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In This Issue:

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Can Announcements of Future Pricing Constitute a "Plus Factor" Sufficient to Infer the Existence of a Conspiracy in a Concentrated Market Characterized by Interdependent Competition? It Depends.

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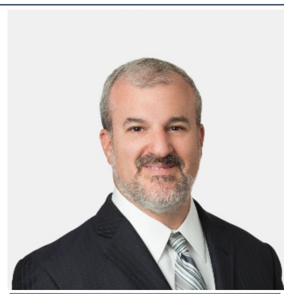

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Distinguishing collusion from legitimate unilateral but interdependent pricing in a concentrated market can be difficult in practice. Legitimate interdependent conscious parallelism among competitors can lead to the same pricing patterns as might result from an unlawful conspiracy. Courts and commentators have suggested that the presence or absence of "plus factors" that may be associated with collusion may demonstrate a likelihood of unlawful conduct, or at least make a grant of summary judgment dismissing a collusion claim inappropriate. However, one such "plus factor" that has been cited in some cases—public or widely disseminated price announcements—can be legitimate and even procompetitive. Since the competitive character of such broad price announcements to the market depends on the particular facts of the market and customers at issue, rather

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than attempting to establish a black letter rule, they should be evaluated at the summary judgment phase of litigation based on the particular facts of each case. To the extent that the practice of price announcements is supported by business necessity or another legitimate business rationale, it is contrary to both economic logic and the weight of case law to consider such announcements as a probative "plus factor" sufficient to make the existence of collusion more likely.

I. RECENT TRENDS: THE TITANIUM DIOXIDE AND CONTAINERBOARD CASES

Recent court decisions demonstrate the challenge of distinguishing collusion from legitimate, unilateral but interdependent pricing patterns in an oligopolistic market. In a notable recent example, when buyers of titanium dioxide filed a class action against leading producers and suppliers of the chemical alleging, *inter alia*, a conspiracy to fix prices, two different district courts reached opposite decisions on what was essentially the same set of facts. The District Court for the District of Maryland denied the class defendants' motion for summary judgment, ultimately leading to a settlement of that case.[1] However, one large class member opted out of the Maryland class and filed its own action against the defendant suppliers, which was eventually transferred to the District Court for the District of Delaware. After all but one of the defendants settled, the remaining defendant prevailed on its motion for summary judgment dismissing the collusion claims against it.[2] The Delaware court's decision to grant summary judgment in favor of the alleged conspirator was at odds with the Maryland court's decision to deny the alleged conspirators' motion for summary judgment. The Third Circuit later affirmed the Delaware court's summary judgment decision based on the interdependent characteristics of competition in the concentrated market, albeit in the face of a rigorous dissent based on circumstantial evidence of collusion offered by the plaintiff.[3]

The plaintiffs in each action alleged "a long pattern of seemingly coordinated price increase announcements by the Defendants," totaling 31 price increases between 2002 and 2013, some occurring within hours of one-another.[4] Rejecting such circumstantial evidence as demonstrating nothing more than the natural state of competition, the Third Circuit held that "the market for titanium dioxide is an oligopoly," and further found that "[t]itanium dioxide is a commodity-like product with no substitutes, the market is dominated by a handful of firms, and there are substantial barriers to entry."[5] According to the Third Circuit, the rationale for such "follow the leader" pricing in an oligopolistic market was simple and could not imply a likelihood of collusion:

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1 *In re Titanium Dioxide Antitrust Litigation*, 959 F. Supp. 2d 799 (D. Md. 2013).

2 *Valspar Corp. v. E.I. du Pont de Nemours*, 152 F. Supp. 3d 234 (D. Del. 2016).

3 *Valspar Corp. v. E.I. du Pont de Nemours and Company*, 873 F.3d 185 (3d Cir. 2017), *affirming Valspar Corp.*, 152 F. Supp. 3d at 234.

4 *In re Titanium Dioxide*, 959 F. Supp. 2d at 809; *Valspar Corp.*, 152 F. Supp. 3d at 238.

5 *Valspar Corp.*, 873 F.3d at 190.

> if a firm announces a price increase, other market participants will know that 'if they do not increase their prices to [the first mover's] level, [the first mover] may be forced to reduce its price to their level. Because each of the other firms know this, each will consider whether it is better off when all are charging the old price or [the new one]. They will obviously choose [the new price] when they believe that it will maximize industry profits.[6]

While "such interdependence or 'conscious parallelism' harms consumers just as a monopoly does, it is beyond the reach of antitrust laws" because it "is not an 'agreement' within the term's meaning under the Sherman Act" and "it is close to impossible to devise a judicially enforceable remedy for interdependent pricing."[7]

In granting the non-settling defendant's motion for summary judgment, the District Court for the District of Delaware noted that, while parallel pricing is important to the plaintiff's claim, "'an inference of conspiracy' can be drawn only when there are 'sufficient other 'plus' factors.'"[8] Further, "[s]ince the price increase announcements may be explained by conscious parallelism, [plaintiff] must be able to show—through plus factors—the existence of an 'actual agreement.'"[9] Agreeing with the district court, the Third Circuit ultimately rejected plaintiff's proffer of plus factor circumstantial evidence, ultimately finding that the defendants' alleged conduct was equally consistent with legitimate interdependent competition in an oligopolistic market.[10] This finding, however, led the dissent to question what "plus factor" circumstantial evidence short of direct evidence of a collusive agreement could ever suffice under such conditions.[11]

Reaching the contrary result, in denying the original class action defendants' motion for summary judgment, the District Court for the District of Maryland held that, while they cannot alone make the plaintiffs' case, "[t]he parallel price increases in this case are nonetheless noteworthy, because they were so pervasive." According to the court, "[t]he sheer number of parallel price increases, when coupled with the other evidence in this case, could lead a jury to reasonably infer a conspiracy."[12] In substance, the Maryland court credited the "plus factor" circumstantial evidence cited by the plaintiffs—reasoning that was echoed by the dissent in the Third Circuit's later rejection of the opt-out plaintiff's identical claims, which also emphasized the "unprecedented" nature of the "sheer number of parallel price increase announcements." According to the dissent, "it is undoubtedly a question of *fact* as to whether the parallel pricing in this case was sufficiently 'unusual'" so as to cross the line from interdependence to unlawful conduct.[13]

Similar to the titanium dioxide industry, the containerboard market at issue in the recently-decided *Kleen Products LLC v. Georgia-Pacific LLC* was found to be dominated by a "handful of major players," and characterized by "relatively inelastic" demand and high costs of entry. After low prices in the early 2000s, prices began to rise dramatically from 2004 to 2010, as those major players attempted fifteen price increases, succeeding nine times. "The pattern was a common one. After one company announced that it would raise its prices for containerboard, the rest followed suit with identical or comparable increases in the ensuing hours, days, or weeks." While prices rose, production capacity declined.[14]

Thus, in their class action lawsuit against several defendant-manufacturers of containerboard, direct purchasers of the product alleged that the defendants' price increase attempts "could not have occurred unless the competitors had an inside scoop." The District Court for the Northern District of Illinois disagreed, granting summary judgment for the defendants,[15] and the Seventh Circuit affirmed, noting that the plaintiff-purchasers "overstate[d] how coordinated these hikes actually were," and rejecting their claim for largely the same reasons articulated by the Third Circuit in *Valspar Corp*.[16] Although acknowledging that circumstantial evidence could establish a collusive agreement, the Seventh Circuit rejected the plaintiff's proffered evidence as being equally consistent with legitimate interdependent competition in an oligopolistic market.[17]

II. FUTURE PRICE ANNOUNCEMENTS AS A POTENTIAL PLUS FACTOR: *MCWANE* AND *PETROLEUM PRODUCTS*

Such increasingly common rulings leave open the question posed by the dissent in *Valspar Corp*.: While it is generally acknowledged as possible that collusion may be established based solely on circumstantial evidence,[18] what "plus factors" that are not actually direct evidence of a conspiracy could suffice to create an inference of conspiracy in an oligopolistic market characterized by interdependent competition? Of course, there is no formal limit on what could qualify as a "plus factor," but including the practice of competitors announcing their respective future pricing intentions as a "plus

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6 *Valspar Corp.*, 873 F.3d at 191 (3d Cir. 2004) (quoting *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 359); *see also Kleen Products LLC v. Georgia-Pacific LLC*, 910 F.3d 927, 935 (7th Cir. 2018) (quoting *In re Text Messaging Litigation*, 782 F.3d 867, 871 (7th Cir. 2015) ("If a small number of competitors dominates a market, they will find it safer and easier to fix prices than if there are many competitors of more or less equal size. . . But the other side of this coin is that the fewer the firms, the easier it is for them to engage in 'follow the leader' pricing ('conscious parallelism,' as lawyers call it, 'tacit collusion' as economists prefer to call it)—which means coordinating their pricing without an actual agreement to do so.").

7 *Valspar Corp.*, 873 F.3d at 191-92 (internal citations omitted); *see also In re Titanium Dioxide*, 959 F. Supp. 2d at 821-22.

8 *Valspar Corp.*, 152 F. Supp. 3d at 242, *quoting In re Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir. 1999).

9 *Valspar Corp.*, 152 F. Supp. 3d at 242, *quoting In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 360 (3d Cir. 2004).

10 *Valspar Corp.*, 873 F.3d at 202.

11 *Id.* at 206, n.3 (Stengel, Chief District Judge, dissenting). The dissent also shared the concern, observed by some commentators, that conditions "in which the danger of [parallel pricing] is most serious," a plaintiff's burden on summary judgment is heightened and so liability is ironically made less likely. *Id.*

12 *In re Titanium Dioxide*, 959 F. Supp. 2d at 825-26.

13 *Valspar Corp.*, 873 F.3d at 203-205 (Stengel, Chief District Judge, dissenting).

14 *Kleen Products*, 910 F.3d at 931-32.

15 *Kleen Products LLC v. Int'l Paper*, 276 F. Supp. 3d 811 (N.D. Ill. 2017).

16 *Kleen Products*, 910 F.3d at 936.

17 *Id.* at 939.

18 *Id.* at 934 ("It is worth recalling that an antitrust plaintiff, like all others, is entitled to try to meet that burden with either direct or circumstantial evidence.").

factor" may serve to only repeat the same problem of mistakenly construing legitimate business conduct as an indication of collusion.[19]

For example, the Federal Trade Commission's decision in *In the Matter of McWane, Inc.* found that a defendant's "pricing letters could reasonably be read as veiled communications" to its competitors, signaling its intention not to engage in certain discounting practices.[20] Although there was no inference that such public unilateral pricing announcements were themselves unlawful, in light of evidence that competitors had internally construed such communications "as an offer to support higher prices," the FTC ruled them sufficient to preclude summary judgment. Indeed, the FTC considered that the conflicting evidence between competitors' apparent construction of such announcements as an offer to not discount prices and affirmatively arrange parallel pricing versus McWane's professed legitimate reasons for announcing its future pricing intentions were "precisely the type of disputed facts that preclude summary judgment."[21]

Likewise, the Titanium Dioxide defendants "had lawful, noncollusive reasons for making public price announcements . . ., including the satisfaction of a 'contractual condition' to provide 'some formal notification' to customers and the assurance to customers that announced prices (the starting point for negotiations) were raised as to *all* customers." Even the plaintiff's "expert concedes that there are lawful non-collusive reasons for a firm to make public price announcements."[22] However, where the Third Circuit upheld summary judgment for the remaining defendant, the dissent, apparently agreeing with the FTC's ruling in *McWane, Inc.*, noted that such a legitimate business rationale only created a factual issue—further observing that "there is no evidence that [defendant] was required to [notify its customers] *publicly*."[23] The District Court for the District of Maryland's earlier denial of summary judgment to the class defendants based on the same facts did not discuss their proffered pro-competitive justifications, but apparently agreed with the logic of Third Circuit's later dissent, concluding only that, when taken as a whole, determining whether "the parallel price increases in combination with the other evidence discussed below" are the result of lawful interdependence or unlawful collusion "is a decision for the jury."[24]

The Ninth Circuit's earlier ruling in *Petroleum Products Antitrust Litigation* provides another example of construing advance pricing announcements as

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19 This article does not address the legally distinct claim asserted by the Federal Trade Commission in various proceedings that even a company's unilateral announcements of its competitive intentions (pricing or otherwise) may be anticompetitive and unlawful as veiled invitations to collude in violation of Section 5 of the FTC Act. The FTC has at times argued that this type of conduct violates Section 5 even where such alleged invitations are not accepted by competitors and therefore there is no collusive agreement for purposes of Section 1 of the Sherman Act. *See, e.g.*, *Fortiline, LLC*, FTC File No. 151-0000 (Aug 9, 2016); *U-Haul Int'l, Inc.*, FTC File No. 081-0157 (July 20, 2010); *Valassis Communications, Inc.*, FTC File No. 051-0008 (Apr. 28, 2006).

20 *In the Matter of McWane, Inc.*, 2012-2 Trade Cases ¶ 78061, 2012 WL 4101793, at *13 (F.T.C. Sept 14, 2012).

21 *Id.*

22 *Valspar Corp.*, 152 F. Supp. 3d at 248.

23 *Valspar Corp.*, 873 F.3d 185, 202, 214-15) (Stengel, Chief District Judge, dissenting).

24 *In re Titanium Dioxide Antitrust Litigation*, 959 F. Supp. 2d at 826.

a "plus factor" supporting the denial of summary judgment for defendants. Even in a market for the sale of a commodity characterized by interdependent competition, the Ninth Circuit overruled the district court's grant of summary judgment, finding it permissible to draw an inference of conspiracy from press releases issued by several of the defendants announcing—sometimes in advance—their respective pricing decisions.[25] Although it acknowledged that "proof of interdependent pricing, standing alone, may not serve as proof of an antitrust violation, . . . the evidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement . . . to raise prices."[26]

III. The Impact of Pro-competitive Justifications of Future Price Announcements

Significantly, however, a large part of the Ninth Circuit's reasoning appears to have been the absence of any evidence of an alleged procompetitive purpose for the defendants making their respective pricing announcements. The "virtually uniform response" from several officers of the defendants during their depositions "was that it was done for the purpose of quickly informing competitors of the price change, in the express hope that these competitors would follow the move and restore their prices."[27] Given this virtual concession that the defendants were seeking to facilitate higher prices (as opposed to that occurring as the natural result of each defendant's unilateral incentives), perhaps it is not surprising that the defendants' announcements were a factor in defeating summary judgment. However, it begs the question of whether communications of pricing intentions would and should still be probative as a "plus factor" upon which to infer a conspiracy where legitimate and plausible business rationales are apparent in the evidentiary record. Should such evidence introduce a fact issue to preclude summary judgment, as the FTC held in *McWane, Inc.* and the dissent suggested in *Valspar Corp.*, or does the existence of legitimate and plausible business rationales make the conduct at issue (and parallel pricing it may facilitate) no more likely to be the result of collusion than of legitimate interdependent competition such that advance pricing announcements should not constitute a "plus factor" in that context?

The Seventh Circuit's holding in *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.* is instructive. There, the defendants had broadly informed customers of price increases in advance, and the Court noted that such serial, future pricing announcements had reduced each competitor's uncertainty

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25 *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 445 (9th Cir. 1990). An important, though sometimes overlooked, point is that the Ninth Circuit did not determine or base its decision on whether the gasoline markets at issue constituted an oligopoly. According to the Court, "[w]e need not take any side in this debate." *Id.* at 443. As a result, the significance of the Court's ruling may be even broader, with application in non-oligopolistic markets as well.

26 *Id.*at 446-47.

27 *Id.* at 446; *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskathewan*, 203 F.3d 1028, 1047 (8th Cir. 2000) (considering defendants' communications regarding pricing intentions as a factor upon which to infer collusion where no "legitimate business purpose" was identified by defendants).

with respect to its own proposed pricing, which could be said to have facilitated the parallel pricing that ensued.[28] However, the appellate court noted evidence in the record that the advance pricing announcements served the important and legitimate purpose of advising customers in time so they could account for their suppliers' (the defendants') future pricing in bidding on construction projects, which occurred well in advance of the customers' purchases. As a result, the court concluded that "the practice of announcing price increases is explainable apart from any agreement to fix prices," which tended to eliminate the probative value of the practice as a "plus factor."[29]

The analysis of defendant airlines' pricing announcements in *Hall v. United Air Lines, Inc.* was similar. There, the Court found that defendants' statements about pricing practices to trade publications did not qualify as a "plus factor" because responding to trade publications was an industry-standard practice that served a "legitimate purpose sufficient to rebut any implication that the letters were an attempt to communicate with competitors."[30]

The inference therefore seems to be that, although the practice of competitors communicating pricing intentions in advance can constitute a "plus factor" tending to infer a conspiracy, that inference depends on the reason for the communications or announcements—or lack thereof. Where defendants can offer no plausible legitimate rationale for why they are announcing their future pricing (either to the market or to customers directly), precedents such as *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* demonstrate that it can constitute a "plus factor" for the purpose of inferring conspiracy at the summary judgment stage. While such announcements do not necessarily mean those defendants are engaged in price signaling, the lack of any legitimate business rationale could tend to exclude the possibility of independent action. However, where the record establishes that a defendant had plausible and legitimate rationales for making pricing announcements, the probative value of such conduct as a potential "plus factor" would seem to be limited, if not eliminated. Contrary to the reasoning of *McWane, Inc.* and the dissent in *Valspar Corp*., such a record of advance pricing announcements explained by plausible and legitimate business reasons would not seem capable of creating an inference that a collusive agreement is more likely than independent action. Indeed, as several courts and commentators have observed, such a record would establish nothing more than the parallel pricing that is equally consistent with legitimate interdependent competition in an oligopolistic market.[31] Rather than creating a fact issue

[28] *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 54 (7th Cir. 1992).

[29] *Id.*; *see also E.W. French & Sons, Inc. v. General Portland, Inc.*, 62 F.3d 1424 (9th Cir. 1995) (advance price announcements by competing cement manufacturers not sufficient to infer conspiracy where evidence demonstrated legitimate rationale that customers required such advance notice in order to precommit to prices for downstream construction projects).

[30] *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 672 (E.D.N.C. 2003), *aff'd Hall v. American Airlines, Inc.*, 118 Fed. Appx. 680 (4th Cir. 2004).

[31] *See supra* note 6.

	requiring a trial, without more, the weight of applicable case law indicates that such circumstances require dismissal. While the foregoing analysis does not provide the simplicity and clear guidance of a black letter rule that a particular form of conduct either is or is not a "plus factor" for purposes of inferring a conspiracy, it is the purpose of summary judgment for a court to examine the record and determine whether evidence submitted is capable of supporting a claim.[32] For purposes of an antitrust conspiracy claim, as is the case for many forms of conduct, the probative value (or lack thereof) of vendors in concentrated markets announcing or otherwise communicating their pricing intentions in advance depends on whether or not defendants can demonstrate a plausible and legitimate business rationale for that conduct. * * * * * * * * *

32 Fed. R. Civ. P. 56(a).

Standard Essential Patents: An Overview of Recent Antitrust Developments and Common Themes

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Recent antitrust developments addressing standard-essential patents ("SEPs") significantly affect industries that will rely on standardized technologies to innovate. While approaches to SEP licensing continue to develop, there are a number of important themes that have emerged. This article provides a brief background on SEPs, an overview of key developments in important jurisdictions, and a description of developing trends and themes in SEP-related policies and law. It concludes by encouraging practitioners to consider the SEP landscape and to proactively determine how it may affect their clients or organizations.

I. Introduction

Recent high-profile litigation seems to be increasing interest in SEPs in legal and business communities. Many associate SEP disputes with large telecommunications manufacturers. However, SEP-related policies and laws affect not just the telecommunications sector, but also a wide range of industries and sectors that utilize standardized technology (e.g., the Internet of Things).

Standards underlie most of the infrastructure, products, and services that we rely on in both consumer and enterprise contexts today. At the highest level, standards are an agreed-upon way of doing something between multiple people or organizations to provide a desired level of interoperability. In practice, such standards are very often developed in standards setting organizations ("SSOs"), which are organizations that provide an open, rules-based infrastructure and process where volunteer SSO participants can collaborate to develop consensus through contributing proposed solutions that are accepted or rejected. SSOs vary widely according to their membership, the industries they cover, and the procedures for establishing

	standards.[1] During an SSO process, participants voluntarily contribute patented technology. If such a contribution is accepted into a standard, and if the standard cannot be implemented without using the patent, that patent is an SEP.[2] As a result, SEP holders may request licensing fees from any user of a standard in which their SEP is included. In practice, standards can contain hundreds of SEPs. Antitrust law comes into the picture because it has long recognized that an SEP owner has a great deal of bargaining power over a standard user/licensee, giving rise to competition law concerns, particularly when a standard is globally adopted (examples include WiFi and LTE). As one can imagine, it will be quite difficult for a manufacturer of the next internet-connected widget hoping to break into a consumer market without such standardized wireless connectivity technologies included in that widget. That is why SSO participants who voluntarily contribute patented technology into a standard make a promise to all potential future licensees to license the SEP(s) on fair, reasonable, and non-discriminatory (FRAND) terms. When it is realized, the FRAND commitment ensures equitable access to future innovators that utilize standards while also ensuring that the SEP holder realizes a fair return. SEPs are very different from regular patents—once a patent holder chooses to contribute that patent to an SSO process and voluntarily attaches the FRAND commitment to the SEP, the right to arbitrarily exclude others from patent use is waived. Because the FRAND promise is designed to address the competitive problems that can occur with industry collaboration during the standards process, the violation of a FRAND promise presents not merely contractual issues, but also significant competition law concerns. For example, if an SEP holder exercises market power in violation of its FRAND commitment by seeking supra-FRAND royalties and engages in patent hold-up, the consequences will have a market-wide impact by increasing costs for the entire industry. SEP policy and law will continue to have a deep impact on telecommunications, particularly as standardized technologies are developed and deployed for new fifth generation (5G)[3] and internet of things (IoT)[4] technologies. But mobile communications technology's rise in

[1] US Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 33-34, FN 5 (2007), *available at* https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf.

[2] *See*, Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations,* 90 CALIF. L. REV. 1889, 1889-1980 (2002) (more information on SSOs).

[3] While there is no universal definition for a "fifth generation" (5G) mobile network, the term encompasses the future wave of interoperable mobile networks being driven through various technical standards bodies today. 5G networks are expected to utilize a wide range of spectrum bands, both licensed and unlicensed, through new and innovative spectrum efficiencies and spectrum sharing arrangements. Standard bodies such as the 3GPP and the Institute of Electrical and Electronics Engineers (IEEE), among many others, continue to develop the requirements. *See* Dino Flore & Balazs Bertenyi, *Tentative 3GPP Timeline for 5G, 3GPP THE MOBILE BROADBAND STANDARD* (Mar. 17, 2015), *available at* http://www.3gpp.org/news-events/3gpp-news/1674-timeline_5g; *see also* IEEE Standards Association, *Internet of Things*, *available at* http://standards.ieee.org/innovate/iot/.

[4] Like 5G, IoT will involve everyday products that use the internet to communicate data collected through sensors. IoT is expected to enable improved efficiencies in processes, products, and services across every sector. In key segments of the US economy, from agriculture to retail to healthcare and beyond, the rise of IoT is demonstrating efficiencies unheard of even a few years ago. *See*, *e.g.*, Department of Commerce Internet Policy Task Force and Digital Leadership Team,

introducing new innovations and efficiencies across consumer and enterprise contexts will bring the same issues. The developers of these new innovations need to be able to rely on a competitive environment in the information and communications technology hardware space that enables reasonable access to standards.

A variety of market regulators discussed below have provided significant guidance regarding SEPs and FRAND licensing commitments. Ideally, through further policy and case law development, clarifications as to the meaning of FRAND commitments will continue, benefiting both SEP holders and innovators who use standards, as well as the consumers of technology.

II. NOTABLE DEVELOPMENTS

Across key jurisdictions, there have been notable policy and legal developments related to SEPs that are important to understand.

A. CANADA

- In March 2017, the Canadian Competition Bureau (CCB) finalized revisions to IP enforcement guidelines that define breaches of FRAND commitments as a competition issue for the first time.[5] The IP guidelines note that (i) bundling of SEPs and non-SEPs can cause competitive harm; (ii) there are only limited circumstances under which SEP holders can obtain injunctive relief; (iii) while contract law may be sufficient to resolve contractual breaches of FRAND, competitive effects from some breaches may need to be addressed under competition law; and (iv) the CCB is not a rate regulator and would likely only find a royalty rate alone (without the accompanying threat / use of injunctive relief) to be a competition problem if the SEP owner had set a maximum rate during standard development and then breached it. The CCB acknowledges in its guidelines that rapid developments continue in competition enforcement policy, so it will regularly revisit its guidance in light of relevant developments. More recently, in November of 2018, the CCB released draft revised Intellectual Property Enforcement Guidelines (IPEGs) and sought public comment on them.[6]

B. CHINA

- In 2015, China's National Development and Reform Commission (NDRC) issued an administrative penalty decision against Qualcomm, Inc. The NDRC determined that several aspects of Qualcomm's licensing of telephony SEPs constituted an abuse of a dominant position.[7] The specific practices deemed to be unlawful were:

Fostering the Advancement of the Internet of Things (Jan. 2017), *available at* https://www.ntia.doc.gov/files/ntia/publications/iot_green_paper_01122017.pdf.

5 *See,* The Canadian Competition Bureau (CCB), Intellectual Property Enforcement Guidelines, (March 2017), available *at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04031.html.

6 *Id.*

7 National Development and Reform Commission (NDRC), Administrative Penalty Decision No. 1 (Feb. 9, 2015).

	(i) charging royalties for expired SEPs; (ii) conditioning SEP licenses on licensees' agreement to take licenses to other Qualcomm patents that were not SEPs ("non-SEPs"); (iii) requiring SEP licensees to grant back royalty-free licenses to their non-SEPs; (iv) imposing a "relatively high royalty" calculated on a device-level royalty base; and (v) requiring baseband chip purchasers to agree to licenses with unreasonable conditions such as the ones listed above and not to challenge Qualcomm's licenses. China's State Administration for Industry and Commerce (SAIC) also issued a Regulation on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition in 2015.[8] The SAIC regulation prevents SEP holders with a dominant market position from engaging in conduct that eliminates or restricts competition by refusing to license implementers, tying SEPs to non-SEPs, or imposing other unreasonable conditions in violation of the FRAND commitment. **C. EUROPEAN UNION** • The European Commission's (EC's) guidelines regarding horizontal cooperation agreements, published in 2011, discuss the anticompetitive threat of patent "hold up" in the SSO context and the importance of the effective use of FRAND commitments in combating that threat.[9] To deter companies from "behav[ing] in anti-competitive ways, for example by 'holding-up' users after the adoption of the standard either by refusing to license the necessary Intellectual Property Rights (IPR) or by extracting excess rents by way of excessive royalty fees thereby preventing effective access to the standard," the guidelines stress that SSOs should adopt IPR policies that "require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable, and non-discriminatory terms ('FRAND commitment')."[10] The EC pointed out that "FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees."[11] In case of a dispute involving a FRAND commitment, "the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR."[12]

8 *See* China's State Administration for Industry and Commerce (SAIC), Provisions on Prohibition of Intellectual Property Rights to Eliminate or Restrict Competition, No. 74, (Apr. 7, 2015).

9 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreement, ¶ 285 (Jan. 14, 2011) ("While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market.").

10 *Id.* at 285.

11 *Id.* at 287.

12 *Id.* at 289.

Because FRAND commitments are voluntary, however, IPR holders should be permitted "to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard."[13]

- In 2014, the EC issued a decision in which it determined that "Motorola Mobility's seeking and enforcement of an injunction against Apple before a German court on the basis of a smartphone SEP constitutes an abuse of a dominant position prohibited by EU antitrust rules."[14] The Commission explained that FRAND commitments are "designed to ensure effective access to a standard for all market players and to prevent 'hold-up' by a single SEP holder."[15] The Commission determined that seeking an injunction against a willing licensee of a FRAND-encumbered SEP "could risk excluding products from the market" and "lead to anticompetitive licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction. Such an anticompetitive outcome would be detrimental to innovation and could harm consumers."[16] On the same day, the EC issued a press release on the case that provided further guidance, including the point that (i) the licensee can challenge the validity, essentiality or infringement of SEPs and still be considered a "willing" licensee; and (ii) the specific rate of a reasonable royalty should be determined by courts or arbitrators.

- In November 2017, the EC issued a highly anticipated Communication on the licensing practices for SEPs to provide a "balanced, smooth and predictable framework for SEPs" that will contribute to "the development of the Internet of Things and harnessing Europe's lead role in this context."[17] Notably, in the SEP Communication, the EC reinforced the "license to all" obligation of FRAND-committed SEP holders in stating that the EC's 2011 Horizontal Guidelines clearly established SEP holders' requirement to offer licenses to "all third parties" on FRAND terms. It is well known that SEP holders increase their market power when their patent is incorporated into a standard, and, because of their FRAND commitment, they cannot refuse a license to any willing third party. In the new Communication, the EC reiterates that the Court of Justice of the European Union confirmed in the *Huawei v. ZTE* decision of 2015 that an effort "to grant licenses on FRAND terms creates

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[13] *Id.* at 285.

[14] Press Release, European Commission, Antitrust: Commissions Finds That Motorola Mobility Infringed EU Competition Rules By Misusing Standard Essential Patents (April 29, 2014), *available at* http://europa.eu/rapid/press-release_IP-14-490_en.htm.

[15] *Id.*

[16] *Id.*

[17] EUR. PARL. DOC. (COM 712) 2 (2017), *available at* https://ec.europa.eu/docsroom/documents/26583/attachments/1/translations/en/renditions/native.

legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licenses on such terms."[18]

D. JAPAN

- In early 2016, the Japan Fair Trade Commission (JFTC) updated its Guidelines for the Use of Intellectual Property under the Antimonopoly Act.[19] This update states that a refusal to license to, or bringing an injunction against, a party who is willing to take a license based on FRAND terms can be considered exclusionary conduct under Japan's Antimonopoly Act. The Guidelines indicate that a "willing" licensee will be judged on a case-by-case basis, based on the conduct of both negotiating parties. Factors that the fact-finder/court may consider include: (i) whether the licensor notified the prospective licensee of a specific patent that has been infringed and how it was infringed; (ii) whether the licensor made a licensing offer based on reasonable conditions; whether the prospective licensee made a prompt and reasonable counteroffer; and (iii) whether the parties otherwise acted in good faith. The JFTC clarified that a prospective licensee's challenge to the validity, essentiality, or infringement of the SEP(s) would not be grounds for labeling it an unwilling licensee if it undertakes the negotiations in good faith considering standard business practices.

E. REPUBLIC OF KOREA

- In 2014, the Korean Fair Trade Commission (KFTC) revised its Guidelines on the Unreasonable Exercise of Intellectual Property Rights to address breaches of FRAND commitments as a competition law matter, providing a detailed list of practices by SEP holders that may be deemed abusive.[20] Further, in December 2016, the KFTC issued a decision imposing sanctions against Qualcomm Incorporated in the amount of 1.03 trillion Korean won for alleged violations of Korean competition laws.[21] After conducting a comprehensive investigation that spanned for more than a year and issuing its examination report to Qualcomm on November 13, 2015, the KFTC found that Qualcomm had breached its FRAND commitments when engaging in licensing agreements with certain companies. The Seoul High Court subsequently denied a stay of the Corrective Order.

[18] Case C-170/13, *Huawei v. ZTE*, July 21, 2015 E.C.R.

[19] *See* Guidelines for the Use of Intellectual Property under the Antimonopoly Act, Part 3, Section 1(i)(e) (Jan. 21, 2016), *available at* http://www.jftc.go.jp/en/pressreleases/yearly-2016/January/160121.files/IPGL_Frand_attachment.pdf.

[20] Korea Fair Trade Commission, Guidelines for Review of Unreasonable Exercise of Intellectual Property Rights (Dec. 24, 2014).

[21] Korea Fair Trade Commission v. Qualcomm Inc., *In re Alleged Abuse of Market Dominance of Qualcomm Incorporated,* No. 2017-0-25 (Jan. 20, 2017).

F. UNITED STATES

- In 2011, the United States Federal Trade Commission (FTC) issued a report entitled *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011), in which the FTC addresses the issue of a reasonable royalty for FRAND-encumbered SEPs, and recommends that "[c]ourts should cap the royalty at the incremental value of the patented technology over alternatives available at the time the standard was chosen."[22] The FTC explains that setting the royalty for a FRAND-encumbered SEP "based on the ex-ante value of the patented technology at the time the standard is chosen is necessary for consumers to benefit from competition among technologies to be incorporated into the standard – competition that the standard setting process itself otherwise displaces." The FTC also addressed the question of the appropriate royalty base in patent cases and recommended that "[c]ourts should identify as the appropriate base that which the parties would have chosen in the hypothetical negotiation as best suited for accurately valuing the invention. This may often be the smallest priceable component containing the invention."

- The FTC issued a Decision and Order in 2013 accompanying its challenge to an injunction sought by Google's Motorola Mobility Division, which sets forth in detail procedures that a declared SEP holder must undertake before it may seek an injunction or other exclusionary relief based on an SEP and makes clear that a potential licensee may challenge infringement, validity, and enforcement of a declared SEP before being ordered to pay a royalty.[23]

- In January 2013, the US Department of Justice (DOJ) and US Patent and Trademark Office issued a "Policy Statement on Remedies for SEPs Subject to Voluntary F/RAND Commitments," which recognizes the harms of patent hold up and explains that FRAND commitments are designed as a solution to that problem that benefits both standard implementers and SEP holders.[24] The policy statement states the following:

  > *A decision maker could conclude that the holder of a F/RAND-encumbered, standards-essential patent had attempted to use an exclusion order [a form of injunctive relief] to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment—in essence concluding that the patent holder had sought to reclaim some of its enhanced market power over firms that relied on the assurance that F/RAND-encumbered patents included in the standard would be available on reasonable licensing terms under the SSO's policy.*

	• However, the Policy Statement noted that such relief may be appropriate in some circumstances, "such as where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND term" or "is not subject to the jurisdiction of a court that could award damages." Notably, current Assistant Attorney General (AAG) for Antitrust Makan Delrahim has publicly announced the withdrawal of the DOJ's assent to the Policy Statement based on his belief that competition law does not have a role in SEP disputes[25] despite numerous federal court decisions holding that US competition law should be applied to disputes involving SEPs and related FRAND commitments.[26] • The DOJ issued a detailed response in February 2015 to a "Business Review Letter" request from the IEEE seeking guidance on its updated patent policy.[27] The DOJ's response addressed several important aspects of SEP licensing, including injunctive relief, reasonable royalty rates, availability of FRAND licenses to standard implementers at all levels of the production chain, and reciprocal licenses. The DOJ found the IEEE revised patent policy to be consistent with US law. • In 2017, the FTC brought an enforcement action in the District Court for the Northern District of California against Qualcomm, asserting that Qualcomm violated competition law in its mobile phone chip licensing practices.[28] According to the FTC, Qualcomm either refused licenses or threatened device manufacturers with the withholding of access to those necessary chips unless licensees agreed to pay disproportionate royalty fees, which the FTC described as an anticompetitive "no license-no chips" policy that allowed Qualcomm to obtain royalties significantly higher than those suggested within their FRAND obligation. The FTC's case survived Qualcomm's motion to dismiss and resulted in a ruling that held that a FRAND

22 Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition, (Mar. 11, 2011), *available at* https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.

23 Press Release, Statement of the Federal Trade Commission (F.T.C.) *In the Matter of Google Inc.*, FTC File No. 121-0120, (Jan. 3, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-consent-agreement-google/motorola/130103brillgooglemotorola-sep-stmt.pdf.

24 US Department of Justice and United Stated Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, (Jan. 8, 2013), *available at* https://www.uspto.gov/sites/default/files/documents/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

25 Assistant Attorney General Makan Delrahim, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute (Dec. 7, 2018), *transcript available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-19th-annual-berkeley-stanford.

26 *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030 (9th Cir. 2015); *see also Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014).

27 Letter from Renata B. Hesse, Acting Attorney General, US Department of Justice, Antitrust Division, to Michael A. Lindsay, Dorsey & Whitney LLP (Feb. 2, 2015), on file with the US Dep't of Justice, *available at* https://www.justice.gov/sites/default/files/atr/legacy/2015/02/02/311470.pdf.

28 Compl., *FTC v. Qualcomm Incorporated*, Case No. 5:17-CV-00220-LHK (N.D. Cal. June 26, 2017).

commitment represents an obligation to license to any willing licensee (consistent with the "non-discriminatory" component of FRAND).[29] On May 22, 2019, Judge Koh agreed with the FTC that Qualcomm's licensing practices violate US antitrust law, and ordered five remedies:[30]

1. Based on their dominant position, Qualcomm can no longer tie their supply of chips to a customer's patent license and has to negotiate (and for existing arrangements, renegotiate) licensing terms with its customers without it's "no license-no chips" policy.

2. Qualcomm has to make its SEPs available on FRAND terms, even to competitors.

3. Qualcomm can no longer employ exclusive dealing agreements (agreements only to purchase from Qualcomm) for supplying chips.

4. Qualcomm can no longer interfere with its customers in communicating with a government agency about a potential law enforcement or regulatory matter.

5. Qualcomm has to submit to compliance and monitoring for seven (7) years, and must annually report to the FTC about its compliance with the above remedies.

III. Common Themes

Surveying the jurisdictions above as well as others, some common themes appear. *First*, there is widespread acknowledgment of the inherent link between standard setting, competition, and innovation, and the role of competition law in ensuring a balanced SEP licensing ecosystem. *Second,* enforcement actions by competition regulators and courts across key jurisdictions reinforce the position that a refusal to license to (or seek an injunction against) a party who is willing to take a license based on FRAND terms is exclusionary conduct under antitrust laws. *Third,* a prospective licensee's challenge to the validity, essentiality, or infringement of an SEP should not be grounds for labeling a licensee as unwilling if that licensee undertakes negotiations in good faith consistent with standard business practices. *Fourth*, a reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on the value of the actual patented invention, apart from its inclusion in the standard or potential downstream uses by innovators and end users.

Stakeholders from across sectors face SEP-related challenges, and much can be gleaned from policy and legal developments, but there are many moving

29 Order Granting Motion for Partial Summary Judgment, *FTC v. Qualcomm Incorporated*, Case No. 5:17-CV-00220-LHK (N.D. Cal. Nov. 6,2018).

30 Findings of Fact and Conclusions of Law, *FTC v. Qualcomm Incorporated*, Case No. 5:17-CV-00220-LHK (N.D. Cal. May 22, 2018).

	pieces across different countries that are worth tracking. It is important for antitrust and IP attorneys to think about how SEP-related policy and law affect their clients or organizations today, as well as how it may affect them in the future. Further, future proactive engagement with policymakers by industries that are just beginning to, or may soon, grapple with SEP licensing issues may be necessary. * * * * * * * * *

The Crumbling Façade of Amateurism: Recent Developments Diminish the NCAA's Long-Offered Justification for Not Paying Student-Athletes

By Zoe Rachael Staum

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The most recent decision in a long line of cases concerning the relationship between the Sherman Act and the NCAA's prohibition against certain forms of student-athlete compensation found that the NCAA carried out an agreement to restrain trade and developed rules capping student-athlete compensation that produce significant anticompetitive effects.

Although agreements among competitors regarding prices are ordinarily condemned as per se unlawful, in its March ruling, the U.S. District Court for the Northern District of California (Judge Claudia Wilken) held that "rule of reason" was appropriate in this case because the marketing of college sports requires "a certain degree of cooperation." [1] The rule of reason analysis evaluates the anticompetitive features of a business practice against its procompetitive effects to determine the net impact of a restraint. In *Jenkins v. NCAA*, on summary judgment, the court found that the NCAA's rules capping student-athlete compensation restrained trade in that they limited the compensation that student athletes received for their services. [2] Having found that the NCAA rule restrained trade, the court held a bench trial addressing the procompetitive justifications. The court declined to adopt the NCAA's argument that consumer demand for amateurism justified the restraints. [3] However, the court also ruled that allowing "unlimited, professional-level cash payments, unrelated to education" was procompetitive. [4]

The NCAA has long relied on its assertion of "amateurism" as the core principle of its existence and the main justification against compensating student-athletes.[5] Amateurism refers to the NCAA rules that aim to differentiate college athletes from professional athletes by placing strict

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[1] *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 2019 WL 1747780, at *26 (N.D. Cal. Mar. 8, 2019) (hereafter *Jenkins*).

[2] *See id.*

[3] *See id.*

[4] *Id.* at *36.

[5] Marc Edelman, *As NCAA Prepares For Final Four, Plaintiffs In Jenkins Prepare For December Trial*, FORBES (Mar. 30, 2018, 9:15 AM), https://www.forbes.com/sites/marcedelman/2018/03/30/jenkins-prepares-for-a-december-trial-against-ncaa/#7f94ba1a5be3.

restrictions on the type of financial awards provided to them.[6] Student-athletes are prohibited from receiving financial aid in excess of their cost of attendance, compensation from outside sources based on their athletic ability, and endorsements for any commercial product or service (among other restrictions).[7]

Judge Wilken's decision in *Jenkins* is her second judgment in the last five years to expand compensation to student-athletes and find that certain NCAA rules were not justified by "amateurism."[8] Previously, Judge Wilken's ruling in *O'Bannon v. NCAA* and the Ninth Circuit's subsequent ruling on appeal appeared poised to make strides towards compensating student-athletes by holding that the NCAA's rules prohibiting student-athletes from getting paid for the use of their names, images, and likenesses ("NILs") was an unlawful restraint of trade.[9]

The Supreme Court, however, refused to weigh in on the controversy by denying the petitions for writs of certiorari from both parties in *O'Bannon*.[10] What remains is a circuit split on whether the NCAA bylaws should be subject to antitrust scrutiny and a direct clash over the significance of amateurism as a justification for the NCAA's no-pay rules.[11] With the impending *Jenkins* appeal to the Ninth Circuit, the Supreme Court may find itself with yet another opportunity to resolve this national debate.[12]

This Article discusses the application of rule of reason analysis to the conduct outlined in *O'Bannon* and *Jenkins* and how those decisions differ from their predecessors in other circuits. Part I provides a brief overview of the arguments and conclusions in *O'Bannon* and *Jenkins*. Part II addresses the current circuit split relevant to the aforementioned cases. Finally, Part III briefly concludes that *Jenkins* is likely to soften the NCAA no-pay rules.

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[6] Grants-in-aid, defined as "financial aid that consists of tuition and fees, room and board, and required course-related books," were previously below the cost of attendance. In August 2015, the NCAA made a concession to student-athletes by revising its policy to include "tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance." NCAA Bylaws 15.02.2 and 15.02.2.1; Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills*, N.Y. TIMES, Jan. 18, 2015; Michael McCann, *NCAA Amateurism to Go Back Under Courtroom Spotlight in Jenkins Trial*, SPORTS ILLUSTRATED (Apr. 02, 2018), https://www.si.com/college-football/2018/04/02/ncaa-amateurism-trial-judge-wilken-martin-jenkins-scholarships.

[7] *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 971-72 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

[8] *Jenkins,* 2019 WL 1747780 at *26; *O'Bannon*, 7 F. Supp. 3d at 971-72.

[9] *O'Bannon*, 802 F.3d 1049 (9th Cir. 2015). Kathryn Rubino, *SCOTUS Punts On Amateurism In College Sports, But It May Not Be The End*, ABOVE THE LAW (Oct. 04, 2016, 11:36 AM), https://abovethelaw.com/2016/10/scotus-punts-on-amateurism-in-college-sports-but-it-may-not-be-the-end/?rf=1.

[10] *See Nat'l Collegiate Athletic Ass'n v. O'Bannon*, 137 S. Ct. 277 (2016).

[11] The circuit split stems from competing decisions in the Third Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, and Ninth Circuit. *See generally Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, *NCAA v. Smith*, 525 U.S. 459 (1999); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008); *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *O'Bannon*, 802 F.3d at 1049.

[12] Peter Blumberg, *NCAA to Appeal Ruling Busting Caps on Athlete Compensation*, BLOOMBERG (Mar. 23, 2019, 10:15AM).

I. THE NINTH CIRCUIT JOINS THE DEBATE: INTRODUCING *O'BANNON* AND *JENKINS*

O'Bannon originated in 2008 when Ed O'Bannon, a former basketball player at UCLA, discovered his likeness in a video game created by Electronic Arts (EA). [13] O'Bannon's complaint against the NCAA's amateurism rules, brought on behalf of all current and former student-athletes who competed on a Division I men's basketball team or an FBS football team whose NILs may have been used, alleged that the rules constitute an illegal restraint of trade under Section 1 of the Sherman Act. [14]

During the district court's non-jury trial, the dispute in *O'Bannon* centered on the reasonableness of this restraint, which hinged on the evaluation of the offered procompetitive justifications and the viability of the plaintiffs' asserted less restrictive methods of maintaining those objectives.[15] The relevant market in *O'Bannon* was the "College Education Market,"[16] comprised of FBS football and Division I men's basketball programs competing to recruit top high school athletes. In this national market, schools bundle scholarships, mentoring from top-tier coaches, medical treatment, athletic facilities, and the chance to compete at the highest level of college sports into offers to recruits.[17] Recruits in turn provide their athletic services and implicitly allow the use of their NILs for commercial and promotional purposes.[18]

The bundles offered by FBS football and Division I basketball schools are unique because recruits skilled enough to play at that level do not generally pursue other opportunities.[19] As the only suppliers in the College Education Market, these schools have the power, when acting together through the NCAA, to fix prices.[20]

The NCAA argued that its compensation rules are necessary to protect its tradition of amateurism and promote the integration of academics and athletics.[21] Rules restricting compensation allegedly aim to maintain consumer demand for amateur sports and ensure the quality of the educational services and academic communities provided to student-athletes.[22]

Following the non-jury trial, Judge Wilken found that the NCAA exercised this market power to fix prices by conspiring to charge every recruit the same price for the bundle[23] and refusing to offer a share of the licensing revenues from the use of their NILs.[24] The district court found limited support for the NCAA's procompetitive justifications, largely because the NCAA has been historically inconsistent in its use and definition of "amateurism," as evidenced by factual testimony and past versions of its bylaws.[25] The district court acknowledged, however, that consumer preferences for amateurism might justify limited restraints.[26]

Judge Wilken also challenged the link between community integration and the restrictions, as student-athletes' incentives to succeed academically are the same whether or not they receive compensation for the use of their NILs.[27] The court again acknowledged that limited rules on compensation

	promote the procompetitive purpose of integration without the need for strict restrictions.[28] Per this ruling, the NCAA may still cap the compensation provided, but the amount may not be below the cost of attendance. [29] The Ninth Circuit affirmed the district court's decision to allow schools to provide grants-in-aid up to the full cost of attendance but rejected the proposal to provide students NIL cash payments untethered to their education expenses and to establish a trust of the school's licensing revenue.[30] The Ninth Circuit explained offering students "cash sums untethered to educational expenses" would transform college athletics into "minor league status" for professional sports leagues.[31] Significantly, the Ninth Circuit made a number of critical declarations. First, the appellate court clarified that *Board of Regents*, the landmark Supreme Court case discussing the applicability of the Sherman Act to the NCAA,[32] did not approve the NCAA's amateurism rules as categorically consistent with the Sherman Act. [33] According to the Ninth Circuit, *Board of Regents* actually

13 *O'Bannon*, 802 F.3d at 1055-56; *see O'Bannon*, 7 F. Supp. 3d at 965.

14 Sherman Act § 1, 15 U.S.C. § 1; *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

15 The NCAA in effect conceded that an agreement existed and the agreement affects interstate commerce. *See O'Bannon*, 7 F. Supp. 3d at 985.

16 *See O'Bannon*, 7 F. Supp. 3d at 965, 995, 998-99.

17 *See id.* at 966, 986.

18 *See id.* at 966.

19 *See id*. at 966, 968; *see also White v. NCAA*, 2006 WL 8066802 (C.D. Cal. Sept. 20, 2006) (finding the "unique combination of coaching-services and academics" offered by FBS football and Division I basketball schools sufficient to plead a relevant market). The empirical data on recruitment from 2007 to 2011 showed that top recruits with an opportunity to play in Division I accepted that offer. *O'Bannon*, 7 F. Supp. 3d at 966.

20 The NCAA expert, Dr. Rubinfeld, admitted during trial that the NCAA operates as a cartel that imposes a restraint on trade. *See O'Bannon*, 7 F. Supp. 3d at 988.

21 *See id.* at 973, 999.

22 *See id.* at 979, 1003. *See also County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

23 *O'Bannon*, 7 F. Supp. at 963.

24 *See id.* at 988-89. The NCAA imposes sanctions and other punishments on member schools that circumvent these restrictions.

25 *See O'Bannon*, 7 F. Supp. at 973-74; *see also Banks v. NCAA*, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) ("The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed."). Instead, other factors like loyalty and geography are more likely drivers of consumer demand for FBS football and Division I basketball. *See O'Bannon*, 7 F. Supp. 3d at 1001.

26 *See O'Bannon*, 7 F. Supp. at 978, 1000.

27 *See id.* at 980, 1003.

28 *See id.*

29 *See id.* at 1007.

30 *Id.*

31 *O'Bannon*, 802 F.3d at 1049.

32 468 U.S. 85 (1984) (holding that antitrust laws apply to some aspects of college football and the NCAA violated those laws by placing restrictions on the ability of member schools to sell the rights to televise their games).

33 *O'Bannon*, 802 F.3d at 1063.

stands for the notion that not every rule adopted by the NCAA that restricts the market is necessary to preserve the "character" of college sports.[34]

Second, the Ninth Circuit rejected the NCAA's contention that its compensation rules are not subject to antitrust scrutiny because these "eligibility rules" do not regulate any "commercial activity."[35] Finally, the Ninth Circuit stated, "the evidence at trial showed that the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses."[36]

The claims alleged by former and current student-athletes in *Jenkins* were similar to the claims in *O'Bannon*, though the rules challenges had more far-reaching implications for student-athlete compensation. The case was heard in the same district and in front of the same judge. Former and current student-athletes requested an injunction that would allow colleges to compensate student-athletes beyond the grants-in-aid currently offered.[37] The plaintiffs sought to prevent the NCAA and a number of major conferences from collectively confining athletes to scholarships covering only tuition, fees, room and board, books and incidental costs of attending college.[38] Essentially, plaintiffs argued that the NCAA caps on compensation establish coordinated, artificial limits on price without justification.[39] Defendants asserted that consumer demand for college sports is connected to the preservation of amateurism and the integration of student-athletes into their academic communities.[40]

Ruling on a motion for Summary Judgment last spring, the court found the existence of an agreement, which restrains commercial, interstate transactions.[41] The court adopted the rule of reason analysis applied in *O'Bannon* because athletics competition requires a certain amount of cooperation and turned its attention to the NCAA's procompetitive justifications.[42] On summary judgment, the court found that the challenged restraints had significant anticompetitive effects because the rule eliminated

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34 *See id.* at 1074.

35 *Id.* at 1064-65.

36 *Id.* at 1075.

37 Jill Ingels, *What You Need to Know About Jenkins v. NCAA*, MULS SPORTS LAW SOCIETY BLOG (Mar. 7, 2017), https://musportslawsociety.wordpress.com/2017/03/07/what-you-need-to-know-about-jenkins-v-ncaa/. *Jenkins,* 2019 WL 1747780.

38 Cost of attendance is defined by NCAA Bylaw 15.02.2 to mean "an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution."

39 *Jenkins,* 2019 WL 1747780 at *1.

40 *See id*.

41 *See id.* at *5.

42 *See id.* at *1.

competition among Division I basketball and FBS football schools for the price of the services of student-athletes. [43]

On March 8, 2019, after a bench trial, Judge Wilken held that the NCAA's asserted procompetitive benefits did not justify rules limiting non-cash, education-related benefits on top of grant-in-aid awards and that such rules unreasonably restrained trade. [44] The decision did not extend so far as to mandate that the NCAA allow unlimited cash payments unrelated to education, but instead bars the NCAA from prohibiting colleges from offering student-athletes compensation to cover all education-related costs. The court held that the "only education-related compensation that the NCAA could limit under this alternative would be academic or graduation awards or incentives, provided in cash or cash-equivalent." [45] Similar to Judge Wilken's conclusions in *O'Bannon*, the Judge again found the NCAA's assertion of amateurism unpersuasive but maintained that less restrictive rules may be necessary to distinguish college athletes from professionals. [46] On appeal, the NCAA may seek to refine its principle of amateurism to persuade the Ninth Circuit that athletic scholarship caps promote competition more than they harm it in the market for student-athletes' athletic services.[47]

II. CONFUSION SPREADS: THE CIRCUIT SPLIT AND AMATEURISM

A significant problem arising from the Supreme Court's denial of certiorari in *O'Bannon* is that a circuit split persists and continues to prevent clarity on whether the applicable market for athletic services is commercial and, if so, whether amateurism is a reasonable justification for the NCAA's restraints on trade. The seminal Supreme Court case *Board of Regents* did not consider whether antitrust scrutiny should apply to the governing body's rule making. [48] The precedent set by the Third, Fifth, and Sixth Circuit on one side of the issue and the Seventh and Ninth Circuit on the other have all come to conflicting conclusions on these issues.[49]

The Fifth Circuit made the first contribution in 1988 in *McCormack v. NCAA* with a broad declaration that the NCAA's eligibility rule restricting benefits awarded to student-athletes is a reasonable restraint in order to maintain amateurism in college sports. [50] Looking to *Board of Regents*, the Fifth Circuit noted that the Supreme Court "indicated strongly" in its decision that in order to preserve the amateur character and quality of the NCAA's product,

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[43] *See id.* at *31.

[44] *See id*.

[45] *See id.* at *1.

[46] *See id.* at *9.

[47] McCann, *see supra* note 4.

[48] *See Smith v. NCAA*, 139 F.3d at 185 ((citing *Bd. of Regents*, 468 U.S. at 117) (holding that the NCAA's proposed restrictions on television coverage of college football games violated Section 1)).

[49] *See generally Smith*, 139 F.3d 180 (3d Cir. 1998); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008); *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

[50] *See McCormack*, 845 F.2d at 1343.

student-athletes must be governed by these no-pay eligibility rules.[51] The Fifth Circuit insisted the practice is reasonable stating, "[though] the NCAA has not distilled amateurism to its purest form[, that] does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."[52]

The Third Circuit followed with *Smith v. NCAA*, where the court affirmed the dismissal of a claim that the NCAA bylaw "prohibiting a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an institution other than the student-athlete's undergraduate institution" violated the Sherman Act.[53] The court concluded that the eligibility rules are not subject to antitrust scrutiny because they are not related to the NCAA's commercial or business activities as the rules "primarily seek to ensure fair competition[.]"[54] The Third Circuit found in the alternative that even if antitrust law does apply, under the rule of reason test the NCAA's eligibility rules preserve the quality of amateur sports and promote an even playing field.[55]

A decade later, the Sixth Circuit determined that claims under the Sherman Act must be commercial in nature and the NCAA's rules on recruiting student-athletes, specifically those prohibiting improper inducements, "are all explicitly non-commercial."[56] As the court concluded that the rules and corresponding sanctions are not commercial, the inference is that NCAA enforcement of those rules is also a non-commercial activity.[57]

Unlike the appellate decisions mentioned above, the Seventh Circuit interpreted *Board of Regents* as "the seminal case on the interaction between the NCAA and the Sherman Act, impl[ying] that *all* regulations passed by the NCAA are subject to the Sherman Act."[58] The Seventh Circuit was emphatic that "[n]o knowledgeable observer could assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program."[59] The court found that the NCAA's bylaws can have an anticompetitive or a procompetitive effect on collegiate athletics and the recruiting market specifically.[60]

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[51] *See id*.

[52] *See id.* at 1345.

[53] *See Smith*, 139 F.3d at 182.

[54] *Id.* at 185.

[55] *See id.* at 187.

[56] *Bassett*, 528 F.3d at 433.

[57] *See id.*

[58] *See Agnew*, 683 F.3d at 338-39 (emphasis in original).

[59] *Id.*

[60] *See id.* at 341.

Finally, the Ninth Circuit in *O'Bannon* disagreed with the Sixth Circuit's decision in *Bassett v. NCAA*,[61] finding flaws in its logic and stating that "[t]he intent behind the NCAA's compensation rules does not change the fact that the exchange they regulate—labor for in-kind compensation—is a quintessentially commercial transaction." [62] The Ninth Circuit went further in *O'Bannon*, finding that the NCAA could not restrict schools from providing student-athletes with scholarships to cover the costs of attendance and that amateurism was not a sufficient procompetitive justification for such restraints.[63]

A distinction between the Seventh and Ninth Circuits and those on the other side of the issue is the use of *Board of Regents*.[64] *O'Bannon* essentially treated the strongest precedential support for the other circuits' decisions as nonbinding dicta that has been misinterpreted by prior cases. The disagreement centers on competing conclusions over the NCAA's amateurism defense as the justification for its various rules and regulations.

III. THE ROLE OF *JENKINS* IN SOFTENING "NO-PAY" RULES

After years of litigation, student-athletes are largely in the same position, with the Ninth Circuit's rejection of a less restrictive alternative in *O'Bannon* acknowledging the "limited scope of the decision we have reached and the remedy we have approved."[65] So far, the *Jenkins* case has not changed that balance. Although the court in *Jenkins* encouraged schools to offer student-athletes additional non-cash educational-related benefits such as computers, post-eligibility scholarships, tutoring, expenses related to study-abroad programs, etc., the court permitted the NCAA to restrict unlimited cash payments to student-athletes.

Ultimately, if *Jenkins* plays out similarly to *O'Bannon*, the Ninth Circuit will continue to permit the NCAA to restrict professional-style cash payments to student-athletes, but uphold the district court's findings related to amateurism. Although there remains distinct views about the NCAA's amateurism defense in the circuit courts, a *Jenkins* decision from the Ninth Circuit similar to *O'Bannon* is unlikely to lead to an additional circuit split, and the Ninth Circuit itself cast doubt on whether a split exists because it views the other circuits' statements on "amateurism" as dicta. If the Supreme Court did take this opportunity to resolve the controversy, the court could definitively address whether the applicable market is commercial and, if so, whether amateurism is a reasonable justification for the NCAA's restraints on trade. Regardless, the *O'Bannon* and *Jenkins* cases (if *Jenkins* stands) have

[61] *Bassett v. NCAA*, 528 F.3d 426, 430, 433 (6th Cir. 2008) (holding that the NCAA's rules against giving recruits improper inducements were not commercial).

[62] *O'Bannon*, 802 F.3d at 1049.

[63] *See id.*

[64] The NCAA has been citing this case for decades to defend its amateurism rules.

[65] *O'Bannon*, 802 F.3d at 1079.

	increased ways that colleges can compensate student-athletes for their services. * * * * * * * * *

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