

Getting Paid To Play: An Analysis Of The Application Of Antitrust Law And Labor Law To NCAA Athletics

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On January 28, 2008 the National Collegiate Athletic Association (NCAA) reached a settlement with a class of student-athlete plaintiffs who claimed that the NCAA and its member institutions had entered into a horizontal agreement to deny student-athletes their legitimate share of the profits obtained through big-time college sports. The settlement of *White v. NCAA* removed from the courts the question of whether the NCAA's grant-in-aid restrictions violate the Sherman Act. In the wake of that settlement, an even bigger question remains open, the question of whether student-athletes can demand compensation from the NCAA and its member institutions for the monies that the student-athletes produce for big-time athletic programs.

This study tackles that question from two different, but related, angles. The first angle picks up where the plaintiffs in *White v. NCAA* left off in that it addresses the NCAA's vulnerability to Sherman Act application. Specifically, we examine whether student-athletes could succeed if another antitrust action is brought against the NCAA and actually litigated. In doing so, this section examines the claims asserted by the plaintiffs in *White v. NCAA* as well as the body of anti-trust case law applicable to arguments available to potential plaintiffs.

Particular emphasis was placed on case law examining whether colleges and universities that compete in big-time college football and basketball form a definable and recognizable relevant market for the purpose of antitrust litigation. This study also includes an in-depth examination of the rule of reason as applied to antitrust actions involving college athletics. The results of these examinations established that there is a legitimate basis for plaintiffs to challenge the current grant-in-aid system under antitrust laws. Although, the likelihood that potential plaintiffs will prevail on an antitrust action remains unclear given the magnitude of the impact that such a decision will have on college athletics. Another challenge under antitrust law is the most likely avenue for augmenting student-athletes' compensation, but labor law provides a possible alternative.

McCormick (1997) suggests that in professional leagues player welfare under labor law is superior to antitrust protection. The second angle addresses the issue of grant-in-aid as compensation and the legal question of the status of NCAA athletes as employees. McCormick and McCormick (2006) put forth that student-athletes receiving grant-in aid scholarships should be classified as employees under National Labor Relations Act (NLRA) standards. Classification as employees permits them to join, or organize, a labor union and collectively bargain the terms of their compensation. Parasuraman (2007) considers the obstacles to unionizing NCAA athletes, using graduate teaching assistants attempts at unionization as a relevant comparison. Contrary to McCormick and McCormick (2006), he concludes that the National Labor Relations Board (NLRB) should not recognize grant-in-aid athletes as employees and suggests that Congress is the appropriate adjudicator. We address this argument, and consider in greater detail the complications relationship between the NCAA in its role as a governing body and the university as the employer of the student athlete.

We conclude that a collectively bargained solution to the compensation for student-athletes is optimal, but unlikely in the current legal environment. Given this an antitrust action may be the only catalyst for change available to student-athletes. This study determined that there is a legitimate legal basis for challenging the current system under antitrust laws. However, this study also determined that the courts might be reluctant, or perhaps even unwilling, to effect such change. If a class of student-athlete plaintiffs is able to prevail in court on an antitrust challenge they stand to recover an estimated \$300 to \$400 million in treble damages (Dennie, 2007). Perhaps more importantly, the nature of amateurism and college athleticism will be irrevocably and permanently changed by a successful antitrust challenge. The question of whether the courts are willing to effect that change remains unclear. What is clear is that the settlement in *White v. NCAA* did not result in any meaningful change to the system. That type of change will depend on a determined group of student-athletes and a court system willing to pierce the veil of amateurism that exists in big-time college sports.