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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How To Fix College Football's Legal Issues

Law360, New York (January 28, 2015, 10:01 AM ET) -- The first National Collegiate Athletic Association football playoff concluded recently with a win by Ohio State over Oregon. Early in the offseason, commentary regarding college football already is preoccupied with events in the courtroom instead of with play on the field. Among the cases currently pending against the NCAA are claims by players for compensation for use of their names and likenesses in licensing agreements and claims by players for compensation in excess of the traditional athletic scholarship.



James Gulotta Jr.

Cases involving compensation claims by players generate considerable shrillness in the press and a surprising degree of opacity in the courthouse. In the press, one reads of accusations against the NCAA for hypocrisy in garnering for itself billions in revenues while relegating players to penury and hunger. Players are cast in a poor light when we learn, for example, that University of North Carolina tutors covered up lack of class attendance by football players. More recently, everyone winced upon reading the tweet by the Buckeyes' quarterback in which he expressed the view that Ohio State football players should not be bothered with attending class.

In court, the NCAA defends its rule prohibiting compensation of athletes in excess of the traditional athletic scholarship on the grounds that the restriction promotes competitive balance among competing teams and that it preserves amateurism of college athletes. Compensation restrictions, as for example, caps on player salaries, can be useful in promoting competitive balance in sports leagues. National Football League owners certainly think so. But, even the NFL salary cap is not a direct cap on an individual player's salary. It is a cap on the total team payroll for all players. More importantly, it is the product of a collective bargaining agreement with the NFL Players' Association. Outside of a collective bargaining agreement, caps on employee salaries are very difficult to justify under antitrust laws, even in the context of sports leagues, in which competitive balance is a permitted justification for other less direct restrictions.

The NCAA has experience with this issue. In *Law v. NCAA*,^[1] assistant college basketball coaches challenged a cap imposed on their salaries by NCAA rules. The appellate court sided with the coaches and affirmed the district court's injunction nullifying the cap. In other cases, the NCAA has been favored with opinions containing forgiving and even positive references to NCAA rules prohibiting athletes from earning compensation in excess of their athletic scholarships. But, the most recent district court opinion considering the issue held that the NCAA's prohibition against athletes' receipt of compensation for use of their names and likenesses cannot be justified on the basis of promoting competitive

balance. O'Bannon v. NCAA.[2]

Courts are not entirely dismissive of restrictions promoting competitive balance. Restrictions that do not directly cap compensation often are permitted. For example, an NCAA rule restricting the maximum number of assistant coaches that a member program can employ has been upheld. Similar restrictions on the number of football scholarships that can be extended are permitted.

Amateurism as an alternative for justifying compensation restrictions is unique to the NCAA among sports leagues. In O'Bannon, the NCAA contended in the trial court, and continues to maintain on appeal, that its restriction on compensation promotes an identity that distinguishes college athletics from professional athletics in the overall marketplace for spectator sports. The identification of college athletes as amateurs contributes to the popularity of college athletics. As a result, the NCAA contends that amateurism is pro-competitive because it expands the overall output of opportunities for athletes and athletic offerings for spectators. Expert testimony based on market surveys was offered in evidence by the NCAA in support of amateurism during the O'Bannon trial. Presiding Judge Claudia Wilken, however, found the evidence unpersuasive.[3]

The NCAA's amateurism defense derives from the U.S. Supreme Court's decision in NCAA v. Board of Regents[4] and from several lower court opinions following Board of Regents. A great deal of argument has been expended on all sides regarding the import of Board of Regents. Judge Wilken did not consider herself constrained by Board of Regents, as it did not involve the NCAA's ban on compensating student athletes. The vitality of amateurism as a justification for compensation restrictions will be determined either on appeal of O'Bannon or in the follow-up multidistrict litigation case currently consolidated before Judge Wilken and styled as In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation.[5] As its name suggests, the Grant-in-Aid Cap litigation has within it the potential for addressing head on the validity of any rule by the NCAA that caps athletic scholarships. Even the recently-adopted NCAA rules permitting the Power 5 conferences to enhance grant-in-aid scholarships with stipends to cover the full cost of attending NCAA member colleges ultimately are in question.

The preceding discussion sketches the current setting involving litigation over scholarship caps. The current setting takes for granted a rule for which the NCAA is not responsible, but which confounds the normal incentives colleges and their football players ordinarily would have to pursue common interests. That rule is the NFL's three-season waiting rule, which is part of the collective bargaining agreement between the NFL and its players' association.

Football fans will recall the case of Maurice Clarett. Clarett was a freshman running back of great distinction at Ohio State. After his freshman year, he found himself in legal and academic trouble and was dismissed from the team. Instead of waiting a year or two before becoming eligible for employment by an NFL team, he challenged the NFL rule preventing him from entering the draft before three football seasons elapsed after his senior year of high school. In essence, the NFL will not draft a football player under the age of 21. For most high school seniors, the rule leaves them with nowhere to play football except at an NCAA member college for a minimum of three seasons after high school. The National Basketball Association has a one-season waiting period. Major League Baseball has none.

Clarett lost his case.[6] The court upheld the three-season waiting rule, concluding that it is immune from antitrust scrutiny because its place in the NFL collective bargaining agreement protects it as a nonstatutory labor exemption — very much in the way that the NFL payroll cap is protected. Unlike the payroll cap, however, the NFL's three-season waiting rule affects adversely persons not party to the collective bargaining agreement. Nevertheless, the NFL three-season waiting rule still is in effect.

One wonders why. It is well known that the NFL owners want more games played in order to earn more revenue. NFL players have resisted because of concerns regarding injuries. NFL rosters are small, allowing fewer than 60 players to be activated for a game. NFL owners from time to time have expressed an interest in organizing spring football seasons played by non-regular roster players — in essence a minor professional football league. Thus, it appears that NFL owners understand that to earn more revenue they need more games and hence more players. They seem to understand that they will need to pay for the services of more players and for their development, somewhat like Major League Baseball owners always have done. Opposition to opening professional football to more players appears to be coming primarily from current NFL players.

It is no coincidence that college baseball and basketball players are not among the most prominent complainants in the legal actions challenging NCAA restrictions. It is, of course, true that football is the highest revenue-producing sport for colleges and an accusation of hypocrisy rings hollow when applied to the vast majority of college basketball and, nearly all, college baseball programs. But, it is also true that baseball and basketball players have professional employment opportunities at an early age. There is no reason why football players should not have similar opportunities. A physically mature 18-year-old running back is very similar to a gifted 18-year-old pitcher who can control a couple of pitches. Both can play professionally and both are vulnerable to career-threatening injuries during virtually every moment that they play their sports as either amateurs or professionals.

If the NFL's three-season waiting rule were lifted, much of the confusion affecting college football resolves into clarity. Players, colleges, and prospective professional employers all will have choices regarding which they can make rational decisions. Players can decide whether college attendance is for them. NFL owners can have access to more players to fill larger rosters in order to create more playing time. They can decide how much they can afford to pay for more players, together with the extra practice and game time needed to develop the players. Networks can decide how much they are willing pay to broadcast more play dates.

Colleges can concern themselves less with restricting their players from earning compensation. Think of it this way: Northwestern University's drama students are not prevented from acting professionally while attending Northwestern. The same is true for Boston University's music students. It's also true that Harvard was not left poorer because Mark Zuckerberg and Bill Gates quit Harvard to found social media and software companies. The University of Texas was not harmed because Michael Dell started a PC company in his dormitory room in Austin before quitting college.

In each of the preceding examples, drama students, music students and entrepreneurs understand that while they are enrolled in college they are students and they are expected to fulfill minimum academic requirements, failing which, they are dismissed or they quit. One does not read of cover-ups involving academic lapses by drama students, musicians or entrepreneurs. It's also rare that one reads of an academic cover-up involving college baseball players. Why are college football players different? One reason is that they don't have a choice for a period of time that, considering their relatively young ages, is too long.

Competitive balance in college football might be diminished by forsaking amateurism. But, competitive balance already is diminishing as a result of the distance that the Power 5 conferences are moving beyond traditional scholarship caps. Piling rulebooks higher with more collective restrictions engendering more controversy for the sake of preserving uniformity among large budget Power 5 football programs seems like wasted effort.

Competitive balance still can be promoted in ways that are consistent with the mission of colleges as educational institutions and in compliance with antitrust law. Rosters can be restricted; the number of scholarships offered can be limited; spring practice seasons can

be regulated; practice time during football season can be restricted; and most of all, football players can be required to meet and to maintain minimum academic standards.

Enforcing the preceding restrictions in a world in which football players, like baseball players, have a choice to play professionally, will separate quickly the players who want to be student athletes from those who do not. Separation based on player choice will make a modest contribution to competitive balance and, quite possibly, a contribution to competitive balance that is more sustainable than artificial rules that are hard to enforce fairly.

The NCAA and college players cannot compel the NFL and its players' association to eliminate the three-season waiting rule. But, they can signal to the NFL, to courts, to Congress, and to the spectating public that they are open to a world of choice for young athletes. The NCAA and its member colleges can then concentrate on their mission of delivering the opportunity of a higher education to those who want it.

—By James C. Gulotta Jr., Stone Pigman Walther Wittmann LLC

James Gulotta Jr. is a member in Stone Pigman's New Orleans office.

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[1] 134 F.3d 1010 (10th Cir. 1998)

[2] 7 F. Supp.3d 955, 993 (N.D. Cal. 2014), appeal docketed, No. 14-16601 (9th Cir. Aug. 21, 2014)

[3] *Id.* at 1000.

[4] 468 U.S. 85 (1984)

[5] No. 14-md-2541-CW (N.D. Cal.).

[6] *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004).

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