most capital expenditures and many indirect costs of athletic programs which would add millions of dollars to the financial drain.[60] If college athletes received salaries, then this deficit, financed out of the school's educational budget,

---

[57] STUDENT-ATHLETE TIME DEMANDS, PENN SCHOEN BERLAND & PAC 12 CONFERENCE (Apr. 2015), https://sports.cbsimg.net/images/Pac-12-Student-Athlete-Time-Demands-Obtained-by-CBS-Sports.pdf [https://perma.cc/NSG3-GWKA].

[58] Andrew Zimbalist, *The NCAA Sports Model Is Broken, And It's Time For Congress To Step In*, FORBES (Dec. 20, 2019, 8:00 AM), https://www.forbes.com/sites/andrewzimbalist/2019/12/20/the-ncaa-sports-model-is-broken-and-its-time-for-congress-to-step-in/#4118eea23d09 [https://perma.cc/YQ76-2H4M]. *But see* Andy Schwarz, *The NCAA Isn't Going Broke, No Matter How Much You Hear It*, FIVETHIRTYEIGHT (Apr. 20, 2016, 1:44 PM), https://fivethirtyeight.com/features/the-ncaa-isnt-going-broke-no-matter-how-much-you-hear-it/ [https://perma.cc/K3LL-6L9J].

[59] NCAA RESEARCH, 14-YEAR TRENDS IN DIVISION I ATHLETICS FINANCES 9 (2019).

[60] Note that the athletic department financial books count athletic scholarships at their quoted rate based on tuition, room and board, fees and required books rather than their actual expense to the school, based on marginal costs. In this sense, actual athletic costs are overstated. But the understatement from incomplete accounting of capital costs (facility construction and maintenance) and indirect costs (charging a share of the college administration's salaries, offices, travel, etc.) far outweighs any undercounting. Also note that the NCAA reporting system includes donations to athletics as revenue generated, but some of the athletic donations may displace donations to a school's general fund. While it is true that big-time college athletics revenues have been growing rapidly in recent decades, expenses have grown more rapidly. The basic problem is that college athletics departments do not have stockholders who seek reports of quarterly profits to bolster stock prices and dividends, instead they have stakeholders who seek victories. Athletic directors respond accordingly, resulting in little cost discipline.

would balloon. Eventually, the extent of the increase in the deficit will diminish as coaches and athletic administrators, who are now paid out of the value of the athletes they recruit, would see their salaries decrease. Further compounding these problematic implications is that as the athletic department deficit grows, there is less funding available for women's sports, which makes Title IX compliance increasingly more difficult.[61]

The argument in favor of paying athletes often references the multi-million-dollar salaries received by coaches and top administrators, as well as current expenditures on ultra-lavish facilities.[62] Not to pay athletes in the face of these bloated salaries is seen as unjust and unseemly. With this, we agree. Indeed, in 2019, there were 176 college football and men's basketball coaches who received salaries exceeding $1 million, 71 whose salaries exceeded $3 million, and 38 whose salaries exceeded $4 million.[63] The highest paid coach was Dabo Swinney at Clemson University, with a guaranteed salary of $9.3 million plus bonuses of $1.1 million and a potential buyout clause worth $50 million.[64] Swinney's assistant coaches collectively earned $6.8 million, raising the total compensation for all football coaches at Clemson to $17.2 million, not including their handsome perquisites and opportunities for outside income. Perquisites generally include free use of cars, housing subsidies, country-club memberships, private jet services, exceptionally generous severance packages, and more.[65] Coaches also have alluring

---

[61] 20 U.S.C. §§ 1681–1688 (2018). In *O'Bannon v. National Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), Judge Wilken rejected the NCAA's procompetitive justification that its amateurism limits enable increased support for women's sports stating that the NCAA could mandate that schools direct a greater portion of their licensing revenue generated by football and basketball to the other sports. *Id.* at 1000–01.

[62] For example, in 2017 Clemson University opened its ultra-extravagant $55 million, 142,000 square-foot Reeves Football Complex that includes a miniature golf course, bowling lanes, a barber shop, nap room and wiffle ball court. Following Clemson's lead, the University of South Carolina's new $50 million football operations center opened in January 2019 equipped with a recording studio and barber shop. Manie Robinson, *Staying Power: Clemson Football Has Changed the Game In Facilities*, GREENVILLE NEWS (July 30, 2019, 8:00 AM), https://www.greenvilleonline.com/story/sports/college/clemson/2019/07/30/staying-power-clemson-football-facility-college-athletics-facilities/1839960001/ [https://perma.cc/AM6E-Z6UY].

[63] *2019 NCAAF Coaches Salaries*, USA TODAY, https://sports.usatoday.com/ncaa/salaries/ [https://perma.cc/MG9M-4EEC].

[64] *Id.*

[65] One eye-popping severance clause appeared in the contract of Mike Sherman, Texas A&M's football coach, who, if terminated, would have been paid $150,000 a month for the remainder of his contract that would have amounted to a "$7.8

opportunities to earn outside income via apparel or sneaker endorsements, the lecture circuit, summer camps, and book contracts.[66] In forty states, the head football or basketball coach on a college team within the state makes more in guaranteed compensation than the state's governor.[67]

Defenders of multimillion-dollar coaches' salaries argue that coaches' compensation packages are driven by market forces. While this may be true, the market for coaches is buoyed by artificial factors: (1) the lack of compensation paid to the athletes; (2) substantial tax privileges given to intercollegiate sports; (3) a lack of shareholder demand for dividend distributions or higher profits to bolster stock prices at the end of every quarter; (4) the university and statewide financial support given to athletic departments; and (5) the incentives of athletic directors who negotiate coaches' salaries and whose own worth rises with the salaries of their employees.

The answer to the bloated spending though, in our view, is not to pay the athletes a salary; it is to cap coaches' and administrators' salaries, limit the expenditures on lavish facilities used for a single sport, and reinforce the educational mission of the school.[68] We believe that these restrictions would require an antitrust exemption.[69] Such an exemption should be conditioned on the NCAA ensuring that athletes receive a robust educational and social experience in college, safeguarding athletes' health, and providing health and lost-income-from-injury insurance. Significantly, this plan would permit athletes to receive payments for product endorsements from third parties or other use of athlete NIL rights with appropriate restrictions. Our

---

million golden handshake." ANDREW ZIMBALIST, CIRCLING THE BASES: ESSAYS ON THE CHALLENGES AND PROSPECTS OF THE SPORTS INDUSTRY 177 (2011).

[66] To be clear, outside of basketball and football, coaches do not receive such lavish remuneration. In Divisions II and III no coaches benefit from this largesse.

[67] Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013, 3:23 PM), http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228 [https://perma.cc/4Z3N-PL9R].

[68] *See* Jayma Meyer & Andrew Zimbalist, *Reforming College Sports: The Case for a Limited and Conditional Antitrust Exemption*, 62 THE ANTITRUST BULLETIN (2017). Also, note that such a cap on coaches' salaries would have no discernible impact on the quality of college coaches. The best alternative employment for these coaches would be coaching at lower levels at much lower salaries. If a few went to the professional leagues, the existing professional coaches would become available to coach at the college level.

[69] The NCAA has already lost an antitrust case when it tried to impose compensation limits on assistant basketball in the 1990s. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998). Price fixing is a restraint of trade and generally seen as a per se violation of antitrust laws. *See* discussion *infra* Part II.A.

proposed plan for NIL payments, along with an antitrust exemption, is explained in Part V.[70]

Another factor in athlete pay is whether the college-sports brand would suffer if pay for play, including the institution paying for athletes' NILs, were introduced.[71] Some claim that college sports derive much popularity from the presumption that the athletes are students, not "ringers" or professionals who do not attend class. If the athletes are matriculated students who attend and participate in classes alongside non-student-athletes, a link is formed between the athletes and non-athletes. The team is thus perceived to be the school team, which stimulates support from current students, administrators, alumni, and local businesspeople. If the link between athlete and student is disrupted, however, then the special fan attachment to the team could dissipate, morphing college sports into little more than a minor league professional basketball or football league, with attendant reductions in attendance and television contracts. Proponents of pay for play or for NILs retort that this position ignores the experience of the Olympics, where athletes have not been required to be amateurs since the 1980s, yet the popularity of the Olympic Games has continued to grow in recent decades.[72] Each side of this debate has proffered non-dispositive evidence, and it is thus fair to say that this debate has not yet been resolved.[73]

Certain opponents of pay for play argue that NIL payments by third parties will diminish the progress that women have made toward gender

---

[70] *See infra* Part V.

[71] This issue is further discussed from a legal standpoint in Part II *supra.*

[72] In 1984, the International Olympic Committee ("IOC") voted to allow the International Federation of each sport to set the eligibility rules for their sport, within some limits. In 1987, the IOC voted to permit professional tennis players to participate in the Games and in 1989, the IOC extended the welcome to all professional athletes. *See* ANDREW ZIMBALIST, CIRCUS MAXIMUS: THE ECONOMIC GAMBLE BEHIND HOSTING THE OLYMPICS AND THE WORLD CUP ch. 2 (2015). It should be noted, however, that the compensation of Olympic athletes in the United States is determined by each sport's federation and tends to be nominal. Thus, almost all of the Olympic athletes receive below a livable wage, and while they are "paid," the perception of the public may still be the athletes are not professionals. Top Olympic athletes from other countries, especially Asian countries, receive more robust compensation, and those who win medals usually receive hundreds of thousands of dollars in rewards. In those countries, government funding supports the Olympic program.

[73] Experts, equipped with survey evidence, in the antitrust cases present much conflicting evidence on this hypothetical question. *See* Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html [https://perma.cc/PLQ3-Z9ZT].

equality in collegiate sports since Title IX[74] was enacted in 1972.[75] The concern is that high-profile men playing football and basketball will receive the vast majority of NIL payments and Title IX will not apply to require equity because the discrimination would not be engaged in by the organization receiving federal funds (i.e., educational institutions). Of course, if the institution directly pays athletes for use of their NILs, which is not what this Article proposes, then there is little question that Title IX would apply, mandating equivalent NIL payments to women either as part of its financial-aid or benefits-and-opportunities requirements.[76] Yet Title IX's requirements may apply even if schools do not pay the NIL payments to athletes but are involved in one form or another, directly or indirectly, with respect to the third party payments—e.g., in an administrative or compliance capacity.[77] To the extent that NILs become a recruiting tool, then

[74] Title IX requires that women and men be provided equitable opportunities to participate in sport, to receive financial aid proportional to their participation numbers and equivalent treatment with respect to over-all benefits. Equivalent benefits and treatment that must be provided specifically include publicity and promotions, support services and recruitment of athletes. For a fuller explanation, see generally WOMEN'S SPORTS FOUNDATION, https://www.womenssportsfoundation.org/ [https://perma.cc/L3ZZ-SCN2].

[75] This is in addition to the arguments made above regarding the possibility that group licenses paid by educational institutions to athletes, especially in football and basketball, or third-party payments now made to individuals, will diminish athletic department revenues and therefore harm women's sports. *See supra* Part I.D.

[76] The schools then might need to either match the amount paid by third parties to men or require that the respective third party equally make payments for women athletes or teams. This would not be dissimilar to Title IX's requirements regarding fundraising. *See* Donna Lopiano, Gerald Gurney, Fritz Polite, David B. Ridpath, Allen Sack, Sandy Thatcher & Andrew Zimbalist, *A Critical Analysis of Proposed Models of College Athlete Compensation*, DRAKE GROUP (Mar. 2, 2019), https://www.thedrakegroup.org/wp-content/uploads/2019/10/COMPENSATION-POSITION-PAPER-March-2.pdf [https://perma.cc/K52T-NGJF].

[77] In a situation involving very different facts, the Office of Civil Rights in 2017 pointed out that if a member institution assists an outside organization in making employment available to any of its students, it must make certain that the employment is available without discrimination on the basis of sex. *Id.*; *see also* Michael McCann, *Key Questions, Takeaways From the NCAA's NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019), https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions [https://perma.cc/9FDH-YF3W]; Mark Emmert, *If College Athletes Could Profit Off Their Marketability, How Much Would They Be Worth? In Some Cases, Millions*, USA TODAY (Oct. 9, 2019, 3:13 PM), https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/ [https://perma.cc/D9ME-MVBL]; Jenny Dial Creech, *More Progress Must Be Made To Secure Equal Pay For Women's Sports*, HOUS. CHRON. (June 10, 2018, 8:44 PM), https://

"there is a question as to whether that school's knowledge creates an obligation [under Title IX] to try to ensure similar opportunities are offered for the other gender."[78] Further, since promotional efforts must be equitable under Title IX for men and women, if schools promote NIL opportunities from third parties for men or men's teams, then they must devote qualitatively similar efforts to women or women's teams.[79]

NIL payments made by third parties, even if generally not as large to female athletes as to males, may meaningfully benefit high-profile female athletes.[80] This is significant given that women today have fewer opportunities to become professional athletes. Just consider how many men play football professionally. Indeed, the sponsor of the California bill, Nancy Skinner, made this point stating that "women [athletes] really should have a shot at getting something while they're in college" because of the lack of professional opportunities for women after college.[81] As explained by Congresswoman Skinner, many female athletes, whether nationally or locally known, have their moment in the spotlight, with corresponding earning power, while in college. For them, the chance to receive NIL payments while in college is a significant benefit. For example, Katelyn Ohashi, a star gymnast at the University of California, Los Angeles, whose perfect (10.0) floor rou-

---

www.houstonchronicle.com/sports/columnists/dialcreech/article/More-progress-must-be-made-to-secure-equal-pay-12982980.php [https://perma.cc/BU5Z-N9EE].

[78] Paul Steinbach, *What Title IX Fallout Might NIL Legislation Pose?*, ATHLETIC BUS. (Jan. 2020), https://www.athleticbusiness.com/college/how-might-nil-legislation-be-impacted-by-title-ix.html [https://perma.cc/AW5X-SF9L].

[79] *Id*.

[80] *See supra* note 74; *see also* Dan Murphy, *What California Bill Means For NCAA Image and Likeness Debate*, ESPN (Oct. 1, 2019), https://www.espn.com/college-football/story/_/id/27585301/what-california-bill-means-ncaa-image-likeness-debate [https://perma.cc/4VZY-XQ9X] ("Sen. Skinner, co-author Sen. Steven Bradford, and Gov. Newsom all said they felt the *law actually opens more doors for female athletes* who can now promote themselves rather than relying on the schools, which typically spend most of their marketing budget on revenue sports like football and men's basketball."); Cecelia Townes, *Why California's Fair Pay To Play Act Could Be A Financial Win For Female Athletes*, FORBES (Sept. 16, 2019, 2:08 PM), https://www.forbes.com/sites/ceceliatownes/2019/09/16/why-the-california-fair-pay-to-play-act-could-be-a-financial-win-for-female-athletes/#388a592d4c72 [https://perma.cc/6PHN-YCUV] ("Endorsements (and other opportunities to earn income from one's NIL) may be the only opportunity that a talented female athlete has to be compensated for her skills.")

[81] *See* Emmert, *supra* note 77; Elliot Almond, *What Does the NCAA Board's Vote On Paying Athletes Actually Mean?*, MERCURY NEWS (Oct. 29, 2019, 4:33 PM), https://www.mercurynews.com/2019/10/29/what-does-the-ncaa-boards-vote-on-paying-athletes-actually-mean/ [https://perma.cc/P7L2-TFPX].

tine in 2019 went viral when posted on YouTube,[82] pointed out that her situation would have been dramatically different if she could have profited from that video.[83] Ohashi said she felt stifled by NCAA regulations as she gained name recognition:[84]

> Along with this came a lot of attention and opportunities, but I couldn't capitalize on them. I was handcuffed by the NCAA rules that prevented me from deriving any benefit from my own name and likeness, regardless of the fact that after my final meet, I had no pro league to join.[85]

Finally, some commentators argue that payment for play will reduce the ugly underbelly of surreptitious payments to athletes.[86] Indeed, former U.S. Secretary of State Condoleezza Rice, as Chairperson for the Committee that evaluated the recent NCAA basketball scandal,[87] explained that athletes

---

[82] UCLA Athletics, *Katelyn Ohashi – 10.0 Floor (1-12-19)*, YOUTUBE (Jan. 12, 2019), https://www.youtube.com/watch?v=4ic7RNS4Dfo [https://perma.cc/M5QX-Z6XC].

[83] Michelle R. Martinelli, *Viral Former UCLA Gymnast Katelyn Ohashi Slams NCAA, Felt 'Handcuffed' by Profit Rules*, USA TODAY (Oct. 9, 2019, 9:25 AM), https://ftw.usatoday.com/2019/10/katelyn-ohashi-ucla-viral-gymnast-slams-ncaa-fair-pay-to-play [https://perma.cc/7PY4-NC3C].

[84] *Id.*

[85] One cannot help but ask whether it would have been different for Olympic Swimmer Missy Franklin if she had not faced the choice of making money from her NIL only by dropping out of University of California-Berkeley. She dropped out after two years in order to sign with an agent and pursue attractive endorsement deals in 2015. She never regained the same level of swimming success. Or, would it have been different for Katie Ledecky, another Olympian swimmer, who in 2018 stopped competing for Stanford where she earned numerous NCAA titles and records in order to accept professional endorsements and sponsorship opportunities? *See* Dial Creech, *supra* note 77.

[86] *See generally* Ryan Swanson, *Want To Clean Up College Athletics? Pay The Players.*, WASH. POST (Oct. 2, 2017, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2017/10/02/want-to-clean-up-college-athletics-pay-the-players/ [https://perma.cc/P3UL-BKVQ].

[87] On September 26, 2017, the Federal Bureau of Investigation announced ten arrests involving various big-name Division I basketball programs and Adidas executives on various corruption and fraud charges including bribery, money laundering, and wire fraud. *See* Lauren Thomas, *FBI arrests NCAA basketball coaches and Adidas rep in bribery probe involving recruitment*, CNBC (Sept. 26, 2017, 4:19 PM), https://www.cnbc.com/2017/09/26/ncaa-basketball-officials-arrested-on-fraud-and-corruption-charges.html [https://perma.cc/7VUV-TLBR]. The core allegations were that student-athletes were being paid to attend certain schools and participate in their basketball programs. *See id.*

should be entitled to NIL payments for this very reason.[88] She then said that the NCAA's rules relating to NIL payments are "incomprehensible," and noted that, when she sees policies as "confused" as the NCAA's is with respect to NILs, she thinks "'why haven't you gone and looked at this before?' It's really time to come to terms with name, image and likeness."[89]

II. The Legal Landscape of Amateurism and Paying College Athletes, Including for their NILs, in College Sports[90]

Litigation aimed at providing college athletes with pay or additional benefits and rights has relied on various causes of action pursuant to federal, state, and common laws.

Antitrust laws have been the most widely used to challenge the NCAA's amateurism rules. In these cases, the NCAA has argued that, even if its rules are anti-competitive, they are necessary to preserve amateurism in order to protect the uniqueness of college sports and thus demand for the brand.[91] Right-of-publicity-claims have proved to be more complicated because they turn on state laws and common law, and the First Amendment and copyright laws may offer strong defenses, depending on the usage (for example, live broadcasts versus video games).

Athletes have also resorted to employment and labor laws in order to find a friendly basis for pursuing their claims to receive payment, including the Fair Labor Standards Act, arguing that they are employees, and the National Labor Relations Act, arguing that they be allowed to unionize. As

---

[88] Christine Brennan, *NCAA Rules Are 'Incomprehensible, Says Condoleezza Rice*, USA Today (May 9, 2018, 7:24 PM), https://www.usatoday.com/story/sports/ncaab/2018/05/09/ncaa-mens-basketball-rules-incomprehensible-condoleezza-rice/596549002/ [https://perma.cc/7B5E-CGNT]. The NCAA granted a waiver to Notre Dame basketball star, Arike Ogunbowale to earn money from *Dancing with the Stars* soon after Notre Dame won the Final Four tournament when Ogunbowale hit a winning three point shot that went viral. The NCAA reasoned that the show was unrelated to her basketball abilities. Dr. Rice used this as an example of the incomprehensibleness of the rules. *See id.*

[89] *Id.*

[90] *See* Meyer & Zimbalist, *supra* note 68 (including certain of the same analysis as in this Section but with more detail).

[91] The rules that have been challenged under the antitrust laws include not only payment and benefits to athletes for their play, but also the length and number of scholarships available to athletes, the length of competitive seasons, the selection of teams to participate in national championships, the transfer of athletes between schools and the payment of assistant coaches. Meyer & Zimbalist, *supra* note 68, at nn.51–54.

explained, *infra*, these employment- and labor-law-based efforts have not succeeded to date.[92]

A. Athletes Have Received Additional Benefits Under the Antitrust Lawsuits

Antitrust laws, and their judicially created frameworks, while not easy to apply to intercollegiate sports, have been the most fertile ground for chipping away at the NCAA's amateurism rules.

The Sherman Act,[93] designed to govern commercial activities,[94] prohibits contracts, combinations, or conspiracies that unreasonably restrain trade.[95] Once a court finds a rule fundamentally commercial under the Sherman Act, a court then must address whether the rule unreasonably restrains trade.[96] With respect to the NCAA, because the product—competitive sports—requires joint activity among individual institutions (i.e., a team cannot play against itself), courts apply a rule of reason analysis to determine whether the rule is unreasonably anticompetitive. The judicially created rule of reason framework involves three burden-shifting steps. First, the plaintiff has the burden of proving that the restraint creates anti-competitive effects. If the plaintiff successfully argues this point, the analysis moves to the second step, in which the burden shifts to the defendant to prove pro-competi-

---

[92] *See, e.g.*, Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2005), https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html [https://perma.cc/5UDB-GBZV].

[93] Codified in 15 U.S.C. §§ 1–38 (2018), the Sherman Antitrust Act is a federal antitrust statute which prohibits acts that restrict interstate commerce and competition. Section 1 of the Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* § 1.

[94] While nonprofit organizations, like many universities and colleges, are not categorically exempt from the Sherman Act, "when they perform acts that are the antithesis of commercial activity, they are immune from antitrust regulations." United States v. Brown Univ. in Providence in St. of R.I., 5 F.3d 658, 665 (3d Cir. 1993).

[95] *See generally* Meyer & Zimbalist, *supra* note 68, at 41; *see also* Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 340 (7th Cir. 2012) (opining that "no knowledgeable observer could earnestly assert that big-time college football programs . . . do not anticipate economic gain from a successful recruiting program. Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions").

[96] *See generally* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

tive benefits flowing from the restraint. If the defendant's justifications are "sufficient," the burden shifts back to the plaintiff, in the third step, to show that the challenged conduct is not reasonably necessary to achieve the legitimate benefits or that comparable procompetitive benefits could be achieved through a less restrictive alternative ("LRA") that is virtually as effective and as economically efficient. Courts, at least implicitly, try to assess the legitimacy of, or weigh, these pro- and anti-competitive effects and the LRA, and therefore determine whether the virtues of the anti-competitive conduct justify the adverse impact. Their judgment turns on whether the dominant or net effect of the restraint, or of the LRA, is to promote competition or hinder it.[97]

1. The Supreme Court's Decision in *Board of Regents*

The Supreme Court has issued just one antitrust decision relating to college sports: *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* ("*Board of Regents*").[98] It discusses amateurism only in dicta. The case involved the NCAA's control (limitation) of how many games a college could broadcast on national TV and the prices for such broadcasts. The Court quickly concluded that the challenged contracts that schools jointly negotiated with television networks were commercial rules and, accordingly, that the Sherman Act applied.[99]

Next, the Court applied the rule of reason and its three-step burden-shifting analysis.[100] First, the Court found that the restraint both limited output (reduced the number of games televised) and restricted prices (set a minimum aggregate price)— which are "paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."[101] Shifting to the second step of the rule of reason analysis, the Court stated that the contracts, as "hallmarks of anticompetitive behavior," placed a "heavy burden" on the NCAA to establish an affirmative defense that justifies the deviation from a free market.[102] The Court then upheld the lower court's

---

[97] *See* Meyer & Zimbalist *supra* note 68, at 36–39.

[98] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

[99] "The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, *the eligibility of participants*, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Id.* at 117 (emphasis added); *see infra* notes 106–27 and accompanying text.

[100] *See Bd. of Regents*, 468 U.S. at 101.

[101] *Id.* at 107–08.

[102] *Id.* at 113.

findings that the pro-competitive justifications of protecting a live audience, establishing an efficient marketing strategy, and preserving competitive balance were not supported by the evidence, and thus did not "offset" the anti-competitive limitations on price and output.[103]

While the Court's holding was straightforward, its opinion included discourse that the NCAA has since relied on regularly to justify its refusal to pay athletes, including refusal to permit NIL payments to athletes:

> One clear effect of most, if not all, of these regulations [including those relating to eligibility] is to prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives."[104]

In further dicta, the Court said that college athletes "*must not be paid*, must be required to attend class, and the like."[105] The Court did not analyze whether pay-for-play rules would be unreasonably anti-competitive and violations under the Sherman Act because payments to athletes were irrelevant to the issue at hand: the legality of the rules on TV contracts.

2. The Ninth Circuit's Decision in *O'Bannon*

Whether the NCAA rules regarding payments to athletes violated the Sherman Act was at the core of the Ninth Circuit's decision in *O'Bannon v. National Collegiate Athletic Ass'n*.[106] Edward O'Bannon was a basketball player on the University of California, Los Angeles national championship team in 1995. After discovering that his likeness was used in a commercial video game without his permission and without the promise of any compensation for use of his property rights, he brought an antitrust suit against the

---

[103] Because step two was not satisfied, the Court never reached consideration of a less restrictive alternative, although it stated that it agreed with the lower court's conclusion that if the procompetitive justifications had been supported by the evidence, they could be achieved by a less restrictive alternative. *Id.* at 102.

[104] *Id.* at 123.

[105] *Id.* (emphasis added).

[106] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *cert denied*, 137 S. Ct. 277 (2016); *In re* NCAA Student-Athlete Name & Likeness Litig., 4:09–cv–1967 CW, 4:09–cv–3329 CW, 2015 WL 5005901 (N.D. Cal. Aug. 19, 2015) (which is the consolidation with Keller v. Elec. Arts, Inc., 4:09–cv–1967-CW, 2015 WL 5005057 (N.D. Cal. Aug. 18, 2015)).

NCAA[107] on behalf of purported classes of FBS football and Division I men's basketball players. The case sought to enjoin NCAA rules that prohibited payments to athletes for their NILs in three submarkets: (1) live game telecasts; (2) sports video games; and (3) game rebroadcasts, advertisements, and other archival footage.[108]

The issue in the case, brought under the Sherman Act, was whether the agreement to prevent such payments to athletes for their NILs was an unreasonable restraint of trade.[109] Embedded in the case is whether athletes have rights of publicity for usage in the three submarkets. If they do not, then they would lack standing and suffer no antitrust injury as a result of the agreement.[110] On summary judgment motion, the Northern District of California court found that the athletes had standing and satisfied the antitrust injury without specifying in which submarket the harm occurred.[111]

After much legal maneuvering,[112] the parties proceeded to a bench trial on the merits of the antitrust claim. Judge Claudia Wilken issued a 99-page opinion in 2014, finding the NCAA rules to be commercial and then applying the three-part rule of reason analysis to determine whether the alleged prohibitions violated the Sherman Act. First, she found that the prohibitions constituted an anticompetitive restraint—a price-fixing agreement. The

---

[107] At the same time, Michael Keller, Ed O'Bannon and others brought a separate lawsuit against Electronic Arts ("EA") alleging an infringement of their rights of publicity in EA produced video games under California's anti-SLAPP law. Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1276 (9th Cir. 2013).

[108] *O'Bannon*, 7 F. Supp. 3d. at 963.

[109] *Id.*

[110] Also, the court analyzed the three proposed submarkets to determine if there was injury to competition since groups of athletes would not compete with each other to sell their rights. The court concluded that groups of athletes would have an incentive to cooperate to sell packages of rights to the buyers. *Id.* at 994.

[111] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1155 (N.D. Cal. 2014). The NCAA unsuccessfully sought an interlocutory appeal on this matter. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2014 WL 1949804 (N.D. Cal. May 23, 2014) (leave to file for reconsideration denied); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2014 WL 12642228 (N.D. Cal. May 23, 2014) (motion to certify appeal denied). It argued that neither the Supreme Court nor any circuit court had squarely addressed whether athletes have a right of publicity for the use of the NILs in sports broadcasts. Defendant NCAA's Notice of Motion and Motion to Certify Pursuant to 28 U.S.C. § 1292(b) Court's Order Resolving Cross Motions for Summary Judgment at 4, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126 (N.D. Cal. 2014) (No. 1032).

[112] The procedural posture of this case is long and complicated, including motions to dismiss and for summary judgment and interlocutory appeals.

schools had agreed to rules prohibiting NIL payments to athletes for group licenses.[113] Next, under the second step,[114] Judge Wilken accepted as valid two of the NCAA's justifications, finding that amateurism played a "limited" role in maximizing consumer demand[115] and that integrating athletics and academics was a "narrow" pro-competitive goal of increasing the quality of athletes' education.[116]

Moving to the third step under the rule of reason analysis, Judge Wilken found two less restrictive alternatives were available to fulfill the NCAA's stated pro-competitive justifications of amateurism and integration:

- Payment of scholarships up to cost of attendance ("COA") (an increase of between $2,000 and $6,000 per year depending on the school over the previous grant-in-aid ("GIA") amount).[117]

- Payment of up to $5,000 a year to be held in trust for when the athlete leaves or graduates from college with the requirements that all athletes on a team receive the same amount and that the funds be generated from group licenses.

Both sides then had reason to be dissatisfied and appealed to the Ninth Circuit. On appeal, the Ninth Circuit agreed that the restriction of no payments for group licensing of NILs was a commercial restraint subject to the Sherman Act.

In applying the three-step burden-shifting framework, the Ninth Circuit first said that the restraint had a "significant" anti-competitive effect by eliminating price competition among schools.[118] Moving to the second step in the rule of reason analysis, it accepted that amateurism and integration were pro-competitive justifications because they preserve the popularity

---

[113] *O'Bannon*, 7 F. Supp. 3d. at 973. *But see* Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1284 (9th Cir. 2013) (focusing only on the video-game market).

[114] *O'Bannon*, 7 F. Supp. 3d. at 973.

[115] *Id.* at 1001.

[116] *Id.* at 1003.

[117] GIA includes room, board, tuition, fees and required books for courses. COA adds miscellaneous expenses such as travel to and from campus, other books and supplies, laundry expenses, etc. Schools determine their respective COA based on a federally mandated formula. Given the discretion available in applying the formula, some schools are calculating the applicable amount on the high side and allegedly are gaining recruiting advantages. The COA, however, is limited by what is offered to other non-athlete scholarship students. *Id.* at 965, 974.

[118] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070–72 (9th Cir. 2015).

of intercollegiate sports and broadened choices, respectively. Third, the Ninth Circuit considered the proposed LRAs. Ultimately, the court upheld Judge Wilken's holding that the NCAA could restrict the schools' ability to award scholarship amounts above the COA, agreeing that this was "substantially" less restrictive than a rule prohibiting payments beyond GIA and would not "significantly" increase costs.[119] The panel's reasoning focused on the need for amateurism in college sports: (1) amateurism requires no payment to athletes, so there would be no amateurism if there were payments and (2) payments up to the COA were "tethered" to academics, and therefore preserved the concept of amateurism. Writing for the panel, Judge Bybee explained:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point . . . . At that point the NCAA will have surrendered its amateurism principles and transitioned from its 'particular brand of football' to minor league status.[120]

That said, the panel split on trust fund stipends for NIL rights, with the majority finding that they violated principles of amateurism because they were untethered to academics. Chief Judge Thomas's dissent on this issue challenged the artificiality of the majority's distinction and detailed the evidence that showed that small amounts of cash payments (beyond COA) provided to athletes after they left school would not harm the principle of amateurism. Plus, Chief Judge Thomas pointed out, amateurism, a "nebulous" concept, is relevant as a pro-competitive justification in an antitrust analysis only to the extent that it relates to consumer interest, which is a quantitative effect.[121] He stated there was no showing that such small, deferred payments would harm consumer interest. Finally, Chief Judge Thomas stressed the difficulty in resolving whether athletes should be paid for play: "The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we."[122]

---

[119] *Id.* at 1074–75.

[120] *Id.* at 1078–79 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984)).

[121] *Id.* at 1083 (Thomas, C.J., concurring in part and dissenting in part).

[122] *Id.* The O'Bannon Plaintiffs compared the NCAA's reliance on amateurism to the defendant's defense in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), wherein the Court said that the antitrust laws do not permit the defendant to establish a legally cognizable interest in the suppression of competition: "These considerations are, however, not for us. If the act ought to read as contended for by

Again, both sides had reason to be dissatisfied. Accordingly, after the plaintiffs' request for an en banc rehearing to the full Ninth Circuit Court of Appeals was denied,[123] in a somewhat unusual consensus on the need for review, both the plaintiffs and the NCAA submitted petitions for a writ of certiorari to the Supreme Court.[124] But both petitions were ultimately denied.[125] As a result, the NCAA's regulations were left vulnerable to more challenges.[126]

3. *Jenkins* and *Alston*: NCAA "Grant-in-Aid" Litigation

Two recent antitrust class action cases have further challenged the NCAA's amateurism rules, *Jenkins v. National Collegiate Athletic Ass'n* and *Alston v. National Collegiate Athletic Ass'n*.[127] They were coordinated before

---

the defendants, Congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable," 166 U.S. at 340. *See* Petition for Certiorari at 15, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277 (2016) (No. 15-1167).

[123] Plaintiff-Appellees' Petition for Rehearing En Banc, Nat'l Collegiate Athletic Ass'n v. O'Bannon, 802 F.3d 1049 (9th Cir. 2015), *reh'g denied*, No. 4:09-cv-03329-CW (9th Cir. Dec. 16, 2015) (Nos. 14-16601, 14-17068).

[124] The Plaintiffs submitted a petition on March 14, 2016. Petition for Writ of Certiorari, Nat'l Collegiate Athletic Ass'n v. O'Bannon, 137 S. Ct. 277 (2016) (No. 15-1167). The NCAA submitted a petition on May 13, 2016. Petition for Writ of Certiorari, Nat'l Collegiate Athletic Ass'n v. O'Bannon, 137 S. Ct. 277 (2016) (No. 15-1388).

[125] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277 (2016).

[126] In its Petition for Certiorari, the NCAA showed its frustration with the current litigations: "The NCAA should not have to undergo a full trial (and years of litigation) or face treble damages whenever a plaintiff or counsel hits on a supposedly better way to administer college athletics." Petition for Writ of Certiorari at 26–27, *O'Bannon*, 137 S. Ct. 277 (No. 15-1388) (clarifying that the precedent would "preclude[ ] potentially endless antitrust challenges to NCAA rules").

[127] *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019); *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. 2015). The five power conferences are the Atlantic Coast Conference; Big 12 Conference; Big Ten Conference; Pac-12 Conference; and Southeastern Conference. The six other conferences are the American Athletic Conference; Conference USA; Mid-American Conference; Mountain West Conference; Sun Belt Conference; and Western Athletic Conference. The original *Alston* complaint was consolidated with four other complaints and a consolidated complaint was filed. Steve Berkowitz, *Court Filing: NCAA, Conferences Say Scholarships Could Be Reduced*, USA TODAY (May 1, 2015, 1:16 AM), http://www.usatoday.com/story/sports/college/2015/05/01/ncaa-suit-shawne-alston-martin-jenkins-kessler-nigel-hayes-claudia-wilken/26685565/ [https://perma.cc/695Z-833L]. While *Jenkins* and *Alston* were coordinated for pretrial purposes in the Northern District of California before Judge

Judge Wilken in the Northern District of California ("*NCAA Grant-in-Aid*").[128] The plaintiffs alleged that the NCAA and eleven athletic conferences systematically colluded to cap the compensation a school may provide athletes and sought to open compensation to the free market.[129] These cases, accordingly, were broader than *O'Bannon* as they were not limited to NIL payments. Judge Wilken certified three classes: FBS football players, Division I men's basketball players, and Division I women's basketball players.

On March 8, 2019, after a bench trial, Judge Wilken held that the NCAA's rules capping the amount of compensation that student-athletes can receive in exchange for their athletic services violated the Sherman Act. Like she did in *O'Bannon*,[130] she found that the NCAA rules were commercial, had anticompetitive effects, and were subject to the rule of reason analysis. Judge Wilken devoted most of her analysis to the asserted procompetitive justifications. This time, the defendants relied only on the two justifications that the Ninth Circuit in *O'Bannon* had upheld: the compensation rules promote (1) amateurism because it is a key part of demand for college sports and (2) integration of student-athletes with their academic communities because it improves the college education student-athletes receive.[131]

In analyzing the defendants' first purported pro-competitive effect, Judge Wilken expressed great frustration. She noted that the defendants

---

Wilken (the same Judge that decided *O'Bannon*), there is a significant difference between the cases. *Jenkins* sought only injunctive relief. *Alston* sought injunctive relief and monetary damages for four years (amount of time permitted under the applicable statute of limitations) of the difference between GIA and COA scholarships. Prior to trial, the damages portion of *Alston* was settled for approximately $208 million. The injunctive portion of *Alston* went to trial. *Jenkins* was stayed. Order Denying Motion to Dismiss and Maintaining Stay on *Jenkins*, in re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. 2015) (No. 1200). Accordingly, the *Jenkins* case could still be remanded to New Jersey for trial.

[128] 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

[129] NCAA Bylaw 15.1 as amended in 2015, provided that "[a] student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance. . . ." NAT'L COLLEGIATE ATHLETIC ASS'N, 2009-10 NCAA DIVISION MANUAL 174 (2009).

[130] For a fuller discussion of Judge Wilken's decision, see Harrison (Buzz) Frahn, Michael R. Morey, Loren Shokes & Omar Kanjwal, *The Northern District of California Enjoins the NCAA From Capping the Amount of Education-Related Compensation that Student-Athletes Can Receive*, CAL. L. ASS'N (June 25, 2019), https://calawyers.org/antitrust-ucl-and-privacy/the-northern-district-of-california-enjoins-the-ncaa-from-capping-the-amount-of-education-related-compensation-that-student-athletes-can-receive/ [https://perma.cc/MGE4-XUE8].

[131] *In re Grant-in-Aid Cap*, 375 F. Supp. 3d at 1098–1103.

failed to offer "an affirmative definition of amateurism" and that "no link appears" between the "Principle of Amateurism" described in the NCAA's Division I Constitution and the challenged compensation limits: "the principle does not mention or address compensation; nor does it prohibit or even discourage compensation."[132] Judge Wilken expressed her concern that the defendants defined amateurism based on what it is not: the "only thing that can be inferred is that compensation constitutes 'pay for play' or 'pay' if the NCAA has decided to forbid it, and compensation is not 'pay for play' or 'pay' if the NCAA has decided to permit it."[133]

Judge Wilken then analyzed whether the amateurism rules affected consumer demand and agreed with the plaintiffs that consumer demand, despite modifications in the rules permitting more benefits since *O'Bannon*, had not decreased.[134] But she concluded, based mostly on anecdotal evidence, that:

> when compared with having no limits on compensation, *some* of the challenged compensation rules may have *some* effect on preserving consumer demand for college sports as distinct from professional sports to the extent that they prevent unlimited cash payments unrelated to education such as those seen in professional sports leagues.[135]

As for the defendants' second pro-competitive justification, integration of athletes and other students, Judge Wilken dismissively rejected it, stating that considerable economic disparities already existed on college campuses due to students' socioeconomic backgrounds and other sources of wealth.[136]

Judge Wilken then turned to the third step of the rule of reason analysis: the plaintiffs' proposed less restrictive alternatives. She rejected the plaintiffs' "alternative that would prohibit the NCAA from placing any lim-

---

[132] *Id*. at 1098–99.

[133] Judge Wilken noted that the NCAA, in fact, permits "cash or cash-equivalent compensation that exceeds the cost of attendance by thousands of dollars," some of which are "directly correlated with athletic performance" that would "appear, on their face, to be pay for play." *Id.* at 1099.

[134] *Id.* at 1100.

[135] *Id.* at 1101 (emphasis added). Also, she found that "limits or prohibitions on most other benefits related to education that can be provided on top of a grant-in-aid, such as those on tutoring, graduate school tuition, and paid internships, have not been shown to have an effect on enhancing consumer demand for college sports as a distinct product." *Id.* at 1102.

[136] Indeed, Judge Wilken next explained that, if anything, the record supported that the challenged compensation limitations increased separation among students because they allowed schools to spend significant resources on opulent, athletes-only facilities. *Id.* at 1102–03.

its on compensation or benefits, whether or not related to education, given in exchange for athletic services,"[137] noting (consistent with the Ninth Circuit's decision in *O'Bannon*) that *unlimited* cash payments unrelated to education would harm the demarcation between college and professional sports.[138]

Judge Wilken issued a rather complicated injunction. Basically, she permitted virtually every conceivable type of non-cash benefit as long as it was in some form or manner incidental or related to education[139] but capped cash benefits for achievement in academics up to the value of those currently provided for team-based performance (commonly viewed to be up to $5,600 over COA).[140] Judge Wilken left in place the NCAA's rules that prohibit non-education-related cash compensation for individual athletic achievement. The injunction also allowed any NCAA member conference to impose stricter limits.[141]

Both sides appealed to the Ninth Circuit and the oral argument was held on March 9, 2020.[142] The panel was comprised of Judges Milan Smith, Gould, and Chief Judge Thomas, who wrote the partially dissenting opinion in *O'Bannon* and would have permitted the proposed $5,000 payments for group NILs as long as they were held in trust for athletes until they leave school or graduate.[143] Judge Smith was the only active questioner, including questions about the impact of CA SB 206 on the case.[144] Seth Waxman,

---

[137] *Id.* at 1086.

[138] *Id.*

[139] This included "computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies; post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships." *Id.* at 1088.

[140] *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-md-02541 CW, 2019 WL 1593939, at *1 (N.D. Cal. Mar. 8, 2019); *see also* Jenkins' Appeal Brief, *supra* note 42 at 11.

[141] More specifically, the injunction stated that the NCAA member conferences may "fix or limit academic or graduation awards or incentives that may be made available from that conference or its member schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid." *In re Grant-in-Aid Cap*, 2019 WL 1593939, at *1; *see also* Jenkins' Appeal Brief, *supra* note 42.

[142] Alston v. Nat'l Collegiate Athletic Ass'n, No. 19-15566 (9th Cir. Mar. 9, 2020).

[143] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015) (Thomas, C.J., concurring in part and dissenting in part).

[144] Oral Argument, *Alston*, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000017229 [https://perma.cc/Z7L6-YUGT].

attorney for the NCAA and conferences, stated that SB 206 is "flatly inconsistent" with the NCAA's principles of amateurism.[145] Amateurism, as defined by the NCAA, continues to be the raison d'etre of its argument. In contrast, Jeffrey Kessler, one of the plaintiffs' attorneys, argued that the court should enjoin all NCAA restraints on compensation (which would allow the NIL compensation in SB 206).[146] He stressed that the NCAA already, especially since *O'Bannon* was decided, permits benefits not related to education and consumer demand has only increased.[147] He conceded that it would be appropriate to let the conferences respectively decide on appropriate limits.[148] Based on the oral argument, it is unclear how the panel will rule; what is clear is that it is reasonable to expect at least one of the parties will petition for certiorari to the Supreme Court once the Ninth Circuit issues its decision.

In sum, these antitrust cases show the instability of the scope of amateurism and its relationship to consumer demand. Intercollegiate athletics, as discussed above, are increasingly commercial but still a hybrid model, containing elements of both professionalism and amateurism. There is much tension between these elements. Effective reform, including the payment for NILs, will move the system along the spectrum toward professionalism. But, as explained in Part V, we propose that the more defensible concern should focus on the difference between professionalism and the primacy of education in college sports.

B. Claims to Rights of Publicity Are Inconclusive

College athletes also have attempted to use right-of-publicity claims to obtain compensation for their NILs. Athletes have asserted their rights of publicity within antitrust lawsuits, as argued in *O'Bannon,* by alleging that the NCAA has agreed or conspired to refuse to pay for rights of publicity under the Sherman Act. Significantly, the Sherman Act permits treble damages and attorney's fees.[149] Other times, athletes assert their rights of publicity claims directly.

Publicity rights, under common law or state statutory laws, protect a person's ability to control the use of their NIL for commercial gain. Thus, a right-of-publicity claim is an allegation of unauthorized misappropriation of

---

[145] *See id.*
[146] *See id.*
[147] *See id.*
[148] *See id.*
[149] 15 U.S.C. § 15(a) (2018).

the commercial value of a person's identity.[150] This right is generally recognized as not extending to use in newsworthy activities like news reporting or commentary, or in entertainment, creative works, or other transformative uses where the First Amendment is a defense to a right of publicity.[151] Thus, athletes' rights to their own publicity vary depending on the respective state law, on how the athletes' NIL is employed, and on how much the athletes' likeness or character has been transformed.[152]

These issues were addressed by the Ninth Circuit in *Keller v. Electronic Arts*[153] and by the Third Circuit in *Hart v. Electronic Arts.*[154] Both courts held on motions that former college athletes had a right-of-publicity claim against Electronic Arts ("EA") based on the creation of avatars for the video game, NCAA Football, that looked like particular players, played like those players, and played in college stadiums that looked like those played in by those players.[155] The defendants had not obtained permission from the players to use their images or likenesses, but argued that video games, like movie and books, are expressive works fully protected by the First Amendment.[156] Both the *Keller* court and the *Hart* court rejected EA's defense that it had sufficiently transformed the avatars to have a First Amendment right to publish the video games without the players' permission and without compensating them.[157] The courts noted that the avatars in the video games

---

[150] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995).

[151] *Id.* § 46 cmt. C; *see generally* Marc Edelman, *Closing the "Free Speech" Loophole: The Case for Protecting College Athletes Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 554 (2013); Eugene Volokh, *The First Amendment, the Right of Publicity, Video Games and the Supreme Court*, WASH. POST (Jan. 4, 2016, 3:30 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/04/the-first-amendment-the-right-of-publicity-video-games-and-the-supreme-court/ [https://perma.cc/ST5Y-DUNU]; Michael Marrero, *A Primer On NCAA Athletes' Right of Publicity*, LAW360 (July 16, 2013, 12:49 PM), https://www.law360.com/articles/456776/a-primer-on-ncaa-athlete's-right-of-publicity [https://perma.cc/7K59-DYZS].

[152] Specific analysis of rights of publicity, the First Amendment, federal and state consumer protection laws, copyright and trademark laws, fair use doctrines and federal and state tax laws as applied to institutions, athletes and donors is beyond the scope of this article.

[153] Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1276 (9th Cir. 2013). As noted *Keller* was consolidated with *O'Bannon*. *See supra* note 106.

[154] Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013); *see also* Daniels v. Fanduel, Inc., 909 F.3d 876 (7th Cir. 2018).

[155] *Hart*, 717 F.3d at 151; *Keller*, 724 F.3d at 1284.

[156] *Hart*, 717 F.3d at 145; *Keller*, 724 F.3d at 1271.

[157] *Keller*, 724 F.3d at 1271.

were not sufficiently transformed; they were too accurate and faithful to reality.[158]

Chief Judge Thomas of the Ninth Circuit, like in *O'Bannon*, issued a dissenting opinion in *Keller.* He would have permitted EA's defense based on the First Amendment and would not have found that the athletes were entitled to publicity rights in the particular EA video football games.[159] He said that the players were unidentified and anonymous (despite the availability of third-party software that allowed gamers to determine the identity of the player), and stated that the game as a whole was sufficiently transformative.[160]

Significantly, in *Keller*, EA and the Collegiate Licensing Co., the NCAA's licensing arm, settled before trial for $40 million,[161] and the NCAA settled for $20 million.[162] As a result of the litigation, EA also agreed to stop producing its video games with avatars similar to former college athletes. Subsequently, the NCAA agreed to discontinue selling jerseys on its website with numbers of star athletes that matched the numbers used in games and school designations.[163] Further, the NCAA said it would allow a blanket eligibility waiver for any currently enrolled student-athletes who receive funds connected with the settlement, adding "[i]n no event do we consider this settlement pay of athletics performance."[164] *Hart* was wrapped into the settlement as well.

---

[158] *Hart*, 717 F.3d at 170; *Keller*, 724 F.3d at 1284.

[159] *Keller*, 724 F.3d at 1284 (Thomas, J., dissenting). In *O'Bannon*, Chief Judge Thomas would have provided additional rights to athletes (up to $5,000 held in trust) without specifying the particular submarket in which the revenues would be earned. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015) (Thomas, C.J., concurring in part and dissenting in part).

[160] *Keller*, 724 F.3d at 1288–90 (Thomas, C.J., dissenting).

[161] Tom Farrey, *Players, Game Makers Settle for $40M*, ESPN (May 30, 2014), https://www.espn.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm [https://perma.cc/GS6C-Y7T6].

[162] Jon Solomon, *NCAA Reaches $20 Million Settlement With Players in Video Game Suit*, CBS Sports (June 9, 2014, 8:15 AM), https://www.cbssports.com/college-football/news/ncaa-reaches-20-million-settlement-with-players-in-video-game-suit/ [https://perma.cc/YE8V-LEDZ].

[163] Significantly, the dissent in *Keller* noted the inequity in a system wherein colleges, universities, coaches, television networks and others all make off the talent and hard work of athletes, many of whom come from inner city neighborhoods and rural towns, while the athletes are precluded from sharing in the revenues. *Keller*, 724 F.3d at 1289, n.5 (Thomas, C.J., dissenting).

[164] Jon Solomon, *NCAA Reaches Settlement in EA Video Game Lawsuit*, Nat'l Collegiate Athletic Ass'n (June 9, 2014, 10:53 AM), http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-settlement-ea-video-game-lawsuit

A broader discussion of whether college athletes have a right of publicity can be found in *O'Bannon*. The Ninth Circuit said that athletes have a right of publicity in the EA-produced NCAA football and basketball video games and, based on the realistic nature of the players, rejected the NCAA's argument that the First Amendment would preclude any publicity right for video games. Because it found that the athletes had standing and had suffered injury under the antitrust laws as a result of not being paid for their NILs in the video games, the Ninth Circuit declined to reach "the thornier questions of whether participants in live TV broadcasts . . . have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA's current licensing arrangement for archival footage."[165] Notably, the District Court in *O'Bannon*[166] stated that athletes would have a right to create and sell group licenses for the use of their NILs in live game broadcasts absent NCAA rules prohibiting such.[167] District Judge Wilken specifically rejected the NCAA's defense that the First Amendment barred plaintiffs' claims.

[https://perma.cc/GMT7-HYV4]. It is easy to agree that the pay was not for performance on the field, but arguably it was pay for use of the athletes' NILs.

[165] The court declined to consider NCAA's other argument that the Copyright Act preempts right-of-publicity claims. The court said this was irrelevant to the standing argument and other main issues of the case and is convoluted and complex. It did note that EA pays professional players in the National Football League ("NFL") and NBA for the right to use their NILs in its video games, indicating that the Copyright Act may not preempt such claims. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1067 (9th Cir. 2015).

[166] Two points to emphasize from *O'Bannon* that are relevant to this paper's proposal of NIL payments are that the allegations in the case involved payments from the NCAA or member institutions (not third parties) and only group licenses between the NCAA or member schools and the athletes (not third-party payments to individual athletes).

[167] A case filed in 2017 by former football great, Chris Spielman, against Ohio State would have elucidated many of the issues left open in *O'Bannon*, but the case settled. Jennifer Smola, *Spielman and Ohio State Reach $140k Settlement in Lawsuit Over Athletes' Images*, COLUMBUS DISPATCH (Nov. 30, 2018, 10:02 PM), https://www.dispatch.com/news/20181130/spielman-and-ohio-state-reach-140k-settlement-in-lawsuit-over-athletes-images [https://perma.cc/YUN8-492L]. There, Spielman, on behalf of a class of current and former Ohio State football players in federal court in Ohio (which is in the Sixth Circuit and not bound by the Ninth Circuit's opinion in *O'Bannon)*, sued Ohio State; IMG, Ohio State's sports marketing agency; Nike, with whom Ohio State had a licensed apparel contract that included the sale of jerseys with former players depicted; and Honda, which sponsored banners at Ohio State with former players' names and photos. Spielman alleged that Ohio State unfairly profited from the use of the former players' NILs used on banners hanging at the school, sales of DVDs that showed replays of games and the sale of photos and jerseys. A year later and before much motion practice or discovery, the

A few years later, in *Marshall v. ESPN*,[168] the Sixth Circuit held differently. In *Marshall*, a group of Division I football and basketball players alleged that an agreement to force athletes to sign waivers of their otherwise existing right to compensation for their publicity rights for in-game broadcasts violated the Sherman Act. The Sixth Circuit held that the athletes did not have a cognizable right of publicity in the broadcast use of their likenesses. Significantly, Tennessee's right-of-publicity law had a carve out that stated, "it is deemed a fair use and no violation of an individual's rights shall be found . . . if the use of a name, photograph or license is in connection with a . . . sports broadcast or account."[169] Thus, the decision is limited due to the specific state law, although many states have similar laws.[170]

The NCAA's guidelines on NILs, as recently proposed and discussed in Part IV, directly caution that the new rules must account for athletes' rights of publicity and any defense of the First Amendment.[171] As explained above, the applicability of these legal theories depends on the state in which the event occurs, the type of use (e.g., matters of public interest, like in-game live broadcast, versus commercial activities, like video games with players altered as avatars) and the extent of transformation of the images.[172]

C. Employment Law Claims Have Failed to Yield Pay for College Athletes

Finding federal antitrust laws and rights of publicity insufficiently hospitable to their demands to be paid for their services, athletes have also resorted to employment law, seeking to categorize athletes as employees. Their efforts have thus far failed. For example, in *Berger v. National Collegiate*

---

parties settled. Spielman donated his settlement award of $140,000 to charity. Speculation was that numerous similar lawsuits would be filed at other schools but perhaps due to the huge cost of litigation and loyalty by most athletes to their schools, we have seen no such explosion.

[168] Marshall v. ESPN, 668 F. App'x 155 (6th Cir. 2016) (brought against two dozen entities including conferences, networks and licensing agencies; the NCAA was not sued).

[169] TENN. CODE ANN. § 47-25-1107 (2019).

[170] *See supra* notes 9–14. Also, to note is that the NCAA argued that California, in fact, has a state law that is similar to Tennessee law and protects live broadcasts as fair use, however, Minnesota where two of the plaintiffs lived did not have a similar law.

[171] *See infra* Part IV.

[172] Providing historical facts through game programs and video clips may command a substantial public interest and be a form of expression with First Amendment protection. Also, as noted earlier, copyright law recognizes that broadcast rights are held by the copyright owner. 17 U.S.C. § 106 (2018).

Athletic Ass'n,[173] the University of Pennsylvania women's track and field athletes alleged that they were "employees" under the Federal Labor Standards Act ("FLSA") and were thus entitled to compensation for playing, similar to students who are compensated in work-study programs. In December 2016, the Seventh Circuit rejected this claim and held that, based on the revered tradition of amateurism, the athletes were not employees, emphasizing that intercollegiate sports are extracurricular "play" not "work."[174] The concurring opinion, however, muddied the waters by stating that the economic reality and tradition of amateurism in revenue-producing sports like Division I men's basketball and FBS football may dictate a different result.[175]

In *Dawson v. NCAA*,[176] the Ninth Circuit addressed the situation raised by the concurring opinion in *Berger*. The Ninth Circuit panel, which included Chief Judge Thomas (who would have permitted both the $5,000 stipend in *O'Bannon* and the First Amendment defense in *Keller*, and who is now on the panel in *GIA*), held that FBS football players were not employees and therefore not owed a minimum wage or overtime pay. The court explained that the FLSA requires an analysis of the economic realities of the situation to discern the true nature of the parties' relationship. The court focused heavily on the fact that neither of the two defendants (the NCAA and the Pac-12 Conference) had the power to hire or fire Dawson, and then explicitly left open the possibility of similar claims succeeding against schools.[177] Presumably, athletes would have to show that they do not al-

---

[173] 162 F. Supp. 3d 845 (S.D. Ind. 2016).

[174] This case originally was captioned Sackos/Anderson v. Nat'l Collegiate Athletic Ass'n. A former soccer player at the University of Houston alleged that the NCAA and DI universities conspired to violate the Fair Labor Standards Act by failing to at least pay a federal minimum wage of $7.25 per hour. No. 1:14-cv-1710-WTL-MJD (S.D. Ind. Oct. 22, 2014). Sackos was replaced by the women track and field athletes at the University of Pennsylvania as the plaintiffs. Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2016). The District Court granted the defendants' motions to dismiss on February 16, 2016, and stated that the relationship between athletes and institutions of higher education is fundamentally an "educational experience," more akin to extracurricular student-run programs than to work-study programs. *Berger*, 162 F. Supp. 3d at 856.

[175] *Berger*, 843 F.3d at 294.

[176] Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019).

[177] *Id.* Failing in the Ninth Circuit, two months later, certain FBS football players brought a similar lawsuit in the Third Circuit. In November 2019, a former Villanova football player, Trey Johnson, filed a 116-page complaint in the Eastern District of Pennsylvania on behalf of a purported class of football players from 22 Division I schools (all located in the Third Circuit) against the NCAA. *See* Complaint, Johnson v. Nat'l Collegiate Athletic Ass'n, No. 2:19-cv-05230 (E.D. Pa. Nov. 6, 2019). In great detail, the complaint alleges that the NCAA failed to pay

ready, through GIA and other benefits, receive the equivalent of the minimum wage.

D. Efforts to Unionize Fail: Northwestern Football Players

Yet another way in which college athletes have sought to obtain increased benefits, including pay, is through unionization. Specifically, a group of football players at Northwestern University, under the guidance of the College Athletes Players Association ("CAPA"), petitioned in 2013 to gain the right to unionize pursuant to the National Labor Relations Act ("NLRA"), seeking to gain similar rights to those held by professional athletes.[178]

The Regional Office in Chicago of the National Labor Relations Board ("NLRB"), after extensive briefing and a hearing, found that Northwestern (i) exerted great control over the athletes on issues including what they wore, where they traveled, when and how much they practiced, and (ii) received great benefits from the players (e.g., the Northwestern football program generated $30.1 million in operating revenue during the 2012–13 season alone).[179] The Regional Director concluded that the scholarship football players were "employees" and entitled to vote on whether to unionize and be represented for collective bargaining purposes by CAPA.[180]

---

the minimum wage to the athletes as required by the Pennsylvania Minimum Wage Act and the FLSA. The Plaintiffs assert that they are employees the same, or if not more so than, students in work study programs. The complaint alleges: "Notably, student ticket takers, seating attendants and food concession workers at NCAA contest are paid a minimum wage. . . under Work Study. At the same time, the Student Athlete, whose athletic work creates those Work Study jobs at the ticket gate, in the seats and at concession stands, are paid *nothing*." Ryan Boysen, *NCAA Must Pay Minimum Wage, Ex-Villanova Player Says*, LAW360 (Nov. 7, 2019, 5:31 PM), https://www.law360.com/articles/1217930/ncaa-must-pay-minimum-wage-ex-villanova-player-says [https://perma.cc/5GKE-92FE]. While this complaint does not address NIL payments, clearly any reasoning that compares non-athlete student pay to athlete pay is relevant.

[178] *See* Roberto L. Corrada, *The Northwestern University Football Case: A Dissent*, 11 HARV. J. OF SPORTS & ENT. L. 15 (2020) (describing Northwestern University students' unionization efforts).

[179] Professional players, through respective unions, negotiate collective bargaining agreements with owners and agree on restrictive commercial rules (e.g., player and team salary caps and reserve clauses) that otherwise would be prohibited under the Sherman Act.

[180] *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 13-RC-121359, 2014-15 NLRB Dec. P 15781, 2014 WL 1246914, at *13 (Mar. 26, 2014).

This decision was heralded as a breakthrough for college athletes' rights, but this optimism was short-lived. The full NLRB overruled the regional director[181] in an opinion that most view as a "punt." The NLRB chose not to address the merits of the matter, instead finding that unionization would not promote labor harmony. The NLRB made three key observations: (i) intercollegiate athletics was in a transitional phase in 2015; (ii) allowing unionization would have engendered systemic instability by only permitting unionization at the seventeen private colleges among 128 FBS schools; and (iii) there was a need to resolve the labor market issues and academic tensions in the current system.[182] Significantly, the NLRB called on the United States Congress to clarify the institutional structure of college sports with a plea that it was addressing the "case in the absence of explicit Congressional direction regarding whether the Board should exercise jurisdiction," emphasizing that it was leaving open the issue of whether they might find jurisdiction in another case involving scholarship players.[183]

Notably, if athletes become "employees" under any of the scenarios above, schools will have to make payments for social security, workers' compensation, Medicare, unemployment insurance, and other benefits, along with pay; athletes will have to pay income and social security taxes on their compensation; and schools may lose some of their favorable Unrelated Business Income Tax ("UBIT") treatment by the IRS, along with other tax preferences.[184] In the end, we believe that the educational budget and learning process will suffer from such a result.[185]

---

[181] *Id.*

[182] *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1368 (2015).

[183] *Id.* at 1355.

[184] Subsequently, in August 2016, the NLRB held that graduate and undergraduate teaching and research student assistants were statutory employees pursuant to the National Labor Relations Act. *Trustees of Columbia Univ. in the City of New York & Graduate Workers of Columbia GWC, UAW*, 364 N.L.R.B. 90 (2016). Significantly, this decision overruled *Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL–CIO, Petitioner*, 342 N.L.R.B. 483 (2004), a case that the NLRB in *Northwestern* said was distinguishable because "scholarship players bear little resemblance to the graduate student assistants." Northwestern had heavily relied upon *Brown* in its briefs. *Northwestern Univ.*, 362 N.L.R.B. at 1365.

[185] *See generally* John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109 (2010).

III. The Potential Scope of NILs

Athletes seek to sell their NILs to entities for a host of activities other than in-game broadcasts, including endorsements, advertisements, items of clothing with their names on them, appearing at clinics, appearing in video games, or commercializing an athlete's social media site. There is a lot yet to be determined regarding the application of NIL rights to these types of activities before college athletes are compensated. Consider the following:

- How will the eventual NCAA rulings or guidelines restrict athletes from receiving pay in exchange for their NIL rights? In its October 29, 2019 statement, the NCAA Board of Governors simply said that the three Divisions[186] should develop rules that would permit NIL "benefits" for athletes without further elaboration of the term "benefits."[187] The District Court in *NCAA Grant-In-Aid,* while not directly addressing NILs, permitted unlimited benefits like laptops, smart phones, unlimited numbers of scholarships to graduate school, payment for semesters to study abroad and so on, as long as they are related to education, on top of (i) cash benefits up to $5,600 that do not have to be related to education as long as they are team-based performance awards and (ii) cash benefits up to $5,600 stemming from academic achievement awards.[188] How this translates to NIL payments presents a host of complications. Such non-cash benefits are all potentially valuable, but, of course, they would be more valuable to some students than others.
- Will Division I seek to permit at least some cash payments as "benefits"? If so, will they require these payments be tethered to education, allowed while the student is still enrolled, or will the money accumulate in a trust fund, not available until after the athlete leaves school or graduates? Chief Judge Thomas in his dissent in *O'Bannon* would have required payments for group licenses to be held in trust and provided to the athlete once they leave school or graduate.[189]

---

[186] Eventually, if college athletes were paid, the astronomical compensation now paid to college coaches and athletic administrators likely would be reduced, alleviating some of the cost pressure. See the discussion in Gurney et al., *supra* note 15, at chs. 7–8.

[187] *See* NCAA NIL Report, *supra* note 7, at 3.

[188] *See id.* at 4.

[189] *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1099 (N.D. Cal. 2019).

- If the new regime for NIL payments emanates from national legislation, in addition to the foregoing questions, will payments for NILs be restricted to non-game use of names, images, and likenesses? If so, what will be the scope of the restriction? Would commercials for in-game broadcasts and the like be allowed? In *O'Bannon*, the district court said that athletes have NIL rights for in-game broadcasts, while the Ninth Circuit specifically refused to address this—calling it a "thornier" question.[190] Many states, like Tennessee in *Marshall*, as discussed earlier, have laws that explicitly exclude rights of publicity in live broadcasts.[191] Plus, First Amendment rights, copyright laws and fair use standards may come into play to prohibit payments for in-game NILs. By contrast, NIL payments for names and rights of publicity on jerseys, likenesses in video games, endorsements on billboards, advertisements on social media, among others, are much more established. They are not live action. In most likelihood, any practical definition of NIL rights will be limited to non-game NIL rights.
- Will NIL rights be restricted to contracting with third parties, such that schools cannot contract with athletes either directly or as an intermediary? The potential implications here are twofold. First, if schools are involved in the contracting, then the school seemingly becomes similar to an athlete's employer.[192] Second, if schools pay athletes directly for NILs, then Title IX would require parallel payments for women athletes.
- Even if third parties make the payments, would Title IX apply? If schools are involved—e.g., by administering, enforcing, or promoting the NIL contracts—or the payments are disguised as indirect recruiting efforts by schools, or if additional promotion efforts are provided to men and men's teams regarding the availability of NIL payments, then would Title IX apply like it does with fundraising efforts by third parties?
- If the schools pay out NIL money, how do they protect against growing financial deficits? Of course, the athletic department may lose some revenue in any case to the extent that companies substi-

---

[190] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1080 (9th Cir. 2015).

[191] *Id.*

[192] *See, e.g.*, TENN. CODE ANN. § 47-25-1107(a) (2019) ("It is deemed a fair use and no violation of an individual's rights shall be found, for purposes of this part, if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account.").

tute athletes for whole programs as the vehicle to promote their products.[193]

- Will athletes be restricted as to when they can contract or activate their NIL rights? Will they have to do so only after the competitive playing season is over or only when classes are out of session? Can they do so as high school students?
- Will athletes be able to use university names, marks, and brands while exploiting NIL rights with outside companies?
- Will athletes on their social media that is being monetized be permitted to state that they play a certain sport at their respective schools?
- Will athletes be able to sign up with companies in competition with companies already in sponsorship deals with the school? What role will the compliance staff in athletic departments play in such evaluation?
- Should athletes be allowed to contract their individual NIL rights as well as join with other athletes to contract group NIL rights? The latter would apply, for example, to multiple athletes appearing in one advertisement, in one video game, or in a set of playing cards.
- Will the price that is paid to athletes for their NILs be regulated or will the total NIL income earned per year be bounded?[194] Absent any restraints, it is easy to imagine an all-out competition of manipulated contracts among athletic department recruiters for star high school athletes. Consider this hypothetical: Big Ten schools from medium-sized Midwest cities contact various local businesses and arrange for these businesses to offer NIL contracts to prospects. The schools make a deal with these businesses, such as cheaper advertising space at the stadium or free luxury suite passes, if the businesses offer the school's top prospect $10,000 for a public appearance to sign autographs that would normally fetch only $500 in a competitive market. This type of behavior could quickly transform itself into a surrogate pay-for-play market. Some schools, particularly those in larger markets or a more lucrative conference, would gain another competitive advantage. Schools might find their sponsorship and luxury suite revenue from companies sacri-

[193] See *supra* notes 185–86 and accompanying text for tax implications to the employer (schools) and employees (athletes).

[194] This substitution effect may be mollified if the popularity of college sports grows as a result of more fan interface with the athletes.

ficed at the altar of this new, circuitous system of athlete compensation. To be sure, even if there is no such underhanded manipulation of market prices in the market for NILs, some schools in larger markets, such as the University of Southern California or the University of California, Los Angeles, will benefit over other schools in smaller markets, such as Oregon State University or Washington State University.

- Will the law permit athletes to unionize to help them identify opportunities and negotiate group NIL payments? Will athletes have a right to form trade associations to do the same?
- Will athletes have a right to hire agents to help them identify and negotiate NIL contracts? The NCAA's strict rules prohibiting agents, except in very narrow circumstances, could be an obstacle to athletes receiving expert advice. If agents are permitted, how would they be prevented from exploiting teenagers who are unsophisticated and inexperienced in business? If permitted, will athletes be allowed to contract with agents prior to their matriculation in college? If they are, then the agents could become surrogates for the university during recruitment and trigger open market competition.

The list of possible machinations and infelicitous outcomes is virtually endless. Clearly, there is a strong argument for imposing certain constraints on a newly emerged NIL marketplace. We suggest solutions to many of these concerns in Part V, *infra.*

IV. The NCAA's Recommendation for Implementation of NIL Payments

In response to the many pressures on the NCAA, including lawsuits, legislation, and the court of public opinion, the NCAA formed the NIL Committee, headed by Big East Commissioner Val Ackerman and Ohio State Athletic Director Gene Smith, to examine the feasibility of NIL payments to NCAA student-athletes.[195] This committee, on October 29, 2019, presented an interim report to the NCAA Board of Governors that was

[195] If they are so regulated, without an antitrust exemption, we are likely to see a continuation of lawsuits brought on antitrust grounds. Then the NCAA, no doubt, would argue that amateurism is a procompetitive justification for the restrictions. Even if the NCAA were successful, (which given the trend of the cases may not be likely), much time and money would be spent on the case(s).

unanimously adopted.[196] The interim report from the NIL Committee and the Board's affirmative vote on the report potentially represent a turning point in the NCAA's definition of and insistence on amateurism. Still, there remains great uncertainty around the report's details, which will be further detailed in April 2020 when the NIL Committee presents its second report to the Board of Governors.

The momentous report stated that "[i]t is the policy of the Association that NCAA member schools may permit students participating in athletics the opportunity to benefit from the use of their name, image and/or likeness in a manner consistent with the values and beliefs of intercollegiate athletics."[197] The Board voted that each of the three Divisions should modify and modernize the relevant NCAA bylaws and rules and:

- Ensure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.
- Maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
- Ensure rules are transparent, focused, and enforceable and facilitate fair and balanced competition.
- Make clear the distinction between collegiate and professional opportunities.

---

[196] There is additional pressure to pay athletes for their NILs due to the limited options that high school students have to play professional sports upon graduation. Indeed, both high school and college athletes with dreams of going professional are subject to entry rules created by the different professional leagues, e.g., the NBA's "one-and-done" rule or the NFL's requirement that athletes be out of high school for three years or the MLB rule that allows athletes after high school but once enrolled in college, they must remain until they complete their junior year or reach 21 years of age, unless they attend junior college in which case they can enter the draft after two years. Kelly Hines, *Going Pro: Which Sport Gets Draft Rules Right?*, TULSA WORLD (Apr. 20, 2013), https://www.tulsaworld.com/sportsextra/collegebasketball/going-pro-which-sport-gets-draft-rules-right/article_ea5642ca-4a94-5084-bd1f-f3f3213cbec3.html [https://perma.cc/96P7-QWAL]. The NBA rule, in particular, requiring just one year post-high school before receiving eligibility, has received a lot of negative attention because, for the elite players who would otherwise go straight into the NBA, they are forced to either play in the NCAA, patronizing the notion of primacy of education, play with the NBA's developmental league, or play with professional teams located overseas. The NFL does not have a significant international market so athletes out of high school have few choices but to enter college, risking serious injury, if they wish to one day turn professional. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, FEDERAL AND STATE LEGISLATIVE WORKING GROUP REPORT TO THE NCAA BOARD OF GOVERNORS 2 (2019) [hereinafter NCAA NIL WORKING GROUP REPORT], https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf [https://perma.cc/R3CF-J8UQ].

[197] *See* NCAA NIL REPORT, *supra* note 7, at 3.

- Make clear that compensation for athletics performance or participation is impermissible.
- Reaffirm that student-athletes are students first and not employees of the university.
- Enhance principles of diversity, inclusion, and gender equity.
- Protect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution.[198]

Attempting to control the future modifications, the NIL Committee provided more "guidance" in its report to the Board.[199] The guidance appears to stem from the cases discussed above, including that payments be tethered to education (as in *O'Bannon* and *NCAA Grant-in Aid*), that athletes not be employees and not be compensated for their athletic performances (as in the FLSA and NLRA cases), and that First Amendment rights of third parties be considered (as in *Keller, Hart*, and *Marshall*).

The NIL Committee made a point of noting that the NCAA's current bylaws permit athletes to engage in outside employment and business activity.[200] The NIL Committee then provided examples of situations in which NIL payments might fit under the current bylaws but could also conceivably be used unfairly to compensate an athlete directly or indirectly for participation in athletics or involve inappropriate payments by boosters and therefore should be prohibited. The examples of possible acceptable use include athletes using their NILs in connection with writing and publishing a book or charging a fee for a lesson that is unrelated to sports; creating a social media channel to serve as the platform for their own business; promoting their own nonprofit organization; and creating and producing a video series containing nutritional tips for athletes and distributing the content via social media.[201]

The NIL Committee also said that each of the NCAA's three Divisions should develop their own rules and consider, *inter alia,* whether the rules require that athletes must receive prior approval from the athletic director, faculty athletics representative, or their designee for NIL payments, and whether there must be no involvement of schools, employees, or boosters in the development or promotion of NIL opportunities.[202]

While commentators and member institutions are generally optimistic about these potentially important changes, many are quick to note that the

---

[198] *Id.*
[199] *Id.* at 3–4.
[200] NCAA NIL Working Group Report, *supra* note 196, at 3.
[201] *Id.* at 5
[202] *Id.*

"devil is in the details."[203] The final proposals will need to be very specific, especially to avoid unintended consequences. We believe that the NIL Committee has taken a useful step forward in suggesting guidelines.[204] Our biggest concerns are with the following suggestions:

- Athletic department approval must be required.
- All deals must not relate to athletics and must be tethered to education.
- Schools can make NIL payments to athletes.
- All compensation for athletic performance or participation, even outside the school arena, is impermissible.
- The availability of cash payments for NIL use may be prohibited as the report refers only to "benefits" that can be received.

Directly addressing these concerns, we believe:

- Athletic departments should not play a role in approving NIL payments but instead should receive copies of proposed NIL deals only to determine whether they conflict with the school's current contracts. Congress should appoint an independent commission to set appropriate restrictions; analyze the impact, including unintended consequences, of the new rules; and act as a clearinghouse.
- Athletes should have complete control over receiving payments for their own NILs, including use of or reference to their athletic abilities (e.g., basketball players can autograph a picture of themselves dribbling a basketball). One exception is that, as explained *infra*, there should be reasonable restrictions set by the independent commission, including the annual dollar amount of payments on local contracts per individual to protect the primacy of education and to ensure that the payments are not disguised recruiting bonuses or other improper payments. Further, athletes should not be restricted to receiving only payments that are tethered to education. As demonstrated during the trial in *NCAA Grant-in-Aid* and the District's Court extremely complicated injunction, such tethering is artificial, unnecessary, very limiting, and entirely unworkable, and

---

[203] *Id.*

[204] *See, e.g.*, Greg Hunter, *Lyons Addresses Ever-Changing Landscape of College Athletics*, MORGANTOWN NEWS (Nov. 30, 2019), https://www.wvnews.com/morgantownnews/sports/lyons-addresses-ever-changing-landscape-of-college-athletics/article_db3bdc30-efa1-53e7-ac46-a54dd5f9c046.html [https://perma.cc/J4BV-W5L4] (interview with Shane Lyons, Chairman of the NCAA Division I Football Oversight Committee and West Virginia University Director of Athletics).

would constitute restrictions that are not applied to other students. For example, is a car used to drive to school related to education?[205]

- Schools should not engage in paying athletes directly or indirectly for their NILs. Such behavior would bring the relationship between the school and athletes closer to an employer/employee relationship with all the attendant consequences. Also, it would raise questions regarding schools' UBIT responsibilities and other tax issues. College athletes should not be permitted to be professional athletes, employed by professional leagues, while eligible for college sports but otherwise, should not be restricted from receiving payment at the going market rate for participation in athletics outside of school.
- Athletes should be permitted to receive cash as one form of benefit. They already receive cash, through COA stipends, of which use is not regulated.[206]

V. A Proposal for Federal Implementation of NIL Rights[207]

In this section, we propose a detailed framework for the payment to college athletes for their NILs.[208] The framework includes principles and

---

[205] In November 2019, the NCAA released a timeline for schools and divisions to provide feedback and prepare for the future rules. Key dates are: April 2020—Working Group Second Report to Board of Governors due; September 2020—Deadline for Divisions II and III Presidents to sponsor legislation; November 2020—Deadline for Division I to submit proposals; January 2021—discussion at the NCAA Convention of the proposals. Notably there is no deadline for Division I to sponsor legislation, although the NCAA notes that the Division I legislative process allows the Division I Board of Directors discretion to adopt legislation at any time. In fact, there is no deadline for voting on the proposals. *See* NCAA NIL Report, *supra* note 7, at 4.

[206] This would help better resolve situations like that of University of Central Florida backup kicker, Donald De La Haye, who lost his eligibility after refusing to stop monetizing his YouTube channel. *See* Dan Gartland, *UCF Kicker Ruled Ineligible After YouTube Channel Gets Him in Trouble with NCAA*, Sports Illustrated (July 31, 2017), https://www.si.com/college/2017/07/31/ucf-kicker-donald-de-la-haye-ineligible-ncaa-youtube-videos [https://perma.cc/NB7D-F8WF]. The NCAA based its decision on the fact that there were football-related videos on the channel. *See id.* Even United States Senator Marco Rubio tweeted "The @NCAA is out of control," in response to this decision. Marco Rubio (@marcorubio), Twitter (Aug. 1, 2017, 7:58 AM), https://twitter.com/marcorubio/status/892353886589116417 [https://perma.cc/MG5M-VMMQ]

[207] *See* Mandell, *supra* note 34.

[208] This proposal is similar to the Drake Group Position Paper. *Compensation of College Athletes Including Revenues Earned from Commercial Use of Their Names, Image*

conditions for both institutions and athletes and a proposal for an independent Commission that would set specific standards and adjudicate compliance with those standards.

A. Guiding Principles

We propose that intercollegiate athletics operate according to the following basic principles and rules:

- College athletes should be treated like other students as much as possible with regard to their independent efforts to engage in non-school efforts to receive payments for their NILs.
- Extracurricular activities generally, and intercollegiate athletic programs particularly, are important contributors to student development.[209]
- Higher education institutions should have the right to own and commercially benefit from performance events involving students participating in the institution's curricular and extracurricular activities through the sale of tickets, parking, game, or event programs, posting on the school's social media accounts, advertising, and sponsorship rights, and rights to live and delayed electronic telecasts. The revenues from such activities should be used to defray the costs of the extracurricular activity or otherwise advance the mission of the nonprofit higher education institution, including caring for the health and welfare of participants.
- College athletes should not be permitted to use the logos, brands or marks of their institution for private gain. But, under fair use, they should be able to reference the fact that they are athletes at their respective school. College athletes should otherwise have the right to use their NILs for private gain conditioned on the athlete obtaining such opportunity without assistance from the institution (i.e., such activities are not arranged by employees or others engaged by the athlete's institution for that purpose) and other conditions that protect the primacy of education.

---

and Likenesses and Outside Employment, DRAKE GROUP (Nov. 4, 2019), https://www.thedrakegroup.org/2019/10/14/compensation-of-college-athletes-including-revenues-earned-from-commercial-use-of-their-names-images-and-likenesses-and-outside-employment/ [https://perma.cc/8BU2-8NBU]. The position paper provides considerably more detail for a proposed solution.

[209] This framework is most applicable for Division I athletes and can be easily modified for Divisions II and III, if necessary. Given that our proposal does not permit institutions to pay athletes, no modification may be necessary.

B. Specific Proposal

1. Higher Education Institution Use of Athlete NILs

Higher education institutions should be permitted to condition participation in their athletic programs upon athletes providing the limited use of their NILs related to such participation. Such limited use shall include:

- Audio or videocast or otherwise recorded for live or delayed electronic distribution or photographed for print or digital publication of the regular season (including post-season) athletic events in which the athlete is participating during that season.
- Advertising or promotion of the regular season and post-season athletic events in which the athlete is participating during that season.
- Publication and sale of event programs sold with or during the regular season and post-season at athletic events in which the athlete is participating during that season.
- Perpetual print and electronic publication rights for the athlete's historical performance and participation statistics and photographs of prior champions or championship teams which may not be commercially exploited in any way other than athletic event programs. Such historical license should not extend to commercial documentary products that exist separate from the current athletic event. The inclusion of historical data on the institution's official athletics internet site which may be supported by sponsorship revenues shall not be considered prohibited commercial exploitation.
- Official team apparel or equipment to teams or to be the exclusive seller of such products at official athletic events and activities in which the athlete is participating.[210] Athletes' obligations to wear official team apparel shall extend throughout the academic year for official team practices, exhibition or non-traditional season contests, and appearances at official university events in which this apparel must be worn by all attending players.

Other conditions on institutions that we propose are:

- Higher education institutions should be prohibited from otherwise exploiting current students' NILs (other than as detailed above for official

[210] *See College Extracurricular Activities – Impact on Students, Types of Extracurricular Activities*, STATEUNIVERSITY.COM, http://education.stateuniversity.com/pages/1855/College-Extracurricular-Activities.html#ixzz3RYLjNs8c [https://perma.cc/VSE9-V7D8].

team events and activities) such as entering into licensing agreements using student NILs for video games, licensed apparel, licensed products, and more.

- The NCAA, athletic conferences, and member schools can jointly license their regular season and post-season collective intellectual property (NCAA, school, and conference names, marks, logos, and more) to third parties, conditioned on such agreements not including royalty or other payments to athletes.
- Any rules that schools or conferences employ regarding restrictions on social media usage during athletic contests, travel, or any other official team events will continue to apply.[211]

2. College Athlete Independent Use of Own NIL

College athletes should be permitted to obtain employment and accept pay for the commercial use of their NIL in advertisements, appearances, or speaking engagements, and for endorsement of commercial products ("commercial arrangements") with certain conditions:

- College athletes (or their agents) must independently obtain such arrangements (such arrangements cannot be made, directly or indirectly, by the institution's employees, donors, athletic program sponsors, or advertisers, or other representatives of its athletics' interests).[212]
- College athletes' commercial arrangements must not conflict with the institution's rights as specified above for official team events or activities. This shall not preclude a college athlete's agent or the athletes themselves from independently soliciting work from any company that also supports the institution.
- College athletes may earn pay for work performed but are limited by the maximum imposed by the NIL Commission (discussed *infra*), including for work related to the athlete's skill and notoriety and NIL agreements related to endorsements, product licensing, personal appearances, books,

---

[211] Athletes shall retain the right to use their own sports equipment. Shoes are subject to a medical exception, in which case, athletes shall be required to cover the brand of the conflicting sponsor during participation if during such regular season (including post-season) athletic events.

[212] *See, e.g.*, Marc Stein, *NBA Social Media Guidelines Out*, ESPN (Sept. 30, 2009), https://www.espn.com/nba/news/story?id=4520907 [https://perma.cc/WY8P-S3SL] (explaining that the NBA introduced a policy prohibiting players, coaches and team personnel from using electronic communication devices and accessing social media beginning forty-five minutes before the start of a game and only concluding after players and coaches have completed their post-game media obligations).

movies, television, or radio shows, providing autographs, endorsing commercial products, or being the owner or partner of a sports business, among others.

- College athletes may not enter into NIL arrangements with third parties that are inappropriate as determined by the Commission with respect to the character and integrity of the third party and the type of the activity.
- College athletes must report, in writing, their NIL arrangements above a de minimis amount set by the Commission and submit such arrangements to both the school and the Commission or entity such as an Eligibility Center.[213]
- College athletes must adhere to the standards set by the NIL Commission including the maximum annual local income based on going market rates that can be earned from the arrangements.
- College athletes must be in good academic standing, meeting all rules related to athletics' eligibility, including normal progress and full-time enrollment provisions.
- College athletes may enter into group licensing agreements with other athletes. Such group agreements shall also conform to the policies above.[214]
- College athletes may hire agents and lawyers without impacting their eligibility.

3. An Independent Commission Should Set Appropriate Standards for NIL Payments to Athletes

Congress should establish an independent NIL Commission to set standards for the payment of college athletes' NILs.[215] Higher education has an important obligation to promulgate rules that place a student's academic

---

[213] Marketing companies are jumping at the opportunity to assist college athletes to monetize their NIL rights either individually or as a group. *See* Michael Smith & Liz Mullen, *College Sports: Sharper Resolution*, SPORTS BUS. J. (Dec. 2, 2019), https://www.sportsbusinessdaily.com/Journal/Issues/2019/12/02/In-Depth/NIL.aspx [https://perma.cc/D7N9-C3J8].

[214] *See generally* Gabe Feldman, *The NCAA and "Non-Game Related" Student Athlete Name, Image and Likeness Restrictions*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (May 2016), https://www.knightcommission.org/wp-content/uploads/2008/10/feldman_nil_white_paper_may_2016.pdf [https://perma.cc/23RX-UTZH] (proposing numerous restrictions, many of which are similar to those suggested here but also proposing group licensing arrangements between schools and athletes in addition to individual agreements between athletes and third parties).

[215] *Id.*

success above the athletic success of its sports teams. The proper limitations that permit students to engage fully in athletics and to complete academic requirements for a degree, while also using their NILs for payment, can best be developed and enforced by an independent commission that does not also have the competing objective of creating winning athletic teams.

a. Standards

We suggest the independent NIL Commission be charged with the following:

- Set the maximum income based on going market rates that can be paid to athletes for use of their NILs on an annual, local basis.[216] Absent such control, the NIL market runs the risk of devolving into a surrogate labor market where colleges will approach high school recruits with financial packages based on promised NIL contracts.[217]
- Set standards related to the appropriateness of college athletes' required activities, including a requirement that no classes, exams, or participation in other required academic activity be missed to perform agreement-related activities.[218]
- Set standards for the character and integrity of any third party which shall not be more onerous than the NCAA's advertising and promotional standards.
- Set standards for the registration and recognition of college athlete approved sports agents.
- Set standards for agents and attorney agreements that specify recommended ranges for hourly rates or percentage commissions.

---

[216] The NIL Commission should consider establishing a clearinghouse for NILs that could be similar to the NCAA's current Eligibility Center or the Drug Free Sport International. All athletes could be required to submit their NIL agreements to the clearinghouse for review. Also, the agreements would be posted on a website that is searchable. This transparency hopefully will help reveal potential abuses. The Commission could set appropriate standards for the redaction of competitively sensitive information as long as such redaction does interfere with the purpose in making the contracts publicly available.

[217] It is important to control local, as opposed to national, income because it is local income that enters into consideration during athlete recruitment. Local would be delineated by a mile radius around the university, with an exception for social media income which, while generated locally, can engage national sources of revenue. We believe that those athletes with a national reputation should be able to fully exploit their notoriety nationally without limitation.

[218] Also setting a cap on the amount that athletes can earn from local sources may minimize the concern that donations made directly to schools will be reduced, which in turn could particularly impact non-revenue sports.

- Set a value (e.g., $1,000) that is considered *de minimis* for reporting purposes.
- Collect all non-*de minimis* NIL arrangements and make them publicly available.
- Receive and monitor complaints concerning agents, attorneys, and other third parties related to compliance with the standards set by the Commission.
- Adjudicate generally compliance with its standards.[219]

b. Composition of the NIL Commission

The NIL Commission shall consist of a majority of independent experts. At least one independent member shall be appointed by each of the Faculty Athletic Representatives Association, the National Association for Athletics Compliance, the National Association of Collegiate Directors of Athletics, the Sports Lawyers Association, CAPA, and the Association of Sports Economists. The term "independent" shall mean at least two years removed from employment by the NCAA, a NCAA member athletic conference, or a member institution athletic department. The member must also agree not to return to this employment within two years of leaving the NIL Commission.

c. A Necessary Antitrust Exemption

The NIL Commission could effectively operate only if Congress (and the NCAA to the extent that its rules require athletes to abide by the NIL Commission's requirements) grants it a limited and conditional antitrust exemption.[220] A limited antitrust exemption would specifically permit implementing the above standards.[221] These controls are necessary to achieve the prioritized purposes of higher education in the conduct of intercollegiate athletics. Further, the exemption would eliminate any restrictions and ambi-

---

[219] The authors have considered other restrictions, including limitations on the amount of time that athletes may devote to NIL profiting activities and the number of these activities. While it may be something that the Commission in the future finds desirable, we do not suggest such regulations at this time.

[220] These activities could be delegated to the clearinghouse discussed earlier. *See supra* note 217. We do not envision the Commission initiating such adjudication, as the burden would be too great. Rather, we suggest that certain designated third parties could bring appeals that would be adjudicated by the Commission.

[221] Ideally, Congress would consider a limited Commission and conditional antitrust exemption that would be much broader and address holistically all the key reforms needed in college sports. *See generally* Meyer & Zimbalist, *supra* note 68.

guity resulting from the current cases, including those from *O'Bannon* and *NCAA Grant-in-Aid.*

If an antitrust exemption is granted that allows the setting of market restraints, such as caps on local NIL income, then we believe the exemption should also apply to setting caps on coaches' and administrators' income. As discussed above, the extraordinary income paid to Division I football and basketball coaches results largely from the suppression of pay to athletes. It would be unconscionable to pass an exemption permitting the capping of local athlete NIL income, while not permitting the capping of coach and administrator income.

The exemption would also allow for the establishment of uniformity of rules regarding agreements on NIL rights for live in-game broadcasts that are now dependent on underlying common law and statutory law.[222]

A limited and conditional antitrust exemption that applies to the legitimate categories of controls discussed in this proposal will enable the NIL Commission and the NCAA collectively to enact needed reforms without fear of future legal liability. Such an exemption is both justifiable and necessary. Antitrust lawsuits represent huge costs for legal representation, participation in court cases, and payment of damages.[223] These funds would otherwise be available to advance the NCAA's and its member institutions' nonprofit educational purposes.

A solution that includes an antitrust exemption would not be extraordinary.[224] Congress has enacted limited antitrust exemptions in many

---

[222] An Act of Congress that creates a national NIL Commission and grants a federal antitrust exemption would preempt state laws that attempt to regulate NILs.

[223] Interestingly, the NCAA no longer requires athletes to sign Form 15-3(a) in which athletes agreed to give up any NIL rights they might have regarding broadcasts and promotions thereof. This is consistent with the argument made by the NCAA at the oral argument on behalf of the summary judgment motion in *Keller*, at which the NCAA's attorney stated: "[T]he student athletes don't have any NIL rights in the live broadcasts of the games." He explained that live broadcasts are noncommercial events, noncommercial speech that involves a matter of public interest. Reporter's Transcript of Proceedings at 31, Keller v. Elec. Arts, Inc., 4:09–cv–01967 CW (N.D. Cal. Aug. 18, 2015).

[224] Noteworthy is that antitrust damages are trebled under the Sherman Act. *See* 15 U.S.C. § 15 (2018). This is an impetus for the parties to reach a settlement. Settlements resolve matters only between the particular parties and do not foreclose future cases brought by a different set of plaintiffs. *See, e.g.*, White v. Nat'l Collegiate Athletic Ass'n, No. CV 06-0999-RGK, 2006 WL 8066803 (C.D. Cal. Oct. 19, 2006) (discussing allegations regarding the GIA Cap that settled, allowing for a different set of plaintiffs in *O'Bannon* to bring similar allegations without the existence of contrary precedent).

industries—ranging from the hog industry,[225] to railroads,[226] to soft drinks,[227] to the insurance industry,[228] to professional sports,[229] and, most significantly, to higher education.[230] Statutory antitrust exemptions involving the sports industry or higher education include (a) The Sports Broadcasting Act of 1961 ("SBA"), which provides limited immunity from antitrust litigation to the four major professional sport leagues for selling horizontally pooled broadcasting rights to over-the-air channels;[231] (b) a narrow and targeted antitrust exemption in 1966 that permitted the combination of the National Football League and American Football League;[232] (c) the Ted Stevens Olympic and Amateur Sports Act in 1978 (subsequently amended in 1998), which created a vertical structure for the management of certain amateur sports in the United States;[233] (d) the Curt Flood Act of 1998, which removes Major League Baseball's presumed antitrust exemption (judicially conferred in 1922) in the area of labor relations;[234] (e) the Improving America's Schools Act of 1994, which exempts from antitrust laws agreements to admit students on a need-blind basis by institutions of

---

[225] Arguably, regulating college athletics including eligibility, scholarships, scheduling and spending is not so different from regulating college financial assistance such as covered in the Higher Education Act that includes rules on loan limits, accreditation, determining who gets money, how much and when, etc. And, regulating gender equality in college sports, *e.g.*, 20 U.S.C. §§ 1681–1688 (2018), demonstrates that Congress believes it is appropriate to impose legislation in this important area.

[226] Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, 49 Stat. 781 (1935) (codified at 7 U.S.C. § 852 (2018)).

[227] ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 812 (codified at 49 U.S.C. § 10706 (2018)).

[228] Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, 94 Stat. 939 (1980) (codified at 15 U.S.C. §§ 3501–03 (2018)).

[229] McCarran-Ferguson Act, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011–15 (2018)).

[230] *See infra* notes 233–237.

[231] *See infra* notes 237–238.

[232] Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. § 1291 (2018)) (stating, "[t]he antitrust laws, as defined in section 1 of the [Sherman] Act[,] . . . shall not apply to any joint agreement . . . by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs").

[233] Pub. L. No. 89-800 § 6(b)(1), 80 Stat. 1515 (1966) (codified as amended at 15 U.S.C. § 1291 (2018)).

[234] Ted Stevens Olympic and Amateur Sports Act, Pub. L. No. 105-225, 112 Stat. 1466 (1998) (codified as amended at 36 U.S.C. §§ 220501–220512 (2018)).

higher education;[235] and (f) the Medical Resident Matching Program Exemption in 2004.[236]

These Acts demonstrate that Congress protects certain activities in sports and higher education from the antitrust laws when it deems fit. It defines antitrust exemptions specifically and narrowly. Here, too, the exemption should be narrowly defined.

VI. Conclusion

In this Article, we have reviewed the legal history of amateurism in collegiate sports and its relationship to NILs. The *Keller* and *O'Bannon* cases brought the NIL issue to the fore and the September 30, 2019, signing of the California Fair Pay to Play Act by Governor Newsom broke the long-standing legislative inertia surrounding NCAA amateurism. Threatened with losing control over NIL and broader compensation issues, on October 29, 2019, the NCAA Board of Governors relented and suggested, at least nominally, that the NCAA's enduring prohibition on athlete compensation from NILs be changed.

While the Board did not announce specific measures to implement NIL rights for athletes, it did charge each of the NCAA's three Divisions with proposing guidelines for implementation by January 2021. These guidelines are to be consistent with the NCAA's conception of amateurism and only allow "benefits" that are tethered to education.

We critique this approach as far too narrow and failing to grant college athletes the same NIL rights as granted to other students (with a few exceptions). The NCAA has applied a constantly morphing definition of amateurism over the years. The only sensible definition of amateurism for a college

---

[235] 15 U.S.C. § 26b (2018). Congress ensured the limited scope of its intervention by expressly stating that, "the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity." Curt Flood Act, Pub. L. No. 105–297, § 2, 112 Stat. 2824 (1998). The Supreme Court had previously presumed that Major League Baseball was exempt from the antitrust laws. *See* Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

[236] Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. V, § 568(a), 108 Stat. 4060) (codified at 15 U.S.C. § 1 (2018) (note)) The Act permits, *inter alia*, schools jointly "to use common principles of analysis for determining the need of such students for financial aid if the agreement to use such principles does not restrict financial aid officers . . . in their exercising independent professional judgment with respect to individual applicants for such financial aid." The Act does not permit schools to agree on which particular students are entitled to aid.

athlete would require that athletes not be paid by member institutions a cash income for playing their sport.

Accordingly, we propose a NIL policy that affords many more opportunities for college athletes. Athletes should have the same right to be paid by third parties as other students, save for a few narrow exceptions. Importantly, NIL income contracted with third parties should not conflict with students' pursuits of a college education.[237] Any difference that persists between students who are not athletes, on the one hand, and students who are athletes, on the other hand, is necessary due to the extraordinary time demands placed on athletes.[238] To ensure both that our more open system does not ignore athletes' abilities to attend and study for their classes and that a surrogate, indirect pay-for-play system does not evolve, it is necessary to impose a regulatory structure. Such a structure would be most effective if it were mandated by Congress and were independent. Unfortunately, the oversight structure means a modicum of bureaucracy.[239] While it would be desirable to have a world where no regulatory controls were necessary, we do not live in such a world, and the challenge then becomes not to abolish regulation, but to make it function effectively.

---

[237] 15 U.S.C. § 37 (2018).

[238] See *supra* Part III for a few other narrowly drawn circumstances where third party NIL income may be restricted to ensure no conflicts with the school's intellectual property.

[239] It is recognized that athletic departments that earn revenues from broadcasts and apparel deals have legitimate concerns in protecting those.