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Thomas R. Hurst

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Articles

PAYMENT OF STUDENT-ATHLETES: LEGAL & PRACTICAL OBSTACLES

THOMAS R. HURST*
J. GRIER PRESSLY III**

I. INTRODUCTION

Collegiate athletics at the Division I level is a big business. The National Collegiate Athletics Association ("NCAA") budget during the 1997-1998 school year was $270 million.1 The NCAA recently signed a contract with CBS, giving the network exclusive rights through the year 2002 to televise the NCAA Division I Men's Basketball Championship for which the NCAA and its member institutions will receive $1.7 billion.2 In 1997, the Southeastern Conference alone received $9 million from the NCAA men's basketball tournament.3 The University of Michigan led all Division I universities in 1996 with over $5 million earned from royalties associated with athletic merchandise bearing the school's logo.4

* S.T. Dell Research Scholar and Professor of Law, University of Florida Levin College of Law. University of Wisconsin, A.B.; Harvard University, J.D. This author dedicates this article to Betsy.
** Associate, Pressly & Pressly, PA. University of Florida (highest honors), B.A.; University of Florida (with honors), J.D. This author dedicates this article to his father and mother, Jamie and Katie Pressly.
3. See Robert N. Davis, Academics and Athletics on a Collision Course, 66 N.D. L. REV. 239, 255 (1990) (arguing major reform of NCAA needed to reflect current environment in which student-athletes are required to be more like professionals). In addition, the Southeastern Conference generated $2.9 million from its own annual basketball tournament. See id.
4. See David Barkholz, Wear No. 1: UM is Royalties King in Sports Products, CRAIN'S DETROIT BUS., Mar. 28, 1997, at 20; see also Goplerud, supra note 1, at 1087 (discussing how numerous schools make revenue of over one million dollars due to popularity of certain student-athletes).
signed Duke University Coach Mike Krzyzewski to a contract, under which Duke basketball players would wear Nike shoes, paying him a $375,000 annual salary with a $1 million dollar signing bonus.\(^5\) When a university’s athletic teams experience success on the hardwood and gridiron, booster donations flow into the university’s athletic department, and enrollment increases at the university.\(^6\) In the past quarter-century, college sports revenues have increased by an estimated 8000 percent.\(^7\) NCAA member schools generated nearly $3 billion in revenues in 1997-1998.\(^8\)

The popularity of collegiate men’s football and basketball and women’s basketball is largely responsible for the money flowing into the coaches’ coffers, the universities and the NCAA itself. Division I student-athletes on full scholarship, however, are limited to receiving tuition, fees, room, board and books.\(^9\) Nor can student-athletes receive, in appreciation of their talents and good play, any money or gifts from boosters or sports agents.\(^10\) The foundation and justification for the NCAA bylaw limiting compensation continues to be “amateurism” which espouses the ideal that collegiate athletes play sports for pleasure and physical, mental or social benefits and as an avocation rather than a vocation.\(^11\) Compensating amateur athletes in the form of monetary payments has been viewed as

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5. See Sharp Gains in Salaries Enjoyed by NCAA Basketball Coaches, Sports Indus. News, Mar. 28, 1997, at 117. Roy Williams of the University of Kansas and Lute Olson of the University of Arizona are other Division I basketball coaches who benefit from shoe contracts paying them more than $400,000 each year. See id.


7. See Barra, supra note 1, at A26 (expressing amazement at NCAA’s success in representing its members in marketing matters).

8. See id. (comparing college sports to professional sports).


10. See id. § 16.02.3. Such payments would be “extra benefits” prohibited by § 16.02.3. See also NCAA Const. art. II, § 13:

A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided that amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association.

Id.

contrary to the amateurism ideal. However, the reality of collegiate athletics is inconsistent with the amateurism ideal advanced by the NCAA, as studies have revealed that only forty percent of Division I student-athletes participate in collegiate sports for the “fun of it.” In addition, Pennsylvania State University football coach Joe Paterno has written about the conflict between the non-NCAA “amateur” track and field athletes and the NCAA paragon of amateurism. Furthermore, the famous classicist David C. Young reported that the prohibition of compensation was not fundamental to ancient Greek athletics, the purported origin of the “amateurism” ideal. In response to the growing commercialism in collegiate athletics and the realization that “amateurism” is a false ideal, substantial support has emerged for compensating Division I student-athletes in addition to their scholarships.

Proponents of compensating student-athletes in excess of the allowable scholarship amount argue that student-athletes should be paid because many of them need the money. Full scholarships do not provide student-athletes with any spending money. Thus, it is difficult for many student-athletes, especially those from disadvantaged socio-economic backgrounds, to go out on dates or even return home for a family emergency. Only in 1996 did the NCAA pass an amendment to the bylaws, allowing student-athletes to obtain part-time employment during the school year, which permits

12. See id. at 31 (explaining evolution of concept of amateurism and incorrect assumption that it originated in ancient Greece).
14. See Joe Paterno & Bernard Asbell, Paterno: By the Book 184 (1989). A passage in the book reads, “Carl Lewis . . . became a millionaire while remaining an amateur. All kinds of endorsement money was dumped on him, and all legal as long as the money was paid to a trust fund instead of directly to Lewis. That’s legal in track, but not in [NCAA] football. Don’t ask me why.” Id. See also Shropshire, supra note 13, at 18. Student-athletes are permitted to participate on a professional sports team which is not the same as their collegiate sports so long as they are not on scholarship. See id.
15. See David C. Young, The Olympic Myth of Greek Amateur Athletics 7 (1985). The ancient Greeks regularly competed for valuable prizes in other games before they reached the Olympics, and they openly profited from athletics whenever they could. See id.; see also Shropshire, supra note 13, at 9-11 (explaining that amateurism ideal was not Greek, rather it was introduced later).
16. See Schott, supra note 11, at 49.
17. See NCAA Manual, supra note 9, § 15.02.5.1.
student-athletes to make up the difference between the value of an athletic scholarship and the university's "full cost of attendance."  

However, the tremendous time demands — be it class, exams, practice, games, or work-outs — placed on student-athletes make part-time jobs during the school year unrealistic, not to mention the potential enforcement nightmares in controlling overeager boosters who would be providing the jobs in many instances. Furthermore, the recent amendment seems to be at odds with the purported NCAA priority on education. Qualified student-athletes may receive a Pell grant of up to $2400, and the NCAA allows student-athletes to receive money from its special assistance fund when a hardship or an emergency creates unmet needs. Many student-athletes, however, either do not qualify for such assistance, are unaware it exists, or have needs that outweigh the permissible amounts. Lack of accessibility of necessary funds may justify student-athletes' willingness, in the vast majority of cases, to accept illegal payments from sports agents and university boosters.

Proponents of compensating student-athletes beyond the amount of athletic scholarships argue that fairness requires that student-athletes be paid. The value of a four-year athletic scholarship at a state university is approximately $30,000 while the value of the same scholarship at a private university may exceed $120,000. Popular and talented student-athletes may generate millions of dollars for their schools during the course of their collegiate careers,

18. See id. § 15.2.6 (outlining how earnings from employment are factored into determination of whether full grant-in-aid has been reached). Prior to the amendment, student-athletes could only obtain employment during the summer months. See id.

19. See Acain, supra note 2, at 316 (discussing how part-time job would subtract from precious study time and possibility that boosters might use opportunity to provide student-athletes with additional money under the table).

20. See id.

21. See NCAA MANUAL, supra note 9, § 15.2.4.1 (noting that Pell grants are not included when determining permissible amount of full grant-in-aid or cost of attendance of student-athlete); see also Athletes Gain Greater Access to Assistance Fund, NCAA News, May 13, 1996, at 1 (outlining changes made in 1996 to NCAA special assistance fund); Goplerud, supra note 1, at 1084-85 (explaining changes to special assistance fund in May 1996, such as expansion of pool of eligible athletes and restrictions on use).

22. See Goplerud, supra note 1, at 1085-86 (discussing NCAA's concern that financial hardships created by Pell grant and emergency fund restrictions tempt student-athletes to accept gifts and arguing that NCAA's attempts to make changes to remove temptation are insufficient).

23. See Acain, supra note 2, at 313 (arguing that universities' contentions that athletic scholarships provide adequate compensation fail to consider disparity between value of scholarship and revenue generated by athletes and that NCAA rules were created before this disparity existed).
in the form of coaches’ shoe and apparel contracts, merchandise sales, increased booster donations, television packages and increased student enrollment.\textsuperscript{24}

Opponents of proposals to pay student-athletes argue that the education provided by an athletic scholarship is valuable and sufficient compensation. However, in a recent survey of professional football and basketball players, over two-thirds admitted that they never received a college degree.\textsuperscript{25} A striking number of student-athletes who did in fact earn their college degrees, still admitted that they attended college for the sole purpose of playing sports and devoted little of their time to their education.\textsuperscript{26}

Opponents to proposals to pay student-athletes also argue that the athletic scholarship is adequate compensation because collegiate athletics can act as a stage for scouts from the NFL, NBA and the WNBA, where lucrative professional careers await student-athletes. The reality is that an extremely low number of collegiate athletes will parlay their athletic scholarships into professional sports careers.\textsuperscript{27} Furthermore, unlike non-scholarship university students, student-athletes are prohibited from profiting from their talents due to the NCAA limited compensation bylaw; a talented engineering student who develops a patent, assuming he or she has not contracted away patent rights to the university, may profit without restriction from any profits earned from the patent.\textsuperscript{28} Equity seemingly demands that student-athletes share in the financial success of intercollegiate athletics.

\textsuperscript{24} See Goldman, \textit{supra} note 6, at 206 (asserting that NCAA’s idea of “amateurism” is mere pretense and deception).

\textsuperscript{25} See id. at 206-07 n.10 (discussing academic abuses at universities).

\textsuperscript{26} See Timothy Davis, \textit{An Absence of Good Faith: Defining a University’s Educational Obligation to Student-Athletes}, 28 Hous. L. Rev. 743 (1991) (clarifying popular misconceptions that student-athletes attend schools solely to play sports by offering statistical data that student-athletes believe earning degree is very important).

\textsuperscript{27} See Burton J. Kinerk, \textit{The Illusory Dream That Drives College Sports}, \textit{Sports Law}, Jan./Feb. 1996, at 12. Statistics suggest that each year there are approximately 2600 seniors playing college basketball, 2.5 percent of whom will find a place on the roster of an NBA team; there are approximately 9500 seniors playing college football, 2.2 percent of whom will find a roster spot on an NFL team. \textit{See id.; see also C. Peter Goplerud III, Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal}, 5 Kan. J.L. & Pub. Pol’y 125, 126 (1996) (explaining that while many student-athletes are enticed to attend schools to prepare them for career as professional athlete, most will not continue on to professional sports).

Although proponents of paying student-athletes have advanced numerous proposals,29 the proposal which has garnered the greatest support has been the payment of a monthly stipend to Division I student-athletes in the revenue-producing sports (on most campuses, these sports consist of men’s football and basketball and women’s basketball), and to an equivalent number of women student-athletes in order to comply with Title IX. Under this plan, the individual universities would select the amount of the stipend and a "salary cap" would be established to preserve competition.30 In the interest of simplicity in the antitrust discussion, this paper will limit its scope to the potential legal and practical consequences of adopting the stipend with salary cap proposal.

II. ANTITRUST ISSUES

The stipend proposal potentially could be viewed as price-fixing which violates the Sherman Antitrust Act. The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."31 The United States Supreme Court has long held that only unreasonable restraints of trade are proscribed by the Act.32 It is readily apparent that the NCAA and its member institutions engage in interstate commerce with such activities as nationwide recruiting of student-athletes, nationwide ticket sales, nationally televised games and inter-collegiate competition. In addition, courts generally have held that NCAA restraints on collegiate athletics involve interstate commerce.33 However, the Supreme Court has recog-

29. See Acain, supra note 2, at 307-53. The author proposed a market-based revenue-sharing plan. See id. Such a plan would be cost-prohibitive, difficult to implement, involve high transaction costs and result in collegiate athletics taking on aspects of professional sports. See id. at 336-45; see also Goplerud, supra note 27, at 125-31 (proposing fixed stipend payment).

30. See Goplerud, supra note 1, at 1081-1105. The idea proposed by Goplerud consists of stipends given to student-athletes. See id. at 1089. While schools could decide the exact amount of the stipend, the salary cap would be set at $300 per month. See id. Half of the stipend would go into a trust fund to be paid to the athletes who receive degrees within five years. See id. The proposal would also allow student-athletes to work because the stipend would not count against the cost of attendance. See id.


32. See Standard Oil Co. v. United States, 221 U.S. 1, 55-56 (1911) (discussing origin of Sherman Act and analysis to be applied when approaching individuals).

33. See NCAA v. Miller, 10 F.3d 633, 638 (9th Cir. 1993) (holding that Nevada statute, requiring any national collegiate athlete association to provide certain procedural due process protections to anyone in situation where sanctions may be imposed, is unconstitutional because it violated Commerce Clause); Hennessey v.
nized that certain types of restrictive activities by the NCAA may be permitted under the Sherman Act in order to preserve inter-collegiate competition as a product. As a result, the Supreme Court has consistently analyzed antitrust challenges to NCAA regulations under the more lenient “rule of reason” rather than the per se rule. The per se rule is utilized for commercial restrictions that would “almost always” be found illegal. Under the per se rule, the plaintiff is not required to show that the restraint leads to a decrease in competition, and the court will not consider any of the defendant’s purported explanations for the restraint; in essence, the restraint will be held to be “unreasonable” and a violation of antitrust law. In contrast, the “rule of reason” provides defendants an opportunity to present justifications for the restraint. Under the “rule of reason” analysis, the plaintiff must prove that the restraint has anti-competitive effects. If the plaintiff meets that burden, the defendant must show that the restraint is in fact pro-competitive; if the defendant meets its burden, then the restraint will be upheld as a “reasonable” restraint.

NCAA, 564 F.2d 1136, 1148 (5th Cir. 1977) (holding NCAA is not exempt from Sherman Act even though its activities and objectives are educational and apply to amateur athletes); see also Acain, supra note 2, at 319-20 (discussing how scheduling games which require traveling to another state and regulating nationwide high school athlete recruiting establish interstate involvement).

34. See NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 119 (1984) (stating that recruitment regulations, limitations on the number of scholarship per team and other standards are sufficient to improve competition); see also Goplerud, supra note 1, at 1090 (explaining that in order to keep collegiate sports, horizontal restraints on competition are necessary). Otherwise, regulations relating to equipment, field size and length of seasons would be illegal. See id.

35. See Banks v. NCAA, 977 F.2d 1081, 1088 (7th Cir. 1992) (following ruling in Bd. of Regents of the Univ. of Okla., court addressed allegations that NCAA rules restrain trade or commerce under rule of reason); McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988) (following ruling in NCAA v. Bd. of Regents, and applying “rule of reason” analysis to determine whether restraint enhances competition); Law v. NCAA, 902 F. Supp. 1394, 1403 (D. Kan. 1995) (qualifying holding to state belief that Supreme Court did not intend to give NCAA carte blanche power in imposing restraints on its member institutions or other parties because of its role in marketplace).

36. See, e.g., Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (applying per se rule to horizontal market division); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (applying per se rule to price fixing).

37. See United States v. Scocony-Vacumn Oil Co., 310 U.S. 150 (1940) (clarifying that Court hesitates to make test of legality whether prices are reasonable); see also Acain, supra note 2, at 323 (discussing while horizontal price fixing has been considered classic example of illegal per se restraint, courts considering NCAA’s justifications have strayed from per se analysis).

38. See Acain, supra note 2, at 325-26.

39. See United States v. Brown Univ., 5 F.3d 658, 678-79 (3d Cir. 1993) (holding that agreement between Ivy League school to award financial aid based solely on need could be allowed if program has pro-competitive and non-economic goals

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The NCAA limited compensation bylaw is anti-competitive because, instead of freely competing for student-athletes, universities are compelled to limit their compensation packages to amounts specified by NCAA regulations. Courts on two occasions have addressed whether the NCAA engages in illegal price-fixing when it limits the amount of financial aid a university may offer a student-athlete in an athletic scholarship.

In *NCAA v. Board of Regents of the University of Oklahoma*, the Boards of Regents of the University of Georgia and University of Oklahoma challenged, under the Sherman Act, an NCAA rule which placed a ceiling on the number of basketball games member universities could televise. Although the Supreme Court recognized that the NCAA created a horizontal restraint by enforcing a rule which prevented free competition for television rights, the Court refused to apply the per se rule to the NCAA restriction. Instead, the Court analyzed the regulation under the “rule of reason” and allowed the NCAA to present justifications for the restriction. The Court did not address directly the legality of the NCAA limited compensation bylaw in holding that the NCAA television restriction violated the Sherman Act. In dicta, the Court indicated that the limited compensation bylaw, among other NCAA regulations, actually enhances competition and would thereby satisfy a

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40. 468 U.S. 85, 95 (1984). The College Football Association (“CFA”) was created to “promote the interests of major football playing schools within the NCAA structure.” *Id.* at 89. The NCAA enacted a plan to televise football games, which limited the number of times a team could be televised and the amount of money a team could make. *See id.* at 93-94. In 1979, the CFA decided it wanted more input into the plan to televise football games. *See id.* at 94. The CFA explored the possibility of its own television agreements and received a contract offer from NBC. *See id.* at 94-95. The NCAA announced that it would take disciplinary action against any CFA member who complied with the new contract. *See id.* at 95.

41. *See id.* at 99-101. A horizontal restraint is an agreement among competitors on the way in which they will compete with one another. *See id.* Courts apply the per se rule when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.” *Id.* at 100 (citing Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 19-20 (1979)). The per se rule was not applied because the industry requires horizontal restraints if the product is to be available at all. *See id.* at 107.

42. *See id.* at 103. The Court held that a fair evaluation required consideration of the NCAA’s justifications for the restraints. *See id.* The rule of reason test allows the court to determine whether a restraint is unreasonable based on the surrounding circumstances and their impact on competitive conditions. *See id.*
“rule of reason” analysis because it preserves education and amateurism in collegiate athletics. 43

McCormack v. NCAA 44 is the only case in which a court has addressed directly whether the NCAA limited compensation bylaw violated the Sherman Act. In McCormack, an alumnus of Southern Methodist University ("SMU") brought a class action lawsuit against the NCAA on behalf of SMU alumni and SMU football players in response to the NCAA’s suspension of SMU’s football program for the 1987 season. 45 The NCAA imposed this sanction after it found that SMU had violated the limited compensation bylaw through illegal booster payments to football players. 46 Plaintiffs alleged that the NCAA limited compensation bylaw constituted price-fixing in violation of antitrust laws. 47 The United States Court of Appeals for the Fifth Circuit applied the “rule of reason” in lieu of the per se test, and relied on dicta from Board of Regents of the University of Oklahoma in holding that the NCAA limited compensation bylaw was “reasonable” and not in violation of the Sherman Act. 48

The court’s reasoning in McCormack is unpersuasive as it relies on dicta from Board of Regents of the University of Oklahoma rather than making its own independent antitrust analysis. The holding in Board of Regents of the University of Oklahoma is binding only as to the anti-competitive nature of NCAA television packages. 49 In addition to being mentioned only in dicta, the discussion of payment to college athletes in Board of Regents of the University of Oklahoma was unreasoned obiter dictum. 50 The Supreme Court in Board of Regents of the University of Oklahoma suggested that anti-competitive NCAA restrictions would be “reasonable” under the “rule of reason” if such restrictions advanced education and amateurism in collegiate ath-

43. See id. at 118-19 (stating that limitations are effectively imposed by member schools who will not be affected and that limitation affects important source of revenue for some member schools).
44. 845 F.2d 1338 (5th Cir. 1988).
45. See id. at 1340 (alleging that players’ careers were destroyed, cheerleaders suffered mental anguish and students and alumni were deprived of right to attend football games and to support their team).
46. See id.
47. See id. at 1343-44 (holding that eligibility rules restricting compensation are not presumed to be illegal).
48. See id. at 1343 (holding that NCAA’s eligibility rules are reasonable).
50. See Goldman, supra note 6, at 213 (recognizing that subsequent cases relied on dicta from opinion without conducting independent analysis).
As argued in the introduction, the NCAA's restraints on payments to student-athletes do not further education or amateurism. Education is not a priority for student-athletes, their coaches or in many cases, the universities themselves, despite recent efforts, reflected in Proposition 16, to increase freshmen initial eligibility standards. The concept of amateurism in collegiate athletics has been outdated by the realities of the present. Therefore, if future courts applied their own independent and thorough antitrust analysis, rather than relying exclusively on Board of Regents of the University of Oklahoma or McCormack, they likely would find the NCAA limited compensation bylaw violates the Sherman Act. Doing so would recognize the restriction on payments to student-athletes for what it is – not a regulation promoting competition, education and amateurism, but rather a regulation aimed at saving universities' money.

Whether courts ultimately find that the NCAA limited compensation bylaw violates antitrust laws, courts potentially could find that the stipend proposal constitutes price-fixing in violation of the Sherman Act, especially in light of the recent multi-million dollar settlement arising out of the “restricted earnings coach” case. In Law v. NCAA, a Kansas federal district judge found the NCAA in violation of the Sherman Act in a challenge to an NCAA regulation placing a limit on the salaries for “restricted earnings” coaches.

51. See Bd. of Regents of the Univ. of Okla., 468 U.S. at 120 (holding that NCAA’s television broadcast plan “restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.”) Id.

52. For the discussion of how the NCAA’s restraints on payments do not further education or amateurism, see supra notes 13-28 and accompanying text.

53. Proposition 16 set the initial eligibility requirement for both standardized test scores and grade point averages (“GPA”) on a sliding scale. Proposition 16 raised the number of core courses from eleven to thirteen and required a 2.5 GPA, rather than a 2.0 GPA formerly required under Proposition 48.


55. See Acain, supra note 2, at 331 (reasoning that student-athletes are not really amateurs because they receive compensation in form of tuition, room and board, and books); see also Goldman, supra note 6, at 213 (recognizing that antitrust analysis involving payment to college athletes in Bd. of Regents of the Univ. of Okla. was dicta and was incorrectly followed by McCormack).


57. See Law, 902 F. Supp. at 1394 (applying rule of reason, court found that “restricted earnings” coach rule was not reasonably necessary and, therefore, was in violation of Sherman Act). The court awarded $22.3 million in damages, an amount which was tripled after the application of the treble damages clause in the Sherman Act. See id. In February 1999, the NCAA and the plaintiffs reached a $54.5 million settlement agreement. See id.
The case originated from an NCAA cost-cutting measure which limited “restricted earnings” Division I basketball coaches to an annual salary of $12,000 that is assumed and not supported in the opinion.\(^{58}\) Under the regulation, each basketball program was allowed one of these “restricted earnings” coaches in addition to one head coach and two assistants.\(^{59}\) Several “restricted earnings” coaches challenged the NCAA regulation under antitrust laws asserting that the restriction was in violation of the Sherman Antitrust Act.\(^{60}\) The court agreed, rejecting the NCAA’s argument that the regulation was in fact pro-competitive because it would save the NCAA from financial ruin, thus preserving the collegiate competition that the NCAA promotes, and thus, the court found the NCAA to be in violation of the Sherman Act.\(^{61}\)

Courts would certainly cite Law in striking down a fixed payment stipend as violative of the Sherman Act. However, the non-fixed payment stipend proposal coupled with a “salary cap” potentially could survive antitrust scrutiny so long as the proposal had the support of the student-athletes and was the result of a collective bargaining agreement.\(^{62}\) Under the non-statutory labor exemption, antitrust laws have no application to collective bargaining agreements.\(^{63}\) After all, courts have approved the team salary caps incorporated by many of the professional leagues, including the NBA and NFL.\(^{64}\) Still, the NCAA might be hesitant to adopt a regulation that would risk another enormous judgment or settlement if a court found the NCAA liable for antitrust violations, because the member institutions would ultimately pick up the bill.\(^{65}\)

\(^{58}\) See id. at 1400 (limiting salary of “restricted earnings” coaches was one of several measures proposed by NCAA Cost Reduction Committee to curtail increasing institutional costs).

\(^{59}\) See id. (allowing “restricted earnings” coach to earn additional income by performing duties outside athletic department).

\(^{60}\) See id. at 1397 (alleging that Division I members of NCAA conspired to limit compensation of “restricted earnings” coaches).

\(^{61}\) See id. at 1410 (finding that NCAA’s restraint on “restricted earnings” coaches was not reasonably necessary).

\(^{62}\) See Acain, supra note 2, at 343 (reasoning that true competition in recruiting “star athletes” between Universities would result). Certainly a market-based revenue-sharing plan would not constitute price-fixing in violation of the Sherman Act. For a discussion of the possible problems of collective bargaining by student-athletes, see infra notes 99-105 and accompanying text.

\(^{63}\) See NBA v. Williams, 45 F.3d 684, 693 (2d Cir. 1995) (concluding that application of antitrust principles to collective bargaining relationship would disrupt collective bargaining as we know it).

\(^{64}\) See id. at 692 (citing Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989).

\(^{65}\) For a discussion of NCAA’s violation of the Sherman Act by placing a limit on the salaries of “restricted earnings” coaches, see supra notes 58-67 and accompanying text.
III. WORKERS' COMPENSATION ISSUES

If the NCAA adopted the stipend proposal and commenced paying Division I student-athletes who participate in revenue-producing sports, it is likely that in most jurisdictions the student-athletes receiving stipends would then be covered by the workers' compensation laws of those states. "Workers' compensation laws are state statutes enacted to compensate employees for job-related injuries or death, regardless of fault." Generally, only those defined as "employees" are covered by the workers' compensation statutes. In addition, only employees who are "injured or killed in actions arising out of the 'scope of employment' are covered by the statutes." Therefore, workers applying for the workers' compensation coverage must meet a two prong requirement: (1) employees must be covered, and (2) act within the scope of their employment when they suffer injury or death. Coverage would therefore have a financial and practical impact on universities.

As the workers' compensation statutes in the majority of jurisdictions do not expressly address coverage of scholarship student-athletes, the major hurdle facing scholarship student-athletes seeking to receive workers' compensation benefits, including stu-

66. See Goplerud, supra note 1, at 1092. Currently, universities pay for any required surgery and accompanying physical therapy that results from injury. See id.

67. ARTHUR LARSON, WORKER'S COMPENSATION LAW: CASES, MATERIALS AND TEXT (1992); see also Goplerud, supra note 1, at 1094 (recognizing "legal and financial considerations" that workers' compensation coverage would bring to athletic programs).

68. For a discussion of workers' compensation law, see Goplerud, supra note 1, at 1095.

69. Id. (stating that "the ultimate question becomes whether the incident involved a covered employee who was acting in the course of her employment when the injury or death occurred").

70. The focus will be on the "employee" requirement. The "scope of employment" requirement would take on a different twist, as most people do not associate sports with employment. However, in the workers' compensation context, student-athletes who receive a stipend would take a role akin to a professional athlete, who the law has held to be acting within the scope of employment during or in preparation for a game. Assuming that the student-athlete was injured during or in preparation for a game, whether it be practice or workouts, it certainly would be considered that the injury took place during the student-athlete's "scope of employment."

71. See Goplerud, supra note 1, at 1095. New York "specifically excludes 'amateur' athletes from its definition of 'employee.'" Id. (citing N.Y. WORKERS' COMP. LAW § 2 (1) (McKinney 1993)). California and Hawaii specifically exclude "scholarship athletes" from their definitions of "employee." See id. at 1095-96 (citing CAL. LAB. CODE § 3352(k) (West 1989) and HAW. REV. STAT. § 386-1(3) (1995)). "Nevada, on the other hand, specifically includes 'collegiate athletes' within its definition of 'employee.'" Id. at 1096 (citing NEV. REV. STAT. § 616.251 (1995)).
dent-athletes who would be receiving stipend payments, would be to establish an employment relationship with the university or the university's athletic department as employer and the student-athlete as employee.\(^{72}\) The recent judicial trend has seen courts deny coverage to student-athletes who sought to establish an employment relationship between their universities and them based upon the universities providing them with athletic scholarships.\(^{73}\) The reasoning has focused on the purported amateur nature of collegiate athletics and the NCAA's own description of collegiate athletics as an avocation rather than a vocation.\(^{74}\)

In *Rensing v. Indiana State University Board of Trustees*,\(^{75}\) the Indiana Supreme Court held that an employment relationship did not exist between an injured student-athlete and the university on the basis of the university providing the plaintiff student-athlete an athletic scholarship, and, therefore, the student-athlete was not entitled to workers' compensation coverage.\(^{76}\) Rensing, a scholarship football player who was paralyzed while making a tackle during practice, sought compensation for permanent total disability as well as medical and hospital expenses.\(^{77}\) Although the court acknowledged that Rensing agreed to certain obligations to the university to keep his scholarship, the court ultimately focused on the lack of intent between Rensing and the university to form an employer-employee relationship as well as NCAA policies regarding amateurism and education as a priority.\(^{78}\)

*Coleman v. Western Michigan University*\(^{79}\) involved facts similar to those in *Rensing*. Coleman, a scholarship football player injured during football practice, based his claim for workers' compensation benefits on his receipt of an athletic scholarship from the univer-

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\(^{72}\) The University of Florida and other athletically successful universities have formed athletic departments which are independent of the university itself.

\(^{73}\) See *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983) (finding that student-athlete injured in football practice was not "employee"); see also *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983) (finding that student-athlete injured in football practice was not "employee").

\(^{74}\) See Goplerud, *supra* note 1, at 1097 (recognizing that athletes on scholarship generally have been found not to be covered by workers' compensation laws).

\(^{75}\) 444 N.E.2d 1170 (Ind. 1983).

\(^{76}\) See *id.* at 1175 (concluding that Rensing was not employee of university under Workman's Compensation Act, but he was student-athlete).

\(^{77}\) See *id.* at 1170-71 (arguing there was employer-employee relationship under Workman's Compensation Act).

\(^{78}\) See *id.* at 1174-75 (recognizing that courts in other jurisdictions have found that scholarship students are not considered "employees" under the Workman's Compensation Act "unless they are employed in a university job in addition receiving scholarship benefits").

Instead of applying the intent test as the *Rensing* court did, the Michigan Court of Appeals applied the economic reality test in finding that no employment relationship existed between Coleman and the university, and therefore, Coleman was not entitled to workers' compensation coverage. Under the economic reality test, the court considered the university's right to control Coleman as a scholarship athlete, the university's right to discipline him and the payment or lack of payment of wages. In addition, the court considered whether the task performed by Coleman, playing football, was an integral part of the university's business. In denying that the student-athlete's football playing was an integral part of the university's business, the court refused workers' compensation benefits for Coleman.

Critics have questioned the reasoning advanced in the *Rensing* and *Coleman* opinions. The court in *Rensing* supported its decision to deny the student-athlete workers' compensation benefits with an intent test, which is not as widely used as the economic reality test in the workers' compensation "employee" analysis. In addition, the court in *Rensing* relied on the education and amateurism ideals advanced by the NCAA, two concepts criticized in the introduction to this Article. While the court in *Coleman* analyzed the employment relationship issue under the more popular economic reality test, the court concluded that the football program at the university was not an integral part of the university's business.

It is not difficult to find fault in such a conclusion. On the majority of the college campuses, a successful football program brings with it increased booster donations, increased student en-

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80. See id. at 225 (claiming he was employee for purposes of Worker's Disability Compensation Act).
81. See id. at 228 (finding that plaintiff was not "employee" of defendant within purpose of Act).
82. See id. at 225 (requiring examination of four factors to determine if employment relationship existed).
83. See id. at 225-26 (noting that none of four factors are dispositive).
84. See *Coleman*, 336 N.W.2d at 227-28 (reasoning that university was in primary business of providing academic education).
85. See Goplerud, *supra* note 27, at 128 (questioning analysis of *Rensing* and *Coleman* courts).
86. See id.
87. See *Rensing*, 444 N.E.2d at 1173 (recognizing policy of NCAA that student-athlete is student first and foremost).
88. For a discussion of amateurism and education in college athletics, see *supra* notes 11-15, 23-26 and accompanying text.
89. See *Coleman*, 336 N.W.2d at 224 (finding that university's academic program would likely remain effective without presence of football program).
rollment and revenue to fund the non-revenue sports on campus.\textsuperscript{90} Thus, if a future court conducts an independent analysis of the nature of the relationship between universities and scholarship student-athletes, the recent trend of denying workers’ compensation coverage to student-athletes seeking to establish an employer-employee relationship based on their receipt of athletic scholarships, potentially may be short-lived.

If the NCAA commenced making stipend payments to student-athletes, student-athletes would unquestionably qualify as “employees” under the state workers’ compensation statutes because the stipend would represent a wage paid for services rendered.\textsuperscript{91} Student-athletes would be entitled to workers’ compensation coverage under the intent test, economic reality test or any other test used by courts. A fair comparison would be the workers’ compensation coverage provided by universities to teaching assistants.\textsuperscript{92} University teaching assistants generally receive a tuition scholarship in addition to a stipend and receive workers’ compensation coverage by the university.\textsuperscript{93} The scholarship and stipend are provided in exchange for the student’s serving as a teacher for a designated number of classes. It is difficult to imagine that student-athletes who are paid a stipend would be treated any differently.\textsuperscript{94}

It appears that the adoption of the stipend proposal would have a financial effect, albeit not a dramatic one, on NCAA member universities. Student-athletes would suddenly transform into university employees, thereby becoming eligible for workers’ compensation coverage. Although universities now regularly pick up the bill for surgery and rehabilitation for athletic-related injuries of student-athletes, participants in a sport as rough and violent as Division I collegiate football are no strangers to paralysis and other career-debilitating injuries, which can involve expensive payoffs by employers for sophisticated medical procedures and loss of future earning power. Universities would be wise, and perhaps compelled, to contract with a private insurance carrier or pay into the state

\textsuperscript{90} For a discussion of the effects of successful athletic programs on universities, see \textit{supra} note 6 and accompanying text.

\textsuperscript{91} See Goplerud, \textit{supra} note 1, at 1099 (reasoning that athletes would then likely “fall within existing definitions of ‘employee.’”).

\textsuperscript{92} See \textit{id.} (reasoning that teaching assistants are similarly situated to athletes who would receive stipend).

\textsuperscript{93} See \textit{id.}

\textsuperscript{94} See \textit{id.} at 1100 (implying that student-athletes would be included in universities’ Workers’ Compensation coverage).
workers’ compensation fund, to cover the newly qualified student-athletes.95

IV. LABOR LAW ISSUES

Currently, scholarship student-athletes do not qualify as "employees" under the National Labor Relations Act ("NLRA").96 However, if the NCAA adopted the stipend proposal, student-athletes would more than likely meet the NLRA "employee" definition because they would be considered wage earners.97 The NLRA covers employees in businesses which engage in interstate commerce.98 This would give student-athletes the right to unionize and bargain collectively.99

If qualified as NLRA "employees," student-athletes receiving stipend payments would have the right to select an exclusive collec-

95. See generally Larson, supra note 67; see also Goplerud, supra note 27, at 127 (discussing use of Workers' Compensation law to benefit student-athletes).


The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railroad Labor Act, (45 U.S.C. § 151 et seq.) as amended from time to time, or by any person who is not an employer as herein defined.

Id. § 152(3).

98. See Acain, supra note 2, at 317. Courts have long recognized that the NCAA's activities involve interstate commerce. See id.

99. See 29 U.S.C. § 157 (1994). This section provides:
Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id.
tive bargaining representative. They would negotiate the terms and working conditions of their participation. Suddenly, to the universities' chagrin, the amount of the stipend payments, transfer rules, commercial endorsements, and the frequency, duration and intensity of practices all potentially could enter the negotiating landscape. Similarly, educational issues such as the minimum number of credits required to graduate and changes within the curriculum would enter the landscape as well. Absurd as it may be, if a university and its student-athletes failed to reach an agreement as to any or all of the negotiable terms, the NLRA would grant student-athletes the option to strike. Imagine the bargaining leverage that would arise out of a threat by a highly ranked football team to strike during an upcoming contest with an equally ranked opponent. In addition, what would be the bargaining units? Offense and defense? Starters and reserves? Linebackers and linemen? It becomes readily evident that paying stipends to student-athletes would create drastic factual issues under the NLRA.

V. TITLE IX ISSUES

Should the NCAA adopt the stipend proposal, gender equity likely would compel universities to provide stipends for a proportionate number of women student-athletes. Title IX requires not only equal opportunities for participation, but also equal treatment

100. See id. § 159(a). The section provides: Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect rates of pay, wages, hours of employment, or other conditions of employment . . . .

101. See id. (allowing employees to have right to bargain collectively via their chosen representatives).

102. See Ukeiley, supra note 96, at 216 (allowing student-athletes to become employees suggests there will be labor disputes between schools and student-athletes which will not be easily resolved).

103. See id. (noting that even though players can exercise employee rights, Board can exclude all educational issues as negotiable). But see Regents of Univ. of Mich. v. Mich. Employment Relations Comm’n, 389 Mich. 96 (1973) (prohibiting bargaining dealing with education); see also Ukeiley, supra note 96, at 216 (noting negotiations can be limited).

104. See 29 U.S.C. § 163 (1994) (providing that employees may engage in “concerted activities for the purpose of collective bargaining or other mutual aid protection . . . .”).


106. See id. at 127.
and benefits for athletes within collegiate programs. Universities might attempt to draw a legal distinction between scholarships and stipend payments in crafting an argument that "equality of opportunity" under Title IX should be construed to mean equal opportunity for women's sports teams to raise revenue, rather than equal access to men's sports' revenues. However, due to the fact that collegiate women's athletic teams generally do not generate profits, it is unlikely that female student-athletes would have the same opportunities as male student-athletes to share in the revenue that they generate, and courts would probably hold the universities to a stringent Title IX test regarding the stipend proposal. Therefore, because each university would be providing stipend payments to eighty-five football players alone, the number of Title IX stipend payments made to female student-athletes would be quite substantial. Considering that basketball is the only women's sport which generates revenue on the vast majority of Division I campuses, the stipend proposal would carry with it an even more expensive price tag.

In determining whether universities would be in compliance with Title IX concerning stipend payments, universities would have to meet one of the three prongs of the "policy interpretation" test announced in *Cohen v. Brown University*. This test calls for: (1) substantial proportionality; (2) continuing practice of program ex-

107. See 20 U.S.C. § 1681(a) (1994) (providing Title IX of the Education Amendments Act of 1972 in part: "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 . . . ").

108. See Blair v. Wash. State Univ, 740 P.2d 1379 (Wash. 1987) (finding plan requires university to create equal opportunity and raise revenue for both men's and women's sports).

109. See Goplerud, *supra* note 27 at 130 (stating that inclusion of men's football would assure significantly larger number of men receiving stipend).

110. See id. at 130 (stating that effects of this situation might provide impetus to reduce number of scholarships provided for football). The NFL only allows teams to have fifty-three players under contract during the regular season. See id. at 130 n.68 (noting if NCAA reduces amount of scholarships available for Division I football programs to fifty-three, cost of stipend payments would be substantially reduced as thirty-two fewer stipends would be required to be paid to female student-athletes). To alleviate concerns of significant attrition of scholarship football players, either through injury or ineligibility related to academics or discipline problems, walk-ons could fill out the remainder of the collegiate football roster. See id.

111. See id.

pansion; and (3) full and effective accommodation.\footnote{113} If universities failed to satisfy the "policy implementation" test, thereby violating Title IX, female student-athletes undoubtedly would sue the universities requesting injunctive relief and monetary damages. Due to financial hardships many universities are experiencing today as a result of Title IX, gender equity continues to be a sizable hurdle confronting any stipend proposal.\footnote{114}

VI. Taxation Issues

If universities began compensating student-athletes beyond the amount of their athletic scholarships, both the student-athletes receiving the stipend payments and the universities themselves potentially would be reporting more taxable income to the Internal Revenue Service. Section 117(a) of the Internal Revenue Code excludes from gross income any amount received as a "qualified scholarship."\footnote{115} Section 117, however, does not exclude those por-

\footnote{113. See \textit{id}. Defendant Brown University was charged with discriminating against women within the intercollegiate athletic program in violation of Title IX. See \textit{id}. (demanding through injunction that defendant Brown University immediately restore women's gymnastics and volleyball as fully funded intercollegiate varsity teams).}

\footnote{114. See Goplerud, \textit{supra} note 27, at 130 (stating gender equity practices would be problematic because disproportionate benefits to men may lead to sanctions on program).}

\footnote{115. See I.R.C. § 117(a) (Supp. III 1998). This section provides in relevant part:}

\textbf{Qualified Scholarships.}
\begin{enumerate}
\item \textbf{General Rule} – Gross income does not include any amount received as a qualified scholarship by an individual who is a candidate for a degree at an educational organization described in section 170(b)(1)(A)(ii).
\item \textbf{Qualified Scholarship} – For purposes of this section –
\begin{enumerate}
\item \textbf{In General} – the term "qualified scholarship" means any amount received by an individual as a scholarship or fellowship grant to the extent the individual establishes that, in accordance with the conditions of the grant, such amount was used for qualified tuition and related expenses,
\item \textbf{Qualified Tuition and Related Expenses} – For purposes of paragraph (1), the term "qualified tuition and related expenses" means –
\begin{enumerate}
\item tuition and fees required for the enrollment or attendance of a student at an educational organization described in section 170(b)(1)(A)(ii), and
\item fees, books, supplies, and equipment required for courses of instruction at such an educational organization.
\end{enumerate}
\end{enumerate}
\item \textbf{Limitation} – Subsections (a) and (d) shall not apply to that portion of any amount received which represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction.
\end{enumerate}

tions of an athletic scholarship constituting room and board from gross income. However, a paucity of student-athletes report the amount of their room and board as income, and the IRS does not pursue the issue. In addition, it is widely recognized that all portions of the athletic scholarship do not meet the exclusionary requirements of section 117 because scholarship recipients are required to perform athletic services as a condition of receiving their scholarships. Still, athletic scholarships remain untaxed, and there is case law to support this aberration.

However, if the NCAA adopted the stipend proposal, the stipend amount would immediately constitute taxable income to the stipend recipient. Although the tax liability to the student-athletes would not be substantial, assuming that the stipend payment itself was not an excessive amount, many student-athletes from low-income families could ill afford to lose any amount of the stipend, especially if these same student-athletes are spending the stipend payments on necessities. In addition, because the athletic scholarships are now taxable, universities would be required to handle the ancillary burden of withholding for income tax as well as for social security and Medicare.

More significant to the universities would be the potential effect of stipend payments on the universities’ tax-exempt status. Generally, an educational institution does not pay federal tax on

116. See id. (stating related expenses are included in generalized scholarships).

117. See Schinner, supra note 105, at 155 (stating that expenditures other than tuition, fees and books, such as room, board, or incidental expenses must be included in recipient’s gross income).

118. See I.R.C. § 117(c) (stating (a)-(d) do not apply when services by student is condition for receiving scholarship or tuition reduction); see also Robert W. Lee, The Taxation of Athletic Scholarships: An Uneasy Tension Between Benevolence and Consistency, 37 U. Fla. L. Rev. 591, 595 (1985) (stating section 117(c) applies to athletes on scholarship because they must be degree candidates); Schinner, supra note 105, at 144-48 (analyzing athletic scholarship as gross income under primary purpose test, quid pro quo test and control test).

119. See Schinner, supra note 105, at 139 (stating that since enactment of section 117 forty-five years ago, no court has specifically addressed issue of whether athletic scholarships constitute taxable income). The Tax Court has tangentially considered the issue on a few occasions but avoided taking it head-on each time. See id.

120. See id. (stating Supreme Court believed Congress intended payments to taxpayer should be taxed).

121. See Goplerud, supra note 27, at 131 (noting that stipend will provide money for underprivileged student athletes).

122. See Goplerud, supra note 1, at 1103 (noting that stipend would be burden on universities because stipends are taxable).

123. See Schinner, supra note 105, at 158 (noting it is unclear whether athletic programs are unrelated business which could impose large tax liability on universi-
income directly related to carrying out its educational mission.\textsuperscript{124} However, on its unrelated business income, a tax-exempt organization is taxed at the corporate rate.\textsuperscript{125} The Internal Revenue Code defines “unrelated business taxable income” as income derived from (1) a “trade or business” that is (2) “regularly carried on,” but that is (3) “not substantially related” to the institution’s tax-exempt purposes.\textsuperscript{126}

Paying stipends to student-athletes would further fuel the arguments of those who have long advocated for the elimination of the tax-exempt status for collegiate athletics, as the payments to the student-athletes potentially could tarnish the concept of amateurism, and the educational objectives of athletic scholarships, to such a degree that the universities’ athletic programs would no longer be “substantially related” to the universities’ tax-exempt purposes.\textsuperscript{127} The loss of tax-exempt status would reduce a large portion of the annual profits of many universities.\textsuperscript{128}

\section*{VII. Constitutional Issues}

If the stipend proposal were adopted and the universities began paying stipends to student-athletes in revenue-producing sports, with a proportionate number of female student-athletes in order to comply with Title IX, a student-athlete in a non-revenue sport potentially could mount an Equal Protection challenge against a university.\textsuperscript{129}

\textsuperscript{124} See I.R.C. § 501(a) (1997). Education is defined as relating to: “(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community.” Treas. Reg. § 1.501(c)(3)-1(3)(3)(i).

\textsuperscript{125} See I.R.C. § 501(a)(1) (1997) (stating in order to exempt, organization must fit within education definition of § 501(c)(3)); see also Schinner, \textit{supra} note 105, at 158-59 (stating educational organizations usually do not pay federal income tax on income directly related to its educational purposes).

\textsuperscript{126} I.R.C. § 511(b) (1997); see also Schinner, \textit{supra} note 105, at 158 (stating within first two elements of Code’s definition, athletic programs and many factors like profitability and scope determine third prong).

\textsuperscript{127} See Schinner, \textit{supra} note 105, at 109 (stating if professional athlete program produces large profits, its size is over adequate size necessary for its educational goals, then activity will probably be unrelated trade or business).

\textsuperscript{128} See \textit{id.} at 159 (noting tax liability generated by football team alone at a university would exceed $1 million annually).

\textsuperscript{129} See Goplerud, \textit{supra} note 27, at 130 (noting disproportionate benefits to men can expose program to sanctions or liability).
VIII. Vicarious Liability Issues

Another legal issue which would flow out of the adoption of the stipend proposal would be the universities' potential *respondeat superior* liability for injuries and misconduct by student-athletes. As employees, student-athletes also may be deemed agents of their employers – the universities. Therefore, if a collegiate football player injured a player on an opposing team, it would be possible that the university could face liability, unless a court determined that the student-athlete was acting outside the scope of his employment. However, because of the violent nature of the “employment” of Division I college football, the injured plaintiff probably would be required to prove gross negligence. In addition, it would seem that the assumption of risk doctrine would be an effective affirmative defense for the university. Still, universities would certainly feel uneasy about this new source of potential liability, no matter how unlikely a successful plaintiff’s verdict.

IX. Practical Issues

Paying stipends to student-athletes in revenue-producing sports and a proportionate number of female student-athletes would be expensive. Experts have estimated that the cost to all Division I universities would be $30 million annually. However, not all universities are as fortunate as the University of Florida in reaping millions of dollars in profits from campus athletics each year. The athletic departments of many universities have been operating at a loss since the advent of Title IX. In fact, a recent study revealed that over 60% of Division I universities and over 80% of all

130. See id. (noting that existence of increased exposure to liability would likely cause schools to be uneasy about stipend plan).

131. For a discussion of the potential employment relationship between student-athlete and university, see supra notes 66-95 and accompanying text.


133. See Ivan Maisel, *Don’t Expect Athletes to be Paid Anytime Soon*, *Sporting News*, Apr. 10, 1995, at 52 (stating estimation was based on annual stipend payment of $3600 or monthly stipend payments of $300 and noting impact to individual budgets might approach $400,000 annually); see also Goplerud, supra note 27, at 131 (stating about $29 million annually would cover cost of Division I athletic stipends).


135. See id. at 131 (noting if athletes are employees, they then can bring lawsuits under Title IX and Sherman Act).
universities are operating their athletic programs at a loss without the added burden of providing stipend payments. Support for the non-revenue producing sports would be jeopardized at those universities struggling financially to make the stipend payments, and such universities would be compelled to eliminate a number of non-revenue sports teams altogether. Title IX requirements would demand that the majority of the eliminated sports teams be male teams. Other universities may determine that stipend payments would be cost-prohibitive and instead form their own “non-stipend” leagues. Such a response would spell the end of historical conference alignments and traditional rivalries. Other commentators have suggested that new sources of revenue should be sought to make the stipend payment affordable. These suggestions, many of them unpleasant to university administrators, have included increasing student activity fees, tuition and ticket prices, soliciting corporate benefactors, creating a national championship football playoff, reducing available football scholarships, and requesting professional leagues such as the NBA, NFL and the WNBA to provide support in recognition that collegiate athletics have long been the “minor leagues.”

Purists fear that paying student-athletes would be the death knell of the fading ideal of “amateurism” in collegiate athletics. Adopting the stipend proposal, purists argue, would make college sports no different from the professional leagues. Judith Albino, former President of the NCAA, said, “I can’t imagine we are moving in that direction [of paying student-athletes]. Doing that would fundamentally change what we are about. If we pay players, we are no longer educational institutions.” Purists have also expressed

136. See Steve Kelly, *Fiesta Time to Celebrate College Football*, *Seattle Times*, Jan. 2, 1996, at C1; see also Barra, supra note 1, at A26 (noting how NCAA rules work to benefit of professional sports’ leagues).

137. See Goplerud, supra note 1, at 1102 (acknowledging enormous practical and financial difficulties presented by his proposal).

138. See id. at 1104 (noting purpose of university is to learn).

139. See Goplerud, supra note 27, at 131 (suggesting that universities look for creative ways in cutting administrative and travel expenses).

140. See Goplerud, supra note 1, at 1104 (commenting that corporate sponsors like Nike could be considered supporters of program).

141. See id. at 1102. Purists argue that “any denigration of the amateurism concept is against step towards the destruction of intercollegiate athletics.” Id.

142. Thomas O’Toole, *Paying Players Opposed: NCAA Mulls Eligibility*, *Com. Appeal* (Memphis), Jan. 8, 1995, at D12; see also Goplerud, supra note 27, at 130 (commenting on number of well-respected football coaches, notably Tom Osborne of University of Nebraska and Don Nehlen of University of West Virginia, who have publicly supported idea of paying student-athletes).
concern that the denigration of "amateurism" on the college level would eventually pervade high school athletics as well and make high school sports vulnerable to the same abuses.143

It is possible that if universities began paying student-athletes, tension on campus potentially would erupt between the student-athletes in the stipend sports and those in the non-stipend sports. The traditional strong sense of community among student-athletes at universities would be jeopardized if the majority of student-athletes felt like second-rate participants to the minority of their stipend-receiving peers. Furthermore, it is possible that a student-athlete who joins a team as a non-scholarship walk-on would feel hostility toward his or her own teammates who are receiving stipends, thereby destroying team chemistry.

Lastly, the NCAA may align itself in opposition to the stipend proposal in the interest of bureaucratic self-preservation. Permitting payment of student-athletes would make many NCAA regulations and enforcement mechanisms obsolete.144 It is doubtful that the paternalistic NCAA will ever willingly give up its place at the center of collegiate athletics.

X. THE AUTHORS' PROPOSAL

The authors would incorporate both elements, need and fairness, in the proposal to pay student-athletes beyond the current allowable amount of the athletic scholarship. We would offer Division I universities the opportunity to pay all student-athletes a small amount of spending money, perhaps $30-$50 per month, as part of their athletic scholarship. Unlike a stipend payment, which resembles a wage for services rendered, the amount would represent "laundry money" such as was allowed in the 1970s and would fall under the new NCAA definition of "athletic scholarship," along with tuition, fees, room, board and books. Because the "laun-
"dry money" would represent a scholarship feature, and not wages, student-athletes would avoid the label "employees" under both the workers' compensation statutes and the NLRA, as well as under any vicarious liability theory. A successful challenger under the Sherman Antitrust Act would have to convince a court to depart from the reasoning expounded in the Board of Regents of the University of Oklahoma and McCormack opinions. Title IX would not offer any resistance because all student-athletes, male and female, would receive the "laundry money." Payment to all student-athletes would also negate any feelings of animosity or jealousy among teammates and peers, with the possible exception of non-scholarship student athletes if the universities decided not to offer them "laundry money." The "laundry money" would certainly qualify as gross income under section 117 of the Internal Revenue Code, but until the IRS chooses to enforce the taxation of non-exempt scholarship amounts, student-athletes should not feel obligated to report any amount of their athletic scholarships. Although the "laundry money" would not satisfy the needs of many of today's student-athletes, it would provide enough cash for an occasional date, or gas or bus money for an emergency trip home.

Offering "laundry money" (in the $30-$50 range) to all student-athletes would cost each university less than $100,000 per year, and therefore would not financially cripple most Division I universities. However, if a university could simply not afford to include "laundry money" as part of its athletic scholarship, it could choose to exclude it. It is doubtful that a recruit would choose not to attend a university that he or she otherwise likes for its sports team, coach and educational opportunities because that university does not offer $30 per month in "laundry money." Each university could also choose whether to offer the full allowable amount of "laundry money" to partial scholarship holders and walk-ons or to pay the "laundry money" in an amount proportionate to the amount of the scholarship.

Jim Host of Host Communications wrote in a recent NCAA newsletter, "We've [the NCAA] got more assets to sell corporate America than any professional league or professional team will ever have." This Article's proposal incorporates a revenue-sharing scheme to address such NCAA ostentation and the larger issue of fairness to the under-compensated student-athletes in the revenue-producing sports. This proposal would make available to student-athletes a reasonable percentage of revenue derived each year from

145. Id.
the football bowls, the men’s and women’s NCAA basketball tournaments, and shoe and apparel contracts. For example, if the University of Florida football team received $3 million for its invitation to play in the 2000 Orange Bowl, the student-athletes on that team (and that team only) would receive a small percentage of that payout. However if the 2001 University of Florida football team failed to receive a bowl invitation, the student-athletes on that team would not receive any funds. The same scheme would operate for the student-athletes on the men’s and women’s basketball teams and the existence and amount of any payout would be dependent on an invitation to and success in the NCAA men’s and women’s basketball tournaments. Likewise, the athletes would receive a percentage of any shoe or apparel contracts operating at the time of their participation in the tournaments.

The amount of money required to be paid to female student-athletes would naturally depend on the success of the men’s football and basketball teams and the women’s basketball teams. It is entirely possible that Title IX would not be a concern in a given year. For example, if the University of Florida women’s basketball team received an invitation to the 2001 NCAA tournament, but the football and men’s basketball teams failed to obtain post-season play, the University of Florida would not need to pay any female student-athletes other than those who participated on the women’s basketball team. A much different scenario, however, would present itself if, for example, both the University of Florida football and men’s basketball teams received a bowl and NCAA tournament invitation, respectively, but the women’s basketball team failed to receive an NCAA tournament invitation. In this situation, the University of Florida would have to pay female student-athletes the same amount that was paid to the football and men’s basketball players. Rather than randomly choose the female student-athletes paid in order to comply with Title IX, the university should pay an equal amount to each female student-athlete in all sports.

This proposal seems very expensive, but any money paid to student-athletes is derived directly from revenue. Rather than enjoying the entire $3 million received from the 2000 Orange Bowl, for instance, the University of Florida would “only” retain a large percentage of that $3 million. In addition, the proposal would include a recommendation that all Division I universities reduce available football scholarships from eighty-five scholarships to fifty-five.

146. Because this money is derived from revenue and not included as part of a team’s scholarship program, this aspect is different from the stipend proposal.
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scholarships in order to reduce the effect of Title IX on the proposal.147 Also, the NCAA should seek new sources of revenue, such as Division I football playoffs and wealthier corporate sponsors.148

In addition, the amount received by these revenue-generating student-athletes and their Title IX counterparts should be a rather small percentage, perhaps in the 10%-15% range of revenue generated by the student-athletes' sports teams. A low percentage would both allow the student-athletes to "share in the fruits of their labor" as well as allow the universities to retain the lion's share of the revenue which they need to pay the female student-athletes to meet Title IX compliance and to support the remaining non-revenue athletic teams, male and female. Each university would have the option of not offering the revenue-sharing scheme to its student athletes. In addition, the percentage (10%-15%) would act as a "salary cap" so that universities could choose to share any percentage of revenue, not to exceed 10%-15%.

Assuming that the revenue-sharing plan had the support of the student-athletes and any existing collective bargaining representative, the "salary cap" structure would probably avoid any antitrust litigation under the non-statutory labor exemption.149 Furthermore, the NCAA and the student-athletes should come to an agreement that only revenue-sharing issues would be permitted at the negotiation table and not any academic or practice requirements.150 Although this proposal would seem to separate the "haves" from the "have-nots," each year would be a new year under the proposal. A men's basketball coach could counter a recruit's concern about the school's team not receiving any revenue by telling the recruit that "next year will be different." Preserving competition is another reason for keeping the "salary cap" at a relatively low amount.

147. See Goplerud, supra note 27, at 130 n.68 (noting that NFL has fifty-three players under contract during season but are permitted eighty players under contract during time of training camp, therefore, universities should be limited to NFL standards).

148. See Goplerud, supra note 1, at 1104 (admitting that absorbing cost of stipend will be difficult, but schools can find sources of revenue and support stipend program).

149. See id. at 1089-90 (finding that, in appropriate circumstances, some restrictive activities by NCAA may be permitted because nature of competitive sports allows for restrictions such as squad size, size of field, academic standards, length of season, and number of scholarships, in order to foster competition).

The proposal should not have a dramatic financial effect on universities in terms of worker's compensation or taxes. Even if the courts began to recognize student-athletes as "employees" under workers' compensation statutes, the universities should be able to insure themselves adequately. Although a revenue-sharing plan between the universities and the student-athletes may cast doubt upon the universities' long enjoyed tax-exempt status, it is likely that the NCAA could finance a lobbying group to preclude the IRS from categorizing athletic revenue as "unrelated business income." Still, it is advisable that the NCAA obtain a tax opinion from the IRS before adopting the revenue-sharing proposal.

Finally, to prevent the death of the "amateurism" ideal, eligible student-athletes should not receive their share in revenue immediately upon the completion of their team's season, nor upon the completion of the school year. Rather, any share in revenue should be deposited in a trust account until the student-athletes graduate or otherwise complete their collegiate careers. Under such an arrangement, student-athletes would retain their amateur status throughout their college playing days, similar to "amateur" millionaires in non-NCAA track and field events. Until graduation, student-athletes would rely on their "laundry-money" for necessities.

The proposal to pay student-athletes combines a simple need-based scheme with a significantly more complex equitable scheme. Although universities would encounter difficulties implementing this proposal, the day to compensate student-athletes fairly has arrived along with the commercial reality of collegiate athletics. The proposal is not intended to bankrupt collegiate athletic programs but rather to create a revenue-sharing relationship between the universities and the student-athletes, the true producers behind the big bucks.

151. For a discussion of the conflict between NCAA amateurs' perceptions and the NCAA's definition of "amateurism," see supra note 13.