Jeremy Bloom v. National Collegiate Athletic Association and the University of Colorado: All Sports Are Created Equal; Some Are Just More Equal than Others

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Participants in this Symposium have made some unflattering comparisons between the National Collegiate Athletic Association (NCAA) and fallen communist regimes. Unfortunately, the NCAA does not fare much better when one considers the facts of Bloom v. NCAA, a 2004 case against the NCAA that exposed certain archaic and stagnant attitudes that serve to marginalize individual sports under the guise of equity with respect to eligibility and amateurism at the collegiate level. This essay will explore the Bloom decision in light of the NCAA’s concept of amateurism and treatment of dual-sport athletes. First, I will start by discussing the meaning of amateurism.

I. THE AMATEURISM CONCEPT

In sports, an amateur is an individual who engages in athletic competition without material reward. Upper-class Englishmen in the nineteenth century used the concept to help define their social status, using it to describe anyone who competed in athletics without pay. By the beginning of the twentieth century, leaders of two major sports (B.A.) and the College of William and Mary (M.A.) with degrees in English. In 1996, she graduated magna cum laude from Syracuse University College of Law. Ms. Levine is also on the advisory council for the American Arbitration Association.

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1 A Web cast of the Law, Technology, and the Arts Symposium at Case Western Reserve School of Law can be viewed at http://law.case.edu/centers/lta/webcast.asp?dt=20051111.


721
movements, the American Intercollegiate System and the Olympic Games, had adopted the concept of amateurism, claiming that it developed competitors who were "morally superior" to professional athletes: if you did not receive pay for your participation in sports, then you were morally superior to those athletes who did.

In the early 1900s, the concept of amateurism was so important that strict rules regarding it were in place for Olympic athletes. Under these rules, athletes who received prize money for athletic competition, who were sports instructors, or who had previously competed against professionals were not considered "amateurs" and were, therefore, not allowed to compete in the Olympics. In a well-known incident, Olympic officials stripped Jim Thorpe of two gold medals that he had won at the 1912 games because it came to light that he had once accepted money to play semiprofessional baseball.3

In 1974, after communist block nations had been subsidizing their athletes for decades, the Olympics ceded to athletes the right to compensation. Shortly thereafter, the Olympics permitted professionals in sports whose governing bodies did not object to their participation, as evidenced by the posthumous return of Jim Thorpe's medals in 1982. Amateurism by the 1990s was a concept of diminished importance and one of more technical rather than moral distinction, that is, except for the NCAA, as is apparent in the Bloom case.4

Today, the key to amateur sports is the question of eligibility, which is a decision of whether a particular athlete or a particular team can participate in any given sporting event or in a given league. Establishing eligibility under a particular rule or a bylaw is the province of the applicable governing association. Eligibility rules cover all possible requirements and permutations regarding potential athletes, and these can include the no pass/no play rules, no transfer rules, anti-marriage rules, summer camp rules, no agent rules, and rules regarding red-shirting.5

The eligibility debate in the Bloom case concerned an individual versus a team athlete, commercialism in the form of salaries and signing bonuses versus endorsements, and the artificial construct of ama-

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4 Bloom, 93 P.3d 621
teur status as fashioned by the collegiate governing body, the NCAA. The NCAA, a voluntary unincorporated association, regulates inter-collegiate amateur athletics of its more than 1,200 member colleges and universities. The NCAA was established in 1906, originally known as the Intercollegiate Athletic Association of the United States, before becoming the NCAA as we know it today some four years later.

The NCAA was originally created around the turn-of-the-century in response to increasing concerns over the safety of football. At that time, football players did not use safety gear or safety equipment. The 1905 football season, just prior to the formation of the NCAA, saw 18 deaths and 149 serious injuries to collegiate football players.

NCAA rules are established by representatives of member institutions (that is, colleges and universities), and these rules are generally formed at the NCAA’s annual convention. All NCAA legislation must be voted on and adopted by a vote of all the active members. As a condition of membership, each institution is obligated to apply and enforce all the NCAA legislation as related to its own athletic programs.

Among other functions, the NCAA maintains, applies, and enforces the rules of eligibility and the standards of amateurism in connection with student participation in intercollegiate athletic events. The United States Supreme Court has recognized that the NCAA is “the guardian of an important American tradition,” namely, amateurism in intercollegiate sports.

The NCAA first addressed the issue of amateurism in its 1906 constitution shortly after the association’s formation, making student eligibility to participate in intercollegiate sports contingent on the student-athlete not having accepted at any time, or received at any time, money or other consideration for his or her athletic endeavors. By 1916, the NCAA specifically defined amateurism in its bylaws, stating that an amateur athlete is one who participates in competitive, physical sports only for the pleasure and for the physical, mental, moral, and social benefits derived therefrom. The NCAA’s current Principle of Amateurism states:

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6 Bloom, 93 P.3d at 622.
Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.\textsuperscript{10}

This principle of amateurism is reflected in the NCAA’s statement of its basic purpose, which, according to the NCAA constitution, is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports.”\textsuperscript{11}

Article 12 of the NCAA Bylaws governs student-athlete eligibility with respect to amateurism.\textsuperscript{12} One of its bylaws states, in part, that “only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”\textsuperscript{13} Bylaw 12 also establishes the numerous ways in which a student-athlete can lose his or her eligibility, and the bylaw describes prohibited forms of payment to student-athletes.\textsuperscript{14} Among these is a prohibition in certain circumstances against student-athletes’ granting the use of their names or likenesses in connection with commercial products, even if the student-athlete is not compensated for this use and even if the offense occurred prior to the student-athlete’s collegiate enrollment.\textsuperscript{15} There is a carve-out for certain pre-enrollment offenses, provided that certain criteria established by the NCAA are met.\textsuperscript{16}

Article 14 of the NCAA bylaws also addresses amateurism, stating that

\textit{[a] student-athlete shall not be eligible for participation in an intercollegiate sport if the individual takes or has taken pay, or has accepted the promise of pay in any form, for participation in that sport, or if the individual has violated any of the other regulations related to amateurism set forth in Bylaw 12.}\textsuperscript{17}

\textsuperscript{10} NCAA CONST. art. 2, § 9, reprinted in NCAA MANUAL, supra note 5.
\textsuperscript{11} NCAA CONST. art. 1, § 3.1, reprinted in NCAA MANUAL, supra note 5.
\textsuperscript{12} NCAA BYLAWS art. 12, reprinted in NCAA MANUAL, supra note 5.
\textsuperscript{13} \textit{Id.} § 12.1.1.
\textsuperscript{14} \textit{Id.} art. 12.
\textsuperscript{15} \textit{See id.} §§ 12.5.1.3, 12.5.2.1.
\textsuperscript{16} \textit{Id.} § 12.1.1.4.1.
\textsuperscript{17} \textit{Id.} § 14.1.3.1.
These two articles of the NCAA Bylaws, articles 12 and 14, operate to prohibit a student-athlete from receiving pay for skill in his or her collegiate sport, as both articles have sections that refer to losing eligibility in an intercollegiate sport, if that student-athlete also uses his skills for pay in that sport. If the collegiate sport and the sport for which pay is received are the same, then eligibility will be lost.

The amateurism rules regarding dual-sport athletes were modified at the 1974 NCAA convention. Juxtaposed with the eligibility requirements already discussed, since 1974, the NCAA has allowed student-athletes to compete as professionals in one sport while retaining their amateur status in another sport. They will allow this provided that the student-athlete does not receive financial assistance from the member institution. This 1974 rule change is what enabled Drew Henson to play football for the University of Michigan while receiving a two million dollar signing bonus from the New York Yankees, and Chris Weinke to accept a four hundred-thousand dollar signing bonus from the Toronto Blue Jays just prior to winning the Heisman Trophy as quarterback at Florida State University.\(^8\)

To compete on the collegiate level while attending a school that is a member of the NCAA, a student-athlete must agree to abide by all of the NCAA rules and regulations. Under article 14, however, the NCAA has discretion to provide a waiver exempting individuals from the application of a specific NCAA regulation.\(^9\) It was such a waiver from the NCAA that Jeremy Bloom sought.

II. ELIGIBILITY OF THE DUAL-SPORT/INDIVIDUAL-SPORT ATHLETE: THE CASE OF JEREMY BLOOM

At the age of fifteen, Jeremy Bloom was the nation’s best freestyle mogul skier in his age group and the youngest member named to the U.S. freestyle ski team. Jeremy Bloom was a member of his state champion high school football team, a track star, a skiing star, and a distinguished student with a 3.4 G.P.A. Bloom was awarded a scholarship to play football for the University of Colorado in 2001; however, he deferred his admission to Colorado to train for the 2002 Winter Olympics, in which he placed ninth. Later that season, he became the youngest World Cup freestyle moguls champion in history.

Skiers like Jeremy Bloom earn very little prize money. Instead, they generally rely on endorsements from corporate sponsors to fi-

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\(^9\) NCAA BYLAWS art. 14, reprinted in NCAA MANUAL, supra note 5.
nance the high cost of travel and training that comes with elite-level competition. Jeremy Bloom was no different, as he had a six-figure endorsement income from Oakley, Under Armour, and other companies to help pay for his coaching and training so that he could continue to compete at the highest levels. Jeremy Bloom also had an exclusive modeling contract with Tommy Hilfiger. He had appeared in segments on television shows on MTV and on other shows, such as *Extra* and *Access Hollywood*, and he was offered a hosting position on Nickelodeon.²⁰

He also took advantage of an opportunity to play football at the University of Colorado but declined a scholarship. Bloom played two seasons of football at Colorado as a kick returner and a wide receiver, and he was named a first-team freshman All-American. At the end of each football season, Bloom would rejoin the World Cup circuit. Bloom, however, was concerned that his endorsements and media activities might interfere with his eligibility to compete in collegiate football.

On Bloom's behalf, the University of Colorado first requested waivers from the NCAA, asking for a waiver of the rule restricting student-athlete endorsements and media activities and then for a favorable interpretation of the NCAA rule restricting media activities.²¹ The waiver request noted that mogul skiing (Bloom's other sport) was not a collegiate sport and that endorsements and sponsorships were the standard form of compensation in professional skiing, much like salaries and signing bonuses are the standard in baseball. Bloom also contended that the opportunities that were presented to him preexisted his status as a collegiate athlete; that is, he had these opportunities long before he ever set foot on the campus of the University of Colorado.

The University of Colorado filed its initial waiver request in February 2002. The NCAA denied the waiver. Bloom then brought suit against the NCAA seeking an injunction that would allow him to play football for the University of Colorado while continuing to accept his skiing sponsorship money to support his professional skiing career, the pursuit of which the NCAA rules permitted.²²

In his complaint, Bloom alleged, among other arguments, that he was a third-party beneficiary to the contract between the NCAA and its member institutions, in his case the University of Colorado, and as such he was entitled to enforce the NCAA bylaws permitting him to

²⁰ See Gouveia, *supra* note 18, at 22.
²² *Id.*
engage in and receive compensation for a professional sport that was different than his amateur sport. Bloom also argued that, as applied to the facts of his case, the NCAA restrictions on endorsements and media appearances were arbitrary and capricious.

The trial court determined that Bloom was, indeed, a third-party beneficiary of the agreement between the NCAA and the University of Colorado. The trial court also determined that Bloom truly was an amateur in the sport of football. In spite of these determinations, however, the trial court held that Bloom was not entitled to injunctive relief because he could not satisfy all the factors required for an injunction, including showing a reasonable probability of success on the merits. Bloom appealed the trial court’s decision.

The appellate court found that because each student-athlete’s eligibility to compete is determined by the NCAA, Bloom had standing to contest the meaning or applicability of NCAA eligibility restrictions. Bloom did not, however, have a constitutional right to engage in amateur intercollegiate athletics at the University of Colorado. With respect to Bloom’s claim of arbitrary and capricious acts by the NCAA, courts are generally reluctant to intervene, except on the most limited grounds, in the internal affairs of voluntary associations, such as the NCAA. Despite this reluctance, the appellate court noted that relief from our judicial system should be available, if voluntary athletic associations act arbitrarily and capriciously toward student-athletes.

The question then became, was the NCAA arbitrary and capricious in its handling of Bloom’s situation? To answer this question, the appellate court turned to the NCAA bylaws. Bloom relied on the bylaw allowing an athlete who is a professional in one sport to represent a member institution in a different sport. Bloom asserted that “because a professional is one who ‘gets paid’ for a sport, a student-athlete is entitled to earn whatever income is customary for his or her professional sport, which, in the case of professional skiers, primarily comes from endorsements and paid media opportunities.” The appellate court recognized that, like many others in individual professional

23 Id.
24 Id.
25 Id. at 623.
26 Id.
27 Id. at 623.
28 Id. at 624.
29 Id.
30 Id.
31 Id.
32 Id. at 625.
sports such as golf and tennis, professional skiers do, in fact, obtain much of their income from sponsors. The court continued, however, that "none of the NCAA's bylaws mentions, much less explicitly establishes, a right to receive a 'customary income' for a sport." The appellate court also highlighted that the NCAA bylaws prohibit every student-athlete from receiving advertisement and endorsement money.

The NCAA bylaws express a clear and unambiguous intent to prohibit student-athletes from engaging in endorsements and paid media activities without regard to when the opportunity for such activities originated, without regard to whether the opportunity arose or exists for reasons unrelated to participation in the amateur collegiate sport, and without regard to whether the income derived from the opportunity is customary for any particular professional sport. Although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activities and to maintain their eligibility to participate in amateur competition.

According to the court, this application of the endorsement and media appearance rules, in Bloom's case, was "rationally related to the [NCAA's] legitimate purpose of retaining the 'clear line of demarcation between intercollegiate athletics and professional sports.'" Under these circumstances, the appellate court found the trial court did not abuse its discretion in failing to fault the NCAA for refusing to permit Bloom to pursue any television or film opportunities that came his way while he was a student-athlete. The court concluded that it was not convinced that the NCAA treated Jeremy Bloom unfairly in the manner in which it denied the request to waive or to interpret its rules and, accordingly, the appellate court affirmed the trial court's order.

On August 17, 2004, about a month after the appellate decision was released, the NCAA issued a press release in which it announced that its student-athlete reinstatement staff had determined that Jeremy Bloom had "rendered himself permanently ineligible for intercollegiate athletics with multiple and willful violations of NCAA rules

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33 Id.
34 Id.
35 Id.
36 Id. at 626.
37 Id.
38 Id. (citing NCAA CONST. art. 1, § 1.3, cl. 1).
39 Id. at 627.
40 Id. at 628.
Bloom currently is the reigning World Cup Champion in moguls freestyle skiing and competed for the U.S Olympic team at the Turin games in February 2006.

Immediately after competing in the freestyle moguls in Turin, Bloom traveled directly to Indianapolis to attend the NFL combine held the week after the winter games end in hopes of landing a job as a punt returner and receiver. Toward this end, Jeremy Bloom recently signed an agent "to get some of that politicking taken care of [for him]." Bloom's real offense, and what ultimately ended a promising collegiate football career, was the fact that he excelled in a nontraditional sport in addition to his collegiate sport. If Bloom had been a dual-sport athlete in any other traditional team sport, in which athletes are paid a salary for their participation, his continued collegiate participation would have been a nonissue. Similarly, if he had been able to receive a traditional salary for skiing, he likely would have been permitted to continue skiing professionally while retaining his collegiate eligibility to play football. Unfortunately for Bloom, his professional sport was an individual sport with no feasible income source save his sponsors' endorsement money.

III. CONCLUSION

The NCAA decided that for Bloom to maintain his eligibility for college football, he had to give up those endorsements and other contracts that he had received through his reputation as a professional skier. Doing this would have undoubtedly harmed his skiing career, as his training would have suffered for lack of funds. The NCAA could have provided Bloom with a waiver. Under article 12, a student-athlete can not receive payments for athletic skill in their collegiate sport. Under this rule, Bloom does not violate the NCAA By-laws by receiving money for skiing while playing collegiate football.

The NCAA's amateurism rules are inconsistent with other eligibility rules, which allow professional athletes to compete as student-athletes, provided their professional and amateur sports are not the same. The blanket ban on endorsement money ignores the reality of many individual sports and many individual athletes in that they will not have a team to pay them a salary, they will not receive a signing
bonus, and they must rely on sponsorship dollars to compete in their sport. This includes standouts in skateboarding, snowboarding, motorcross, and other individual sports. These athletes, as soon as they receive a sponsor’s money to help defray training and competition expenses, are effectively precluded from being dual-sport athletes in the eyes of the NCAA.

The current NCAA rules and their application prohibit compensation because of athletic ability in general instead of more narrowly circumscribing activities related to the student-athlete’s collegiate sport. These nonmainstream individual sport athletes will do no more to undermine the stated goals and the purposes of the NCAA and its amateurism principles than would any dual-sport athlete who gets paid for his for services by the NFL or under the auspices of Major League Baseball; however, the short-sighted application of the NCAA rules by the NCAA, and its refusal to bend serve to marginalize dual-sport student-athletes, who participate in individual sports.