

# SPORTS LITIGATION ALERT

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## Cases

### Professional Sports Arenas and Their Microscopic Damage

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*Legal ramifications come to fruition in post-pandemic times.*

**A**s the new year begins, we near the four-year anniversary of when the world shut down due to the Covid-19 pandemic. The world continues to experience a “new normal.” However, while it seems many aspects of life have reverted back to as they were in

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pre-Covid-19 pandemic times, many legal ramifications and issues remain.

The world came to halt in March of 2020 due to the Covid-19 pandemic affecting everyone in some fashion. Many small businesses had to close their doors. Millions lost their lives. Professional sports arenas had to cease operations.

The matter of *San Jose Sharks, LLC v. Superior Court of Santa Clara County, et al.*, a case brought by a group of plaintiffs, including the National Hockey League (the “NHL”), the San Jose Sharks, LLC, and additional NHL member teams, exemplifies unprecedented coverage disputes that arose as a result of the Covid-19 pandemic. 98 Cal. App. 5th 158 (2023), review filed (Jan. 30, 2024). The plaintiffs brought suit against Factory Mutual Insurance Company (“Factory Mutual”) alleging that the losses they incurred as a consequence of the Covid-19 pandemic were covered by a commercial insurance policy issued by Factory Mutual. Specifically, the plaintiffs claimed they lost earnings as a result of canceled hockey games and limited fan access to games, and that such losses were covered under the Factory Mutual policy. The plaintiffs argued that because they paid their required premiums, provided timely notice of the losses, and submitted a proof of loss, their Covid-19 related losses should be covered under their respective policies.

By way of background, the trial court determined the claims were adequately plead by the plaintiffs, determining they sufficiently stated a claim for relief. However, the trial court did grant Factory Mutual’s motion to strike “in large part, concluding that [the] plaintiffs failed ‘to allege covered physical loss

or damage to property due to Covid-19.’” *Id.* at 316. The trial court declined to address Factory Mutual’s contention that the contamination exclusion barred the plaintiffs’ claims for coverage. The plaintiffs appealed the matter to the Sixth District Court of Appeals in California challenging the trial court’s findings, ultimately reviewing the plaintiffs’ petition.

The review at the appellate level was twofold. First, the Court had to determine whether the plaintiffs adequately plead their claim for covered physical loss or damage to property due to Covid-19. Second, the Court had to interpret the terms of the insurance agreements, which the plaintiffs argued were ambiguous. As the case itself cites, “[w]hile insurance contracts have special features, they are still contracts to which the ordinary rules of contract interpretation apply.” *Id.* (internal citations and quotation marks omitted). Insurance agreements, much like contracts, need to be read as a whole when interpreting them. One cannot read terms or exclusions of a policy on their own with an independent lens, and instead, they must be read as a whole to interpret their true intent.

What constitutes physical damage to property? The plaintiffs argued that the Covid-19 virus simply existing in the air and on the surfaces of their arenas sufficed as physical damage to their arenas. The appeals court, based upon other trial court rulings in making its determination, stated that it relied upon the plaintiffs’ factual allegations and, thus, determined there was physical loss and/or damage as defined within the terms of the agreements/policies. Therefore, if the Covid-19 virus was in the air or on the surfaces of the arenas, the arenas had suffered physical damage to their property. Other trial court cases identified that the Covid-19 virus bonded with surfaces causing physical damage to property and thus, sufficed as physical damage. Additionally, the plaintiffs alleged that the Covid-19 virus actually altered the molecular structure of property at their arenas. Factory Mutual did not contest this argument so the appeals court assumed the truth of the plaintiffs’ factual allegation as claimed.

The court then looked to whether said physical damage to property fell within the confines of the contamination exclusion contained in the policies. The plaintiffs agreed that the contamination exclusion did not allow them to recover for diminution to the property at their arenas; however, they contested whether

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the exclusion applied to their lost earnings. The court agreed with Factory Mutual, in that the language of the exclusionary provision was not ambiguous and, as a result, the policy did not provide coverage for physical loss or damage in the form of Covid-19 viral contamination.

Ultimately, the court of appeals (Judge Lie), held that the plaintiffs sufficiently stated a claim that the presence of Covid-19 in and at their properties did constitute “physical loss or damage” within the meaning of their policies, but further held that the provisions contained in their policies under the business-interruption and civil-authority sections unambiguously excluded physical loss or damage in the form of viral contamination, including earnings lost due to such damage, from the scope of coverage.

This case was a win for insurers. Specifically, the holding in this case is significant for those insurers who insure recreational facilities, sports arenas, and professional sports teams. The National Hockey League, the San Jose Sharks, LLC, and additional NHL member teams, as the plaintiffs here, attempted to recoup their lost revenue as a result of a global pandemic. However, as has been the case in various other settings around the country, this Court did not agree and found that there was no business interruption coverage triggered by the pandemic.

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## From Courtside to Courtroom: What Happens When A Fan’s Heckling Goes Too Far

By John E. Tyrrell, Esq. and Michael E. Rosenthal, Esq., of [Ricci Tyrrell Johnson & Grey](#)

In the ever-evolving realm of sports and entertainment, stadiums emerge as modern coliseums, where athletes showcase their grit, and fans ignite in a fervent symphony of cheers and boos alike. Amidst this competitive atmosphere, the First Amendment serves as both referee and cheerleader, balancing the intricate dichotomy between freedom of expression and the obligations of venue governance. This clash was illustrated in front of the Court of Appeals of Utah in *Keisel v. Westbrook*, 2023 UT App 163 (UT App. 2023), where

a fan’s comments to NBA Superstar Russell Westbrook sparked a national conversation on the boundaries of fan behavior and players’ rights.

The Utah Jazz was playing the Oklahoma City Thunder in March of 2019. *Id.*, at ¶ 5. Shane Keisel, a Jazz fan, was sitting with his girlfriend a few rows up from courtside. *Id.* Midway through the second quarter, Westbrook, the Thunder’s point guard, had a verbal altercation with Mr. Keisel. Although some of the exchange was captured on video, much of what was

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actually said is still up for debate. *Id.*, at ¶¶ 6-9 What was clear was this was not a “family-friendly” discussion, part of which involved Mr. Keisel telling Westbrook to “get on his knees.” *Id.* When Westbrook was asked about the altercation in a post-game interview, Westbrook said that he thought Keisel’s initial comment to him was “racial.” *Id.*

The Jazz General Counsel quickly investigated the altercation, determined that Keisel had violated a code of conduct that governed fan behavior, and banned Keisel from attending its home games for life. *Id.* Before the next home game, then-owner Gail Miller addressed the crowd and said, among other things, “We are not a racist community.” *Id.*, ¶¶ 6-9.

In December 2019, Keisel and Huff (his girlfriend in attendance with him) filed a civil complaint against both Westbrook and the Jazz (collectively, “defendants”), asserting causes of action for defamation, false light, intentional infliction of emotional distress, and negligent infliction of emotional distress. For the purposes of this article, we will focus on his defamation claim. In brief, the relevant claims alleged:<sup>4</sup>

- defamation against Westbrook based on his post-game statement in which he either expressly said or “implied” that Keisel “had made statements that were racist . . . in nature;”
- defamation against the Jazz based on their press releases and public statements that implied that “the alleged offensive behavior was racism or racist commentary” . . .

*Id.*, ¶ 22.

#### Defamation Against Westbrook and the Jazz

Keisel’s defamation claim against Westbrook was based on Westbrook’s post-game statement, wherein Westbrook stated that what Keisel had said to him was “completely disrespectful” and he thought it was “racial.” *Id.*, ¶ 32. His claim against the Jazz mostly implicated the statements Miller made before the March 14 home game. Although Miller did not identify Keisel by name, Keisel argued she defamed him by suggesting that he had said something racist to Westbrook at the earlier game. *Id.*, ¶ 57.

“Under Utah law, a statement is defamatory if it impeaches an individual’s honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule.” *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994). To state a claim for defamation,” a plaintiff must therefore “show that defendants published the statement concerning him, that the statements were false, defamatory, and not subject to any privilege, that the statements were published with the requisite degree of fault, and that their publication resulted in damage.” *Id.*, at 1007-08 (quotation simplified) (emphasis added).

As noted, one of the elements of a defamation claim is that the statement at issue must be “false.” *Id.* at 1007. By extension, a statement can only be actionable as defamation if it is capable of being proven to be true or false. *Id.* And by further extension, a plaintiff is “definitionally unable” to satisfy this falsity element “with regard to statements of pure opinion, because such statements are incapable of being verified and therefore cannot serve as the basis for defamation liability.” *Id.* (quotation simplified). “Because expressions of pure opinion fuel the marketplace of ideas and because such expressions are incapable of being verified, they cannot serve as the basis for defamation liability,” *Id.* at 1015. The *First Amendment to the United States Constitution* likewise protects statements of opinion, and this protection is even more pronounced in matters of public concern. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 452-53, (2011) (noting that speech is a matter of public concern if it is “fairly considered as relating to any matter of political, social, or other concern to the community” and that for matters of public concern, courts should “accord broad protection to speech to ensure that courts themselves do not become inadvertent censors” (quotation simplified)).

Defendants moved for summary judgment, which the trial court granted. The court reasoned: (1) “no hearer could have reasonably understood [Westbrook’s] statement to be directed at Keisel [close quote] and (2) Westbrook’s post-game statement was a constitutionally protected statement of opinion. *Id.* On appeal the Utah Court of Appeals noted that the summary judgment standard applied differently to a defamation claim, “primarily because it never arrives at court without its companion and antagonist, the First Amendment, in tow.” *Id.*, ¶ 35. In other words, when

<sup>4</sup> Given the other claims arose from the same alleged facts as the defamation claim, the Utah Court of Appeals held that none of the same alleged facts supported claims of false light and/or negligent and intentional emotional distress.

reviewing the record, the court does not give the non-moving party the benefit of the doubt in a factual dispute, as it would under most any other civil case. *Id.*

The determination of whether a particular statement qualifies as an opinion thus presents a question of law for the court to decide. The Appellate Court noted it need not resolve the first rationale for the trial court's grant of summary judgment, i.e., how the reasonable "hearer" would interpret the comment, because Westbrook's post-game statement was a constitutionally protected statement of opinion. *Id.*, ¶ 34.

Before this lawsuit, no Utah appellate case had ruled on whether calling someone racist was actionable in a defamation case; however, in support of its conclusion that it was not, the Court looked to neighboring jurisdictions which have concluded that calling someone a racist cannot be actionable under a theory of defamation because it is an opinion. *Keisel*, at ¶ 38. This is so because the statement cannot be verified as being true or false as a matter of fact. With most "bright line" rules like this, there are of course exceptions. The Court quickly qualified its holding to note that an allegation of racism can, in certain contexts, be defamatory. *Id.*, ¶ 39; *See, e.g., La Liberte v. Reid*, 966 F.3d 79, 93 (2d Cir. 2020) (holding that "accusations of concrete, wrongful conduct are actionable[,] while general statements charging a person with being racist, unfair, or unjust are not." (quotation simplified)).

As a result, the Appellate Court concluded that, regarding the defamation claim against Westbrook, although Westbrook opined that particular statements were "racial" in nature (as opposed to directing that kind of assessment at Keisel more generally), his opinion still enjoyed constitutional protection. *Id.*, ¶ 42. In his post-game comments, Westbrook referred to "people", in the plural, as opposed to any one person such as Keisel. *Id.*, ¶ 48. In short, Westbrook's post-game statement "I think it's racial" was protectable opinion. *Id.*, ¶ 52.

Likewise, the statements made by Miller during the next game were constitutionally protected opinions. *Id.*, ¶ 58. For the same reasons and logic applied to Westbrook, Miller's statement, "We are not a racist community," was a general statement of pure opinion and "incapable of being verified..." *Id.* Moreover, it was not directed specifically at Keisel.

#### Discussion

This case provides three interesting takeaways.

First, establishing a theory of defamation against a professional athlete or stadium is a high burden. The summary judgment standard in Utah is different in a defamation lawsuit, namely that the court will not resolve factual disputes in the non-movant's favor. Therefore, the Court did not review the record in the light most favorable to Keisel, who was the non-moving party.

Second, courts tend to align their reasoning with other federal courts which have held, generally, that calling or implying someone is "racist", alone, is not enough to satisfy the first element of a defamation claim (i.e. that the statement is *false*). Calling someone racist is an opinion, and thus cannot be proven true or false based off mere words or ambiguous circumstances.

Third, due process issues affecting public entities do not apply to privately owned stadiums. While technically they are open to the public, stadiums are allowed to promulgate their own procedures and protocols for dealing with unruly or rowdy fans. Thus, they are free to kick or ban a fan from the stadium if they find he or she violated their policies or codes of conduct.

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## **Plaintiff Strikes Out in Claiming School District's Baseball Field Negatively Impacted His Property**

A federal judge from the Eastern District of Missouri has granted summary judgement to a school district that was sued by a property owner, who lived next to the school's district's baseball field and complained about players and parents trespassing on his property.

The defendant Rockwood School District operates several sports fields at its Rockwood Summit High School campus in Fenton, Missouri. At issue in the instant case is a baseball field (field) in the southwest corner of the campus, which abuts the plaintiff's property. Specifically, the plaintiff's front yard runs parallel to the field's third baseline. A lightly wooded portion of the yard runs along the shared boundary of the properties.

Prior to 2017, an eight-foot fence (field fence) surrounded the field, and an additional six-foot fence (perimeter fence) ran along the property between the

wooded area and the west side of the field. Because the perimeter fence did not tie-in to the field fence, spectators and players were able to enter the property to retrieve foul balls. The field also had a 12- to 15-foot backstop between home plate and the spectator area.

The defendant began renovations to the field in 2017. The plaintiff's parents, Jane and Harold Petry, owned the property at that time. Christopher Freund, Director of Facilities for the Rockwood School District, met with the plaintiff's parents in 2017 and agreed to make certain improvements to address their concerns about trespassing. As part of these improvements, the defendant extended the perimeter fence and connected it to the field fence to prevent patrons from entering the property. The defendant also installed a 20-foot backstop between home plate and the bleachers. Beyond that, the defendant planted new shrubs to reinforce the wood line along the plaintiff's property and installed netting along the south dugout. The defendant also erected "no trespassing" signs and added locks the gates around the field.

The plaintiff began living at the property in January of 2018. She purchased the property from her parents in June of the same year. The plaintiff was aware of the field before moving to the property. Even so, the plaintiff asserted that the defendant's usage of the field "has become so frequent and available to the public for multiple uses, including a dog park, that is has constituted . . . a grossly unreasonable use of [district] property in a manner that causes severe detriments to Plaintiff [and] the fair market value of the Property[.]"

The plaintiff also alleged that the defendant has deprived her of her right to quiet enjoyment. Specifically, she complained of litter, "loud, boisterous crowds," harassment by patrons, and baseballs that "rain down" on the property.

The plaintiff alleged causes of action for inverse condemnation and a taking under the Fifth Amendment. She sought monetary damages, attorney's fees, and injunctive relief. The defendant moved for summary judgment.

In its discussion, the court noted that the plaintiff appears to assert that the defendant's usage of the field, "constitutes a direct physical taking in the form of errant baseballs, trespassers, and loud sounds."

The court continued, noting that the plaintiff, "offers no support for the idea that even the frequent

presence of baseballs, trespassers, and sounds constitutes true possession or occupation in the traditional sense. At this stage, it is not enough to rely upon allegations and denials. Carter, 956 F.3d at 1059. Plaintiff must instead bring forth sufficient probative evidence that would permit a finding in her favor beyond mere conjecture or speculation. *Id.* Plaintiff has not done so. Thus, the Court will grant Defendant's Motion for Summary Judgment to the extent Plaintiff's Complaint can be understood to assert a claim of physical possession or occupation of her Property."

The court added that the "Complaint is better understood to assert a regulatory taking." But even here, the plaintiff falls short, according to the court, which relied on *Murr v. Wisconsin*, 582 U.S. 383, 393, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017).

"The Supreme Court has offered two guiding principles for determining when regulation is so onerous that it constitutes a taking. *Id.* First, 'with certain qualifications . . . a regulation which denies all economically beneficial or productive use of law will require compensation under the Takings Clause.' *Id.* (quoting *Palazzo*, 533 U.S. at 617) (cleaned up). Second, where a regulation does not deprive the owner of all economically beneficial use, 'a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.' *Id.* (citing *Palazzo*, 533 U.S. at 617) (cleaned up).

"Plaintiff does not contend that Defendant's use of the field has denied her of all economically beneficial or productive use of the Property. Thus, the Court must consider the 'complex of factors' outlined in *Palazzo*. 533 U.S. at 617.

"Plaintiff acknowledges that the value of the Property has increased since she purchased it in June 2018. But Plaintiff asserts that Defendant's 'unreasonable uses' of the field have nevertheless substantially impaired her use and quiet enjoyment of the Property. Plaintiff offers no evidence of any negative economic impact or interference with her investment-backed expectations. Indeed, when asked via interrogatory to describe any physical damage to Plaintiff's property, Plaintiff offered a boilerplate objection followed by a single responsive sentence: 'Plaintiff's landscaping

has frequently been damaged by foul balls struck into her yard.’

“Plaintiff also fails to establish the third factor. Beyond the occasional use of terms like ‘careless’ and ‘unreasonable,’ Plaintiff makes little effort to explain why the character of Defendant’s action supports a finding in her favor, especially absent any evidence relating to the first two factors. Unsupported allegations of this sort are not enough at this stage. See Carter, 956 F.3d at 1059. All three factors weigh in Defendant’s favor. The Court will grant Defendant’s Motion for Summary Judgment on Plaintiff’s takings claim.”

The court continued, “even viewing the facts in the light most favorable to Plaintiff, there is no basis for this Court to conclude that Defendant’s use of the field is unreasonable. Plaintiff cites no authority to show that the alleged nuisances are anything more than the foreseeable consequences of living next to a baseball field.

“It is undisputed that an eight-foot fence surrounds the field and that an additional six-foot fence runs along Plaintiff’s property. It is also undisputed that Defendant has erected a 20-foot backstop and ‘no trespassing’ signs. And while the parties dispute the density of the foliage running between Plaintiff’s yard and the field, it is undisputed that the narrow-wooded area provides at least some protection from foul balls.

“Reasonability aside, Plaintiff cannot establish damages. Where a public entity only temporarily damages the property rights of a property owner, the proper measure of damages is the diminution in value of the use of occupancy of the property. *Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573, 577 (Mo. banc 2000) (citation omitted). Plaintiff concedes that her property value has increased since she purchased the property in 2018. For these reasons, the Court will grant Defendant’s Motion for Summary Judgment on Plaintiff’s inverse-condemnation claim.”

*Teresa Petry v. Rockwood School District*; E.D. Mo.; No. 4:22-CV-796 RLW; 12/20/23

## Appeals Court Affirms Ruling in Concussion Case Involving Swimmer Who Collided Head-to-Head With Another Swimmer

A California state appeals court has affirmed the ruling of a trial court, effectively dismissing the claim of a swimmer, who “collided head-to-head” with another swimmer, and then sued a Paseo Aquatics Sports (his swim club) and his coach.

In so ruling, the court relied on the doctrine of primary assumption of the risk for its decision.

The plaintiff in the case was Zechariah Wolf, a 17-year-old member of Paseo. Wolf collided head-on with teammate Ethan Lee while warming up for a swim meet. At the meet, each swim club was assigned a specific lane in which to warm up. Wolf’s coach, Grant Richman, instructed 15 to 20 swimmers to “circle swim” counterclockwise in their assigned lane. Wolf swam behind Lee. Lee made a flip turn, pushed off the wall, and “collided head-to-head” with Wolf.

Wolf alleged Paseo was vicariously liable for Coach Richman’s negligent conduct because he “made the event unsafe by placing 15-20 minor swimmers, including Wolf, in one lane.” Wolf sought damages and medical expenses incurred as a result of the “catastrophic injuries” he suffered, including “head trauma, traumatic brain injury, and neck injury.”

The trial court granted Paseo’s motion for summary judgment, finding Wolf assumed the inherent risk of colliding with another swimmer when he participated in the warm-up swim.

On appeal, Wolf argued that the trial court erred in granting summary judgment because triable issues of material fact exist as to whether Coach Richman increased the risks of competitive swimming beyond those inherent in the sport.

In considering the plaintiff’s argument, the appeals court reviewed the aforementioned doctrine:

“Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), some activities—and, specifically, many sports—are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.” (*Kahn v. East Side Union High School*

Dist. (2003) 31 Cal.4th 990, 1003, 4 Cal. Rptr. 3d 103, 75 P.3d 30 (Kahn).) “The primary assumption of risk doctrine, a rule of limited duty, developed to avoid such a chilling effect. [Citations.]” (Nalwa v. Cedar Fair, L.P. (2012) 55 Cal.4th 1148, 1154, 150 Cal. Rptr. 3d 551, 290 P.3d 1158 (Nalwa).)

The court noted specifically that the doctrine provides, “defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty not to increase the risk of harm beyond what is inherent in the sport.” (Kahn, *supra*, 31 Cal.4th at p. 1004, *italics added*.) The appeals court further added that other courts have applied the rule to sports instructors or coaches, “keeping in mind, of course, that different facts are of significance in each setting.” (Kahn, at p. 1011.) The rule extends to “non-contact competitive sports” as well. (Staten v. Superior Court (1996) 45 Cal.App.4th 1628, 1633, 53 Cal. Rptr. 2d 657.)

More generally, “[a] sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is ‘totally outside the range of the ordinary activity’ [citation] involved in teaching or coaching the sport.” (Kahn, *supra*, 31 Cal.4th at p. 996, *italics added*.) If the conduct “cannot be prohibited without deterring vigorous participation in the sport or otherwise fundamentally altering the nature of the sport,” the court is less likely to find a breach. (Freeman v. Hale (1994) 30 Cal. App.4th 1388, 1396, 36 Cal. Rptr. 2d 418.)

Determining whether the doctrine applies, according to the panel, requires analysis of both the “the nature of the sport or activity in question” and “the parties’ general relationship to the activity.” (Knight v. Jewett (1992) 3 Cal.4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (Knight), citing 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 748, pp. 83-86.) When the facts are undisputed, application of the doctrine is a question of law for the court to decide. (Childs v. County of Santa Barbara (2004) 115 Cal.App.4th 64, 69, 8 Cal. Rptr. 3d 823.)

### **Coach Richman Did Not Increase the Risks Inherent in Competitive Swimming**

The appeals court noted that Wolf’s complaint alleged that Paseo “knew that it was unsafe to allow 15-20 minor swimmers to swim in one lane all at one time because of the potential for concussion.” In fact, he charged that the defendants “continued with this dangerous practice despite this knowledge, sacrificing swimmer safety for ill-perceived [sic] expediency and practicality” and that each of the defendant “had the power and authority to stop this unsafe practice.”

With respect to Paseo, Wolf alleges Coach Richman “was in charge of . . . supervising Plaintiff at the event [and he] could have banned the Plaintiff from warming up with 15 to 20 minor swimmers in the same lane at the same time.” He alleges the danger created by this practice “was not an inherent risk of a swim meet, vastly and unreasonably increasing the risks to Plaintiff over and above those inherent in a swim meet.”

The appeals court acknowledged Paseo presented evidence that “coaches tell swimmers to enter the water with a three-point entry, without diving, one to two body lengths apart.” Further, “the number of swimmers in each lane is determined by the number of lanes assigned to a team by the host team; Paseo had no control over the number of lanes it is assigned for warm-ups at swim meets; that limiting warm-ups to one or a very small number of swimmers per lane ‘would fundamentally alter the sport’ by making it ‘likely . . . impossible for a group of swimmers to warm up simultaneously’; and doing so ‘would have the potential of significantly delaying the start of the swim meet.’”

Wolf contended the motion must fail because Paseo did not “demonstrate all the elements of primary assumption of risk,” pointing to evidentiary deficiencies.

The appeals court disagreed.

“While Paseo’s moving papers were skeletal, it need not have produced its own evidence to prevail on summary judgment. The doctrine of judicial admission allows a moving party to use allegations from the non-moving party’s pleadings to eliminate triable issues of material fact. (Mark Tanner Constr., Inc. v. HUB Internat. Services, Inc. (2014) 224 Cal.App.4th 574, 586-587, 169 Cal. Rptr. 3d 39.) Similarly, the moving party may seek judgment as a matter of law by challenging the sufficiency of the non-moving party’s

pleadings. (See *Barnett v. Delta Lines, Inc.* (1982) 137 Cal.App.3d 674, 682, 187 Cal. Rptr. 219 [‘A motion for summary judgment necessarily includes a test of the sufficiency of the complaint and as such is in legal effect a motion for judgment on the pleadings’]; *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1055, 282 Cal. Rptr. 726 [‘When a motion for summary judgment is used to test whether the complaint states a cause of action, the court will apply the rule applicable to demurrers and accept the allegations of the complaint as true’].)”

The court also wrote that the doctrine, “while sometimes denominated as an affirmative defense, is a matter of duty. A plaintiff bears the burden to establish both the existence and breach of a duty by the defendant. (See *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162-168, 41 Cal. Rptr. 3d 299, 131 P.3d 383 [plaintiff must allege facts ‘supporting breach of the duty not to enhance the inherent risks of his sport’]; *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250, 91 Cal. Rptr. 3d 532, 203 P.3d 1127 [‘In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation, and damages’].)”

The appeals court zeroed in on a weakness in the plaintiff’s complaint, since it alleged that allowing 15 to 20 swimmers to warm up in the same lane was a “common practice by all Defendants at invitational meets” and that “every other lane” in the pool contained the same number of swimmers on the day of the collision.

“His own description of this activity,” wrote the appeals court, “contradicts his assertion that Paseo ‘vastly and unreasonably’ increased the risk of a collision. The parties do not dispute that swimmers engage in simultaneous circle swimming prior to meets and that this type of swimming is an integral part of competitive swimming. Nor do they dispute it is common for 15 to 20 swimmers to warm up in one lane. It follows that collisions are an inherent risk in competitive swimming. (See, e.g., *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 53 Cal. Rptr. 2d 657 [collisions are inherent in the sport of solo figure skating because practice involves group skating].) Wolf’s statement of undisputed material facts supports this conclusion.

The court opined, “Paseo owed a limited duty not to increase the risk to Wolf by acting recklessly or ‘totally

outside the range of the ordinary activity’ [citation] involved in teaching or coaching the sport.” (Kahn, *supra*, 31 Cal.4th at p. 996.) Wolf has not presented any evidence showing this occurred. His pleading admits as much. His opposition tried to plug these gaps with several unpleaded facts: that Coach Richman directed the swimmers to leave at three second intervals; that two younger swimmers were hanging onto the pool wall as Lee approached, causing him to perform his flip turn directly into the oncoming Wolf; and that Coach Richman was standing on the opposite side of the pool when they collided. Even if Wolf included these facts in his second amended complaint, they do not establish that Coach Richman acted differently than any other coach or increased the risks inherent in competitive swimming. The parties do not dispute how Coach Richman acted, nor can the evidence be construed by a trier of fact as reckless or outside the range of ordinary activity involved in teaching or coaching the sport. (See Kahn, *supra*, 31 Cal.4th at pp. 1012-1013.)”

Therefore, the appeals court concluded, “judges and juries should not second-guess the judgment of coaches and other sports instructors by imposing liability for injuries suffered during participation in competitive sports, even when caused by negligent conduct. (See *Kane v. National Ski Patrol System, Inc.* (2001) 88 Cal.App.4th 204, 214, 105 Cal. Rptr. 2d 600 [‘the ability to second-guess an instructor’s assessment is essentially limitless, so too would an instructor’s liability be limitless’].) The evidence shows collisions are inherent risks of group swimming. Wolf offers no evidence to the contrary. As such ‘all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ (§ 437c, subd. (c).)”

*Wolf v. Paseo Aquatics Sports*; Ct. App. Calif., 2nd App. Dist.; No. B324969; 12/21/23

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## Articles

### The NCAA is Trying to Crack Down on NIL Collectives; It Isn't Working

By **Alec Winshel**

#### I. Introduction

The National Collegiate Athletics Association (“NCAA”) has opened an investigation into the University of Tennessee for potential violations of the league’s name, image, and likeness (“NIL”) policy.<sup>1</sup> The investigation will probe the recruitment of starting quarterback Nico Iamaleava and the involvement of an NIL collective that remains closely associated with the University of Tennessee athletics program. The school has denounced the allegations as “factually untrue and procedurally flawed.”<sup>2</sup> Only days after news of the investigation became public, the Attorney General of Tennessee filed a complaint in federal court challenging the validity of the very regulations that the NCAA seeks to enforce. As the concurrent investigation and lawsuit unfold, the claims against the University of Tennessee are turning into a potential flash point for antitrust scrutiny against the NCAA. The NCAA’s attempt to rein in the influence of booster money in recruitment might instead upend the regulations that the league currently imposes on prospective students.

#### II. Allegations Against The University of Tennessee

Last month, bad news reached Knoxville. The University of Tennessee received notice from the NCAA that it was investigating allegations that the school violated its policies regarding player recruitment.<sup>3</sup> History was repeating itself. Last year, the NCAA fined the University of Tennessee more than \$8 million for violations of its regulations concerning impermissible benefits for recruited athletes.<sup>4</sup> Now, the NCAA is investigating

the Volunteers’ football program for similar infractions. The allegations center on Spyre Sports Group, a marketing group that operates a name, image and likeness collective representing more than 200 athletes at the University of Tennessee.<sup>5</sup>

The NCAA is focusing on Spyre Sports Group for alleged benefits given to prospective students during their recruitment process. Nico Iamaleava, the University of Tennessee’s quarterback, may have flown to the school’s campus on a private jet paid for by the Spyre Sports Group during his recruiting visit.<sup>6</sup> Representatives for the company claim that they entered a contractual relationship with Mr. Iamaleava that included a limited assignment of his NIL rights regardless of which school he chose to attend, and that the agreement disavowed any form of inducement.<sup>7</sup> It may be true that Mr. Iamaleava signed a contract that did not determine which college he would attend, but the other signatory to the agreement was a Knoxville-based organization operating the nation’s leading NIL collective that is called the “Volunteer Club.”<sup>8</sup> The relationship is undeniable.

If the assignment of Mr. Iamaleava’s rights to the Spyre Sports Group was part of his recruitment, the University of Tennessee faces serious consequences. The NCAA prohibits the use of NIL opportunities “as a recruiting inducement or as a substitute for pay-for-play.”<sup>9</sup> As a would-be repeat violator, the NCAA is empowered to impose significant penalties against the University of Tennessee for its failure to comply with the policy.<sup>10</sup> The University of Tennessee’s chancellor,

uted more than \$60,000 in impermissible inducements to recruited athletes. *Id.*

5 <https://www.knoxnews.com/story/sports/college/university-of-tennessee/2023/09/08/tennessee-athletes-score-big-nil-deals-with-spyre-sports-collective/70700420007/>

6 <https://www.nytimes.com/2024/01/30/us/ncaa-tennessee-booster-group-violation.html?smtyp=cur&smid=tw-nytimes>

7 <https://twitter.com/TomMarsLaw/status/175248854877746830>

8 <https://www.nytimes.com/2024/01/30/us/ncaa-tennessee-booster-group-violation.html?smtyp=cur&smid=tw-nytimes>

9 NIL Q&A. <https://perma.cc/4QJ4-R332> [look at BRIEF FOR CITATION]

10 [https://www.espn.com/college-football/story/\\_/id/39423331/sources-ncaa-investigating-tennessee-nil-violations](https://www.espn.com/college-football/story/_/id/39423331/sources-ncaa-investigating-tennessee-nil-violations)

1 Interim NIL Policy. [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf)

2 <https://www.wvlt.tv/2024/01/30/factually-untrue-university-tennessee-chancellor-responds-ncaa-president-amid-nil-investigation/>

3 <https://www.si.com/college/2024/01/30/sources-tennessee-under-ncaa-investigation-for-nil-violations-in-multiple-sports>

4 The NCAA concluded that the University of Tennessee had distrib-

Donde Plowman, has denied any wrongdoing and challenged the NCAA's inconsistent guidance related to NIL activity.<sup>11</sup> Spyre Sports Group denies misconduct on its behalf, too, and emphasized that it was not acting on behalf of the university.<sup>12</sup> The NCAA has remained quiet as its investigation unfolds, and it has not announced any findings as of the publication of this article.

### III. Collectives in College Athletics

In 2021, the name, image and likeness era of collegiate athletics began. The Supreme Court's holding in *NCAA v. Alston* precipitated the seismic change by permitting colleges and universities to extend education-related benefits to recruited athletes.<sup>13</sup> The question before the court was narrow, but Justice Kavanaugh used his concurring opinion to signal suspicion about whether the NCAA's other limitations on athletes' compensation would withstand antitrust scrutiny.<sup>14</sup> The NCAA responded days later by issuing its interim name, image and likeness policy.<sup>15</sup> The policy permits college athletes to "engage in NIL activity" including the "[u]se of a professional services provider" to license their rights in connection with endorsements, sponsorships, and other brand deals.<sup>16</sup> Yet, the NCAA's policy maintains that its prohibitions on pay-for-play and improper inducements during the recruiting process are in full effect.<sup>17</sup>

Athletes quickly began licensing their publicity rights in response to the NCAA's policy, and collectives soon joined the fray.<sup>18</sup> Collectives are organizations that facilitate NIL deals for students participating in the athletic programs of colleges and universities. They operate independently from schools, but they are

often funded by and closely associated with alumni of schools.<sup>19</sup> Collectives are typically registered as nonprofits for tax purposes, although the IRS has indicated that it may no longer be amendable to that generous tax classification.<sup>20</sup> There are more than 200 NIL collectives operating at colleges and universities<sup>21</sup> and nearly every school in the Power Five conferences is home to a collective.<sup>22</sup> Large collectives, including Spyre Sports Group, distribute millions of dollars to students at their associated school.<sup>23</sup>

In some ways, collectives occupy a traditional role: the influence of money in college athletics is no innovation.<sup>24</sup> Collectives may even be funded by the same donors that have traditionally directed their funds directly to schools' athletics departments.<sup>25</sup> "A collective is nothing more than pooled booster money," says Professor Richard Karcher, professor of sports management at Eastern University. The promise of the collective, however, offers distinct advantages compared to traditional donations that might be used to improve team facilities, establish scholarships, or pay coaches' salaries. The collective cultivates direct, financial relationships that place money in the students' hands. An NIL collective allows a wealthy alumnus to pay one—or many—students enrolled at their alma mater to nominally promote a business or charity of choice. At a glance, the result seems to be a pecuniary reward for the students' enrollment. Direct transactions are the *sine qua non* of the NCAA's regulations and, nevertheless, collectives continue to flourish.

Collectives would deny any characterization as their enterprise as a modern pay-for-play scheme, much like the more overt arrangements that have existed in college athletics' shadowy corners since its

11 [https://www.espn.com/college-football/story/\\_/id/39423331/sources-ncaa-investigating-tennessee-nil-violations](https://www.espn.com/college-football/story/_/id/39423331/sources-ncaa-investigating-tennessee-nil-violations)

12 <https://www.cbssports.com/college-football/news/tennessee-based-nil-collective-spyre-sports-lawyer-releases-statement-amid-ncaa-investigation-into-volunteers/>

13 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2166 (2021).

14 *Id.* at 2167 (Kavanaugh, J., concurring).

15 <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>

16 NIL Interim Policy. [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf)

17 *Id.*

18 <https://www.insidehighered.com/news/students/athletics/2023/06/07/two-years-nil-fueling-chaos-college-athletics>

19 <https://www.on3.com/nl/news/what-are-nil-collectives-and-how-do-they-operate/>

20 <https://www.sportico.com/leagues/college-sports/2024/blueprint-sports-nil-collective-nonprofit-1234761748/>

21 *Id.*

22 <https://www.on3.com/nl/news/what-are-nil-collectives-and-how-do-they-operate/>

23 <https://www.on3.com/nl/news/spyre-sports-tennessee-football-volunteer-club-hits-membership-goal-13-5-million-nil-deal/>

24 The Supreme Court has pointed out the same. *NCAA v. Alston* [2148] ("From the start, American colleges and universities have had a complicated relationship with sports and money.").

25 <https://www.sportico.com/leagues/college-sports/2024/college-sports-donations-nil-money-1234763721/>

inception. Collectives maintain that their agreements with students are not conditional on their selection of any particular school.<sup>26</sup> There is no inducement and, therefore, no violation of the NCAA's recruiting rules.

Yet, the NCAA's allegations against the University of Tennessee are not the first sanctions against a school for NIL-related conduct. In 2023, the NCAA penalized the University of Miami for its involvement in facilitating a meeting between a wealthy alumnus, John Ruiz, and two basketball players that had recently transferred to the school.<sup>27</sup> Mr. Ruiz has signed more than one hundred of the school's athletes to promote his company in exchange for financial compensation.<sup>28</sup> More recently, the NCAA punished Florida State University after an assistant football coach at the school drove a prospective transfer student to a meeting with a person affiliated with Rising Spear, the school's NIL collective.<sup>29</sup> The student was offered an agreement worth \$15,000 per month.<sup>30</sup> And, most recently, the allegations against the University of Tennessee were made public only days after a similar investigation into the University of Florida was announced.<sup>31</sup> The NCAA is currently investigating the Florida Gators football program after a recruited student decommitted from the school amidst a strained relationship with the now-defunct Gator Collective.<sup>32</sup> These two investigations mark the NCAA's most high-profile attempts to crack-down on perceived impropriety in the burgeoning NIL system.

The influence of booster money has been a persistent force in college athletics. "It won't go away," said Dr. B. David Ridpath, a professor at Ohio University. Athletic departments have always relied on significant revenue from wealthy, interested third parties as an integral part of their business plan. In major Division I programs, like football and basketball, success may be

impossible without a consistent influx of cash that helps to draw top recruits. "It's about how we manage that," said Dr. Ridpath. "Sunshine is the best disinfectant."

The NCAA is trying to place guardrails on the influence of outside cash in player recruitment, but its attempt to reign in the ever-expanding power of NIL deal-making reflects the persistent tension in collegiate athletics: the irony of amateurism. The doublethink of the 'student-athlete' has provided a framework for the NCAA's many restrictions on students and schools alike. "'Student-athlete' is a term of control," said Dr. Ridpath. "It's about suppressing economic rights that other students have as a matter of course." The University of Tennessee has expressed its dissatisfaction with the NCAA's continued regulation of its students' personality rights, even after *NCAA v. Alston*. They aren't the only ones. It was only days after the NCAA's announcement of its investigation into the school that the state's attorney general joined the fray.

### Challenging the NCAA's Restraints on NIL

On January 31, 2024, the attorneys general of Tennessee and Virginia filed a lawsuit against the NCAA alleging that its remaining NIL restrictions on students are violations of federal antitrust law. The complaint, filed in the Eastern District of Tennessee, frames the Supreme Court's decision in *NCAA v. Alston* as "reject[ing] the NCAA's long-held arguments about why its amateurism rules are exempt from the Sherman Act."<sup>33</sup> Their claim targets the NCAA's remaining restrictions on prospective athletes, including students seeking transfers, that prohibit any discussion of NIL agreements prior to signing with a school.<sup>34</sup> Those sorts of agreements, in the NCAA's own language, "improperly induce matriculation" and remain prohibited.<sup>35</sup>

The lawsuit claims that these restrictions on recruited athletes constitute an illegal boycott against students that fails the rule of reason analysis applicable to claims arising under Section 1 of the Sherman Act.<sup>36</sup> Recruited athletes' bargaining power can be welded

26 <https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html>

27 [https://www.espn.com/womens-college-basketball/story/\\_/id/35727606/ncaa-sanctions-miami-women-hoop-nil-related-infractio](https://www.espn.com/womens-college-basketball/story/_/id/35727606/ncaa-sanctions-miami-women-hoop-nil-related-infractio)

28 *Id.*

29 <https://www.sportico.com/leagues/college-sports/2024/ncaa-fsu-punishment-nil-1234762667/>

30 *Id.*

31 <https://www.cbsnews.com/miami/news/florida-is-under-ncaa-investigation-a-year-after-a-failed-nil-deal-with-qb-signee-jaden-rashada/>

32 *Id.*

33 Complaint at 1. <https://www.bloomberglaw.com/product/blaw/document/X7NM9B4L2UT9SO9SGU9JDQJ7LPT/download?image=1>

34 Complaint at 2.

35 NCAA, Name Image and Likeness Policy Question and Answer (Feb 2023), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_QandA.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf), [perma.cc/4QJ4-R332].

36 Complaint at 15.

to negotiate favorable NIL deals with collectives that are eager to see the student select their school; if those discussions cannot occur prior to committing with a school, the prospective students' leverage disappears and they must instead select a market without knowledge of their own value.<sup>37</sup>

The NCAA released a public statement in opposition to the lawsuit. In their view, lifting NIL restrictions on prospective athletes would “diminish[] protections for student-athletes from potential exploitation” and “further tilt[] competitive imbalance among schools.”<sup>38</sup> Tennessee and Virginia share a different view than the NCAA on the degree of control that students should exercise over their own image. Both states have statutes that expressly protect the right of “student-athletes” to earn compensation for their name, image and likeness and, in fact, prohibit the NCAA from interfering with the exercise of those rights.<sup>39</sup> As for concerns that unfettered NIL deal-making will result in deeper imbalances between schools, commentators say this argument rings hollow. “Competitive equity is a complete myth,” says Professor Ridpath. Parity amongst collegiate athletic programs is unrealistic and, explains Professor Ridpath, operates as a thin excuse for the NCAA's restrictions.

On February 6, 2024, District Judge Clifton L. Corker denied the states' motion for a temporary restraining order.<sup>40</sup> The plaintiffs failed to convince the court that recruited athletes would suffer irreparable harm and that a restraining order was appropriate.<sup>41</sup> One week later, Judge Corker heard oral arguments on whether a preliminary injunction should be granted.<sup>42</sup> As of this writing, an order has not yet been issued. Based on Judge Corker's prior ruling, the prospect of a preliminary injunction appears unlikely.

Judge Corker's order denying the temporary restraining order contains clues as to how the case may develop. In discussing the likelihood of the claim to

succeed on the merits, the court briefly walked through a rule of reason analysis. As a preliminary matter, it found “sufficient evidence that the NCAA's NIL-recruiting ban likely harms competition.”<sup>43</sup> The court evaluated the NCAA's procompetitive justifications for the ban and, after dismissing its arguments about competitive balance and student exploitation, accepted its arguments that the restriction promotes amateurism and the “integration of academics and athletics.”<sup>44</sup> However, the court suggested that NCAA regulations—requirements that students maintain progress towards graduation and prohibitions on NIL deals with athletic performance as compensation—accomplish the same procompetitive goals without burdening students' economic choices.<sup>45</sup> Judge Corker determined that the states' claim is likely to succeed on the merits.<sup>46</sup>

The NIL-related lawsuit is only one of many antitrust claims that the NCAA faces. A class-action lawsuit in California is challenging the NCAA's refusal to share revenues from television rights with athletes.<sup>47</sup> In Philadelphia, a lawsuit has been filed claiming that students in athletics programs are owed hourly wages.<sup>48</sup> Another lawsuit is aimed squarely at the NCAA's transfer rules.<sup>49</sup> Meanwhile, the National Labor Relations Board has announced that members of the Dartmouth men's basketball teams are employees eligible for unionization.<sup>50</sup> The tide continues to rise.

The NCAA is no stranger to legal battles. “Defending antitrust lawsuits is just a necessary part of doing business in the operation of league sports,” says Karcher. “[T]he NCAA has always navigated through district court proceedings and rulings, sometimes they settle and sometimes they wait to see what the appeals courts have to say, and sometimes they tweak their rules pending a court's decision.”

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43 Doc 29 on Docket, page 7.

44 *Id.* at 9.

45 *Id.*

46 *Id.*

47 <https://apnews.com/article/college-athletes-nil-eb702d33a87b-ca98084ea492eccdf84c>

48 <https://apnews.com/article/sports-college-3d98cd455c2ed1c-636ce46d8dd322100>

49 <https://apnews.com/article/ncaa-transfer-rule-lawsuit-ed99948447479e34f6edfec4e94412af>

50 <https://www.nytimes.com/2024/02/05/business/dartmouth-basketball-nlrb-union.html>

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37 Complaint at 11 – 13.

38 <https://apnews.com/article/tennessee-lawsuit-ncaa-recruiting-violations-nil-df83bc5b39c46476ea1682a96c5d5a2f>

39 Complaint at 2.

40 <https://apnews.com/article/ncaa-tennessee-lawsuit-a5b9872d6fb4f7717bcfd12009d434ce>

41 Doc 29 on Docket, page 12.

42 <https://apnews.com/article/ncaa-tennessee-lawsuit-dca14f14dae-3352842d669b7568df157>

The University of Tennessee is hoping that this lawsuit will be different. After *Alston*, the tide of antitrust scrutiny has placed the NCAA in an increasingly precarious position. The league is looking for solutions. Last October, NCAA President Charlie Baker testified before Congress and urged the legislative body to carve out a statutory antitrust exemption for the NCAA that would preclude judicial review of its regulations.<sup>51</sup> Without legislative action, the lawsuit before Judge Corker is only one of many that could result in a significant adverse ruling for the NCAA.

## Conclusion

The NCAA's investigation into the University of Tennessee might be understood as merely another instance in a long history of a powerful league policing the recruiting practices of its member schools. Set against the backdrop of rising judicial hostility to the league's practices, however, the picture changes. This investigation may signal a tipping point in collegiate athletics. The challenge of carving out permissible behavior for students and schools in the NIL space has become too strained, too muddled, and too unfaithful to the league's purported virtues of amateurism. This investigation may conclude with sanctions against the University of Tennessee but, more likely, it will conclude with the collapse of the NCAA's remaining restrictions on prospective students' ability to license their likeness as they see fit.

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## Stormy Courts – Addressing a Growing Problem in College Basketball

**By Prof. Gil Fried, The Crowd Management Doctor, University of West Florida**

Court storming is a rite of passage. So was paddling, wedgies, and other antics that we have decided as a society need to end. Maybe it is time to stop court/field storming. The following represent some insight from Professor Gil Fried of the University of West Florida (Professor and Interim Assistant Dean of the College of Business) who is often referred to as the Crowd Management Doctor. Prof. Fried has written

extensively on the topic and has been educating security personnel for many years. He also has been an expert witness in some of the largest United States crowd management cases in the past 30 years, including crowds storming fields at college football games and a high school basketball game often mentioned in many articles (the Kay case from 2024 in Arizona). Kay was injured during a court storming by fans after a high school basketball game and suffered a torn carotid artery (and a stroke) that left him paralyzed on his right side. He was going to be a volleyball player at Stanford University before the injury changed his life. ([https://www.espn.com/mens-college-basketball/story/\\_/id/9019013/joe-kay-sobering-rushing-court-story](https://www.espn.com/mens-college-basketball/story/_/id/9019013/joe-kay-sobering-rushing-court-story))

The following represent some ideas to consider related to court storming. There have been numerous ideas presented, but some of the easiest solutions really have not been promoted for fear of alienating fans. The positive and negative to various solutions will be considered along with the historical backdrop of what is now front and center for many sport fans.

## Storming Incident

Early 2024 was a tough month for basketball fans and their celebration around basketball games. On February 24th, Duke's star player Kyle Filipowski was injured when fans collided with him when they stormed the court after a victory by Wake Forest against the Blue Devils. The students came so fast onto the court that Filipowski had no time to protect himself. (<https://www.cbssports.com/college-basketball/news/kyle-filipowski-injury-breaking-down-the-film-on-duke-stars-run-in-with-court-storming-wake-forest-fans/>)

That incident came shortly after Iowa star basketball player Caitlin Clark avoided serious injury when a fan rushed onto the court after Ohio State beat the Hawkeyes. The fan can be seen on video running onto the court with her phone in the air taking a picture or video. The fan was oblivious to arguably the best college basketball player in the country and easily could have seriously injured her. While Caitlin was knocked down, she was able to get off the court and was not seriously injured. (<https://apnews.com/article/caitlin-clark-fans-storming-court-7f226a252df600432734db-409d3b5b3e>)

<sup>51</sup> <https://www.sportico.com/law/analysis/2023/ncaa-congress-baker-senate-judiciary-hearing-1234742345/>

In December, Purdue men's coach Matt Painter and his top-ranked Boilermakers lost at Northwestern. A month later, his No. 1-ranked team lost at Nebraska. A month after that, Purdue lost at Ohio State. Home-team fans stormed the court each time. In his postgame comments in Lincoln, Painter called for improved preparatory safety measures. In anticipation of a possible court storming at the Northwestern game some of the Purdue players and staff were seen exiting the court while time was still on the clock and Northwestern was shooting free throws. In fact, students started rushing the court with 0.3 seconds left on the clock and had to be ushered back for the free throws to take place. (<https://ftw.usatoday.com/2023/12/northwestern-fans-nearly-stormed-the-court-too-early-in-upset-of-no-1-purdue>)

Since the start of 2024, there have been three court storms after Big Ten basketball games at Nebraska: January 9- when the Cornhuskers routed top-ranked Purdue; February 1, when the Cornhuskers came back from 19 points down to beat No. 6 Wisconsin in overtime; and February 11, when the Nebraska women's team overcame a 14-point deficit to defeat Clark and No. 2 Iowa.

### **What are the possible solutions, and do they work?**

The following are various solutions that have been undertaken or suggested to deal with court/field storming.

#### **Fines**

SEC imposes a fine of \$100,000 for the first storming of a basketball or football game. The next occurrence results in a \$250,000 fine and the third instance results in a \$500,000 fine. The fines have been around for years and have no real impact. In fact, many schools and alumni raise the funds through online sites such as Go Fund Me to get fans to contribute to pay a fine. Other conferences or leagues also have fines, but some of them are token fines with no real bite. The following represent some fines from 2023.

- \$100,000: LSU basketball (beat Kentucky on Feb. 21)
- \$100,000: South Carolina basketball (beat Kentucky on Jan. 23)
- \$5,000: Santa Clara basketball (beat Gonzaga on Jan. 11)

- \$25,000: UCF basketball (beat Kansas on Jan. 10)
- \$100,000: Ole Miss football (beat LSU on Sept. 30, 2023)
- \$100,000: Missouri football (beat Kansas State on Sept. 16, 2023)

While fines might appear to generate some publicity they really do not change conduct. The best example entails fines for speeding. Many drivers are speeding and only slow down when they see an officer. They know the cost, but they are thinking about the odds and feel they are likely to get away with it. Others might feel storming is worth it to generate enthusiasm and excitement for a program. In fact, paying a fine might well be worth the recruiting cache that could be generated when prospects see the enthusiasm on campus.

### **Have a plan**

Many pundits say that venues need a plan. As someone who has been involved in this space for years. They all have plans. Some plans are in a three-inch-thick binder for each game which highlights the potential detail. I am sure that plans also contain elements associated with a possible crowd rush or court/field storming. Other emergency action plans focus on active shooters, bomb threats, fires, medical emergencies, weather related emergencies, and other concerns. The problem is that it is impossible to prevent all incidents just like it is impossible to eliminate all crime. Steps can be taken to minimize potential issues and that is why many plans specifically call for allowing fans to storm a field or court as the alternative could possibly lead to more injuries. In one case involving a major Pac-10 University who beat an undefeated nationally ranked football team, the plan specifically provided for opening gates to allow fans to rush the field rather than having them possibly asphyxiated by being crushed by fans interested in pushing forward. Even with a plan that worked well, one student fell over a wall and broke their arm. The court examined the plan and held that the university executed the plan, but this injury still arose. It is impossible to hold a major event with possibly 100,000 people and not have any possible injuries. The plan is designed to address the most significant and likely injuries. A venue can only do what is reasonable under the circumstances and follow industry best practices or government safety mandates.

## More Security

Some pundits claim that if more security is present there would not be any storming incidents. That is pure speculation and contradicted by so many years of examples. Security, whether ushers, security, non-uniformed officers, or uniformed police can have a possible impact on some individuals and what they might do, but they cannot have a measurable impact on a mob of thousands intent on storming. Imagine if an officer tries to arrest a person in the middle of this mayhem. The officer and the suspect both risks being injured, especially if they are on steps, stairs, or on bleachers. The downward momentum of thousands of people descending down stairs/bleachers cannot be stopped by several officers. The industry standard is roughly one trained crowd manager for every 250 people in attendance. Even if there was one trained crowd manager for every 50 fans, that would not stop a crowd intent on storming a court.

## Barriers

One suggestion raised by some is to have some type of barrier between the court and the fans. South Carolina women's basketball team has a yellow rope around the court. This could be problematic for high end donors who have donated lots of money for courtside seats. There are many fans at NBA games who have courtside seats and the culture in professional sports is to not go onto the court, even with the most exciting games. Thus, it is not barriers, but fan behavior that is the problem.

Another major concern is the type of barrier that could possibly be utilized. If it is just a rope or stanchion, then it would not really do anything and could possibly be a tripping hazard. If the barrier was tubular steel or barricades, they represent an enhanced risk of people being pinned against them from people behind pushing forward. This is sometimes seen at concerts or other events where someone is injured or crushed. This was seen at the Camp Randall stampede in 1993 after the Badgers win against Michigan. The metal barriers were twisted like they were rubber by human bodies...when in fact they could withstand more than 1,000 pounds pressure per square foot. That shows how much force was exerted by the crowd pushing forward and twisting and mangling bodies down by the barrier that circled the field

at the time. (<https://www.workingwithcrowds.com/the-camp-randall-crush-1993/>)

## Announcement by Stars/Coaches/Athletic Directors

One strategy that some venues use to some success entails announcement made over the public address (PA) system or the scoreboard video by coaches, player, and athletic directors imploring fans to not violate rules or descend on the court/field. Sometimes these strategies work. There has never been a study on their effectiveness. However, it is assumed that a star player or coach would have a greater impact on a crowd than a regular announcer. These videos have successfully been used to educate fans on code of conduct behaviors or emergency exits at venues. Thus, they cannot hurt.

## Announcements Over Loudspeakers

Announcements made by the PA have limited effect. Sometimes inappropriate comments by a PA announcer can contribute to an issue. In one incident involving a field storming after a Ball State football game years ago, someone from the communication booth posted on the scoreboard that the goal posts looked lonely. The resulting field storming resulted in fans trying to take down the goal posts and during the ensuing mayhem the goal posts hit someone in the head and rendered him paraplegic. The fan had climbed over a three-foot barrier (another example that barriers often don't work) but the folks in the communication booth thought it would be fun to encourage inappropriate student behavior. The better option is to convey to students the need to be safe and to not undertake dangerous activities.

## Alcohol Sales

One concern raised by many is whether students and others are possible impaired by alcohol. Some have advocated for discontinuing alcohol sales after a given time. Alcohol sales are often stopped after the half at football games and around the 12:00 media timeout in the 2nd half for men's basketball and end of the 3rd quarter for women's basketball. While this might seem to be an easy solution, it is not. Alcohol sales are relatively new for college sports and crowds storming courts/fields happened for years before alcohol sales were approved at the college level. Many students are also cost conscious, and they sneak in alcohol or

partake in drinking before heading to a venue. Furthermore, there are similar alcohol sales issues with professional sports and there are rarely any storming incidents in professional sports. That does not mean there are no streakers or individuals who try to enter the field/court in professional sports (remember Morgana the Kissing Bandit- <https://www.youtube.com/watch?v=CHulCk7VOFc>) but they are the exception rather than the rule.

### Alternative Celebrations

Some have suggested holding a separate celebration or delaying the rush onto the field/court until officials and opponents have left. While these might seem like reasonable approaches, they would not work when students want to celebrate the moment a victory is achieved and not wait around ten minutes for the field/court to empty out. Similarly, many students think it is a tradition and want to be involved in the moment. That is especially accurate in the new social media age where they are looking for a viral moment immediately rather than waiting for some future time/date when the news might not be as newsworthy.

### Other Options

Some of the other options that have been discussed include:

- Playing without fans
- Playing on neutral courts
- Playing at odd hours so fans might not be as excited (such as an early morning game)
- Having dedicated student sections behind a basket or some other location to minimize the distance needed to travel and avoid harm to those not interested in possibly storming the court/field.

Each option has possible concerns or can be considered a last resort option.

### Why is this an issue?

Field and court storming can result in injuries. Numerous videos show people falling, tripping, colliding with each other, and epic celebrations going wrong (remember Edwin Diaz's celebration injury in 2023 during the World Baseball Classic- <https://www.cnn.com/2023/03/16/sport/edwin-diaz-world-baseball-classic-injury-spt-intl/index.html>). There is a very interesting journal article examining 62 athletes injured while celebrating in sports from

1993-2015 including one death. (Momaya A, Read C, Estes R. When celebrations go wrong: a case series of injuries after celebrating in sports. *J Sports Med Phys Fitness*. 2017 Mar;57(3):267-271. doi: 10.23736/S0022-4707.16.06042-4. Epub 2015 Nov 12. PMID: 26564273. <https://www.minervamedica.it/en/journals/sports-med-physical-fitness/article.php?cod=R40Y2017N03A0267>). If athletes can be injured while celebrating, the average fan can likewise face serious injuries, especially when being jostled, bumped, and trampled by others. While most injuries might be minor, they are injuries none-the-less. There is no way to eliminate all these injuries, and some can escalate into serious injuries, even when unintentional. The issue with court/field storming entails the risk of injury to fans and players alike. The risk of injury can also impact those who are not interested in going onto the field or court. Many fans have been caught-up in the movement of others and were injured on no fault of their own.

One of the interesting areas of possible concern entails litigation. There can be claims by those injured in a rush. These claims can and normally include the athletic department, university, athletic personnel, security companies, the venue, and other parties. Besides possible suits from those injured, there can also be claims by athletes, coaches, and officials. They can sue someone who injured them as well. In fact, there are laws in many states that says attacking an official can result in an enhanced criminal penalty. Even though those laws apply to battery, running into an official is actually a battery. Thus, there is a possible criminal law element besides possible civil liability.

### So, what are solutions that can really work?

The following represent some potential options to address the issue of court/field storming.

### Game Forfeiture

Some have advocated for a home team to forfeit the game they had just won if there is a storming incident. That might encourage some to avoid such a harsh penalty for a program. Such a plan would appear to have much more clout than the current financial penalties. Imagine if a team wins their conference tournament and would go to the big dance, but they get disqualified from the tournament. That would be a huge incentive for fans to police themselves and not storm a court.

## Loss of a Home Game

Another option is to have the next home game for a school cancelled. This could lose the school a lot of money in ticket sales and concession revenue. It can also serve as a warning that future actions could result in even more game cancellations for the home team. This might result in some contractual issues, but it would put pressure on administrators to change fan behavior.

## Change Culture

All the various solutions suggested fail to address the primary issue which is fans themselves and how they behave. Years ago, there were no fan codes of conduct. People were expected to behave in a certain manner. Civility has been lost, often more so on college campuses. This can be seen in the anti-Israel rhetoric on college campuses where any dissenting opinions are shot down. This lack of civility needs to change and that is where University officials can educate their students as to what is appropriate behavior. It might require a carrot and stick approach, but all the risk management efforts discussed are only Band-Aid solutions when the underlying condition is not addressed.

## Utilize the Legal System

Those who want to storm a court/field should be informed that such efforts are a violation of trespass laws and individuals would be fully prosecuted to the full extent of the law. Professional sport venues issue trespass bars for those who try to enter the field of play or otherwise violate venue rules. Those who storm a court/field could be prosecuted and barred from attending future events at the venue. Some might wonder how this could be accomplished when thousands of people might storm a court/field? The answer is very easy and that is facial recognition software. Every university already has a copy of a student's face from issuing ID cards for students. These photos can easily be uploaded to a facial recognition software system and students can be told in advance that their photos will be utilized for security and safety purposes. Video images can quickly be scanned by AI enabled software to identify students and then they can be processed through the system.

The second element of the legal system is to hold people liable for their actions. If they help destroy

property or injure people, they should be held accountable through prosecution for criminal offenses (vandalism or battery as examples) and face possible civil penalties for harm they might have caused. If people know they will be hit in the pocketbook (as well as possible legal bills and fines), they might quickly change their behavior.

## Develop New Policies/Procedures

Possibly the most viable option for addressing storming is to develop new policies and procedures that have teeth and are enforced. The most effective risk management tools are associated with the layering approach. This entails multiple levels of protection efforts rather than one simple solution. For example, a robust program could include the following:

- New policies such as student code of conduct violation for one to storm a field/court and that someone can be punished such as fines up to expulsion
- Communicate the policies to all students in the student code of conduct, university web page, ticket buying plans, student government, student clubs, Greek life, etc...
- Post the policies around the venue and on the venue's web page
- Hang posters around the venue similar to fan code of conduct posters
- Have warning on the back of tickets
- Shoot public service announcements with star players, campus leaders, and coaches
- Have warning show on the video screen
- Have warning aired on the PA system
- Have officials make statements as to the possible penalty for such behavior before a close game ends
- Broadcast footage of the storming around campus and indicate what penalties were imposed for those who engaged in the conduct
- Have public hearing for those caught violating the rule
- Promote what punishments were meted out to discourage future potential issues.

There is no perfect solution, but efforts need to be taken to minimize the risks associated with such behavior before someone unfortunately dies. The same type of concern was seen in Major League Baseball (MLB) with foul ball netting. It took several serious injuries publicized on social media and the death of a

Dodgers fan for MLB to take serious efforts to better protect fans with more netting. We are at the point with field/court storming. Now is the time for change rather than waiting for more serious injuries.

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## NFL's Television Model Goes To Trial

By Christopher R. Deubert, Senior Writer

In June, a trial will begin in a Los Angeles federal court that could dramatically alter the way clubs in the NFL and other leagues broadcast their games. The trial comes after a recent court decision denying the NFL's motion for summary judgment on antitrust claims brought by subscribers to the out-of-market Sunday Ticket package. While technically only Sunday Ticket is at issue, the Court repeatedly stressed the importance of reviewing how all the league's "interlocking" agreements (including specifically those with CBS and FOX) work together to determine their reasonableness under antitrust law. A loss for the NFL would shake (at least temporarily) the core of its highly lucrative business model.

### The Court's Decision

In the October 6, 2023 Sports Litigation Alert, I summarized the background issues, including their relation to the history of sports broadcasting, the 1961 Sports Broadcasting Act (SBA), and the Ninth Circuit's 2019 decision reinstating the plaintiffs' case. The crux of the case is that the plaintiffs allege that the manner in which out-of-market games are made available for viewing is a violation of antitrust law.

There are some important undisputed facts to know in understanding the legal issues. The NFL, on behalf of its member clubs, collectively negotiates and sells the broadcast rights to the clubs' Sunday afternoon games to CBS and FOX. This combined sale of broadcast rights is exempt from antitrust law by the Sports Broadcasting Act because the broadcasts are

free to viewers. CBS and FOX transfer ownership of those broadcasts back to the NFL. The NFL then bundles and sells those broadcasts as part of a subscription package called NFL Sunday Ticket. The CBS and FOX agreements require that such a subscription package only show out-of-market games, i.e., games not otherwise available on CBS or FOX. The CBS and FOX agreements also prohibit the "a la carte" or "pay per view" sale of games. NFL Sunday Ticket is the only way out-of-market fans can watch their favorite teams. The NFL Sunday Ticket package had been available through DirecTV for many years, until moving to YouTube this season. Sunday Ticket costs \$399 per year.

The NFL's motion for summary judgment raised several issues for adjudication.

First, the NFL argued that there was insufficient evidence of DirecTV's involvement in any alleged conspiracy to reduce the output of game broadcasts. This is an important issue because claims under Section 1 of the Sherman Act require multiple parties to have engaged in a common scheme for an unlawful purpose. However, the NFL-DirecTV agreement provided DirecTV with the exclusive rights to broadcast out-of-market games and otherwise restricted how many games could be broadcast nationally and in any one location at one time. Consequently, the court determined that there was a "triable issue as to whether DirecTV had a conscious commitment to participate in the conspiracy." The same facts led the court to conclude that there was also a triable issue of fact on the plaintiff's Section 2 monopolization claim, specifically whether the "agreements between the NFL, the member clubs, and DirecTV were designed to maintain market power by reducing the number of telecasts available of the games."

Second, the NFL argued that the Sports Broadcasting Act immunizes the conduct at issue. In the NFL's view, the plaintiffs' claims cannot proceed if they are "predicated on eliminating or altering the NFL-Network Agreements that provide CBS and FOX with exclusivity for the Sunday afternoon NFL games that they produce and broadcast." The court was not persuaded, starting from the perspective that antitrust exemptions are to be narrowly applied, particularly when they are the result of special-interest legislation. It is well-established that the Sports Broadcasting Act "does not

exempt league contracts with cable or satellite television services, for which subscribers are charged a fee [such as DirecTV], from antitrust liability.” Consequently, the NFL’s arguments improperly sought to “expand the SBA’s exemption to antitrust laws outside of the conduct permitted by the SBA.”

Third, the NFL argued that there is no agreement among its member clubs to pool their broadcast rights except for in the agreements with CBS and FOX, which is conducted protected by the SBA. Without an agreement by the clubs, there cannot be antitrust liability. This argument is mildly shocking, to say the least. Students and practitioners of sports law and business are well acquainted with the idea that one of the major successes of the NFL over the years has been the collective sale of clubs’ broadcast rights. In support of its argument, the NFL argued that the NFL Constitution permits clubs to broadcast their games, subject to certain restrictions, including Commissioner approval. However, the court noted that the restrictions are so onerous that no club realistically has the ability to sell broadcast rights outside the pooled arrangement. Moreover, multiple NFL executives testified during depositions that the clubs had ceded control over their broadcast rights to the league for their collective sale. The NFL’s argument simply does not match reality.

Fourth, the NFL resuscitates the somewhat infamous single-entity argument. Specifically, the NFL asserted that it and its member clubs are a single-entity for purposes of licensing telecasts and thus cannot violate Section 1 of the Sherman Act. In making this argument, the NFL tried to differentiate the current case from *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), in which the Supreme Court unanimously held that the NFL was not a single-entity for purposes of licensing intellectual property to apparel companies. The NFL argued that clubs “cannot compete to produce telecasts of an NFL game because such productions cannot exist without the cooperation of the NFL and its member clubs.” Televising games necessarily requires “visual display of the League’s and club’s trademarks.” Consequently, the NFL argued that plaintiffs failed to offer a plausible account of how a club, acting alone, could produce an NFL telecast.

The court was not persuaded. At plaintiff’s prodding, the court recognized that in the 1950s, before the passage of the SBA, NFL teams did in fact sell their

television rights individually. Further, the court acknowledged that both the Notre Dame and BYU football teams – independent of any conference affiliations – have sold their telecast rights individually. Consequently, the court concluded, “the evidence shows it is possible for the member clubs to act individually to produce telecasts.”

Interestingly, the court did not address a statement from Justice Kavanaugh concerning the prior denial of the NFL’s petition for certiorari of the Ninth Circuit’s decision in this case. Recognizing the need for the NFL to act as a “joint venture,” Justice Kavanaugh opined that “antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights.”<sup>52</sup> Plaintiffs had responded by stating that they “are not claiming that the teams must, as a matter of law, compete with each other and the NFL so long as they make their own independent business decisions and do not agree with each other not to compete.” The court did not specifically address these arguments.

### The End Game

The outcome of the litigation will be monumental for the major North American sports leagues, all of which have some package that out-of-town fans must buy in order to watch certain teams. The NFL and its member clubs will need to demonstrate that their current method of making out-of-market games available to viewers – that is, through a wholesale subscription package – has procompetitive benefits that outweigh its anti-competitive effects. In other words, the NFL will need to show that its Sunday Ticket package maximizes the number of games available to the viewing public and at reasonable rates. The plaintiffs on the other hand may well gather evidence that shows that there is a substantial market for fans to purchase out-of-market games for just one team and a rate far lower than the \$399 for Sunday Ticket. The NFL has insinuated that striking down the Sunday Ticket package will have significantly harmful effects on the NFL’s television model and revenues. However, sports leagues have a history of making hyperbolic claims about the possible effect of antitrust rulings on their business operations which later proved to be incorrect.<sup>53</sup> The leagues have proven

<sup>52</sup> *NFL v. Ninth Inning, Inc.*, 141 S.Ct. 56, 57 (2020).

<sup>53</sup> See Christopher R. Deubert, “Baseball Would Certainly Fail”: A

adept at adapting. Moreover, given Justice Kavanaugh's prior thoughts on the case, we might even see the Supreme Court take up the case. We will all be watching, regardless of our market.

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## **NIL and Career Development of International Student-Athletes: USCIS Regulations, VISA Classifications, and Employment-Based Immigration**

**By Sungho Cho, J.D.; Ph.D., Bowling Green State University\* and Myung-Ah Lee, Ph.D., Indiana State University\***

In recent years, the United States has witnessed a significant surge in international collegiate student-athletes (ICAs), with a growth rate exceeding 1000% over the past decade (Baghurst et al., 2018). This increase has resulted in ICAs comprising nearly 13% of the total NCAA Division I (D-I) student-athlete population, a trend that has steadily evolved over several decades (Newell & Sethi, 2023). The remarkable growth of this demographic poses a significant challenge to faculty, administrators, and coaching staff in advising and supporting ICAs' educational experience and career planning. While the presence of ICAs within higher education institutions plays a pivotal role in facilitating cross-cultural learning and fostering inclusiveness, equity, and fairness (Newell & Sethi, 2023), many ICAs deal with unique challenges, including cultural adjustment, language barriers, financial needs, academic achievements (Baghurst et al., 2018), and post-baccalaureate career development.

In July 2021, a historic shift occurred in intercollegiate athletics when the National Collegiate Athletic Association (NCAA) enacted new legislation on student athletes' name, image, and likeness (NIL) rights, primarily because of recent antitrust lawsuits against the governing body, i.e., *O'Bannon v. NCAA* (2015)

and *NCAA v. Alston* (2020). Under the current regulatory scheme, the NCAA no longer restricts the commercial transactions associated with student-athletes' NIL rights except for a few exceptions, which enable student-athletes to engage in the personal branding business. Amidst this transformative shift, however, a critical point has been overlooked. While the NCAA's restrictions have been lifted, the federal law governing F1 VISA (i.e., student visa) prohibits ICAs from working off-campus in most cases. This presents complicated problems and policy questions which warrant careful examination.

This study aims to explore the potential solutions to this controversial issue by scrutinizing immigration statutes and relevant agency regulations. After the project explores non-immigrant VISA regulations for ICAs, possible NIL options will be identified. Given the lack of realistic avenues, a regulatory reform at the federal level is called for.

### Immigration and Naturalization Act, Code of Federal Regulations, and Public Policy

The immigration and naturalization process in the U.S. is regulated pursuant to the Immigration and Naturalization Act of 1952 and subsequent amendments, 8 U.S.C. § 1101 et seq. (2011). The statutory scheme has been correspondingly codified in the Code of Federal Regulations, 8 C.F.R. § 1 et seq. (2011), which provides government agencies with enforcement authority. Under 8 U.S.C. § 1103 (2011), the Department of Homeland Security primarily oversees the regulatory system through the U.S. Immigration and Customs Enforcement (ICE) and the United States Citizenship and Immigration Services (USCIS). While the ICE is mainly charged with the policing power against illegal immigration and cross-border crime, the USCIS issues employment authorization, administers lawful immigration processes, and adjudicates petitions for non-immigrant VISAs under 8 C.F.R. §§ 274a.12-274a.14 and 8 C.F.R. § 214.1 (2011). Thus, most matters related to ICAs are subject to the USCIS regulations and its jurisdiction.

While the impact of immigrants on the domestic labor market has been controversial in the academia (Edo, 2019), labor economics research generally indicates that the skill composition of immigrant labor force variably influences different groups of domestic workers in competition (Albert, 2021; Borjas, 2003).

History of Sports Leagues' Hyperbolic Predictions in the 20th Century's Biggest Cases and the Largely Successful Evolution of Their Arguments, 14 Harvard J. Sports & Ent. L. J. 211 (2023).

The U.S. immigration policy mainly intends to protect the low-skilled domestic labor force from the influx of foreign workers who would be willing to accept lower wages while inviting highly skilled immigrants and innovative entrepreneurship. The USCIS regulations echo such a policy background. Non-immigrant VISA holders such as ICAs with F-1 VISA have very limited access to the U.S. labor market.

#### Non-Immigrant VISAs for International Student Athletes

Most ICAs hold F-1 VISA, which would not allow off-campus employment with few exceptions. The practical training under 8 C.F.R. § 214.2(f)(10) is one of the limited ways that an international student may work off campus: “[a] student may be authorized 12 months of practical training ... An eligible student may request employment authorization for practical training in a position that is directly related to his or her major area of study.” Practical training might be either Curricular Practical Training (CPT) or Optional Practical Training (OPT). The CPT is described: “alternative work/study, internship, cooperative education ... that is offered by sponsoring employers through cooperative agreements with the school.” 8 CFR § 214.2(f)(10)(i) (2011). The CPT must be an integral component to an academic course with credit hours. On the other hand, the OPT allows a 12-month internship during an academic year, vacation, or after the degree completion as far as the field experience is directly related to the petitioner’s major. 8 CFR § 214.2(f)(10)(ii)(A)(3) (2011). If an ICA’s major is qualified for the science, technology, engineering, and mathematics, (STEM) category, an OPT period can be extended up to 24 months. 8 CFR § 214.2(f)(10)(ii)(C) (2011).

Some ICAs might be qualified for P-1A or O-1A categories if they participate in elite-level high-profile athletic competitions. P-1A can be issued for an individual or team athlete “who is coming temporarily to the United State: (1) [t]o perform at specific athletic competition as an athlete ... at an internationally recognized level or performance.” 8 CFR § 214.2(p)(1)(ii)(A)(1) (2011). Some ICAs who compete in the D-I level intercollegiate athletics may be qualified for this category (USCIS, 2021, March 26). If an ICA is an internationally recognized athlete, O-1A VISA is attainable. The regulation provides that: “(A) [a]n O-1 classification applies to: (1) [a]n individual alien who has extraordinary ability in

... athletics which has been demonstrated by sustained national or international acclaim.” 8 CFR § 214.2(o)(1)(ii)(A) (2011). The “extraordinary ability or achievement” required for the O-1 VISA category “means a level of expertise indicating that the person is one of the small percentages who have arisen to the very top of the field.” 8 CFR § 214.2(o)(3)(ii) (2011). If qualified, O-1A is the best option for ICAs. The O-1 VISA category is a dual-intent VISA. Thus, an O-1A petitioner does not need to demonstrate that he or she will not immigrate to the U.S. by seeking permanent residency. Additionally, employment-based immigration through EB-1A might be available for an ICA who is qualified for this VISA category. 8 CFR § 204.5(h)(1) (2011). Both P-1A and O-1A categories would allow ICAs to engage in off-campus NIL deals.

#### Discussion: NIL Options and Career Development for International Student Athletes

Due to the new NIL landscape in intercollegiate athletics, academic and career advising for ICAs have become more complicated and multifaceted. In general, the F-1 VISA regulation does not allow off-campus active income generation (Johnson, 2023). But international students are not prohibited from receiving passive income such as royalty, endorsement fee, stock dividends, real estate rental income, etc. (Johnson, 2023; Romano & Kamyuka, 2022). Some NIL practices might be conceivable if they are carefully designed to avoid any active income generation. Such practice would call for extra caution, however. Although the IRS Code and immigration law are textually connected for the passive/active income distinction, they are two separate statutory schemes with inherently different legislative intent.

Secondly, NIL deals might be arranged between ICAs and off-campus organizations through CPT or OPT internships. Nevertheless, both CPT and OPT must be directly related to ICAs’ academic majors. It might not be logistically easy to find NIL opportunities perfectly matching with ICAs’ individual majors. In addition, the total length of CPT/OPT terms may not exceed 12 months for the entire baccalaureate period, which would negatively affect the value of potential NIL deals with ICAs. The 12-month limit is also a critical factor in ICAs’ career planning. For ICAs, OPT is the only realistic career bridge between their completion of a college degree and full-time employment in the U.S. Thus, OPT might need to be preserved for their post-graduation job

opportunities as they will likely have to go through the H-1B employment VISA process with the OPT status. Given the critical value of OPT, CPT would be a better option for ICAs for NIL activities during regular semesters. In this regard, an academic major qualified for the STEM category might have extra merits for ICAs because it allows extended CPT period (24 months in total).

While P-1A and O-1A categories are not widely available to a majority of ICAs, they allow ICAs to maintain employment in the U.S. P-1A provides a longer duration of stay (5 years) than O-1A (3 years) while requiring less stringent international fame than the latter. While both P-1A and O-1A allow ICAs to engage in NIL deals, they are unlikely realistic options for most ICAs due to their demanding standards, i.e., “internationally recognized (P-1A)” and “extraordinary ability in athletics (O-1A),” respectively. Since O-1A requires petitioners’ unique athletic talent, athletes participating in individual sports would have a better chance than those in team sports (Johnson, 2023). While O-1A provides the option to pursue employment-based immigration via EB-1 process, permanent residency (i.e., green card) may not be automatically granted. Since the EB-1 process requires the Department of Labor’s certification that there is a shortage of domestic labor force in the petitioned area of employment, the USCIS has occasionally rejected EB-1 applicants with extraordinary athletic achievement. *Man Soo Lee v. Zigler* (2002) (stellar playing career in baseball is not necessarily qualified for EB-1 process for coaching).

The current NIL system in collegiate sports almost categorically excludes ICAs except those few qualified for P-1A or O-1A. While ICAs with F-1 VISA may have some limited access to the NIL market through CPT and OPT, they still need to take significant risks of losing their VISA eligibility. According to Haneman and Weber (2022), the relevant regulatory scheme unambiguously articulates that any unauthorized labor performed by immigrants is considered employment, which is in violation of 8 U.S.C. § 1324a(a)(4). If a U.S. Consular somewhere perceives that an ICA’s CPT/OPT is not a type allowed under the immigration regulation, the revocation or nonrenewal of the petitioner’s VISA will be final without any further legal recourse under the doctrine of non-reviewability (Johnson, 2023). The only safe option for ICAs with F-1 status might be incorporating a

business entity offshore, creating passive income (Haneman & Weber, 2022).

Despite the apparent inequality, ICAs do not have viable legal claims to challenge the discriminatory system. Due process or 14th Amendment equal protection claims against the NCAA would be unavailable because the NCAA is not a state actor (*NCAA v. Tarkanian*, 1988). Since NIL deals are managed by external agencies under the NCAA policy, equal protection claims against public institutions must establish the symbiotic nexus between the third-party contractors and schools as a threshold. Title VII discrimination claims would not be conceivable because student-athletes are not employees as of this writing. The federal legislature is the only entity that has the authority and power to clean up this inequitable and chaotic NIL landscape.

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## BSE Global Chief Legal Officer Jeff Gewirtz Discusses His Successful Career as a Sports Lawyer

By Patrick George

**J**eff Gewirtz, the Executive Vice President, Business Affairs and Chief Legal Officer of BSE Global (BSE), has had a remarkable, decades-long career as a sports lawyer.

To learn more about his journey, we visited him in New York City, where Gewirtz advises BSE's ownership and his executive management colleagues on key business and legal matters for BSE's holdings, including the Brooklyn Nets, Barclays Center, the New York Liberty, BSE Enterprises, the NBA G League's Long Island Nets, the NBA 2K League's NetsGC, and, through 2019, Nassau Veterans Memorial Coliseum and Webster Hall.

The interview follows below:

**Question:** Can you share the key milestones in your career that led you to your current position as Executive Vice President of Business Affairs and Chief Legal Officer of BSE Global, and how did your previous experiences shape your approach to sports law?

**Answer:** My first position following law school was as a corporate associate at the New York City law firm of Dunnington, Bartholow & Miller. It was, at the time, one of a handful of law firms with a meaningful sports industry practice, including clients such as the United States Tennis Association, U.S. Olympic Committee, the WTA TOUR, and the International Tennis Hall of Fame. I primarily worked for a firm partner named George Gowen III, who was the relationship partner for the firm's sports industry clients and also served as the USTA's General Counsel – the USTA had no in-house legal department at that time. As a result, I assisted Mr. Gowen on a wide range of legal matters for the US OPEN Tennis Championships, which was (and continues to be) an event controlled by the USTA. So, early in my career, I had exposure to the lawyering required around the commercial and operational aspects of a major global sporting event.

The firm also had a major advertising industry practice, which allowed for an opportunity to gain legal experience around various media, IP, and production issues and matters.

After leaving the Dunnington firm, I have held a variety of positions across the sports business landscape, including as General Counsel of the LPGA TOUR, where I was, quite literally, the only employee to have never played a round of golf (still have not). As the sole member of the legal department, I am sure the Commissioner I served under, Ty Votaw, preferred that I be working in my office rather than playing golf rounds at our home course, LPGA INTERNATIONAL. From there I served a Director of Legal Affairs for IOC Television & Marketing Services, based in Lausanne, Switzerland. The core focus of this position was negotiating global sponsorship and technology alliances with Fortune 500 companies under the IOC's "TOP" Program. Following that, I joined The Coca-Cola Company, having met the Coca-Cola global sports marketing team through my negotiations with them during my representation of the IOC. Much of my time at Coca-Cola was focused on negotiating marketing, sponsorship and beverage availability alliances with leagues, teams, national and global sporting events, stadia, arenas, the NCAA, colleges and university athletics departments, and professional athletes. I next joined the U.S. Olympic Committee as General Counsel and Chief of Government Relations, following which I joined BSE Global – May will mark the start of my 17th year with the company.

**Q:** You have a very expansive title as executive vice president of business affairs and chief legal officer. How much of your time is spent on the legal side versus the business side?

**A:** It is not atypical for senior legal executives with professional sport properties to also have a business affairs role. The "business" side dovetails with the legal affairs work insofar as serving, for example, as an advisor on deal structuring in revenue-generating areas such as sponsorship and media, as well as having a co-lead role in negotiating a variety of transactions.

**Q:** What was the job like those first few years?

The first phase of my tenure with BSE was singularly focused on putting all of the pieces in place to allow for construction commencement and then opening of Barclays Center; we were based in New Jersey at that time, and our team was the New Jersey Nets. This "phase one" work included workstreams such as closing arena founding partner sponsorship deals,

along with our Barclays Center naming rights transaction, tackling a number of real estate matters (including with public parties such as the State of New York) along with resolution of various litigation matters, collective bargaining with unions representing a wide-range of arena work units, arena development financing, securing entertainment event alliances with major event promoters, and negotiating critical vendor alliances, such as for ticketing and food and beverage concessions.

Since our September 2012 opening of Barclays Center, BSE formed a number of interesting business alliances, such as our handling of business operations for the New York Islanders, which used Barclays Center as its home arena for a few seasons, acquiring the leasehold rights to Nassau Veterans Memorial Coliseum, and partnering with AEG to acquire the business of Webster Hall, a historic live music entertainment venue in Manhattan. While BSE is no longer involved with these properties, in addition to Barclays Center and the Brooklyn Nets, the current portfolio does include the WNBA's New York Liberty, the Long Island Nets of the NBA G League, and NetsGC of the NBA 2K League.

**Q:** Can you share a bit about your journey of becoming a lawyer, and how do you believe your experiences influenced or shaped your decision to pursue a career in sports law?

**A:** While attending Tufts University, I read books authored by iconic pro tennis agents Mark McCormack and Donald Dell. While both briefly practiced law, they morphed their legal training into representation of professional athletes, including top-flight professional tennis players. I was a junior and college tennis player and, having been influenced by their writings and noting they both held a JD, I decided to attend law school with the end goal of working as a player agent for pro tennis players. Frankly, as I progressed through law school and enjoying my studies, I decided to a shift away from the athlete-agent side of the business – which, generally, does not have (or require) a meaningful quotient of lawyering; instead, I explored the intersection of sport and the law on the “other side of the table.” This led me to the sports industry corporate practice at Dunnington, Bartholow & Miller; a decision I have never regretted.

**Q:** Do you have any recommendations for those who are/want to pursue a law degree for the purpose of working in the field of sports law?

**A:** First, recognize that “sports law” is not an actual field of practice. Rather, there are a number of legal specialties that have application to the professional and intercollegiate sport sectors, respectively. Some examples include antitrust, labor, M&A, private equity, corporate finance, general corporate, tax, intellectual property, and others. Second, focus on your grades; nothing is a better entry point to the law firms that have sports industry practices than a pristine law school transcript. Third, serve on a law journal and explore whether there is a ripe subject in sport for your note or comment. Last, if offered, take a class in drafting commercial agreements; this does not have to have a nexus to sport.

**Q:** What does your internal legal team at BSE Global look like?

**A:** We are leanly staffed. Russell Yavner is our deputy general counsel, who first worked for us in our legal internship program while he attended Harvard Law School. HLS Professor Peter Carfagna recommends legal interns to us for the school's annual “J-Term” three-week session, and we were fortunate to meet Russell through that avenue. After Russell spent some time at Schulte Roth, we brought him over as Associate Counsel; he has since risen to our Deputy GC post. Our other lawyer is Wendy Li, who we also met through our legal internship program. She interned for us while enrolled at Columbia Law and then joined us as Associate Counsel after a couple of years of great training in the M&A group at Davis Polk. They both handle a wide range of matters, as expected based on the size of department.

**Q:** Do you use any out-of-house counsel?

**A:** We use outside counsel for potential litigation and litigation matters, occasionally for employment matters, for complex IP questions, for advice around qualified employee benefit plans and tax questions, M&A, and anything else for which we do not have the requisite level of expertise or the bandwidth to handle.

**Q:** As a longtime member and now an Emeritus Director of the Sports Lawyers Association, would you like to go into detail about what the association does and

the resources it provides to professionals within your field?

**A:** It's the leading trade association for lawyers working in sport in the United States. We now have a number of international members as well. I've built many wonderful friendships and a strong network in 25+ years of involvement with the association.

**Q:** Lastly, what do you anticipate as kind of the leading legal issues within sports?

**A:** The continued evolution of legalized sports betting in the U.S., the changing landscape of how fans consume live sports outside the venue, and the rights of intercollegiate athletes to commercialize their NIL against the background of a fragmented regulatory landscape.

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## Journalist Sues UW-Madison & UW Foundation for NIL Consultant Contract

University claims Foundation has contract; Foundation claims it's not subject to records laws

Journalist Daniel Libit and the Wisconsin Transparency Project have filed a lawsuit in Dane County Circuit Court alleging that the University of Wisconsin-Madison and the UW Foundation are illegally denying Libit's request for copies of an athletic department consulting agreement. The lawsuit seeks to force the defendants to turn over the contract, as well as an award of reasonable attorney fees, costs, and damages.

In 2022, the University of Wisconsin-Madison signed a contract with Altius Sports Partners to provide "name, image, and likeness" services to the Badgers athletic department. That contract is a public record that should be made readily available, but the University has taken extraordinary steps to try and hide it from the public. They claim they possess no copies of the contract because the UW Foundation has it. The UW Foundation, in turn, claims that it is a private organization not subject to the state's Open Records Law.

"Madison can't pass the ball like this," explained Tom Kamenick, President and Founder of the Wisconsin Transparency Project. "The law specifically prohibits these kind of games where government agencies

try to hide records from the public by storing them with third parties."

State statutes require government agencies to "make available for inspection and copying . . . any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority." So even if the University has no copies of the Altius contract in its possession, it is obligated to obtain a copy from either Altius or the UW Foundation to release to the public.

Libit has previously sued the University of New Mexico, the University of Colorado, and the United States Military Academy over those schools' refusal to produce athletic department-related records. In each case, Libit either prevailed in court or received a favorable settlement.

"Public university foundations must not be used as instruments to obscure the public's business," said Libit, a UW alum who now writes for Sportico. "If UW-Madison is keen to play this game with an athletic department NIL consultant, imagine how much other public business is being concealed in this manner."

This latest lawsuit also alleges that the UW Foundation, although legally distinct from the university, is itself a "quasi-governmental corporation" also subject to the Open Records Law. The UW Foundation manages UW-Madison's \$4.5 billion endowment, is located on campus, appears on campus maps, and is permitted to use UW-Madison's logo and other trademarks. It describes itself as "the official fundraising and gift-receiving organization for the University of Wisconsin-Madison." Its sole purpose is providing funding for the government services the university provides.

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## Plaintiffs Settle Lawsuits with San Francisco Unified School District After Alleging Athletic Director Abused Them

Two sexual abuse lawsuits against the San Francisco Unified School District have been settled, according to the San Jose law firm that represented the plaintiffs. The SFUSD board of trustees approved the

settlement amount of \$4.5 million after the SFUSD insurance carriers and the plaintiffs agreed to the settlement amount.

The plaintiffs sued SFUSD in 2022 for failing to supervise then George Washington High School athletic director Lawrence Young-Yet Chan. Chan allegedly sexually abused two students and was allowed to quietly resign from his position.

According to one of the plaintiffs' attorney, "the majority of the sexual abuse took place on the George Washington campus during school hours – in Chan's locked office, in a locker room and a stairwell, and in the student government classroom. He was totally unsupervised."

The two survivors were named as Jane Doe 1 and Jane 2 in the lawsuits. Chan allegedly sexually abused Jane Doe 1 from 2012 to 2016; the abuse of Jane Doe allegedly occurred between 2012-2013.

According to Jane Doe 1's lawsuit, it is alleged that she told San Francisco police about Chan's sexual assaults in 2017 leading to his arrest. After he was released for a lack of evidence, the school district entered into a "secret agreement" with Chan that allowed him to quietly resign.

Despite the fact the two students were allegedly sexually abused more than a decade ago and that Chan was never convicted, the evidence was compelling enough for the District to agree to the settlement, according to the firm.

"Had this case gone to trial, we were confident that a jury would likely return a verdict greater than the settlement amount," the attorney said. "But in agreeing to the settlement, the two women were spared having to retell their stories and can now move forward and start to rebuild their lives."

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## University of Arizona Appoints Sports Lawyer Reed-Francois as Director of Athletics

**V**eteran sports lawyer Desiree Reed-Francois has been appointed the University of Arizona's new Director of Athletics. Reed-Francois was previously AD at the University of Missouri.

The terms of the five-year contract include an annual base salary of \$1 million in year one elevating to \$1.2 million in year five, with an additional \$250,000 annual contribution from the University of Arizona Foundation. Reed-Francois will have the opportunity for additional incentive compensation based on the department's athletic and academic success, as well as retention bonuses after four and five years of employment with the University.

Any retention bonus or buyout expenses for Reed-Francois will be fully covered by donor funds, according to the university. Donor funds were also secured to cover the full payout costs of the University's previous athletic director.

"Reed-Francois brings proven business expertise and financial acumen to the Director of Athletics position," according to a press release. "She is an accomplished fundraiser and relationship builder and has transformed two collegiate athletic departments into high-performing, cost-effective operations. Reed-Francois also has deep ties to the University of Arizona, where she earned her juris doctorate from the James E. Rogers College of Law in 1997."

Reed-Francois has served as the Director of Athletics at the University of Missouri since 2021, raising the athletics program's profile over the past several years to include a top 10 football program, postseason berths across multiple sports, and enhancements to student-athlete welfare and support. In addition to hiring six head coaches, she has overseen the department's first budget surplus in six years; record-breaking successes in fundraising, including securing the largest gift in Missouri Athletics history of \$62 million; five straight semesters of record student-athlete GPAs; attendance growth in football and basketball; the opening of the Stephens Indoor Football Practice Center; significant upgrades to the game-day experience for fans; the growth of the Missouri brand across the state and country; and implementation of innovative Name Image Likeness (NIL) initiatives.

Prior to her tenure in Columbia, Reed-Francois served as the Director of Athletics at the University of Nevada, Las Vegas (2017-2021), revitalizing the department. During her time with the Rebels, she completed or implemented more than \$70 million in facility upgrades; hired seven head coaches, including three who earned conference Coach of the Year honors early

in their tenures; oversaw the completion and opening of a \$35 million on-campus football training complex; and successfully negotiated a joint-use agreement with the NFL's Las Vegas Raiders with the opening of the new \$2 billion Allegiant Stadium.

Prior to ascending to the director's chair, Reed-Francois served several institutions in leadership roles, including as the Deputy Athletics Director at Virginia Tech, as a Senior Associate Athletics Director at the University of Cincinnati and as the Senior Associate Athletics Director at the University of Tennessee. Additionally, she has worked at Fresno State University, Santa Clara University, San Jose State University, the University of California Berkeley and the University of San Francisco. She also has experience at the professional levels, working with the then Oakland Raiders and the National Football League Management Council.

Reed-Francois currently is the Vice Chair of the Lead1 Association Board of Directors and serves on the organization's executive committee, as well as on the boards of Women Leaders in Sports, the National Association of Collegiate Directors of Athletics (NACDA) and the National Coalition of Minority Football Coaches. Reed-Francois recently served as Vice Chair of the NCAA Baseball Selection Committee and formerly was a member of the College Football Playoff Committee's operations committee. In addition, she is a member of the National Association of Collegiate Marketing Administrators (NACMA) and has been a presenter at NACDA, NACMA, Women Leaders in Sports, and Sports Business Journal's annual conventions.

Reed-Francois was a rower at UCLA, where she graduated with a degree in political science before earning her JD at Arizona. She is a member of the State Bar of California and has taught law classes at the University of Tennessee and at Santa Clara University.

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## **Fubo Sues The Walt Disney Company, FOX Corp., Warner Bros. Discovery and Affiliates for Antitrust Practices**

**F**uboTV Inc. (d/b/a/ Fubo), a leading sports-first live TV streaming platform, has filed an antitrust

lawsuit against The Walt Disney Company, FOX Corp., Warner Bros. Discovery, Inc. and their affiliates, alleging that the vertically-integrated media companies have engaged in a years-long campaign to block Fubo's streaming business resulting in significant harm to both Fubo and consumers. The complaint alleges that "the forthcoming launch of a sports-streaming joint venture steals Fubo's playbook and is the latest example of this campaign."

The Company claims that the Defendants have engaged in "a long-running pattern of stymying Fubo's sports-first streaming service by engaging in anti-competitive practices. Fubo was founded nine years ago to offer consumers a sports-first package of live TV streaming channels as a less expensive alternative to traditional cable bundles." However, as described in the complaint, "For decades, Defendants have leveraged their iron grip on sports content to extract billions of dollars in supra-competitive profits" by engaging in practices causing consumers to pay more for highly popular sports content and resulting in significant damages to both Fubo and its customers.

Fubo's complaint describes "the tactics" the Defendants have taken to prevent Fubo from "competing fairly" in the marketplace. Such practices as outlined in Fubo's legal papers include unfair "bundling" - forcing Fubo to carry dozens of expensive non-sports channels that Fubo's customers do not want as a condition of licensing the Defendants' sports channels.

Other examples of anti-competitive behavior cited in the complaint include the Defendants charging Fubo content licensing rates that are as much as 30%-50%+ higher than rates they charge other distributors. Defendants also impose non-market penetration requirements (the percentage of total subscribers to which a content package must be sold to or cannot exceed) on Fubo. "These actions individually and collectively increase the costs Fubo must pass onto customers." Fubo believes it has incurred billions of dollars in damages as a result of the Defendants' actions.

Additionally, Fubo claims the Defendants have restricted Fubo "from offering compelling streaming products that consumers would find desirable, despite similar products being offered by other traditional pay TV and streaming services, including the Defendants' own Hulu service."

Fubo further alleges that the Defendants' recently announced joint venture "is simply the latest coordinated step in the Defendants' campaign to eliminate competition in the sports-first streaming market and capture this market for themselves.

"The Defendants have locked arms to remove further competition, according to Fubo's complaint. Each Defendant is a media conglomerate that owns critical sports content and," according to the complaint, "has individually engaged in anti-competitive behavior against Fubo resulting in harm to consumers. Together, the Defendants control more than half of the U.S. sports rights market.<sup>1</sup> By combining to license their must-have sports content on a standalone basis to their own joint venture, other distributors, including Fubo, would be at an extreme competitive disadvantage to the detriment of millions of U.S. consumers, according to the complaint."

In its complaint, Fubo seeks, among other things, to enjoin the joint venture or, in the alternative, require the parties impose restrictions on the Defendants in order to proceed, such as economic parity of licensing terms and substantial damages from the Defendants.

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## Sports Lawyer Gregg Clifton of Lewis Brisbois Shares Insights on Sports Law Expert Podcast

**H**ackney Publications announced today the release of the latest episode of Sports Law Expert Podcast, which features Gregg Clifton of Lewis Brisbois, one of the sports industry's most accomplished lawyers.

The podcast segment can be heard [here](#).

Going forward, those interested in being notified when a segment of the podcast goes live can subscribe by visiting [here](#).

"Gregg is one of those rare sports lawyers, whose time is focused almost exclusively on sports matters," said Holt Hackney, the publisher of Hackney Publications. "Whether it's a matter in the professional sports world, collegiate athletics, or even a high-profile case involving a high school athlete, Gregg has a long history of effectively representing his clients."

Clifton is a partner in the Phoenix office of Lewis Brisbois, chair of the firm's Collegiate & Professional

Sports Law Practice, and a member of the Entertainment, Media & Sports Practice.

He has extensive experience in the collegiate and professional sports world. Clifton has advised numerous professional franchises on general labor and employment issues, including Title III ADA regulatory compliance and wage and hour issues. He serves as lead counsel for several Major League Baseball teams in their salary arbitration matters and has represented NCAA and NAIA collegiate clients, including multiple college conferences and coaches regarding NLRB student-athlete classification issues, name, image and likeness legal issues, overall rules compliance, investigatory matters and in disciplinary hearings. In addition, he has handled Title IX investigations and compliance issues for NCAA and NAIA member institutions. Clifton has also worked extensively in the area of agent regulation and enforcement in professional and college sports and regularly provides counsel on issues relating to NCAA and NAIA amateurism issues and athlete eligibility questions. He has also served as an expert witness in matters involving sports agents' work and responsibilities, as well as athlete compensation issues.

Prior to joining Lewis Brisbois, Clifton spent six years as chief operating officer for Gaylord Sports Management. He also served as president of the Athlete and Entertainment Division for famed sports attorney Bob Woolf's firm, Woolf Associates, in Boston.

Clifton continues to counsel clients in the areas of collective bargaining negotiations, representation cases, arbitrations, and National Labor Relations Board matters.

He frequently serves as an expert speaker to law schools, including Harvard University, Boston College, Hofstra University, and Arizona State University, and bar associations regarding sports law issues, including agent regulation and salary arbitration. Clifton is often called upon by national news media as a source for his commentary and opinion on legal issues in sports. He currently serves as the of Lewis Brisbois' sports law blog, The Official Review, which regularly provides subscribers with key insights and analysis to help stay at the forefront of a variety of sports law related issues.

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## College Athletics as the University's 'Front Porch': What Is the Relationship between Athletics and Educational Quality?

By Jody W. Lipford, Associate Professor of Economics, Francis Marion University, Florence, SC 29505 and Jerry Slice, Professor of Economics, Presbyterian College, Clinton, SC 29325

Key Words: economics of information, advertising as information, educational quality, subsidies, power index

### Abstract

College administrators and athletic supporters often justify expenditures on college athletics with the argument that athletics serves as the “front porch” of the university. If prospective students, donors, and other constituents are impressed with a university’s athletic program, they are more likely to provide resources to the university, thereby improving institutional quality. In this paper we test the correlation between educational quality and measures of athletic success, on and off the field and court. Our findings are supportive of the front porch hypothesis, but not in the way that many would expect. Specifically, we find that institutions that are size-appropriate, and as a result have the resources to play Football Bowl Subdivision athletics, also have higher measures of educational quality.

*“Athletics is to the university like the front porch is to a home. It is the most visible part, yet certainly not the most important.”*

*Dean Smith, Legendary UNC basketball coach*

### Introduction

College administrators and athletic departments, along with the media and much of the broader public, understand the common claim that college athletics is the “front porch” to the university. The idea behind the front porch hypothesis is that institutions of higher education seek to maximize their prestige and brand, and that athletics is a key component of this pursuit (Ngo et. al., 2022). The prominence of the front porch idea is so widespread and deeply held that “most of the larger American universities . . . design their athletic programs around the front porch

proposition . . .” (Suggs, 2009, p. 13). Athletic departments argue that a university can “leverage” the athletic program to its benefit, through visibility and compelling stories that may lead to higher enrollment and greater donations (Advancement Resources, March 11, 2019, Davidson, 2021). Athletic directors understand a clean front porch as a key component to a university’s overall image and a means to establish trust with university constituents (Pratt, 2013). Moreover, athletics may provide information to prospective students and other university constituents about overall institutional quality. In effect, the front-porch hypothesis may encompass advertising, image, exposure, and information.

Nonetheless, many constituents of higher education are cautious or skeptical. A wide array of athletic scandals has undermined public support (Suggs, 2003) and led to calls for reform (Gurney et. al., 2017; Mitchell, 2018). For example, Gerdy (2016) calls on university trustees to apply greater scrutiny to the athletic programs under their charge, and Ennis (2016) wonders if the academic side of the university can reclaim the front porch through “academic outreach” (para. 4) such as public lectures and entrepreneurship incubators. Branch (2011) even goes so far as to call into question the very ethics of college sports.

Two sets of questions, related but distinct, are of importance when examining the hypothesis that college athletics are the “front porch” of a university. First, does the public believe or perceive that college athletics are a good indicator of overall institutional quality? That is, if the public observes success on the field and court, do they infer that the institution is well-run and reward the institution with more students, higher quality students, and greater donations? Does it matter if winning programs are “clean” and scandal-free? Second, moving away from belief and perception to reality, is the question of whether an attractive front porch is truly indicative of institutional quality. More directly, do universities with winning athletic programs rank high on metrics of academic and educational quality, and does it matter if the athletic program is well-run and scandal-free?

This study focuses on the second set of questions. Specifically, we examine the empirical relationship between athletic success and educational quality for Football Bowl Subdivision (FBS) institutions. Using data from the Wall Street Journal/College Pulse Best Colleges Ranking on educational quality and measures of athletic success in football and men’s basketball, we empirically test the

relationship between football and men's basketball success and educational quality. We also test whether institutions that heavily subsidize their athletic departments from the broader institutional budget are associated with lower-quality education. Probing further, we test the link between athletic subsidies and the size of a university relative to its peers.

We conclude that universities with athletic departments that win with self-generated resources are likely to be well-run and -managed and so offer quality academic programs and educational opportunities. Universities with athletic departments that lose, and this despite significant subsidies from the institutional budget, are likely to be institutions that make poor decisions with respect to their academic program as well. An administration and board of trustees that put their athletic department in a position where it can neither compete on the field or court, nor generate sufficient funds to support itself, may be doing a poor job of managing the educational program.

In the following section, we provide a brief overview of the literature on the link between athletic success and the public's response to it, looking at performance on and off the field and court. We then look briefly at the economics of information and advertising to provide a theoretical underpinning to the front porch hypothesis. In the fourth section, we discuss methodology, and in the fifth section, we explain the data used in the empirical tests presented in section six. We discuss the implications of our work in section seven and opportunities for future research in section eight.

## Literature Review

### The Link between College Athletic Success and Public Response

The literature on college athletics is vast. In this section, we examine literature on how the public – prospective and current students (and presumably their parents) and donors – respond to athletic success.<sup>54</sup> We note at the outset that some literature supports the hypothesis that the public perceives athletic success as indicative of institutional quality, whereas other literature does not support this hypothesis.

### On-Field and On-Court Success and Public Response

In an early piece, McCormick and Tinsley (1987) argue that the athletic-academic relationship is symbiotic,

so that athletic success yields a beneficial advertising effect for the entire university. These authors support their hypothesis by finding that members of major conferences and prominent independents have higher incoming SAT scores for freshmen. In later work supportive of the advertising effect, Mixon (1995), Mixon et. al., (2004), Pope and Pope (2009), and Chung (2013) also find positive relationships between basketball and football success and student quality. Mixon and Trevino (2005) consider freshmen retention and graduation rates and find that football success leads to higher rates of both. In a slight variant of these results, Smith (2009) finds that SAT scores and high school GPA and rank are positively correlated with a winning football program and a strong football tradition, but that the school's football tradition matters more.

Other researchers investigate the relationship between athletic success and giving to the university. Stinson et. al., (2012) find that the return on investment for athletic expenditures is positive for FBS schools with respect to core and gift revenues. They also find that athletic expenditures lead to higher graduation rates. Koo and Dittmore (2014) trace causality from football success to giving to the athletic and academic programs and find not crowding out but rather a symbiotic relationship as McCormick and Tinsley argued. Chung (2015) also finds that winning brings greater revenue for the athletic department.

Against this body of evidence stands the work of other researchers who do not find a link between resources devoted to athletics and positive public response. Litan et. al., (2003) and Orszag and Orszag (2005) find no proven correlations between operating expenses for athletics and SAT scores or alumni giving. Baumer and Zimbalist (2019) find that successful basketball and football programs have a positive effect on SAT scores and donations, respectively, but that the effects are negligible. In papers unique to this literature, Zoda (2012) and McDermand (2021) examine Football Championship Subdivision (FCS) schools only. Zoda finds no link between spending on football and higher SAT scores, and McDermond finds that institutional expenditures on athletics have no effect on enrollment, applications, or student quality.

Taking a similar approach, some researchers question the costs of the apparent benefits from athletics. Desrochers (2013), for example, acknowledges the “campus spirit, name recognition, and reputation” (p. 2) that athletics may bring, but wonders if these benefits are worth

<sup>54</sup> Vanover and DeBowers (2013) provide a broad overview of the effects of college athletics on many constituents and outcomes, including student-athletes, non-student athletes, faculty, multiculturalism, community colleges, university rankings, and college finances.

the high and rising costs and heavy institutional subsidies they often require. Frank (2004) doubts that they are, arguing that college athletics is like an entrapment game in a winner-take-all market: although a few schools win, most lose financially with bid escalation. Zimbalist (2010) follows a similar line of reasoning by asking tough questions of the evidence linking athletic success to overall benefits to the university. He asks, for example, not if the return on investment in athletics is positive, but rather how this return compares to the rate that would be earned from other investments in the university. He points out that the return to investments in athletics is overestimated if the costs include only operating costs and exclude capital costs. Further, if athletic success brings gains, does it not follow that losing erases these gains?

Taking a somewhat different approach, Ridpath et. al., (2015) highlight the substantial student fees and other institutional subsidies used to support the athletic program. Using survey evidence from a Mid-American Conference school, where student fees are high and subsidies are common, they find that a substantial share of students is aware of athletic fees but that few students are aware of the amount of the fees and that few value athletics highly. Moreover, Davidson (2021) finds no evidence that student fees increase the winning percentage of an institution's football or men's basketball programs.

#### **Off-Field and Off-Court Success and Public Response**

Research on off-field and -court success, or perhaps more accurately, failure, is limited. Eggers et. al., (2019), however, test the effects of athletic malfeasance on student profile using FBS men's basketball programs. They find that post-season tournament bans reduce the class rank and GPA of incoming high school students (though not mean SAT scores) and conclude that their results are "consistent with the supposition that prospective students use athletics as a signal for university quality" (p. 10), supporting the proposition that "university athletics are indeed the front porch to a university" (p. 11). Fleisher III et. al. (1992) find that the mean winning percentage of college football teams placed on probation declines in the second, third, and fourth years after the team has been put on probation, and Rhoads and Gerking (2000), find that probation of the men's basketball program (although not the football program) reduces alumni contributions.<sup>55</sup>

<sup>55</sup> Although Fleisher III et. al. (1992) argue that the net effect of NCAA enforcement is to protect the status quo among college football

On the other hand, Smith (2015) cites deterrence theory, which argues that sanctions are only effective if they are certain, swift, and severe and argues these criteria do not apply to college athletics, no matter how "visible" they are. In his empirical work, he finds that NCAA sanctions have little to no effect on football or basketball winning, revenue, or home attendance, or on freshman applications.

#### **Summary of the Literature**

The literature on the effects of athletic success, on and off the field and court, is vast, and although this review is not exhaustive, the upshot from the review is that the evidence is mixed. This paper advances the literature by determining whether a positive public response to athletic success, on and off the field and court – in effect, to the university's "front porch" -- is warranted. More directly, this paper tests the hypothesis of whether a well-run athletic program is, in fact, a good indicator of an institution's educational quality. Before turning our attention to the link between athletic success and educational quality, we look briefly at the economics of information and advertising.

#### **Theoretical Framework**

##### **The Economics of Information and Advertising**

The acquisition of information about products can be costly for consumers. Applying standard economic analysis to information implies that consumers will search and acquire information until the marginal benefit of search and inquiry equals the marginal cost. As Stigler (1961) puts it, rational, optimizing consumers will search until "the cost of search is equated to its expected marginal return" (p. 216). The time and effort invested to acquire information varies significantly across products. Stigler's rational, optimizing consumer will invest few resources in determining the right tube of toothpaste to buy but will invest substantial resources in determining the right product to buy if that product is complex, bundled, or one for which quality is difficult to assess. Moreover, Stigler (1961) argues that consumers will incur even higher search costs if the prospective purchase is a large share of the consumer's budget or if the geographic size of the market is large.

powers, Depken II and Wilson (2006) find that NCAA enforcement improves the competitive balance in college football.

Advancing the work of Stigler, Nelson (1974) distinguishes between search goods, for which quality can be determined relatively easily by inspection prior to purchase, and experience goods, for which quality cannot be determined by simple inspection prior to purchase. Nelson argues and presents empirical support for the proposition that advertising is more prevalent for experience goods than for search goods and that the purpose of the advertising is to enhance the firm and product's reputation as opposed to providing direct information on the product.

From the economics perspectives on information and advertising, the reasoning grounding the front porch hypothesis is sound. A college education is a complex product with many attributes and with quality that is difficult to determine before purchase and so fits the characteristics of an experience good. In addition, a college education is costly, and for many buyers, the market is large geographically. For all these reasons, advertising is important to colleges and universities, and athletics is one way to advertise. In the words of Ridpath et. al., (2012),

(S)ome university leaders justify the increase in dollars to athletics . . . by saying that the university is using these major sports as the 'front porch' of the university. The 'front porch' mentality seems to mean that sports are the easiest way to nationally advertise and draw attention to the school (p. 80).

We argue then that athletics provides advertising and exposure for a college or university and valuable information to prospective students and their parents about educational quality. Athletic success informs the prospective consumer that the university in question has not only winning athletic teams but also quality academics. If this is the case, observing the university's athletic program is a sensible way to reduce search costs.

Are these assertions correct? More directly, is athletic success a good indicator of educational quality? And, if so, what measures of success, on and off the field and court, matter? We now turn our attention to these questions, which provide our work's contribution to the existing literature.

## Methodology

To test the link between athletics and overall educational quality, we employ three sets of empirical tests.

- First, we examine the link between educational quality and athletic success on the field and court.
- Second, we examine the link between educational

quality and athletic success off the field and court.

- Third, we examine relative institution size as a determinant of athletic department management and overall institution management.

We emphasize that our first and second tests are strictly about correlation and not causation: can an unbiased observer conclude that athletic success – on the field and court, off the field and court, or both – is associated with an overall superior institution that provides the benefits of a sound educational program and positive student experience? Our third test, however, lends itself to interpretations that may indicate causation.

## Data

Before presenting the empirical models and test results, we discuss the data.

### Measure of Institutional Quality

Our measure of institutional quality is the *Wall Street Journal/College Pulse Best Colleges Ranking* for 2024.<sup>56</sup> This measure utilizes three student-centered metrics – student outcomes, the learning environment, and diversity -- with the goal of “measuring the value added by college—not simply measuring their students’ success, but focusing on the contribution the college makes to that success” (Carr, 2023).<sup>57</sup>

### Measures of On-Field and -Court Success

Our determinants of success on the field and court use the season-ending ESPN Football Power Index (FPI) and ESPN men's Basketball Power Index (BPI). Both of

<sup>56</sup> Data used by the WSJ/College Pulse Ranking are from 2019 to 2023. We note that for our purposes the Wall Street Journal/College Pulse Rankings compares favorably to other college rankings. The U.S. News & World Report college rankings have a longer history and perhaps larger following. Nonetheless, Fisher (2009) cites studies that call this ranking into question because of evidence that some schools report inaccurate or fraudulent data to raise their rankings. Forbes list of America's top colleges provides a ranking but not a quantitative measure of institution quality, and the Princeton Review provides rankings of specific metrics of institutional quality (e.g., Academics & Administration, Quality of Life, and Social Scene) but does not provide overall college rankings.

<sup>57</sup> Student Outcomes account for 70 percent of the ranking and measure salary, years to pay off the net price, and graduation rates. The Learning Environment accounts for 20 percent of the ranking and is based on student surveys. The measure includes learning opportunities, career preparation, facilities, and recommendations. Diversity accounts for 10 percent of the ranking and measures student interactions with members of the campus community with different backgrounds, ethnicity, family earnings, countries, and with students with disabilities. For a complete discussion of the methodology of the WSJ/College Pulse Ranking, see Carr (2023) and <https://www.wsj.com/rankings/college-rankings/best-colleges-2024>.

these indexes measure “how many points above or below average a team is.” Specifically, for football, the ratings are “composed of a predicted offensive, defensive and special teams component” that measures the “number of points each unit is expected to contribute to the team’s net scoring margin on a neutral field against an average FBS opponent.”<sup>58</sup> We take data from the last five years and calculate the average and standard deviation of the respective power indexes. The actual variables we use are the inverses of the coefficients of variation of the power indexes (i.e., Average FPI/Standard Deviation FPI and Average BPI/Standard Deviation BPI). We argue that these measures are better than simple FPIs or BPIs because they add consistency to the measures of on-field and -court performance. With this measure, if two above (below) average teams had the same average FPI or BPI, the team with less season-to-season variability in performance would have a higher (lower) score.

Measures of Off-Field and -Court Success

We utilize four measures of off-field and -court performance.

- First, we use the percentage of athletic department revenues that are subsidized by the broader institutional budget. These data are available for 2021-22 from the USA Today and provide information on

athletic department revenues, expenses, and “total allocated,” which is defined as the “sum of student fees, direct and indirect institutional support and state money allocated to the athletic department, minus certain funds the department transferred back to the school.”<sup>59</sup> The subsidy percentage is calculated as the value of “total allocated” divided by total athletic revenues.<sup>60</sup>

- Second, we use the academic progress report for football and men’s basketball for the 2021-22 academic year. This measure is a four-year average, and higher scores indicate greater academic progress.<sup>61</sup>
- Third, we use a dummy variable for NCAA major infractions in football or men’s basketball from 2018 to 2022. Schools that had committed an infraction were coded with a one.<sup>62</sup>
- Fourth, we consider relative university size, defined as the number of standard deviations from the mean

58 As a result, power indexes are positive for above-average teams and negative for below-average teams. For complete details on the methodology used to calculate the power indexes, see <https://www.espn.com/college-football/fpi> and <https://www.espn.com/mens-college-basketball/bpi>.

59 For a full discussion of the methodology of this measure, see <https://www.usatoday.com/story/sports/2023/04/14/college-sports-finances-ncaa-revenue-expense-database-methodology/11664404002/>

60 As an example of the contribution of student fees to the athletic budget, student fees provide no revenues to the athletic budget of Ohio State University but provide 85 percent of the budget at Ohio University. We thank an anonymous reviewer for this telling anecdote.

61 Data for Academic Progress Rates by institution and by year are available at <https://web3.ncaa.org/aprsearch/aprsearch>.

62 Data for Major Infractions by institution and by year are available at <https://web3.ncaa.org/lstdbi/search?types=major&q=>.

Table 1  
Descriptive Statistics

Variable	Mean	Std. Dev.	Minimum	Maximum
WSJ Education Score	65.14	9.95	41.6	84.2
Inverse C.V. of FPI	0.25	2.61	-5.86	8.71
Inverse C.V. of BPI	1.82	2.40	-3.33	11.06
Subsidy Percentage	30.22	27.45	0	79.21
APR Football	966.66	16.43	916	996
APR Basketball	970.14	18.83	922	1,000
NCAA Major Infraction	0.21	0.41	0	1
Relative University Size	0.00	1.00	-1.74	4.10

of a university’s undergraduate enrollment.

- Table 1 provides descriptive statistics for the 97 FBS schools for which we have complete data.

Empirical Tests and Results

We now turn to our empirical tests of the correlation between educational quality and athletic success, on and off the field. After presenting these tests,

we examine athletic department management more closely.

Educational Quality and On-Field and -Court Success

To determine the correlation between educational quality and athletic success on the field and court, we estimate the following equation with OLS:

$$\ln \text{WSJ Education Score}_i = a_0 + a_1 \text{Inverse C.V. FPI}_i \text{ (or BPI}_i \text{)} + \varepsilon_i.$$

Table 2			
Educational Quality and On-Field and -Court Success			
Dependent Variable: Log of WSJ Education Score			
Independent Variable	Coefficient/t-stat	Coefficient/t-stat	Coefficient/t-stat
Inverse C.V. FPI	0.025/4.26***		0.019/2.68***
Inverse C.V. BPI		0.023/3.62***	0.012/1.63
Constant	4.16/274.57***	4.12/212.80***	4.14/210.64***
Adj. R-square	0.15	0.11	0.17
F-statistic	18.18	13.11	10.58
N	97	97	97
*significant at the 10% level for a two-tail test; **significant at the 5% level for a two-tail test; ***significant at the 1% level for a two-tail test			

The results, shown in Table 2, indicate that football and basketball success on the field and court are associated with higher scores of educational quality: the correlations between the inverses of the coefficients of variation for the FPI and BPI are positively and significantly correlated with the natural log of the WSJ education quality score. These results, taken alone, provide support for the front porch hypothesis. A one-standard deviation increase in the inverse of the football and basketball coefficients of variation in the third regression raises the WSJ education score by 5.2 points.

Educational Quality and Off-Field and -Court Success

We next test the correlation between educational quality and how the athletic department performs off the field and court. Whether a winner or a loser, is the athletic program financially sound? Do its student-athletes measure up academically? Does

the athletic program follow the rules? Is the athletic program “clean” and scandal free?

To determine the correlation between educational quality and athletic success off the field and court, we estimate the following equation with OLS:

$$\ln \text{WSJ Education Score}_i = a_0 + a_1 \text{Subsidy Percentage}_i + a_2 \text{APR}_i \text{ for Football (or Basketball)} + a_3 \text{NCAA Major Infraction}_i + \varepsilon_i.$$

The results are shown in Table 3.

Of interest, neither the academic progress of athletes nor an NCAA major infraction is correlated with the measure of educational quality. The financial variable, the share of the athletic budget subsidized from the broader institutional budget, is however, highly significant. A one-standard deviation increase in the subsidy percentage in the third regression would reduce the WSJ education score by 2.5 points.

**Table 3***Educational Quality and Off-Field and -Court Success***Dependent Variable: Log of WSJ Education Score**

<b>Independent Variable</b>	<b>Coefficient/t-stat</b>	<b>Coefficient/t-stat</b>	<b>Coefficient/t-stat</b>
Subsidy Percentage	-0.0026/-4.29***	-0.0026/-4.75***	-0.0026/-4.21***
Football APR	0.0004/0.42		0.0002/0.19
Basketball APR		0.0006/0.76	0.0006/0.66
NCAA Major	0.043/1.20	0.040/1.10	0.041/1.11
Infraction			
Constant	3.82/3.89***	3.64/4.66***	3.50/3.17***
Adj. R-square	0.21	0.21	0.21
F-statistic	9.56	9.73	7.23
N	97	97	97

\*significant at the 10% level for a two-tail test; \*\*significant at the 5% level for a two-tail test;

\*\*\*significant at the 1% level for a two-tail test

In Table 4, we show the results of regressions when we combine the on- and off-field and court metrics of athletic performance. We find that, unlike in Table 2, the measures of football and basketball success are no longer significant. The athletic department's subsidy percentage remains significant in all three regressions, with coefficient values and significance levels comparable to those shown in Table 3. The other measures of athletic department performance off the field and court remain insignificant as

in Table 3. Drawing inferences from these results, we conclude that a university that runs an athletic department that cannot fund itself may also provide a broad-based educational product that is inferior to that of its peers with financially-sound athletic programs. Athletic costs that are unsustainable must receive revenues from another source, and an institution's educational programs are one such source (Suggs, 2009). **Athletic Department Subsidies and Institutional Management**

**Table 4.***Educational Quality and On- and Off-Field and -Court Success***Dependent Variable: Log of WSJ Education Score**

<b>Independent Variable</b>	<b>Coefficient/t-stat</b>	<b>Coefficient/t-stat</b>	<b>Coefficient/t-stat</b>
Inverse C.V. FPI	0.0087/1.13		0.0093/1.16
Inverse C.V. BPI		0.0026/0.32	0.0005/0.06
Subsidy Percentage	-0.0021/-2.84***	-0.0025/-3.45***	-0.0020/-2.38**
Football APR	0.0002/0.19		-0.00009/-0.08
Basketball APR		0.0006/0.70	0.0007/0.76
NCAA Major	0.0403/1.11	0.0390/1.07	0.0366/0.99
Infraction			
Constant	4.03/4.04***	3.67/4.64***	3.64/3.28***
Adj. R-square	0.21	0.21	0.20
F-statistic	7.51	7.25	5.04
N	97	97	97

\*significant at the 10% level for a two-tail test; \*\*significant at the 5% level for a two-tail test;

\*\*\*significant at the 1% level for a two-tail test

Since the percentage of athletic revenues subsidized is consistently and negatively correlated with the WSJ education score, we further investigate its determinants. The revenue side surely matters, and McEvoy et. al., (2013) and Chung (2015) find that winning football and men’s basketball programs bring in greater revenue, a finding that McEvoy et. al., (2013) conclude provides “support for using the ‘have’s’ and ‘have nots’ to describe athletic programs” (p. 263). Corroborating this conclusion, Gurney et. al., (2017) document a trend of vast and rising differences in revenues generated across college athletic programs.<sup>63</sup> Following the

63 Ngo et. al., (2022) provide empirical evidence that the NCAA’s Cost of Attendance policy adopted in 2015 increased financial pressures on non-Power 5 schools and increased the resource disparity between Power 5 and non-Power 5 institutions.

lead of these researchers, we include the inverse coefficients of variation of the ESPN football and basketball power indexes in our empirical estimate.

We hypothesize in addition that an institution’s resource base is an important determinant of athletic department subsidies. We argue that an institution’s size, relative to its peers, will also determine athletic department subsidies. To measure relative size and the resources it may generate through attendance at games, television viewing, and donations, we use a university’s total number of undergraduates and calculate the number of standard deviations from the mean number of undergraduates for each university in our sample. In effect,

$$\text{Athletic Subsidy}_i = a_0 + a_1 \text{Inverse C.V. FPI}_i \text{ (or BPI}_i \text{)} + a_2 \text{Relative University Size}_i + \varepsilon_i.$$

Table 5			
Athletic Department Subsidies and On-Field and -Court Success			
Dependent Variable: Percentage of the Athletic Budget Subsidized			
Independent Variable	Coefficient/t-stat	Coefficient/t-stat	Coefficient/t-stat
Inverse C.V. FPI	-6.22/-7.12***		-4.29/-4.86***
Inverse C.V. BPI		-6.63/-7.06***	-4.53/-4.78***
Relative University Size	-4.94/-2.17**	-5.47/-2.42**	-2.65/-1.26
Constant	31.79/15.48***	42.27/15.85***	39.54/16.08***
Adj. R-square	0.46	0.46	0.56
F-statistic	42.51	41.92	42.54
N	97	97	97
*significant at the 10% level for a two-tail test; **significant at the 5% level for a two-tail test; ***significant at the 1% level for a two-tail test			

As shown in Table 5, winning athletic programs reduce subsidies. Our measures of on-field and –court success are negatively and significantly correlated with the share of athletic department revenues drawn from the overall institutional budget. But, size matters too. Holding winning constant, the larger an institution is relative to its peers, the lower the share of athletic revenues drawn from the institutional budget. The coefficient on relative university size is negative and significant in the regressions that include the inverse of the coefficient of variation of the FPI or the inverse of

the coefficient of variation of the BPI. Although the relative university size variable loses significance in the regression with both inverses of the coefficients of variation of the power indexes included, its sign remains negative.

We note that these results are consistent with evidence on median revenues, expenses, and athletic subsidies for Division I institutions that Desrochers (2013) presents and with Ridpath et. al., (2012), who argue that for “mid-majors” – relatively small Division I schools – expenditures on athletics do not lead

to winning, nor are they advantageous to the university as a whole.<sup>64</sup> In effect, these findings support the front porch hypothesis, but perhaps not in a way that many expect. A school that subsidizes a losing athletic program that lacks the resource base to support itself may also have a poor-quality educational program.

Last, we test the link between academics, athletics, and institution size directly by regressing the WSJ education score against the relative university size variable, as shown in the equation below:

64 This finding is also consistent with the work of McDermand (2021) on FCS schools, where budgetary pressures may be acute and where athletic expenditures account for a higher share of the budget than at FBS schools.

$$\ln \text{WSJ Education Score}_i = a_0 + a_1 \text{Relative University Size}_i + \epsilon_i$$

The point of the test is to address the following question: does an institution that is well-positioned in its athletic program – the athletic program is competitive on the field and court and generates sufficient resources so that it isn’t a burden to the overall budget -- offer a quality educational program? The empirical evidence presented in Table 6 suggests the answer is “yes.” The sign on the relative size of a university is positive and significant, and a university that is one standard deviation above the mean in number of undergraduates has a WSJ education score 5.8 points higher than the average size school.

Table 6	
Educational Quality and Institution Size	
Dependent Variable: Log of WSJ Education Score	
Independent Variable	Coefficient/t-stat
Relative University Size	0.087/6.21***
Constant	4.16/300.18***
Adj. R-square	0.28
F-statistic	38.62
N	97
*significant at the 10% level for a two-tail test; **significant at the 5% level for a two-tail test; ***significant at the 1% level for a two-tail test	

This result is consistent with well-reasoned expectations. Large schools have not only more students, many of whom support athletics, but also and more importantly, larger alumni and fan bases from which to draw support for the athletic program. An unbiased observer could conclude reasonably that these institutions are well-managed and have adequate resources to fund their athletic and academic programs. Moreover, an institution with a right-sized athletic program will divert fewer resources from its educational mission to support athletics. On the other hand, relatively small schools within a given NCAA division lack the strong student, alumni, and fan bases to support their athletic programs. An unbiased observer may conclude that an athletic program that is too small for the NCAA division in which it competes indicates that the athletic and academic programs are poorly managed. Such an

institution will divert more resources from its educational mission to support athletics, and these diverted resources are paid for typically by low-income students (Davidson, 2021). This trend is exacerbated by changes in NCAA policies that demand an increase in expenditures and corresponding revenues for the athletic program; one such example is the adoption of Cost of Attendance policies in 2015 (Ngo et. al., 2022). The financially-sound decision for institutions that cannot afford their current NCAA division is to reclassify to a lower NCAA division (Davidson, 2021).

This finding is consistent with Lipford and Slice (2017) who find that because a high share of athletic costs is fixed, small schools face higher per-student costs for their athletic programs and that these costs escalate as the division of play rises (e.g., from Division II no football to Division II with football to Division

FCS to Division FBS). Despite these costs, many institutions attempt to “play above their weight as a means of chasing visibility, funds, and students” (Suggs, 2009, p. 14). Deemphasizing athletics, while possible, is difficult (Hutchinson 2013), as such decisions run afoul of university politics, and the consequences for college presidents can be severe (Jarvis, 2019).

### Discussion and Implications

The upshot of this analysis supports the front-porch hypothesis. The findings expand the literature on the front porch hypothesis by testing the proposition that a well-run athletic program is indicative of a quality educational product. Empirical analysis supports this conclusion. Athletic teams that win on the field and court and have the resources to do so indicate that an institution is likely well managed with a quality academic program that benefits its students. On the other hand, an institution that is managed by an administration and governing board that insist on maintaining an athletic program that, given its NCAA division, is not competitive and requires a substantial draw of resources from the overall institutional budget, is likely poorly managed with an educational program of marginal value for its students.

Although our analysis in no way measures economies of scale properly defined, it does deal with fixed cost-spreading, and Stigler’s (1958) warning that “competition of different sizes of firms sifts out the more efficient enterprises” (p. 2) may apply. Institutions that have insufficient resources to fund their athletic programs are likely to have insufficient resources to fund their educational programs as well. A shabby front porch may indicate that the rest of the house is in a state of disrepair -- and is hardly inviting.

Institutions of higher education can use these findings to evaluate their athletic programs. Administrators may rightly conclude that winning athletic programs that draw few resources from the overall institutional budget should be continued. However, if an institution’s athletic programs are losing and siphoning resources from the educational mission of the university, administrators may want to re-evaluate the scope and scale of their athletic programs.

### Limitations and Recommendations for Future Research

A limitation of this study is that the sample consists only of FBS schools. The findings are consistent with expectations of the role of athletics for FBS schools that often play on television and before large crowds, and so may use athletics for advertising and exposure and to provide information to the institution’s prospective customers. Along with the expected applicability of the front-porch hypothesis, the other reason for limiting the study to FBS institutions was the availability of data to conduct our analysis.

The limitations of our study, however, indicate opportunities for future research that addresses the applicability of the front-porch hypothesis to FCS, Division II, and Division III institutions. An examination of academic quality, athletic teams’ winning, athletic department subsidies, and institution size for smaller schools would provide a more complete determination of the role of athletics for colleges that are trying to increase their exposure and expand their markets. In effect, what are the payoffs for investments in athletics for institutions of different sizes that play at different NCAA levels? Future research on this and related questions would shed more light on our findings, and if upheld, reinforce the conclusions we have drawn.

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## **Knight Commission Makes Statement on Future College Football Playoff (CFP) Media Deal and ‘the Necessity for Change’**

**F**rom Amy Privette Perko, CEO, Knight Commission on Intercollegiate Athletics:

Media reports indicate that the College Football Playoff (CFP) is working to complete a new media deal that could result in more than \$700 million in new and uncommitted annual revenue. This impending CFP deal must lead to new governance and management of the sport of FBS football and of the biggest pot of money in the history of college sports. With an annual contract that is expected to exceed \$1.3 billion, the independently operated CFP will generate more annual revenue than the NCAA. Yet remarkably, the NCAA receives no money from the sport of FBS football, even though the NCAA and all of its member institutions absorb the national costs of FBS football (e.g., catastrophic health insurance, rules enforcement, legal expenses).

The FBS conferences, which control CFP revenue, do not require any CFP dollars to be earmarked for athlete education, health, and safety. Spending data provide overwhelming evidence that a new financial framework for managing CFP revenue is desperately needed. Since the CFP began, football coaching salaries have grown faster than all other aspects of athletics and institutional spending, fueling exorbitant salaries and lavish severance packages. Without earmarks or restrictions on these new CFP revenues, these dysfunctional patterns will only worsen, with nearly half of all football programs in the “autonomy conferences” projected to spend more on compensating 11 “countable” football coaches than on funding for athlete scholarships and medical expenses for all college athletes in all sports at each school.

The Knight Commission reaffirms its 2020 recommendation that the sport of FBS football should be governed by a new entity, separate from the NCAA and funded by CFP revenue. This change would benefit the sport of FBS football, providing a single leadership structure to couple authority of revenue administration with authority over rules administration. The new structure should also include meaningful football athlete representation and independent directors to provide unbiased and expert input. New representation in the governance of the sport

could include medical experts, former head coaches, former FBS football players, and other independent voices. Additionally, independent directors will reduce existing conflicts of interest, which are evident in ongoing disagreements on a postseason structure and revenue distribution. A separate FBS football-centric structure would also allow the NCAA to better support and concentrate on the sports for which it conducts championships.

The following minimum changes should be made to recognize the CFP monies for what they are – FBS football’s exclusive and unrestricted revenue distribution plan:

1. The CFP should annually reimburse the NCAA for all national costs related to FBS football, such as catastrophic health insurance, rules enforcement, and legal costs.
2. The sport of FBS football should no longer be counted in the NCAA’s revenue distribution formula since the NCAA does not operate the FBS football championship and receives no revenue from the sport. This change would allow more than \$60 million in NCAA revenue distribution, currently tied to counting FBS football factors in the distribution formula, to be reallocated.
3. With or without a governance overhaul, FBS conferences and institutions receiving CFP revenues should adopt the principles included in the Knight Commission’s C.A.R.E. Model framework. This principle-based framework is tethered to the educational model by prioritizing college athlete education, health, safety, well-being, gender equity, and opportunity. It directs both how revenues from the CFP, the NCAA, and conference media rights agreements are used as incentives, as well as providing accountability for how the revenues are spent.
4. Our recommendations would significantly boost the importance of education and athletic opportunities for hundreds of thousands of college athletes in all NCAA championship sports. These sports are essential to the NCAA’s mission and are the backbone of our nation’s Olympic efforts.

It is time for the CFP, and the FBS conferences and institutions that receive these revenues, to establish new measures of accountability so that the \$700 million in new, uncommitted revenue supports the core mission of college sports.

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## News Briefs

### Hogan Lovells Advises Guidehouse on Sponsorship Deal with D.C. United

**G**lobal law firm Hogan Lovells has advised Guidehouse Inc., a global consultancy, on a major sponsorship deal with D.C. United, a professional men's soccer club based in Washington, D.C. Guidehouse is a global provider of consulting services to public sector and commercial markets, with broad capabilities in risk management, technology, and risk consulting. The Virginia-based business has a workforce spread across the United States, Germany, India, and other global locations. As part of the sponsorship deal, the Guidehouse logo will be featured prominently on the front of D.C. United's home and away kits starting with the 2024 Major League Soccer (MLS) season. The logo will also be featured on the kits for the D.C. United Academy and professional eMLS team. This front-of-kit partnership is the first-of-its kind in MLS between a club and a global consultancy. The Hogan Lovells team was led by partner Steve Argeris (Washington, D.C. and New York) and associate Lexi Bender (Boston).

### Caesars Sportsbook Accepts Legalized Mobile Sports Wagers on Eastern Band of Cherokee Indians Tribal Lands in North Carolina

**C**aesars Entertainment, Inc. (Caesars) has announced its sports wagering platform, Caesars Sportsbook, is the first sportsbook to launch legalized mobile sports betting in the state of North Carolina. Made possible under the Indian Gaming Regulatory Act and through Caesars' expanded relationship with the Eastern Band of Cherokee Indians, the Caesars Sportsbook app is now accepting mobile sports bets at Harrah's Cherokee Casino Resort in Cherokee, NC, Harrah's Cherokee Valley River Casino & Hotel in Murphy, NC and on surrounding Eastern Band of Cherokee Indians tribal lands.

### Sports Law Professor Tan Boston Joins Faculty at WKU Law School

**S**ports Law Professor Tan Boston is returning to the Salmon P. Chase College of Law at Western Kentucky University as a faculty member, bringing with her leadership experience from her work at two national sports law associations - the Association of American Law Schools (AALS) Section on Law & Sports and the Sports and Recreation Law Association (SRLA). Professor Boston taught courses at Chase before leaving WKU for the University of Dayton (Ohio) School of Law for 2021-22 academic year. Then came the opportunity to return to Chase and teach the property law courses she had taught before as well as factor in her growing experience in the sports law area. Professor Boston was a lawyer with the National Collegiate Athletic Association following graduation from the University of Virginia School of Law. She is secretary of the AALS Section on Law and Sports as well as chair of the newly created Diversity, Equity and Inclusion Committee for SRLA.



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