

Tom Hauck/Getty Images Sport/Getty Images



Seeking Better Field Position Targeted Reform of Commercialized Intercollegiate Athletics

This is an excerpted version of an article in the *San Diego Law Review* written by Matthew J. Mitten, Professor of Law and Director, National Sports Law Institute, Marquette University Law School; James L. Musselman, Professor of Law, South Texas College of Law, Houston, Texas; and Bruce W. Burton, retired Professor of Law, South Texas College of Law. Reprinted with permission of the copyright holder, *San Diego Law Review*.

The United States marketplace responds to cultural forces and strong public demand for popular products; the commercialization of college sports directly reflects the marketplace realities of our society. For example, in response to substantial public interest in intercollegiate sports, particularly Division 1 Football Bowl Subdivision (FBS) football and men's

basketball, colleges and universities rationally invest substantial resources in their athletic departments. Leaders of these institutions see the athletic program as a means to achieve a wide range of legitimate objectives that further their missions: providing a lens through which the nature, scope, and quality of their higher educational services are discovered by the public; attracting faculty,

students, and student-athletes; diversifying their student body; forging a continuing bond with alumni, the local community, and other constituents that provides both tangible and intangible benefits; and enhancing their institutional reputations. In an extremely competitive higher education market, academic leaders increasingly use intercollegiate sports as a catalyst and means to achieve these legitimate ends. This rational conduct on the part of university presidents and governing boards is merely a facet of competition in a well-functioning democratic society, which is embedded in human nature and modern culture and embodied by the centuries' old American enterprising spirit of doing what is necessary to compete successfully.

Some commentators have taken the position that the increasing commercialization of college and university athletic programs requires that federal tax laws pertaining to those programs be reexamined and ultimately modified by Congress. Specifically, the argument is that many intercollegiate athletic programs, particularly those with FBS football and men's basketball teams, have become large and profitable businesses insufficiently related to education; as a result, Congress should reexamine whether college and university athletic programs, as well as the NCAA, should be entitled to exemption from federal taxation and/or from the federal unrelated business income tax ("UBIT").

These recent appeals to Congress to subject college and university athletic programs to the UBIT appear in reality to be at best a cry for increased and more effective regulation of such programs by the NCAA, and at worst a red herring aimed at gaining leverage in a quest to diminish the ever-widening influence of intercollegiate athletics in the world of higher education.

There is probably universal agreement that college and university athletic programs are in need of reform, and most would probably agree that the most competitive and profitable programs are in need of more effective regulation than they currently receive. But that falls far short of concluding that any programs currently in existence are not substantially related to the college or university's educational purpose. It would be difficult to envision an athletic program that would be so devoid of educational value that it would not contribute importantly to the educational purpose of a college or university; for that to be the case, the athletic program would have to be conducted similarly to a professional sports franchise, with virtually no regard

given to education of its student-athletes. No athletic program would be allowed to go that far if appropriate and effective regulation were administered by the NCAA.

It would be a mistake to further burden and complicate federal tax laws with new requirements to be met by the NCAA and its member educational institutions, along with creating the potentially significant costs of federal agency enforcement, when targeted reform can more effectively achieve some of these objectives and others in an alternate manner.

The commercialization of intercollegiate athletics in response to culturally driven market forces is a largely irreversible trend, which is not necessarily socially undesirable because it can be used to further broaden university academic objectives. Some reform, however, is needed to ensure that intercollegiate athletics are student-athlete centered and actually further the purpose of higher education, rather than functioning as a tail that wags the university dog or an anchor that inhibits fulfillment of its academic mission. We propose offering the carrot of federal antitrust law immunity (rather than swinging the stick of threatened federal taxation of athletic department revenues) to implement targeted reforms to correct the most significant problems caused by the commercialization of intercollegiate athletics.

Because of antitrust liability concerns, the NCAA has been reluctant to enact cost control legislation and currently is simply encouraging each of its member institutions to individually make financially responsible decisions regarding the resources allocated to its intercollegiate athletics program and its athletics department's expenditures. Effective NCAA internal governance of commercialized intercollegiate athletics requires uniform rules and enforcement, which are necessarily the product of agreements and collective decision-making among NCAA member institutions, thereby inviting antitrust challenges under § 1 of the Sherman Act.

We propose that Congress provide the NCAA and its member institutions with broad or limited immunity from antitrust liability under § 1 of the Sherman Act, expressly conditioned upon the adoption and implementation of several targeted external reforms to ensure that 21st-century intercollegiate athletics further legitimate higher education objectives, provide student-athletes with the full benefits of their bargain, and enhance the likelihood they will obtain a college education that maximizes their future career opportunities other than playing professional sports.



“Because intercollegiate athletics are an integral part of institutions of higher education, the revenues generated by university athletic departments should continue to be exempt from federal taxation.”

The step we propose would keep collegiate athletics from crossing the line between a primarily educational endeavor and a commercial enterprise; enhance the academic integrity of intercollegiate athletics; promote more competitive balance in intercollegiate sports competition; require university athletic departments to operate with fiscal responsibility; and limit unbridled market competition for inputs necessary to produce intercollegiate athletics such as coaches.

Our proposed antitrust immunity would be conditioned upon certain requirements that the NCAA and/or its member institutions must satisfy. The following are some possible requirements:

- At least a four-year athletic scholarship that covers the full annual cost of college attendance (which may be taken away only for failing to meet minimum academic requirements, engaging in misconduct, or voluntarily choosing not to continue playing a sport) and tuition funding for a fifth or sixth year of college education if necessary to complete a bachelor's degree if the student-athlete is in good academic standing when his or her intercollegiate athletics ability is exhausted. Providing these additional benefits likely would increase the college graduation rates of Division I FBS football and men's basketball student-athletes, whose efforts generate most intercollegiate athletics revenues.
- Free medical care or health insurance for all sports-related injuries, plus extension of the injured student-athlete's scholarship for a period of time equal to the time he is medically unable to attend class due to injury. This is an important benefit because the NCAA currently permits, but does not require, its member institutions to provide medical care or health insurance for sports-related injuries.
- Mandatory remedial assistance and tutoring for entering student-athletes whose indexed academic credentials are below a certain percentile (e.g., 25th) for their university's freshman class.
- The creation of a post-graduate scholarship program administered by the NCAA and funded by a designated percentage of the total net revenues generated by intercollegiate football and men's basketball (and perhaps other sports), including the sales of mer-

chandise incorporating aspects of student-athletes' persona (e.g., team jerseys with numbers identifying individual players).

Antitrust immunity could also be conditioned upon requiring that a certain percentage of the net revenues from sports such as football and basketball be used to fund and expand participation opportunities for student-athletes in sports that do not generate net revenues, or requiring the NCAA and its member universities to provide detailed information concerning their athletic department finances using standardized accounting methods.

Given the shield of antitrust immunity, the NCAA could adopt legislation to curb the existing athletics' arms race by imposing annual or multiyear per sport aggregate spending caps or limits on certain expenditures (e.g., coaches' salaries) for the different levels of intercollegiate athletics competition. In turn, these cost savings could be used to maintain or increase intercollegiate athletics participation opportunities in women's sports and men's nonrevenue sports.

Legend has it that King Canute I was the ancient monarch who stood on the ocean shore and commanded the tide not to come in—not surprisingly, his effort failed. Similarly, the commercialization of intercollegiate athletics is an inevitable market response to our nation's strong cultural passion for sports competition. It is equally inevitable that college and university leaders would seek to use intercollegiate athletics as a means of achieving other legitimate institutional objectives. Because intercollegiate athletics are an integral part of institutions of higher education, the revenues generated by university athletic departments should continue to be exempt from federal taxation. It is, however, necessary to ensure that the increasing commercialization of intercollegiate athletics does not conflict with the academic missions of universities or interfere with student-athletes' educational opportunities. Our proposed solution is that Congress should provide the NCAA and its member universities with a limited exemption from the federal antitrust laws as a means of implementing targeted reforms to ensure that intercollegiate athletics are primarily an educational endeavor rather than commercialized quasi-professional sports. ■

