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The NCAA Cartel, Monopsonistic Restrictions, and Antitrust Policy

Roger D. Blair* and Joseph Whitman*

Abstract

NCAA members behave like a buyer cartel and use the bylaws of the NCAA to maintain their collusive agreement. We model the NCAA as a collusive monopsony and demonstrate the impact on compensation and employment for student athletes, as well as the consequences for social welfare and distribution of surplus. Then we identify specific NCAA bylaws that restrain competition among cartel members, such as limits on the number of athletic scholarships awarded, recruiting, player transfers, and athletic housing. Lastly, we discuss the effects of the NCAA's recent move to lift the restriction on contract durations for student athletes and the recent *Agnew* antitrust litigation which may have precipitated this change.

Keywords

Monopsony, NCAA, Antitrust, Buyer Cartels

I. Introduction

The National Collegiate Athletic Association (NCAA), which was founded in 1906, describes itself as "a membership driven organization dedicated to safeguarding the well-being of student athletes."[1] While the origins of the NCAA can be traced to serious concerns for player safety, the NCAA can now be reasonably described as a profit-maximizing cartel that thrives on exploiting student athletes in the pursuit of profit.[2] While the athletic competition on the field or in the arena may be fierce, there is a good deal of cooperation off the field. Nobel Laureate Gary Becker once characterized the NCAA as a "cartel in sheepskin clothing."[3] No doubt, the NCAA and most—if not all—of its members would object to this characterization, but we will argue that the cartel label is entirely appropriate.[4] In this article, we will examine the NCAA's policies regarding student athletes.

1. This statement is featured prominently on the NCAA website: http://www.ncaa.org/about/who-we-are
2. Arthur A. Fleisher III, Brian L. Goff, & Robert D. Tollison, The National Collegiate Athletic Association (1992).
3. Gary S. Becker, *The NCAA: A Cartel in Sheepskin Clothing*, Business Week (Sep. 14, 1987).
4. Since the NCAA describes itself as a "membership driven organization," the members can hardly claim that they are not independent economic entities working together. That is, they cannot claim to be a single entity. This makes them vulnerable to antitrust challenge under American Needle, Inc. v. National Football League, 560 US 183 (2010).

*Department of Economics, University of Florida, Gainesville, FL, USA

Corresponding Author:
Roger D. Blair, Department of Economics, University of Florida, Gainesville, FL 32611, USA.
Email: rdblair@ufl.edu

In Section II, we review the economics of buyer cartels. In doing so, we identify the impact on the number of student athletes employed and their compensation. We also identify the impact on social welfare as well as the distributional effects of the cartel restrictions. In Section III, we enrich the simple model developed in the previous section and outline the restraints necessary to prevent nonprice competition from dissipating the cartel profits. In Section IV, we turn our attention to one specific restraint involving contract duration. We also review legal challenges and the reasons for their ultimate failure. In Section V, we explore the paucity of public antitrust enforcement and the seeming futility of private enforcement. Finally, in Section VI, we close with some concluding remarks.

II. The NCAA Cartel

Our thesis is that the NCAA members act collusively in their dealings with student athletes. In short, they behave like a buyer cartel and use the NCAA to organize and monitor their conduct. As we will see, the members submit to the NCAA's punishment for violating the terms of their collusive agreement. The economic theory of collusive monopsony provides an excellent description of the behavior of the NCAA and its members.[5]

Suppose that a group of independent firms decide to collude in the labor market rather than in the output market. The Cartel's profit function can be written as:

$$\Pi = pQ(L, K) - w(L)L - rK,$$

where Π is profit, p is the output price, Q is output, Q(L, K) is the production function, L is labor, K is capital, w is the wage rate of labor, and r is the total rental rate of capital. We assume that the supply of labor is positively sloped and, therefore, we note that $w = w(L)$ and $dw/dL > 0$.

In order to maximize profit, the cartel will operate where the $\frac{\partial \pi}{\partial L} = 0$ and $\frac{\partial \pi}{\partial K} = 0$. The first order condition of interest is:

$$\frac{\partial \pi}{\partial L} = p\frac{\partial Q}{\partial L} - \left[w + L\frac{dw}{dL}\right] = 0.$$

The first term, $p\frac{\partial Q}{\partial L}$, is the marginal revenue product of labor. The second term, $w + L\frac{dw}{dL}$, is the marginal factor cost of labor. Thus, profit maximization for the cartel requires hiring that quantity of labor where the marginal revenue product (MRP) equals the marginal factor cost (MFC).

Contrast this with the result if the labor market was perfectly competitive. Total industry output would be given by the equality of market demand and labor supply. The cartel's MRP is effectively the market demand, so equilibrium in the labor market occurs where

$$MRP = w(L).$$

Notice that $MFC > w$ because the term $L \cdot dw(L)/dL$ is always positive due to monotonicity. This implies less labor is employed by the monopsonist cartel than otherwise would be employed in a competitive labor market. This deviation from competition in the labor market has consequences for social welfare, which we examine below. It also has distributive consequences.

These results can be illustrated in Figure 1. The left-hand panel shows market demand for labor (MRP), which is the horizontal sum of the individual firm's MRP. The industry supply is denoted by S. The competitive wage and employment level are w_1 and L_1, respectively. The cartel recognizes that it can improve profits by reducing employment and thereby reduce the wage. Profit maximization leads to employing L_2 where MRP equals MFC. The wage is depressed to w_2.

5. For an extensive look at buyer cartels, *see* Roger D. Blair & Jeffrey L. Harrison, Monopsony in Law and Economics (2010); and Roger D. Blair & Wenche Wang, *Buyer Cartels and Private Antitrust Enforcement* (2016) (unpublished manuscript).

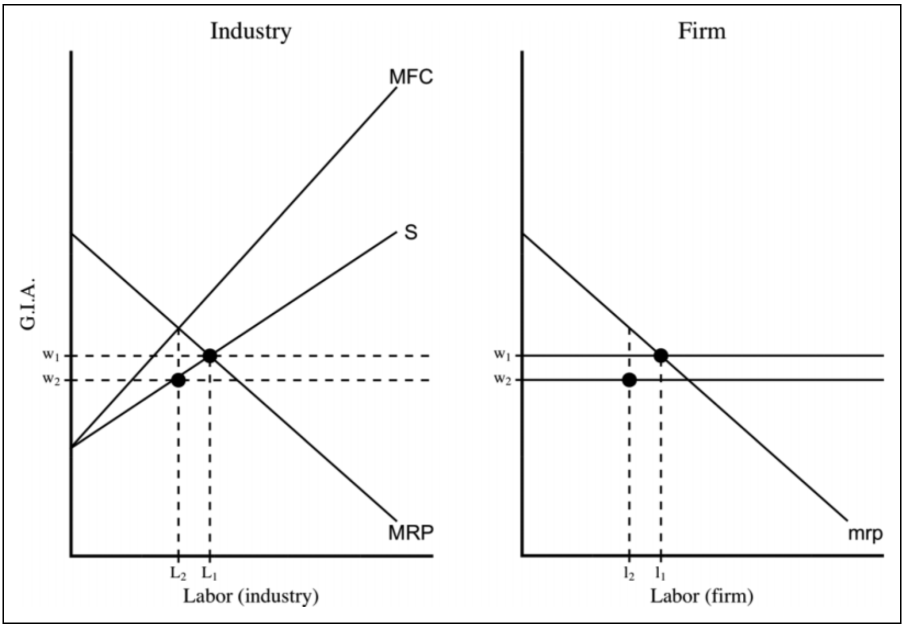

Figure 1.

The right-hand panel of Figure 1 depicts the situation for an individual firm. At the cartel's profit maximizing wage, the firm's marginal revenue product (mrp) exceeds the wage. This, of course, means that the firm has an incentive to expand—rather than restrict—employment. All firms share this incentive. If they all try to expand employment, the wage will rise rather than fall. Consequently, each firm must be limited in its hiring decision to l_2, which is equal to $(1/n)L_2$, where n is the number of firms. In other words, each firm can hire its fair share of the total labor (L_2).

Welfare and Distribution

The cartel generates a deadweight social welfare loss by restricting employment. As shown previously, the marginal revenue product is higher than the wage at the monopsony equilibrium. This means an additional unit of labor produces more value than it costs. Put differently, the marginal value to society generated by employing an additional unit of labor is greater than its associated marginal cost.

This is illustrated graphically in Figure 2. In the competitive equilibrium, the triangle aw_1b is the total surplus to the buyers (the firms), while the triangle w_1cb is the total surplus of the sellers (labor). Compare this to the monopsony equilibrium. Now the buyer (the cartel) receives the surplus equal to the area aw_2df. Labor now receives the lower triangle w_2cf in surplus. The shaded triangle *dfb* represents the deadweight social welfare loss created by the cartel's monopsony power. This area is allocated to neither labor nor the cartel. Furthermore, the rectangle w_1w_2ef has been reallocated from labor to the cartel. This shows the cartel is able to draw surplus away from labor using its monopsony power.

The NCAA and its members are positioned ideally to operate as the economic model of collusive monopsony suggests. First, the NCAA holds an annual meeting that provides an opportunity for the member institutions to reach agreement on practices and policies. When it comes to employment, the cartel quantity is below the competitive quantity. In football, for example, each team is limited to eighty-five scholarships, which are referred to as grants-in-aid. There is a provision for "walk-ons,"

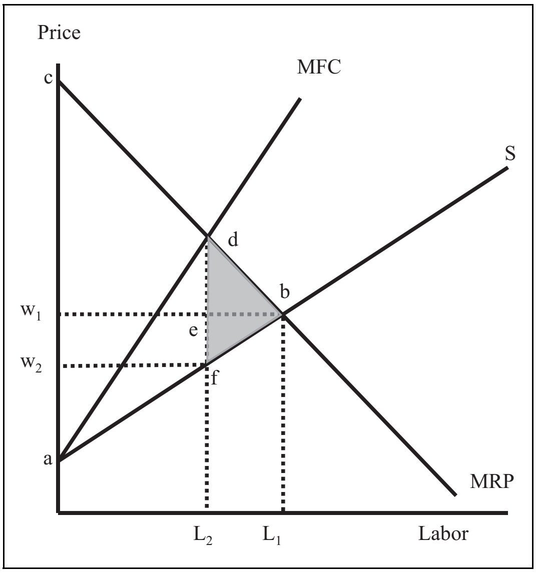

Figure 2.

which are players willing to participate without any financial aid. There are limits on the number of those as well.[6]

The wage (w_2) is strictly limited to "room, board, tuition, books, and fees."[7] Proposals and counter-proposals are made and eventually a consensus is reached. The terms are then embodied in the NCAA Bylaws, which are binding on the member institutions.

In addition to restricting the number of student athletes who can be employed, compensation is room, board, tuition, books, and fees. In order to avoid any confusion, the NCAA has spelled out very carefully what can and cannot be given to a student athlete. Perhaps the most famous bit of minutia involved bagels. A bagel without cream cheese was a permissible snack, but a bagel with cream cheese was a violation.[8]

III. Additional Cartel Restraints

In the preceding section, we presented an extremely simple model of a buyer cartel restricting purchase (or hiring) decisions and reducing the price (or wage) to improve joint profits. In practice, however, it takes more than that. First, it is necessary to impose restraints on nonprice competition. Second, it is useful to reduce costs related to the employment decision.

Restraints on Nonprice Competition

Nobel Laureate George Stigler pointed out that simply agreeing on price would not guarantee cartel success. While such agreements may result in noncompetitive prices, each cartel member would have an incentive to expand its share of the market.[9] To do so, it would engage in nonprice competition,

6. *See* Bylaw 17.10.2.1.2, "Limit on Number of Participants—Bowl Subdivision."
7. *See* Bylaw 15.02.5, "Full Grant-in-Aid."
8. Nathan Fenmo, *Three Oklahoma Athletes Penalized by University for Eating Pasta*, Los Angeles Times (Feb. 19, 2014), http://articles.latimes.com/2014/feb/19/sports/la-sp-sn-three-oklahoma-athletes-penalized-over-pasta-20140219.
9. George J. Stigler, *Price and Non-Price Competition*, 76 J. Pol. Econ. 149 (1968).

which would increase its costs and thereby dissipate the cartel profits. In the limit, nonprice competition could increase costs sufficiently to erase all cartel profits. To avoid this fate, the NCAA and its members have tried to minimize the costs of nonprice competition.

In addition to depressing the student athlete's compensation, which would ordinarily lead to increased employment, the NCAA limits the number of scholarships that can be awarded.[10] The Bylaws carefully spell out the number by sport and how to count multisport athletes.

There are many further restraints on competition covering recruiting: contacts with players, visits, length of visits, expenditures on visits, souvenirs, and activities during visits. Schools are not allowed to recruit student athletes who have signed with another school.[11] To further reduce incentives to induce transfers, the NCAA's onerous transfer rules limit the attractiveness of transferring from the athlete's perspective.[12]

The models of competition that provide the foundation for antitrust policy in the U.S. implicitly or explicitly assume that everyone has sufficient information to make sound decisions. The NCAA, which is made up of institutions dedicated to imparting information, ironically tried to impose limits on the information available to student athletes. For example, if a student athlete hires an agent, he or she loses all future eligibility. In addition, if a student athlete wants to determine the sensibility of turning pro early by testing the draft, all future eligibility is lost. That is, there is no turning back. These efforts to restrict important information may reduce costs to the schools.

Until recently, the NCAA imposed a one-year limit on the contract between the student athlete and the school. In the next section, we examine this restraint and a failed legal challenge.

There is fierce competition among NCAA members for the service of "5-star" and "4-star" athletes. In order to preserve cartel profits, it is necessary to put curbs on this activity. The NCAA Bylaws put limits on employee turnover. In the NCAA, turnover is inevitable since athletic ability is limited. Some turnover can be reduced, however, by preventing schools from recruiting athletes who are already committed to other schools.

The NCAA voted to ban athlete-only housing in 1991, with the rule change taking effect in the fall of 1996. The NCAA justified the decision by arguing that "athletic dorms contributed to feelings of student-athlete isolation."[13] A more cynical observer might instead view this as further restraint on nonprice competition among member universities. As noted above, NCAA members fiercely compete for the most talented athletes. Even small differences in amenities, especially regarding housing, can make a difference in the recruiting process. This tactic is well known and luxurious dormitories are integral for recruiting athletes and nonathletes alike.[14]

NCAA Bylaw 16.5.1.1, "Athletics Dormitories," states: "Athletics dormitories shall be defined as institutional dormitories in which at least 50 percent of the residents are student-athletes." Of course, this means member universities can house their athletes in any dorm so long as the proportion of athletes never exceeds 50%. However, a sufficiently large dormitory could be a de facto athletic dormitory without violating this rule. Indeed, this is exactly what member universities are doing.

10. *See* Bylaw 15.5, "Maximum Institutional Grant-in-Aid Limitations by Sport."
11. *See* Bylaw 13.1.1.3, "Four-Year College Prospective Student-Athletes."
12. *See* Bylaw 14.5, "Transfer Regulations."
13. Doug Bedell, *Not a Sporting Match*, Chicago Tribune (Mar. 23, 1997), http://articles.chicagotribune.com/1997-03-23/business/9703230048_1_dorms-agents-and-athletes-athletic-coffers.
14. Sara Olkon, *Luxury Dorms: Purdue University, Other Schools Build Swanky Housing to Lure Undergrads*, Chicago Tribune (Sep. 17, 2009), http://articles.chicagotribune.com/2009-09-17/news/0909161250_1_purdue-university-dorms-luxury.

One such example is Auburn University's South Donahue Residence Hall, which has replaced what was previously an athletic dormitory. The $51 million building contains 209 rooms—more than enough to house the entire football team while still remaining below the 50% threshold.[15] The building is clearly intended to be an athletic dormitory, as it is located near the football stadium, basketball arena, and many other centers of athletic activity. This indicates how valuable athletic housing is to NCAA members.

IV. Restraints on Contract Duration

Until a recent change, the NCAA Bylaws did not permit NCAA members to offer multiyear contracts to student athletes. This restraint minimized risk for the school and reduced expected costs at the student athlete's expense.

In the absence of the discipline imposed by the NCAA, member institutions may well have competed on this dimension in order to recruit the best athletes. By and large, competition has been avoided by agreement among member institutions.

In this section, we examine the costs and benefits of multiyear contracts from the student-athlete's perspective and from the college's perspective. This analysis identifies the distribution of risks, which fall disproportionally on the student athlete. It also identifies the benefits of collusion among the schools. We then turn to an examination of the relevant NCAA Bylaws.

Costs and Benefits of Multiyear Contracts

Top football prospects are flooded with scholarship offers from the likes of Alabama, Florida State, Ohio State, and USC. These schools can tout the quality of their educational programs, the quality of their coaching staff, the quality at their football facilities, location, weather, and a host of other things. When one of the recruiting rivals lands a prospect, the school and the athlete sign a contract, which sets out the school's obligations and the athlete's responsibilities in broad terms. The duration of the contract is an important element in distributing the risks associated with commitments agreed to by the parties.

When a football program awards a scholarship to a player, there are risks. The player's skills may not transfer from high school excellence to the major college level. A promising player may not develop. The player might be injured, a heart defect may be discovered, or the player may become ill. Some players are simply bad apples and get in trouble with the law. In some cases, a change in coaching staffs may cause a mismatch in skills.

If the athlete has a one-year contract with the university the risk of nonrenewal falls squarely on the athlete's shoulders. If the university offers a multiyear contract, the risk shifts to the university since it must support the athlete even if he or she cannot compete.

As we will see, shifting the risk to the athlete provides a cost saving for the school and thereby improves the profitability of the football program.

Expected Value of a Scholarship

When a player signs a letter of intent he or she usually receives a one-year contract that is renewable for up to four additional years. If a player is injured and can no longer compete, the contract may not be renewed by the school. On signing day, therefore, the value of the scholarship is a random variable. The expected value of the scholarship is $\boldsymbol{E}[\boldsymbol{S}] = \boldsymbol{S}_1 + \frac{\boldsymbol{p}\boldsymbol{S}_2}{1+\boldsymbol{r}} + \frac{\boldsymbol{p}^2\boldsymbol{S}_3}{(1+\boldsymbol{r})^2} + \frac{\boldsymbol{p}^3\boldsymbol{S}_4}{(1+\boldsymbol{r})^3} + \frac{\boldsymbol{p}^4\boldsymbol{S}_5}{(1+\boldsymbol{r})^4}$, where E is the

15. Charles Goldberg, *Suite Life: Auburn Athletes Like New Residence Hall*, AuburnTigers.com (Aug. 1, 2013), http://www.auburntigers.com/genrel/080113aab.html

expectations operator, p is the probability that the scholarship will be renewed for year t, S_t is the value of the scholarship in year t, and r is the discount rate. If the athlete had received a multiyear contract for five years, then the present value of the contract would be $\boldsymbol{PV}(\boldsymbol{S}) = \boldsymbol{S}_1 + \sum_{t=1}^{4} \frac{\boldsymbol{S}}{(1+\boldsymbol{r})^t}$, where $\sum$ is the summation operator. By making some assumptions about the numerical values of S, P, and r, we can compare the two values.

Numerical Example

For purposes of comparison, we will assume specific values for S, P, and r. First, we assume that the value of a one-year scholarship is \$30,000. For simplicity, we do not increase the value over time. We assume that the probability of scholarship renewal is 0.9 and that the discount rate is 8.0 percent. Based on those assumptions, the present value of a five-year contract is $\boldsymbol{PV}(\boldsymbol{S}) = \$30,000 + \frac{\$30,000}{(1.08)} + \frac{\$30,000}{(1.08)^2} + \frac{\$30,000}{(1.08)^3} + \frac{\$30,000}{(1.08)^4}$, which amounts to \$129,363.81.

In contrast, the expected value of a series of one-year contracts is reduced by the probability of nonrenewal. Under these assumptions, the expected value is $\boldsymbol{E}[\boldsymbol{S}] = \$30,000 + \frac{(0.9)\$30,000}{(1.08)} + \frac{(0.81)\$30,000}{(1.08)^2} + \frac{(0.73)\$30,000}{(1.08)^3} + \frac{(0.66)\$30,000}{(1.08)^4}$, which amounts to \$107,771.85. The difference between these two values is the benefit that the school enjoys by limiting scholarship contracts to one-year, and thereby shifting the risk of nonrenewal to the student athletes. For top prospects, the increased value of a five-year commitment could be an important competitive influence on signing day. Until recently, the NCAA has forbidden competition on this dimension pursuant to the agreement reached by the member institutions.

On signing day, the benefit to the athlete is equal to the present value of the commitment, which depends on whether it is a series of one-year contracts or a single multiyear contract. At the same time, those alternative values represent the cost to the school. Expected costs are lower if the school employs a series of one-year contracts. Exacerbating this incentive to reduce costs is the fact that there is a limit on the number of athletes that can be on scholarship.

NCAA Bylaws

The limits on competition in contract terms are governed by the NCAA Bylaws. Prior to their recent revision, contracts with the student athletes were limited to one year or less. More specifically, the contract duration was found in Bylaw 15.3.3, "Period of Institutional Financial Aid Award."

> 15.3.3.1 One-Year Period. If a student's athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year (see Bylaw 15.01.5). *(Revised: 4/27/06; effective: 8/1/06)*
>
> 15.3.3.1.1 Exceptions. An institution may award athletically related financial aid to a student-athlete for a period of less than one academic year only under the following circumstances: *(Adopted: 4/27/06; effective: 8/1/06)*
>
> (a) Midyear Enrollment. A student-athlete whose first full-time attendance at the certifying institution during a particular academic year occurs at midyear (e.g., the beginning of the second semester or second or third quarter of an academic year) may receive a financial aid award for the remainder of that academic year. *(Revised: 5/9/06)*
>
> (b) Final Semester/Quarter. A student-athlete may receive athletically related financial aid for less than one academic year, provided the student is in the final semester or final two quarters of his or her degree program and the institution certifies that the student is carrying (for credit) the courses necessary to complete the degree requirements.

> (c) One-Time Exception. One time during a student-athlete's enrollment at the certifying institution he or she may be awarded athletics aid for less than a full academic year, provided the student-athlete has not previously received athletically related financial aid from the certifying institution.
> (d) Eligibility Exhausted/Medical Noncounter. A student-athlete who has exhausted eligibility and is exempt from counting (per Bylaw 15.5.1.6) in the institution's financial aid limit, or a student-athlete who is exempt from counting (per Bylaw 15.5.1.3) due to an injury or illness may receive athletically related financial aid for less than one academic year. If an institution awards aid under this provision, the institutional financial aid agreement shall include specific nonathletically related conditions (e.g., academic requirements) the student-athlete must satisfy in order for the aid to be renewed for the next academic term or terms. If the student-athlete satisfies the specified conditions, the institution shall award financial aid at the same amount for the next term or terms of the academic year. If the student-athlete does not satisfy the specified conditions, he or she must be provided a hearing opportunity per Bylaw 15.3.2.4. *(Adopted: 4/24/08; effective: 8/1/08)*

This is the bylaw that allowed universities to dismiss athletes who are injured and could not perform or whose athletic potential was over estimated when they were recruited out of high school. It is also the bylaw that led to the *Agnew* case.[16]

V. The *Agnew* Litigation

Joseph Agnew agreed to play football for Rice University in exchange for a scholarship. The terms of the scholarship were governed by NCAA Bylaws. An issue in his subsequent antitrust case was the NCAA's limit on the duration of the contract. In his second year, Agnew was injured and his scholarship was not renewed for his junior year. After appealing the decision, Agnew received only a tuition scholarship for his junior year. He received no aid at all for his senior year and, therefore, had to pay for his room, board, tuition, and books out of his own pocket.

Patrick Courtney's experience at North Carolina A&T was somewhat similar. He also signed a one-year contract, which was not renewed after he suffered an injury while training to play football. Courtney transferred to another school, but without financial aid, which meant that he was on his own to pay for the cost of attendance.

Agnew and Courtney filed an antitrust suit against the NCAA in federal district court in northern California. The NCAA asked the court in California to transfer the case to Indianapolis, which is in the Seventh Circuit and is the home of the NCAA. The district court transferred this case. The NCAA filed a motion to dismiss Agnew's case on the grounds that Agnew's complaint failed to allege a relevant product market. The district court in Indianapolis granted the NCAA's motion to dismiss the case and, on appeal, the Seventh Circuit affirmed the district court's decision.

At the heart of the *Agnew* suit was the allegation that the NCAA Bylaws reflect a horizontal agreement among the member institutions. The agreement to limit scholarship contracts to one year prevented the schools from competing on this contract term. Agnew contended that without this restraint schools would have offered four-year unconditional scholarships. As a result, the bylaws restrained competition at the expense of Agnew and other similarly situated athletes. Agnew and Courtney alleged that they suffered antitrust injury because their physical injuries resulted in nonrenewals. The nonrenewals imposed financial harm because they had to pay for their education. Their financial injuries resulted from the collusive agreement to limit the duration of their contracts.

The district court pointed out that a successful plaintiff alleging a Section 1 violation must prove three things. First, there must be evidence of an agreement between two or more legally independent

16. Agnew v. National Collegiate Athletic Association, 683 F. 3d 328 (7th Cir. 2012).

entities-since Section 1 requires multiple actors. Second, the agreement must unreasonably restrain competition in a relevant market. Third, the restraint must cause injury to the market.

Proof of agreement was easy in this case because the plaintiffs complained that an NCAA Bylaw constituted the unreasonable restraint. Since all NCAA members agreed to honor the bylaws, proof of the agreement was self-evident. Agnew's problem arose because he failed to identify a relevant product market.[17]

Agnew's complaint challenged the agreement to limit the duration of the contract between an NCAA member and a student athlete. It would have been natural to allege that the relevant product market was the market for labor services at NCAA Division I football players or some variation thereof. However, an earlier Seventh Circuit decision foreclosed that option. In *Banks v. National Collegiate Athletic Association*,[18] the Seventh Circuit rejected the concept of a labor market in the amateur college sports context. If such a market existed, the price paid by the schools would be determined by the supply and demand in the market. But student athletes receive grants-in-aid, which are limited to room, board, tuition, and books. Thus, the "price" is determined by a school's tuition and not by the forces of supply and demand in the alleged labor market. This obviously misses the point that compensation is not determined by market forces because the NCAA cartel determines the compensation and codifies that agreement in its bylaws.

The *Agnew* court recognized the Seventh Circuit's holding in *Banks* as controlling precedent. Consequently, Agnew could not successfully define the relevant product market as the market for the labor services of student athletes.

Agnew's Appeal

Agnew appealed the district court's dismissal of his suit to the Seventh Circuit. Ultimately, the Seventh Circuit agreed with the district court that Agnew had failed to adequately allege a commercial market that was adversely affected by an NCAA Bylaw restricting competition.

The Seventh Circuit cited *Board of Regents*[19] for the proposition that the NCAA's members provide competition on the field between teams that are made up of amateur football players. If they are to preserve the character of this product, they must agree among themselves on many decisions. Otherwise, those teams that do not adhere to the tradition of amateurism will have an unfair advantage on the field. To the extent that NCAA Bylaws serve the purpose of preserving amateurism, they may be entitled to a presumption of reasonableness. If the bylaws restrain competition beyond that which is necessary to preserve amateurism, they must be evaluated under a rule of reason analysis. On its face, the bylaw in question has nothing to do with preserving amateurism or the tradition of fielding student athletes.

The Seventh Circuit found that "[i]t is undeniable that a market of some sort is at play in this case. A transaction clearly occurs between a student-athlete and a university. The student athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board." But the court went on to point out that the Sherman Act only applies to commercial transactions. Thus, the question then becomes whether the exchange between a student-athlete and a university could be considered commercial. There is, however, no bright line that separates commercial and noncommercial transactions. Following *Board of Regents*, the court observed that all NCAA regulations are subject to the Sherman Act.

17. The relevant market has two dimensions: (1) a relevant product (or service) market and (2) a relevant geographic market. Agnew alleged that the relevant geographic market was the United States and the court agreed.
18. Banks v. National Collegiate Athletic Association, 977 F. 2d 1081 (7th Cir. 1992).
19. National Collegiate Athletic Association. v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984).

The Seventh Circuit began its analysis in *Agnew* by pointing out that the transaction between major university football programs and the student athletes cannot be characterized as noncommercial. Thus, they are subject to scrutiny under the Sherman Act. The court found that the NCAA limits on contract duration are not obviously related to the protection of amateurism and college football. In fact, the bylaw at issue seemed to be aimed at containing costs rather than protecting the character of college football.

The Court held that the plaintiffs could have alleged a cognizable relevant market for college football players that would have survived a motion to dismiss. Sadly, they did not do so, and therefore the lower court's decision to grant the NCAA's motion to dismiss was appropriate. This seems odd to an economist. The Seventh Circuit precedent in *Banks* precludes the product market definition that the Seventh Circuit in *Agnew* claims could have been alleged. Faithfully following the *Banks* precedent, which the Seventh Circuit seemed to disavow, hardly seems like adequate grounds for dismissal—at least to an economist.

Impact of Altered Bylaws

It is unclear how much influence the *Agnew* case had on the NCAA, but the bylaws were changed in 2012. Following a Presidential Summit organized by Mark Emmert, the NCAA revised its bylaws to permit its members to offer multiyear contracts. Currently, Bylaw 15.3.3.1 "Period of Award" states:

> If a student's athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period less than one academic year nor for a period that would exceed the student's five-year period of eligibility (see Bylaws 12.8 and 15.01.5). One-year grants-in-aid shall be awarded (as set forth in the written statement per Bylaw 15.3.2.2) in equal amounts for each term of the academic year. (Revised: 4/27/06 effective 8/1/06, 10/27/11 effective 8/1/12; awards may be executed before 8/1/12, 8/7/14).

Thus, schools can now compete—however grudgingly—on this basis.

At least initially, there was considerable resistance toward implementation of the new rule. In most endeavors in life, there are few guarantees. If an employee does not work out due to lack of ability, poor work ethic, trouble with the law, insubordination, and the like, employers are not bound to retain him or her. Many athletic administrators feel the same way about the student athletes. On the other hand, the fault—if any—may not be the athlete's. In *Agnew*, for example, both Agnew and Courtney were injured. Agnew was hurt while playing football, and Courtney was hurt while training to play football. Nonrenewal in these circumstances seems a bit harsh.

In some cases, a coach who employs a spread-option offensive system is replaced by a coach who prefers a pro-style offense. A promising spread-option quarterback may not fit in and is, therefore, expendable. Given the NCAA's onerous transfer rules, nonrenewal in these circumstances would be clearly objectionable.

An early survey by the *Chronicle of Higher Education*[20] revealed a very slow start on multiyear contracts. The survey indicated that two-thirds of schools in the five power conferences—ACC, Big Ten, Big 12, Pac 10, and SEC—had awarded multiyear contracts, but not very many of them.

Initially, the freedom to offer multiyear contracts was not exercised to a significant degree. For the 2012–2013 academic year, the public universities in the top five conferences offered very few multi-year contracts. There were only six schools that offered more than two dozen. These included Arizona State, Auburn, Florida, Michigan State, North Carolina State, and Ohio State. This list leaves out some financial powerhouses, such as Alabama, Florida State, Georgia, Michigan, Tennessee, and Texas.

20. Brad Wolverton & Jonah Newman. *Few Athletes Benefit from Move to Multiyear Scholarships*, CHRON. HIGHER EDUC. (Apr. 19, 2013), http://www.chronicle.com/article/Few-Athletes-Benefit-From-Move/138643.

Competition, however, can force schools to offer better treatment to the athletes irrespective of a coach's reluctance to do so. In fact, there were early signs of this.

Some universities recognized that they could use multiyear offers to compete in the recruiting battles over top prospects. This is especially true in the revenue-generating sports—football and men's basketball.

Final Words on Contract Duration

Unless there is further revision of the NCAA Bylaws reversing course, schools will be competing on contract duration. As long as the contract duration is unspecified, there will be variation across athletes within a sport and variation across sports. This, of course, will appear to be discriminatory and thereby result in wounded feelings. It could also spell trouble under Title IX.[21]

Nearly all meaningful revenue is generated by football and men's basketball; for the most part, women's sports and all other men's sports do not support themselves and must be subsidized. Consequently, market forces may not demand that multiyear contracts be awarded. Whether this poses a Title IX problem is debatable.

VI. Concluding Remarks

A cartel is an association of ostensible competitors that is formed for the purpose of restricting competition between the members. If the members are sellers, the aim is to raise the price above the competitive level. If the members are buyers, the aim is to reduce price below the competitive level. It is clear from this definition that the NCAA is a cartel. We have analyzed their cartel conduct on the buying side of the student-athlete market. In most circumstances, such cartels are unlawful per se. When ostensible competitors collude in the nurse labor market, the high-tech hardware and software engineers market, or the digital animators market they are subject to antitrust scrutiny. The NCAA, however, seems to be shielded by the Court's *Board of Regents* decision. There, the Court found a need for the NCAA members to agree on more than the rules of play, schedules, championships, and the like. It also articulated a need to preserve the amateur status of the student athletes.

A central feature of the *Board of Regents* ruling is the notion that the NCAA and its members need to collaborate in order to preserve amateurism in collegiate sports. This, however, makes little sense. If a football player receives a grant-in-aid from a private school, such as Duke or Northwestern, that grant-in-aid is worth $65,000 to $70,000. This payment in kind is the compensation a student athlete receives in exchange for his or her efforts. It seems odd to call someone earning $70,000 an amateur. Such athletes are "amateurs" because the NCAA defines them to be "amateurs."

The NCAA and its members behave like a buyer cartel. The predictable effects of this conduct include (1) a reduction in employment, (2) depressed compensation, (3) social welfare losses, and (4) collusive profits at the expense of student athletes. These are objectionable on antitrust grounds and should be challenged by the antitrust agencies and by private parties.

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21. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."

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