KINE 5302: The NCAA and Player Compensation

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Should college athletes be paid? This question has taken many forms throughout the years. For the most part, the answer has been college athletes are paid through scholarships and therefore do not need to be paid for the use of their names, likeness, or anything else. The fact that the lone authority making this decision, the National Collegiate Athletic Association (NCAA) has a vested intertest in not paying athletes, as well as enjoying a monopoly on the upper levels of collegiate competition, has caused several court cases to be brought forward related to antitrust issues and the right to fair play.

The NCAA is a nonprofit organization that regulates student athletes from 1,268 North American institutions and conferences. Critics of the NCAA consider the practice of limiting athlete compensation to that of a cartel (Sanderson 2018). Throughout the history of the NCAA several court cases have been filed to test the limits of the NCAA's power related to player compensation, sanctions, and employee suspension. This paper will show that the NCAA does in fact engage in antitrust actions in violation of the Sherman Antitrust Act of 1890 as determined by rulings in front of the United States Supreme Court.

Section 1 of the Sherman Antitrust Act of 1890, prohibits "every contract, combination, or conspiracy, in restraint of trade or commerce" (FTC, 2020). By skirting the spirit of the Sherman Act, the NCAA creates an environment where they become the only game in town and member schools are left to take it or leave it when it comes to the rules set forth by the NCAA. It is true that no one forces schools to becomes members of the NCAA, however, the simple fact that the NCAA does not have any competition allows it to create de facto monopoly where it sets the rules for schools to follow if they want to participate in the highest levels of collegiate athletics. While this fact has made billions of dollars for member schools, it has left the players out of the financial windfalls generated by their efforts on the field.

The reach of control the NCAA has is not limited to players. Through the broad powers it has assumed, the NCAA is able to impose sanctions, suspensions and financial penalties to member schools who fall outside the lines set forth by the NCAA. On occasion, the NCAA even tries to involve itself in employment issues as was the case with a certain basketball coach in Las Vegas. In 1988, the NCAA settled a $2.5 million lawsuit filed by former UNLV basketball coach, Jerry Tarkanian in the case NCAA v. Tarkanian, 488 U.S. 179 (1988). Tarkanian had sued the NCAA claiming he had, “been deprived of his Fourteenth Amendment due process rights after he was forced to resign from UNLV” (Tarkanian, 1988). The case centered on Tarkanian’s position that the NCAA had overstepped its authority and was acting as a state actor in dictating the staffing decisions of UNLV since his employer was not dissatisfied with his performance (Tarkanian, 1988).

NCAA v. Tarkanian is not specifically an antitrust case, however, it does lend credence to the thesis that the NCAA acts like it is above the law and feels that it has supreme authority in telling the member schools what they can and cannot do in their athletic programs. In UNLV’s case the NCAA tried to tell a school who they could have as their coach. The U.S. Supreme Court ruled that the events leading to Tarkanian's suspension did not constitute "state action" (Tarkanian, 1988). However, the case did demonstrate the lengths the NCAA will go to in order to protect the brand.

NCAA v. Tarkanian was focused on the role the NCAA played in employment issues while also showing an example of how tightly the NCAA is willing to pull on the reins. The growing issue of antitrust violations which would define a battle between players and the NCAA had one of the first big challenges of the 21st Century in 2007. The case of White et al. v. NCAA was filed by former NCAA student-athletes Jason White, Brian Pollack, Jovan Harris, and Chris

Craig as a class action lawsuit (Elfman, 2008). The athletes argued that the NCAA's limits on a full scholarship, or grant-in-aid, was a violation of federal antitrust laws by limiting athletic-based aid to tuition, books, housing and meals (Elfman, 2008).

The case was settled by establishing a $10 million Former Student-Athlete Fund from NCAA reserves for “athletes in the named football and basketball programs who received athletic grants-in-aid from Feb. 17, 2002 to Aug. 4, 2008” (Elfman, 2008). Under the settlement eligible parties were permitted to use the funds to, “cover the costs of career-development services, such as résumé preparation and career counseling (not to exceed $500), and/or reimbursement of future educational expenses (maximum of $2,500 per year for three years) (Elfman, 2008). Despite the settlement agreement, the White v. NCAA case resulted in both parties appealing to the United States Supreme Court however the court refused to hear the case (Elfman, 2008).

In a statement released at the time NCAA president Myles Brand noted that he was, “pleased the court has granted final approval of the settlement agreement in the White case. The settlement allows us to resolve the litigation and enhance the benefits potentially available to former, current and future student-athletes. By adjusting the rules regarding access to the hundreds of millions of dollars in aid scheduled to be made available for student-athletes over the next several years, it is the NCAA’s intention to help meet any true additional needs of its student-athletes” (Elfman, 2008).

Any pleasure the NCAA may have felt in settling the lawsuit was short-lived. Seven years after the White settlement, the NCAA once again found itself in the crosshairs of antitrust litigation brought forward by players who felt they were under compensated. In March 2014, in the case O'Bannon v. NCAA, four players filed a class action antitrust lawsuit, alleging that the

NCAA and its five dominant conferences are an "unlawful cartel" (Sanderson, and Siegfried, 2018). The suit charged that the caps the NCAA put on the value of athletic scholarships have "illegally restricted the earning power of football and men's basketball players while making billions off their labor" (Sanderson, and Siegfried, 2018). In O'Bannon v. NCAA the court found that, “the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules” (O'Bannon, 2015).

Proponents of the way the NCAA does business would say that the players receive fair market value for their efforts through the awarding of scholarships as well as the exposure they receive as members of an elite program. The other side of the argument is that as a non-profit organization the NCAA should not be making billions of dollars in revenue that it is not sharing with the athletes who play the largest role in generating that revenue. Additionally, those who feel players are not entitled to more than room and board and a scholarship will likely cite the U.S. Court of Appeals for the Ninth Circuit ruling in White et al. v. NCAA that stated, “Limiting compensation to the cost of an athlete's attendance at a university was sufficient” (Elfman, 2008). The U.S. Court of Appeals for the Ninth Circuit simultaneously ruled against a federal judge's proposal to pay student athletes $5,000 per year in deferred compensation (Elfman, 2008). Of course, the Supreme Court overturned that ruling and stated that players were entitled to deferred compensation (O'Bannon, 2015).

So, with the leg of the U.S. Court of Appeals for the Ninth Circuit swept out from under them, others in the no need to pay college athletes camp will say that no one is forcing anyone to become a college athlete. Therefore, they will attest that college athletes willingly know the rules of the game and choose to participate and thus give up any rights to complain about the conditions related to their agreements with the school. Proponents of this position will likely take

the argument goes one step further and note that the amount of exposure players get during their college careers benefits them in the professional careers and therefore they wind up getting paid on the backend.

It is certainly true that no one is forcing young men and women to join the NCAA like some kind of compulsory draft. It is also true that a certain percentage of college athletes go on to be highly paid professional athletes. However, that does not absolve the NCAA of compliance with the Sherman Antitrust Act. In fact, the US Supreme Court reaffirmed that "NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason" (O'Bannon, 2015).

Players should be paid to play, and for their likeness, since they are risking their health to injury and may never make the professional ranks so the argument that they will get paid in the pros is false. Especially since there are provisions that prevent athletes in the NBA and NFL from turning pro right out of high school.

The subject of player compensation for injury was raised in 1953 in University of Denver v. Nemeth when football player, Ernest Nemeth, sued "for compensation benefits arising from an accidental injury, which the evidence shows was suffered while Nemeth was playing football on the University of Denver grounds" (University of Denver v. Nemeth, 1953). It seems unimaginable that a player would not be covered for injuries sustained during organized team activities but the fact that the case was even contested shows a long history of trying to avoid paying students, even if that means paying for their medical expenses.

The risk to player health is especially concerning during the current COVID-19 pandemic where students are being forced to choose between sitting out and missing a season of exposure

to professional scouts, or playing and risking catching COVID-19. The number of outbreaks on college campuses and the unknowns related to the long-term health effects of the disease are another example of why athletes should be paid for putting their health and livelihood at risk for the entertainment of others. One need only look at the amount of college football games being postponed due to outbreaks of COVID-19 to question the wisdom of trying to play sports in a pandemic.

The simple answer for why schools are determined to play is financial as schools will try to squeeze every last penny out even if that means putting fans in the stands and risking their health as well as the health of everyone else involved. There is little doubt that the NCAA subscribes to Gordon Gekko's assertion in the movie *Wall Street* that "Greed is good." However, players are unlikely to see any of that money heading their way, despite being the ones taking all of the risks.

The argument that a scholarship and education are fair compensation holds slightly more weight for athletes competing in the so-called Olympic sports where their competitive athletic careers are likely to end when they graduate. Players in these sports are also more likely to complete their degrees and graduate which would allow them to enter the workforce at an advantage over those individuals without a college degree.

However, for athletes in basketball and football, the NCAA restrictions on their compensation seem archaic and unjust when compared to the amount of revenue generated. They also seem unjust when one considers the fact that the NCAA holds a monopoly on a player's ability to turn pro through what amounts to collusion with the National Football League (NFL) and the National Basketball Association (NBA). Although the eligibility rules differ between the NFL and NBA for when an athlete is eligible to be drafted, in both cases an athlete is unable to

go directly from high school to professional football or basketball giving the NCAA access to players in their prime for the small investment of a scholarship.

With being forced to join an NCAA program to maintain visibility to try to go pro, collegiate athletes competing at NCAA governed schools are shouldering the bulk of the risk in terms of life altering injuries while involved in activities that generate millions of dollars for their school. Meanwhile, the NCAA continues to double down on numerous amateurism rules that limit student-athletes' compensation and their interactions with professional sports leagues (O'Bannon, 2015).

The NCAA has no limit to the amount of money it can make off of an athlete, however, an athlete can lose his amateur status by signing a contract with a professional team, declaring for a professional league's player draft, or hiring an agent. Furthermore, an athlete is prohibited from receiving any pay based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness (NIL). Although athletes have their hands tied in terms of making money, the NCAA has been free to capitalize on players through jersey sales, various marketing campaigns, as well as video games. It is this area of name, image, and likeness that courts seem the most willing to side with the athletes in recent years as cases like O'Bannon v. NCAA are beginning to show.

In fact, in O'Bannon v. NCAA, the court noted that, “the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market” (O'Bannon, 2015). The fact that the NCAA’s rules are heavily biased towards maintaining the appearance of amateurism is not surprising. The very term “student athlete” that has come to describe the men and women who compete in collegiate athletics was coined by the

NCAA in 1953 as the result of the ruling in University of Denver v. Nemeth (McCormick & McCormick, 2006).

With the Colorado Supreme Court Ruling, in the case University of Denver v. Nemeth, DU was forced to provide worker's compensation insurance to cover any football related injuries. In response to the ruling, the NCAA coined the term "student-athlete" to "diminish any tendency to characterize athletes as employees" (McCormick, & McCormick, 2006). O'Bannon v. NCAA reenforced the limited scope of player compensation when the court stated that, "the Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more (O'Bannon, 2015).

Despite the small gains collegiate athletes are making in earning compensation, the issue continues to move at a glacial speed with little signs of an ice shelf of justice falling off in one stroke of a jurist's pen. If in the words of William Shakespeare, "what's past is prologue," it is highly unlikely that the NCAA will voluntarily open up the purse strings to give athletes a greater slice of the pie. While it is unlikely that the NCAA will volunteer to give anything up from their coffers, court cases are starting to lean more towards benefiting athletes. However, it is too soon to say that a tsunami of changes is coming to allow college athletes to be paid fair market value for their efforts.

With so much in the air on this issue, sports managers need to know where school regulations end and NCAA regulations begin. They must also maintain compliance with NCAA regulations to maintain eligibility for the program and to avoid attempts by the NCAA to impose their will on the programs through suspensions and probation. Additionally, with the growing changes coming through the legal system sports managers need to ensure they know what constitutes permissible compensation for players since the bar is likely to move both forward and

backwards as the courts look to set a new normal. The role of compliance offices at in athletic departments will become even more critical in navigating the changing tides to come; as what was once in permissible may very well become permissible. With increased visibility on the subject of player compensation sports managers who deal with members of the press need to know how to respond to media inquiries related to the perceived injustice of an organization making billions off of the work of players.

If sports managers thought that trying to salvage a season in the middle of a global health pandemic caused by COVID-19 was difficult, it is likely that the only vaccine and therapeutic treatment for the pandemic to come related to player compensation is fair use agreements and adherence to antitrust laws to allow players to get paid for their likeness and other things. The NCAA, and college sports in general are likely headed towards a major course correction that could be litigated for years to come.

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