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Personal Foul: Unnecssary Restriction of Endorsement and Employment Opportunities for NCAA Student-Athletes

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COMMENT

PERSONAL FOUL: UNNECESSARY RESTRICTION OF ENDORSEMENT AND EMPLOYMENT OPPORTUNITIES FOR NCAA STUDENT-ATHLETES

History shows that the NCAA is not going to do anything unless it's forced to.

Tom McMillen, former NCAA and NBA basketball player[1]

I. INTRODUCTION

Imagine that you are a talented athlete. In fact, you possess such talent that you achieve Olympic status as a free-style moguls skier, from which you receive substantial publicity and numerous endorsement opportunities.[2] Your endorsements contribute largely to your ability to finance continued participation in your Olympic sport.[3] Additionally, you happen to be a strikingly attractive individual, so much so that your services are sought to model a world-wide recognized line of clothing.[4] Also, you possess charisma that is coveted by a wildly popular cable television station, enough to warrant a request for you to make a guest appearance on one of its shows.[5] All the while, you harbor a desire to

1. Andrew Zimbalist, *Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports* 189 (Princeton U. Press 1999) (quoting Tom McMillen, former member of Congress and co-chair of President's Council on Physical Fitness) (internal quotations omitted).

2. *See* text accompanying *infra* n. 12.

3. *See* Aff. of Andrew Carroll at ¶ 5, *Bloom v. NCAA*, 02 CV 1249 (Colo. 20th Dist. filed Aug. 13, 2002) (copy on file with *Tulsa Law Review*). Carroll, CEO of a sports management and marketing agency, also points out that "[u]nlike professional baseball, basketball, hockey, soccer or football, professional skiing has no teams to pay the athletes salaries and bonuses, or to provide competition equipment and all expenses." *Id.*

4. *See* text accompanying *infra* n. 12.

5. *See* Aff. of Conan Smith at ¶ 3, *Bloom v. NCAA*, 02 CV 1249 (Colo. Dist. Ct. 20th Dist. filed July 23, 2002) (copy on file with *Tulsa Law Review*). Smith, a veteran talent scout for William Morris Agency in New York, recounts a conversation with Melissa Chusid, Nickelodeon's Talent and Development Manager, during which Chusid "stated her belief that Jeremy had potential to excel in television and films and that he was someone [the agency] should consider as a client." *Id.* Smith, who currently represents, among other clients, "Ray Romano, . . . star of the . . . popular television series *Everybody Loves Raymond*," later met with Bloom and concluded that football notwithstanding, "Jeremy has the charisma and talent necessary to now secure gainful employment in the television and film industry." *Id.* at ¶ 2.

pursue yet another dream: to play college football for a university frequently ranked among the top teams in the country.[6]

Unfortunately, while all the work you put into skiing generated recognition that contributed to opportunities that would benefit you financially, your dream of playing college football comes with a cumbersome string attached.[7] According to National Collegiate Athletic Association (NCAA) bylaws, you must forfeit all promotional appearances, endorsement opportunities, and acting engagements if you wish to pursue your dream to play college football.[8]

Such is the plight of Jeremy Bloom.[9] Bloom is the rarest of athletes. The world-class skier and college football recruit of the University of Colorado (CU) chose to forego college football in 2001 and instead trained and competed in the 2002 Winter Olympics, placing ninth in the freestyle mogul competition.[10] Bloom then emerged with a surprising victory at the United States Freestyle Nationals in Boise, Idaho, in March 2002.[11] Due to his success on the slopes and stunning good looks, Bloom inked endorsement deals with Oakley, Dynastar, Tommy Hilfiger apparel, and Under Armour ski wear.[12]

A Colorado state trial court denied Bloom's request for a temporary restraining order which would have prohibited the Association from enforcing bylaws that required him to forfeit acting, endorsement, and modeling opportunities.[13] In making its decision, the court in essence decided that the NCAA has the right to create, enforce, and interpret its own bylaws.[14] If the court

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6. *See* Off. College Sports Network, Inc., *Record by Season* <http://graphics.fansonly.com/photos/schools/colo/sports/m-footbl/auto_pdf/17-1890-1959.pdf> (accessed Oct. 23, 2003) (displaying the University of Colorado's history of football rankings). The University of Colorado finished the season ranked in the top ten of both major polls in six of the last thirteen seasons and has achieved nine top-twenty rankings during the same timeframe, winning a split national championship during the 1990-1991 season. *Id.*

7. *See generally* NCAA, *2002-03 NCAA Division I Manual* art. 12 (NCAA 2002).

8. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 8-9, *Bloom v. NCAA*, 02 CV 1249 (Colo. 20th Dist. filed July 30, 2002). The NCAA declares that "[t]here is not an exception for student-athletes . . . who may have dreams of stardom or who may possess 'star qualities.'" *Id.* at 9.

9. Bloom chose to play college football during the fall of 2002 and finished the season as the nation's top-ranked freshman punt returner, averaging almost fifteen yards per return. NCAA, *NCAA Sports Statistics, NCAA Football Team and Individual Sports Statistics, National Rankings, IA National Player Report Punt Returns* <http://ncaa.org/stats/division1%20football/national%20rankings/IA_playerpuntret.html> (accessed Jan. 21, 2004).

10. *See* B.G. Brooks, *Bloom Sues for Right to Play with Buffs* <http://www.dailycamera.com/bdc/buffzone/article/0,1713,BDC_2399_1289758,00.html> (accessed Sept. 4, 2002) (copy on file with *Tulsa Law Review*).

11. Skimag.com, *Bahrke, Bloom Win Mogul National Titles* <http://www.skimag.com/skimag/article/print/0,13435,325453,00.html> (accessed Sept. 7, 2003).

12. Brooks, *supra* n. 10 (discussing the endorsement work Bloom performed before enrolling at CU, including stints for Tommy Hilfiger apparel, Dynastar skis, and Oakley); Goldman Bros., *Under Armour News: Under Armour Goes for the Gold . . . Again – Performance Apparel Supplier Strikes Second Lucrative Olympic Deal* <http://goldmanbros.com/under-armour/under-armour-news-012102.asp> (accessed Jan. 21, 2004) (discussing Bloom's agreement to appear in print advertising for the performance apparel manufacturer).

13. *Bloom*, slip op. at 8.

14. *See id.* at 7. In its decision, the court wavered: "As much as I would like to, I cannot substitute my judgment for the judgment of the NCAA regarding the rule making and the administrative process by which it seeks to achieve its objectives." *Id.*

continues to give the NCAA deference in enacting and interpreting its own bylaws in addition to the power to create them, the NCAA will have, in effect, unrelenting power without any checks and balances to maintain the integrity of its regulatory system.

This comment contends that the NCAA bylaws must be amended to allow student-athletes to engage in endorsement and employment opportunities that were secured for reasons unrelated to the collegiate athletic pursuit. Furthermore, the restraints which prohibit Bloom from endorsement and employment opportunities result from an arbitrary denial of his waiver request and a violation of the antitrust laws. Part I of this paper discusses the history of the NCAA bylaws and the prevalent theme of amateurism and eligibility considerations. Part II discusses the NCAA's administrative process related to waivers and examines its treatment of Bloom's case. Part III details how courts have interpreted NCAA bylaws governing eligibility and amateurism. Part IV develops the background of the Sherman Act and discusses how courts have applied it to the NCAA bylaws in general, and more specifically how the court should apply antitrust law in Bloom's case. Finally, Part V suggests amendments that should be made to the NCAA bylaws to avoid future antitrust scrutiny and allow for an equitable outcome in cases such as Bloom's.

II. NCAA BYLAWS

A. *Historical Perspective*

> *I do not agree . . . that you cannot control athletics. You can control them. Anything that this organization decides to control in athletics you can control.*
>
> C.A. Richmond, President, Union College[15]

The forerunner of the NCAA was born as the International Athletic Association of the United States (IAAUS) on March 31, 1906, with a "birth certificate" that would have listed higher education as its mother and football as its father.[16] Spurred by the dangers of football, a sport that at the time had neither developed adequate safety equipment nor adapted its rules to prohibit dangerous formations such as the "flying wedge" and "hurdle plays," several representatives of universities that fielded football teams decided to take matters into their own hands, since "there was no authoritative body that could take the necessary action [to make necessary changes to the rules]."[17] Many of the rule changes

15. NCAA, *The NCAA News, The NCAA Century Series – Part I: 1900–1939* <http://ncaa.org/news/1999/19991108/active/3623n30.html> (accessed Oct. 23, 2003) (quoting 1921 statement of C.A. Richmond) (internal quotations omitted).

16. Kay Hawes, *The NCAA News, The NCAA Century Series – Part I: 1900-1939, 'Its Object Shall Be Regulation and Supervision': NCAA Born from Need to Bridge Football and Higher Education* <http://ncaa.org/news/1999/19991108/active/3623n27.html> (accessed Oct. 23, 2003).

17. *Id.*

implemented by the committee nearly one hundred years ago are still intact today.[18]

By its first convention in December 1906, the IAAUS had ratified its constitution and bylaws, which included as its objective "the regulation and supervision of college athletics throughout the United States, in order that the athletic activities . . . may be maintained on an ethical plane in keeping with the dignity and purpose of higher education."[19]

Many of the issues discussed at the inaugural convention were amazingly similar to concerns that consume the NCAA today, such as "academic eligibility . . . [requirements, off season workout rules,] contest limitations . . . amateurism and agents."[20] Ironically, both the NCAA and its precursor allowed member schools a relative period of deregulation during its first thirty-four years of existence.[21] In fact, the schools were left to police themselves regarding the Association's bylaws, a concept referred to as "home rule."[22] Due to the limited resources of the fledgling organization, each school was left to determine its own rules for eligibility, in addition to the responsibility of assuming the role of arbiter for any punishment that was to be levied for violation of the bylaws.[23]

By the end of World War I, the popularity of intercollegiate athletics had begun to increase, and the recruitment of athletes had become prevalent.[24] While many abuses occurred in recruiting and enforcing eligibility and amateurism requirements, it was not until 1940 that the NCAA took the reigns of ownership over investigation and enforcement of its bylaws, a power it has not relinquished since.[25] Impelled by the fear of contests fixed by professional gamblers,[26] weary of recruiting that had become national in scale due to the advent of commercial air travel,[27] and eager to profit from postseason football bowl revenue,[28] the NCAA adopted the "Sanity Code"[29] to provide a "declaration affirming sound principles

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18. *Id.* Among the changes approved in 1906 were "approv[al of] the forward pass, prohibiti[on of] hurdling and mass-momentum plays (by requiring at least six men on the offensive line), and increasing first-down yardage to 10 yards." *Id.*

19. *Id.* (quoting art. 2 of the original constitution) (internal quotations omitted).

20. Hawes, *supra* n. 16.

21. *See* Gary T. Brown, *The NCAA News, NCAA Answers Call to Reform: The 'Sanity Code' Leads Association Down Path to Enforcement Program* <http://ncaa.org/news/1999/19991122/active/3624n24.html> (accessed Oct. 23, 2003); Hawes, *supra* n. 16.

22. Hawes, *supra* n. 16. Article 8 of the IAAUS constitution dictated that "[t]he Colleges and Universities enrolled in this Association severally agree to take control of student athletic sports, as far as may be necessary, to maintain in them a high standard of personal honor, eligibility and fair play, *and to remedy whatever abuses may exist.*" *Id.* (emphasis added).

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* Brown, *supra* n. 21.

27. *See id.*

28. *See id.*

29. Zimbalist, *supra* n. 1, at 23. The Sanity Code established, among other things, that "a student-athlete could receive a tuition and fees scholarship (not room and board) if the student had a demonstrated financial need and met the school's normal admissions requirements." *Id.* (emphases omitted).

and practices"[30] for member institutions to follow. Detractors referred to the new declaration as the "Purity Code," making light of what the media felt were inequitable and unwarranted restrictions.[31]

The Sanity Code provided only one option to punish violators: "expulsion from the NCAA."[32] Understandably, many schools were reluctant to inflict such a harsh punishment on a fellow institution, so much so that the NCAA was unable to obtain the two-thirds majority necessary to expel the seven violators that had been identified prior to the 1950 Convention.[33]

The Sanity Code was replaced in 1952 by a version sharply focused on regulation, which included provisions not only for "the regulatory function but also the enforcement arms necessary to uphold the rules."[34] It was in 1954 that the Committee on Infractions was established, with most of its early years spent

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30. Brown, *supra* n. 21 (quoting Wiles Hallock, former executive director of Pac-10 and Western Athletic Conferences) (internal quotations omitted). E.K. Hall, chairman of the NCAA's Football Rules Committee, is credited with championing the cause of the Sanity Code as early as 1931. *Id.* After nine years of persuasion, "[t]he Association eventually heeded Hall's plea, taking on investigative and judicial powers at the 1940 Convention when the Executive Committee was authorized to probe alleged violations and issue interpretations." *Id.* The Sanity Code was finally adopted by the NCAA Constitution in 1948. *Id.* The basic principles of the Code remain intact today, even though enforcement of the provisions has taken on a life of its own. The Code listed as its tenets:

> *Principle of Amateurism.* An amateur sportsman is one who engages in sports for the physical, mental or social benefits he derives therefrom, and to whom the sport is an avocation. Any college athlete who takes or is promised pay in any form for participation in athletics does not meet this definition of an amateur.
>
> *Principle of Institutional Control and Responsibility.* The control and responsibility for the conduct of both intercollegiate and intramural athletics shall, in the last analysis, be exercised by the institution itself.
>
> *Principle of Sound Academic Standards.* Athletes shall be admitted to the institution on the same basis as any other students and shall be required to observe and maintain the same academic standards.
>
> *Principles Governing Financial Aids to Athletes.* Financial aids in the form of scholarships, fellowships or otherwise, even though originating from sources other than persons on whom the recipient may be naturally or legally dependent for support, shall be permitted without loss of eligibility [under certain conditions].
>
> *Principle Governing Recruiting.* No member of an athletic staff or other official representative of athletic interests shall solicit the attendance at his institution of any prospective student with the offer of financial aid or equivalent inducements. This, however, shall not be deemed to prohibit such staff member or other representative from giving information regarding aids permissible under Section 4.
>
> No member institution shall, directly or through its athletic staff members or by any other means, pay the traveling expenses of any prospective student visiting its campus, nor shall it arrange for or permit excessive entertainment of such prospective student during his visit there.
>
> No member institution shall, on its campus or elsewhere, conduct or have conducted in its behalf any athletic practice session or test at which one or more prospective students reveal, demonstrate, or display their abilities in any branch of sport.

Id.

31. Brown, *supra* n. 21.

32. *Id.*

33. *Id.* The seven alleged violators were apparently considered *in toto*, and the vote to expel was 111 for, ninety-three opposed. *Id.*

34. *Id.*

resolving issues involving financial aid violations.[35] Many southern schools considered abandoning the NCAA during this time due to the restrictions imposed on financial aid to student-athletes.[36] Although much has changed in the last fifty years, the fundamental structure of the NCAA remains intact today.

B. *Financial Effects of NCAA Bylaws on the Student-Athlete*

> *Some people think football is a matter of life and death. I don't like that attitude. I can assure them it is much more serious than that.*
>
> Bill Shankly[37]

The NCAA has long wielded its regulatory power over the student-athlete population, buttressed largely by its tremendous financial resources.[38] The typical student-athlete has stood little chance of successfully contesting the validity of restrictions imposed by the governing body of collegiate sports, which boasts $143 million in assets at last report.[39] The NCAA states in its constitution that its basic purpose is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports."[40]

To say that the relationship between the NCAA and its student-athletes is unconventional is an understatement.[41] Try to imagine another industry that has more control over its workforce. The NCAA and its member institutions control, among other things, the minimum number of credit hours in which a student must be enrolled,[42] awards and gifts that the athlete may receive,[43] and with whom the

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35. Brown, *supra* n. 21. While the Sanity Code enjoyed only a short stint as active legislation, its long-term implications are evident in the changes that took place in the early 1950s, when a laissez faire organization transformed into a regulated association that recognized the need for an enforcement arm that would ensure a level playing field for its constituency. *Id.*

36. *Id.*

37. Quote Project, *Sports* <http://quoteproject.com/subject.asp?subject=66> (accessed Oct. 23, 2003) (quoting Bill Shankly) (internal quotations omitted). Although Mr. Shankly was referring to British rugby, this sentiment could easily be attributed to many fans of American football.

38. *See* NCAA, *NCAA Revenue Distribution, Budget and Finances, 2002-03 Budget* <http://www.ncaa.org/financial/2002-03_budget.pdf> (accessed Oct. 23, 2003). For the 2002-2003 operating year, the NCAA projected revenue of over $422 million. *Id.*

39. *See e.g.* Mike Fish, *To Ski or Not to Ski? Olympian Bloom Preparing to Make Case to NCAA* <http://www.basketballdraft.com/inside_game/mike_fish/news/2002/03/19/fish_straightshooting_mailbag/> (accessed Oct. 23, 2003) (likening Jeremy Bloom's legal battle to Curt Flood's fight against Major League Baseball's reserve clause).

40. NCAA, *supra* n. 7, at § 1.3.1, 4.

41. *See generally* Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 15, *Bloom*, 02 CV 1249. The NCAA refers to its relationship with student-athletes as "incidental," and that its actual relations are with the member schools. *Id.*

42. NCAA, *2003-04 NCAA Division I Manual* § 14.1.8.2, 130 (NCAA 2003) ("To be eligible for competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies leading to a baccalaureate or equivalent degree as defined by the institution, which shall not be less than 12 semester or quarter hours.").

43. *See e.g. id.* at § 16.1, 217-19.

athlete may consult about professional opportunities.[44] And until August 1, 2003, a student-athlete was only permitted to earn a maximum of $2,000 from work performed during the school year.[45]

Ironically, the executive staff of the NCAA is compensated at a level not only in excess of the revenue-producing athletes, but also at higher levels than those in comparable positions throughout corporate America.[46] In contrast, a student-athlete on a full scholarship for four years will receive the equivalent of approximately $60,000 in aid towards educational expenses.[47] At first glance, this may appear to be a substantial sum for "playing a game." However, when one considers the enormous time commitment made by the typical Division I athlete, the amount of aid seems rather insignificant. Consider that many athletes either practice or compete six days a week when their sport is in season.[48] NCAA regulations require one "day off" per week.[49] Practices, weight training, therapy for sports-related injuries, film study, travel, team meetings, and interviews often necessitate fifty- to sixty-hour work weeks.[50] Of course, this does not begin to

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44. *See* NCAA, *supra* n. 42, at § 12.2.4.3, 75 ("An individual who retains an agent shall lose amateur status."); *see generally Matthews v. NCAA*, 179 F. Supp. 2d 1209, 1215 (E.D. Wash. 2001).

45. Zimbalist, *supra* n. 1, at 26. Effective August 1, 2003, a student-athlete may earn unlimited income through employment, as long as the pay received is not due to the "value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability." NCAA, *supra* n. 42, at § 15.2.6(a), 199. The practical impact of this revision is hardly felt by the typical football or men's basketball player, who has little if any time to devote to outside employment during the school year. *See infra* nn. 48-51 and accompanying text.

46. Zimbalist, *supra* n. 1, at 182-84. The hypocrisy of the NCAA becomes apparent when considering the perquisites received by the executives of the NCAA. Cedric Dempsey, executive director of the NCAA, and his predecessor, Dick Schultz, have received hundreds of thousands of dollars of additional benefits due to the association's numerous contractual relationships. *Id.* These perks include all-expense-paid trips to the Winter Olympics, subsidized mortgages, kickbacks on group insurance premiums, complimentary private jet usage, and trips to the finest resorts to discuss, of all things, where to schedule the *next* corporate meeting. *Id.*

47. Caleb Langston, *U. of Wyo., Dept. of Commun. & Journalism, Colleges Debate Whether to Compensate Athletes* <http://uwadmnweb.uwyo.edu/cmjr/WILTSE/4100/Story3/caleb.htm> (accessed Sept. 7, 2003) (noting value of full athletic scholarship for out-of-state resident at the University of Wyoming).

48. Melissa Moore, *Cavalier Daily, Student Athletes: All Work, Lots of Play* <http://www.cavalierdaily.com:2001/.Archives/1996/February/1/lfdone.asp> (accessed Oct. 23, 2003). According to NCAA bylaws, the one day off guaranteed to student-athletes each week could end up being a travel day to or from competition. NCAA, *supra* n. 7, at § 17.1.5.4.1, 239.

49. NCAA, *supra* n. 7, at § 17.1.5.4, 239. Of course, the NCAA throws this rule out the window "during participation in one conference and postseason championship and any postseason certified bowl games . . . and during participation in NCAA championships." *Id.*

50. While the thrust of this comment is that all student-athletes should retain pre-existing endorsement and employment opportunities, the time commitments referred to are more attributable to men's football and basketball. *But see* NCAA, *supra* n. 7, at § 17.1.5.1, 239. This rule limits athletically related activities to twenty hours per week, which is laughable in sports such as college football. The NCAA circumvents its own rule through yet another bylaw, which declares that any day on which a competition is scheduled shall only count for three hours against the twenty hour maximum. *Id.* at § 17.1.5.3.2, 221. A typical college football game day will require around eight hours of a participant's time, starting with a scheduled team meal before the game and ending with post-game interviews. Legendary programs such as Notre Dame even hold fantasy camps, which simulate the game day experience. *See* Global Football, *2004 Notre Dame Football Fantasy Camp, Daily Itinerary* <http://www.ndfootballfantasycamp.com/itinerary.cfm> (accessed Feb. 1, 2004) (noting that "gameday" activities begin at 8:30 in the morning and last until late in the afternoon. Ironically, the actual game is abbreviated from its usual length in order to accommodate the rest of the activities.).

account for their scholastic responsibilities. While the "seasons" for most sports usually only encompass about five months of the year, mandatory off-season workout programs usually fill the remaining school calendar.[51] Additionally, most athletes participate in "optional" summer training programs.[52] In essence, a Division I athlete works all year to create the product that is marketed under the NCAA brand. Figured conservatively, an athlete who spends thirty hours per week on the sport is compensated by the NCAA member institution at a rate of $9.62 per hour.[53] The student-athlete is on a one-year contract, renewable for four years,[54] which will expire with no future benefits, no profit sharing, and no opportunity for advancement during the four-year term. While this system of compensation may seem inequitable, it only scratches the surface of the dilemma that embroils Jeremy Bloom.

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51. NCAA bylaw 17.11.6(a) sets a maximum of eight hours to be spent per week for out-of-season practice.

52. These optional workout programs have come under fire recently due to the tragic death of Rashidi Wheeler, a Northwestern University defensive back who collapsed during a summer workout. *See* Associated Press, *ESPN.com, College Football, School Seeks Independent Evaluation of Matter* <http://espn.go.com/ncf/news/2001/0803/1234992.html> (last updated Aug. 6, 2001). An anonymous letter sent to a website developed by the deceased player's mother insists these workouts are anything but voluntary. The letter stated:

> Check out every "winning edge" workout during the off-season and you will see for yourself. Lack of recovery time, insufficient water, and players falling to the ground. You can even see it at the many so-called "voluntary" workouts that coaches can or supposedly cannot participate. If you come you will see that coaches are within eyesight at any given activity. Some were seen the day Rashidi died, they were running on the beach near by[sic]. They are there to let their presence intimidate you.

Rashidiwheeler.org, *Letters, Letter from an Anonymous Northwestern Student* <http://www.rashidiwheeler.org/letters/anonstudent2/anonstudent2.html> (accessed Oct. 23, 2003).

53. The calculation used to determine the hourly rate paid to an NCAA student-athlete is as follows: the quotient derived from a $15,000 one-year scholarship, divided by 52 weeks, divided by thirty hours per week. The Knight Commission proposed a three-pronged reform which was accepted by the NCAA in 1991. Among its major emphases was to address time constraints on student-athletes. Kay Hawes, *NCAA News, A Presidential Era: Institutional CEOs Launch Reforms in College Athletics* <http://ncaa.org/news/1999/19991220/active/3626n25.html> (accessed Oct. 23, 2003). Proponent Edward T. Foote, University of Miami (Florida) President, noted, "I've long believed one problem we've needed to address is the excessive demands the system puts on a student-athlete's time." *Id.*

54. *See* High Sch. Baseball Web, *Watch Out for Improper Recruiting* <http://www.hsbaseballweb.com/improper_recruiting.htm> (last updated Jan. 20, 2003).

III. THE WAIVER REQUEST: BLOOM'S UNSUCCESSFUL ATTEMPT TO USE THE NCAA'S ADMINISTRATIVE PROCESS

The NCAA rules are not the laws of the United States. They're simply a bunch of hypocritical and unworkable rules set up by the NCAA. I would no sooner abide by the rules and regulations of the NCAA than I would the Ku Klux Klan.

Mike Trope, former sports agent[55]

A. NCAA Bylaws Affecting Bloom

The NCAA makes available to its member institutions an administrative waiver system whereby student-athletes may apply for exemption from the particular bylaws affecting them. This is precisely the course of action that Bloom took. NCAA bylaws 12.4.1, 12.5.1.3, and 12.5.2.1 were the specific NCAA bylaws that prevented Bloom from continuing his acting, modeling, and endorsement opportunities while retaining eligibility to play football at CU. Accordingly, Bloom sought a waiver to prevent such bylaws from applying to him.

NCAA bylaw 12.4.1 states in relevant part that compensation paid to student-athletes "must be consistent with the limitations on financial aid set forth in Bylaw 15. Compensation may be paid to a student-athlete: (a) Only for work actually performed; and (b) At a rate commensurate with the going rate in that locality for similar services."[56] NCAA bylaw 12.5.1.3 states:

> If an individual accepts remuneration for or permits the use of his or her name or picture to advertise or promote the sale or use of a commercial product or service prior to enrollment in a member institution, continued remuneration for the use of the individual's name or picture (under the same or similar circumstances) after enrollment is permitted without jeopardizing his or her eligibility to participate in intercollegiate athletics only if all of the following conditions apply:
>
> (a) The individual's involvement in this type of activity was initiated prior to his or her enrollment in a member institution;
>
> (b) The individual became involved in such activities for reasons independent of athletics ability;
>
> (c) No reference is made in these activities to the individual's name or involvement in intercollegiate athletics;
>
> (d) The individual does not endorse the commercial product;
>
> (e) Any compensation received by the individual is consistent with applicable limitations on a student-athlete's maximum amount of financial aid; and
>
> (f) The individual's remuneration under such circumstances is at a rate commensurate with the individual's skills and experience as a model or

55. Zimbalist, *supra* n. 1, at 25-26 (quoting Mike Trope) (internal quotations omitted).
56. NCAA, *supra* n. 7, at § 12.4.1, 77.

> performer and is not based in any way upon the individual's athletics ability or reputation.[57]

NCAA bylaw 12.5.2.1 further dictates:

> Subsequent to becoming a student-athlete, an individual [will be ineligible] for participation in intercollegiate athletics if the individual:
>
> (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or
>
> (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.[58]

The NCAA considered Bloom's waiver request and subsequently denied it. The details of the NCAA's improper consideration of the waiver are examined below.

B. Factors Considered by the NCAA

The NCAA improperly reviewed Bloom's waiver request, resulting in an arbitrary and capricious denial.[59] To make things worse, the court reviewing the temporary restraining order sought pursuant to the denial of the waiver request also erroneously found that Bloom's request was, while meritorious, incapable of enforcement.[60] Although the NCAA boasts that the five factors it considers in determining waiver applications are in no particular order of importance,[61] apparently each is weighted differently.

First, the NCAA claimed that it contemplates all the information provided by the student-athlete.[62] Bloom provided numerous affidavits from professionals in the entertainment, broadcasting, and modeling arenas who all supported the fact that his appeal in those areas had nothing to do with his competition in football at CU.[63] He initially declined scholarship funds so that he might be

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57. *Id.* at § 12.5.1.3, 79.

58. *Id.* at § 12.5.2.1, 81.

59. *See* Verified Compl. for Declaratory & Injunctive Relief at ¶ 62, *Bloom v. NCAA*, 02 CV 1249 (Colo. 20th Dist. filed July 25, 2002) (copy on file with *Tulsa Law Review*).

60. *See Bloom*, slip op. at 8.

61. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 10, *Bloom*, 02 CV 1249.

62. *Id.*

63. *See e.g.* Aff. of Conan Smith at ¶ 8, *Bloom*, 02 CV 1249; Aff. of Melissa Chusid at ¶ 6, *Bloom v. NCAA*, 02 CV 1249 (not filed) (copy on file with *Tulsa Law Review*). Interestingly, Chusid never signed her affidavit, which comes as no surprise when considering that Viacom, Chusid's employer, not only owns Nickelodeon, but also owns CBS, the NCAA's $1.7 billion corporate partner. *See generally* Zimbalist, *supra* n. 1, at 26; Viacom Intl., Inc., *Viacom, The Facts* <http://www.viacom.com/thefacts.tin> (accessed Jan. 30, 2004). While attempting to get Chusid's signature on the affidavit, Peter Rush, Bloom's attorney, and Chusid exchanged numerous emails. During one such exchange, Chusid was asked to verify the accuracy of the affidavit. Ms. Chusid then reviewed the affidavit and verified its content, except for an inaccurate reference to the name of a movie. The inference can be drawn from that exchange that although Chusid never signed the affidavit, the content of the affidavit is nonetheless accurate. Specifically, Chusid's "assessment that Jeremy Bloom has star quality has nothing to do with whatever football or athletic skill Jeremy Bloom may or may not have. Instead, [Chusid's] assessment is based solely upon his on-camera talent. [Nickelodeon] wanted Jeremy Bloom

allowed to accept compensation, since CU would be providing no additional benefits to him over and above what other non-student-athletes were receiving, all of whom are unrestricted in pursuing employment opportunities while enrolled in college.[64] Had the NCAA considered all information provided by Bloom, this factor should have weighed heavily in his favor.

The next factor, which also should have been favorable to Bloom, is "the welfare of the student athlete involved."[65] Financially speaking, there is no valid argument that Bloom would be better served by excluding him from endorsement, promotional, and broadcasting opportunities. The NCAA, however, voices its concern that its duty to protect student-athletes from exploitation calls it to prohibit such activities.[66] The NCAA's purported concern is suspect at best, especially when considering the litany of instances where it allows such intrusions into a student-athlete's life when the benefit flows directly to the NCAA and its member schools.[67] While appearing off-campus to shoot an episode for a Nickelodeon series is considered impermissible exploitation, NCAA bylaw 12.5.3(a) allows Bloom to perform "unlimited" interviews as related to CU football, for which he receives no compensation.[68]

Of course, while financial concerns are paramount in Bloom's case, there is also the much more rampant exploitation of the average student-athlete's time.[69] Additionally, athletes today are encouraged to participate in televised post-game celebrations during which merchandise sporting the logo of the official NCAA licensee is adorned (usually on hats or t-shirts),[70] not to mention post-season bowl games, which often consume much of the traditional holiday break between the fall and spring semesters.[71] The following statement by John Cavanaugh, Vice President of Notre Dame in 1941—which appears in a letter written to the Sugar Bowl Committee—provides a glimpse of how those responsible for caring for the well being of student-athletes used to treat such matters:

> A postseason game draws the football season out over a large part of the regular academic year [and after the] strenuous . . . regular schedule [the players must focus on their studies.] But much as we need money and could use it here, it does not

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to work on [its] show because of his talent [as an on-camera personality]." Aff. of Melissa Chusid at ¶ 6, *Bloom*, 02 CV 1249; *see* email from Melissa Chusid, Manager of Casting, Nickelodeon & The Natl. Network, to Peter Rush, atty., *RE: Draft Statement* (July 17, 2002) (copy on file with *Tulsa Law Review*).

64. *See* Verified Compl. for Declaratory & Injunctive Relief at 17, *Bloom*, 02 CV 1249.

65. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 10, *Bloom*, 02 CV 1249.

66. *See* NCAA, *supra* n. 7, at § 2.9, 5 ("[S]tudent-athletes should be protected from exploitation by professional and commercial enterprises.").

67. *See e.g. id.* at § 12.5.3(a), 81-82; *supra* nn. 48-51 and accompanying text.

68. *See* NCAA, *supra* n. 7, at § 12.5.3(a), 81-82.

69. *See* text accompanying *supra* nn. 48-52.

70. Pl.'s Opening Br. at 7, 11-12, *Bloom v. NCAA*, 02 CA 2302 (Colo. App. filed July 2, 2003) (copy on file with *Tulsa Law Review*).

71. *See generally* 2003-04 Bowl Schedule <http://www.suntimes.com/special_sections/holiday/holiday_bowlsked.html> (accessed Jan. 30, 2004) (noting that of the twenty-eight bowl games played during the 2003-2004 season, only five were scheduled prior to Christmas day, and the remainder extended from Christmas until January 4).

> seem to us best for the boys [on the football team] and for the University to try to procure it in such a way. So far as we can see, a postseason game would be played at the sacrifice of many values, physical and academic, which properly belong to the students participating in football.[72]

Unfortunately, the Cavanaughs of the world are not vocal within the specter of Division I football today. The only bowl invitations that go unaccepted in today's climate are those offered for "minor bowls" that offer little hope of attracting enough alumni to travel to the destination to make it a profitable venture for the athletic department.[73] The welfare of the student-athlete is relegated to the back seat since it now rides the same bus as corporate sponsorships, licensing partnerships, and television contracts.

A third factor weighed by the NCAA is "any possible competitive or recruiting advantages"[74] that might be gained by the member school if the applicable waiver is granted. It is difficult to envision an advantage that CU would gain in this instance, since the chances that another athlete with similar skills will surface in the near future is infinitesimally small. The court hearing the temporary restraining order also conceded this fact, stating:

> This is an exceptionally unique case that is virtually certain to never occur again. Today Mr. Bloom stands alone when compared to the other more than 350,000 student athletes. Entities can respond to unique circumstances as the NCAA has or can see such a situation as a unique opportunity to take a positive, proactive student athlete friendly approach and still not undermine a primary and laudable objective relating to amateurism. Here the NCAA had an opportunity to recognize and

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72. Zimbalist, *supra* n. 1, at 90 (quoting letter written by John Cavanaugh, Notre Dame University Vice President, to Sugar Bowl Committee, 1941) (internal quotations omitted). Many attitudes toward post-season play have changed. The virtue of academic focus and the necessity of rest for weary warriors has been replaced by conference championship games during final examination periods, thirteen-game regular season football schedules, and post-season competition which extends until the end of January, thus overlapping the college basketball season by nearly three months. Some believe that the football season is destined to become even longer. With the possibility of an additional $1 million revenue for each Division I school participating in football, the question likely becomes not if, but when. *See id.* at 109.

73. Tom Weir & Thomas O'Toole, *USA Today, Bowl Invitations For Sale* <http://www.usatoday.com/sports/college/football/2001-12-05-bowl-focus.htm> (accessed Oct. 23, 2003). In 2001, UCLA Athletic Director Pete Dalis estimated that had the Bruins accepted a bid to play in the 2001 Humanitarian Bowl in frigid Boise, Idaho, the tradition-rich Pac-10 school would have lost an estimated $300,000. *Id.*; *but see* ESPN.com, *College Football, Replacement May Be Sought outside C-USA* <http://sports.espn.go.com/ncf/news/story?id=1674891> (last updated Dec. 1, 2003) (reporting that TCU declined an invitation to play in the GMAC Bowl because the "game conflicted with the school's exams schedule"). TCU opted to play in its own backyard, in the Forth Worth Bowl, on December 23 rather than play in the GMAC Bowl, citing academic reasons. Skeptics point to the fact that the Horned Frogs played four games on weekdays during the season, casting doubt that TCU's stance to refuse the GMAC bid was academically motivated. Stephen Hawkins, *No Exam Conflicts, No Travel Worries: TCU Bowling at Home* <http://www.wfaa.com/sharedcontent/APStories/stories/D7V6IPAO1.html> (accessed Jan. 30, 2004). Suspiciously, the payout for the Fort Worth Bowl was $800,000 per team, compared with $750,000 for the GMAC. And when considering the expenses eliminated from declining a trip to Mobile, Alabama, the TCU coffers were undoubtedly benefited by the substituted Fort Worth Bowl. *See* Sports Fans of Am. Assn., *2003/2004 College Football Bowl Games* <http://www.sportsfansofamerica.com/Links/Football/College/Bowls/2003.htm> (accessed Feb. 1, 2004).

74. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 10, *Bloom*, 02 CV 1249.

> support a world cup champion and an Olympic competitor by supporting his future success—by leaving doors open rather than closing them. A thoughtful and narrowly constructed waiver based upon the unique circumstances of this case could have been granted. Such a waiver would have been a recognition by the NCAA that: Mr. Bloom is truly an amateur athlete in football with only dreams of... receiving playing time, and that his potential arises not from his football ability, but arises from the circumstances relating to obvious talent unrelated to his athleticism. I think that the NCAA is missing an opportunity to promote amateurism on the one hand, and the opportunity to support the personal and football [and] non-athletic growth of a student athlete on the other.[75]

In addition, the court's apologetic approach in its decision speaks volumes regarding the public sentiment towards Bloom. Yet the court still relied on cases that have little factual similarity to devise a ruling on a matter that it admits is without any parallel from which to draw guidance.[76] The only advantage that CU had over most schools in the recruitment of Bloom was its geographic proximity to numerous ski resorts, where Bloom can practice his chosen profession.[77]

The NCAA relied heavily on the two remaining factors in denying Bloom's waiver requests: the intent of the applicable bylaw and case precedent arising in similar situations.[78] The court cited *NCAA v. Lasege*[79] and *Cole v. NCAA*[80] as persuasive authority and concluded that it could not find that the NCAA administrative review process was not "at least minimally substantively rational and procedurally fair."[81] The court also relied on the holding in *Pinsker v. Pacific Coast Society of Orthodontists*[82] in establishing that the NCAA's actions were in compliance with the minimum standards required.[83] Conspicuously, the court failed to analyze the test set forth in *Pinsker* to determine whether an alleged action falls under the "arbitrary and capricious" umbrella.[84] *Pinsker* held that a "decision to exclude or expel an individual may be 'arbitrary' either because the reason for the exclusion or expulsion is itself irrational or because, in *applying a given rule in a particular case, the [governing body] has proceeded in an unfair manner.*"[85] The court in *Bloom* completely overlooked this important guidance[86] which, in effect, supplies the trier of fact the autonomy to consider individual

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75. *Bloom*, slip op. at 7.

76. *See id.*

77. No less than twenty-seven ski resorts dot the state of Colorado, many of which are within a few hours of CU's campus. *See Ski Colorado* <http://skicolorado.com> (accessed Aug. 31, 2003).

78. *See* Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 10, *Bloom*, 02 CV 1249.

79. 53 S.W.3d 77 (Ky. 2001).

80. 120 F. Supp. 2d 1060 (N.D. Ga. 2000), *aff'd*, 235 F.3d 1346 (11th Cir. 2000).

81. *Bloom*, slip op. at 6-7. The court's decision to speak in double negatives—"I cannot find that the... process was not... fair"—rather than expressly concluding that the process was fair is curious. *See id.*

82. 526 P.2d 253 (Cal. 1974).

83. *Bloom*, slip op. at 6-7.

84. *See Pinsker*, 526 P.2d at 256.

85. *Id.* (emphasis added).

86. *See Bloom*, slip op. at 6-7.

circumstances in applying an administrative rule. When application of the rule would lead to an unfair result, the court should impede its imposition. Had the court in *Bloom* applied its rationale to the language in *Pinsker*, Bloom would have been allowed to benefit from his modeling, acting, and endorsement opportunities without interruption.[87]

IV. THE COURT'S HOLDING THAT THE NCAA HAS A RIGHT TO ESTABLISH CONDITIONS FOR ELIGIBILITY

> *Under existing conditions, promising young athletes in high schools . . . are rounded up by alumni scouts or other agencies, they receive inducements of one sort or another, in many cases legitimate and in many other cases such as to prostitute all moral integrity. But whether right or wrong, the athlete is zealously sought after, and that because he is an athlete.*
>
> *If possible, he is placed under obligations before reaching college. . . . He thus enters college with the wrong idea of the relative importance of sport and study. Once in college, he lives in an athletic atmosphere that is commercialized and professionalized.*
>
> Professor C.W. Savage[88]

A. *Purpose of NCAA Amateurism Bylaws*

The NCAA bylaws state, "Only an *amateur* student-athlete is eligible for intercollegiate athletics participation in a particular sport."[89] The purpose of the NCAA bylaws in maintaining amateurism is to "maintain[] a clear line of demarcation between college athletics and professional sports."[90] The means through which the NCAA has enforced the demarcation has served to prevent student-athletes from accepting compensation for certain employment and endorsement opportunities. The NCAA bases its stance on what it refers to as the "Principle of Amateurism,"[91] which insists that student-athletes should be guided in their pursuit of intercollegiate athletics by motivational factors such as the

87. Off. College Sports Network, Inc., *CollegeSports.com, Jeremy Bloom Signs Ad Deal* <http://www.collegesports.com/sports/m-footbl/stories/020304aam.html> (Feb. 3, 2004). Although Bloom desisted from accepting endorsement income once he enrolled at CU, he recently announced his intention to resume such activities. Bloom signed a deal with Equinox Fitness Clubs—his first plunge into compensation-related endorsements while competing at CU—which plans to feature him on billboards in New York, Los Angeles, and Chicago, as well as in popular magazines. While the move is likely to draw the ire of the NCAA, Bloom insists that he "will not willingly leave college football," and that "[i]f the NCAA truly cares about student-athletes, then there is no reason why they should attempt to stand in [his] way of winning a gold medal for [the United States]. . . . If they don't [care], they will have to kick [him] out." *Id.* (quoting Jeremy Bloom) (internal quotations omitted).

88. NCAA, *NCAA News, The NCAA Century Series – Part I: 1900-39, Thoughts of the Day* <http://ncaa.org/news/1999/19991108/active/3623n30.html> (accessed Jan. 2, 2004) (quoting C.W. Savage, professor, Otterbein College, 1914) (internal quotations omitted).

89. NCAA, *supra* n. 7, at § 12.01.1, 69 (emphasis added).

90. *Id.* at § 12.01.2, 69.

91. *Id.* at § 2.9, 5.

educational, physical, and social benefits achieved through competition, while the NCAA serves as protector from the dangers of commercial exploitation.[92]

B. *Exceptional Student-Athletes Receive Undue Scrutiny under Existing NCAA Amateurism Bylaws*

Similar to Bloom, Darnell Autry, the star running back on Northwestern's historic Rose Bowl team, excelled as a drama major off the field.[93] Due to his talent in his chosen field of study, he was invited to perform in a movie filmed during the summer of 1996 in Rome, Italy.[94] While any "normal" college student would jump at the opportunity to work a summer job related to his course of study, Autry consulted the NCAA, just to make sure that it would be officially permitted for him to do so.[95] The NCAA ruled that his participation would violate the then existing bylaw "that one cannot be an amateur qualified to play in intercollegiate competition and still receive remuneration in any activity connected to one's sport."[96] Therefore, Autry was forced to get a temporary restraining order so he could accept the role.[97] However, he still was not allowed to accept payment for his part in the movie; only his expenses were covered.[98] While the NCAA amended the rule the following year so that subsequent student-athletes could participate in such roles, it retained the stance that compensation could not be accepted for such work.[99]

Autry's case is illustrative of the quandary facing Bloom today. While Autry was able to get the NCAA to modify its position ever so slightly, he had to seek legal assistance to do so.[100] Legal battles, especially those involving the NCAA, tend to take months and even years to resolve.[101] With a window of only four or five years in which to compete as student-athletes,[102] many would rather focus on their chosen sport than ensnare themselves in an attempt to change legislation that may or may not affect their careers. Those who litigate tend to be athletes who

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92. *Id.*

93. *See* Zimbalist, *supra* n. 1, at 17.

94. *Id.*

95. *Id.*

96. *Id.* The NCAA initially determined that Autry would not have been offered the role had it not been for his football prowess.

97. *Id.*

98. Zimbalist, *supra* n. 1, at 17 (sarcastically noting the NCAA's "flexibility" in allowing a student-athlete to pursue summer work that relates to a chosen field of study as long as no payment is accepted).

99. *Id.*

100. Autry was represented by Peter Rush, the same attorney who represents Bloom. Telephone interview with Peter Rush (Sept. 10, 2002).

101. *See e.g.* Las Vegas Rev. J., *Tarkanian, NCAA Reach Settlement* <http://www.lvrj.com/lvrj_home/1998/Apr-01-Wed-1998/news/7236825.html> (accessed Oct. 20, 2003). The NCAA stalled the litigation for over seven years through numerous motions and appeals, including a change of venue request that it pursued all the way to the U.S. Supreme Court. Las Vegas Rev. J., *Jerry Tarkanian and the NCAA: Chronology of Events* <http://home.att.net/~rebels02/page21b_tarkncaa.html> (accessed Oct. 20, 2003).

102. Student-athletes are allowed five years to play their chosen sport as long as they refrain from participating against outside competition during one of those years. NCAA, *Frequently Asked Questions on Redshirts, Age Limits and Graduate Participation* <http://www1.ncaa.org/membership/membership_svcs/eligibility-recruiting/faqs/eligibility_seasons.html> (accessed Oct. 20, 2003).

have been declared ineligible and are seeking reinstatement,[103] not athletes already eligible who simply want inequitable bylaws reformed.

Bloom's case is unique in that his legal issue was discovered before he ever set foot on the University of Colorado's campus as a student.[104] Even if it takes another year to resolve the question of whether he can accept endorsement compensation, which resulted from activities engaged in *prior* to his admission at Colorado, any such rule changes would still benefit him for his final year of eligibility.

Bloom attempted to take Autry's minimal victory a step further by forcing the NCAA to allow compensation for employment gained by means unrelated to participation in an NCAA-sponsored sport. Bloom first sought declaratory and injunctive relief in a complaint filed July 25, 2002, in state court in Colorado.[105] In his complaint, Bloom claimed that "[a]n actual controversy exists between the NCAA and [Bloom] concerning the application of NCAA Bylaws 12.4.1, 12.5.1.3, [and] 12.5.2.1 . . . to the preexisting opportunities open to [Bloom]."[106]

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103. *See e.g. Shelton v. NCAA*, 539 F.2d 1197 (9th Cir. 1976); *Cole*, 120 F. Supp. 2d 1060; *Ganden v. NCAA*, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 19, 1996); *Matthews v. NCAA*, 79 F. Supp. 2d 1199 (E.D. Wash. 1999); *Lasege*, 53 S.W.3d 77; *Hart v. NCAA*, 550 S.E.2d 79 (W. Va. 2001).

104. Verified Mot. for T.R.O. & Prelim. Inj. at 2, *Bloom v. NCAA*, 02 CV 1249 (Colo. 20th Dist. filed July 25, 2002).

105. Verified Compl. for Declaratory & Injunctive Relief at ¶ 65, *Bloom*, 02 CV 1249.

106. *Id.* at ¶ 59. The relevant NCAA bylaws state:

> *Criteria Governing Compensation to Student-Athletes.* All compensation received by a student-athlete must be consistent with the limitations on financial aid set forth in Bylaw 15. Compensation may be paid to a student-athlete:
>
> (a) Only for work actually performed; and
>
> (b) At a rate commensurate with the going rate in that locality for similar services;

NCAA, *supra* n. 7, at § 12.4.1, 77.

> *Advertisements and Promotions Subsequent to Enrollment.* Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:
>
> (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or
>
> (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

NCAA, *supra* n. 7, at § 12.5.2.1, 81.

> *Appearance in Commercial Films.* Footage of an institution's intercollegiate game or event or of the individual performance of a student-athlete may not be used in a commercial movie unless all individuals appearing in the footage have exhausted their seasons of eligibility.

NCAA, *supra* n. 7, at § 12.5.2.3.4, 81.

> [*Media Activities*] *During the Playing Season.* During the playing season, a student-athlete may appear on local radio and television programs (e.g., coaches shows) or engage in writing projects when the student-athlete's appearance or participation is related in any way to athletics ability or prestige, provided the student-athlete does not receive any remuneration for the appearance or participation in the activity. The student-athlete shall not make any endorsement, expressed or implied, of any commercial product or service. The student-athlete may, however, receive legitimate and normal expenses directly related to the appearance or participation in the activity, provided it occurs within a 30-mile radius of the institution's main campus. The institution also may provide such expenses for a student-athlete to appear on radio or television in the general locale of an institution's away-from-home competition.

Bloom further contended that he was a third-party beneficiary to the contract between the NCAA and CU, a contention with which the court agreed.[107] Bloom prayed for the court to determine that the NCAA should be "permanently enjoined from interpreting [the] Bylaws . . . in such a way as to preclude . . . Bloom from fulfilling and pursuing the pre-collegiate and pre-NCAA occupations [then] available to him in skiing, acting and modeling."[108] Bloom also asked the court to enjoin the NCAA from affecting his football eligibility because of his various activities related to skiing or because he filed the litigation.[109] Finally, Bloom was courteous enough to plead on behalf of CU that the NCAA be prohibited from penalizing CU's status "as a consequence of his acting, skiing or modeling work or the filing of this litigation."[110]

C. *Key Cases Involving Eligibility and Amateurism Considerations*

The NCAA defended its position to establish eligibility criteria for its student-athletes on a long line of cases, none of which encompassed facts similar to those present in *Bloom*.[111] *Cole* dealt with the NCAA's ability to impose academic admissions procedures on its student-athletes.[112] *Cole* involved a "partial qualifier," one who is ineligible to compete during the first year of enrollment at an NCAA institution due to failure to achieve the minimum high school grade point average and SAT or ACT score.[113] Cole unsuccessfully attempted to utilize the NCAA's waiver process to gain full eligibility his freshman year due to a preexisting learning disability first discovered when he was in second grade.[114] After the NCAA denied his waiver request due to insufficient information upon which to grant the waiver, Cole sued.[115] However, the court found that the student-athlete's claim was moot because his freshman year had ended, and therefore he was no longer considered a partial qualifier.[116]

Undoubtedly, the NCAA has the discretion to impose academic requirements upon those attending its member institutions, but to suggest that academic standards parallel those relating to amateurism is unfounded. Amateurism is a distinctive qualification requirement of NCAA student-athletes, since all students must adhere to at least some level of academic performance in

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NCAA, *supra* n. 7, at art. 12, § 12.5.3(a), 81.

107. *Bloom*, slip op. at 2.

108. Verified Compl. for Declaratory & Injunctive Relief at ¶ 65, *Bloom*, 02 CV 1249.

109. *Id.* at 12-13.

110. *Id.*

111. *See* Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 11-12, *Bloom*, 02 CV 1249.

112. 120 F. Supp. 2d at 1070-71.

113. *See id.* at 1067. A partial qualifier has the option to "pay his own way" during his freshman year, which would preserve four years of eligibility to compete. *See generally* NCAA, *supra* n. 7, at § 14.3.2, 142-43.

114. *Cole*, 120 F. Supp. 2d at 1065.

115. *Id.* at 1066.

116. *Id.* at 1067-69.

order to enroll and maintain academic standing in a college or university.[117] *Cole* is also distinguishable due to the fact that the waiver request sought in *Cole* is far more commonplace[118] than the rare instance brought by Bloom.[119] If the NCAA is truly concerned about defending its legislation, *Cole* is a much bigger fish than *Bloom* could ever become.

Lasege involved a basketball player who attempted to retain NCAA eligibility after he signed a contract overseas to play professional basketball.[120] The student-athlete also accepted plane tickets, lodging, meals, and numerous other benefits, including a personal cook and driver.[121] The NCAA found that Lasege had demonstrated a "clear intent to professionalize"[122] and therefore denied his waiver request.[123] *Lasege* is clearly inapposite to this case since Bloom is not seeking to compete on the ski team at CU, nor has he signed a professional contract to play football. It is important to note that *Lasege* also recognized that "[w]hile courts ordinarily refrain from reviewing decisions of unincorporated private associations [and instead defer to the association's best judgment], *if the organization acts inconsistently with its own rules, its action may be sufficiently arbitrary to invite judicial review.*"[124]

Hart v. NCAA,[125] another case upon which the NCAA relies,[126] involved a wrestler who sought an additional year of eligibility when he was precluded from competition due in part to an emergency resolution adopted by the NCAA to protect the safety of its student-athlete wrestlers.[127] The university for which he competed had recruited another wrestler to compete in the weight division occupied by Hart, with a plan to have Hart lose weight to compete in a lower weight class.[128] Although Hart was the only wrestler out of five from his school who was unsuccessful in obtaining a waiver to compete in a lower weight class, the court nevertheless found that participation in interscholastic athletics, alone, is not a protected right.[129] It is important to differentiate this situation from Bloom's, in that Bloom's involves not only participation, but also pre-existing financial opportunities. The court in *Hart* alludes to a scenario in which a participation

117. *See e.g.* Regents of U. of Colo., *Prospective Student Center, Freshman Student Admission, Admission Requirements, Guaranteed Admission for Colorado Freshmen* <http://www.colorado.edu/prospective/freshman/requirements/guarantee.html> (accessed Oct. 20, 2003).

118. *See e.g. Matthews*, 79 F. Supp. 2d at 1202, 1204-05.

119. *See supra* n. 75 and accompanying text.

120. 53 S.W.3d at 80.

121. *Id.* at 81.

122. *Id.*

123. *Id.*

124. *Lasege*, 53 S.W.3d at 83 n. 9 (quoting 6 Am. Jur. 2d *Associations and Clubs* § 28) (internal quotations omitted) (emphasis added).

125. 550 S.E.2d 79.

126. *See* Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 12, *Bloom*, 02 CV 1249.

127. 550 S.E.2d at 82-83.

128. *Id.*

129. *Id.* at 85.

right could be enforced if it coincides with an educational interest.[130] Bloom could easily argue that his educational interest related to communications is negatively impacted by his inability to perform on Nickelodeon due to NCAA restraints.[131] Additionally, in matters regarding the physical well being of student-athletes, the NCAA has had and should continue to be shown the highest level of deference to implement appropriate measures to ensure their protection.[132] The NCAA's suggestion that the rationale in *Hart* is similar to that which should be used in this case is a ludicrous proposition, since endorsement revenue and the life of a student-athlete are clearly dissimilar issues.

Finally, the NCAA cites *Ganden v. NCAA*[133] as persuasive authority that member institutions may impose "reasoned conditions" upon eligibility.[134] *Ganden* held that a swimmer who was ruled a partial qualifier due to his low high school grade point average had no cause of action even though Ganden challenged the NCAA's eligibility requirements under Title III of the Americans with Disabilities Act (ADA).[135] Again, Bloom's legal argument has nothing to do with the NCAA's authority to set academic standards for admission. The inability of the NCAA to produce cases which address similar circumstances to those in Bloom's case point both to the uniqueness of his situation and the NCAA's lack of legal authority to support its defense.

D. Bloom*: An Unprecedented Case*

There are several problems with the court's holding in *Bloom*. First, the court erroneously compared the relationship between most student-athletes and the NCAA to Bloom's relationship with the NCAA, which distorted its view of the intent of the applicable bylaw.[136] CU was in no way "exchanging" an education with Bloom for his adherence to terms of the student-athlete agreement,[137] because he had not yet accepted financial assistance in the form of a

130. *Id.* at 86.

131. Verified Mot. for T.R.O. & Prelim. Inj. at 3-5, *Bloom*, 02 CV 1249 (Colo. 20th Dist. filed July 25, 2002). The Assistant Dean of CU's Journalism and Mass Media Schools stressed the importance to Bloom of gaining work-related experience while in school in order to separate himself from others in both the program at CU and the workforce in general once he graduates. In fact, Jones went so far to say that "[t]he profession will hire the recent graduate with experience over other graduates *every time*...." *Id.* at 5 (emphasis added).

132. *See* Hawes, *supra* n. 16, at 2-3. Safety of student-athletes has always been a primary concern of the NCAA. In fact, the precursor to the NCAA, the Intercollegiate Athletic Association of the United States (IAAUS), was formed at the insistence of Theodore Roosevelt, who, after "[t]he 1905 college football season[, during which]... 18 [competitors] d[ied] and 149 [were] serious[ly] injur[ed]," met with leaders from "Harvard, Yale and Princeton... [and delivered the message to] "[r]eform the game or it will be outlawed," even if it meant taking executive action to do so. *Id.* Ironically, even the NCAA's initial formation was prodded by the threat of presidential intervention. *Id.* at 3.

133. 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 19, 1996).

134. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 12, *Bloom*, 02 CV 1249.

135. 1996 U.S. Dist. LEXIS 17368 at *1.

136. *Bloom*, slip op. at 2.

137. *See id.* at 2-3.

scholarship or otherwise from CU.[138] He was a resident of the State of Colorado who was attending a state school, so any exchange involved would have been a separate contract independent of any dealing with the NCAA, just as any other non-scholarship student would have with the university to which tuition was paid. It was a contractual relationship between CU and Bloom only. The only quid pro quo between Bloom and the NCAA was Bloom's opportunity to play college football in exchange for abidance to the NCAA rules.[139] Bloom could have actually argued that CU gained from the publicity that Bloom drew (and continues to draw) to the school while he received nothing in return.[140]

Bloom therefore is entitled to injunctive relief for exactly the reason that the NCAA attempts to convince the court that relief is not warranted: "because 'a mandatory injunction prescribes conduct that has not been defined by contract, and instead requires the court to choose a mode of performance from a wide range of possibilities.'"[141] While it may necessitate an extreme circumstance to involve judicial determination of a specific remedy, the NCAA's own iron-clad bylaws are themselves to blame for such a requirement. *Snyder v. Sullivan*,[142] upon which the NCAA relied, involved the sale of a business between two businessmen, who were free to contract in any way they saw fit.[143] Conversely, Bloom had no options to amend or draft contract proposals when signing the NCAA student-athlete agreement.

The NCAA also misinterpreted the Colorado Supreme Court's holding in *Snyder* regarding the "essential purpose" of a mandatory injunction, which "is to *preserve the status quo* and prevent injury."[144] The NCAA incorrectly assumed that the status quo referred to in *Snyder* is the state of its own bylaws before the request for injunctive relief was sought,[145] when a careful reading of the decision undoubtedly leads to the conclusion that the status quo in this case is the position Bloom was in prior to the date NCAA's restrictions were placed upon him, when he was free to enter ski-related endorsement contracts, acting engagements, and modeling appearances.

The NCAA further complained that if Bloom's relief were granted, it would be required to draft a new Division I Manual,[146] when all that would be necessary

138. Verified Compl. for Declaratory & Injunctive Relief at ¶ 17, *Bloom*, 02 CV 1249.

139. *See Bloom*, slip op. at 2.

140. *See generally* Zimbalist, *supra* n. 1, at 169. In a similar attention-drawing scenario on a macro scale, it is estimated that the College of Charleston's trip to the NCAA basketball tournament in 1997 accounted for an immediate increase in admissions inquiries and a marketing benefit estimated at $3 million. Keith F. West, *Charleston Regional Business Journal, C of C Arena Decision Raises New Questions* <http://www.charlestonbusiness.com/issues/6_5/news/2484-1.html> (Mar. 10, 2003).

141. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 13, *Bloom*, 02 CV 1249 (quoting *Snyder v. Sullivan*, 705 P.2d 510, 514 n. 5 (Colo. 1985) (en banc)).

142. 705 P.2d 510 (Colo. 1985) (en banc).

143. *See id.* at 511.

144. *Id.* at 514 n. 5 (emphasis added).

145. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 13-14, *Bloom*, 02 CV 1249.

146. *Id.* at 13-14.

are a few minor revisions to allow the Blooms of the world to showcase all of their given ability.[147]

The court then analyzed the six factors espoused in *Rathke v. MacFarlane*[148] and determined that Bloom was not entitled to injunctive relief.[149] The factors considered were:

1. a reasonable probability of success on the merits,
2. a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief,
3. that there is no plain, speedy, and adequate remedy at law,
4. that the granting of a preliminary injunction will not disserve the public interest,
5. that the balance of equities favors the injunction, and
6. that the injunction will preserve the status quo pending a trial on the merits.[150]

Bloom satisfied three of the requirements, proving a "danger of real, immediate and irreparable injury,"[151] the non-existence of "an adequate legal remedy,"[152] and, finally, that "the injunction would preserve the status quo prior to a trial on the merits."[153] However, the court determined that Bloom had not proven "a reasonable probability that [he would] succeed on the merits,"[154] that "the public interest would be served by the injunction,"[155] or that the weight of all equities considered would favor an injunction.[156]

In its determination that Bloom did not prove that he would likely succeed on the merits, the court points to the "professional baseball exception" as a demonstration why Bloom's claim would likely fail.[157] The court correctly points out that the customary compensation for a professional baseball player is a salary and signing bonus, both of which are permissible under NCAA regulations for a student-athlete who plays a different sport—usually football—in college.[158]

147. Article 12 of the NCAA Constitution, which addresses amateurism, lists no less than thirty-one amendments or revisions which have been made to the document in the last ten years. Most changes have taken place in the last five years, which indicates that the task of revision may not be as burdensome as the NCAA would have the court in *Bloom* believe. *See* NCAA, *supra* n. 7, at art. 12, 69-83. What is far more burdensome than publishing a new manual, which the NCAA does every year regardless of the number of changes from the previous year, is the process that Bloom and those similarly situated would have to endure to get proposed legislation passed. *See infra* nn. 257-69 and accompanying text.

148. 648 P.2d 648, 653-54 (Colo. 1982).

149. *Bloom*, slip op. at 3-8.

150. *Rathke*, 648 P.2d at 653-54.

151. *Bloom*, slip op. at 3.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 8.

156. *Bloom*, slip op. at 8.

157. *Id.* at 5.

158. *Id.*

Incongruently, the NCAA prohibits a large part of the customary earnings paid to a professional skier, that is, endorsement and promotion income.[159] The court shows the NCAA deference in determining that income customary to a particular sport still falls outside the ambit of salary, and is thus prohibited by the NCAA. Therefore, any athlete who happens to compete professionally in a sport that is largely compensated through endorsement income and appearance fees will enjoy none of the financial benefit of one who happens to compete in another sport that compensates its athletes primarily through salary. The NCAA claimed that "customary" income, if allowed, would be easily manipulated by those seeking a loophole in the association's amateurism bylaws. However, a carefully crafted waiver or bylaw would allow the NCAA to retain the clear line of demarcation between intercollegiate athletics and professional sports of which it is so covetous.[160]

E. Injunctive Relief Was an Appropriate Remedy in this Case

In its assessment of the merits, the court iterated that injunctive relief is a seldom-used remedy, which should be entertained in only the rarest circumstances.[161] *Bloom* presents an extraordinary circumstance for which injunctive relief is appropriate. Conversely, the NCAA insists that a temporary restraining order should only be issued with a court's unwavering conviction and that Bloom's case fails to meet this standard.[162] In its denial for injunctive relief, the court gives short shrift to Bloom's contention that the NCAA's ruling on his waiver request regarding endorsements was handled arbitrarily and capriciously, citing the fact that the NCAA had asked Bloom for further documentation regarding his request as evidence that it had adequately considered the matter.[163] However, the NCAA's answer to Bloom's request for waiver reads like a form letter, with no apparent consideration for the unprecedented situation that it was asked to review.[164]

The memo states that "[t]he subcommittee believes its responsibility of setting aside the normal application of NCAA legislation in certain situations is a serious one and reminds the membership that *extraordinary circumstances must be present to warrant relief from the normal application of the legislation in question.*"[165] Based on its own stated criteria, the NCAA denied that a situation in which a student-athlete who happens to be an Olympic athlete in another sport

159. *Id.*

160. *See id.* at 7; text accompanying *supra* n. 40.

161. *Bloom*, slip op. at 2 (citing *Snyder*, 705 P.2d at 514).

162. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 13, *Bloom*, 02 CV 1249.

163. *Bloom*, slip op. at 6.

164. *See* Memo. from Laura M. Wurtz, Admin. Rev. Subcomm. Coord., NCAA, to Dir. of Athletics, Faculty Athletics Rep., Senior Woman Adminstr., and Conf. Commr., *Administrative Review Subcommittee Waiver* (Mar. 21, 2002) (copy on file with *Tulsa Law Review*). Conspicuously absent from the memorandum is any reference to Bloom, the University of Colorado, a case number, or any other unique information that would suggest it is not a form letter.

165. *Id.* (emphasis added).

and also has been recognized as a modeling, acting, and broadcasting talent does not fit the NCAA's definition of "extraordinary." By setting such a vague standard of review under which to grant a student-athlete relief, the NCAA effectively insulates itself from any legal redress, and the burden on the student-athlete is only multiplied by the fact that the possibility of an administrative remedy is miniscule at best.[166] Additionally, the court in *Bloom* failed to consider the fact that the NCAA may have made the request for more information merely to perform veiled discovery before a legal complaint was ever filed, sensing that a legal battle was about to ensue once it rejected the waiver and that it would once again have to defend itself from antitrust attack.

V. THE SHERMAN ACT

Collegiate amateurism is not a moral issue. It is an economic camouflage for monopoly practice.

Walter Byers, former NCAA Executive Director[167]

A. *Background*

The Sherman Act mandates that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[168] It is important to note that the Sherman Act only prohibits unreasonable restraints of trade since contracts, by their very nature, restrain trade in some way.[169]

Some restraints of trade are so objectionable on their face that they are deemed per se violations of the Sherman Act.[170] However, courts have consistently held that alleged antitrust violations involving sports leagues and associations should be subject to a "Rule of Reason" analysis due to the unique nature of the business enterprise.[171] "Rule of Reason analysis calls for a thorough investigation of the industry at issue and a balancing of the arrangement's positive

166. *See Cole*, 120 F. Supp. 2d at 1071-72 ("[T]he NCAA's rules and decisions regarding the concerns and challenges of student-athletes are entitled to considerable deference and [the] court is reluctant to replace the NCAA subcommittee as the decision-maker on private waiver applications. *See e. g. Shelton v. NCAA*, 539 F.2d 1197, 1198 (9th Cir.1976) (holding that 'it is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules.')." (footnote omitted)); Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 12, *Bloom*, 02 CV 1249 ("[T]he NCAA unquestionably has an interest in enforcing its regulations and preserving the amateur nature of intercollegiate athletics" (quoting *Lasege*, 53 S.W.3d at 85-86 (internal quotations omitted))).

167. Zimbalist, *supra* n. 1, at 19 (quoting Hal Sears, *The Moral Threat of Intercollegiate Sports*, 19 J. of Sport History 211 (1992) (quoting Walter Byers)) (internal quotations omitted). Byers was NCAA Executive Director from 1951 to 1987. *Id.*

168. 15 U.S.C. § 1 (2000).

169. *NCAA v. Bd. of Regents of U. of Okla.*, 468 U.S. 85, 98 (1984); *see e.g. Ariz. v. Maricopa County Med. Socy.*, 457 U.S. 332, 342-43 (1982); *Natl. Socy. of Prof. Engrs. v. U.S.*, 435 U.S. 679, 687-88 (1978); *Bd. of Trade of City of Chi. v. U.S.*, 246 U.S. 231, 238 (1918).

170. *See L.A. Meml. Coliseum Commn. v. Natl. Football League*, 726 F.2d 1381, 1387 (9th Cir. 1984).

171. *See id.* at 1391-92.

and negative effects on competition."[172] This balancing process is not applied until the plaintiff first establishes a cause of action.[173] To establish a cause of action, a plaintiff must prove the following elements: "(1) an agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition."[174]

B. Key Cases Involving the NCAA

The seminal case dealing with antitrust issues relating to intercollegiate athletics is *NCAA v. Board of Regents of the University of Oklahoma*,[175] in which the U.S. Supreme Court held that the NCAA did not have the right to limit the number of college football television appearances of its members.[176] While *Board of Regents* dealt with restraints imposed upon NCAA member schools as opposed to restrictions placed on student-athletes, it nonetheless set the method of analysis to be utilized in future cases involving antitrust issues and the NCAA.[177] The Court in *Board of Regents* determined that by placing a "ceiling" on the number of games a school could televise, the NCAA had set an output restraint that prior case law had held to be unreasonable.[178] Additionally, the Court found that the NCAA had set a "minimum aggregate price"[179] that prevented negotiations between schools and broadcasters, thus making its action a clear horizontal restriction on pricing.[180]

The NCAA bylaws establish an agreement between the NCAA and its member schools, which satisfies the first requirement that an agreement exist among two or more business entities.[181] Additionally, as discussed in *Board of Regents*, "[t]he NCAA is an association of schools which compete against each other to attract . . . fans and *athletes*."[182]

While horizontal price-fixing among members of an association is usually considered a per se violation of the antitrust laws, courts have consistently held that a Rule of Reason analysis should apply when "certain products require horizontal restraints, including horizontal price-fixing, in order to exist at all."[183] Similarly, the Supreme Court in *Board of Regents* found that the determining factor in deciding to abandon a per se analysis had nothing to do with either the

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172. *Id.* at 1391 (quoting *Cascade Cabinet Co. v. W. Cabinet & Millwork Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983)) (internal quotations omitted).

173. *Cascade Cabinet Co.*, 710 F.2d at 1373.

174. *Id.* (quoting *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir. 1983)) (internal quotations omitted); *see Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979).

175. 468 U.S. 85.

176. *Id.* at 91-95, 120.

177. *See id.* at 100-06.

178. *Id.* at 99.

179. *Id.*

180. *Bd. of Regents*, 468 U.S at 99-100.

181. *Id.*

182. *Id.* at 99 (emphasis added).

183. *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998).

NCAA's non-profit status or its stature as a catalyst for higher education and athletics.[184] Instead, the court found that the NCAA involves an association of schools that would be non-existent without some horizontal restrictions that are necessary for its survival, thus necessitating a Rule of Reason inquiry.[185] In *Law v. NCAA*,[186] the Tenth Circuit held that when the NCAA established a rule that placed a salary cap on certain assistant coaches, thus "fix[ing] the cost of one of the component items used by NCAA members to produce the product of Division I basketball,"[187] it constituted what would, in most circumstances, be viewed as a per se violation of antitrust law.[188] However, the unique context of athletic association membership beckons for Rule of Reason analysis, since the success of the product of each member institution is at least partially dependent upon the other institutions maintaining a certain level of success.[189]

In *Law*, the court also recognized restraints that the NCAA may permissibly impose on its membership, with the important caveat that they be necessary for the product to exist.[190] The court also made clear in *Law* that the NCAA's attempt to use a "joint venture" defense to escape antitrust liability is futile, since the NCAA is not responsible for hiring coaches (the schools hire coaches independently).[191] Bloom was recruited by CU, not the NCAA, so any antitrust violation flowing from Bloom's relationship with CU and the NCAA would pass muster under a joint venture defense.

C. *Recent Antitrust Decision*

A recent case analyzing analogous considerations is *TFWS, Inc. v. Schaefer*,[192] which involved a liquor store owner who sued the state comptroller for implementing a mandatory pricing scheme upon wholesalers.[193] The court considered the unique context of the situation in which the plaintiff was using antitrust laws to challenge the state regulations responsible for wholesale liquor pricing.[194] To decide whether the state regulation should be preempted by antitrust law, the court found the decisive inquiry to be "whether there exists an

184. *Bd. of Regents*, 468 U.S. at 100-01.
185. *Id.* at 101.
186. 134 F.3d 1010.
187. *Id.* at 1017.
188. *Id.*
189. Ray Yasser, Lecture, *Antitrust in Professional Sports* (Tulsa, Okla., Sept. 10, 2002).
190. *Law*, 134 F.3d at 1018.
191. *Id.* at 1018-19.
192. 242 F.3d 198 (4th Cir. 2001), *vacated on other grounds*, 325 F.3d 234 (4th Cir. 2003). The Fourth Circuit subsequently ruled that it was inappropriate for the trial court to grant summary judgment based on unresolved factual determinations, which were necessary to apply the ultimate balancing test between the state's interest to promote temperance and the federal antitrust laws. *TFWS, Inc. v. Schaefer*, 325 F.3d 234 (4th Cir. 2003).
193. *TFWS*, 242 F.3d at 201-02; *see* William C. Holmes, *Antitrust Law Handbook* § 1:1, 2 (2002 ed., West 2001).
194. Holmes, *supra* n. 193, at § 1:1, 2.

irreconcilable conflict between the federal and state regulatory schemes."[195] The court also cited from *Rice v. Norman Williams Co.*[196] that "[a] state regulatory scheme, when challenged on its face, 'may be condemned under the antitrust laws . . . *if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.*'"[197] Analogously, a private association's constitution should be preempted by the antitrust laws, because in this case, "irresistible pressure" is placed on CU not only to abide by the bylaws, but also to *not even challenge the bylaws*, since allowing Bloom to compete before he relinquishes his acting and modeling opportunities would cause the school to forfeit television revenue, team victories, and individual awards.[198]

D. Antitrust Implications in Bloom's Case: Applying the Rule of Reason

The NCAA is in violation of the Sherman Act by conspiring with member schools such as CU to produce horizontal restrictions upon its member student-athletes in regards to outside endorsement opportunities, which inures to the benefit of the NCAA in its endorsement arrangements with companies such as Nike, ABC, and CBS.[199] In *Board of Regents*, the Supreme Court held in part that if a sports association's rules provide for a level playing field among participants, a valid restraint upon competition exists.[200] However, a Rule of Reason analysis leads to the conclusion that Bloom will prevail on an antitrust claim. Although the NCAA's pro-competitive rationale is afforded certain deference by the courts, "it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice."[201]

On its website, the NCAA illustrates how highly the odds are stacked against a high school football player hoping to play in the National Football League.[202] Only 300 out of the estimated 971,000 high school football players who hit the gridiron each year will ever play in the NFL.[203] The NCAA argues that Bloom's claim—that his contract rights were unlawfully restrained by its actions—should fail because, among other reasons, the "NCAA rules merely present [Bloom] with

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195. *TFWS*, 242 F.3d at 207 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)) (internal quotations omitted); *see* Holmes, *supra* n. 193, at § 1:1, 3.

196. 458 U.S. 654 (1982).

197. *TFWS*, 242 F.3d at 207 (quoting *Rice*, 458 U.S. at 661) (emphasis added) (internal quotations omitted); *see* Holmes, *supra* n. 193, at § 1:1, 3.

198. *See* NCAA, *supra* n. 7, at § 19.8, 319.

199. *See e.g.* Aff. of Andrew Carroll at ¶ 14, *Bloom*, 02 CV 1249.

200. *See* 468 U.S. at 102. The court listed among the valid restraints that "athletes must not be paid" or else the integrity of the product would suffer. *Id.* Because athlete compensation was not an issue in this case, it should not be assumed that the Court had any inkling of the facts that would surface in *Bloom*. More likely, the court was referring to direct compensation to athletes for participating in football or basketball at a given school.

201. *Bd. of Regents*, 468 U.S. at 101 n. 23 (citing *U.S. v. Griffith*, 334 U.S. 100, 105-06 (1948); *Associated Press v. U.S.*, 326 U.S. 1, 16 n.15 (1945); *Bd. of Trade of City of Chi.*, 246 U.S. at 238; *Stand. Sanitary Mfg. Co. v. U.S.*, 226 U.S. 20, 49 (1912); *U.S. v. Trans-Mo. Freight Assn.*, 166 U.S. 290, 342 (1897)).

202. NCAA, *What Does It Take to Make to the NFL* <http://www1.ncaa.org/membership/enforcement/amateurism/player_contacts/football/what_it_takes> (accessed Nov. 3, 2003).

203. *Id.*

an option to pursue intercollegiate sports as an amateur and do not bar him from pursuing other contracts."[204] However, those fortunate and talented enough to play the sport at its highest level almost always played collegiately,[205] and therefore those who hope for a chance at the NFL are compelled into service under the umbrella of the NCAA.[206] It is also important to note that college football is unique as compared to baseball and basketball in that football players have no legitimate option to showcase their skills after graduating from high school other than playing collegiately. Only a handful of current players on NFL rosters did not attend an NCAA-affiliated college or university.[207] The NBA has routinely drafted high school graduate basketball players in recent years,[208] and even those who opt to go pro and are not selected by an NBA team may end up playing in the NBA Developmental League, Continental Basketball Association, or go overseas to compete professionally.[209] Similarly, high school baseball players are drafted by the hundreds each year by Major League Baseball franchises.[210] Due to the physical demands of professional football, few, if any, eighteen-year-olds are ready for such an experience. The NCAA therefore enjoys a virtual monopoly over eighteen- through twenty-one-year-old football players, to be exploited at its whim.

The court in *Bloom* would be best served to follow the guidance established in *Matthews v. NCAA*,[211] where the court found that Title III of the ADA applied to the NCAA, thus allowing federal law to trump the private association's eligibility rules.[212] Similarly, antitrust law should prevail over eligibility bylaws when student-athletes' access to the football field is unfairly restricted through the NCAA's use of anticompetitive financial restraints. The NCAA's interference with a football player's contractual rights such as Bloom's is not only a hindrance in the present, but also has the potential to unnecessarily restrain future financial

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204. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 24, *Bloom*, 02 CV 1249.

205. *See* text accompanying *infra* n. 206.

206. *See generally* CBS Sportsline, *NFL* <http://www.sportsline.com/nfl/teams> (accessed Oct. 27, 2003) (providing access to 2003 NFL rosters listing colleges attended).

207. *See id.*

208. *See* NBA Media Ventures, LLC, *NBA Draft NY02, 2001 NBA Draft, First Round* <http://www.nba.com/draft2002/history/history_01draft.html> (accessed Nov. 3, 2003). Four of the top eight picks in the 2001 NBA draft were high school seniors, and the ninth pick in the 2002 draft was also a high school senior. *Id.*; NBA Media Ventures, LLC, *NBA Draft NY02, NBA Draft Board, Round 1* <http://www.nba.com/draft2002/board/index.html> (accessed Jan. 6, 2004). Most recently, in the 2003 NBA draft, four high school seniors were taken in the first round, including the number one pick overall. NBA Media Ventures, LLC, *NBA Draft NY03, Draft Board* <http://www.nba.com/draft2003/board.html> (accessed Jan. 6, 2004).

209. *See* Eurobasket, *CBA Draft* <http://www.usbasket.com/cba/draft02.asp> (accessed Oct. 27, 2003).

210. *See* ESPN.com, *Baseball, Draft List: Round One* <http://espn.go.com/mlb/s/2002/0604/1390623.html> (accessed Jan. 6, 2004). Seven of the top eight picks in the 2002 MLB draft were high school seniors. Tom Singer, *MLB.com, High Hopes for High Schoolers* <http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20020604&content_id=42104&vkey=news_mlb&fext=.jsp> (accessed Nov. 16, 2002).

211. 179 F. Supp. 2d 1209 (E.D. Wash. 2001).

212. *Id.* at 1220-23.

opportunities. Renowned economist Gary Becker observed that "[a]n association of companies that limits payments to employees and punishes violators would usually be considered a labor cartel. Why should the restrictions on competition for athletes among . . . the members of the NCAA be any different?"[213]

Much more difficult is the task of proving that the bylaws intend to unreasonably restrain competition. Courts have commonly held that a presumption exists that the NCAA bylaws are intended to further the goals of amateurism and create a level playing field on which all member schools may compete.[214] While the NCAA claims that it does not object to Bloom receiving remuneration for the use of his name or picture by Tommy Hilfiger,[215] its conditional approval can be quickly withdrawn or negated by other bylaws restricting such opportunities in a different manner.[216] The opacity of its bylaws forces member institutions to make uncertain determinations that could have disastrous impacts on the student-athlete's eligibility and potentially have similarly harsh consequences on the school's finances and athletic legacy.[217] A close look at some of the bylaws relevant to Bloom's case reveals language that is difficult to decipher due to ambiguities drafted by the NCAA. For example, NCAA bylaw 12.5.1.3 states:

> If an individual accepts remuneration for or permits the use of his or her name or picture to advertise or promote the sale or use of a commercial product or service prior to enrollment in a member institution, continued remuneration for the use of the individual's name or picture (under the same or similar circumstances) after enrollment is permitted without jeopardizing his or her eligibility to participate in intercollegiate athletics only if all of the following conditions apply:
>
> (a) The individual's involvement in this type of activity was initiated prior to his or her enrollment in a member institution;
>
> (b) The individual became involved in such activities for reasons independent of athletics ability;
>
> (c) No reference is made in these activities to the individual's name or involvement in intercollegiate athletics;
>
> (d) The individual does not endorse the commercial product;
>
> (e) Any compensation received by the individual is consistent with applicable limitations on a student-athlete's maximum amount of financial aid; and
>
> (f) The individual's remuneration under such circumstances is at a rate commensurate with the individual's skills and experience as a model or performer and is not based in any way upon the individual's athletics ability or reputation.

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213. *See* Zimbalist, *supra* n. 1, at 20 (quoting Gary Becker, *College Athletes Should Get Paid what They're Worth*, Bus. Week 18 (Sept. 30, 1995)) (internal quotations omitted).

214. *See e.g. Cole*, 120 F. Supp. 2d at 1071; *Lasege*, 53 S.W.3d at 85-86.

215. *See* Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 4, *Bloom*, 02 CV 1249.

216. *See infra* n. 228 and accompanying text.

217. *See infra* n. 253.

Unfortunately, courts have left the NCAA with the discretion to decipher its own bylaws,[218] at the expense of the student-athletes whom the regulations are supposedly designed to protect. A brief analysis of NCAA bylaw 12.5.1.3 clearly shows that the court should find that Bloom must be allowed to continue to participate in and be fairly compensated for his preexisting opportunities.

Bloom clearly satisfies subsections (a) and (c), and also fulfills the requirement of subsection (b) for endorsement opportunities, as long as the endorsements are not *solely* related to his athletic ability.[219] Interpretation of the word "independent" is determinative in establishing the meaning of subsection (b). A liberal interpretation by the court could indicate that "independent" reasons should be construed as those *other than* athletic ability, rather than *exclusive of* athletic ability. Additionally, the bylaw should be interpreted to refer to "athletic ability" as the athletic ability for which the athlete competes collegiately, not the ability necessary to perform as a professional skier. Bloom's skiing ability has nothing to do with the NCAA's guidelines, because he does not compete collegiately as a skier. The language of the bylaw should be construed against the drafter, who had the opportunity to clarify its intent when producing the legislation,[220] but instead crafted the "conundrum" that exists today.[221] The court should have ruled that the bylaw was to be construed to require a reason not relating to the athletic ability necessary to compete as a college football player, "since an interpretation of a contract against a party who prepared the instrument is preferred where different interpretations are possible or where ambiguities are present."[222] Because "athletic ability" could be determined to include components such as coordination, strength, agility, speed, lateral movement, muscular endurance, and balance, some limitation must be placed on how the term is construed. Otherwise, due to the tremendous overlap of "athletic ability" among various sports,[223] even those as dissimilar as football and skiing,[224] the term becomes excessively restrictive. Furthermore, the NCAA's director of membership services, Steve Mallonee, admits that the endorsement provision is the lone amateurism provision applied to the student-athlete in his *professional sport*, which distinguishes the bylaw from the other amateurism rules that are

218. *See e.g. Lasege*, 53 S.W.3d at 83 ("In general, the members of such associations should be allowed to 'paddle their own canoe' without unwarranted interference from the courts.").

219. *See generally* NCAA, *supra* n. 7, at § 12.5.1.3, 79; *supra* nn. 12, 63, 75 and accompanying text.

220. *See e.g. Jones Assocs. v. Eastside Props., Inc.*, 704 P.2d 681, 685 (Wash. App. Div. 1 1985) ("[A]mbiguous contract language is strictly construed against the drafter.").

221. Pl.'s Opening Br. at 12, *Bloom*, 02 CA 2302.

222. *Ethyl Corp. v. Forcum-Lannom Assocs.*, 433 N.E.2d 1214, 1216 (Ind. App. 4th Dist. 1982) (quoting trial court's conclusions of law) (internal quotations omitted).

223. Bill Foran, *Human Kinetics Excerpt for September!, 3-D Balance and Core Stability From High-Performance Sports Conditioning* <http://www.connectedcoach.com/html/NewsDetail.asp?ID=63> (accessed Feb. 2, 2004).

224. *Id.* "Dynamic balance" is an essential ability to succeed in both football and skiing. While skiers depend heavily on controlling their center of gravity and balance, football players must sustain balance "while moving in relation to a moving object." *Id.*

applied on a "sport specific" basis to the sport in which the student-athlete competes collegiately.[225]

Prior to the August 2003 revision,[226] which rescinded the $2,000 cap on employment income during the school year, it mattered little whether Bloom's employment was related to athletic ability, since he would likely exceed the cap from one modeling engagement, television appearance, or endorsement deal.[227] Now that the $2,000 cap has been abolished, the NCAA's purportedly permissive stance has become a gratuitous attempt to allow Bloom the opportunity to continue these activities, because in reality the rule swallows any opportunity that exists.[228] The "related to athletic ability" issue is now the stumbling block that prohibits Bloom from earning unlimited income from modeling, acting, and endorsement opportunities.

Particularly vague is the requirement in subsection (d) that "[t]he individual does not endorse the commercial product."[229] This restriction would obviously preclude Bloom from any public appearances or autograph sessions. Less clear is how his appearance in a picture modeling the Tommy Hilfiger brand name would be viewed. Although the NCAA claims that the picture would not constitute an endorsement, it is hard to imagine how modeling photographs are any less of an expression of endorsement of a product than is making a personal appearance on behalf of the clothier.[230] The rule simply does not clarify how one could possibly model a product, yet not endorse it. The NCAA only states that the rate of pay given to such athlete should not be based *in any way* upon the individual's athletics ability or reputation, thus pay must be given exclusive of any consideration of athletic ability or reputation as an athlete.[231]

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225. Pl.'s Opening Br. at 10, *Bloom v. NCAA*, 02 CA 2302.

226. Email from James Bandy, Asst. Dir. of Member Svcs., NCAA, to David Warta, Student, U. Tulsa, *RE: NCAA Information* (Jan. 29, 2004) (copy on file with *Tulsa Law Review*) (quoting from the 1998-1999 NCAA manual noting that a student-athlete could "receive earnings from legitimate on- or off-campus employment during semester or term time in combination with other financial aid included in the student-athlete's individual financial aid limit up to the value of a full grant plus $2,000 . . . .")

227. *See e.g.* B.G. Brooks, *RockyMountainNews.com, Bloom to Challenge NCAA, Play Football* <http://www.rockymountainnews.com/drmn/cu/article/0,1299,DRMN_2938_2589241,00.html> (Jan. 20, 2004) ("[Bloom] won $45,000 in a television Superstars competition—money he couldn't accept.") As if his all-American image needed a further boost, Bloom planned to donate the money to his hometown in order to help build a Little League baseball field. Mt. Sports Media, *Skiingmag.com, Bloom Wins Superstars in Jamaica* <http://www.skiingmag.com/skiing/competition/article/0,12910,453069,00.html> (accessed Feb. 3, 2004).

228. *See* Zimbalist, *supra* n. 1, at 26.

229. NCAA, *supra* n. 7, at § 12.5.1.3(d), 79. "Endorse" is defined by *Webster's* as "to express approval of publicly and definitely." *Webster's Ninth New Collegiate Dictionary* 411 (9th ed., Merriam-Webster 1991).

230. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 8, *Bloom*, 02 CV 1249.

231. NCAA, *supra* n. 7, at § 12.5.1.3(f), 79.

E. *The NCAA's Memo in Opposition to Bloom's Request for Mandatory Injunctive Relief Misinterprets Holdings from Other Courts*

The NCAA defends its action against antitrust attack by citing *Justice v. NCAA*,[232] in which four Division I football players attempted to enjoin the NCAA from prohibiting their university from participating in a post-season bowl game due to infraction sanctions.[233] The NCAA asserts the court rejected the claim due to its finding that the penalties were imposed out of "the NCAA's concern for the protection of amateurism."[234] Conspicuously absent from the NCAA's brief is the analysis utilized by the court in reaching its decision, which undoubtedly distinguishes it from the circumstances present in Bloom's case.[235] The student-athletes in *Justice* claimed that they were being limited in their ability to procure professional contracts and bonuses due to the NCAA's sanctions that prohibited their university from participating in post-season bowl competition. The court's rationale for rejecting the claims rested on the simple fact that "[w]hat is at issue here is not . . . revocation of the plaintiffs' scholarships, or even participation in intercollegiate athletics, *but rather the significantly less substantial and speculative opportunity to play in televised or post-season games.*"[236] Bloom's case determines whether or not he will ever have a legitimate chance at an NFL career, since his chance of playing professionally without college experience is an extreme long shot.[237] Additionally, Bloom's Olympic window of opportunity is quickly closing, and without endorsement income he will be at a competitive disadvantage on the slopes.[238] Being denied the opportunity to participate in one game during the course of a four-year career, as were the plaintiffs in *Justice*, pales in comparison to the consequences Bloom faces by choosing to continue his preexisting endorsement and employment opportunities.

F. *Anti-Competitive Effect*

In *Board of Regents*, the Court noted that the NCAA's practices left little doubt that it was impeding its members' ability to negotiate their own television contracts.[239] The Court held that the NCAA actions restrained trade, stating:

> There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and

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232. 577 F. Supp. 356 (D. Ariz. 1983).

233. *Id.* at 360.

234. Def.'s Memo. in Opposition to Pl.'s Req. for Mandatory Injunctive Relief at 24, *Bloom*, 02 CV 1249 (quoting *Justice*, 577 F. Supp. at 383) (internal quotations omitted).

235. *See Justice*, 577 F. Supp. at 364-68.

236. *Id.* at 365 n. 6 (emphasis added) (citations omitted).

237. *See supra* n. 203 and accompanying text.

238. *See* Brooks, *supra* n. 227. Bloom insists that he needs a minimum of $75,000 from endorsements, which would be used to cover travel expenses and salaries for a coach, trainer, and nutritionist. All are necessary expenses due to the evolution of the sport. *Id.*

239. 468 U.S. at 106 n. 30 (noting that "[t]he anticompetitive consequences of this arrangement are apparent"). The district court insisted that the "NCAA ha[d] commandeered the rights of its members and sold those rights for a sum certain. In so doing, it . . . fixed the minimum, maximum and actual price which will be paid to the schools . . . ." *Id.*

> enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.[240]

In determining what would make a restraint unreasonable, the Supreme Court observed the district court's considerations:

> Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products.[241]

The NCAA's treatment of member institutions in such a manner is felt similarly by constituent student-athletes. The uniform price is set for each student as the cost of education, without any recognition for the revenue generated by an individual athlete.[242] Moreover, the NCAA has found a way to calculate into the equation skills acquired and utilized by the athlete, which are distinct from those for which the scholarship provides assistance.

At the core of the NCAA's concern is the use of its brand name in any fashion to the financial benefit of another.[243] In one of its bylaws, the NCAA specifically prohibits student-athletes from using an "individual performance" for a commercial venture, even when the performance is unrelated to the sport in which the athlete competes collegiately.[244] Ironically, however, the shoe does not seem to fit the other foot. In a recent college football telecast involving CU and spotlighting Bloom's performance, a segment of the telecast was spent explaining the similarity in movements required of a moguls skier and punt returner.[245] Bloom is shown on a split screen—on one side returning a punt, on the other skiing in the World Championships.[246] While the fact that Bloom is prohibited from ever using his college football affiliation as a tool to reap endorsement opportunities is of paramount concern to the NCAA, it apparently finds no such restriction applicable when using footage of Bloom skiing during one of its own

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240. *Id.* at 98 (footnote omitted).

241. *Id.* at 96 (quoting *Bd. of Regents of U. of Okla. v. NCAA*, 546 F. Supp. 1276, 1300-01 (W.D. Okla. 1982)) (internal quotations omitted).

242. *See generally* Interview by Larry Conley, ESPN College Basketball Analyst, with Kirk Hinrich, Preseason All-American Guard for the University of Kansas (Nov. 19, 2002). When asked if he could change one thing about the NCAA, Hinrich answered that student-athletes should get a piece of the huge financial pie that they produce on their respective school's behalf. *Id.*

243. *See generally* CBS Sportsline, *News, Name of the Game: Leagues Protecting Logos, Trademarks* <http://cbs.sportsline.com/general/story/5723572> (accessed Oct. 27, 2003). The NCAA even goes so far as to employ "private police forces" to monitor sales activity outside major events such as the Final Four to ensure that only officially licensed NCAA merchandise is sold to protect its $2.5 billion interest. *Id.*

244. Verified Mot. for T.R.O. & Prelim. Inj. at 11, *Bloom*, 02 CV 1249; *see* NCAA, *supra* n. 7, at § 12.5.2.3.4, 81.

245. *Kansas State University vs. University of Colorado* (ABC Sports Oct. 5, 2002) (tv broadcast).

246. *Id.*

college football telecasts.[247] *Board of Regents* elucidates that an unreasonable restraint of trade may be "based . . . on the nature or character of the contracts, or . . . on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices."[248] Bloom's agent made considerable efforts to obtain a sponsorship deal with Nike, but when the multi-national conglomerate became aware that Bloom was playing football at CU, it immediately ceased interest in signing Bloom since he would be required to wear Nike gear anyway as part of its exclusive arrangement with CU.[249] It becomes difficult to take seriously the provision in the NCAA Constitution that proclaims: "student-athletes should be protected from exploitation by professional and commercial enterprises."[250] Unfortunately, that from whom the student-athlete need be protected most from exploitation is the NCAA itself.

The anticompetitive effect of the NCAA's restrictions on Bloom's preexisting economic opportunities are clear in light of the relevant standard:

> Anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more

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247. Meanwhile, the NCAA and ABC both reap the financial rewards. ABC, who owns the broadcast rights to the Bowl Championship Series (the NCAA's attempt at determining a national champion in college football), also owns the broadcast rights for the footage on which Bloom appeared during his victory at the World Championships. *See* Jasen R. Corns, Student Author, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 Tulsa L. Rev. 167, 174-75 (2003) (noting that ABC owns the rights to televise the Bowl Championship Series); Family Education Network, Inc., *The Rights Stuff* <http://www.infoplease.com/ipsa/A0884464.html> (accessed Aug. 31, 2003); USSA News Desk, *SkiingMag.com, Competition: Freestyle Championships Head West* <http://www.skiingmag.com/skiing/competition/article/0,12910,323282.00.html> (Sept. 19, 2001) (noting that the 2002 championships to be held March 22-24, 2002, would be televised by ESPN, a sister network of ABC).

248. *Bd. of Regents*, 468 U.S. at 103 (quoting *Natl. Socy. of Prof. Engrs.*, 435 U.S. at 690) (internal quotations omitted).

249. Aff. of Andrew Carroll at ¶ 14, *Bloom*, 02 CV 1249. William C. Friday, former president of the University of North Carolina System, had this to say about a system that has somehow been able to leave its producers on the sidelines when it comes to compensation:

> What looked like a game and a way to teach sportsmanship has become something else. . . .
>
> Television has a magnificent thing here. They don't have to train actors; they don't have to pay the athlete . . . . They just turn on their cameras and there it is.
>
> . . .
>
> I don't think the NCAA can handle it any longer because they make too much money for themselves . . . . It's the power of the dollar that no college administration has yet devised a way of controlling.

NCAA, *The NCAA News, News and Features, Thoughts of the Day* <http://ncaa.org/news/1999/19991206/active/3625n34.html> (accessed Oct. 27, 2003) (quoting Mr. Friday) (internal quotations omitted). Ironically, the man considered to be the founder of Nike's recruiting and endorsement division, Sonny Vaccaro, is also leery of the current state of affairs between the NCAA and corporate sponsors. "Yes, I fear for where this is going. If corporate America keeps involving itself with amateur athletics, if we keep allowing companies to own the schools, then you're going to be in trouble." Zimbalist, *supra* n. 1, at 125 (quoting Mr. Vaccaro) (internal quotations omitted). While Vaccaro was likely more concerned about shady dealings among rival shoe companies and coaches, his quote still serves as foreshadowing of the dilemma now facing the NCAA in dealing with Jeremy Bloom.

250. NCAA, *supra* n. 7, at § 2.9, 5.

> favorable to the defendant than otherwise would have resulted from the operation of market forces.[251]

First, the NCAA's agreement fixed the price of endorsement dollars for athletes at zero.[252] Second, the agreement is effective in that harsh penalties are imposed by the NCAA against member schools when an ineligible student-athlete initiates a legal challenge that is not ultimately resolved in the student-athlete's favor.[253] Finally, market forces have already indicated that Bloom would have received far more from his endorsement deals with companies such as Oakley, Under Armour, and Tommy Hilfiger than the non-existent remuneration he receives from the NCAA.[254] The NCAA and CU benefit from the restriction in that they reap all financial benefit from any recognition of Bloom due to his status as an Olympic skier and model, because they control his endorsement opportunities as a student-athlete, whether related to his status as a student-athlete or not.

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251. *Law*, 134 F.3d at 1020 (citing Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 Tul. L. Rev. 2631, 2636-39 (1996)).

252. *See* NCAA, *supra* n. 7, at § 12.5.2.1, 81.

253. *See* NCAA, *supra* n. 42, at §19.7, 340-41; *supra* n. 110 and accompanying text. A laundry list of penalties awaits the NCAA member school that defies the eligibility bylaws in the errant hope of a legal victory by the offending student-athlete. The NCAA may take one or more of the following actions:

> (a) Require that individual records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
>
> (b) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
>
> (c) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;
>
> (d) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
>
> (e) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
>
> (f) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;
>
> (g) Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;
>
> (h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Management Council concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and
>
> (i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be a assessed a financial penalty as determined by the Committee on Infractions.

NCAA, supra n. 42, at § 19.7, 340-41.

254. *See* Brooks, *supra* n. 227 (noting that Bloom's representatives estimate his endorsement income could "climb into the high six figures" should he choose to accept it); text accompanying *supra* n. 12.

VI. BLOOM'S CASE CALLS FOR AMENDMENTS TO THE NCAA BYLAWS

The college community needs to get off its high horse and deal with these things. Athletes ought to be allowed to test the water (in professional sports). We're just flat wrong to not let these kids give it a whirl.

Ferdinand A. Geiger, Athletic Director, Ohio State University[255]

The final element that Bloom must prove in order to succeed on an antitrust claim is that the NCAA could have achieved its objectives in a substantially less restrictive manner.[256] This requirement is best argued by pointing to simple revisions that the NCAA could have made to its bylaws once Bloom's waiver request was offered. Amendments should be made to NCAA bylaws to allow flexibility for unique circumstances such as those present in Bloom's case. While the NCAA would have the court believe that amending its constitution is an onerous task,[257] all that is onerous about amending the constitution is the process required by the NCAA to effect such a change.[258] First, proposed legislation must be presented to the NCAA by a member institution or an entity affiliated with the NCAA, such as a conference.[259] An individual student-athlete has no power to unilaterally propose legislation to the NCAA.[260] The Alabama Supreme Court opined as much, stating:

> In such cases the athlete himself is not even a member of the athletic association .... The athlete himself has no voice or bargaining power concerning the rules and regulations adopted by the athletic associations because he is not a member, yet he stands to be substantially affected, and even damaged, by an association ruling declaring him to be ineligible to participate in intercollegiate athletics.[261]

Next, the NCAA membership services staff drafts the proposed legislation for presentation to the Management Council or Board of Directors, and at least one member of either group must sponsor the amendment.[262] The Management Council then has an opportunity to review the proposal—which it can delegate to a sub-committee—kill the proposal on its own accord, or concur with the

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255. NCAA, *The NCAA News, Thoughts of the Day* <http://ncaa.org/news/1999/19991220/active/3626n26.html> (accessed Oct. 31, 2002) (quoting Ferdinand A. Geiger, Athletic Dir., Ohio St. U., 1997).

256. *See Tanaka v. U. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

257. *See supra* n. 146 and accompanying text.

258. *See* NCAA, *supra* n. 42, at § 5.3, 37-43.

259. Telephone Interview with James Bandy, Asst. Dir. of Membership Services, NCAA (Jan. 28, 2004).

260. *Id.* Similarly, the NCAA does not allow student-athletes to "draft the waiver request, . . .decide what it says, . . . decide what materials to submit in support of the application, . . . [or] present their own cases with their own advocates [at a hearing]." Pl.'s Opening Br. at 14-15, *Bloom*, 02 CA 2302.

261. Pl.'s Opening Br. at 32, *Bloom*, 02 CA 2302 (quoting *Gulf Sts. Conf. v. Boyd*, 369 So.2d 553, 557 (Ala. 1979)) (internal quotations omitted).

262. Telephone Interview, *supra* n. 259. The Management Council is comprised of forty-nine athletics administrators, including athletics directors, conference administrators, and faculty athletics representatives. *See* NCAA, *supra* n. 42, at § 4.5.1, 26. The Board of Directors consists of eighteen chief executive officers of member schools. *Id.* at § 4.2.1, 23.

decision.[263] A concurrence by the Management Council is followed by consideration of the Board of Directors, who also has the ability to kill the bill without regard to the will of the membership.[264] The Board can then adopt the legislation by majority vote, kill the proposal, or suggest revisions.[265]

Division I members may not enact legislation through a member vote.[266] Amazingly, Division II and III members are allowed to pass bylaws through the one school, one vote system.[267] The only method through which Division I membership may initiate legislation is through an override process, which requires a minimum of thirty written requests by member schools in order to trigger a division-wide vote.[268] If the written request requirement is met, five-eighths of the voting membership must also support an override to enact the legislation.[269]

Once the procedural hurdles are overcome, the bylaw changes necessary to insulate the NCAA from future antitrust implication are quite simple. These modifications would not have the broad implications the NCAA fears because there are so few individuals with the extraordinary combination of talent, charisma, and appearance that Bloom possesses.[270]

The United States Olympic Committee (USOC), an organization with concerns similar to those of the NCAA, recognizes the NCAA as a national governing body over many different sports.[271] Similarly, the NCAA, through its allowance of remuneration to athletes under Operation Gold Grant, recognizes the existence and authority of the USOC.[272]

However, the leniency afforded Olympic athletes in pursuing other professional pursuits, including those sought by Bloom, is unparalleled by the NCAA. For example, USOC bylaws dictate:

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263. Telephone Interview, *supra* n. 259.

264. *Id.*

265. *Id.*

266. NCAA, *National Collegiate Athletic Association* 12 (NCAA 2003) (available at <http://www.ncaa.org/library/general/general_brochure/2003/2003_gen_info.pdf>).

267. *Id.*

268. *Id.*

269. The thirty written requests must be received within sixty days of the Board's decision to adopt a legislative change or its failure to adopt proposed legislation. If a conference submits a request on behalf of its members, additional procedural hurdles exist that convolute the process. *See* NCAA, *supra* n. 42, at § 5.3.2.3.1, 38-39.

270. *See supra* n. 75 and accompanying text.

271. The Ted Stevens Olympic and Amateur Sports Act § 220504(b)(3) states that it establishes its bylaws in order to represent:

> amateur sports organizations [such as the NCAA] that conduct a national program or regular national amateur athletic competition in 2 or more sports that are included on the program of the Olympic Games, the Paralympic Games, or the Pan-American Games on a level of proficiency appropriate for the selection of amateur athletes to represent the United States in international amateur athletic competition . . . .

U.S. Olympic Comm., *About Us, Ted Stevens Olympic and Amateur Sports Act* <http://www.usolympicteam.com/about_us/documents/amateuract.htm> (accessed Aug. 31, 2003).

272. NCAA, *supra* n. 7, at § 12.1.1.1.4.1.2, 71. Operation Gold Grant allows student-athletes to receive up to $25,000 for a medal-winning performance in the Olympics, and still retain amateur status under NCAA rules. *See* Verified Compl. for Declaratory & Injunctive Relief at ¶ 32, *Bloom*, 02 CV 1249.

> No member of the official delegation or other person subject to the jurisdiction of the USOC shall engage in newspaper, magazine, radio or television work for remuneration during the interval between selection and return of the Team, or shall appear as a guest or participant on radio or television programs for remuneration, without the permission of the Chief Executive Officer, or his/her designee.[273]

While at first glance the USOC bylaws appear equally restrictive as compared to the NCAA's, it is important to note an essential distinction. The USOC allows athletes to engage in radio, television, and print media work for compensation between Olympiads as long as it falls within the window running from completion of the prior Olympiad to the selection of the next Olympic team.[274] Therefore, an athlete who competed in the 2002 Winter Olympics is free to pursue those opportunities for pay and still retain eligibility for the 2006 Winter Olympics as long as the individual ceases those activities for the much smaller window of time running from team selection until the final day of competition.[275] The USOC is succinct in its rationale for abandoning a narrow line view regarding the principles of amateurism: "We wanted to rid ourselves of the hypocrisy."[276] The NCAA could impose a similar requirement upon its athletes, which in Bloom's case would require him to desist from modeling, acting, and broadcasting for pay during the NCAA football season, which would run from early August through the BCS championship game in early January. Outside that window, Bloom should be allowed to pursue those opportunities as long as (1) he does not associate himself with CU or college football while performing those professional opportunities, and (2) he receives compensation that is commensurate for one of his talent and experience.[277] In allowing Bloom to do so, the NCAA would bring its version of amateurism in closer harmony with the USOC guidelines and would encourage the most gifted student-athletes to maximize their special talents.

Another simple, yet effective change should be made to NCAA bylaw 12.5.1.3(b), which weighs toward allowing promotional activities if "[t]he individual became involved in such activities for reasons independent of athletics ability."[278] A more appropriate version would allow promotional activities if the individual became involved in such activities for reasons independent of his or her participation in a sport at a member institution. This would preclude the NCAA from capitalizing on student-athletes' athletic ability for sports in which they participate outside of the NCAA's authority. Even NCAA President Myles Brand now admits that promotional activities and endorsements "are of significant interest to student-athletes"[279] and that while endorsements should not be

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273. USOC Bylaws, ch. 29, § 6 (2003) (available at <http://www.usolympicteam.com/about_us/documents/bylaws050803.pdf>).

274. *Id.*

275. *See id.*

276. Zimbalist, *supra* n. 1, at 20 (quoting Goldie Blumenstyk, *NCAA Director Says Colleges Should Rethink Rules of Amateurism*, Chron. of Higher Educ. A31 (June 21, 1996) (quoting Mike Moran, USOC Dir. of Pub. Info.)) (internal quotations omitted).

277. *See* NCAA, *supra* n. 7, at § 12.5.1.3(f), 79.

278. *Id.* at § 12.5.1.3(b), 79.

279. NCAA, News Release, *Division I Subcommittee to Review Endorsement Legislation* (Feb. 25,

permitted at the sacrifice of the basic amateurism principles, the NCAA "need[s] to ensure that the standard is applied fairly and supports student-athletes."[280]

VII. CONCLUSION

The biggest problem with the current bylaws affecting Bloom is that they were crafted to prevent those who would manipulate the system from gaining financial advantage. But they also work to the detriment of those with legitimate interests like Bloom's. The NCAA's real fear is that it would be opening a box of Pandoran proportion if it provides Bloom the relief he seeks. The NCAA envisions a world where star football players would be performing local spots for car dealerships, fast food restaurants, and the like due only to their celebrity status as collegiate athletes. The question the NCAA would ask is: Where do we draw the line? In Bloom's case, the line is not in danger of becoming blurred, specifically due to his preexisting Olympic status in another sport and his endorsement deals in place prior to enrollment at CU. Strong public policy exists to protect the economic benefit flowing from Olympic competition to those who volunteer to represent our country,[281] and those rights should not be truncated due to the athlete's interest in pursuing amateur interests in a different sport.

Through its bylaws, the NCAA has roadblocked three well-paved avenues that Bloom worked hard to open. The NCAA has shifted Bloom's endorsement, acting, and modeling careers to neutral while he acts as one of the thousands of student-athlete deliverymen in the billion-dollar business of college football.

The NCAA, in dealing with its member schools and its student-athletes, such as Bloom, would be better served by taking the course suggested in 1915 by LeBaron R. Briggs, Dean of Harvard University and President of the NCAA:

> [B]lind unbelief is sure to err. We cannot establish trust in ourselves without trusting others. Moreover, heretical though it may seem, there are many worse things than being cheated now and then. And if we are always expecting to be cheated, we are not merely unhappy, we are cheated quite often. When we know that a man or a college is untrustworthy, let us not deal with him or it, but let us be slow in knowing. *Let us not distrust until we have to—and we may never have to.*[282]

*David Warta**

2004) (available at <http://www.ncaa.org/releases/divi/2004/2004022501d1.htm>). The Management Council accepted a proposal made by the Student Athletes Advisory Committee to review the endorsement legislation at the NCAA's Academic, Eligibility, and Compliance Cabinet meeting in June 2004. The endorsement legistation was last considered for amendment in 1999. *Id.*

280. *Id.*

281. *See supra* n. 272 and accompanying text.

282. NCAA, *The NCAA News, The NCAA Century Series – Part I: 1900–1939, Thoughts of the Day* <http://ncaa.org/news/1999/19991108/active/3623n30.html> (accessed Oct. 27, 2003).

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