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Sporting Judgment

NCAA meets hurdles if it changes the system, pays student-athletes

By Timothy L. Epstein

Over the past 18 months, the NCAA has been the subject of a litany of scandals that have affected some of the most prestigious and successful college football programs in the country. The latest scandal involving the University of Miami, where a single booster allegedly provided thousands of impermissible benefits to at least 72 student athletes between 2002 and 2010, could be the most egregious case of rule violations the NCAA has ever seen. Before Miami, the headlines of the sports pages chronicled the scandals at Ohio State University, the University of North Carolina and the University of Southern California, all related to student-athletes' receipt of money or preferential treatment based on their status as athletes. If there is one lesson from this recent spate of scandals, it's that incidents such as these appear to be just as much a part of college football as the games themselves. The question then becomes: How can the NCAA prevent such violations?

The most radical approach to attacking the issue of student-athletes' receipt of impermissible benefits involves a pay-for-play scheme whereby schools would pay football and men's basketball players beyond what their scholarships provide. This approach reasons that payment of student-athletes would obviate the allure of the impermissible benefits offered by third parties such as agents and boosters. Proponents of a pay-for-play scheme cite the fact that scholarships do not cover the full cost of attendance for student-

athletes, many of whom are not able to meet the shortfall themselves and thus need to look for other sources of income. This argument is also grounded on fairness: Men's football and basketball players produce a significant amount of revenue for their schools, yet do not share in the windfall.

In addition to the fact that such a proposal would result in significant changes to the NCAA's own rules about amateurism, one of the foundational principles of the organization's mission, there are numerous legal issues, outside the realm of the NCAA's rules and by-laws, which are raised by the prospect of paying players.

Amateurism

The NCAA Division I Manual sets forth its "Principle of Amateurism," which states: "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." The theme of amateurism runs deeply throughout the NCAA's rules and by-laws. The "no pay" rules prevent the amateur athlete from using his or her athleticism for pay in any form in that sport, accepting a promise of future pay and receiving any form of financial assistance from anyone, with few exceptions. Once a current or prospective student-athlete crosses the line of demarcation between amateur and professional, there is no turning back.

It is axiomatic that a pay-for-play scheme is anathema to the concept of amateurism, and any move toward such an arrangement in collegiate sports would amount to an erosion of a fundamental tenet of the modern NCAA. However, proponents of paying student-athletes argue that the increased commercialization of men's basketball

and football has gradually eroded the concept of amateurism in these sports to the point that the difference between the collegiate and professional versions is merely a matter of semantics. In college football, coaches earn, on average, about \$1 million a year. In April 2010, the NCAA signed a 10-year, \$10.8 billion television contract for its annual men's basketball tournament. These figures are just two examples of how men's basketball and football are amateur sports in name only.

NCAA and antitrust

For obvious reasons, the NCAA has treated the issue of paying student-athletes beyond their scholarships as a non-starter. Thus, the most plausible avenue is to challenge the NCAA's amateurism rules on antitrust grounds. To date, courts have demonstrated great deference towards the NCAA's mission of maintaining amateurism in collegiate athletics and have routinely thwarted challenges to player restraints by focusing on the NCAA's alleged noncommercial and educational purposes. The case law has created a two-pronged antitrust approach to NCAA regulation. While joint economic action by NCAA members on matters not dealing with the regulation of players should be subjected to the rule of reason analysis under Section 1 of the Sherman Act, regulations governing player eligibility and amateurism might be exempt from or at least subject to less stringent antitrust scrutiny. Courts that have elected to apply antitrust principles to amateurism regulations have consistently deflected challenges to such regulations on the basis that the NCAA goals of integrating athletics and academics, as well as maintaining a clear line of demarcation between professional and amateur sports, are valid and lawful objectives, and such regulations reasonably further this goal.

The main criticism of antitrust doctrine regarding NCAA amateurism rules

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centers on the apparent inconsistency between the courts' approach and the economic realities of contemporary intercollegiate athletics. Commentators have suggested that deference to the NCAA's regulations on the basis that amateurism promotes educational ideals is misguided when considering the NCAA student-athletes are engaged in a decidedly commercial endeavor. Additionally, in showing deference to the NCAA's putative justifications for its amateurism regulations, courts have not required the NCAA to justify its rules with concrete proof that the regulatory scheme achieves this goal. If removing restrictions on student-athlete compensation would somehow detract from consumer interest in college sports, the NCAA would then be required to prove such a point under the rule of reason test applied in most antitrust cases.

Student-athletes as employees

In many ways, high-profile student-athletes already mirror employees. They produce a product that creates a profit for the institution, and are compensated through scholarship and education. However, paying student athletes would firmly establish an employer-employee relationship, which would expose schools to substantial risk and cost. Schools could be held vicariously liable for the actions of student-athletes under the doctrine of respondeat superior. Professional sports teams have been held liable for on-field actions of athletes, and while the scope of such liability is unclear, schools would face the same risks and a steep increase in insurance costs, at a minimum. See

Hackbart v. Cincinnati Bengals. 601 F.2d 516 (10th Cir. 1979). The employer-employee relationship would also subject schools to workers' compensation statutes, which would likewise increase insurance premiums for the school.

Federal tax exemptions

Perhaps the greatest obstacle to any scheme involving paying student-athletes is that such a change jeopardizes the NCAA's exemption as an Internal Revenue Code § 501(c)(3) organization. The NCAA qualifies for the nonprofit exemption because it purports to be organized and operated exclusively for educational purposes. In 2006, the U.S. House Ways and Means Committee investigated whether the NCAA misused its tax exempt status by virtue of its apparent profit-seeking activities, evidenced by high salaries for coaches, and the fact that the NCAA has its own marketing arm with a budget north of \$200 million. While the NCAA maintains its tax-exempt status, if the NCAA were to change its amateurism regulations to permit payment of student-athletes above and beyond scholarship aid, it is likely that the educational purpose of the NCAA would be further called into question.

Title IX compliance

With few exceptions, the vast majority of big-time programs in college football and men's basketball are public universities. As such, these schools must comply with the requirements of Title IX of the Civil Rights Act of 1964, which mandates publicly funded schools provided equal opportunities to both male and female student-athletes. For many schools,

athletic departments operate in the red and would not be able to support payments to athletes in all sports, thus violating Title IX if male student-athletes in revenue producing sports were paid, and female student-athletes in non-revenue sports were not.

Although the debate on the issue is unlikely to subside anytime soon, it is clear from the foregoing that any designs on paying student-athletes beyond their scholarships presents numerous legal questions for the NCAA, all of which point to the likelihood that the days of paid student-athletes are a long way off, if not altogether precluded.

The effect that paying student-athletes would have on the prevalence of amateurism violations at places like Miami and North Carolina is speculative at best. What is clear is that the potential remedial effects create additional legal questions in the area of antitrust, labor and tax law that make a controversial approach even more of a headache to the NCAA. As for alternative solutions, one possibility is for the NCAA to loosen its regulations regarding the benefits that student-athletes can receive from third parties who are not agents. Many of the legal issues raised in the foregoing would be eliminated, since the benefits would not be coming from NCAA member institutions, while providing student-athletes with an additional means of support beyond their scholarship aid. To be sure, if the NCAA chooses to sit on its hands and leave its system of amateurism regulation alone, it's only a matter of time before another scandal breaks.