Amateur in Name Only? The Intersection Between Antitrust Law and College Athletics

MR. KATZ: If everyone can make their way back to their seats.

We're now going from history to sports. You know, today we started with developments. We went on to merger, we talked about cartels and then history, now sports.

This is the last panel of the day. I do want to let you know that after this panel ends, we have a cocktail reception for antitrust associates and young lawyers. It will be at the Sutton Center, which is on this floor.

Let me get started on this last panel. The title is Amateur in Name Only? The Intersection Between Antitrust Law and College Athletics. Our moderator is Steven Tugander of the Department of Justice Antitrust Division in New York. Steve, please take it away. Thank you.

MR. TUGANDER: So as a government lawyer, I also have to do the usual disclaimer. Maybe mine is a little bit different from what we've heard, but any views expressed today are my own and they do not necessarily represent those of the Antitrust Division or the Department of Justice.

Before we get started, I want to thank Dan Anziska and Gerald Stein for being invaluable in helping out putting this panel together behind the scenes.

So sports fans or not, you probably know the Super Bowl will be played this Sunday. And with all the recent controversy surrounding the NFL, you probably also know that the NFL generates huge revenues, billions of dollars that are shared between team owners and the players.

But on the sports calendar, the Super Bowl is sandwiched between two other big revenue-generating events, and that's the college football playoffs in January and the NCAA college basketball tournament in March, which I think most people know is the Final Four Tournament.

But unlike the NFL players, college athletes do not share in the billions of dollars generated by their sports. In college sports, schools collectively enforce what they call amateurism rules that prohibit the players from getting paid.

So with all this money at stake, within the last few years there's been a surge in antitrust litigation challenging these amateurism rules, and that includes the pending class action suit, *Jenkins v. NCAA*.

Now the *Jenkins* suit was filed on behalf of a class of men's college football and basketball players. It alleges that the NCAA's amateurism rules constitute price fixing and a group boycott in violation of Section 1 of the Sherman Act.

If the suit is successful, it may pave the way for college athletes to start getting paid and start sharing in those large revenues generated by their sports, all of which lead us to the following questions.

Are the amateurism rules pro-competitive? In other words, are they necessary and beneficial to the higher educational system? Or are they, as the *Jenkins* suit alleges, the byproduct of an illegal cartel that exploits college athletes and harms American consumers?

So here, to help answer these questions, is our expert panel.

Everyone on this panel has a very impressive resume, but in the interest of time I'm just going to hit some highlights. The full bios can be found in the written materials.

All the way to my left is Professor Marc Edelman. He is an associate professor of law at the Zicklin School of Business at Baruch College. He focuses on sports law and antitrust law, among other things. He's cited by the media on a wide range of sports law topics, including how the Sherman Act applies to professional sports leagues and the legal issues pertaining to NCAA amateurism. And Professor Edelman also writes a column on sports law for *Forbes Sports Money.*

Sitting next to Professor Edelman is Dan Graca. Now, Dan has a job that most sports fans would love to have. He hosts a radio show on Sirius XM's Mad Dog Sports Radio channel, and he's going to give us a non-lawyer's perspective on the amateurism issue and give us a sense as to how fans, sports fans, feel about the possibility of college athletes getting paid.

Dan, if we want to listen to you, where and when can we tune in?

MR. GRACA: Well, every night, 7 to 11 eastern on Sirius XM Mad Dog Radio, Channel 85. And it's a welcome relief. Thanks for having me. I don't want to talk about deflated footballs like I have for the last two weeks.

MR. TUGANDER: That was going to be my first question.

And then sitting next to Dan is David Greenspan, who is a litigation partner in Winston & Strawn's New York office and co-chair of the firm's college sports sub practice group. Mr. Greenspan has represented National Football League players, National Basketball Association players, Major League Baseball players, National Hockey League players and various other sports entities and individuals.

He also serves as the Chairman of the New York City Bar Association's Sports Law Committee, and most importantly for this panel he represents the plaintiffs in the *Jenkins* lawsuit that will be the main focus of our discussion.

And sitting next to David is Professor Scott Hemphill. Scott is a visiting Professor of Law at NYU School of Law, Professor of Law on leave at Columbia Law School. He teaches and writes about antitrust, intellectual property and regulation of industry. I think most of you know for some time he served as the Antitrust Bureau Chief in the New York AG's Office. He also clerked for Judge Posner on the Seventh Circuit and Justice Scalia on the Supreme Court. And Professor Hemphill's antitrust work has been cited by the Supreme Court and he's testified before Congress on various antitrust matters.

And last, but not least, sitting to my immediate left is Dr. Donna Lopiano. Dr. Lopiano is the President and Founder of Sports Management Resources, a consulting firm that assists scholastic and collegiate athletics departments. She is also an adjunct lecturer in sports management at Southern Connecticut State University.

Now, previously Dr. Lopiano served for 18 years as the Director of Women's Athletics at the University of Texas. She's testified about Title IX before Congress, and she's a member of the National Sports Hall of Fame, the National Softball Hall of Fame and the Connecticut and Texas Women's Halls of Fame, and I believe there are some more halls of fame also, but we don't have enough time to mention them all. Dr. Lopiano was named one of the ten most powerful women in sports by Fox Sports.

So thank you, panelists.

And, Dr. Lopiano, why don't we start with you. Could you give us a brief background on the NCAA? For example, who are its members, what is its mission, how does it operate?

DR. LOPIANO: The NCAA was established in 1906 under the threat of the then-President Roosevelt. There were numerous football deaths and the president threatened to ban football unless higher education cleaned up its act.

The NCAA did not enforce rules between 1906 and 1948. It issued guidelines. It didn't really have a regulatory function. It didn't have an enforcement staff. It wasn't until 1952 that enforcement really kicked in.

Between 1952 and 1997, it was one member, one vote, legislative body that passed rules that governed how competition was conducted between member institutions. It is the largest association of 4-year colleges with athletic programs in the United States. It has 1,076 members. It's split into three competitive—I only got to 1997—but I'll come back to 1997—it has 1,076 divisions members. It's split into three competitive divisions. There are 346 members in Division One, its most commercial division, the one you hear the most of. It has 291 members in Division Two, which gives about half the number of scholarships as Division One. It is not as pure as Division Three with 439 members, which gives no scholarships at all.

But most of our attention is on these commercialized athletic programs in Division One.

Division One is split into three subdivisions. The most visible one is FBS, the Football Bowl Subdivision. It has 126 members and 10 conferences and it is, by far, the richest group.

I say that with tongue and cheek in that only 20 of those 126 programs make more money than they spend—20 out of 1,076 member institutions make more money than they spend.

Even the biggest budget, and I say this because I'm from the University of Texas, even the richest institution generating $160 million a year in revenues —the University of Texas—will go into deficit this year. And so, that's the FBS.

Then there's the mid-majors, the Football Championship Subdivision 120 institutions—and then 100 Division I institutions who do not play football

The important point I think is that, and this is what people don't realize, that NCAA Division I college athletics is a $12 billion industry. About $5 billion is generated by television rights, and the remainder of revenues is from sponsorship fees and ticket sales.

The NCAA itself generates about a billion just selling its own national championships —the tickets to and championship media rights .

The NCAA does not own the College Football Playoff. It is the only national championship that it doesn't own.

So I bring you back to 1997. What happened in 1997?

The one institution, one member vote system succumbed to threats from the FBS saying it was going to leave the NCAA if the membership did not give it majority voting power.

The system federated. An Executive Committee and a Legislative Council were formed with conference representation, and the FBS was given 50 percent voting power.

At that same time, in 1997, the FBS made sure it would continue to own the football championship rather

than the NCAA by adopting legislation specifying that if the NCAA started an FBS football national championship, all revenues would go to only FBS institutions.

And I just point this out because when we talk about antitrust lawyers going after big money, there's where it all is—in the FBS.

The NCAA basketball championship annually yields $417 million for the NCAA, and 90% of this money gets redistributed back to all Division I member institutions. Not so with the FBS College Football Playoff where the 126 members of the FBS are reaping the benefits of this four team championship playoff which currently generates $440 million a year. The value of this championship will increase to $1 billion when it expands to eight teams, which is inevitable. What you should know is of that $440 million, 75 percent of that money goes to the top five conferences in the FBS. The bottom five conferences only get 25 percent.

So that's probably the financial picture you need to know.

MR. TUGANDER: Okay. In a nutshell, if we could just focus on the NCAA's amateurism rules. What specific restrictions do they place on college athlete compensation?

DR. LOPIANO: Very quickly, all the NCAA does is say that there must be a demarcation between a professional athlete and a college athlete, and it draws whatever line it wants. So it makes up the definition of college athlete, and you know that as "amateurism."

It says that the professional athlete gets paid for playing a sport, and the amateur college athlete does not and cannot, and that excludes an athletic scholarship being considered as pay.

Athletic scholarships are not considered to be pay for play. They're educational grants. And so there are a series of rules that simply say to college athletes: "You can only get your athletic scholarship, nobody can pay you additional money for playing, and you don't have the rights to sell your name, image or likeness related to the playing of your sport because we will consider that to be pay for play."

The *O'Bannon* case did result in athletes being able to get more scholarship money from their institutions. Instead of the NCAA being able to limit scholarships to tuition, required fees, room, board, and books, institutions now have to increase those scholarships by anywhere from $3,000 to $6,000 to include "cost of attendance."

The *O'Bannon* judge has said to the NCAA that it must set pay limits or maximum scholarship limits to be the same as the Federal Government limit for other student financial aid, which is tuition, required fees, room and board, books, and cost of attendance

MR. TUGANDER: Which is a nice segue into Professor Hemphill.

Professor, as Dr. Lopiano referenced, in 2014, in the highly publicized *O'Bannon* case, Judge Wilken of the Northern District of California ruled in favor of the plaintiff class of college athletes against the NCAA.

Earlier in 2014, college football players at Northwestern won the right to unionize. Both these cases are now on appeal.

Can you give us a brief overview of the two opinions that were issued in those cases and what are your thoughts on how those rulings may impact the *Jenkins* suit that Mr. Greenspan's firm has filed?

MR. HEMPHILL: Sure. So thanks to Steve and the organizers for the invitation to join this panel. It's obviously a fascinating and timely topic.

I want to suggest three points from these opinions that might matter for the *Jenkins* case.

First, a point about college sports as a big business; second, a point about the enduring importance of amateurism; and third, a point—this is an antitrust conference after all—a point about the antitrust's rule of reason and how we might apply it to sports cases.

On the first point, college sports is clearly fully subject to antitrust law. It's economic activity, like any other. Sure, it's a non-profit. Sure, it's dedicated to amateurism. But that doesn't change the basic facts. Not only is this economic activity, it's perfectly ordinary economic activity in a lot of ways.

The *Northweste*rn case illustrates this.

The National Labor Relations Board is considering whether to allow the Northwestern football team to unionize.

Last March [2014], the board's hearing officer found that the players are employees of the university and, therefore, have a right to hold elections to figure out whether they want to unionize.

The team members voted. The votes have not yet, last I checked, been counted. We don't know the result because there's an appeal pending at the Board itself to see whether the hearing officers ruling will be confirmed.

The case shows that players are economic actors. They're conferring a benefit on the school and receiving compensation. At Northwestern, that compensation comes to about $60,000 a year for each of 85 scholarship players. That's a multimillion dollar outlay, depending on how you count a scholarship.

The case also illustrates that college sports are big business.

Beyond the players, Northwestern employs a head coach, three directors, nine full-time assistant coaches, five full-time strength coaches, two video staff, and two administrative assistants, more than 20 full-time employees in all.

The NLRB ruling doesn't state the salary of the head coach; it comes to a little bit less than $2 million.

At the same time, it's unclear how much compensation would go to the players in a fully open and unrestricted market. The ruling suggests that Northwestern clears something like $10 million after costs. If players see half of that we're talking about tens of thousands per player, not hundreds of thousands or millions. These are not NFL-sized numbers.

I think the bottom line for *Jenkins* is good news. Courts are likely to be receptive to the argument that college sports are a business.

Second, at the same time, this is a business for which amateurism matters. People like to watch college teams, whether to root for a particular team or because of how amateurism affects the quality of play.

Amateurism was front and center in the *O'Bannon* case.

This was a case brought by a former basketball player, who filed an antitrust suit against the NCAA challenging the rule that limits compensation to student athletes.

The challenge here was not to the lack of payment to play the sport. That issue is raised squarely by *Jenkins*. It's a narrower issue, the failure to pay players for their likenesses, which are valuable to video game makers and other licensees.

It's worth noting an odd contrast here to the *Northwestern* case. In the *Northwestern* labor case, the teams are in trouble, in part, because the players are being compensated so much.

Here the teams are in trouble because they're not being compensated enough by virtue of this restraint of trade.

The judge's opinion recognizes that amateurism matters.

Paying players a lot of money, she worried, would jeopardize the amateur tradition and it would remove one means by which college sports competes with professional sports and other forms of entertainment.

Now that should ring some bells for this audience. It's a bit like in the vertical restraints context, where we frequently observe intra-brand restraints like territorial restrictions or resale price maintenance being tolerated in the service of inter-brand competition.

So you might even imagine a small loss of competition among teams being tolerated in the service of improving competition between the different sports.

This second point is bad news for *Jenkins*, that courts seem to be at least potentially receptive to the central NCAA argument that inter-brand competition might justify some restraints on payment.

Third, a point about the rule of reason.

In the end the judge condemned the NCAA rule as a violation of Section 1. She did this under the rule of reason, using the usual procedure that's been developed in the lower courts. She said that the NCAA has market power, that the rule restricts price competition, and that there are some pro-competitive justifications here. (I mentioned one, and there is a second which I'm going to ignore for now.)

So she was faced with a classic case of what we might think of as mixed conduct—mixing something we like with something we don't. There's some restriction on price competition, while furthering some kind of justification. This is a common problem that also shows up in mergers, in vertical restraints, and in monopolization.

Courts basically have two choices in a case like that. They can either balance by adding up the bitter and the sweet to see which is bigger. Or they can dodge the question by asking is there a less restrictive alternative. In other words, is there some way that the sweet could have been achieved with less bitter.

Courts don't really like to balance. So this less restrictive alternatives test is attractive. And the court seized on that here.

The alternative embraced by the court was to pay the players, but only a little bit. In other words, don't pay them too much. Allow a little bit of price fixing, but not a lot of price fixing, and also to put some of the payment in escrow so the players will be paid afterwards.

And I think this part of the ruling just raises a number of interesting questions for antitrust.

First, does it count if the alternative is less effective in achieving the defendant's justification, as this alternative probably did? Courts often say that the alternative needs to be equally effective. But is that really right?

Second, is this a legitimate alternative at all, or is it just a payoff to the players? You can't make a restraint pro-competitive simply by making the firm pay out its profits in some way. Not every solution like that would count as a less restrictive alternative.

Third, this is kind of a complicated remedy. Do we want courts to be doing things quite so fancy?

And finally, does a less restrictive alternative of this kind actually avoid balancing? If in fact, the alternative is a bit less effective in serving the justification, isn't the Court actually engaged in balancing? And, if so, don't we need to recognize that for what it is?

For *Jenkins*, the upshot is that the plaintiffs are going to need to think carefully about how the rule of reason should proceed, particularly if the Ninth Circuit has trouble swallowing the less restrictive alternatives analysis.

MR. TUGANDER: Thank you, Professor.

David, let's bring you into the conversation. The *Jenkins* suit alleges that the NCAA amateurism rules have no justifiable pro-competitive effect, and your suit also alleges that because most college athletes will never have a career in the NFL or the NBA, they will not receive any economic benefit from the scholarships they receive.

But doesn't the current system result in a fair bargain for major college athletes? They get a free college education worth hundreds of thousands of dollars and a chance to make millions in the NFL or the NBA in exchange simply for playing a sport?

MR. GREENSPAN: Well, first thanks for having me, for organizing this.

I'm going to give my own disclaimer here, I am here speaking for me, not for plaintiffs or for our class.

I think that the short answer to your question is we don't allege that college athletes get no benefit, but certainly we allege that the bargain is not a fair one.

The issue that *Jenkins* challenges is that, as Donna explained, the compensation for college athletes is the line that the NCAA draws for everyone. In this room we call that price fixing.

There is zero competition on economic terms between colleges and universities to recruit students.

So that's the issue, that absence of competition. For their services, they get a scholarship, and as someone who is still paying off my student loans—I wouldn't be so naive as to suggest there's not a significant economic benefit to that, but that doesn't mean it's a fair bargain.

The antitrust laws don't evaluate what makes a fair bargain subjectively. It's what is produced by competition in the market and there is zero competition among colleges on their own economic terms for athletes.

And I don't think that there is any debate at all that if these NCAA amateurism prohibitions were lifted that colleges would do more and that college players would do better.

You have to think about other students on a college campus which are not prohibited from working and earning money above and beyond their scholarship, from exploiting their talents.

Yale didn't stop Jodi Foster from performing in movies while she was a student. No one objects to a resident advisor making $400 bucks a week above his or her scholarship. No one stops the business manager of a student newspaper from earning money above his or her scholarship.

You have schools like Stanford that have entrepreneurship programs where they can invest, they effectively serve as venture capitalists for students to develop businesses on campus; see, e.g., Google.

But for some reason, when it comes to college players who are part of this massive multi-billion dollar industry, we hear amateurism. But there's nothing amateurism about paying coaches $7 million a year. There's nothing amateur about college stadiums. There's nothing amateur about their TV contracts. There is nothing amateur about the $68 million facility that Oregon just built with a barbershop and a waterwall—I don't know what a waterwall is. You know, this purported principle of amateurism is reserved only for college players.

Just to wrap up, you're right, most of these athletes are never going to have a whiff of the NFL or the NBA. So why isn't it that during their short window of time during which they're risking their bodies, they're distracted from their studies, why shouldn't they—and many of whom come from impoverished backgrounds—why shouldn't they get their fair share, which is simply what colleges choose to do independently on their own, why shouldn't they have the opportunity to share in that?

MR. TUGANDER: Professor Edelman, turning to you.

In the law review article that's contained in the written materials for this program, you take the position that the NCAA's amateurism rules violate Section 1 of the Sherman Act. You also contend that the NCAA has advanced a legal fiction that student athletes are foremost students and not workers.

If the NCAA is not really interested in promoting amateurism, then what do you believe to be the real reason behind its amateurism rules?

MR. EDELMAN: Well, the amateurism rules in the United States were really propagated in the first half of the 20th Century by the Big Ten schools.

Up until 1951, the Big Ten was a dominant conference and the NCAA actually operated out of the back room in the basement of the Big Ten.

Now the Big Ten became very concerned in the late 1940s and early 1950s, they used to have the dominant college football programs. This was the University of

Michigan. This was the University of Illinois. It was Red Grange as the star running back.

And what happened was, all of a sudden, schools in the south became dominant in football for the first time. And part of how the Southeastern Conference schools became dominant was that they were offering better terms to their athletes, and the Big Ten member schools wanted to make this go away, and they cannot control the SEC schools.

So the Big Ten pushed very hard for the creation of a more powerful NCAA. And the leader of the first NCAA, Walter Byers, was actually a former assistant over at the Big Ten.

So this created for the first time, may I use the word in front of antitrust people, a cartel, that before that point in time each of the conferences, at least on a conference level, would compete against each other for college athletes—now if you put in place a unified rule where you will boycott any school that does not follow the system, that ends the price competition.

Now in terms of who benefits from this, if you look at the NCAA colleges today, several of them make more than $100 million in revenue. In fact, the University of Texas' athletic program and the University of Alabama's athletic program each brings in more money per year than any single NHL team. Put in perspective, the University of Texas's total Athletic Department revenues are greater than those of the New York Rangers.

Now with all this money coming in, Dr. Lopiano said that most of these colleges do not turn a profit. And indeed, that's true, because when you have inefficiencies, you have inefficient price outcomes.

What happens is, because you don't pay the college athletes, it leaves a huge sum of money to be allocated to other places.

And if you look at the salaries of college presidents, athletic directors and coaches, they're able to take a benefit of that dead weight loss. Because they're not paying the college athletes, it's a 100 percent share of revenue that goes to those within management.

So today the reason why I believe the rules still exist are those that vote on the rules within the bottom-up organization, the NCAA, have a very strong financial interest in maintaining the status quo.

The reason why Jim Harbaughs of the world are able to make close to $10 million a year in salary is because that money is out there, and that money is out there because when you factor the revenues of college sports, you don't have an expense of college athletes.

As long as the system remains the same where all college athletes' salaries are pegged at zero, it leaves additional funding, which theoretically could go back to the university, theoretically could go into science, education and scholarships, but empirically, if you look at where the numbers have lied, tends to go in a substantial amount to some extraordinarily highly paid coaches, especially in football and in men's basketball.

MR. TUGANDER: So then Dr. Lopiano, turning back to you, do the NCAA's amateurism rules serve any legitimate purpose? Do they provide any benefits to athletes or to the college educational system, and are you in favor of allowing college athletes to get paid?

DR. LOPIANO: I'm in complete agreement with Dr. Edelman, for sure.

The NCAA has made a mess of this. There is no question in my mind that like professional athletes, college athletes should get half of the proceeds from television media revenues and everything else, but they should do so within the context of a non-profit higher education institution with the NCAA mandating that colleges provide greater benefits rather than salaries, like those that are now required because of *O'Bannon*, up to the maximum level allowed of any other student.

People also don't realize that colleges and universities are not paying athletic injury insurance for student athletes. All of these schools are using parent policies or requiring students to buy their own insurance. The NCAA should be mandating that institutions provide this benefit to their athletes. There could be academic trust funds that provide athletes with post-graduate scholarships. There could be educationally defensible forms of compensating athletes with regard to benefits that protect their health and welfare and advance their education.

That's the direction it should have gone, especially since Congress has given incredible tax preferences to enable institutions of higher education like the University of Texas to earn $160 million

If Jim Smith at Texas wasn't given an 80 percent tax break on the $50,000 he just paid for a suite at the football game, then the whole system would be a different system.

So I'm in favor of amateurism rules in the context of increasing educational opportunities for kids and protecting their health and welfare, but not straight pay.

MR. TUGANDER: So, Dan, let's bring you into the discussion.

In the *O'Bannon* case, the NCAA has taken the position that one of the reasons its amateurism rules are necessary is that fans may become less interested in college sports if college athletes are paid.

Do you think fans of college sports will become less interested if the players are paid? Do fans care about the

amateurism issue? And what's your position on whether a college athlete should receive compensation?

MR. GRACA: I'll start with saying thank you for having me, and it's an interesting discussion, it really is.

The subject of whether or not college athletes should be getting paid, believe it or not, is one of what I'd like to call several hot button issues that really resonate with an audience on my programs.

There's several—any time you throw out well, the NCAA—because I think that the majority of fans out there, college football fans, and we're here in New York City where I know it's hard to believe to some people outside of here, but here in New York City college sports, college football is not exactly the most popular thing. New York City is a pro city. But if you go to some other parts of the country, I mean college football, especially, is life, it's religion.

It's from a little bit different perspective, and they are really passionate about this stuff—and so am I, because it's a big part of what I do.

In terms of whether or not these guys should be getting paid, it's a very complicated issue. It's not as cut and dry as, okay, pay these guys. We know that the football program and the basketball program are the revenue generating sports.

There are a lot of student athletes at these universities. I'm not naive enough to realize that you have kids who are on the swim team, kids who are on the volleyball team, tennis team, under scholarship, but that's not what these networks are paying hundreds of millions of dollars to televise.

If you then go ahead and give a little something to the football players, something for the basketball players—what happens if I'm somebody who is on the golf team, student athlete, under scholarship, and I raise my hand and say, well, where's mine?

It's a very complicated issue. And I understand the facts are the facts, that the football program is bringing in tons of money, the basketball program a little less.

As several of you guys have pointed out, and you've all made outstanding points, when you look at the window to earn, it is a capitalist society that we all live in, and everybody is out there looking for theirs.

I consider myself a performer. It's what I do. So I only have a narrow window and I'm going to go out there and make sure I capitalize. It's no different for these college athletes.

If I could take you back to something that happened involving a very prominent player back in the fall, running back from the University of Georgia, Todd Gurley, outstanding, going into the season, he was one of the front runners for the Heisman Trophy for the best player in college football, was off to a great start. Then midway through the season, he got injured.

But prior to that, he was suspended by his school, by the NCAA, because it was found out that he was signing some autographs. Signing your name, that's an innocent thing, right? I mean just signing your name, and he got suspended because of that.

If you went to the University of Georgia's website where they sell a bunch of merchandise pertaining to the football program, on there were jerseys, number 3—or whatever his number was, I can't remember—but a bunch of jerseys, which you assume were Todd Gurley—it didn't say Gurley on the back, but it was physical number 3. People were buying it because of Todd Gurley.

Todd Gurley didn't see any of that money. Just because his name wasn't on it, the school could say, oh no, that's just a generic jersey with just an arbitrary number on it.

Well, wouldn't you know that as soon as Gurley got suspended, the very next day you go back to that Georgia website, those jerseys were off.

So why are you taking the jerseys off, if it's not really that player? You know, so there's the hypocrisy of it.

It really is amazing. Donna threw out just the numbers that are being thrown around and with the television revenue, that's another thing that has really taken off.

We know about the growth of the Big Ten network, which has grown leaps and bounds, maybe better than any other regional sports network that we have in the country. The Pac-12 Network has come about now, the SEC Network launched last year, which is huge. The Longhorn Network down in Texas, they have their own network.

You guys mentioned the college football playoffs this year, and when it was first run it was a huge success, I mean ridiculous television numbers, greater than 40 million people were watching each of these games on New Year's Day.

ESPN wrote a check for more than $475 million a year for the exclusive rights to televise these games.

It's essentially what it amounts to, it's six games a year, $475 million dollars.

Why are they paying that money? They're paying it to watch these athletes, these performers.

If you want to bring it back to academics at the university level, nobody is writing a check for $400 million to watch the Science Department go out there and whip up some lab experiments for 3 hours. They don't do that. They want to see guys perform.

If I could put myself back in those days and I was out on that field. Things have changed, the world has changed, it's evolved—now college sports, it has become not even big business, that doesn't do it justice—the NCAA system, in my opinion, it's an outdated model. It's an antiquated model.

So yeah, I do think that there needs to be some change in order. For sure.

MR. TUGANDER: So let me direct this question for David and Professor Edelman about the *Jenkins* suit and what is in the best interest of college athletes and the educational system.

In the *O'Bannon* case, the NCAA has also defended amateurism rules on the ground that they serve the important function of integrating student athletes into the academic community.

The NCAA argues that academic integration benefits not only the athlete, but also the entire student body.

And recently the media, and very recently, has been reporting on a scandal at the University of North Carolina where athletes took easy classes to stay eligible.

And one month ago, on December 30, 2014, the *New York Times* ran a front page story containing the tweet of Ohio State quarterback Cardale Jones, who wound up winning the college playoff tournament, that stated, "Why should we have to go to class if we came here to play football? We didn't come to play school. Classes are pointless."

Now the *Jenkins* suit alleges that most of its class members do not graduate.

If the *Jenkins* suit is successful, will athletes have any incentive to go to class and get a degree? Will they have any incentive to be part of and contribute to the college community, and will the concept of the student athlete be completely eliminated at schools with major sports programs?

So, David, why don't we start with you?

MR. GREENSPAN: Well, I guess I take issue with any generalization that college athletes aren't interested in their educations or if they get something outside of a scholarship they're going to not take that organic chemistry test and just sit in their dorms staring at their money.

But I think that the right way to look at this issue is, are these amateurism rules promoting the integration of academics and athletics?

And since these two obviously disturbing stories you're talking about occurred in the regime where these amateurism rules exist, maybe they're not doing a very good job in promoting what may be an end with redeeming value. But the question is, are these rules promoting it?

This debacle at UNC, which was not just about students taking easy classes, but a school and coaches and administrators that were complicit in making sure that the students stayed eligible for their teams by any means possible, that scandal dates back before Martin Jenkins was born. I mean this isn't like a problem that could be born out of a win in the *Jenkins* suit. It's something that exists now.

The Ohio State quarterback who tweets that "I'm here to play football," maybe that's because his school has him on, playing prime time games, has him on a practice schedule and a travel schedule that would make it difficult for a Rhodes scholar to succeed academically.

It's clear—I mean if you look at the schools in the NCAA, they're incredibly lax at enforcing their academic requirements. They're incredibly lax about enforcing this ostensible 20-hour a week limit on the amount that college players are supposed to practice. But they're extremely vigilant when it comes to enforcing rules that are designed to make sure that students don't get extra benefits.

So this scandal could go on in North Carolina for decades with all these red flags and no action, and yet Todd Gurley is suspended for signing autographs.

There is this great anecdote that Oklahoma self-reported because a few football players ate too much pasta at a buffet and the school was concerned if they didn't self-report, they could get in trouble for giving these students an extra benefit, i.e., too much spaghetti.

So when the students were fined, they were fined like $4 bucks each to remedy the problem.

So schools have this massive infrastructure to make sure that the college athletes don't get anything extra. But there's no attention to really what would promote their academics.

So again, I think the essential question is do these amateurism rules have anything to do with the integration of academics and athletics? And I think the evidence is no, they don't. It's about not paying students whom they don't want to.

MR. TUGANDER: Professor Edelman, same question. Will the concept of the student-athlete be completely eliminated if the *Jenkins* suit is successful?

MR. EDELMAN: Well, the example that you gave was on University of North Carolina, which is the extreme example of malpractice by a university in terms of education. And people could put that aside as the extreme example.

But even in the mainstream, I'm completely in agreement with David here that even under the current system where the college athletes are denied compensation, the NCAA on its own has moved away from the educational model.

Let's not talk about the extreme University of North Carolina. Let's talk about the mainstream for a minute.

Syracuse University men's basketball team, if you take a look at their schedule last season—and I think Syracuse is fairly standard for a college program—and if you take every night game that they played on the road during a school day, during the week, and called that a missed class day—and then assume that any game they played on the road more than 3 hours away that began at 8 p.m. or later would be a missed class day the following day—because if you tip off at 8 p.m., you finish at 10, by the time you get finished with everything that needs to be done, the locker room, press conferences, before you could leave you're looking at 1 or 2 in the morning—if you take those days, if the men's basketball team made it all the way to the NCAA championship game, they would have missed more than 33 percent of the class days in their semester merely based on NCAA mandate.

The NCAA tournament, Thursday Friday, Thursday Friday, Thursday Friday, and lo and behold a championship game, Monday night—just winning that tournament, you miss at least 10 percent of your class days.

Or the NCAA football championship game. Look at Ohio State for a moment. The students at that school, including the football players, were on break for close to a month. They could have played the game any single day during winter break without requiring athletes to miss class.

The championship game, it was played the night of the first day that Ohio State football players and students began their spring semester.

You want to talk about irony? The Ohio State University president sent a letter to all the students saying it is your obligation to be in class on this day. You should not go to the game, because it's so important you don't miss class.

But when the revenues were factored into the equation, it was not important enough to change the date of the game or change the start of the semester to make sure the athletes were there.

So, factually, will *Jenkins* make things worse? I don't know how it could get worse.

But I also want to make one very quick legal point, and it might be a boring minutia point, but this is an antitrust conference so I do want to talk about antitrust for a moment.

Rule of reason. It's supposed to be balancing the anticompetitive effects of a restraint against the pro-competitive benefits in that same market.

Pro-competitive benefits are not public policy things that we care about. They are things that make the mark the same benefit in the economic sense, as the Supreme Court articulated in *U.S. v. National Society of Professional Engineers*.

Well, what was anti-competitive about the NCAA's rules? It harms labor markets by preventing college athletes the opportunity to compete for pay in a free market.

What is the NCAA alleging as the pro-competitive benefit? They say it improves the educational process by combining the college athletes with the regular students.

Is that the same economic market? I'm doubtful that it is. I think Judge Wilken struggled with that question until she had to address the matter on a factual point of view.

But even if I'm wrong, even if I'm completely wrong and the NCAA really does care about education and does all of this truly to help college education and not to make their coaches wealthy, as a matter of antitrust law, I'm very doubtful that still should matter.

MR. TUGANDER: Dr. Lopiano, let's come back to you.

Assuming the *Jenkins* suit is successful and college athletes are free to receive compensation, what impact do you think that result will have on women's college athletic programs?

DR. LOPIANO: Let me throw this in before I answer that question.

All of our conversations conclude that the NCAA remains broken. These antitrust lawsuits are not going to change that. The NCAA is going to remain broken.

The same thing happened in the mid-1970s when the Amateur Athletic Union (AAU) was screwing up USA national teams. AAU governed all of our national teams. And Congress finally stepped in and said we're going to develop a non-profit federally chartered organization to replace the AAU.

And that could be done today. Congress can give an antitrust exemption, a limited antitrust exemption, to a new non-profit, federally chartered non-profit organization. That would be mandated under a threat of loss of higher education money from the Federal Government to straighten out this crazy mess and to have educational sport conditions be a condition of the antitrust exemption.

That's the direction we should go in instead of arguing whether or not we're going to win antitrust cases.

Now to your point. What will happen if the arms race continues to escalate as paying players will have it do?

The answer is the same thing that happened when the arms race began 20 years ago with the influx of big media money from the NCAA Final Four Basketball

Champion—$770 million, 90 percent of which was returned to the institutions.

What's going to happen is Division One athletic programs are going to drop our so-called Olympic non-revenue sports. Over the last 20 years, the richest institutions in the country are the only institutions eliminating men's and women's sports. Divisions Two and Three, the poorest athletic programs have been adding men's and women's sports during this same period. We know that in Division I, all of the money saved by dropping sports is going into two sports, men's football and men's basketball.

Currently 78 percent of the men's sports operating budgets in athletics goes to two sports—men's football and men's basketball. Seventy-eight percent! So we're going to see a continuation of this trend to drop sports programs.

Some women's teams are going to benefit because OCR still considers higher education extracurricular activities to be covered under Title IX.

So what we are going to see is 87 football players getting treated like kings, 13 men's basketball players getting treated like kings, and an equal number of women athletes getting treated like queens, and the rest of the athletes will go away.

What we haven't seen yet, creeping up behind the arms race, are the costs of antitrust and other lawsuits on court dockets. The concussion lawsuits alone—an estimated $770 million minimum liability for the NFL to settle with 3,500 former professional players—will be replicated at the college level where there are 30,000 football college athletes currently playing. There will be huge costs coming up that aren't yet reflected in the financial picture I just painted where all but 20 schools are operating in the red.

There has to be structural systemic change and it can't include a continuation of the NCAA as we now know it.

And let me say one more thing about the lack of academic integrity of the system. The data is the NCAA uses for its TV public service ads is always presented in the aggregate. It is true that athletes graduated at higher rates than students in the general student body. But we should not be talking about data in the aggregate. We should be talking about the 10 percent of all athletes in Division I and close to 50% of those recruited in basketball and football who are being admitted under waivers of normal admissions standards into colleges and universities woefully unprepared to compete in the classroom against their peers.

They are receiving presidential admissions exceptions in order to get in. They are reading at the 3rd and 4th grade level and being admitted to institutions of higher education. Academic fraud is inevitable when you have that number of kids who cannot compete with their classroom peers..

That is the crime that is going on now that the NCAA isn't addressing, that everyone is trying to push under the rug under the guise of aggregated data. And that's not the worst of it. This academic exploitation has racial overtones. There is no question that the majority of those specially admitted kids are predominantly non-white and they're being absolutely exploited in order to raise money for their institutions.

We have much work to do and I don't particularly think the antitrust lawsuit route is the way to do it. All you're doing is going to pay those exploited athletes. What is that going to do?

MR. TUGANDER: Well, Professor Hemphill, back to you. This will be more of an antitrust question.

The *Jenkins* suit alleges that the NCAA's amateurism rules violate Section 1 of the Sherman Act as a *per se* violation and under the rule of reason.

So which standard has applied in prior similar cases and should the NCAA members be characterized as competitors, a joint venture, or both?

MR. HEMPHILL: I think pursuing this as a per se case is pretty challenging. The famous Supreme Court case was not per se after all—we're talking about *NCAA v. Board of Regents of the University of Oklahoma*, which the court decided back in 1984. That case condemned a restriction on TV appearances that had been imposed by the NCAA. That case emphasizes the amateurism issue that we've been talking about.

The court had said, "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question whether it needs ample latitude to play that role."

I expect you'll hear that quote over and over again.

MR. GREENSPAN: I've heard it.

MR. HEMPHILL: I should say, I agree with Marc's earlier point that the consideration justifications is not an open-ended policy analysis, but I think it's worth noting that Judge Wilken was focused on the amateurism point. Here is the quotation: "the court therefore concludes that the restrictions on compensation do play a limited role in driving consumer demand for football and Division One basketball related products."

So I think it's going to be hard to get around that.

The old Supreme Court case has a couple of things it teaches us. One, the court does have ways of handling mixed conduct. They did a less restrictive alternatives analysis.

The NCAA had offered a justification of competitive balance that is closely related to the amateurism argument.

And the Court said this is not even arguably tailored to serve such an interest. There were lots of other restrictions already in place that were better tailored to serve that.

This connects with a point that David made before in the context of student integration. Are the rules actually promoting the justification? If not, then this is actually pretty easy. You can say this is justification, but it doesn't count if your chosen means isn't doing anything helpful toward that end.

Now I think the old Supreme Court case is relevant for another reason. We already talked about per se, and we talked about rule of reason.

But the case is known for employing a kind of intermediate quick look analysis where a court inspects the justifications and finding them wanting, sometimes, condemns the conduct without further ado.

Judge Wilken's clear reluctance to do that might be a hint that plaintiffs are going to have the full kind of rule of reason slog on their hands.

One final point.

MR. HEMPHILL: It's sometimes said here and in lots of other antitrust contexts that courts should not be in the business of second guessing the judgment of private parties about their conduct.

But the Supreme Court case makes clear that courts can and should second guess the NCAA or anybody else at least in the sense relevant to antitrust. I think the very label, "second guessing," suggests a confusion about the role of the court here.

The point is not to tell private parties how to do their job. To the contrary, the courts are making an independent judgment about whether we should tolerate the loss of competition.

MR. TUGANDER: So I just want to go down the table one by one, real quick, maybe a minute or less.

If we start with the premise that the main goal of antitrust law is to promote and enhance consumer welfare, I want to get a sense from the panelists as to how fans are harmed by the current system.

Is there any legitimate argument to be made that the best athletes are not playing because of the NCAA's restrictions on athlete compensation?

Dr. Lopiano, why don't we start with you and just move down the line?

DR. LOPIANO: Deceptive advertising, that these are not students at colleges and universities who are playing the game, and I think we're deceiving the consumer into believing they are.

MR. TUGANDER: Professor Hemphill?

MR. HEMPHILL: I mean I think it depends on who we think the consumers are.

MR. TUGANDER: Should they be considered the fans or someone else?

MR. HEMPHILL: Here when we say consumer welfare, usually we mean the effect on the players.

As to fans, I think it's a little bit trickier. The games will probably be played in more or less the same way they are right now.

The amateurism argument does suggest there might be a loss to fan's welfare if they do, in fact, care about whether the players are paid. I think we've heard a mix of views about whether that's really true.

MR. TUGANDER: David?

MR. GREENSPAN: So I'll let Scott articulate my quarrel with the premise. But even focusing just on fans and are fans hurt and is there any legitimate argument that the best players aren't out there—I mean there is a very legitimate argument. Yes, fans whose Heisman winning quarterback just decided to leave college and go to the NFL. If these incentives are changed, maybe that player makes a different choice. Maybe he stays in school, gets a degree, and the fans' Heisman winning quarterback is back for his senior year.

And athletes that have no chance of going pro, maybe they are currently making choices not to play basketball and football in college because there's no career for them afterwards and the incentives aren't currently there for them to join.

So I think that things could look very differently even from the perspective of a fan, in a beneficial way, to a fan if these restrictions were eliminated.

MR. TUGANDER: Dan?

MR. GRACA: You know, it's funny. College sports is unique. I think back to when you asked the question about whether or not the fans are going to feel gypped in any sort of way.

Seinfeld had a great joke about when we root for teams nowadays in professional sports, how essentially all you're doing is you're rooting for laundry, because players change teams every so often. You can't even really rule out identity with your favorite team.

To a certain extent, it's true with college sports. You have kids that come in, some for 2 years, some for 3 years, and then they're either going to the pros or their career is over.

As long as that team is going to run out of the tunnel each and every weekend and you're there rooting them on and they're wearing the uniform, I think that fans are about who it is, as long as their team is out there. That's all they care about.

Nowadays, you have guys, whether it's transferring, leaving school early, like David just brought up—the appeal is always going to be there for that next level and, of course, the great perks of those multi-million dollar contracts.

MR. TUGANDER: Professor Edelman, real quick.

MR. EDELMAN: I'm a fan and I'm harmed because I live in New York and I would like to see the best quality football players play on the college level.

In a free market, if we all got together with our buying preferences, we probably could have had Marcus Mariota come to Fordham, or come to Columbia or another program.

But the reality is we are not able to do that because we cannot pay. And by contrast, Oregon is able to build a multi-million dollars fitness facility with all types of incredible locker rooms, sneakers, and free video games.

MR. GREENSPAN: And don't forget the barbershop.

MR. EDELMAN: And the barbershop. And they get Marcus Mariota, not the free market solution which would bring him here to New York where consumers have the most money to spend.

MR. GRACA: They don't have a barbershop at Fordham?

MR. TUGANDER: I want to just ask David one very quick question and then I want to see if we have a couple of minutes for some audience questions. I know we're at about that time.

David, if you could just give us an update on the procedural posture of the *Jenkins* suit.

MR. GREENSPAN: I can give you a quick answer. The defendants moved to dismiss. Their motions were denied from the bench. Our class and the consolidated class, we've both moved to certify injunctive relief classes. In *Jenkins*, we're not seeking damages, we're never going to seek to certify a damages class. The class certification motions will be heard in the spring.

Beyond that, there is not a schedule for the case going forward. But one note, the *Jenkins* case, once pretrial proceedings are exhausted, we will go back to New Jersey and have our trial there.

MR. TUGANDER: Do we have questions from the audience?

Q: Dr. Lopiano, is there some kind of summit that is being convened to try to have this discussion outside of the—I know this is an antitrust day—but these are very real issues about potential exploitations of these young people, and is there some kind of convening that's going on to try to do problem solving?

DR. LOPIANO: There is a move in Congress, a bill, identical to one that was offered during last fall's lame duck session, to establish a Presidential Commission on Collegiate Sports Reform, which would consider all the things I just mentioned: a limited antitrust exemption, a federally chartered organization replacing the NCAA, soup to nuts. A Presidential Commission is exactly what prefaced the action in the 1970s to replace the AAU with the United States Olympic Committee (USOC). So there's precedent for it.

If that can happen, all of these problems are aired with full transparency. We cannot expect the NCAA, which is ruled by the FBS plutocracy, to do other than what it is not doing — only advancing the interests of the wealthy schools. The FBS schools are not going to consider all of these costly athlete benefits that damage their current ability to give athletic directors and men's football and basketball coaches million dollar salaries.

The Presidential Commission is the only way to go, and a bill will be filed in this session again.

MR. TUGANDER: Was there another question?

Q: After Dr. Lopiano's compelling statements, as an antitrust lawyer I'm conceding that I don't see much of a role for antitrust here. Nevertheless—

DR. LOPIANO: Well, I do, because it adds fuel to the fire. It's going to force Congressional action.

Q: I understand. And we have the cases, so they have to be dealt with.

So addressing—I'd love to just ask Mr. Greenspan this, but he probably won't be able to answer me, so I'll ask it of everybody—I'm hearing from a lot of sources and reading a lot of discomfort with the notion of an injunctive remedy that results in a system in which these athletes are just paid, you know, insurance is great, but ultimately I think a lot of participants in the cases, what they want is competition that results in them being paid dollars, and I do hear a lot of discomfort with that.

Thinking about the relationship between remedy and theory of the case, is there any disconnect, is there a problem if the results were to be a system of say trusts or deferred compensation of some sort assuming, you know, on the merits of the cases, go to the athletes?

MR. GREENSPAN: I can answer, I'll answer some, but not all of the question, which I think it's an antitrust case. It's strike down the unlawful restraint, period.

And so, to be clear, I think this is often a misconception about our case. We're not seeking an injunction requiring schools to do anything, not seeking an injunction requiring schools to pay athletes, but simply to stop the NCAA from dictating a one-size-fits-all rule for all schools.

And schools will use their best judgment about what they think, they want to balance academics and athletics and the like, they'll make their own choices.

DR. LOPIANO: That's exactly right. That's what's going to happen. The Big Five Conferences have proposed an academic trust. They want to promise every student athlete that if you don't graduate, you have a lifelong access to an athletic scholarship—to a scholarship. You can finish any time you want.

Think about that for a minute. They're saying to all these athletes, don't worry about studying now, you can study later, just keep eligible. It is an impetus supporting a continuation of academic fraud. So all of these solutions, I think, are fruitless.

Q: I have a non-antitrust question. Did I hear that they don't provide health insurance to the football or basketball players and that they rely on the family's health insurance?

DR. LOPIANO: Yes.

Q: That is the craziest thing I've ever heard. They were banging their heads there for the colleges and they have to pay for their own medical?

MR. GREENSPAN: And, by the way, their athletic scholarships are not guaranteed. So in addition to that prize for getting hurt, they yank their scholarship if you can't play.

DR. LOPIANO: If the NCAA had exclusive right to the College Football Playoffs, and it should have the exclusive right to conduct national championships, the proceeds from that event could pay for a primary athletic injury insurance policy for every single one of the 480,000 NCAA student athletes.

Q: For games and training. You get hurt. You break your knee. You're doing it for them. They should pay.

MR. GRACA: And that's a common risk, to a large degree. They just think, oh, this guy is on scholarship, he has a free ride, whatever. They are not guaranteeing.

And it took me a long time to realize this and to even have it brought to my attention, because I was just like most people. But they can yank that thing any time they want, and then these players are hung out to dry. But you don't hear about those situations often.

MR. KATZ: On that non-antitrust note, we're going to conclude.

I should say, actually, the fact that we've gone to some non-antitrust issues to me demonstrates, in fact, how relevant it all is, because you've got some competition to real life and real business very quickly when you let the discussion flow.

I want to thank the panelists for a superb panel.

I want to also thank the audience for sitting through a long day, but a very engaging and exciting day.

We have cocktails for young associates next door. We have a dinner at 6 p.m. I hope to see you all later.

Thank you very much.