

2005

# Attacking the NCAA's Anti-Transfer Rules as Covenants Not To Compete

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## Recommended Citation

15 Seton Hall J. Sport L. 221 (2005).

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# ATTACKING THE NCAA'S ANTI-TRANSFER RULES AS COVENANTS NOT TO COMPETE

*Ray Yasser and Clay Fees\**

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*“Undoubtedly judicial disfavor of these covenants is provoked by ‘powerful considerations of public policy which militate against sanctioning the loss of a (person’s) livelihood.’”<sup>1</sup>*

As most sports fans know, the National Collegiate Athletic Association enforces a variety of rules that sports law academicians refer to as “anti-transfer rules.” While this body of rules is quite complex, the gist of them is that certain athletes who transfer from one Division I school to another must “sit out” a year before participating in athletics. This article contends that the rules are preposterous.

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1. Reed, Roberts Assoc., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976).

Placing the rules in any other collegiate context reveals their absurdity. Imagine telling a budding young theater student at Harvard that if she transfers to Yale, she would be ineligible to participate in any dramatic production her first year at Yale. Also imagine telling a coach who takes a new job that he or she must stay off the sidelines or bench for a season. Despite their preposterousness, no one has yet mounted a successful challenge to these rules. This article lays out the case for a successful legal attack against the NCAA's anti-transfer rules based upon the well-developed body of law dealing with "covenants not to compete."<sup>2</sup>

Part I of this article describes the complex body of anti-transfer rules. Part II examines a recent case that challenges the anti-transfer rules on an antitrust law theory.<sup>3</sup> Although the plaintiff was unsuccessful, the case provides a good backdrop upon which to design a successful hypothetical case against the rules. Part III explores the law relating to restrictive covenants generally. Part IV applies that body of law to a hypothetical case brought by an aggrieved athlete. Part V examines the world of intercollegiate athletics in the wake of the successful attack.

## I. THE ANTI-TRANSFER RULES

By most accounts, athletic talent is the key to a successful athletic program. Quality athletes render programs successful. With success comes exposure and publicity. This in turn has the potential to generate revenue through alumni donations, ticket sales, marketing promotions, and lucrative television contracts. Increased revenue can translate into improvements in facilities that in turn can lure a greater number of talented athletes. Thus, the upward spiral continues. Note that it is the athlete who is the engine of this success. Athletes play and win the games.

The recruitment of athletic talent is therefore highly significant. Colleges and universities vigorously compete for the best athletes. Athletes are convinced to attend a particular school by myriad reasons: quality of facilities, quality of coaching, academic reputation, historical success, the possibility of substantial playing time, the number of games on television, and proximity to home, just to name a few. "Recruiting" athletic talent is a key ingredient for success at the highest levels of

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2. The idea for this article arose out of a classroom discussion in a Law of Amateur Sports class taught by Professor Yasser during the fall of 2003. Classroom discussion focused upon the possible theories utilized by athletes to attack NCAA rules. Clay Fees, a student in the class at the time, made the point that the anti-transfer rules operated somewhat like covenants not to compete. He was encouraged by Professor Yasser to pursue the idea by writing a short "think piece." The two then decided to expand the think piece into a law review article. This article is a collaborative effort that builds upon Fees' initial idea.

3. *Tanaka v. Univ. S. Cal.*, 252 F.3d 1059 (9th Cir. 2001).

intercollegiate athletics.

The National Collegiate Athletic Association, commonly known as the NCAA, oversees much of the highly competitive world of college athletics. The NCAA is a voluntary association of about 1,200 colleges and universities, athletic conferences, and sports organizations devoted to the sound administration of intercollegiate athletics. From its headquarters in Indianapolis, Indiana, the NCAA is chiefly responsible for the regulation of athletic competition among its members. The NCAA has three divisions: Division I, Division II and Division III; membership in a particular division depends on a variety of factors, including the number of sports the individual school offers, and whether athletic scholarships are available. In football, Division I is divided into Division I-A and Division I-AA. Division I is composed of the major athletic powers in the country, as well as many other institutions that choose to compete at the major college level.<sup>4</sup>

The NCAA purports to promote sportsmanship and academic achievement. At the same time, the organization seeks to ensure a competitive balance within divisions among its members.<sup>5</sup> An essential component of the public appeal of college athletics (indeed all athletics) is the uncertain outcome of the competitive events. If all the best athletes gather together on one team, the outcome is much more certain. As this reasoning goes, dynasties are undesirable. It is the drama of uncertainty that sparks the public's interest.

The NCAA has established guidelines for all aspects of college athletics, including the regulation of the accumulation of athletic talent. For example, the NCAA imposes roster limits to ensure that schools cannot stockpile athletic talent. Talent is to be dispersed. Similarly, the NCAA establishes scholarship maximums by sport. For example, the maximum number of scholarships that may be awarded for Division I basketball is thirteen.<sup>6</sup>

The NCAA also tightly governs the eligibility of athletes. These rules are set out under Article 14 of the NCAA bylaws. The rationale for the establishment of rules governing eligibility is "to promote competitive equity among institutions."<sup>7</sup> Article 14 sets up guidelines that determine eligibility requirements for high school seniors, junior college transfers,

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4. RAY YASSER ET AL., *SPORTS LAW-CASES AND MATERIALS* 2-3 (5TH ed. 2003).

5. NAT'L COLLEGIATE ATHLETIC ASS'N, 2003-04 NCAA DIVISION I MANUAL: CONSTITUTION art. 2.10 (2003), available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/index.html](http://www.ncaa.org/library/membership/division_i_manual/index.html) (last visited Apr. 3, 2005) [hereinafter "NCAA CONST."].

6. NAT'L COLLEGIATE ATHLETIC ASS'N, 2003-04 NCAA DIVISION I MANUAL: OPERATING BYLAWS art. 15.5.4 (2003), available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/index.html](http://www.ncaa.org/library/membership/division_i_manual/index.html) (last visited Apr. 3, 2005) [hereinafter "NCAA BYLAWS"].

7. NCAA CONST., *supra* note 5, at art. 2.12.

and foreign students. Broad in scope, Article 14 governs everything from the eligibility of pregnant athletes<sup>8</sup> to the residence requirements of athletes enrolled in night school.<sup>9</sup>

Article 14.5 governs the transfer of athletes from one member school to another. The general rule<sup>10</sup> is that while a transferring athlete may freely transfer to another school, the ability of that athlete to compete will be contingent on the athlete satisfying a one-year academic residency requirement.<sup>11</sup> In effect, the rule requires athletes who transfer to sit out a year before becoming eligible for competitive participation.<sup>12</sup> The NCAA provides a limited number of exceptions to this general rule, which are scattered throughout the provisions of Article 14.5.

Of particular interest to the NCAA is the athlete who transfers from one Division I program to another. This situation is governed by Article 14.5.5.2.10.<sup>13</sup> Known simply as the "One-Time Transfer Exception" (hereinafter "anti-transfer rule"), this rule is an exception to the general rule requiring a year of residency, and sets out the conditions under which an athlete may transfer from one Division I program to another without having to sit out a year.<sup>14</sup>

8. *Id.* at art. 14.2.1.3.

9. NCAA BYLAWS, *supra* note 6, at art. 14.5.1.2.

10. *Id.* at art. 14.5.1. Article 14.5.1 states, in applicable part, that:

[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution. Further, a transfer student-athlete admitted after the 12th class day may not use that semester or quarter for the purpose of establishing residency.

*Id.*

11. *Id.* at art. 14.5.1.1. To satisfy the academic year of residence requirement under the NCAA bylaws, a student must:

(a) Be enrolled in and complete a minimum full-time program of studies for two full semesters or three full quarters; or

(b) Be enrolled in a minimum full-time program of studies for two full semesters or three full quarters and pass a number of hours that is at least equal to the sum total of the minimum load of each of the required terms. Any student-athlete (e.g., partial qualifier, qualifier, nonqualifier, transfer student) admitted after the 12th class day may not use that semester or quarter for the purpose of establishing residency.

*Id.*

12. *Id.*

13. NCAA BYLAWS, *supra* note 6, at art. 14.5.5.2.10.

14. *See id.* The "One-Time Transfer Exception" (hereinafter "anti-transfer rule"), provides that: The student transfers to the certifying institution from another four-year collegiate institution, and all of the following conditions are met (for graduate students, *see also* Bylaw 14.1.9.1):

(a) The student is a participant in a sport other than basketball, Division I-A football or men's ice hockey at the institution to which the student is transferring. A participant in Division I-AA football at the institution to which the student is transferring may utilize this exception only if the participant transferred to the certifying institution from an institution that sponsors Division I-A football or the participant transfers from a Division

Generally, athletes may transfer from a Division I program to another only one time, provided they meet a set of criteria. The language of the anti-transfer rule is more than a bit perplexing. Yet, under its provisions, athletes who participate in Division I men's or women's basketball, Division I-A football, or men's ice hockey may not compete unless they fulfill one year of "residency" as defined by the NCAA.<sup>15</sup> Participants in all other sports are free to utilize an exception to the residency rule. In short, for athletes who participate in Division I basketball, Division I-A football, or ice hockey, the anti-transfer rule requires the athlete to satisfy the NCAA's residency requirement by "sitting out" a year before engaging in competition.<sup>16</sup>

I-AA institution that offers athletically related financial aid in the sport of football to a Division I-AA institution that does not offer athletically related financial aid in football; (*Revised: 1/16/93 effective 8/1/93, 1/11/94, 1/10/95, 11/1/00 effective 8/1/01*)

(b) The student has not transferred previously from one four-year institution unless, in the previous transfer, the student-athlete received an exception per Bylaw 14.5.5.2.6 (discontinued/nonsponsored sport exception); (*Revised: 1/11/94, 1/11/97*)

(c) The student is in good academic standing and meets the progress toward degree requirements. The transferring student must be one who would have been academically eligible had he or she remained at the institution from which the student transferred, and he or she also must be eligible at the certifying institution as a regularly enrolled, full-time, degree-seeking student who was admitted in accordance with the regular, published entrance requirements of the institution. The student shall not be required to fulfill the necessary percentage-of degree requirements per Bylaw 14.4.3.2 at the previous institution; (*Revised: 1/10/95, 1/9/96*)

(d) If the student is transferring from an NCAA or NAIA member institution, the student's previous institution shall certify in writing that it has no objection to the student's being granted an exception to the transfer-residence requirement. If the student's previous institution denies his or her request for the release, the institution shall inform the student-athlete in writing that he or she, upon request, shall be provided a hearing conducted by an institutional entity or committee outside of the athletics department (e.g., the office of student affairs; office of the dean of students; or a committee composed of the faculty athletics representative, student-athletes and nonathletics faculty/staff members). The institution shall have established reasonable procedures for promptly hearing such a request; and (*Revised: 1/11/94, 4/26/01*)

(e) If the student transfers to the certifying institution from a Division III member institution and meets the foregoing conditions, he or she may be eligible to compete but shall not receive athletically related financial aid during the first academic year in residence at the certifying institution.

*Id.*

15. See NCAA BYLAWS, *supra* note 6, at art. 14.5.1.1(a).

16. The NCAA grants waivers to the residency requirement in limited circumstances. Pursuant to Article 5.4.1.4 of the NCAA Constitution, a school may appeal an application of the NCAA legislation to the Administrative Review Subcommittee. NCAA CONST., *supra* note 5, at art. 5.4.1.4. According to the NCAA's Administrative Review Subcommittee Waiver Application, the committee's decision is based on factors such as the purpose of the rule being applied, the overall welfare of the student-athlete, and any competitive advantages that may arise from a granting of a waiver. See NAT'L COLLEGIATE ATHLETIC ASS'N, ADMIN. REVIEW SUBCOMM. WAIVER APPLICATION (2004), available at <http://www1.ncaa.org/eprise/main/administrator/>

The reasoning in support of these rules is not entirely clear.<sup>17</sup> It should be noted, however, that Division I basketball and Division I-A football are the revenue producers of the college athletic world. Football and basketball also generate the bulk of the public interest in collegiate athletics. More often than not, it is these programs that are the flagships of a college athletic program.<sup>18</sup> For whatever reasons, the NCAA has chosen to separate out particular sports for special treatment insofar as transfers are concerned. The NCAA rules provide other disincentives for athletes transferring from one Division I program to another. The rules explicitly prevent coaches from raiding each other's programs.<sup>19</sup>

In short, the NCAA has set up a "price" which must be paid by the athletes engaged in the specified sports if they want to transfer. While there is evidence that this deterrent is not always effective,<sup>20</sup> the goal of the NCAA is to ensure that Division I talent in the major revenue generating sports is spread uniformly throughout the NCAA Division I membership to protect competitive balance.<sup>21</sup> Open, unrestricted transfers would somehow disturb competitive balance, according to the NCAA.<sup>22</sup>

Additionally, the NCAA and its member schools benefit from the stability inherent in a system of restricted transfers, because once they have a player signed, they have that athlete there for the duration of his college career, unless that athlete chooses to pay the price of transferring. In essence, the school knows what it has in the athlete, and that athlete's

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*ARS/ARS\_Applic.rtf* (last visited Apr. 2, 2005). Such waivers are rare, and only the most extenuating of circumstances warrant a waiver. See generally NCAA BYLAWS, *supra* note 6, at art. 14.01.3.5 (providing list of narrow exceptions to the anti-transfer rule).

17. Attempts were made to contact the NCAA for a clarification of the reasoning behind the anti-transfer rules. We were told that unless the inquiry emanated from an athletic administrator, the NCAA would not address any inquiries.

18. According to a July 10, 2004 Salina (Kansas) Journal article citing the NCAA, attendance at women's basketball games at some schools even rival that of the men's teams, with attendance figures exceeding 10,000. Archive of Columns by Chuck Schoffner, <http://saljournal.com> (last visited Aug. 30, 2005). For example, in 2003-04, Big XII women's basketball teams averaged 5,381 fans per game, an NCAA record. *Id.* It was the fourth straight year Big XII women's basketball averaged more than 5,000 per game. *Id.* Tennessee averaged over 14,000 fans and Connecticut averaged 13,435. *Id.*

19. NCAA BYLAWS, *supra* note 6, at art. 13.1.1.3.

20. OKLA. STATE UNIV., COWBOY BASKETBALL 2003-2004 ROSTER (2004), available at [http://www.okstate.com/SportSelect.dbml?SPSID=1466&SPID=145&DB\\_OEM\\_ID=200&Q\\_SEAS\\_ON=2003](http://www.okstate.com/SportSelect.dbml?SPSID=1466&SPID=145&DB_OEM_ID=200&Q_SEAS_ON=2003) (last visited Feb. 17, 2005). For example, 5 of the 13 members of the 2004 Oklahoma State men's basketball team, which reached the Final Four, are Division I transfers, including 3 starters. Chip Brown, *At Second Chance University, The Door Always is Open Oklahoma State Wins With Transfers*, THE DALLAS MORNING NEWS, Mar. 18, 2004.

21. It is unclear why ice hockey, a sport with little nationwide appeal, is included.

22. See, e.g., NCAA CONST., *supra* note 5, at art. 2.10. (Article 2.10 promotes the principle of competitive equity as a goal of the NCAA, so it reasonably follows that any rules promulgated by the NCAA are in the interest of competitive equity.)

particular program can “count on” that athlete. The anti-transfer rules appear to also further empower coaches: coaches know that athletes are less likely to transfer in light of the disincentives associated with transferring. Disgruntled athletes cannot easily leave a given institution. In the eyes of the NCAA, the anti-transfer rule secures the legitimate interests of coaches, programs, and athletes (who might flee prematurely if unrestricted).

On its face, the anti-transfer rule operates as a covenant not to compete. Covenants not to compete generally seek to prevent departing employees from engaging in competitive activities detrimental to the interests of the former employer. These restrictions are usually set out in terms of an activity that is to be restricted over a certain time period and within certain geographic boundaries. The anti-transfer rules have the effect of limiting the transferring athlete just as restrictive covenants limit employees. These rules are thus strikingly similar to common law covenants not to compete.<sup>23</sup>

Analyzing the anti-transfer rule as a restrictive covenant makes perfectly good sense. To begin with, the relationship between an athlete and the school at which the athlete participates in intercollegiate athletics is clearly contractual in nature. The North Carolina courts have held that the relationship between a state university and a student-athlete receiving financial aid is essentially contractual in nature.<sup>24</sup> Likewise, one commentator has likened the National Letter of Intent,<sup>25</sup> a document signed by athletes after recruitment that binds the athlete to a particular school, to a restrictive covenant.<sup>26</sup>

While courts may view the relationship between a student-athlete and a university as “contractual in nature,” they are reluctant to view the athlete as in fact a party to a viable and enforceable employment contract. For example, several courts have declined to give workmen’s

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23. NCAA BYLAWS, *supra* note 6, at art. 14.5.5.2.10. Unlike a restrictive covenant, the transfer rule does allow a student to transfer if that athlete is determined to do so and is willing to satisfy the residency requirement. In enforcement of a restrictive covenant, a competitor is usually enjoined from the competitive activity outright, although the period of restriction is often a year or less.

24. Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. Ct. App. 1972).

25. Marianne Jennings & Lynn Ziolkow, *Student-Athletes, Athlete Agents and Five Year Eligibility: An Environment of Contractual Interference, Trade Restraint and High-Stake Payments*, 66 U. DET. L. REV. 179, 192 (1989). The National Letter of Intent program is administered by the Collegiate Commissioner’s Association (CCA), and is comprised of over 500 voluntary institutions. *National Letter of Intent, Overview: What is NLI?*, available at <http://www.national-letter.org/overview/> (last visited Apr. 4, 2005). The intent of the program is, quite simply, to ensure that athletes attend the institutions at which they have committed to play. *Id.* While the NLI program seeks to limit athletes to participation at the schools at which they signed, the NLI program is not sponsored or administered by the NCAA. *Id.*

26. Jennings & Ziolkow, *supra* note 25, at 192.



compensation benefits to athletes injured in the course of athletic participation, sometimes in the face of findings by the state labor commissions of the particular state that the athletes, as employees, were indeed entitled to such benefits.<sup>27</sup> In some ways this reflects a willful refusal by the courts to acknowledge things as they really are.<sup>28</sup>

An examination of the nature of an athletic scholarship reveals a relationship clearly akin to employment. By accepting a scholarship, the athlete enters into a legal relationship with the particular educational institution that grants the award. The athlete agrees to maintain a certain level of academic performance and perform athletically for the school. At the same time, the educational institution provides the athlete with tuition, books, and certain other educational expenses.<sup>29</sup> Undeniably, there exists a *quid pro quo* arrangement, and one that is clearly contractual, both in form and substance with athletic scholarships. Notably, this kind of *quid pro quo* arrangement is the earmark of the employee-employer relationship.<sup>30</sup>

The reluctance on the part of courts to confront the issue of athletic scholarships as employment contracts in the workers compensation context stems from a fear of uncharted waters – scholarships have never

27. See *Rensing v. Ind. State Univ. Bd. of Tr.*, 444 N.E.2d 1170, 1175 (Ind. 1983) (finding injured athlete not an “employee” of Indiana State University under the Workmen’s Compensation Act); *State Comp. Ins. Fund v. Indus. Comm’n of Colo.*, 314 P.2d 288, 290 (Colo. 1957) (finding injured athlete not entitled to benefits under the Workmen’s Compensation Act because claimant failed to carry the burden of showing that the athlete was under contract to play football for Fort Lewis A&M or that playing football was incident to his part-time employment with the university); see also Ray Yasser, *Are Scholarship Athletes At Big-Time Programs Really University Employees? – You Bet They Are*, 9 NAT’L BLACK L.J. 65 (1984).

28. YASSER ET AL., *supra* note 4, at 29, n.2.

29. Yasser, *supra* note 27, at 65.

30. *Id.* at 69. Notably, NCAA Bylaw 15.3.5 allows athletes to be cut for a lack of skill, which creates a situation very similar to an at-will employment contract with a one-year duration. NCAA BYLAWS, *supra* note 6, at art. 15.3.5. NCAA Division I Bylaw, Article 15.3 governs the terms and conditions of awarding institutional financial aid to athletes (athletic scholarships). *Id.* at art. 15.3. NCAA Division I Bylaw, Article 15.3.3.1 sets out the one-year duration of athletic scholarships, stating “[w]here a student’s athletics ability is taken into consideration in any degree in awarding financial aid, such aid shall not be awarded in excess of one academic year.” *Id.* at art. 15.3.3.1. Of course, an athlete’s eligibility can be renewed as long as the athlete has eligibility and is deemed by the institution to have the requisite athletic ability. NCAA Division I Bylaw, Article 15.3.5.1 governs renewals of athletic scholarships, stating:

The renewal of institutional financial aid based in any degree on athletics ability shall be made on or before July 1 prior to the academic year in which it is to be effective. The institution shall promptly notify in writing each student-athlete who received an award the previous academic year and who has eligibility remaining in the sport in which financial aid was awarded the previous academic year (under Bylaw 14.2) whether the grant has been renewed or not renewed for the ensuing academic year. Notification of financial aid renewals and nonrenewals must come from the institution’s regular financial aid authority and not from the institution’s athletics department.

*Id.* at 15.3.5.1.

been viewed as “employment contracts” in the traditional sense, despite their common characteristics. Namely, judicial recognition that the relationship between athletes and the schools they represent are employment contracts for worker’s compensation purposes could constitute legal acknowledgment that big-time college athletes are not amateurs at all.<sup>31</sup>

For courts to recognize that college athletes are “employees” pursuant to the Workmen’s Compensation Act would challenge the long-held notion that college athletes play their sports as an avocation.<sup>32</sup> Yet, at the same time, for courts to fail to find that college athletes are not “in the service of” for workmen’s compensation purposes flies in the face of the plain meaning of those statutory terms. As a dissenting judge of the Court of Appeals for the Seventh Circuit noted,

[t]he mythological image of the amateur athlete, despite the realities of the revenue driven world of college athletics, is one cherished by the public, and not one the courts are ready to destroy. It is consoling to buy into these myths, for they remind us of a more innocent era - an era where recruiting scandals were virtually unknown, where amateurism was more a reality than an ideal.<sup>33</sup>

But viewing the anti-transfer rules as covenants not to compete does not pose the same challenges to the intercollegiate athletic model that workmen’s compensation cases present. Unlike workmen’s compensation cases, which threaten the entire system of intercollegiate athletics, viewing the anti-transfer rules as covenants not to compete would alter only the contours of the anti-transfer rules.

Notwithstanding the judicial disingenuousness in refusing to recognize the athlete-university relationship as employment, the similarities between the anti-transfer rules and covenants not to compete are too compelling to be ignored. Accordingly, the question that remains is whether the transfer rules, if viewed under the lens of the law of restrictive covenants, would

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31. Judge Flaum of the Court of Appeals for the Seventh Circuit has acknowledged this, observing that “NCAA member colleges are the purchasers of labor in this market, and the players are the suppliers. The players agree to compete in . . . games sponsored by the colleges, games that typically garner the colleges a profit, in exchange for tuition, room, board and other benefits.” *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1095 (7th Cir. 1992) (Flaum, J., dissenting). Judge Flaum, however, seems to be alone in his acknowledgement.

32. The NCAA Division I Constitution defines amateurism as follows:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

NCAA CONST., *supra* note 5, at art. 2.9.

33. *Banks*, 977 F.2d at 1099 (Flaum, J., dissenting).

withstand judicial scrutiny. It is our contention that the anti-transfer rules could not be upheld, given that they are illegal, overly restrictive covenants not to compete.

## II. AN UNSUCCESSFUL CHALLENGE TO THE PAC-10 CONFERENCE'S ANTI-TRANSFER SCHEME - *TANAKA V. UNIVERSITY OF SOUTHERN CALIFORNIA*<sup>34</sup>

Rhiannon Tanaka was a very accomplished high school soccer player.<sup>35</sup> Many college coaches agreed.<sup>36</sup> A number of Division I universities heavily recruited Tanaka, including the University of Southern California ("USC"), a Pacific-10 ("Pac-10") conference member.<sup>37</sup> After meeting with various USC athletic officials, Tanaka signed a National Letter of Intent to enroll at USC as a high school senior.<sup>38</sup> Before signing the Letter of Intent, Tanaka had asked USC officials about the anti-transfer rules and was told that she would be free to transfer from USC if she were unhappy after her freshman year.<sup>39</sup>

Tanaka attended USC during the 1994-1995 academic year and found herself entirely dissatisfied with both the soccer program and the quality of the USC education.<sup>40</sup> In particular, Tanaka believed that athletes were steered to "sham" courses of little academic value.<sup>41</sup>

In the spring of 1995, Tanaka decided to transfer to the University of California at Los Angeles (UCLA), another Pac-10 school.<sup>42</sup> She was impressed by the UCLA soccer program and wanted to stay in the Los Angeles area.<sup>43</sup>

At this point, USC stepped in to oppose the transfer under the anti-transfer rule of the Pac-10.<sup>44</sup> The rule provided that:

[e]ach institution, before it permits a student who has transferred directly or indirectly from, or practiced at, another Pacific-10 member institution to compete in intercollegiate athletics, shall require the student to fulfill a residence requirement of two full academic years . . . and shall charge the

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34. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001).

35. *See id.* at 1061.

36. *See id.*

37. *Id.* Pac-10 is an association comprised of ten universities formed "for establishing an athletic program to be participated in by the members." *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1317 (9th Cir. 1996).

38. *Tanaka*, 252 F.3d at 1061.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Tanaka*, 252 F.3d at 1061.

43. *Id.*

44. *Id.*

student with two years of eligibility in all Pacific-10 sports, and during the period of ineligibility shall not offer, provide, or arrange directly or indirectly any earned or unearned athletically related financial aid.<sup>45</sup>

USC took the position that Tanaka could not play intercollegiate soccer her first year at UCLA and that she must forfeit a year of eligibility.<sup>46</sup> USC also maintained that during Tanaka's first semester at UCLA she was ineligible for financial aid tied to athletics.<sup>47</sup>

Tanaka challenged the imposition of these sanctions, suing USC in federal court on both a state law contract claim and a federal antitrust claim under the Clayton Act.<sup>48</sup> Specifically, Tanaka alleged that USC had violated Sherman Act, 15 U.S.C. § 1.<sup>49</sup> Tanaka averred that the imposition of the penalties amounted to retaliation for publicly raising the issue of academic fraud at USC.<sup>50</sup> Noting in her complaint that she was "the *only* transferring athlete who had the sanctions imposed on her," Tanaka emphasized that "[i]n all other instances where student-athletes transferred from USC, Pacific-10 penalties had not been used."<sup>51</sup>

The District Court for the Central District of California dismissed the complaint with prejudice.<sup>52</sup> It held that the Pac-10 anti-transfer rule was not susceptible to attack under the Sherman Act because the rule was effectively "non-commercial."<sup>53</sup> The district court noted further that even if the Sherman Act applied, Tanaka's claim would fail because the anti-transfer rule would withstand the "rule of reason" analysis under the Sherman Act.<sup>54</sup> Having dismissed the federal claim, the district court did not employ its supplemental jurisdiction over the state law claim.<sup>55</sup>

On appeal, the Court of Appeals for the Ninth Circuit affirmed, but in so doing, clearly left the door open for a better-reasoned attack on the NCAA's anti-transfer rules.<sup>56</sup> The court noted that USC had applied the Pac-10 anti-transfer rule, not the NCAA's anti-transfer rule, to Tanaka.<sup>57</sup>

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45. *Id.* (quoting Pac-10 Rule C 8-3-b).

46. *Tanaka*, 252 F.3d at 1061-62.

47. *See id.* at 1062.

48. *Id.*

49. *Id.*

50. Prior to suing USC in federal court, Tanaka had first filed a fraud action in state court that was unsuccessful. *Tanaka*, 252 F.3d at 1062.

51. *Id.* at 1062 (emphasis in original).

52. *Id.* Notably, the district court initially dismissed Tanaka's complaint with leave to amend in August 1999. *Id.* The court dismissed Tanaka's amended complaint in November 1999, which she then appealed to the Court of Appeals for the Ninth Circuit. *Id.*

53. *Tanaka*, 252 F.3d at 1062.

54. *Id.*

55. *Id.*

56. *See id.* at 1063-65.

57. *Tanaka*, 252 F.3d at 1065 n.3. For our purposes, it is important to note that Tanaka's case

Moreover, the court noted that Tanaka undermined any argument that the Pac-10 transfer rule had the requisite “significant anticompetitive effect within a relative market” to be actionable under the Clayton Act.<sup>58</sup>

By characterizing her case as an “isolated act of retaliation”<sup>59</sup> (remember that Tanaka claimed she was the “only one” against whom the transfer sanctions were applied), Tanaka unwittingly undid her antitrust claim.<sup>60</sup> Furthermore, Tanaka failed entirely to properly define either a relevant geographical market or a relevant product market.<sup>61</sup> Additionally, Tanaka’s “strictly personal preference to remain in Los Angeles” did nothing to buttress her antitrust claim – antitrust laws, after all, “were enacted for ‘the protection of competition, not competitors.’”<sup>62</sup> As the court concluded, “Tanaka simply has no antitrust cause of action. . . .”<sup>63</sup>

Antitrust claims typically turn on the ability of the plaintiff to demonstrate significant anti-competitive effects in relative markets.<sup>64</sup> By contrast, the focus of the state law jurisprudence strictly construing covenants not to compete is to protect the individual from overly burdensome restrictions.<sup>65</sup> While the court of appeals held that Tanaka’s antitrust claim failed,<sup>66</sup> the court never addressed her state law contract claim.<sup>67</sup> Moreover, Tanaka did not base her claim on a covenant not to

challenged the intra-conference transfer rule of the Pac-10. *See id.* at 1062. The court strongly implied that its holding did not reach beyond the Pac-10’s transfer rule, and thus declined to comment on the similar NCAA transfer regulations. *Id.* at 1065.

58. *Id.* at 1064-65.

59. *Id.* at 1064.

60. *See id.* at 1064.

61. *Tanaka*, 252 F.3d at 1063.

62. *Id.* at 1063-64 (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)).

63. *Id.* at 1065.

64. *Id.* at 1063; *see also Banks*, 977 F.2d at 1087-88.

65. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 674 (1960).

66. Courts have indicated that claims seeking relief from eligibility rules will not succeed if based on antitrust principles. *See, e.g., Banks*, 977 F.2d at 1089-94 (noting that plaintiff failed to allege an “anti-competitive effect on a relevant market”). *Id.* at 1093. Facially, the *Banks* decision seemingly left the door open to better drafted antitrust claims: “[w]hile *Banks* might possibly have been able to allege an anti-competitive impact on a relevant market through a more carefully drafted complaint or an amendment to his complaint, he failed to do so. It is not for us, as appellate judges, to re-structure his complaint for him.” *Id.* at 1094. Yet, given the analysis of the court, the spirit of *Banks* suggests that even if presented in a properly drafted complaint, an attack based on anti-trust principles would fail. *See id.*

67. *Tanaka*, 252 F.3d at 1065 n.4. The *Tanaka* court observed that:

[t]he district court did not abuse its discretion in dismissing Tanaka’s state breach of contract claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3), which provides that “district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . (3) the district court has dismissed all claims over which it has original jurisdiction.”

*Id.* (quoting 28 U.S.C. § 1367 (c)(3)).

compete theory.<sup>68</sup> Thus, the *Tanaka* court did not foreclose or frustrate contract-based challenges to the NCAA anti-transfer rule. Courts would likely be receptive, in the right case, to a claim brought by an aggrieved athlete alleging that the NCAA anti-transfer rule operates as an illegally restrictive covenant not to compete.<sup>69</sup>

### III. THE COMMON LAW CONCERNING COVENANTS NOT TO COMPETE

“The common law’s policy against restraint of trade is one of its oldest and best established.”<sup>70</sup> Though restrictive covenants are primarily a creature of state law, and thus vary somewhat from state to state, the judicial principles governing this area of the law are relatively well established.<sup>71</sup> These contracts usually arise as a part of an employment contract and are designed to limit the ability of an employee to compete against the employer in the event that the employment is terminated.<sup>72</sup>

Generally, a promise is unenforceable on the grounds of public policy if it unreasonably restrains trade.<sup>73</sup> A promise is in restraint of trade if its performance limits competition in any business or restricts a person in the exercise of gainful occupation.<sup>74</sup> Such restraints of trade are unreasonable if the restraint is greater than is reasonably necessary to protect the legitimate business interest of the party seeking enforcement of the covenant.<sup>75</sup> Further, even if protecting a legitimate interest, if the need for protection is outweighed by the hardship to the employee, then the restraint is unreasonably injurious to the public interest.<sup>76</sup> This rule has been boiled down to a general rule of thumb adopted by the majority of jurisdictions in the United States: a restraint of trade “is reasonable only if it (1) is no greater than is required for the protection of the employer, (2)

68. See *Tanaka*, 252 F.3d at 1062 (noting that the complaint set forth a breach of contract claim and a claim under the Clayton Act).

69. *Id.* at 1065 n.4.

70. RESTATEMENT (SECOND) OF CONTRACTS: RESTRAINT OF TRADE introductory note (2004) [hereinafter RESTATEMENT].

71. Restrictive covenant jurisprudence has traditionally grown from state common law. However, many states have enacted state constitutional or statutory provisions, which codify common law principles regarding restraint of trade. See, e.g., GA. CODE ANN. § 13-8-2.1 (2004); WIS. STAT. § 103.465 (2002).

72. See generally *Alliance Metals, Inc. of Atlanta v. Hinely Indus., Inc.*, 222 F.3d 895, 901 (11th Cir. 2000) (noting that the “language of the non-competition provision demonstrates that Alliance Atlanta bargained for a commitment from Hinely that he would not start, participate in, or assist any competitive enterprise for two years after his departure from Alliance Atlanta”); see also RESTATEMENT, *supra* note 70, at § 186(2).

73. RESTATEMENT, *supra* note 70, at § 187.

74. *Id.* at § 186(2).

75. *Id.* at § 188 cmt. a.

76. *Id.*

does not impose undue hardship on the employee, and (3) is not injurious to the public.”<sup>77</sup>

Courts traditionally look with disfavor on restrictive covenants, and such agreements are usually construed in favor of the party against whom enforcement is sought.<sup>78</sup> An analysis of the terms of the restraint usually will not begin unless the party seeking enforcement of the covenant meets a threshold question of whether there is a legitimate business interest the protection of which makes enforcement of the agreement necessary.<sup>79</sup> The burden of positively proving a need for protection is on the party seeking to enforce the covenant.<sup>80</sup>

Thus, the threshold requirement of any restrictive covenant is the existence of a legitimate protectible business interest on the part of the party seeking enforcement of the contract.<sup>81</sup> Such an interest usually rises out of concern about the unfairness of allowing the employee to compete against his or her former employer. An important factor in this assessment is whether the employee possesses special skills or knowledge that would make competition unfair. The Supreme Court of Wisconsin has defined this test as determining whether the competition threatened by the employee is beyond that “a stranger could give.”<sup>82</sup> The Court added that additional factors such as skill or special relationship with a specific client base, which would render the restrictive covenant reasonably necessary for the protection of the employer’s business, should also be present.<sup>83</sup> If the competition is greater than that which a stranger could give, there is a

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77. Blake, *supra* note 65, at 648-49.

78. *E.g.*, Hopper v. All Pet Animal Clinic Inc., 861 P.2d 531, 539 (Wyo. 1993) (citing Commercial Bankers Life Ins. Co. of Am. v. Smith, 516 N.E.2d 110 (Ind. Ct. App. 1987)) (noting that “[t]he traditional disfavor of such restraints means covenants not to compete are construed against the party seeking to enforce them”).

79. *E.g.*, Lakeside Oil Co. v. Slutsky, 98 N.W.2d 415, 419 (Wis. 1959) (noting that “the first question to be determined under the rule is whether there is a need for any restriction of the activities of the defendant for the protection of the plaintiff . . . [t]here must be some additional special facts and circumstances which render the restrictive covenant reasonably necessary for the protection of the employer’s business”). *Accord* Heyde Cos., Inc. v. Dove Healthcare, LLC, 654 N.W.2d 830, 835 (Wis. 2002) (citing *Lakeside Oil Co.*, 98 N.W.2d at 419) (recognizing that the first element of the “five-factor analysis” used to ascertain whether a restrictive covenant is enforceable is whether the restraint is “necessary to protect the employer”). *C.f.* Vt. Elec. Supply Co., Inc. v. Andrus, 315 A.2d 456, 458 (Vt. 1974) (noting that under Vermont law “enforcement will be ordered unless the agreement is found to be contrary to public policy, unnecessary for protection of the employer, or unnecessarily restrictive of the rights of the employee, with due regard being given to the subject matter of the contract and the circumstances and conditions under which it is to be performed”).

80. *See generally* Heyde, 654 N.W.2d at 835 (noting that restrictive covenants are to be “construed in favor of the employee”).

81. RESTATEMENT, *supra* note 70, at § 187 cmt. b.

82. *Lakeside Oil Co.*, 98 N.W.2d at 419.

83. *Id.*

protectible business interest, and the threshold is met. The analysis then would proceed to the reasonableness of the specific terms of the covenant not to compete, given all the circumstances. This structure is set out by the Wisconsin courts is representative of many states.<sup>84</sup>

Once this threshold has been met, the agreement is subjected to a test of reasonableness.<sup>85</sup> The court engages in a balancing test, weighing the employer's need for protection from unfair competition against the economic interests of the employee, coupled with the public policy interest in favor of open competition in a free market economic system.<sup>86</sup> The competing principles of the freedom to work and the freedom to contract are thus at odds when courts test the enforceability of restrictive covenants.<sup>87</sup> A restraint of trade will generally be deemed unreasonable if, absent a statutory authorization or dominant social or economic justification, the covenant "is greater than required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted."<sup>88</sup>

Despite variations from jurisdiction to jurisdiction, most courts typically weigh three factors when determining the enforceability of a covenant not to compete.<sup>89</sup> These fairly universal considerations take into account the geographical reach of the restriction, the duration of the restriction, and the extent to which the restriction limits the activities of the employee.<sup>90</sup> The test of the reasonableness of a restrictive covenant turns on a court's view of these factors.<sup>91</sup>

A covenant not to compete must be reasonable with regard to its geographical reach.<sup>92</sup> If it covers a geographical area more extensive than necessary to protect the former employer, it is unreasonable.<sup>93</sup> The aim of the restriction is to prevent competition that would cause substantial harm

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84. The Wisconsin rule is representative of the Restatement rule. Indeed, most jurisdictions look first to a protectible business interest, including New York, Minnesota, Alaska, Texas, California, New Jersey and Illinois. See, e.g., *Wausau Med. Ctr. v. Asplund*, 182 Wis. 2d 274, 283 (Ct. App. 1994); *Reed, Rohberts Assoc. v. Strauman*, 40 N.Y.2d 303 (1976); *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998); *Metcalf Inv. v. Garrison*, 919 P.2d 1356, 1362 (Alaska 1996); *DeSantos v. Wachenhut Corp.*, 793 S.W.2d 670, 683 (Tex. 1990); *Monogram Indus., Inc. v. Sar Indus., Inc.*, 64 Cal. App. 3d 692, 698 (1976); *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 32-3 (1971); *Hydroaire, Inc. v. Sager*, 98 Ill. App. 3d 761, 764 (1981).

85. See RESTATEMENT, *supra* note 70, at § 188 cmt. a.

86. *Hopper v. All Pet Animal Clinic Inc.*, 861 P.2d 531, 539 (Wyo. 1993).

87. *Id.*

88. *Hansen v. Edwards*, 426 P.2d 792, 793 (Nev. 1967); see RESTATEMENT, *supra* note 70, at § 186 cmt. a.

89. *Blake*, *supra* note 65, at 675-81.

90. *Id.*

91. *Id.*

92. *Id.* at 675-78.

93. RESTATEMENT, *supra* note 70, at § 188 cmt. d.



to the employer.<sup>94</sup> A restriction that has a nationwide reach, for example, might be broader than necessary.<sup>95</sup> When determining the reasonableness of the geographical restrictions of a restrictive covenant, some courts look at the nature of the competition in a particular geographical area drawing a distinction between direct and indirect competition.<sup>96</sup> The area in which the employee principally operates is taken into consideration.<sup>97</sup>

Some courts would consider restrictions that cover an area where the employer does not conduct business broader than necessary for the protection of the employer.<sup>98</sup> The District Court for the Southern District of Indiana and the Court of Appeals for the Fifth Circuit are two such courts. In *Ridgefield Park Transp. v. Uhl*, the district court examined a restriction that was nationwide and distinguished what the court called "indirect" from "direct" competition.<sup>99</sup> The court defined "direct" competition as that which takes place in the employer's traditional area of operation, while "indirect" competition is competition outside of that area.<sup>100</sup> The court held that a nationwide restriction is overly broad when the competition with the former employer is indirect.<sup>101</sup> In similar fashion, the Fifth Circuit Court of Appeals held that the "nominal" threat of direct competition to a business would not support a nationwide restriction on competition, and that the mere possibility of direct competition across the nation does not create a protectible interest nationwide.<sup>102</sup>

If geographic restrictions are more extensive than necessary to protect the interests of the former employer, the restriction is too broad and unenforceable.<sup>103</sup> Likewise, if the restraint lasts longer than is required, in light of the interests of the employer, the restraint is unreasonable.<sup>104</sup>

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94. Blake, *supra* note 65, at 674-76.

95. *Id.* at 675-76.

96. *Id.* at 675.

97. *Id.*

98. Blake, *supra* note 65, at 675-76.

99. *Ridgefield Park Transp. v. Uhl*, 803 F. Supp. 1467, 1470 (S.D. Ind. 1992).

100. *Id.*

101. *Id.* In *Ridgefield*, a trucking company sought to enforce a restrictive covenant that would restrict a buyer of a portion of the business from competing directly or indirectly with the parent trucking company anywhere in the United States. *Id.* The seller, while occasionally hauling freight across the United States, mainly confined its business activities to a handful of clients in the Indianapolis region. *See id.*

102. *Tandy Brands, Inc. v. Harper*, 760 F.2d 648, 653 (5th Cir. 1985). In that case, a mail-order retailer, which advertised in publications and sold goods across the US and Canada, sought to prevent a rival who had purchased a portion of the plaintiffs' business from competing with the seller in a similar nationwide mail-order business. *Id.* at 650. The court held that the advertisement of business in nationwide publications does not create a protectible interest in every city in the U.S. and Canada. *Id.* at 653.

103. RESTATEMENT, *supra* note 70, at § 188 cmt d.

104. *Id.*

Courts seldom criticize restraints of six months to a year on the grounds of duration, and even longer restraints are sometimes enforced.<sup>105</sup>

While jurisdictions have yet to agree on a uniform standard for the reasonableness of durational requirements in restrictive covenants, some jurisdictions have expressly defined reasonable with regard to temporal restrictions. The Texas Court of Civil Appeals explains the standard very succinctly – “[t]wo to five years has repeatedly been held a reasonable time in a non-competition agreement.”<sup>106</sup> The United States District Court for the Western District of Arkansas is even less charitable. The court stated that, under Arkansas law, “the cases previously cited strongly indicate that covenants contained in employment contracts which restrict competition for more than two years are highly suspect and are generally void as against public policy.”<sup>107</sup>

Finally, restrictions typically articulate the type of activities the former employee may not conduct.<sup>108</sup> Generally, a restraint may not be so “broad as to violate the public policy against unduly limiting. . . [the employee’s] skill, labor and talent.”<sup>109</sup> The covenant not to compete “will not be enforced if, under all the circumstances, the restraining covenant is unduly restrictive of the employee’s freedom.”<sup>110</sup>

In a gestalt approach, restraints of activity affect the reasonableness of both the spatial and temporal restrictions.<sup>111</sup> If the activity to be restrained is highly specialized, of a unique nature, or otherwise sensitive in a business context, a restraint may be more extensive in spatial and geographical terms.<sup>112</sup> Conversely, restraints of general or non-specialized activity must be narrowly tailored in terms of time and place.<sup>113</sup> Thus, the courts have established a sliding scale: the more narrowly the restrictions on activities are defined, the broader the limitations may be in terms of time and space.<sup>114</sup> Only in rare cases will restrictions in the broadest terms be reasonable.

Furthermore, courts weigh other factors as well when determining the reasonableness of restrictions on activities.<sup>115</sup> One such factor is whether

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105. Blake, *supra* note 65, at 677.

106. *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App. 1981).

107. *Stubblefield v. Siloam Springs Newspapers, Inc.*, 590 F. Supp. 1032, 1035 (W.D. Ark. 1984).

108. Blake, *supra* note 65, at 677.

109. 6 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 13:5 (4th ed. 2004).

110. Blake, *supra* note 65, at 674.

111. *Id.* at 675.

112. *Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A Corp.*, 369 N.E.2d 4, 6 (N.Y. 1977).

113. *Id.*

114. *Id.*

115. Blake, *supra* note 65, at 676.

the particular activity the employer wishes to restrict is based upon an employee's natural talent and ability.<sup>116</sup> A restriction on such an activity would be strictly construed.<sup>117</sup> On the other hand, if the employer has spent considerable time and money training the employee, a restriction on such an activity would be liberally construed.<sup>118</sup> Courts appear more willing to restrict the activities of an employee when these skills and abilities were conveyed to the employee through the former employer's expense and effort.<sup>119</sup> Likewise, courts been less willing to restrict the activities of individuals who exhibit unique or special talents.<sup>120</sup> Many jurisdictions have shown reluctance to restrict an employee's use of his own natural talents or skills, which are not the result of investment or effort on the part of the former employer.<sup>121</sup> Interestingly, many courts are unwilling to enforce restrictions against activities of an employee where the talents and abilities of the employee are considered ordinary, or less than ordinary, and thus easily replaced.<sup>122</sup>

Courts also weigh the hardship an employee would suffer if restrictions on activities were enforced.<sup>123</sup> Covenants that are overly burdensome on the employee are usually not enforced.<sup>124</sup> An important factor is the ability of the employee to pursue a living and the economic harm the employee would suffer as a result of the enforcement of the covenant.<sup>125</sup> As the Court of Appeals of New York stated, "[u]ndoubtedly judicial disfavor of these covenants is provoked by 'powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood.'" <sup>126</sup> Another court states "[r]estrictive covenants that tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored and are strictly construed against the employer."<sup>127</sup> As always, the hardship on the employee is weighed against the harm that the employer might suffer. For example, as Corbin stated, "[b]efore granting an injunction preventing an employee

116. *Id.*

117. *Id.*

118. *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975).

119. *See New River Media Group, Inc. v. Knighton*, 429 S.E.2d 25, 26-27 (Va. 1993); *Norlund v. Faust*, 675 N.E.2d 1142, 1154 (Ind. Ct. App. 1997); *T.K. Communications, Inc. v. Herman*, 505 So. 2d 484, 486 (Fla. Dist. Ct. App. 1987).

120. *See Cullman Broad. Co. v. Bosley*, 373 So. 2d 830, 835 (Ala. 1979).

121. *Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 256 N.E.2d 304, 307 (Mass. 1970); *see also W. Group Broad., Ltd. v. Bell*, 942 S.W.2d 934, 938-39 (Mo. Ct. App. 1997).

122. *Cullman*, 373 So. 2d at 835.

123. *Blake*, *supra* note 65, at 676-77.

124. *Id.*

125. *Id.*

126. *Reed*, 353 N.E.2d at 593.

127. *Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1989).

from earning his living in his customary trade or employment, the court should make sure, not only that he contracted to forbear and is guilty of a breach, but also that the former employer is suffering substantial harm. . . ."<sup>128</sup>

Moreover, some courts describe additional considerations. For example, the Supreme Court of Nebraska considers the degree of inequality in bargaining power between the two parties, the current employment conditions under which the employee works, and the necessity of the employee changing his calling or residence.<sup>129</sup>

Judicial treatment of restrictive covenants has evolved over time. Historically, courts flatly outlawed restrictive covenants at common law.<sup>130</sup> Courts viewed such agreements as overly restrictive of trade and against public policy.<sup>131</sup> Under this view, the particular terms of the restrictive covenant did not matter greatly because the essence of the covenant itself sealed its fate.<sup>132</sup> However, modern case law has signaled a departure from the old rule of holding any restrictive covenant illegal and recognizes that such agreements may be enforceable under certain circumstances.<sup>133</sup>

Restrictive covenant jurisprudence has evolved to allow enforcement of covenants that are reasonable in all of its terms.<sup>134</sup> Still, unreasonableness in one term could void the entire covenant.<sup>135</sup> Formerly, the rule used to be "all or nothing."<sup>136</sup> Although this rule is still in effect in some jurisdictions today,<sup>137</sup> it has led to results of questionable equity, and the current trend is toward the judicial modification of unreasonable terms in the covenant.<sup>138</sup>

Through judicial modification, the court essentially re-writes the contract to render it reasonable, and thus enforceable, in its terms.<sup>139</sup> The courts have two methods of judicial modification.<sup>140</sup> The first, and older of the two, is commonly known as the "blue pencil rule."<sup>141</sup> Under this doctrine, the court will enforce a covenant not to compete if the words that

128. CORBIN ON CONTRACTS § 1394 (1st ed. 1962).

129. *Johnson & Co. v. Salmen*, 317 N.W.2d 900, 904 (Neb. 1982).

130. *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711).

131. WILLISTON & LORD, *supra* note 109, at § 13:3.

132. *Id.*

133. *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970).

134. WILLISTON & LORD, *supra* note 109, at § 13:4.

135. *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 374 (Iowa 1971).

136. *Id.* at 371.

137. *Schultz & Assoc. of the Southeast, Inc. v. Broniec*, 236 S.E.2d 265, 269 (Ga. 1977).

138. *Ehlers*, 188 N.W.2d at 371.

139. *Blake*, *supra* note 65, at 681.

140. *Ehlers*, 188 N.W.2d at 371-72.

141. This term comes out of a line of English cases, beginning in the Eighteenth Century. *Blake supra*, note 65, at 681 (citing *Chesman v. Nainby*, 93 Eng. Rep. 819 (K.B. 1726)).

make the contract unenforceable can be mechanically stricken and still leave a grammatically meaningful restriction.<sup>142</sup> However, the “blue pencil rule,” is contrary to the weight of recent authority.<sup>143</sup>

The second, and currently the more commonly accepted method of judicial modification, is the “rule of reason.”<sup>144</sup> This method is considered to be a more efficient method of modification, and has been adopted by many courts today.<sup>145</sup> This doctrine moves away from the mechanical modification of the “blue pencil” rule and allows the court to modify and enforce an unreasonable restriction to a degree the court considers reasonable.<sup>146</sup> Essentially, the court disregards the express provisions of the contract, and substitutes provisions that it considers reasonable. Jurisdictions adopting this rule believe that enforcement of the express provisions, as agreed to by the parties, should be performed whenever possible without injury to the public or injustice to the parties.<sup>147</sup> This method respects the freedom of the parties to contract, while allowing courts to protect public policy where necessary.

#### IV. A HYPOTHETICAL CHALLENGE

For purposes of discussion, let us hypothesize a fact pattern in which a plaintiff, named J.P.,<sup>148</sup> is a basketball player who has been named to

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142. *Ehlers*, 188 N.W.2d at 371.

143. RESTATEMENT, *supra* note 70, at § 184 Reporter’s note.

144. CORBIN ON CONTRACTS at § 1390. *Ehlers*, 188 N.W.2d at 371.

145. *Id.* at § 1390.

146. *See id.* at § 1390.

147. *Ehlers*, 188 N.W.2d at 368.

148. The hypothetical J.P. is based very loosely upon the plight of Jason Parker, who played basketball at the University of Tulsa from 2000 through 2004. Jason’s father Johnny is a friend and colleague of Professor Yasser at the University of Tulsa College of Law. Jason was a high school star at Memorial High School in Tulsa, where he also excelled academically. He ultimately decided to stay home and signed a National Letter of Intent with Tulsa in the spring of 2000, when current Kansas head coach Bill Self was the head coach. Jason never played for Bill Self. Self left Tulsa to accept the head coaching position at Illinois shortly after Jason signed. As a freshman, Jason played for Buzz Peterson, who came to Tulsa from Appalachian State. After winning the National Invitational Tournament in his first year, Peterson left to become the head basketball coach at Tennessee. Tulsa then hired John Phillips, who is still head coach at Tulsa as of this writing.

Interestingly enough, had Jason decided to transfer in the wake of Self’s departure, he would have fallen victim to the most draconian of anti-transfer rules – one which mandates the loss of two years of eligibility for an athlete who signs a National Letter of Intent but never enrolls at the school to which he commits. Paragraph 4 of the National Letter of Intent spells out the fact that athletes “sign” to play for a school, not a coach. While the National Letter of Intent program is set out, administered and enforced by the Collegiate Commissioners Association, an entity independent from the NCAA, the NCAA recognizes Letters of Intent. A departing coach therefore provides no license to transfer. One final note – Jason had a stellar playing career at Tulsa, and graduated with high honors. Jason was an academic All-American, and a Western Athletic Conference first team selection. Jason is now playing professionally, having decided to put on hold his decision to attend

several All-State teams in his home state of Oklahoma during his senior year of high school. J.P. is a good student, having qualified to receive an athletic scholarship based on his high school grades and test scores.<sup>149</sup> J.P. was heavily recruited out of high school, and signed with Sunbelt University, a mid-level NCAA Division I basketball program with a recent history of having made it to the NCAA national championship tournament – “the Dance.”<sup>150</sup> Sunbelt is located in Heartland, Arizona, and is a member of the Southwest Conference. Sunbelt is known as a breeding ground for successful coaches, with several former coaches going on to bigger and more prominent schools. One former coach has led his new team to two national NCAA Division I titles. Coaches typically make their mark at Sunbelt, and then leave for greener (more financially lucrative) pastures.<sup>151</sup>

J.P. was recruited and signed by Sunbelt head coach Billy Sales. Within two weeks after signing his National Letter of Intent with Sunbelt, Coach Sales left Sunbelt to take a more lucrative head-coaching job at a “big name” school. While J.P. entertained thoughts of leaving Sunbelt after Sales left, new Sunbelt coach Bip Petersburg convinced J.P. to stay. After red-shirting his freshman year,<sup>152</sup> J.P. had a moderately successful season as a red-shirt freshman, during which J.P. established himself as a solid reserve guard. Following that season, Petersburg left Sunbelt for a

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law school at Vanderbilt.

149. The NCAA would consider J.P. a “qualifier.” A “qualifier” is a high school graduate who has met certain academic qualifications. Such qualifications include having passed a mandated number of credits in core high school subjects such as math, science and English, as well as minimum high school grade point average and standardized test scores. NCAA BYLAWS, *supra* note 6, at art. 14.3.

150. The inspirations for Sunbelt in this hypothetical are schools such as the University of Tulsa of the Western Athletic Conference or Gonzaga of the West Coast Conference.

151. Again, the University of Tulsa serves as an example. Since the early 1980s, Tulsa has had several head coaches move on to more prominent jobs after having success at Tulsa. These include Nolan Richardson and Tubby Smith, who won national titles at Arkansas and Kentucky respectively, as well as Bill Self of Kansas and Buzz Peterson of Tennessee. UNIV. OF TULSA, 2004 UNIV. OF TULSA MENS BASKETBALL MEDIA GUIDE 13 (2003). It should be noted, all information in this footnote was gleaned from interviews with the University of Tulsa Sports Information Director, Don Tomkalski. This information is readily available generally in the 2004 University of Tulsa Men’s Basketball Media Guide, published by the University of Tulsa Office of Media Relations .

152. To “red-shirt” means that a coach may opt not to play an athlete during a given season, for reasons such as to let the player develop further, or because of depth at the player’s position. NCAA BYLAWS, *supra* note 6, at art. 14.2.2.5. The athlete may practice, but may not participate, in any sanctioned games. *Id.* at art. 14.2.2.5, art. 14.2.3.1. To participate in an NCAA sanctioned game would be to “take off the red shirt.” *Id.* at 14.2.3.1. Red-shirting is based on NCAA Bylaw 14.2 and 14.2.1. Bylaw 14.2 deems that an athlete may not participate in more than 4 years of competition, while 14.2.1 allows those 4 seasons to be fulfilled in 5 calendar years, essentially giving an athlete a year “to burn” wearing a red shirt if the coach so desires. *See generally id.* at 14.2 (“Eligibility: Academic and General Requirements”).

head-coaching job in a major conference. J.P. again chose to stay when Nate Richards was named head coach at Sunbelt. After playing under Richards for a year, J.P. decided to transfer to Catholic University.

Catholic is a private Division I institution located in Baton Rouge, Louisiana. While Catholic is nationally recognized for the excellence of its academic programs, it is near the bottom of the ladder in terms of Division I basketball competitiveness. At Catholic, J.P. reasoned, he could still play Division I basketball but would receive a much more prestigious undergraduate degree. J.P. is a practicing Catholic as well, and religious considerations played a large role in his desire to transfer to Catholic. J.P. is likely to be the best player on the roster at Catholic. Catholic has never in its history played a basketball game against Sunbelt or any other teams in the Southwest Conference, nor has it ever made it to "the Dance."

Unfortunately for J.P., Catholic is only interested in him if he can come to Baton Rouge with two years of eligibility remaining. Additionally, because of his lack of success at Catholic, head coach Edward LeBeau needs J.P. to make an immediate impact in order to save his job. Because he red-shirted his freshman year and then played for two years at Sunbelt, J.P. would be able to compete for Catholic for only one season. Catholic would rather "get more bang for [its] buck" and use the scholarship J.P. would have received on a promising player who could make an immediate and longer-term impact.<sup>153</sup> In short, the residency requirement of the transfer rules make J.P. unattractive in the eyes of Catholic, and despite compelling academic, athletic, and religious reasons, J.P. will be unable to transfer to Catholic unless he has two years of eligibility remaining.

### A. *Protectible Interest*

As previously noted, the threshold requirement to justify a restrictive covenant is the existence of a legitimate business interest on the part of the party seeking enforcement of the contract.<sup>154</sup> In our hypothetical, the question is whether it would be unfair to allow J.P. to compete against Sunbelt. The Wisconsin test would appear to indicate that J.P. indeed poses a competitive threat beyond that "which a stranger could give."<sup>155</sup> While there is a large pool of athletic talent, the Division I college athlete possesses skills that are not shared by the community at large.

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153. Additionally, J.P. could not receive any athletically based financial aid from Catholic without a release from Sunbelt. The granting of a release is entirely arbitrary and at the discretion of the athletic director or coach of the previous institution. See NCAA BYLAWS, *supra* note 6, at art. 13.1.1.3.

154. *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 419 (Wis. 1959).

155. *Id.*

Universities do not recruit just anyone to their athletic programs – they recruit the most skilled athlete they can persuade to come to their school. It is perhaps self-evident that an athlete capable of performing at the Division I level poses a threat of competition to the university sufficient to satisfy the threshold inquiry.

Having met this threshold, it must now be shown that the specific provisions of the covenant restricting J.P. in terms of time, geography, and activity are reasonable. Many courts hold that the provisions of the covenant are to be strictly construed against the employer.<sup>156</sup> While the threshold requirement is a low bar, the terms of the agreement itself and the reasonableness of those terms is a substantially more difficult hurdle to jump.

### *B. Restrictions on Geography*

The transfer rules restrict the transferring athlete in geographical terms by restricting athletes from transferring to any Division I school in the nation without satisfying the residency requirement.<sup>157</sup> In J.P.'s case, the rule requires J.P. to "complete one full academic year of residence . . . before being eligible to compete for . . . the member institution . . ." <sup>158</sup> Because the NCAA has set forth no express geographical limitation, the effect is that a transferring athlete is restricted from competing at the Division I level anywhere in the US without sitting out one year. J.P. would be subject to a nationwide restriction on his ability to participate in Division I basketball. Moreover, without a release, J.P. could not receive financial aid during the year in which he establishes residency.

In theory, J.P. would be competing with Sunbelt if he transfers to Catholic, since each Division I school is "in the hunt" for a national championship. In this sense, J.P. would be competing with Sunbelt if he were to transfer to Catholic. On the other hand, members of the same conferences compete with the conference rivals directly. Additionally, schools, with an eye on travel budgets, typically play non-conference opponents within the same geographical region.<sup>159</sup> In such circumstances, the competition would provide yet another example of direct competition.

The competition between Catholic and Sunbelt, however, would be regarded as indirect. Absent extraordinary circumstances, J.P. is unlikely to play in a game against Sunbelt. There is only a remote chance of direct

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156. *Simmons v. Miller*, 544 S.E.2d 666, 678 (Va. 2001); *Freiberger v. J-U-B Eng'rs, Inc.*, No. 30104, 2005 WL 674207, at \*2 (Idaho Mar. 24, 2005).

157. NCAA BYLAWS, *supra* note 6, at art. 14.5.1.

158. *Id.* at art. 14.5.

159. Telephone Interview with Don Tomkalski, Athletic Director, University of Tulsa (Aug. 17, 2004).



competition with his former school. Catholic and Sunbelt University are not in the same conference, and are not in the same geographic region of the country. Indeed, the two schools have never met on the basketball court. Only in the unlikely event of a tournament pairing would J.P. meet his former team on the basketball court. J.P.'s transfer poses a minimal opportunity for direct competition with Sunbelt.

As indicated above, the question of indirect nationwide competition has been addressed by the United States District Court for the Southern District of Indiana, which held that that where the competition with the former employer is indirect, a nationwide restriction is overly broad.<sup>160</sup> The question of the remote chance of J.P. meeting his former team on the basketball court in direct competition has likewise been answered by the Fifth Circuit, in its holding that the "nominal" threat of direct competition to a business would not support a nationwide restriction on competition. The mere possibility of direct competition across the nation would not support a nationwide geographical restriction.<sup>161</sup>

Under established principles, Division I universities appear to be overreaching in geographical restrictions on athletes who wish to transfer. While each school is theoretically in competition with one another for the same national championship, the likelihood of two schools playing each other directly, absent geographical or conference factors, is unlikely. In fact, the chances are much greater that a given school *will not* compete directly against another school outside of its conference or region. There are simply too many programs nationwide to allow for each team to compete directly with one another.<sup>162</sup> Applying the indirect/direct competition distinction of the district court, as well as the Fifth Circuit's ruling on remoteness of possibility of direct competition, it is clear that the anti-transfer rule and its nationwide geographical restriction would not withstand judicial scrutiny if viewed as a restrictive covenant.

### C. Restrictions on Time

As previously noted, the anti-transfer rule requires an athlete like J.P., who transfers from one Division I basketball program to another, to satisfy a year of residency before being allowed to compete.<sup>163</sup> In effect, the athlete must sit out a year.<sup>164</sup> In addition, scholarship assistance is not permitted while establishing residency unless a release from the former

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160. *Ridgefield Park Transp. v. Uhl*, 803 F. Supp. 1467, 1470 (S.D. Ind. 1992).

161. *Tandy Brands, Inc. v. Harper*, 760 F.2d 648, 653 (5th Cir. 1985).

162. Approximately 325 schools play Division I basketball. With a few exceptions, the NCAA limits each school to 28 regular season games. NCAA BYLAWS, *supra* note 6, at art. 17.5.5.1.

163. NCAA BYLAWS, *supra* note 6, at art. 14.5.1.

164. *Id.*

school is obtained.<sup>165</sup>

To analyze the durational limitations of the anti-transfer rule as a restrictive covenant, it makes sense to discuss the “lifespan” of a typical college athlete. In general, restrictive covenants in an employment contract restrict former employees from competition for a fraction of that employee’s working life.<sup>166</sup> So, a person who works from age 22 might be expected to enjoy a work life of over 40 years. In tort law, damages for impairment of earning capacity typically make reference to expectations in regard to one’s “work life.” J.P., however, has a much shorter “work life.” The NCAA mandates that an athlete may not engage in more than four seasons of intercollegiate competition in any one sport.<sup>167</sup> In effect, this makes the “work life” of the Division I athlete four years. Additionally, athletes rarely transfer from one school to another without having spent at least one season at the original institution.<sup>168</sup>

Most courts require that restrictive covenants have reasonable durational limits. The Texas court, for example, has expressly stated that two to five years is acceptable.<sup>169</sup> In contrast, Arkansas law, as interpreted by the federal district court, frowns upon restrictions of more than two years.<sup>170</sup> A five-year restriction, the most restrictive approved by either the Texas or the Arkansas courts, still restricts employees from competitive activity for 12.5% of their “work life,” assuming that the employee works for 40 years.

By contrast, the anti-transfer rule, in forcing athletes like J.P. to sit out one year, effectively takes 25% of the athlete’s “working life.”<sup>171</sup> Thus,

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165. *Id.* at 15.01.5.

166. *See generally, e.g.,* Deutsche Post Global Mail, Ltd. v. Conrad, No. 03-2504, 2004 U.S. App. LEXIS 24249, at \*7 (4th Cir. Nov. 19, 2004) (unpublished decision) (stating that restrictive covenants are enforceable under Maryland law only if they are reasonable in their “scope and duration” and they are “no broader than is reasonably necessary to protect [the employers’] legally protected interest”); Tigor Title Ins. Co. v. Cohen, 173 F.3d 63, 69 (2d Cir. 1999) (“whether a restrictive covenant not to compete is enforceable [under New York law] . . . depends in the first place upon whether the covenant is reasonable in time and geographic area”).

167. NCAA BYLAWS, *supra* note 6, at art. 14.2. NCAA mandates that these years of eligibility be completed within five years. *Id.* at art. 14.2.1.

168. The Five-Year Rule provides one year “to waste.” In theory, the extra year provided by the Five-Year Rule could be spent satisfying the residency requirement. However, because many athletes spend their freshman year as a “Red Shirt” at the school from which they wish to transfer, that extra year has been spent. Moreover, as previously noted, an athlete who signs a National Letter of Intent but never attends the school at which he signs loses two years of eligibility. *See infra* note 173.

169. *See, e.g.,* Deutsche Post Global Mail, 2004 U.S. App. LEXIS 24249, at \*7; Cohen, 173 F.3d at 69; *AMF Tuboscope*, 618 S.W.2d at 108.

170. *Stubblefield v. Siloam Springs Newspapers, Inc.*, 590 F. Supp. 1032, 1035 (W.D. Ark. 1984).

171. That is, if a player has four years to play, and must sit out one of those four satisfying a

the anti-transfer rule with its one-year residency requirement works to deprive the transferring athlete of twice what even the Texas court found to be the outer limits of reasonableness. Absent the most extraordinary of circumstances, courts uniformly reject covenants that would restrict an employee from competition for 25% of his working life.<sup>172</sup> Clearly, when Texas and Arkansas law is applied to the anti-transfer rule as a restrictive covenant, the anti-transfer rule fails the test of reasonableness.

#### D. Restriction on Activity

The restrictions on activity in the anti-transfer rule are unique restrictions in the universe of restrictive covenants. The NCAA, through its anti-transfer rules, does not entirely preclude transferring athletes from participating. The anti-transfer rule, as previously noted, affects athletes who transfer from one Division I program to another. Therefore, J.P. would not be prohibited from playing basketball, just not at the Division I level. J.P. would be free to compete at the Division I-AA level or lower. J.P. can play only by agreeing to "play down" or perhaps playing at a school that is not a member of the NCAA.<sup>173</sup> This difference, however, would not immunize the anti-transfer rule from attack on restrictive covenant grounds. Rather, it appears to render the anti-transfer rule more vulnerable based on public policy considerations.

The anti-transfer rule would be repugnant to public policy as overly burdensome. First, the rule restrains J.P. from using his natural skills and talents to his own best advantage. The policy underlying the judicial treatment of restrictive covenants is that people should be relatively free to apply their trade.<sup>174</sup> Therefore, restrictions must be narrowly drawn. The anti-transfer rule, in J.P.'s case, operates to significantly restrict his freedom to utilize his talents and skill. Additionally, another policy behind the judicial treatment of restrictive covenants concerns the extent to which the employer can claim credit for developing the skills and ability of the

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residency requirement, he has lost 25% of his "working life" as a college athlete.

172. Interestingly, the district court in *Stubblefield* went on to say that a "ten-year covenant... would obviously be an unreasonable restraint of trade and [would be] void." *Stubblefield*, 590 F. Supp. at 1035. The ten-year restriction rejected by the district court would be slightly less than 25% of the 43 year working life of the average person. See *supra* note 171.

173. See NCAA BYLAWS, *supra* note 6, at art. 14.5. The transfer rule applies only to athletes transferring from one Division I program to another, and athletes transferring to lower NCAA divisions are beyond the reach of the rule. See *id.* at art. 14.5.5.2.10(a). Additionally, athletes who transfer to schools that are not members of the NCAA, such as National Association of Intercollegiate Athletics members, are likewise unaffected by the NCAA transfer rules. See *id.* at art. 14.5.5.2.10(d).

174. *Reed, Roberts Assoc., Inc. v. Strauman*, 353 N.E.2d 590, 593 (N.Y. 1976); see also RESTATEMENT, *supra* note 70, at § 186(2).

person it seeks to restrain. In this connection, Sunbelt cannot be viewed as having done much by way of developing J.P.'s ability sufficient to justify its power to limit J.P. from playing ball at another Division I school. The anti-transfer rule is overly burdensome in restricting J.P. from using his inherent ability and skill. J.P.'s abilities cannot be fairly said to result from Sunbelt's goodwill, investment, or expenditure.

In J.P.'s case, the restriction on the use of his natural athletic ability threatens dual harm. First, J.P. could very well suffer economic harm. Division I is the highest level of amateur collegiate athletics, and therefore receives the most attention from the public, the media, and the professional ranks. Athletes who excel at the highest level of competition have the best chance of being noticed and subsequently playing professionally.<sup>175</sup> Players who excel at a lower level are viewed with suspicion by the professional leagues. Their accomplishments are somewhat tainted because of the "easier" level of competition. Thus, despite J.P.'s obvious ability to excel in Division I men's basketball, he is being pushed out of Division I play by the rules. Restraining J.P.'s ability in this way would provoke "judicial disfavor . . . by 'powerful considerations of public policy, which militate against sanctioning the loss of a man's livelihood.'<sup>176</sup>

Secondly, the consuming public has an interest in viewing high quality intercollegiate athletic competition. A considerable amount of money is spent each year in support of Division I athletic programs. For example, in 1999 CBS signed an eleven year, six billion dollar contract with the NCAA to televise the annual Division I men's basketball championship tournament.<sup>177</sup> The anti-transfer rules force Division I athletes, such as J.P., to play at a lower level of competition. This harms the quality of product put on the field by the schools.<sup>178</sup> The anti-transfer rule operates

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175. According to the National Basketball Association's official website, of American players drafted in the first round of the NBA draft since 2000, 95 of 116 were athletes that attended a Division I school. Of the remaining 21 American players drafted, 2 have come from junior colleges, and 19 have come from the high school ranks. *NBA History, NBA Draft: Complete First Round Results - 2000-2003*, available at [http://www.nba.com/history/draft\\_round1\\_2000s.html](http://www.nba.com/history/draft_round1_2000s.html) (last visited Apr. 6, 2005). Any high school basketball player drafted in the first round is a phenomenal athlete and would have been able to attend a Division I school, assuming that athlete was academically eligible. It is unclear whether the two junior college draftees attended junior college due to academic deficiencies or otherwise.

176. *Reed*, 353 N.E.2d at 593.

177. CNN, *March Money Madness: CBS Sports to Spend \$6 Billion over 11 years for Basketball Tourney* (Nov. 18, 1999), available at <http://money.cnn.com/1999/11/18/news/ncaa/>.

178. A good example of the competitive benefits of allowing the free transfer of athletes is the granting of a transfer waiver for the members of the scandal-stricken Baylor men's basketball team in the fall of 2003. Each of the three transfer students went on to find success at other programs. John Lucas, Jr. transferred to Oklahoma State, where he led the team to a Big XII title, Big XII tournament

also to reduce the number of years an athlete can compete. Because the NCAA is artificially restraining talent, the public interest is implicated. Therefore, “[w]hatever is injurious to the interests of the public is void, on the grounds of public policy.”<sup>179</sup>

These restrictions on activity are therefore illegal, due to public policy considerations of harshness on the employee and damage to the consuming public.<sup>180</sup> Coupling these oppressive activity restrictions with the fact that the geographical restrictions are nationwide, restrict indirect competition, and are of a duration equaling a substantial portion of an athlete’s “working” life, a court might likely conclude that the transfer rules fail the test of reasonableness under well-established restrictive covenant jurisprudence.<sup>181</sup>

### *E. Collateral Considerations*

Finally, there are the “collateral considerations.” These considerations include bargaining power, employment conditions, and the reasons for the employee in changing his calling or residence.<sup>182</sup> In a contractual sense, athletes such as J.P. simply have no bargaining power once they sign with a Division I school and come under the purview of the transfer rule. If the athlete wishes to compete at the Division I level in one of the sports affected by the anti-transfer rule, that athlete simply must acquiesce to the demands of the NCAA. The athlete has no power to negotiate, and is faced with a “take it or leave it” proposition. While the athlete may choose a different school, if that school is a member of the NCAA and participates at the Division I level, the anti-transfer rule is applicable wherever the athlete may go. The only alternative for the athlete is to forgo participation at the Division I level and participate at the Division I-AA or lower level, or at a school that is not a member of the NCAA at all. Clearly, athletes such as J.P. have little bargaining power. To suggest that J.P. could have bargained about the terms of the anti-transfer rules is disingenuous at best.

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championship and Final Four appearance in 2004. UNIV. OF OKLA., 2004 UNIV. OF OKLA. MENS BASKETBALL MEDIA GUIDE 32 (2003). Lawrence Roberts transferred to Mississippi State and was named Southeastern Conference Player of the Year and was named to several All-American teams. MISS. STATE UNIV., 2004 MISS. STATE UNIV. MENS BASKETBALL MEDIA GUIDE 29 (2003). Kenny Taylor transferred to Texas and was a solid contributor off the bench for a team that eventually reached the Sweet 16. UNIV. OF TEX., 2004 UNIV. OF TEX. MENS BASKETBALL MEDIA GUIDE 38 (2003).

179. *Horner v. Graves*, 131 Eng. Rep. 284 (C.P. 1831).

180. *See generally* Blake, *supra* note 65, at 648-49.

181. *See generally id.*

182. *Johnson & Co. v. Salmen*, 317 N.W.2d 900, 904 (Neb. 1982).

Additionally, the NCAA rarely takes into consideration the conditions within the program under which the player participates.<sup>183</sup> The NCAA has granted transfer waivers in extreme circumstances.<sup>184</sup> The NCAA does not grant waivers for athletes in J.P.'s situation, where the coach who did the recruiting leaves the program and takes another job. J.P. never played for the coach with whom he signed, and in the simplest terms, the NCAA does not care. It is not a relevant consideration in the eyes of the NCAA.

The NCAA anti-transfer rule also fails to take into consideration a player's personal reasons for desiring to transfer. J.P. for instance, wishes to transfer in part due to his religious preference of attending a Catholic school. This is not a relevant consideration to the NCAA.

Likewise, the NCAA fails to consider the status of a program or the conditions under which a player is forced to stay at the original institution. For example, if a school is on NCAA-mandated probation, the athlete is forced to languish in the crippled program. Absent an express waiver from the NCAA, the player must satisfy the residency requirement unless the length of the term of probation exceeds the number of years the athlete has left in eligibility.<sup>185</sup> And if a player's scholarship is not renewed because the school has decided the athlete lacks skill, the athlete still must sit out a year upon transfer to another Division I program.<sup>186</sup>

If the NCAA does not normally grant waivers in these situations, it certainly is not likely to grant one for lack of playing time or general dissatisfaction with the program. This rigidity is at cross-purposes with the NCAA's professed concern for both the well being of student athletes and competitive balance. Even if J.P. wants to transfer simply to play more, is it undesirable to let him do so? If J.P. is stuck on the bench at Sunbelt, he is a net athletic loss to the Division I men's basketball landscape. His talent would be unused and wasted. If J.P. and athletes like him were allowed to transfer to other, perhaps weaker programs, the overall competitive balance of Division I basketball would be enhanced. In J.P.'s case, his status as a student-athlete would be enhanced. He has a well thought-out plan to play at a more prestigious university.

In terms of its restrictions on activities, geography, and time, the anti-

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183. See generally NCAA BYLAWS, *supra* note 6, at art. 14 (neither probation for NCAA violations nor the departure of a coach are included in Article 14.5's narrow list of circumstances under which a player may transfer).

184. Again, a good example is the granting of a transfer waiver for the three former Baylor basketball players. See also *supra* note 16.

185. NCAA BYLAWS, *supra* note 6, at art. 14.8.1.2(c).

186. *Id.* at 15.3.3.1. The NCAA has deemed that scholarships are of a one-year duration. *Id.* While the school cannot terminate the scholarship of an athlete in mid-season due to a lack of skill or for any reason other than those falling within a narrow set of exceptions, a school may terminate a scholarship for nearly any reason at the conclusion of a season. See *id.* at 15.3.3.1.

transfer rule as applied to J.P. appears to be unreasonable. The restrictions are overbroad, do not protect the interests of the universities, and threaten unreasonable harm to both the athlete and the consuming public. Therefore, Rule 14.5 of the NCAA Division I bylaws would be void if properly viewed as a restrictive covenant.

#### V. THE WORLD OF BIG TIME INTERCOLLEGIATE ATHLETICS IN THE ERA OF LESS RESTRICTIVE TRANSFERS

We contend that the existing anti-transfer scheme is unreasonably restrictive. So the next question is, what are the consequences of the invalidation of the current anti-transfer rules? We believe that a less restrictive set of anti-transfer rules will have a number of beneficial effects in the world of big-time intercollegiate athletics. In this concluding section, we explore those effects. We also lay out a less restrictive alternative set of transfer rules that better serves the avowed purposes of the anti-transfer limitations, without unduly restricting the rights of student-athletes.<sup>187</sup>

The oft repeated and much ballyhooed incantations of the NCAA about "student-athletes" ring a bit hollow when athletes are singled out for special treatment. The limitation on the right to transfer is a clear example of this disparate treatment. Why shouldn't athletes have the same right to transfer as other students? If a "regular" student is disgruntled about the quality of his or her educational experience, transferring makes perfectly good sense. If a "regular" student comes to the conclusion that attending another institution will in the long run, enhance his or her life, transferring makes good sense. Does it make any sense to limit athletes to a greater degree than "regular" students? We contend that the rationales in support of the freedom to transfer that hold sway insofar as regular students are concerned have just as much force when applied to student-athletes. Student-athletes are, after all, students first and athletes second. Treating them as students when it comes to transferring strengthens the notion that they are indeed student-athletes.

We also maintain that a less restrictive transfer regime will result in better coaching and treatment of athletes within a given program. As things stand now, "blue-chip" athletes are wooed in the recruiting process and then held captive once they "commit." These binding commitments provide carte blanche for coaches to engage in behavior entirely foreign to the academic experience. The stories about abusive coaching are more than anecdotal. We do not contend that all or even most Division I

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187. See NCAA CONST., *supra* note 5, at art. 1.3.1; see generally *id.* at art 2.2 ("Principles for Conduct of Intercollegiate Athletics").

coaches engage in abusive practices. But we do assert that a clearly perceptible thread of abuse is woven into the coaching fabric at the most competitive levels of intercollegiate sport.<sup>188</sup> If athletes were free to leave, coaches would be a bit more careful. While we believe that athletes should be treated like students, we also believe in the corollary – coaches should behave like teachers.<sup>189</sup>

Finally, a less restrictive transfer system would lead to greater competitive balance in the NCAA. Student-athletes who desire to transfer to “get more playing time” should not be discouraged from doing so. The current construct looks with a jaundiced eye at an athlete who wants to transfer for this reason. In the current transfer context, this is not a valid reason to transfer – it receives no consideration from the NCAA as a relevant circumstance. But in the interest of competitive balance, doesn’t it make sense to freely allow such a transfer? Aren’t the interests of competitive balance better served when an athlete like J.P. plays at Catholic rather than sitting on the bench at Sunbelt?<sup>190</sup>

188. Unfortunately, recent history is replete with examples of abuse of players by coaches. Consider former Indiana head men’s basketball coach Bobby Knight, who’s explosive behavior and player abuse led to his firing from that program. CNN Sports Illustrated, *Knight’s Out: Coach’s Tirade Overshadowed Titles Until The End*, available at [http://sportsillustrated.cnn.com/basketball/college/news/2000/09/10/iu\\_knight\\_ap/](http://sportsillustrated.cnn.com/basketball/college/news/2000/09/10/iu_knight_ap/) (last visited Apr. 11, 2005). Former University of California-Berkeley men’s basketball coach Lou Campanelli was fired after an abusive post-game speech to his players. *Campanelli v. Bockrath*, 100 F.3d 1476, 1478 (9th Cir. 1996). Arizona State head football coach Frank Kush was fired after striking a player following a poor punt. CNN Sports Illustrated, *Going Home Again: Former Kush Bask at Arizona State*, available at [http://sportillustrated.cnn.com/football/college/news/2000/07/26/kush\\_returns\\_ap/](http://sportillustrated.cnn.com/football/college/news/2000/07/26/kush_returns_ap/) (last visited Apr. 11, 2005). Rutgers men’s basketball head coach Kevin Bannon was sued for state and federal civil rights violations after making his players participate in “strip free-throw shooting” in which the losers ran wind-sprints naked. The case has since been dismissed. *Rutgers Fires Bannon After Last Place Finish* (Mar. 21, 2001), available at <http://espn.go.com/ncb/news/2001/0320/1158722.html>. Baylor head men’s basketball coach Dave Bliss resigned in 2003 following allegations of drug use by team members, improper financial aid and a plot to portray a player murdered by a teammate as a drug user. *SI.com, Total Shakeup: Bliss, AD Resign from Baylor*, available at [http://sportsillustrated.cnn.com/basketball/college/news/2003/08/08/bliss\\_resigns\\_ap/](http://sportsillustrated.cnn.com/basketball/college/news/2003/08/08/bliss_resigns_ap/) (last visited Apr. 11, 2005). Finally, in an extreme case of willful neglect of a program, University of Oklahoma head football coach Barry Switzer was responsible for a program in which players were variously involved in rape, shooting of teammates, and drug trafficking – all within a span of months in 1988. Texas Sports, *OU Breaks Ground on Complex Named for Switzer* (Apr. 19, 1997) available at <http://www.texnews.com/texsports97/swit041997.html>.

189. Consider an instance in which a professor in a classroom setting engages in behavior similar to that of some coaches. It is highly unlikely that such actions would be tolerated.

190. Consider Arizona Cardinals quarterback Josh McCown, who at the time of this writing has been named the starter for the 2004 season. See *Arizona Cardinals*, at [http://www.azcards.com/team/player\\_bio.html?iid=114](http://www.azcards.com/team/player_bio.html?iid=114). McCown finished his college career at Sam Houston State, an NCAA Division I-AA school, after three years at Southern Methodist University, a Division I school. *Id.* He left SMU to go to a more passer-friendly offensive system where he could better showcase his passing skills. *Id.* In three years at SMU, McCown threw for 4,022 yards and 24 touchdowns. *Id.* In



In the final analysis, we believe that the current anti-transfer rules are illegal covenants not to compete. We also assert that the best system would simply treat student-athletes as students when it comes to transferring. But we should also point out that a less restrictive set of anti-transfer rules might well pass muster as reasonable restrictive covenants. As we have previously noted, under the "rule of reason," modern courts may disregard the express provisions of restrictive covenant, which are unreasonable, and substitute provisions that it considers reasonable. So it is entirely possible that a court might craft new, less restrictive, more reasonably tailored anti-transfer rules. The contours of such newly crafted rules would be more narrowly drawn geographical and temporal restrictions. For example, a residency requirement might be imposed upon a student-athlete who transfers to a school within the conference or to a historical rival. This could be viewed by a court as consistent with the covenant not to compete jurisprudence distinguishing direct from indirect competition.<sup>191</sup> Admittedly, a court crafting new rules might choose to shorten the length of time required to establish residency. Requiring that student-athletes who transfer to a direct competitor sit out a number of games, or a semester, is certainly more defensible than the current requirement to sit out a full year. The point is, the now-operational anti-transfer system is, we believe, illegal.

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his one season at Sam Houston, McCown threw for 3,481 yards and 32 touchdowns. *Id.* McCown went on to be drafted in the third round by the Arizona Cardinals and was the fourth quarterback chosen. *Id.* Had McCown been able to transfer to another Division I-A school, he undoubtedly would have improved that program and by extension, the competitive balance of the Division I-A football landscape. *Id.*

191. RESTATEMENT, *supra* note 70, at § 188 cmt d.