Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes?

I. INTRODUCTION

During the 2016-2017 school year, the NCAA recorded over $1 billion in revenue. The vast majority was generated through the NCAA men's basketball tournament. Much of the money is dispersed back to member schools and to conferences that perform well in the "March Madness" tournament.[1] The athletes who played a vital role in generating this revenue do not receive any of the money beyond their scholarship award, room and board, books, and a cost of attendance stipend.

As far back as the 1940s, athletes have challenged aspects of the NCAA model in court. In a 1941 case involving Davey O'Brien, O'Brien's photograph was used in a calendar advertising Pabst Blue Ribbon beer.[2] [3] While O'Brien did not consent for his image to be used, the director of the TCU publicity department did, and TCU received payment for the use of the photo.[4]

Over 30 years later, in 1975, a secondary issue not addressed by the court in *Kupec v. Atlantic Coast Conference* involved the ACC setting maximum compensation student athletes could receive and allegedly violating the Sherman Act.[5] [6] Another early case involved former SMU athletes arguing that the NCAA's imposition of the death penalty on the SMU football

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[1] Darren Rovell, *NCAA Tops $1 Billion in Revenue During 2016-2017 School Year*, ESPN.COM, March 7, 2018.
[2] O'Brien was a legendary TCU Quarterback and namesake of the award for Best NCAA QB.
[3] *O'Brien v. Pabst Sales Co.,* 124 F.2d 167, 168 (5th Cir. 1941). *See also,* Sean Hanlon & Ray Yasser, *"J.J. Morrison" and his Right of Publicity Lawsuit Against the NCAA,* 15 VILL. SPORTS & ENT. L.J. 2, p. 260 (2008).
[4] Hanlon & Yasser, "*J.J. Morrison,"* p. 261.
[5] Chris Kupec was a quarterback at the University of North Carolina. More information about Chris is available in the case.
[6] 399 F. Supp. 1377 (M.D.N.C. 1975). The complaint read, "The actions of the member institutions of the Atlantic Coast Conference in combining to set maximum compensation to be received by student athletes . . . have unreasonably restrained . . . commerce . . . in violation of the Sherman Act. *See also,* Ray Yasser, *Sports Law Cases and Materials,* LEXISNEXIS, p. 253, n. 5

team unlawfully restricted the benefits that could be awarded to athletes.[7] Over the past 15 years, current and former athletes have challenged the NCAA amateurism model in court leading to lengthy litigation battles.[8] One of the first victories for athletes involved NCAA licensing agreements with Electronic Arts to develop videogames.[9]

The courts appear willing to give credence to legal problems with the NCAA model, but they are hesitant to overthrow the current system. In *O'Bannon,* the court recognized that NCAA rules prevented video game makers from negotiating with college athletes for use of their names and likenesses.[10] However, the court held that cash payments beyond education expenses would seriously undermine the amateur system.[11] While the court recognized that the NCAA model kept athletes from capitalizing on their own intellectual property, the court was not willing to grant college athletes access to the open market. Instead, the court allowed NCAA member schools to offer scholarships up to the full cost of attendance.[12]

In March 2019, the next potential landscape-shifting case was decided at the district level. While both parties are likely to appeal, as it stands, there will not be a huge shift towards "pay-to-play," and the court again proved hesitant to upend the current system. In his synopsis of the case, *Alston v. NCAA,* Len Simon noted that if the case were a football game, the NCAA

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[7] See *McCormack v. NCAA,* 845 F.2d 1338 (5th Cir. 1988). *See also,* Yasser, *Sports Law Cases and Materials,* LEXISNEXIS, p. 253, n. 3
[8] See *O'Bannon v. National Collegiate Athletic Ass'n,* 802 F.3d 1049 (9th Cir. 2015), *Marshall v. ESPN Inc.,* 111 F.Supp. 3d 815 (M.D. Tenn. 2015).
[9] See *In re NCAA Student-Athlete Name & Likeness Licensing Litigation,* 724 F.3d 1268 (9th Cir. 2013).
[10] *O'Bannon,* 802 F.3d at 1067.
[11] *Id.* at 1076.
[12] *Id.* at 1053.

would have won 55-3.[13] [14] Again, the court recognized that the NCAA violated antitrust laws, but the court only allowed for broadening the definition of "education-related" benefits.[15] Presumably, this means that schools could provide benefits from lab equipment to scholarships for graduate school without violating NCAA rules.[16] However, the decision does not go into effect until the appeals process is finished. At this point, it is not clear if any policy change will come from this case. While broadening educational benefits would be a small step forward for athletes, this is a far cry from "pay-to-play."

Athletes used another strategy to receive compensation in *Berger v. NCAA.*[17] This time, the plaintiffs attempted to frame their dispute around the Fair Labor Standards Act and alleged that student athletes were employees of the university and entitled to a minimum wage.[18] The suit was dismissed because the athletes did not have standing and were not employees.[19]

II. ISSUES WITH "PAY-TO-PLAY"

There are many reasons why courts have been hesitant to upend the NCAA model. First, the system has worked for a long time, and it has become a staple of American sport. Watching college football is a hallmark of many Saturday afternoons in the fall, and millions of people follow their favorite teams throughout the year. Secondly, the "pay-to-play" system would likely

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[14] See, *In re National Collegiate Athletic Association Athletic Grant-in-Aid Antitrust Litigation - Findings of Fact and Conclusions of Law (03.08.19). See also,* Len Simon, *NCAA Won Big in Case Vs. Athletes,* SAN DIEGO UNION-TRIBUNE, March 10, 2019
[15] *Id.*
[16] Simon, *NCAA Won Big*.
[17] 843 F.3d 285 (7th Cir. 2016).
[18] *Id.* at 288.
[19] *Id.* at 294.

only affect a small minority of athletes who participate in the lucrative sports of football and basketball.

At the same time as March Madness, the NCAA holds the national wrestling tournament pitting the top college wrestlers in the country against each other for dominance on the mat.[20] While March Matness has a niche audience, it does not generate the same revenue as the NCAA basketball tournament even though it features future world and Olympic champions.

For sports like wrestling, "pay-to-play" could seriously hinder funding. Currently, schools use revenue from football and basketball to fund the other sports programs. In fact, most college athletic departments do not generate a profit, and they put all of their revenue back into the other programs.[21] If "pay-to-play" becomes reality, there is fear that schools would lose the ability to fund these other sports if they had to pay star athletes to remain competitive.

The potential for wealthy donors to steer athletes towards specific schools is another issue regarding "pay-to-play" that could lead to upsetting the competitive balance of college sports.[22] Additionally, "pay-to-play" could open up Title IX concerns surrounding financial aid available for male and female athletes.[23] Current Title IX regulations mandate that universities provide financial assistance to men and women on an equal basis.

At this point in time, it seems fairly safe to say that the NCAA model is not going to be entirely replaced anytime soon. However, litigation continues. While "pay-to-play" may be the

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[20] In my family, this tournament is a highlight of the spring. Many fans call this tournament March Matness as a tongue in cheek homage to the NCAA basketball tournament.
[21] Brian Burnsed, *Athletics Departments That Make More Than They Spend Still a Minority,* NCAA.ORG, September 18, 2015.
[22] Cody J. McDavis, *Paying Students to Play Would Ruin College Sports,* NEW YORK TIMES, February 25, 2019.
[23] Len Simon, *NCAA Should Allow College Athletes to Cash in on Endorsements*, SAN FRANCISCO CHRONICLE. December 24, 2018.

ultimate goal for some collegiate athletes and their activist lawyers, the solution that seems most reasonable is the third-party payment alternative.

III. THE THIRD-PARTY PAYMENT ALTERNATIVE

The third-party payment system would allow student athletes to capitalize on their own name and likeness. A reasonable compromise between colleges players and the NCAA, third-party payment would allow athletes to use their own fame to garner endorsements, sponsor products, and negotiate deals.[24]

In today's social media landscape, top college athletes are famous before they arrive on campus, and they gain more notoriety based upon their exploits on the field or court. For example, Zion Williamson has over 2.7 million followers on Instagram, and his domination of college hoops has made him a household name. As the NCAA basketball tournament ramps up, his picture is plastered on TV promos advertising the tourney. However, he was forced to relinquish his intellectual property rights in order to compete under the current system.[25]

It is fundamentally unfair that athletes like Mr. Williamson cannot take advantage of their own intellectual property rights while as the NCAA rakes in millions of dollars by utilizing his name and likeness. The third-party payment system would help address this issue.

IV. BENEFITS OF THE THIRD-PARTY SYSTEM

First, the third-party system would allow athletes to negotiate in the open marketplace for the rights to the athlete's intellectual property.[26] Opening up this process would protect athletes from overzealous parties who currently engage in third-party payments under-the-table.[27]

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[24] Len Simon, *NCAA Should Allow College Athletes to Cash in on Endorsements*, SAN FRANCISCO CHRONICLE. December 24, 2018.
[25] Articles 12.01-12.7 of the Division 1 Manual
[26] Simon, *NCAA Should Allow College Athletes to Cash in on Endorsements.*
[27] See, *United States v. Gatto,* 2019 WL 266944 (S.D.N.Y. 2019).

Article 2.9 of the Division I Manual states, ". . . student-athletes should be protected from exploitation by professional and commercial enterprises."[28] A legal third-party system, in which third-parties interact with athletes openly in the marketplace would further this purpose better than the current system because it would keep athletes from being taken advantage of at early ages by shady figures as seen in the recent college basketball scandal.

Further, the third-party system offers a potential solution to the issue regarding what athletes are worth. It is clear that some sports generate more revenue than others and that some athletes are worth more than others; the third-party system allows the free market to determine an athlete's value.[29]

Similarly, the third-party system could also address steering. In his article advocating for the third-party system, Len Simon posits a situation regarding ultra-wealthy sports philanthropists like T. Boone Pickens at Oklahoma State University. Mr. Simon argues that if true "pay-to-play" was implemented, nothing would stop an ultra-wealthy donor from bank-rolling a team in order to win a championship one year and then getting outbid the next season by a donor of another school.[30]

The third-party system offers a reasonable solution to this by eliminating the need for payments from college donors, while allowing for payments by third-parties. Additionally, steering could be more fairly regulated under the third-party system, and regulations could be devised to prevent third-party payers from steering athletes into particular programs.

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[28] Article 2.9, Division I Manual.
[29] Simon, *NCAA Should Allow Athletes to Cash in on Endorsements.*
[30] *Id.*

Third-party payments would also offer a solution to the issue of funding "minor" sports. A third-party payment system would not require payments by the college and would not affect the way sports like wrestling are currently funded.[31]

Another issue regarding "pay-to-play" could potentially arise if a star player gets paid more than their professor by a university.[32] It would be highly embarrassing for a school if students received higher salaries than their teachers. Under the third-party system, this issue could be avoided because colleges would not pay the athlete.

In essence, the third-party system could address many of the serious issues regarding "pay-to-play" by maintaining the status quo between colleges and student athletes, while at the same time allowing athletes to capitalize on their own name, image, and likeness from third-parties.

V. WAYS TO IMPLEMENT THIRD-PARTY PAYMENTS

a. NCAA Amendment to the Division I Manual

This is probably the easiest way to implement a third-party payment system. As it stands, the Division I Manual explicitly denies student athletes the right to receive compensation for their own name, image, or likeness.[33] However, in her remarks to the NCAA Board of Governors, Condoleezza Rice, chair of the Commission on College Basketball, left third-party payments as an avenue to explore after the court battles had ended.[34] Assuming decision-makers within the NCAA are amenable to third-party payments, an amendment to the Division I Manual would legitimize the system. In an article for Forbes, Marc Edelman drafted the following:

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[31] *Id.*
[32] Simon, *NCAA Should Allow Athletes to Cash in on Endorsements.*
[33] Articles 12.01-12.6 of Division I Manual.
[34] Condoleezza Rice, *Independent Commission on College Basketball Presents Formal Recommendations*, NCAA.ORG, April 25, 2018.

> "12.01.5 **Permissible Student-Athlete Licensing Rights**. A payment administered by a non-educational institution is not considered to be pay or the promise of pay for athletics skill, provided the student-athlete does not use the trademarks of the NCAA or any NCAA member college in any manner that may be construed as an endorsement, unless such manner is otherwise protected by principles of the First Amendment or fair use."[35]

By adding this language, the third-party payment system would be officially recognized by the NCAA.[36]

b. The End to Litigation

At present, the NCAA will continue defending antitrust litigation regarding the current model. It may well be that a third-party payment system would be a solution that satisfies antitrust law's oft-used rule of reason test. If so, it could mean the end of the road for those seeking to implement "pay-to-play" in college sports.

c. Congressional Statute

Currently, a bill has been introduced in the House of Representatives that would require the NCAA to allow athletes to receive third-party compensation for the use of the student athlete's name, image or likeness or face a change to the NCAA's tax status.[37] It is too early to tell what the outcome of this legislation will be. While an act of Congress would supersede the NCAA Manual, it is fair to say that Congress tends to act slowly and that the status of this bill is highly uncertain.

VI. CONCLUSION

Ultimately, the third-party payment system is a compromise between the current NCAA model and "pay-to-play." While still allowing the NCAA to mandate rules for the amount of

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[35] Edelman, *NCAA Can't Figure Out How to Grant Student-Athletes Endorsement Rights, But It's Simple – Really*, FORBES, May 10, 2018.
[36] *Id.*
[37] Student-Athlete Equity Act

scholarship and financial aid that member schools can give to student athletes, the third-party payment system allows athletes to retain their intellectual property and negotiate with third-parties. A third-party payment system offers a reasonable solution to the legal quandary surrounding paying college athletes.