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A Prelude to *Jenkins v. NCAA*: Amateurism, Antitrust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis

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A Prelude to *Jenkins v. NCAA*: Amateurism, Antitrust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis

*Marc Edelman**

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INTRODUCTION

On September 30, 2015, the United States Court of Appeals for the Ninth Circuit held in *O'Bannon v. National Collegiate Athletic Association* that the National Collegiate Athletic Association ("NCAA") violated Section 1 of the Sherman Act by prohibiting member colleges from offering their athletes compensation equal to the full cost of their college attendance.¹ Nevertheless, the *O'Bannon* decision failed to enjoin the NCAA from maintaining its rules that prevent colleges from paying their athletes directly in cash or with additional in-kind benefits.²

At present, the antitrust status of the NCAA's "no pay" rules again are the subject of legal challenge in *Jenkins v. National Collegiate Athletic Association*—a lawsuit that seeks to further overturn the NCAA's amateurism rules that "plac[e] a ceiling on the compensation that may be paid to [college] athletes for their services."³ Although the NCAA has claimed that

1. *O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015) ("Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason."). Although the NCAA had long purported in its public relations materials and media that it allowed colleges to provide athletes with scholarships to cover the cost of their education, until the *O'Bannon* ruling, the NCAA's maximum scholarship levels maintained a several thousand dollar per year shortfall between the maximum amount of athletic scholarship money permissible under NCAA rules and the true cost of a student-athlete attending college. See *Free Ride Still Costs Athletes*, ESPN (Oct. 26, 2010), <http://www.espn.com/college-sports/news/story?id=5728653> [<https://perma.cc/VK2A-PMDQ>]; see also *Study: College Athletes Worth Six Figures Live Below the Poverty Line*, DREXEL NOW (Sept. 13, 2011), <http://drexel.edu/now/archive/2011/September/Study-College-Athletes-Worth-Six-Figures-Live-Below-Federal-Poverty-Line> (explaining that a study entitled "The Price of Poverty in Big Time College Sport" shows that the average scholarship shortfall per college athlete during the 2010–2011 school year was \$3,222 per athlete) [<https://perma.cc/TY3Y-5UB6>]; Ed Payne, *Report: College Scholarship Athletes are Living in Poverty*, CNN (Sept. 13, 2011), <http://edition.cnn.com/2011/SPORT/09/13/full.scholarships> (also citing to the annual average student-athlete out of pocket expense of \$3,222 per year) [<https://perma.cc/BD2U-5ACE>]. Although this amount is defined as a "full grant-in-aid," it does not include money to cover the costs of all meals, travel to and home from college, basic living expenses, or even books marked as recommended reading by the student-athletes' professors; see also Complaint at 3, *Jenkins v. NCAA*, No. 14-cv-01678 (D.N.J. Mar. 17, 2014) ("[U]nder NCAA and Power Conference Rules, players may receive only tuition, required institutional fees, room and board, and required course-related books in exchange for their services.").

2. *O'Bannon*, 802 F.3d at 1076.

3. Complaint, *supra* note 1, at 1–2; see also *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 974–75 (N.D.Cal. 2014) ("The amateurism provision in the NCAA's current

“pay-for-play arrangements would transform the intercollegiate sports model into a minor league in which the virtues of college sports . . . would disappear,” advocates on behalf of players’ rights recognize that, even absent pay, the operation of college football and men’s basketball already “has the feel of a professional economic machine.”⁴

This Article serves as a prelude to the litigation in *Jenkins*. Part I of this Article provides a brief overview of the current economics of NCAA Division I men’s basketball and NCAA Football Bowl Subdivision (“FBS”) football. Part II explores the underlying antitrust challenges to the NCAA’s “no pay” rules in both *O’Bannon* and *Jenkins*. Finally, Part III explains how the issue of consumer demand applies to the expected antitrust analysis in *Jenkins*, and why a strong consumer demand survey would help the plaintiffs to prevail in *Jenkins*.

I. THE CURRENT LANDSCAPE OF BIG-TIME COLLEGE SPORTS

Although United States colleges have competed in organized sports for almost 150 years, the commercial market for intercollegiate sports has grown substantially over the past generation.⁵ At present, college sports represent an \$11 billion enterprise, with most college athletic revenue derived from FBS football and Division I (“D-I”) men’s basketball.⁶ According to a recent report produced by *USA Today*, during the 2014–2015 academic year, 40 NCAA member colleges earned athletic revenues that exceeded \$80 million.⁷ Meanwhile, four NCAA member colleges earned athletic revenues that exceeded \$150 million.⁸

constitution states that student-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.’”) (internal citations omitted).

4. William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 ALA. L. REV. 551, 554, 561 (2016).

5. *O’Bannon*, 802 F.3d at 1053.

6. See Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS L. REV. 809, 809 (2016).

7. See *NCAA Finances 2014-15*, USA TODAY, <http://sports.usatoday.com/ncaa/finances> (last visited June 27, 2017) [<https://perma.cc/G87D-Y2GR>].

8. See *id.* (indicating that these colleges include Texas A&M University, the University of Texas, Ohio State University, and the University of Michigan).

If American colleges were for-profit entities, FBS football and D-I men's basketball programs would produce shareholder profits.⁹ Because the colleges that compete in NCAA D-I sports are entirely non-profits, however, the collegiate sports model is subject to a non-distribution restraint.¹⁰ Thus, instead of producing profits, these collegiate athletics departments must either reinvest their revenues into the college overall or reallocate their revenues as “windfall payments” to some set of quasi-shareholders.¹¹

Presuming that a college athletics department chooses to reallocate some of its athletic revenue to individuals, two potential classes of quasi-shareholders reasonably might stand to benefit from the financial success of college sports: (1) collegiate athletes, who serve as the primary labor force behind revenue-producing sporting events; and (2) college sports “managers” who supervise these events—sports administrators, athletics directors, and coaches.¹² In this vein, the NCAA's “Principle of Amateurism” is not truly about some lofty social ideal,¹³ but rather is about a specific allocative scheme that keeps college athletics revenues “in the hands of a select few administrators, athletics directors, and coaches.”¹⁴

9. Marc Edelman, *From Student-Athletes to Employee Athletes: Why a ‘Pay for Play’ Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137 (2017).

10. *Id.* (citing Gordon Winston, *Why Can't a College Be More Like a Firm*, 5 CHANGE 32 (1997)).

11. *Id.*

12. *Id.* at 5–6.

13. Professor Berry explains that increasing evidence exists that the current model of big-time college sports does not even serve an educational mission for students. *Cf.* Berry, *supra* note 4, at 554. (“The current model compromises the quality and scope of the education received by student-athletes, particularly in revenue sports.”).

14. Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. L. REV. 861, 864 (2002). To further buttress this point, even the NCAA's purported bright-line rule requiring college athlete amateurism contains exceptions where the compensation of college athletes arguably would not even affect the potential distributions available to the college administrators, athletics directors, and coaches who vote to preserve the NCAA's amateurism rules. For example, the NCAA rules allow tennis players to receive payments of up to \$10,000 per year for playing their sport. Thus, a tennis player who begins competing at a young age theoretically could accept upwards of \$50,000 in payments without being seen in violation of the NCAA amateurism bylaws. *O'Bannon v. NCAA*, 802 F.3d 1049, 1083 (9th Cir. 2015) (Thomas, J., dissenting).

II. CHALLENGING NCAA “NO PAY” RULES UNDER THE SHERMAN ACT

Until recently, few college athletes had challenged the NCAA Principle of Amateurism.¹⁵ As the revenues associated with big-time college sports have increased, however, college athletes have begun to use antitrust lawsuits to challenge the NCAA Principle of Amateurism and its associated “no pay” rules.¹⁶

A. An Introduction to Section 1 of the Sherman Act

Section 1 of the Sherman Act, in pertinent part, states that “[e]very contract, combination[,] . . . or conspiracy in the restraint of trade or commerce . . . is declared to be illegal.”¹⁷ Read literally, Section 1 of the Sherman Act seems to prohibit all commercial contracts.¹⁸ Most courts, however, have interpreted Section 1 of the Sherman Act to prohibit only those contracts that “unreasonably” restrain trade.¹⁹

1. Antitrust Basics

To determine whether a particular restraint violates Section 1 of the Sherman Act, a court typically will apply a two-part test.²⁰ First, the court must determine whether the alleged restraint involves concerted action between two legally distinct entities in a manner that affects interstate commerce (“threshold requirements”).²¹ Then, a court must consider whether the alleged restraint “unduly suppresses competition within any relevant market” (“competitive effects analysis”).²²

In assessing the threshold requirements of an antitrust challenge, a court typically will consider two separate sub-elements: (1) concerted

15. See *O’Bannon*, 802 F.3d at 1053 (“As far as we are aware, the district court’s decision [in *O’Bannon*] is the first by any federal court to hold that any aspect of the NCAA’s amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices.”).

16. See *infra* notes 44–82 and accompanying text (referencing the *O’Bannon* and *Jenkins* litigations).

17. The Sherman Act, 15 U.S.C. §§ 1–7 (2012).

18. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 70 (2013).

19. *Id.* at 70–71.

20. *Id.* at 71.

21. *Id.*

22. *Id.*

action; and (2) interstate commerce.²³ A court will assess the presence of “concerted action” by considering “whether there is evidence of an agreement, either written or implied, between entities that lack a common objective.”²⁴ Meanwhile, a court will determine whether an alleged restraint affects interstate commerce based on whether the restraint involves “the exchange of buying and selling of commodities especially on a large scale involving transportation from place to place.”²⁵ Under the modern view, any amount of exchange greater than *de minimis* constitutes “interstate commerce,” making “almost every activity from which [an] actor anticipates economic gain” sufficient to meet this threshold requirement.²⁶

Thereafter, a court will determine whether a given restraint “unduly suppresses competition” by applying one of the approved tests along the antitrust “spectrum.”²⁷ On one end of the spectrum, if a restraint is so nefarious that a high probability exists that the restraint lacks any redeeming value whatsoever, a court will apply the per se test, which simply presumes illegality without any further inquiry.²⁸ Meanwhile, on the other end of the spectrum, if a court, upon first glance, believes the restraint may have some competitive benefit, the court instead will apply a full Rule of Reason inquiry.²⁹ Under a full Rule of Reason inquiry, a court will need to “distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”³⁰ To accomplish this, a court will examine every aspect of an alleged restraint, including whether the parties involved had the power to control any relevant market, whether the restraint encourages or discourages competition, and whether the restraint causes any “antitrust harm,” or, stated otherwise, harm to consumers.³¹

23. *Id.* at 72.

24. *Id.*

25. *Id.* (internal citations and quotations omitted).

26. 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 206 (2d ed. 2000); see also Edelman, *A Short Treatise on Amateurism and Antitrust Law*, *supra* note 18, at 72–73 (internal citations and quotations omitted).

27. Edelman, *A Short Treatise on Amateurism and Antitrust Law*, *supra* note 18, at 73.

28. *Id.*

29. *Id.*

30. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

31. Edelman, *A Short Treatise on Amateurism and Antitrust Law*, *supra* note 18, at 73–74.

2. *Applying Section 1 of the Sherman Act to the NCAA's No Pay Rules*

Based upon the foregoing, there are at least two theoretical means by which a plaintiff could challenge the NCAA's no pay rules implicit within its Principle of Amateurism under Section 1 of the Sherman Act.³² The first way is to argue that aspects of the NCAA Principle of Amateurism “represent a form of wage fixing that harms not only the market for college athlete services but also the quality of college sports’ on-field product.”³³ The second way is to argue that the NCAA rules against colleges paying their athletes constitute a form of illegal group boycott against colleges that would otherwise wish to pay their athletes.³⁴

Under both legal theories, it is overwhelmingly likely that the antitrust claims against the NCAA's no-pay rules would meet both of the Sherman Act's Section 1 threshold requirements. With respect to the first threshold issue of “concerted action,” the Supreme Court's 2010 decision in *American Needle v. National Football League* explains that a court may infer concerted action based on “how the parties involved in [the] alleged anticompetitive conduct actually operate.”³⁵ Much like professional football teams, colleges with collegiate sports teams operate as competitors, given that each college operates a separate business that competes against one another for student-athletes, tuition dollars, and athletic revenues.³⁶

Meanwhile, with respect to the second threshold issue of “interstate commerce,” both legal and economic realities seem to recognize that NCAA members engage in the “exchange of buying and selling of commodities” across state lines—even though a limited number of federal court decisions have held otherwise.³⁷ Indeed, it is difficult to dispute the “commercial” nature of today's NCAA Division I football and men's basketball, given that “[49] college athletics departments earn annual

32. *Id.* at 75.

33. *Id.*

34. *Id.*

35. *Am. Needle v. Nat'l Football League*, 560 U.S. 183, 191 (2010). Because the NCAA is composed of individual member colleges that control the decision-making of the NCAA, all—or at least most—NCAA conduct would constitute “concerted” behavior under federal antitrust laws. Marc Edelman, *The NCAA's “Death Penalty” Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise*, 18 LEWIS & CLARK L. REV. 385, 403 (2014).

36. *See generally Am. Needle*, 560 U.S. at 199 (describing the test for competitors within a joint venture).

37. Edelman, *A Short Treatise on Amateurism and Antitrust Law*, *supra* note 18, at 75.

revenues that exceed \$70 million[.]” with most of such revenue derived from these two sports.³⁸ In addition, NCAA members pay the association’s president an annual salary of \$1.8 million and pay their athletic conference commissioners salaries as high as \$3.5 million per year—further evidence of bona fide commercial activity.³⁹

Turning next to the competitive effects analysis, most courts today would review the NCAA’s amateurism rules under the full Rule of Reason test because the NCAA represents a classic “joint venture.” A “joint venture” is defined as “a collaboration among competitors designed to achieve a specific business objective through some integration of resources or risk.”⁴⁰ Applying the full Rule of Reason test, a plaintiff would bear the initial burden of presenting evidence to show that the NCAA both maintains market power and implements its amateurism rules in a manner that suppresses competition and harms consumers.⁴¹ Given that it is relatively well-settled that NCAA member colleges maintain close to 100% of the market for collegiate athletic labor, the pivotal legal issue in an antitrust assessment likely would turn on whether the NCAA’s rules yield net anticompetitive effects and hamper consumer demand within the relevant market.⁴²

B. *O’Bannon v. National Collegiate Athletic Association*

O’Bannon v. NCAA was the first meaningful antitrust challenge that sought to overturn the NCAA’s “amateurism” rules as a form of illegal wage fixing and group boycott under Section 1 of the Sherman Act.⁴³ The

38. Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 *CARDOZO L. REV.* 1627, 1630–31 (2017).

39. *Id.* at 1631.

40. Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaboration among Competitors*, 86 *IOWA L. REV.* 1137, 1171 (2001); see also Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable Nor Necessary: “Amateurism” in Big-Time College Sports*, 14 *ANTITRUST* 51 (2000) (“The NCAA is more appropriately described as a joint venture that has, like other joint ventures, certain aspects that must be agreed upon.”); *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 972 (N.D. Cal. 2014) (explaining that both the plaintiffs’ economic expert and the NCAA’s economic expert opine that the NCAA operates as a “joint venture”).

41. Edelman, *The NCAA’s “Death Penalty” Sanction*, *supra* note 35, at 407.

42. See *supra* notes 27–31 and accompanying text (discussing the factors that courts will consider in a proper Rule of Reason antitrust analysis).

43. For a more thorough discussion of the procedural history in the *O’Bannon* litigation as well as an understanding of the precedent antitrust cases reasonably relied upon by plaintiffs’ lawyers in *O’Bannon*, see Marc Edelman, *The District Court*

case's named plaintiff, Ed O'Bannon, was an All-American college basketball player at UCLA who, upon leaving college, played in the NBA and later became a car salesman.⁴⁴ While visiting a friend's home, Ed O'Bannon learned that his image had appeared in a college basketball video game produced by Electronic Arts.⁴⁵ Electronic Arts had paid a licensing fee to the NCAA for the use of its intellectual property.⁴⁶ Electronic Arts, however, had not paid Ed O'Bannon or any college player for the use of their likeness.⁴⁷

1. Case Overview

Although the real substance of Ed O'Bannon's legal dispute arose from the alleged infringement of his intellectual property rights, O'Bannon's legal complaint alleged, among other things, that the NCAA member colleges had violated Section 1 of the Sherman Act by conspiring "to fix the price of former student athletes' images at zero and to boycott former student athletes in the collegiate licensing market."⁴⁸ Thus, the purported antitrust violation was the NCAA's mandate that all member colleges require their athletes to sign an identical release.⁴⁹

Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change, 71 WASH. & LEE L. REV. 2319, 2322–23 (2014).

44. O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015); *see also* Dave Sheinen, *Ed O'Bannon Has Gone from the Hardwood to the Sales Floor*, WASH. POST (June 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/11/AR2009061103332.html> [<https://perma.cc/SS8Q-BKJB>].

45. O'Bannon, 802 F.3d at 1049.

46. *See NCAA Settles with Former Athletes*, ESPN (June 9, 2014), http://www.espn.com/college-sports/story/_/id/11055977/ncaa-reaches-20m-settlement-video-game-claims [<https://perma.cc/DDV2-MKVR>].

47. *See id.*

48. Order on CAA's and CLC's Motions to Dismiss at 9, O'Bannon v. NCAA, No. C-09-3329-CW, 2010 WL 445190, at *5 (N.D. Cal. Feb. 8, 2010); *see also* O'Bannon, 802 F.3d at 1055. ("[T]he gravamen of O'Bannon's complaint was that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs, were an illegal restraint of trade under Section 1 of the Sherman Act.").

49. *See* Dan Wolken & Steve Berkowitz, *NCAA Removes Name-Likeness Release from Student-Athletes' Forms*, USA TODAY (July 18, 2014), <https://www.usatoday.com/story/sports/college/2014/07/18/ncaa-name-and-likeness-release-student-athlete-statement-form/12840997> (explaining that, until well into the O'Bannon litigation, the NCAA had required individuals who wanted to play college sports to sign away the rights to their names and likenesses in a standard form document).

2. Bench Trial and District Court Decision

After many years of pleadings and oral arguments, litigation in *O'Bannon* proceeded to a bench trial in which Honorable Claudia Wilken of the United States District Court for the Northern District of California ruled on the outstanding issues of both fact and law.⁵⁰ Upon review, Judge Wilken ruled generally in Ed O'Bannon's favor. Specifically, the court held that the NCAA member colleges acted concertedly with one another, engaged in interstate commerce, and unreasonably restrained trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools.⁵¹

The district court's order enjoined the NCAA from enforcing any rules that "would prohibit its member schools and conferences from offering their FBS football and Division I [men's] basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses, in addition to a full grant-in-aid."⁵² This order marked a first in sports-antitrust jurisprudence.⁵³

Nevertheless, the district court's order did not establish an absolutely free market for college athletes' services.⁵⁴ Instead, the order forbade the NCAA only from restricting payments to athletes that exceeded the full cost of their college attendance—an amount greater than the NCAA's then-limit on scholarships—plus deferred compensation of \$5,000 per year.⁵⁵ This limit on college athlete pay was based on the court's conclusion that any greater payments would harm the overall consumer demand for fans to watch college sporting events, negating antitrust law's goal of maximizing consumer welfare.⁵⁶

One of the main reasons why the plaintiffs in *O'Bannon* could not secure a broader injunction against the NCAA was because Judge Wilken gave some weight to the testimony of the NCAA's research expert, Dr. J.

[<https://perma.cc/JFH4-3CR3>]. 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. 553, 570–71 (2013) (discussing the scope of what rights, if any, college athletes had truly signed away based on the NCAA's mandatory paperwork).

50. See *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

51. *Id.* at 963.

52. *Id.* at 1002; see also *O'Bannon*, 802 F.3d at 1060 (explaining that the court's injunction did not "require that all schools pay their student-athletes" but rather permitted them, if they chose, to do so).

53. *O'Bannon*, 802 F.3d at 1053.

54. See *id.*

55. See *id.*

56. *Id.*

Michael Dennis. Dr. Dennis surveyed 2,455 respondents across the United States about their feelings toward paying elite college athletes different sums of money.⁵⁷ Dr. Dennis's survey began by asking respondents what they had heard previously about paying college athletes, leading many of the respondents to think about the "illegal or illicit payments" to athletes that the NCAA had long opposed.⁵⁸ The survey proceeded to ask respondents "specifically whether they would be more or less likely to watch, listen to, or attend college football and basketball games if student-athletes were paid" at various different theoretical levels of compensation.⁵⁹ According to Dr. Dennis's findings, most survey respondents opposed athlete pay.⁶⁰

3. Appellate Court Decision

Although the district court's decision in *O'Bannon* brought only modest changes to the NCAA's amateurism rules, the NCAA nevertheless appealed the decision to the United States Court of Appeals for the Ninth Circuit.⁶¹ On appeal, the appellate court affirmed the district court's holding that the NCAA violated Section 1 of the Sherman Act but overturned the part of the district court's injunction that would have allowed colleges to make deferred payments, in trust, to their athletes of up to \$5,000 per year more than the cost of college attendance.⁶²

The appellate court relied even more heavily on Dr. Dennis's consumer demand study than the district court had, as it opined that a remedy enjoining the NCAA from restricting even small payments to college athletes would be troublesome under antitrust law.⁶³ In other words, according to the court, allowing any cash payment from colleges to their athletes would hurt "consumer demand."⁶⁴ The appellate court

57. See *O'Bannon*, 7 F. Supp. 3d at 975.

58. *Id.*

59. *Id.*

60. *Id.* ("[69%] of respondents to Dr. Dennis's survey expressed opposition to paying student-athletes while only [28%] favored pay them.").

61. See *O'Bannon*, 802 F.3d 1049.

62. *Id.* at 1079; see also Order Denying Motion for Judgment on the Pleadings at 3, *Jenkins v. NCAA*, No. 14-2758-CW (N.D. Cal. Aug. 5, 2016) ("[T]he majority [in *O'Bannon*] reversed the portion of the permanent injunction related to deferred compensation."). But see generally *O'Bannon*, 802 F.3d at 1079–84 (Thomas, J., dissenting) (taking the opposing view, arguing that the district court's injunction should have been upheld in full, allowing for small cash payments from colleges to their athletes without NCAA interference).

63. See *O'Bannon*, 802 F.3d at 1078.

64. *Id.* at 1077.

believed “consumer demand” would diminish because “[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor [but rather] a quantum leap.”⁶⁵

The appellate court’s *O’Bannon* decision, which scaled back any financial gains secured by players at the district court level, since has been construed by the lawyers for both parties as a relative victory.⁶⁶ The lawyers representing Ed O’Bannon claimed victory because the Ninth Circuit’s ruling strongly fortified that aspects of the NCAA’s amateurism rules were collusive restraints that affected interstate commerce and were subject to economic review under antitrust law’s Rule of Reason.⁶⁷ Meanwhile, the NCAA’s lawyers focused on the practical reality that the only immediate change the NCAA would need to make to its amateurism rules was increasing the cap on athlete scholarships to reflect the true cost of college attendance.⁶⁸

C. Jenkins v. NCAA

Although *O’Bannon* represents a small tangible gain for college athletes in terms of the available compensation, it was nevertheless an important legal victory for the college athletes’ rights movement because it opened the gateway for future college athletes to challenge the NCAA’s “no pay” rules more broadly under Section 1 of the Sherman Act.⁶⁹

65. *Id.* at 1078.

66. See *Did the NCAA Win or Lose the O’Bannon Case Appeal*, WBUR (Oct. 3, 2015), <http://www.wbur.org/onlyagame/2015/10/03/ncaa-antitrust-obannon-lawsuit> (expressing disagreement as to whether the Ninth Circuit’s decision in *O’Bannon* was actually a win for the plaintiffs or the defendants) [<https://perma.cc/33AK-W2JL>].

67. See Joe Nocera, *Ed O’Bannon’s Hollow Victory Over the N.C.A.A.*, N. Y. TIMES, Oct. 2, 2015, at A-23 (“Michael Hausfeld, Ed O’Bannon’s lead lawyer, quickly declared victory — and having the N.C.A.A. deemed an antitrust violator surely *is* a victory.”).

68. See generally *id.* (“In a conference call, Mark Emmert, the [NCAA]’s president, pronounced himself ‘pleased’ [with the court’s ruling in *O’Bannon*.”); Michael McCann, *What the Appeals Court Ruling Means for O’Bannon’s Ongoing NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 30, 2015), <https://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling> (“The NCAA and its members are pleased that they will not need to fund trusts for student-athletes’ NIL right.”) [<https://perma.cc/347U-99C2>].

69. Edelman, *The District Court Decision in O’Bannon v. National Collegiate Athletic Association*, *supra* note 43, at 2352–55 (discussing how the district court’s ruling that the NCAA amateurism rules were subject to substantive

Lurking behind *O'Bannon* on the U.S. District Court for the Northern District of California's docket is another sports antitrust case, *Jenkins v. NCAA*, which seeks to use the Ninth Circuit's decision in *O'Bannon* as a starting point to challenge the NCAA's broader rules that prevent colleges from financially competing to sign new athletes.⁷⁰

At the time *Jenkins* was filed, the plaintiffs in that case had sought to overturn the NCAA grant-in-aid cap, which had been set at "the value of tuition, fees, room and board and required course books."⁷¹ Even after the *O'Bannon* decision required the NCAA to raise its maximum permissible scholarship amount, the plaintiffs in *Jenkins* continued to challenge the new NCAA payment cap as yet another illegal restraint of trade.⁷²

1. Case Overview

The litigation in *Jenkins* commenced on March 17, 2014 when five attorneys filed a class action lawsuit against the NCAA and its "Power Five Conferences"—the Atlantic Coast Conference, Big Twelve Conference, Big Ten Conference, Pac-12 Conference, and Southeastern Conference—in the United States District Court for the District of New Jersey.⁷³ Martin Jenkins, the lead plaintiff in the case, had been a starting defensive back for

review under Section 1 of the Sherman Act opens the door for future lawsuits to usher far greater change to the economics of big-time college sports).

70. Complaint, *supra* note 1, at 1–2. The *Jenkins* lawsuit seeks both to enjoin the NCAA from enforcing its "no pay" rules of college athletes and to allow a class of plaintiffs, who were victims of these wage-fixing rules, to recover monetary damages. *Id.* at 2, 4; *see also* Berry, *supra* note 4, at 556 ("*Jenkins* . . . goes further in challenging the current system [because unlike *O'Bannon*] which focused solely on the use of student-athletes' names and likenesses, *Jenkins* challenges the entire amateurism structure arguing that restricting the ability of individual institutions to compensate their athletes constitutes an unlawful restriction on commerce.").

71. Order Denying Motion for Judgment on the Pleadings at 2, *Jenkins v. NCAA*, No. 14-2758-CW (N.D. Cal. Aug. 5, 2016).

72. *Id.*

73. Complaint, *supra* note 1, at 1, 42. The lead attorney whose name appeared on the complaint, Jeffrey Kessler, previously had secured important antitrust victories for the National Football League Players Association in federal litigation against the NFL. *See* Jon Solomon, *Meet Jeffrey Kessler: Lawyer Whose Suit Strikes Fear in NCAA's Heart*, CBS SPORTS (Nov. 4, 2014), <http://www.cbssports.com/college-football/news/meet-jeffrey-kessler-lawyer-whose-suit-strikes-fear-in-ncaas-heart> [<https://perma.cc/CP9L-Q6AH>].

Clemson University—a college whose athletics department generated more than \$70 million in revenues in 2012.⁷⁴

The *Jenkins* complaint alleged, in pertinent part, that the NCAA’s “agreements to price-fix players compensation, and to boycott any institutions or players who refuse to comply with the price fixing agreement, are *per se* illegal acts under Section 1 of the Sherman Act” or, in the alternative, “an unreasonable restraint of trade under the rule of reason.”⁷⁵ Thus, the *Jenkins* complaint fundamentally differs from the *O’Bannon* complaint in that it draws no nexus between the use of a college athlete’s likenesses and right to earn financial compensation.⁷⁶ Instead, it focuses exclusively on the NCAA’s purported wage restraints in the labor markets to sign college athletes.⁷⁷

During the preliminary stages of the *Jenkins* litigation, the U.S. District Court for the District of New Jersey granted the plaintiff’s motion to transfer the case to the United States District Court for the Northern District of California to consolidate aspects of *Jenkins* with *O’Bannon* and a third amateurism-antitrust litigation that since has settled, *Alston v. National Collegiate Athletic Association*.⁷⁸ From there, *Jenkins* was placed on the docket of Judge Claudia Wilken, who was already familiar with the legal and factual issues based upon her role in deciding *O’Bannon*.⁷⁹ Since the case’s transfer, the NCAA twice has attempted to have the case summarily dismissed.⁸⁰ Nevertheless, the U.S. District Court for the Northern District of California has rejected both of these motions.⁸¹ Unless the NCAA successfully moves for summary judgment at the close of

74. Complaint, *supra* note 1, at 35–36.

75. *Id.* at 3.

76. *See id.*

77. *See id.*

78. *See* Transfer Order, *In re: NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, No. 3-14-cv-01678 (D.N.J. June 17, 2014).

79. *See id.*; *see also supra* notes 51–61 and accompanying text (discussing Judge Wilken’s role as the finder of both fact and law at the district court level in *O’Bannon*).

80. *See* Order Denying Motion to Dismiss, *Jenkins v. NCAA*; Order Denying Motion for Judgment on the Pleadings, *Jenkins v. NCAA*, No. 14-2758-CW (N.D. Cal. Aug 5, 2016).

81. *See* Order Denying Motion to Dismiss, *Jenkins v. NCAA*, No. 14-2758-CW (N.D. Cal. Oct. 10, 2014); Order Denying Motion for Judgment on the Pleadings, *Jenkins v. NCAA*, No. 14-2758-CW (N.D. Cal. Aug. 5, 2016).

discovery, which is soon forthcoming, a trial in *Jenkins* is anticipated for 2018.⁸²

2. *Why Jenkins May Prove a Game Changer for College Athletes' Rights*

Although the *Jenkins* case has some similarities to *O'Bannon*, there are a number of reasons to believe it may yield broader financial gains for elite college athletes. First, the Ninth Circuit's recent decision in *O'Bannon* obviates the need for the lawyers in *Jenkins* to address whether their claims meet the threshold requirements for antitrust scrutiny or whether these claims are subject to a Rule of Reason inquiry.⁸³ Instead, plaintiffs' lawyers can focus their efforts exclusively on arguing about the negative economic impact of the NCAA's no pay rules.⁸⁴ By limiting the scope of what the plaintiffs' lawyers must argue to those issues pertaining to economic impact, it is likely that the plaintiffs' lawyers will devote more resources to an economic analysis of amateurism, including, perhaps, providing a surveying expert to produce a counter-study to the one generated by Dr. Dennis.

Second, the plaintiffs' lawyers in *Jenkins* need not contend with complex issues regarding the value of individual athletes' publicity rights in the context of an antitrust analysis. This issue is irrelevant in *Jenkins* because the plaintiffs argue that the NCAA engages in a wage-fixing restraint in the market for signing college athletes rather than the market for using their likenesses.⁸⁵ Thus, whereas it is theoretically possible that a college athletes' publicity rights may have no economic value when used on television, such a finding would not have a direct impact on the court's order in *Jenkins*.

Finally, the plaintiffs' lawyers in *Jenkins* have the benefit of learning from the pitfalls encountered by the lawyers when litigating *O'Bannon*. Perhaps the biggest stumbling block for the plaintiffs in *O'Bannon* was addressing the issue of "consumer demand" in light of Dr. Dennis's expert

82. See Todd Cunningham, *NCAA Hire of Wilkinson Sets up Dream Matchup in Antitrust Case*, NAT'L LAW J. (June 14, 2017), <http://www.nationallawjournal.com/id=1202789831539/NCAA-Hire-of-Wilkinson-Sets-Up-Dream-Matchup-in-Antitrust-Case> (stating that if the NCAA fails to secure summary judgment at the close of discovery, a trial in *Jenkins* would be likely for late 2018) [<https://perma.cc/X4UG-YHGS>].

83. See *supra* notes 62–69 and accompanying text.

84. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015).

85. See *supra* notes 75–77 and accompanying text.

study.⁸⁶ There are a number of ways in which the plaintiffs in *Jenkins* can attempt to tackle this issue, even though continuing to adopt the approach taken by the lawyers in *O'Bannon* likely will lead to a replication of the mixed result generated in that case.⁸⁷

III. WHAT IT WOULD TAKE FOR COLLEGE ATHLETES TRULY TO PREVAIL IN *JENKINS V. NCAA*

For the plaintiffs to prevail in *Jenkins*, their lawyers will need to adopt at least one of three alternative approaches to address the issues of consumer demand related to lifting the NCAA amateurism rules.⁸⁸

One potential approach is to convince the court that, despite its holding in *O'Bannon*, fan interest in watching college sports is irrelevant to a proper labor-side antitrust analysis of consumer demand. Although it is rather incontrovertible that antitrust law is about preserving consumer welfare, one reasonably could argue that, in a labor-side antitrust lawsuit such as *Jenkins*, the true consumers entitled to protection by antitrust law are the colleges seeking to purchase athletic labor and not the fans watching college sporting events live or on television.⁸⁹ This argument, albeit not meaningfully considered in *O'Bannon*, has some support grounded in previous Supreme Court antitrust decisions.⁹⁰ For example, in *United States v. National Society of Professional Engineers*, the Court held that antitrust law's Rule of Reason serves exclusively to "form a judgment about the competitive significance of

86. See Marc Edelman, *Single Legal Mistake Cost Plaintiffs in O'Bannon v. NCAA: Lack of Consumer Demand*, FORBES (Sept. 30, 2015), <https://www.forbes.com/sites/marcedelman/2015/09/30/single-legal-mistake-cost-plaintiffs-in-obannon-v-ncaa-lack-of-consumer-demand-study/#2d38a6ea4283> [<https://perma.cc/CN24-VUHR>].

87. See *O'Bannon*, 802 F.3d at 1076 ("We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand.").

88. See *infra* notes 92–98 and accompanying text.

89. Cf. *Brown v. Pro Football Inc.*, 50 F.3d 1041, 1061 (D.D.C. 1995) ("So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumer."); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L. J. 707, 737 (2007) ("Promoting consumer welfare is a goal of the Sherman Act, but only a goal, and that making end-user welfare the touchstone under the Act could have extraordinarily undesirable consequences.").

90. See *infra* note 94 and accompanying text.

[a given] restraint [and not] to decide whether a policy favoring competition is in the public interest.”⁹¹

Alternatively, the *Jenkins* plaintiffs may attempt to tackle the consumer demand issue by producing a proper counter-study to show that paying college athletes actually would not decrease consumer demand to watch collegiate sporting events. The ideal consumer demand study would analyze actual consumer decisions to buy college sports tickets in situations in which it was believed widely that particular colleges were paying their athletes in violation of NCAA rules. Without even conducting such a study, empirical evidence demonstrates that when colleges have paid their athletes in violation of the NCAA rules, the NCAA’s investigations into such payments have not reduced consumer demand to watch collegiate sports.⁹²

Finally, the *Jenkins* plaintiffs also may seek to use behavioral psychology to better rebut the findings of Dr. Dennis’s study that purports to link paying college athletes with lower consumer demand to watch college sports.⁹³ Upon a more careful analysis of Dr. Dennis’s study through the lens of behavioral psychology, there are a number of inappropriate ways in which the survey administrators seemed to “prime” or “pre-suade” respondents into opposing college athlete pay.⁹⁴ For example, the first question that the surveyors asked respondents in Dr. Dennis’s study is what they had heard about paying college athletes, which, in turn, led many respondents to think about the negative connotations the NCAA has long associated with college athlete pay.⁹⁵ This line of questioning “stacks the deck by focusing people, unduly, on their dissatisfaction.”⁹⁶

91. *United States v. Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. 679, 692 (1978).

92. For examples of scandals that NCAA member schools were paying their star football players, none of which negatively impacted college football attendance at these schools, see *Top 5 Pay to Play Scandals Rocking College Football*, THE WEEK (Jan. 6, 2011), <http://theweek.com/articles/488252/5-pay-play-scandals-rocking-college-football> [<https://perma.cc/GS37-2JWN>].

93. See *infra* notes 97–100 and accompanying text.

94. ROBERT CIALDINI, *PRE-SUASION: A REVOLUTIONARY WAY TO INFLUENCE AND PERSUADE* 4 (2016) (“[Pre-suasion is] the process of arranging for recipients to be receptive to a message before they encounter it.”).

95. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 975 (N.D. Cal. 2014).

96. CIALDINI, *supra* note 94, at 23–24. See also *O’Bannon*, 7 F. Supp. 3d at 975 (recognizing this issue by explaining that the survey respondents had been “primed” in a particular manner). Robert Cialdini, a renowned Professor Emeritus of Psychology and Marketing at Arizona State University, described this behavior of focusing on unhappiness to lead people to describe themselves as unhappy as “target chuting,” and pointed out that this is a strategy frequently used by cults to convince individuals that they are sufficiently unhappy to consider membership. CIALDINI, *supra* note 94, at 23.

Other problems with Dr. Dennis's study include the survey's singular focus on athlete pay rather than including other factors that also may impact fan interest—a surveying technique that may forge a false causal relationship in respondents' minds between athlete pay and their level of fan interest.⁹⁷ Finally, the NCAA consumer demand study may confuse its respondents by failing to state affirmatively that paying college athletes would not increase their cost of game tickets.⁹⁸ Given that many colleges are already price maximizers when selling game tickets, it is likely that moving to a pay-for-play model would not increase ticket prices by one cent.

CONCLUSION

In many ways, the Ninth Circuit's ruling in *O'Bannon* can be analogized to the work of an offensive lineman in a college football game. On the surface, *O'Bannon* produced only a mundane victory for the players, as it did not “score a touchdown” on the issue of paying college athletes. On a deeper legal level, however, the court's recognition that the NCAA amateurism rules are subject to antitrust analysis under the Rule of Reason standard creates a big hole through which a future antitrust litigant, with a proper consumer demand study, could run for that touchdown.

In the movement to create a free market for college athletes' services, much of the difficult legal work already has been accomplished. The one major challenge remaining for the plaintiffs' lawyers in *Jenkins* is to either legally or factually rebut the presumption that the NCAA's “no pay” rules enhance consumer outcome in the antitrust context. Though there are several ways the *Jenkins* plaintiffs can accomplish this task, one feasible approach entails having an expert witness produce a factual study concluding that there is no *bona fide* link between the NCAA's “no pay” rules and consumer demand for college sports. If the plaintiffs in *Jenkins* were to produce a study that strikes down the purported link between the NCAA's “no pay” rules and consumer demand in the antitrust sense, then the plaintiffs would be likely to prevail on the merits and legally achieve eradication of the NCAA's nationwide “no pay” rules that continue to keep much of the revenues derived from college sports in the hands of a select few administrators, athletics directors, and coaches.

97. See CIALDINI, *supra* note 94, at 54 (explaining how what is focal to someone often becomes seen as causal, even when that often is not the case); *see also id.* at 51–53 (describing how people often overestimate the impact of money on changing individuals' behavior because the exchange of money is so focal).

98. See *O'Bannon*, 7 F. Supp. 3d at 975 (discussing NCAA consumer demand study).