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Should Student-Athletes Share in the Lucrative Profits of College Sports?

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## INTRODUCTION

Imagine you are an eighteen year old high school athlete being approached by a number of Universities offering you a full scholarship due to your athletic abilities. Some schools have excellent academic programs, others are known for their outstanding sports accomplishments. Some have both. You approach the decision either as a student getting an education while continuing your participation in a sport or as an athlete who attends the school to remain eligible for college sports. It may be either about the education or about the sport. For our purposes here today then, the definition of a student athlete is determined by the priority one places upon being a student or being an athlete.

Addressing the issues posed in the title “Should student-athletes share in the lucrative profits of college sports” is anything but simple without understanding the context, history and issues currently being addressed. It would be easier to make a presentation about World War II – at least it is over. College Sports, amateur athletics and the NCAA are in the middle of a sea of potential changes. Past Supreme Court rulings set the stage for major changes back in 1984, and more recently the Federal Labor Relations Board (NLRB) ruling and separately the Federal District Court ruling have again set the stage for potentially vast changes.

In March 2014, in response to Northwest University students’ petition for the right to form a union, the NLRB ruled in the Kessler case that Northwestern football players were employees of the university and have the right to form a union and bargain collectively. In August of 2014 the US District Court (in the Northern District of CA) ruled against the NCAA in the class action suit brought by former players -- O’Bannon v. NCAA -- stating the NCAA violated antitrust law by prohibiting student-athletes from being paid. There is disagreement as to whether the ruling will be a death knell to the collegiate system that produces billions of dollars in revenues while providing scholarships rather than paychecks. No matter what, it focuses the public on both the growth in revenue and the controls the NCAA has placed on the member institutions and players over the past 30 years. The rulings also focus on the issue of whether the scholarships really are adequate compensation for the demands placed upon athletes.

While the NLRB and Federal District Court Rulings are on appeal, the media continues to report daily on the annual rites of passage as each of the major sports conclude their seasons. Local sports news reported that Indiana University and Purdue University spent over \$400,000 each for recruitment of football players. An amount that may seem shocking, yet not an unusual amount for colleges in the hunt for talent. Some run significantly higher. Reports went on to look at the results of these investments by evaluating the students and talent acquired. National signing day also generated a wave of reporting on the schools that traditionally are in the running for the national title.

At the conclusion of each season, the news keeps us informed on the key players who opt out of college football to be part of the upcoming Pro Football draft -- a quarter back here, a defensive lineman there. Media also list all the players who are top picks on a given day. Then comes the coach and assistant coach contract announcements. There are those let go, those who move on to other schools and conferences, and those who extend their contracts.

This year the football announcements followed the conclusion of the fall season and the 38 bowl tournaments including a first time National Championship Playoff series that was the equivalent of the Final Four in basketball. And each year the same phenomena follows the basketball season and their playoffs -- March Madness. Players decide if they want to move on to play professional basketball, coaches are let go and others are hired, recruitment of high school players culminates with announcements both locally and nationally. "Amateur Athletics", as it exists, continues for another year. But the winds of change are now facing both the NCAA and college sports.

The announcements and tracking of players, coaches and schools keeps the "business" of amateur college sports in the news. The importance of this repeating and now expanded pattern is that it has become the annual ritual linking college football and basketball directly to the professional sports. Student athletes increasingly make decisions influenced by their market value in professional sports. A coach's salary or contract is determined by this competitive market. The top-rated high school athletes consider where they will go to college based on a recruitment process and based upon dreams and visions of a professional sports career. To many the decision seems to be more about the opportunities in their sport than the education. So, when considering the question of student-athlete it seems to be the opposite -- the athlete-student --we are considering. And the concern that for some, college football and basketball are the minor leagues for professional sports.

What the media identifies as "Pay to Play" on the surface is very simple. After all, the athletes that get scholarships are getting a free college education, right? So what else do they want or

need? On the other hand there are those who wonder about whether college sports is too profitable and who benefits from all of that money? But are there really profits? Which programs get the majority of the financial resources? Who is making these decisions related to sharing in the billions of dollars of revenue? Then there are concerns about whether this is really amateur athletics supporting student athletes. When does it move beyond amateur athletics and becomes the minor league for professional sports? Are the athlete-students really employees? Are there implications to the minor or less profitable sports, women's sports programs and smaller college programs?

College sports have been around for a long time and in many institutions it is core to the college identity, alumni support and the college experience. Being under the umbrella of the NCAA may not be a part of the dialogue during the academic year for the majority of students yet the influence that it has upon these post-secondary institutions has significant impact on many of them.

As we examine the history and current status of college sports terms such as "Pay to Play" and "Employment at Will" have become part of the conversations because of the way the scholarships are awarded and managed. This history sets the context for understanding the future implications of sharing the "profits" with student athletes. The reality is that the clock is ticking and the very future of the NCAA as we know it will be determined by its actions or inactions. Court rulings may so drastically alter the landscape that the NCAA could cease to be a significant factor.

#### Setting the Stage – How We Got Here

It all started in the late 1800's and early 1900's when financial compensation for men in college sports was commonplace and utilized to assist teams to win. The scholarships helped men who would otherwise not be able to afford to play the chance to be part of college sports. The issue of how to reconcile financial compensation with amateur sports was a subject of debate and in 1906 the NCAA issued an official prohibition on athletic scholarships. Regardless of this position, and due to the lack of a unified voice on this subject -- some conferences offered a wide range of compensation options while others remained opposed to offering scholarships -- the policy was never fully implemented.

In 1948 the NCAA adopted what was termed the "Sanity Code" (as opposed to the Sanity Clause of the Marx Brothers) in an attempt to reconcile the differences by allowing financial aid to be provided on the basis of both athletic ability and a needs-based approach covering tuition and expenses. There were those who believed any financial support was an abandonment of the principles of amateur athletics by paying for those who played the sport. This Code maintained

that the financial aid could not be deprived for failure to participate in intercollegiate sports so it satisfied those who believed it should be focused upon education. In 1949, because there was non-compliance with this rule by a significant number of institutions who could not be held accountable, the "Sanity Code" ended. It did, however, lay the framework for the 1957 NCAA rules for Grants in Aid (GIA) to cover room board tuition and fees. Later, in 1973, significant shifts in NCAA rules created the annual yearly renewable scholarship where the scholarships is not based upon academic performance and where scholarships can be reduced or revoked based upon performance on the athletic field, injury, reduction of playing time and coach's decisions.

The 1973 rule, which changed the way in which scholarships were awarded and renewed, caused those who believed it was already "pay for play" to their point even stronger. After all, if the scholarship can be revoked or reduced by the change in coaches or due to an injury that may not allow an athlete to perform than is it changed to being "employment at will" rather than a commitment of a scholarship for an education?

These changes where students were no longer guaranteed a four-year award allowed a shift back to the focus on the sport rather than the opportunity for an education. Student athletes were subject to potential dismissal at any time at the discretion of the coach. In fact, coaches increasingly began the practice of signing more players to ensure the best possible roster. Once a player got to the university they found out whether they still had a scholarship. It could happen at any time during the four years of college.

The Stakes Rise...

In 1981 the NCAA adopted a plan for televising college football games of member institutions for the 1982-1985 seasons. The plan both limited the total number of games televised and the total number of games any one single college could televise. It also restrained any sale of television rights except in accordance with the plan. The NCAA had specific agreements with both American Broadcasting Company (ABC) and Columbia Broadcasting System (CBS) giving them the rights to broadcast live coverage as defined in the plan. The agreements defined the direct negotiations for the television rights of NCAA games.

The member organizations were upset and claimed they should have more input into the football television policy of the NCAA. They then went ahead as members of the College Football Association (that was within the NCAA structure) and negotiated a contract with the National Broadcasting Company (NBC) with greater revenue and more liberal numbers in terms of television appearances. Based upon these actions the NCAA took disciplinary action that

forced the institutions to turn to the court for what became known as NCAA V. Board of Regents of the University of Oklahoma.

The District Court (Western District - OK) determined that the controls exercised by the NCAA over the televising of college football games violated the Sherman Anti-Trust Act and granted injunctive relief. The Court found that competition in the relevant market had been restrained by the NCAA fixing the price for telecasts, creating exclusive network contracts and putting artificial limits on the production of televised college football.

The NCAA appealed the rulings and the 10<sup>th</sup> Circuit Court of Appeals ruled against the NCAA and agreed that the Sherman Antitrust Act was violated and that the NCAA's plan constituted illegal per se price-fixing and its anticompetitive limitations on price and output was not offset by any justification sufficient to save the plan. The Court rejected the NCAA justification for a "joint venture" that assists marketing and was procompetitive and also rejected the NCAA assertion that it protected live attendance for games being televised. The NCAA then appealed to the U.S. Supreme Court which, in 1984, concurred with the lower Court and in its written decision set the new standards.

The U S Supreme Court ruling caused a major shift in the role and relationships between the NCAA and the member institutions. It allowed for more television live game coverage for regional and national markets. Alumni got to see their favorite team play on television. And it resulted in the NCAA that we now see.

What is the NCAA?

The NCAA is an extremely large and financially impressive, wide ranging and diverse operation. The NCAA is a billion dollar operation with over 1100 colleges and university members. There remains a three Division structure created in 1973 for teams from campuses of similar size, commitments and resources as well as to provide more opportunities to participate in championships. Overall governance is by the NCAA with separate sub-governance structures, rules and relationships for each of the Divisions. Division III schools are smaller schools who do not tend to have athletic scholarships so much of the controversy may seem like nonsense to them. Division III student athletes experience shorter practice and playing seasons, reducing their time away from academic studies. On the opposite end are the Division I schools who have more students, larger athletics budgets and more supports than the other two divisions. Division II schools are in the middle getting less benefits than the Division I and more opportunities than the Division III.

The NCAA proclaims on its website the following ten advantages and value of competing in college sports both immediate and lifelong:

1. **College Education** which will have a “Direct impact on a person’s quality of life”.
2. **Academic Success** with student-athletes earning their degrees.
3. **Scholarships** to more than 150,000 athletes receiving 2.7 billion in scholarships each year.
4. **Student assistance Fund** where Division 1 athletes have access to more than 73 million dollars to help fly athletes home during a family tragedy etc.
5. **Academic and Support Services** for tutoring, academic advisers, state of the art technology
6. **Medical Care** that is on the forefront of safety issues, playing rules, equipment requirements. The NCAA funds an insurance policy covering all student-athletes who experience catastrophic injuries with lifetime benefits.
7. **Elite Training Opportunities** top-notch coaching, facilities and equipment that cost thousands of dollars to Olympic athletes.
8. **Healthy Living** by providing access to cafeteria “training tables” on campus.
9. **Exposure and Experiences** traveling across the country and around the world.
10. **Preparation for life** by learnings leadership, time management, and working effectively with others.

It’s hard to believe anyone would be opposed to these stated values, while questions do arise as to whether they are accurate representations of what is provided. The latter ones are great offerings to all athletes: the chance to have continued coaching, access to training facilities, healthy living including good food, the chance to see other parts of the country and world, and gaining skills and experiences that prepare one for jobs and employment. But all of this needs to be put into perspective since the real focus on available resources and controversy on players market value stems from two primary sports: basketball and football. If there are financial gains or even financial value to the athletes, they often come from these two sports while the other sports have costs but do not tend to generate the same financial benefits. And for the vast majority of members of the NCAA the two major sports do not cover the costs for their institutions which then requires alumni donor support and, in some cases, public revenues. Despite the total revenue that gets attention, there are only a minority of institutions that have athletic programs where there is overall profitability.

How the resources generated are utilized by the individual college institution varies. The reason for this discrepancy is that the overall amateur athletic programs represents a much larger world than tends to get attention. There currently are approximately 450,000 NCAA college

athletes attending the member institutions across the country organized into conferences and division. As mentioned, each division has separate membership guidelines, governance structures and policies. Each with differing benefits from the NCAA.

The most profitable conferences are what are identified as the Power 5: Atlantic Coast Conference (ACC), Big 10, Big 12, PAC 12, and Southeastern Conference (SEC). Individual schools generate revenues. There were 13 schools with at least \$100 million in athletic revenue in 2013 and all had significant increases.

See attachment on Revenues

The total revenue does not accurately represent what can be considered profits since it is only one way in which finances and profitability can be viewed. The total revenue supports the athletic department and since the majority of programs have subsidies from various sources it becomes unclear if there are actually any profits. When an analysis is performed to determine actual profit by taking revenue minus subsidies and expenses another picture emerges. Texas, who was number one in revenue, drops to number 4 in profits with just under \$19 million. The Ohio State moves up to number one with profits of over \$23 million and Wisconsin who was number 2 with \$149 million in revenue drops all the way to number 53 with a loss of over \$5 million. Only 20 of the public Division I schools show an actual profit and the amount is smaller than most would expect.

So the questions related to profitability of college amateur athletics remains confusing. There are variances in the total revenues achieved and how they are raised. There are a wide range of ways they are utilized, handled in terms of expenses and reported as profits depending on the accounting practices. According to USA Today Athletic Departments are trying to walk a rhetorical tightrope. They may want to hide their profits to make it easier to be flexible on the way they are used. They may also want to avoid looking so poor that other stakeholders within academia will not use the apparent poverty to strip them of power.

The idea of sharing profits, at least when looking at individual institutions, may be a real challenge depending on how factual the information is reported. At the national level the NCAA acknowledges it had a total revenue of over a billion dollars in 2013. These numbers may also seem questionable because of the rapid changes in sources and may not be a full report of all the revenues. More recent reports are indicating higher amounts for 2014 even prior to calculating revenue from the 38 bowls and the new Football Championship tournament. The previous year 84% of the revenue came from the Division I Basketball tournament and that represents around \$800 million. Of their total revenue the NCAA states that 20% is for central operations, 20% goes for championship and national programs, over 50% goes directly to

Division I schools and the remaining 10% to the Divisions II and III. The NCAA states that the funds help member schools who award more than \$2.7 billion in athletic scholarships every year to more than 150,000 student-athletes. This represents financial support of scholarships to about one third of the 450,000 student athletes.

The Student-athlete who gets a scholarship to attend a University and completes his/her education gains the full benefit of that scholarship. There are strong advocates for this position, stating that for the vast majority of those students who receive scholarships and do not attend what are considered the "blue blood" sports programs for football and basketball, it is unlikely they will make a living playing professional sports. In those cases they understand the value of a cost-free education. It is about a doorway to a better life with their college degree.

These supporters of the student-athlete scholarship view argue that in the past 20 years or so a myth has been created that college athletes are mistreated and barely scraping by financially while coaches are getting rich. They offer that it is unfair to monetize everything and disregard the cost of a four-year education. They say while most students emerge from college with significant debt, scholarship athletes are exempt from that burden. And emerge with the knowledge and background to earn a living for a lifetime. Others argue that while the record of graduation has been improving more recently, it still does not provide the benefits claimed. They further argue that the scholarships do not actually cover the full costs of the education and that student athletes do leave college with debt, sometimes significant.

Reports do show that graduation rates for student-athletes have been increasing over the past several years and now exceed overall graduation rates. The NCAA states that 84% of Division I student-athletes graduate and that they outperform their peers in the general student body. The overall numbers show discrepancies between the minor sports and the two major sports. When one looks at other reports the numbers and percentages decline for the major sports of football and basketball. There is a more significant decline in that percentage when looking at first generation college and minority athletes. It is still higher than the overall student population for that segment. So, where the overall graduation rate is 84% for all student athletes, the percentage drops to 66% when utilizing the federal standards for calculating the results. It is even lower for African American student athletes where it is 52%.

Looking at these numbers one can say that it is impressive the athletes graduate at a higher rate than others in the university. Yet, if just over half of the minority students graduate and between 25-40% overall do not graduate then for these students the full benefit of the scholarship is reduced significantly. This is especially true for those that do not have the likely opportunity for a professional sports career.



For many, the claims of the NCAA can be relevant only if one accepts the basic premise that these are students who happen to be athletes rather than athletes that attend a college or university to pursue that sport, aiming toward a professional career. For the vast majority of the 150,000 scholarships there may be a balance between the demands of gaining an education and their sport which increases the likelihood of graduation. In the major sports, and especially those in the 5 so-called Power Conferences, this may not be as true as presented to the overall public. The completion of their education and getting a college degree is the pay day for those who do not have a successful professional career in sports or a sports related job.

### More than Scholarships

Beyond the benefits of the college scholarships and how they are awarded, are issues related to how and who generates the revenues for the NCAA, the conferences and the specific institutions. The rapid growth in revenues due to television contracts, championships, bowls, tickets sales and increased marketing of products now generates billions of dollars overall. How these resources are controlled and the relationship between the NCAA and their member institutions and the student athlete is being redefined by the Courts and other regulatory institutions.

The issues that are front of mind stem from the more recent rulings still in the process of resolution. First, as mentioned earlier, is the March 2014 Kessler case where the NLRB determined football players are eligible to form a union because of numerous factors including the hours they devote to football, the control exerted by coaches and their scholarships which was seen as a contract for compensation. The decision stated "It cannot be said that employer's scholarship players are primarily students". This ruling applies only to Northwestern scholarship football players, but the precedent and momentum could soon extend this to other Division I players.

Northwestern appealed the decision and the NCAA issued a statement by Donald Remy NCAA Chief Legal Officer. "This union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education. Student-athletes are not employees, and their participation in college sports is voluntary." He went on to state, "Many student athletes are provided scholarships and many other benefits for their participation. There is no employment relationship between the NCAA, its affiliated institutions or student-athletes."

The New York Times stated that "The ruling comes at a time when the NCAA and its largest conferences are generating billions of dollars, primarily from football and men's basketball. The television contract for the new college football playoff system is worth \$7.3 billion over 10

years and the current deal to broadcast the men basketball tournament is worth \$10.8 billion over 14 years”.

Following the NLRB rulings, as mentioned above in August 2014 Judge Claudia Wilken of US District Court ruled in *O’Bannon v. NCAA* that the NCAA’s decades old rules barring payments to college athletes were in violation of the antitrust laws. She issued an injunction against current rules prohibiting athletes from earning money from the use of their names and images. The New York Times reported that this decision allows universities to offer football players in the top 10 conferences and all Division I basketball players trust funds for use after graduation, thus giving players a chance to share in the billions of dollars of revenue they help generate for their colleges and the NCAA. It would take effect in 2016 but is not a mandate for players to be paid. It does allow for the creation of trust funds as well as annual payments that reflect the full cost of attending a school.

During the same time period the NCAA granted the five Power Conferences the autonomy to propose and implement more benefits for the 65 universities in their conferences and be a model for the Division I students-athletes. All five agreed to redefine a full athletic scholarship to cover all expenses federally defined as “cost of attendance”. These expenses include supplies, transportation and related items in addition to tuition and fees, room and board and required course-related books. Renew guaranteeing multi-year scholarships for athletes and preventing schools from failing to renew aid for any athletics-related reasons such as injury. They have strengthened requirements of concussion management and concussion safety protocols. They are continuing to consider lifetime scholarship guarantees which would allow athletes to return to finish their degrees, comprehensive long-term health care and insurance to athletes.

The NCAA appealed the *O’Bannon* case to the US Court of Appeals for the Ninth Circuit insisting that the 1984 Supreme Court ruling (*NCAA v. Board of Regents*) the NCAA has relied upon preserves its amateur system and thus should prompt the Court to overturn the Judge Wilkin’s ruling, and set aside the injunction. The appeal relies heavily on the 1984 Supreme Court ruling arguing the federal judge erred by not applying the 1984 ruling that protects amateurism in college sports.

In their arguments they state that Judge Wilken’s ruling is in contradiction to the 1984 ruling which states “athletes must not be paid”. The NCAA writes in the appeal that this decision amounts to “about \$30,000 per student athlete over four years for the football and basketball players.”

Oral arguments in on the appeal are set for March 17<sup>th</sup> 2015. Talk about a timely topic! Conventional wisdom is after this ruling, the case will continue on to the Supreme Court and the consequences of the final decision will have a significant impact of both college amateur athletics and the NCAA. There are those who believe that a decision affirming the suit sets the stage for the end of NCAA as we know it, and will financially devastate college sports. Then there are those who believe affirmation of the NCAA position allows the uncompensated exploitation of the student-athletes. The unknown resolution to these questions continues selling newspapers, sports magazines and leaving many wondering about the future.

### In Conclusion

Currently, thousands of student athletes secure financial assistance for furthering their education which is valued by their parents, the communities where they are engaged in high school sports and the college programs that benefit from their participation. The student athletes in the minor sports and women's sports value the opportunities created which have helped those sports grow and mature. Now there are those who seek to know whether the resources generated will continue to support these programs.

The possibility that the lawsuits will set the stage for some changes in the amount of supports student-athletes may get in the future could benefit a few at the potential costs to the many across the system thus create a tiered class of amateur athletes. Yet many might say this already exists. The changes in the current rulings redirect revenues and by doing so could either jeopardize college sports or transform amateur athletics. So there are those that see this as reinforcing the role of these programs as minor leagues for professional football and basketball.

This is a dilemma that without resolution could fracture amateur sports. The issues is a conflict between both value and values. Is it really about the growing revenue and commercialism of college sports? If so, then determining who and what is driving the growth might require more clearly and fairly sharing those resources. Is it about providing scholarships for a college education to young men and women and in so doing providing the opportunity for a better life? If so, then providing a multi-year commitment with full financial educational and health care supports that ensures completion of that education become reasonable. Is it the intent to build a financial model that sustains the wide range of amateur sports opportunities for young men and women and financially support the member institutions? If so, then a fair and equitable approach to sharing these revenues becomes key to the future relationships.

The NCAA has moved towards making modifications that address the issues raised over the years while it has proceeded with the O'Bannon appeal. The concern is related to the long term consequences upon the NCAA and the way in which college amateur athletics exists. The Court rulings have what are now termed dramatic and potentially devastating consequences financially. It also has potential impact on thousands of student athletes who are not party to the two major sports that are the focus of both the large financial revenues and costs that could be created.

The questions that swirl around these issues and the initial question as to whether student athletes should share in the lucrative profits of college sports are yet to be resolved by the courts, the NCAA and the member institutions. Only time will tell whether the student athletes will be defined as employees and whether they have the rights to form unions. Only time will tell whether individuals have the control over the use of their images and identity. And only time will tell whether there is new and different ways in which student athletes will share in the revenues generated by college sports.

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### COLLEGE REVENUES

Universities	2005	2013
Texas	89.7	165.7
Wisconsin	76	149
Alabama	62	143
Michigan	78	143
Ohio State	90	140
Florida	Doubled	130
Oklahoma	Doubled	123
Louisiana State	Doubled	117.5
Oregon	40	115

Numbers above are shown in millions