

# Emerging Issues in Inter- Collegiate Athletics

Current Issues and  
Potential Future  
Developments

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# Topics to be Discussed

- I. The Numbers of the NCAA
- II. Power of the NCAA
- III. Player Safety
- IV. NCAA Student-Athlete Benefits
- V. Worker's Compensation Claims
- VI. Antitrust Claims
- VII. Athletics as a Fiefdom
- VIII. Future of College Athletics

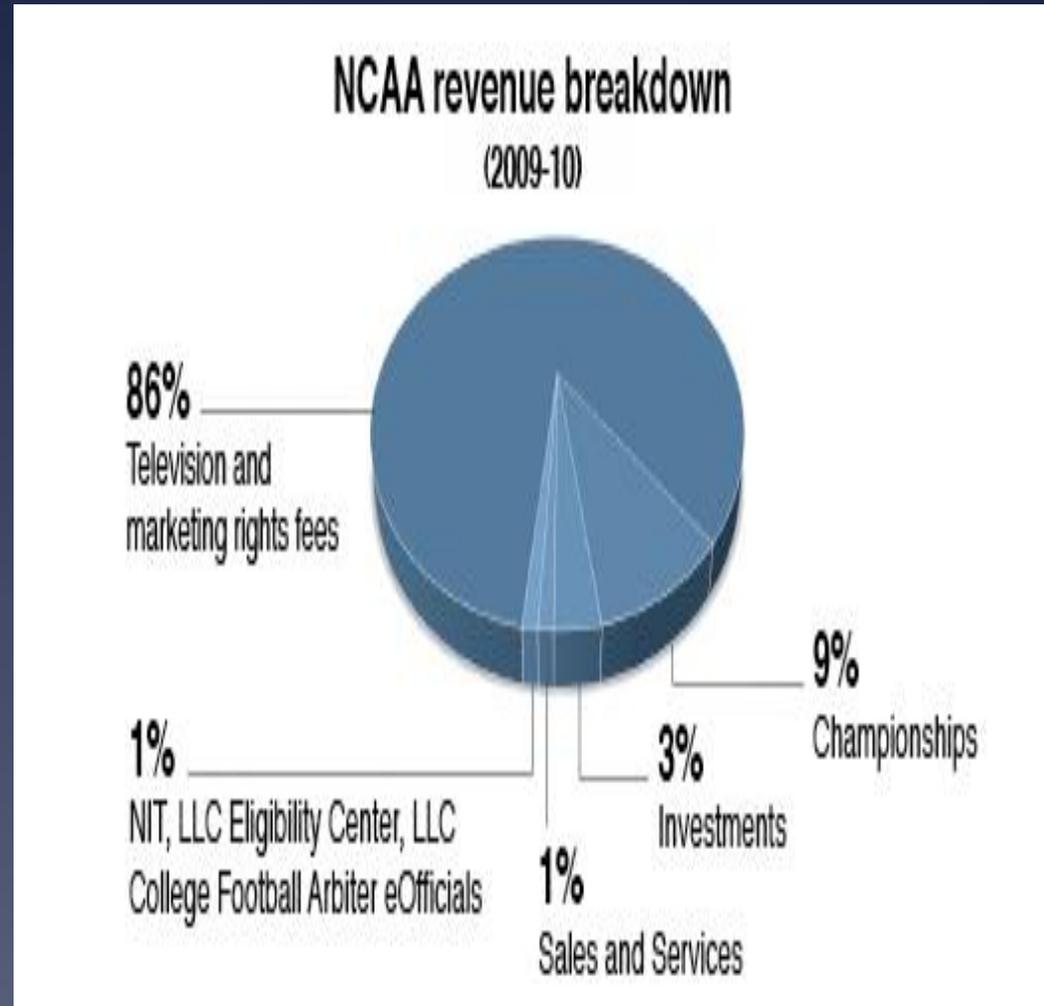
# I. The Numbers of the NCAA 2009-2010

A. NCAA revenue = \$749,800,000

1. 86% from television and marketing rights fees
2. 14% from championships (ticketing and merchandise sales)
3. About 96% goes to D-I membership

B. NCAA projects 2010-2011 revenue to be \$757,000,000

C. More than 400,000 athletes and 1,000 participating institutions



## II. Power of the NCAA

### ➤ *NCAA v. Tarkanian* (1988)

- NCAA Committee on Infractions found 38 violations by UNLV, including 10 involving basketball coach Jerry Tarkanian
- NCAA placed basketball team on 2-year probation
- In addition to probation, NCAA requested that UNLV suspend Tarkanian from UNLV's athletic program during the 2-year probation, or face sanctions
  - NCAA does NOT have the power to sanction member institutions' employees directly
  - But, it can sanction member institutions for failing to impose NCAA's recommended suspensions

## II. Power of the NCAA

### ➤ *NCAA v. Tarkanian*

- UNLV disagreed with NCAA's findings and did not believe Tarkanian should be punished
- UNLV President had 3 options:
  - 1) Refuse to suspend Tarkanian, and take the risk of NCAA imposing further sanctions on UNLV
  - 2) Recognize that UNLV has delegated power to the NCAA to act as final arbiter, and suspend Tarkanian
  - 3) Pull out of NCAA on the grounds that UNLV refuses to impose what it views as unjust judgments
- UNLV chose option #2

## II. Power of the NCAA

### ➤ *NCAA v. Tarkanian*

- Tarkanian sued UNLV claiming that his right to due process had been violated
  - NCAA joined the suit
- Issue: Are UNLV and the NCAA “state actors”?
  - UNLV – Yes. Publicly funded institution.
  - NCAA – No. Private, unincorporated collection of member institutions. NCAA actions are not attributable to the state.
- Because NCAA is not a state actor, it cannot be sued for violations of an individual’s constitutional rights under 42 U.S.C. §1983

# III. Player Safety

- *Arrington v. NCAA* (2011) - Concussions
  - Plaintiffs suffered concussions while playing NCAA sports
  - Filed a Class Action suit against the NCAA claiming:
    - Negligence
    - Fraudulent concealment
    - Unjust enrichment
    - Medical monitoring

# III. Player Safety

## ➤ *Arrington v. NCAA*, cont.

- Plaintiffs alleged several NCAA failures:
  - Failure to educate coaches, athletic trainers, and student athletes about concussions
  - Lack of system-wide “return to play” guidelines
  - Lack of system-wide guidelines for the screening and detection of head injuries
  - No support system for student-athletes who have suffered concussions
  - NCAA ignored studies regarding concussions
- Case currently pending

# III. Player Safety

## NCAA Constitution Article 2:

“It is the responsibility of **each member institution** to protect the health of and provide a safe environment for each of its participating student-athletes.”

# IV. NCAA Student-Athlete Benefits

- Scholarship Programs
- Catastrophic Injury Insurance
  - Total Disability
    - \$300/month for up to 12 months
    - \$2,000/month thereafter if athlete remains Totally Disabled
  - Partial Disability
    - Maximum initial payment is \$1,500/month
    - Payment increases by 4% after 12 consecutive payments
  - Death
    - \$25,000 for death resulting from a Covered Accident

# V. Worker's Comp. Claims

Injured athletes' lawsuits for Worker's Compensation benefits have typically been denied by courts

Why?

- No employer/employee relationship.
  - Players are not under contract
- Players do not receive salaries.
- Players cannot be "fired."

# V. Worker's Comp. Claims

State Compensation Ins. Fund v. Industrial Comm'n (1957)

Suit by widow of NCAA football player who was fatally injured during football game

Issue: was athlete "hired" to play football?

- Plaintiff claimed that athlete was an employee:
  - The athlete received financial aid in exchange for playing football
  - The athlete was a student worker making \$.70/hour
  
- The court found there was no contractual obligation to play football
  - Therefore, no employer-employee relationship for injuries suffered on the football field

# V. Worker's Comp. Claims

State Compensation Ins. Fund v. Industrial Comm'n (1957)

“It is significant that the college did not receive a direct benefit from the activities, since the college was not in the football business and received no benefit from this field of recreation.

In fact, the state conducted institution, supported by taxpayers, could not as a matter of business enter into the maintenance of a football team for the purpose of making a profit directly or indirectly out of the taxpayers' money.”

# V. Worker's Comp. Claims

State Compensation Ins. Fund v. Industrial Comm'n (1957)

The “football business” today:

- Annual Revenue from football:
  - University of Texas: \$120,288,370
  - The Ohio State University: \$117,953,712
  - University of Florida: \$106,030,895
  - Louisiana-Monroe: \$7,733,035
    - Big business even for smaller schools
- Should this enormous revenue generated by athletes' efforts entitle them to Worker's Comp?

## V. Worker's Compensation Claims (cont'd)

B. Waldrep v. Texas Employers Ins. Ass'n, 21 S.W.3d 692 (Tex. 2000).

1. Waldrep, while playing football for Texas Christian University, sustained a severe injury to his spinal cord which left him paralyzed below the neck
2. Waldrep argues he signed express contracts for hire when he signed his letter of intent and financial aid agreement
3. During recruiting, head coach assured Waldrep's mother that if an injury occurred, TCU "would take care of them"
  - a. TCU intended Waldrep to participate as a student, not an employee
4. Held: Waldrep not an employee and not entitled to Worker's Compensation

# VI. Antitrust Law

## Sherman Act

- Intended to rectify injuries to consumers caused by diminished competition
- Elements:
  - A contract, combination, or conspiracy
  - A market
  - An unreasonable restraint of trade
  - Injury
- Only restricts unreasonable restraints on competition

# VI. Antitrust Law

## ➤ *NCAA v. Board of Regents (1984)*

- Seminal NCAA Antitrust case
- Members challenged the NCAA Television Plan
  - NCAA signed exclusive TV deal with CBS and ABC
  - Each network was allowed to televise 14 games per year
  - NCAA established the price that schools could charge networks for TV rights
  - No team could appear on TV more than 6 times in a 2-year period
  - Members could not negotiate separate TV deals

# VI. Antitrust Law

- *NCAA v. Board of Regents (1984)*, cont.
  - Big football schools responded by creating the College Football Association (CFA)
  - CFA negotiated its own TV deal with NBC
  - NCAA Response:
    - Sanctions for any NCAA member who signs NBC deal
      - Sanctions against member schools' entire athletic departments, not just football programs
    - Other NCAA member teams refused to play games against CFA members

## VI. Antitrust Law

### ➤ *NCAA v. Board of Regents* (1984), cont.

- Supreme Court's decision:
  - Struck down NCAA's Television Plan
    - Unjustified Anticompetitive Conduct (Sherman Act)
  - But, the nature of college athletics requires some reasonable restraints on competition:
    - Nature of sport requires defining rules of the game that all teams must follow
    - NCAA can prohibit paying players in order to maintain fair competition among all member teams
  - Some restrictions actually promote competition
- Rule of Reason Analysis

## VI. Antitrust Law

### ➤ *NCAA v. Board of Regents* (1984), cont.

- Supreme Court's decision:

“In order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”

# VI. Antitrust Law

- *Agnew v. NCAA* (2011) - Scholarships
  - Plaintiff's challenged:
    - The NCAA's prohibition on multi-year scholarships
    - The NCAA's cap on the number of athletic-based discounts a school can offer
  - Plaintiff was injured while playing football and subsequently his scholarship was not renewed
  - Plaintiff argued that players should be able to negotiate with schools for multi-year scholarships

# VI. Antitrust Law

## ➤ *Agnew v. NCAA* (2011)

- Court's decision:
  - Football is a “product”
  - Court applies Rule of Reason analysis
- Plaintiff's claim fails because there is no “market”:
  - No labor market in the NCAA
  - No “market” for bachelor's degrees

# VI. Antitrust Law

NCAA has proposed multi-year scholarships

- Member Institutions rejected the proposal
  - Members claim a lack of funds
  - Claim that only the largest schools have the funds for multi-year scholarships
    - Small schools would be disadvantaged
- Compare to coaches:
  - Receive multi-million dollar contracts
  - Are quick to leave schools for better offers
- Yet, student athletes remain unprotected year-to-year

# VI. Antitrust Law

## ➤ *O'Bannon v. NCAA* (2010)

Concerns athletes' commercial rights to their own image and likeness

NCAA does not allow athletes to profit from the sale of their image or likeness

- Athletes claim that this is price-fixing under Sherman Act
  - Essentially fixes the price of athletes' images at \$0

# VI. Antitrust Law

## ➤ *O'Bannon v. NCAA* (2010)

NCAA Form 08-3a:

- “You authorize the NCAA . . . to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”
- Essentially a life-time waiver of rights to the commercial use of an athlete’s image

# VI. Antitrust Law

## ➤ *Keller v. Electronic Arts* (2011)

- Plaintiff contends that video game makers design virtual football players to resemble real-life college athletes
  - Same physical characteristics
  - Same team, number, position
  - NO NAME
- Plaintiff argues he has a right to be compensated for the use of his likeness

# VI. Antitrust Law

## ➤ *Keller v. Electronic Arts* (2011)

- Electronic Arts raised a Copyright Law defense
  - **Transformative Use**
  - Claimed that video game added its own creative expression to the athlete's image
- Court denied this defense
  - Player's depiction shares many of the player's characteristics
  - Player depicted in his known setting – football field
  - Transformative use must be judged only in respect to player's image – not game as a whole

# VI. Antitrust Law

- *In re Student-Athlete Name & Likeness*
  - Consolidation of *O'Bannon* and *Keller*
  - Currently pending before 9<sup>th</sup> Circuit Federal Court of Appeals
  - Issue:
    - Should student-athletes have a commercial right to their name and likeness?
    - How would this be reconciled with NCAA compensation rules?

# VI. Antitrust Law

## ➤ *Law v. NCAA (1998)* - Coaches' salaries

- NCAA placed salary restrictions on all NCAA coaches (except for football)
- NCAA's justifications for the rule:
  - Allows schools to retain entry-level coaches
  - Reduces costs for schools
  - Maintains competitive equity among schools
- Court struck down the salary restrictions:
  - Anticompetitive
  - Rule of Reason analysis

# VI. Antitrust Law

- *Law v. NCAA (1998)* - Coaches' salaries
  - Court found the salary restrictions anticompetitive under a Rule of Reason analysis
    - NCAA could not establish redeeming pro-competitive effects of the restrictions
  - Court struck down the restrictions as unreasonable:
    - No provision required that the restriction apply only to entry-level coaches
    - Reducing costs is not a pro-competitive justification
    - No proof that this rule would actually help smaller schools retain coaches

# VI. Antitrust Law

## ➤ Student-Athlete Pay:

- Several cases have held that the NCAA's academic goals prevent it from antitrust liability in this area
- Even under practices that are usually per se illegal

# VI. Antitrust Law

## ➤ Student-Athlete Pay:

- *Henessey v. NCAA (1977)*
  - Coach challenged rule limiting size of coaching staff
  - “Group boycott” – typically, per se illegal
  - Court upheld the rule because the market was not purely commercial
- *Banks v. NCAA (1992)*
  - Undrafted player attempted to return to college
  - NCAA ruled him ineligible
  - Court upheld NCAA action under Rule of Reason
- *Jones v. NCAA (1975)*
  - Even if NCAA is a monopoly, it did not willfully acquire a monopoly
  - Acts to preserve amateurism, not acquire a monopoly

# VII. Athletics as a Fiefdom

## ➤ Coaches' Salaries:

- Mac Brown (Texas) = \$5,193,500\*
- Nick Saban (Alabama) = \$4,833,333\*
- Bob Stoops (Oklahoma) = \$4,075,000\*
- Darrell Hazell (Kent St.) = \$300,000\*

# VII. Athletics as a Fiefdom

## ➤ Athletic Discipline

- Hiding behind the product image
- Coaches' discipline of athletes
  - DOE investigations
  - Incestuous
  - Stricter discipline will make you a better overall program
- Penn St. University

## ➤ Transparency

- How can this be achieved?

# VIII. Future of College Athletics

- European Club Model?
  - “Club” sports
  - Separate athletics and education
- Back to academic control?
  - Eradicate athletic departments
  - Academic Dean would control athletics
    - Vanderbilt University
    - Gordon Gee and Ohio St.
- A monopoly by super-conferences?
  - Leave NCAA and create their own rules
  - Big Ten + Pac 12 could be the beginning