Maine Law Review

Volume 52 | Number 1 Article 5

January 2000

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*Stephanie M. Greene**

I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) is a powerful force in shaping the intercollegiate athletic programs of some 1200 public and private colleges. Courts have recognized the NCAA as an entity that serves the important and admirable functions of maintaining the amateur status of intercollegiate athletics and the integrity of the educational process for the student-athlete, while providing a fair and equitable competitive environment.[1] Most of the NCAA's rules and regulations are promulgated to promote and maintain these goals. Nevertheless, both student-athletes and coaches have challenged NCAA rules in the courts, claiming that certain rules discriminate on the basis of sex, race, and disability or that the rules place an unreasonable restraint on trade. Courts have struggled with how to apply the laws of the business world as well as civil rights laws to the organization.

Two recent decisions have shed some light on the NCAA's status with regard to the reach of federal regulation. In *Law v. NCAA*,[2] the Tenth Circuit Court of Appeals held that an NCAA rule that restricted the salary of certain Division I basketball coaches violated the Sherman Antitrust Act.[3] The Supreme Court denied certiorari,[4] and the controversy has ended with the NCAA paying 54.5 million dollars to the 2000 coaches who made up the plaintiff class.[5] *NCAA v. Smith*[6] involved both Sherman Antitrust and Title IX Claims.[7] The plaintiff, a female student-athlete, challenged an NCAA Bylaw that prohibited her from playing college varsity volleyball as a graduate student. The Bylaw, she claimed, violated both the Sherman Antitrust Act[8] and Title IX of the Educational Amendments Act of 1972.[9] The Supreme Court denied certiorari on Smith's antitrust claim[10] and

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1. *See* NCAA v. Tarkanian, 488 U.S. 179, 183 (1988); NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984); Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 65 (1999); Smith v. NCAA, 139 F.3d 180; 186-87 (3rd Cir. 1998), *cert. denied*, 119 S. Ct. 170 (1998) (Sherman Act claim), *and cert. granted*, 119 S. Ct. 31 (1998) (Title IX claim), *vacated*, 119 S. Ct. 924 (1999).

2. 134 F.3d 1010 (10th Cir. 1998).

3. *See id.* at 1012.

4. *See* NCAA v. Law, 119 S. Ct. 65 (1998).

5. *See* Wallace I. Renfro, *NCAA Settles Restricted-Earnings Coaches' Case* (NCAA Press Release Mar. 9, 1999) <http://www.ncaa.org/releasees/miscellaneous/1999030901ms.html>.

6. 119 S. Ct. 924 (1999).

7. *See id.* at 927 & n.2.

8. An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

9. Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-1688 (1994)).

10. *See* Smith v. NCAA, 119 S. Ct. 170 (1998).

held that the NCAA was not subject to Title IX on the theories presented by Smith because the NCAA is not a recipient of federal funds within the meaning of Title IX.[11] Despite the apparent victory for the NCAA on the Title IX claim, substantial questions about the NCAA's status as a recipient of financial funds and its required compliance with Title IX and other antidiscrimination laws remain.[12]

The decision of the Court of Appeals for the Tenth Circuit in *Law v. NCAA* and that of the Court of Appeals for the Third Circuit in *Smith v. NCAA*[13] follow previous Supreme Court and federal court decisions in applying antitrust law and analysis to NCAA rules and clarify the Sherman Act's relationship to the NCAA. The Supreme Court's decision in *NCAA v. Smith*, however, leaves several questions unresolved and unclear regarding Title IX's application to NCAA rules. This Article will discuss the recent antitrust challenges to NCAA rules as well as recent claims that NCAA rules violate civil rights laws. It will focus on how the decisions of the courts of appeals in *Smith v. NCAA* and *Law v. NCAA*, with the benefit of the Supreme Court's decision in *NCAA v. Board of Regents of University of Oklahoma*,[14] illustrate the boundaries of NCAA role making within the constraints of the Sherman Act. It will discuss the Supreme Court's Title IX analysis in *Smith*, the unclear precedent on which the decision rests, and will develop theories for holding the NCAA accountable under federal antidiscrimination laws.

II. THE ANTITRUST CLAIMS

In the many suits involving antitrust claims against the NCAA, courts have frequently held that the rules governing intercollegiate athletics are not always subject to strict antitrust analysis.[15] The Sherman Antitrust Act prohibits any unlawful "contract, combination . . . or conspiracy in restraint of trade."[16] In agreeing to abide by NCAA rules and regulations, NCAA member institutions enter into a horizontal agreement, "an agreement among competitors on the way in which they will compete against one another."[17] Yet because the principle thrust of the Sherman Act is to prohibit combinations that have primarily commercial or business objectives,[18] courts have found that many NCAA rules are not the type of restraints on trade against which the Sherman Act seeks to protect.[19] The NCAA is a private, not-for-profit organization and business is not its primary purpose. Thus, when NCAA rules are challenged as restraints on trade in violation of the Sherman Act, courts look closely at whether the challenged rule promotes business objectives of the NCAA or serves its primary objectives of maintaining a competitive, amateur athletic league.[20] In general, rules governing a student-

11. *See* NCAA v. Smith, 119 S. Ct. at 926.

12. *See id.* at 930.

13. 139 F.3d 180 (3rd Cir. 1998).

14. 468 U.S. 85 (1984).

15. *See, e.g.*, Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977).

16. 15 U.S.C. § 1 (1994).

17. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. at 99.

18. *See* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959); Apex Hosiery Co. v. Leader, 310 U.S. 469, 491-93 (1940).

19. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. at 490-94.

20. *See, e.g.*, NCAA v. Smith, 119 S. Ct. 924, 926-27 (1999).

athlete's eligibility to compete, such as the Postbaccalaureate Bylaw challenged in *Smith v. NCAA*,[21] have survived Sherman Act scrutiny.[22]

A. Smith v. NCAA

In *Smith v. NCAA*, the plaintiff, a female student-athlete, challenged an NCAA Bylaw that prevented her from playing college varsity volleyball as a graduate student.[23] The Postbaccalaureate Bylaw (Bylaw) allows graduate students to play intercollegiate sports during graduate school, provided that the student-athlete still has years of eligibility remaining and the graduate student-athlete is attending the same institution she attended as an undergraduate.[24] Smith claimed that this Bylaw violates the Sherman Antitrust Act because it operates as an unreasonable restraint on trade.[25] The Court of Appeals for the Third Circuit upheld the district court's dismissal of Smith's antitrust claim.[26] Both the district court and the court of appeals focused on the fact that the alleged restraint—the Postbaccalaureate Bylaw—is an eligibility restriction that "primarily seek[s] to ensure fair competition in intercollegiate athletics" and not one that promotes the business or commercial interests of the NCAA.[27] The court of appeals could have ended its analysis at this point but chose to show that even further scrutiny under the Sherman Act would demonstrate that the Bylaw had no anticompetitive effects and that the Bylaw had procompetitive justifications.[28]

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21. 139 F.3d 180 (3rd Cir. 1998).

22. *See, e.g.*, Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1320 (9th Cir. 1996) (noting that the NCAA sanction banning a university from participating in bowl games for infractions is not an antitrust violation because the sanction promotes the NCAA's legitimate objective of maintaining the amateur status of student-athletes); Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992) (concluding that the NCAA rule denying eligibility to college football players who retained an agent or participated in NFL draft did not violate the Sherman Act because the rule's primary objective was not commercial but to maintain amateur status and educational focus of student-athletes); McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988) (reasoning that NCAA sanctions suspending university's football program did not violate the Sherman Act because the sanctions' primary goal was not commercial but rather to preserve character and quality of college football); Bowers v. NCAA, 9 F. Supp.2d 460, 497 (D.N.J. 1998) (holding that NCAA initial eligibility rules, designating student-athletes as "qualifiers," "partial qualifiers," or "nonqualifiers" is not subject to the Sherman Act because it is not related to commercial activities).

23. Smith v. NCAA, 139 F.3d at 182.

24. *See* NCAA, 1999-00 NCAA DIVISION I MANUAL § 14.1.8.2 (1999). The Bylaw provides:

> A student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period . . . .

Id. (revised Jan. 10, 1990; Jan. 16, 1993; effective Aug. 1, 1993).

25. *See* Smith v. NCAA, 139 F.3d at 184.

26. *See id.* at 187.

27. *Id.* at 185-86.

28. *See id.* at 186.

Examining the Postbaccalaureate Bylaw under the rule of reason, the court of appeals in *Smith* focused on "whether or not the challenged restraint enhances competition."[29] The *Smith* court was persuaded that by encouraging student-athletes to participate as undergraduates and not preserving eligibility for graduate years, the Bylaw clearly enhanced the competitive goals of intercollegiate athletics.[30] The rule of reason analysis as employed by the *Smith* court was superfluous, as the court had already determined that the Bylaw was not subject to the Sherman Antitrust Act because it did not promote NCAA business objectives. The rule of reason is more appropriately applied when courts are called upon to weigh the anticompetitive and procompetitive effects of an agreement that restrains trade, as the courts were in *NCAA v. Board of Regents of the University of Oklahoma*[31] and *Law v. NCAA*.[32]

B. Law v. NCAA

Law v. NCAA involved a rule promulgated by the NCAA that restricted the salary of certain Division I basketball coaches.[33] The Restricted Earnings Coach Rule (REC Rule)[34] was adopted by the NCAA primarily as a cost-cutting mechanism in response to the ballooning budget of intercollegiate athletics.[35] The REC Rule provided that Division I schools could only employ four coaches, one of whom would be a restricted earnings coach who would not receive more than $16,000 per year.[36] The REC Rule became effective in 1991 and coaches who

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29. *Id.* at 186; *see also* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984).

30. *See* Smith v. NCAA, 139 F.3d at 187.

31. 468 U.S. 85 (1984).

32. 134 F.3d 1010 (1998).

33. *See id.* at 1012.

34. *See* NCAA, 1993-94 NCAA DIVISION I MANUAL §§ 11.02.3, 11.3.4 (1993). Bylaw 11.02.3 provided in part:

> Restricted Coach. A restricted coach is any coach who is designated by the institution's athletics department to perform coaching duties and who serves in that capacity on a volunteer or paid basis with the following limitations on earnings derived from the member institution (adopted Jan. 10, 1991; effective Aug. 1, 1992):
>
> (a) During the academic year, a restricted-earnings coach may receive compensation or remuneration from the institution's athletics department . . . that is not in excess of either $12,000 or the actual cost of educational expenses incurred as a graduate student in the institution's graduate program; (revised Jan. 10, 1992)
>
> (b) During the summer, a restricted-earnings coach may receive compensation or remuneration (total remuneration shall not exceed $4,000) from:
>
> (1) The institution's athletics department or any organization funded in whole or in part by the athletics department or that is involved primarily in the promotion of the institution's athletics program (e.g., booster club, athletics foundation association); (revised Jan. 10, 1992)
>
> (2) The institution's camp or clinic;
>
> (3) Camps or clinics owned or operated by institutional employees; or
>
> (4) Another member institution's summer camp.
>
> (c) During the summer or the academic year, the restricted-earnings coach may receive compensation for performing duties for another department or office of the institution .... (Adopted Jan. 10, 1991; effective Aug. 1, 1992).

Id.

35. *See* Law v. NCAA, 134 F.3d at 1012-13.

36. *See id.* at 1013-14.

were affected by the REC Rule in the 1992-1993 season filed suit against the NCAA, claiming the REC Rule violated the Sherman Antitrust Act.[37]

The coaches argued that the restriction on salary should be evaluated by the court as horizontal price-fixing, a practice that the Supreme Court has generally condemned as illegal per se.[38] Nevertheless, in confronting the antitrust claims of the coaches, the Tenth Circuit Court of Appeals rejected the per se approach to the salary restriction, employing instead the rule of reason approach used in *NCAA v. Board of Regents*.[39] In *Board of Regents*, the Court recognized that college sports is a unique industry in which some horizontal restraints are necessary for the product—college sports—to exist at all;[40] consequently, horizontal price-fixing, in the form of NCAA rules, must be examined under the rule of reason standard rather than the harsher per se analysis.

In subjecting the REC Rule to the rule of reason analysis, the Tenth Circuit outlined the shifting burden of proof format that the rule of reason requires.[41] First, the plaintiff must prove the anticompetitive effect of the restraint.[42] If the plaintiff succeeds, the defendant then may present evidence to show that the procompetitive effects of the restraint outweigh the anticompetitive effects of the rule.[43] If the defendant meets this burden, the plaintiff may show that the procompetitive effects may be achieved in a less restrictive manner.[44]

In considering the plaintiff's initial burden of establishing an anticompetitive effect, the Tenth Circuit maintained that because the REC Rule was a naked restriction on price, it was clearly anticompetitive.[45] "The NCAA adopted the REC Rule to reduce the high cost of part-time coaches' salaries, over $60,000 annually in some cases, by limiting compensation to entry-level coaches to $16,000 per year."[46] Because the rule artificially lowered the price of coaching services, the anticompetitive effect was clear. The Tenth Circuit rejected the NCAA's argument that there was a genuine issue of material fact as to whether the organization had power within the "relevant market."[47] In support of this "quick look" method, or truncated rule of reason, the Tenth Circuit again referred to *Board of Regents* in which the Supreme Court said that an analysis of market power is unnecessary where horizontal price restraints are so obviously anticompetitive.[48]

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37. *See id.* at 1014-15.

38. *See id.* at 1016-18.

39. *See id.* at 1018-19 (citing NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984)).

40. *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101-03 (1984). *See also* Broadcast Music v. Columbia Broad. Sys., 441 U.S. 1 (1979) (blanket licensing of musical compositions was not price fixing per se because the industry needed such horizontal agreements to avoid impracticality of negotiating individual licenses for each composer).

41. *See* Law v. NCAA, 134 F.3d at 1016.

42. *See id.* at 1017.

43. *See id.*

44. *See id.* at 1024 & n.16.

45. *See id.* at 1020.

46. *Id.*

47. *Id.*

48. *See id.* In *Board of Regents*, the Court did in fact find that the NCAA had market power but stated that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984).

In *Board of Regents*, the Court held that the NCAA's agreements with broadcasters regarding the televising of college football games involved unreasonable restraints on trade in violation of the Sherman Act.[49] The plan limited the total number of televised intercollegiate football games, limited the number of televised appearances of any NCAA member team, prohibited NCAA members from making any sale of television rights except in accordance with the NCAA plan, and set a minimum aggregate price to be paid by the broadcasting networks for the television package.[50] The Court recognized the NCAA plan as a horizontal restraint on trade, involving both price-fixing and a restriction on output.[51] Under rule of reason analysis, the Court found the restraints to be clearly anticompetitive, thus obviating the necessity of proving that the NCAA had power in the relevant market.[52] Neither *Board of Regents* nor *Law* granted the plaintiffs the benefit of per se antitrust analysis, but, in both cases, the fact that they were alleging horizontal price-fixing effectively excused them from the burden of proving anticompetitive effects or that the defendants had market power. The courts accepted the anticompetitive effects, per se, so to speak.

The crucial issue in *Law v. NCAA*, was whether the defendant NCAA could meet its burden of proving that the REC Rule had procompetitive effects that outweighed the anticompetitive effects.[53] The *Law* court held that the NCAA failed to meet this burden.[54] The court rejected the NCAA's arguments that retaining entry-level coaches, reducing costs, and maintaining competition were all advantages wrought by the REC Rule.[55] Interpreting the Rule, the court noted that the salary restriction did not necessarily dictate the level of experience of the REC coach; thus, the measure would not necessarily have the effect of equalizing competition amongst teams.[56] The court found the argument that reducing costs enhanced competition to be equally unpersuasive, particularly since the REC Rule did not prohibit schools from using money saved on coaching salaries for other areas of their basketball programs.[57] Because of the overt anticompetitive effects of the REC Rule and the defendant's inability to show that the REC Rule enhanced competition in any meaningful way, the Court of Appeals for the Tenth Circuit affirmed the district court's decision to permanently enjoin the NCAA from enforcing the REC Rule or from promulgating any similar restriction on coaches' salaries.[58]

The procompetitive justification analysis in *Law* was similar to that in *Board of Regents*. In *Board of Regents*, the Supreme Court rejected the NCAA's proffered evidence that its television plan enhanced competition through efficiency and protection of ticket sales and live attendance at home games of member institutions.[59] In both *Board of Regents* and *Law*, the NCAA contended that control-

49. *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. at 88.
50. *See id.* at 92-94.
51. *See id.* at 113.
52. *See id.* at 109-10.
53. *See* Law v. NCAA, 134 F.3d at 1024.
54. *See id.*
55. *See id.* at 1021-24.
56. *See id.* at 1022.
57. *See id.* at 1023.
58. *See id.* at 1024.
59. *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 113-17 (1984).

ling costs and revenues amongst member institutions promoted some equality in their athletic programs.[60] In *Board of Regents*, the Court stated that the NCAA's television plan was a restriction on revenue and that "[t]here is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity."[61] Both the Supreme Court and the Court of Appeals for the Tenth Circuit found that such measures impermissibly interfered with competition in the free market.[62] The NCAA television plan interfered with the supply and demand of intercollegiate football, affecting both the price of television rights and consumer demand and preference. Similarly, the REC Rule interfered with the competitive forces of the market by artificially lowering the salary of entry-level coaches. In both cases, the courts stressed that such restrictions on competition could not be justified because the Sherman Act "precludes inquiry into the question whether the competition is good or bad."[63]

The *Smith* and *Law* cases define the territory of NCAA rules that are subject to antitrust regulation. Rules such as the Postbaccalaureate Bylaw, which focus on student-athlete eligibility to compete in intercollegiate sports, are either beyond the reach of the Sherman Act because their objectives are not commercial in nature, or survive a rule of reason analysis because they are not anticompetitive or they have procompetitive virtues that enhance competition. NCAA regulations that have identifiable commercial interests, such as salary restrictions, will be analyzed under the rule of reason. In reaching their decisions, both courts benefited from the clear guidance and systematic approach provided in *Board of Regents* for addressing claims of antitrust violations by the NCAA or other interscholastic sports organizations. However, the Court has yet to provide clear guidance on the reach of Title IX and similar federal antidiscrimination statutes to NCAA rules.

III. THE TITLE IX CLAIM

Title IX has had a confusing history. Section 901(a) of Title IX prohibits sex discrimination in "any education program or activity receiving Federal financial assistance."[64] In determining how Title IX applies to various educational programs, the Supreme Court initially interpreted Title IX to be "program-specific," so that only the department or activity that received federal financial assistance

60. *See* Law v. NCAA, 134 F.3d at 1024 ("The NCAA asserts that the REC Rule will help to maintain competitive equity by preventing wealthier schools from placing a more experienced, high priced coach in the position of restricted earnings."). *Cf.* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. at 128 (White, J., dissenting) ("An agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools.").

61. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. at 119.

62. *See id.* at 116-20; Law v. NCAA, 134 F.3d at 1021-24.

63. Law v. NCAA, 134 F.3d at 1022-23 (quoting National Soc'y of Prof'l Eng'r v. United States, 435 U.S. 679, 695 (1978)); *see also* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. at 117 ("The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.") (quoting National Soc'y of Prof'l Eng'r v. United States, 435 U.S. 679, 696 (1978)).

64. 20 U.S.C. § 1681(a) (1994).

was subject to Title IX compliance.[65] This interpretation would have put athletic departments and, consequently, the NCAA, beyond the reach of Title IX, as no athletic departments receive direct federal financial assistance.[66] In response to the Supreme Court's program-specific approach, Congress passed the Civil Rights Restoration Act,[67] which made it clear that if any part of an educational program or activity receives federal aid, the entire institution is subject to Title IX.[68] Thus, Title IX's prohibition against gender discrimination now extends to the athletic programs of any school that receives federal funds.[69] In *NCAA v. Smith*,[70] the Supreme Court recognized that "if any part of the NCAA received federal assistance, all NCAA operations would be subject to Title IX."[71] The extended coverage clarifies some issues about who must comply with Title IX but confusion remains about which entities are considered "recipients" of federal financial assistance for purposes of regulation. In *NCAA v. Smith*, the Supreme Court considered whether the NCAA is such a recipient.[72]

In *NCAA v. Smith*, the plaintiff claimed that the NCAA violated Title IX's prohibition against gender discrimination by granting more waivers of the Postbaccalaureate Bylaw to men than to women.[73] The crucial issue for the Court was whether the NCAA is an organization subject to Title IX's prohibition against gender discrimination.[74] Title IX's definition of a "recipient" includes "any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . . ."[75] The plaintiff argued that the NCAA is an indirect recipient of federal financial assistance because it receives dues from its member institutions, both public and private colleges and universities, which are clearly recipients of federal financial assistance.[76] The Supreme Court rejected this argument, holding that the NCAA is not an indirect recipient of federal aid within the reach of Title IX, but merely an indirect beneficiary of such aid.[77] The Court's holding is limited to the theory that receipt of members' dues does not trigger Title

65. Grove City College v. Bell, 465 U.S. 555 (1984). In *Grove City*, the Court held that only the college's financial aid program was subject to Title IX because the federal loans that students received constituted federal financial assistance to that program. *See id.* at 573-74.

66. *See* Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993).

67. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(9), 102 Stat. 28, 28-29 (1988) (codified at 20 U.S.C. § 1687 (1994)).

68. *See* Cohen v. Brown University, 991 F.2d at 894.

69. *See id.* at 906-07 (reinstating university women's gymnastics and volleyball programs to varsity status pending investigation of gender disparity in sports program); Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) (allowing claim of female high school student-athletes that Board of Education and High School Athletic Ass'n violated Title IX by denying female student-athletes a fast-pitch softball program).

70. 119 S. Ct. 924 (1999).

71. *Id.* at 928.

72. *See id.* at 927.

73. *See id.*

74. *See id.* at 928.

75. 34 C.F.R. § 106.2(h) (1998).

76. *See* NCAA v. Smith, 119 S. Ct. at 928.

77. *See id.* at 929.

IX coverage. The Court left to be determined other theories that might trigger Title IX coverage for NCAA rules.[78]

The *Smith* decision illustrates and perpetuates the uncertainty and ambiguity that accompany a court's task of determining who is a recipient of federal financial assistance for purposes of Title IX and other antidiscrimination statutes that employ substantially the same language. Direct and indirect recipients are clearly covered by Title IX, while beneficiaries are not, according to the Court.[79] The criteria, however, for distinguishing "indirect recipients," from "indirect beneficiaries" is not evident from either the *Smith* decision or the cases on which the Court relied in deciding *Smith.*

The Court had previously addressed the issue of who is a recipient of federal financial assistance for purposes of Title IX in *Grove City College v. Bell,*[80] and for purposes of Section 504 of the Rehabilitation Act[81] in *U.S. Department of Transportation v. Paralyzed Veterans of America.*[82] The language triggering antidiscrimination coverage is nearly identical in the two acts and raises the question of who is a recipient of Federal financial assistance.[83] In *Grove City*, the Court held that a private college is covered by Title IX when students receive federal funds in the form of financial aid and this aid is then received indirectly by the college.[84] In analyzing *Smith*, the Court of Appeals for the Third Circuit reasoned that the NCAA's receipt of dues from federally assisted members was similar to the private college's receipt of tuition money from students who received federal aid.[85] Relying on *Grove City*'s emphasis on the broad and encompassing language of the statute, the court of appeals held that the NCAA was, like Grove City College, an indirect recipient of federal financial assistance and thereby subject to Title IX.[86] In vacating the court of appeal's judgment and rejecting its reasoning, the Supreme Court distinguished *Grove City* from *Smith.*[87] In doing so, the Court focused on the fact that the federal aid received by students was earmarked for use as tuition payment at the school and no comparable argument could be made that federal funds received by NCAA member institutions were earmarked for dues payments to the NCAA.[88] The lack of earmarking apparently eliminated the NCAA from the category of "indirect recipient," and placed it in the "indirect beneficiary" category.

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78. *See id.* at 926.

79. *See id.* at 929.

80. 465 U.S. 555 (1984).

81. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794(a) (1994)).

82. 477 U.S. 597 (1986).

83. *Compare* Education, 20 U.S.C. § 1681 (1994) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."), *with* 29 U.S.C. § 794(a) (1994) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

84. *See* Grove City College v. Bell, 465 U.S. at 563-70.

85. *See* Smith v. NCAA, 139 F.3d 180, 189 (3rd Cir. 1998).

86. *See id.* at 187-88.

87. *See* NCAA v. Smith, 119 S. Ct. 924, 929 (1999).

88. *See id.*

The Supreme Court had relegated other alleged indirect recipients of federal financial assistance to "indirect beneficiary" status in determining whether Section 504 of the Rehabilitation Act applies to commercial airline carriers.[89] In *Paralyzed Veterans*, the Court held that airline carriers were merely indirect beneficiaries of the federal financial assistance given to airport operators, not recipients covered by the Rehabilitation Act.[90]

> While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. In this case, it is clear that the airlines do not actually receive the aid; they only benefit from the airports' use of the aid.[91]

The *Smith* court recognized distinctions between the NCAA's receipt of membership dues from a body it governs and the relationship between airlines and airport operators, yet concluded that these distinctions did not bear on the ultimate question of Title IX coverage.[92] The *Smith* decision indicates that the NCAA's receipt of members' dues was not similar to the relationships between recipient and funding in either *Grove City* or *Paralyzed Veterans*.[93] The Court's conclusion, nevertheless, indicates that the NCAA is not covered by Title IX because the membership dues are merely economic benefits.[94]

In a case involving high school female athletes claiming gender discrimination based on unequal sanctioning of sports, the Court of Appeals for the Sixth Circuit analyzed the receipt of membership dues by an athletic association and held that the association's receipt of those dues did trigger Title IX coverage for the association.[95] In *Horner v. Kentucky High School Athletic Association* (KHSAA), the court held that the KHSAA qualified as an "agent" indirectly receiving federal financial assistance.[96] The only significant difference between the NCAA's relationship with its members, and that of the KHSAA and its members, was that the KHSAA is designated as an agent of the state board of education by statute,[97] whereas the NCAA's authority is not statutorily based. This distinction did not trouble the Court of Appeals for the Third Circuit in *Smith*, which concluded that the NCAA acts as a "surrogate with respect to athletic rules"[98] for its member institutions, and that it "acts no less than the association in *Horner* as an agent of its member institutions merely because it lacks statutory authority for its activities."[99] The Supreme Court's decision in *Smith* mentioned neither the *Horner* case nor whether the NCAA could be deemed an agent for purposes of qualifying

89. *See* United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 606 (1986).
90. *See id.* at 606-07.
91. *Id.* at 607.
92. *See* NCAA v. Smith, 119 S. Ct. at 929-30.
93. *See id.*
94. *See id.* at 929.
95. *See* Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265, 271-72 (6th Cir. 1994).
96. *Id.* at 272.
97. *See* KY. REV. STAT. ANN § 156.070(1)-(2) (Michie 1996).
98. Smith v. NCAA, 139 F.3d 180, 188 (3d Cir. 1998).
99. *Id.*

under Title IX as an indirect recipient of federal financial assistance. The Court may have omitted such analysis purposely since the theory that the NCAA is an agent for its members is similar to theories that the Court left to be considered by the lower courts on remand.

The *Smith* decision explicitly left the door open for other theories that might extend Title IX coverage to the NCAA.[100] At least two theories, which were not procedurally ripe for review by the Court, could be presented to lower courts. The plaintiff may yet prove that the NCAA is an indirect recipient of federal financial assistance for Title IX purposes through its relationship with the National Youth Sports Program (NYSP).[101] Alternatively, the plaintiff may argue that the NCAA should be subject to Title IX because its federally funded members have ceded control over an educational program to the NCAA. Both of these theories have been advanced successfully in lower courts.[102]

IV. DEVELOPING THEORIES FOR COVERAGE UNDER TITLE IX AND OTHER ANTIDISCRIMINATION LAWS

In *Bowers v. NCAA*,[103] the United States District Court for the District of New Jersey denied the NCAA's motion for summary judgment in a suit claiming discrimination under Section 504 of the Rehabilitation Act, holding that "there are genuine questions of material fact as to whether the NCAA receives federal funds through the NYSPF."[104] In *Bowers*, the plaintiff, a talented football player with a learning disability, maintained that NCAA rules categorizing student-athletes as "qualifiers," "partial qualifiers," and "non-qualifiers" violated the Rehabilitation Act's prohibition against otherwise qualified individuals with disabilities.[105] The Rehabilitation Act pertains to "any program or activity receiving Federal financial assistance."[106] In denying the NCAA's motion for summary judgment on this issue, the court noted that the NCAA concedes that the NYSP receives federal funds.[107] Although the NCAA argued that its relationship with the NYSP is merely administrative, the court noted that the NCAA Manual makes specific reference to the NCAA's responsibilities to administer the NYSP and that there is significant overlapping of personnel on the Board of Directors and committees of the two organizations.[108]

In *Cureton v. NCAA*,[109] the United States District Court for the Eastern District of Pennsylvania continued the *Smith* and *Bowers* courts' inquiry into whether

100. *See* NCAA v. Smith, 119 S. Ct. 924, 929-30 (1999).

101. *See* Cureton v. NCAA, 37 F. Supp.2d 687, 694 (E.D. Pa. 1999). The NYSP provides summer education and sports programs for disadvantaged children on the campuses of NCAA member and non-member institutions. *See id.* at 692 n.3.

102. *See* Bowers v. NCAA, 9 F. Supp.2d 460, 493-94 (D.N.J. 1998); Cureton v. NCAA, 37 F. Supp.2d at 694.

103. 9 F. Supp.2d 460 (D.N.J. 1998).

104. *Id.* at 494. "NYSPF" is an acronym for the National Youth Sports Program Fund. *See id.* at 493.

105. *Id.* at 465. Bowers was also alleging the NCAA's rules discriminated against him in violation of the Americans with Disabilities Act and the New Jersey Law Against Discrimination. *See id.*

106. 29 U.S.C. § 794(a) (1994).

107. *See* Bowers v. NCAA, 9 F. Supp.2d at 493.

108. *See id.* at 493-94.

109. 37 F. Supp.2d 687 (E.D. Pa. 1999).

the NCAA is a recipient of federal financial assistance for purposes of federal regulation.[110] In *Cureton*, four African-American students alleged that they were denied educational opportunities as freshmen because of the NCAA's initial eligibility rules.[111] They claimed that Proposition 16,[112] which required minimum standardized test scores, had an unjustified disparate impact on African-American student-athletes.[113] Student-athletes claimed that they missed opportunities to attend Division I schools and to participate in Division I athletics, or were denied recruiting opportunities because of the operation of Proposition 16.[114] A threshold question for the court was whether the NCAA receives federal financial assistance within the meaning of Title VI,[115] which prohibits discrimination "on the ground of race, color, or national origin . . . under any program or activity receiving Federal financial assistance."[116]

The *Cureton* court had substantial information with which to evaluate the relationship between the NCAA and the NYSP. On the basis of "overwhelming evidence," the court concluded that the NCAA indirectly receives federal financial assistance through the NYSP due to the NCAA's complete control and decision making power over the NYSP.[117] Specifically, the court determined that "the NCAA exercises effective control and operation of the Community Services Block Grant given by the United States Department of Health and Human Services."[118] The *Cureton* court's decision is significant because the language of Title VI regarding "recipients," although nearly identical to that in Title IX, specifically excludes any "ultimate beneficiary" as a "recipient."[119] Nevertheless, the *Cureton* court found that the NCAA met Title VI's definitional requirements of "indirect recipient," and were not a mere "beneficiary," of federal funds.[120] In finding that the NCAA is an indirect recipient of federal funds through its relationship with the NYSP, the court concluded that all of the NCAA's "operations, including its promulgation of initial eligibility rules are covered by Title VI."[121]

In addition to finding the NCAA subject to Title VI as an indirect recipient of federal funds, the *Cureton* court held that the NCAA is subject to Title VI because its member institutions cede controlling authority of a federally funded program to the NCAA.[122] This theory recognizes the reality of NCAA control over its member institutions with regard to intercollegiate athletics. The member institutions

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110. *See id.* at 695-96; NCAA, 1999-00 NCAA DIVISION I MANUAL § 21.3.20 (1999).

111. *See* Cureton v. NCAA, 37 F. Supp.2d at 689.

112. *See* NCAA, 1999-00 NCAA DIVISION I MANUAL § 14.3 (1999). The Bylaw became effective in the 1996-1997 academic year. It increases the number of required core courses for prospective students and introduced a "sliding scale" with regard to evaluating student's GPAs in conjunction with SAT or ACT scores. *See id.* § 14.3.1.1.1.

113. *See* Cureton v. NCAA, 37 F. Supp.2d at 700-01.

114. *See id.* at 689.

115. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (1964) (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a (1994)).

116. 42 U.S.C. § 2000d (1994).

117. Cureton v. NCAA, 37 F. Supp.2d at 694.

118. *Id.*

119. 45 C.F.R. § 80.13 (1999); *See* Cureton v. NCAA, 37 F. Supp.2d at 693.

120. Cureton v. NCAA, 37 F. Supp.2d at 692-96.

121. *Id.* at 694.

122. *See id.*

are bound by NCAA legislation and noncompliance with NCAA rules can have severe repercussions for a school's athletic program. Based on this transfer of authority with regard to decisions and enforcement regarding intercollegiate athletic programs, the court held that "the NCAA comes sufficiently within the scope of Title VI irrespective of its receipt of federal funds."[123]

The Supreme Court has not addressed holding an organization such as the NCAA accountable under federal antidiscrimination statutes such as Title IX or Title VI on the theory that recipients of federal funds have ceded control to that organization. The Court did, however, address a similar issue in *NCAA v. Tarkanian*,[124] a case that considered whether a university had delegated authority to the NCAA so as to make the NCAA subject to the due process protections of the Fourteenth Amendment.[125] The *Cureton* court cites *Tarkanian* several times in describing the unique nature of governance and administration in intercollegiate athletics.[126] But in *Tarkanian*, the Supreme Court did not find that the university had delegated authority to the NCAA in order to make the NCAA a state actor for purposes of the Fourteenth Amendment.[127] Nevertheless, differences between the *Tarkanian* case and other cases claiming discriminatory effects of NCAA rules support the "ceding control" theory of the *Cureton* court.

In *Tarkanian*, the head basketball coach of the University of Nevada, Las Vegas (UNLV), claimed that both the NCAA and UNLV had violated his right to due process under the Fourteenth Amendment when he was suspended for alleged recruiting violations.[128] The Supreme Court held that the NCAA was not subject to the due process requirements of the Fourteenth Amendment because it was not a "state actor."[129] Only UNLV had the ultimate power to suspend Tarkanian, reasoned the Court.[130] The NCAA's "greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university from membership."[131]

Despite the *Tarkanian* court's refusal to recognize a valid delegation of authority from a member school to the NCAA, the *Cureton* court's "ceding control" theory may be consistent with the Court's analysis of delegating authority in *Tarkanian*. The point made in *Tarkanian* that the ultimate action, suspension of a university employee, could only be taken by the university, does not apply in cases such as *Cureton*, *Bowers*, or *Smith*.[132] In these cases, the ultimate action of decision-making power lies solely with the NCAA. Student-athletes challenging NCAA rules and regulations can receive effective responses or remedies only from the NCAA, not from the schools they attend or would like to attend. Smith, for example, needed a waiver of the Postbaccalaureate Bylaw from the NCAA to participate in intercollegiate volleyball. Both of the postgraduate schools she attended

123. *Id.* at 696.
124. 488 U.S. 179 (1988).
125. *See id.* at 191-99.
126. *See* Cureton v. NCAA, 37 F. Supp.2d at 695.
127. *See* NCAA v. Tarkanian, 488 U.S. at 191-98.
128. *See id.* at 181.
129. *Id.* at 196-97.
130. *See id.* at 197.
131. *Id.*
132. NCAA v. Smith, 119 S. Ct. 924 (1999).

petitioned the NCAA on her behalf, to no avail.[133] Similarly, student-athletes challenging initial eligibility requirements for intercollegiate participation may not participate at NCAA member institutions whether or not individual schools agree with NCAA standards. Although it is true that the members formulate NCAA legislation, it is also true that the member institutions have surrendered meaningful control of intercollegiate athletics to the NCAA. Schools have truly delegated authority to the NCAA where athletic eligibility rules are concerned.

V. CONCLUSION

The NCAA has lost a lengthy and costly battle to the coaches whose earnings it sought to restrict and the specter of mandatory compliance with federal civil rights laws looms large and near. The coaches' successful challenge to the REC Rule should send a clear message to the NCAA that any regulations that have commercial overtones will not stand up to Sherman Antitrust analysis. While courts have been supportive of NCAA rules that enhance competition, the NCAA cannot justify cost-cutting measures as means of equalizing competition among its members.

Although the courts have recognized NCAA eligibility rules as immune from the Sherman Act's reach, the same eligibility rules are unlikely to escape scrutiny under Title IX, Title VI, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. Courts are likely to find that the NCAA indirectly receives federal financial assistance through the National Youth Sports Program or that the NCAA is subject to these regulations because it controls the athletic programs of its member institutions. If the NCAA is required to comply with federal laws prohibiting discrimination, suits by student-athletes will undoubtedly proliferate. The NCAA will face a challenge in assessing which rules may be discriminatory or have a disparate impact on a protected class. Although member institutions have struggled with similar issues, the NCAA's task is particularly difficult because the organization's rules must protect the integrity of intercollegiate athletics and the amateur status of student-athletes. However burdensome federal regulation may appear to the NCAA, the organization should shoulder it willingly. The NCAA has tremendous power in determining which student-athletes qualify to participate in intercollegiate athletics and to enjoy the benefits of such participation. The NCAA's power should not be so great that student-athletes cannot seek the protection of federal regulations when discrimination is an issue.

133. *See id.* at 927.