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# MONEY AND SPORTS: ECONOMIC REALITIES OF BEING AN ATHLETE

*Darren A. Heitner, Esq.\**

## INTRODUCTION

College athletics is a billion dollar industry.<sup>1</sup> In particular, major men's sports such as college football and basketball have "become more than an extracurricular activity . . . [they have become] a global business."<sup>2</sup> This "global business" has created billions of dollars for stakeholders such as the National Collegiate Athletic Association (the "NCAA" or "Association"), the hundreds of schools and universities throughout the nation that make up the NCAA, television networks and sponsors. This billion-dollar business, however, is built on the backs of amateur athletes who are prohibited from profiting from the sweat-equity they put into college athletics.<sup>3</sup> Thus, under the current NCAA rules, the intercollegiate athletes are the only stakeholders not benefitting from their relationship with the NCAA.

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1. See *Time for Professional Student Athletes?*, THE ECONOMIST (Apr. 4, 2011), [http://www.economist.com/blogs/freeexchange/2011/04/sports\\_and\\_games](http://www.economist.com/blogs/freeexchange/2011/04/sports_and_games). See also Jodi Upton, Steve Berkowitz and Jack Gillum, *Big-Time College Athletics: Are They Worth the Big-Time Costs?*, USA TODAY (Jan. 15, 2010), [http://www.usatoday.com/sports/college/2010-01-13-ncaa-athletics-subsidies\\_N.htm](http://www.usatoday.com/sports/college/2010-01-13-ncaa-athletics-subsidies_N.htm).

2. KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, THE BUSINESS OF SPORTS AGENTS 172 (2d ed. 2008)

3. See 2010–2011 NCAA DIV. I MANUAL § 12 (2010) [hereinafter NCAA MANUAL].

## HISTORY OF NCAA

*Founding and Purpose*

The NCAA was initially founded in response to mounting safety concerns over college football.<sup>4</sup> As rules governing college athletes became more standardized and safety concerns were alleviated, the governing body evolved into an institution predicated on adhering to the principles of amateurism.<sup>5</sup> Under these notions, an amateur athlete must compete for the physical, mental, and social benefits of a sport and must reject any commercial aspects.<sup>6</sup> To maintain his or her amateur status, a student-athlete participating in NCAA sanctioned events cannot receive anything other than the pre-approved compensation, either directly from the university or from a third-party (governed by Article 12 of NCAA Bylaws).<sup>7</sup> If a student-athlete violates this rule, both the student-athlete and member school may be disciplined. The NCAA levies discipline to guard the amateurism ideal.<sup>8</sup>

*Change in role over time**Role of Knight Commission*

The Knight Commission on Intercollegiate Athletics was formed by the John S. and James L. Knight Foundation in October 1989.<sup>9</sup> The Commission was formed in response to more than a decade of highly visible scandals in college sports. The Commission's initial goal was to recommend a reformed agenda that emphasized academic values in

4. See Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1389, 1398 (2010).

5. History, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Nov. 8, 2010), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history>

6. "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." NCAA MANUAL, *supra* note 3, § 2.9

7. See generally *id.* § 12.1.2 (discussing amateur status).

8. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Anti-trust Recidivist?* 86 *OR. L. REV.* 329, 349 (2007) (discussing *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992) ("[T]he regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students.")).

9. About The Knight Commission, Knight Commission, [http://knightcommission.org/index.php?option=com\\_content&view=article&id=2&Itemid=74](http://knightcommission.org/index.php?option=com_content&view=article&id=2&Itemid=74), (last visited February 12, 2012).

an arena where commercialization of college sports often overshadowed the underlying goals of higher education.<sup>10</sup>

The most recent Knight Commission report addressed the “never-ending pressure to increase spending on intercollegiate athletics.”<sup>11</sup> The commission put forth three suggestions that it hoped the NCAA would adopt in order to restore the balance between athletics and education. First, it suggested greater transparency, including better measures to compare athletics spending to academic spending.<sup>12</sup> Second, it suggested rewarding practices that make academic values a priority by strengthening eligibility standards and distributing revenues according to educational values.<sup>13</sup> Finally, the commission suggested that schools begin treating college athletes as students first and foremost—not as professionals.<sup>14</sup>

### *NCAA Rules Reform Package*

On the back of the Knight Commission’s report, NCAA president Mark Emmert pushed through a package of rules reforms to intercollegiate athletics. These measures were adopted as emergency legislation following a presidential summit in August 2011.<sup>15</sup> The first measure would allow conferences to vote to add \$2,000 in “full cost-of-attendance” money to scholarship offers. The second allowed individual schools to choose to award multiyear scholarships. These scholarships would replace the current year-to-year scholarships and would not be able to be withdrawn based on athletic performance.

As of December 2011, more than 125 schools objected to this reform package. In January of 2012, the NCAA delayed implementation of a \$2,000 expense allowance<sup>16</sup> The suspension of the \$2,000 stipend means recruits signed in February and April will not get the stipend. However, a number of schools—including four in the ACC—already included the stipends in the financial aid offered to the men’s

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10. *Id.*

11. Knight Commission On Intercollegiate Athletics, *Restoring the Balance: Dollars, values, and the Future of College Sports* 19 (2010).

12. *Id.* at 11.

13. *Id.* at 14.

14. *Id.* at 16.

15. Associated Press, *NCAA panel approves major changes*, ESPN (October 27, 2011, 11:03 PM), [http://espn.go.com/college-sports/story/\\_id/7156548/ncaa-panel-approves-major-scholarship-rules-changes](http://espn.go.com/college-sports/story/_id/7156548/ncaa-panel-approves-major-scholarship-rules-changes).

16. Associated Press, *NCAA asks for new stipend proposal*, ESPN (January 15, 2012, 12:14 AM), [http://espn.go.com/college-sports/story/\\_id/7461930/ncaa-asks-new-proposal-2000-stipend](http://espn.go.com/college-sports/story/_id/7461930/ncaa-asks-new-proposal-2000-stipend).

basketball recruits signed during the November signing period.<sup>17</sup> The proposal could be in trouble, mostly because most schools object to the plan's impact on already tight athletic department budgets. The University of North Carolina, for instance, provides full-scholarships to roughly 400 student-athletes, which would equate to an \$800,000 impact under the terms of the proposal.<sup>18</sup> On February 13, 2012, the multiyear scholarships legislation narrowly survived an override vote (62.12 % voted to override, but 62.5% was needed).

## TITLE IX

One big obstacle to the prospect of paying student athletes is Title IX. The law has its genesis in the 1965 Executive Order 11246 prohibiting federal contractors from discrimination in employment on the basis of race, color, religion, or national origin.<sup>19</sup> This order was later amended to include sex. In 1970 Rep. Edith Green (D-Ohio) drafted legislation that prohibited sex discrimination in education and held the first congressional hearings on education and employment of women.<sup>20</sup> These hearings were the first legislative steps towards the enactment of Title IX. The legislation was initially introduced as an amendment to Title VII of the 1964 Civil Rights Act, but eventually wound up as a separate and new title.<sup>21</sup>

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>22</sup>

The legislation covers all education activities and applies to an entire school or institution if any part of that school receives federal funds; hence athletic programs are subject to Title IX, even though there is very little direct federal funding of school sports.<sup>23</sup> With respect to athletic programs the Department of Education evaluates a large list of factors in order to determine whether equal treatment exists.<sup>24</sup> These factors include whether the selection of sports and

17. Steven Yanda, *NCAA deciding whether to give stipends to student-athletes*, Washington Post (February 21, 2012), [http://www.washingtonpost.com/sports/colleges/ncaa-deciding-whether-to-give-stipends-to-student-athletes/2012/02/21/gIQAfTqASR\\_story.html](http://www.washingtonpost.com/sports/colleges/ncaa-deciding-whether-to-give-stipends-to-student-athletes/2012/02/21/gIQAfTqASR_story.html).

18. *Id.*

19. IramValentin, *Title IX: A Brief History*, Women's Equity Resource Center (August 1997) <http://www2.edc.org/WomensEquity/pdffiles/t9digest>.

20. *Id.* at 2.

21. *Id.*

22. 20 U.S.C. §1681(a).

23. 34 C.F.R. §106.2

24. 34 C.F.R. §106.41(c)(1)-(10)

levels of competition effectively accommodate the interests and abilities of members of both sexes, scheduling of game and practice times, locker room facilities travel and per diem allowances, publicity, etc. In 1979, the Department of Health, Education, and Welfare issued its policy interpretation on Title IX and intercollegiate Athletics.<sup>25</sup> The policy interpretation explains the regulation and provides a framework within which such complaints could be resolved, and provides for a three-prong test of compliance. A recipient of federal funds can demonstrate compliance with Title IX by meeting any one of the three prongs.

1. Whether opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.<sup>26</sup>
2. Whether the institution can show a history and continuing practice of program expansion, which is responsive to the interests and abilities of the members of the underrepresented sex.<sup>27</sup>
3. Whether it can be demonstrated that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.<sup>28</sup>

In 1984, Title IX would change again following the Supreme Court's ruling in *Grove City College v. Bell* wherein the court held that Title IX applied only to those programs receiving direct financial aid.<sup>29</sup> Grove City College was a small private, liberal arts college that accepted no direct assistance, but did enroll students who received federal grants used for education purposes.<sup>30</sup> Because the college accepted students who received financial aid, the Department of Education concluded that Grove City was a recipient of federal financial assistance and thus needed to comply with Title IX.<sup>31</sup>

The Supreme Court affirmed the lower court's ruling that Grove City had to comply with Title IX, stating that the distinction between direct federal assistance and indirect aid was not one that was supported in the text of the United States Code.<sup>32</sup> The court concluded that the receipt of Basic Education Opportunity Grants (BEOGs) by some of Grove City's students does not trigger institution-wide cover-

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25. Dept. of Health, Education, & Welfare, *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 239 (45 C.F.R. pt. 26).

26. *Id.* at 10.

27. *Id.* at 10.

28. *Id.* at 10.

29. *Grove City College v. Bell*, 465 U.S. 555 (1984).

30. *Id.* at 558.

31. *Id.* at 560.

32. 20 U.S.C.A. § 1681

age under Title IX.<sup>33</sup> However, BEOGs represent federal financial assistance to the college's own financial aid program, and it is that program that may properly be regulated under Title IX.<sup>34</sup> Thus, only the financial aid program and not any other program, such as athletics, needed to comply with Title IX.

In Response to *Grove City*, Congress passed the Civil Rights Restoration Act in 1988. This Act restores Title IX to affecting every educational institution's programs if the institution receives any federal assistance, whether direct or indirect.<sup>35</sup> Title IX is a significant roadblock to paying student athletes, because the money (legally) could not be channeled to the sexes differentially. Essentially, "there's no viable end-around Title IX to allow schools to pay only those athletes who are in profitable sports, which generally are football and men's basketball."<sup>36</sup> Title IX case law is so significant that pay-for-play might not be a workable concept (this assumes, of course, that non-profitable teams—which comprise the majority of NCAA programs—are unable to compensate all of their student athletes equally.)

#### METHODS OF PAYING ATHLETES

##### *Olympic/Free-Market Model*

Many suggest that, instead of allowing schools to give stipends to players under the watchful eye of the NCAA, student athletes should be free to make as much money as they can on their own. This would, obviously, throw the NCAA rulebook out the window. Rules about playing for the physical, social, and mental benefits of sport<sup>37</sup> would be pointless, since athletes would be looking for the schools and programs that could guarantee them the most cash (It wouldn't "throw the NCAA rulebook out of the window" if the athletes' prerogative to earn their livelihood were itself codified in the rulebook. If the NCAA were to overhaul the system, which is obviously a precondition to a pay-for-play system, the athletes would be acting within proper bounds.). This sort of plan could also threaten the (empty) notion of competitive balance.

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33. *Grove City*, at 573.

34. *Id.* at 574.

35. PL 100-259, 1988 S 557

36. [http://espn.go.com/college-sports/story/\\_id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics](http://espn.go.com/college-sports/story/_id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics)

37. NCAA MANUAL, *supra* note 3, § 2.9

*SI Model*

In November 2011, *Sports Illustrated* offered up its own plan to not only pay student athletes, but also to save athletic departments' money.<sup>38</sup> The "SI Model" advocates many large sweeping changes to athletic departments, including: limiting the number of scholarships, eliminating sports that do not generate revenue, and eliminating the NCAA rule on the minimum number of teams an institution must have to be in Division I.

Football teams take up hundreds of scholarships accounting for millions of dollars in spending for athletic departments. If rosters were capped at 90 players and the number of scholarships available reduced from 85 to 63 universities could save millions.<sup>39</sup> Another way to save athletic departments' money, and thus free up money with which to pay student athletes, is to eliminate (or convert to club status) sports that do not make money. At most schools this would mean all sports but football and men's basketball. This, however, would probably be in violation of Title IX. There are a number of other negatives to this approach. First, while it may save athletic departments money it does not really give us a way in which student-athletes can receive compensation for their performance on the field. Additionally, it would mean the end of many men's athletic programs. It may not have quite as large of an effect on women's sports simply because many women's sports would need to be retained in order to ensure Title IX compliance.

## THE PROPOSAL

The pay-for-play proposal is further complicated by the fact that very few athletic departments turn a profit, meaning there is not a lot of cash available to pay athletes. SI's model advocates the elimination of sports that do not turn a profit. This would, essentially, eliminate all men's sports other than football and basketball. Women's sports will have to be kept in order to maintain balance of funding distributed to male and female athletes. Many athletic departments would wind up with two men's sports and 4 or 5 women's sports. A plan that eliminates opportunities for college athletes is not necessarily something that is desirable. The most logical, albeit most difficult, way to enable student-athletes to receive payment for playing is for the athletic department to be fully funded by donations. This would likely be impos-

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38. George Dohrman, *Pay for play*, *Sports Illustrated* (November 7, 2011) <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1191778/index.htm>.

39. *Id.*

sible. Even schools with “sugar daddy” boosters, like Phil Knight at Oregon, would be hard pressed to cover the entire operating budget for the athletic department with donations (plus salaries).

EFFECT ON THE NCAA AND MEMBER INSTITUTIONS:  
TAX IMPLICATIONS

A plan to pay student athletes could have a detrimental effect on the NCAA and, eventually, its members. For starters, the balance of power would shift dramatically. Suddenly, without the ability to regulate players receiving extra benefits, boosters and schools would have more power than the NCAA. It would, essentially, be a case of the inmates running the asylum. There are other considerations as well.

The NCAA is a nonprofit organization, which is exempt from federal income tax by section 501(c)(3) of the federal tax code. University athletic departments are exempt under the same section of the tax code because they “foster national . . . amateur sports competition.”<sup>40</sup> American universities are nonprofits and are thus exempt from taxes on any income derived from their “charitable mission.” Why the privileged status? Universities avoid taxation on income from athletics because athletics are considered part of the educational experience given to students. THE INTERNAL REVENUE SERVICE HAS TAKEN THE POSITION THAT COLLEGE ATHLETICS ARE “SUBSTANTIALLY RELATED” TO EDUCATION (HENCE, PRESENT EXPO6. GEOFFREY RAPP - THE BRAIN OF THE COLLEGE ATHLETESURE TO UNRELATED BUSINESS INCOME TAX IS MINIMAL).<sup>41</sup> But if schools were to pay student-athletes, it would compromise their tax exemption because the money paid would not be considered part of the education experience (it would be considered an unrelated business, subject to corporate tax).

Additionally, if the IRS and statutory regime remain unchanged, and schools begin paying their athletes, these athletes would likely be considered “employees.” As a result, athletic departments would have to pay social security taxes, Medicare, federal and state unemployment tax, and worker’s compensation insurance on all of their new student-athlete employees.<sup>42</sup> While that would certainly cost ath-

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40. “Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition. . .” 26 U.S.C.A. § 501(c)(3)

41. <http://www.organizationalconsultinggroup.com/blog/bid/49601/Paying-College-Athletes-A-Letter-to-the-Editor-of-The-New-York-Times-Magazine>

42. Kristi Dosh, *Why college athletes will never be paid*, *The Business of College Sports* (August 10, 2011) <http://businessofcollegesports.com/2011/08/10/why-college-athletes-will-never-be-paid/>.

letic departments money, the real cost would come from the athletic departments losing their tax-exempt status. It would seem to follow that by paying student athletes, they would no longer be viewed as amateurs and thus the “foster[ing]. . . amateur sports competition” exemption would disappear. In addition to the taxes each athletic department would have to pay on any income, they would likely lose large amounts of revenue as a result of donors no longer being able to make tax-deductible contributions.<sup>43</sup>

If the member institutions lose their tax-exempt status, it is not hard to see the NCAA quickly losing its status as well. The NCAA asserts that its non-profit status is warranted because it is a higher education association. It does not claim to be exempt under the “foster[ing]. . . amateur sports” provision. In 2007, the House Ways and Means Committee called on the NCAA to justify its tax-exempt status.<sup>44</sup> In response, the NCAA asserted that its tax-exempt status should not be linked to the amount of revenue it generates, but rather to how the revenue is spent. In the Association’s case, 96 percent of its revenue is returned to the membership through direct distributions, championships or other services.<sup>45</sup> However, if college athletes are no longer “student athletes” it is unlikely that the NCAA would be able to claim their higher education exemption.

#### CONCLUSION

Partly because of its problematic tax implications, a play-for-pay system is not likely to be instituted any time soon. Paying student-athletes would probably result in higher institutions losing their tax-exempt status with respect to athletics (which are currently considered part of their educational mission and are largely tax-insulated), in turn dismantling the tax-exemptions the NCAA enjoys. In other words, paying student athletes would lead Congress or the IRS to treat whatever programs are paying their athletes—e.g., men’s basketball and football—as unrelated business activities, subject to the UBIT – unrelated business income tax. In addition, pay-for-play could recast student-athletes as “employees,” which would simultaneously render

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43. “[T]he term “charitable contribution” means a contribution or gift to or for the use of a corporation, trust, or community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition.” 26 U.S.C.A. § 170(a)(1)

44. Steve Wieberg, *NCAA’s tax-exempt status questioned*, USA TODAY (October 4, 2006) [http://www.usatoday.com/sports/college/2006-10-04-ncaa-tax-status\\_x.htm](http://www.usatoday.com/sports/college/2006-10-04-ncaa-tax-status_x.htm).

45. *NCAA’s tax-exempt status*, National Collegiate Athletic Association <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Commercialism/NCAA+tax+exempt+status> (last visited February 16, 2012).

athletic programs the “employers,” and require they pay a variety of additional expenses. On another note, most athletic programs do not generate profits, but are instead subsidized by the parent institution (only the very best, biggest programs turn a profit—22 programs in 2010).<sup>46</sup> Paying their athletes would not be a viable plan for over 90% of athletic programs.

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46. <http://chronicle.com/article/22-Elite-College-Sports/127921/>