

RECLAIMING STUDENT ATHLETES’ RIGHTS TO THEIR NAMES, IMAGES, AND LIKENESSES, POST *O’BANNON V. NCAA*: ANALYZING NCAA FORMS FOR UNCONSCIONABILITY

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I. INTRODUCTION

Every year in late August, student athletes at colleges belonging to the National Collegiate Athletic Association (“NCAA”) throughout the country assemble for a mandatory eligibility meeting. Before a student athlete can compete for the NCAA, he or she must complete the Student-Athlete Statement/Drug Testing Consent form, also known as Form 14-3a (“Form 14-3a” or the “Form”).¹ Form 14-3a is a standard form contract given to every student athlete without exception, no matter his or her skill, fame, or importance to the team. Currently, Form 14-3a is seven pages in length, has six different sections, and states the basic rules for eligibility.² It effectively constitutes the contractual agreement between a student athlete and the NCAA.

Failure to complete Form 14-3a bars a student athlete from competition.³ Student athletes cannot negotiate its terms and are left with two options: take it or leave it.⁴ Given the desire student athletes have to play, they have little bargaining power and thus little incentive to argue the Form’s terms and will simply sign it. Although Form 14-3a is short and

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1. *Form 14-3a*, NAT’L COLLEGIATE ATHLETICS ASS’N (2013), http://www.ncaa.org/sites/default/files/DI%20Form%2014-3a%20-%20Student-Athlete%20Statement_0.pdf [hereinafter *Form 14-3a*]. Each year the first two digits reflect the academic year. For example, 12-3a for academic year 2012–2013 and 13-3a for academic year 2013–2014. 14-3a was the most recent form signed in August for the 2014–2015 academic year. Furthermore, 3a corresponds to Division I, whereas 3b is Division II and 3c is Division III. The language at issue in these forms is consistent across all three.

2. *Id.*

3. *Id.*

4. *Id.*

succinct, by signing Part I a student athlete affirms that he or she was given the thirteen page Summary of NCAA Regulations (“Summary”),⁵ which is a handout that attempts to summarize the nearly 500 page Division I Manual⁶ that contains all of the rules a student athlete must abide by.

As the formal title of Form 14-3a—the Student-Athlete Statement/Drug Testing Consent form—suggests, the Form’s main purpose is to have the student athlete affirm his or her amateur status and consent to drug tests. For the 2014–2015 academic year, the contents of the form adequately meet the expectations raised by the title. This version of the form, however, is both slightly different in content than previous years and vastly different in substance.

In prior versions, such as Form 13-3a, the immediate predecessor of 14-3a, “Part IV: Promotion of NCAA Championships, Events, Activities or Programs” was conspicuously placed in the middle of the agreement.⁷ Part IV simply stated, “You authorize the NCAA [or third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”⁸ The term “generally promote” had no definition or limitation, thus allowing the NCAA wide discretion in using a student athlete’s name or image. While this term may have seemed minor, it failed to inform the student athlete of the NCAA’s true monopoly over his or her name, image, and likeness (“NIL”) rights. Upon closer examination of the NCAA bylaws in the Division I Manual, student athletes, by agreeing to Part IV, were actually giving the NCAA near exclusive rights to their NIL.⁹ The effect of these bylaws was that the NCAA, schools, and commercial entities, would be

5. *Id.* at 2. SUMMARY OF NCAA REGULATIONS – DIVISION I, NAT’L COLLEGIATE ATHLETICS ASS’N, 3 (2013), http://grfx.cstv.com/photos/schools/coas/genrel/auto_pdf/2013-14/misc_non_event/summpary-of-ncaa-regulations.pdf [hereinafter SUMMARY OF NCAA REGULATIONS].

6. 2014–15 NCAA DIVISION I MANUAL, NAT’L COLLEGIATE ATHLETICS ASS’N (2013), available at <http://www.emueagles.com/custompages/compliance/2014-2015%20Forms/Coaches/2014-15%20NCAA%20Compliance%20Manual%20%28Aug.%202014%29.pdf> [hereinafter NCAA DIVISION I MANUAL]. The rules at issue in this manual are identical to the rules that apply to Division II and III.

7. *Form 13-3a*, NAT’L COLLEGIATE ATHLETICS ASS’N (2013), <http://www.utroockets.com/pdf9/2467387.pdf>.

8. *Id.*

9. SUMMARY OF NCAA REGULATIONS, *supra* note 5, at 3; Dan Wolken and Steve Berkowitz, *NCAA Removes Name-Likeness Release From Student-Athlete Forms*, USA TODAY (July 18, 2014), <http://archive.press-citizen.com/usatoday/article/12840997>.

free to use a student athlete's NIL as long as they could make a connection to a sporting event; student athletes, however, could not use their NIL for any personal commercial use.¹⁰

The likely catalyst for this change was the recent student athletes' victory over the use of their NIL in the *O'Bannon v. NCAA* antitrust lawsuit.¹¹ Prior to the litigation, NCAA bylaws prohibited schools from paying student athletes anything beyond full grant-in-aid scholarships.¹² According to Judge Claudia Wilken, however, the NCAA rules that prohibit further payments violate the Sherman Antitrust Act and unlawfully restrain trade.¹³ Thus, the NCAA is now enjoined from enforcing rules that prohibit schools from paying student athletes a stipend on top of a full grant-in-aid and paying them a share of the profits earned from licensing the use of their NIL.¹⁴ Judge Wilken's ruling, however, has some important limitations. First, the order is merely an injunction that prevents the NCAA from enforcing rules that prohibit schools from instituting two possible types of compensation.¹⁵ The order does not actually force schools to pay their athletes anything.¹⁶ Second, the trust fund provision only applies to the Football Bowl Subdivision ("FBS") and Division I men's basketball players, and the stipend provision only applies to students already receiving a full grant-in-aid, which is essentially provided to the same set of student athletes.¹⁷ Women and non-revenue student athletes are left to wonder how this case will impact their NIL rights in the future and in the rare occasions when their games are broadcast on television. Third, many of the rules governing a student athlete's NIL rights are left intact, including the ban on endorsements and the bylaws that allow many other entities to use a student athlete's NIL without his or her consent.¹⁸ Finally, the ruling's effects do

10. NCAA DIVISION I MANUAL, *supra* note 6, at 68–71.

11. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) [hereinafter *O'Bannon*].

12. *See id.* at 971.

13. *Id.* at 1007.

14. *Id.* at 963.

15. *Id.* at 1004 (“In any event, Plaintiffs are not seeking an injunction requiring schools to provide compensation to their student-athletes – they are seeking an injunction to permit schools to do so.”).

16. *Id.*

17. *See id.* at 965.

18. *O'bannon*, *supra* note 11, at 1008–09.

not have to be instituted until August 1, 2015, which leaves current student athletes and new recruits in limbo.¹⁹

This Note originally set out to tackle issues left unresolved by the *O'Bannon* decision by analyzing Form 13-3a for unconscionability with regards to the NCAA's policies on the use of a student athlete's NIL. While Part IV of Form 13-3a, and preceding forms, has been omitted from the current version, this analysis is still relevant for two reasons. First, there is no guarantee the clause will remain omitted in future additions, and may appear once the dust following the *O'Bannon* decision settles. Second, while the clause is no longer included in the current version, the underlying principles in the bylaws that give substance to Part IV still exist and are, thus, still part of the contractual relationship between student athletes and the NCAA. Part II of this Note provides some historical perspective behind the NCAA, the growth of college athletics into a nearly billion-dollar industry, and an overview of the NCAA bylaws that govern the use of a student athlete's NIL as they apply in this interim time period. Part III will explore probable changes the NCAA will have to make to the Form and its bylaws in light of *O'Bannon*. Part IV explains the doctrine of unconscionability. Part V applies the doctrine to the Form to determine the merits of an unconscionability claim and concludes that such a claim is tenuous at best. Part VI suggests certain NCAA reforms that could alleviate the issues caused by the bylaws, such as loosening the NCAA's restrictions on endorsements.

II. OVERVIEW OF THE NCAA AND CURRENT BYLAWS

A. PURPOSE AND GROWTH OF THE NCAA

The Intercollegiate Athletic Association, the predecessor of the NCAA, was founded in 1906 to address the violence plaguing college football.²⁰ More broadly, the founders sought to set national standards for all collegiate sports.²¹ From the outset, the organization emphasized

19. Jon Solomon, *NCAA, O'Bannon Agree Injunction Should Start Aug. 1, 2015*, CBS SPORTS (Aug. 11, 2014, 9:39 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24656087/ncaa-wants-obannon-judge-to-clarify-when-payments-can-start>.

20. David Warta, *Personal Foul: Unnecessary Restriction of Endorsement and Employment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419, 421 (2003).

21. Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 322-23 (2003).

education and upholding amateurism.²² It adopted the NCAA name in 1910.²³ The NCAA constitution states that the organization's purpose is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."²⁴ To achieve its goals, the NCAA issues and enforces rules that govern aspects such as recruiting, eligibility, academic standards, and the requirements for schools to be classified as Division I, II, or III.²⁵

Membership in the NCAA is voluntary²⁶ and it continues to remain a nonprofit organization.²⁷ Approximately 463,202 student athletes participated in NCAA sports in 2013.²⁸ In 2014, the NCAA boasted a membership of over 1,112 colleges and universities.²⁹ For schools, membership in the NCAA is valuable because it assists in coordinating regular season competitions and hosts post-season championships like the men's and women's basketball tournaments.³⁰ For student athletes, playing in the NCAA offers not only an unparalleled opportunity to participate in athletics, but also the means to earn a college degree that may otherwise be unaffordable. As a prominent NCAA commercial reminded viewers, most student athletes will "go pro" in something other than sports,³¹ and participation in these teams teaches them important lessons in teamwork, discipline, and relentless hard work.

The NCAA's value has grown exponentially since its formative years, and stands today as a powerhouse in sports. Due to the allure of collegiate

22. *Id.*

23. *Id.* at 322.

24. NCAA DIVISION I MANUAL, *supra* note 6, at 1.

25. *O'Bannon*, *supra* note 11, at 963.

26. Rosenthal, *supra* note 21, at 324.

27. *Finances*, NAT'L COLLEGIATE ATHLETICS ASS'N, <http://www.ncaa.org/about/resources/finances> (last visited Jan. 25, 2015, 2014).

28. ERIN IRICK, NAT'L COLLEGIATE ATHLETICS ASS'N, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 5 (2013), *available at* <http://www.ncaapublications.com/productdownloads/PR1314.pdf>.

29. NCAA MEMBERS BY DIVISION, NAT'L COLLEGIATE ATHLETICS ASS'N, <http://web1.ncaa.org/onlineDir/exec2/divisionListing> (last visited Feb. 20, 2014).

30. *Id.*

31. Nat'l Collegiate Athletics Ass'n, *NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website*, (Mar. 13, 2007), *available at* <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html>.

athletics, the NCAA has sealed ever-growing, lucrative media deals.³² In 1982, the Columbia Broadcasting System (“CBS”) and the NCAA entered into a three year \$49.9 million deal.³³ In 1991, the CBS-NCAA deal reached one billion dollars for a seven-year term.³⁴ The NCAA contracted with CBS again in 2002 for six billion dollars and with ESPN for \$200 million, both for a term of eleven years.³⁵ The NCAA’s most recent media deal was in 2010 with CBS/Turner for \$10.8 billion for a term of over fourteen years.³⁶

In 2012, the NCAA generated \$871,687,872 in revenue.³⁷ The NCAA received \$708,860,595, or 81 percent of that total, from selling media rights.³⁸ The remaining revenue came mostly from ticket and merchandise sales for championships.³⁹ Going into the 2013 fiscal year, the NCAA projected that revenue would drop to \$797 million, with only \$702 million coming from media rights.⁴⁰ In fact, the NCAA actually generated \$912,804,046 in 2013, approximately \$41 million more than the previous year.⁴¹ Of the 2013 revenue, \$726,391,860 came from media rights.⁴² Because the NCAA is a nonprofit organization, most of the revenue returns to member institutions.⁴³ In 2012, 57 percent of the NCAA’s revenues went to Division I members, 9.8 percent to Division I championships and programs, 3.7 percent to Division II championships and programs, 2.9 percent to Division III championships and programs, and 13 percent to association wide programs.⁴⁴ In 2013, 57 percent of the NCAA’s revenues went to Division I members, 10.6 percent to Division I championships and programs, 3.9 percent to Division II championships and programs, 3

32. REVENUE, NAT’L COLLEGIATE ATHLETICS ASS’N, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Feb. 20, 2014).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. NAT’L COLLEGIATE ATHLETICS ASS’N AND SUBSIDIARIES, CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED AUGUST 31, 2013 AND 2012, SUPPLEMENTARY INFORMATION AS OF AND FOR THE YEAR ENDED AUGUST 31, 2013, AND INDEPENDENT AUDITORS’ REPORT, 5 (2013), available at http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf [hereinafter FINANCIAL STATEMENTS]

38. *Id.*

39. REVENUE, *supra* note 32.

40. *Id.*

41. FINANCIAL STATEMENTS, *supra* note 37.

42. *Id.*

43. *Id.*

44. *Id.*

percent to Division III championships and programs, and 13 percent to association-wide programs.⁴⁵

The growth in revenue is staggering, but unsurprising. In the current technological world, demand and ease of access have undoubtedly grown significantly. The NCAA March Madness basketball tournament is a prime example: in the past, games could only be broadcast over CBS, but now they are broadcast over three other channels.⁴⁶ Moreover, viewers not near a television can stream games over the Internet on their computers and even phones and tablets.⁴⁷ Consequently, advertisers can now purchase advertisement space across all types of mediums.⁴⁸ Conferences and even individual schools have enough demand to launch channels dedicated solely to their sports.⁴⁹ With such a huge demand and capability to make more money than ever before, broadcasters are willing to bid increasingly higher for NCAA and conference media contracts, in turn causing this explosion.

B. AMATEURISM, THE NCAA BYLAWS, AND THE USE OF A STUDENT ATHLETE'S NIL

One of the NCAA's main goals is to uphold the virtues of amateur sports.⁵⁰ Such amateurism—or the practice of participating in a discipline without financial compensation—separates the NCAA from professional leagues where participants are paid to perform.⁵¹ In fact, an individual can lose amateur status if he or she is paid in any manner seemingly related to athletic ability and consequently lose NCAA eligibility.⁵²

45. *Id.*

46. *New TV Deal Changes How Fans Watch NCAA Tournament*, CBS NEW YORK (Mar. 15, 2011, 6:34 AM), <http://newyork.cbslocal.com/2011/03/15/new-tv-deal-changes-how-fans-watch-ncaa-tournament/>.

47. Nathan Alvarez, *March Madness Live App Will Let You Stream Any Game As Long As You Have a Paid TV Subscription*, TALK ANDROID (Mar. 16, 2013, 12:17 PM), <http://www.talkandroid.com/154682-march-madness-live-app-will-let-you-stream-any-game-as-long-as-you-have-a-paid-tv-subscription/>.

48. See Paula Lavigne, *College Sports Thrive Amid Downturn*, ESPN (May 1, 2014, 11:23 AM), http://espn.go.com/espn/otl/story/_id/10851446/sports-programs-nation-top-public-colleges-thrived-economic-downturn-earning-record-revenues.

49. *Id.*; Richard Sandimor, *SEC Will Start TV Network in 2014*, N.Y. TIMES (May 2, 2013), http://www.nytimes.com/2013/05/03/sports/ncaafotball/sec-will-have-own-tv-network-starting-in-2014.html?_r=0.

50. See NCAA DIVISION I MANUAL, *supra* note 6, at 1.

51. See Michael A. Corgan, *Permitting Student-Athletes To Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created By Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VIL SPORTS & ENT. L.J., 371, 376 (2012).

52. NCAA DIVISION I MANUAL, *supra* note 6, at 57–86.

Bylaw Article 12, entitled “Amateurism and Athletics Eligibility,” specifically section 12.5, governs the use of a student athlete’s NIL.⁵³ However, before delving into the details of Article 12, it is helpful to step back and follow the path student athletes take to discover this section. At the start of each academic year, student athletes meet with their teammates, coaches, and athletic department administrators at mandatory eligibility meetings. At these meetings, student athletes are handed a thick stack of forms to sign, including the Form. Along with this contract, an institution must provide either the Summary or the relevant sections of the Division I Manual, and allow for time to ask questions.⁵⁴ Due to the heavy amount of information given out at these meetings, it is more likely that an institution will provide the Summary over the bulky manual.

In previous years, when the Form had Part IV, a student athlete would agree to the statement, “You authorize the NCAA [or third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”⁵⁵ Nowhere in these Forms did a student athlete learn what it means to generally promote. Nor do these Forms inform a student athlete that he or she is also giving up the right to use his or her NIL in commerce. In the current Form 14-3a, this language is entirely absent, and it is not included on any other form a student athlete signs.

Because Form 13-3a and its predecessors only have ambiguous language and Form 14-3a omits it entirely, the first indication of the relinquishment of these rights following either version probably comes from reading the paragraph in the Summary that states, “You are not eligible in any sport if, after you become a student-athlete, you accept any pay for promoting a commercial product or service or allowed your name or picture to be used for promoting a commercial product or service. [Bylaws 12.5.2.1 and 12.5.2.2].”⁵⁶ Here, a student athlete is directed to Article 12, which fleshes out these statements. Although a student athlete

53. *Id.*

54. FORM 14-3A, *supra* note 1, at 2.

55. *Id.* at 4.

56. SUMMARY OF NCAA REGULATIONS, *supra* note 5, at 2.

only signed the initial short form, the 408 pages in the Division I Manual apply in full.⁵⁷

Section 12.5.1 lists the permissible uses of a student athlete's NIL in promotional activities.⁵⁸ In this discussion, it should be noted that in no instance is an entity that is authorized to use a student athlete's NIL allowed to directly profit from doing so.⁵⁹ Furthermore, in only two instances must a student athlete sign a release allowing his or her NIL to be used.⁶⁰ First, a "member institution or recognized entity thereof, member conference, or a noninstitutional charitable, educational, or nonprofit agency" can use a student athlete's NIL for limited purposes, provided that a number of conditions are met, one of which is that the student athlete has signed a release.⁶¹ Second, a student athlete's NIL can appear in media related to sport-skill demonstrations, provided that a few conditions are met, one of which is a signed release.⁶²

Nine other sections do not require a signed release by student athletes, meaning they have no control over the use of their NIL in these instances. First, as previously noted, the NCAA can use a student athlete's NIL to generally promote NCAA events.⁶³ Second, an institution or charitable, educational, or nonprofit organization can use a student athlete's NIL to promote generally its fundraising activities at a commercial establishment.⁶⁴ Third, a member institution can distribute noncommercial items to commercial establishments.⁶⁵ Fourth, a member institution or recognized entity thereof, member conferences, or a noninstitutional charitable, education, or nonprofit agency can distribute, but not sell, player trading cards bearing a student athlete's NIL.⁶⁶ Fifth, an institution can make a wallet-sized playing schedule including the NIL of a student athlete

57. This Note will cite to the current version of the Bylaws. The cited sections contain the same language as the preceding edition for the 2013–2014 Academic Year. However, the numbering of those sections may be changed to adjust for additions made to the new version.

58. NCAA DIVISION I MANUAL, *supra* note 6, at 68–71.

59. *Id.*

60. *Id.*

61. *Id.* at 68.

62. *Id.* at 70.

63. *Id.* at 68.

64. *Id.* at 69.

65. *Id.* Provided the institution generally distributes such items to other commercial establishments and the establishment does not require a recipient to make a purchase.

66. *Id.*

and include commercial language.⁶⁷ Sixth, a business, commercial product, or service can use a student athlete's NIL in an advertisement publicizing the sponsor's congratulations towards the player, provided it meets a number of qualifications.⁶⁸ Seventh, a camp can use a student athlete's NIL in the camp counselor section of its brochure to identify him or her as a staff member, but not in any advertisement.⁶⁹ Eighth, any party authorized by the institution, but not the student athlete, can sell and distribute institutional highlight films, videotapes, or media guides with the student athlete's NIL.⁷⁰ Finally, a conference or an institution hosting even part of a championship can create a poster using a student athlete's NIL.⁷¹

In the midst of the above sections, there is one that allows a student athlete to continue to be paid for specific work performed before becoming a student athlete. If an individual was paid for the use of his or her NIL to advertise or promote a commercial product, he or she can continue to be paid if involvement arose independent of athletic ability, no reference is made to collegiate involvement, the individual does not endorse the product, and remuneration is at a reasonable rate and not based upon athletic ability.⁷² This is the only section that allows a student athlete to receive payment outside of financial aid.

Section 12.5.2 turns to impermissible uses of a student athlete's NIL.⁷³ If a student athlete "accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind," then he or she is no longer eligible to play for the school's athletic team.⁷⁴ If a student athlete "receives remuneration for endorsing a commercial product or service through the individual's use of such product or service," then he or she also loses eligibility.⁷⁵ This latter condition is subject to the exception

67. *Id.* Provided the commercial product's name, trademark, or logo, does not appear and that the commercial language does not appear on the same page as the student athlete's image.

68. *Id.* Provided the primary purpose of the ad is to publicize congratulations, the advertisement only includes the name or trademark and not a reproduction of the product associated with it, the ad does not indicate that the student athlete or team endorses the product or service, and that the student athlete has not signed away rights inconsistent with the bylaws.

69. *Id.*

70. *Id.* Also provided the ad does not indicate the student athlete or team endorses the product or services of the advertiser.

71. *Id.* at 70.

72. *Id.* at 69–70.

73. *Id.* at 71–72.

74. *Id.* at 71.

75. *Id.*

previously discussed.⁷⁶ Another exception arises if the student athlete took steps to retract permission for work that was performed prior to becoming a student athlete.⁷⁷ Furthermore, the bylaws burden the student athlete with policing the commercial use of his or her NIL without the student athlete's knowledge or permission.⁷⁸ The only exception to this burden is when individuals or agencies are selling a student athlete's image for private use.⁷⁹

Thus, the Form, in any form, is only the tip of the iceberg when it comes to defining the contractual relationship between student athletes and the NCAA. To understand amateurism and the use of a student athlete's NIL, one must take the time to thoroughly review the sections detailed above.

III. PROBABLE CHANGES IN LIGHT OF *O'BANNON V. NCAA*

The *O'Bannon* decision will force the NCAA to revisit its rules on amateurism.⁸⁰ Most of them, however, will remain intact since the decision was limited in its scope.⁸¹ The above section set out the framework of the NCAA's bylaws regarding the use of a student athlete's NIL as the bylaws stood before the decision; however, it will be important for purposes of this discussion to explore what changes the NCAA will probably make, because these changes could impact the unconscionability discussion.

It is worth reiterating here that Judge Wilken did not force schools to pay players; her order only enjoined the NCAA from enforcing certain rules. Judge Wilken also helped the NCAA by suggesting two less restrictive alternatives.⁸² Using funds brought in by licensing the use of a student athlete's NIL, schools may now fund stipends to cover the difference between a full grant-in-aid and the cost of attendance and may fund trust funds for FBS football and men's basketball players.⁸³ Considering the NCAA's strong opposition to any form of paying student

76. See NCAA DIVISION I MANUAL, *supra* note 6, at 68–71.

77. *Id.* at 71.

78. *Id.*

79. *Id.*

80. The bylaws most likely to be affected by the stipend injunction will be found in Article 15 Financial Aid. NCAA DIVISION I MANUAL, *supra* note 5, at 187–209. The trust funds will most likely affect Article 16, specifically 16.11.2.1, which prohibits a student athlete from receiving any extra benefits. *Id.* at 219.

81. See *O'Bannon*, *supra* note 11, at 1007–08.

82. *Id.*

83. *Id.*

athletes, it is probable that the NCAA will only adopt these two less restrictive alternatives because both allow for favorable limitations the NCAA can implement to minimize the effects.

With regards to the stipends, the NCAA may limit payments above the full grant-in-aids at the cost of attendance.⁸⁴ Furthermore, certain schools and conferences were already highly in favor of offering a stipend. The NCAA seemed to be close to acquiescing to stipends, which indicates it foresaw that stipends would allow it to continue maintaining its core value of amateurism, or at the very least as a viable solution to solving the issues at hand.⁸⁵

With regards to trust funds, however, the NCAA vehemently opposes any such payments to student athletes, and thus it is very probable that the new rules will reflect the most limited implementation possible.⁸⁶ The first limitation allowed by the order is to cap the trust funds at five thousand dollars per year.⁸⁷ While Judge Wilken's decision prevents the NCAA from setting a cap of less than five thousand dollars⁸⁸, the injunction order allows for deferred compensation of five thousand dollars.⁸⁹ The reasonable interpretation of these two provisions, taken together, is that while the NCAA is allowed to cap at five thousand dollars, this does not prevent a school from paying less than five thousand dollars. Thus, not every school is committed to paying a student athlete five thousand dollars. The second limitation allowed prohibits schools from filling the trust "with anything other than revenue generated from the use of the student-athletes' own names, images, and likenesses."⁹⁰ Schools will be able to give recruits a certain percentage of the revenue generated from licensing agreements, which will then be used to calculate how much goes into the trust fund. This means that only revenue from the sale of school merchandise such as pictures and jerseys in a school store, licensing agreements with entities

84. *Id.* at 1008–09.

85. Todd Jones, *NCAA Board vote could put athlete stipends back in play*, BUCKEYE EXTRA (Aug. 7, 2014), <http://buckeyextra.dispatch.com/content/stories/2014/08/07/ncaa-board-vote-could-put-athlete-stipends-back-in-play.html>.

86. *See, e.g.*, NCAA DIVISION I MANUAL, *supra* note 6.

87. *O'Bannon*, *supra* note 11, at 1008–09.

88. *Id.*

89. *Id.*

90. *O'Bannon*, *supra* note 11, at 1005–06.

such as broadcast networks and video game developers, and retail merchandise can be used to fund the trusts.⁹¹

These sources of revenue, however, may not prove fruitful for student athletes hoping to max out their trust funds. Currently, licensing for video games has ceased.⁹² Thus, these agreements are not funding the trust. Likewise, apparel sales are not particularly profitable and may not make an impact on filling up a trust, depending on the student athlete's share.

There is also an issue in determining what constitutes the use of a student athletes' NIL. Do jerseys with just a student athlete's number, but not his or her name, qualify as the use of NIL? Despite these difficulties, the real goal for student athletes would be to obtain a share in the television-licensing rights. Many television-licensing agreements contain assurances by the NCAA and schools that they have the right to license student athletes' NILs.⁹³ Thus, it seems clear that these deals should qualify as licensing agreements that schools must share with the student athletes. However, if these deals can be successfully made without the need to license a student athletes' NIL, then the schools would escape having to share the revenue with them.⁹⁴

Most importantly, however, is that the NCAA will not have to adjust its rules regarding the restrictions on student athletes using their NIL to endorse products or in other commercial pursuits. Moreover, the other entities currently authorized to use a student athlete's NIL without his or her permission will be able to continue to do so without any consequences.

IV. CONTRACTS AND THE UNCONSCIONABILITY DOCTRINE

While the NCAA may be reluctant to adjust its rules regarding student athletes' NIL, the *O'Bannon* decision proved that the U.S. judicial system

91. While there may be more markets available, these are the markets emphasized by Judge Wilken.

92. Jon Solomon, *Not in the game: College football players want NCAA video game back*, CBS SPORTS (July 21, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24631298/not-in-the-game-college-football-players-want-ncaa-video-game-back>.

93. Jon Solomon, *O'Bannon judge rules NCAA violates antitrust law*, CBS SPORTS (Aug. 8, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24653743/obannon-judge-rules-ncaa-violates-antitrust-law>.

94. The probability of deals that attempt to leave out provisions over the licensing of student athletes' NILS surviving other legal challenges is, admittedly, very small. However, it will not be surprising if at least one school attempts to circumvent these rules to limit what must be paid into a trust fund.

is a viable means of relief for student athletes. While *O'Bannon* targeted antitrust allegations, there are also a number of legal doctrines student athletes can employ to have a court refuse to enforce contracts, one of which is the doctrine of unconscionability.⁹⁵ The Supreme Court has long recognized that courts should not enforce contracts that “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”⁹⁶ Formerly a common law tool, the doctrine was eventually codified in section 2-302 of the Uniform Commercial Code (“UCC”), which requires a court to refuse to enforce a contract upon a finding of unconscionability.⁹⁷ The UCC, however, only applies to contracts involving the sale of goods.⁹⁸ Still, courts have found that the UCC is helpful in interpreting the validity of all contracts and have applied its principles, including the doctrine of unconscionability, to contracts not concerning the sale of goods.⁹⁹ Today, the Restatement (Second) of Contracts § 208 states, “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”¹⁰⁰ The Restatements, however, are only persuasive and require judicial application, thus an analysis of contract law and unconscionability requires support from case law.

Due to the lawsuit’s location in the Northern District of California, this Note will look at California contract law and its judicial application of the unconscionability doctrine. Section 1670.5 of the California Civil Code codifies the unconscionability doctrine, allowing a court to either enforce the contract without the unconscionable term or refuse to enforce the contract as a whole if the contract or term was unconscionable at the time it was made.¹⁰¹ Because the doctrine was codified in the Civil Code rather

95. Kendall K. Johnson, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 *SPORTS L.J.* 1, 14–15 (2012).

96. *Hume v. US*, 132 U.S. 406, 411 (1889). *See also* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.”).

97. U.C.C. § 2-302 (2003).

98. Johnson, *supra* note 95, at 15.

99. *Id.*

100. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

101. CAL. CIV. CODE § 1670.5 (West 1979).

than the Commercial Code, it is applicable to all types of contracts, not just the sale of goods.¹⁰²

In applying this statute, courts analyze contracts for two types of unconscionability: procedural and substantive.¹⁰³ Procedural and substantive unconscionability do not need to be present to the same degree.¹⁰⁴ Instead, the two should be analyzed along a sliding scale, so that if the evidence supports procedural unconscionability but little to no substantive unconscionability, or vice versa, a court may still find the contract unconscionable.¹⁰⁵

A. PROCEDURAL UNCONSCIONABILITY

A procedural unconscionability analysis begins with the question of whether the contract is adhesive.¹⁰⁶ An adhesion contract is defined as a standardized, nonnegotiable contract that is written by a party with superior bargaining power and given to an inferior party on a “take it or leave it” basis.¹⁰⁷ In *Armendariz v. Foundation Health Psychcare Services*, a contract imposed on an employee as a condition of employment without the opportunity to negotiate its terms was found to be adhesive.¹⁰⁸

California appellate courts have found that a finding of an adhesion contract is essentially, but not always, a finding for procedural unconscionability.¹⁰⁹ Procedural unconscionability focuses on two prongs: oppression and surprise.¹¹⁰ Oppression involves the inequality of bargaining power between the parties that prevents negotiation and creates an absence of meaningful choice.¹¹¹ Surprise involves the extent to which the party that drafted the contract hid the terms from the other party.¹¹²

The first prong of procedural unconscionability, oppression, is most readily found in an adhesion contract due to the lack of negotiation.¹¹³ The

102. *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 643 (Cal. App. 2010).

103. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006).

104. *Id.*

105. *Id.*

106. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113 (Cal. 2000).

107. *Id.*

108. *Id.* at 114–15.

109. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006).

110. *Id.* at 1280.

111. *Id.*

112. *Id.*

113. *Id.* at 1281.

“meaningful choice” element is interpreted differently depending the court.¹¹⁴ On one hand, one California appellate decision found that an employment contract was procedurally unconscionable because it was presented on a “take it or leave it” basis, despite the plaintiff’s status as a sophisticated corporate executive not actively seeking employment.¹¹⁵ On the other hand, another California appellate decision found that a sophisticated investor did not enter into an unconscionable contract with a stock brokerage and securities firm because there were meaningful alternatives where the plaintiff could obtain the services without the challenged terms.¹¹⁶ In the latter case, the court held that the oppression factor may be defeated if the plaintiff has a “meaningful choice of reasonably available alternative sources of supply” from which to obtain the goods or services without the challenged terms.¹¹⁷ Still, California appellate courts have tended to reject “the notion that the availability in the marketplace of substitute employment, goods, or services *alone* can defeat a claim of procedural unconscionability.”¹¹⁸

With regards to the second prong, the element of surprise, the normal standard is that failing to read a contract does not free a party from its terms.¹¹⁹ However, this general proposition may not be given full force with regards to adhesion contracts.¹²⁰ In such cases, if an adhesion contract’s terms would defeat the weaker party’s strong expectations, it may be necessary for the stronger party to call attention to the contract’s specific language.¹²¹ In *Wheeler v. St. Joseph Hospital*, the court found that the plaintiff, a patient at a hospital, did not agree to an arbitration clause in a Condition of Admission form despite having not read through the entire form.¹²² The court reasoned that a patient would reasonably think that he has no alternative but to sign the form, that the form only included an obligation to pay, and that it only states hospital rules to abide by.¹²³ Thus, the inclusion of an arbitration clause for medical malpractice defeated the patient’s strong expectations and should have been called to his

114. *Id.*

115. *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1533–34 (Cal. Ct. App. 1997).

116. *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 773 (Cal. Ct. App. 1989).

117. *Id.* at 772.

118. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006).

119. *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 785 (Cal. Ct. App. 1976).

120. *Id.*

121. *Id.*

122. *Id.* at 786–87.

123. *Id.* at 786.

attention.¹²⁴ Furthermore, in *Bauer v. Jackson*, the defendant, who was shipping plaintiff's horses, erred in not notifying the plaintiff of the shipping terms and having the plaintiff sign the contract after the horses were loaded onto the trailer.¹²⁵ Under the circumstances, the plaintiff reasonably drew the inference that he was only signing a delivery receipt, and thus the plaintiff's failure to read the contract was excusable neglect.¹²⁶

Moreover, the sophistication of a party alone cannot defeat a procedural unconscionability claim.¹²⁷ Experienced but legally unsophisticated parties may be unfairly surprised by terms depending on how the terms are presented.¹²⁸ In *A&M Produce v. FMC Corp.*, the court found that the plaintiff, although experienced in farming deals, may have been reasonably surprised by the terms of an adhesion contract because of its complexity and the fact that the defendant failed to suggest, both verbally and in writing, that the plaintiff should read the back of the form.¹²⁹ Thus, procedural unconscionability focuses on the lack of negotiation in adhesion contracts and also takes into account the experience and level of power among the parties.

B. SUBSTANTIVE UNCONSCIONABILITY

In addition to the first type of procedural unconscionability, the second type, substantive unconscionability, must be considered to determine whether a contract is unconscionable or not. A contract or its terms are substantively unconscionable if they are overly harsh or generate one-sided results.¹³⁰ Because contracts are an allocation of risk, contract terms are substantively unconscionable if they reallocate risks in an objectively unreasonable or unexpected manner.¹³¹ In other words, the contract or its terms must "shock the conscious."¹³² Substantive unconscionability must be present at the time of formation, meaning there must have been a justification for the allocation of risk.¹³³

124. *See id.* at 786.

125. *Bauer v. Jackson*, 93 Cal. Rptr. 43, 50–51 (Cal. Ct. App. 1971).

126. *Id.*

127. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006).

128. *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 124 (Cal. Ct. App. 1982).

129. *Id.*

130. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 690 (Cal. 2000).

131. *A&M Produce Co.*, 186 Cal. Rptr. at 122.

132. *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 649 (Cal. App. 2010).

133. *A&M Produce Co.*, 186 Cal. Rptr. at 122.

Although only persuasive law in California, the Third Circuit's ruling in *Campbell Soup Co. v. Wentz*¹³⁴ provides a famous example of when a contract can be unfairly one-sided. The plaintiff, Campbell Soup, contracted with the defendant, a farmer, to buy all of his carrots.¹³⁵ When the market price greatly exceeded the contracted price, the defendant refused to honor the contract and sold the carrots elsewhere.¹³⁶ Under the contract, the plaintiff was free to refuse purchasing the carrots but if it chose to do so the defendant was not permitted to sell them elsewhere and thus they would go to waste.¹³⁷ The plaintiff sued to enforce the contract, however, and the court opined that the contract had driven too hard of a bargain and found it unconscionable.¹³⁸

In California, substantive unconscionability claims have mostly been targeted at arbitration clauses. For example, an arbitration clause that limited the plaintiffs' remedy to an amount well below full compensation for their claim, but did not so limit the defendants' without any justification, was substantively unconscionable.¹³⁹ The Ninth Circuit, in interpreting California law, found that an arbitration clause limiting the weaker party to only arbitration while allowing the stronger drafting party to use a judicial forum was substantively unconscionable.¹⁴⁰ However, an arbitration clause that barred class actions was not substantively unconscionable where it did not hinder a plaintiff from pursuing a legal remedy.¹⁴¹

C. SEVERABILITY

The final area of unconscionability to discuss is severability, or whether a court can remove the unconscionable terms and enforce the remainder of the contract or invalidate the contract as a whole. California Civil Code § 1670.5(a) allows a court, at its discretion, to either refuse to enforce the contract, enforce the contract without the unconscionable

134. *Campbell Soup Co. v. Wentz*, 172 F. 2d 80 (3d Cir. 1948).

135. *Id.* at 82.

136. *Id.*

137. *Id.*

138. *Id.* at 84.

139. *Lhotka v. Geographic Expeditions, Inc.*, 101 Cal. Rptr. 3d 844, 853 (Ct. App. 2010) (finding substantive unconscionability where recovery was limited to amount paid for the mountain climbing trip).

140. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006).

141. *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 649 (Cal. App. 2010) (requiring a plaintiff to individually bring a claim, rather than through a class action, that would yield around \$43,000 did "not shock the conscience").

clause, or limit the application of any unconscionable clause to avoid unconscionable results.¹⁴² A court should only refuse to enforce an entire contract if it is permeated by unconscionability.¹⁴³ Two reasons support severance rather than voiding an entire contract.¹⁴⁴ One is to prevent parties from either gaining or suffering undeserved consequences resulting from the voidance of an entire contract, especially when there was full or partial performance.¹⁴⁵ The other is to conserve a contractual relationship that is otherwise a legal scheme.¹⁴⁶ Overall, the main inquiry is whether “the interests of justice . . . would be furthered.”¹⁴⁷

In deciding whether a contract is severable, a court must look to its language and subject matter, and compare them to the intentions of the parties.¹⁴⁸ In a sale of pinball machines, one court found that because the value of the illegal machines was quantifiable, their value could be severed from the paid consideration and the contract could stand.¹⁴⁹ Furthermore, because the illegal machines were of minor importance to the contract, they did not taint the entire agreement.¹⁵⁰

On the other hand, a contract for the purchase of a lease, liquor license, and alcohol, was entirely voided because the sale of the license, which was an integral part of the agreement as a whole, was illegal.¹⁵¹ Without the license, the lease and alcohol were valueless to the purchaser.¹⁵² Additionally, a contract to sell lumber was wholly invalidated because its purpose, to restrict the lumber trade, was against public policy.¹⁵³ While the parties had the right to enter into a sale of goods, they did not have the right to restrain trade against the best interest of the community, and thus the sale itself permeated the contract with illegality.¹⁵⁴

142. CAL. CIV. CODE § 1670.5(a) (West 1979).

143. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 695 (Cal. 2000).

144. *Id.* at 696.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 695.

149. *See Keene v. Harling*, 392 P.2d 273, 276–77 (Cal. 1964).

150. *Id.*

151. *Teachout v. Bogy*, 166 P. 319, 321–22 (Cal. 1917).

152. *Id.* at 322.

153. *Santa Clara Val. M. & L. Co. v. Hayes*, 18 P. 391, 393 (Cal. 1888).

154. *See id.* at 393.

It is important to note that a court cannot augment a contract with additional terms to avoid unconscionability.¹⁵⁵ A court's only remedies are to void the contract, sever the unconscionable term, or limit the term's application to avoid an unconscionable result.¹⁵⁶

V. UNCONSCIONABILITY APPLIED TO THE FORM

In order to apply the unconscionability doctrine, there must be an underlying contract. Courts have consistently found that a combination of forms, including the National Letter of Intent, the Statement of Financial Aid, and the Form, create a contractual relationship between the NCAA and student athletes.¹⁵⁷ Furthermore, courts have found that the NCAA Constitution and bylaws are part of that contractual relationship.¹⁵⁸ Using this contractual relationship as the base, the following section will apply the doctrine of unconscionability to Part IV of Form 13-3a and its predecessors and the specific bylaws that pertain to the use of student athletes' NIL.¹⁵⁹

In the following analysis, ideally all student athletes would be grouped into a single class. The reality, however, is that not all student athletes are equal, nor are the different sports treated equally. For example, Title IX of the Education Amendments has been held to require universities to provide substantially proportionate athletic opportunities for men and women.¹⁶⁰ Further, sports like men's basketball and football generate a substantial amount of revenue whereas most sports generate no revenue or even operate at a loss. Thus, the football and basketball stars generating the most money in collegiate sports are prominent examples of the NCAA's flaws; not many cite wrestlers or runners as examples of NCAA exploitation. On top of this, the path to professionalism varies between sports. For example, a prospective National Basketball Association draftee must be 19 years old—a rule known as the “one-and-done” rule since it reflects the fact that

155. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000).

156. *Id.*

157. *Johnson*, *supra* note 95, at 13–14. This case looked at the form as it was written with Part IV included. It is very probable that the finding would be the same if the court considered the form in its current state.

158. Thomas A. Baker III, John Grady & Jesse M. Rappole, *Consent Theory As a Possible Cure for Unconscionable Terms in Student-Athlete Contracts*, 22 MARQ. SPORTS L. REV. 619, 629 (2012).

159. *See NCAA DIVISION I MANUAL*, *supra* note 6, at 68–72.

160. *Corgan*, *supra* note 52, at 382–84.

many draftees only play one year of college basketball before going pro.¹⁶¹ On the other hand, a prospective National Football League draftee must be three years removed from high school.¹⁶² For other student athletes, the path to professionalism is less restrictive and will simply depend on athletic talent. In short, the need to play in the NCAA for student athletes that intend to turn professional varies greatly.

A. PROCEDURAL UNCONSCIONABILITY

1. Meaningful Choice

In analyzing oppression—the first prong of procedural unconscionability—the first step is to determine whether the Form is an adhesion contract. Because it is drafted solely by the NCAA and presented to student athletes on a take it or leave it basis, without any opportunity to negotiate its terms, the form is probably adhesive. While this supports a finding for procedural unconscionability, adhesion contracts are commonplace and holding each of them unconscionable would create an absurd result.¹⁶³ Thus, it is important to consider whether student athletes have a meaningful choice.

The NCAA offers student athletes a unique opportunity to compete at a high level while earning a college degree.¹⁶⁴ Talented players can earn scholarships ranging from small amounts to full rides depending on the sport, conference, and division. For some student athletes, participation is a way to round out a fulfilling college career. For others it is a way to showcase skills to professional teams before becoming draft eligible, and the impressive television contracts indicate that people are watching.

Despite the NCAA's prominence, it is not, however, the only organization that allows college aged athletes to compete in sports.¹⁶⁵ For example, organizations like the National Association of Intercollegiate Athletics (NAIA) and the National Junior College Athletic Association (NJCAA) offer college students alternative leagues to play in.¹⁶⁶ The NAIA

161. Myron Medcalf, *Roots of One-and-Done Rule Run Deep*, ESPN (June 26, 2012), http://espn.go.com/mens-college-basketball/story/_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball.

162. Albert Breer et al., *Jadeveon Clowney Stimulates Debate on NFL Draft Age Restriction*, NFL (Feb. 14, 2013), <http://www.nfl.com/news/story/0ap1000000139190/article/jadeveon-clowney-stimulates-debate-on-nfl-draft-age-restriction>.

163. Johnson, *supra* note 95, at 24.

164. *Id.* at 23.

165. *Id.* at 26–27.

166. *Id.* at 27.

has 60,000 student athletes, thirteen sports, 260 member institutions, and offers \$500 million in scholarships.¹⁶⁷ The NAIA generated total revenues of \$4,171,023 in 2010¹⁶⁸ and \$5,154,333 in 2011.¹⁶⁹ The NJCAA is the governing body for two-year college athletics around the country with nearly 60,000 student athletes from 525 member colleges.¹⁷⁰ In 2011, the NJCAA generated \$1.56 million.¹⁷¹ While these organizations exist as alternatives, the enormity of the NCAA, with its 463,202 student athletes, 1112 members, and \$871.6 million revenue, is above and beyond what the NAIA and NCJAA can hope to achieve.

For basketball and football, the NCAA's most popular sports, a number of alternatives exist. For basketball players, first and foremost is the NBA, however, players rarely ever proceed straight from high school to the NBA.¹⁷² They must either wait a year or continue playing in the NCAA or other leagues to better develop.¹⁷³ These other leagues include overseas professional leagues, semi-professional American leagues, and minor NBA leagues such as the NBA Summer League and the NBA Development League.¹⁷⁴ Since the most talented players only require a year after high school, it would seem that these leagues offer viable alternatives. Whether this is true, however, is still up for debate.¹⁷⁵ One example stands out. Brandon Jennings, point guard for the Detroit Pistons, played in Italy on a \$1.65 million contract before entering the NBA.¹⁷⁶ In 2012, more than 130 players on NBA rosters played in the NBA development league, however, almost all of them waited until they were selected in the NBA draft before

167. *About the NAIA*, NAT'L ASS'N OF INTERCOLLEGIATE ATHLETICS (Mar. 5 2014), http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019.

168. MARKS NELSON VOHLAND CAMPBELL RADETC, LLC., NATIONAL ASSOCIATION OF INTERCOLLEGIATE ATHLETICS AND SUBSIDIARY: INDEPENDENT AUDITOR'S REPORT AND CONSOLIDATING FINANCIAL STATEMENTS 6 (2011).

169. *Id.* at 5.

170. *Opportunities*, NAT'L JUNIOR COLLEGE ATHLETIC ASS'N (Mar. 5, 2014), <http://www.njcaa.org/marketing.cfm>

171. *Id.*

172. *See* Medcalf, *supra* note 162 (discussing the one-and-done rule).

173. *Id.*

174. Johnson, *supra* note 95, at 27.

175. Eamonn Brennan, *Is the D-League a Viable Alternative?*, ESPN (May 6, 2011), <http://sports.espn.go.com/nbc/news/story?id=6490719>; *see also* Michael McCann, *NCAA Makes Strong Counterargument to Close O'Bannon Trial*, SPORTS ILLUSTRATED (June 28, 2013), <http://www.si.com/college-football/2014/06/28/obannon-ncaa-trial-student-athlete-antitrust> (reporting that the average attendance in the D-League is approximately 2600 and only forty-two games of 400 are televised).

176. *Id.*

joining.¹⁷⁷ Thus, while there are success stories, the vast majority of NBA players attended an NCAA school before entering the draft, likely due to its competitiveness and immense exposure.

Football players seeking to rise to the professional level are pressured even more to attend an NCAA school due to the three-year wait time. Like basketball, there are leagues around the world such as the British Universities American Football League,¹⁷⁸ the International Federation of American Football,¹⁷⁹ and the Canadian Football League.¹⁸⁰ However, football players seeking to make it to the NFL will probably choose to play in the NCAA due to its extensive media coverage and highly competitive nature.

For the vast majority of student athletes that simply want to compete and earn a college degree, the NCAA is the best of both worlds, boasting a membership of the top universities in the country and offering a high level of competition. For those looking to pursue professional careers, the NCAA is the prominent proving ground. While a wide range of choices exist, this does not necessarily defeat unconscionability. The choices must be reasonably available and offer the same goods. Because it is unlikely that the alternatives to the NCAA are meaningful choices reasonably available to student athletes, Part IV of Form 13-3a and its predecessors is partially procedurally unconscionable.

2. *Surprise*

Depending on the circumstances, a student athlete may be surprised by the extent to which the bylaws control the use of his or her NIL at the time of the eligibility meetings. At this annual meeting, student athletes are handed a number of contracts, but no lawyers are permitted to explain the process.¹⁸¹ The Summary is also handed out and is meant to summarize the larger Division I Manual adequately enough so that the reader has a general expectation of what the manual states.¹⁸² Still, the Summary may be

177. *D-League Changed Glen Rice Jr.*, ESPN (June 18, 2013, 10:49 PM), http://espn.go.com/nba/draft2013/story/_/id/9398312/2013-nba-draft-glen-rice-jr-vies-go-d-league-1st-round?src=mobile.

178. *About the Association*, BRITISH UNIVS. AM. FOOTBALL LEAGUE, <http://www.buafll.net/governance/about-the-association> (last visited Jan. 14, 2015).

179. *About IFAF*, INT'L FED'N OF AM. FOOTBALL, <http://ifaf.org/pages/about-ifaf> (last visited Jan. 14, 2015).

180. CANADIAN FOOTBALL LEAGUE, <http://www.cfl.ca/> (last visited Jan. 14, 2015).

181. Johnson, *supra* note 95, at 20.

182. See SUMMARY OF NCAA REGULATIONS, *supra* note 5.

inadequate because it only covers instances where the student athlete is paid for use of his or her NIL and does not discuss how other entities are allowed to also use the athlete's NIL.¹⁸³ Student athletes, however, are not expected to decipher all of the documents and figure out each obligation by themselves. Each college has a compliance department to explain and enforce the rules, and the Form includes a phone number to an NCAA department that will answer questions.¹⁸⁴

Regardless, the issue is not whether the terms were hidden from the student athletes, but instead whether a student athlete's reasonable expectation of what he or she was agreeing to would be defeated upon learning all the implications of the bylaws. Here, Form 13-3a and the Summary would reasonably lead a student athlete to expect that the NCAA can use his or her NIL to generally promote championships and events, and that he or she will become ineligible by accepting payment for endorsing a commercial product or service.¹⁸⁵

With these expectations in mind, it is probable that a first time signer of the Form would be surprised to learn the extent to which the NCAA and other institutions can use his or her NIL without him or her having to secure a release. Form 13-3a and its predecessors mentioned NCAA sponsored events, but the bylaws permit member institutions, charitable, educational, and nonprofit organizations to use the student athlete's NIL for non-NCAA sponsored events that are arguably for commercial purposes.¹⁸⁶ Furthermore, a business can use a student athlete's NIL on a congratulatory advertisement, provided that only the trademark is associated with the advertisement.¹⁸⁷ While someone who sees the advertisement would probably not think the student athlete or athletes pictured are sponsoring the business, the business is clearly using their NIL to earn goodwill in the community so as to attract customers.

Furthermore, a first time student athlete may be surprised to learn the extent to which he or she cannot use his or her own NIL. On one hand, the rule is very clear that student athletes cannot profit from using their NIL to promote or endorse a commercial item.¹⁸⁸ This even includes selling

183. *See id.* at 2–3.

184. Johnson, *supra* note 95, at 21.

185. *Form 14-3a*, *supra* note 1, at 4; SUMMARY OF NCAA REGULATIONS, *supra* note 5, at 2.

186. NCAA DIVISION I MANUAL, *supra* note 6, at 68.

187. *Id.* at 70.

188. *Id.*

autographs of their own name.¹⁸⁹ But the rules can lead to other surprising results. For example, student athletes are permitted to work jobs unassociated with their athletic talents.¹⁹⁰ However, the rules would likely prevent a student athlete from creating a business since consumers might be drawn to the business simply because of the fame of its owner as an NCAA athlete.¹⁹¹ Determining how much success of such a business was due to the student athlete's fame would be nearly impossible, and likely a violation of NCAA rules.

The above analysis is tailored to first time signers because the surprise element diminishes quickly with each successive year in the NCAA. Surprise is evaluated at the time the contract was signed, but because NCAA student athletes must sign that year's version of the Form at the beginning of each year, he or she is continually reaffirming acceptance of the bylaws. Further, one innocent violation might be lightly reprimanded, but afterwards a student athlete is put on notice that such an action will not be tolerated again. When a student athlete signs the Form after a violation, it is unlikely that he or she would be surprised by the limitations on using his or her NIL. In sum, the surprise analysis supports a very weak finding of procedural unconscionability, one that will likely not be enough to surpass the threshold.

3. Procedural Unconscionability Conclusion

Even though the Form operates as an adhesion contract, it is not necessarily procedurally unconscionable. Student athletes have a number of alternative options to compete and earn an education, however, none of them come close to matching the NCAA. Moreover, student athletes may be surprised by the scope to which they agreed to let the NCAA use their NIL and the complementary restrictions imposed on the athlete. However, the analysis is severely complicated by the different reasons for which a student athlete competes in the NCAA, and the fact that student athletes must reaffirm their acceptance of the bylaws each year. Thus, while the rules might be unfair, it is not clear that they rise to the level of procedural unconscionability.

189. Beth Brown, *Breaking Down the NCAA Bylaw Johnny Manziel Is Accused of Violating*, AGGIE SPORTS (Aug. 7, 2013, 12:00 AM), http://www.aggiesports.com/football/article_02f478fb-1820-5456-8d10-81bb98932e00.html.

190. NCAA DIVISION I MANUAL, *supra* note 6, at 67.

191. Dan Levy, *The NCAA, Johnny Manziel and Who Should (and Does) Own a Man's Name*, BLEACHER REPORT (Aug. 5, 2013), <http://bleacherreport.com/articles/1727370-the-ncaa-johnny-manziel-who-should-and-does-own-a-mans-name>.

B. SUBSTANTIVE UNCONSCIONABILITY

In analyzing a contract for substantive unconscionability, the main question is whether the terms generate such one-sided results that the contract shocks the conscience. Thus, what the NCAA and student athletes bargain for at the time of formation must be explored.

1. At the Time of Formation

Substantive unconscionability always focuses on the conditions of the agreement at the time of formation, and whether the terms shocked the conscience at that moment. The purpose of this is to avoid overturning speculative agreements that are fair on their face when signed, but turn out to drastically favor one side over another.¹⁹² Here, the moment in question is the signing of the Form at the eligibility meeting.

As with procedural unconscionability, the fact that student athletes sign the Form anew at the beginning of each year muddies the analysis. For most student athletes, the value of their NIL is unknown since they are either new to the NCAA or have already participated and their previous years did not give any reason to think that their NIL has value. The occasional highly-hyped returning athlete, however, raises concerns because one can generally infer that his or her NIL has value.

The case of Johnny Manziel, the Texas A&M quarterback who won the 2012 Heisman Trophy, college football's top honor, is a prime example.¹⁹³ Not yet three years out of high school, Manziel had little choice but to reenroll at Texas A&M for the 2013 season and thus resign the Form. Prior to the 2013 season, a controversy erupted over whether Manziel was paid a five-figure fee by a broker to do a mass signing of merchandise.¹⁹⁴ While Manziel was found virtually not guilty, the NCAA declared that such an act would have been a violation of NCAA bylaws.¹⁹⁵ While the allegation was untrue, the force in which the controversy hit the

192. Johnson, *supra* note 95, at 37.

193. *Johnny Manziel Wins Heisman*, ESPN (Dec. 8, 2012), http://espn.go.com/college-football/story/_/id/8727326/johnny-manziel-texas-aggies-wins-2012-heisman-trophy.

194. George Schroeder, 'No Evidence' Manziel Took Money for Autographs, *Texas A&M Says*, USA TODAY (Aug. 28, 2013, 6:11 PM), <http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/28/johnny-manziel-suspended-for-first-half-of-texas-am-opener-vs-rice/2723767/>. The NCAA was unable to uncover convincing evidence, but decided that the evidence showing him participating in a mass autograph signing warranted a half game suspension.

195. *Id.* Specifically a violation of 12.5.2.1. An eBay search in March 2014 reveals that a picture of Manziel with his signature runs about \$100.

collegiate football world seems to indicate that Manziel's NIL had discernable value.

The point of the above example is twofold. At first, Manziel joined the NCAA relatively unknown, had an incredible season, and in less than five months became the most recognizable player in college football. Thus, the value of his NIL was negligible when he signed Form 12-3a¹⁹⁶ before his winning season began, but in hindsight the NCAA won big. Afterwards, Manziel's NIL was known to carry value and still, as a requirement to play, Manziel had to forgo his rights and assign them to the NCAA. Thus, it might be the case that the NCAA knowingly acquired a much better deal at the time Manziel signed Form 13-3a in 2013.

2. *What Has the NCAA Bargained for?*

Many of the benefits the NCAA receives are detailed above, especially the multi-million dollar broadcast agreements.¹⁹⁷ This note has so far focused on the relationship between the NCAA and its student athletes, but it is important to note that the individual colleges have a large stake in this relationship as well and what they derive from the NCAA cannot be ignored.

Not all broadcast deals go through the NCAA. Conferences like the Southeastern Conference (SEC)¹⁹⁸ and Pac-12¹⁹⁹ negotiate their own deals with broadcasters and share the profits between member schools. Even individual schools can partner with cable networks to create their own channel.²⁰⁰ Together, the NCAA and universities generate an estimated four billion dollars in collegiately licensed merchandise.²⁰¹ In 2010, the football programs at the University of Texas, University of Georgia, University of Florida, Penn State, Louisiana State, Notre Dame, and University of Alabama, all generated net revenues of over \$38 million.²⁰²

196. Because this was the 2012–2013 academic year, the name of the form is 12-3a.

197. See *supra* Part II.A.

198. Sandimor, *supra* note 49.

199. Ted Miller, *Pac-12 Announces Deal for National, Regional Networks*, ESPN (July, 27, 2011, 6:42 PM), http://espn.go.com/blog/pac12/post/_id/23602/pac-12-announces-deal-for-national-regional-networks.

200. The University of Texas partnered with ESPN to launch the Longhorn Network worth \$300 million. See Lavigne, *supra* note 48.

201. Johnson, *supra* note 95, at 32.

202. Corgan, *supra* note 52, at 389.

Only four Division I Bowl Championship Series (“BCS”) football programs lost money: Connecticut, Syracuse, Wake Forest, and Duke.²⁰³

Schools also receive invaluable indirect benefits when their athletic programs succeed.²⁰⁴ Alumni tend to reward their alma maters with large donations after successful seasons.²⁰⁵ For example, the sixty-eight teams that make the NCAA basketball tournament in March receive an estimated \$450,000 increase in alumni donations per college.²⁰⁶ More specifically, the University of Florida alumni donated thirty-eight million dollars to the university after its 2006 and 2007 NCAA basketball championships, and its 2006 BCS national championship.²⁰⁷ Schools also receive waves of publicity and heightened interest after successful athletic runs.²⁰⁸ On average, a Division-IA football program that wins the BCS national championship experiences an 8 percent enrollment increase the following year.²⁰⁹ Gonzaga University’s enrollment in 1999 was 4500 when it went on a Cinderella run that same year in the NCAA basketball tournament.²¹⁰ After many more subsequent trips to the big dance, Gonzaga’s enrollment continually increased, exceeding 7000 students in 2010.²¹¹

Whether the NCAA and colleges, however, are simply lining their pockets or not is a highly contested issue. Because the NCAA is a nonprofit organization, the vast majority of what generates is distributed to member schools. There are, of course, operating and management costs, which the NCAA reported as being \$41,785,827 in 2013. While seemingly very high, this is only 4.5 percent of the \$912,804,046 in 2013 revenue. Thus, the NCAA does not have an incentive to hold out on distributing money to colleges.²¹²

Whether colleges are lining their pockets is a much more debatable topic. As previously stated, only twenty-three schools operate at a profit.²¹³

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 390.

209. *Id.*

210. *Id.*

211. *Id.*

212. Interestingly, the NCAA did have assets of \$752,380,366 at the end of 2013. Why it is holding on to that much in assets is unknown.

213. DANIEL L. FULKS, REVENUES & EXPENSES: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 8 (2013).

However, other schools may also be able to operate in the black, but choose not to because there is no incentive to show a profit.²¹⁴ Colleges are also involved in an arms race, where spending appears to be wildly out of line with what the market would otherwise dictate.²¹⁵ One example of this is that coaching salaries have risen dramatically in recent years.²¹⁶ Aside from prohibiting paying players, the NCAA does not restrict the use of funds it distributes, and thus colleges are free to spend athletic money however they see fit.

On the other hand, the money generated from the broadcasts of football and basketball games is needed to support the non-revenue generating sports—essentially every other sport a school hosts.²¹⁷ This way, the NCAA can further its mission to provide post-high school athletic opportunities on a large scale, and colleges have more opportunities to offer to prospective students that are not football or basketball players.²¹⁸ Programs operating in the black are the exception, not the rule, in NCAA athletics, and the revenue generated from the powerful teams is needed to keep most other teams upright.

Critics will go one step further and argue that the current system is not even generating enough to maintain existing teams, causing schools to cut a number of programs.²¹⁹ Since 1988–89, there has been a net loss of 322 Division I men's teams.²²⁰ However, over that same time period there has been a net gain of 761 Division I women's teams.²²¹ While budget constraints cannot be ruled out as a cause for the loss in men's team, the notable increase in women's teams is evidence that the swing was probably more connected with having to balance the programs schools offered in order to conform to Title IX's application to collegiate sports.

The question remains as to where the right to use a student athlete's NIL plays a role. Arguably, the reason the NCAA requires such a broad general right is because otherwise it cannot afford to pay individual players for that right.²²² Having the extra costs would disrupt the NCAA's financial

214. See Lavigne, *supra* note 48.

215. *Id.*

216. *Id.* For example, coaching salaries increased by an average of 45 percent at public FBS schools.

217. FULKS, *supra* note 214.

218. Johnson, *supra* note 95, at 41.

219. *Id.*

220. FULKS, *supra* note 214.

221. *Id.*

222. Johnson, *supra* note 95.

scheme, rendering it unable to support the teams that rely on the funds from revenue generating teams.²²³ However, this does not explain the exclusive right. In other words, there does not seem to be anything preventing the NCAA from changing the language to read generally that it does not have to pay a student athlete for use of his or her NIL and that the student athlete is free to license his or her NIL elsewhere.

The most convincing argument for the monopoly is amateurism.²²⁴ Amateur values tend to promote an environment free of financial interests so that participants are solely focused on competition, and in the context of collegiate sports, also on their education. Thus, preventing student athletes from using their NIL, such as in endorsing products, seems to further the amateur values that courts have consistently upheld.²²⁵

In effect, the current NCAA distribution scheme that raises eye-popping numbers in the exceptional cases and yet still raises concerns about its viability elsewhere probably indicates that it is not receiving benefits that would shock the conscious. The NCAA also appears to be justified on amateurism grounds in requiring an exclusive right to use a student athlete's NIL so that it can maintain the clear distinction from professional sports.

3. What have student athletes bargained for?

By participating in the NCAA, student athletes receive many benefits that the regular student body probably does not enjoy. The purpose of college is to earn a degree, and student athletes have a number of academic advantages when it comes to fulfilling that purpose. Most notably, student athletes are compensated through scholarships, which helps alleviate financial constraints when it comes to figuring out how to pay for the degree.²²⁶ For some, that scholarship is a full ride carrying a value of nearly \$160,000.²²⁷ Even with such a high value, exceptional student athletes may provide their schools with more money than the value of their degree.²²⁸ For example, Patrick Ewing generated an estimated twelve million dollars for Georgetown University in his four-year career there in the 1980s.²²⁹

223. *Id.*

224. *See id.* at 42.

225. *Id.*

226. Johnson, *supra* note 95, at 33.

227. *Id.*

228. *Id.* at 31.

229. *Id.*

Furthermore, schools often provide student athletes with exceptional academic and medical resources.²³⁰ To ensure student athletes remain academically eligible, schools provide tutors and academic advisors.²³¹ Student athletes are provided the equipment they need to compete at the NCAA level.²³² Schools seek out the most qualified coaching staff that will not only win but will serve as invaluable mentors to their student athletes.²³³ Schools also provide exclusive athletic trainers and medical personnel to its student athletes so they do not have to solely rely on the school's health center.²³⁴ In some cases, student athletes have access to specialized gyms and locker rooms that the regular student body is not allowed into.²³⁵

Finally, the television deals the NCAA negotiates with broadcasters provide student athletes with the platform that fuels their fame and publicity.²³⁶ Even for those student athletes that do not get a chance to play on television, the NCAA's public relations office generally promotes the accomplishments of all student athletes.²³⁷

Only a very few student athletes, however, will benefit extraordinarily from NCAA participation. Student athletes receiving full rides because of their athletic skills are few compared to the many student athletes that receive little to nothing in scholarships. Moreover, a full ride does not guarantee freedom from financial constraints since most scholarships only cover the cost of tuition, not the cost of attendance (however, the *O'Bannon* decision likely alleviates this concern).²³⁸ In some instances, the disparity between the value of a scholarship and the value the NCAA and a school sees from a student athlete is particularly heightened when a single student athlete, like Ewing, is responsible for major boons to the school.²³⁹ The perception that student athletes are showered with equipment is also misguided. Players of revenue generating teams like football and basketball (in other words, the student athletes most likely to have full rides) will

230. *Id.* at 33–34.

231. *Id.*

232. *Id.* at 33.

233. *Id.* at 34.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Shawne Alston Suing NCAA, Others*, ESPN (Mar. 6, 2014, 12:44 AM), http://espn.go.com/college-football/story/_/id/10558893/ncaa-conferences-sued-scholarship-value.

239. Johnson, *supra* note 95, at 31.

probably have their gear paid for, but the non-revenue generating sports will likely require their student athletes to supply their own. Despite the shifts in monetary resources that favor prominent teams, all student athletes are sure to have access to other resources like medical and academic support staff no matter what their status, and all will probably benefit from the invaluable personal growing experience that comes with participation in the NCAA.

Specifically, student athletes also bargain away their right to use their NIL and give that right not only to the NCAA, but also to other organizations that can use this right for financial gain.²⁴⁰ For some student athletes, this could be a major loss especially if they could pursue profitable endorsement deals but for NCAA rules. However, for most student athletes the simple reality is that their NIL are valueless.²⁴¹ Many student athletes only find their NIL being used for programs, schedules, team posters, or tickets.²⁴² This use is probably well within the meaning of the phrase “generally promote” in Form 13-3a and its predecessors. Furthermore, it is unclear which student athletes will actually rise to such a high level.

In short, what student athletes receive is not all too exceptional when compared to what the NCAA receives. Thus, it is unlikely that the difference between what a student athlete receives from his or her contractual relationship compared to what the NCAA receives would shock the conscience.

4. Conclusion: Substantive Unconscionability

A comparison of what the NCAA and what a student athlete bargains for probably does not shock the conscience. In order to function properly, maintain an organization of economically diverse schools, and offer a wide range of sports, the NCAA must sell its products, the competitions put on by student athletes, for substantial sums of money. When the NCAA’s revenue is compared to how much it costs for its members to run their programs, the numbers do not seem so overwhelming. Furthermore, the majority of student athletes receive fair compensation for their participation, albeit not as easily quantifiable as what the NCAA receives. Because most student athlete’s NIL are valueless, only in the exceptional cases are student athletes potentially losing out on grand opportunities or giving more to their school than they are getting. Thus, while a small

240. See 2014–2015 NCAA DIVISION I MANUAL, *supra* note 6, at 68–70.

241. Johnson, *supra* note 95, at 34–35.

242. *Id.*

number of individual Forms may be unfair, they, and the vast majority of Forms, are probably not substantively unconscionable.

C. SEVERABILITY OF TERMS

The last consideration is whether the terms concerning the rights to a student athlete's NIL, if found unconscionable, can be severed so the rest of the contract can stand or whether the entire contract must be nullified. Here, it appears that these rights could be severed so that the rest of the agreement can stand. The NCAA could likely still function as an organization even if it does not hold the exclusive right to its student athletes' NIL. Severing these terms would, however, cause revenue problems since it would probably have difficulty securing the broadcast agreements that largely fund the NCAA's operations. While courts cannot add or change terms to the agreement, it is likely that faced with a finding of unconscionability the NCAA could quickly reword the language giving it the same rights, but not in exclusive terms.

D. UNCONSCIONABILITY CONCLUSION

Part IV of Form 13-3a, and its attendant NCAA bylaw sections, while seemingly unfair for student athletes, is probably not unconscionable. The adhesiveness of the agreement, a student athlete's lack of comparable alternatives, and the length to which student athletes must go to understand all the details of the rights he or she is giving up, likely favor procedural unconscionability. However, the surprise element of the terms wanes with each signing of the Form. Substantively, it is not clear that the disparity between what the parties bargain for is unconscionable. The NCAA generates extraordinary revenue off of its student athletes, yet that money is distributed back to member schools so they can maintain the non-revenue generating sports. Even though the exceptionally talented and publicized student athlete will likely miss out on profitable endorsement deals, this is probably not enough to reach unconscionable levels. Applying these levels to the sliding scale used for unconscionability, a little procedural and nearly no substantive unconscionability cannot support a finding of unconscionability.

Overall, two unique circumstances of the NCAA agreements frustrate the analysis, and will likely frustrate any other attack against the NCAA's practices. The first is the NCAA's requirement that student athletes sign the Form every year. For most student athletes, the bargain is agreeable at the time of formation since the main goal is to play. Furthermore, for the

average student athlete, his or her NIL is commercially valueless, so the thought would probably not cross his or her mind that he or she may want to try and personally profit. Yet concerns arise when a student athlete, like Manziel, has to resign the Form to continue playing, knowing full well that his NIL has commercial value. Making exceptions for this kind of athlete may be a possible solution, but changing the terms for these exceptional athletes would likely cause more problems than currently exist. Singling out the eligibility requirements of a handful of the approximately 463,202 student athletes would probably do more to injure the NCAA's mission in maintaining amateur values than it would to keep the current system in place.

The second, and the more important of the two, is that the NCAA has enjoyed special court protection because of those amateur values.²⁴³ A number of suits throughout the twentieth century against the NCAA have focused on the Sherman Act.²⁴⁴ In their decisions, the various judges of these suits have unanimously upheld the perceptions that student athletes should be students, not businessmen and women,²⁴⁵ and that the amateur rules, especially the no draft and no agent rules, are intended to prevent the commercialization of collegiate athletics.²⁴⁶ Essentially, according to these decisions, collegiate athletics are extracurricular activities that should not receive any special treatment.²⁴⁷ Thus, in order for a student athlete to succeed not only on a Sherman Act cause of action, but nearly any other challenge to the NCAA, he or she will first have to explain how the current rules are either in violation of amateur ideals, or that amateurism can survive without them.

VI. REFORMING THE SYSTEM

A. PAY FOR PLAY AND STIPENDS

As the preceding discussion explains, an unconscionability cause of action may be fruitful but will probably ultimately fail. This is not to say that any legal cause of action will probably fail. Student athletes may continue to bring suits as long as they can make a viable argument against

243. Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 332 (2005).

244. *Id.* at 343–58.

245. *Id.* at 344.

246. *Id.* at 351–52.

247. *Id.* at 358.

the NCAA. Thus, it might be in the NCAA's best interests to find a voluntary, workable solution.

The momentum caused by the growing realization that the NCAA is generating substantial revenue off of the performances from its student athletes has led to increased support for paying student athletes. The argument is simple: student athletes participate in the competitions that generate the money, so they should be entitled to a share in the profits.²⁴⁸ Such a scheme, however, might force schools to cut teams.²⁴⁹ First, the money the NCAA generates goes back to universities. If the NCAA were responsible for paying its student athletes, less money would be distributed to schools. If schools pay student athletes, they would likely have to use the money given to it by the NCAA, money from broadcast deals with conferences, and maybe even tuition to cover the costs. Only twenty-three schools in 2012 had profitable seasons, so while they might be able to pay up, the remaining schools will just have more costs to bear, leading to more financial trouble. Second, a number of employer-employee laws would complicate matters even further.²⁵⁰ Paying student athletes could raise issues related to Title IX, worker's compensation, vicarious liability for schools, and affect the tax benefits schools enjoy.²⁵¹

Another solution gaining support is to give student athletes a \$2,000 stipend per school year on top of scholarships to help close the gap between the cost of tuition and the cost of attendance.²⁵² Although a seemingly nice compromise, similar problems still loom. For one, Title IX will instantly cause problems due to its requirement to treat men and women's sports teams equally.²⁵³ Further, this does not alleviate the budget problems that most schools face.²⁵⁴

Finally, there is an argument to be made that only the money generating sports should be considered in the above schemes, and the players who are not bringing in money should not be compensated.²⁵⁵ Once

248. Corgan, *supra* note 52, at 406–10.

249. *Id.* at 406.

250. *Id.* at 382–88, 407–10.

251. *Id.* at 407.

252. Jerry Carino, *Athletes, Administrators Debate Scholarship Stipends*, USA TODAY (Sept. 28, 2013, 11:24 PM), <http://www.usatoday.com/story/sports/college/2013/09/28/athletes-administrators-debate-ncaa-scholarship-stipends/2890117/>.

253. *Id.*

254. *Id.*

255. Corgan, *supra* note 52, at 410–12.

again, however, there is no effective way to escape Title IX issues and it will still put a strain on school budgets.²⁵⁶

B. ENDORSEMENT DEALS

Allowing student athletes to be free to use their NIL for endorsements and other commercial ventures would both help alleviate concerns about the NCAA's monopoly over those rights and allow some student athletes to supplement their scholarships. This solution avoids the practical and ethical concerns that come with paying players directly.²⁵⁷ Because schools are not paying student athletes and all student athletes will have the right to sign endorsement deals, there would likely be no Title IX or budget issues.²⁵⁸ Furthermore, while schools may be concerned about losing money on their endorsement deals with apparel companies like Nike and Reebok, the market will probably remain unchanged as these companies will still be interested in displaying their logos on school managed channels, such as uniforms.²⁵⁹

Critics will probably point out that concerns are not with the specific action of paying players, but with the general concept that financially profiting off of athletic accomplishments in college is fundamentally counter to amateur values. Preventing student athletes from potential corruption and exploitation by commercial entities, like companies seeking endorsements, is in the best interests of the student athlete. Prior to the 1970s, the United States Olympic Committee ("USOC"), an organization similarly dedicated to amateur values, held similar beliefs.²⁶⁰ Olympians were once held to many of the same standards as NCAA athletes are today, including a requisite ban on commercial endorsements.²⁶¹ However, the USOC reversed its stance and now allows its athletes to seek out endorsement deals to help them finance their training.²⁶² While endorsement rules still cause problems for Olympians and may not fully

256. Carino, *supra* note 253.

257. Corgan, *supra* note 52, at 415.

258. *Id.* at 420.

259. *Id.* at 419.

260. Elizabeth Olson, *Olympic Athletes*, INFOPLEASE, <http://www.infoplease.com/spot/olympic-athletes.html> (last visited Jan. 14, 2015).

261. *Id.*

262. *Id.*

cover costs,²⁶³ the USOC's example demonstrates that maintaining a monopoly on an athlete's NIL is not necessary to preserve amateur values.

Allowing student athletes to sign endorsement deals will probably not cause major shifts in the world of college sports for the simple fact that most student athletes' NIL are valueless.²⁶⁴ Thus, taking the time to seek out these deals would be fruitless, and a student athlete will see that his or her best interest is to focus solely on school and training.

Even for exceptional student athletes that might be able to land lucrative endorsement deals, their window to capitalize on the opportunity is probably limited. In the current suit against it, the NCAA raises the defense that its student athletes are free to use their NIL after their college careers.²⁶⁵ However, the opportunity for post college endorsements may come too late even for the most famous college athletes. Certainly a player like Manziel could immediately capitalize off his accomplishments at Texas A&M, but the precedents set by former Heisman winners do not offer much hope post-college.²⁶⁶ Of the nine winners between 2003 and 2011, four had short-lived NFL careers.²⁶⁷ Those that do have NFL careers struggle to recapture the momentum they achieved during their Heisman winning campaigns.²⁶⁸ Thus, opportunities post-college cannot be relied upon and fairness would dictate that student athletes be allowed to capitalize on whatever value their NIL have while they are in school.

Basic principles of fairness would also indicate that it is unfair to allow companies to use a student athlete's NIL for arguably commercial reasons, even though the bylaws are tailored to prevent such activity. Where student athletes have a blanket ban, organizations completely unaffiliated with the NCAA or a member school can use the student athlete's NIL without the student athlete's consent. While this dichotomy in the rules is probably not unconscionable, it is certainly unfair to the student

263. Kristi Dosh, *Olympic Athletes See Limited Sponsorships*, ESPN (July 31, 2012, 1:40 PM), http://espn.go.com/blog/playbook/dollars/post/_id/811/olympic-athletes-see-limited-sponsorships.

264. Johnson, *supra* note 95, at 34–35.

265. *Student-Athlete Likeness Lawsuit Timeline*, NAT'L COLLEGIATE ATHLETICS ASS'NASS'NASS'NCAA (Dec. 12, 2013), <http://www.ncaa.org/about/resources/media-center/press-releases/student-athlete-likeness-lawsuit-timeline>.

266. Pablo Figueroa, *Success of Heisman Trophy Winners in the NFL Since 2003*, SPORTING CHARTS (Dec. 17, 2013), <http://www.sportingcharts.com/articles/nfl/success-of-heisman-trophy-winners-in-the-nfl-since-2003.aspx>.

267. *Id.*

268. *Id.*

athlete who should have some say as to who can use his or her NIL and how.

VII. CONCLUSION

This Note endeavored to answer the question of whether Part IV of Form 13-3a and its predecessors and the relevant bylaws concerning the use of a student athlete's NIL are unconscionable. Applying the facts to a procedural and substantive unconscionability analysis, the rules seem unfair, but probably do not rise to the level of unconscionability. Critics of the NCAA's practice will likely continue to falter in court so long as the NCAA is allowed to use amateur values to justify its actions. Thus, challengers should focus their arguments on how the amateurism bylaws in question are not necessary to maintain amateur values. The rules concerning the NCAA's monopoly over a student athlete's NIL are probably unnecessary to maintain amateur values since ending the NCAA's monopoly would only truly impact a small number of players while not impacting the NCAA's delicate financial structure. Allowing student athletes to sign endorsement deals is probably a better solution than paying student athletes directly, and it is only fair that a student athlete have some rights if the NCAA is going to allow third party organizations to profit by using a student athlete's NIL.