COLLEGE ATHLETE NAME, IMAGE, LIKENESS – ISSUES CAUSING CONFUSION

Institutional "Revenue Sharing" with College Athletes

What is it?

- Revenue generated from the institution's athletics events (extracurricular developmental activities) such as sponsorships, media rights fees, advertising fees and gate receipts which, at the option of the institution, may be shared with participating students under current law in the form of educationally-related compensation

Example?

- Educationally-related compensation includes athletic scholarships, summer school financial aid, post-graduate scholarships, payment of medical expenses, provision of educationally related services, provision of insurance policies related to athletic injuries

Why do NCAA/ institutions support?

- Limits per scholarship institutional costs to educational coin (tuition, required fees, room, board, books and other expenses related to the cost of education as determined by office of student financial aid) and NCAA limits on the maximum number of athletic scholarships that may be awarded in each sport except athletic scholarships in Division III and in the Ivy League are prohibited with all such financial outlays determined by the financial ability of the institution.
- NCAA prohibits institutions from paying "salaries" to athletes - upheld by courts.
- NCAA rules do not require institutions to pay for insurance or actual medical expenses related to athletic injury. Thus, most institutions require the athlete to provide family or own insurance as a condition of participation and pay for secondary insurance only. Because of recruiting pressure and the fact that NCAA rules are permissive, these expenses are more likely to be paid for scholarship athletes at most FBS institutions (130 of 1100 members). While an NCAA catastrophic injury/expense policy exists for limited circumstances, no long-term coverage of medical treatment for chronic effects athletic injuries after typical policy limit of two years.

NCAA pitch line:

- Re: spending: Amateurism requires limits on what institutions or third parties can provide athletes
- Re insurance and medical expenses: NCAA claims no responsibility; institutions are responsible for the health and wellness of their college athletes. Institutions determine the extent to which they can offer scholarship incentives or cover medical costs.

What athletes want:

- Guarantee of 5-year scholarships which may not be removed or reduced because of athletics injury as long as the student continues to participate in the athletic program (Note: Currently, most athletic scholarships are one-year agreements)
- Guarantee of lifetime scholarships: currently not prohibited and offered by some Division I schools, but currently at the option of the institution
- Guarantee of health-related benefits: (1) NCAA/Institutions mandated to cover cost of insurance for athletics injury and any uncovered medical expenses, (2) loss of value insurance for athletes on professional draft lists, (3) long-term disability and extended coverage for chronic effects of athletics injuries, and (4) trust fund for long-term impact of brain trauma (dementia, ALS, CTE, etc.)

What Congress should want:

- Tax-exempt educational institutions should not operate professional athletic teams – should not provide salaries/cash compensation unrelated to educational expense

What Congress should want (cont.)

- Guarantee of 5-year scholarships which may not be removed or reduced because of athletics injury as long as the student continues to participate in the athletic program and is academically eligible and progressing toward a degree
- NCAA and member institutions should be responsible for cost of athletic injuries and long-term health/medical protection

Group Licensing – Joint Licensing with the Athlete's Institution

What is it?

- Institution and currently eligible athletes enter into an agreement with third-party product manufacturer/supplier to license the schools and athletes' respective NILs for joint usage.

Example?

- NCAA video games – current athletes/college team brands
- Team jerseys w/ athlete names on back

Why do NCAA/ institutions support?

- New revenue source for the institution they currently are not allowed to monetize
- Added value to enhance existing sponsorship and concessions agreements

NCAA sales pitch:

- If the institution controls, it will mandate that revenues be equally shared among all athletes in the program, not just those with open market value

What athletes want:

- Athlete association negotiating for athlete members or agent(s) representing one or more athletes to enter into agreements with any-third party product manufacturer for any joint licensing agreement
- Right of athletes to engage in group licensing agreements with each other (aggregation of multiple athletes) and then to enter into an agreement with any third-party product manufacturer for any joint licensing agreement

What Congress should want?

- Tax-exempt higher education institutions, conferences and national governance organizations should not operate as business partners for athletes engaged in outside employment or other institutional UBIT ventures.
- Neither college students nor employees should not have the right to use the names/marks of a tax-exempt educational institution for private gain – against state law for students and employees at public institutions in many states
- Video games, jersey sales and such licensed products should be UBIT – taxable business income unrelated to the mission of the educational institution for which tax-exempt status was granted
- Once the institution is allowed to go into business with currently eligible athletes, what stops the athlete from arguing in court that they should have the same benefits as professional athletes to revenues from use of their NILs in athletic events and therefore, a share of gate receipts, television revenues, etc.? Neither Congress nor higher education institutions should invite this outcome.

Limited Antitrust Exemption

What is it?

< The Sherman Act prohibits 1) two or more entities (including non-profit institutions) from engaging in agreements that unreasonably restrain trade and 2) monopolists from engaging in predatory or exclusionary behavior. Congress can exempt such acts engaged in by particular institutions or industries from the Sherman Act in order to advance particular causes.

Example?

< Types of possible antitrust violations: Two or more institutions cannot agree, if it would unreasonably retrain trade, on the price to charge for tickets to its athletics events, on how much to pay coaches, or how much to pay athletes. Instead, institutions should compete –not agree—on these types of activities. The NCAA is considered a monopolist by many courts and its enactment and enforcement of any exclusionary and anticompetitive behavior is subject to the antitrust laws. Congress could pass a limited antitrust exemption that would specifically exempt institutions and the NCAA from antitrust scrutiny for engaging in any activities it requires.

Why do NCAA/ institutions support?

< The NCAA, conferences and institutions have been increasingly embroiled in cases brought under the Sherman Act for their rules. They argue that the rules are necessary to support amateurism which, in turn, they argue is necessary for the product of intercollegiate athletics to exist. They want relief from the antitrust law in order to enact rules that they believe are in the best interests of intercollegiate athletics. They do not want to continue to spend time and energy on lawsuits that challenge their ability to make and enforce such rules.

NCAA sales pitch:

< We know what is best and have everyone's interests—including the athletes, institutions and fans— at heart. We need the rules to prevent intercollegiate athletics from being professionalized.

What athletes want:

< The free market should control. There should be no artificial constraints. Competition will result in the most fair, equitable and best product.

What Congress should want?

< Congress and its designees (e.g., an independent third party appointed by Congress that receives a limited antitrust exemption to do so) should impose guardrails or restrictions deemed necessary to prevent recruiting and booster involvement abuses and other activities that would tarnish or diminish intercollegiate athletics (e.g., the types of activities and third parties with whom athletes can monetize their NILS and even possibly the rates), as part of the NIL legislation. Further, other entities (i.e., conferences, NCAA) should receive a limited antitrust exemption for the express purpose of restricting eligibility for athletic participation consistent with the federal law and the findings and conclusions of the Congressionally designed NIL third party administrative agency. None of these entities should have a blanket exemption or broad safe harbor from the antitrust laws.