OLIVER V. NCAA: THROWING A CONTRACTUAL CURVEBALL AT THE NCAA'S "VEIL OF AMATEURISM"[†]

T. Matthew Lockhart[*]

I. INTRODUCING *OLIVER V. NCAA*

"It's not an easy job, picking nits this tiny, but nobody is up to the task like the NCAA."

—Sports Columnist, Rick Reilly[1]

Nit-picking occurs every day. Taxes must be filed a certain way. Barcodes must be wrinkle-free when swiping them through the self-checkout line. And DMV clerks will send you home without hesitation for not bringing enough forms of identification.

As noted sports columnist Rick Reilly points out, the National

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[†] "Veil of Amateurism" is a phrase coined by Amy Christian McCormick & Robert A. McCormick in their article, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008).

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[1] Rick Reilly, *Corrupting Our Utes*, SPORTS ILLUSTRATED, Aug. 11, 2003, at 154, *available at* http://sportsillustrated.cnn.com/inside_game/magazine/life_of_reilly/ (discussing NCAA violations allegedly committed by former Utah basketball coach Rick Majerus, which included buying a player dinner from a deli and watching fifteen minutes of a pickup basketball game he was not supposed to watch).

Collegiate Athletic Association ("NCAA")[2] is no different. Through its 427-page manual, the NCAA regulates just about everything.[3] For instance, if a student-athlete plays in an unauthorized five-on-five basketball tournament, he or she runs the risk of being suspended by the NCAA.[4] One former college baseball player was even told his career was over after writing a book about how he survived brain cancer.[5] The reason? "[H]is name was attached to a 'corporate product.'"[6]

The case of Andrew "Andy" Oliver is no different. Just hours before he was to take the mound in Oklahoma State's regional baseball championship game, Oliver was "'interrogated'" and declared ineligible.[7] The accusation? Violation of NCAA Bylaw 12.3.2.1, which prohibits lawyers from being present during contract negotiations with a professional organization if the student-athlete wishes to preserve his or her collegiate eligibility while deciding between accepting a professional contract or continuing as an amateur athlete.[8] As a general rule, the NCAA does not allow players to hire (orally or in writing) an agent "for the purpose of marketing his or her athletics ability or reputation in that sport."[9] If an agent[10] is hired, the athlete is deemed ineligible.[11] NCAA regulations do provide for an attorney exception by allowing professional prospects to secure advice from lawyers concerning professional sports contracts, but the

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[2] The NCAA is a voluntary collegiate athletic organization formed to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NAT'L COLLEGIATE ATHLETIC ASS'N, 2008-2009 NCAA DIVISION I MANUAL, Const. art. 1.3.1 (2008), *available at* http://www.ncaapublications.com/Uploads/PDF/Division_1_Manual_2008-09e9e568a1-c269-4423-9ca5-16d6827c16bc.pdf [hereinafter NCAA MANUAL].

[3] *See id*.; s*ee also* T. Matthew Lockhart, *The NCAA Should Adopt a Uniform Student-Athlete Discipline Policy*, 16 UCLA ENT. L. REV. 119, 123 (2009). The Author would like to note that in his previous article, *The NCAA Should Adopt a Uniform Student-Athlete Discipline Policy*, he advocates that the NCAA should enact legislation to deal with troubled athletes. Despite this call for the NCAA to exercise more power, this Author believes the NCAA regulates arbitrarily in other areas.

[4] Heather A. Dinch, *Two Terps Suspended for Opener; Gist, Milbourne to Sit Because They Played in Unapproved Event; College Basketball Preview*, THE BALTIMORE SUN, Nov. 7, 2007, at 3E. Two University of Maryland basketball players were suspended for one game by the NCAA for participating in an unsanctioned five-on-five basketball tournament, which is in violation of NCAA bylaw 14.7.2.

[5] Jeremy Bloom, *Show Us the Money*, N.Y. TIMES, Aug. 1, 2003, at A21 (referring to the book, *You Don't Know Where I've Been*, written by former University of Oklahoma third baseman Aaron Adair). As Adair wrote on his web site, "I have surrived [sic] brain cancer, radiation, a mysterious stomach disease, and numerous other situations, physcial [sic] and emotional. The good Lord wants me to help you with your situation. I was an athlete at the University of Oklahoma until I wrote a book and got it published this past spring. My book 'You Don't Know Where I've Been' prohibited me from playing since I was making money off of it." Changing Lives Forever, http://www.aaronadair.com (last visited Feb. 23, 2010).

[6] Bloom, *supra* note 5, at A21.

[7] Liz Mullen*, Pitcher's Father, Lawyer Decry Tactics of NCAA, Oklahoma St.*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, July 21, 2008, at 14, *available at* http://www.sportsbusinessjournal.com/article/59593 [hereinafter *Decry Tactics*].

[8] *Id.*; NCAA MANUAL, *supra* note 2, Bylaw 12.3.2.1, at 69. Under NCAA regulations, lawyers can be hired to review a proposed contract. This bylaw, however, revokes a student-athlete's eligibility if the lawyer negotiates the contract or is present during the negotiation of the contract. *Id.*

[9] NCAA MANUAL, *supra* note 2, Bylaw 12.3.1, at 68.

[10] An "agent" here refers to any individual, including, but not limited to, a lawyer, who markets a person's athletics ability or reputation in that sport.

[11] NCAA MANUAL, *supra* note 2, Bylaw 12.3.1, at 68.

lawyer may not be present during the actual negotiation or the student-athlete will compromise his or her eligibility.[12] To support these rules, the NCAA stands behind its goal of "retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports."[13]

Following Oliver's senior year of high school in 2006, he was drafted in the seventeenth round of the Major League Baseball Amateur Draft by the Minnesota Twins. Near the end of the summer, a representative of the Twins came to the Oliver home to discuss a contract offer.[14] Present at the visit was Oliver's lawyer, Tim Baratta, who was retained to act as his attorney and sports advisor.[15] Mr. Barratta's presence at the Oliver home during contract negotiations triggered the NCAA violation.[16] When the NCAA and Oklahoma State learned of this, Oliver was ruled ineligible to participate in college athletics.[17] In response, Oliver filed a lawsuit asking an Ohio court of common pleas[18] to, among other specific claims, declare Bylaws 12.3.2.1 and 19.7[19] arbitrary and capricious and to enter a permanent injunction to allow him to participate in collegiate athletics again.[20] Ohio Common Pleas Judge Tygh M. Tone granted Oliver's request against the

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[12] NCAA MANUAL, *supra* note 2, Bylaws 12.3.2 and 12.3.2.1, at 69.

[13] NCAA MANUAL, *supra* note 2, Const. art. 1.3.1, at 1.

[14] First Amended Complaint ¶ 23, Oliver v. NCAA, No. 2008-CV-0762 (Ohio Ct. Com. Pl., Dec. 17, 2008) (on file with author) [hereinafter Oliver Complaint].

[15] *Id.* ¶ 11.

[16] Mr. Barratta also allegedly spoke with a Twins representative on the phone. Letter from Scott Williams, Assoc. Athletic Dir., Okla. State Univ., to Jennifer Henderson, Dir. of Membership Servs./Student-Athlete Reinstatement, NCAA (Oct. 24, 2008) (on file with author) [hereinafter Williams Letter to NCAA].

[17] Liz Mullen, *OSU P Andy Oliver Files Suit Against NCAA, Former Advisor*, STREET & SMITH'S SPORTSBUSINESS DAILY, July 2, 2008, *available at* https://www.sportsbusinessdaily.com/article/122046 [hereinafter *Oliver Files Suit*]. When a member institution of the NCAA discovers that a player has violated NCAA rules, the institution must declare the student-athlete ineligible for intercollegiate competition. The institution can ask for reinstatement of a student-athlete's eligibility by sending a request to the NCAA. NCAA, Overview of NCAA Bylaws Governing Athlete Agents, (2010), http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/legislation+and+governance/eligibility+and+recruiting/agents+and+amateurism/uaaa/overview.html. Working hand-in-hand with the NCAA puts institutions in tough spots, as was the case in Andrew Oliver's situation. When the NCAA issued a public statement that Oklahoma State, not the NCAA, was responsible for the determination of Oliver's ineligibility, Oklahoma State athletic director, Mike Holder, wrote the NCAA a forceful letter. "[T]his release shifted all blame to the University when the NCAA initiated the investigation into this matter." Letter from Mike Holder, Athletic Dir., Okla. State Univ., to C. Dennis Cryder, Sr. Vice President of Branding and Commc'ns, NCAA (July 23, 2008) (on file with author).

[18] Oliver, an Erie County, Ohio, resident, obtained jurisdiction in Ohio against the NCAA because it does business in Ohio and has members domiciled in Ohio. Oliver Complaint, *supra* note 14, ¶¶ 1-2. As an unincorporated association, the NCAA is a citizen of every state in which it has a member. So for the NCAA, that means all fifty states. *See id.*

[19] Under current NCAA rules, if a student-athlete successfully obtains a restraining order or injunction against his or her institution or the NCAA that is ultimately invalidated, the institution faces stiff penalties if it allowed the student-athlete to participate in athletic competition as a result of the initial restraining order or injunction. This is the "Restitution Rule" that encompasses Bylaw 19.7. For an in-depth discussion of Bylaw 19.7, see *infra* Part II.A.2 and note 57.

[20] Oliver Complaint, *supra* note 14, ¶¶ 95-106. Oliver also sued the NCAA for breach of contract and tortious interference with contract. *Id.* ¶ 99.

backdrop of years of judicial deference toward the NCAA.[21]

As expected, the NCAA was not about to let this decision have nationwide implications. Just before the parties' October 19, 2009, trial date for Oliver's breach of contract and tortious interference with contract claims,[22] the NCAA paid Andy Oliver $750,000 to settle the lawsuit. By doing this, Judge Tone's Order was vacated, thereby allowing the NCAA to continue to enforce its regulations.[23] Before the settlement, the NCAA was adamant about its position that Bylaws 12.3.2.1 and 19.7 are not arbitrary and capricious in light of the potential impact of the *Oliver* decision.[24] The NCAA feared the lower court's decision would "'transform this case into a national "class action" affecting the rights of over 1,200 [NCAA] member institutions and hundreds of thousands of student-athletes,'" but it continued advising student-athletes that the judge's ruling is narrow and the no-attorney negotiation rule still applies.[25] However, in a post-decision Order

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[21] Oliver v. NCAA, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009); *see also* Part II.B.1 *infra*, and Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 119 (2008) (describing years of judicial deference toward the NCAA).

[22] Katie Thomas, *Appeals Court Blocks N.C.A.A. Rule Barring Lawyers*, N.Y. TIMES, Apr. 2, 2009, at B16 [hereinafter *Appeals Court Blocks NCAA*] (an appeal at this stage was premature because the *Oliver* case was not yet complete, according to a ruling from the Ohio Court of Appeals).

[23] Liz Mullen, *NCAA: We'll Still Enforce Rule That Drew Suit*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Oct. 19, 2009, at 28, *available at* http://www.sportsbusinessjournal.com/article/63861 [hereinafter *Still Enforce Rule*].

[24] *See Appeals Court Blocks NCAA*, *supra* note 22. An NCAA spokesman said the NCAA was "'disappointed that we have to wait to appeal, but we still intend to do so.'" *Id.*

[25] *Id.* The NCAA characterized the "sheer scope of the trial Court's order" as "no less than breathtaking." Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion to Dismiss at 11, Oliver v. NCAA, No. E-09-007 (Ohio Ct. App. Mar. 2, 2009) (on file with author) [hereinafter NCAA's Opposition]; *see also* Plaintiff's Notice of Additional Evidence in Support of his Supplemental Motion for Contempt with Request for Evidentiary Hearing at 23, Oliver v. NCAA, No. 2008-CV-0762 (Ohio Ct. Com. Pl. Mar. 12, 2009) (on file with author) (quoting a May 11, 2009 memo from the NCAA to student-athletes).

> Am I permitted to have an advisor?
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> YES, but only if your advisor acts in accordance with NCAA agent legislation. That legislation allows you and your parents to receive advice from a lawyer concerning a proposed professional sports contract, provided that individual does not represent you directly in negotiating the contract. It also allows you to seek advice and counsel from an individual (even a nonlawyer agent), so long as that individual does not market you to or have direct communications, on your behalf, with MLB clubs. The most important point to remember is that it is impermissible for you to allow your advisor to talk to clubs about you. If you do, the advisor will be considered an agent and you will have jeopardized your eligibility at NCAA schools. [Note: February 12, 2009, in a case entitled Oliver v. NCAA, an Ohio trial-court judge held Bylaw 12.3.2.1 was invalid under Ohio law and as a result a student-athlete was not ineligible if an attorney is present during discussions of a contract offer with a professional team. The NCAA intends to appeal the decision in the Oliver case.]
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> …
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> Is my advisor allowed to speak with teams on my behalf?

issued by Judge Tone, the NCAA was warned the rule was void nationwide, and any attempt to enforce it upon student-athletes could result in contempt of court.[26] Thus, the NCAA was left with two options—hope for success upon appeal or settle the case and vacate the Order. It chose the latter.

Today, the NCAA continues to enforce Bylaw 12.3.2.1. However, the fight over the legality of the bylaw is not over as some in the legal community believe the *Oliver* case opened the door for future challenges to NCAA bylaws by student-athletes.[27] "'Another court can come to exactly the same conclusion and hold the policy unlawful, and the fact that the decision has been vacated does not make its reasoning any less persuasive,'" sports attorney Jeffrey Kessler told *Street & Smith's SportsBusiness Journal*.[28]

Thus, the purpose of this Article is to navigate the *Oliver v. NCAA* decision in hopes of predicting what the future will hold for athletes challenging the NCAA. As one can imagine, this case is like any other lawsuit. It is riddled with factual sidebars,[29] many of which matter a great deal to the parties involved. However, the idea of this Article is not to get tangled in minutiae.[30] For the sake of keeping the discussion in this Article about the NCAA regulations and legal decisions in *Oliver v. NCAA* and the long-term legal impact of this case, the author is forced to keep the facts and

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> NO. You cannot allow your advisor to have conversations with MLB clubs on your behalf. This means that your advisor cannot discuss your draft status with any club. Your advisor cannot discuss your signability with any club. You advisor [sic] cannot arrange tryouts for you with any club. Your advisor cannot speak with any club on your behalf for any reason. Also, keep in mind that it is likely that you will have to accept responsibility for the actions your advisor takes on your behalf. It is not sufficient to simply state that you did not know what your advisor had done for you.

Id.

[26] Judgment Entry at 2, Oliver v. NCAA, No. 2008-CV-0762, (Ohio Ct. Com. Pl. May 6, 2009) (on file with author) [hereinafter Contempt Order].

> Contrary to Defendant's rhetoric, the February entry did not presume to void an NCAA rule, it did void an NCAA rule. In that respect, discussions of how to proceed without Bylaw 12.3.2.1 should be discussed by the NCAA and its member institutions. Make no mistake, however, that wherever the NCAA is located, the ruling of this Court should be currently maintained and Bylaw 12.3.2.1 is void, not presumed void, until and unless an appellate review would determine otherwise.

Id. (internal citation omitted).

[27] *Still Enforce Rule*, *supra* note 23.

[28] *Id.*

[29] "Factual sidebars" in this context means that just like any lawsuit, this one has many background facts, such as who reported Oliver to the NCAA, why they reported him, and so on. These facts are important to the parties, but add little to the analysis of the future legal implications of the *Oliver v. NCAA* decision.

[30] As United States District Court Judge Jack Zouhary wrote, "[t]his case is reminiscent of an Okie tornado which gathers speed and heads in one direction, only to abruptly make a turn and speed toward another target." Order, Oliver v. Baratta, No. 3:08-CV-1734, (N. D. Ohio Nov. 17, 2008) (on file with author).

legal procedure of the case straightforward.

Now that the basic factual backdrop has been presented, this Article will move into Part II, which discusses the NCAA regulations at issue and examines Andrew Oliver's claims in light of years of judicial deference to the NCAA. Against this backdrop, the *Oliver v. NCAA* decision will be analyzed, as it opened up the possibility that NCAA bylaws can be attacked under a third-party contract theory.

Finally, in Part III of this Article, the focus will turn to the future. In light of the settlement and Judge Tone's persuasive reasoning, what happens next?[31] Can amateur athletes, mainly baseball players, hire attorneys to negotiate professional contracts? And more importantly will *Oliver v. NCAA* help chip away the years of judicial deference courts have provided the NCAA?

II. EXAMINING THE ANDREW OLIVER STORY

"'The NCAA tries to keep these kids down with a big thumb while they take in revenues of $600M a year as a tax exempt entity.'"

—Andrew Oliver's Attorney, Richard Johnson[32]

To appreciate the importance of the *Oliver v. NCAA* decision, it is critical to understand the bylaws at issue. For organizational purposes, this Part of the Article will first describe the NCAA bylaws at play, thereby making it easier to follow the legal arguments and the ultimate decision by the Erie County Court of Common Pleas.

A. NCAA Regulations: "Who is the NCAA Trying to Protect?"

"*When looking at these regulations, the unavoidable question arises: who is the NCAA trying to protect?"*

—Law Professor, Richard Karcher[33]

This important question provides a starting point when analyzing the regulations at issue in *Oliver v. NCAA*—Bylaws 12.3.2.1 and 19.7.

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[31] Before the settlement, the NCAA asked itself this very question. "The trial court's ruling has left this critical question open to debate and speculation among NCAA members, their hundreds of thousands of student-athletes and potential student-athletes, as well as the national media. . . . Left to answer questions the trial court itself refused to clarify (will the Order effect 'Ohio members, Oklahoma members, all institutions?'), the NCAA literally has no effective way to guide its members." NCAA's Opposition, *supra* note 25, at 11.

[32] Liz Mullen, *Judge Voids NCAA Ban on Lawyers Aiding in Pro Contract Talks*, STREET & SMITH'S SPORTSBUSINESS DAILY, Mar. 9, 2009, at 12, *available at* http://www.sportsbusinessdaily.com/article/127737.

[33] Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?,* 7 VAND. J. ENT. L. & PRAC. 215, 215 (2005) (discussing what is known as the NCAA's "no-agent" rule).

1. NCAA Bylaw 12.3.2.1[34]

Florida Coastal School of Law Professor Richard Karcher was a visionary. His 2005 article, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, presented the basic question that would be at the center of *Oliver v. NCAA* four years later: "[W]ho is the NCAA trying to protect?"[35] From the perspective of the NCAA, the question is easy and absolute: the student-athlete. The NCAA's *intention* for many of the regulations in its bulky manual is to "retain a clear line of demarcation between intercollegiate athletics and professional sports."[36] However, intentions do not always translate to the actual intended results.

For all sports, the NCAA has a general policy prohibiting the use of agents[37]: "An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport."[38]

If a player enters into an agreement for representation in future professional sports negotiations, he or she will be deemed ineligible.[39] Moreover, players also risk the possibility of being ruled ineligible if they accept benefits from an agent.[40] This set of regulations has become known as the "no-agent" rule, a rule widely discussed in academic circles.[41] The implication of this rule is that a student-athlete may not hire an agent until (1) he or she has exhausted his or her eligibility, or (2) he or she is ready to forgo his or her remaining eligibility. While the intention is to protect the student-athlete, the effect reaches further. As was written in the *Harvard Law Review*, the no-agent rule "restrain[s] player mobility by discouraging athletes from testing the professional players' markets before their college eligibility expires."[42]

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> 12.3.2.1 Presence of a Lawyer at Negotiations. A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.

NCAA MANUAL, *supra* note 2, Bylaw 12.3.2.1, at 69.

[35] *See* Karcher, *supra* note 33, at 215.

[36] NCAA MANUAL, *supra* note 2, Const. art. 1.3.1, at 1.

[37] NCAA MANUAL, *supra* note 2, Bylaw 12.3, at 68 (Use of Agents section).

[38] NCAA MANUAL, *supra* note 2, Bylaw 12.3.1, at 68 (General Rule).

[39] NCAA MANUAL, *supra* note 2, Bylaw 12.3.1.1, at 69 (Representation for Future Negotiations).

[40] NCAA MANUAL, *supra* note 2, Bylaw 12.3.1.2, at 69 (Benefits from Prospective Agents).

[41] *See generally* Karcher, *supra* note 33; Thomas R. Kobin, *The National Collegiate Athlete Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483 (1994); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules,* 105 HARV. L. REV. 1299 (1992); Jan Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting*, 67 N.D. L. REV. 215 (1991).

[42] Note, *supra* note 41, at 1300.

There is one small exception to the no-agent rule, and it comes into play in *Oliver v. NCAA*. Bylaw 12.3.2, titled Legal Counsel, allows players to secure "advice from a lawyer concerning a proposed professional sports contract."[43] However, there is one important caveat: if the athlete wishes to preserve his or her college eligibility while considering a professional contract, the lawyer may not represent the individual in negotiations for such a contract (or even be present during negotiations).[44] And the NCAA defines the word negotiate with broad overtones:

> A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussion is considered representation by an agent.[45]

This exception is unique to baseball, as opposed to basketball and football, for two key reasons. First, unlike the National Basketball Association and National Football League drafts, the Major League Baseball draft occurs during the college season.[46] And unlike the NBA or NFL, college baseball players can be drafted without losing their eligibility.[47] Therefore, specific to baseball, the no-agent rule forces student-athletes to toe the line between negotiating a contract and maintaining their eligibility.[48] The second unique situation, unlike basketball and football, is that players can be drafted out of high school. This presents the unique dilemma Andrew Oliver encountered.

Does a high school baseball player sign the professional contract, or does he opt for college? And who helps make this decision? He can hire an attorney with whom to discuss the proposed contract, but the attorney is extremely limited in what he or she can do. As NCAA Bylaw 12.3.2.1 currently reads, an attorney, hired by an athlete to secure advice regarding a professional sports contract, cannot even be in the same room with his client when the professional sports organization is attempting to plead its case for why the athlete should sign the contract.

As Professor Karcher has argued, "[i]f the NCAA seeks to protect the amateur athlete, it would seemingly be in the athlete's best interest to have competent representation to deal with professional sports organizations

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[43] NCAA MANUAL, *supra* note 2, Bylaw 12.3.2, at 69 (Legal Counsel).

[44] *Id.*

[45] NCAA MANUAL, *supra* note 2, Bylaws 12.3.2–12.3.2.1, at 69.

[46] Katie Thomas, *Baseball Star Challenges N.C.A.A. Rule*, N.Y. TIMES, Oct. 4, 2008, at D1 [hereinafter *Star Challenges*].

[47] Letter from Rachel Newman Baker, Dir. of Agent, Gambling and Amateurism Activities, NCAA, to Baseball Student-Athletes with Remaining Eligibility (Oct. 2, 2007) (on file with author) [hereinafter NCAA's MLB Draft Letter].

[48] John Seewer, *College Baseball Star Suing NCAA in Ohio Court*, ASSOCIATED PRESS, Jan. 6, 2009.

and the complex business and legal issues that surround the world of professional sports."[49]

In Oliver's situation, his attorney placed a phone call to the Minnesota Twins, who had drafted Andrew in the seventeenth round of the 2006 draft, and sat in on an in-house visit during which the Minnesota Twins offered his client nearly $400,000.[50] To recap, a high school player who is drafted cannot have an attorney negotiate over hundreds of thousands of dollars if he wishes to preserve his future collegiate eligibility while deciding whether to sign the contract. Instead, only family members and the athletes themselves can negotiate life-changing contracts with professional organizations.[51]

In light of this rule, the 18-year-old Oliver, and his father, who is a part-time truck driver, should have acted alone in negotiating the big money contract with the Minnesota Twins.[52] For many high school and college players, the contract's value is much more than $400,000, which creates even more reason for a seasoned attorney to be involved in the negotiation process.[53] As can be imagined, Bylaw 12.3.2.1 is often violated. "'Baseball underestimates in general the magnitude of what kids are going through at this age,'" said former major leaguer A. J. Hinch. "'You're 18 to 22 and you're talking about $7 million . . . .'"[54] In turn, "'[v]irtually every player has an agent -- call them a lawyer, call them an advisor, there's no difference,'" a Major League Baseball executive told the *New York Times* on condition of anonymity.[55] Oliver's Cleveland, Ohio, based attorney, Richard Johnson, points to the bigger issue: "'[The] idea that you can restrain somebody's right to counsel is preposterous . . . .'"[56] The rule forces an attorney to either go along with the NCAA regulation and abandon his or her client at a critical time, or competently represent his or her client, thereby running the risk of jeopardizing the student-athlete's collegiate eligibility.

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[49] Karcher, *supra* note 33, at 215.

[50] Williams Letter to NCAA, *supra* note 16; *Oliver Files Suit*, *supra* note 17. Oliver turned down the nearly $400,000 signing bonus, opting to pitch collegiately at Oklahoma State. *Id.*

[51] The NCAA does allow institutions (if they wish) to create professional sports counseling panels to help student-athletes already enrolled in college navigate the professional sports business. NCAA MANUAL, *supra* note 2, Bylaws 12.3.4, at 69; *see also* Karcher, *supra* note 33, at 218-19. However, high school players who are drafted, or anticipate being drafted, are not covered under this rule and do not have access to these panels. *Id.* at 219.

[52] *Star Challenges*, *supra* note 46.

[53] Karcher, *supra* note 33, at 220.

[54] *Star Challenges*, *supra* note 46.

[55] *Id.*

[56] *Id.*

2. NCAA Bylaw 19.7 (Formerly 19.8)[57]

Under current NCAA rules, if a student-athlete successfully obtains a restraining order or injunction against his or her institution or the NCAA that is ultimately invalidated, the institution faces stiff penalties if it allowed the student-athlete to participate in athletic competition as a result of the initial restraining order or injunction.[58] This is known as the "Restitution

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> 19.7 Restitution
> If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions: (*Revised*: *11/1/07 effective 8/1/08)*
> (a) Require that individual records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
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> (b) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
>
> (c) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;
>
> (d) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
>
> (e) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
>
> (f) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;
>
> (g) Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;
>
> (h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Leadership Council concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and (*Revised: 11/1/07 effective 8/1/08*)
>
> (i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions. (*Revised: 4/26/01 effective 8/1/01*)

NCAA MANUAL, *supra* note 2, Bylaw 19.7, at 302.

[58] *Id.*

Rule."[59]

Injunctions are important in the student-athlete context. Due to the short career of college athletes in general, an injunction is often the only effective remedy an athlete can have.[60] However, even if a student-athlete obtains an injunction, effectively reinstating his or her eligibility, institutions are still weary of retribution should the court order ultimately be found unenforceable; and for good reason. The penalties are vast and harsh. Team records can be vacated, championship trophies rescinded, money taken away (in the form of television receipts), and monetary penalties imposed.[61] With such forceful teeth, it is easy to see why the NCAA poses a tough challenge—not only to student-athletes, but to member institutions as well.[62] It can leave institutions with the choice of honoring a student-athlete's initial legal rights (i.e., an injunction) or refusing to recognize the court order, thereby preserving its athletic teams' future status should the injunctive rights be found unenforceable by a higher court.

Some have opined that the Restitution Rule itself pushes courts toward ignoring a student-athlete's legal rights (i.e., granting an injunction) because of the fear that more harm could be placed upon the institution if the injunction were to be overruled by a higher court.[63] Hence, the reason one writer has called the Restitution Rule the "NCAA's Big Stick."[64]

B. It's More than Balls and Strikes

"Courts have wrongly deferred to the amateurism bylaws and to the NCAA's definition of the product of intercollegiate athletics. The NCAA's claim of the need to promote amateurism is merely a pretense; the NCAA bylaws themselves do not adhere to a pure notion of amateurism . . . ."

—Anonymous, Harvard Law Review[65]

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[59] *Id.* For a more in-depth discussion on the Restitution Rule, see Gordon E. Gouevia, *Making a Mountain out of a Mogul:* Jeremy Bloom v. NCAA *and the Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22 (2003); *see also* Alain Lapter, Bloom v. NCAA: *A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS LAW. J. 255, 268-69 (2005).

[60] Lapter, *supra* note 59, at 268.

[61] NCAA MANUAL, *supra* note 2, Bylaw 19.7, at 302 (§§ 19.7(b)-(e), (h), (i)).

[62] Gouevia, *supra* note 59, at 24 ("[T]he potential for such severe sanctions under Bylaw 19.8 discourages institutions from adhering to injunctions against the NCAA, and, as [Jeremy] Bloom's case has revealed, may discourage courts from issuing injunctions against an institution at all.").

[63] *Id.*

[64] Lapter, *supra* note 59, at 268-69.

[65] Note, *supra* note 41, at 1318 (explaining why NCAA rules should be given a "meaningful rule of reason analysis" to invalidate those regulations that equate to an unreasonable restraint of trade).

1. Judicial Deference

It is not easy to sue the NCAA. The organization fights at every legal twist and turn, spending major money to defend its regulations.[66] Many times, it is even harder to win. For years, courts have provided judicial deference to NCAA rules, despite numerous attacks upon the regulations in the NCAA's 427-page manual. Two of the main attacks have been in the way of due process[67] and antitrust challenges.[68] However, these have been unsuccessful. In *NCAA v. Tarkanian*, the United States Supreme Court held that the NCAA need not provide constitutional due process protections because NCAA rules do not invoke state action.[69] Attempts by states to regulate the NCAA have failed in the name of infringing upon interstate commerce.[70] And the NCAA's perceived advancement of amateurism has allowed it to avoid liability for its bylaws regarding limited compensation.[71] Despite small victories against the NCAA—courts have struck down regulations that restricted television plans, coaches' earnings, and participation in tournaments[72]—courts have provided judicial deference to the NCAA over the years in the name of concepts such as private association and amateurism.[73]

In fact, the NCAA's no-agent rule is no stranger to litigation. It has been upheld on the premise that the no-agent rule does not have an anticompetitive effect and is in furtherance of the idea of amateurism. In *Banks v. NCAA*, the Seventh Circuit Court of Appeals reasoned as follows:

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[66] Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 109 (2007).

[67] Mitten & Davis, *supra* note 21, at 125.

[68] *See generally* Note, *supra* note 41.

[69] NCAA v. Tarkanian, 488 U.S. 179, 199 (1988); *see also* Lockhart, *supra* note 3, at 129 (describing *Tarkanian* as the NCAA's "legal anchor"). However,

> [i[n January, 2007, the United States Court of Appeals for the Second Circuit court held, in Cohane v. NCAA, that the NCAA could be deemed a state actor if allegations in a coach's complaint were proven that a state university colluded with and effected the resignation of the coach in order to 'placate the NCAA.' The Supreme Court denied certiorari. The Second Circuit in Cohane distinguished Tarkanian on the narrow ground that in Tarkanian the public university and the NCAA acted more like adversaries than joint participants in the coach's suspension.

See Kadence A. Otto and Krisal S. Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORTS 243, 244-245 (2008) (citing Cohane v. NCAA, 215 Fed. Appx. 13 (2d Cir. 2007)).

[70] NCAA v. Miller, 10 F.3d 633, 638 (9th Cir. 1993); *see also* Gary R. Roberts, *Resolution of Disputes in Intercollegiate Athletics*, 35 VAL. U. L. REV. 431, 433-434 (2001).

[71] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984). The Supreme Court upheld the NCAA's limited compensation bylaw, in light of anti-trust laws, because it advanced amateurism. *Id.; see also* Note, *supra* note 41, at 1301.

[72] Dennie, *supra* note 66, at 110 nn. 95-97 (describing a series of cases in which courts found certain NCAA regulations violated the Sherman Antitrust Act as unreasonable restraints on trade).

[73] Mitten & Davis, *supra* note 21, at 120.

> The involvement of sports agents in NCAA football would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a 'minor league' farm system out of college football that would operate solely to improve players' skills for professional football in the NFL.[74]

Furthermore, the court stated that the no-agent rule is "vital and must work in conjunction with other eligibility requirements to preserve the amateur status of college athletics, and prevent the sports agents from further intruding into the collegiate educational system."[75] Thus, the Seventh Circuit held that the plaintiff in *Banks*, a former college football player, did not establish that the no-agent rule had an anticompetitive effect punishable by law.

Tying bylaws to the idea of amateurism seemingly has given the NCAA a get out of jail free card, as "[d]eference to the NCAA's amateurism policy has become the norm for courts hearing challenges of NCAA regulations."[76] Part of the reason for the deference is the basic idea that courts shy away from interfering with private voluntary entities, as long as the actions do not "infringe on a personal liberty or property right and are [not] illegal or fraudulent."[77] For instance, under Florida law, a court will not inject itself into the internal affairs of a private organization absent extraordinary circumstances.[78] As Matthew Mitten and Timothy Davis wrote in the *Virginia Sports and Entertainment Law Journal*, "[d]eference premised on the law of private associations is particularly troublesome."[79] However, the private association rationale is a red herring in the context of the NCAA and student-athletes, as the rule of deference applies to members, which the student-athletes are not.

In effect, student-athletes are seemingly regulated by a non-governmental body of which they are not members. Yet, claims by them are overlooked in favor of deference to the private association. Providing such deference, in light of the NCAA's "increased level of commercialism," unjustifiably deteriorates meritorious challenges to NCAA regulations.[80] In fact, questions remain whether the NCAA's goal is really to protect its amateur image. While college athletes are prohibited from receiving benefits, other than scholarships, in the name of amateurism, the NCAA and

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[74] Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992).
[75] *Id.*
[76] Gouevia, *supra* note 59, at 26.
[77] Mitten & Davis, *supra* note 21, at 120.
[78] NCAA v. Brinkworth, 680 So. 2d 1081, 1084 (Fla. Dist. Ct. App. 1996).
[79] Mitten & Davis, *supra* note 21, at 128.
[80] Gouevia, *supra* note 59, at 26; *see also* Brian Davidson, *Pushing the Limits?*, NATIONAL COLLEGIATE SCOUTING ASSOCIATION, April 6, 2009, http://blog.ncsasports.org/2009/04/06/pushing-the-limits/.

member institutions make millions off players' computer-generated likenesses in video games.[81] In 2009 alone, the NCAA men's basketball tournament generated $591 million in television and marketing revenue.[82] As the late NCAA President Myles Brand said recently:

> "There's nothing wrong with being a business like one of the professional leagues. They're very good at what they do. But we have additional constraints. We're in the college milieu, and those who play for us are not professional athletes.
>
> Having said that, I think we can look for and find ways to increase our revenue streams."[83]

These staggering comments and figures lead back to the passage from the *Harvard Law Review* presented at the beginning of this section: "Courts have wrongly deferred to the amateurism bylaws and to the NCAA's definition of the product of intercollegiate athletics. The NCAA's claim of the need to promote amateurism is merely a pretense; the NCAA bylaws themselves do not adhere to a pure notion of amateurism . . . ."[84]

2. Contractual Curveball

By now, it is clear that courts provide judicial deference to the NCAA based on its private association status and its goal of amateurism. Most legal theories and challenges to NCAA bylaws have failed. However, as Mitten and Davis have pointed out, one possible avenue for convincing courts to look more closely at private organizations is contract law's arbitrary and capricious exception.[85] To pursue a claim against the NCAA on the grounds that a particular regulation is arbitrary and capricious, a student-athlete must first establish standing. To get standing, a court must

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[81] A former college football player filed a class action lawsuit against the NCAA and EA Sports, "claiming they've gone too far in using the likenesses of college players who are prohibited from sharing in the games' profits." EA Sports produces a college football and basketball video game each year that features college athletes, right down to their height, weight, number, skin color and hometown. The players are not given names on the games, but consumers can name the players manually or download rosters created by other consumers. In 2008, the NCAA Football game sold around 2.5 million copies. Steve Wieberg, *Suit Targets NCAA Athletes' Likenesses in Video Games*, USA TODAY, May 8, 2009, at C1; *see generally* Complaint, Keller v. Electronic Arts, Inc., No. CV-09-1967 (N.D. Cal. May 5, 2009), *available at* http://www.courthousenews.com/2009/05/06/ElectronicArts.pdf.

[82] Steve Wieberg & Steve Berkowitz, *Has College Sports Marketing Gone Too Far?: Casino Ads, Video Deals Reflect Urgent Push for Revenue*, USA TODAY, Apr. 2, 2009, at 1A.

[83] *Id.*

[84] Note, *supra* note 41, at 1318. For a more in depth discussion of the NCAA's "Veil of Amateurism," see Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008).

[85] Mitten & Davis, *supra* note 21, at 121. The authors discuss the arbitrary and capricious exception, but they write that recent case law (prior to *Oliver*) "illustrate[s] that the arbitrary and capricious standard does not provide an effective measure of legal protection to student-athletes in eligibility disputes or appropriately limit the extreme deference courts afford the NCAA." *Id.* Another important exception appears to be the public policy argument, which was argued heavily in *Oliver v. NCAA*.

accept that the student-athlete is a third-party beneficiary of the membership contract between the NCAA and the student-athlete's institution.[86] This is based on an argument that the NCAA's constitution, bylaws, and regulations are intended to benefit student-athletes.[87] If a court accepts such an argument, then the student-athlete has standing to pursue a claim that the NCAA acts arbitrarily and capriciously in "applying its eligibility rules by breaching the duty of good faith and fair dealing implied into every contract."[88] Therefore, a student-athlete first has to establish a third-party contractual relationship with the NCAA and then must show that the regulation violates the implied duty of good faith and fair dealing required in every contract to effectively rely on the arbitrary and capricious exception.

The court in *Oliver v. NCAA* was not the first to accept the third-party contract analysis. In *Bloom v. NCAA*,[89] Jeremy Bloom, a former University of Colorado football player, used the third-party contract rationale to argue an NCAA rule that prohibited Bloom, also a professional skier, from entering into endorsement deals was arbitrary and capricious and therefore void.[90] Bloom was a high school football star who was recruited by the University of Colorado. Prior to enrolling, he participated in the Olympics and ultimately became the World Cup champion in freestyle moguls. As a result, he secured "various paid entertainment opportunities."[91]

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[86] *Id.* at 122 (citing Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004)).

[87] *Bloom*, 93 P.3d at 623-24.

[88] Mitten & Davis, *supra* note 21, at 122.

[89] *Bloom*, 93 P.3d at 621.

[90] Mitten & Davis, *supra* note 21, at 122 (citing *Bloom*, 93 P.3d at 623-24). "NCAA bylaws prohibit every student-athlete from receiving money for advertisements and endorsements." *Bloom*, 93 P.3d at 625. A professional athlete in one sport can participate as a collegiate athlete in a different collegiate sport as long as he or she does not receive money for advertisements and endorsements. However, many professional athletes in sports like skiing, golf, tennis, and boxing receive a great portion of their income from sponsors. *Id.*

As the *Bloom* court stated:

> In our view, when read together, the NCAA bylaws express a clear and unambiguous intent to prohibit student-athletes from engaging in endorsements and paid media appearances, without regard to: (1) when the opportunity for such activities originated; (2) whether the opportunity arose or exists for reasons unrelated to participation in an amateur sport; and (3) whether income derived from the opportunity is customary for any particular professional sport.
>
> The clear import of the bylaws is that, although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activity and maintain their eligibility to participate in amateur competition. And we may not disregard the clear meaning of the bylaws simply because they may disproportionately affect those who participate in individual professional sports.

Id. at 626.

[91] *Bloom*, 93 P.3d at 622.

Because of these endorsement deals, Bloom's amateur status as a college football player was compromised, and his college football career was cut short. While the court accepted Bloom's third-party beneficiary argument, it held that the no-endorsement rule was "rationally related to a legitimate purpose -- maintaining a line of demarcation between college and professional sports."[92] To be clear, Bloom was attempting to participate in collegiate football after successfully securing endorsement deals as a professional skier. By accepting endorsement deals as a skier, Bloom somehow compromised his amateur status as a collegiate football player.

Not allowing a student-athlete to collect endorsement deals undoubtedly maintains a line of demarcation between collegiate and professional sports. However, that line of reasoning only logically stretches to the sport in which the athlete wishes to participate as a collegiate athlete. Bloom, a professional skier,[93] only wished to participate as an amateur collegiate football player, a sport in which he had yet to earn a dime.

In light of the *Bloom* ruling in Colorado, it was conceivable to expect the Common Pleas Court of Erie County, Ohio, to defer to the NCAA's amateurism argument when it was presented with the question of whether Bylaw 12.3.2.1—which prohibits an attorney, who is legally retained under NCAA bylaws to review a professional contract, from actually being present during negotiations of the contract—is at odds with the concept of amateurism?

i. Step One—Alleging a Contractual Wrong

The *Bloom* decision, although decided in favor of the NCAA, presented opportunities for cases like *Oliver v. NCAA* to be meaningfully heard because of its recognition that student-athletes have standing to challenge NCAA regulations through a third-party contract analysis.

Andy Oliver did just that, challenging the NCAA's no-agent and restitution rules as arbitrary, capricious, and against public policy.[94] Working in Oliver's favor was the fact that Bylaw 12.3.2.1 purportedly regulated the conduct of attorneys, which Oliver argued belongs exclusively to the states. In his complaint, Oliver alleged that 12.3.2.1 was against public policy because the NCAA and Oklahoma State "have absolutely no authority whatsoever to promulgate a rule that would prevent a lawyer—legally retained under the NCAA's bylaws—from competently or zealously representing his or her client."[95] Additionally, Oliver alleged 12.3.2.1 was arbitrary and capricious because it "limits the player's ability to effectively

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[92] Mitten & Davis, *supra* note 21, at 123 (citing *Bloom*, 93 P.3d at 626-27).
[93] Professional skiers earn most of their living from endorsements. *See Bloom*, 93 P.3d at 623-24.
[94] *See* Oliver Complaint, *supra* note 14, ¶¶ 69, 71, 74.
[95] *Id.* ¶ 96A.

negotiate a contract that the Defendant NCAA allows the player to negotiate."[96] In essence, Oliver points to the logical holes in the NCAA's amateurism claims. On one hand, it allows an attorney to review proposed professional contracts, but on the other hand, it prohibits the attorney from negotiating a contract that a student-athlete has every right to negotiate him- or herself without compromising his or her collegiate eligibility.

In regard to Bylaw 19.7, the Restitution Rule, Oliver argued it "illegally interferes with the Ohio Constitution's delegation of all judicial power to the Courts of this State, and it exists solely to coerce or direct its agents and members to ignore court orders that are binding upon them as members of the Defendant NCAA . . . ."[97] Once the contractual harm is clear, the focus shifts to establishing a contractual relationship.

ii. Step Two—Establishing a Contractual Relationship

As in *Bloom*, Oliver needed standing to bring such a contract claim. Predictably, the NCAA argued Oliver had no standing to argue a contract claim because he was not a party to any contract with the NCAA. However, the court sided with Oliver, finding he was an intended third-party beneficiary between the NCAA and Oklahoma State's contract for membership.

> Whether the basic rudiments of a contractual relationship were formed from [the National Letter of Intent] is questionable, but the court finds that a contractual relationship does exist. How? A contractual relationship was formed by the plaintiff's status as an intended third-party beneficiary between the NCAA and OSU. The plaintiff, who is not a party to the contract between the NCAA and OSU, stands to benefit from the contract's performance, and thus he acquires rights under the contract as well as the ability to enforce the contract once those rights have vested.[98]

Under Ohio law, the court reasoned, "an intended third-party beneficiary has enforceable rights under the contract only when the contracting parties expressly intend that a third party should benefit from the contract."[99] The court found that duties were owed by the promisee and the promisor "by way of the contractual agreements within the manual . . . ."[100]

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[96] *Id.* ¶ 96B.
[97] *Id.* ¶ 97A.
[98] Oliver v. NCAA, 920 N.E.2d 196, 200 (Ohio Ct. Comm. Pl. 2008).
[99] *Oliver*, 920 N.E.2d 203, 211 (Ohio Ct. Comm. Pl. 2009).
[100] *Id.* at 211.

iii. Step Three—Framing the Conflict

Once standing was established, it was up to Oliver's attorney to convince the court that Bylaws 12.3.2.1 and 19.7 violated the duty of good faith and fair dealing implied in contracts. At this stage, it is important to frame the conflict in a manner as to show how the NCAA bylaw at issue does not further the idea of amateurism. *Bloom* failed at this stage because the court rejected the argument that accepting endorsement deals in a totally different sport than the one the collegiate athlete participates in at a member institution did not conflict with the NCAA's goal of maintaining a clear line of demarcation between college and professional sports.[101]

When framing the conflict, it is important to understand that the court is not in a position to rewrite the bylaws. Nor is it supposed to agree or disagree with the bylaws in question.[102] The job of the court is to decide whether a party has violated its implied duty of good faith and fair dealing within the contract.

NCAA Bylaw 12.3.2.1 provides:

> A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.[103]

Here, the NCAA clung to its amateurism claim, arguing Bylaw 12.3.2.1 helped retain the line of demarcation between college and professional sports and that the public is not served when courts intervene upon the internal affairs of private associations.[104]

The *Oliver* court did not agree with this often-used argument by the NCAA, however. In addition to taking issue with the fact that there was clear evidence the rule was selectively enforced,[105] the trial judge peered through the NCAA's veil of amateurism:

> These rules attempt to say to the student-athlete that they can consult with an attorney [Bylaw 12.3.2] but that attorney cannot negotiate a contract for them with a professional sport's team [Bylaw 12.3.2.1]. *This surely does not retain a clear line of demarcation between amateurism and professionalism*.

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[101] *Bloom*, 93 P.3d at 626-27.
[102] *Oliver*, 920 N.E.2d at 212.
[103] NCAA MANUAL, *supra* note 2, Bylaw 12.3.2.1, at 69.
[104] *Oliver*, 920 N.E.2d at 208.
[105] *Id.*; *see also Star Challenges*, *supra* note 46 (indicating that Bylaw 12.3.2.1 is broken all the time).

> Was Barratta's presence in that room a clear indication that the Plaintiff, a teenager who had admitted at trial that he was in no position to negotiate a professional contract and whose father testified to the same, was a professional?[106]

Instead of deferring to the private organization, Judge Tone of the Common Pleas Court of Erie County, Ohio, pondered the true applicability of such a rule prohibiting attorneys from negotiating contracts:

> For a student-athlete to be permitted to have an attorney and then to tell that student athlete that his attorney cannot be present during the discussion of an offer from a professional organization, is akin to a patient hiring a doctor but the doctor is told by the hospital board and the insurance company that he (the doctor) cannot be present when the patient meets with a surgeon because the conference may improve his patients decision-making power.[107]

Bylaw 12.3.2.1 also presented "what-ifs" for the court:

> What occurs if the parents of a student are attorneys or for that matter sports agents? What would have happened if Tim Baratta had been in the kitchen or outside or on the patio instead of in the same room as his client when the offer from the Minnesota Twins was made to Plaintiff?[108]

Does the fact that his attorney was technically "present," instead of sitting on the front porch at the time of the negotiations, mean that Oliver crossed the line of amateurism? As the court reasoned:

> If the [NCAA] intends to deal with this athlete or any athlete in good faith, the student-athlete should have the opportunity to have the tools present (in this case an attorney) that would allow him to make a wise decision without automatically being deemed a professional, especially when such contractual negotiations can be overwhelming, even to those who are skilled in their implementation.[109]

As such, the court found Bylaw 12.3.2.1 to be "unreliable (capricious) and illogical (arbitrary) and indeed stifl[ing] what attorneys are trained and retained to do."[110]

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[106] *Oliver*, 920 N.E.2d at 214 (emphasis added).
[107] *Id.*
[108] *Id.* at 214-215.
[109] *Id.* at 215.
[110] *Id.* at 214.

The court had even less trouble declaring Bylaw 19.7 unenforceable. Under 19.7, if a student-athlete successfully obtains a restraining order or injunction against his or her institution or the NCAA that is ultimately invalidated, the institution faces stiff penalties if it allowed the student-athlete to participate in athletic competition as a result of the initial restraining order or injunction.[111] In the view of the court, this type of bylaw is overreaching.

> Just because member institutions agree to a rule or bylaw does not mean that said bylaw is sacrosanct or that it is not arbitrary and/or capricious.
>
> . . . The old adage that you can put lipstick on a pig but it is still a pig is quite relevant here. The Defendant may entitle Bylaw 19.7 "Restitution" but it is still "punitive" in its achievement and it fosters a direct attack on the constitutional right of access to courts.[112]

This right to access courts is embodied in the questions Bylaw 19.7 leaves institutions to ponder—Do they obey the court or the NCAA?

> Does the institution allow the student-athlete to play as directed by the Court's ruling and in so doing face great harm should the decision be reversed on appeal? Alternatively, does the institution, in fear of Bylaw 19.7, decide that it is safer to disregard the Court Order and not allow the student athlete to play thereby finding itself in contempt of court? Such a bylaw is governed by no fixed standard except that which is self-serving for the Defendant. To that extent, it is arbitrary and indeed a violation of the covenant of good faith and fair dealing implicit in its contract with Plaintiff as the third party beneficiary.[113]

Such a ruling was refreshingly unique, as the Restitution Rule has been used by courts as a reason to deny student-athletes injunctions in the first place because of the potential for great harm to occur to the institution should the injunction be overturned by a higher court.[114] In *Bloom v. NCAA*, the judge "determined Bloom had not demonstrated that the issuance of an injunction would serve the public interest because the NCAA's ability to regulate student-athletes would be impaired and [the university] could potentially face sanctions under the Restitution Rule . . . ."[115] This, one commentator suggests, is a prime "example of the court's historical

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[111] NCAA MANUAL, *supra* note 2, Bylaw 19.7, at 302.
[112] *Oliver*, 920 N.E.2d at 215-216.
[113] *Id.* at 216.
[114] Gouevia, *supra* note 59, at 27 (discussing *Bloom*).
[115] *Id.*

deference to the NCAA."[116]

The hope now, following the reasoning of the now-vacated *Oliver v. NCAA* decision, is that courts will begin "legitimately considering the merits of the legal challenge[s]"[117] brought before them by student-athletes challenging NCAA bylaws. This can only be achieved if the court is willing to legitimately consider and analyze whether the NCAA bylaws in question really do further the idea of amateurism or whether they merely operate in a fashion as to avoid the implied duty of good faith and fair dealing bestowed upon the NCAA.

IV. WHAT'S NEXT?

*"*Oliver *case frees college players to use agents*"

—ESPN blog headline[118]

Headlines like these cause concern.[119] Did the *Oliver v. NCAA* decision give student-athletes a universal pass to use agents? Not exactly—neither before nor after the settlement. Truthfully, no one knows exactly what the *Oliver* decision will bring because it was the first of its kind.

One thing is for sure, however. The ruling gave the NCAA 750,000 reasons to settle the case so the Court could quickly vacate the Order.[120] Before the settlement, the NCAA was publicly staying quiet[121] and compliance departments at NCAA universities continued to "urg[e] their student-athletes to proceed with caution since the situation is so murky."[122]

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[116] *Id.*

[117] *Id.*

[118] Keith Law Blog, Oliver Case Frees College Players to Use Agents, http://sports.espn.go.com/espn/blog/index?entryID=3911973&name=law_keith (Feb. 16, 2009 19:37 EST).

[119] Mr. Law's headline is misleading, as the *Oliver* decision did not give athletes a universal free pass to use agents. However, his blog entry is somewhat more on point: "The ruling puts an end -- at least for the moment -- to the farcical NCAA rule that prohibited players from using agents to negotiate on their behalf with major league teams, even after they had been drafted." *Id.* Although, even if a settlement had not been reached, it is unclear whether non-attorney agents could negotiate these contracts.

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> "Within this landscape it remains to be seen whether there is a potential plaintiff sitting on a metaphorical legal bench who cannot be induced to play the NCAA settlement game. Most of the business-related cases against the NCAA have been settled because plaintiffs have had vested financial interest in settling rather than engaging in protracted legal battles whose outcomes were not assured. However, if this potential plaintiff does not need to protect a future career and is already financially secure, then the NCAA may be unable to hold the ball indefinitely."

Fitness Information Technology, http://fitinfotech.wordpress.com/2009/12/04/ncaa-wins-in-long-run-with-legal-settlements/ (Dec. 4, 2009, 16:22 EST) (quoting Mark Nagel and Richard Southall in the *SportsBusiness Journal*).

[121] Liz Mullen*, NCAA Quiet on Immediate Effect of Ruling in Andy Oliver Case*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Mar. 9, 2009, at 12, *available at* http://www.sportsbusinessjournal.com/article/61798 [hereinafter *NCAA Quiet*].

[122] NCAA Compliance Blog, http://ncaacompliance.wordpress.com/2009/04/06/andy-oliver-v-ncaa-update/ (Apr. 6, 2009).

In legal briefings, the NCAA was chomping at the bit to be heard. "These bylaws, adopted by and critical to orderly functioning of some 1,200 NCAA member institutions and directly affecting 380,000 student-athletes, have now been—at a minimum—set at disarray by the *ill-considered, extra jurisdictional ruling* of a lone Common Pleas Court."[123] Now that the case has been settled and the decision vacated, the NCAA is enforcing "'the bylaw as appropriate, as the bylaw never changed . . . .'"[124] Andrew Oliver is moving on as well; he is currently pitching in the Detroit Tigers minor league system.[125] But many believe this case is bigger than one person.

"'He gets his life back,'"[126] Oliver's attorney told the *New York Times*. "'And for the 360,000 student-athletes in the N.C.A.A., it's the tip of the iceberg that they actually have legal rights.'"[127] Before the settlement was reached, one baseball agent said the decision, if it held up, would "'validate the existing practice in the industry,'" and lawyers will now be able to negotiate contracts of major league draft picks.[128]

But what exactly will happen?

One not so optimistic observer believed the ruling, even if it would have been upheld and not vacated, would only apply to student-athletes who either attend school in Ohio or are Ohio residents like Oliver.[129] An argument existed that the decision had no implications outside of Erie County, Ohio, where the *Oliver v. NCAA* case was heard.[130] Judge Tone, however, disagreed. In May 2009, he attempted to clear up any confusion the permanent injunction order might have created:

Contrary to Defendant's rhetoric, the February entry did not presume to void an NCAA rule, it did void an NCAA rule. In that respect, discussions of how to proceed without Bylaw 12.3.2.1 should be discussed by the NCAA and its member institutions. Make no mistake, however, that wherever the NCAA is located, the ruling of this Court should be currently maintained and Bylaw 12.3.2.1 is void, not presumed void, until and unless an appellate review would determine otherwise.[131]

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[123] NCAA's Opposition, *supra* note 25, at 1 (emphasis added).

[124] *Still Enforce Rule*, *supra* note 23.

[125] Jason Beck, *Oliver Gets Past Rough Start in AFL*, MLB.COM, Oct. 23, 2009, http://mlb.mlb.com/news/article.jsp?ymd=20091023&content_id=7536980&vkey=news_det&fext=.jsp&c_id=det.

[126] Alan Schwarz, *N.C.A.A. Can't Ban Lawyers for Athletes*, N.Y. TIMES, Feb. 13, 2009, at B11.

[127] *Id.*

[128] *NCAA Quiet*, *supra* note 121.

[129] JETLaw Blog, Vanderbilt Journal of Entertainment & Technology Law, http://jetl.wordpress.com/2009/04/05/the-ncaa-strikes-out-but-only-in-ohio/ (Apr. 5, 2009, 20:56 EST) (describing the view of Dean of Indiana University School of Law, Gary Roberts). Although the NCAA itself has asked the question "will the Order effect [sic] 'Ohio members, Oklahoma members, all institutions?'" NCAA's Opposition, *supra* note 25, at 11.

[130] NCAA Compliance Blog, *supra* note 122 ("[I]t is unclear how far-reaching this decision is since the ruling . . . . will apply only to students who live or play college baseball in Ohio, while others believe this case will set precedent that other courts could follow should a legal challenge arise.").

[131] Contempt Order, *supra* note 26, at 2 (citation omitted).

Even though the decision has now been vacated by the settlement, this wide-sweeping proclamation by Judge Tone indicates that *Oliver v. NCAA* could be strike one to the NCAA's no-agent rules.[132] Oliver's attorney, Richard Johnson, believes the NCAA "'will lose 100 out of 100 of any such future lawsuits over this rule, since no court is going to allow the NCAA to regulate lawyers or prohibit nonmember student athletes from retaining counsel.'"[133]

However, it is unlikely this case, by itself, will open the floodgates for all collegiate athletes, regardless of sport, to obtain agents. Baseball is arguably the only major college sport that is implicated by the main NCAA bylaw at issue in *Oliver*, Bylaw 12.3.2.1, because baseball players can be drafted and presented with professional contracts without losing their eligibility under NCAA rules.[134]

The admirable line of demarcation can be seen in rules governing benefits received by student-athletes, and even by some rules protecting athletes from agents. However, as Judge Tone correctly noted, allowing a person to hire an attorney to review a contract, but prohibiting that same attorney from negotiating that contract on behalf of the student-athlete, does not further any of the NCAA's alleged interests. In fact, while trying to protect the athletes, the NCAA is actually hindering them.

Simply permitting a student-athlete to retain competent representation to contact professional clubs and to advocate on his behalf to obtain a result that is in his own best interests, financially and otherwise, would not destroy the line of demarcation any more than allowing the student-athlete or the professional sports counseling panel to engage in the same conduct.[135]

The Major League Baseball Players Association issued a statement through its general counsel, stating it "'believes that all individuals dealing

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[132] *See MLPBA Warns NCAA*, *supra* note 28. In fact, expect more lawsuits to arise in the future, as the NCAA is sending out questionnaires to student-athletes that were selected in the June Major League Baseball draft asking if their advisers had direct communication with Major League Baseball teams. Reading between the lines, the NCAA is trying to nail student-athletes with violations of the no-agent rule. Oliver's attorney is receiving phone calls from parents around the nation regarding these questionnaires. *Id.*

[133] *Still Enforce Rule*, *supra* note 23. Oliver's attorney is not alone in his post-settlement assessment of NCAA bylaws at issue. "'The regulation is as improper now as it was when the judge found it to be a violation of state law," attorney David Cornwell said. *Id.*

[134] Although it is conceivable that this same situation could occur in the high school basketball setting if a player is deciding between a contract offer to play professionally overseas for a year before entering the NBA draft and a scholarship offer to play in college. If a lawyer negotiated a contract for the athlete to play professionally overseas, but ultimately the player decided instead to go to college, the player might run into a situation in which the NCAA determines he has compromised his amateur status under Bylaw 12.3.2.1.

[135] Karcher, *supra* note 33, at 223. Karcher points out that NCAA rules already allow for the player and a professional sports counseling panel (if the university elects to form such a panel) to negotiate a professional sports contract. High school players are left to negotiate the contract themselves, as they do not have access to these sports counseling panels. *Id.* at 224.

with professional sports franchises should have access to representation. We hope the Oliver case furthers that goal.'"[136]

However, *Oliver v. NCAA* is bigger than whether an attorney can be used to negotiate a professional sports contract without student-athletes compromising their eligibility. The most important aspect of *Oliver v. NCAA* is that the court took the time to truly analyze all the aspects of the case. This case could "'begin[] to establish precedent'" for future challenges by student-athletes.[137] In light of the question posed by Richard Karcher in 2005 ("When looking at these regulations, the unavoidable question arises: who is the NCAA trying to protect?"),[138] the court refused the proverbial punt that all too often occurs when student-athletes challenge NCAA regulations. Instead, it poked holes in the NCAA's veil that these regulations "retain a clear line of demarcation between intercollegiate athletics and professional sports."[139] The third-party contractual analysis finally allows student-athletes in situations like those of Andrew Oliver and Jeremy Bloom to put NCAA regulations in front of courts. The reasoning Judge Tone advanced gives courts the framework and opportunity to consider if these rules truly align with the NCAA's goal of amateurism or if they are arbitrary and capricious regulations aimed only at controlling student-athletes for no justifiable reason. Reform must start somewhere, even if that somewhere is a Common Pleas Court in Erie County, Ohio.

Now that an Ohio court has called the NCAA's bluff, the hope exists that *Oliver v. NCAA* will be the line of demarcation between courts that provide judicial deference to the NCAA and those who finally peer into arbitrary NCAA regulations hidden behind the *veil of amateurism*.[140] Only then can the student-athlete truly be protected; a goal the NCAA, the universities, and the student-athletes should strive for in unison.

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[136] *Still Enforce Rule*, *supra* note 23.

[137] JetLaw Blog, *supra* note 129 (quoting Karcher).

[138] Karcher, *supra* note 33, at 215.

[139] NCAA MANUAL, *supra* note 2, Const. art. 1.3.1, at 1.

[140] *See* McCormick & McCormick, *supra* note 84 (exposing the NCAA's claim of amateurism in light of the big business it has happily become); *see also* Note, *supra* note 41, at 1318 (observation in *Harvard Law Review* that the "NCAA's claim of the need to promote amateurism is merely a pretense; the NCAA bylaws themselves do not adhere to a pure notion of amateurism").

Author Note: This Article was originally written before the parties reached a settlement. It was modified following the settlement. Since that time, two articles have been published regarding certain aspects of *Oliver v. NCAA*. Because of time constraints, these articles have not been incorporated into this Article. However, these articles can be found at James Halt, *Andy Oliver Strikes Out the NCAA's "No-Agent" Rule for College Baseball*, 19 J. Legal Aspects of Sport 185 (2009) and Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 Duke L.J. 555 (2009).