

# NCAA: A LESSON IN CARTEL BEHAVIOR AND ANTITRUST REGULATION

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## INTRODUCTION – THE PRE-GAME SHOW

The National Collegiate Athletic Association (“NCAA”) celebrated its centennial in March 2006, and it seems to have received a generous gift from the U.S. Department of Justice (“DOJ”): a free pass enabling the Association to purchase a solution to a costly antitrust problem. In August 2005, in an unprecedented move, the NCAA acquired its long-time rival postseason men’s basketball tournament, the National Invitation Tournament (“NIT”), in a settlement of an antitrust case brought by the Metropolitan Intercollegiate Basketball Association (“MIBA”), the owner-operator of the NIT.<sup>1</sup> The NCAA has called the moment a “historic day for men’s college basketball.”<sup>2</sup> Whether this “historic” event will remain undisturbed by antitrust law is unclear. Although legal issues abound, the DOJ has yet to challenge the settlement’s legitimacy.

Splashed across newsstands for several months, the antitrust suit, first filed in 2001, finally went to trial on August 1, 2005.<sup>3</sup> The MIBA told the jury that, in order to protect its cash cow “March Madness,”<sup>4</sup> the NCAA was purposefully ruining the

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<sup>1</sup> *NCAA purchases NIT events to end four-year legal battle*, THE NCAA NEWS, Aug. 29, 2005, [http://www.ncaa.org/wps/portal/newsdetail?WCM\\_GLOBAL\\_CONTEXT=/wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2005/Division+I/NCAA+purchases+NIT+events+to+end+four-year+legal+battle+-+8-29-05+NCAA+News](http://www.ncaa.org/wps/portal/newsdetail?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2005/Division+I/NCAA+purchases+NIT+events+to+end+four-year+legal+battle+-+8-29-05+NCAA+News) (last visited Oct. 2, 2006) [hereinafter THE NCAA NEWS].

<sup>2</sup> Press Release, NCAA Pub. & Media Relations, NCAA and MIBA End Litigation; NIT Tournaments Purchased (Aug. 17, 2005), [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/august/20050817\\_mibanit.html](http://www2.ncaa.org/media_and_events/press_room/2005/august/20050817_mibanit.html) (last visited Oct. 2, 2006) [hereinafter Press Release].

<sup>3</sup> Mark Alesia, *Antitrust case puts NCAA on defense; NIT suit over tournament will go to court Monday*, THE INDIANAPOLIS STAR, July 31, 2005, at 1A [hereinafter Alesia].

<sup>4</sup> The NCAA March Madness tournament accounts for at least 90% of the Association’s revenue. *Id.*

NIT in violation of federal antitrust laws.<sup>5</sup> It claimed that the NCAA “willfully, deliberately set out to get a monopoly, to eliminate competition, to make it impossible to compete,” by promulgating rules requiring NCAA member schools to accept a bid to March Madness over an invitation to any other postseason tournament.<sup>6</sup>

This Article will explore the relevant antitrust issues under §§ 1 and 2 of the Sherman Act presented by the two Associations in the litigation proceedings, as well as the practical implications and legal issues under § 7 of the Clayton Act raised by the settlement itself. The analysis herein aspires to present a complete picture of the interaction between the NCAA and the MIBA in relation to antitrust law and those principles the laws were designed to uphold.

## I. TRANSACTION HISTORY AND BACKGROUND – SLOW MOTION INSTANT REPLAY

Thorough analysis of this particularly newsworthy acquisition initially requires an examination of the unique and thought-provoking context out of which it was born, including a close look at the organizations involved, their motivations, and their storied pasts.

### A. The Players

#### 1. NCAA

##### a. Origins and Cartel Theory

The association now known as the NCAA was formed in 1906 in response to a growing number of injuries and deaths among college football players<sup>7</sup> that spawned from both a lack of protective rules in the game and a failure to enforce the

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<sup>5</sup> Associated Press, *NIT sues NCAA*, ATHLON SPORTS, Aug. 2, 2005, <http://www.athlonsports.com/college-basketball/6733/nit-sues-ncaa> (last visited Oct. 2, 2006) [hereinafter *NIT sues NCAA*].

<sup>6</sup> *Id.*

<sup>7</sup> The History of the NCAA, <http://www.ncaa.org/about/history.html> (last visited Oct. 2, 2006) [hereinafter History of the NCAA]. In 1905, the annual tally of serious injuries incurred in college football was 159 and eighteen young men died in that year alone. ARTHUR A. FLEISHER III ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, A STUDY IN CARTEL BEHAVIOR 38-39 (1992) [hereinafter FLEISHER ET AL.].

rules that were in place.<sup>8</sup> The violence had become so severe that it not only drew the attention of the general public, but also that of President Theodore Roosevelt, who, in the fall of 1905, called together representatives from three of the most prominent schools—Harvard, Yale, and Princeton—to discuss potential solutions.<sup>9</sup> The prevalence of violence in college football caused several schools to drop or suspend their programs that year.<sup>10</sup> Finally, after several conventions, delegates from sixty-two schools voted to form the Intercollegiate Athletic Association of the United States (“IAAUS”), aimed at curbing the crisis and establishing rules for the game.<sup>11</sup> The IAAUS was officially constituted on March 31, 1906; it changed its name to the National Collegiate Athletic Association in 1910.<sup>12</sup>

In its adolescent years (that is, up to 1920), the NCAA expanded its influence beyond the football field to reach eight more college sports, including basketball.<sup>13</sup> But what some refer to as the “golden age” of college athletics occurred during the period from 1920 to 1950, when college athletics grew into a national preoccupation.<sup>14</sup> The NCAA’s role up to that point consisted primarily of record

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<sup>8</sup> In the late 1800s, football games became notorious for their haphazard rules, violence, and controversy regarding eligibility requirements. *Id.* at 37. Athletic clubs hired professional athletes (also known as “ringers”) to play in college games, and no standardized set of rules prevailed across teams. *Id.* The most dangerous technique utilized in that era of football, which was responsible for much of the negative public sentiment and was eventually outlawed, was the “flying wedge,” invented in 1892 by Lorin F. Deland, a construction engineer. PAUL R. LAWRENCE, UNSPORTSMANLIKE CONDUCT, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND THE BUSINESS OF COLLEGE FOOTBALL 4-5 (1987) [hereinafter LAWRENCE]. Deland’s “flying wedge” involved a more powerful variation of the “V-trick” or “wedge” that had been utilized since 1884, calling for seven players to interlock their arms and move in a “V” pointed toward the goal line, with the ball-carrier protected within. *Id.* Deland’s version added a twenty-yard running start to the already dangerous formation, causing dramatic increases in game injuries. *Id.*

<sup>9</sup> The discussion took place on October 9, 1905, and, though not accomplishing much, did provide for the beginning of dialogue and open acknowledgement of the issues. FLEISHER ET AL., *supra* note 7, at 39. The conversation covered potential solutions such as means of enforcement of current rules and also the creation of new rules that might stem the tide of violence in the sport. *Id.*

<sup>10</sup> These schools included Columbia, Northwestern, California, and Stanford. *Id.*

<sup>11</sup> History of the NCAA, *supra* note 7.

<sup>12</sup> *Id.*

<sup>13</sup> FLEISHER ET AL., *supra* note 7, at 42.

<sup>14</sup> *Id.* The “golden age” refers to the exponential rise in the popularity of primarily college football between 1920 and 1950, where many stadiums were being built and expanded to keep up with attendance growth. *Id.* at 42-43.

keeping, conducting national championship tournaments in several sports, and promoting uniform playing rules.<sup>15</sup> Although some guidelines had been adopted in the 1920s regarding player eligibility, recruiting, and financial aid, the NCAA did not actively enforce those rules; instead, enforcement was left in the hands of the universities.<sup>16</sup> This approach, however, proved to be highly ineffective given the divergent interests of competing universities.<sup>17</sup>

Though attempts only a few years earlier had failed,<sup>18</sup> measures taken by the NCAA in 1952 signaled a permanent change in the organization's character from merely a game-defining and "amateurism"-promoting<sup>19</sup> association of member

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<sup>15</sup> E. Woodrow Eckard, *The NCAA Cartel and Competitive Balance in College Football*, 13 REV. INDUS. ORG. 347, 348 (1998) [hereinafter Eckard].

<sup>16</sup> *Id.* Eckard notes that "the NCAA's role remained 'advisory, at best'" and that the

member institutions specifically *forbade* NCAA enforcement. The initial constitution contained the following language: "The acceptance of a definite statement of eligibility rules shall *not* be a requirement of membership in this Association. The constituted authorities of each institution shall decide on methods of preventing the violation of the principles laid down . . . .

*Id.* at 348 n.2 (quoting JACK FALLA, NCAA: THE VOICE OF COLLEGE SPORTS 22 (1981)). In 1921, the NCAA amended its constitution to reflect a philosophy of establishing *strict, uniform laws* of eligibility and amateurism, and adoption of those rules by members, as opposed to the original stated purpose of promoting the adoption of *recommended measures*. LAWRENCE, *supra* note 8, at 24. Some schools viewed the changes as an "attempt to supersede [the NCAA's] original purpose by establishing a system of control over all of college athletics," and threatened to withdraw. *Id.*

<sup>17</sup> *See id.* at 23. The violations continued despite the NCAA's efforts to condemn those schools that disregarded the Amateur and Eligibility Codes. *Id.*

<sup>18</sup> In 1948, members of the Association voted the "Sanity Code" into the NCAA constitution; this Code consisted of rules on amateurism, financial aid, recruiting, and eligibility, and was accompanied, for the first time, by a self-created, association-level enforcement mechanism. FLEISHER ET AL., *supra* note 7, at 47. Because of the severity of its only punishment—termination of a school's membership—and the requirement of a two-thirds vote of NCAA members to proceed with the termination, the Code was rarely invoked, the sanction was never imposed, and it was finally repealed in 1951. *Id.* at 48-49.

<sup>19</sup> Several economists have criticized the NCAA's prizing of "amateurism;" as one critic notes, "Many casual observers believe that the NCAA endorsed the participation of amateurs to keep intercollegiate athletics 'pure,' but we cannot ignore the fact that it was cheaper to allow amateur rather than professional participation." LAWRENCE, *supra* note 8, at 22.

schools, to a powerful enforcement machine.<sup>20</sup> Economists note this point in the NCAA's history as that in which it effectively became an economic cartel, setting firm prices on the inputs of compensation for student-athletes; limiting recruiting efforts, including forbidding advertising<sup>21</sup> to attract recruits; and restricting output by fixing the maximum number of seasons each athlete could play, as well as the number of postseason games in which teams could participate.<sup>22</sup>

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<sup>20</sup> In 1952, the NCAA promulgated a new code containing rules governing player eligibility, financial aid, and recruiting. Eckard, *supra* note 15, at 349. As part of its new scheme, the NCAA also created a Membership Committee and an Infractions Subcommittee that were given the responsibility of enforcing NCAA rules and investigating potential violations. FLEISHER ET AL., *supra* note 7, at 50. The NCAA Council, to which members of the Membership Committee belonged, was vested with operational control; member schools were reduced to a final appellate group. *Id.* The committees had the power to punish breaching members through a variety of means, including probation; private and public reprimands; bans on participation in televised events; reduction in the number of scholarships allocated to the breaching member; and ultimately, the schedule boycott, sometimes referred to as the "death penalty." Eckard, *supra* note 15, at 349.

<sup>21</sup> Typical cartel behavior includes restricting advertising in an effort to restrain competition and keep costs down for all participants. *Id.* at 349 n.6.

<sup>22</sup> *Id.* at 349 (supporting the notion that this marked the time of true cartel formation); LAWRENCE, *supra* note 8, at 38 (claiming that around this time, the NCAA took steps associated with typical cartel formation). Reasons for classifying the NCAA as a cartel include: setting maximum prices paid for athletes; regulating the quantity of student athletes each school can effectively purchase; controlling the duration and intensity of schools' usage of athletes; periodically informing members regarding transactions, costs, sales techniques, and market conditions; often pooling and distributing portions of cartel profits; and policing member behavior and imposing penalties on members who violate cartel rules. James V. Koch, *Intercollegiate Athletics: An Economic Explanation*, 64 SOC. SCI. Q. 360, 361 (1983); see also FLEISHER ET AL., *supra* note 7, at 50 (noting the extinction of the free market within which schools competed for student athletes). Economic cartel theory explains why the NCAA was able to overcome the opposition to self-enforcement at this particular time in history:

By agreeing on an enforcement mechanism, schools gave up more of their individual control over their programs. Schools gaining the most by breaking the rules had the most to lose. On the other side, by restricting input payments, the enforcement mechanism would benefit schools financially. Although college athletics had always enjoyed popularity, the 1920-50 period witnessed a boom in the demand for college sports. As the 1950s dawned, college sports began to tap the revenues from television exposure. As cartel theory suggests, the return to producers from collusion on inputs and outputs is greater as the demand for the final product grows. The demand growth for college sports over this period increased the benefits of an effective enforcement mechanism across institutions. . .

[Consistent with] the theory of the relative distribution of cartel rewards . . . [w]hile restricting payments to student athletes, the rules allowed athletic powers with existing physical and brand-name assets to capitalize on these assets. The schools

During the 1950s to 1970s, the NCAA, enjoying increasing national demand for its college football and basketball contests<sup>23</sup> and having gained a newfound police power over its members, began promulgating what is now a colossal book of rules.<sup>24</sup> These rules conveniently enabled the Association to significantly reduce the costs of recruiting and maintaining student athletes<sup>25</sup> and provided it with more effective means of discovering noncompliance.<sup>26</sup> Proponents of increased regulatory control over institutional spending asserted that such limitation would achieve “parity”

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with better facilities and academic and athletic reputations (usually in the North and the Midwest) had a distinct advantage over the schools with up-and-coming athletic and academic programs (usually in the South and the Southwest).

FLEISHER ET AL., *supra* note 7, at 51.

<sup>23</sup> *See id.* at 52-55.

<sup>24</sup> The NCAA 2005-06 Division I Manual is comprised of 510 pages of rules. The manual is available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/2005-06/2005-06\\_d1\\_manual.pdf](http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf) (last visited Oct. 2, 2006). During the 1960s and 1970s, the NCAA solidified its control over its members by closing loopholes in existing regulations and adding many new rules, as well as strengthening its enforcement procedures. *See* Eckard, *supra* note 15, at 350.

<sup>25</sup> An example would include limiting a student-athlete’s financial aid to “tuition and fees, room and board, books and . . . \$15 a month laundry money.” LAWRENCE, *supra* note 8, at 60 (quoting NCAA PROCEEDINGS 299 (1957)) (alteration in original). Upon conducting a year-long study and learning that members were spending large amounts of money to recruit the best athletes, the NCAA Council determined at its 1957 convention that competition between the schools should be limited to control costs. *Id.* at 59. Pursuant to that aim, a constitutional amendment was passed that limited recruiting visits, disallowed benefits like transportation for a recruit’s relatives, and prevented “booster” organizations from participating in recruiting. *Id.*

<sup>26</sup> Creating means of monitoring member activities is also one of the classic key components of an effective cartel. BRAD R. HUMPHREYS & JANE E. RUSESKEI, FINANCING INTERCOLLEGIATE ATHLETICS: THE ROLE OF MONITORING AND ENFORCING NCAA RECRUITING REGULATIONS 5-10 (2005), *available at* [https://netfiles.uiuc.edu/brh/www/papers/financing\\_athletics.pdf](https://netfiles.uiuc.edu/brh/www/papers/financing_athletics.pdf) (discussing Stigler’s theory of oligopoly in the context of the NCAA and noting that “[t]he major functions of a cartel are (1) to establish the rules of the cartel; and (2) to ‘self-police’, that is to monitor each member’s conduct to ensure that everyone abides by the agreement”); *see also* U.S. Department of Justice & Federal Trade Commission, HORIZONTAL MERGER GUIDELINES § 2.1 (1997), *available at* [www.usdoj.gov/atr/public/guidelines/hmg.pdf](http://www.usdoj.gov/atr/public/guidelines/hmg.pdf) (noting the importance of detecting and punishing deviations in ensuring profitability of coordinated interaction) [hereinafter GUIDELINES]. The NCAA accomplished this through a 1957 rule that required each member school to be responsible for the administration of funds distributed to recruits. *Id.* (citing NCAA PROCEEDINGS 299 (1957)). Further, a 1959 rule compelled members giving financial aid to student-athletes to put the total amount in written form; this rule also aided the discovery and enforcement efforts. *Id.* at 61 (citing NCAA PROCEEDINGS 249 (1959)).

among schools competing for athletes.<sup>27</sup> Many are critical of those assertions,<sup>28</sup> however, especially since competitive balance declined considerably once cartel enforcement began via the NCAA's effective sanctions of 1952.<sup>29</sup>

In response to conflict over television revenue distribution plans and the diverging interests of smaller and larger schools, which threatened the NCAA's cartel profit maximizing capabilities,<sup>30</sup> the Association divided its members into three competitive and legislative divisions in 1973.<sup>31</sup> In 1997, The NCAA granted an increased level of autonomy to each division, and implemented its current governance structure.<sup>32</sup>

#### b. NCAA Today: A Brief Note on Its Commercialization

Today the NCAA has become a vast organization staffed by about 350 employees and headquartered in Indianapolis.<sup>33</sup> Its active membership has increased enormously since its early years, from 362 active members in 1950 to over one thousand in 2004.<sup>34</sup> Along with the growth of the organization itself, criticism of

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<sup>27</sup> NAND HART-NIBBRIG & CLEMENT COTTINGHAM, *THE POLITICAL ECONOMY OF COLLEGE SPORTS* 24-25 (1986).

<sup>28</sup> *See, e.g., id.*

<sup>29</sup> *See* Eckard, *supra* note 15, at 359-63 (performing statistical analyses of balance levels for pre- and post-enforcement periods over the full period as well as shorter periods).

<sup>30</sup> *See* LAWRENCE, *supra* note 8, at 97-98. The schools' differing interests regarding the division of football revenues threatened the smooth and efficient workings of the cartel; cartel members with differing objectives did not have an incentive to approve a policy that benefited only one of the members when there was no correlating benefit to the others, rendering the collective decision-making process much more difficult and costly. *See id.* at 97. By organizing itself into distinct divisions, the cartel not only reduced the cost of collective decision-making, but also erected barriers to entry into Division I athletics by imposing restrictions on schools wanting to join. Joel G. Maxcy, *The 1997 Restructuring of the NCAA: A Transactions Cost Explanation*, in *ECONOMICS OF COLLEGE SPORTS* 11, 16-17 (John Fizek & Rodney Fort eds., 2004) [hereinafter Maxcy].

<sup>31</sup> *See* History of the NCAA, *supra* note 7.

<sup>32</sup> *Id.* *See generally* Maxcy, *supra* note 30, at 20-22 (explaining this organizational overhaul in terms of economic motivation and transaction cost analysis).

<sup>33</sup> *See* History of the NCAA, *supra* note 7.

<sup>34</sup> 2004 NCAA Membership Report, available at [http://www.ncaa.org/library/membership/membership\\_report/2004/2004\\_ncaa\\_membership\\_repo](http://www.ncaa.org/library/membership/membership_report/2004/2004_ncaa_membership_repo)

the NCAA has also escalated, with many condemning the commercialization of “amateur” college athletics that has become readily observable in recent decades.<sup>35</sup> The “show me the money”<sup>36</sup> mentality has certainly infiltrated the NCAA’s operation, as evidenced by the staggering television revenue figures from the Association’s men’s basketball championships.<sup>37</sup> While the NCAA is a “not-for-profit” organization, its motivation to increase member profitability through collusion or otherwise is no less real; such profits are manifested in the form of subsidies to general university expenses, office facilities, administration and coaches’ salaries, and the like, instead of shareholder returns.<sup>38</sup>

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rt.pdf [hereinafter NCAA Membership Report]. This represents a 184% increase. Overall membership (inclusive of active, provisional, conference, corresponding, and affiliate) experienced an even greater 234% increase over the period from 387 members in 1950 to 1,292 in 2004. *Id.*

<sup>35</sup> See, e.g., Paul D. Staudohar & Barry Zepel, *The Impact on Higher Education in Big-Time College Sports, in ECONOMICS OF COLLEGE SPORTS* 35, 46-47 (John Fizel and Rodney Fort eds., 2004). The NCAA’s stated purpose is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body;” in reality, however, the NCAA is more of a professional league in that 80% of its revenues come from television contracts and it enjoys lavish headquarters and lucrative corporate sponsorships, but in the absence of salary woes and income taxes. *Id.* at 39; see KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, *A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION* 19-21 (2001), available at [http://knightcommission.org/about/knight\\_commission\\_reports/](http://knightcommission.org/about/knight_commission_reports/).

<sup>36</sup> JERRY MCGUIRE (Sony Pictures Home Entertainment 1996).

<sup>37</sup> The NCAA’s contract with CBS granting exclusive television rights for the Division I Men’s Basketball Championships became effective in September of 2002 and provided for payments over the next 11 years; the agreement also gives the NCAA the right to renegotiate the contract after the initial eight years. See NCAA Membership Report, *supra* note 34, at 57 n.12. The NCAA received its first payment of \$360 million at the end of the 2003 fiscal year and it received \$389 million at the end of the 2004 fiscal year. *Id.* at 57. It expects to take in at least an additional \$5.211 billion through 2013. *Id.* The CBS contract carries a guaranteed minimum of \$6.0 billion over the course of the 11-year agreement. *Id.* The argument that college sports have been commercialized is strong, given that last year alone, television and marketing rights fees accounted for 86% of the NCAA’s revenues, while championships accounted for 10%, for a grand total of approximately \$452 million. *Id.* at 22. Projected revenues for the 2008-2009 fiscal year approach \$650 million. *Id.*

<sup>38</sup> FLEISHER ET AL., *supra* note 7, at 21. Cartel rents are thereby masked by member schools accounting practices, as “profits” take the form of other balance sheet items that are maximized. *Id.*; see generally Press Release, NCAA Pub. & Media Relations, Athletics Budgets Continue to Increase in Divisions I and II (May 3, 2005), [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/may/20050503\\_revenues\\_expenses\\_rl\\_s.html](http://www2.ncaa.org/media_and_events/press_room/2005/may/20050503_revenues_expenses_rl_s.html) (last visited Oct. 2, 2006) (discussing the biennial NCAA study of spending on college sports).



Though the revenue figures speak for themselves,<sup>39</sup> the NCAA continues to insist that any allegations of improper motives are false<sup>40</sup> and continues to make efforts to improve the public perception of the Association.<sup>41</sup> It is, however, unlikely to convince the nation that college sports have not been commercialized, and that some measure of amateurism has not been lost forever.<sup>42</sup>

## 2. MIBA/NIT – Origins

The MIBA, which owned and operated the NIT, was the face across the table in the settlement at issue.<sup>43</sup> The MIBA is comprised of five New York area

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<sup>39</sup> See *supra* notes 35-38 and accompanying text.

<sup>40</sup> See Press Release, Wallace I. Renfro, Senior Advisor to the NCAA President, NCAA President Calls for Value-Based Budgeting for Intercollegiate Athletics Programs, (Jan. 8, 2005), [http://www.ncaa.org/wps/portal/legacysiteviewer?CONTENT\\_URL=http://www2.ncaa.org/portal/media\\_and\\_events/press\\_room/2005/january/20050108\\_soa\\_speech.html](http://www.ncaa.org/wps/portal/legacysiteviewer?CONTENT_URL=http://www2.ncaa.org/portal/media_and_events/press_room/2005/january/20050108_soa_speech.html) (last visited Oct. 2, 2005). President Myles Brand therein attempts to refute “myths” such as “[c]ollege sports is more about sports than college;” “[c]ollege sports is only about the money . . . ;” and “[a]mateurism itself is a myth.” *Id.* He opines that “education is the goal, *not* sports entertainment,” and “[a]mateurism is not about *how much*; it is about *why*. It’s not about the money; it is about the motivation.” *Id.* He stresses that the “myths” exaggerate the problems and that the primary mission of the NCAA is “the education of the student and the student-athlete.” *Id.*

<sup>41</sup> NCAA EXECUTIVE COMMITTEE, STRATEGIC PLAN 7 (2004), *available at* <http://www.ncaa.org/planning/StrategicPlan5.pdf>. “Perceptions of the Association and Intercollegiate Athletics,” found in section five of the provision entitled “3- to 5-Year Outcome-Oriented Goals,” reads: “The public will gain a greater understanding of and confidence in the integrity of intercollegiate athletics and will more readily support its values.” *Id.* Objective 5.2 goes on to state: “Increase the public’s confidence in the Association as a whole.” *Id.*

<sup>42</sup> See *College Recruiting: Are Student Athletes Being Protected?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 1, 24 (2004) (statement of Hon. Cliff Stearns, Chairman, House Comm. on Energy and Commerce) (noting that “[c]ommerce is certainly implicated” in the NCAA’s activities and that college athletics is “big business”). The Chairman pointed out that the NCAA has multiple products that are sold to cable and television networks for hundreds of millions of dollars each year. *Id.* at 1. He also observed that schools jump to other conferences in pursuit of bigger contracts and that the NCAA is sued over distribution of funds from the tournaments and bowl games. *Id.* Others noted that college athletics are no longer an “altruistic endeavor of not-for-profit institutions of higher learning” and that the lives of skilled athletes “become a commodity.” *Id.* at 24; see *Role of Antitrust Law in Amateur Athletics is Examined at ABA Meeting*, 74 ANTTITRUST & TRADE REG. REP. 341 (Apr. 9, 1998) (debating whether the current system “exploits” college athletes).

<sup>43</sup> See Press Release, *supra* note 2. The NCAA purchased the rights to operate both the preseason and postseason National Invitation Tournaments. *Id.*

schools: New York University, Fordham University, Manhattan College, Wagner College, and St. John's University,<sup>44</sup> all of which are themselves members of the NCAA.<sup>45</sup> After several years of intersectional doubleheaders and big match-up games in men's basketball,<sup>46</sup> the post-season NIT was initiated in 1938 and was considered to be the original tournament producing America's "national champion."<sup>47</sup>

### 3. Competition between NIT and NCAA Championships

Although the NCAA postseason men's basketball tournament began just one year later, in 1939,<sup>48</sup> the NIT maintained its national title status until 1960.<sup>49</sup> In the interim years, both organizations enjoyed increasing demand for the sport.<sup>50</sup> For the benefit of the Red Cross during World War II, from 1943-1945 the NIT and NCAA tournament winners played against each other in unofficial national championship games, with the NCAA title-holders sweeping all three matches.<sup>51</sup> Although NCAA

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<sup>44</sup> *Id.* These schools are all New York colleges and universities, and reportedly had run the NIT over the years with a purpose of "keeping basketball for the city." Matthew Roberts, *NIT Sues NCAA on Antitrust Claim*, MARK'S SPORTSLAW NEWS, <http://www.sportslawnews.com/archive/Articles%202001/NITNCAAsuit.htm> (last visited Oct. 2, 2006) [hereinafter Roberts].

<sup>45</sup> *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004). The court also noted that the MIBA itself is an affiliated member of the NCAA. *Id.* at 566.

<sup>46</sup> Basketball's first intersectional doubleheader was held at Madison Square Garden on December 19, 1934. Infoplease.com, *From the First NIT to the NCAA Final Four*, <http://www.infoplease.com/ipisa/A0747186.html> (last visited Oct. 2, 2006) [hereinafter Infoplease].

<sup>47</sup> Alesia, *supra* note 3.

<sup>48</sup> The NCAA tournament was originally organized by the National Association of Basketball Coaches ("NABC") who asked the NCAA to assume responsibility for running it the following year. Infoplease, *supra* note 46.

<sup>49</sup> FLEISHER ET AL., *supra* note 7, at 55-60. This turn of events was presumably due to the NCAA Executive Committee's adoption of a rule in 1960 advising members that, if chosen "at large" for the NCAA tournament, the schools "should" participate in it over the postseason NIT. *Id.* at 55-56. Even after ceding premier national championship status to the NCAA, the NIT was still able to consistently attract talented teams to its tournament until NCAA tournament expansion in the 1970s. Alesia, *supra* note 3.

<sup>50</sup> *See* FLEISHER ET AL., *supra* note 7, at 42 (observing that college athletics expanded from a "small cottage industry" in 1920 to "nationwide preoccupation" in the 1940s).

<sup>51</sup> Infoplease, *supra* note 46.

member schools were allowed to participate in both postseason tournaments until 1953,<sup>52</sup> the MIBA contended that during the mid-1940s the NCAA began to look for ways “to ‘curb’ competition from the Postseason NIT,”<sup>53</sup> resulting primarily in the following trends in the NCAA tournament’s operation:

(1) *Bracket Expansion.* The NCAA playoff tournament, which originally included eight teams, was expanded in 1953 to include twenty-two teams.<sup>54</sup> Expansions continued such that, in 1979, the NCAA invited forty teams to the tournament; in 1980, forty-eight; in 1982, fifty-two; in 1984, fifty-three; in 1985, sixty-four;<sup>55</sup> and finally, beginning in July 2001, the NCAA invited sixty-five teams to the tournament.<sup>56</sup> The MIBA contends that this series of expansions was aimed at absorbing all of the most talented teams, specifically to the NIT’s detriment.<sup>57</sup> It further alleged that, by deliberately preventing talented teams from participating in the NIT, the NCAA intentionally harmed the quality of the MIBA’s product.<sup>58</sup> The NCAA, however, posits that it was merely undergoing those expansions to keep up with consumer demand and the increasing number of member men’s basketball teams.<sup>59</sup>

(2) *Self-promoting Rules.* Also during these years, the NCAA adopted a series of rules that the MIBA claimed effectively eliminated competition for postseason basketball, beginning with its “One Postseason Tournament Rule” in 1953; this rule required dual invitee members to choose one tournament in which they would participate.<sup>60</sup> Its “Expected Participation Rule” was added in 1961, further

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<sup>52</sup> *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Infoplease, *supra* note 46.

<sup>56</sup> *Metro. Intercollegiate Basketball Ass’n*, 337 F. Supp. 2d at 568. The resulting sixty-five team playoff system has continued since 2001 and represents the current structure of the tournament. *Id.*

<sup>57</sup> *Id.* at 567.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 566.

encouraging NCAA member schools to give priority to the NCAA tournament over the NIT.<sup>61</sup> In 1981, this rule was revised and the infamous “Commitment to Participate Rule” was born, destined to become one of the primary points of contention in the suit filed by the MIBA.<sup>62</sup>

## **B. The Tip-off: Litigation**

### **1. Initial Filing – A Long Road Ahead**

Decades after the contested rules were promulgated by the NCAA,<sup>63</sup> the MIBA filed its complaint in 2001.<sup>64</sup> It alleged that over multiple decades the NCAA had violated §§ 1 and 2 of the Sherman Act<sup>65</sup> through its promulgation of several rules that operated to unfairly restrict competition from other men’s college basketball postseason tournaments.<sup>66</sup> These “Postseason Rules” included the Commitment to Participate Rule; the End of Playing Season Rule; the One Postseason Tournament Rule; the “automatic qualification procedure,” whereby all winners of the thirty-one conferences had to participate in the NCAA tournament;

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<sup>61</sup> See *supra* note 49.

<sup>62</sup> *Metro. Intercollegiate Basketball Ass’n*, 337 F. Supp. 2d at 567.

<sup>63</sup> The NCAA criticized the MIBA’s delayed response to the Postseason Rules. Gregory L. Curtner, attorney for the NCAA, reportedly “accused the NIT of exercising a form of courthouse bad sportsmanship by waiting until 2001 to file its lawsuit, decades after its troubles began.” *NIT sues NCAA*, *supra* note 5.

<sup>64</sup> *Id.*

<sup>65</sup> 15 U.S.C. §§ 1 & 2 (2006).

<sup>66</sup> *Metro. Intercollegiate Basketball Ass’n*, 337 F. Supp. 2d at 565, 568.

and the bracket expansions.<sup>67</sup> The MIBA also alleged tortious interference with a contract.<sup>68</sup>

## 2. NCAA Rule 31.2.1.1

The language of the primary rule at issue is deceptively short, yet its alleged effect on the NIT was devastating. Bylaw 31.2.1.1, entitled “Commitment to Participate,” reads: “Eligible members in a sport who are not also members of the National Association of Intercollegiate Athletics will participate (if selected) in the NCAA championship or in no postseason competition in that sport.”<sup>69</sup>

The current rule is an evolutionary product of the original “Expected Participation Rule” adopted in 1961.<sup>70</sup> Presumably the “suggestion” of the 1961 rule escalated to a “requirement” after five member schools ignored the Executive Committee’s guidance by declining NCAA invitations in order to play in the

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<sup>67</sup> See *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 339 F. Supp. 2d 545, 547 (S.D.N.Y. 2004); *Metro. Intercollegiate Basketball Ass’n*, 337 F. Supp. 2d at 568. The Commitment to Participate Rule is discussed at length in Part II(b)(ii), *infra*. The End of Season Playing Rule mandates that the NIT conclude prior to the end of the NCAA playoff tournament; the One Postseason Tournament Rule prevents teams invited to the NCAA tournament from participating in both postseason tournaments. *Metro. Intercollegiate Basketball Ass’n*, 337 F. Supp. 2d at 568.

<sup>68</sup> *Metro. Intercollegiate Basketball Ass’n*, 337 F. Supp. 2d at 565. The Court did not discuss this claim, nor did it mention the particular contract in question. As this issue is beyond the scope of this Article, it will not be analyzed herein.

<sup>69</sup> NCAA BYLAW 31.2.1.1, reprinted in 2005-06 NCAA Division I Manual, at 426 (2005), available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/2005-06/2005-06\\_d1\\_manual.pdf](http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf). An exception within this rule is granted to schools who are also members of the National Association of Intercollegiate Athletics (“NAIA”); a joint-declaration program has been established with the NCAA and NAIA whereby dual members are allowed to elect whether to participate in the NAIA championship, the NCAA championship, or no postseason competition in each of their respective sports. See *id.*

<sup>70</sup> See *supra* text accompanying notes 61-62.

postseason NIT in 1962,<sup>71</sup> and after Marquette University's head coach Al McGuire openly defied the "suggestion" in 1970.<sup>72</sup>

Although the Commitment to Participate Rule has been revised several times since 1981, none of those revisions carried much significance.<sup>73</sup> As such, the NCAA rule has remained in effect and virtually unchanged since its inception, despite internal recommendations for its removal<sup>74</sup> and despite its effect of limiting NIT participation to teams that rank far lower than the vast majority of the NCAA tournament teams.<sup>75</sup>

### 3. The MIBA's Claims

The MIBA asserted three claims against the NCAA,<sup>76</sup> two of which will be analyzed in this Article. First, it contended that the NCAA violated § 1 of the Sherman Act<sup>77</sup> through its promulgation of the Postseason Rules.<sup>78</sup> The MIBA contended that the rules themselves are anticompetitive and constitute proscribed "unreasonable restraints of trade" in that, together with the NCAA's bracket

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<sup>71</sup> *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 566. The five schools included Loyola University of Chicago, Dayton University, Mississippi State, St. John's University, and The University of Houston; Dayton University had also declined an NCAA invitation in favor of the NIT's in the previous year. *Id.*

<sup>72</sup> Alesia, *supra* note 3. Angered and offended by the (presumably low) seed given his extremely talented team in the 1970 NCAA tournament, Coach McGuire pulled his team out of the tournament and instead played his team in the NIT. *Id.*

<sup>73</sup> *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 567.

<sup>74</sup> The NCAA Division I Championships/Competition Cabinet issued a report in July of 2000 recommending deletion of the rule; the rationale was explained as follows: "In the spirit of deregulation, institutions should be vested with the responsibility of selecting postseason competition opportunities." Report of the NCAA Division I Championships/Competition Cabinet, Item 2(b)(6)(g) (July 5, 2000).

<sup>75</sup> See *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 568 (stating that "there is no material dispute that the vast majority of the NCAA teams rank above the best NIT teams").

<sup>76</sup> See *supra* notes 63-67 and accompanying text.

<sup>77</sup> 15 U.S.C. § 1 (2006).

<sup>78</sup> *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 569; *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545, 547 (S.D.N.Y. 2004); see *supra* note 66 and accompanying text.

expansion, they operate to diminish competition from postseason<sup>79</sup> tournaments sponsored by other entities, including the NIT.<sup>80</sup>

The MIBA also alleged that the NCAA violated § 2 of the Sherman Act<sup>81</sup> by using those rules not only to reduce competition among Division I men's basketball tournaments, but specifically to realize or attempt to realize monopoly power in that market.<sup>82</sup>

#### 4. Motions for Summary Judgment

Both parties filed motions for summary judgment in an attempt to achieve a relatively quick and inexpensive resolution.<sup>83</sup> The MIBA filed on its claims under § 1

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<sup>79</sup> The MIBA also claimed that the rules inhibited competition from *preseason* tournaments, including the NIT preseason tournament. *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 565. The MIBA sued to block proposed rules that would count each preseason tournament game toward the NCAA's cap on total allowable season games per team; under current rules, an entire preseason tournament counts as only one game. Roberts, *supra* note 44. Though the measures obviously threaten the preseason NIT's viability by forcing teams to either forgo the tournament or play fewer games during the regular season, the NCAA claims that the change is necessary "to get a handle on the number of games that certain institutions play" and to achieve "a little more parity" in the number of games that each team plays. *Id.*

<sup>80</sup> *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 565, 568.

<sup>81</sup> 15 U.S.C. § 2 (2006).

<sup>82</sup> *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 565.

<sup>83</sup> The word "relatively" is used here because by the time the MIBA and NCAA filed these motions on November 18, 2003, and April 8, 2004, respectively, much time had passed and money had been spent since the initial filing of the suit in early January 2001. *See* Notice of Motion by Metropolitan for an Order Granting Summary Judgment, *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 563 (No. 31); Reply Brief of NCAA in Support of Summary Judgment on the Merits, *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 563 (No. 64) (previously filed under seal); Reply Brief in Support of Summary Judgment on Statute of Limitations, *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 563 (No. 65) (previously filed under seal); *see also supra* text accompanying note 64. In fact, the NCAA had already spent \$5.7 million in 2001-2003 on legal services provided by Miller Canfield, the firm representing the NCAA in its suit against the MIBA. Mark Alesia, *NCAA-NIT trial near settlement; Judge suspends case, sends jurors home as both sides negotiate*, THE INDIANAPOLIS STAR, Aug. 17, 2005, at 1D [hereinafter Alesia II]. Presumably, however, a successful motion for summary judgment could save further expenditures at trial and at any possible appeal.

and § 2 of the Sherman Act<sup>84</sup> only with respect to the NCAA's Commitment to Participate Rule.<sup>85</sup> Its motion was denied.<sup>86</sup>

The NCAA sought summary judgment on all five of the contested Postseason Rules,<sup>87</sup> arguing that (1) the rules are “noncommercial” and therefore the Sherman Act does not apply;<sup>88</sup> (2) the rules are of the kind endorsed as “reasonable” by the Supreme Court in *NCAA v. Board of Regents*;<sup>89</sup> (3) under *Copperweld Corp. v. Independence Tube Corp.*, the NCAA is a single entity and should be exempt from analysis under § 1 of the Sherman Act;<sup>90</sup> and (4) the MIBA cannot show that the NCAA rules have injured *competition* itself.<sup>91</sup> The NCAA's motion for summary

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<sup>84</sup> 15 U.S.C. §§ 1 & 2 (2006).

<sup>85</sup> *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 568.

<sup>86</sup> *Id.* at 573. Judge Cedarbaum of the United States District Court for the Southern District of New York denied the MIBA's motion for summary judgment under § 1 of the Sherman Act on the grounds that “quick look” analysis was inappropriate in the case since it is appropriate solely in instances where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Id.* at 572 (quoting *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 770 (1999)). The court's decision was based on the Southern District of Ohio's decision in *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, No. 2:00-CV-1439, 2002 WL 32137511, at \*6 (S.D. Ohio July 19, 2002) (refusing to review the NCAA's “Two in Four” restriction under a “quick look” analysis because plaintiff promoters' allegation that output suffered was negated by the presence of 319 available Division I teams and only 25 certified events), *rev'd on other grounds*, 388 F.3d. 955 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 334 (2005). *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 572-73. Adopting the *Worldwide* court's reasoning, the court observed that anticompetitive effects are not clearly present where the MIBA may invite any of the 260 teams not invited to the NCAA playoff tournament and where the MIBA failed to demonstrate that it had been unable to fill its brackets each year. *Id.* at 573. The MIBA's motion for summary judgment pursuant to § 2 of the Sherman Act also was denied; the court concluded that a material question of fact existed as to whether the NCAA acted with a specific intent to monopolize when it adopted the Commitment to Participate Rule. *Id.*

<sup>87</sup> *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545, 547 (S.D.N.Y. 2004); *see supra* note 67 and accompanying text.

<sup>88</sup> *Metro. Intercollegiate Basketball Ass'n*, 339 F. Supp. 2d at 547.

<sup>89</sup> *Id.* at 548 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984)). The ruling in *NCAA v. Board of Regents* will be examined further in Section II of this Article.

<sup>90</sup> *Metro. Intercollegiate Basketball Ass'n*, 339 F. Supp. 2d at 549 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)); *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 569-70.

<sup>91</sup> *Metro. Intercollegiate Basketball Ass'n*, 339 F. Supp. 2d at 551.



judgment was also denied, approximately one month after the court denied the MIBA's motion.<sup>92</sup>

### 5. Trial Coverage – “Trash Talking”

The case finally went to trial in the U.S. District Court in Manhattan on August 1, 2005,<sup>93</sup> more than four and a half years after the lawsuit was originally filed.<sup>94</sup> At trial, Jeffrey Kessler, the MIBA's attorney, accused the NCAA of eliminating the NIT's ability to secure the best teams' participation in the NIT tournament; he compared competing with the NCAA for teams in the postseason tournament to playing a “rigged game.”<sup>95</sup> Kessler asked the presidents of the MIBA schools to stand, introduced them to the jury, and explained that the NIT had once been a tournament of prestige.<sup>96</sup> He also told the jury that the NCAA's March Madness was attempting to ruin the postseason NIT, averring that the NCAA has been corrupted by “the multi-billion-dollar business of college basketball.”<sup>97</sup>

The NCAA's attorney, Gregory Curtner, pointed out that the MIBA schools themselves are members of the NCAA.<sup>98</sup> Nodding to the MIBA school officials, including two members of the clergy, he told the jury “that those five schools ‘want more money.’ ‘They want to take it from the other[s] . . . and put more of it in their

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<sup>92</sup> See *id.* The court found the NCAA's arguments unpersuasive. It determined that the rules were commercial, were not obviously reasonable under a *Board of Regents* analysis, and represented a horizontal agreement among member schools; thus, the rules were subject to § 1 scrutiny. *Id.* at 548-49. The court found triable issues of fact under a § 1 Rule of Reason analysis surrounding the definition of a relevant market, harm to competition, pro-competitive justifications, and the existence of less restrictive alternatives. *Id.* at 549-52. The court also denied the NCAA's motion for summary judgment on the § 2 claim, noting a genuine issue of fact regarding the NCAA's possession of “monopoly power” and maintenance of that power by the use of exclusionary means. *Id.* at 552. The NCAA's motion for summary judgment based on the statute of limitations was denied at oral argument. *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 565 n.1.

<sup>93</sup> Alesia, *supra* note 3.

<sup>94</sup> See *supra* text accompanying note 67.

<sup>95</sup> *NIT sues NCAA*, *supra* note 5.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

pocket' . . . ."<sup>99</sup> "[T]he NCAA has helped keep [the NIT] in business," he said.<sup>100</sup> He proceeded to compare the NCAA to Congress as "a truly democratic institution" and to note that the NCAA money distributed to member schools often goes to support teams for women and unprofitable sports.<sup>101</sup>

Over the course of the ten day trial, the MIBA called coaches John Calipari (University of Memphis) and Bobby Knight (Texas Tech University, formerly Indiana University) to testify.<sup>102</sup> Mr. Knight gave colorful testimony, calling the NCAA a monopoly and stating, "I have felt as long as I've been in coaching . . . that the NCAA has wanted to eliminate the NIT."<sup>103</sup> On August 16, 2005, the court suspended the case as the parties neared a settlement.<sup>104</sup> The NIT had been expected to conclude its case that day with the testimony of a financial expert, and the NCAA to open its case with testimony from NCAA President Myles Brand.<sup>105</sup>

### **C. Playing Until the Buzzer: The Settlement**

#### **1. Terms**

The parties arrived at a settlement on Wednesday, August 17, 2005, ending the historic struggle with the NCAA's outright purchase of the NIT.<sup>106</sup> Strikingly different from a failed earlier proposal,<sup>107</sup> the price included \$40.5 million for the

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Alesia II*, *supra* note 83.

<sup>103</sup> *Id.* (alteration in original).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* Also on the witness list for the NCAA were Jim Delany (Big Ten commissioner) and several renowned coaches: Mike Kryzewski (Duke), Tubby Smith (Kentucky), and Jim Boheim (Syracuse). *Id.*

<sup>106</sup> Andy Katz, *NCAA buys tournaments, ends NIT litigation*, ESPN.COM, Aug. 17, 2005, <http://sports.espn.go.com/ncb/news/story?id=2136724> (last visited Oct. 2, 2006) [hereinafter Katz].

<sup>107</sup> The first proposal, tendered by the MIBA in April 2004, was for \$75 million in damages and included a provision for a lottery system to split teams for approximately three years; the NCAA reportedly commented, "You can't be serious." *Alesia II*, *supra* note 83.

transfer of ownership of both preseason and postseason NIT tournaments to the NCAA, as well as \$16 million to end the litigation, with the total amount payable in installments over a ten-year period.<sup>108</sup>

## 2. Remarkable Amiability and New-Found Synergy

The aftermath of the settlement signaled a suspiciously remarkable turnaround in the conduct and goals of each party. The NCAA moved from the staunch and caustic defense of its rule demanding participation in its own event<sup>109</sup> to welcoming the NIT and broadcasting an intent “to grow [the two NIT] tournaments to showcase college basketball and the student-athletes who make the game great.”<sup>110</sup> The annual \$1.85–\$3 million payments through 2010 under ESPN’s contract with the NIT,<sup>111</sup> combined with the opportunity to control or even eliminate its former competitor, suggest other motives.

The MIBA had a change in ideals as well, as it moved from relying heavily on the grand history and roots of its tournament to convince the court of the anticompetitive effects of the NCAA’s actions,<sup>112</sup> to later accepting a lucrative deal that leaves the fate of the NIT in the hands of an organization that owns its own postseason tournament.

The settlement, though a resolution of the dispute between the two Associations, begs the question: what will happen to the NIT? Part IV(b) of this Article addresses that query. First, however, Part II more closely examines the legality of the Postseason Rules and Part III, the legality of the acquisition itself.

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<sup>108</sup> Press Release, *supra* note 2.

<sup>109</sup> See *supra* text accompanying notes 98-100.

<sup>110</sup> Press Release, *supra* note 2.

<sup>111</sup> Alesia II, *supra* note 83.

<sup>112</sup> See *supra* text accompanying notes 44-50, 96.

## II. VALIDITY OF THE MIBA'S CLAIMS – HAD THE NCAA STEPPED OUT OF BOUNDS?

### A. Sherman Act § 1

Section 1 of the Sherman Antitrust Act provides: “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 hereby declared to be illegal. . . .”<sup>113</sup> Since any and all agreements technically impose some level of restraint on trade, the act has been interpreted to declare illegal only those restraints that “may suppress or even destroy competition” as opposed to those that “merely regulate[] and perhaps thereby promote[] competition.”<sup>114</sup> A plaintiff may prove that the restriction violates § 1 by establishing that (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under a *per se* or Rule of Reason analysis; and (3) the restraint affected interstate commerce.<sup>115</sup>

#### 1. NCAA as Promulgator: Single Entity Rules or Horizontal Agreements?

Generally, a single entity is not capable of forming a “contract, combination . . . or conspiracy” and thereby is not subject to § 1.<sup>116</sup> However, rules adopted and executed by the NCAA are conceptually viewed as “the agreement and concert of action of the various members of the association, as well as that of the association itself,” thereby rendering any rules promulgated by the NCAA properly subject to

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<sup>113</sup> 15 U.S.C. § 1 (2006). The act deems violation a felony punishable by fines up to \$100 million for a corporation and \$1 million for any other person, as well as imprisonment for up to 10 years. *Id.*

<sup>114</sup> *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). To conduct the analysis, a court must generally consider

facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

*Id.*

<sup>115</sup> *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir.1998).

<sup>116</sup> *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769-71 (holding that a parent company and its wholly owned subsidiary are properly viewed as a single entity because of their “complete unity of interest,” and therefore agreements between them fall outside the purview of § 1).

scrutiny under § 1.<sup>117</sup> In fact, every year each member school must agree in writing to abide by all of the NCAA rules, including those regarding the NCAA tournament.<sup>118</sup> If the member schools' economic interests were completely unified, such formalism would not be necessary.

## 2. Interstate Commerce Implicated?

Courts have categorized the NCAA's rules into two types:<sup>119</sup> those considered "commercial"<sup>120</sup> and those considered primarily "non-commercial."<sup>121</sup> In *Apex Hosiery Co. v. Leader*,<sup>122</sup> the Supreme Court acknowledged that the Sherman Act is primarily aimed at combinations possessing commercial objectives and applies only to a limited extent to organizations with non-commercial objectives.<sup>123</sup>

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<sup>117</sup> *Hennessey v. NCAA*, 564 F.2d 1136, 1147 (5th Cir. 1977). The court also observed that "the 'voluntary' nature of the NCAA" does not bar members from bringing suit against it for damages, since the NCAA levies significant sanctions for violation of its rules and thus pressure for compliance exists. *Id.*

<sup>118</sup> *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 337 F. Supp. 2d 563, 569 (S.D.N.Y. 2004). The NCAA asserted that, because its members have "a unified interest in the success of the NCAA Tournament," they act as a single entity with respect to tournament decisions. *Id.* The court refused to give credence to that argument, pointing out that members "exist as independent institutions of higher education" and "[t]he fact that these individual members participate in the NCAA Tournament does not turn the membership into a single actor." *Id.* at 570.

<sup>119</sup> *See, e.g., Justice v. NCAA*, 577 F. Supp. 356, 383 (D. Ariz. 1983) (noting the distinction between rules rooted in the NCAA's concern for amateurism and those "accompanied by a discernible economic purpose").

<sup>120</sup> *See, e.g., Hennessey*, 564 F.2d at 1150-51 (restrictions on the number of assistant coaches affected the multi-state collegiate coach employment market and thus implicated interstate commerce).

<sup>121</sup> *See, e.g., Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (stating that no nexus was present between NCAA eligibility guidelines and the Association's commercial or business activities, and therefore the rules were held to be outside the ambit of the Sherman Act).

<sup>122</sup> 310 U.S. 469 (1940).

<sup>123</sup> *Id.* at 491-93; *see also Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959); Stephanie M. Greene, *Regulating the NCAA: Making the Calls under the Sherman Antitrust Act and Title IX*, 52 ME. L. REV. 81, 83-88 (2000) (discussing how several recent cases illustrate the boundaries of NCAA regulatory freedom within the bounds of the Sherman Act and concluding that rules focusing on student-athlete eligibility are either outside the scope of the Act due to their non-commercial nature or they survive a Rule of Reason analysis because they are either not anticompetitive or have more substantial procompetitive aspects that enhance competition overall) [hereinafter Greene].

Although the NCAA has repeatedly insisted that its rules are non-commercial and do not restrain interstate commerce,<sup>124</sup> the requisite subject matter jurisdiction is established because the NCAA's "overall business activity—not merely the particular conduct in question—has a substantial effect on interstate commerce."<sup>125</sup> Moreover, the rules at issue in this case are in place for the admitted purpose of ensuring that the best teams will participate in the NCAA tournament, making it more attractive to fans, advertisers, and television broadcasters, which clearly intimates the rules' commercial nature.<sup>126</sup>

### 3. Unreasonable Restraint of Trade? Standard of Analysis

Much of the confusion typically surrounding § 1 analysis involves the applicable standard: whether the court should apply a *per se* standard,<sup>127</sup> a full Rule of

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<sup>124</sup> See, e.g., *Hennessey*, 564 F.2d at 1150; *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545, 547 (S.D.N.Y. 2004); *Justice*, 577 F. Supp. at 383.

<sup>125</sup> *Justice*, 577 F. Supp. at 378 (citing *McLain v. Real Estate Bd.*, 444 U.S. 232, 242-43 (1980)). In reaching its conclusion that the requisite interstate activity was established, the *Justice* court commented on the national scope of recruiting efforts, team transportation across state lines for participation in NCAA events, and the NCAA's involvement in interstate television broadcasting of its events. *Id.*

<sup>126</sup> *Metro. Intercollegiate Basketball Ass'n*, 339 F. Supp. 2d at 548.

<sup>127</sup> Early in antitrust jurisprudence, restraints subject to § 1 were subdivided into two categories: those that had no purpose other than the restraint of trade and those that, though restraining trade, were "ancillary" to an otherwise legitimate purpose. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). An irrebuttable presumption of unreasonableness attaches to restraints representing the former group; such restraints are deemed *per se* unlawful under the Sherman Act. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972). If a court determines that the restraint lacks any legitimate purpose and exists solely to restrain trade, no further analysis is required and the agreement is proscribed. *Id.*; see *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (declaring an agreement among sellers of bathroom fixtures to fix prices categorically unreasonable and unlawful under the Sherman Act). Other types of agreements that have fallen into the *per se* category include "naked" horizontal territorial limitations and concerted refusals to deal. See, e.g., *Topco Assocs., Inc.*, 405 U.S. at 610; *Klor's Inc.*, 359 U.S. at 210-12. The Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* declared a *per se* rule applicable when the agreement "facially appears to be one that would always or almost always tend to restrict competition and decrease output . . ." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979). These types of restraints, when not ancillary to a legitimate lawful purpose, are ordinarily condemned as a matter of law because of the extremely high probability that they are unreasonably anticompetitive. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984). The Court has noted that the justification for applying a *per se* rule is partly "rooted in administrative convenience." *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 434 (1990).

Reason analysis,<sup>128</sup> or a truncated Rule of Reason analysis, commonly referred to as a “quick look” analysis.<sup>129</sup> However, the Court in *NCAA v. Board of Regents* made clear that, because the industry of college athletics is one in which certain horizontal restraints on competition are necessary for the product to be available at all, cases involving the NCAA are appropriately analyzed under the Rule of Reason.<sup>130</sup> The “product” is collegiate competition itself: those athletic contests between competing

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<sup>128</sup> The Rule of Reason is the most common analysis performed in antitrust, presumably because most restrictive agreements have at least some measure of pro-competitiveness. The basic structure of the analysis was first stated in *Board of Trade of the City of Chicago v. United States*. Bd. of Trade of Chicago v. United States, 246 U.S. 231, 237-38 (1918); see *supra* note 114 and accompanying text. Essentially, the test of reasonableness involves a balancing of all the circumstances of a case to determine whether or not the challenged restraint unreasonably restricts competition. *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir.1998). The plaintiff bears the initial burden of proving that the agreement causes anticompetitive effects in the relevant market by either showing actual anticompetitive effects or by proving the defendant has market power. *Id.* Once the plaintiff makes that showing, the burden shifts and the defendant must show that the restraint promotes a pro-competitive objective. *Id.* If the defendant makes such a showing, the burden of proof shifts back to the plaintiff to demonstrate that the restraint is not reasonably necessary to achieve the stated objective. *Id.* If the defendant cannot offer a legitimate justification, the restraint is condemned. *Id.* The Rule of Reason is the standard by which this Article’s analysis is conducted. See Section II(a)(iv), *infra*.

<sup>129</sup> In *Board of Regents*, the Court introduced the “quick look” Rule of Reason analysis, which is applicable in cases where, though immediate *per se* condemnation of an agreement is not appropriate, no elaborate industry analysis is needed in order to discern the anticompetitive character of a restraint that is inherently suspect. *Law*, 134 F.3d at 1020 (citing Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2636-39 (1996) [hereinafter Roberts]). For example, under this standard, if anticompetitive effects are apparent, market power need not be proven, and the court goes straight to an examination of the defendant’s pro-competitive justifications for the restriction. See, e.g., *Law*, 134 F.3d at 1020.

The confusion surrounding which of the three methods to utilize is apparent. See *Bd. of Regents*, 468 U.S. at 104 n.26 (indicating that no “bright line” exists to separate a *per se* analysis from one under the Rule of Reason). The court went on to explain,

Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a “per se” rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.

*Id.*

<sup>130</sup> *Bd. of Regents*, 468 U.S. at 100-01. The court in the case at issue also found the “quick look” Rule of Reason approach inappropriate. See *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 337 F. Supp. 2d 563, 573 (S.D.N.Y. 2004).

colleges and universities.<sup>131</sup> Such “necessary” rules are many and include, for example, the size of the court or field and the number of players allowed on a team,<sup>132</sup> as well as rules required to preserve the character of the product, such as requiring athletes to attend classes and to not be paid.<sup>133</sup> As a result, even in cases where member schools’ ability to compete in terms of price and output is overtly restrained, a “fair evaluation” of the effects on competition necessitates an examination of the NCAA’s pro-competitive justifications for its rules under the Rule of Reason analysis.<sup>134</sup>

#### 4. Rule of Reason Analysis

Regardless of which method of analysis is employed, the inquiry remains the same: Does the challenged restraint enhance or suppress competition?<sup>135</sup> Under a Rule of Reason analysis, the plaintiff bears the initial burden of establishing that the restraint produces significant anticompetitive effects within the relevant market.<sup>136</sup> Once the anticompetitive effects have been established, the burden of production shifts to the defendant to provide evidence that the restraint at issue has pro-competitive effects that outweigh the anticompetitive effects.<sup>137</sup> Finally, if the

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<sup>131</sup> *Bd. of Regents*, 468 U.S. at 101.

<sup>132</sup> *Id.* The Court went on to observe the absurdity of those contests should they be conducted with no agreed rules. *Id.*

<sup>133</sup> *Id.* at 102. The court noted that “the integrity of the ‘product’ cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.” *Id.* The truth of the Court’s observation in this regard is essentially that which provokes economists to write volumes criticizing the NCAA’s function as a cartel enforcer, enabling members to “agree” to keep their own input costs (such as that of player compensation in the form of financial aid) down and to control member action by sanction. *See supra* notes 15-29 and accompanying text.

<sup>134</sup> *Bd. of Regents*, 468 U.S. at 103.

<sup>135</sup> *Id.* at 104.

<sup>136</sup> *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (2004).

<sup>137</sup> *Id.* Significant criticism exists concerning the weight assigned pro- and anticompetitive effects in order to arrive at the net result. *See, e.g.*, Roberts, *supra* note 129, at 2655-56 (observing that the effects are neither “qualitatively similar nor quantitatively measurable” and concluding that in cases where one effect is not clearly dominant over the other there is little a fact-finder can do outside of intuitively sensing how “bad” or how “good” the effects are, given the lack of judicial guidance).



defendant meets that burden, the plaintiff must prove that those legitimate pro-competitive objectives are achievable through substantially less restrictive means.<sup>138</sup>

a. Anti-Competitive Effects in the Relevant Market?

An assessment of anti-competitive effects first requires a determination of the “relevant market.”<sup>139</sup> Courts have defined “relevant market” as those commodities “reasonably interchangeable by consumers for the same purposes;”<sup>140</sup> it encompasses both product and geographic markets.<sup>141</sup> The MIBA argued in its motion for summary judgment that the relevant market is properly viewed as Division I men’s college basketball.<sup>142</sup> The NCAA, on the other hand, posited that its tournament belongs to a market of “marquee sports programming” along with premiere professional sporting events, including the Super Bowl, the World Series, and the Olympic Games, and not to a market that includes the NIT because the two tournaments are neither “similar” nor “interchangeable.”<sup>143</sup>

A genuine issue of fact existed as to the definition, and thus it properly was not decided in the motion for summary judgment; however it is likely that the court at trial would have determined that the relevant market would be Division I men’s college basketball, as demonstrated by the MIBA. The Supreme Court in *NCAA v. Board of Regents* went to great lengths to emphasize that televised college football games have “an audience uniquely attractive to advertisers,” and, therefore, “competitors are unable to offer programming that can attract a similar audience.”<sup>144</sup> As a result, the Court found that professional games were not reasonably

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<sup>138</sup> *Worldwide Basketball*, 388 F.3d at 959.

<sup>139</sup> See *id.* at 959.

<sup>140</sup> *Id.* at 961 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)).

<sup>141</sup> *Id.* at 959.

<sup>142</sup> *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 339 F. Supp. 2d 545, 549 (S.D.N.Y. 2004). The MIBA also asserted that several submarkets exist in regard to the tournaments at issue, including “the business of operating Division I men’s college basketball tournaments and the business of operating *postseason* tournaments in particular.” *Id.* Recall that the MIBA also owns the rights to and operates a preseason National Invitational Tournament. See *supra* note 79.

<sup>143</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 549.

<sup>144</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 111 (1984).

interchangeable.<sup>145</sup> It would hardly require an exercise of the imagination to extend the same reasoning to the business of NCAA men’s Division I basketball. In fact, the two tournaments were indeed found to be “reasonably interchangeable” by the District Judge to the extent that both (and only those two tournaments) feature (1) competition between Division I men’s college basketball teams after the regular season has concluded; (2) games that are played all around the country; and (3) games that are nationally televised.<sup>146</sup>

Assuming that the relevant market is Division I men’s basketball, the MIBA would then have had to prove that the restraint had anticompetitive effects in that market.<sup>147</sup> The burden of proof requires a showing of harm to *competition itself* (e.g., through price increases or decreases in output or quality), and not merely harm to the MIBA,<sup>148</sup> because, in the enactment of antitrust law, Congress clearly expressed “concern with the protection of competition, not competitors.”<sup>149</sup> This requirement becomes something of a conundrum in the instant case because, as the District Judge aptly noted, (1) the NIT is the only postseason tournament besides that of the NCAA; and (2) each of the two tournament organizers markets competition itself.<sup>150</sup>

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<sup>145</sup> *See id.*

<sup>146</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 549-50. The NCAA tournament is currently broadcast on CBS, while the NIT is televised by ESPN. *See supra* notes 35, 107 and accompanying text. Nonetheless, could the NCAA have successfully argued that, though not in a relevant market that includes professional sporting events, their “marquee” status has eliminated the NIT from the market definition, and thus the NCAA men’s basketball tournament is truly “in a league of its own” and does not compete with the NIT? The author of this Article would conclude in the negative. First, the purpose of antitrust law would hardly be served by allowing defendants whose restraints have illegally pushed their competitors out of the defined relevant markets an effective safe-harbor created by their illicit action. Second, if the NCAA did not in fact compete with the NIT, the NCAA would not have had the incentive to transform its One Postseason Tournament Rule, which merely “suggested” that member schools choose the NCAA tournament over the NIT, into a rule requiring its members to make that choice. *See supra* notes 69-75 and accompanying text.

<sup>147</sup> *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (2004).

<sup>148</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 550.

<sup>149</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

<sup>150</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 551.

Even given these difficulties, however, harm to quality and output *is* provable to the extent that, without these three Postseason Rules,<sup>151</sup> lower seeded teams in the NCAA tournament might choose to participate instead in the NIT, where their chances for advancement would be greater; in addition, many teams might opt to play in both tournaments. Thus, the rules operate to deprive consumers of another potentially attractive tournament choice.<sup>152</sup> The “anticompetitive nature” of the NCAA rules requiring invitees to participate in its postseason tournament or none at all, coupled with the proven market power of the NCAA in its successful acquisition of the “vast majority” of the most highly ranked teams, creates a powerful argument for the establishment of anticompetitive effects.<sup>153</sup> Hence, had the case reached final judicial resolution, a finding of anticompetitive effects would have been highly likely.

#### b. Pro-Competitive Effects?

Assuming a finding of anticompetitive effects, the NCAA’s burden of production at that juncture would require evidence of pro-competitive effects of its restraints in excess of their anticompetitive effects.<sup>154</sup> The NCAA asserted two pro-competitive justifications for its rules in its motion for summary judgment: (1) (presumably highly ranked) member schools’ participation in its event is necessary to ensure the “legitimacy of the National Champion,” and (2) without the imposition of these rules, the NIT could “free-ride” on the NCAA’s product by “swooping in at the last minute” and inducing teams to participate in the NIT.<sup>155</sup> The NCAA’s proffered justifications are properly examined on two levels: whether it is *factually true*

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<sup>151</sup> The Postseason Rules include the Commitment to Participate Rule, the End of Playing Season Rule, and the One Postseason Rule. *See supra* note 67.

<sup>152</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 551.

<sup>153</sup> *Id.*

<sup>154</sup> *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (2004); *see also* text accompanying note 137.

<sup>155</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 552. The NCAA’s second justification was phrased in terms of free-riding by “an[y] independent tournament.” However, their remarks have been represented in the text in this manner, since it has been established that the NIT is the only other postseason tournament for Division I men’s basketball teams. *See supra* text accompanying note 150.

that the restraint in question provides the pro-competitive effects asserted and whether the pro-competitive effects are themselves *legitimate*.<sup>156</sup>

### 1. Factual?

Though facially these arguments seem reasonable, a thorough inquiry requires a closer look. The factual tangle lurking beneath the NCAA's pro-competitive assertions arises because the NCAA has also made claims that every team's goal and preference is to play in the NCAA tournament and has emphasized that (1) since 1970 no team has passed on the NCAA's tournament to play in the NIT; and (2) not one team has asked for a waiver of the Commitment to Participate Rule since its adoption.<sup>157</sup> Thus, it seems the NCAA has undermined its own justification for the rule if, without it, teams would still choose the NCAA tournament.<sup>158</sup>

### 2. Legitimate?

The question of legitimacy is apparent in both asserted justifications. At first glance, the protection of the "legitimacy of the National Champion" seems a sound benefit to competition in that it would maintain the quality<sup>159</sup> of the athletic product (that is, the competition itself) and might prevent the public's interest in that athletic product from declining. An argument could be made, however, that the NCAA does not hold the right to protect the authenticity of college basketball's "Number One," especially in light of the fact that the NIT was the *original* "national championship."<sup>160</sup>

The second pro-competitive benefit proffered by the NCAA is that of preventing the NIT from "free-riding" on the NCAA's product by enticing the best

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<sup>156</sup> Roberts, *supra* note 129, at 2658 (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101-02, 120 (1984)).

<sup>157</sup> *Metro. Intercollegiate Basketball Ass'n*, 339 F. Supp. 2d at 552. The court criticized the NCAA's justifications and stated that there was "at least a question of fact" as to whether the rule had real pro-competitive effects. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Increases in output and quality and decreases in price are among those considered pro-competitive effects. *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir.1998).

<sup>160</sup> *See supra* text accompanying notes 46-50.

teams to participate instead in the NIT.<sup>161</sup> This argument seems to stem from the same sense of entitlement as the first “pro-competitive benefit” asserted by the NCAA, which, as discussed above, is questionable at best. Combined with the factual objections previously entertained, the NCAA’s position appears to rest on the premise that competition is itself harmful; the judiciary has universally denied this argument in light of Congressional determination to promote competition.<sup>162</sup>

Since the NCAA would have the burden of showing net pro-competitive benefits and that the restraints are related or tailored to the interests they purport to protect,<sup>163</sup> it seems unlikely that it would prevail.

### c. Least Restrictive Alternative?

Should the NCAA manage to convince the court of the Postseason Rules’ pro-competitive benefits, the MIBA would still have an opportunity to prevail on its claim if it could prove the existence of less restrictive alternatives to the current rules.<sup>164</sup> One such alternative was noted by the District Judge in the denial of the NCAA’s motion for summary judgment: allowing teams to participate in both events by scheduling them so they do not overlap, and abolishing the One Postseason Tournament Rule.<sup>165</sup> Elimination of the Commitment to Participate Rule might mean that some ranked teams would play in the NIT rather than the NCAA tournament, but any concerns about legitimizing a single national champion could be alleviated by implementing a point system akin to college football rankings in the

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<sup>161</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 552.

<sup>162</sup> *See, e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 684, 695-96 (1978) (rejecting defendant’s argument that “competition among professional engineers was contrary to the public interest” and explaining that “[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services,” and “the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220 (1940) (ruling that “the elimination of so-called competitive evils is no legal justification” for price-fixing and that to rule otherwise would undermine the whole philosophy of the Sherman Act, namely to *promote* competition).

<sup>163</sup> *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 118-19 (1984).

<sup>164</sup> *See Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (2004); *see also* text accompanying *supra* note 136.

<sup>165</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 552.

Bowl Championship Series (“BCS”) standings or, as suggested by Bobby Knight, by having the winners of each tournament play off against the other.<sup>166</sup>

## **B. Sherman Act § 2**

### **1. Conspiracy to Monopolize**

The MIBA also claimed that the NCAA violated § 2 of the Sherman Act, which states: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . .”<sup>167</sup> Specifically, the MIBA asserted that the NCAA’s Commitment to Participate Rule violated § 2 because it constituted a conspiracy to monopolize.<sup>168</sup> A prima facie showing for such a claim includes the following elements: (1) concerted action; (2) specific intent to achieve an unlawful monopoly; and (3) commission of an overt act in furtherance of the conspiracy.<sup>169</sup>

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<sup>166</sup> See Alesia II, *supra* note 83.

<sup>167</sup> 15 U.S.C. § 2 (2006).

<sup>168</sup> Metro. Intercollegiate Basketball Ass’n v. NCAA, 337 F. Supp. 2d 563, 573 (S.D.N.Y. 2004).

<sup>169</sup> Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988) (citing United States v. Consol. Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961)); Int’l Distribution Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 795 (2d Cir. 1987). Courts tend to confuse the elements of conspiracy to monopolize with the elements of attempt to monopolize; the latter requires a showing of dangerous probability of success, while the former does not. *Int’l Distribution Ctrs., Inc.*, 812 F.2d at 795 n.8 (citing Levitch v. Columbia Broad. Sys., Inc., 495 F. Supp. 649, 668 (S.D.N.Y. 1980); Am. Tobacco Co. v. United States, 328 U.S. 781, 789 (1946)). The intent to achieve a *lawful* monopoly, such as through “superior skill, foresight and industry,” is not proscribed; this is assumed to be a legitimate goal of every big business. United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (acknowledging that a single producer may be the sole survivor of a group of active competitors through such business prowess and stating, “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins”).

a. Concerted Action & Overt Act in Furtherance of the Conspiracy

With respect to the first element, because the NCAA's rules have been found to constitute agreements subject to analysis under § 1 of the Sherman Act,<sup>170</sup> it is likely that the court would have acknowledged the existence of concerted action.<sup>171</sup> Furthermore, an overt act in furtherance of the conspiracy seems to be evident in the promulgation of the Postseason Rules, to which all members must agree in writing each year<sup>172</sup> and from which no team has requested a waiver.<sup>173</sup>

b. Specific Intent to Achieve Unlawful Monopoly

Though conceptually simple, the application of the "specific intent" requirement has been a somewhat elusive concept for the courts.<sup>174</sup> In order to evince such intent on the part of the NCAA, the MIBA produced statements made by various members of NCAA committees during the 1940s to 1960s that the MIBA argued were proof of illegal motivation behind the Commitment to Participate Rule's adoption.<sup>175</sup> The NCAA maintained that the proffered statements were "unrelated" and did not illuminate the reasons for the rule's adoption.<sup>176</sup> The court determined that this issue was a material question of fact to be resolved at trial.<sup>177</sup>

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<sup>170</sup> See *supra* notes 116-18 and accompanying text.

<sup>171</sup> Despite the readily apparent logical connection, the district judge, in ruling that summary judgment for the MIBA was inappropriate, did not address the issue. See *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 563.

<sup>172</sup> See *supra* text accompanying note 118.

<sup>173</sup> See *supra* text accompanying note 157.

<sup>174</sup> See Daniel E. Feld, Annotation, *What Constitutes "Attempt to Monopolize," Within Meaning of § 2 of Sherman Act (15 U.S.C. § 2)*, 27 A.L.R. FED. 762, § 2(a) (2005) (noting that the definition and treatment of the element of specific intent vary considerably across lower courts and that no clear majority approach exists from the opinions; some opinions contain no analysis whatsoever behind their conclusions while some recite facts pertaining to the conduct at issue followed by a finding that specific intent can or cannot be inferred from that conduct, with little or no analysis offered in support) [hereinafter Feld].

<sup>175</sup> *Metro. Intercollegiate Basketball Ass'n*, 337 F. Supp. 2d at 573.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

The history surrounding the establishment of the rule, which ended the practice of NCAA member schools independently choosing to participate in the NIT instead of the NCAA tournament,<sup>178</sup> suggests that the NCAA acted to pursue a monopoly in the market through means other than legitimate “superior skill, foresight, and industry”: its cartel-like control over individual members.<sup>179</sup> Given the weight of this evidence, coupled with the fact that specific intent is often inferred purely from the intuition of the fact-finder,<sup>180</sup> the NCAA faced serious risk that specific intent to achieve an unlawful monopoly would have been found to exist.

## 2. Monopolization

In order to succeed against the NCAA on a claim of § 2 monopolization,<sup>181</sup> the MIBA would have had to prove “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>182</sup>

### a. Monopoly Power in the Relevant Market

Assuming that the relevant market is Division I men’s basketball,<sup>183</sup> the first element of a § 2 monopolization claim requires a finding that the NCAA possessed monopoly power in that market.<sup>184</sup> The fact that every NCAA member school

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<sup>178</sup> See *supra* notes 52-62, 69-72 and accompanying text.

<sup>179</sup> See *supra* notes 18-22 and accompanying text.

<sup>180</sup> See Feld, *supra* note 174, at § 2(a).

<sup>181</sup> The district judge made no specific mention of a monopolization or attempted monopolization in either of the orders denying summary judgment; however, the judge did state that the MIBA had raised a genuine issue of fact on “its claim that NCAA possesses monopoly power in the market . . . and maintains this monopoly through exclusionary means.” *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 339 F. Supp. 2d 545, 552 (S.D.N.Y. 2004). These two claims represent both elements of a monopolization offense under § 2 of the Sherman Act; thus, the existence of such a complaint has been inferred.

<sup>182</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

<sup>183</sup> See *supra* notes 140-46 and accompanying text.

<sup>184</sup> *Aspen Skiing Co.*, 472 U.S. at 596 n.19 (quoting *Grinnell Corp.*, 384 U.S. at 570-71).



agrees in writing to abide by, and in reality does abide by, a Commitment to Participate Rule and other relevant Postseason Rules supports the conclusion that the NCAA possesses monopoly power.<sup>185</sup> The fact that the NCAA promulgated the rules in the first place shows that it acted like a monopolist; such behavior itself is relevant to a finding of monopoly power because only a true monopolist can raise prices, reduce output, or otherwise behave in a monopolistic fashion without suffering a loss of profit to its competitors.<sup>186</sup> Therefore, the extreme profitability that the NCAA has sustained over periods of years suggests that it holds monopoly power in Division I men's basketball tournaments.<sup>187</sup>

#### b. Illegitimate Acquisition or Maintenance

The NCAA has certainly acquired its monopoly power in part because of its stellar marketing efforts (who *hasn't* heard of March Madness?). However, the conduct proscribed by the second element of a monopolization claim includes the construction of barriers to entry into the market by a firm possessing monopoly power.<sup>188</sup> The Commitment to Participate Rule itself, as well as the combination of all of the NCAA's Postseason Rules, could easily be characterized by the court as a restraint constituting an unlawful barrier to entry into the relevant market, inhibiting competition from the NIT and other potential tournament sponsors.

### **C. Summary: Much Risk for the NCAA**

Though doubtlessly a trier of fact would find resolution of these issues a demanding and arduous task, a strong likelihood exists that the MIBA would have

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<sup>185</sup> See, e.g., *Volvo N. Am. Corp. v. Men's Int'l Profl Tennis Council*, 857 F.2d 55, 73 (2d Cir. 1988) (tennis association alleged to have exhibited monopoly power in that the top one hundred men's professional tennis players signed the association's "Commitment Agreement" which included certain restrictive provisions).

<sup>186</sup> See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 472 (1992) (refusing to grant summary judgment to defendant company where, after adopting a restrictive sales policy to drive out a competitor, its sales were not found to have declined as would reasonably be expected of a company with less than monopoly power).

<sup>187</sup> See, e.g., *supra* notes 35-38 and accompanying text.

<sup>188</sup> See, e.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 345-46 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (declaring lease-only and full-service-only practices resulting in construction of barriers to entry of rivals in primary manufacturing and derivative service markets illegal despite the proffered justification that the conduct was necessary to ensure the quality of the product and to achieve maximum economies of production and distribution).

succeeded on one or more of its claims.<sup>189</sup> Even so, in at least two respects, the NCAA faced much greater risks in this litigation than merely the risk of being compelled to make pecuniary restitution to the MIBA and to eliminate its Commitment to Participate Rule. The first of these risks illustrates the beauty of antitrust law for a plaintiff in such a suit: the magical phrase “treble damages,” which allows a successful plaintiff whose property or business is injured due to violations of antitrust law to recover triple damages from the violator, in addition to attorneys’ fees.<sup>190</sup> A financial loss of that magnitude would be a stunning blow, even to an organization as vast as the NCAA.

There is, however, a second aspect of an unfavorable judgment that would be felt even more deeply by the NCAA: the prospect of ceding an untold amount of control over its members. If one or all of its Postseason Rules were to be struck down as violations of antitrust law under §§ 1 or 2 of the Sherman Act, or both, the NCAA could likely expect many more challenges to its existing rules, especially those affecting the commercial aspects of its operations.<sup>191</sup> The virtual immunity from antitrust law that it has historically enjoyed (outside of blatant price-fixing

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<sup>189</sup> This assessment is also reflected by sports antitrust analysts and practicing attorneys. For example, Paul Haagen, a sports law expert at Duke University, commented after the parties settled that he was not surprised, “especially given the ‘potential for serious risk’” being faced by the NCAA. Doug Lederman, *Ending Court Fight, NCAA Buys NIT*, INSIDE HIGHER ED, Aug. 18, 2005, [www.insidehighered.com/news/2005/08/18/nit](http://www.insidehighered.com/news/2005/08/18/nit) (last visited Oct. 2, 2006) [hereinafter Lederman]. Haagen noted that, while the Association faced a serious financial price tag if it did not win the antitrust suit, there was even more risk in the “enormous disruption” it could’ve experienced: “To lose this really could have been to endanger the entire viability of the organization.” *Id.* Prior to settlement, sports law expert at Tulane, Gary Roberts, agreed, stating: “The potential here is significant . . . [t]he NCAA is at some risk.” Alesia, *supra* note 3. Stressing the unpredictability of antitrust cases, he said, “Anytime you take an antitrust case to a jury of people off the street, it’s a crapshoot. . . . The issues are very complex and the laws themselves are sufficiently vague that it could come out in a lot of different ways.” *Id.* Even the NCAA’s general counsel admitted, “The ultimate (adverse) outcome, though remote, would be so devastating there’s no way not to take something like this seriously.” *Id.*

<sup>190</sup> 15. U.S.C. § 15 (2006).

<sup>191</sup> Those comprehensive restraints on “inputs” regarding eligibility requirements and the like would still probably be found reasonable under a *Board of Regents* analysis. See *supra* notes 130-33 and accompanying text; see also Greene, *supra* note 123, at 88 (concluding that NCAA rules focusing on student-athlete eligibility to compete in college sports are either beyond the scope of the Sherman Act as non-commercial in nature, or survive a Rule of Reason analysis because they are either not anticompetitive or have more substantial pro-competitive aspects that enhance competition overall).

activities<sup>192</sup>) would be shaken, and its ability to dictate the behavior and options of its members would finally meet some palpable limitation.

Because the outcome of the litigation involved great risks for both parties, given their respective investments in the tournaments, generally, and in the litigation, specifically, it is no great surprise that they chose to settle their dispute. Ironically, by virtue of their chosen settlement form, their antitrust woes may have just begun.

### III. LEGALITY OF THE ACQUISITION – SHOULD THE DOJ BLOW THE WHISTLE?

“We’ve now unified postseason basketball,” said Myles Brand, President of the NCAA.<sup>193</sup> This is a telling remark to antitrust scholars because it suggests the elimination of competition in that arena. A merger or acquisition (like the NCAA’s acquisition of the NIT resulting from the settlement) is subject to multiple facets of antitrust law. As an agreement between competitors, the transaction is subject to scrutiny under § 1 of the Sherman Act as a potentially unreasonable “restraint of trade.”<sup>194</sup> It can also be analyzed under § 2 of the Sherman Act as a “monopolization” of or an “attempt to monopolize” a market.<sup>195</sup> However, primary enforcement of antitrust law as it relates to mergers and acquisitions is accomplished through § 7 of the Clayton Act.<sup>196</sup>

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<sup>192</sup> See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 111 (1984) (fixing prices for football television contracts); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir.1998) (setting a salary cap for entry level coaches).

<sup>193</sup> Katz, *supra* note 106.

<sup>194</sup> See section II (a), *supra*. Since the Postseason Rules and bracket expansions constituted valid claims under § 1 and § 2 of the Sherman Act that required a trial, it seems very likely that a merger eliminating *all* competition between the only two postseason Division I men’s basketball tournament sponsors would also be found to be either an illegal restraint of trade under § 1, an illegal monopolization of the market under § 2, or both.

<sup>195</sup> See section II (b), *supra*. Also, the FTC may challenge mergers under § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45 (2006); see also Constance K. Robinson, *Mergers and Acquisitions*, 1484 PLI/CORP. 303, 310 (2005) [hereinafter Robinson].

<sup>196</sup> Robinson, *supra* note 195, at 309; see 15 U.S.C. § 18 (2006). This is likely the case because § 7 of the Clayton Act has a significantly broader reach than §§ 1 and 2 of the Sherman Act, since § 7 was explicitly intended from its enactment “to reach incipient monopolies and trade restraints outside the scope of the Sherman Act . . . .” *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962) (citing S. REP. NO. 698, at 1 (1914)). The “incipiency standard” enables the plaintiff to proceed without having to prove actual anticompetitive effects. See *id.* (citing S. REP. NO. 1775, at 4-5 (1950), as reprinted in 1950 U.S.S.C.A.N. 4296). Also, the broad language of the statute enables the

### A. Clayton Act § 7:

#### 1. Judicial Interpretation

Section 7 of the Clayton Act was enacted in 1914 in an attempt to better regulate merger activity.<sup>197</sup> Today it contains the prohibition, “No person engaged in . . . any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . or any part of the assets of another person engaged also in . . . any activity affecting commerce, where...the effect of such acquisition *may* be substantially to lessen competition, or to tend to create a monopoly.”<sup>198</sup>

Bolstered by amendments made to the Clayton Act in 1950,<sup>199</sup> the Supreme Court began to apply the Act’s proscriptions more strictly, using the expansive language of those amendments to increase the power of the judiciary and the federal agencies to restrict mergers and acquisitions.<sup>200</sup> The Supreme Court interpreted the

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government to challenge a transaction anytime, whether before or after its consummation. *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 419 (2002) [hereinafter GAVIL ET AL.]; *see also* Robinson, *supra* note 195, at 309 (noting that in *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957), the government brought suit 30 years after an acquisition was consummated).

<sup>197</sup> Before the Clayton Act’s enactment in 1914, horizontal mergers were only challenged if the merger would result in monopolistic effects under § 2 of the Sherman Act; such challenges were largely ineffective with very little consistency in the Act’s enforcement in that area. Brian Golden, *The Evolution of Horizontal Mergers and the 1992 Merger Guidelines*, 28 NEW ENG. L. REV. 159, 171 (1993) [hereinafter Golden].

<sup>198</sup> 15 U.S.C. § 18 (2006) (emphasis added). The Court interpreted the Congressional intent behind the word “may” to indicate concern, not with “certainties,” but with “probabilities,” expanding the original scope of antitrust review under the Sherman Act. *Brown Shoe Co.*, 370 U.S. at 323. The Senate Report delineated the requisite measure of the likelihood of anticompetitive effects to be that of “reasonable probability”: more than the mere possibility, but less than the “certainty and actuality of injury to competition.” *Id.* (quoting S. REP. NO. 81-1775, at 6 (1950), as reprinted in 1950 U.S.C.C.A.N. 4298; 51 CONG. REC. 14464 (1914) (statements of Sen. Reed)).

<sup>199</sup> When originally enacted, the statute applied only to acquisitions of the stock of one company by another, but not the acquisition of a company through the purchase of all or most of its assets; amendments to the act in 1950 included the closing of this “asset acquisition” loophole. *See* Golden, *supra* note 197, at 173-74.

<sup>200</sup> *Id.* at 174; *see also* *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 346 (1963) (acknowledging the expansive nature of the amended Act). The Court cited the House Report on the bill to amend the statute: “The bill retains language . . . which is broad enough to prevent evasion of

legislative intent in expanding the scope of the act as an attempt to stem the “rising tide of economic concentration in the American economy.”<sup>201</sup>

A formidable precedent that became known as the “rule of presumptive illegality” resulted from a string of decisions from 1962 to 1973,<sup>202</sup> whereby a *prima facie* case under § 7 merely required statistics showing that the resulting merged firm controls “an undue percentage share” of the relevant market, and a resulting “significant increase” in concentration of market participants.<sup>203</sup> This showing could only be overcome by “evidence clearly showing that the merger is not likely to have . . . anticompetitive effects.”<sup>204</sup>

The rule of “presumptive illegality” has been eroded somewhat over the years due to the sharp criticism of opinions written in its wake.<sup>205</sup> Though later cases affirmed the use of the rule as controlling precedent, they also illustrated that a defendant could effectively rebut the presumption<sup>206</sup> by (i) attacking the relevance of

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the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition . . .” *Id.* (quoting H.R. REP. NO. 81-1191, at 8-9 (1950)).

<sup>201</sup> *Brown Shoe Co.*, 370 U.S. at 315.

<sup>202</sup> See Golden, *supra* note 197, at 177.

<sup>203</sup> *Philadelphia Nat’l Bank*, 374 U.S. at 363.

<sup>204</sup> *Id.* The Court found the first element of requisite post-merger market share to be satisfied by a combination controlling 30% of the relevant market. *Id.* at 364. A significant increase in concentration was found to include an increase of 33%. *Id.* at 365.

<sup>205</sup> The Court, in *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966), went even further than the presumption described in *Philadelphia National Bank*, it introduced a *per se* rule condemning an otherwise efficient merger, holding that a merger contributing to a reduction in the number of competitors can be found illegal, regardless of economic concentration of the market, level of competition therein, or any positive effects on the market therefrom. Golden, *supra* note 197, at 180. Noting the economic aspects of the market that should have alleviated any concern over its monopolization, Justice Stewart, in a sharp dissent, rendered an oft quoted criticism: “The sole consistency that I can find is that in litigation under [§ 7], the Government always wins.” *Von’s Grocery Co.*, 384 U.S. at 301.

<sup>206</sup> See GAVIL ET AL., *supra* note 196, at 425. To effectively rebut the presumption, a defendant “must produce evidence that ‘shows that the market-share statistics [give] an inaccurate account of the [merger’s] probable effects on competition’ in the relevant market.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975)) (alterations in original).

market statistics in a particular industry;<sup>207</sup> (ii) demonstrating low or non-existent barriers to entry or a high level of sophistication among consumers in the market;<sup>208</sup> (iii) factually substantiating net efficiencies;<sup>209</sup> and (iv) showing that the acquisition was of a “failing firm.”<sup>210</sup>

## 2. Application to the NCAA’s Acquisition of the NIT

The NCAA might argue that its purchase of the NIT is outside the scope of § 7 of the Clayton Act because the transaction does not consist of a corporation acquiring another corporation in the traditional sense. However, a court would likely find otherwise, given the breadth of the amended Act<sup>211</sup> and the stated purposes of the relevant amendments.<sup>212</sup>

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<sup>207</sup> See, e.g., *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 503 (1974) (reasoning that in the coal market, competition is focused on the procurement of new long-term supply contracts, not on the disposition of coal already produced under previous sales contract, and a company’s power to compete depends on its uncommitted coal reserves, of which the company had little, thus the company “was a far less significant factor . . . than . . . statistics seemed to indicate”).

<sup>208</sup> See, e.g., *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (noting that the Supreme Court adopted a “totality-of-the-circumstances approach” to interpreting § 7, and that “a variety of factors” can be used to rebut the *prima facie* case of market concentration, including the misleading nature of statistics, the sophistication of market consumers, the absence of significant entry barriers, as well as those factors established in the Department of Justice’s Merger Guidelines). The Merger Guidelines’ factors are introduced in detail in section IV(b)(ii), *infra*.

<sup>209</sup> See, e.g., *H.J. Heinz Co.*, 246 F.3d at 725 (denying the proffered efficiency creation defense based on a lack of the requisite factual findings that would “render that defense sufficiently concrete to rebut the government’s *prima facie* showing”).

<sup>210</sup> See, e.g., *Int’l Shoe v. FTC*, 280 U.S. 291, 302-03 (1930) (holding that the purchase of a failing company’s stock by a competitor “does not substantially lessen competition or restrain commerce within the intent of the Clayton Act”).

<sup>211</sup> The statute explicitly states that its application extends to any “person” that is “engaged in . . . any activity affecting commerce.” 15 U.S.C. § 18 (2006). It is well-established that the NCAA is such a person affecting commerce. See *supra* notes 42, 124-26 and accompanying text. The statute prohibits not only the acquisition of any kind of “share capital” in another such “person” but also the acquisition of *assets* where the effect is to lessen competition or create a monopoly. 15 U.S.C. § 18. The NCAA’s purchase of the MIBA’s right to own and operate the NIT is likely to constitute the acquisition of assets, properly subject to scrutiny under the Act.

<sup>212</sup> See *supra* note 200 and accompanying text.

Recall once more that the relevant market can properly be defined as Division I men's college basketball,<sup>213</sup> with potential relevant submarkets including the businesses of operating Division I men's college basketball tournaments, generally, and postseason tournaments, specifically.<sup>214</sup> In an analysis incorporating any of these delineations of the relevant market, statistics regarding market share and concentration would most likely meet the *prima facie* requirements under the presumptive rule.<sup>215</sup>

The NCAA might assert mitigating factors; for instance, it might argue that, despite the Association's acquisition of its only existing rival in postseason Division I men's college basketball, barriers to entry are not significant. This argument, however, is not persuasive in light of its existing Postseason Rules, which make the prospect of another postseason tournament garnering any of the top sixty-five teams in the country obsolete, and consequently, make entry into the market far less attractive.

The Association has also vaguely alluded to efficiencies that it will realize as a result of the acquisition by "mov[ing] the [NIT] to a new level' . . . with the . . . 'assets of the NCAA behind it.'"<sup>216</sup> These assertions, however, will not be given credence without demonstrable proof of such efficiencies.<sup>217</sup>

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<sup>213</sup> See *supra* notes 140-46 and accompanying text.

<sup>214</sup> See *supra* note 142.

<sup>215</sup> See *supra* notes 202-05 and accompanying text. Under the first element, the NCAA, after acquiring the NIT, could be shown to control well more than the 30% found to be an "undue percentage share" of the relevant market in *Philadelphia National Bank*, as it (now) sponsors all the regular season and postseason games, leaving only a few preseason tournaments run by independent sponsors. Secondly, viewed in terms of number of post-season tournaments or number of participating teams, the resulting increase in concentration of market participants could very likely pass the 33% "significant" holding in *Philadelphia National Bank*, especially with respect to the submarket of postseason tournaments; the NCAA's share of that market increased to 100% from one that was significantly lesser, since it no longer has to compete with the NIT, which itself was a multi-million dollar enterprise. See *supra* text accompanying note 111.

<sup>216</sup> Lederman, *supra* note 189. This quote was excerpted from a statement by John Sexton, president of NYU (one of the MIBA's five member schools) upon announcement of the acquisition. *Id.*

<sup>217</sup> See *supra* note 209 and accompanying text. The nature of the asserted efficiency does not lend itself to be measured in any tangible way, making production of the requisite demonstrable proof nearly impossible.

The NCAA might also claim that the transaction is lawful under § 7 because the NIT was already incapable of attracting the best teams and hence is a failing firm or at least not a significant competitor of the NCAA; therefore, its acquisition by the Association is not likely to substantially alter the competitive landscape. This argument, however, will be difficult to sustain given the substantial revenue the NIT garners in exchange for its television rights.<sup>218</sup>

### 3. Disposition Under and Enforcement of § 7

In summary, the transaction would be highly suspect and could very likely be held presumptively illegal based on market share statistics. The NCAA would be hard-pressed to substantiate mitigating factors sufficient to overcome that presumption, especially in light of the heavier burden faced by a defendant seeking to rebut such a compelling *prima facie* case.<sup>219</sup> Accordingly, it is very likely that a court would find, with the requisite reasonable probability,<sup>220</sup> that the acquisition substantially lessens competition or tends to create a monopoly in violation of § 7 of the Clayton Act.

Though the analysis appears to lead to a finding of illegality, the transaction's legitimacy may never reach judicial review under § 7. Both private plaintiffs and the government may have standing under the Act,<sup>221</sup> but private plaintiffs usually do not play an important role in merger regulation enforcement.<sup>222</sup> Therefore, the merger enforcement agencies (the DOJ and the Federal Trade Commission ("FTC")) are the

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<sup>218</sup> See *supra* text accompanying note 111.

<sup>219</sup> Instead of requiring a defendant to rebut the presumption of illegality by the "clear" showing originally required in *Philadelphia National Bank*, the Court has required a defendant attempting to rebut the presumption of anticompetitive effect to demonstrate that the *prima facie* case does not accurately predict the transaction's likely effect on competition. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 990-91 (D.C. Cir. 1990). Accordingly, the court recognized a *sliding scale* of required showing by the defendant: "The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Id.* at 991.

<sup>220</sup> See *supra* note 198.

<sup>221</sup> Robinson, *supra* note 195, at 310.

<sup>222</sup> Most likely this is the case because any private plaintiff that is able to demonstrate antitrust injury entitling it to standing in an antitrust suit must have motivation to bring suit; in merger cases, where two competing firms combine, a rival usually lacks that motivation to sue to undo the merger because it prefers fewer existing competitors and less competition in the relevant market.



primary plaintiffs in these cases.<sup>223</sup> Hence, while the Supreme Court represents the ultimate authority in determining the legality of transactions challenged under § 7, the merger policies of these agencies often represent the sole criteria under which a business combination is evaluated.<sup>224</sup>

The observation that private plaintiffs rarely file a complaint in merger situations is illustrated in the case at hand. Since this is an acquisition by one postseason tournament sponsor of the only other such entity, no true rival remains to seek rescission of the sale. Television broadcasters, like CBS, that may later endure increased prices in order to televise the NCAA tournament (and thus would have standing based on antitrust injury) also lack motivation to raise a challenge. Should one of the major network broadcasters lift a finger against the NCAA, it would not only incur substantial expenditures to bring the issue to trial, but it would effectively forfeit any hope of ever entering into a lucrative contract with the Association. As March Madness continues to gain popularity and is not likely to disappear in the foreseeable future, this would be a costly mistake indeed.

Thus, should the legality of this acquisition be challenged, such a claim would likely be brought by the DOJ or FTC under the agencies' Horizontal Merger Guidelines.

## **B. DOJ/FTC Horizontal Merger Guidelines**

### **1. Purpose**

The DOJ first released the Horizontal Merger Guidelines ("Merger Guidelines" or "Guidelines") in 1968 in response to the confusion created by the Supreme Court's decisions in the early 1960s.<sup>225</sup> The latest Guidelines, issued in 1992 and subsequently revised in 1997, represent a joint effort by the DOJ and FTC (collectively referred to as the "Agency") "to reduce the uncertainty associated with enforcement of the antitrust laws in [the merger] area."<sup>226</sup> They have significantly contributed to enhancing the predictability of merger enforcement, ensuring that

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<sup>223</sup> Golden, *supra* note 197, at 182 n.164 (citing Note, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 YALE L.J. 670, 671-72 (1985)).

<sup>224</sup> *Id.* at 182.

<sup>225</sup> *Id.* at 180; *see also supra* notes 202-04 and accompanying text.

<sup>226</sup> GUIDELINES, *supra* note 26, at § 0.

private practitioners and federal law enforcement officials follow the same analytical framework.<sup>227</sup>

## 2. Analytical Framework

The acquisition at issue is properly analyzed under the five steps laid out in the Merger Guidelines. These analytical steps are aimed at identifying those “competitively harmful mergers” that “create or enhance market power or . . . facilitate its exercise,” as opposed to most “mergers that are either competitively beneficial or neutral.”<sup>228</sup> The five steps of the analysis are: (1) determining market concentration; (2) examining “potential adverse competitive effects;” (3) assessing whether entry would likely deter or counteract the anticompetitive effects; (4) “assess[ing] any efficiency gains;” and (5) determining whether either of the firms would likely fail, resulting in the exit of its assets from the market.<sup>229</sup>

### a. Market Definition and Measuring Concentration

A merger that does not significantly increase concentration or result in a concentrated market ordinarily is not analyzed further under the Guidelines.<sup>230</sup> In order to assess the concentration of the relevant market that market must first be defined in terms of product type and geography.

#### 1. Relevant Product and Geographic Markets

Under the Guidelines, the relevant product market is determined to be that market in which a hypothetical profit-maximizing monopolist would impose a “small but significant and nontransitory” price increase based on the probable reaction of buyers to such a price increase and whether the sales of the product would drop enough to make the price increase unprofitable.<sup>231</sup> In so analyzing the cross-elasticity

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<sup>227</sup> Robinson, *supra* note 195, at 310.

<sup>228</sup> GUIDELINES, *supra* note 26, at § 0.1.

<sup>229</sup> *Id.* at § 0.2.

<sup>230</sup> *Id.* at § 1.0.

<sup>231</sup> *Id.* at § 1.11. The “small but significant and non-transitory” price increase used by the Agency in its analysis is usually 5%; typically prices used are the current prices in the industry, or future prices, if reasonably predictable. *Id.*

of demand,<sup>232</sup> the relevant product market will be the most narrowly defined group of products to satisfy the test.<sup>233</sup>

As the depth of analysis required to replicate this process is beyond the scope of this Article, the relevant product market will be presumed to be that noted by the court: Division I men's college basketball.<sup>234</sup> More specifically, the relevant market can be defined as postseason tournaments within that category, given their reasonable interchangeability as found by the court in the suit under §§ 1 and 2 of the Sherman Act.<sup>235</sup> Likewise, though summarily addressed, the only conceivable geographic market is national in scope due to the unique nature of the product.

## 2. Measuring Concentration: HHI

Measuring the concentration of the market involves several steps: the current producers or sellers must be identified, their respective market-shares calculated, and the market's concentration determined under an index known as the Herfindahl-Hirschman Index ("HHI") by summing the squares of all participants' market shares.<sup>236</sup> Identifying the producers in this instance requires no intensive search: the

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<sup>232</sup> The "cross-elasticity of demand" is an economic term representing the extent to which a price increase in a particular product would induce consumers of that product to switch to others. Robinson, *supra* note 195, at 312. It is calculated as the percentage change in demand for one good that occurs as a response to a percentage change in the price of another good. Wikipedia, Cross Elasticity of Demand, [http://en.wikipedia.org/wiki/cross\\_elasticity\\_of\\_demand](http://en.wikipedia.org/wiki/cross_elasticity_of_demand) (last visited Oct 26, 2006). Where the two goods are complements, the cross elasticity of demand will be negative; where the goods are substitutes, the cross elasticity of demand will be positive. *Id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See supra* notes 140-46 and accompanying text.

<sup>235</sup> *See supra* note 146 and accompanying text. The numerical data on the NCAA's revenues from television broadcast rights for primarily the Division I Men's Basketball Championships are consistent with such a result under the Guidelines; under the contract, each annual payment in fact represents a price increase over the prior year of nearly 8%. *See* NCAA Membership Report, *supra* note 34, at 57 n.12. The Guidelines normally utilize a monopolist's ability to profitably sustain a 5% increase in price. *See supra* note 221. Clearly, the NCAA's ability to negotiate price increases of that magnitude in the Division I men's basketball postseason playoffs year after year lends some measure of credibility to the existence of such a market's ability to be monopolized.

<sup>236</sup> The HHI reflects the distribution of the market shares of all firms in the market, giving proportionately greater weight to the larger firms' market shares, which is consistent with their relative importance and impact in competitive interactions. GUIDELINES, *supra* note 26, at § 1.5. Courts have accepted the HHI as the best method of measuring market concentration; thus its use by the Agency under the Merger Guidelines cannot be taken lightly by potential defendants. Robinson, *supra* note 195, at 315 (noting the use of HHI by the court to determine market concentration in *FTC v. Cardinal*

only two entities running postseason Division I men's basketball tournaments were the MIBA and the NCAA.<sup>237</sup> Their respective shares in that precise market can be loosely approximated using the dollar sales of television broadcasting and marketing rights reasonably allocable to postseason tournaments over the period of years covered by current contracts.<sup>238</sup> Rough calculations yield market share calculations for the MIBA of 0.3% to 0.5% and for the NCAA, 99.5% to 99.7%.<sup>239</sup> By summing the squares of those numbers, the HHI concentration level is found to be approximately 9,900 to 9,940.<sup>240</sup> Thus the market for postseason basketball tournaments clearly falls into the "highly concentrated" segment of the Guidelines, which consists of markets with HHI levels of 1,800 and above.<sup>241</sup> In this segment, increases of fifty or more HHI points due to a merger require further analysis.<sup>242</sup> Since eliminating its only competitor in the market will leave the NCAA with 100% of the market, post-merger HHI is 10,000, and the increase in HHI due to the merger is estimated at sixty to one hundred points.<sup>243</sup> Hence, the acquisition should

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*Health, Inc.*, 12 F. Supp. 2d 34, 53 (D.D.C. 1998) and *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715-17 (D.C. Cir. 2001)).

<sup>237</sup> This fact was observed by the court in litigation proceedings. *See supra* text accompanying note 150.

<sup>238</sup> Under the Guidelines, market shares are calculated using the best indicator of the firms' future competitive significance, including dollar sales where firms are distinguished primarily by product differentiation. GUIDELINES, *supra* note 26, at § 1.41. Though annual data are usually employed in such an analysis, the Agency does often measure market shares over longer periods of time when individual sales are large and infrequent. *Id.* This is such an instance, as contracts approximately span a decade. *See* NCAA Membership Report, *supra* note 34, at 57 n.12; Alesia II, *supra* note 83.

<sup>239</sup> These calculations were made from financial data derived from the information concerning both Associations' television broadcasting and marketing contracts. *See* Alesia II, *supra* note 83 (revealing the terms of the MIBA's contract with ESPN); NCAA Membership Report, *supra* note 34, at 57 n.12 (revealing the terms of the NCAA's contract with CBS). Though a portion of the payment terms under the MIBA's contract are attributable to the Preseason NIT, and payments under the NCAA's contract are attributable to "other championship and marketing rights," presumably the dominant portion of each is attributable to their postseason basketball tournament rights. *See* Alesia II, *supra* note 83; NCAA Membership Report, *supra* note 34, at 57 n.12. Ranges of calculations were based on attributable portions of the MIBA and the NCAA contracts to their postseason basketball tournaments, estimated at roughly 67-100% and 90-100%, respectively.

<sup>240</sup>  $(.5)^2 \times (99.5)^2 = 9900.50$ ;  $(.3)^2 \times (99.7)^2 = 9940.18$

<sup>241</sup> GUIDELINES, *supra* note 26, at § 1.5. The highest possible HHI for any given market is 10,000, as a completely monopolized market has only one participant, the monopolist, with 100% of the market.

<sup>242</sup> *Id.* at § 1.51(c).

be examined as potentially raising competitive concerns, based on analysis of the remaining factors under the Guidelines.<sup>244</sup>

### b. Potential Adverse Competitive Effects

Under this section of the Guidelines, the Agency would analyze the potential adverse unilateral competitive effects of the merger to determine whether the NCAA could find it profitable to unilaterally raise prices, suppress output, or otherwise utilize market power.<sup>245</sup> The probable existence of anti-competitive effect was demonstrated in the prior analysis under § 1 of the Sherman Act with regard to only a few rules promulgated by the NCAA—those directed at controlling the participation of teams in the NIT.<sup>246</sup> How much greater, then, is the potential negative effect on competition should the two tournaments be placed entirely under common ownership!

The potential for reduction in output of postseason games is clear now that the NCAA has the ability to control, and thus the power to entirely eliminate, the NIT. Also, by utilizing its market power to control the participation of tournament teams, the NCAA could further increase prices of broadcast rights, concessions, sponsorships, and event tickets.<sup>247</sup> In addition, the consolidation of the two tournaments would “preclude the emergence of a stronger rivalry between the NCAA and NIT,”<sup>248</sup> a rivalry that had the potential to grow had the MIBA prevailed

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<sup>243</sup> 10,000 – 9,940 = 60; 10,000 – 9,900 = 100

<sup>244</sup> See GUIDELINES, *supra* note 26, at § 1.51(c).

<sup>245</sup> *Id.* at § 2.2. The Guidelines provide for analysis of the potential curbing of competition through both “coordinated interaction,” where a merger enables remaining firms to more likely, more successfully, or more completely act in concert to the detriment of consumers, and “unilateral effects,” where the merged firm might profitably alter its behavior on its own by raising prices or suppressing output. See *id.* at §§ 2.1-2.2. In this instance, however, the merger of the only existing competitors renders any inquiry into potential coordinated interaction among sellers moot.

<sup>246</sup> See *supra* notes 151-53 and accompanying text.

<sup>247</sup> Letter from Diana Moss, Vice-President and Senior Fellow, Am. Antitrust Inst., to the Honorable Thomas Barnett, Acting Assistant Attorney Gen. for Antitrust, U.S. Dep’t of Justice, Antitrust Div. et al. 2 (Sept. 12, 2005), available at <http://www.antitrustinstitute.org/recent2/445.pdf> [hereinafter Letter from Diana Moss]. The American Antitrust Institute urged the DOJ, the FTC, and the State of New York to carefully scrutinize the proposed settlement, positing that it would greatly harm consumers. *Id.* at 1-2.

<sup>248</sup> *Id.* at 2.

in the litigation and the NCAA's Postseason Rules been struck down. As a result, men's basketball teams have no options remaining with regard to participation in postseason tournaments,<sup>249</sup> and television networks have but one organization with whom to deal in airing men's basketball playoff games. The likelihood of these considerable anticompetitive effects should convince the Agency to challenge the acquisition.

### c. Entry Analysis

Under the Merger Guidelines, “[a] merger is not likely to create or enhance . . . or . . . facilitate” the exercise of market power if entry by new competitors is timely, likely, and sufficient in magnitude to mitigate any anticompetitive effects; such a merger is generally dismissed as raising no antitrust concern.<sup>250</sup> However, antitrust concern may indeed arise when applying this analysis to the case at hand.

Should the NCAA continue to control the only two postseason tournaments with significant histories and followings *and* maintain its Postseason Rules, the likelihood of another postseason tournament being established is extremely slim; the alternative tournament would be left with teams possessing, at most, marginal talent. Such a tournament would have difficulty earning a meaningful profit, and should it manage to make money, indubitably the NCAA would expand its bracket scope to capture it, as the Association has done in the past.<sup>251</sup>

An analysis of probable entry raises a related concern: the probable forced *exit* of competitors in related markets. Once the NCAA is given a “green light” by the government to eliminate competition in the postseason basketball market, it has little incentive not to do the same in the market for preseason tournaments. The Association might eventually replace independent tournaments with events over which the NCAA could exert control and from which it could capture existing profits.<sup>252</sup>

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<sup>249</sup> *Id.*

<sup>250</sup> GUIDELINES, *supra* note 26, at § 3.0.

<sup>251</sup> *See supra* text accompanying notes 54-58.

<sup>252</sup> *See* Letter from Diana Moss, *supra* note 247, at 3.

#### d. Efficiencies

Acknowledging that many mergers and acquisitions generate significant efficiencies and in doing so often benefit the economy, the Merger Guidelines incorporate an examination of such efficiencies into the analytical process.<sup>253</sup> The Agency makes very clear, however, that it will consider only those efficiencies that are “merger-specific” (unlikely to be accomplished in absence of the merger), substantiated (not vague, speculative or unverifiable), and do not result from anticompetitive reductions in output or service.<sup>254</sup>

As previously noted, the likelihood of establishing efficiencies sufficient to justify the acquisition is very low, since the efficiencies asserted by the parties only vaguely refer to leveraging the NCAA’s assets to improve the quality of the NIT.<sup>255</sup> Of particular insight in the assessment of the NCAA’s transaction are the Guidelines’ own words: “Efficiencies almost never justify a merger to monopoly . . . .”<sup>256</sup> The Agency also observed that “those [claimed efficiencies] relating to procurement, management, or capital cost are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.”<sup>257</sup> If the potential adverse competitive effect of the merger is great, as indicated by the earlier stages in the analysis, then the proffered efficiencies that are merger-specific, substantiated, and not the result of anticompetitive action by the merged entities, *if any*, must be even greater in order to carry the day.<sup>258</sup> Such a finding by the Agency is highly improbable.

#### e. Failure and Exiting Assets

The Merger Guidelines provide a narrow exception for a merger that cannot pass muster under sections 1-4, yet is unlikely to create, enhance, or facilitate the exercise of market power because “imminent failure” of one of the firms would result in its assets exiting the relevant market.<sup>259</sup> Since, as previously noted,<sup>260</sup> the

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<sup>253</sup> GUIDELINES, *supra* note 26, at § 4.

<sup>254</sup> *Id.*

<sup>255</sup> *See supra* notes 216-17 and accompanying text.

<sup>256</sup> GUIDELINES, *supra* note 26, at § 4.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at § 5.0.

NIT was operating under a lucrative contract, this exception is unavailable to the Associations.

Pursuant to the analysis laid out in its own Merger Guidelines, the DOJ seems to have ample reason to challenge the settlement under § 7 of the Clayton Act. Should the government decline to challenge the settlement, the acquisition might never be subjected to scrutiny under antitrust law.<sup>261</sup> Yet, to date no such challenge of the settlement by the DOJ has been announced. The following section briefly addresses potential reasons behind the DOJ's failure to challenge the settlement, as well as probable short-term and long-term implications of this oversight.

#### IV. AFTERMATH – REFUSING TO CALL THE FOUL

##### A. Possible Explanations for Inaction

Why has the DOJ not challenged the acquisition of the NIT by the NCAA? Perhaps it is simply because the administrative agency has not yet had time to conduct a thorough analysis of the acquisition under its Guidelines and is reluctant to announce the challenge until it has had the opportunity to do so. Although the Merger Guidelines were designed to reflect the aim of § 7 of the Clayton Act—to halt anticompetitive mergers in their incipiency<sup>262</sup>—the DOJ has no time constraints within which to bring its claim.<sup>263</sup> It is also conceivable that the DOJ has conducted extensive analysis under the Guidelines and has come to the conclusion that the overall effect of the acquisition will *not* be adverse to competition; the analysis of the issues above, however, weigh against that explanation.

There are several other possibilities worthy of succinct mention. First, the excitement generated by March Madness and other college athletic contests may leave federal employees with the same appreciation for the NCAA's role in providing these contests as that held by the rest of the populous—many of whom devote nearly one-twelfth of their lives to watching tournament play each year.<sup>264</sup> As the

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<sup>260</sup> See *supra* notes 217-18 and accompanying text.

<sup>261</sup> See section III(a)(iii), *supra*.

<sup>262</sup> See *supra* note 196; GUIDELINES, *supra* note 26, at § 0.1.

<sup>263</sup> See Robinson, *supra* note 195 (“[T]he government can challenge a transaction at any time, even after it has been consummated.”).

<sup>264</sup> Though hard to imagine at such high levels of government, the strength of this appreciation is considerable amongst those who possess it, even those holding “neutral” positions in our legal



ultimate consumers of the product, those analysts might like the idea of having a single national postseason tournament; the temptation might be great to let the issue slip through the proverbial bureaucratic cracks.

Second, the fact that this particular acquisition was accomplished through a court settlement could also explain the DOJ's silence. As noted in response to concern over the use of settlements as anticompetitive tools in the pharmaceutical industry,<sup>265</sup> the policy in this country has been to favor settlements.<sup>266</sup> Settlements are valued because they conserve "judicial resources and often yield quick resolutions."<sup>267</sup> They can "reduce costs" and even "engender competition."<sup>268</sup> However, the public interest must not be ignored at the settlement table.<sup>269</sup>

In the case at hand, the public interest in promoting competition must be addressed with respect to the NCAA's settlement agreement to acquire the NIT. Because the agreement is a private contract, this can only be accomplished through

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system. The appreciation for college athletics and the NCAA as an organization may even have been an influential factor prompting Justice White, a 1937 All-American selection in football when playing for the University of Colorado, to write a spirited dissent in *Board of Regents*, defending the NCAA's price-fixing television plan because it legitimately "reflect[ed] the NCAA's fundamental policy of preserving amateurism and integrating athletics and education." See Jerry Garau, *The Effect of NCAA v. Board of Regents on the Power of the NCAA to Impose Television Sanctions*, 18 IND. L. REV. 937, 946, 946 n.69 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 125 (1984) (White, J., dissenting)).

<sup>265</sup> Under the Hatch-Waxman Act, the first manufacturer of a generic drug can obtain FDA approval to enter the market for a particular drug before the (branded drug) patent expires. Mark L. Kovner et al., *Applying the Noerr Doctrine to Pharmaceutical Patent Litigation Settlements*, 71 ANTITRUST L.J. 609, 609 (2003). Such an applicant can trigger patent litigation by filing a form with the FDA claiming the branded drug's patent is invalid or is not infringed by the generic drug. *Id.* Sometimes that litigation is settled in what is seen as the buying off of generic firms by the patent holder in exchange for a share of the "monopoly rents" from the patented product. *Id.* at 610.

<sup>266</sup> Sheila F. Anthony, Comm'r, Fed. Trade Comm'n, *Riddles and Lessons from the Prescription Drug Wars: Antitrust Implications of Certain Types of Agreements Involving Intellectual Property* (June 1, 2000), <http://www.ftc.gov/speeches/anthony/sfip000601.htm> (last visited Oct. 2, 2006).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

judicial review of the purchase agreement, which in turn requires the action of the enforcing administrative agencies.<sup>270</sup>

## **B. Implications**

The NCAA and the MIBA leaders have hailed the acquisition as “a victory without defeat,” stressing that the purchase will result in a stronger NIT with its tradition and heritage safely preserved, and providing the NCAA with the “opportunity to better . . . build on the status of the . . . NIT events.”<sup>271</sup> When a reporter questioned the intent behind the purchase and noted the irony in that, “instead of killing [the NIT,] . . . [the NCAA] has just bought it,” NYU President John Sexton responded sharply on behalf of the MIBA, saying “I’m very allergic to being judgmental.”<sup>272</sup>

Those antitrust scholars not sharing President Sexton’s allergy must, however, look beyond the glorious plans for the NIT broadcast by the Associations—one that now controls its sole competitor and the other that just accepted a huge check in exchange for its interest in the business. The consequences that could realistically be expected to result from this shift of control, both in the next few years and beyond, must be examined.

### **1. Short Term**

It is safe to assume that the NCAA will initiate no great change in the operation of the postseason NIT tournament in the next several years, although the tournaments will be rescheduled to avoid televising conflicts<sup>273</sup> and the NCAA might

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<sup>270</sup> See section IV(a)(iii), *supra*.

<sup>271</sup> These comments were made by NYU President John Sexton on behalf of the MIBA and the NCAA President Myles Brand. THE NCAA NEWS, *supra* note 1.

<sup>272</sup> Lederman, *supra* note 189.

<sup>273</sup> Reg P. Wydeven, *NCAA skirts monopoly accusation with \$40M NIT buyout*, APPLETON POST-CRESCENT, Aug. 27, 2005, at 12.

revisit its “two-in-four rule” as a result of the changing competitive scene.<sup>274</sup> The lack of any new entrants to this monopoly market is also predictable.<sup>275</sup>

Several factors support this conclusion: (1) ESPN’s contract with the MIBA covers the tournament through 2010,<sup>276</sup> and some negotiation regarding the preservation of the NIT was probably necessary to ensure the transition of legal ownership; (2) the NCAA made numerous public statements indicating its intent to preserve the NIT<sup>277</sup> and would not want the public to question the Association’s integrity; and (3) eliminating the postseason NIT in the near future might create the appearance that the NCAA indeed intended to eliminate its competition by acquiring the tournament, and thus could prompt the DOJ to challenge the acquisition under § 7 of the Clayton Act. Hence, the NCAA has great motivation to continue operating the postseason NIT running, *for now*.

## 2. Long Term

In later years, however, the NCAA might change its course of action. Once the ESPN contract has expired, sufficient time has passed to dull the public’s memory, and the MIBA has long since dissolved,<sup>278</sup> the NCAA will have shed some of its prior incentives to continue operating the postseason NIT. A new ESPN contract for television and marketing rights for the *preseason* NIT could be renegotiated without drawing much attention. Well-publicized, “newly discovered” benefits to all involved, such as reduced operating expenses on the part of the NCAA and the excitement of having a “single national championship,”<sup>279</sup> could dispel the public’s suspicion of the NCAA’s credibility regarding its prior assertions of an intent to preserve the NIT. Finally, because the MIBA would no longer exist, the acquisition could not easily be rescinded at that point. Further, the tournament

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<sup>274</sup> THE NCAA NEWS, *supra* note 1. The “two-in-four rule” prohibits Division I teams from participation in more than two exempted events in any four year period (the preseason NIT is one such exempted event). *Id.*

<sup>275</sup> See section III(b)(ii)(3), *supra*.

<sup>276</sup> See *supra* note 111 and accompanying text.

<sup>277</sup> See, e.g., text accompanying note 271.

<sup>278</sup> The MIBA’s dissolution as a basketball entity soon after consummation of the transaction is currently expected to occur. Katz, *supra* note 106.

<sup>279</sup> This assertion should sound familiar to the reader. See *supra* text accompanying note 155.

could not be easily sold to anyone else, as an operator of a postseason tournament would still be subject to the NCAA's Postseason Rules, which drastically reduce the potential profitability of tournament operation.<sup>280</sup> Thus, any later challenge to the acquisition might lack a suitable remedy.

The NCAA's acquisition of the NIT may very well have sounded the death-knell for its postseason tournament. Whether that possibility is an improper "judgmental" response or a prophetic vision can only be revealed by the impartial verdict of the passage of time.

## V. CONCLUSION – BOX SCORES & POST GAME HIGHLIGHTS

From its competitive maneuvers alleged to have begun in the 1940s<sup>281</sup> to the acquisition consummated not long ago, the NCAA has managed to oust its long-time rival, the MIBA, in the arena of postseason Division I men's basketball tournaments. Whether it chooses to maintain the postseason NIT indefinitely as a "loser's bracket" of sorts, or to eliminate it entirely, one thing is certain: for the time being, and likely forever if the DOJ does not challenge the acquisition, \$56.5 million has rid the NCAA of the only obstacle in its path to complete monopolization of the postseason tournament market. That prospect, along with the lucrative television contract inherited by the Association,<sup>282</sup> renders this transaction a decisive "W" for the NCAA.

The MIBA also goes home with a win, taking the \$56.5 million, relinquishing the responsibility of running a tournament that brings in only a small fraction of that amount on an annual basis, and eliminating the risk of losing the litigation and being forced to absorb its enormous cost.

The only potential losers in this game are certain NCAA member schools' basketball teams that might prefer a choice of postseason tournaments, and consumers of the product, including fans, broadcasters and marketers of the tournaments, who face potentially higher prices with the NCAA in complete control of the market.

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<sup>280</sup> See section III(b)(ii)(3), *supra*.

<sup>281</sup> See *supra* note 53 and accompanying text.

<sup>282</sup> See *supra* note 111 and accompanying text.

Though properly subject to review under three different antitrust laws,<sup>283</sup> the result of this transaction—a completely monopolized market with significant entry barriers—is in direct opposition to the fundamental principle that underlies each law: prevention of the acquisition or exercise of market power that would eradicate the inherent benefits of competitive markets to the detriment of consumers. To say that this outcome reeks of irony is an understatement indeed.

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<sup>283</sup> See *supra* text accompanying notes 194-96.