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## The NCAA's Transfer Rules: An Antitrust Analysis

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## The NCAA's Transfer Rules: An Antitrust Analysis

Roger D. Blair\* and Wenche Wang\*\*

### ABSTRACT

In *Deppe v. National Collegiate Athletic Association*,<sup>1</sup> the Seventh Circuit accepted the NCAA's argument that its transfer rules are presumptively procompetitive. It also approved the NCAA's no-poaching agreement. This Article analyzes these NCAA-imposed restraints and finds them inconsistent with current antitrust policy.

### INTRODUCTION

For decades, the NCAA has imposed strict transfer rules, restricting student-athletes' ability to transfer from one university to another. Past legal complaints about the NCAA's transfer rules have largely failed.<sup>2</sup> Most recently, in *Deppe v. National Collegiate Athletic Association*, Peter Deppe, a student athlete, challenged the NCAA's transfer rules as a horizontal agreement in violation of § 1 of the Sherman Act.<sup>3</sup> The Seventh Circuit rejected Deppe's claim and found the transfer rules to be presumptively procompeti-

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<sup>1</sup> 893 F.3d 498 (7th Cir. 2018)

<sup>2</sup> See, e.g., *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 328 (7th Cir. 2012); *Pugh v. Nat'l Collegiate Athletic Ass'n*, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at \*3 (S.D. Ind. Sept. 27, 2016).

<sup>3</sup> 893 F.3d 498 (7th Cir. 2018); see also 15 U.S.C. § 1 (2018)

tive.<sup>4</sup> Its foundation for this sweeping conclusion can be traced to dicta in the Supreme Court's opinion in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.<sup>5</sup>

In this Article, we examine the inferences drawn by the Seventh Circuit and, in short, we find them wanting. First, in Part I, we review the background surrounding Deppe's suit. Second, in Part II, we present the Seventh Circuit's decision and the foundation for that decision. Third, in Part III, we discuss the Seventh Circuit's views on the competitive significance of the NCAA's no-poaching rules. Here, we observe that the Seventh Circuit is out-of-step with current antitrust enforcement. We introduce the Department of Justice and Federal Trade Commission's *Antitrust Guidance for Human Resources Professionals* and compare that guidance to the NCAA's conduct. Fourth, in Part IV, we argue that the NCAA would not prevail if its transfer rules and no-poaching rules were subject to a rule of reason analysis. Fifth—and finally—in Part V, we close with some concluding remarks.

## I. PETER DEPPE'S COMPLAINT

Peter Deppe, a star punter from Almont High School in Michigan, received athletic-scholarship offers from several college football teams.<sup>6</sup> In the end, he elected to attend Northern Illinois University without a scholarship as a "walk-on."<sup>7</sup> For his first year at Northern Illinois, Deppe decided to "red-shirt," which meant that he could practice and train with the team but he could not participate in games.<sup>8</sup> During that first year, his position coach told him that he would receive an athletic scholarship for his second year.<sup>9</sup> When his position coach left Northern Illinois, however, the head coach informed Deppe that the team would not award him a scholarship because they were recruiting another punter.<sup>10</sup>

Without a scholarship or the prospect of playing time, Deppe decided to transfer to another school.<sup>11</sup> Even though Deppe had been a red-shirt walk-on at Northern Illinois—that is, a non-playing and non-scholarship member of the football team—the NCAA's transfer rule, Bylaw 14.5.5, still

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<sup>4</sup> *Deppe*, 893 F.3d at 503–04.

<sup>5</sup> 468 U.S. 85 (1984).

<sup>6</sup> *See Deppe*, 893 F.3d at 499.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

applied.<sup>12</sup> Thus, he had to obtain permission from Northern Illinois to transfer to another Division I school.<sup>13</sup> Additionally, he would have to sit out for the entire academic year following his transfer.<sup>14</sup> This rule hurt Deppe since the University of Iowa wanted him to join their team, but only if he could play immediately.<sup>15</sup> Deppe requested an exception to the transfer rule so that he could play immediately at Iowa,<sup>16</sup> but NCAA rules prohibited Deppe—the student-athlete—from requesting an exception.<sup>17</sup> Only the University of Iowa, the transferee school, could request such a waiver.<sup>18</sup> Iowa, however, decided to move on to another punter and was no longer interested in Deppe.<sup>19</sup> When the NCAA refused to consider his request, Deppe filed an antitrust suit alleging that the transfer rule was an unreasonable restraint of trade in violation of § 1 of the Sherman Act.<sup>20</sup> As we will discuss, Deppe's suit failed because of the Seventh Circuit's interpretation of *Board of Regents*.

## II. THE SEVENTH CIRCUIT'S PRESUMPTION OF PRO-COMPETITIVENESS

Deppe's antitrust challenge can be traced to the Supreme Court's largely deferential attitude toward the NCAA. In *Board of Regents*, the issue involved the legality of the NCAA's plainly anticompetitive television plan, which limited the quantity and quality of televised college football games.<sup>21</sup> Ordinarily, such an agreement would have been condemned as a per se violation of § 1 of the Sherman Act.<sup>22</sup> But in *Board of Regents*, the Court recognized the historical importance of the NCAA:

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<sup>12</sup> *Id.*; see also NAT'L COLLEGIATE ATHLETIC ASS'N, 2017–18 NCAA DIVISION I MANUAL ¶ 14.5.5 (2017) [hereinafter NCAA Manual], <http://www.ncaapublications.com/productdownloads/D118.pdf> [<https://perma.cc/3FUK-KGRX>].

<sup>13</sup> See *Deppe*, 893 F.3d at 500.

<sup>14</sup> *Id.* Transfers attend school and train with the team but cannot compete in intercollegiate athletic events.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 500; see also 15 U.S.C. § 1 (2018) (providing that “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is hereby declared to be illegal”). Currently, a violation of § 1 is a felony. Firms face maximum fines of \$100 million, while individuals face maximum fines of \$1 million and/or maximum prison sentences of ten years. *Id.*

<sup>21</sup> See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 88 (1984).

<sup>22</sup> 15 U.S.C. § 1 (2018).

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs.<sup>23</sup>

The Court did not explain its apparent approval of recruiting restraints as well as limits on the number of players and coaches per team.<sup>24</sup> Because these limits are binding, they inhibit competition on these dimensions. Though these restraints tend to reduce costs and thereby improve profitability, they likely decrease quality. These restraints can only be maintained through collaboration among NCAA members, because otherwise, competitive pressure would incentivize the members to gain a competitive advantage by not abiding by the rules. Since the Court thought these restraints necessary, it refused to treat the NCAA's agreements as a *per se* violation:

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.<sup>25</sup>

The Supreme Court failed to cite empirical evidence for its assertion that the NCAA's restraints, which protect amateurism, enhance public interest in intercollegiate athletics. Thus, the Supreme Court's conclusion was based entirely on conjecture. Without sound and relevant evidence, there is no theoretical or empirical foundation to justify the NCAA's restraints as a general proposition.<sup>26</sup> The Supreme Court laid the foundation for future misadventures with the following broad conclusory statement:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But

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<sup>23</sup> See *Bd. of Regents*, 468 U.S. at 88.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 117.

<sup>26</sup> It comes as no surprise that the NCAA would restrict student-athletes to be amateurs and change the definition of amateurism over time to suit its needs. It is also no surprise that the NCAA would revere a tradition that limits payment to student-athletes.

consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die.<sup>27</sup>

In *Board of Regents*, the Supreme Court distinguished the anticompetitive restrictions in the NCAA's television plan from "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture."<sup>28</sup> From this statement, the Seventh Circuit inferred that *all* eligibility rules are procompetitive.<sup>29</sup> And since the Seventh Circuit considered the NCAA's transfer rules to be eligibility rules, the Seventh Circuit deemed the NCAA's transfer rules presumptively procompetitive without requiring further inquiry.

The NCAA's transfer rule—Bylaw 14.5.5.1—frustrated Deppe's efforts to transfer from Northern Illinois University to the University of Iowa. Bylaw 14.5.5.1 specifically provides that "[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution."<sup>30</sup> Deppe alleged that this rule violates § 1 of the Sherman Act because it unreasonably restrains trade or commerce.<sup>31</sup>

As an economic matter, there is a clear employment relationship between the student-athlete and the school. Indeed, a student-athlete on an athletic scholarship receives both payment in kind and an educational opportunity, while the school receives a commitment from the student-athlete to train, practice, and participate in competition. But the NCAA's transfer rule adds friction to this market. For a school receiving a transferring student-athlete, this rule is an obvious cost, as the school may have to pay the student-athlete in kind while the student cannot compete. For the student-athlete, sitting out a year at a new school inhibits her incentive to switch

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<sup>27</sup> See *Bd. of Regents*, 468 U.S. at 120.

<sup>28</sup> *Id.* at 117.

<sup>29</sup> *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 501 (7th Cir. 2018).

<sup>30</sup> *Id.* at 500 (quoting NCAA Manual, *supra* note 12, ¶ 14.5.5.1). There are some exceptions to this rule which can be found in the NCAA Manual. Notably, students in Division I sports outside of basketball, baseball, bowl subdivision football, and ice hockey have a one-time transfer exception to this rule. That is, if a student in a sport other than those listed has not previously transferred, she may qualify to immediately begin playing at another institution without the year in residence requirement. See NCAA Manual, *supra* note 12, ¶ 14.5.5.2.10. Additionally, if the student was dismissed or non-sponsored, the transfer rule may not apply. See *id.* ¶ 14.2.1.5.

<sup>31</sup> *Deppe*, 893 F.3d at 500.

schools, even when an opportunity arises that could help her career. Altogether, the NCAA's transfer rule impairs competition.<sup>32</sup>

In *Deppe*, the district court recognized that the NCAA is ordinarily subject to the antitrust laws and that its restraints are evaluated under the rule of reason.<sup>33</sup> The district court also observed that “most—if not all—eligibility rules . . . fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations.”<sup>34</sup> The district court determined that the eligibility rules “do not violate the antitrust laws,” noting that “[t]he eligibility rules create the product [of college football] and allow its survival in the face of commercializing pressures.”<sup>35</sup> Accordingly, because the challenged bylaw was directly related to eligibility, the court deemed it presumptively procompetitive, thus requiring no further analysis under the Sherman Act.

The district court began by addressing the issue of whether the challenged restraint was procompetitive. If the bylaw was presumptively procompetitive, then there is no need for a rule of reason analysis because the bylaw is per se lawful. The district court also pointed out that the transfer regulation falls under Article 14 in the NCAA Division I Manual, which addresses the eligibility of student athletes. Pointing to an earlier Seventh Circuit decision in *Agnew v. National Collegiate Athletic Association*,<sup>36</sup> where it held that “most [of the Association's] regulations will be a ‘justifiable means of fostering competition among amateur athletic teams,’”<sup>37</sup> and a prior district court decision in *Pugh v. National Collegiate Athletic Associa-*

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<sup>32</sup> See JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION*, ch. 26. (1933). The labor economics literature has found that frictions in the labor market result in monopsonistic exploitation, which Joan Robinson defined as the gap between labor's marginal revenue product and the wage paid; see also Alan Manning, *Imperfect Competition in the Labor Market*, in *HANDBOOK OF LABOR ECONOMICS* 973–1041 (Vol. 4b 2011) (identifying employer collusion as one source of monopsony power in the labor market). The report also explained the adverse consequences of monopsony.

<sup>33</sup> See *Deppe v. Nat'l Collegiate Athletic Ass'n*, Case No. 1-16-cv-00528-TWP-DKL, 2017 WL 897303, at \*4 (S.D. Ind. Mar. 6, 2017).

<sup>34</sup> *Id.* at \*4 (citing *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 328 (7th Cir. 2012)).

<sup>35</sup> See *id.* (quoting *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1345 (5th Cir. 1988)).

<sup>36</sup> 683 F.3d 328 (7th Cir. 2012).

<sup>37</sup> *Id.* at 341 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

tion,<sup>38</sup> the court determined that eligibility rules are presumptively procompetitive.<sup>39</sup>

This concluded the matter in the district court, but Deppe appealed to the Seventh Circuit. In its decision, the Seventh Circuit began by observing that “[t]he year-in-residence requirement is an eligibility rule clearly meant to preserve the amateur character of college athletics and is therefore presumptively procompetitive under *Board of Regents*.”<sup>40</sup> The court’s reasoning is strained here. To be an “amateur,” a student-athlete must not receive compensation greater than the NCAA-approved maximum.<sup>41</sup> It is far from clear how the residency requirement for transferring students relates to amateurism.<sup>42</sup> Having determined that the transfer rule was presumptively procompetitive, the Seventh Circuit affirmed the district court’s dismissal of Deppe’s case.<sup>43</sup>

The central problem with this inference is the lack of analysis of the NCAA’s transfer rules by the Supreme Court. In *Board of Regents*, the issue did not involve transfer rules or eligibility rules.<sup>44</sup> And the Supreme Court has never made a finding on the competitive significance of these restraints. But in *Deppe*, the Seventh Circuit continued to rely on its strained interpretation of *Board of Regents*:

Importantly here, we also explained that most—if not all—eligibility rules fall within the presumption of pro-competitiveness established in *Board of Regents*. After all, the Supreme Court explicitly mentioned eligibility rules as a type that fits into the same mold as other procompetitive rules. And because eligibility rules define what it means to be an amateur or a student-athlete, they are essential to the very existence of the product of college football.<sup>45</sup>

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<sup>38</sup> No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at \*3 (S.D. Ind. Sept. 27, 2016).

<sup>39</sup> *Deppe*, 2017 WL 897307, at \*3.

<sup>40</sup> *Deppe v. Nat’l Collegiate Athletic Ass’n*, 893 F.3d 498, 501 (7th Cir. 2018).

<sup>41</sup> See NCAA Manual, *supra* note 12, ¶ 12.1.2.

<sup>42</sup> *Id.* ¶ 13.11.2.4.2.

<sup>43</sup> See *Deppe*, 893 F.3d at 501. Yet the court later provided some fanciful arguments. For example, referring to athletes in the high-revenue sports of football, men’s basketball, and ice hockey, the Seventh Circuit speculated that “[w]ithout transfer restrictions, the players in these high-revenue sports could be traded like professional athletes.” *Id.* This inference is absurd. Student-athletes are not owned by member institutions and there has never been a suggestion that transfers to another school could be compelled. Moreover, the existing rule would only make such “trades” more expensive; it would not preclude them.

<sup>44</sup> See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 136 (1984).

<sup>45</sup> See *Deppe*, 893 F.3d at 502 (alterations and citations omitted).



The NCAA's transfer rules are unnecessary to preserve amateurism. These rules do, however, inhibit some forms of competition and thereby improve the profits earned by the NCAA's members. Thus, the rules tend to be anticompetitive rather than procompetitive.

The economic effect of the NCAA's transfer rules are clear. For the student-athlete, the cost of transferring is higher than it would be in the absence of the restraint. Requesting permission to transfer may be a daunting prospect for some eighteen- to twenty-one-year-old student-athletes. More importantly, however, the transferring student-athlete cannot compete until she has been in residence at the new school for a full academic year. Because demand functions are negatively-sloped, these costs reduce the equilibrium number of transfers.

Schools losing a transferring student-athlete sometimes welcome such transfers. For example, if an athlete is disgruntled or not performing well, the school may wish to reallocate the scholarship to someone else. In other cases, however, the school may wish to retain a player, perhaps to fill an important backup position. In that event, the school may make it difficult for a student-athlete to transfer. Thus, the Transfer Regulation Bylaw 14.5.5 has costs and benefits: costs for the students and benefits for the school.

### III. THE NCAA'S NO-POACHING AGREEMENTS

In addition to endorsing the NCAA's transfer rules, the Seventh Circuit observed that the NCAA rules also prohibit schools from soliciting a student-athlete enrolled at another school.<sup>46</sup> Referenced in Bylaw 14.5.5, but detailed in Bylaw 13.1.1.3, the rule states that:

An athletics staff member or other representative of the institution's athletics interests shall not make contact with the student-athlete of another NCAA or NAIA four-year collegiate institution, directly or indirectly, without first obtaining the written permission of the first institution's athletics director (or an athletics administrator designated by the athletics director) to do so, regardless of who makes the initial contact. If permission is not granted, the second institution shall not encourage the transfer and the institution shall not provide athletically related financial assistance to the student-athlete until the student-athlete has attended the second institution for one academic year. If permission is granted to contact the student-athlete, all applicable NCAA recruiting rules apply.<sup>47</sup>

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<sup>46</sup> See *id.* at 503.

<sup>47</sup> NCAA Manual, *supra* note 12, ¶ 13.1.1.3.

Thus, the NCAA Bylaws, which govern the conduct of its members, forbid solicitation. For example, if the University of Tennessee were to invite the University of Alabama's backup linebacker to transfer to Tennessee, such an action would constitute illegal poaching by Tennessee under Bylaw 13.1.1.3. Violations of NCAA Bylaws can result in severe sanctions, such as a ban on bowl-game participation, loss of championships, forfeiture of games, and loss of scholarships.

A no-poaching agreement is an agreement among employers to refrain from hiring one another's employees. The purpose of such agreements is to eliminate a form of competition in the labor market. Because these agreements suppress wages and other forms of compensation,<sup>48</sup> the NCAA's ban on solicitation is clearly anticompetitive.

In *Deppe*, however, the Seventh Circuit appears to disapprove of "poaching."<sup>49</sup> Indeed, the court seems to suggest that because poaching happens in professional sports, allowing it in the NCAA would be inconsistent with the preservation of amateurism.<sup>50</sup> But this presumption is misinformed because the four major sports leagues—Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League—all have anti-tampering provisions, or no-poaching rules that forbid such competition.<sup>51</sup> For example, Major League Baseball's anti-tampering rule is similar to the NCAA's no-poaching bylaw: absent current employer permission, "negotiations [and] dealings respecting employment, either present or prospective, between any player, coach or manager and any Major or Minor League Club other than the Club with which the player is under contract" are prohibited.<sup>52</sup> In the case of the four major professional sports leagues—all of which are unionized—the no-poaching agreements avoid antitrust prosecution because they are the product of collective bargaining.<sup>53</sup> In contrast, student-athletes are not unionized, but

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<sup>48</sup> See Oz Shy & Rune Stenbacka, *Anti-Poaching Agreements in Labor Markets*, 57 *ECON. INQUIRY* 243, 243 (2018) (analyzing the economic effects of no-poaching agreements in a duopoly model of wage competition and finding that employers enjoy higher profits while the employees are worse off).

<sup>49</sup> See *Deppe*, 893 F.3d at 503.

<sup>50</sup> See *id.*

<sup>51</sup> For an examination of the anti-tampering rules in the major sports leagues, see Roger D. Blair & John E. Lopatka, *The Economic Effects of Anti-Tampering Rules in Professional Sports Leagues*, 38 *MANAGERIAL & DECISION ECON.* 704 (2017).

<sup>52</sup> See THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, MAJOR LEAGUE BASEBALL, Rule 3(k) (2019), <https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf> [<https://perma.cc/L2VH-MDQU>].

<sup>53</sup> For a compact discussion of the labor exemptions, see AMERICAN BAR ASSOCIATION, *ANTITRUST LAW DEVELOPMENTS* 1491–99 (8th ed. 2017).

should be considered employees. Thus, the NCAA's no-poaching rules—unlike those in unionized professional sports leagues—should be subject to antitrust scrutiny.

Notably, the Seventh Circuit refers to poaching in a way that suggests poaching is undesirable.<sup>54</sup> But poaching is simply another word for a specific form of competition. If a good player receives expressions of interest from other teams, the pursuit of this player would increase competition among the teams. Because a fundamental premise of the Sherman Act is that competition is socially desirable, one cannot defend a restraint of trade on the grounds that competition is undesirable.<sup>55</sup>

Moreover, the Seventh Circuit's view of no-poaching agreements is out-of-step with current antitrust enforcement. In *United States v. Adobe Systems, Inc.*, the Department of Justice ("DOJ") challenged the legality of no-poaching agreements among Adobe Systems, Apple, Google, Intel, Intuit, and Pixar.<sup>56</sup> Similarly, in *United States v. Lucasfilm, Inc.*, the DOJ alleged that a no-poaching agreement among digital animators violated § 1 of the Sherman Act.<sup>57</sup> Likewise, in *United States v. eBay, Inc.*, the DOJ challenged a no-solicitation and no-hiring agreement between eBay and Intuit, Inc.<sup>58</sup> In each suit, the DOJ reached consent decrees with the defendants. Subsequent private suits have resulted in payments of hundreds of millions of dollars to those injured by the agreements not to compete.<sup>59</sup>

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<sup>54</sup> See *Deppe*, 893 F.3d at 503.

<sup>55</sup> See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 773 (1975); *United States v. Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 696 (1978) ("In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

<sup>56</sup> See *United States v. Adobe Sys., Inc.*, Case No. 1:10-cv-01629, 2011 WL 10883994, at \*6 (D.D.C. Mar. 18, 2011).

<sup>57</sup> See *United States v. Lucasfilm, Inc.*, Case No. 1:10-cv-02220, 2011 WL 2636850, at \*1 (D.D.C. June 3, 2011).

<sup>58</sup> See *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1034 (N.D. Cal. 2013).

<sup>59</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). No-poaching agreements suppress wages and salaries as well as other forms of compensation. Those employees who are denied the benefits of competition will have suffered antitrust injury and would appear to have standing to sue for treble damages. The damage suffered by an employee is the difference between the compensation that she would have received but for the unlawful agreement and the actual compensation. For student-athletes, the estimation of damages poses a daunting empirical challenge. Nonetheless, student-athletes who have been denied the benefits of competition should be able to prove their magnitude. In *Adobe*, the eventual settlement amounted to roughly \$415 million. See David Streitfeld, *Bigger Settlement Said to Be Reached in Silicon Valley Antitrust Case*, N.Y. TIMES (Jan. 14, 2015), <https://nyti.ms/1DYcPO4> [https://perma.cc/64G7-X77B].

In the Department of Justice and Federal Trade Commission's ("FTC") *Antitrust Guidance for Human Resource Professionals*, the antitrust agencies explain their view that no-poaching agreements are per se violations of § 1 of the Sherman Act.<sup>60</sup> They have warned that the DOJ will begin pursuing no-poaching agreements as criminal violations. This antitrust enforcement policy is clearly inconsistent with the Seventh Circuit's holdings in *Deppe*.

"Naked . . . no-poaching agreements among employers . . . are per se illegal under the antitrust laws."<sup>61</sup> To escape the "naked" label, the NCAA would have to show that the no-poaching agreements were reasonably necessary to maintain the system of intercollegiate athletics. This, it cannot do. In its *Antitrust Guidance*, the antitrust agencies advised the community of human resource professionals that "[a]greements among employers not to recruit certain employees or not to compete on terms of compensation are illegal."<sup>62</sup> In the *Antitrust Guidance*, the DOJ warned that it "intends to proceed criminally against naked . . . no poaching agreements."<sup>63</sup> The agencies make it clear that the antitrust laws pertain to nonprofit organizations, which would also include colleges and universities.<sup>64</sup>

#### IV. RULE OF REASON ANALYSIS

No one disputes that the NCAA is subject to the antitrust laws. As a result of the Supreme Court's *Board of Regents* decision, however, the NCAA's restraints must be analyzed under the "rule of reason" unless they are presumptively procompetitive. A rule of reason inquiry is aimed at determining whether a restraint is competitively reasonable. If it is, the re-

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<sup>60</sup> DEP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016), <https://www.ftc.gov/public-statements/2016/10/antitrust-guidance-human-resource-professionals-department-justice> [<https://perma.cc/6X7B-YP4L>]. The *Antitrust Guidance* is not legally binding, but the agencies make it clear that they will challenge no-poaching agreements. See *id.* at 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 4.

<sup>64</sup> See *Seaman v. Duke Univ.*, No. 1:15-CV462, 2016 WL 1043473 (M.D.N.C. Feb. 12, 2016). The nonprofit status of the NCAA's members will not protect them from antitrust exposure. Duke University and the University of North Carolina—Chapel Hill allegedly agreed not to poach one another's medical staff. They both recently reached settlements. See Jake Satisky, *Duke agrees to pay \$54.5 million to settle class action lawsuit*, DUKE CHRONICLE (May 25, 2019), <https://www.dukechronicle.com/article/2019/05/duke-university-settles-class-action-lawsuit-for-54-5-million> [<https://perma.cc/L3S2-3SM7>].

straint will be lawful. If it is not, it will violate § 1 of the Sherman Act. In addition to fines, the NCAA would be vulnerable to private damage actions.<sup>65</sup> In that event, the damages caused by the antitrust violation would be tripled automatically. The sums involved could be staggering. In 2018, there were about 179,200 student-athletes in Division I schools. Even if the damage to each athlete was only \$1,000, the actual damages would amount to about \$180,000,000. This sum would be tripled automatically to \$540,000,000. The NCAA and its members will have a difficult time defending some of their restraints under a rule of reason analysis.

In broad strokes, there are three stages in a rule of reason analysis.<sup>66</sup> First, the plaintiff must make a *prima facie* case that the challenged restraint was anticompetitive. In response, the defendant may disprove the allegation as a factual matter. Alternatively, the defendant may offer a procompetitive justification for the challenged conduct. The plaintiff can rebut this response by disproving the facts alleged or by showing that a less restrictive alternative is available. The trier of fact must then decide whether, on balance, the restraint is beneficial or detrimental.

#### A. *Application of the Rule of Reason to the NCAA's Transfer Regulations*

In Deppe's case, the complaint involved the NCAA's requirement that a student-athlete sit out a year at the new school. The *prima facie* argument is straightforward: the NCAA rule imposes additional costs for transferees and thereby hinders the allocation of scarce resources. Some would-be transferees will be deterred from transferring. Some student-athletes will transfer and be forced to sit out. If the new school would have given these student-athletes playing time but for the NCAA rule, that school's team would not be as good as it could have been absent the restraint. Thus, there is a misallocation of resources that decreases the quality of the output.

Faced with this argument, the NCAA would have to disprove the allegation or offer a procompetitive justification for the challenged conduct. This, the NCAA cannot do. First, the restraint is stated clearly in Bylaw 13.1.1.3, which is the product of agreement among the NCAA members.<sup>67</sup> There is no way to disprove the fact of the agreement. The economic impact of the rule cannot be denied. It is basic economics—if the cost of an activity

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<sup>65</sup> See generally ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* ¶¶ 71–93 (Oxford Univ. Press, 2d ed. 2008); PHILIP AREEDA ET AL., *ANTITRUST LAW* ¶¶ 390–99 (Wolters Kluwer, 4th ed. 2014).

<sup>66</sup> See generally PHILIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶¶ 1500–12 (Wolters Kluwer, 4th ed. 2017).

<sup>67</sup> NCAA Manual, *supra* note 12, ¶ 13.1.1.3.

increases, demand for that activity will decrease. The NCAA, therefore, must offer a procompetitive justification.

The NCAA may turn to the argument of amateurism, but the transfer rule has nothing to do with “preserving amateurism.” The compensation paid to a student-athlete may rise following a transfer, but the total amount cannot exceed the collusively-agreed-to maximum. For example, suppose a full athletic scholarship, known as a grant-in-aid, is worth \$40,000 at both schools. A student-athlete playing ice hockey may receive a 50% scholarship worth \$20,000 at the first school. If the school receiving the transferee offers a 75% scholarship, which is worth \$30,000, the total compensation for the student would rise by \$10,000. This amount, however, does not exceed the maximum of \$40,000. The bottom line is that transferring does not endanger amateurism.

Paternalistic arguments about transferring are also not procompetitive. According to the NCAA, sitting out a year is good for the student because it provides the student-athlete with time to settle in and become accustomed to the new surroundings.<sup>68</sup> But this is disingenuous. When a student-athlete transfers to a new school, she must adapt to a new environment. Although the transferring student-athlete is not competing, she still practices and trains with her new team. If it is necessary to provide time and opportunity for transfer students to settle into a new environment, the training should also be prohibited, or at least reduced. Second, the same logic would apply *a fortiori* to freshmen. Freshmen often go from high schools with student bodies of 1,500–2,000 to universities with 25,000–50,000 students. Some manage while some do not. Transfer student-athletes are no different, but no one is advocating a return to ineligibility for freshman athletes.

### B. *Non-Solicitation Agreements*

Much the same can be said about the non-solicitation agreements in Bylaw 13.1.1.3. In spite of the Seventh Circuit’s approval of this anticompetitive bylaw in *Deppe*, it is hard to see how it could pass muster under a rule of reason analysis. Neither the DOJ nor the FTC ultimately determines whether a practice is unlawful, but these enforcement agencies believe that non-solicitation agreements are unlawful *per se*. They have warned that the DOJ will file criminal charges in non-solicitation cases.<sup>69</sup>

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<sup>68</sup> Alex Kirshner, *NCAA transfer rules, explained quickly and honestly*, SBINATION (May 9, 2018), <https://www.sbnation.com/college-football/2018/5/9/17311748/ncaa-transfer-rules-change-guide-list-sit-out>, [<https://perma.cc/2SAD-GB3C>].

<sup>69</sup> See DEP’T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM’N, *supra* note 61, at 2.

It should be relatively easy to establish a *prima facie* case that non-solicitation agreements are anticompetitive. By definition, such agreements restrain competition. There are also several cases involving no-poaching agreements. None of these cases found agreements not to compete in the labor market to be procompetitive.<sup>70</sup>

The NCAA cannot deny the existence of the agreement since it is in black and white—Bylaw 13.1.1.3. Nor can the NCAA offer a legitimate procompetitive justification for this restraint. In their *Antitrust Guidance*, the DOJ and the FTC reject a defense involving cost reductions, so the NCAA members cannot cry poverty. Resorting to claims that the restraint is necessary to preserve amateurism should be unavailing.

## V. CONCLUDING REMARKS

In *Deppe*, as in *Agnew* and again in *Pugh*, the Seventh Circuit found that eligibility rules are presumptively procompetitive. This presumption, however, is flawed for two reasons. First, the requirement was obviously the product of a collusive agreement that hinders competition among member institutions for the services of student-athletes. The existence of the agreement itself can hardly be denied since it is in Bylaw 14.5.5. Second, sitting out means not participating (i.e., not competing), which is not obviously procompetitive. Following a transfer, if the student-athlete would have played but for the Transfer Regulation, the result is a lower-quality product. Collusive reductions in product quality are not procompetitive.

In its *Deppe* opinion, the Seventh Circuit has blessed anticompetitive conduct by the NCAA and its members. Neither the transfer rules nor the non-solicitation rules should be considered *presumptively procompetitive*. Both are plainly anticompetitive, and neither would pass muster under a rule of reason analysis.

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<sup>70</sup> See, e.g., *AMN Healthcare, Inc. v. Aya Healthcare Serv., Inc.*, 28 Cal. App. 5th 923, 930 (Cal. Ct. App. 2018). Non-solicitation agreements have come under fire as unfair methods of competition under California state law.