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THE NCAA "DEATH PENALTY" – DEATH FOR PENN STATE OR DEATH FOR COMPETITION?

By: Zachary D. Crowe[1]

ABSTRACT

The NCAA has enjoyed being the primary provider of college athletics for over a century. It has used this dominant position to impose its authority over member universities in a wide variety of areas. The NCAA has a plethora of enforcement measures and has enjoyed extensive judicial protection for its regulations, despite the fact that it essentially operates as a cartel. It has withstood an overwhelming majority of the charges alleging that it violates the Sherman Act by unreasonably restraining competition and it appears that this has resulted in the NCAA developing a feeling of immunity.

The NCAA's most restrictive punishment is appropriately known as the "death penalty." The NCAA uses the "death penalty" to exclude a university from competing in a certain sport for a period of at least one year. While this appears to be a blatant restraint of competition, the "death penalty" has never been successfully challenged. In 2012, the NCAA considered imposing the "death penalty" on Penn State University following the revelation of a child molestation scandal surrounding the Penn State football team. Ultimately, the NCAA decided to institute different sanctions on Penn State; however, the threat of the NCAA freely imposing the "death penalty" in this type of situation continues to exist. The Penn State situation serves as an important example because this is the first time the NCAA has contemplated implementing the "death penalty" for strictly social policy reasons.

This Note proposes that the use of the "death penalty" against Penn State would have violated the Sherman Act. The NCAA likely would not be able to advance any sustainable justifications for using the "death penalty" against Penn State, resulting in the punishment being declared an unreasonable restraint of competition. While this Note concludes that the "death penalty" would not have been an appropriate sanction in this particular case, it provides examples as to when it may be used by the NCAA as a viable punishment in the future. This Note should serve as a reminder to the NCAA that it is not immune from Sherman Act scrutiny and should consider the antitrust implications of its actions in the future.

[1] J.D. Candidate, 2014, Emory University School of Law. I would like to thank my friends and family for their continuing support and encouragement. I could not have come close to being where I am without them. I want to give a special thanks to my best friend in the world, Megan Sweeney, who read more drafts of this Note than anyone, and always did it with a smile. I would also like to give a special thanks to Professor Thomas Arthur for sculpting my shadow of an idea into a full-fledged argument. He has forgotten far more about the law than I can ever hope to learn.

INTRODUCTION

Over a several month period from 2011-12, Pennsylvania State University ("Penn State") was the focus of a highly publicized scandal involving child molestation, perjury, and ignorance of moral obligations.[2] One of Penn State's football coaches, Jerry Sandusky, was charged, and later convicted, of dozens of counts of child molestation,[3] including multiple sexual assaults at Penn State facilities.[4] It was also alleged that several Penn State officials attempted to cover up the sexual assaults that occurred under their watch, which resulted in the forced resignation of Penn State President, Graham Spanier,[5] the firing of long-time head coach, Joe Paterno,[6] and charges of perjury against top Penn State officials.[7] Former director of the FBI, Louis Freeh, led an internal investigation of Penn State and released the "Freeh report" on July 12, 2012, which exposed graphic details of the sexual abuse and the attempted cover-up that occurred at Penn State.[8]

To make matters worse for Penn State, on July 23, 2012, the National Collegiate Athletic Association (the "NCAA") issued the university an array of institutional sanctions.[9] The sanctions included a $60 million fine, a multi-year ban from postseason football competition, and

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[2] *See* Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (June 21, 2012), http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline.
[3] Kimberly Kaplan & M. Alex Johnson, *Sandusky Convicted of 45 Counts, Plans to Appeal*, U.S. NEWS ON NBC NEWS (June 22, 2012, 9:38 PM), http://usnews.nbcnews.com/_news/2012/06/22/ 12363955-sandusky-convicted-of-45-counts-plans-to-appeal?lite.
[4] Brenda Medina, *How Penn State's Sex-Abuse Scandal Unfolded*, THE CHRONICLE OF HIGHER EDUCATION (Nov. 10, 2011), http://chronicle.com/article/article-content/129767/.
[5] *See* Chappell, *supra* note 2.
[6] *See* Chappell, *supra* note 2.
[7] *See* Associated Press, *Two Top Officials Step Down Amid Penn State Scandal*, FOX NEWS (Nov. 7, 2011), http://www.foxnews.com/sports/2011/11/05/penn-state-ex-coach-others-charged-in-child-sex-case/.
[8] FREEH, SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012), *available at* http://progress.psu.edu/the-freeh-report.
[9] Eric Prisbell, *NCAA Hands out Severe Punishment for Penn State*, USA TODAY (July 23, 2012, 7:13 PM), http://usatoday30.usatoday.com/sports/college/football/bigten/story/2012-07-23/ncaa-penn-state-punishment-sanctions/56427630/1.

vacated of over 100 wins by the football team.[10] While the sanctions seemed harsh to some,[11] it was rumored that the NCAA contemplated an even stricter form of punishment: the "death penalty."[12] The "death penalty" is the NCAA's most serious form of punishment and results in the university being completely prohibited from participating in a certain sport for a period of years.[13] To summarize, when it implements the "death penalty," the NCAA forbids all of its members from competing against the team being punished in a particular sport.[14] Prior to the NCAA delivering its official sanctions against Penn State, there was extensive discussion about whether it would invoke the "death penalty" and whether or not it had the authority to do so.[15]

This Note argues that, even if it desired, the NCAA could not have imposed the "death penalty" on Penn State without violating Section 1 of the Sherman Act. The "death penalty" gives rise to antitrust concerns because it is essentially a group boycott by all of the other NCAA members against the one member being punished.[16] This Note suggests that such an agreement to ban one member university from participating in football activities, based on a scandal unrelated to the competition of that member's sports team, constitutes an unreasonable restraint of competition, inconsistent with antitrust law. Restricting a member university's ability to

[10] *Id.* During the period in which this Note was being written, the Governor of Pennsylvania filed an antitrust suit against these sanctions as well. Marc Edelman, *Pennsylvania Governor to File Antitrust Lawsuit Against NCAA*, FORBES.COM (Jan. 2, 2013, 4:05 PM), http://www.forbes.com/sites/marcedelman/2013 /01/02/pennsylvania-to-file-antitrust-lawsuit-against-ncaa/.
[11] *See, e.g.* Bob Ford, *Bob Ford: Punishment for Penn State Misguided and Too Harsh*, PHILLY.COM (June 23, 2012), http://articles.philly.com/2012-07-23/sports/32805756_1_mark-emmert-freeh-report-joe-paterno.
[12] *See* Dashiell Bennett, *Let Penn State Keep Playing Football*, THE ATLANTIC WIRE (July 16, 2012), http://www.theatlanticwire.com/national/2012/07/let-penn-state-keep-playing-football/54623/.
[13] *See* NCAA Academic and Membership Affairs Staff, *2009-10 NCAA Division I Manual*, Bylaw 19.5.2.2(j), 19.5.2.3.2(a) (2009).
[14] *See infra* PART I, *The NCAA*. *See also* NCAA v. Bd. of Regents, 468 U.S. 85, 106 (1984) ("[S]ince as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's [sanctions].").
[15] *See, e.g.*, Marc Edelman, *Sports and the Law: Professor Edelman Explains Why Giving Penn State the 'Death Penalty' May Never Have Been a Real Option*, ABOVE THE LAW (Aug. 2, 2012, 11:23 AM), http://abovethelaw.com/2012/08/sports-and-the-law-professor-edelman-explains-why-giving-penn-state-the-death-penalty-may-never-have-been-a-real-option/.
[16] *See infra* PART III, *Examining the Death Penalty*.

compete based on such a scandal is inconsistent with the NCAA's goals and justifications of maintaining a competitive balance and ensuring amateurism.

Part I of this Note presents a history of the NCAA and its "death penalty," as well as a brief background of antitrust law and the Sherman Act, including an examination of the three forms of antitrust scrutiny typically applied by the courts: per se analysis, Rule of Reason, and quick-look analysis. Part II examines the previous application of the Sherman Act by the courts to the NCAA and highlights the limited success plaintiffs have had in antitrust suits against the NCAA. Part III compares the Penn State situation to other antitrust suits against the NCAA and explains how the facts of the Penn State case lead to the conclusion that the "death penalty" would have been an unlawful violation of the Sherman Act. Part IV discusses, in general, the legality of the "death penalty" under the Sherman Act, ultimately concluding that the punishment would not violate antitrust law if enforced for procompetitive reasons, implying the sanction could be legally used by the NCAA in the future.

PART I: BACKGROUND

The NCAA

The NCAA is an unincorporated association of approximately 1,200 member schools[17] and operates as a non-profit, self-regulating organization.[18] Founded in 1906, one of the primary functions of the NCAA has been to "protect young people from . . . dangerous and exploitative athletics practices."[19] The fundamental purpose of the NCAA is to "preserve distinctively amateur athletics as part of the academic program of the nation's institutions of higher

[17] *E.g.*, NCAA v. Smith, 525 U.S. 459, 462 (1999); *About the NCAA: Membership*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new.
[18] *See, e.g.*, Stephanie M. Greene, *Regulating the NCAA: Making Calls Under the Sherman Antitrust Act and Title IX*, 52 ME. L. REV. 81, 83 (2000).
[19] *About the NCAA: History*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history.

education."[20] The NCAA regulates college athletics by creating and enforcing rules governing a broad array of topics, ranging from recruiting, eligibility, and academic requirements to rules governing the actual in-game performance of all collegiate sports.[21] By joining the NCAA, universities are bound to comply with the NCAA's rules and regulations and are subject to discipline by the NCAA for noncompliance.[22]

The NCAA is governed in accordance with a lengthy and complex manual containing its constitution and bylaws.[23] The NCAA establishes its policies and considers amendments to its regulations at annual conventions.[24] At the Special Convention of 1985, NCAA officials considered a number of proposed amendments, including an addition to the NCAA enforcement procedures, which would increase minimum penalties upon members violating NCAA rules.[25]

Concerned with the criticism of its enforcement procedures, the NCAA sought to distinguish and disincentivize certain "major" violations by subjecting members to a heightened form of punishment if committed.[26] The NCAA officials approved this new form of punishment, known as the "death penalty," by an overwhelming majority.[27] The "death penalty" was designed to increase the effectiveness of the NCAA's enforcement capability and provide a stronger disincentive to member institutions attempting to "cheat."[28] The "death penalty" allows the NCAA to punish member schools for "major" or "repeat" violations of NCAA rules by "prohibit[ing] some or all outside competition in the sport involved . . . for one or two sports

[20] Carl L. Reisner, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656-57 (1978).
[21] *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 88 (1984). *See generally* NCAA Manual, *supra* note 13.
[22] NCAA Manual, *supra* note 13, at Const. art. 3.2.1.2; NCAA. v. Tarkanian, 488 U.S. 179, 183 (1988).
[23] *See* WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW §12.3 (2d ed. 2012).
[24] *See id.*
[25] *See* Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 987, 1009 (1987).
[26] *See id.* at 994-1009 ("A major step toward gaining a significant degree of direct control over the governance of intercollegiate athletics.").
[27] *See id.* at 1010 (427-6 vote).
[28] *See id.* at 987.

seasons."[29] This Note does not discuss whether Penn State's conduct constituted a "major" or "repeat" violation for purposes of implementing the "death penalty," but some journalists have argued that it did not.[30]

It is important to note that the "death penalty" is not an NCAA regulation; it is a penalty for violating enumerated NCAA regulations.[31] Thus, it logically follows that if no underlying NCAA regulation has been violated, the NCAA has no authority to enforce the "death penalty." The types of rule violations the NCAA has used the "death penalty" to punish has typically involved areas such as recruiting or player compensation.[32] However, in the Penn State situation it can be argued that there was no underlying rule violation at all; thus, the NCAA had no authority to punish them at all.[33] This argument is beyond the scope of this Note, but it does appear to have some merit.[34]

The NCAA has used the "death penalty" five times since 1985, but only once on a football program.[35] Southern Methodist University's football team was given the "death penalty" for the 1987 and 1988 seasons and, arguably, has still not recovered from the punishment.[36] This is evidence that the "death penalty" has a long-term impact on punished programs even after the official ban from competition ends. The continued negative effects of the "death penalty" are a

[29] NCAA Manual, *supra* note 13, at Bylaw 19.5.2.2(j), 19.5.2.3.2(a).
[30] *See, e.g.*, Dave Zirin, *NCAA Out of Bounds With Penn State Sanctions*, CBS NEWS (July 23, 2012, 4:16 PM), http://www.cbsnews.com/8301-215_162-57478152/ncaa-out-of-bounds-with-penn-state-sanctions/.
[31] NCAA Manual, *supra* note 13, at art. 19 (listing NCAA Enforcement provisions).
[32] *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (punishing SMU for having a slush fund for football recruits).
[33] *See infra* notes 175-82 and accompanying text.
[34] The argument is that the NCAA is a self-appointed regulator and thus does not enjoy unlimited authority to punish universities. The NCAA is allowed to act as a private regulator in a limited context, consisting of the rules and regulations member universities have consented to. But if one of said regulations is not violated, the NCAA should not have authority to expand its authority over all actions of the universities.
[35] Jason Kirk, *Penn State and the Death Penalty: A Body Count for the Sake of a Body Count*, SB NATION (July 16, 9:00 AM), http://www.sbnation.com/ncaa-football/2012/7/16/3157086/penn-state-football-death-penalty-ncaa-punishment.
[36] *See id.* (describing how SMU went from a prominent football program team to only three winning seasons in the two decades since the program received the death penalty).

result of the reputational damage caused to the school, the loss of scholarships during the years of punishment, and enhanced NCAA scrutiny from that point forward.[37]

Section 1 of the Sherman Act

Congress passed the Sherman Act in 1890 to prohibit restraints of competition and monopolies that were prevalent at the time.[38] Section 1 of the Sherman Act states "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal."[39] Read literally, the Sherman Act makes every contract and agreement illegal. However, the Supreme Court has held that Congress only intended to prohibit "unreasonable" restraints of competition.[40] This coincides with the aim of Senator Sherman himself to "distinguish between lawful restraints in aid of production and unlawful combinations to prevent competition in restraint of trade."[41] In addition, the courts have held that Section 1 of the Sherman Act only applies to agreements and activities which are commercial in nature.[42] This particular distinction between commercial and noncommercial practices has proved to be difficult among plaintiffs alleging antitrust violations against non-profit organizations, such as the NCAA.[43]

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[37] *See* David Williams, *Overcoming the Death Penalty: Southern Methodist, 21 Years Later*, BLEACHER REPORT (Apr. 7, 2008), http://bleacherreport.com/articles/16678-overcoming-the-ncaa-death-penalty-southern-methodist-21-years-later (discussing the continued up-hill battle SMU has faced in recovering from receiving the "death penalty.").

[38] *See* AUSTIN T. STICKELLS, FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS § 38 (2012) (discussing the response of politicians to monopolies such as Standard Oil).

[39] 15 U.S.C. §1 (2006 & Supp. 2009).

[40] *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 688-89 (1978).

[41] Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 343 (2000) (citing 21 CONG. REC. 2456 (1890)).

[42] United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993) ("It is axiomatic that section one . . . regulates only transactions that are commercial in nature.") (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959)).

[43] *See* Gregory M. Krakau, *Monopoly and Other Children's Games: NCAA's Antitrust Suit Woes Threaten Its Existence*, 61 OHIO ST. L.J. 401, 403-04 (2000).

To prevail on a Section 1 Sherman Act claim, the plaintiff needs to show that the defendant "(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market."[44] However, the word "unreasonable" is nebulous and depends on the surrounding facts and circumstances. Thus, to evaluate whether an agreement unreasonably restrains trade in a market, courts typically apply one of three forms of analysis: the per se analysis, the Rule of Reason, or the "quick-look" analysis.[45]

A. Per Se Analysis

Courts apply a per se approach to agreements that are so anticompetitive on their face as to warrant immediate condemnation.[46] A per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[47] The types of activities subject to per se rules are referred to as "naked restraints" because they are often imposed solely to inhibit competition.[48] When the court applies this type of rule, it simply presumes the agreement is an unreasonable restraint of trade and thus "illegal per se" without inquiring into the nature or market context of the activity.[49] Examples of agreements that are typically subject to per se rules are horizontal price-fixing and group boycotts.[50] For a claim alleging a per se illegal restraint of competition, the plaintiff merely

[44] Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998) (citing Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 959 (10th Cir. 1990)).
[45] *See, e.g.*, *Agnew*, 683 F.3d at 335-36 (describing the three frameworks applied by the courts to analyze an action's anticompetitive effects on a market).
[46] *See* WILLIAM HOLMES ESQ. & MELISSA MANGIARACINA, ESQ., ANTITRUST LAW HANDBOOK § 2:10 (2011-2012 ed.).
[47] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979).
[48] Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1220 (1993).
[49] *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984).
[50] *See generally* Chin, *supra* note 48, at 1220; Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941). *But see* Broad. Music, 441 U.S. at 23 (holding that certain products/industries require horizontal restraints and price-fixing to make agreements function at all).

needs to show that the defendant engaged in the per se illegal activity.[51] The court will then deem the restraint unreasonable and a violation of the Sherman Act.[52]

B. Common Law Tests and the Rule of Reason

Courts applied per se rules almost exclusively until the late 1970s.[53] However, over the next few decades, courts restricted the reach of per se rules and expanded the scope of what they referred to as "the Rule of Reason."[54] Even once the courts began to apply what they were calling the Rule of Reason more regularly, they struggled with establishing a consistent standard for examining the restraints.[55] Different judges applied different common law standards, creating confusing precedent for future cases.[56]

One of the common law standards courts applied was the ancillary restraints doctrine. Former President of the United States, Judge Taft, articulated the ancillary restraints doctrine in the famous case of *Addyston Pipe*.[57] The ancillary restraints doctrine condemned naked restraints (restraints with the sole object of avoiding competition) as a matter of law, but allowed restraints that were "ancillary to the main purpose of a lawful contract" and necessary to protect the "fruits" of the contract.[58] This method of review was effective for examining actual cartels but insufficient for reviewing monopolistic mergers, which accomplished the same purpose as said cartels.[59] In order to account for this flaw, the court in *Addyston Pipe* added a third step[60] to the

[51] *See* Holmes, *supra* note 46.
[52] *See id.*
[53] Arthur, *supra* note 41, at 337.
[54] *Id.*
[55] *See id.* at 341-57.
[56] *See id.* (courts applied the ancillary restraints doctrine, monopoly power doctrine and 'all of the circumstances' tests unsuccessfully).
[57] *See generally* United States v. Addyston Pipe and Steel Co., 85 F. 271 (6th Cir. 1898) *aff'd as modified*, 175 U.S. 211 (1899).
[58] *Id.* at 282.
[59] *See* Arthur, *supra* note 41.
[60] *Addyston Pipe*, 85 F. at 291 (holding that in monopolistic mergers "the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract" so they are still invalidated).

ancillary restraints doctrine to condemn monopolistic mergers as well.[61] However, this form of review was not capable of adequately balancing the restraint on competition caused by an agreement with the associated benefits of it, and was thus not sufficient for review of complex, less obvious restraints of competition.[62] The courts found little more success when applying an "all the factors" test, which permitted any restraint that *the particular court* found reasonable, essentially allowing that court to regulate price and output for the market.[63]

Finding these common law tests unworkable, the courts moved to a more functional Rule of Reason.[64] Today, in the absence of an inherently unreasonable activity,[65] courts will apply the Rule of Reason to weigh whether the affected market would be better off with or without the restraint.[66] Most restraints of trade are analyzed under this flexible test today.[67] When applying the Rule of Reason, the courts "weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[68]

The Rule of Reason provides the Sherman Act with both flexibility and definition by focusing the analysis directly on the challenged restraint's impact on competition.[69] This method of analysis is consistent with the purpose of the Sherman Act to distinguish between acceptable and unacceptable restraints based on their effect on competition.[70] The current Rule of Reason

[61] *See* Arthur, *supra* note 41, at 344 n.33 (discussing Taft's rationale behind adding a third step to the ancillary restraints doctrine).
[62] *See id.* at 343.
[63] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 331-32 (1897) (discussing the unsuitability of the "all of the factors" test); s*ee* Arthur, *supra* note 41, at 344-45.
[64] *See* Arthur, *supra* note 41, at 351.
[65] Inherently unreasonable restraints will be declared illegal on their face. *See supra* PART I, *Section 1 of the Sherman Act*, Per Se Analysis.
[66] Thomas A. Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 79 (2011).
[67] United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).
[68] *Cont'l T.V.*, 433 U.S. at 49.
[69] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).
[70] *See* Arthur, *supra* note 41, at 343.

framework involves a three-step analysis, during which the burden shifts between the plaintiff and the defendant.[71]

In step one, the plaintiff bears the initial burden of showing that an agreement or practice has a substantially anticompetitive effect on a given market.[72] This requires the plaintiff to show several things. First, the plaintiff must establish a relevant market (i.e. product or service affected and a specific geographic area) within which the defendant competes and the alleged restraint will have an effect.[73] Second, the plaintiff must show that the defendant has "market power" in that relevant market.[74] In this context, market power means the ability to significantly affect the price or output of a market without losing one's place in it.[75] This is often referred to as the "market power filter," and may be satisfied if a plaintiff either shows evidence of actual detrimental impacts on the given market or that the defendant possesses enough control in the market to threaten competition.[76]

Finally, to satisfy the first step the plaintiff must show that the defendant's use of its market power caused an anticompetitive effect on the relevant market.[77] Federal courts are split regarding whether a showing of an actual anticompetitive effect (i.e., higher prices, diminished service) is required or whether a showing that the defendant's conduct is likely to cause an anticompetitive affect is sufficient.[78] Further, on occasion, courts have accepted direct evidence

[71] *See* Krakau, *supra* note 433, at 408-11.
[72] *See, e.g.*, Brown Univ., 5 F.3d at 668; Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012).
[73] *See* Baker, *supra* note 66, at 86; Holmes, *supra* note 46, at § 2:10.
[74] *See, e.g.*, Agnew, 683 F.3d at 335.
[75] *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 464 (1992); Valley Liquors, Inc. v. Renfield Imps., Ltd., 822 F.2d 656, 666 (7th Cir. 1987) (defining market power as "the ability to raise prices significantly above the competitive level without losing all of one's business").
[76] *See* Holmes, *supra* note 46, at § 2:10.
[77] *See* Baker, *supra* note 66, at 80.
[78] *See* Holmes, *supra* note 46, at § 2:10.

of actual market effects caused by the restraint even if no exact market can be defined.[79] It is thus unclear how much evidence of market effect the plaintiff is actually required to show in order for the court to move to the next step and shift the burden to the defendant.

If the plaintiff meets its initial burden, the court proceeds to step two, and the burden shifts to the defendant to produce evidence of "procompetitive effects" of the alleged unlawful agreement.[80] A restraint of trade may still survive scrutiny under the Rule of Reason if the procompetitive benefits and legitimate objectives of the restraint justify its anticompetitive effects.[81] The Supreme Court has held that justifications for anticompetitive restraints will only be considered valid if they have the net effect of "enhanc[ing] competition."[82] Essentially, the only procompetitive justifications that will be accepted are efficiency justifications, such as cost cutting or quality improvement, that the restraint is reasonably necessary to produce.[83] If the defendant cannot justify the restraint by showing some procompetitive justification, the analysis ends and the court will declare the agreement an unreasonable restraint of trade.[84]

If the defendant is able to show procompetitive justifications for its restraint on competition, the court then moves to step three, and the burden shifts back to the plaintiff to show that the restraint is not "reasonably necessary" to achieve the legitimate objectives of the restraint, or that these objectives could be achieved in a "substantially less restrictive manner."[85]

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[79] *See* Mark R. Patterson, *The Role of Power in the Rule of Reason*, 68 ANTITRUST L.J. 429, 432-33; NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104-08 (1984); Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61 (1986).
[80] Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998). *See* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993); Baker, *supra* note 66, at 88 (describing the defendant's burden of producing procompetitive justifications).
[81] *Law*, 134 F.3d at 1019.
[82] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984).
[83] *See id.* at 113-20.
[84] *See, e.g.*, Bd. of Regents of Univ. of Okla., 468 U.S. 85 (declaring a mandatory television plan an unreasonable restraint of competition because the court did not accept the NCAA's justifications that it was beneficial because it limited college football television exposure, thus maintaining college football's amateur characteristics).
[85] *Law*, 134 F.3d at 1019.

Step three provides the most unpredictable results because of its vagueness.[86] However, courts have clarified that the restraint does not need to be the *least* restrictive method possible of achieving a desired result to prevail under step three, only that it cannot "exceed[] the outer limits of restraint reasonably necessary to protect the defendant."[87] While it is often said that the court weighs the procompetitive and anticompetitive effects of a restraint to determine its net effect,[88] this is normally not the case in practice. Instead, the courts shift the burden of proof between the parties as described above, as a built-in way of balancing the effects of the restraint without leaving it to the subjective calculation of a judge. Only if each party meets its burdens under the Rule of Reason will the courts perform a balance to see if the procompetitive benefits outweigh the anticompetitive harms of the restraint.[89] This is an important aspect that differentiates the current Rule of Reason from the failed and abandoned common law "all of the factors" approach, which simply allowed the judge to attempt to weigh all of the circumstances and determine if the restraint was reasonable or not.[90]

C. Quick-look Analysis

Different courts and commentators have debated the function of the quick-look standard of review and have applied it in vastly different ways.[91] For simplicity, in this Note, the quick-look analysis is the abbreviated form of review that courts use when the per se framework is inappropriate, but where "no elaborate industry analysis is required to demonstrate the

[86] Krakau, *supra* note 43, at 411.
[87] American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975) (quoting Walt Disney Prods. v. American Broadcasting-Paramount Theaters, 180 F. Supp. 113, 117 (S.D.N.Y. 1960)).
[88] FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE, *Antitrust Guidelines for Collaborations Among Competitors* § 3.37 (Apr. 7, 2000), *available at* http://ftc.gov/os/2000/04/ftc dojguidelines.pdf (discussing the "overall" effect of the restraint).
[89] *See* 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1912i, at 302 (1998).
[90] *See* Arthur, *supra* note 41, at 344-45.
[91] *See generally* Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493 (2009) (outlining the confusion surrounding the diverse standards referred to as "quick-look").

anticompetitive character of . . . an agreement" and proof of market power is not required.[92] This form of analysis can be thought of as essentially a quasi-per se test. Application of the quick-look approach instead of the full Rule of Reason is a case-specific judgment call by the court. Courts have applied the quick-look approach when restraints would normally be viewed as illegal per se, but some level of cooperation is required if the product at issue is to be made available at all.[93] Examples of industry agreements that courts have applied the quick-look analysis to include those made by dental associations, professional engineers, and sports leagues that need to cooperate to some extent in order to operate effectively.[94]

The application of the quick-look approach allows courts to skip a lengthy market power analysis and move directly to an analysis of a restraint's procompetitive rationales.[95] The Supreme Court has applied the quick-look approach in multiple cases in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[96] When using the quick-look approach, if the defendant cannot present any sound justifications for the facially anticompetitive practice, the court "condemns the practice without ado," but if the court accepts the justifications, the court can uphold the restraint or perform a full Rule of Reason analysis if it deems it necessary.[97] The exact details of the quick-look approach are less clear than the full Rule of Reason review and appear to vary more on a case-by-case basis.[98]

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[92] Agnew v. NCAA, 683, F.3d 328, 336 (7th Cir. 2012)(quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 (1984)).
[93] *See id.*
[94] *See, e.g.*, Catherine Verschelden, *Is the Quick-Look Antitrust Analysis in Polygram Holding Inherently Suspect?*, 32 J. CORP. LAW 447, 453-54 (2007) (discussing specific cases where courts have applied the quick-look approach).
[95] *See* Brunet, *supra* note 91, at 502-03.
[96] California Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999). *See generally* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Nat'l Soc'y of Prof'l Engineers v. U.S., 435 U.S. 679 (1978); F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986).
[97] Agnew, 683 F.3d at 336 (citing Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 674 (7th Cir. 1992).
[98] *See* Arthur, *supra* note 41, at 359-62.

PART II: APPLICATION OF THE SHERMAN ACT TO THE NCAA

Early Application of the Sherman Act and NCAA v. Board of Regents

For many years, the courts did not apply antitrust law to the NCAA at all.[99] The theory was that antitrust laws like the Sherman Act did not apply to organizations who engaged in nonprofit activities, so the courts should not apply it to the NCAA because it is a self-regulating organization with noncommercial goals.[100] However, in 1975, the Supreme Court rejected this theory, holding that "the nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act."[101] Since then, the courts have held that NCAA rules and regulations are subject to the Sherman Act in a plethora of cases.[102]

Even though its rules and practices are now subject to review under the Sherman Act, the NCAA has normally received a relaxed standard of antitrust analysis.[103] Courts have been reluctant to apply per se rules to NCAA practices, choosing to apply quick-look analysis or the Rule of Reason instead.[104] This is based on the logic that the NCAA is one of the organizations that would not be able to produce a product at all without some cooperation and restraint by members.[105] Without some cooperation and restraint, it would be impossible for college universities to agree upon even basic things necessary to produce collegiate sports (e.g. the actual rules of the sports they compete in, the size of the fields of competition, the number of

[99] Reisner, *supra* note 20, at 663-664.
[100] *Id.*
[101] Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975) (holding that professional self-regulating organizations were subject to the Sherman Act too). *See also* American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982) ("There is no doubt that the sweeping language of §1 applies to nonprofit entities.").
[102] *See* discussion *infra* PART II, *Sherman Act Applications to the NCAA*.
[103] NCAA regulations that would normally be deemed illegal per se receive analysis under the Rule of Reason instead. *See, e.g.*, Baker et. al., *supra* note 66, at 79 ("Courts are extremely reluctant to apply the per se rule to sports leagues, including the NCAA.").
[104] *See* Hennessey v. NCAA, 564 F.2d 1136, 1151-53 (1976) (explaining why the Rule of Reason is most applicable to NCAA practices).
[105] *See* Baker et. al., *supra* note 66, at 79 ("This reluctance stems from the argument that sports leagues must combine both collective cooperation and competition.").

scholarships that can be given out, etc.). That being said, despite showing some deference to the NCAA's goals and purpose, the Supreme Court has held that "the role of the NCAA must be to preserve a tradition that otherwise might die [and] rules that restrict output are hardly consistent with this role."[106]

The preeminent case applying the Sherman Act to the NCAA is the 1984 Supreme Court case, *NCAA v. Board of Regents*.[107] The Supreme Court applied Section 1 of the Sherman Act to the NCAA's television plan that limited the ability of members to have their football games broadcast on television.[108] Despite recognizing that the NCAA was engaging in horizontal restraints that could be considered illegal per se, the Court chose to apply the quick-look approach, rather than per se review.[109] In applying its analysis, the Court found that the NCAA had market power in the field of television broadcasts (without performing a full, lengthy market power analysis) and that the NCAA could not meet its burden of producing procompetitive efficiencies for its policy.[110] Thus, the television plan was declared an unreasonable restraint of competition and a violation of Section 1 of the Sherman Act, without having to proceed to a full Rule of Reason analysis.[111]

The Court provided an important lesson to the NCAA by showing that it would not simply accept the NCAA's justifications of "maintaining competition" and "maintaining amateurism" as a procompetitive shield of immunity for every anticompetitive restraint in which

[106] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).
[107] *Id.*
[108] *Id.* at 91-94.
[109] *Id.* at 103 ("[d]espite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.").
[110] *See id.* at 112-20 (rejecting the NCAA's proposed precompetitive justifications of "protecting live attendance" and "equalizing competition" among amateur athletic teams).
[111] *Id.* at 96. The Court declared the restraint unreasonable without requiring the plaintiff to produce a less restrictive alternative to it. *Id.* at 119-20.

it engages.[112] The Court drew a distinction between procompetitive NCAA practices such as creating rules governing "the conditions of the contest [and] the eligibility of participants," which courts have subsequently upheld as legal, and pure restraints of competition under the veil of maintaining a competitive balance between members.[113] This case also provides an example of the distinction between commercial NCAA rules, which have been subject to full antitrust review, and noncommercial rules, which the courts have declined to perform full review upon.[114]

Sherman Act Applications to the NCAA

Since *Board of Regents*, the courts have dealt with a number of antitrust suits against the NCAA.[115] Consistent with the logic of *Board of Regents*, courts have looked closely at whether challenged NCAA regulations are "promot[ing] business objectives of the NCAA" (commercial) or "serv[ing] its primary objectives of maintaining a competitive, amateur athletic league" (noncommercial).[116] This is a complicated analysis because, regardless of their purpose or objective, NCAA regulations govern a multi-billion dollar industry.[117] As a threshold matter, prior to performing a full antitrust analysis, some courts have held that NCAA regulations designed to achieve a strictly noncommercial objective are not subject to antitrust review.[118] For example, courts have upheld NCAA rules governing player eligibility[119] and restrictions limiting

[112] *Id.* at 117-19.
[113] *Id.*
[114] Regulating television contracts and imposing appearance restrictions was clearly commercial. *See id.* at 112. *See also* Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998), vacated on other grounds by NCAA v. Smith, 525 U.S. 459 (1999) (holding that certain eligibility rules are not commercial and are not subject to antitrust analysis).
[115] *See, e.g.,* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); Agnew v. NCAA, 638 F.3d 328 (7th Cir. 2012).
[116] *See* Greene, *supra* note 18, at 83-84.
[117] *See* Krakau, *supra* note 43, at 405-06; Mike McGraw et al., *Money Games Inside the NCAA: Revenues Dominate College Sports World*, KANSAS CITY STAR, Oct. 5, 1997, at A1.
[118] *See* Krakau, *supra* note 43, 403-04; Smith, 139 F.3d 180; Adidas America, Inc. v. NCAA, 40 F.Supp 2d 1275, 1281 (D. Kan. 1999).
[119] *See* Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); Smith, 139 F.3d 180; Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).

the number of coaches a school may employ [120] without delving into the full Rule of Reason, on the grounds that they have a "noncommercial" character. Courts generally uphold these types of restraints on competition based on the justifications that "they preserve amateurism, maintain the identity of intercollegiate athletics as being distinct from professional athletics and [they] prevent the commercialization of intercollegiate athletics at the expense of educational values."[121]

On the other hand, when an NCAA regulation *seems* to be commercial in nature (because the courts rarely label NCAA regulations as purely commercial)[122] the court will subject it to a full antitrust review.[123] Even when the courts apply the Rule of Reason, plaintiffs have had a difficult time meeting their burden in step one – establishing a relevant market in which the NCAA exercises market power.[124] For example, courts have refused to recognize relevant commercial markets for the "services" of student-athletes in cases brought by student-athletes themselves.[125] This difficulty in establishing a relevant commercial market in which NCAA regulations have an anticompetitive effect stems from the dual-natured characteristics of the regulations.[126] However, the courts have recognized anticompetitive effects of NCAA regulations in relevant markets before when plaintiffs have clearly shown an effect in the given market.[127]

[120] *See* Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Bd. of Regents v. NCAA, 561 P.2d 499 (Okla. 1977).
[121] Chin, *supra* note 48, at 1225 n.100.
[122] Chin, *supra* note 48, at 1225.
[123] *See* Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); NCAA v. Bd. of Regents, 468 U.S. 85 (1984).
[124] *See*, *e.g.*, Baker, *supra* note 66, at 80-81.
[125] *See* Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); Baker, *supra* note 66, at 81-84 (Courts have refused to recognize "a relevant labor market for student athlete services.").
[126] *See* Krakau, *supra* note 43, at 405-06 ("On one hand the NCAA is a nonprofit organization and was created for a wholly noncommercial reason. . . [o]n the other hand, intercollegiate athletics . . . generate millions of dollars annually, for member schools and for the NCAA itself.").
[127] *See* Bd. of Regents of Univ. of Okla., 468 U.S. 85; Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012) ("[T]he transactions between NCAA schools and student-athletes . . . take place in a relevant market with respect to the Sherman Act.").

The Tenth Circuit provided plaintiffs with another possible way to satisfy the relevant market definition requirement of step one of the Rule of Reason.[128] In *Law v. NCAA*, the court invalidated an NCAA regulation without explicitly defining a relevant market that was affected.[129] The court ruled that an NCAA regulation limiting the compensation of certain Division I coaches was an unreasonable restraint of competition by applying a quick-look approach to market power.[130] The court rejected the argument that the relevant market for the regulation was the market for men's basketball coaching services, but declined to define a specific market the regulation affected.[131] Instead, the court ruled that the regulation was a naked price restraint and that "where a practice has obvious anti-competitive effects . . . there is no need to prove that the [NCAA] possesses market power."[132] The court held that the NCAA's regulation clearly had an anticompetitive effect because it directly limited salaries; no further analysis was needed to show the NCAA had market power.[133] Once the plaintiff's burden was met, the court proceeded to weigh the procompetitive rationales behind the regulation and ultimately found the restraint unreasonable.[134]

The *Law* decision illustrates the principle that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output."[135] The courts have held that when there is agreement not to compete in terms of price or output, no elaborate industry analysis is required where the very purpose and effect of a horizontal agreement is to fix prices so far as to make them unresponsive to a competitive marketplace.[136] Thus, even if plaintiffs

[128] *See* Law, 134 F.3d at 1020.
[129] *See id.* at 1019-20.
[130] *See id.* at 1020 (The "REC Rule" set a max salary of $16,000 for certain assistant coaches).
[131] *Id.* at 1019-20.
[132] *Id.*
[133] *Id.* at 1020.
[134] *Id.* at 1021-24.
[135] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986).
[136] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

have difficulty establishing a relevant commercial market for NCAA regulations, courts may advance to step two of the Rule of Reason analysis when the regulation has a clear anticompetitive effect.

Regardless of which method a plaintiff uses to satisfy step one (proving anticompetitive effects of the restraint) of the Rule of Reason, the burden then shifts to the NCAA to demonstrate procompetitive justifications for the restraint.[137] The NCAA has argued that a variety of procompetitive benefits of its regulations offset any anticompetitive effects its regulations have.

One of the NCAA's most used justifications is that its regulations preserve amateurism.[138] Amateurism in this context means the inclusion of only real college students, who attend college classes, and compete in NCAA athletics. The rationale is essentially that preserving amateurism makes student-athletes engage in collegiate sports for the physical, mental, and social benefits the sports provide, rather than for economic benefit.[139] The NCAA's Constitution states that the NCAA's primary purpose is to promote intercollegiate athletics to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and to retain a clear line of demarcation between intercollegiate athletics and professional sports."[140]

Maintaining amateurism is likely the NCAA's strongest argument, when properly applied, because courts respect the idea of keeping collegiate athletics separate from professional sports.[141] The Court held in *Board of Regents* that NCAA actions are procompetitive if they are

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[137] *See supra* PART I, *Section 1 of the Sherman Act*, Common Law Tests and the Rule of Reason; United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993); Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012).
[138] *See, e.g.*, Agnew, 683 F.3d at 342-43.
[139] *See* Chin, *supra* note 48, at 1235-36.
[140] NCAA Manual, *supra* note 13, at Const. art. 1.3.1.
[141] Baker, *supra* note 66, at 88 (discussing Justice Steven's recognition in *Board of Regents*, that preservation of amateur sports had economic value by increasing consumer choice and that preserving amateurism is a procompetitive justification).

"justifiable means of fostering competition among amateur athletic teams" and therefore "enhance public interest in intercollegiate athletics."[142] The NCAA has successfully used this as a procompetitive justification in a number of cases relating to regulations on issues such as player compensation[143] and eligibility rules[144] because they help protect the NCAA's amateur distinction from professional sports. However, the courts have stressed that this justification is not a free ticket for the NCAA, and courts have rejected the NCAA's argument that all regulations foster amateurism.[145]

The NCAA's desire to maintain its amateur characteristics goes beyond wanting student-athletes to simply play for the love of the sport. It is important for the NCAA to preserve the identity of amateur collegiate sports so as to differentiate them from mere inferior professional sports. The NCAA offers unique products (e.g. college football, college basketball, etc.) that constitute a distinct market separate from professional sports.[146] Thus, NCAA actions that enforce collegiate sports' amateur characteristics increase efficiency and its quality of output. The NCAA attempts to maintain its amateurism to avoid simply becoming minor league professional sports, which generate much less profit than collegiate sports currently do.[147] While some would argue that the amateur status of collegiate sports has been eroded over time and is

[142] NCAA v. Bd. of Regents of Univ. of Okla, 468 U.S. 85, 117 (1984).
[143] *See* McCormack v. NCAA, 845 F.2d 1338 (1988); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).
[144] *See* Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990) (upholding a regulation prohibiting players from entering the NFL draft and then returning to play college football); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992).
[145] *See, e.g.*, Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).
[146] McCormack, 845 F.2d at 1344 ("The NCAA markets college football as a product distinct form professional football.").
[147] Bd. of Regents of Univ. of Okla., 468 U.S. at 101-02 ("The identification of this 'product' with an academic tradition . . . makes it more popular than professional sports to which it might otherwise be comparable, such as, for example minor league baseball.").

now only nominal,[148] this Note assumes that amateurism still exists and is fundamental to the purpose of the NCAA's operation.

Another compelling procompetitive justification offered by the NCAA is that its regulations are necessary to ensure competitive equality.[149] The NCAA argues its regulations help ensure an "even playing field" and enhance competition between members, and that without this, parity between the member organizations would be disrupted, which could affect the public's interest in intercollegiate sports.[150] The courts have held this justification has a procompetitive effect on regulations regarding topics such as eligibility, but that it is not a justification legitimizing all NCAA restraints.[151] Thus, for NCAA regulations to be justified based on competitive equity, the NCAA must prove that its regulation actually creates a competitive balance that enhances the quality of intercollegiate athletics.[152]

The third step of the Rule of Reason only arises if the NCAA successfully convinces the court that its procompetitive justifications are legitimately related to the restraint.[153] The burden is then back on the plaintiff to show that this particular restraint is not reasonably necessary to accomplish the NCAA's legitimate objectives. This step has never actually been applied by the courts to an NCAA regulation because NCAA regulations have either been ruled unreasonable through a quick-look approach (which does not include this step), or the regulations have been

[148] *See* Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in the NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 25-29 (2000) ("[A]mateurism is often little more than a myth at the upper levels of college athletics.").
[149] *See, e.g.*, Law, 134 F.3d at 1023-24.
[150] Baker, *supra* note 66, at 92-93.
[151] *See, e.g.*, Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990). *See also* Bd. of Regents of Univ. of Okla., 468 U.S. 85; *Law*, 134 F.3d 1010.
[152] *See* Baker, *supra* note 66, at 93.
[153] *See supra* PART I, *Section 1 of the Sherman Act*, Common Law Tests and the Rule of Reason.

upheld without addressing this step.[154] However, scholars have recognized that the least restrictive alternative analysis is potentially devastating for NCAA regulations.[155]

McCormack v. NCAA: The First "Death Penalty" Challenge

There has been only one previous Sherman Act challenge of the NCAA "death penalty."[156] In *McCormack v. NCAA*, a group of alumni, football players, and cheerleaders sued the NCAA when Southern Methodist University's (SMU's) football team was given the "death penalty" for the 1987-88 seasons.[157] The NCAA issued the punishment based upon multiple violations by SMU regarding eligibility and player compensation restrictions.[158] The suit was doomed from the start, however, because SMU did not sue as a legal entity itself and the plaintiffs were not authorized to represent it, so they did not have proper standing.[159] The court devoted a large portion of its opinion to explaining why each of the plaintiffs did not have antitrust standing to sue in this case.[160] The court also held that since the eligibility rules the plaintiffs were challenging were reasonable, there was no way for the plaintiffs to recover for enforcement of them through the "death penalty" and thus, the plaintiffs claim did not survive the NCAA's motion to dismiss.[161] Based on the particular violations SMU committed that led the NCAA to implement the "death penalty," the court held that *in this case* the "death penalty" did not constitute an illegal group boycott that unreasonably restrained competition.[162]

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[154] *See* Krakau, *supra* note 43, at 411 ("[T]he issue was not addressed in *Board of Regents* or *Law*.").
[155] Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2669 (1996) ("[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule.").
[156] McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).
[157] *Id.* at 1340.
[158] *Id.* SMU's violations included having a "slush fund" to pay football players and recruits. Mark Asher, *NCAA Cancels SMU's 1987 Football*, THE WASHINGTON POST, Feb. 26, 1987.
[159] McCormack, 845 F.2d at 1341.
[160] *Id.* at 1340-43 ("Only a person injured in his business or property may seek damages for violation of the antitrust laws") (internal quotation marks omitted). The Court seems to have been saying the University itself was the proper plaintiff. *Id.*
[161] *Id.* at 1345.
[162] *Id.*

PART III: APPLICATION OF THE SHERMAN ACT TO THE POSSIBILITY OF THE "DEATH PENALTY" IN THE PENN STATE SITUATION

Having discussed the relevant background information, this section presents the Note's main argument – that the application of the "death penalty" to Penn State would have been an unreasonable restraint of competition in violation of the Sherman Act – in more detail. PART III, *Examining the "Death Penalty,"* discusses the characteristics of the "death penalty" relevant to antitrust law. PART III, *Contrasting the SMU and Penn State Situations*, distinguishes the application of the "death penalty" in the Penn State situation from the *McCormack* case involving SMU. PART III, *Applying the Sherman Act to the Penn State Situation*, applies the Rule of Reason to a hypothetical enforcement of the "death penalty" in the Penn State situation and anticipates the probable arguments both parties would make, reaching the conclusion that a court would likely deem this use of the "death penalty" an unreasonable restraint.

Examining the "Death Penalty"

As described in PART I, *The NCAA*, the "death penalty" is the term for the NCAA punishing one of its members by banning it from NCAA competition in a certain sport for at least one year.[163] The NCAA implements this punishment by essentially forbidding other member institutions from competing with the targeted school.[164] The conscious decision by all of the members of the NCAA to not compete in a sport against the punished organization can be labeled a "group boycott." Group boycotts are concerted refusals to deal with the targeted individual, which often denies the individual access to "a supply, facility, or market necessary to

[163] *See supra* PART I, *The NCAA*.
[164] *See id.*

enable the boycotted [individual] to compete."[165] As is typical of the boycotting group,[166] the NCAA enjoys a dominant position in the market with no reasonable substitutes.[167]

Although it is easy to classify the "death penalty" as a group boycott, this does not necessarily mean that it is an illegal restraint of competition. While group boycotts have been held as activities deserving per se invalidation in the past,[168] the Supreme Court has more recently applied the Rule of Reason to group boycotts,[169] and regardless of how they are reviewed generally, the NCAA is viewed as immune from per se standards.[170] While group boycotts may not be subject to per se review, when they are not justified by "plausible arguments that they were intended to enhance overall efficiency and make [the] market[] more competitive . . . the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote."[171] Thus, the reasonableness of the "death penalty" will hinge on whether its application in each scenario was intended to increase efficiency and competition, or merely to advance some unrelated NCAA motive.[172] While the fact that the "death penalty" is an intentional exclusion from dealing with the targeted university is not dispositive, it certainly subjects the "death penalty" to strict scrutiny under the Rule of Reason.

Contrasting the SMU and Penn State Situations

A variety of circumstances differentiate the SMU situation, litigated in *McCormack*, from the Penn State situation. The primary difference, and what could have led to a much different

[165] Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294 (1985).
[166] *See, e.g.*, *id.* at 294; Silver v. N.Y. Stock Exch., 373 U.S. 341, 348 (1963).
[167] *See* Pekron, *supra* note 148, at 33 (The NCAA received a tongue-in-cheek award as the best monopoly in the country).
[168] *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); N. Pac. Ry. Co v. United States, 356 U.S. 1, 5 (1958).
[169] *See Nw. Wholesale Stationers*, 472 U.S. at 296-97.
[170] *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 101-04 (1984) (holding the NCAA is an industry in which horizontal restraints on competition are necessary to produce the product at all, so the restraints are not subject to per se invalidation).
[171] *Nw. Wholesale Stationers*, 472 U.S. at 294.
[172] *See infra* PART III-IV.

result if Penn State was given the "death penalty," is the violations that occurred. SMU was punished by the NCAA for a multitude of eligibility violations, including major recruiting violations and illegal compensation of student-athletes.[173] As discussed in PART II, *Sherman Act Applications to the NCAA*, NCAA regulations relating to eligibility tend to be upheld under the justification that they preserve amateurism and maintain a competitive environment.[174]

On the other hand, Penn State was punished by the NCAA for being involved in a scandal which involved both social and criminal wrongs.[175] While there is no disputing the moral wrongfulness of the events that transpired at Penn State, none of Penn State's violations dealt with student-athlete eligibility or other areas in which the courts have typically upheld NCAA regulations.[176] In fact, Penn State likely did not violate any NCAA regulations at all. The only possible NCAA regulation that Penn State violated is Bylaw 10.1, which forbids "unethical conduct."[177] This Bylaw is the NCAA's catch-all rule because after providing a list of examples of unethical conduct, it is left open by the phrase "may include, but is not limited to."[178] However, Bylaw 10.1 has never been applied to a university without an underlying violation of a separate NCAA regulation.[179] The rationale behind this is the same as "[the] reason the IRS doesn't punish murderers who pay their taxes."[180] If the NCAA could punish members for acting "unethically" even when they did not violate any NCAA regulations, the NCAA could

[173] *See, e.g.*, Asher, *supra* note 158 and accompanying text.
[174] *See supra* PART II, *Sherman Act Applications to the NCAA*.
[175] *See supra* Introduction.
[176] *See id.*
[177] NCAA Manual, *supra* note 13, at 10.1.
[178] Andy Staples, *Justice in Penn State case should come from courts, not NCAA*, SPORTS ILLUSTRATED (July 2, 2012 12:05 PM), http://sportsillustrated.cnn.com/2012/writers/ andy_staples/07/02/penn-state-jerry-sandusky-ncaa/index.html.
[179] *See id.* (describing how NCAA Bylaw 10.1 is normally used to punish universities for obstructing NCAA investigations into the universities' violation of other NCAA regulations).
[180] *Id.*

essentially become morality police, privately regulating the majority of college universities.[181] The fact that Penn State did not violate any underlying NCAA regulations is a critical distinction between the Penn State and SMU situations because it has a major impact on the validity of the procompetitive rationales the NCAA advances, and thus the chances of the "death penalty" surviving Sherman Act analysis.[182]

Another important distinction between the SMU "death penalty" litigation and the hypothetical Penn State "death penalty" litigation would be the standing of the plaintiff. The university did not bring the Sherman Act claim on its own behalf in *McCormack*, and the court held that the plaintiffs that brought the suit did not have proper standing.[183] The court held that SMU, however, "remains the party most directly harmed by the NCAA's action," implying that the university being punished is the most proper plaintiff.[184] Knowing this, if the NCAA would have elected to invoke the "death penalty" on Penn State, the university would have likely learned from SMU's mistakes, and brought the suit themselves, in order to avoid this issue. In making this change, Penn State would be in a more promising position to have the "death penalty" ruled an unreasonable restraint of competition. While this standing issue is not the heart of this Note's argument, it could have a serious effect on the court's disposition towards the suit.

Applying the Sherman Act to the Penn State Situation

In the hypothetical Penn State "death penalty" litigation, the court would have been unlikely to declare the "death penalty" a per se violation of the Sherman Act. As discussed in PART II, *Early Application of the Sherman Act and NCAA v. Board of Regents*, the courts have

[181] If the NCAA could use Bylaw 10.1 to reach the scandal cover-up by the Penn State faculty, what is to stop them from punishing a different university for violations in their music or art departments in the future?
[182] *See supra* PART III, *Contrasting the SMU and Penn State Situations.*
[183] *See supra* PART II, *McCormack v. NCAA: The First "Death Penalty" Challenge.* Claims were brought by alumni, football players, and cheerleaders. McCormack v. NCAA, 845 F.2d 1338, 1340 (5th Cir. 1988).
[184] *Id.* at 1342-43.

never applied a per se standard of review to an NCAA regulation.[185] There is no reason to believe that this suit would have triggered a different approach by the courts. Moreover, the "death penalty" is not an activity that seems substantially more unreasonable on its face than other restraints the courts have refused to apply per se review in the past.[186] Having ruled out a per se approach, the court still would have had a choice between a quick-look approach and a full Rule of Reason analysis.[187] The courts have applied both forms of review to NCAA regulations in the past, so the choice would depend on how much of a facial restraint on competition the court considered the "death penalty."[188] Even if the court initially elected to apply a quick-look approach to the "death penalty," the court could have then conducted a full Rule of Reason analysis if it accepted the NCAA's justifications for the restraint.[189]

Regardless of which of the two approaches the court took, the initial burden would have been on Penn State to show that the "death penalty" had an anticompetitive effect on some market.[190] If the court elected to apply the quick-look approach, they would have skipped a lengthy inquiry into what market the NCAA was restricting competition in and likely would have concluded the "death penalty" is anticompetitive based on its facial characteristics of restricting competition.[191] However, if the court applied the full Rule of Reason, Penn State would have needed to identify a relevant market in which the "death penalty" had an anticompetitive

[185] *See supra* PART II, *Early Application of the Sherman Act and NCAA v. Board of Regents*. Due to the necessary cooperation to produce a quality product, even if a restraint seems unreasonable on its face, "a fair evaluation of [a regulation's] competitive character requires consideration of the NCAA's justifications for the restraints." NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103 (1984).
[186] Despite finding that the restraints in *Board of Regents* and *Law* were obvious horizontal restraints, the courts did not apply a per se form of review. *See id.* at 103-04; Law v. NCAA, 134 F.3d 1010, 1017 (10th Cir. 1998).
[187] *See supra* PART I, *Section 1 of the Sherman Act*, Common Law Tests and the Rule of Reason and Quick-look Analysis.
[188] The Court would only use the "quick-look" approach if "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . [the] agreement." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).
[189] *See supra* note 97 and accompanying text.
[190] United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993); Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012).
[191] *See supra* PART I, *Section 1 of the Sherman Act*, Quick-look Analysis.

effect.[192] Penn State would, presumably, have made several arguments about the market that the "death penalty" impacts. One market Penn State would likely have argued is the market for college football as a whole. While the courts have rejected this as a market before, recent decisions hint that it might now be considered a relevant market.[193]

The argument is essentially that the NCAA controls the market for, and output of, college football and by enforcing the "death penalty" on Penn State, the NCAA is making an agreement amongst the members to not let Penn State participate in the market at all. Penn State likely would have also argued that the "death penalty" had an anticompetitive effect in the market for television broadcasting. Knowing the Supreme Court has already recognized this as a relevant market that the NCAA has affected before,[194] Penn State would have likely argued that the "death penalty" unreasonably restrains its ability to have its football games broadcasted and its ability to receive the associated revenue.[195]

Penn State would have likely also suggested a market for revenue associated with the football program in general. While this would be a difficult area to show a precise amount of market impact,[196] it is a rather straightforward argument. By not being allowed to play football, Penn State would clearly lose revenue it would normally expect its football team to make through ticket sales and bowl game revenue,[197] and would likely also experience a related

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[192] *See supra* PART I, *Section 1 of the Sherman Act*, Common Law Tests and the Rule of Reason.
[193] *See* Banks v. NCAA, 977 F.2d 1081, 1088-89 (7th Cir. 1992). *But see* White v. NCAA, CV 06-999-RGK (C.D. Sept. 20, 2006); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).
[194] *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 112 (1984).
[195] *Where does the Money Go?*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one (last visited Apr. 26, 2013) ("In 2009-10, the media agreements constituted 86 percent of the NCAA revenue.").
[196] Penn State would have needed to perform a calculation and an itemized report of all income that it made through, or associated with, its football program in different years and how much less it made in those areas while being subject to the NCAA sanctions.
[197] Penn State's football program generated $43.8 million in 2011. Curtis Eichelberger, *Penn State Football Revenue Up as Team's Start Worst Since 2006*, BLOOMBERG (Sep. 26, 2012 10:00 PM), http://www.bloomberg.com/news/2012-09-27/penn-state-football-revenue-up-as-team-s-start-worst-since-2006.html.

decrease in other areas such as merchandise sales and alumni donations. If the court accepted any of these markets as one in which the "death penalty" had a substantial anticompetitive effect, Penn State's initial burden would be satisfied.

Once the court was satisfied with the showing of the anticompetitive effects of the "death penalty," it would then consider the procompetitive rationales of the NCAA to see if it they justified the anticompetitive effects of the "death penalty."[198] The NCAA has used substantially the same set of justifications for years, and would probably have argued the same justifications for implementing the "death penalty" on Penn State's football program.[199] The NCAA's main argument that its regulations help preserve the amateurism of collegiate athletics would have little relevance here. Since the actions Penn State was being punished for had nothing to do with student-athletes or the actual sport of football at all, it is difficult to see how the NCAA could justify the "death penalty" as maintaining the amateur status of college football.[200] The Penn State scandal was an anomaly, not common to either collegiate or professional athletics, so it did not threaten to blur the distinction between the two products. As the Court noted in *Board of Regents*, the justification of protecting amateurism will not always be accepted,[201] and this seems like a situation in which the NCAA would simply have been using this argument as a veil to its true purpose for imposing the punishment.

Similarly, the argument that the use of the "death penalty" on Penn State helped enhance competition would be unconvincing in this situation. If anything, inflicting a punishment on one member institution that bans it from competing against other members in a given sport seems to explicitly restrict competition, rather than enhance it. This justification makes much more sense

[198] *See supra* PART I, *Section 1 of the Sherman Act*, Common Law Tests and the Rule of Reason.
[199] *See supra* PART II, *Sherman Act Applications to the NCAA*.
[200] Chappell, *supra* note 2. *Contra* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1998) (punishing SMU for violating player compensation rules that separate the NCAA and professional sports).
[201] *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117-19 (1984).

when applied to NCAA regulations that impose certain requirements and restrictions on member institutions so that they will be on an even playing field with other members.[202] However, being involved in a child molestation scandal, and subsequent cover-up, provides no competitive advantage to Penn State, and no other universities would be better off if they were allowed to perform the same activity. Thus, it is unlikely that the court would accept 'maintaining a competitive balance' as a procompetitive justification in this case.

Since neither of its two most common justifications for restraints of competition would likely work, the NCAA would have to come up with new and specific procompetitive rationales for imposing the "death penalty" on Penn State. One of the main justifications left available to the NCAA would be a rationale based on 'maintaining institutional control' of its members to produce a better product. The NCAA has certain conduct requirements for member institutions and exercises some control over them to make sure they behave within the NCAA's guidelines.[203] The NCAA would argue that Penn State failed to maintain adequate control over the events occurring at its school, and that it was imposing the "death penalty" to realign Penn State with the characteristics of the other NCAA members. However, it is hard to accept this procompetitive justification on its face because Penn State did not violate any substantive NCAA regulations, and there are no regulations imposing certain minimum control standards on a university.[204] It is unclear how the court would feel about this as a justification for restraining competition, but the NCAA has punished member institutions under this argument before.[205]

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[202] *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569 (E.D. Pa. 2004).
[203] *See generally* NCAA Manual, *supra* note 133.
[204] *See supra* PART III, *Contrasting the SMU and Penn State Situations*; NCAA Manual, *supra* note 13.
[205] *See, e.g.*, *California Institute of Technology Cited for Lack of Institutional Control*, NCAA.ORG (June 12, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/June/California+Institute+of+Technology+cited+for+lack+of+institutional+control.

Another justification that the NCAA would likely advance is that the "death penalty" was being used to protect the reputation of its "brand." The Court held in *Board of Regents* that an NCAA action is procompetitive if it is "tailored to the goal" of preserving the "product" of collegiate sports in the marketplace.[206] The NCAA obviously wants to protect its reputation, and there is no disputing that the events that happened at Penn State are morally, socially, and criminally wrong. The NCAA would argue that the use of the "death penalty" helps maintain the reputation of the NCAA by sending the message that the events that transpired at Penn State are not acceptable, and that "unethical conduct" will be severely punished.[207] However, it is unclear whether the court would accept advancement of these social objectives as a justification for the "death penalty" because acting as a moral policing entity is not one of the NCAA's functions.[208] Accepting this justification would imply that as long as a restraint was motivated by the desire to advance the NCAA's social objectives in order to maintain the reputation of its "brand," it is not unreasonable. If the courts allowed this, it could lead to a very slippery slope.[209]

If the court did not ultimately accept the procompetitive quality of these justifications, the analysis would end, and imposing the "death penalty" on Penn State would be declared an unreasonable restraint of competition under either a quick-look approach or the full Rule of Reason. On the other hand, under a quick-look approach, if the court did find that the "death penalty's" procompetitive rationales outweighed its anticompetitive effects, the court could either declare the "death penalty" reasonable or move into a full Rule of Reason analysis.[210] Thus, regardless of which form of review the court began with, it would now be at the point

[206] The Harvard Law Review Ass'n, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1307 (1992) (citing Bd. of Regents of Univ. of Okla., 468 U.S. at 119).
[207] NCAA Manual, *supra* note 13, at Bylaw 10.1
[208] The courts have never addressed whether general social benefits is an acceptable procompetitive rationale that can outweigh anticompetitive effects of restraints. *See generally* NCAA Manual, *supra* note 133.
[209] *See supra* note 181 and accompanying text.
[210] *See, e.g.*, Agnew v. NCAA, 683 F.3d 328, 336 (citing Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 674 (7th Cir. 1992)); Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004).

where it put the burden on Penn State to show a less restrictive alternative than the "death penalty" that the NCAA could use to accomplish the same purpose.[211]

Since the less restrictive alternative doctrine has never been applied to an NCAA regulation, there is uncertainty regarding how it would be implemented by the court.[212] While the courts have emphasized that the restraint need not be the least restrictive approach possible, they have held that the restraint needs to be reasonably necessary to accomplish the defendant's legitimate objectives.[213] It is unlikely that the court would find such a harsh penalty – completely restricting Penn State from competition – necessary to accomplish the NCAA's goals even if the court accepted one of the NCAA's procompetitive justifications. This can be evidenced via the sanctions short of the "death penalty" the NCAA has handed out to members in the past.[214] This conclusion is further supported by the fact that the NCAA actually did punish Penn State with lesser sanctions that still allowed them to compete in collegiate football.[215]

Thus, assuming the court followed precedent, it would hold that the use of the "death penalty" in the hypothetical Penn State litigation was an unreasonable restraint of competition. While the NCAA did not actually choose to implement the "death penalty" against Penn State, this should serve as a warning for future incidents in which the NCAA contemplates the "death penalty's" use for similar reasons.

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[211] *See supra* PART I, *Section 1 of the Sherman Act*, Common Law Tests and the Rule of Reason; Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998).
[212] However, some scholars feel that this step would be devastating to NCAA regulations. *See* Roberts, *supra* note 155, at 2669 ("[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule.").
[213] *See* Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998); Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975) (quoting Walt Disney Prods. v. Am. Broad. Paramount Theaters, 180 F. Supp. 133, 117 (S.D.N.Y. 1960)).
[214] *See, e.g.*, Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, THE NEW YORK TIMES (June 10, 2010), http://www.nytimes.com/2010/06/11/sports/ncaafootball/11usc.html?_r=1& (providing an example of the typical sanctions the NCAA doles out to universities for violating NCAA regulations).
[215] Prisbell, *supra* note 9.

PART IV: THE FUTURE OF THE "DEATH PENALTY"

This Note does not propose that the use of the "death penalty" by the NCAA in future situations will always violate the Sherman Act; rather, it merely suggests that its use can be illegal and would have been in the case of Penn State. While in theory the "death penalty" would never be sustained because there is always some less restrictive form of punishment that does not completely ban a member from competing, the court has never advanced to this stage of the analysis for an NCAA regulation before, so it is difficult to assume the court would suddenly start doing so.[216] Thus, assuming that the courts continue treating NCAA regulations the way they have, the "death penalty" stands a good chance of surviving antitrust review in future cases if it is actually used to advance procompetitive justifications accepted by the courts.

While the anticompetitive effects of the use of the "death penalty" by the NCAA will always be more or less the same,[217] the rest of the analysis the courts would inevitably engage in when applying quick-look analysis or the Rule of Reason could be substantially different. The difference between the use of the "death penalty" being upheld or struck down as unreasonable hinges upon the viability of the procompetitive justifications advanced by the NCAA. If the NCAA uses the "death penalty" in the future to punish a member for an activity that has an adverse effect on competition or the amateur product it offers, the punishment would likely be upheld as a reasonable restraint.

There is a good chance the courts would uphold the use of the "death penalty" against a member violating regulations such as those governing eligibility. Eligibility regulations involving issues such as player compensation, non-agent requirements for student-athletes, and

[216] Roberts, *supra* note 155, at 2669 ("[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule.").
[217] *See supra* PART III, *Applying the Sherman Act to the Penn State Situation*.

transfer restrictions, have withstood antitrust analysis by the courts in previous cases.[218] The courts' rationale for upholding these regulations would likely be the same for upholding the "death penalty" if it were being used to punish violations of these eligibility regulations. These regulations are in place to ensure that the distinction between the NCAA's brand of amateur collegiate and professional athletics continues and that competition in collegiate sports is encouraged by having an even playing field. Thus, the use of the "death penalty" to punish members for violating these regulations is actually strongly tied to the NCAA's primary procompetitive arguments.[219]

To illustrate, the use of the "death penalty" to punish schools for engaging in illegal student-athlete compensation can be examined. The NCAA has a multitude of regulations prohibiting the compensation of student athletes beyond the amount they receive from their scholarships.[220] The NCAA has punished universities for violating these regulations in the past,[221] and may choose to use the "death penalty" to punish major violations in the future. If this use of the "death penalty" was litigated, the validity of the NCAA's procompetitive justifications would be fairly evident.

By punishing a university for paying players, the "death penalty" would be directly promoting the NCAA's main justification of maintaining the amateur status of intercollegiate athletics. Rules such as those governing player compensation are essential to preserving amateurism and the concept of the student-athlete.[222] The court would likely conclude the "death penalty's" use in this situation was enhancing the amateur product being offered by the NCAA,

[218] Agnew v. NCAA, 683 F.3d 328, (7th Cir. 2012) ("Most – if not all – eligibility rules…fall comfortably within the presumption of procompetitiveness[.]").
[219] *See supra* PART III, *Applying the Sherman Act to the Penn State Situation* (outlining the NCAA's normal procompetitive justifications).
[220] *See generally* NCAA Manual, *supra* note 13.
[221] *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).
[222] Agnew, 683 F.3d at 343; Banks v. NCAA, 977 F.2d 1081, 1089-90 (7th Cir. 1992) ("[P]reserve[ing] the bright line of demarcation between college and 'pay for play' football.").

thus increasing overall efficiency even though one member would be excluded from competition. Furthermore, by excluding the sanctioned university from competition, the NCAA would be discouraging members from breaking rules to seek advantages over competing universities, thus increasing the level of competition in that sport. Therefore, the use of the "death penalty" to enforce player compensation regulations provides a clear example of the type of situation in which the procompetitive justifications of the "death penalty" would authorize its enforcement. Thus, the NCAA does not need to completely abandon the "death penalty" as a form of punishment going forward--it just needs to limit the "death penalty's" use to situations in which it is actually related to their procompetitive justifications.

CONCLUSION

This Note argues that the threat contemplated by the NCAA of imposing the "death penalty" on Penn State as a punishment for the Jerry Sandusky scandal was futile. Section 1 of the Sherman Act would have prohibited the use of the "death penalty" in this case as an unreasonable restraint of competition. The use of the "death penalty" is essentially a group boycott of the targeted school, which is a horizontal restraint of competition. Thus, the restraint would only be upheld if it survived applicable antitrust review.

Applying the Rule of Reason, as is typical in antitrust cases involving the NCAA, the "death penalty" would be deemed unreasonable in the Penn State situation. The "death penalty" would clearly be a group boycott by NCAA members prohibiting Penn State from playing college football and realizing the associated opportunities and revenue. While the NCAA would certainly attempt to advance procompetitive justifications for its use of the "death penalty," it is unlikely that the courts would accept them in this case. Even though the courts have previously accepted many of the same justifications the NCAA would likely propose , the difference in this

case, punishing a member for social and criminal wrongs unrelated to the football team or its players, is not reasonably related to any of these procompetitive justifications. Furthermore, even if the courts did accept one of the NCAA's proffered procompetitive rationales for using the "death penalty," it is probably not a reasonably necessary means for accomplishing its goals since many lesser punishments could accomplish the same goals. This fact could prove fatal to the "death penalty," but only if the courts actually address it.

However, while the NCAA's use of the "death penalty" would have been inappropriate for the Penn State situation, it need not abandon the use of the "death penalty" as a form of punishment in all scenarios. The use of the "death penalty" going forward will simply require a case by case examination to decide if it is appropriate. When the reasons for the use of the "death penalty" actually bear a close relation to the associated procompetitive justifications of maintaining the NCAA's amateur product or enhancing competition between member schools, the courts are likely to uphold the use of the "death penalty." It is likely that the courts will allow the NCAA to continue to use the "death penalty" to enforce regulations related to areas such as player eligibility and compensation. Ultimately, the NCAA needs to rethink the way it views its regulation of member institutions and realize that, while it may get some deference from the courts, it is not immune to Sherman Act prosecution and should consider the effects of its sanctions on competition prior to imposing them.