



Unpredictable and Stormy, with Some Hope for Improvement

FOUR MARQUETTE EXPERTS ASSESS THE TUMULTUOUS CHANGES UNDERWAY IN COLLEGE SPORTS.

To paraphrase song lyrics from 1967, there are a lot of things happening here, but what they are ain't exactly clear. The overall structures of college sports and the rules and rights for athletes are among facets of the sports landscape being challenged and revised.

To gain some clarity, we invited four experts from Marquette University to talk about current developments and what might lie ahead. The four were **Paul M. Anderson**, director of the Law School's National Sports Law Institute (NSLI); **Vada Waters Lindsey**, professor of law and a member of the NSLI Board of Advisors; **Matt Mitten**, professor of law and executive director of the NSLI; and **Bill Scholl**, Marquette University's director of athletics and vice president. This is an edited transcript of the conversation, which was moderated by **Alan J. Borsuk**, editor of *Marquette Lawyer*.

Q. How stable are collegiate sports these days?

SCHOLL: There are short-term and long-term aspects of this. In the long term, will college athletics, intercollegiate athletics, continue to exist? That would be a resounding "Yes" from my perspective. Not that things couldn't get really ugly and perhaps go a different direction. But as we sit here today, I would say, in the long term, we will get through the instability and the changes we are seeing today and, in my mind, hopefully have a healthier intercollegiate athletics landscape in 5 or 10 years. Certainly there is a ton of instability right now. I've been in the business more than 30 years, and while I've seen some significant changes occur, I've never seen so many at one time. I think that is causing a lot of insecurity for all of us.

For example, there are the new rules that allow athletes to benefit financially from "NIL"—the use of their name, image, and likeness. I'm very comfortable with our student athletes being able to use their name, image, and

likeness to help themselves. I think that's fine. I think it will be important to have guardrails placed around it. Will there be a patchwork solution long term, or can we get some national solution? NIL opportunities are already being used in the recruiting wars.

Q. Will NIL help the big-revenue sports and hurt the sports that do not generate much revenue?

MITTEN: There's only so much sponsorship revenue out there. Until now, the National Collegiate Athletic Association (NCAA), conferences, and schools have shared the entire pie. Now it's going to be shared with student athletes. That's not a bad thing, certainly. In fact, I think U.S. colleges and universities are going to be the primary training ground for Olympic sport athletes from all countries throughout the world. One beneficial thing is that you'll probably see more student athletes stay in school and get their degree. Everyone thinks they're ready for the NBA or the NFL, but they really should get their degree before they move on.

Here's the bigger issue I see: the effect this is going to have on high school sports. Even though I'm a Buckeye (from my undergraduate days), I did not like the number-one football recruit's decision to skip his senior high school season of football, in Texas, to enroll at Ohio State. He probably won't play much this year, but he already has a \$1.4 million endorsement deal to sign autographs, a \$100,000 truck, and more. I do not want to see college or high school sports be professionalized. There is clearly a difference between the two, and that is the academic component, among other things.

LINDSEY: You look at some of the numbers that Matt threw out, and you see there are significant tax considerations. In terms of the knowledge, the instability, these students are very young athletes who are coming into the universities, and

now they will have to be educated about the tax considerations. There are issues around self-employment taxes, principal place of employment, and more. I think it is very complicated. I hope these athletes are going to get the necessary advice and counsel.

ANDERSON: We're very early into the NIL situation. In a couple of years, it's going to self-correct. We can't keep having sponsors throw money like they are now, without a return. Eventually, not every football player who goes to Ohio State is going to get a great deal. I think we're at this flashpoint where there is money and there are people for the first time. But I wonder what happens when it gets down to the Marquettes, the smaller schools that may not have that many athletes who would have that value. What does that mean? Does it mean they don't come to Marquette? I doubt that, but it could.

Suni Lee, the Olympic gold medal gymnast, and several other gymnasts will make a lot of money while going to college. But that's five athletes who might go to college and get NIL rights. This is not benefiting a lot of Olympic athletes. There aren't many that are perceived as worthy of someone's paying that kind of money for them. Maybe that will change. But this is predominantly about football and basketball players so far. That will create an inequity.

Does it create an inequity that is a Title IX issue, strictly speaking? Probably not. But does it create an inequity that the women are not getting what maybe the men have access to, and will there be a demand on universities that you've got to help the women, too, in the way you're not needing to help the men?

Another big flaw with all of this is that I think universities are left out in the middle of nowhere. I think people have the perception that athletes are against their athletic departments, and I have never seen that. I think athletes are dependent on their athletic departments. NIL is almost a point where athletes



Paul M. Anderson



Vada Waters Lindsey



Matt Mitten



Bill Scholl

can't go to the athletic department for all the help they need. It's almost set up in a way that it's not something the athletic department should be dealing with, in many ways. You mention finding someone who can help them with tax issues. I don't know where they're going to go. Unfortunately, the people they will find, the people who are advertising, are not experts and are not people they should be talking to. This system was set up so fast and is so unregulated at this point—that's my concern. Unfortunately, I know so many universities that are struggling to help their athletes when they actually can't help their athletes in many ways.

Q. On June 21, 2021, in a case known as *NCAA v. Alston*, the U.S. Supreme Court ruled unanimously that NCAA rules violated federal antitrust law by capping the education-related benefits universities could provide to college athletes. The Court accepted antitrust arguments related to the NCAA that it had not endorsed previously. Justice Brett M. Kavanaugh issued a concurring opinion, strongly suggesting that other NCAA rules also violate antitrust law. How important is *Alston*?

ANDERSON: I've seen *Alston* cited in a lot of cases already. Judges are seeming to take it out of the antitrust realm a lot. Will they make decisions based on that? I'm not so sure. Some judges seem to think *Alston* said that athletes are not amateurs. *Alston* has become the way for some to say, "NCAA, you can't do anything." It's not true, but some people are interpreting it that way. Too many people are taking the *Alston* decision as if the concurrence were the decision, when only one justice wrote that and no one else explicitly agreed to it.

MITTEN: Even though *Alston* is a very narrow decision on its face, its broad implications significantly limit the NCAA's historical authority and ability to regulate college sports. For example, two antitrust suits were filed against the NCAA immediately after an internal



Paul Anderson with his bobblehead collection

working group proposed that college athletes be allowed to earn NIL income. The holding in *Alston* that the full three-step "rule of reason" applies—including whether there is a less restrictive means of achieving procompetitive NCAA objectives such as maintaining competitive balance in college sports and distinguishing them from professional sports—creates legal uncertainty regarding the result of these cases and future antitrust litigation. NCAA President Mark Emmert has called for a convention to restructure NCAA governance. And will Congress get involved by providing limited antitrust immunity?

SCHOLL: It has made all of us tentative, hesitant. This idea of a balanced competitive field is something we have always bought into, although there are those who would say it has never really been true. You look at the NCAA rule book. It's ridiculously thick, Bible thick. Every rule that is in there is because somebody did something to ostensibly gain an advantage. For most of them, the advantage gained was probably not that large. So we've handcuffed ourselves with all of these rules, and now they are all under attack.

MITTEN: In my opinion, university presidents and athletics administrators are in the best position to regulate intercollegiate athletics, not courts applying antitrust law on a case-by-case basis. *Alston* has seriously called into question the legality of their collective

authority to govern college sports. It's just total unpredictability at this point, and there is very significant risk of antitrust liability, so there's going to be paralysis. As a result, I think there will be many future negative unintended consequences, which Congress or anyone else may be unable to effectively correct.

Q. What is the health of the separation between amateur college athletes and professional athletes?

MITTEN: *Alston* creates significant doubt regarding the authority of the NCAA (or even two major conferences) to internally govern college sports because virtually every student-athlete eligibility rule, including academic requirements, limits economic competition among its member schools for their playing services. Of course, the essence of sports is that you need uniform rules applicable to all participants. Going forward, it will be very difficult for the NCAA and its conferences and schools to defend their rules from antitrust attack, which poses the danger that the predominantly good features of college sports will be judicially invalidated along with its relatively few bad components. Antitrust law should not be used to transform college sports into minor league professional sports.

LINDSEY: In my tax class, we discussed gifts, and it seems that some of these college athletes receive gifts from various individuals. If I see a

student athlete with a really nice car, I'm wondering, "Where did that car come from?" There may be potential income tax consequences when someone receives a so-called gift because it may not be treated as a gift for income tax purposes. I wonder how many of these amateurs really understand that.

Q. Are Marquette athletes still amateurs?

SCHOLL: I sure hope they're amateurs. And they do have to register their cars with us, so we at least have some sense of what they're driving and how they came to have paid for it. Is there cheating in our industry? Absolutely. Certainly not at Marquette that I'm aware of, obviously. And this isn't going to fix cheating. NIL is not going to fix it. If there's an arrangement where someone is getting a car and not doing anything for it, that's not going to go away just because there is NIL.

Q. We're coming up on the fiftieth anniversary of Title IX, the federal law that generally says that educational opportunities, including in sports, have to be comparable for men and women. How do things stand now when it comes to Title IX?

ANDERSON: Title IX only works if the student athlete or athletes involved bring a lawsuit or go to the government and say there is a problem here. It is not self-fixing. There is no enforcement mechanism unless you force it. I can look at virtually any high school or college and say, just from the outside, you have a Title IX issue here—it's meaningless, though, unless a student athlete brings a claim of some sort. Title IX has had a lot of impact. But at the high school level, the number of boys playing sports in 1972 is still more than the number of girls playing sports in 2020. Has it had an impact? Sure, because girls were starting at zero basically. But has it had an impact that there's some sort of level of equality? Not remotely.

Q. As a fan and observer who casually follows sports, what should I be keeping an eye on when it comes to all of these legal issues?

SCHOLL: The major conference realignments that are being considered could certainly change the landscape, particularly for somebody like Marquette, combined with whether or not football and/or anyone else goes off and creates its own governance structure. I certainly think it's possible that football will be handled outside of whatever new governance structure emerges from changes in the NCAA. The question for us is, obviously, those schools that play high-level football, what are they doing with their basketball programs and all of their other programs? Are they going to compete in two worlds, one of which is the traditional Division I world but another world for football?

For us at Marquette, the single most important thing to keep an eye on is access to the NCAA basketball tournament. That drives so much of what we do, in terms of revenue and who we are as an athletics department. The NCAA constitutional convention is going to be critical. As a fan, that's what I would be following. As an athletic director, that's what I'm following.

LINDSEY: One of the concerns that I have is just making sure that athletes are safe. We've talked about Title IX and things like sexual harassment and some of the abuses that have taken place. I just want collegiate athletes, particularly female athletes, to feel safe and secure when they are on these campuses and traveling to different cities in furthering their commitment to their sport.

MITTEN: Antitrust law is designed to promote consumer welfare, so hopefully lower courts don't interpret *Alston* to invalidate all aspects of the amateur/academic model of college sports, which has resulted in a unique brand of very popular athletic competition. College sports have never been so popular, and fans haven't brought any

antitrust litigation challenging any NCAA amateurism rules. It will be interesting to see *Alston's* effects on the NCAA basketball tournament. Hopefully, judicially mandated less restrictive alternatives to current NCAA rules won't result in all the best college athletes going to only the traditional power schools, which would deprive fans of seeing exciting games in which Number 12 seeds knock off Number 5 seeds.

Tax law also is very important because the IRS has always said athletic scholarships are not subject to federal income tax. Once you start moving college sports toward a more professional model, the IRS might change its mind on that. If so, college athletes will be worse off economically.

ANDERSON: My advice is to stop expecting that the law, lawyers, and judges will actually do anything helpful in collegiate athletics. To me, the main thing is to look at the student athletes. Most people who become student athletes get wonderful educations, and use their education to build their futures. Some of my best law students have been student athletes. Their experience trains them well. The more that we create these things that separate sports from the educational system, the more we devalue sports.

I hope that whatever the NCAA does, the student athlete is still at the forefront. I know it is for athletic departments. I'm not so sure when I see all of these lawsuits and the judges who don't really understand exactly how things work. If we focus on the student athletes, I think we'll be fine. I think college sports will continue in a wonderful way. Things will change. Things seem to change every year. But we can adjust to that as long as we keep the individual athletes in mind.

SCHOLL: We've survived a lot, and we'll continue to survive a lot. We've got to be laser focused on the experiences of student athletes at our institutions. If somehow we can fight through all the politics and keep that in place, we'll be just fine. ■