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Andy Oliver Strikes Out the NCAA's "No-Agent" Rule for College Baseball

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I. INTRODUCTION

Imagine sitting in the locker room, just hours before pitching in the biggest game of your life, and finding out that you have just been suspended due to something you might have done unknowingly two years earlier. This is exactly what happened to Andy Oliver, an All-American pitcher for Oklahoma State University (OSU), in 2008 when he was declared ineligible by the NCAA hours before he was scheduled to pitch in a regional championship game, a game which his team would end up losing, crushing their hopes for a College World Series.

Oliver was suspended for violating a section of the NCAA's "no-agent" rule, which is regularly ignored throughout the baseball community by players, agents, MLB clubs, and even the NCAA.¹ The specific rule, Rule 12.3.2, permits student-athletes to retain a lawyer to serve as an advisor; however, it does not allow the lawyer to be present at contract negotiations with professional teams or have any direct contact with teams.² Oliver broke this rule in 2006 when he permitted his legal advisors, the Barattas, to be present at his home when he was negotiating a professional contract with the Minnesota Twins, the team who drafted him out of high school.³ Consequently, two years later, the NCAA suspended Oliver for the remainder of his sophomore season at OSU and declared him ineligible for a large portion of his junior season.⁴ Oliver responded by filing a lawsuit against the

1. Katie Thomas, *Baseball Star Challenges NCAA Rule*, NY TIMES, Oct. 3, 2008, at D1, available at http://www.nytimes.com/2008/10/04/sports/baseball/04oliver.html?pagewanted=1&_r=2&em.

2. NCAA Bylaws, §12.3.2, NCAA.ORG, Aug. 1, 2008, http://www.ncaapublications.com/Uploads/PDF/Division_1_Manual_2008-09e9e568a1-c269-4423-9ca5-16d6827c16bc.pdf.

3. *Oliver v. NCAA*, No. 2008-CV-0762, at *4 (E.C.C. Ohio Feb. 12, 2009) (granting permanent injunction and declaratory judgment).

4. *Id.*

NCAA in Ohio state court, challenging the NCAA's "no-agent" rule, along with its "restitution rule," and seeking a permanent injunction to restore his eligibility.⁵ In a shocking outcome, the court agreed with Oliver and ruled in his favor, striking down Rule 12.3.2.1 of the "no-agent" rule, as well as the NCAA's "restitution rule," as illegal and void.⁶

This article will provide an analysis of the "no-agent" rule in the context of college baseball and the *Andy Oliver* case. First, it will supply an overview of the background, history, and underlying facts surrounding Oliver's lawsuit against the NCAA. Next, it will take a close look at the claims brought by Oliver, focusing attention on the challenges to the NCAA's "no-agent" and "restitution" rules, and will assess the nature of these rules and discuss both parties' arguments regarding the validity of each rule. This section will be followed by a discussion of the "no-agent" rule as it applies to college baseball, specifically, the non-enforcement of the rule and the prevalence of agents in college baseball today. Then, it will address the court's surprising outcome in *Oliver v. NCAA*, breaking down the reasoning and rationale behind its decision to declare the NCAA's "restitution rule," and Rule 12.3.2.1 of the "no-agent" rule, null and void. Finally, this article will look at the possibility of reversal on appeal, and the potential effects and implications of the *Oliver* decision on college baseball players, as well as the rest of the sports world, if the case is upheld.

II. BACKGROUND AND HISTORY OF THE *ANDY OLIVER* CASE

Oklahoma State pitcher, Andy Oliver, was drafted in the seventeenth round of the 2006 MLB Draft by the Minnesota Twins after his senior season in high school.⁷ He hired two attorneys, the Barattas, to act as his advisors through the draft process.⁸ Hiring attorneys as advisors is permitted under NCAA rules as long as the advisors do not represent the player in contract negotiations, have direct contact with a team, or market the player's services to a team.⁹ The Barattas allegedly made impermissible contact with the Twins on behalf of Oliver in violation of the NCAA's "no-agent" rule.¹⁰ The Barattas

5. *Id.* at *4-*5.

6. *Id.* at *26-*27.

7. Thomas O'Toole, *Okla. State Pitcher Oliver Sues NCAA Over Eligibility Ruling*, USA TODAY, July 7, 2008, available at http://www.usatoday.com/sports/college/baseball/2008-07-07-oliver-ncaasuit_N.htm.

8. *Id.*

9. *Id.*; NCAA Bylaws, *supra* note 2, §§ 12.3.1–12.3.2.

10. O'Toole, *supra* note 7.

had telephone conversations with the Minnesota Twins, and Tim Baratta was present in Oliver's home when a representative of the Twins attempted to negotiate a professional contract with Oliver.¹¹ The Twins offered Oliver a \$390,000 signing bonus to sign with the team; however, he turned down the offer after his father and Baratta advised him that it was in his best interest to do so.¹² Instead, Oliver decided to accept a scholarship to play college baseball at OSU, retaining the Barattas as his advisors.¹³ By rejecting the contract offer from the Twins and entering college, Oliver would not be eligible for the MLB Amateur Draft until after his junior season at OSU in June of 2009.¹⁴

In the spring of 2007, before the start of his sophomore year, Oliver replaced the Barattas with one of the most prominent and well-known agents in baseball, Scott Boras.¹⁵ This occurred one year before Oliver would once again become draft-eligible as a junior, where he has been projected to be a first-round selection.¹⁶ In response, the Barattas billed Oliver for \$113,750 worth of services and lawyer fees.¹⁷ Oliver refused to pay the bill, claiming that he had only agreed to pay the Barattas a percentage of a future professional baseball contract, which was customary among draft picks and their advisors.¹⁸ However, according to the NCAA's standard letter titled, "Information Regarding the 2008 Major League Baseball First-Year Player Draft," athletes who receive assistance from an advisor are expected to pay that advisor "at his or her normal rate" for such services.¹⁹

A dispute arose between the two sides, culminating with the Barattas sending a letter to the NCAA, claiming that Boras had offered Oliver improper benefits, including baseball equipment and pitching lessons.²⁰ They also

11. *Oliver*, No. 2008-CV-0762, at *4.

12. *Id.* at *2-*3; Liz Mullen, *Andy Oliver Files Suit Against NCAA, Former Advisor*, SPORTSBUSINESSDAILY, July 2, 2008, available at <http://www.sportsbusinessdaily.com/article/122046>.

13. Darren Heitner, *Let Andy Play*, SPORTSAGENTBLOG.COM, June 4, 2008, <http://www.sportsagentblog.com/2008/06/04/let-andy-play/>.

14. *Oliver*, No. 2008-CV-0762, at *3.

15. Thomas, *supra* note 1.

16. *Id.*; *Oklahoma Pitcher Sues NCAA*, SI.COM, Jan. 6, 2008, http://sportsillustrated.cnn.com/2009/baseball/more/01/06/ncaa.lawsuit.ap/index.html?eref=si_mlb.

17. Mullen, *supra* note 12.

18. Thomas, *supra* note 1.

19. O'Toole, *supra* note 7.

20. Thomas, *supra* note 1.

produced a contract between them and Oliver.²¹ Ultimately, Andy Oliver became the subject of a joint investigation by the NCAA and Oklahoma State for possible NCAA violations.²²

On May 31, 2008, Oliver was submitted to an NCAA and OSU investigation the night before he was to start in a regional championship game against Wichita St. He was interrogated for about four hours, without his lawyer present, by attorneys from the NCAA, OSU, and an outside law firm hired by OSU.²³ The twenty-one-year old star left-handed pitcher was declared ineligible by the NCAA, before concluding his sophomore season and only hours before he was scheduled to pitch at.²⁴ Oliver was suspended for violating the NCAA's "no-agent" rule due to the illegal contacts made between his advisors, the Barattas, and the Minnesota Twins in 2006.²⁵ Specifically, the Barattas' telephone conversations with the Twins and presence at Oliver's contract negotiations were in violation of NCAA Rule 12.3.2.1, which regulates the conduct of advisors.²⁶ Before a full investigation had taken place and without any immediate right to an appeal, Oliver was held out of competing with his team for a chance to reach the College World Series.²⁷

At the time of his suspension, Oliver was 7-2 with a 2.20 Earned Run Average (ERA). He was the ace of the Oklahoma State pitching staff, and one of the top pitching prospects in college baseball.²⁸ In addition, he was a first team All-Big 12 selection and played on the 2008 USA national team at the Olympics.²⁹ Oklahoma State was ranked No. 6 by the USA Today/ESPN Coaches' Poll and was the top-rated team in the regional tournament.³⁰ However, in Oliver's absence, OSU ended up losing its post-season game

21. O'Toole, *supra* note 7.

22. Thomas, *supra* note 1.

23. Liz Mullen, *Pitcher's Father, Lawyer Decry Tactics of NCAA, Oklahoma St.*, SPORTSBUSINESSDAILY, July 21, 2008, available at <http://www.sportsbusinessdaily.com/article/59593>.

24. Jason Kersey, *Temporary Restraining Order Reinstates OSU Ace Andrew Oliver*, NEWSOK.COM, Aug. 16, 2008, <http://newsok.com/temporary-restraining-order-reinstates-osu-ace-andrew-oliver/article/3284395/?tm=1218855751>.

25. *Id.*

26. *Oliver*, No. 2008-CV-0762, at *4, *14.

27. Darren Heitner, *The Andy Oliver Affair*, SPORTSAGENTBLOG.COM, July 14, 2008, <http://www.sportsagentblog.com/2008/07/14/the-andy-oliver-affair/>.

28. *Oklahoma Pitcher Sues NCAA*, *supra* note 16.

29. Kersey, *supra* note 23; *Id.*

30. O'Toole, *supra* note 7; *Oklahoma Pitcher Sues NCAA*, *supra* note 16.

against Wichita State and was knocked out of the College World Series in the first regional.³¹ Some feel that Oliver's suspension cost his team a chance to move forward in the college baseball post-season and reach the College World Series.³² As stated by Oliver's attorney, Richard Johnson, "Oklahoma State didn't get to play in a super regional, but they probably would have if Andy would have been playing."³³

III. ANDY OLIVER'S CLAIMS AGAINST THE NCAA

On June 25, 2008, Oliver sued the NCAA (and his former advisors, the Barattas) in an Ohio court, challenging the NCAA's "no-agent" rule and attempting to regain his eligibility for his junior season.³⁴ Oliver was initially suspended for the entire 2009 season.³⁵ Oklahoma State later appealed his suspension to the NCAA and had it successfully reduced to seventy percent of the season, equaling a total of forty games.³⁶

In his efforts to defeat the NCAA, Oliver brought a number of different claims. His main claim, and the focus of this article, was to have the NCAA's "no-agent" rule, along with its restitution rule, struck down and declared invalid on their face.³⁷ He brought these claims against the NCAA under a breach of contract theory, and he also asserted tortious interference of contract.³⁸

Oliver asserted procedural due process violations against the NCAA for a variety of reasons, including "fail[ing] to take into account Oliver's defenses to charges never presented to him; fail[ing] to complete its investigation before suspending him; and us[ing] Oliver's attorney-client privileged information, that was illegally obtained, against him."³⁹ The suit alleged that Oliver was

31. O'Toole, *supra* note 7; Mullen, *supra* note 24.

32. Kersey, *supra* note 23.

33. *Id.*

34. Thomas, *supra* note 1.

35. Andrea Cohen, *OSU Baseball Player Andrew Oliver's Case Goes to Trial*, NEWSOK.COM, Jan. 5, 2008, http://www.newsok.com/osu-baseball-player-andrew-olivers-case-goes-to-trial/article/3335353?custom_click=pod_headline_osu-sports.

36. *Id.*

37. Aaron Fitt, *Headed to Trial: Oliver Case May Have Lasting Ramifications*, BASEBALL AMERICA, Dec. 22, 2008, available at <http://www.baseballamerica.com/today/college/on-campus/2009/267366.html>.

38. Mullen, *supra* note 12.

39. *Id.*

improperly interviewed without the presence or aid of a lawyer.⁴⁰ Oliver's father described the interviewing of his son late into the night, before the biggest game of his life, as "coercive" and resembling "Gestapo tactics."⁴¹

As a remedy, Oliver requested a declaratory judgment that NCAA Rule 12.3.2.1 of the "no-agent" rule be deemed invalid and unenforceable.⁴² In addition, he sought a permanent injunction to enjoin enforcement of the rule and restore his athletic eligibility, allowing him to play college baseball during his junior season at Oklahoma State.⁴³ He also demanded unspecified compensatory and punitive damages.⁴⁴

On August 15, 2008, Oliver received a temporary restraining order from the Ohio trial court judge restoring his eligibility and allowing him to begin the 2009 season playing baseball for his team.⁴⁵ In September, he was granted a trial by jury and, in October, the judge denied the NCAA's motion to have the case heard by a judge rather than a jury.⁴⁶ On December 24, the judge denied the NCAA's motion for summary judgment and an expedited ruling, and the case went to trial on January 5, 2009.⁴⁷

IV. NCAA RULES AT ISSUE

Andy Oliver's lawsuit against the NCAA attacked two of the NCAA's long-standing rules, its "no-agent" rule and its "restitution rule." This article will take an in-depth look at each of these rules and Oliver's challenges to them, beginning first with the "no-agent" rule.

A. "No-Agent" Rule

At the heart of the dispute between Oliver and the NCAA is the "no-agent" rule, codified in Rule 12.3 of the NCAA's Bylaws. "According to the

40. Thomas, *supra* note 1.

41. Mullen, *supra* note 24; Alan C. Milstein, *The NCAA is at it Again*, SPORTSLAWBLOG.COM, Aug. 15, 2008, http://sports-law.blogspot.com/2008_08_01_archive.html.

42. *Oliver*, No. 2008-CV-0762, at *1.

43. Mullen, *supra* note 12.

44. *Id.*

45. Kersey, *supra* note 23.

46. Mark Hazelwood, *Judge Denies NCAA Motion in Andy Oliver Case*, SANDUSKY REGISTER ONLINE, Oct. 16, 2008, available at <http://www.sanduskyregister.com/articles/2008/10/16/front/doc48f6c702a958e260337741.txt>.

47. Cohen, *supra* note 35.

NCAA, 'member institutions' athletics programs are designed to be an integral part of the educational program [and] the student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between collegiate athletics and professional sports."⁴⁸ In order to promote and ensure this principle of amateurism in college athletics, the NCAA has established strict rules and guidelines regulating the use of agents by amateur athletes.⁴⁹ Under Rule 12.3.1, *Use of Agents: General Rule*, "an individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport."⁵⁰ This regulation does not apply only to currently enrolled college athletes, it also applies to high school students prior to enrollment.⁵¹

Though students are prohibited from representation by an agent and also banned from receiving any benefits, financial or otherwise, from agents, the NCAA permits an athlete to retain a lawyer for consultation and advice relating to his professional sports aspirations.⁵² Rule 12.3.2, *Legal Counsel*, defines the role of attorneys as advisors for college athletes, stating that "securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the individual in negotiations for such a contract."⁵³ Interestingly, this rule does not distinguish between "lawyers and non-lawyers in terms of giving consultation and advice to the athlete," meaning that any third party (a lawyer, an agent, or a friend) can act as an advisor for the athlete.⁵⁴

The specific rule Oliver was deemed to be in violation of was Rule 12.3.2.1, *Presence of a Lawyer at Negotiations*. This rule declares that "a lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an

48. Richard A. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interests of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 215-216 (2005) (quoting NCAA Bylaws § 12.01.2, NCAA.ORG, Aug. 1, 2008, http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf).

49. *Id.* at 216.

50. NCAA Bylaws, *supra* note 2, § 12.3.1.

51. Karcher, *supra* note 48 at 216.

52. *Id.* at 216-17.

53. NCAA Bylaws, *supra* note 2, § 12.3.2.

54. Karcher, *supra* note 48, at 217.

agent."⁵⁵ Rule 12.3.2, which also applies to high school students prior to enrollment, was established by the NCAA to give student-athletes the necessary aid and assistance needed to understand and assess a professional sports contract, while still attempting to maintain the clear line of demarcation between college and professional sports.⁵⁶

Though Oliver did not dispute that he violated the rule when his advisors, the Barattas, made impermissible contacts with the Minnesota Twins in 2006, he argued that the "no-agent" rule should be struck down because it "interferes with the ethical obligation of a lawyer to protect his client."⁵⁷ In regard to the \$390,000 signing bonus Oliver was offered by the Twins, his lawyer furthered this opinion by stating, "What lawyer could let an 18-year-old kid negotiate a contract like that by himself? That would be malpractice."⁵⁸ Specifically, Oliver claimed that Rule 12.3.2.1 was "arbitrary and capricious, because . . . it does not impact a player's amateur status but instead limits the player's ability to effectively negotiate a contract."⁵⁹ He asserted that the NCAA should not be able to regulate lawyers, nor should it be able to restrict an athlete's right to guidance and assistance when negotiating a professional contract.⁶⁰ In Oliver's view, the state has the exclusive authority to regulate legal counsel, and therefore, Rule 12.3.2.1 is void as against public policy.⁶¹

In its defense, the NCAA stated that judicial deference should be given to the NCAA in managing its own internal affairs.⁶² It asserted that the court should not interfere with rules of private associations when its rules are being applied reasonably, rationally, and consistently.⁶³ It claimed that, because the "no-agent" rule, particularly Rule 12.3.2.1, was rationally related to the NCAA's legitimate goal of preserving amateurism by retaining a "clear line of demarcation between collegiate and professional sports," the rule should be upheld.⁶⁴

55. NCAA Bylaws, *supra* note 2, § 12.3.2.1.

56. Karcher, *supra* note 48, at 217.

57. Fitt, *supra* note 37.

58. *Id.*

59. *Oliver*, No. 2008-CV-0762, at *5.

60. *Oklahoma Pitcher Sues NCAA*, *supra* note 16.

61. *Oliver*, No. 2008-CV-0762, at *4-5.

62. *Id.*

63. *Id.*

64. *Id.* at *7.

B. Restitution Rule

The NCAA's restitution rule, defined under NCAA bylaw 19.7, also played a significant role in this lawsuit, whether or not Oliver was successful with his claim. This rule states that:

If a student-athlete who is ineligible . . . is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction . . . , and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the [NCAA] may take . . . actions against such institution in the interest of restitution and fairness to competing institutions.⁶⁵

Following this paragraph, subsections (a) through (e) of the "restitution rule" list penalties imposed on schools, student-athletes, or team records for adhering to the directions of a court order, which may later be overturned on appeal.⁶⁶

Even though Oliver was successful in court and his eligibility was restored, the NCAA can still use its restitution rule to pressure Oklahoma State into prohibiting Oliver from playing during the 2009 season.⁶⁷ If Oklahoma State lets Oliver play baseball this spring but, on appeal, the injunction restoring his eligibility is reversed, the NCAA will be able to severely penalize the university and its baseball program.⁶⁸ The financial risk of playing an ineligible athlete is great, and given the NCAA's propensity to litigate until a court rules in its favor, Oliver could potentially be forced to sit out all year, ultimately receiving nothing close to due process under the law.⁶⁹ That is why Oliver's lawyers are also attempting to have the NCAA's restitution rule declared invalid as well.⁷⁰

Oliver contended that the "restitution rule" is unlawful and should be struck down, because it interferes with the state's judicial powers and forces NCAA member schools to disregard court rulings that rule against the

65. NCAA Bylaws, *supra* note 2, § 19.7.

66. *Oliver*, No. 2008-CV-0762, at *19.

67. Fitt, *supra* note 37.

68. *Id.*

69. Marc Isenberg, *Andy Oliver v. NCAA and the "Restitution Rule,"* MONEYPLAYERSBLOG.COM, Aug. 27, 2008, <http://www.moneyplayersblog.com/blog/2008/08/andy-oliver-v-ncaa-and-the-restitution-rule.html>.

70. Fitt, *supra* note 37.

NCAA.⁷¹ Ultimately, member schools must abide by the will of the NCAA, in the face of court orders that say otherwise, or else face the risk of punishment if the order is subsequently vacated.⁷² On the other hand, the NCAA maintains that "striking [the restitution rule] leaves the [NCAA] members without a remedy and . . . the Court should not strike a bylaw simply because the Court believes the [NCAA] should govern themselves in a different way."⁷³ In past cases, the NCAA has defended the "restitution rule" by arguing that it ensures that schools that used ineligible athletes in competition were not given an unfair advantage over other schools.⁷⁴ Here, the NCAA took a similar stance arguing that "the member institutions agreed that [the restitution rule] was improper to allow an institution to reap the benefits of playing a student-athlete who was finally adjudicated to be ineligible."⁷⁵

V. APPLICATION OF THE "NO-AGENT" RULE TO COLLEGE BASEBALL

As opposed to the NFL and NBA, amateur baseball players are drafted prior to or during their eligibility as college baseball players.⁷⁶ Baseball players do not declare for the MLB Amateur Draft, known as the First-Year Player Draft, and thus, they still have eligibility remaining before and after the draft.⁷⁷ The draft takes place in June of each year, and, "in general, players who are eligible to be drafted and sign a professional contract are (i) graduating high school seniors, (ii) college players who have completed their junior year . . . , and (iii) junior college players."⁷⁸ Once a team drafts a player, that team obtains the exclusive right to negotiate a professional contract with that player, unless he decides to enter or return to school to play college baseball.⁷⁹

71. *Oliver*, No. 2008-CV-0762, at *5.

72. *Id.*

73. *Id.* at *7.

74. See *NCAA v. Lasege*, 53 S.W. 3d 77, 87 (Ky. 2001) (quoting *Ind. High Sch. Athletic Ass'n v. Reyes*, 694 N.E.2d 249, 257-58 (Ind. 1997)).

75. *Oliver*, No. 2008-CV-0762, at *19.

76. Thomas, *supra* note 1.

77. Karcher, *supra* note 48, at 219, 223.

78. *Id.* at 219.

79. *Id.* at 220.

MLB entry-level contracts allow drafted players and teams to negotiate over a player's signing bonus.⁸⁰ Because high school seniors and college juniors have the option of returning to school after the draft, rather than signing a professional contract, these players have bargaining leverage in negotiations with MLB teams that drafted players in other sports do not enjoy.⁸¹ Teams want to entice players into signing with their club and do not want to lose the player's rights if he decides to go back to school. As result, signing bonuses given out to drafted players have seen a dramatic increase over the past twenty years.⁸² The top high school and college baseball players often sign professional contracts with signing bonuses for millions of dollars.⁸³ Needless to say, a player's "signability" has become an important factor in the draft evaluation process.⁸⁴ Signability "refers to the amount of money it will cost a team to sign a particular player to a professional contract if that player is drafted,"⁸⁵ and can have a significant affect on where a player is drafted or whether a particular team will even consider selecting a player.⁸⁶

In order to minimize their risk, teams will try to engage in discussions or negotiations with a player prior to the draft to determine his signability.⁸⁷ In addition, many teams will arrange pre-draft deals with certain players, whereby the player will agree to sign a contract with the team for a specified amount of money if that team drafts him.⁸⁸ "As a result of the signability factor, increased signing bonuses, and pre-draft dealing, the draft process has become 'big business.'"⁸⁹ Draft-eligible players have a great deal at stake, and it has become almost a necessity for players to retain agents as advisors to guide them through the draft process.⁹⁰ However, as discussed earlier, the NCAA's "no-agent" rule prevents these advisors from having any direct contact with a major league club or being present at negotiations for a professional contract.⁹¹ Advisors cannot talk to MLB clubs to assess their

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 221.

87. *Id.*

88. *Id.*

89. *Id.* at 221-22.

90. *Id.* at 222.

91. NCAA Bylaws, *supra* note 2, § 12.3.2.1.

player's market value, determine which clubs are most interested in their players' services, or ensure that their player receive the best possible contract in negotiations.⁹²

Drafted college baseball players are placed at a significant disadvantage in comparison to other college athletes as a result of the "no-agent" rule, because they have to negotiate contracts without the help of an agent or risk losing their college eligibility.⁹³ Under the NFL and NBA draft processes, amateur players declare for the draft and usually have no further eligibility available when they hire an agent.⁹⁴ Football and basketball players do not have to worry about committing NCAA violations for retaining an agent, and they are able to have the full services of representation throughout the draft process.⁹⁵ On the other hand, because baseball players have eligibility remaining before and after the draft, they are forced to negotiate with MLB teams on their own or face possible suspension for violating the NCAA's "no-agent" rule.⁹⁶ Due to the inherent unfairness of this rule, along with the substantial need for players to protect their interests, the "no-agent" rule has become widely ignored in the baseball circles, with essentially all players retaining agents to act on their behalf.⁹⁷

VI. NON-ENFORCEMENT OF THE "NO-AGENT" RULE IN COLLEGE BASEBALL TODAY

Even though the "no-agent" rule is still part of the NCAA bylaws, it has been consistently ignored and disregarded by players, agents, MLB teams, and the NCAA in the context of college baseball.⁹⁸ Representation by agents has become the "industry norm," and nearly every draft-eligible player retains an agent in violation of the rule.⁹⁹ Agents routinely have direct contact with MLB clubs, gauging market value and negotiating contract terms for their

92. Karcher, *supra* note 48, at 222.

93. *Oklahoma Pitcher Sues NCAA*, *supra* note 16.

94. Karcher, *supra* note 48, at 222-23; Rick Karcher, *The NCAA's "No-Agent" Rule Discriminates Against Baseball Players*, SPORTSLAWBLOG.COM, Aug. 27, 2008, http://sports-law.blogspot.com/2008_08_01_archive.html.

95. Karcher, *supra* note 48, at 223.

96. *Id.*

97. Thomas, *supra* note 1.

98. *Id.*

99. Fitt, *supra* note 37; Karcher, *supra* note 94.

player.¹⁰⁰ For example, "[i]n one instance, as negotiations between club officials and a player's family took place in a hotel room, an agent had an associate listen with a glass up against the wall of an adjoining room."¹⁰¹ The NCAA has turned a blind eye to the enforcement of its "no-agent" rule in these circumstances, and the prevalence of agents in college baseball is no secret, as evidenced by the following quotes made by established figures in the baseball community:

1) Major League executive:

Virtually every [college baseball] player has an agent — call them a lawyer, call them an adviser, there's no difference.¹⁰²

2) American League scouting director:

Every single player that we deal with — I don't care what round you're talking about—has representation, has an agent It's been that way for the last four or five years, and I'm talking even about kids drafted in the 28th round. It's a prerequisite now. These agents are barraging us with telephone calls before we even select a player. . . . It starts way before the draft. . . . The problem is I guess the NCAA's problem, and it's wide and far and deep The college coaches know these guys are represented. You'd think the NCAA would get more involved if they care, because we're playing a charade here if we think these players are representing themselves, and it's just family advisers after they get drafted. That's kind of a joke.¹⁰³

3) Vanderbilt coach Tim Corbin, president of the American Baseball Coaches Ass'n:

The kids need advice, that's precisely why they pick up an adviser At the same time there's a rule against (agents representing players) and it's basically ignored by everyone. . . . At the college level, I don't think administrators understand this part of college baseball¹⁰⁴

100. Alan Schwarz, *NCAA Ban on Lawyers for Athletes Ruled Illegal*, NY TIMES, Feb. 12, 2008, at B11, available at http://www.nytimes.com/2009/02/13/sports/baseball/13ncaa.html?_r=1&ref=sports.

101. *Id.*

102. Thomas, *supra* note 1.

103. Karcher, *supra* note 94 (quoting Aaron Fitt, *Secret Agent Deals: NCAA has Rules on Agents, But They're Rarely Enforced*, BASEBALL AMERICA, Aug. 25, 2008).

104. *Id.*

The NCAA has done very little in terms of punishing college baseball players for violating the "no-agent" rule in the past, and there have only been a few instances where a player has been disciplined for impermissible contacts by his agent.¹⁰⁵ Most recently, in 2002, the NCAA suspended current Cleveland Indian pitcher Jeremy Sowers for six games while he was at Vanderbilt due to illegal conversations between his advisor and the Cincinnati Reds, the team that drafted him out of high school.¹⁰⁶

VII. PRIOR CASE LAW RELATING TO NCAA RULES AND ITS "NO-AGENT" RULE

Judicial deference has usually been given to the NCAA in its rules enforcement process, and past cases have illustrated that winning a lawsuit against the NCAA can be rather difficult. Courts are generally deferential to the NCAA, as a private association, when the organization is enforcing its own rules and regulations consistently and rationally.¹⁰⁷ Normally, courts will only interfere with the affairs of private associations when the association is acting "arbitrarily or capriciously," or in violation of its own rules, regulations, or policies.¹⁰⁸ In *Bloom v. NCAA*, the court found that Bloom, a student-athlete, had standing to bring a contract claim against the NCAA asserting violations of private association law, as a third-party beneficiary to the contractual relationship between the NCAA and its member universities.¹⁰⁹ To the extent Bloom's claim of arbitrary and capricious action asserts a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, his position as a third-party beneficiary of that contractual relationship affords him standing to pursue this claim.¹¹⁰

However, Bloom was unsuccessful in his challenge to the NCAA's rule against endorsements or media activities by student-athletes.¹¹¹ The court upheld the NCAA's restriction, because the NCAA applied its rules consistently, and did not treat Bloom arbitrarily, capriciously, or unreasonably.¹¹² Bloom still may have run into problems even if he had won

105. *Oklahoma Pitcher Sues NCAA*, *supra* note 16.

106. Karcher, *supra* note 48, at 222.

107. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 195 (2005).

108. *Id.*

109. *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. App. 2004).

110. *Id.* at 624.

111. *Id.* at 627-28.

112. *Id.*

his contractual claim against the NCAA. Suits brought under private associations law for breach of contract, if found "arbitrary or capricious," may still be susceptible to NCAA challenges under the Dormant Commerce Clause for their effect on interstate commerce.¹¹³

Additionally, the NCAA is immune from federal constitutional claims. In *NCAA v. Tarkanian*, the Supreme Court ruled that the NCAA was not a state actor, and therefore, it was not subject to the constraints of the U.S. Constitution.¹¹⁴ Thus, student-athletes are prohibited from bringing any Due Process, First Amendment, or Equal Protection challenges under the Federal Constitution.¹¹⁵

On a number of occasions, NCAA rules and regulations, such as the "no-agent rule," have been challenged under federal antitrust laws. Federal antitrust law, defined in Section 1 of the Sherman Act, prohibits unreasonable restraints of trade.¹¹⁶ In *NCAA v. Board of Regents*, the Supreme Court found that the NCAA's television contracts, which fixed prices and restricted the number of college football games televised each week, were in violation of the Sherman Act.¹¹⁷

The promulgation and enforcement of NCAA eligibility requirements, on the other hand, are normally not subject to antitrust scrutiny under the Sherman Act.¹¹⁸ In *Smith v. United States*, Smith, a student-athlete unsuccessfully challenged the NCAA's "Post-Baccalaureate Law" under federal antitrust law.¹¹⁹ The court held that NCAA eligibility rules are non-economic activities, unrelated to the NCAA's commercial or business activities, and therefore, are immune from antitrust scrutiny.¹²⁰ In conjunction with this decision, the court in *McCormack v. NCAA* also upheld an NCAA eligibility rule that restricted compensation to college athletes.¹²¹

The NCAA's "no-agent" rule has also been upheld by the courts on federal antitrust grounds. In *Banks v. United States*, a college football player, Banks, unsuccessfully challenged the NCAA's "no-agent" and "no-draft" rules.¹²²

113. MITTEN ET AL., *supra* note 107, at 185.

114. See *NCAA v. Tarkanian*, 488 U.S. 179, 191-199 (1988).

115. *Id.*

116. 15 U.S.C. § 1 (2009).

117. *NCAA v. Board of Regents*, 468 U.S. 85, 88, 120 (1984).

118. *Smith v. NCAA*, 139 F.3d 180, 185-86 (3rd Cir. 1998).

119. *Id.* at 184-87.

120. *Id.* at 185-86.

121. See *McCormack v. NCAA*, 845 F.2d 1338, 1340 (5th Cir. 1988).

122. *Banks v. NCAA*, 977 F.2d 1081, 1087-94 (7th Cir. 1992).

Ultimately, the court held that the "no-agent" rule was an NCAA eligibility rule not subject to antitrust challenges.¹²³ It said that the rule had no anticompetitive effects on a relevant market, while listing a number of its legitimate procompetitive justifications.¹²⁴ The "no-agent" rule was heralded as preserving amateurism by maintaining the line of demarcation between amateur and professional sports.¹²⁵ In addition, the rule was said to promote the educational nature of college football and protect the student-athlete from exploitation by agents.¹²⁶ Though these past cases upheld the "no-agent" rule for a variety of reasons, the Ohio court took a different approach by striking down the rule in the case of Andy Oliver.

VIII. NCAA V. OLIVER

On February 12, 2009, the Erie County Court of Common Pleas in Ohio ruled in favor of Andy Oliver on his challenges to the Rule 12.3.2.1 of the "no-agent" rule, as well as, the "restitution rule."¹²⁷ The court granted Oliver's request for declaratory judgment regarding both rules, stating that the rules were "arbitrary and capricious" and, therefore, void.¹²⁸ It also granted Oliver's request for a permanent injunction, restoring his eligibility and permitting him to play college baseball during his upcoming junior year at OSU.¹²⁹ The court stated that "if an injunction [was] not granted [Oliver] would suffer loss of his college baseball experience, impairment or loss of future baseball professional career, loss in being available for the upcoming draft because he is less likely to be seen, and ongoing damage to [his] reputation and baseball career."¹³⁰

A. Standing

The court first dealt with the issue of whether Oliver had standing to bring a breach of contract claim against the NCAA under the law of private

123. *See id.* at 1089.

124. *Id.* at 1089-90.

125. *Id.* at 1090.

126. Thomas R. Kobin, *The National Collegiate Athletic Association's No Agent And No Draft Rules: The Realities Of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORTS L. 483, 515 (1994).

127. *Oliver*, No. 2008-CV-0762, at *26-*27.

128. *Id.*

129. *Id.*

130. *Id.* at *26.

associations.¹³¹ Following the same reasoning as the court in *Bloom*, the court held that Oliver had standing to bring a breach of contract claim against the NCAA for violating its duty of good faith and fair dealing, through "arbitrary and capricious" action, as a third-party beneficiary to the contract between the NCAA and OSU, one of its member schools.¹³² It stated that the contractual relationship between the NCAA and OSU, represented by the NCAA Constitution and Bylaws, clearly is intended to confer a benefit on student-athletes.¹³³ The NCAA promises "to initiate, stimulate, and improve intercollegiate athletic programs for student-athletes," and OSU promises to "protect and enhance the physical and educational well-being of student-athletes."¹³⁴ As such, the NCAA and OSU are required, under an implied covenant of good faith and fair dealing, to treat Oliver honestly and reasonably, as a third-party beneficiary, and not "arbitrarily or capriciously."¹³⁵ "Arbitrary or capricious" conduct by the NCAA is to be viewed as a violation of the duty of good faith and fair dealing, and thus, a breach of contract.¹³⁶

B. Voiding Rule 12.3.2.1 of the "No-Agent" Rule

Though the court noted that the NCAA, as a private voluntary association, has the right to apply its rules and manage its own internal affairs, the court declared Rule 12.3.2.1 of the "no-agent" rule illegal and void, because it was "arbitrary and capricious" and against state public policy.¹³⁷ Rule 12.3.2 allows players to retain lawyers as advisors; however, it limits the lawyer's ability to represent his client competently by preventing him from being present at contract negotiations and from having direct contact with teams.¹³⁸ The lawyer, as advisor, is unable to serve the best interests of his client adequately, and the player's ability to effectively negotiate a contract is diminished.¹³⁹

For a student-athlete to be permitted to have an attorney and then to tell that student-athlete that his attorney cannot be present during the discussion of

131. *Id.* at *10.

132. *Id.* at *12-13.

133. *Id.* at *11-*12.

134. *Id.*

135. *Id.* at *14.

136. *Id.*

137. *Id.* at *18, *22, *26.

138. *Id.* at *16-*17.

139. *Id.* at *18, 26.

an offer from a professional organization, is akin to a patient hiring a doctor and then the doctor is told by the hospital board and the insurance company that he (the doctor) cannot be present when the patient meets with a surgeon because the meeting may improve his patients decision making power.¹⁴⁰

For these reasons, the court said that Rule 12.3.2.1 was "unreliable (capricious) and illogical (arbitrary) and indeed stifle[d] what attorneys are trained and retained to do."¹⁴¹

In defense of the rule, the NCAA argued that Rule 12.3.2.1 served the NCAA's fundamental goal of "amateurism."¹⁴² However, the court failed to see how permitting a student-athlete to consult with a lawyer, but prohibiting that lawyer from assisting his client in contract negotiations with a team, would help maintain a clear line of demarcation between amateurism and professionalism.¹⁴³ The lawyer is being prevented from doing what he was hired to do, and the student-athlete is bearing the cost.¹⁴⁴ The court also determined that Rule 12.3.2.1 was impossible to oversee, and, therefore, it was being enforced selectively.¹⁴⁵ Lastly, the court declared that, through this rule, the NCAA was impermissibly attempting to regulate lawyers, a job which is exclusively left in the hands of the state.¹⁴⁶ Ultimately, the court concluded that the NCAA breached its contract with Oliver and violated its duty of good faith and fair dealing through its application of Rule 12.3.2.1 of the "no-agent rule."¹⁴⁷

C. Voiding the "Restitution Rule"

In addition to invalidating an important part of the "no-agent" rule, the court also made waves by striking down the NCAA's "restitution rule," labeling it as overreaching and an interference with the court's judicial power.¹⁴⁸ The court emphasized its position by providing the following illustration:

140. *Id.* at *17-*18.

141. *Id.* at 18.

142. *Id.*

143. *Id.* at *16, *18.

144. *Id.*

145. *Id.* at 17.

146. *Id.* at *16, *18-*19.

147. *See id.* at *19.

148. *Id.* at *26.

If a Court grants a restraining order that permits a student-athlete the right to play, the institution will find itself in a real dilemma. Does the institution allow the student-athlete to play as directed by the Court's ruling and in so doing face great harm should the decision be reversed on appeal? Alternatively, does the institution, in fear of [the restitution rule], decide that it is safer to disregard the Court Order and not allow the student-athlete to play thereby finding itself in contempt of court.¹⁴⁹

As seen from this example, the "restitution rule" makes student-athletes and members schools fearful and reluctant to use the court system to resolve disputes with the NCAA.¹⁵⁰ It constitutes a "direct attack on the constitutional right of access to courts," and it seems to only serve the interests of the NCAA.¹⁵¹ Discounting the fact that the NCAA's member schools voluntarily agreed to the restitution rule, the court ultimately held that the rule was "arbitrary and capricious," a violation of the NCAA's duty of good faith and fair dealing, and, therefore, a breach of contract.¹⁵²

IX. ON APPEAL

After the trial, the NCAA issued a response stating, "[t]he bylaws related to agent relationships are important principles our colleges and universities have established to protect and preserve amateurism standards. We intend to seek a review of the decision by a higher court, and we are hopeful these significant standards will be preserved."¹⁵³ There is a very good chance that, on appeal, these NCAA's standards will be preserved and the Ohio county court's decision in regards to the "no-agent" and "restitution" rules will be overturned.

Normally, the judicial system is very deferential to the NCAA in its rules enforcement process, as it will rarely meddle in the affairs of this private association. Strong precedent exists in favor of the NCAA suggesting that there is a likelihood of reversal on appeal. The court in *Cole v. NCAA* stated that "NCAA's rules and decisions regarding the concerns and challenges of student-athletes are entitled to considerable deference and this court is

149. *Id.* at *20.

150. *Id.*

151. *Id.*

152. *Id.* at *20-*21.

153. Schwartz, *supra* note 100.

reluctant to replace the NCAA . . . as the decision-maker."¹⁵⁴ In *NCAA v. Lasege*, the court declared that the "members of [the NCAA] should be allowed to 'paddle their own canoe' without unwarranted interference from the courts."¹⁵⁵ *Bloom* provides further support for these same principles, yet the court in *Oliver* decided to void the "no-agent" and "restitution" rules by classifying them as "arbitrary and capricious." The court in *Lasege* held that NCAA rules are to be considered "arbitrary and capricious" only when they are clearly erroneous.¹⁵⁶ If the NCAA provides a rational and reasonable basis for implementing or enforcing a particular rule, a court will usually defer to the judgment of the NCAA and uphold the rule.

In *Oliver*, the NCAA attempted to justify Rule 12.3.2.1 of the "no-agent" rule by stating that the rule was rationally related to its goal of preserving amateurism and maintaining a clear line of demarcation between college and professional sports. Though the court in *Oliver* rejected this defense, this same argument was accepted by the Seventh Circuit in *Banks* when it upheld the "no-agent" rule under an antitrust challenge. The *Banks* court accepted "preserving amateurism" as a legitimate procompetitive justification for the "no-agent rule."¹⁵⁷ Even though the court in *Banks* dealt with an antitrust suit looking at the "no-agent" rule as a whole, rather than a breach of contract suit simply looking at Rule 12.3.2.1 as in *Oliver*, this case can provide a strong support for the argument that Rule 12.3.2.1 is at least rationally related to the goal of promoting "amateurism" and not clearly erroneous.

In addition, past cases lend support to the justifications offered by the NCAA in *Oliver* in support of its "restitution rule." The Kentucky Supreme Court in *Lasege* specifically endorsed the NCAA "restitution rule," finding that the rule did not impinge upon the functions of the judicial system.¹⁵⁸ The *Lasege* court emphasized the fact that member schools voluntarily agreed to abide by the rule and recognized that the "use of an ineligible player imposes a hardship on other teams that must compete against the teams fielding ineligible players."¹⁵⁹ Though these arguments were quickly discounted by the Ohio court in *Oliver*, the Court of Appeals might find these arguments more persuasive, given the fact that these same arguments were upheld in prior cases. All that the court needs to find is that the "restitution rule" has some

154. *Cole v. NCAA*, 120 F.Supp.2d 1060, 1071-72 (N.D. Ga. 2000).

155. *NCAA*, 53 S.W.3d at 83.

156. *See id.* at 85.

157. *Banks v. NCAA*, 977 F.2d 1081, 1089-90 (7th Cir. 1992).

158. *Id.* at 88.

159. *Id.* at 87 (quoting *Ind. High Sch. Athletic Ass'n*, 694 N.E.2d at 257-58).

reasonable and rational basis in order to overrule the lower court's decision. In light of prior cases such as *Lasege*, as well as, the judicial deference given to the NCAA, there is a significant chance that the Court of Appeals will follow the justifications offered by the NCAA the second time around.

Though the previous arguments may prove to be successful, the NCAA's best strategy on appeal may be to challenge the court's ruling under the Dormant Commerce Clause. It can argue that the court's invalidation of Rule 12.3.2.1 of the "no-agent" rule, along with the "restitution rule," is, in essence, state regulation of interstate commerce. Because the Dormant Commerce Clause limits the authority of the states in passing regulations that affect interstate commerce,¹⁶⁰ the NCAA can argue that the court's ruling in *Oliver* is prohibited under the Dormant Commerce Clause and should be reversed.

In *NCAA v. Miller*, the Ninth Circuit struck down a Nevada state statute that imposed certain due process requirements on NCAA enforcement proceedings in Nevada, as unconstitutional because it violated the Dormant Commerce Clause.¹⁶¹ The *Miller* court stated that, in order for the NCAA to accomplish its fundamental goals and maintain the integrity of its product, it must have a uniform system of rules and regulations on a nationwide basis.¹⁶² Thus, in order to preserve its uniform enforcement process, the NCAA would be forced to adopt the due process standards set by the Nevada statute in every other state to avoid any inconsistencies across states and still remain in compliance with Nevada law.¹⁶³ Ultimately, the Ninth Circuit held that:

The Statute directly regulates interstate commerce and runs afoul of the Commerce Clause both because it regulates a product in interstate commerce beyond Nevada's state boundaries, and because it puts the NCAA . . . in jeopardy of being subjected to inconsistent legislation arising from the injection of Nevada's regulatory scheme into the jurisdiction of other states.¹⁶⁴

Following the same reasoning that the Ninth Circuit used in *Miller*, the NCAA can argue that, in order to preserve its fundamental goal of uniform rules and regulations, it will be forced to adopt the Ohio court's ruling in *Oliver* and void Rule 12.3.2.1 of the "no-agent" rule and the "restitution rule" in every other state. In this way, the Ohio court's decision is in violation of the

160. See generally *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829).

161. See *NCAA v. Miller*, 10 F.3d 633, 637-40 (9th Cir. 1993).

162. *Id.* at 638.

163. *Id.* at 639.

164. *Id.* at 640.

Dormant Commerce Clause, because it is directly regulating the NCAA's activity across state lines. The court's opinion even seems to allude to the fact that its holding is intended to effect interstate commerce when it declares that Rule 12.3.2.1 is "against the public policy of the State of Ohio as well as all the states within this Union."¹⁶⁵ Though the lower court in *Oliver* paid little attention to whether its ruling would run into problems under the Dormant Commerce Clause, there is a distinct possibility that the Court of Appeals will follow the reasoning in *Miller* and find that the court's ruling runs afoul to the Constitution.

X. EFFECT ON COLLEGE BASEBALL PLAYERS AND AMATEUR ATHLETES

Although a higher court may overturn the *Oliver* decision for the reasons stated above, the trial court did make the right decision when it ruled in favor of Andy Oliver. Rule 12.3.2.1 of the "no-agent" rule was an illogical and unfair rule, which forced college baseball players to negotiate professional contracts alone or risk facing possible suspension for violating NCAA rules. The student-athlete was permitted to retain a lawyer, yet the lawyer was barred from performing the services which he was hired to do. The lawyer was hindered in his ability to represent his client competently and attain the best possible contract he could for his client. Why prevent a lawyer from being present at these negotiations, what goals did this rule serve for the NCAA and its student-athletes? It is hard to see how allowing an athlete to hire counsel, but restricting that counsel's presence at negotiations, helped to preserve amateurism and a clear line of demarcation between amateur and professional sports. The player is about to be or has already been drafted by an MLB team, and it is inevitable that he will be in direct contact with this team.

In the context of college baseball, the line between amateurism and professionalism has been smeared by the draft process, and allowing a lawyer to be present at negotiations does nothing to change this. The only effect of Rule 12.3.2.1 was to diminish a player's ability to effectively negotiate a contract and prevent him from attaining the best possible contract that he can obtain. The NCAA was established to protect student-athletes, not to hurt them; however, Rule 12.3.2.1 clearly worked only to the detriment of student-athletes. For these reasons, it was proper for the court in *Oliver* to strike down the rule as "arbitrary and capricious."

165. *Oliver*, No. 2008-CV-0762, at *26.

If *Oliver* is upheld on appeal, this ruling will have major implications for college baseball players, amateur athletes in other sports, and the relationship between college and professional sports. Though the potential reach of the *Oliver* decision is still unclear, it is very likely that this ruling will apply to all 50 states and all 360,000 student-athletes in the NCAA, given the NCAA's goal of uniform rules and regulations, along with the court's ruling that Rule 12.3.2.1 was "against public policy of . . . all states within this Union."¹⁶⁶ College baseball players, who were once at a disadvantage, will now be put on a level playing field with amateur athletes in football and basketball.

The direct effect of the court's ruling in *Oliver* is that drafted high school and college baseball players will be able to have lawyers personally negotiate their MLB contracts, as is the case with drafted players in the NFL and NBA. Players and their legal representatives will not have to dance around the rule or commit blatant NCAA violations anymore. The player's rights will be fully protected, and teams will not be able to exploit or take advantage of players in contract negotiations. Negotiations will not get bogged down now that there is no rule blocking the lines of communication between the two sides. The free flow of information between team and the player's agent will facilitate more efficient negotiations and greater understanding.

However, this ruling could have some potential drawbacks for baseball players and MLB teams depending on what side you are on. As is the case in all sports, the presence of agents in contract negotiations will likely increase the tensions between both sides. Agents are more likely than an individual player to play hardball with the team in contract discussions. One benefit to the player is that this hardball strategy will likely lead to higher signing bonuses being handed out by MLB teams. However, the animosity created during contract talks could carry over and strain the relationship between the two sides in the future. In addition, the presence of agents in contract negotiations could result in more student-athletes leaving school early to enter the professional baseball ranks. By having more direct involvement in the negotiating process, agents may have a greater incentive to convince their clients to sign a professional contract. They know they will be the one negotiating the deal, and therefore, if they feel they can get their client the big bucks, they will push the player to forego his eligibility and sign with an MLB team.

The *Oliver* decision may also have a major impact on the pre-draft process for high school and college baseball players. Prior to this ruling, only student-

166. *Id.* at *26; Schwartz, *supra* note 100.

athletes, coaches, and the school's professional sports counsel could have direct contact with representatives from MLB teams on behalf of the student-athlete.¹⁶⁷ Because the MLB Amateur Draft comes right after the high school and college baseball seasons, players do not have time to reach out to MLB teams to assess their market value and draft status. Coaches and the school's professional sports counsel can help the student-athlete in these regards, however, they are biased parties who may be more interested in convincing the player to return to school and play for their team, than in helping the player make the best decision for him and his family. As such, these players' interests may not be adequately represented. With the downfall of Rule 12.3.2.1 in *Oliver*, lawyers and agents, as advisors, will likely be able to directly contact MLB teams on behalf of their client during the pre-draft process. These advisors will be put in a better position to assess their player's market value and determine their potential salary and draft status. On the flip side, teams will gain a better understanding of a player's "signability," which could result in the number of pre-draft deals increasing.

The court's ruling in *Oliver* will not solely benefit college baseball players, but it may also have an impact on other amateur athletes. Drafted college hockey players are selected by NHL teams before they enter college, and NHL teams retain the rights of these players while they are enrolled at school.¹⁶⁸ Teams can choose to offer their players a professional contract at any time during their college careers. As result of the *Oliver* decision, a college hockey player will now be able to have a lawyer present at these contract negotiations without losing his remaining eligibility. It is unclear yet how prospective NFL and NBA players will be affected by *Oliver*; however, there are a few commentators who believe that the decision will also prove beneficial for some of these amateur athletes. Believing that this ruling will enable underclassmen to make better decisions regarding early entry into the NFL or NBA drafts, one reporter stated:

It will be particularly significant for athletes allowed to declare for the draft as underclassmen but who can withdraw from the draft and return to school if they do not use an agent. Now, it would seem, they

167. Karcher, *supra* note 48, at 218-19.

168. Jaime Fitzpatrick, *NHL Draft Day Basics: A Quick Summary of the NHL Entry Draft*, ABOUT.COM:HOCKEY, http://procehockey.about.com/cs/prospects/a/nhl_draft_basic.htm (last visited August 30, 2009).

will be able to be above board in using an agent to gauge the pro market before deciding whether to become draft eligible.¹⁶⁹

Legally speaking, the *Oliver* decision may also have an impact on future challenges to the NCAA and its rules and bylaws. The *Oliver* court struck down Rule 12.3.2.1 of the "no-agent" rule for, among other reasons, attempting to regulate and control lawyers, a duty which is left exclusively for the states. It voided the "restitution rule," because it impinged upon the state's judicial power. It seems that this decision might open the door for student-athletes to challenge NCAA rules that interfere with the powers of the state and its judiciary system.

In regards to the "no-agent" rule, some believe that *Oliver* "essentially guts the NCAA's rules dealing with agents."¹⁷⁰ However, it is unlikely that this ruling will have any effect on the main sections of the "no-agent" rule, which prohibit an agent from marketing a player's athletic ability or providing extra benefits to student-athletes. These rules clearly preserve "amateurism" and help maintain a clear line of demarcation between amateur and professional sports. However, the role of a school's professional sports counseling panel, established under Rule 12.3.4 of the "no-agent" rule, will likely be severely diminished.¹⁷¹ The main duties of the professional sports counsel are to advise student-athletes about future and proposed professional contracts and to communicate directly with representatives of professional teams to secure tryouts or gage a player's market value, draft status, or potential salary.¹⁷² Because advisors are permitted to engage in many of these same duties after the ruling in *Oliver*, student-athletes will likely look toward them for assistance in these areas, rather than the school's professional sports counsel, which may not have the student's best interests at heart.

XI. CONCLUSION

Rule 12.3.2.1 of the "no-agent" rule has been a thorn in the side of drafted high school and college baseball players throughout the country starting at its inception and lasting up until now. With the increases in signing bonuses, pre-

169. Tracy Ringolsby, *Legal Ruling Agent of Change?*, ROCKY MOUNTAIN NEWS (Colorado), Feb. 19, 2009, available at <http://www.rockymountainnews.com/news/2009/feb/19/ringolsby-legal-ruling-agent-of-change/>.

170. Mike Fitzpatrick, *Judge: Vermilion's Andy Oliver Should Pitch Again*, SANDUSKY REGISTER, Feb. 14, 2009, available at <http://www.sanduskyregister.com/articles/2009/02/14/front/1152244.txt>.

171. NCAA Bylaws, *supra* note 2, § 12.3.4.

172. *Id.*

draft deals, and the "signability factor," the draft process has become a complex and intricate process, making it necessary for players to seek guidance or assistance from agents in order to adequately protect their interests. The rule put college baseball players at a disadvantage in comparison to other amateur athletes and restricted a player's ability to effectively negotiate a professional contract. As a result, Rule 12.3.2.1 has been widely ignored among baseball circles, with almost all draft-eligible players electing to retain an agent for representation in contract negotiation and contacting teams. The NCAA has often turned its cheek and looked the other way regarding blatant violations to this rule; however, there have been a few rare instances where the NCAA has decided to enforce the "no-agent" rule and levy punishment against a player. One of these instances was in the case of Andy Oliver.

Recognizing the inherent unfairness of this rule, Oliver fought back by suing the NCAA and Rule 12.3.2.1 of its "no-agent rule." In an unexpected decision, an Ohio lower court took a bold stance against the NCAA and declared Rule 12.3.2.1 invalid and legally unenforceable. It labeled the rule as "arbitrary and capricious" for restricting a player's right to proper counsel and attempting to regulate lawyers. As an added bonus, the court also struck down the NCAA's "restitution rule." Barring a reversal on appeal, the *Oliver* ruling will finally put college baseball players on a level playing field with other amateur athletes, as well as, the MLB teams they are negotiating with. Having a lawyer or agent present during negotiations will guarantee that college baseball players receive guidance at every stage of the draft process and will ensure that their interests are adequately protected.

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