



Promoting Competition in Collegiate Sport: Why NCAA Should Allow Payment

Qianran Sun

Beijing Royal School, Beijing, China

Ran.susan@outlook.com

Abstract. This study investigates the legal status of student athletes under National Collegiate Athletic Association (NCAA) member schools' policies for the restriction on payment. It further draws attention to the role of Sherman Act in examining the case. Publications from professors interested in related sociological and economic concerns in addition to oral arguments on the court were analyzed to learn how markets and employment status would impact court decisions. Moreover, scholarly critiques of NCAA's restriction on payment by pioneers of socioeconomic issues and social activists for student athlete body were explored. This led to understanding that courts could lean toward conservative decisions for stabilizing the existing structure of college sport. However, competitive imbalance resulting from payment restriction outweighs its benefits. NCAA's prohibition on payment violates the Sherman Act and student athletes should be considered as employees in status, thus should be repealed.

Keywords: NCAA, Payment, Student athletes, Sherman Act, Collegiate sport.

1 Introduction

While the growing popularity of college sports raised concerns about sharing revenues with student athletes, public debate has been especially heated with the litigation of NCAA vs. Alston's case. The influential governing of collegiate sport begs the question, to what extent is NCAA's restriction on payment a fair and effective means for promoting competition in collegiate sport? Surrounding this query, there exists a wide range of opinions on the legality and competitive balance of college sports as a product of NCAA's restraint on payment. In this paper, the author will conduct theoretical review on existing legal critiques and argue for the repeal of NCAA's payment restriction, as the benefits of maintaining amateurism in college sport should be dismissed for addressing welfare of student athletes, adjusting against racial inequity, protecting free labor trade, and reducing anticompetitive effects.

2 The brief information of College Sport

2.1 The Status of College Sport

College sport has transformed from casual leisure to an activity that resembles professionalism [1]. According to the National Bureau of Economic Research, from 1999 to 2007, the total ticket sale for collegiate football and men's basketball surpassed the total ticket revenue of professional football, baseball, and hockey (2020). Preserving the distinction between college and professional sport was one of the major concerns of college athletic departments [2] due to the belief that "participation should be motivated primarily by education and by the physical, mental and social benefits to be derived" (National Collegiate Athletic Association [3]. To meet this goal, the National Collegiate Athletic Association (NCAA) was established as the primary governing board for U.S. intercollegiate athletics and prohibited student athletes being paid for participation in sporting activities [4]. With roughly 1100 member institutions [5], that is noted by the Supreme Court as virtually all public and private universities [6], affiliated to the NCAA and committing to its rules, the impact of the agreement on payment is substantial to nearly half a million student-athletes that competed at NCAA-member institutions each year [7]. By result, the Ninth Circuit Court of Appeals noted that the NCAA's principle of amateurism, which is prohibiting payment for play, is conceptionally attaining towards its procompetitive goal [3].

2.2 Legality and Competitive Balance

There exists a wide range of opinions on the legality and competitive balance of college sports as a product of NCAA's restraint on payment. According to the chief justice John Robert of Supreme Court, the NCAA has a number of rules, including the restriction on payment, "that are designed to ensure that its product is amateur athletic competition" [7]. Despite the potential procompetitive effect that the restriction on payment has brought to college sport, it is widely believed by the legal community that NCAA's prohibition of payment is unlawful in violation of the Sherman's Act, and is not the least restrictive mean in promoting competition so that the consumer demand of college sport can continue to flourish [8]. At this point in time with past conclusions reached for cases about the competition for TV broadcast [9], assistant coaches' salaries [10], and name, image and likeness of student-athletes [11], the various concerns associated with payment restriction outweigh its possible procompetitive effect and likely make the reason for NCAA maintaining a judicially created antitrust exemption to be only of an "imaginary revered tradition" [7].

3 Employment Status of Student Athletes

The issue of paying college athletes extends from the controversy around the employment status of student athletes. William Berry, an associate professor of Legal Studies and Professionalism in the University of Mississippi, claimed that the determination in

characterizing student athletes as amateurs or employees has implicitly driven the result in a court's decision of antitrust law, as it "informs the degree to which a court is willing to alter the status quo in the name of economic fairness" [12]. This implicit decision of how student-athletes should be characterized is made from the perception that NCAA has defined the status of student-athletes in a circular way, "College sports are amateur because otherwise they wouldn't be college sports, which are amateur" [13]. This ambiguity in defining amateur doesn't support NCAA's principle of amateurism for justifying its prohibition of payment, as to that "pay does not disqualify someone's amateur status" [14]. Therefore, to engage student athletes in sport with payment, regarded as work, still may result in affording back "with a self-enriching and fulfilling purpose, in the same way that some leisure activities afford the benefits of self-development and enjoyment" [14]. There is also the notion that NCAA's definition of student-athletes as amateurs is not directing from the interest of students. The conception of amateur was initially applied by the NCAA from the 1950s in response to a "former NCAA football player who demanded workers' compensation"[13], as well as that in 2014, while the NCAA generated revenues of nearly 1 billion dollars, colleges and universities still avoid paying minimum wages to student-athletes who generated them [13], even the maximum amount of scholarship permitted by the NCAA are below the poverty line [15]. As Burlette Carter, past Chair of the Section on Law and Sports of the Association of American Law Schools has remarked, universities, that composed the NCAA, can make decisions that come in conflict with student-athlete rights and interests, which can be modeled from child-parent relations as for student-institution relations (2000). This would include the genetic intention of the NCAA barring compensation from professionalism for "barring specialized recruiting, specialized coaching, and even specialized training for athletics" at the time which athletics was concerned for beneath a gentleman[2], that is proven unnecessary and unethical in today's context as athletics is recognized for being a legitimate career. Similarly, the present goal of the NCAA about preserving amateurism, through restricting payment, could lead on to outcomes with lessened considerations for the welfare of students athletic, such as college athletic departments developing into commercial enterprises that attempts to reduce costs for programs [1]. Whith meaningful income generated in revenue sports by student-athletes flowed to coaches' salaries and spending on other sports, The National Bureau of Economic Research found that "athletes generating the [revenue] are more likely to be black and come from lower-income neighborhoods, and the [revenue] are shared with a set of athletes and coaches that are more likely to be white" [1]. This phenomenon could lead to the worsening of racial inequity. Thus, the NCAA should allow payment in order to maintain the benefits of amateurism while incurring the least damage to students' interest.

4 Legality of Payment Restriction

4.1 Examining Sherman Act

Both the District Court for the Northern District of California and the Ninth Circuit issued that the NCAA's amateurism rules violate the Sherman Act, though it varies in

leniency of compensation cap [11, 16]. The situation exhibits clear that the NCAA restrain free labor trade in college sport. A study conducted by Richard Borghesi [17], professor of finance in the College of Business Administration, University of South Florida, calculated that if college athletics is in a free market and athletes receive 47% of football revenue, as in National Football League's Collective Bargaining Agreement, then players would earn a range from \$799,000 to \$21,000 in addition to athletic scholarships (2017) [18]. That means student-athletes are paid far less than their competitive level wage, so the marginal value of student athletes exceeds the opportunity cost, and create market inefficiencies in college sport [19]. Consequently, without the optimal allocation of economic resources among college sport, some student athletes with valuable talent have been forced out of college athletics [19].

4.2 NCAA's Amateurism Principles

However, the NCAA constructed its core amateurism principles including "2.10 The Principle of Competitive Equity, 2.11 The Principle Governing Recruiting, and 2.12 The Principle Governing Eligibility" in claiming that competitive balance is promoted through the rules [13], and is sided by circuits except for the Ninth Circuit. In addition, the National Bureau of Economic Research has made rent-sharing estimates which demonstrate that non-revenue sports participant would be harmed if revenue sport athletes are paid. "If meaningful funds that are currently dedicated to non-revenue sports are instead used as compensation for athletes, then that could cause schools to either offer fewer non-revenue sports or decrease the amenities offered to participants in those sports" [20]. Regardless of drawbacks in maintaining the restriction on payment, remaining the NCAA's long-held rules is safe because this wouldn't bring unprecedented impacts that would ruin the existing structure of college sport, driving the courts to rule conservatively.

4.3 Competitive Imbalance Brought by Restriction

Yet, in spite of the potential drawbacks in allowing payment, the NCAA's restriction on payment is still unreasonably restraining trade even to concern in conjunction with preexisting common law, which violates Section 1 of the Sherman Act. By applying a two-part test of antitrust decisions, the NCAA meet the threshold requirements, then the rule of reason shows a result of anticompetitive effects offset with the competitive benefit of restricting payment [15]. Michael Steele, who completed clerkship at the Wisconsin Court of Appeals as well as an editor of the Marquette Law Review, reported that there's no credible and sufficient evidence in justifying the procompetitive economic effect of the NCAA's rules (2015) [11]. Rather, as a result of the anticompetitive impact, the NCAA's definition of amateur fails to reflect reality as colleges engage in non-price competition for attracting the top talents in athletics, with winning as the aim. The largest payment to coaches of collegiate football and basketball was over \$7 million to 2015, in contrast to \$32,500 in 1975 [5]. As, the increasing compensation to coaches has shown the drastic arms race of the past decades, it follows that competitive imbalance exist as an outcome of restricted payment instead. Only small collections of

schools generally win in each sport [13], so the best talented high school athletes would prefer the few teams with high likelihood to win, and that is anticipated from the school's past record of winning. In 2015, "of the 351 schools that played Division I-A basketball, 320 did not have a single player selected in the 2015 NBA draft" [13]. In contrast, the University of Kentucky reached the Final Four with 6 players selected in the NBA draft; the school was able to recruit 27 of the top high school players ranked on the Recruiting Services Consensus Index from 2009 to 2014, then 20 of the 27 recruited players were later drafted by an NBA team (Berri, 2015). Thus, the potential procompetitive effect brought by NCAA's restriction on payment is undercut by the anticompetitive effect raised.

5 Conclusion

The growing industry of college sport has revealed increasing similarities to professional sport, and propelled colleges in maintaining the distinction in between the two by safeguarding the non-employment status of student-athletes. As the Supreme Court continued to investigate on the issue of *NCAA v. Alston* in 2021 after its lower courts' decisions, whether the NCAA's restriction on payment is unlawful remains a pertinent discussion. Despite the potential risk in changing the tradition of how the NCAA maintain amateurism in college sport, several reasons have arguably rejected the benefit. The ambiguity in the way the NCAA defined the amateur status of student athletes doesn't justify for its prohibition of payment, as activities in the form of work may still fulfill educational purpose. The NCAA's definition of student-athletes as amateurs is not directing from the interest of students, leading to lessened considerations for the welfare of students athletic such as the worsening of racial inequity. Additionally, the NCAA's amateurism rules violate the Sherman Act as the free labor trade in college sport is restrained. Furthermore, the restraint is unreasonable that the potential procompetitive effect brought by NCAA's restriction on payment is undercut by the anticompetitive effect raised. Hence, the decision of the District Court for the Northern District of California supports that the NCAA's prohibition of payment of compensation to student-athletes violates federal antitrust law, that acts unfairly and ineffectively in promoting competition for collegiate sport [16]. Until more credible evidence is emerged in justifying the procompetitive effect of the NCAA's restrictive act, it will remain illegit.

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