Elimination of the NBA's "One and Done" Rule Will Open Doors for Potential Incoming Rookies

Armand Magardician
NOTES

Elmination of the NBA’s “One and Done” Rule Will Open Doors for Potential Incoming Rookies

Introduction

The general population has it impressed upon them that being an athlete comes hand-in-hand with an exorbitant amount of employment opportunities and even stardom. However, an athlete’s employment opportunities are not as easy or as glorious as most people believe. The policies implemented by the National Basketball Association (hereinafter “NBA”) have created an environment which results in limited opportunities for potential incoming rookies. The NBA implemented the notorious “one and done” policy in 2005, for the purpose of protecting its rookies, but, in turn, the “one and done” policy is actually doing more harm than good.1

The sports industry – and, more specifically, its athletes – is governed by numerous legal authorities, which place constraints on the entirety of the process. These authorities consist of: (1) the Sherman Anti-Trust Act (hereinafter “Sherman Act”); (2) the league’s Collective Bargaining Agreement (hereinafter “CBA”); (3) the National Collegiate Athletic Association (hereinafter “NCAA”); and (4) case law on the amateur status of student-athletes.2

Student-athletes have been subject to a loss of opportunity due to Sherman, the CBA, and the NCAA because they cannot transform from


collegiate athletes to professional athletes. The CBA for the NBA, which is still in place today, is the document responsible for setting forth the “one and done” rule. The “one and done” rule states, in sum, that a player must be at least nineteen years old during the year of the draft when the player declares, or they must be at least one year removed from high school. The “one and done” rule, along with the holdings of two seminal federal cases, O’Bannon v. National Collegiate Athletic Association and Berger v. National Collegiate Athletic Association, both of which upheld the NCAA’s rule that student-athletes are amateurs and thus should not be paid, have essentially taken the employment opportunities that eighteen-year-old athletes would be able to receive if they qualify for the NBA. The players’ choice to either go to college right out of high school or play professional basketball is still being hindered by these rules. While the NCAA has recently passed guidelines that would potentially allow student-athletes to be paid for their name, image, and likeness, the proposed changes would not be enacted for a few years. Therefore, for the majority of collegiate athletes, there is no longer any incentive to remain within their college program for more than one year at this time.

This note will address the current issue that the “one and done” rule has presented to the underrepresented class of student-athletes who have hopes to play in the NBA. An examination of the history of the NBA, how the “one and done” rule came to be, and the current law governing student-athletes, will demonstrate that the “one and done” rule should be

---

4. Id.
5. See generally O’Bannon, 802 F.3d at 1079 (holding that “the NCAA’s rules have been more restrictive than necessary to maintain its tradition of amateurism”).
6. See generally Berger, 843 F.3d at 293 (holding that the appellants were unable to “allege that the activities they pursued as student athletes qualify as ‘work’ sufficient to trigger the minimum wage requirements of the FLSA”).
7. See infra Sections VI, VII.
8. Stacey Osburn, Board of Governors starts process to enhance name, image and likeness opportunities, NCAA (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities (outlining proposed guidelines that asks the three divisions to submit policies that would allow student-athletes to be paid for their name, image, and likeness. The proposed rules stress that, inter alia, student-athletes should not be considered employees of the organization or be treated differently than non-student-athletes).
9. See id. (noting that each division should have new rules in place by January 2021).
10. See generally Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016) (discussing the rights of student athletes to receive compensation, and whether the students can be considered employees under the FLSA). Student athletes can be considered an underrepresented class because they are considered amateurs, and not employees of the schools they play for. Id. at 291.
removed from the NBA’s CBA. The rule designed to protect incoming rookies has proven faulty and has caused greater harm to parties than it has protected.11 This note proposes that the NBA adopt the mechanism of player drafting that the MLB has implemented because it benefits the majority of the parties involved.12

I. STRUCTURE OF THE NATIONAL BASKETBALL ASSOCIATION

The NBA began in 1946 as the “Basketball Association of America,” before merging with the “National Basketball League” in 1949.13 After having some initial drawbacks, fighting financial challenges, and then competing with another rival league known as the “American Basketball Association” (hereinafter “ABA”), which merged with the NBA in 1976, the NBA finally began to gain major traction in the 1980s.14 Its tremendous growth was mainly due to competitive rivalries between players, such as Larry Bird and Magic Johnson.15 The NBA has only grown in popularity since players like Michael Jordan, Kobe Bryant, and LeBron James have broken through into mainstream popularity (and also because of the efforts of former commissioner David Stern).16 The popularity of these players was not limited to being known only as mere basketball players; through their commercial endorsements and media presence, they became modern day icons.17

Currently, the NBA is comprised of thirty teams and split into two conferences, the Eastern conference and Western conference.18 Twenty-nine of those teams exist in the United States and the remaining one is in

11. See Bontemps, supra note 1 (stating that with this new rule, scouts stopped recruiting players from high school, costing them a potentially lucrative contracts with the NBA).
14. Id.
15. Id.
17. The NBA has grown so much in popularity that players’ playing styles, celebrations, and even fashion senses are being mimicked by people all around the world. E.g., Rifkin, supra note 16 (“A small but growing number [of players] have attained the level of celebrity status usually reserved for movie and rock stars.”).
Canada. The two conferences each have fifteen teams. Each conference has three divisions, with five teams making up each division.

The following discusses general background information as a primer on the schedule of the average NBA season. An average NBA season is made up of eighty-two regular season games, three rounds of playoffs, and then the finals in the post-season. The first eight teams in each conference with the best record will qualify for the first round of the playoffs. The first seeded team plays the eighth seed, the second seeded team plays the seventh seed, the third seeded team plays the sixth seed, and then the fourth and fifth seeds play each other. The victors of both conferences will then play in the NBA finals, and the winner of this round becomes the champion of the season.

There are two types of structures that a sports league can maintain: a traditional league and a single entity league. A traditional league, unlike a single entity league, is structured so "the teams had a 'discrete legal entity' because they are separately owned and operated with non-shared expenses, revenues, profits, losses, and capital expenditures." Along with many other professional sports leagues in the United States, the NBA maintains a traditional structure. In a single entity league, even though there are different teams, all the teams are owned by the league, and therefore the league acts as a parent company. Therefore, no team has true autonomy. In a traditional league, because the individual teams have independent control of capital expenditures, a traditional league permits for an increase in competition amongst teams to bid for the best players and, in turn, attempt to compete for the championship. By being a traditional

20. Id.
21. Id.
23. NBA Frequently Asked Questions, supra note 16.
24. Id.
25. Id.
27. Id. at 6.
28. Id. at 1, 5 ("[T]raditional professional sport leagues tend to be structured in a similar, 'traditional' way. Leagues are generally unincorporated joint ventures, in which there is a central office that oversees the individually owned teams.").
29. See id. at 8 (noting "that there is always a 'unity of purpose or a common design' for a single entity such as a parent company and its subsidiaries") (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984)).
30. Id. at 8.
league, teams are allowed to "compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise." Through the use of a traditional league, teams are able to better compete against one another and, through their autonomy, can create for a better consumer product.

II. THE SHERMAN ANTITRUST ACT AND ITS ROLE IN THE NBA

At first glance, the NBA appears to be a monopoly. A monopoly is a "market situation where one producer (or a group of producers acting in concert) controls supply of a good or service, and where the entry of new producers is prevented or highly restricted." The NBA is the biggest platform in the United States (and the world) that allows players to play the sport of basketball professionally, and it controls the service that players provide to fans. Due to the "big business" of the NBA, it is naturally subject to many Sherman regulations and lawsuits.

The Sherman Act was passed by Congress in 1890, a time where monopolies ran rampant, and certain "bad" business practices needed to be restricted in order for fair business proceedings to survive. The Sherman Act was Congress' attempt to promote free trade within the United States.

The sections of the Sherman Act that impact professional sports leagues include section one and section two. Section one of the Sherman Act (hereinafter "Sherman One") states:

Every 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not

31. Kaiser, supra note 26, at 8 (quoting Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994)).
32. See id. (noting that the teams compete with each other in more than one way).
34. See NBA HISTORY, supra note 13 (detailing the creation and history of the NBA).
37. Id.
exceeding 10 years, or by both said punishments, in the discretion of the court.\textsuperscript{38}

Section two (hereinafter “Sherman Two”) states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.\textsuperscript{39}

Congress’ draft of Sherman One technically prohibited every agreement in restraint of trade, which the Supreme Court interpreted to mean unreasonable restraints of trade.\textsuperscript{40} Congress “wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements.”\textsuperscript{41} As a result, the “rule of reason” test was formed.\textsuperscript{42} The rule of reason test is “whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.”\textsuperscript{43} When a Sherman One violation is at issue, the finder of fact must analyze the claim under a “rule of reason test.”\textsuperscript{44} A Sherman Two violation occurs when at least sixty percent of market share has been taken up by one specific business entity.\textsuperscript{45}


\textsuperscript{41} See Kaiser, supra note 26, at 3 (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194 (1974)).

\textsuperscript{42} State Oil Co., 522 U.S. at 10 (internal citation omitted).

\textsuperscript{43} Id.

\textsuperscript{44} See, e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679 (1978) (analyzing a Sherman One violation claim under the Rule of Reason).

III. THE COLLECTIVE BARGAINING AGREEMENT AND ITS ROLE IN THE NBA

Sports have become such a massive part of the everyday lives of fans all over the world, and the sports industry receives so much media coverage. Additionally, the business of sports is rather unusual because of the players’ popularity throughout the world. As a result of this, there needs to be some form of a contractual relationship between the employers (the league/teams) and the players. Since the media avidly covers sports and other sport related events, there is a greater attention placed on the players as compared to other classes of workers who are represented by unions. It should be noted that, there is a distinction between student-athletes and professional athletes. A CBA only applies to professional organizations and professional athletes but not student-athletes or the NCAA, which is the organization governing student-athletes. Therefore, student-athletes are not entitled to all of the benefits that come along with a CBA, including the protection provided by unions.

A CBA is a written contract between a duly certified union and an employer setting forth the negotiated terms for working conditions within that industry/job for a certain period of time. In the context of sports,
duly certified union is a representative body of individuals that employees (professional players) have elected to represent their interests. The union is usually a players union that has been established, and the employer is the league that those players are a part of. This power was granted under Section 9(a) of the National Labor Relations Act, which states, "[r]epresentatives . . . selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." Additionally, under federal law, once the players union has been formed and a representative has been elected, the players cannot negotiate with the employer without the approval of the representative. A CBA establishes standard conditions for employment such as wages, hours, and holidays. The CBA will also set forth more specific terms such as team salary caps, free agency requirements, and any dispute resolution procedures. Matters such as these are imperative in the professional sports bargaining process.

A CBA is a contract.

First, it allows an employer and a union to agree upon those arrangements that best suit their particular interests. Courts cannot . . . fashion contract terms more efficient than those arrived at by the parties who are to be governed by them. Second, freedom of contract furthers the goal of labor peace.

In terms of professional sports, there are many conclusions and rules that may be agreed to between the players’ union and the league, so there is essentially no precedent that can exist to guide the agreement. The process is too unique, which is an example of why the issue of the “one and done” rule has not already been decided upon by a third-party not a part of the union or the league. Once the courts become involved in the

54. Wong, supra note 51.
55. Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).
56. Id. (citing 29 U.S.C. § 159(a)).
57. Id.
60. See Wood, 809 F.2d at 962 (noting that the contracted provisions in the CBA were “intimately related to ‘wages, hours, and other terms and conditions of employment’”).
61. Id. at 961.
62. Id.
63. See id. ("Such bargaining relationships raise numerous problems with little or no precedent . . . ").
64. See generally id. ("The NBA/NBPA agreement is just such a unique bundle of compromises.").
process, one would anticipate there would be less compromise and the entire process would become much less organized and methodical.\textsuperscript{65}

In 1954, Bob Cousy, a Boston Celtic, became the first President of the National Basketball Players' Association (hereinafter "NBPA").\textsuperscript{66} At this time, there were no regulations as to minimum wage, benefits, etc.\textsuperscript{67} However, "it was not until 1964 when the players threatened to strike for the first televised NBA All-Star game, that the NBA recognized the NBPA as the exclusive collective bargaining representative of the players."\textsuperscript{68} Throughout the history of the NBA there have been multiple CBA agreements between the NBA and the NBPA and each time a new CBA is negotiated, there are issues between both sides.\textsuperscript{69} In order to settle these disputes, the NBA and NBPA developed a system of dispute resolution, similar to other sports leagues and their CBAs. There are two types of arbitrators allowed by the CBA, one is a grievance arbitrator and the other is a system arbitrator.\textsuperscript{70} The grievance arbitrator has exclusive jurisdiction over all disputes that may arise which involve any interpretation or compliance issues with any section of the CBA.\textsuperscript{71} Additionally, the grievance arbitrator has this same influence over any player contract.\textsuperscript{72} The CBA also sets forth the duties of a system arbitrator:

The NBA and the Players Association shall agree upon a System Arbitrator, who shall have exclusive jurisdiction to determine any and all disputes arising under Articles I, II, VII (except as otherwise specifically provided by Article VII, Section 3(d)(5)), VIII, X; XI, XII, XIII, XIV, XV, XVI, XXXVII, XXXIX, and XL of this Agreement, any and all disputes arising under Article XXVIII and Paragraph 14 of the Uniform Player Contract regarding an Unauthorized Sponsor Promotion (as that term is defined in Paragraph 14(c) of the Uniform Player contract), and those disputes made subject to his jurisdiction by Sections 9 and 10 of this Article. In addition, in the event of a disagreement between the NBA

\textsuperscript{65} See Wood, 809 F.2d at 961 ("If courts were to intrude ... leagues and their player unions would have to arrange their affairs in a less efficient way.").


\textsuperscript{67} Id.

\textsuperscript{68} Id. at 274-75.

\textsuperscript{69} See generally id. at 275-76 (discussing the 1976, 1980, 1983, and 1988 agreements between the NBA and NBPA).

\textsuperscript{70} Id. at 278.

\textsuperscript{71} Id.; see 2017 Nat'l Basketball Ass'n Collective Bargaining Agreement, supra note 3, at 392.

\textsuperscript{72} 2017 Nat'l Basketball Ass'n Collective Bargaining Agreement, supra note 3, at 392.


Published by Scholarly Commons at Hofstra Law, 2020
and the Players Association, the System Arbitrator shall have exclusive jurisdiction to determine whether the System Arbitrator, the Grievance Arbitrator or some other arbitrator provided for by the provisions of this Agreement has jurisdiction to hear or resolve a particular dispute.\textsuperscript{73}

Among the articles covered in the system arbitrator’s designation is the player eligibility and draft age.\textsuperscript{74}

Currently, one of the biggest CBA issues between the NBA and the NBPA is the drafting process into the league, in determining which players are eligible for the draft and which are not.\textsuperscript{75} The court in \textit{Wood} defined the NBA/NBPA agreement as “such a unique bundle of compromises.”\textsuperscript{76}

\textbf{IV. THE “ONE AND DONE” RULE}

Player eligibility in the NBA draft has been a hotly contested issue within the professional basketball sphere for a fairly long time. In this context, “a draft is a process used to allocate certain players to teams.”\textsuperscript{77} But what is the “one and done” rule and why was it implemented?

Since the NBA began gaining popularity in the 1970s, players were able to declare for the NBA and enter the draft right from high school.\textsuperscript{78} There have been many notable players who have declared for the NBA draft such as LeBron James, Kobe Bryant, and Kevin Garnett, who had successful careers.\textsuperscript{79} Nevertheless, there were some players who came to the NBA right out of high school and struggled.\textsuperscript{80} In the 2004 draft, eight of the first nineteen picks in the draft were straight out of high school, and this was when former commissioner David Stern began to push for an updated rule.\textsuperscript{81} Originally, he wanted the players to be at least twenty years old.\textsuperscript{82} But in 2005, the NBA and the NBPA came together and

\textsuperscript{73} 2017 NAT’L BASKETBALL ASS’N COLLECTIVE BARGAINING AGREEMENT, \textit{supra} note 3, at 410.
\textsuperscript{74} \textit{See id.} (including Article X as part of the system arbitrator’s purview).
\textsuperscript{75} \textit{Wood v. NBA}, 809 F.2d 954, 961 (2d Cir. 1987).
\textsuperscript{76} Id.
\textsuperscript{78} Bontemps, \textit{supra} note 1.
\textsuperscript{79} Id.
\textsuperscript{80} \textit{But see id.} (listing a few very successful players who were drafted right out of high school).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
eventually settled for what is now called the “one and done” rule. The “one and done” rule is:

The player (A) is or will be at least nineteen (19) years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player (defined below), at least one (1) NBA Season has elapsed since the player’s graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school).84

Thus, a player must be at least nineteen years old, turning nineteen in the year of the draft when they declare, or at least one year removed from high school.85

The “one and done” rule originally worked very well at the professional and collegiate levels.86 Collegiate basketball fans were now able to see top tier high school basketball players compete at the collegiate level, and the players coming into the NBA were more mature and well-rounded players.87 As a result, colleges heavily recruited players to their teams who could go to school for at least one year to work on their craft.88 However, it soon became clear that the top tiered players would never stay in school for more than the one year requirement because there was no incentive for the players to stay within their college program.89 Recruiters for colleges now have the added pressure of attempting to recruit players who won’t just declare for the NBA draft after only one year.90 A secondary major issue that arises from the “one and done” rule is whether

---

83. Bontemps, supra note 1.
84. See 2017 NAT’L BASKETBALL ASS’N COLLECTIVE BARGAINING AGREEMENT, supra note 3, at 273.
85. Id.
87. Id.
90. Id.
student-athletes should be compensated for their time playing collegiate sports. 91

V. THE NCAA

It has been found again and again, that student-athletes do not have the right to receive compensation for their time spent playing, other than in the form of a scholarship. 92 The formation of the NCAA provided guidance on the rules for collegiate sports, 93 and it has a very rich history as to how it was formed.

Collegiate sports have been around for nearly 150 years. 94 There has been a consistency among a variety of sources that the first inter-collegiate game, which was football, took place on November 6, 1869, between Rutgers and Princeton. 95 At that time, "college football was a [very] rough game." 96 Players were frequently injured, and it was not outlandish for players to be killed in the midst of a game. 97 Additionally, schools were allowed to hire out of network students or acquire players from other schools to play. 98 Finally in 1905, in order to bring all the problems of college football injuries to a halt, President Theodore Roosevelt called a meeting in an attempt to come to a solution. 99 As a result, the presidents of 62 colleges or universities came together to establish a uniform system of rules for college football. 100 They founded the Intercollegiate Athletic Association, which would serve as the organization that would monitor the schools and ensure that they were abiding by the rules. 101 In 1910, the Intercollegiate Athletic Association officially changed its name to the National Collegiate Athletic Association. 102

92. Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016); O'Bannon v. NCAA, 802 F.3d 1049, 1054 (9th Cir. 2015).
93. See O'Bannon, 802 F.3d at 1053.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. See id.
101. Id.
102. Id.
The NCAA has grown to include approximately 1,100 schools, which are organized into three divisions: Division I, Division II, and Division III. The division with the most substantial athletic programs is Division I. To be in the Division I category, "schools must sponsor at least fourteen varsity sports teams . . . and they provide the most financial aid to student-athletes." Today, the Division I category has about 350 member schools.

The NCAA has created many rules, one of which does not allow for student-athletes to be paid for their services to the school. The main reason for this ordinance is that students are considered amateurs of the sports and therefore are not entitled to a form of payment.

In the beginning, the NCAA established this rule in order to curb the growing hostility that hiring players entailed. However, since the NCAA was still technically a voluntary organization, no one heeded the guidelines put in place. In 1948, the NCAA adopted the "Sanity Code," which is "a set of rules that prohibited schools from giving athletes financial aid that was based on athletic ability and not available to ordinary students." This was later changed in 1956 to allow for schools to grant scholarships based on athletic ability. Also included in the 1948 edition of the "Sanity Code," was a rule, which created a compliance mechanism to enforce their rules. The compliance mechanism created "a Compliance Committee that could terminate an institution’s NCAA membership."

As previously mentioned, in 1956, the NCAA allowed its members to grant student-athletes scholarships, which were capped at "a full 'grant in aid.'" The "grant in aid" is considered for payment of "tuition and fees, room and board, and required course-related books." Interestingly, student-athletes could not receive any financial aid based on athletic

103. See O'Bannon, 802 F.3d at 1053.
104. Id.
105. Id.
106. Id.
107. Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016).
108. See O'Bannon, 802 F.3d at 1054.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
115. Id.
116. Id.
ability that amounted to more than the already capped scholarship amount.\textsuperscript{117} If they were granted more money than designated by the NCAA, they may lose their eligibility to participate in collegiate athletics.\textsuperscript{118} Student-athletes were allowed to "seek additional financial aid not related to their athletic skills; if they chose to do this, the total amount of athletic and nonathletic financial aid [not related to their athletic skill] . . . could not exceed the 'cost of attendance' at their respective schools."\textsuperscript{119} In 2014, based on the NCAA's approval, the member schools were allowed to increase scholarships for student-athletes so that the scholarship would encompass the full cost of attendance.\textsuperscript{120} Its eighty member schools voted to take that step in January of 2015 and the scholarship cap is now at the full cost of attendance for those schools.\textsuperscript{121} The NCAA is very adamant in ensuring the amateurism of its students.

The NCAA has indicated their encouragement of the inhibition of student-athletes' compensation rights through the amateurism rules they have accepted.\textsuperscript{122} There are two common, notable examples of this policy: (1) a student "athlete can lose his amateur status, for example, if he signs a contract with a professional team, enters a professional league's player draft, or hires an agent;"\textsuperscript{123} and (2) student-athletes cannot receive any pay (with a few exceptions) based on their athletic ability.\textsuperscript{124} Under those exceptions, student-athletes cannot participate in booster programs, companies seeking to endorse the player, or licenses using the player's name, image, and likeness.\textsuperscript{125}

VI. LANDMARK CASES EFFECTING STUDENT-ATHLETE'S RIGHTS

There are two major cases that have paved the way for an analysis of student-athletes rights: Berger v. National Collegiate Athletic Association

\textsuperscript{117} See O'Bannon, 802 F.3d at 1054.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 1054-55.
\textsuperscript{121} Id. at 1055 (citing Marc Tracy, Top Conferences to Allow Aid for Athletes’ Full Bills, N.Y. TIMES (Jan. 17, 2015), https://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html).
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
(hereinafter "Berger") and O'Bannon v. National Collegiate Athletic Association (hereinafter "O'Bannon").126

A. Berger v. National Collegiate Athletic Association

Berger is an ideal case to read when attempting to understand the topic of student-athlete compensation.127 The district court dismissed the plaintiff’s suit against all of the defendants for lack of standing.128 The appellate court then reviewed the decision de novo.129

Student-athletes sued their college, the NCAA, and more than 120 other Division I schools within the NCAA’s jurisdiction.130 The two plaintiffs in the case were Gillian Berger and Taylor Henning.131 Berger and Henning were both former students at the University of Pennsylvania (hereinafter “Penn”), and both students participated in Penn’s women’s track and field team.132

Penn’s track and field team was, and still is, regulated by the NCAA (as are most other collegiate sport participating schools).133 Penn’s track team competes in the Division I category, which as discussed above, is the division that consists of the biggest colleges and universities in the country.134 The students argued that student-athletes could be considered “employees” under the Fair Labor Standards Act of 1934 (hereinafter “FLSA”).135 The students contended that by not paying students, the schools violated the Act, and the court rejected this argument in a two-step process.136 The first step was to establish that student-athletes are considered amateurs and the sports they play are “extra-curricular activities.”137 Once established, the court went on to say that because the student athletes can be considered amateurs, then the FLSA cannot be applied.138

126. See Berger v. NCAA, 843 F.3d 285, 289 (7th Cir. 2016); O’Bannon, 802 F.3d at 1055.
127. Berger, 843 F.3d at 289.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id.
135. Id.
136. Id. at 290.
137. Id. at 292.
138. Id. at 292-93.
In analyzing whether students should be considered amateurs, the court began by analyzing the FLSA "alleged employees rule."\textsuperscript{139} Pursuant to the FLSA, injuries to the alleged employees can only be redressed and traceable to the employer.\textsuperscript{140} Additionally, the FLSA requires every employer to pay their employees a minimum wage of $7.25 per hour.\textsuperscript{141} The plaintiffs in the case compared student-athletes to interns and attempted to persuade the court to use this standard.\textsuperscript{142} The plaintiffs wanted the court to apply a multifactor test in order to make their determination, but the court declined because the plaintiffs did not take into account the tradition of amateurism or the harsh reality of the student-athlete experience.\textsuperscript{143}

The Supreme Court stated that college sports have been revered to be an amateur competition.\textsuperscript{144} To further this idea, the NCAA has created a system of elaborate rules that define eligibility for student-athletes to receive compensation.\textsuperscript{145} The plaintiffs also tried to argue that NCAA athletes are comparable to work-study participants and therefore should be considered employees under the FLSA.\textsuperscript{146} However, the court stated that interscholastic activities, such as collegiate sports, are not included in the FLSA's definition of an employee.\textsuperscript{147} The court even went on to cite a law review article, which collected a multitude of cases and concluded that "the courts have been consistent finding that student athletes are not recognized as employees under any legal standard, whether bringing claims under workers' compensation laws, the NLRA or FLSA."\textsuperscript{148}

After establishing that student-athletes are considered amateurs, the court then needed to decide whether or not the students were employees of the schools, and if so, they deserved to be paid.\textsuperscript{149} Initially, the court looked to how the FLSA defines an "employee."\textsuperscript{150} The FLSA defines the term "employee" in a rather circular fashion:

\begin{itemize}
  \item 139. Berger, 843 F.3d at 290.
  \item 140. Id. at 289 (citing Roman v. Guapos III, Inc., 970 F. Supp. 2d 407, 412 (D. Md. 2013)).
  \item 141. Id. at 290.
  \item 142. Id.
  \item 143. Id. at 290-91.
  \item 144. Id. at 291 (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).
  \item 145. Id. (citing O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015)).
  \item 146. Id. at 293.
  \item 147. Id.
  \item 148. Id. at 292 (citing Adam Epstein & Paul M. Anderson, The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective, 26 MARQ. SPORTS L. REV. 287, 297 (2016)).
  \item 149. Id. at 289.
  \item 150. See generally id. at 290 (examining the FLSA definition of an "employee").
\end{itemize}
Section 203(e)(1) defines “employee” in an unhelpful and circular fashion as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1). Section 203(g) broadly defines “employ” as “to suffer or permit to work.” 29 U.S.C. § 203(g). Thus, to qualify as an employee for purposes of the FLSA, one must perform “work” for an “employer.” “Work” is not defined by the Act.\textsuperscript{151}

The court ultimately held that students should not be considered employees because of the amateur nature of the sports that they play.\textsuperscript{152}

This decision, which has been upheld, has greatly changed the landscape of collegiate sports, in conjunction with the drafting rules of all professional sports organizations; the NBA in particular.\textsuperscript{153} Now, players who may be ready for the NBA draft are forced to lose out on at least one year of earnings.\textsuperscript{154} This decision between the NBA and NBPA had honorable intentions when first established, but it has not worked.

\textbf{B. O'Bannon v. National Collegiate Athletic Association}

Another case that has changed the track of collegiate sports is \textit{O'Bannon v. National Collegiate Athletic Association}.\textsuperscript{155} \textit{O'Bannon} addressed whether the NCAA’s rules prohibiting student-athletes from receiving compensation for the use of their names, images, and likenesses (hereinafter “NIL’s”) are subject to antitrust laws, and if so, whether they unlawfully restrain trade.\textsuperscript{156} The main issue in O’Bannon’s complaint was that the NCAA’s amateurism rules, and how they allow the use of students’ NIL’s without compensation to the students, are a violation of Sherman One.\textsuperscript{157} Ed O’Bannon is a former basketball player at UCLA who, in 2008, discovered that his likeness was being used by Electronic Arts (hereinafter “EA”) in one of their college men’s football and basketball video games.\textsuperscript{158} The video game featured players from the late 1990s until approximately 2013.\textsuperscript{159} The avatar that EA created looked like O’Bannon and wore his jersey, which included his former number.\textsuperscript{160} “O’Bannon

\textsuperscript{151} Berger, 843 F.3d at 290.
\textsuperscript{152} Id. at 293.
\textsuperscript{153} 2017 NAT'L BASKETBALL ASS'N COLLECTIVE BARGAINING AGREEMENT, supra note 3.
\textsuperscript{154} Id.
\textsuperscript{155} See generally O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (examining whether the NCAA’s rules are subject to the Sherman Act).
\textsuperscript{156} Id. at 1052.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 1055.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
had never consented to the use of his likeness in the video game, and he had not been compensated for it." In 2009, O'Bannon filed suit against the NCAA and the Collegiate Licensing Company (hereinafter "CLC"). The CLC is the entity that oversees the licensing of the trademarks in federal court of the NCAA and a few of its member schools for commercial use. At approximately the same time, Sam Keller, a former collegiate quarterback, brought suit against the NCAA, CLC, and EA for a similar reason as O'Bannon. The cases were consolidated during the pretrial proceedings.

The O'Bannon antitrust issue against the NCAA was brought to a bench trial in the district court in June 2014, after the plaintiffs had settled their claims against EA and CLC, which the district court approved. The district court held that the NCAA’s compensation rules were unlawfully restraining trade. It then so ordered the NCAA to bestow a full grant of scholarships to their student-athletes, which would provide for the full cost of attendance to their school, and $5,000 to be held in trust for their athletes until after they leave college. The appellate court affirmed in part and reversed in part. The district court reasoned with an in depth and detailed analysis, beginning with "identifying the markets in which the NCAA allegedly restrained trade." The two markets being affected were the college education market and the group licensing market.

The court first found that a college education market exists and consists of FBS football schools (Division I membership for football is divided into two subdivisions: Football Bowl Subdivision (hereinafter "FBS") and the Football Championship Subdivision (hereinafter "FCS")) and Division I basketball schools. These schools recruit the nation's best high school players. They did so by offering services such as scholarships, access to coaching, access to athletic facilities, and the

161. O'Bannon, 802 F.3d at 1055.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id. at 1056.
167. Id. at 1052-53.
168. Id. at 1053.
169. Id.
170. Id. at 1056.
171. Id. at 1056-57.
172. Id.
173. Id.
174. Id. at 1056.
opportunity to compete at the highest collegiate athletic level.\textsuperscript{175} There are very few athletes who are talented enough to play basketball on the Division I level or FBS football, and of those few, a very small percentage of those athletes will opt not to attend school or play for a lower level division.\textsuperscript{176} Additionally, for those two sports, as mentioned in the court’s opinion, one cannot enter the NBA or NFL from high school.\textsuperscript{177} Therefore, the court held that FBS football and Division I basketball are not liable under Sherman One because “there are no professional [or college] football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide.”\textsuperscript{178}

The court then found that the group licensing market exists.\textsuperscript{179} If not, “for the NCAA’s compensation rules, college football and basketball athletes would be able to sell group licenses for the use of their NILs.”\textsuperscript{180} The court broke down the “groups” into three subcategories: “(1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage” of those games.\textsuperscript{181} The court then addressed each category individually.\textsuperscript{182} When discussing the transmission of live games “the court noted that the TV networks that broadcast live college football and basketball games ‘often seek to acquire the rights to use’ the players’ NILs.”\textsuperscript{183} This, the court stated, “‘demonstrates that there is a demand for these rights’ on the networks’ part.”\textsuperscript{184} For video games, the lower court concluded “that the use of NILs increased the attractiveness of college sports video games to consumers, creating a demand for players’ NILs.”\textsuperscript{185} Therefore, there is an increased demand for the use of the players’ NILs.\textsuperscript{186} Finally, the court turned to the archival footage category, and the district court noted that the NCAA had permitted a company called “T3Media” to use footage of past and current

\textsuperscript{175} O’Bannon, 802 F.3d at 1056.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id. (quoting O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014)).
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id. (quoting O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014)).
\textsuperscript{184} Id. (quoting O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014)).
\textsuperscript{185} Id.
\textsuperscript{186} Id.
college athletes. This also proves that there is a strong appeal to have this footage.

The district court applied this analysis when it ruled that the NCAA's implementation of its compensation rules have "potentially restrained competition in these two markets." More specifically, the NCAA's amateurism guidelines inhibit competition "in the college education market but not in the group licensing market." However, it then concluded that the rules actually serve procompetitive purposes. Nevertheless, the court felt there could be a less restrictive alternative that could exist that still serves the same procompetitive purpose of the current rules. Therefore, the current rules that were in place were unlawful. The court came to these conclusions through the "Rule of Reason" test.

The "Rule of Reason," which long outdates the Sherman Act, has served as a filter on the exact language of the Sherman Act. Absent the "Rule of Reason," the Sherman Act cannot retain the meaning it was purported to convey. As briefly mentioned earlier, the Sherman Act basically states that every contract that puts a restraint on trade is unlawful, which the court in National Society of Professional Engineers states would then completely out rule the entire existence of private contract law. The court stated that Congress "makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition" and thus the "Rule of Reason" test has served to shape the Sherman Act.

What the "Rule of Reason" essentially states is whether the challenged acts, "were unreasonably restrictive of competitive conditions." Under this test, unreasonableness could be based on either: (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to

187. O'Bannon, 802 F.3d at 1056.
188. Id.
189. Id.
190. Id.
191. Id.
192. Id.
193. Id.
194. Id.
196. Id. (explaining that the Sherman Act essentially eliminates any suppression of trade, which would in turn undermine private contract law).
197. Id. at 687-88.
198. Id. at 688.
199. Id. at 690.
restrain trade and enhance prices.” The true test required by the “Rule of Reason” is whether the agreement that is being questioned either encourages competition or inhibits it. A “Rule of Reason” analysis has three steps: (1) the plaintiff must show that the restraint in place actually inhibits competitive effects instead of promoting them within the applicable market; (2) once the plaintiff has done this, the defendant must prove that the restraint in place actually promotes competition; and (3) it is the plaintiff responsibility to show that any of the actual objectives offered by the restraint can be accomplished in a “substantially less restrictive manner.”

1. Anticompetitive Effects

The court found that the NCAA’s rules have an anticompetitive effect on the entire college education market. If these rules did not exist, then colleges would compete to recruit the top players with compensation that would exceed the cost of attendance at their respective schools. This would essentially lower the price that student-athletes would have to pay for both athletic and educational opportunities that the school provides. Therefore, the rule that restricts the compensation of student-athletes for use of their NIL’s is a price fixing agreement. Student-athletes pay for services provided by colleges through their labor, and the colleges as the sellers, agree to value the students NIL’s at zero. In this situation, the colleges are effectively a cartel. The collective colleges and universities are a group of sellers who colluded to price fix their product.
The district court also generated an alternative theory in which the students are the sellers and the schools are one collective buyer.\(^{210}\) In this alternate perspective, the college education market can be considered a monopsony, which is "a market in which there is only one buyer for a particular good or service."\(^{211}\) By the collective buyers (colleges and universities) agreement to not pay anything to the sellers (the student-athletes) for their NILs, they are in turn causing a harm in competition.\(^{212}\)

Conversely, the court did find "that the NCAA’s rules do not have an anticompetitive effect on any of the submarkets of the group licensing market," such as "(1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage" of those games.\(^{213}\) If the NCAA rules were eliminated, there would be no contention between any of submarkets.\(^{214}\) The court’s reasoning was:

That the value of an NIL license to a live game broadcaster or a video game company would depend on the licensee’s acquiring every other NIL license that was available. . . . Similarly, a video game producer would want to acquire NIL rights for all of the teams it needed to include in the game.\(^{215}\)

In that case, the multitude of student-athlete groups that exist would not feel the need to compete so they could sell their NIL.\(^{216}\) The anticipated effect projected is that the student-athletes would have an interest to cooperate to make sure their NIL selling power would be as complete as possible.\(^{217}\) Regarding the "archival footage,"\(^{218}\) the court found that the NCAA’s alignment with "T3Media" did not strip the student-athletes ability to collect any compensation they could receive because "T3Media" cannot sell footage of present-day student-athletes.\(^{219}\) Additionally, they must acquire the approval of the former athlete who may appear in the film in any way before using their NIL.\(^{220}\)

On the appellate level, the NCAA offered three arguments, stating that the district court erred in its finding that “the compensation rules do
not have significant anticompetitive effects.\textsuperscript{221} The Court of Appeals ultimately denied all three arguments and affirmed the district court’s finding that, “the compensation rules have a significant anticompetitive effect.”\textsuperscript{222}

2. Pro-competitive Purposes

The NCAA offered several arguments as to why the rules currently in place were lawful and how prohibiting student’s from receiving compensation actually promotes competition instead of inhibiting it.\textsuperscript{223} The four arguments the NCAA offered were: “(1) preserving ‘amateurism’ in college sports; (2) promoting competitive balance in FBS football and Division I basketball; (3) integrating academics and athletics; and (4) increasing output in the college market.”\textsuperscript{224} The district court accepted the first and third arguments, and rejected the second and fourth.\textsuperscript{225} On appeal, the court upheld the district court’s findings.\textsuperscript{226}

a. Preserving Amateurism

The NCAA first attempted to argue that the restrictions on student-athlete compensation are imperative in preserving the amateur tradition in college sports and the identity that college sports maintain.\textsuperscript{227} The NCAA also argued that the amateurism aspect is one of the core principles that exists within its organization and is a main factor in the popularity of college sports among consumers and fans.\textsuperscript{228} The court did not agree.\textsuperscript{229} The court stated that the NCAA’s definition of amateurism is “malleable” and is constantly changing over time in notable and contrasting ways.\textsuperscript{230}

\textsuperscript{221} O’Bannon, 802 F.3d at 1070.
\textsuperscript{222} Id. at 1070-72; see also Antitrust Labor Law Issues In Sports, USLEGAL, https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/ (last visited Mar. 11, 2020) (“Amateur sports in America do not have nearly as many legal challenges involving antitrust laws. Courts seem to have afforded amateur athletic organizations more latitude and less scrutiny. Several cases involving antitrust analysis in the amateur sports context have offered some guidance and certainty as to how antitrust laws should apply in the amateur sports context. For example, in NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984), the NCAA’s television broadcast plan was held to be anti-competitive and in violation of the Sherman Act.”).
\textsuperscript{223} O’Bannon, 802 F.3d at 1058.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id. at 1072.
\textsuperscript{227} Id. at 1058.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
Therefore, the court concluded that "amateurism" is not a main convention for the NCAA.231 Additionally, the district court was not persuaded that amateurism is the primary driver of consumer and fan interest in college sports; however, the court did find that amateurism does serve pro-competitive purposes.232 The court ultimately held that the NCAA’s understanding of amateurism does play a certain role in the popularity of NCAA sports.233 "It found that the NCAA’s current rules serve a pro-competitive benefit by promoting this understanding of amateurism, which in turn helps preserve consumer demand for college sports."234

b. Procompetitive Balance

Next, the NCAA argued that limiting compensation to student-athletes helps create an equal playing field between FBS and Division I schools in the recruiting process, and in this way, the competitive balance among these schools’ teams is being preserved.235 The district court found that these rules do not promote a competitive balance.236 The court explained that numerous economists have studied the NCAA and its compensation rules, and nearly all of these economists have concluded that the compensation rules do not promote a competitive balance.237 In addition, the court noted that the NCAA does not allow its member schools to pay student athletes beyond a fixed scholarship.238 The schools may invest money into other aspects of the athletic program, such as coaching and their facilities.239 These other aspects that schools can invest in essentially “negate[] whatever equalizing effect the NCAA’s” compensation restraint had.240 Therefore, “[t]he court concluded that competitive balance was thus not a viable justification for restricting student-athlete compensation."241

231. O’Bannon, 802 F.3d at 1059.
232. Id.
233. Id.
234. Id.
235. Id.
236. Id.
237. Id.
238. Id.
239. Id.
240. Id.
241. Id.
c. Integrating Academics and Athletics

After the district court denied the NCAA’s argument for procompetitive balance, the NCAA then put forth the argument that their restraints on student-athlete compensation help integrate academics and athletics. More specifically, the NCAA asserted that the restraints would “improve the quality of educational services provided to student-athletes.” According to the NCAA, the student-athletes would be able to derive long term benefits by student-athletes fully participating in academic life at their respective schools and the current compensation rules in place would promote this idea.

The district court held that “this was a viable procompetitive justification for the NCAA’s regulating the college education market, but it concluded that most of the benefits of academic and athletic ‘integration’ are not the result of the NCAA’s rules restricting compensation.” In its place, this “integration” comes from other NCAA rules. These rules consist of: requiring student-athletes to attend class, disallowing athlete only dormitories, and forbidding practice for more than a certain amount of hours per week. In the court’s opinion, the only way the NCAA’s argument that the compensation rules help the integration of academics and athletics is “by prohibiting student-athletes from being paid large sums of money not available to ordinary students, the rules prevent the creation of a social ‘wedge’ between student-athletes and the rest of the student body.” Despite the existence of a “social wedge,” it is avoided and can be considered an actual procompetitive goal. This alone does not justify a complete ban on paying student-athletes and the use of their NILs.

d. Increasing Output

The last argument that the NCAA put before the court in regards to lack of compensation for the use of students’ NILs was that these

242. O’Bannon, 802 F.3d at 1059.
243. Id. (quoting O’Bannon v. NCAA, 7 F. Supp. 3d 955, 1002 (N.D. Cal. 2014)).
244. Id.
245. Id. at 1059-60.
246. Id. at 1060.
247. Id.
248. Id.
249. Id.
250. Id.
restraints increase output in the college education market. This is due to increasing the opportunities for students to play FBS football or Division I basketball. According to the NCAA, this is accomplished by attracting schools who have a "philosophical commitment to amateurism" concept, and through this, there are schools that can compete in Division I that could not otherwise afford to do so.

The district court rejected this entire argument. The court was of the opinion that schools do not join Division I because of the "philosophical commitment to amateurism." The court acknowledged that there have been some major schools that had "lobbied to change the NCAA's scholarship rules to raise compensation limits." The court went on to explain that schools not in the Division I category still must abide by the same "amateurism rules as Division I schools." This in turn makes it highly doubtful that schools become a member of the Division I category because of the "amateurism rules." The argument is futile still, because the court also found no support for the assertion that the NCAA's compensation rules enable more schools to compete in the Division I category. Division I schools do not share in revenue, so there is no reason to believe that cost savings from not providing compensation to student-athletes are being used to fund additional scholarships at low revenue schools. There is also no reason to believe that saving costs would make it easier for those schools to become a part of the Division I category.

On appeal, the court concluded that "the NCAA's compensation rules serve the two procompetitive purposes identified by the district court." Since both courts found that two of the arguments presented by the NCAA were found to be procompetitive, the courts then addressed the final step of the "Rule of Reason" test.

---

251. O’Bannon, 802 F.3d at 1060.
252. Id.
253. Id.
254. Id.
255. Id.
256. Id.
257. Id.
258. Id.
259. Id.
260. Id.
261. Id.
262. Id. at 1073.
263. Id. at 1074.
C. Less Restrictive Alternatives

When conducting an analysis on the less restrictive alternatives, the court considered if there were other means available "than a total ban on compensating student athletes for use of their NILs." The plaintiffs had recognized two actual, less restrictive alternatives to the current rules that the NCAA put in place. The alternatives were: (1) allowing colleges and universities to grant student-athletes a financial award that would cover "the full cost of attendance," which would make up for any lack in their grants; and (2) permitting schools to hold a portion of the licensing revenue in a trust, which would be distributed to the student-athletes after they leave college. The court accepted both of these alternatives and held that neither of these alternatives would sabotage the "procompetitive" goal that the NCAA is trying to achieve.

The Court of Appeals held that: (1) the district court did not clearly err in allowing NCAA member schools to give student-athletes a full grant of scholarship; but (2) the district court did err "when it found that allowing students to be paid compensation for their NIL's is virtually as effective as the NCAA's current amateur-status rule." The totality of the evidence that was presented to the district court suggested that raising the overall scholarship amount to include to the full cost of attendance would have almost no impact on the NCAA's amateur rules. The money received from a full grant of scholarship would be going to cover the student-athletes costs of attendance. From the evidence presented, there was no indication that if student-athletes were to receive full scholarships, then consumers of college sports would be less interested, or that this would interfere with the integration of student-athletes into their academic communities. Thus, the increase has no effect on the procompetitive purposes of the NCAA, and the increase in scholarship is a substantially less restrictive alternative under the "Rule of Reason" test.

The Court of Appeals held that the district court "clearly erred" in finding that it is a practical alternative to allow students to receive

264. O'Bannon, 802 F.3d at 1060.
265. Id.
266. Id. at 1061.
267. Id.
268. Id. at 1074.
269. Id. at 1074-75.
270. Id. at 1075.
271. Id.
272. Id.
compensation for use of their NILs.\textsuperscript{273} The court did not agree that this rule to pay student-athletes money for use of their NILs along with a rule that forbids them from receiving cash for use of their NILs are equally effective in the promotion of amateurism and preserving demand among consumers.\textsuperscript{274} In finding this, the district court ignored the fact that what makes student-athletes amateurs is their lack of payment.\textsuperscript{275} Amateurism is an integral part of the NCAA’s market and being a “poorly-paid” athlete is not the same thing as falling within the amateur category.\textsuperscript{276} It is a substantial increase from allowing student-athletes to have the resources to pay educational expenses to offering them a sum of money.\textsuperscript{277} At that point, the NCAA would have completely abandoned its amateurism values and would effectively become a minor league enterprise.\textsuperscript{278}

The Court of Appeals completely abolished any student-athlete’s hope to receive compensation for use of their NILs in any market. Hence, the NCAA basketball players will not be able to receive non-educational compensation for their services until they declare for the NBA draft. But this can only occur after one year of college basketball has been played, so these players are losing a year’s worth of salary.

\textit{Berger} and \textit{O’Bannon} have made it abundantly clear that the NCAA’s amateurism rules are ones that must be upheld, as they establish standards setting forth the rules and regulations to apply to future amateurs.\textsuperscript{279} Since these rules are considered to be procompetitive and since the student-athletes cannot be considered employees of those schools, they will not receive payment.\textsuperscript{280} The law is extremely clear and because of this, these student-athletes’ right to compensation is being infringed upon while under the presumption that they are good enough to enter the NBA draft from the high school level. The NBA has set salaries in place for the incoming rookies and this money is guaranteed to those drafted.\textsuperscript{281}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{273} \textit{O’Bannon}, 802 F.3d at 1076.
\item \textsuperscript{274} Id.
\item \textsuperscript{275} Id.
\item \textsuperscript{276} Id. ("[T]he district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is ‘virtually as effective’ for that market as being an amateur.").
\item \textsuperscript{277} Id. at 1078.
\item \textsuperscript{278} Id. at 1079.
\item \textsuperscript{279} Id. at 1070; Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016) ("To maintain this tradition of amateurism, . . . [there is] an elaborate system of eligibility rules . . . these rules ‘define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of’ collegiate athletics.").
\item \textsuperscript{280} \textit{O’Bannon}, 802 F.3d at 1079.
\item \textsuperscript{281} See 2017 NAT’L BASKETBALL ASS’N COLLECTIVE BARGAINING AGREEMENT, \textit{supra} note 3, at Exhibit B-2.
\end{itemize}
\end{footnotesize}
VII. THE ROOKIE SALARY SCALE

The NBA has a different set of scales in order to determine the rookie salary cap compared to paying other players outside of their rookie year. The scale is based on the number pick the players were in the NBA draft they had declared for. The following few paragraphs will explore the salary options and guarantees that the first five picks in the NBA draft will receive over a five-year period.

A. Pick One

Pick one is guaranteed a first year salary of $5,091,500. This is along with a second year salary of $5,346,100. For the third year there is an option salary of $5,600,700. Then, for the fourth year, there is a guarantee of at least a 26.1 percent increase over the previous year’s salary. Lastly, if the number one overall pick is granted a qualifying offer in their now fourth year in the NBA, they are guaranteed a 30 percent increase in salary from the previous year.

B. Pick Two

Pick two is guaranteed $4,555,500 in the first year that they play in the NBA. The second year salary is $4,783,300. For the third year, there is an option salary of $5,011,100. Then for the fourth year, there is a guarantee of at least a 26.2 percent increase over the previous year’s salary. Lastly, if the number two overall pick is granted a qualifying offer in their fourth year in the NBA, they are guaranteed a 30.5 percent increase in salary from the previous year. This number has increased because the number two pick has a slightly lower overall salary than the

282. See generally 2017 NAT’L BASKETBALL ASS’N COLLECTIVE BARGAINING AGREEMENT, supra note 3, at Exhibit B-2 (setting forth the baseline rookie scale for the NBA).
283. Id.
284. Id.
285. Id.
286. Id.
287. Id.
288. Id.
289. Id.
290. Id.
291. Id.
292. Id.
293. Id.
294. Id.
number one overall pick. Therefore, they have a higher opportunity to gain more money.

C. Pick Three

Pick three is guaranteed $4,090,900 in the first year that they play in the NBA. The second year salary is $4,295,400. For the third year there is an option salary of $4,500,000. Then for the fourth year, there is a guarantee of at least a 26.4 percent increase over the previous year’s salary. Lastly, if the number three overall pick is granted a qualifying offer in their fourth year in the NBA, they are guaranteed a 31.2 percent increase in salary from the previous year.

D. Pick Four

Pick four is guaranteed $3,688,400 in the first year that they play in the NBA. The second year salary is $3,872,800. For the third year there is an option salary of $4,057,200. Then for the fourth year, there is a guarantee of at least a 26.5 percent increase over the previous year’s salary. Lastly, if the number four overall pick is granted a qualifying offer in their fourth year in the NBA, they are guaranteed a 31.9 percent increase in salary from the previous year.

E. Pick Five

Pick five is guaranteed $3,340,000 in the first year that they play in the NBA. The second year salary is $3,507,000. For the third year

295. See supra Section VII(A) (detailing the salary for a number one pick ranging between $5,091,500 – $5,600,700 in the first three years).
297. Id.
298. Id.
299. Id.
300. Id.
301. Id.
302. Id.
303. Id.
304. Id.
305. Id.
306. Id.
307. Id.
308. Id.
there is an option salary of $3,674,000. Then, for the fourth year, there is a guarantee of at least a 26.7 percent increase over the previous year’s salary. Lastly, if the number five overall pick is granted a qualifying offer in their fourth year in the NBA, they are guaranteed a 32.6 percent increase in salary from the previous year.

This information has been provided in a graph taken directly from the NBA’s CBA. If a player is ready to declare for the NBA draft and has the ability to be selected within the top five picks, they have the potential of making at least 3.3 million dollars in their first year. Even if a player is not drafted in the top five picks, the absolute minimum amount of money that they could be earning within the first year of playing is $815,615. That amount of money is definitely more than the full cost of attendance for one year of any Division I school. To be clear, this money is guaranteed regardless of playing time, injuries, etc.

VIII. OTHER LEAGUES’ PLAYER ELIGIBILITY FOR THEIR RESPECTIVE DRAFT

The other major sports leagues in the United States (National Football League (hereinafter “NFL”), National Hockey League (hereinafter “NHL”), Major League Baseball (hereinafter “MLB”), and Major League Soccer (hereinafter “MLS”) have their own draft process that is different

310. Id.
311. Id.
312. Id.
313. Id.
314. Id. at Exhibit C.
315. Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016); O’Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015); John R. Thelin, Here’s Why We Shouldn’t Pay College Athletes, MONEY (Mar. 1, 2016), http://money.com/money/4241077/why-we-shouldnt-pay-college-athletes/ (“[A] ‘grant-in-aid’ at an NCAA Division I university is about $65,000 if you enroll at a college with high tuition. This includes such private colleges as Stanford, Duke, Northwestern, University of Southern California, Syracuse, and Vanderbilt. The scholarship is $45,000 for tuition and $20,000 for room, board and books. At state universities, the scholarship would be lower if you were an ‘in state’ student – because tuition would be about $13,000. But if Michigan coach Jim Harbaugh recruits nationwide and wants a high school player from California or Texas, the University of Michigan out-of-state tuition bumps up to about the same as that charged by the private colleges.”).
than the NBA. 317 This section will discuss those processes in order to show that there are other ways that leagues structure their draft.

A. The NFL

The NFL draft takes place each Spring and is a three day process. 318 For players to be eligible for the NFL draft, they must have been out of high school for a minimum of three years’ time. 319 Additionally, the players must have completed their college eligibility before the next year’s college football season begins. 320 If a player has not used their college eligibility or have graduated before their college eligibility has been run through, they must obtain league approval in order to be draft eligible. 321 Lastly, “[p]layers are draft-eligible only in the year after the end of their college eligibility.” 322

B. The NHL

The NHL breaks down draft eligibility into players from North America and players from the rest of the world. 323 Players from North America are allowed to declare for the draft if they turn eighteen years old by September 15th of the year that they are declaring for the draft. 324 They also must be under twenty years old before December 31st of the year that they are declaring for the draft. 325 If a player goes undrafted, then they are allowed to re-declare for the draft as long as they are under twenty years old. 326 “Players can only enter the NHL Draft twice.” 327 In the case that a North American player goes undrafted by the time that they turn

319. Id.
320. Id.
321. Id.
322. Id.
324. Id.
325. Id.
327. Id.
twenty, then they are considered an unrestricted free agent. If a player is not from North America, they must be “over the age of 20” to be permitted to enter the NHL draft. “All non-North Americans must be drafted before being signed, regardless of age.”

What’s interesting about the NHL though, is that once drafted, players are still allowed to play in college and within the NCAA. The team that drafted that player keeps possession of that player until thirty days after the player has left college.

C. The MLB

To be eligible for the MLB draft, there is more of a clear cut policy that players must meet when declaring. First, players are allowed to declare right from high school once they have graduated without attending college or junior college. In this instance, “[j]unior college[] is a general term for two year colleges. There are many that are private and offer special services for Special Education students (for example) and/or offer special two-year degrees.” If a player decides to attend college, they must have finished either their junior or senior years, or they must be at least the age of twenty-one. Junior college players are also allowed to declare for the draft and in this instance, it does not matter what year they have completed.

D. The MLS

The MLS draft is a little different. The MLS’ draft is termed a “SuperDraft” because it includes both players that played in college and

328. Repke, supra note 326.
329. Fitzpatrick, supra note 323.
330. Id.
331. Repke, supra note 326.
332. Id.
333. See First-Year Player Draft, supra note 12.
334. Id; see generally Tom Stagliano, What are the differences between community colleges, junior colleges, and universities?, QUORA (Mar. 11, 2018), https://www.quora.com/What-are-the-differences-between-community-colleges-junior-colleges-and-universities (defining the differences between junior colleges, community colleges, and universities).
335. See Stagliano, supra note 334.
336. See First-Year Player Draft, supra note 12.
337. Id.
338. See Jenson, supra note 77 (explaining the way that the MLS draft works and the processes involved).
players that can be drafted through "other mechanisms." The term "other mechanisms" means that players outside of college (including teenagers) can be: (1) invited to MLS recruitment camps; (2) they can be signed by "Generation Adidas;" or (3) they can be nominated by an MLS team. MLS recruitment camps consist of a multitude of college seniors who have not been drafted yet, but play at Division I schools. "Generation Adidas," essentially... is a minor league system; players participate in the program in order to only focus on their soccer careers. Lastly, players can be nominated by an MLS team, and if this happens, they are eligible to be drafted regardless of age.

IX. THE NBA'S "ONE AND DONE" RULE SHOULD BE ELIMINATED

The "one and done" policy was implemented in 2005, and since then, the policy has done more harm than good. The NBA's CBA agreement is the document that governs the overall actions of the professional sports league. In general, the "one and done" rule states that a player cannot be younger than nineteen years old, turning nineteen in the year of the draft they are declaring for, or at least one year removed from high school.

Being an athlete may be extremely appealing to many people around the world, and in many ways, a career in professional sports is truly a blessing; but this career path comes with some burdens. An athlete's employment rights do not come without difficulties and they have very little power to combat these difficulties. This is especially true in the NBA with the implementation of the "one and done" policy. The "one and done" policy has inhibited the rights of potential incoming rookies.

Student-athletes are not considered employees under the FLSA, which results in their inability to receive compensation for the services

339. See Jenson, supra note 77.
341. Id.
342. Id.
343. Id.
344. See Bontemps, supra note 1.
345. See generally 2017 NAT'L BASKETBALL ASS'N COLLECTIVE BARGAINING AGREEMENT, supra note 3 (setting forth the rules and regulations of the NBA).
346. Id. at 273.
they provide to the universities that they play for. Additionally, because of the amateurism rules that the NCAA has implemented, which are revered and strictly practiced throughout college sports, student-athletes may only be considered amateurs. Therefore, the use of student-athletes’ NILs can be used by multitudes of entities including television networks, video game companies, colleges (for jersey sales), etc. and the student-athlete will not be able to receive any compensation. As a result of these holdings, it was further held that student-athletes cannot be paid more than a full grant of scholarship to the University they are attending. Through a “Rule of Reason” analysis, the NCAA cannot be subject to any Sherman violations, which disallows colleges and universities to compensate student-athletes outside of a full grant in scholarship.

A new CBA was recently negotiated in 2017, but the next negotiation is set to take place in 2022. After this date, the next CBA is set to expire in 2024, but there is an opt-out option that either the NBA or NBPA can take. Hopefully both sides agree that the “one and done” rule should be eliminated and that a different procedure can take its place that makes more sense for all parties involved. Student-athletes are losing a significant amount of money because they are forced to attend one year of college. The numbers speak for themselves.

X. Solution to Repair the NBA’s “One and Done” Rule

In concept, the NBA’s “one and done” rule makes sense and has aimed to serve a specific purpose. But because of this rule, players are forced to lose out on a year’s worth of earnings, which is guaranteed to be at least $815,615. The student-athletes who have enough skill to

348. See generally O’Bannon v. NCAA, 802 F.3d 1049, 1054-55 (9th Cir. 2015) (discussing the NCAA’s amateurism rules).
349. See id. at 1055.
350. See id. at 1079.
351. Id.
353. See id.
354. See generally 2017 NAT’L BASKETBALL ASS’N COLLECTIVE BARGAINING AGREEMENT, supra note 3 (explaining NBA pay restrictions on student-athletes).
355. Id. at Exhibit B-2.
356. Id. at Exhibit C-1.
declare for the NBA draft have almost no reason to stay within their collegiate program other than for their desire to finish their college education. This rule is not fair for the student-athlete, and it is also not fair for the collegiate basketball fan. There are many people who believe that collegiate basketball is much better than professional basketball.\textsuperscript{357} Essentially, the current rule in place is not convenient or beneficial to anyone involved.

The NBA’s competitors (the NFL, NHL, MLB, and MLS) have drafting rules that involve either remaining in college for an adequate amount of time or being drafted from high school.\textsuperscript{358} In the NBA’s next CBA, the NBA and the NBPA should come to an agreement that is similar to the MLB’s. In this instance, a player is either allowed to declare right out of high school, or if they decide to attend college and become a student-athlete, then they must have completed either their junior or senior years of school, or must be at least twenty-one years of age.\textsuperscript{359} If this rule were to be implemented, it would allow the student-athletes more freedom to choose their path. The players can either declare for the draft right out of high school and potentially begin their rookie career, or if they decide to attend college, they must stay there for at least three years.\textsuperscript{360} In those three years, players would most likely be able to significantly develop their skill and it would provide fans the opportunity to enjoy watching their favorite athlete compete on the collegiate level. Schools would be more likely to generate profit from that player due to creating more revenue from fans purchasing merchandise, which is one of the more logical solutions that benefits the majority of the parties involved. Hopefully, the “one and done” rule will reach an expiration.

\textit{Armand Magardician}^\textsuperscript{*}


\textsuperscript{358} See The Rules of the Draft, supra note 318, at 6; Fitzpatrick, supra note 323, at 5; Repke, supra note 326; First-Year Player Draft, supra note 12.

\textsuperscript{359} See First-Year Player Draft, supra note 12; Stagliano, supra note 334.

\textsuperscript{360} See First-Year Player Draft, supra note 12; Stagliano, supra note 334.

\textsuperscript{*} Armand Magardician received his J.D. from the Maurice A. Deane School of Law at Hofstra University in May of 2020. Mr. Magardician served as a Notes and Comments Editor of the Hofstra
Mr. Magardician would like to thank his incredible parents, sister, girlfriend, family, and friends for their incredible support in his endeavors. Mr. Magardician would also like to thank the current Staff and Managing Board of Volume 37 for their assistance throughout the publication process.