

NCAA TRANSFER RESTRAINTS: FREE AGENCY FOR COLLEGE PLAYERS?

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I. INTRODUCTION

Schools frequently announce the hiring of new head coaches with great fanfare and excitement. But for some players, the new hire means their playing days are over at that school, and possibly forever. The root cause of this problem is the billions of dollars in revenue that fuel D-I football and basketball competition, and the spillover benefits for schools that win conference titles and compete for national championships. Alumni give more money to winners than losers. Applications also rise in quantity and quality for championship schools. To make this happen, some schools plow between four and seven million dollars a year into head coaching jobs, and more than one million dollars a year to elite assistant coaches.

The NCAA won't admit it, but its rules mean that some student-athletes pay a big personal price for these football program makeovers. The timing of coaching changes in football—usually occurring in late November or December—gives unwanted players little opportunity to transfer to a suitable academic program. These castoffs move on silently, often to worse situations. They must find new schools with openings that match their position, graduating class, and playmaking skills. Adding irony and insult, new coaches are sometimes hired for larger salaries than departing ones. Aside from the bad optics of running off players into academic and football uncertainty, the brew of glory-seeking and coaching churn incentivizes new coaches to get rid of the players who got their last coach fired.

II. BACKGROUND

Devin Pugh, a scholarship football player at Weber State, experienced this scenario when he was forced by a new head coach to leave his school.¹ Pugh's first head coach promised him four years of annually renewing scholarships, but his new coach decided he would not renew Pugh's grant-in-aid.² Pugh looked into transferring, and several D-I schools offered him conditional scholarships that required him to bring two years of eligibility.³ However, an NCAA rule requiring a transfer to sit out for a year subtracted a year from his eligibility.⁴ A different rule limits player-eligibility to five years, and the combined effect of these rules left Pugh with only one year of eligibility.⁵ He decided to petition the NCAA to waive the transfer penalty since his new head coach forced him out.⁶ Unfortunately his petition was denied, and the D-I schools withdrew their offers.⁷

Instead, Pugh was forced to transfer to a D-II school, where he could play immediately and keep two years of eligibility.⁸ Unfortunately, at his new school he had to take out a student loan for tuition and living expenses to pay for his new school.⁹ Pugh recently filed a class action antitrust lawsuit in response to his experience.¹⁰ He alleges that NCAA scholarship caps and the rule that penalizes transferring players with loss of one year violate the Sherman Antitrust Act.

In this article I focus on a key piece of a team's transition to a new head coach where players—just like Devin Pugh—are pushed out of the program. The main question posed by

¹ Pugh v. Nat'l Collegiate Athletic Ass'n, 2016 WL 5394408, at *1 (S.D. Ind. 2016).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Pugh's lawsuit is whether NCAA rules that restrict player mobility violate the Sherman Act.¹¹ I conclude that Pugh's lawsuit has a good chance of success.

III. ANALYSIS

a. *Previous Efforts*

Let's begin by understanding what Pugh is not seeking, which is an employment relationship. Players on Northwestern's football team already took a hard run at that goal line.¹² They claimed they labor under conditions that compare to professional football, while generating huge revenues for schools.¹³ They were right on the facts, but wrong on the law. The NLRB ended their organizing process by ruling that it lacked jurisdiction to proceed.¹⁴ This ruling was both wise and pragmatic because it avoided the controversial question of whether college football players are employees, while also defeating players' reasonable arguments for more of the wealth they generate for schools and coaches.

A UCLA basketball player took a different angle at player compensation in *O'Bannon v. NCAA*.¹⁵ He spearheaded a class action lawsuit to compel the NCAA and its schools to pay players for exploiting their names, images, and likenesses in video games and TV broadcasts.¹⁶ The players argued that NCAA restrictions on player compensation violated the Sherman Act. *O'Bannon* is more significant for the NCAA than the case involving Northwestern University

¹¹ The district court recently dismissed with prejudice Pugh's claim related to Sherman Act violations regarding the NCAA's transfer rules and his request for injunctive relief. It left intact Pugh's claims of Sherman Act violations regarding the NCAA's football scholarship restrictions. *Id.*

¹² Northwestern University (Employer) and College Athletes Players Ass'n (CAPA), 362 NLRB No. 167 (2015).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

because it uses a potent federal law that applies to private and public schools.

O'Bannon also has a better chance to be a game changer than the Northwestern unionizing effort because the plaintiffs don't aim to upset the NCAA's core tenet of amateur competition. They have exposed the extreme hypocrisy of NCAA restrictions on compensating players, which works well in their favor. Not content to only make money from selling tickets and broadcasting rights, the NCAA and its D-I schools shamelessly exploited the fame and popularity of college athletes by licensing their likenesses to a video game maker. A federal judge found the NCAA's rule against player compensation was a restraint on trade and barred the NCAA from prohibiting schools from paying up to \$5,000 a year for using a player's name or image.¹⁷ The Ninth Circuit Court of Appeals upheld the antitrust violation, but overruled the remedy.¹⁸

Compared to the Northwestern and *O'Bannon* efforts to address player grievances about NCAA rules, Pugh's case looks like a winner. The NLRB resolved the Northwestern player unionizing petition by taking the most dismissive approach—one that is notably not reviewable by courts. The Board said it had no appetite to redefine the role of student-athletes as university employees. This implies that other player efforts to litigate the employment relationship into existence at NCAA D-I sports are probably doomed.¹⁹

Pugh's lawsuit seeks much less than a court-imposed employment relationship. Its core request is to lift two severely anti-competitive rules: the NCAA rule that takes away one year of

¹⁷ *Id.* at 1008–09.

¹⁸ *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015) (vacating the district court's order requiring the NCAA to allow its member schools to pay players deferred compensation.).

¹⁹ See Steve Berkowitz, *Judge Dismisses NCAA Wage Lawsuit Involving Penn Track Athletes*, USA TODAY (Feb. 16, 2016), <http://www.usatoday.com/story/sports/college/2016/02/16/ncaa-wage-hours-lawsuit-samantha-sackos-penn-track-fair-labor-standards-act/80482630/> (explaining the court dismissed a wage and hour claim against the NCAA).

player eligibility as a penalty for transferring, and the rule that sets a cap of 85 football team scholarships. Consider the implications for future players with a case like Pugh's if he wins. First, he would not have needed to petition the NCAA to waive the one-year penalty. Pugh could have transferred to Colorado State or another D-I school that conditionally offered him a scholarship. He probably would have attended a more prestigious school than Colorado State-Pueblo, and could have developed as a player in a D-I program. He also could have received a grant-in-aid to pay most of his educational expenses. Finally, he would have joined a coach who wanted him. If the NCAA means what it says about promoting the welfare of student-athletes,²⁰ these outcomes for players would surpass current rules that caused Pugh to attend a lower quality school, take out a loan, and work a job that paid nine dollars an hour. What federal court wouldn't get behind that outcome?

This court ruling would further have the serendipitous effect of making the NCAA better at delivering on its core mission for student-athletes. Pugh's antitrust lawsuit doesn't ask a court to order the NCAA to alter its mission. It simply seeks a court order to make the NCAA fulfill its mission.

b. Will Pugh v. NCAA Create "Free Agency" for College Players?

Pugh's lawsuit could also go much further than just student welfare. It seeks the NCAA equivalent of free agency for D-I football and basketball players. To understand the arc of change that the Pugh case could trace, consider Table 1 below and its depiction of the NCAA's parallel

²⁰ NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA CONSTITUTION r. 1.3 (2009), <http://www.ncaapublications.com/productdownloads/D110.pdf> ("A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body. . . .").

universe in pro sports. The NCAA’s eligibility restrictions are closely patterned after pro leagues’ reserve systems.

Table 1 Antitrust Lawsuits in Sports Leagues: Impact on Reserve System			
<i>League (Sport)</i>	<i>Key Antitrust Case</i>	<i>Impact on Reserve System</i>	<i>Change in Reserve System</i>
MLB (Baseball)	<i>Federal Baseball Club</i> , 259 U.S. 200 (1922); <i>Toolson v. New York Yankees</i> , 346 U.S. 356 (1953); <i>Flood v. Kuhn</i> , 407 U.S. 258 (1972)	None None None	None None None
NBA (Basketball)	<i>Robertson v. NBA</i> , 556 F.2d 682 (2d Cir. 1977)	High	End Perpetual Reserve, Team Compensation Rule, and Right-of-First Refusal
NFL (Football)	<i>McNeil v. Nat’l Football League</i> , 1992 WL 315292 (D.Minn. 1992)	High	End Team’s Compensation Rule and Right-of-First Refusal
NHL (Hockey)	<i>McCourt v. Cal. Sports, Inc.</i> , 600 F.2d 1193 (6th Cir. 1979)	None	None
NCAA (D-I Football and Basketball)	<i>Pugh v. NCAA</i> , Case No: 1:15-cv-1747	To Be Determined	To Be Determined

This concept began with Major League Baseball players’ contracts that bound them perpetually if their teams wished.²¹ The early success of professional baseball was owed to an innovative agreement, called a Uniform Player Contract. These form contracts had lines for a player’s name, his team, and his salary. These 19th century contracts did not differ much from current NCAA form contracts—called grants-in-aid—which high school players sign when they commit to a college.

²¹ *E.g.*, *Phila. Ball Club, Ltd., v. Hallman*, 8 Pa. C. 57 (Pa. Ct. Com. Pl. 1890).

Early Major League Baseball contracts also contained a reserve clause. This allowed teams to employ their best players indefinitely. Its purpose was to cultivate and retain a loyal fan base by controlling the best players on each team. Each team designated fourteen players in October to be reserved in contracts for the next season.²² This prevented good players from going to other teams in the league. The reserve clause also allowed the league to spread baseball talent relatively evenly among teams. This is essentially the business model in collegiate athletics 130 years later. The NCAA restricts player transfers and limits D-I football teams to 85 scholarships at a time.

Major League Baseball's reserve clause has resisted court-imposed changes over time.²³ One attempt occurred after a merger of the Federal League with the National and American Leagues put the Baltimore team out of business. The team sued for damages under the Sherman Act and won at trial.²⁴ Ultimately, the team lost when the Supreme Court ruled that baseball was not interstate commerce.²⁵ During this litigation, the D.C. Court of Appeals discussed the reserve clause.²⁶ A passage from that court is so apt today that the NCAA might use it in a reply brief to Pugh:

If the reserve clause did not exist, the highly skillful players would be absorbed by the more wealthy [sic] clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause *and the publication of the ineligible lists, together with other restrictive provisions*, had the effect of deterring players from violating their contracts. . . .²⁷

²² *Id.* at 60.

²³ Comment, *Organized Baseball and the Law*, 46 YALE L.J. 1386 (1937).

²⁴ Nat'l League of Professional Baseball v. Fed. Baseball Club of Balt., Inc., 269 F. 681 (D.C. Cir. 1920).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 688 (emphasis added).

With only one exception that was negated by Supreme Court rulings in 1953 and 1972,²⁸ baseball players have never won a court ruling against the reserve system. But this is because baseball's antitrust exemption was created when courts narrowly interpreted the meaning of interstate commerce.²⁹ This archaic ruling stands even though it is derided as "a derelict in the stream of the law."³⁰

Unlike Major League Baseball players however, professional players in other sports have successfully used the Sherman Act to curb league restrictions on player mobility. Consider *Robertson v. National Basketball Ass'n*,³¹ an important antitrust case that was prompted by the merging of teams from American Basketball Association (ABA) with the National Basketball Association. A star player, Oscar Robertson, filed a class action lawsuit contending the NBA's newly formed monopoly was an illegal restraint on trade. The National Basketball Association said the reserve system was needed to promote competitive balance; but players said it deprived them of a market to shop their talents, and kept team labor costs artificially low. Players used the antitrust lawsuit to end the league's smothering hold on them. They settled the case when the NBA agreed to eliminate free agency restrictions, including in particular, the compensation rule which forced teams that signed a free agent to give up a player of equal value (or draft picks or cash) to the team that lost the player.

Players have also gone on strike for relief from the reserve system in the National Football League. They achieved modest gains, but remained under a team compensation rule (like the

²⁸ *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949). *But see Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

²⁹ *Fed. Baseball Club of Balt., Inc.*, 259 U.S. 200.

³⁰ *Flood*, 407 U.S. at 287 (Douglas, J., dissenting).

³¹ *Robertson v. NBA*, 556 F.2d 682 (2d Cir. 1977).

NBA's illegal rule) that froze the market for most free agents. Following a disastrous strike in 1987, players decertified their union and sued under the same antitrust law that Devin Pugh is using.

They won a bonanza. In interrelated cases,³² a judge ordered court supervised collective bargaining for the next eighteen years. Today, the football union proudly publicizes gains that players achieved on their website.³³ They argue the 1993 antitrust settlement "gained for the players two things they had fought for but lost in previous bargaining efforts: free agency, and a guaranteed percentage of the gross revenues."³⁴

The cases discussed above give context to Pugh's case. Courts have rejected baseball players' repeated efforts to use the Sherman Act to modify the reserve clause. More importantly however, antitrust lawsuits by professional basketball and football players resulted in court orders that modified the most unreasonable aspects of the reserve system.

Pugh's case holds promise to replicate these results for NCAA football and basketball players. This is because his antitrust complaint does not ask the court to reform the NCAA's amateur athletics model, even though the model gushes cash that is apportioned stingily to players. A win for Pugh would make things more fair for players whose academic and athletic careers are shortened and made costlier by a new coach. It would give players better options when a new coach wants to chase them off because they don't fit his plans. The 85-player cap can motivate a

³² *White v. Nat'l Football League*, 41 F.3d 402 (8th Cir. 1994); *McNeil v. Nat'l Football League*, 1992 WL 315292 (D. Minn. 1992).

³³ See *History: The 1990's – Growth of the Union*, NFL PLAYERS ASS'N, <http://web.archive.org/web/20101011092613/http://www.nflplayers.com/About-us/History/> (last visited Oct. 9, 2016) (arguing the 1993 settlement achieved considerable benefits for players). All player pensions, whether active or retired, were retroactively increased by 40%; and players who played in 1989 and later received \$110 million in damages. *Id.*

³⁴ *Id.*

new coach to run off some players because this creates space for replacement players. A ruling that this cap violates antitrust law would diminish this disreputable incentive.

A court ordered ban on the one-year transfer penalty and the scholarship cap would also open a new market for players. High achieving players at a lower school could transfer to a stronger program to showcase their talents. Conversely, highly recruited players with disappointing careers could transfer down to a school to become a starter. Some might transfer to avoid a harsh or difficult coach, others might move for academic reasons, and still others might relocate for family or personal reasons. The market for players would be more fluid—and probably, more disrupted. Professional leagues have repeatedly expressed these concerns in Sherman Act cases since the 1970s. Their worries were mostly unfounded as evidenced by the hyper-popularity of all major league sports. Player mobility has raised pro team costs significantly, but market fluidity has added far more value.

IV. CONCLUSION

Devin Pugh would have avoided his costly demotion to the “minor league” of D-II football and stayed in school on a scholarship if not for these NCAA rules. Beyond his specific case, abolishing or reforming the rules would minimize shameful behaviors that often occur when coaching regimes change. Most head coaching changes are foreseeable, especially with internet and news discussions about coaches who are on the “hot seat.” Football players—especially upperclassmen like Pugh—can plan ahead while their unpromising season unfolds and look into transferring.

More player space can also be made at the school firing its head coach. This could actually advance the school’s investment in a new head coach by opening more scholarships for them, and

free agency could induce the new coach to treat his older players better. What would be wrong if college athletes were treated with more respect by coaches, or if that fails, if they had an opportunity to let the market find a new and welcoming home for them as players *and* as students?