"IS THAT ME I SEE ON THE TV?" AN ANALYSIS OF THE O'BANNON DECISION♦

INTRODUCTION

Edward O'Bannon is a former student-athlete who led the University of California, Los Angeles ("UCLA") to victory in the 1995 National Collegiate Athletic Association ("NCAA") Division I basketball championship in his senior season.[1] Mr. O'Bannon was

[1] Ken Belson, *What the O'Bannon Ruling Means for Colleges and Players*, NY TIMES (Aug. 8,

considered a fantastic player in the tournament and a "consensus all-American."[2] In turn, he was drafted ninth overall in the 1995 NBA Draft by the New Jersey Nets, but his professional career never quite matched the expectations set by his excellent undergraduate career.[3] Recently, O'Bannon, working as a car salesman in Las Vegas, recognized himself in a college basketball video game.[4] He became distressed and concerned that his likeness was being used without his consent—and without any form of compensation.[5] As a result, O'Bannon filed an antitrust suit in July of 2009.[6] The lawsuit eventually received certification as a class action when both current and former athletes, including Oscar Robertson and Bill Russell, joined it later that year.[7]

The O'Bannon antitrust class action challenged the NCAA rules restricting compensation for both FBS football and Division I men's basketball for former and current student-athletes.[8] Specifically, the plaintiffs challenge the particular rules that prevent student-athletes "from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likeness in videogames, live telecasts, and other footage."[9] The twenty named plaintiffs[10] argue that the NCAA rules violate the Sherman Antitrust Act[11] because they believe that student-athletes should be entitled to a share of the revenue that otherwise would not exist without the plaintiffs' athletic contributions.[12] In response, the NCAA denied this accusation and contended that its restrictions on student-athlete compensation are "necessary to uphold its educational mission and to protect the popularity of collegiate sports."[13]

Part I of this Note provides a general background of *O'Bannon v.*

2014), http://www.nytimes.com/2014/08/09/sports/what-the-obannon-ruling-means-for-colleges-and-players.html?_r=0.

[2] *Id.* All-Americans are distinguished student-athletes that become part of an honorary team in their respective sport. *See The Award*, CAPITALONE, http://www.capitaloneacademicall america.com/about (last visited March 15, 2015).

[3] Belson, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* Oscar Robertson and Bill Russell have won multiple championships and are highly regarded as incredibly talented professional basketball players. *See* Sean Deveny, *Oscar Robertson: Jordan is not greatest ever*, SPORTING NEWS (June 8, 2011), http://www.sportingnews.com/ nba/story/2011-06-08/oscar-robertson-jordan-is-not-greatest-ever.

[8] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

[9] *Id.* at 963.

[10] *Id.* at 965.

[11] *See* Sherman Antitrust Act § § 1–7, 15 U.S.C.A. § 1 (2014) (explaining that the Sherman Antitrust Act prohibits contracts, conspiracies, and trusts that operate as restraints on trade or commerce).

[12] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

[13] *Id.*

National Collegiate Athletic Association, including the origins of the case and why it was so crucial for the future of collegiate athletics that the issues raised in *O'Bannon* be addressed. Part II examines the language of the NCAA Constitution as well as the relevant antitrust laws including the Sherman Act. Part III discusses each of the three remedies proposed by the plaintiffs and the resulting *O'Bannon* decision. Part IV explores the implications of this decision with regard to the NCAA and student-athletes, specifically moving forward. In particular, although it was expected that the outcome of this case would deliver a fatal blow to the current NCAA collegiate model, instead the *O'Bannon* decision will essentially serve to impose an agreement between the players and the league but without a collective bargaining aspect. By neglecting the potential for collective bargaining, the student-athlete voice is minimized and the NCAA may continue to turn a deaf ear to the needs and rights of its Division I student-athletes. While this Note agrees with Judge Wilken's ruling that the NCAA violated antitrust laws and the Sherman Act, it suggests that the injunction issued by Judge Wilken was the incorrect remedy. Instead, it proposes a solution of collective bargaining between student-athletes and the NCAA. One option is through an organization known as the Former College Athletics Association ("FCAA"). The second potential solution is a collective bargaining agreement between the student-athletes and the NCAA, facilitated by an organization like the FCAA and the Commissioners of the NCAA Athletic Conferences. Both of these avenues expand the voices of student-athletes by allowing them to secure their right to negotiate for their name, image, and likeness rights ("NIL rights"), either through a true mandatory collective bargaining agreement or through trade associations with the FCAA.

I. BACKGROUND

Student-athlete compensation is not a novel issue. The landmark Supreme Court decision in this field is *NCAA v. Board of Regents of Univ. of Oklahoma*, which primarily involved the control of college football television rights.[14] In his majority opinion, Justice Stevens stated:

> [M]oreover, the NCAA seeks to market a particular brand of football—college football. The identification of this product with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be

[14] *See* NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 101 (1984); *see also* Jon Solomon, *NCAA Supreme Court Ruling Felt at O'Bannon Trial 30 Years Later*, CBS SPORTS (June 26, 2014), http://www.cbssports.com/collegefootball/eye-on-college-football/24598262/ncaa-supreme-court-ruling-felt-at-obannon-trial-30-years-later.

> comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the product, athletes must not be paid, must be required to attend class, and the like.[15]

Within this statement lies "a Supreme Court gift that keeps on giving,"[16] namely five words that would determine the legal outcomes of cases for years to come—"athletes must not be paid."[17] Significantly, the NCAA has relied on this specific language from the *Board of Regents* opinion to justify and defend its amateurism model for the past thirty years.[18] In addressing the *Regents* decision, Judge Claudia Wilken stated in her denial of the NCAA's October 2013 motion to dismiss that the *Board of Regents* ruling "does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images, and likenesses."[19] Three decades have passed since the *Board of Regents* decision, and perhaps Judge Wilken thought it was time to analyze *O'Bannon* under a new light.

It is clear from the plaintiffs' claim that they believe their NIL rights are currently being exploited by a commercial enterprise—the NCAA.[20] Ironically, the NCAA's constitution states that one of its goals is to protect student-athletes from commercial exploitation.[21] The *O'Bannon* case challenges the NCAA's commercial exploitation of student athletes, led by Mr. O'Bannon who spotted his likeness in a video game without either his consent or any form of compensation.[22] It is vital to resolve the issue presented in *O'Bannon* so that former, current, and future student-athletes may be aware of and justly compensated for the use of their NIL rights. Therefore, the NCAA must be held accountable if it is in violation of U.S. antitrust law and the court must find a fair and equitable solution to the issue at hand.

II. THE CURRENT NCAA CONSTITUTION AND SHERMAN ANTITRUST ACT

A. *The NCAA Constitution*

The NCAA Constitution currently states that student-athletes:

---

[15] *Id.* at 102 (quoting Justice Stevens) (internal quotations omitted).

[16] Solomon, *supra* note 14.

[17] *Id.*

[18] Steve Berkowitz, *NCAA Files Opening Argument in Appeal of O'Bannon case*, USA TODAY (Nov. 15, 2014), http://www.usatoday.com/story/sports/college/2014/11/15/ncaa-obannon-case-appeal-9th-circuit/19068249/.

[19] *Id.*

[20] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

[21] *See infra* Part II. A.

[22] *See supra* notes 1, 5 and accompanying text.

> [S]hall 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.[23]

In *O'Bannon*, the NCAA largely argued that their decision to limit student-athlete compensation was justified based on this part of its constitution, emphasizing that "student-athletes should be *protected from exploitation by professional and commercial enterprises*."[24] The NCAA stated that allowing student-athletes to be paid in any way, shape or form, other than by a grant-in-aid, would inevitably lead to the devastating commercial exploitation of its student-athletes.[25] However, Judge Claudia Wilken applied the NCAA's arguments against the appropriate legal standard, the Sherman Act. In doing so, Judge Wilken all but shattered the once timeless NCAA defense of maintaining amateurism in the league.

B. *The Legal Standard – The Sherman Antitrust Act*

In assessing whether the NCAA violated antitrust laws,[26] Judge Wilken applied § 1 of the Sherman Antitrust Act.[27] Specifically, § 1

---

[23] NCAA. CONST. §2.9: The Principles of Amateurism (Legislative Services Database – LSDB*i* through 2014), *available at* http://web1.ncaa.org/LSDBi/exec/bylawSearch.

[24] *O'Bannon*, 7 F. Supp. 3d at 975 (emphasis added).

[25] *Id.*

[26] Justin Bynum, *What is Antitrust Law?*, INVESTOPEDIA, http://www.investopedia.com/ask/answers/09/antitrust-law.asp (last visited March 15, 2015) (explaining that Antitrust laws, also referred to as "competition laws," are "statutes developed by the government to protect consumers from predatory business practices by ensuring that fair competition exists in an open-market economy."). Antitrust laws apply to market allocation, bid rigging, price fixing, and its ultimate goal is to maximize consumer welfare. *Id.*

[27] A number of similar cases regarding intercollegiate sports have been tried throughout the history of the Sherman Antitrust Act. *See* Dang v. San Francisco Forty Niners, 964 F. Supp. 2d 1097 (N.D. Cal. 2013) ("Consumer alleged market of several independent and competitive brands, rather than single-brand or single-trademark market, as required to allege existence of relevant product market in putative class action against professional football league, its member clubs, league's merchandising and licensing arm, and marketer of sports apparel, alleging anticompetitive behavior in violation of California's Cartwright Act and federal Sherman Act, in relation to league's and its members' licensing of their intellectual property for use in apparel for retail sales, by alleging that market consisted of intellectual property of league itself and at least thirty different member professional football teams, and that teams competed with each other for sales of clothing apparel bearing their own intellectual property."); *see also In re* NCAA I-A Walk-On Football Players Litigation, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (stating generally that "[f]or purposes of motion by National Collegiate Athletic Association (NCAA) for judgment on the pleadings of their Sherman Act § 1 claim based on their failure to identify relevant market, walk-on football players at Division I-A schools alleged sufficient 'input' market in which NCAA member schools competed for skilled amateur football players.").

states, "[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."[28] Judge Wilken explained that in order for a plaintiff to prevail on a claim under this section, it 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."[29] In light of this standard, Mr. O'Bannon and the other plaintiffs argue that the NCAA's rules and bylaws act as an unreasonable restraint of trade.[30] Specifically, the plaintiffs challenge the rules that prevent FBS football players and Division I men's basketball players "from receiving any compensation, beyond the value of their athletic scholarships, for the use of their names, images, and likenesses in videogames, live game telecasts, re-broadcasts, and archival game footage."[31] Notably, the NCAA did not dispute the first element, namely that its rules were enacted and enforced pursuant to a contractual agreement among its Division I member schools and conferences.[32] Additionally, regarding the third element, the NCAA did not dispute that its rules affect interstate commerce.[33] Therefore, the entirety of the case turns on the second element—whether the NCAA's rules unreasonably restrain trade.[34]

In order to determine whether the NCAA's challenged rules unreasonably restrain trade, the court must apply the "rule of reason," which is "the presumptive or default standard."[35] In the past, the Supreme Court has held that "concerted actions undertaken by joint ventures should be analyzed under the rule of reason."[36] Significantly, "a restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects."[37] In order to conduct

[28] *See* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

[29] *O'Bannon*, 7 F. Supp. 3d at 984; *see also* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (citing Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318 (9th Cir.1996)) (emphasis in original).

[30] *O'Bannon*, 7 F. Supp. 3d at 985.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See id.*; *see also*, NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 101 (1984) ("When restraints on competition are essential if the product is to be available at all, *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.").

[37] *See O'Bannon*, 7 F. Supp. 3d at 985; *see also*, Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir.2001). If the restraint hinders competition more than it bolsters a competitive effect, than it violates the rule of reason. *See O'Bannon*, 7 F. Supp. 3d at 985.

this balancing, courts typically employ a burden-shifting framework.[38] Accordingly the plaintiff

> [B]ears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a relevant market. If the plaintiff satisfies this initial burden, the defendant must come forward with evidence of the restraint's procompetitive effects. Finally, if the defendant meets this burden, the plaintiff must show that any legitimate objectives can be achieved in a substantially less restrictive manner.[39]

1. The Relevant Market

In the context of this case, the term "relevant market" means a specific geographical area that contains products of certain quality, and the available alternative sources of supply for that product in the given competitive area.[40] Importantly, the product market includes all of the goods or services that "enjoy reasonable interchangeability of use and cross-elasticity of demand."[41] In *O'Bannon*, the plaintiffs contend that the challenged restraint creates anticompetitive effects in two national markets.[42] The first market is the "college education market," where universities compete to recruit student-athletes to play FBS football or Division I basketball.[43] The second market is the "group licensing market," in which videogame developers, television networks, and re-broadcasters of archival footage compete for group licenses to use the names, images, and likeness of Division I men's basketball and FBS football players in clips, telecasts, and videogames.[44]

Judge Wilken found that both markets exist,[45] and ruled that the plaintiffs presented sufficient evidence showing that the college market is one in which the NCAA's rules impose a restraint on competition.[46] Indeed, the plaintiffs established the existence of a national market in which NCAA Division I schools "compete to sell unique bundles of

---

[38] *See O'Bannon*, 7 F. Supp. 3d at 985 (internal quotations omitted).

[39] *Id.* (citing Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir.1996)).

[40] *See O'Bannon*, 7 F. Supp. 3d at 985 (citing Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir.1988) (explaining that a relevant market means, "notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition . . . where buyers can turn for alternative sources of supply").

[41] *Id.*; *see also*, Tanaka, 252 F.3d at 1063.

[42] *See O'Bannon*, 7 F. Supp. 3d at 985.

[43] *Id.*

[44] To the extent these groups buy these rights from the NCAA, the NCAA is doing the exploiting, not just permitting it. *Id.*

[45] *See id.* at 985, 94, 97–99.

[46] *Id.* at 998.

goods and services to elite football and basketball recruits."[47] Particularly, Division I schools compete by offering recruits the opportunity to earn a college degree at that school in exchange for playing on a Division I men's basketball or FBS football team.[48] However, this opportunity comes at a high cost. Recruits must first perform athletically but also must "acquiesce in their schools' use of their names, images, and likenesses while they are enrolled."[49] Significantly, the current NCAA rules further restrict student-athletes from conducting business or selling their athletic services and NIL rights to any other party.[50] The plaintiffs presented convincing evidence supporting a monopsony theory during trial and "[t]he Supreme Court has indicated that monopsonistic practices that harm suppliers may violate antitrust law even if they do not ultimately harm consumers;" this indicates an anticompetitive restraint of trade within the college education market.[51]

C. *The Sherman Antitrust Act Applied: NCAA in Violation*

FBS football and Division I basketball schools offer a unique bundle of goods that make them the only suppliers in the relevant college market.[52] Thus, the actions taken by these schools, facilitated by the NCAA and its conferences, result in a significant imbalance in power.[53] In fact, this imbalance is so extremely in favor of the NCAA that it effectively grants the NCAA the sole ability to fix the price of their product.[54] In her decision, Judge Wilken wrote that the schools have exercised this power by establishing an agreement not to compete with each other, and therefore every student receives the same amount

[47] *Id.* at 986.

[48] *Id.*; *see also id.* at 969–70, 97 (concluding that "absent the challenged NCAA rules, teams of FBS football and Division I basketball players would be able to compete for the services of college athletes by offering them a share of the revenues derived from the use of their names, images, or likenesses in various forms.").

[49] *Id.*; *see also id.* at 973 ("In the complex exchange represented by a recruit's decision to attend and play for a particular school, the school provides tuition, room and board, fees, and book expenses, often at little or no cost to the school. The recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect.").

[50] *See id.* at 973.

[51] *Id.* at 988; *see also id.* at 992–93 (highlighting the fact that even though the plaintiffs did not raise a monopsony theory prior to trial, the plaintiff's expert addressed it at trial in response to the Court's questions) (citing Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, (1948)).

[52] *See O'Bannon*, 7 F. Supp. 3d at 988.

[53] *Id.* (noting that the NCAA and Division I schools work tangentially in a way that makes them the only suppliers in the relevant market to supply a unique bundle of goods, creating a unilateral control of power in the competitive market).

[54] *Id.*

for their NIL rights—nothing.[55] Furthermore, "if any school seeks to lower this fixed price—by offering any recruit a cash rebate, deferred payment, or other form of direct compensation—that school may be subject to sanctions by the NCAA."[56] It is in this way that the NCAA's price-fixing agreement establishes a restraint of trade.[57] Moreover, the evidence presented in *O'Bannon* strongly supports the concept that without this price-fixing agreement between the NCAA and the schools, certain universities would indeed compete for recruits—by offering student-athletes a lower price of cost of attendance for the opportunity to play Division I sports while they were enrolled in school.[58] Even the NCAA's own expert witness Dr. Rubinfield supported this proposition, admitting that the NCAA acts as "a cartel that imposes a restrain on trade in this market."[59]

In *O'Bannon*, the NCAA produced some evidence that at least certain restrictions on student-athlete compensation may provide procompetitive benefits.[60] If the NCAA met its initial burden under the rule of reason to the extent that it provides procompetitive benefits, the burden would shift back to the plaintiffs, who then must show that these "procompetitive goals can be achieved in other and better ways, meaning through less restrictive alternatives."[61] In addition, plaintiffs would typically also be required to "show that an alternative is substantially less restrictive and is virtually as effective in serving the legitimate objective without significantly increased cost."[62] However, Judge Wilken ruled that the NCAA did not establish evidence of sufficient procompetitive benefits, thus failing in meeting its burden.[63] Therefore, the court did not need to address whether the plaintiffs were able to show that comparable procompetitive benefits could be achieved through viable and less anticompetitive means.[64] Rather, the court's

[55] *See supra* note 49 & accompanying text.

[56] *Id.*

[57] *Id.* (explaining that allowing the NCAA to prohibit schools from competing with each other for student athletes by the threat of sanctions, the NCAA establishes a price-fixing agreement that operates as a restraint on both competition and trade).

[58] *See id; see also* Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (explaining that the NCAA gave the Big 5 conferences the right to set some rules for themselves, and they are now getting ready to increase the "aid" they pay to student athletes in the form of "cost of attendance stipends and insurance benefits for players.").

[59] *See O'Bannon*, 7 F. Supp. 3d at 988.

[60] *See id.* at 1004.

[61] *Id.; see also* Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 n.4 (9th Cir. 1991) (internal quotations omitted).

[62] *O'Bannon*, 7 F. Supp. 3d at 1005.

[63] *See id.* (internal quotations omitted).

[64] *Id.* ("A court need not address the availability of less restrictive alternatives for achieving a purported procompetitive goal 'when the defendant fails to meet its own obligation under the rule of reason burden-shifting procedure.'"); *see also* Law v. NCAA, 134 F.3d 1010, 1020 at 1024

primary question focuses solely on "whether plaintiffs have identified any less restrictive alternatives for both preserving the popularity of the NCAA's product by promoting its current understanding of amateurism and improving the quality of educational opportunities for student-athletes by integrating academics and athletics."[65]

III. THE O'BANNON REMEDIES AND DECISION

Ed O'Bannon and the other former student-athlete plaintiffs have proposed three different remedies to the court.[66] These remedies are actually three proposed modifications to the challenged NCAA rules. The plaintiffs argued that each of these three proposed modifications would allow the NCAA to maintain the integrity of its mandated purpose in a less restrictive manner.[67] The three proposed modifications were: (1) raise the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student athletes; (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; and (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.[68] Before this Note can analyze the court's decision regarding these proposed modifications, it is important to clarify certain terms in the NCAA by-laws.

The NCAA's bylaws define the term "cost of attendance" as "an amount calculated by [a school's] financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance" at that school.[69] Cost of attendance is a school-specific figure.[70] In contrast to cost of attendance, the term "grant-in-aid" is defined in the bylaws as "financial aid that consists of tuition and fees, room and board, and required course-related books."[71] Grant-in-aid also varies from school to school, but it excludes any student-athlete from receiving "financial aid based on athletics ability" that exceeds the value of a full "grant-in-aid."[72] Significantly, according to NCAA bylaws, any student-athlete who receives financial aid in excess of his or her grant-

n.16 (10th Cir. 1998).

[65] *See O'Bannon*, 7 F. Supp. 3d at 1005.

[66] *See id.* at 982.

[67] *See id.*

[68] *Id.*

[69] *Id.* at 971 (alteration in original).

[70] *Id.*

[71] *Id.*

[72] *Id.*

in-aid would forfeit his or her athletic eligibility.[73] Cost of attendance is a school-specific figure, and since it incorporates the cost of "supplies, transportation, and other expenses," it is usually larger than the amount of a full grant-in-aid.[74] The difference between the grant-in-aid and the cost of attendance is typically a few thousand dollars.[75] After clarifying the difference between these two terms, this Note will discuss the first remedy proposed by the plaintiffs.

A. *Plaintiff's First Proposed Remedy - Stipends*

The court found that allowing schools to award stipends would not impede the NCAA's efforts to achieve a competitive balance and would still allow it to maintain its stated purpose of preventing commercial exploitation of student-athletes.[76] To support this, the court noted that historically the "NCAA's member schools used to provide student-athletes with similar stipends before the NCAA lowered its cap on grants-in-aid."[77] Notably, Judge Wilken maintained that stipends would have to be capped at the cost of attendance so that they would not interfere with the NCAA's goals or "violate the NCAA's own definition of amateurism."[78]

Judge Wilken rejected each argument posed by the NCAA in its attempt to defend their position of offering a lower grant-in-aid amount as opposed to the full cost of attendance. The Judge noted that the NCAA failed to provide any evidence at trial that consumer demand for the NCAA's product would decrease if schools could provide stipends for the full costs of all educational expenses.[79] This is true since the NCAA had provided higher value grants-in-aid in the past.[80] In addition, the NCAA failed to show that such stipends would negatively impact a school's ability to educate its student-athletes or assimilate them into the academic community of the school.[81] On the contrary, Judge Wilken ruled that providing student-athletes with a stipend would help them better integrate into the academic community because stipends could remove some of the educational expense barriers that they previously faced.[82] Expenses such as school supplies and transportation are not

[73] *Id.*
[74] *See id.* at 971.
[75] *Id.*
[76] *See id.* at 983.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *See id.* at 974.
[81] *Id.* at 983.
[82] *Id.* at 972.

covered by a full grant-in-aid.[83] The distribution of these stipends would likely not have an adverse effect on the NCAA's efforts in achieving a competitive balance because such stipends would not contribute to the exploitation of student-athletes.[84] Rather, the current restrictions on student-athlete compensation only serves to further the control the NCAA has over the schools, and in turn, the student-athletes.

B. *Plaintiff's Second Proposed Remedy—The Trust Fund*

This Note centers on the plaintiff's second proposal, which was to allow each university to create a trust fund in which each school would deposit a share of the licensing revenue into this trust fund, and which could be paid after the student-athletes graduate, or if they leave the university for other reasons.[85] Judge Wilken found that this proposal would not interfere with the NCAA's objectives. Judge Wilken held that this second proposal would allow the NCAA to achieve its procompetitive goals in a less restrictive manner, on the condition that the compensation was fairly distributed in limited equal portions among all team members.[86]

Judge Wilken's decision was likely based in part on the NCAA's own witness, Mr. Pilson, former president of CBS Sports and founder of Pilson Communications, who testified that he "would not be troubled if schools were allowed to make five thousand dollar payments to their student-athletes."[87] Mr. Pilson stated that his worry would be relieved, at least in part, if the payments were held in trust.[88] Other witnesses such as Bernard Muir, Stanford's athletic director, shared similar sentiments. Mr. Muir specified that his uneasiness in paying student-athletes varied according to the size of the payments that the student-athletes would receive.[89] The question regarding the payment of student-athletes was uncharted territory for the NCAA and its athletic directors, which likely caused a lot of apprehension for all involved.[90] In addition, Dr. Michael Dennis, a survey expert, echoed the sentiments of Mr. Buir and Mr. Pilson.[91] According to the court, Dr. Dennis observed

---

[83] *Id.*

[84] *Id.* at 983.

[85] *Id.*

[86] *Id.* ("Plaintiffs' second proposed less restrictive alternative—allowing schools to hold payments in trust for student-athletes—would likewise enable the NCAA to achieve its goals in a less restrictive manner, provided the compensation was limited and distributed equally among team members.").

[87] *See id.* at 983.

[88] *Id.*

[89] Mr. Muir made it clear that his anxiety and concern is greater if student-athletes are to receive payments in the six figures or seven figures range. *Id.*

[90] *Id.*

[91] *See* Steve Berkowitz, *O'Bannon Trial: Case vs. NCAA in Hands of Judge*, USA TODAY

that if the restrictions on student-athlete pay were removed, "then the popularity of college sports would likely depend on the size of payments awarded to student-athletes."[92] Therefore, based on the testimony mentioned above, Judge Wilken concluded that permitting schools "to make limited payments to student-athletes above the cost of attendance would not harm consumer demand for the NCAA's product."[93]

The court found that these limited payments would not harm consumer demand if the student-athletes were not paid differently based on their athletic ability or from the quality of their athletic performances.[94] Judge Wilken stated that the payments would be derived only from revenue generated from the use of the student-athletes NIL rights, and this is one of the key components of the remedy.[95] However, one problem with this remedy is that Division I student-athletes are on different teams in various conferences throughout the country. One conference may generate a substantially greater amount of revenue from their collegiate sports compared to another conference.[96] Considering the acceptance of this proposed remedy, all student-athletes would be bound by the same $5,000 stipend in a trust fund, regardless of whether one conference produces more revenue from student-athlete NIL rights.[97]

Judge Wilken rationalized her acceptance of this proposed remedy by stating that holding equal licensing revenue shares in a trust until after student-athletes leave school would further reduce any potential negative impact on consumer demand.[98] The court noted that former student-athletes are allowed to receive compensation for their NIL rights in game re-broadcasts and other types of archival footage of their college athletic performances so long as they entered into an agreement after leaving school.[99] Judge Wilken continued to justify her decision by claiming that the popularity of college sports would not suffer if current and future student-athletes were allowed to receive compensation from

SPORTS (June 28, 2014), http://www.usatoday.com/story/sports/college/2014/06/27/obannon-antitrust-case-vs-ncaa-trial-closes/11576223/.

[92] *See O'Bannon*, 7 F. Supp. 3d at 983.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014), http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/ (The Big Ten raked in the highest amount from the networks, receiving a total $70 million. Comparatively, the Big 12 earned $62 million.)

[97] *See infra* Part V.C.

[98] *See O'Bannon*, 7 F. Supp. 3d at 983.

[99] *See id.* at 983–984.

their schools after they leave college.[100]

Furthermore, the court stated that holding the payment for student-athletes in a trust fund would not create any new obstacles to the schools' effort to educate student-athletes.[101] Judge Wilken also stated that this would not hinder the student-athletes integration into their school's academic community.[102] Witnesses did testify that Division I athletes could potentially monetize their future earnings while still in school by taking out loans against the trust.[103] However, the court stated that the NCAA could easily prohibit such borrowing.[104] The court held that consumer demand for the NCAA's product would not decrease if schools were allowed to offer payment of limited and equal shares of licensing revenue generated from the NIL rights of student-athletes after they left college.[105] Therefore, the court found that holding the licensing revenue for student-athletes in a trust would be a less restrictive means of achieving the NCAA's stated purposes.[106]

C. *The Plaintiff's Third Proposed Remedy—Endorsements*

The last remedy proposed by the plaintiffs was to permit student-athletes to receive limited monetary compensation from third-party endorsements that would be approved by their schools.[107] The court ruled that this third proposed remedy by the plaintiffs' did not offer a less restrictive way for the NCAA to achieve its purposes.[108] The NCAA Constitution mentions that it hopes to prevent the commercial exploitation of its student athletes.[109] The court held that allowing student-athletes to endorse commercial products would directly undermine the efforts of the NCAA and its schools to protect against the "commercial exploitation" of student-athletes.[110] Additionally, the court stated that the trial record contained evidence that the NCAA has not always had the best track record in protecting student-athletes from commercial exploitation.[111] However, Judge Wilken concluded that the NCAA's "past failure does not justify permitting opportunities for commercial exploitation of student-athletes in the future."[112] The

[100] *Id.* at 984.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *See id.* at 984.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *See supra* Part II.A.
[110] *See O'Bannon*, 7 F. Supp. 3d at 984.
[111] *Id.*
[112] *Id.*

plaintiffs also previously indicated that they were not seeking to enjoin the NCAA from enforcing its current rules that prohibit endorsements.[113] Therefore, the court found that the plaintiff's third proposed less restrictive alternative did not allow for, and conflicted with, an appropriate method for the NCAA to achieve the goals stated in its constitution.[114]

This third-party endorsement remedy is the only proposal by the plaintiffs that the court rejected. Should Judge Wilken have denied this last proposal?[115] The removal of endorsement limits could have significantly lessened the NCAA's control over its student-athletes.[116] If Judge Wilken approved this last proposal, it could have brought a large amount of outside influence into the recruiting process. However, the Judge's denial of this last proposal left the NCAA largely unharmed.[117] Judge Wilken found the NCAA's current limits on athlete compensation unreasonable, meaning that the product will not suffer.[118] But Judge Wilken also found that further compensation—such as in return for student-athletes endorsements—would be a reasonable NCAA limit on athlete compensation because the product might change too much if paid endorsements were permissible.[119]

IV. THE PROBLEM—THE IMPLICATIONS OF THE O'BANNON DECISION

There are many interesting implications from the *O'Bannon* decision, and individuals and entities across the nation were quick to critique or defend the decision. Significantly, by imposing a $5,000 cap for the trust, the court is preventing both the student-athlete's and the NCAA's ability to collectively bargain or negotiate over students' rights and gains. There was speculation that Judge Wilken would issue a broad injunction.[120] Such an injunction would state that the NCAA violated antitrust law and must discontinue its actions, unless it reaches a collective bargaining agreement with its student-athletes.[121] Indeed, as

[113] *Id.*
[114] *Id.*
[115] Nabeel Gadit, *An End to the NCAA's Exploitation of Former Student-Athletes: How O'Bannon v. NCAA Highlights the Need for an Inalienable Reversionary Interest in the Right of Publicity for Former Student-Athletes*, 30 CARDOZO ARTS & ENT. L.J. 347, 365 (2012) ("O'Bannon, however, can legitimately argue that the NCAA as an institution has become much more concerned with increasing its revenue than promoting amateurism in student-athletes, and thus should no longer receive deference from the courts when trying to avoid antitrust liability.").
[116] *See* Kevin Trahan, *Everything You Need to Know About the Ruling That Will Get College Athletes Paid*, VOX (Aug. 10, 2014), http://www.vox.com/2014/8/10/5985743/ed-obannon-lawsuit-ncaa-college-athletes-paid.
[117] *Id.*
[118] *See id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

mentioned above, Judge Wilken did approve of a less restrictive alternative.[122] However, Dennis Cordell, a former lawyer for NFL athletes, sums it up best when he said "she essentially just imposed an agreement without the bargaining between the players and the league—and a favorable one for the NCAA at that."[123]

A. *O'Bannon Didn't Go Far Enough—The Critique*

Dennis Cordell's statement strikes at the heart of the issue this Note addresses. When Judge Wilken decided on a $5,000 trust fund for student-athletes, she neglected the student-athletes' ability to collectively bargain over their NIL rights.[124] One result of the *O'Bannon* decision is that the NCAA is permitted to maintain control over most of its rules, shrinking the student-athletes hopes in having a voice in changing any of those rules.[125] The injunction issued by Judge Wilken does not give the NCAA a very strong incentive to enter into bargaining with student-athletes. Further reform will need to come from future lawsuits.[126] The fact that the student-athletes will have virtually no say in NCAA rulemaking signifies an imbalance of power. Yet this imbalance may be remedied by having the NCAA and student-athletes enter into a bargaining agreement. A bargaining agreement would give student-athletes a platform to voice their concerns, which would prevent such lawsuits against the NCAA in the future. [127] It would allow for an equal opportunity for both the NCAA and the student-athletes to discuss their issues and negotiate an agreement that is acceptable to each party.[128]

Another question raised by the *O'Bannon* decision is whether this remedy solves the antitrust issues in this case. Skeptics such as Ramogi Huma, President of the College Athletes Players Association, which is a non-profit advocacy group composed of players throughout the nation, believes that the answer is no.[129] According to the *New York Times*, Mr. Huma has supported a unionization effort in college sports in the past.[130] Regarding the *O'Bannon* decision, he does not believe that the NCAA

---

[122] *See supra* Part III.B.

[123] *Id.*

[124] Robert A. McCormick & Amy Christian McCormick, *The Myth Of The Student-Athlete: The College Athlete As Employee*, 81 WASH L. REV. 71, 72, 81 (2006); *see also* Trahan *supra* note 116.

[125] *See* Trahan, *supra* note 116.

[126] *Id.*

[127] *Id.*

[128] *See infra* Part V.

[129] *See* Ben Strauss, Steve Eder & Marc Tracy, *99-Page Ruling in O'Bannon Case Is Missing Something: Clarity*, N.Y. TIMES (Aug. 9, 2014), http://www.nytimes.com/2014/08/10/sports/court-ruling-in-o-bannon-case-misses-a-key-element-clarity.html?_r=0.

[130] *Id.*

should "be allowed to impose a cap of any kind."[131] In fact, Mr. Huma commented that the *O'Bannon* decision "specifically seems to allow the NCAA to act as a cartel and cap deferred compensation."[132] Under Judge Wilken's remedy and injunction, the NCAA would maintain the ability to put a limit on compensation, and further defer it until after the student-athlete graduates.[133] Therefore, one result of the *O'Bannon* decision is that the NCAA can continue to act as a monopsony (exist as the only buyer in the market) and, moreover, act as a cartel that can cap deferred compensation. As a result, the remedy issued by Judge Wilken must be explored to assess if there is a better way to resolve the antitrust issues presented in this case.

The *O'Bannon* decision and its implications regarding the NCAA can also draw a comparison to that of professional leagues.[134] Student-athletes want to be compensated for NIL rights similar to professional athletes, as their unique skill set generates a large sum of money for their universities and the NCAA.[135] Arguably, if student-athletes and professional athletes compete in the same sport in a similarly competitive market, they should be compensated in a similar manner, especially regarding their NIL rights. Dennis Cordell commented on the *O'Bannon* decision stating, "It essentially gave the NCAA a salary cap, where in the professional league you would have to collectively bargain for that. I don't see any justification for the $5,000."[136] This quote illustrates one of the major controversies surrounding the *O'Bannon* decision. Namely, critics argue that student-athletes should be able to collectively bargain for their NIL rights, rather than have it limited by the NCAA.

B. *Defending the Implications of O'Bannon—The Shield*

While many individuals are fast to criticize the potential implications of the *O'Bannon* decision, others are quick to defend Judge Wilken's ruling. One scholar is Robert Boland, a professor of sports law at New York University.[137] He explained that the NCAA lost its right to restrict any college or university from paying athletes for their NIL rights, and subsequently Division I student-athletes could now receive payment for their NIL rights in the form of deferred compensation.[138] Furthermore, Mr. Boland said that the students could receive a payment,

---

[131] *Id.*
[132] *Id.*
[133] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014).
[134] *See* Strauss et al., *supra* note 129.
[135] *Id.*
[136] *Id.*
[137] Belson, *supra* note 1.
[138] *Id.*

but that the money will be held in a trust for the student, which he could access once his or her career is over.[139] There appears to be a balance where the students could receive payment for their NIL rights, but only access it after the student-athlete graduates. Mr. Boland summarized the case stating, "[t]he judge really split the baby. She allowed the NCAA to keep their model, but she said their model was too restrictive."[140] In this way, Judge Wilken reached a compromise on this issue.

However, when asked how much players could ultimately make, Mr. Boland responded by saying "[t]hat depends on what the NCAA chooses to do. It could cap the compensation at a figure of at least $5,000 per athlete per year."[141] Boland's specific words, "[t]hat depends on what the NCAA chooses to do," [142] are indicative of how the NCAA is able to maintain much of its power. By placing the cap on compensation in the NCAA's hands, Judge Wilken has only slightly loosened the grip the NCAA has on its student-athletes. The fact that the NCAA can still unilaterally decide to cap the compensation without engaging in any sort of bargaining with student-athletes truly keeps the process firmly in the NCAA's control.

The NCAA's potential control over the amount in the trust fund may not necessarily be such a bad thing.[143] The necessity for college athletes to receive million-dollar paydays immediately is questionable.[144] Money could serve as a distraction, and it could impair student-athletes ability to succeed in school.[145] Judge Wilken concurred in her opinion:

> [T]he only evidence that the NCAA has presented that suggests that its challenged rules might be necessary to promote the integration of academics and athletics is the testimony of university administrators, who asserted that paying student- athletes large sums of money would potentially "create a wedge" between student-athletes and others on campus.[146]

Allowing student-athletes to receive large payments may serve to divide the academic community between students and student-athletes. In fact, plaintiff attorney William Isaacson stated that if the cap was $5,000 per year for a Division I athlete, then "athletes at Division I basketball and Football Bowl Subdivision universities could earn an

---

[139] *Id.*
[140] *Id.* (quoting New York University Professor of Sports Management, Robert Boland).
[141] *Id.*
[142] *Id.*
[143] Strauss et al., *supra* note 129.
[144] *Id.*
[145] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 980 (N.D. Cal. 2014).
[146] *Id.*

estimated $300 million combined over a four-year period."[147] Therefore, the injunction allowing the NCAA to cap the payments at $5,000 per year for Division I student-athletes may be persuasive if the limit is used as a way to minimize the divide between student-athletes and their peers in their academic communities.

Yet one may wonder how Judge Wilken arrived at the amount of $5,000 per year. This number was largely decided based on the NCAA's expert witnesses and the already existing Pell Grant.[148] In Judge Wilken's decision, she explained that NCAA witnesses testified that their concerns about student-athlete compensation would be diminished if "compensation was capped at a few thousand dollars per year."[149] Judge Wilken rationalized her decision regarding the $5,000 amount by stating that it is comparative to the amount of money that the NCAA allows student-athletes to receive if they qualify for a Pell grant, as well as the sum that tennis players may receive prior to enrollment.[150] As mentioned earlier, Judge Wilken maintained certain restrictions including student-athletes' inability to sign endorsement deals, and a school's legal capacity to keep payments for NIL rights in a trust until after the student-athlete graduates.[151] Therefore, advocates of *O'Bannon* can claim that Judge Wilken ensured that collegiate athletics would not operate solely according to free-market principles in a post-*O'Bannon* era.[152] This concept of a free-market could have very significant repercussions and is perhaps the NCAA's biggest fear. If the NCAA were to operate under a completely free market, the NCAA is concerned that this would largely benefit the richest colleges—which could pay players the highest sums and, in turn, gain a substantial recruitment advantage.[153] Judge Wilken coined this fear as the NCAA's "legitimate precompetitive goals," and rationalized her decision by assenting to this fear and making the various compromises discussed above.[154]

C. *Implication Summary*

In making these compromises, Judge Wilken has deprived the student-athlete the ability to negotiate for his own NIL rights. She has

---

[147] Strauss et al., *supra* note 129.

[148] *See O'Bannon*, 7 F. Supp. 3d at 1008. A federal Pell Grant is an award that has a maximum cap of $5,775 and is based on one's cost of attendance, financial need, and status as a full-time student. Unlike a loan, a federal Pell Grant does not need to be repaid.

[149] *Id.*

[150] *Id.; see also supra* Part III.B–C.

[151] *See supra* Part III.C.

[152] The Editorial Board, *The O'Bannon Ruling: College Athletes Win*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/2014/08/14/opinion/the-obannon-ruling-college-athletes-win.html?_r=0.

[153] *Id.*

[154] *See O'Bannon*, 7 F. Supp. 3d at 1004.

imposed an agreement between the NCAA and the players by setting an arbitrary $5,000 cap and effectively choosing not to mandate or enforce the student-athletes' ability to negotiate through collective bargaining or through a trade association.[155] On the one hand, critics of *O'Bannon* may believe that the NCAA received a very light punishment regarding Wilken's injunction prohibiting a cap of less than $5,000 per year on licensing revenue per player.[156] She has allowed this NCAA collegiate model to continue. Judge Wilken suggested that other bodies, both legislative and non-legislative, could share their insight concerning the status of college athletics.[157] In the last page of her decision she stated, "[s]uch reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress."[158]

V. THE SOLUTION

The issue of compensation for a student-athlete's NIL rights could be better resolved through negotiating in a collective bargaining agreement. In imposing an agreement between the two parties, and arbitrarily selecting a $5,000 cap, Judge Wilken neglected the possibility of allowing the student-athletes to bargain for their own NIL rights. A true collective bargaining agreement is the best way to achieve a fair settlement for both the NCAA, and especially for student-athletes.[159] However, one aspect of Judge Wilken's decision is appropriate—student-athletes should not receive compensation while in school.[160] Compensation should be put in a trust and accessible after the student-athlete leaves or graduates the school in order to avoid enlarging any pre-existing disparity between student-athletes and colleagues.[161] Student-athletes should be allowed the ability to collectively bargain for the amount in that trust fund generated from their own NIL rights.

A collective bargaining agreement is as an alternative solution to the *O'Bannon* decision and there are two potential avenues to achieve this goal. The first proposal suggests two opposing parties, the FCAA, and the NCAA, to come together to reach a collective bargaining

[155] *See* Trahan, *supra* note 116.

[156] Jon Solomon, *O'Bannon Judge Rules NCAA Violates Antitrust Law*, CBS SPORTS (Aug 8, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24653743/obannon-judge-rules-ncaa-violates-antitrust-law.

[157] *See O'Bannon*, 7 F. Supp. 3d at 1009.

[158] *See id*.

[159] *See* Trahan, *supra* note 116 and accompanying text; Strauss et al., *supra* note 129 and accompanying text.

[160] If student-athletes were to receive payment while in school, the potential disparity between student-athletes and other students in the academic community could prove disastrous. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 980 (N.D. Cal. 2014).

[161] *Id.*

agreement. The FCAA is an organization that is already in place and one that is ready to assist student-athletes. The second proposal involves both student-athletes and the FCAA as one party, and the school athletic-directors and conference commissioners as the other party in a collective bargaining scenario. This second proposal is an original concept that may also be utilized to create a fair collective bargaining solution for both student-athletes and the NCAA. Both options are worth considering as potential alternative solutions.

A. *The FCAA & The NCAA*

The first alternative solution to the overall issue involves negotiating a collective bargaining agreement between the FCAA and the NCAA. The FCAA is an organization that hopes to represent former student-athletes for the commercial use of their NIL rights in the future.[162] The mediator leading the FCAA, Kenneth Feinberg,[163] wants to use the FCAA as a way to engage in a fair collective bargaining agreement for student-athletes concerning their compensation for their likeness on television, video games, and other various products.[164] Frank Ciatto is an attorney with Venable LLP, a firm that assisted the FCAA with its formation, and he stated that the FCAA could be used "to negotiate group licensing deals on former athletes' behalf with entities such as the NCAA, video game companies and broadcasters interested in showing classic college sporting events."[165] The FCAA is an established organization,[166] which provides the advantage of being ready to assist student-athletes in earning a fair share for their NIL rights.[167]

---

[162] Michael McCann, *Feinberg Sheds Light on FCAA, How Compensation Could be Handled*, SPORTS ILLUSTRATED (May 7, 2014), http://www.si.com/college-football/2014/05/07/kenneth-feinberg-fcaa.

[163] Kenneth Feinberg is a renowned leader in the world of fund distribution. He oversaw the allocation of victim funds for several national tragedies including the September 11th terrorist attack, the Boston Marathon bombings, and the BP Deepwater Horizon disaster. Additionally, Mr. Feinberg is frequently responsible for making tough decisions concerning how much money goes to whom. His strong involvement with the FCAA makes the organization significantly credible and highly worthy of consideration as an alternative solution. *Id.*

[164] *Id.*

[165] Steve Berkowitz, *Non-Profit Aims to Support Former College Athletes*, USA TODAY (May 30, 2014), www.usatoday.com/story/sports/college/2014/05/29/new-non-profit-aims-to-sport-former-college-athletes/9729139/.

[166] *Id.* (stating that "The FCAA was incorporated in March 2011, but largely has been dormant until this month, when its board formalized a series of governance documents. Its activation potentially would resolve the question of who would represent athletes in prospective bargaining over the value of their name, image and likeness."); *see also* Jon Solomon, *Ed O'Bannon Plaintiffs have Organization with Attorney Ken Feinberg if NCAA Suit Prevails*, AL.COM (Jan. 28, 2013), http://www.al.com/sports/index.ssf/2013/01/ed_obannon_plaintiffs_have_org.html (explaining that the FCAA registered with the corporations division of the District of Columbia's Department of Consumer and Regulatory Affairs on March 22, 2011).

[167] McCann, *supra* note 162.

1. Proposal for Former-Student Athletes

The FCAA would be an independent non-profit organization[168] able to represent student-athletes in negotiating for a collective bargaining agreement.[169] In addition to Kenneth Feinberg, the FCAA Board of Directors also consists of well-known sports marketing executive Sonny Vaccaro, and the President of the National College Players Association, Ramogi Huma.[170] With FCAA representation former student-athletes would avoid many issues present in *O'Bannon* including academic integration and division between the student-athletes and the rest of the academic community.[171] Since Judge Wilken ruled that student-athletes are entitled to some form of compensation,[172] student-athletes could choose to utilize the FCAA as an organization that could represent their interests in pursuing their NIL rights as explored below.

Although Judge Wilken allowed for a trust fund creation of at least $5,000,[173] the FCAA would draw exclusively from the NCAA's share of revenue,[174] rather than from media types such as television companies.[175] Significantly, the focus solely on NCAA revenue makes this a unique aspect of the FCAA trade organization. Feinberg stated that revenue would come from former athletes the NCAA has "secured for video games, T-shirts, emblems on automobile stickers or any item. It could be any and all revenue sources that benefit the NCAA. The FCAA is not looking to get revenue from TV outlets. It includes only those funds that end up in the NCAA's bank account."[176] This would

[168] Roger Groves, *Former College Athletes' Attorneys Propose a Real Solution to the Pay For Play Dilemma*, FORBES (May 5, 2014), http://www.forbes.com/sites/rogergroves/2014/05/15/former-college-athletes-attorneys-propose-a-real-solution-to-the-pay-for-play-dilemma/.

[169] Berkowitz, *supra* note 165 (explaining that although it is a non-profit, Mr. Ciatto mentioned that further funding for the FCAA could come from a for-profit subsidiary that the FCAA intends to form in the future).

[170] Solomon, *supra* note 166 (reporting that Mr. Ramogi Huma "has helped produce athletes' rights bills in Connecticut and California while overseeing the nonprofit NCPA, which claims to have more than 17,000 current and former college athletes as members.").

[171] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 980 (N.D. Cal. 2014) ("The only evidence that the NCAA has presented that suggests that its challenged rules might be necessary to promote the integration of academics and athletics is the testimony of university administrators, who asserted that paying student-athletes large sums of money would potentially 'create a wedge' between student-athletes and others on campus.").

[172] *Id.* at 1006–07.

[173] *See supra* Part III.B.

[174] McCann, *supra* note 162 (explaining that the FCAA would be a revenue-generating trade organization because "[t]he FCAA would demand from the NCAA a share of revenue it generates from the commercial use of individuals who are no longer college students. The share would reflect some percentage of revenue, and there may be varying percentages depending on the type of revenue at stake.").

[175] However, those companies may still get entangled in future lawsuits concerning NIL rights, but the FCAA would not be involved in any capacity in such litigation. *Id.*

[176] Jon Solomon, *NCAA Critics Offer ways to pay College Players*, CBS SPORTS (June 4, 2014),

minimize resistance from major broadcast and television companies such as ESPN.[177] This share "would reflect some percentage of revenue, and there may be varying percentages depending on the type of revenue at stake."[178] The funds would then be deposited in a type of trust fund for former student-athletes and then distributed by the FCAA.[179] In contrast to *O'Bannon*, the FCAA would not pay former college athletes based on a "paternalistic system."[180] The distribution of funds by the FCAA to former college athletes would be based on formulas that are "still in development."[181] Notably, potential factors for the formulaic equation could include the "types of sports played, playing time, team and individual exposure on television, statistical performance and public recognition."[182] The FCAA will also consider the conference the athlete participated in, and the revenue generated from that sport's media, apparel and ticket sales.[183] Regardless, formulaic compensation could lead to dissatisfaction among athletes since compensation is unlikely to

http://www.cbssports.com/collegefootball/writer/jon-solomon/24580273/ncaa-critics-offer-ways-to-pay-college-players.

[177] McCann, *supra* note 174.

[178] For example, former student-athletes may receive higher or lower percentages of revenue based on the frequency their likeness appears. This could include revenue earned from television and Internet broadcasts of past games in which they appear, archival clips and highlights, as well as video games where avatars represent the individual student-athlete. *Id.*

[179] *Id.*

[180] Rather than a deferred payment system in O'Bannon, Mr. Feinberg stressed that former student-athletes are "adults" who can choose to receive their payment as the money is earned from their NIL rights. *Id.*

[181] Feinberg has had experience with balancing multiple factors in similar distributions. Indeed, "[i]n other distributions supervised by Feinberg, individuals and businesses have been awarded different amounts of money depending on such factors as type of injury suffered, proximity to the harm, loss of revenue pegged to prior years' averages and quality of supporting documentation." *Id.*

[182] *Id.* (explaining that, notably, given elite athletes success based on these factors, "it is possible that college athletes at big-time sports schools would receive more from the FCAA after college. This could provide a recruiting advantage for coaches at big time sports schools when recruiting star high school athletes."). However, the formulas are not yet fully established, and Feinberg stresses that the FCAA would be fair in its distribution of money. *Id.*

[183] Tom Farrey, *O'Bannon Plaintiffs Want Judge to Rule*, ESPN (May 15, 2014), http://espn.go.com/college-sports/story/_/id/10937049/obannon-plaintiffs-prefer-not-jury-trial-vs-ncaa (explaining that in determining how much players will receive, Feinberg stated that the FCAA would consider a variety of factors, "including the conference in which an athlete played and how central the sport is to the media, licensing, ticket and apparel revenues that were produced while they were college athletes."). Feinberg further explained that, "[t]here's a difference between football and basketball, and fencing and field hockey . . . The formulas have to reflect the relationship between the role of the athletes and the revenues generated." *Id.*; *see also* Jon Solomon, *If Football, Men's Basketball Players get Paid, What About Women?*, CBS SPORTS (June 5, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24581041/if-football-mens-basketball-players-get-paid-what-about-women (noting that a number of factors would be considered in issuing payouts "[i]ncluding how important an athlete's sport was to a school's athletic revenue."). In other words, an athlete in one sport such as volleyball presumably would not receive the same amount as an athlete in a major basketball program. *Id.*

be uniform for all college athletes.[184] The compensation will focus on the revenue generated by a sport or school, rather than a royalties contract, and it is likely that the FCAA would ensure that student-athletes on the same team receive similar compensation, rather than base it solely on the individual athlete.[185]

The FCAA would be a voluntary organization where former student-athletes have the option of joining the FCAA, and thus membership is not guaranteed.[186] This stands in contrast to class action lawsuits such as the *O'Bannon* case. The distinction lies in the certification of a class in a class lawsuit compared to that of a voluntary organization.[187] For example, in *O'Bannon*, if the certified class of twenty plaintiffs that represented the class action won the lawsuit against the NCAA, membership would be presumed unless one member opts out of the class.[188] However, the FCAA would require former athletes to register, thereby demonstrating a clear interest in opting in to the class.[189] Registration would be open to all former college athletes—including both male and female individuals.[190]

Unsurprisingly, the NCAA has not been particularly warm or welcoming to the FCAA.[191] The FCAA would not wish to be perceived as a college athletes' union and would not support the professionalization of college sports.[192] According to Mr. Feinberg, the FCAA is a distinct organization exclusively for former student-athletes.[193] Feinberg rejects the idea that the FCAA may further the professionalizing of college sports.[194] The FCAA emphasizes that its members are also members of the marketplace, simply hoping to receive a fair share for the use of their NIL rights.[195]

---

[184] McCann, *supra* note 174.

[185] Solomon, *supra* note 176. Notably, the revenue generated by the university or sport would result in allocating more money for that individual student-athlete. But Feinberg notes, "[I] would think a former football player at Michigan or Southern California is probably entitled to more funds than a former football player at Harvard or Yale." He continued, "[b]ut I don't think it's feasible or wise to allocate different funds among football players at a particular team." Solomon, *supra* note 176.

[186] *Id.*

[187] *Id.*

[188] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014); *see also* McCann, *supra* note 162.

[189] *O'Bannon,* 7 F. Supp. 3d at 965 (noting that not all former athletes may wish to become a member of the FCAA, others may seek to negotiate with the NCAA on their own).

[190] *O'Bannon* raised legal claims specifically for men's football and basketball, but the FCAA would be open to former athletes of all sports and both genders. *Id.*

[191] McCann, *supra* note 162.

[192] *Id.*

[193] Mr. Feinberg expressly commented, "[w]e're not talking about college students in the FCAA. Those who join the FCAA won't have a relationship with their college beyond being alums." *Id.*

[194] *Id.*

[195] *Id.*; *see also* Tom Farrey, *NCAA Athletes can Pursue TV Money*, ESPN (Jan. 30, 2013),

2. Current Student-Athletes

Although the FCAA maintains that it will not invite current student-athletes to become a part of the organization,[196] one must explore how these student-athletes may receive compensation for their NIL rights. Distinguished attorney and sportswriter Michael McCann[197] explored potential options for current student-athletes in the wake of the *O'Bannon* trial.[198] Mr. McCann suggests that a trade association similar to the FCAA would likely become established.[199] This trade association would offer various "negotiation services to those student-athletes with their colleges and with companies—including broadcast companies—that are in contract with the NCAA and member schools."[200] Similar to the FCAA, student-athletes would not be required to join this trade association, and could opt to bargain for their own NIL rights contracts.[201] According to Mr. McCaan, however, it is highly likely that most students will join a trade association.[202] This trade association would be able to negotiate with "individual colleges, conferences, video game publishers, networks and apparel companies, among other businesses that profit from college sports."[203] This is one concept that is worth mentioning as a potential solution for current student-athletes.

http://espn.go.com/espn/otl/story/_/id/8895337/judge-rules-ncaa-athletes-legally-pursue-television-money (quoting Mr. Ramogi Huma President of the National College Players Association, who stated, "[i]t's great that the NCAA and its members have been able to capitalize monetarily on the publicity rights of their athletes, but there is no justification to deny them a portion of the benefits. The FCAA will be prepared to ensure that athletes ultimately receive what is rightfully theirs as Americans in a capitalistic, free market society.").

[196] Farrey, *supra* note 183. It should be noted that although a current athlete cannot join the FCAA, a student-athlete could join after finishing his or her college career. The payments would be based on formulas that account of the money generated while they were athletes. Mr. Feinberg stated that "[u]nlike the unionization effort at Northwestern, the FCAA does not propose to change the status of athletes while they are still on campus, but instead put the money due to them aside for later collection. Farrey, *supra* note 183.

[197] Michael McCann is a well-known attorney in Massachusetts. He is also the founding director of the Sports and Entertainment Law Institute at the University of New Hampshire School of Law. In addition, Mr. McCann is also the distinguished visiting Hall of Fame Professor of Law at Mississippi College School of Law. McCann, *supra* note 162.

[198] Michael McCann, *O'Bannon v. NCAA: With Trial Over, What Comes Next?*, SPORTS ILLUSTRATED (June 30, 2014), http://www.si.com/college-football/2014/06/30/obannon-ncaa-antitrust-case-next-steps.

[199] *Id.*

[200] *Id.*

[201] Student-athletes could also seek out their own options, such as the assistance of a sports agent. Although the NCAA raised this potential concern during trial, it is not likely that every college athlete will have a sports agent to represent him. *Id.*

[202] *Id.*

[203] *Id.*

B. *FCAA & Student-Athletes v. Athletic Directors & Conference Commissioners*

Notably, the various Division I conferences have demanded, and received, much more power in recent months. In fact, on August 7, 2014, the NCAA Division I board of directors voted to allow the schools in the top five conferences to create and rewrite many of their own rules.[204] This allowed the top 64 schools in the richest five conferences, known as the Big Five: the ACC, Big 12, Big Ten, SEC and Pac-12, plus Notre Dame, much more autonomy in deciding how they interact with their student-athletes.[205] The new rules these conferences can enact include "loosened restrictions involving contact between players and agents, letting players pursue outside paid career opportunities and covering expenses for players' families to attend postseason games."[206] As a result of this newfound power, conferences are more capable of collectively bargaining with their student-athletes.

Since the court in *O'Bannon* found that a market for group licenses does exist,[207] a solution where each university would elect student-athlete representatives to negotiate with the athletic directors of the various conferences might ultimately be best.[208] For ease of reference, this proposal will focus on the primary Big Five conferences.[209] In this proposal, a legal representative, such as from the FCAA or some other type of trade association,[210] would accompany the student-athletes to the bargaining table. This proposal suggests that each school in the Division I and FBS conferences elect one or more student representatives to negotiate on behalf of their team.[211] From a legal aspect, having the

[204] Bennett, *supra* note 58 (explaining that in a majority vote of 16-2, the board of directors issued autonomy measures to these top five conferences, which will "permit those leagues to decide on things such as cost-of-attendance stipends and insurance benefits for players, staff sizes, recruiting rules and mandatory hours spent on individual sports.").

[205] Bennett, *supra* note 58.; *see also* Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014) http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/. ("Those conferences – the ACC, Big Ten, Big 12, Pac-12 and SEC – will collect a combined $311 million just from bowl games and NCAA Tournament payouts this year.").

[206] Bennett, *supra* note 58 (explaining "areas that will not fall under the autonomy umbrella include postseason tournaments, transfer policies, scholarship limits, signing day and rules governing on-field play.").

[207] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 985, 994, 997–99 (N.D. Cal. 2014).

[208] *See supra* Part III.B; *see also supra* note 89 and accompanying text (showing that the athletic directors who oversee their student-athletes would be particularly suited for hearing student-athletes demands, especially since they testified in *O'Bannon*).

[209] *See* Smith, *supra* note 96 and accompanying text (explaining that the Big Five Conferences are known as the five richest leagues, composed of the ACC, the Big 12, Big Ten, SEC, and Pac12.)

[210] *See* McCann, *supra* note 162 and accompanying text.

[211] Every school year, the team would elect a new student-athlete to maintain fairness.

student-athlete represent his team as a group negotiation rather than acting in an individual capacity makes sense since Judge Wilken found a market existed for group licenses.[212] On the other side of the bargaining table would be the athletic directors from each school,[213] since they testified in *O'Bannon* mentioning their concern with student-athlete compensation for their NIL rights.[214] In addition, there would also be the Conference Commissioner for the athletic directors, and he would mirror the FCAA representative for the student-athletes.[215] Therefore, this collective bargaining agreement would hope to be equal and proportional both in number and in supervisory power.

In order to ensure cohesion and fairness in negotiations, this proposal suggests that current student-athletes in the same conference would all earn the same amount of money. The only variation in amount of money earned between all student-athletes NIL rights would be based on which conference the student-athlete participated in.[216] Similar to *O'Bannon*, student-athletes would receive payment based on the revenue generated from their NIL rights.[217] However, the payment would be based on a percentage of the revenue generated from the NIL rights of the entire conference.[218] For example, a more profitable conference such as the Big Ten may generate more revenue from the student-athlete NIL rights based on broadcasting agreements and other contracts, than a less profitable conference such as the Big 12.[219]

---

[212] *See supra* text accompanying note 44.

[213] Sara Ganim, *As Testimony Starts in Former College Star's Suit, NCAA Settles Another Suit*, CNN (June 9, 2014), http://www.cnn.com/2014/06/09/us/ed-obannon-ncaa-lawsuit/ (explaining that one of the reasons the school would have representation in this proposal is because the NCAA does not generate a lot of money from regular season television games). Rather "[r]evenue from the NCAA specifically comes from March Madness television contracts and from sports paraphernalia sales. It's the conferences and the schools that negotiate the TV deals for—and profit from—Saturday football and regular season basketball games." *Id.* Thus, it is important that there is representation from both the conference commissioners and the schools in order to ensure that both parties of the negotiation have authority and power to settle. *See id.*

[214] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).

[215] These collective bargaining negotiations would exist for each conference. An NCAA representative would also be allowed to sit in on each of these negotiations, but he or she would not maintain the right to negotiate.

[216] In the rare case of a two-sport athlete, the athlete would get paid twice. This is logical considering he would generate revenue based on his NIL rights on two distinct teams.

[217] *See O'Bannon*, 7 F. Supp. 3d at 983 ("The Court therefore finds that permitting schools to make limited payments to student-athletes above the cost of attendance would not harm consumer demand for the NCAA's product —particularly if the student-athletes were not paid more or less based on their athletic ability or the quality of their performances and the payments were derived only from revenue generated from the use of their own names, images, and likenesses.").

[218] Similar to the FCAA proposal, payment will be based on a percentage of the revenue earned from the NIL rights of student-athletes. However, rather than having the payment based on individual factors of the student athlete's NIL rights, payment in this proposal would be a percentage based on the each conferences total NIL's earnings.

[219] *See* Smith, *supra* note 96.

However, even though payment amounts would vary among conferences, this proposal would ensure that athletes within each conference would have equal payments, thus ensuring some equality while not penalizing more profitable conferences. This will allow for the student-athletes to share a unified voice and collectively bargain for their rights.

VI. CONCLUSION

Judge Claudia Wilken's ruling in *O'Bannon v. National Collegiate Athletic Association* was certainly unique, but it was also underwhelming. Mr. O'Bannon's class action lawsuit allowed the Sherman Act to be viewed in a different light. Indeed, this was one of the first cases to hold that particular restraints on student-athlete compensation violate Section 1 of the Sherman Act. Additionally, *O'Bannon* allowed for the possibility that student-athletes can receive limited compensation for their athletic talents and their NIL rights. Moreover, it established a legal precedent that can be used and built upon for future potential lawsuits concerning other antitrust aspects of the NCAA.

However, the *O'Bannon* ruling failed to take down some major barriers concerning student-athletes rights. Judge Wilken did not allow for student-athletes to receive full ownership of their NIL rights. Instead, Judge Wilken simply issued an injunction that failed to meet the student-athletes true needs. The injunction only enjoined the NCAA from preventing universities to offer full cost of attendance, and it limited student compensation to $5,000 per year to be held in a trust fund. Thus, Judge Wilken failed to provide student-athletes with complete and adequate legal protection over their NIL rights.

Therefore, this Note's solution is one in which the student-athletes can maintain more control over their NIL rights. Allowing for a collective bargaining agreement would foster open communication between the student-athletes and the NCAA. In addition, it would allow for the student-athletes voices to be heard, preventing the NCAA from continuing to turn a deaf ear to its student-athletes needs. The plaintiffs expected Judge Wilken to find just compensation regarding student-athletes NIL rights, especially when the use of an athlete's NIL rights is used without his consent, but she failed to do so. As Mr. O'Bannon expressed, "[t]he main thing is you control your likeness,"[220] and, hopefully one day, Mr. O'Bannon's wish for complete control of a student athlete's NIL rights will become a reality.

While the *O'Bannon* decision is seen in many ways as a compromise, this case has opened the door for future lawsuits to

[220] Strauss, *supra* note 129.

achieve greater rights for student-athletes. Fearful of a totally free market, the NCAA has already appealed the *O'Bannon* decision to the U.S. Court of Appeals for the Ninth Circuit.[221] The debate over student-athlete compensation has persisted in this country for quite some time. Moreover, the seemingly "impenetrable" NCAA amateurism defense has prevented any change in this country for decades. However, Edward O'Bannon sums it up nicely when he said, "I think change, in my opinion, is inevitable. I think change needs to happen."[222] Indeed, Judge Wilken's decision in *O'Bannon v. National Collegiate Athletic Association* will be remembered as a significant first step in paving the way for future lawsuits against the NCAA's unjust control over its student-athletes.

*Zachary S. Beal**

[221] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *appeal docketed*, No. 14-16601 (9th Cir. Aug. 21, 2014).

[222] Ganim, *supra* note 213.

* Associate Editor, CARDOZO ARTS & ENT. L.J. Vol. 34, J.D., Benjamin N. Cardozo School of Law (2016); B.A., Tulane University (2013). I would like to thank Professor Weisenfeld for his invaluable edits and comments. I would also like to thank the Editorial Board of the *Art & Entertainment Law Journal* for their efficiency and efforts in improving the quality of this Note. I dedicate this Note to the student-athletes of the NCAA—may their voices eventually be heard. Lastly, I would like to thank both my girlfriend Jennifer Edelson, and my family, for their love and unwavering support.