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## Bridging the NCAA's Accident Insurance Coverage Gaps? A Deep Dive into the Uncertainties of Injury Coverage in College Contact Sports, and the Impact that has on Athletes' Future Physical and Financial Comfort

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**BRIDGING THE NCAA'S ACCIDENT INSURANCE  
COVERAGE GAPS? A DEEP DIVE INTO THE  
UNCERTAINTIES OF INJURY COVERAGE IN  
COLLEGE CONTACT SPORTS, AND THE IMPACT  
THAT HAS ON ATHLETE'S FUTURE PHYSICAL  
AND FINANCIAL COMFORTS.**

NICOLE KLINE

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## PART I: INTRODUCTION

What if in the terms of an employment agreement, the healthcare provision was not guaranteed? What if financial burdens associated with a major accident and health crisis could be excluded if not considered a “covered accident?” What if, not only the healthcare provision, but the entirety of the agreement could be revoked “at will” because of an accidental injury? Yes, you read that correctly, whether or not your employer was going to provide you with healthcare benefits is discretionary, and benefits provided are tiered based on performance amongst your colleagues. In this scenario, your underperformance could lead to your healthcare benefits being denied outright. To further complicate matters, you may not be able to afford healthcare coverage to alleviate these concerns, because you are not being compensated for services rendered. The schedule you are required to adhere to does not allow for spare time to generate income necessary to pay for independent healthcare coverage. Can this legally be happening to you? Yes, in fact it is more common than you may think. You are simply upholding your end of a scholarship contract at a major university in the United States where you have been assured time and time again that, “everything is taken care of.” Given this scenario, would you sign on the dotted line?

Sadly, despite being under fire in recent years, these are the realities of the accidental injury insurance program required of National Collegiate Athletic Association (NCAA) student-athletes. The NCAA uses the narrow definition of the term “covered accident,” in its comprehensive accidental injury policy as a means to exclude a large portion of collegiate athletes from coverage who risk severe injury participating in their respective sports.<sup>1</sup> This definition limits the injuries it is willing to cover to those with short term and immediately assessable effects, without granting any opportunity for coverage of long-term delayed onset effects.<sup>2</sup> Additionally, the NCAA refuses to regulate whether a university is required to provide accident injury coverage to its student-athletes, adding a level of ambiguity to injury coverage expectation.<sup>3</sup>

The problem is not that benefits are not offered to qualifying student-athletes by the NCAA. In truth, the NCAA has been conducting research with member

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<sup>1</sup> See *Definitions*, NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, [http://www.ncaa.org/sites/default/files/MC28428\\_0816\\_NCAACatastrophicBenefitSummary\\_20160719.pdf](http://www.ncaa.org/sites/default/files/MC28428_0816_NCAACatastrophicBenefitSummary_20160719.pdf) (last visited on November 11, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> See 2016-2017 NCAA DIVISION I MANUAL art.3 § 3.2.4.8.1, <http://www.ncaapublications.com/productdownloads/D117.pdf> (Last visited November 11, 2016) (Such insurance coverage must be of equal or greater value than the deductible of the NCAA catastrophic injury insurance program and may be provided through the following sources: [D] (Adopted: 4/28/05 effective 8/1/05) (a) Parents’ or guardians’ insurance coverage; (b) Participant’s personal insurance coverage; or (c) Institution’s insurance program.”); *infra* Part II(c) (discussing ambiguities in coverage offered to student-athletes).

institutions and making improvements to the overall “catastrophic coverage policy” since it was put in place in 1992.<sup>4</sup> There are two major issues that plague the current system. The first being gaps in coverage for student athletes who are forced to shop for their own policies, not realizing that certain necessary medical tests and procedures may not be covered.<sup>5</sup> The second is the definition of “covered accident,” and the injury reporting requirements set out by the NCAA. “Covered accident,” as currently defined is problematic because it greatly limits the window student-athletes have for injury reporting and assessment.<sup>6</sup> These injury and reporting time frames may ultimately deprive those who may need the long-term benefits most from qualifying for coverage. Unlike a typical employer-employee relationship, where an injury may result in a worker’s compensation claim or some form of post-career medical care, these student-athletes have no employment contract to rely on nor post-career benefits packages like we have seen awarded in professional sports.<sup>7</sup>

This article analyzes the flaws in the NCAA’s current accidental injury health coverage policies for student-athletes and suggests ways to remedy the issues that plague student-athletes incurring serious injuries that may not be covered under current policies. Part I of this article outlines the history of the NCAA, and the policies relevant to the issues with accidental injury coverage currently in place. Part II looks at the significance of these coverage gaps in today’s world of modern medicine and technology as well as the impact they have on the everyday life of college athletes. Part III suggests solutions to bridge the gaps in accidental injury coverage for the physical and financial futures of these student-athletes.

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<sup>4</sup> See Brian Burnsed, *Survey: Most DI Schools Provide Injury Coverage*, NCAA.ORG (May 26, 2016, 3:04 PM), <http://www.ncaa.org/about/resources/media-center/news/survey-most-di-schools-provide-injury-coverage> (last visited November 11, 2016) (where study indicated eighty-four percent of Division I schools provide the mandatory accidental injury coverage mandated by the NCAA to their athletes voluntarily); see also Juanita Sheely, *Insurance Coverage for Student-Athletes*, NCAA.ORG (May 20, 2015, 5:05 PM), <http://www.ncaa.org/health-and-safety/sport-science-institute/insurance-coverage-student-athletes>.

<sup>5</sup> See Sheely, *supra* note 4 (discussing that often providers closest to campus and injury sites may be out of network for their individual policy, leaving athletes and families with overwhelming co-pays and unforeseen medical bills).

<sup>6</sup> See generally NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, *supra* note 1 (where the policy lists multiple time lines that must be adhered to in reporting injury, all of which must occur within the presumed four years of athletic eligibility of the student athlete).

<sup>7</sup> See NFL, *ex-players agree to \$765M settlement in concussion suit*, ASSOCIATEDPRESS, <http://www.nfl.com/news/story/0ap1000000235494/article/nfl-explayers-agree-to-765m-settlement-in-concussions-suit> (last updated Aug. 29, 2013, 2:52PM); see also Marin Hedin, *John Hopkins Study of Retired NFL Players Sheds Light on Concussion Related Brain Damage*, HUB JOHNS HOPKINS UNIVERSITY (Jan. 26, 2015), <http://hub.jhu.edu/2015/01/26/nfl-players-concussion-research/>.

PART II: HISTORY OF ACCIDENTAL INJURY INSURANCE COVERAGE UNDER NCAA  
POLICIES AND PRACTICES*A. Where We Are and How We Found Ourselves Here*

The NCAA originated as a means to protect the well-being of college football players in 1906, when the sport was responsible for claiming the lives of between fifteen and twenty players a year.<sup>8</sup> At the time, President Theodore Roosevelt mandated that safety regulations be implemented or the sport would be banned.<sup>9</sup> The prominent university presidents came together to promulgate safety measures and formed the NCAA.<sup>10</sup> The group (“commissioners”) made clear that a directive of its function was to create and maintain a clear difference between athletes at the collegiate and professional levels.<sup>11</sup> This was the birth of the terms of art “student-athlete” and “amateurism,” which officially defined the difference between compensated professionals and students receiving the benefits of education in exchange for their athletic endeavors.<sup>12</sup> To this day the NCAA claims that, “student-athlete success on the field, in the classroom and in life is at the heart of [their] mission,” which they uphold by awarding over \$2.7 billion in athletic scholarships annually to young adults across the country and across the world.<sup>13</sup> Looking out for the best interests of student-athletes seems simple enough, but it does leave a question for contemplation; how do ambiguities in healthcare coverage and no guarantee of long term care fit within this mission?

What was not made clear during the founding of the NCAA was the intent behind maintaining the difference between compensated professionals and student athletes; universities self-interests and overarching NCAA indemnification.<sup>14</sup> The

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<sup>8</sup> See Peter A. Carfagna, *Representing the Professional Athlete*, 32 (West, 2009).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*; see also *O’ Bannon v. NCAA*, 802 F.3d 1049, 1053 (9<sup>th</sup> Cir. Cal., 2015) (sixty-two university Presidents are credited with the founding of the NCAA as it is known today, which has grown to encompass over eleven hundred member schools).

<sup>11</sup> See Carfagna, *supra* note 6; see also *Waldrep v. Tex. Emp. Ins. Assoc.*, 21 S.W.3d 692, 700 (Tex. App. 2000); see also 2016-2017 NCAA DIVISION I MANUAL art.12 § 12.01.2.

<sup>12</sup> See *Friendly Reminder: The NCAA Invented The Term “Student-Athlete” To Get Out Of Paying Worker’s Comp*, INSIDE NU (Jan. 28, 2014, 8:57PM), <http://www.insidenu.com/2014/1/28/5355988/ncaa-student-athlete-kain-colter-union-workers-comp>.

<sup>13</sup> See *What We Do*, NCAA.ORG, <http://www.ncaa.org/about/what-we-do> (last visited Feb. 28, 2017); see also *NCAA Core Values*, NCAA.ORG, <http://www.ncaa.org/about/ncaa-core-purpose-and-values> (last visited Feb. 28, 2017) (outlining the importance of scholarship, leadership, and academic success as first priority and athletic success taking the back seat).

<sup>14</sup> See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college->

commissioners were proactively eliminating student-athletes' right to unionize, and in doing so, protecting university and NCAA budgets from footing the expensive costs; specifically, the commissioners were creating a buffer between the NCAA and the costs associated with the athletic injuries and deaths they were simultaneously charged with preventing.<sup>15</sup>

The NCAA has countless examples throughout its history that solidify the protective shield from financial liability that these terms of art have become for them in the U.S. court system.<sup>16</sup> One narrative that sheds light on the power of these terms of art and applies directly to issues with accidental injury insurance coverage gaps is the experience of Kent Waldrep. Waldrep was a 1974 Texas Christian University ("TCU") student and football player, who incurred a debilitating spinal injury during an athletic contest, a "covered event," at the hands of the University of Alabama's defensive line.<sup>17</sup> The injury left Waldrep and his family members unsure if he would ever regain use of his extremities, let alone walk or play football.<sup>18</sup> TCU continued to pay for Waldrep's hefty medical expenses for a mere nine months post injury, before refusing any further coverage.<sup>19</sup> Waldrep's physical state left him unable to finish school and achieve a college degree, and his family struggled to finance his care through charity while challenging TCU's actions and pursuing a worker's compensation claim in court.<sup>20</sup> The court ultimately held that there was no employer-employee relationship between Waldrep and TCU, or any student-athlete and university as history would show, that would entitle him to a worker's compensation claim.<sup>21</sup> The court reasoned that, "for the purpose of worker's compensation law, the employer-employee relationship may be created only by a contract,"<sup>22</sup> and that the

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[sports/308643/](#) (where NCAA former executive director Walter Byers in his memoir admits that the very idea of amateurism was unfounded, and used to the NCAA's advantage in litigation and liability avoidance).

<sup>15</sup> See Taylor Branch, *The Cartel: Inside the Rise and Imminent Fall of the NCAA*, DEADSPIN (Feb. 20, 2014, 1:35PM), <http://deadspin.com/how-the-myth-of-the-ncaa-student-athlete-was-born-1524282374>; see also Carfagna, *Representing the Professional Athlete* at 32.

<sup>16</sup> See Branch, *supra* note 14.

<sup>17</sup> See Branch, *supra* note 14 (discussing the facts of Kent Waldrep's experience as a student-athlete).

<sup>18</sup> *Id.*; see also Waldrep, 21 S.W.3d at 696.

<sup>19</sup> See Branch, *supra* note 14.

<sup>20</sup> *Id.*

<sup>21</sup> See Waldrep, 21 S.W.3d at 701-02.

<sup>22</sup> *Id.* at 698; see also *id.* at 702.

national letter of intent and other scholarship obligations that Waldrep signed prior to his attendance at TCU did not clearly constitute such contract.<sup>23</sup>

There are numerous examples outside of medical coverage and injuries where the U.S. court system has repeatedly found that student-athletes cannot be compensated for their participation in collegiate sports as they are not employees of the school.<sup>24</sup> In turn, these decisions rendered student athletes ineligible for the benefits like rights to a worker's compensation claim or similar reimbursement for long-term medical costs like post-career or quasi-retirement coverage.<sup>25</sup> Early in the organization's life, the NCAA transformed from a means to protect student athletes from harm, into the driving limiting the expansion of student-athletes rights to fair and accessible accidental injury coverage benefits through the creation of the unique class "student-athlete".

*B. Playing by the Rulebook, a Quick Discussion of NCAA Bylaws.*

It is important to clarify specifically how the NCAA Bylaws read before diving into the issues that arise out of their ambiguities. The commissioners began to outline rules that each and every member university and participating student-athlete are required to abide by from the topics of qualifying as an amateur, all the way to the safety measures and protocols that must be taken after injury.<sup>26</sup> As time evolved, so did the process. Today, members of the numerous NCAA Committees charged with proposing and legislating new policies and Bylaws are appointed by institution members.<sup>27</sup> Each year the NCAA publishes an updated version of its three Divisions Official Compliance Manuals with all additions or amendments to the previous year's Bylaws.<sup>28</sup>

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<sup>23</sup>*Id.* at 701.

<sup>24</sup> *Id.* at 702 (where the Court upholds a jury verdict declining to find an employment relationship between injured petitioner Waldrep and Texas Christian University);

The term came into play in the 1950s, when the widow of Ray Dennison, who had died from a head injury received while playing football in Colorado for the Fort Lewis A&M Aggies, filed for workmen's-compensation death benefits... The Colorado Supreme Court ultimately agreed with the school's contention that he was not eligible for benefits, since the college was "not in the football business."

*Id.*; see also Branch, *supra* note 15; see also *O'Bannon*, 802 F.3d at 1077-79.

<sup>25</sup> See generally Waldrep, 21 S.W.3d 692; see generally Branch, *supra* note 15.

<sup>26</sup> See Carfagna, *supra* note 8.

<sup>27</sup> Today the NCAA contains a representative balance of coaches, athletic directors, commissioners, university faculty, compliance officers and others who govern as members of over 150 committees in total. See *NCAA Committees*, NCAA.ORG, <http://www.ncaa.org/governance/committees> (last visited November 30, 2016).

<sup>28</sup> See *NCAAPUBLICATION.COM*, <https://www.ncaapublications.com/s-13-Manuals.aspx> (last visited Nov. 30, 2016).

There are a few Bylaw articles that are particularly relevant to the argument found in this note. The first is Bylaw article 12.01 which outlines that in order to be eligible as a student-athlete within the NCAA, a student must attain and maintain their status as an amateur throughout their collegiate experience.<sup>29</sup> The NCAA guidelines emphasize the importance of no student-athlete receiving any form of “extra-benefit” as determined by the NCAA for their athletic endeavors.<sup>30</sup> Additionally, the manual sets up the expectations and requirements for each of its member universities.<sup>31</sup> One of these expectations gets to the crux of the argument at hand; Bylaw article 3.2, Active Membership.<sup>32</sup> Amongst other things, this article mandates that each university certify that every student-athlete has accidental injury insurance coverage prior to any participation in an athletically organized and “covered event.”<sup>33</sup> The NCAA specifies that the amount of coverage should be at minimum equivalent to the \$90,000 deductible that must be reached to be eligible for NCAA funded catastrophic injury insurance.<sup>34</sup> Though the Bylaws are subject to amendments, additions and annual changes, the integrity of legislated policies are the same year after year allowing compliance officers and universities to easily apply

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<sup>29</sup> See 2016-2017 NCAA DIVISION I MANUAL art.12 § 12.01.1.

<sup>30</sup> 2016-2017 NCAA DIVISION I MANUAL art.16 § 16.02.3.

An extra benefit is any special arrangement by an institutional employee or representative of the institution’s athletics interests to provide a student-athlete or the student-athlete family member or friend a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their family members or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution’s students or their family members or friends or to a particular segment of the student body (e.g., international students, minority students) determined on a basis unrelated to athletics ability.

*Id.*

<sup>31</sup> See NCAAPUBLICATION.COM <https://www.ncaapublications.com/s-13-Manuals.aspx> (last visited Nov. 30, 2016).

<sup>32</sup> See 2016-2017 NCAA DIVISION I MANUAL art.3 § 3.2.

<sup>33</sup> See 2016-2017 NCAA DIVISION I MANUAL art.3 § 3.2.4.8.

<sup>34</sup> See 2016-2017 NCAA DIVISION I MANUAL art.3 § 3.2.4.8.1; see also Meghan Walsh, *'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 31, 2013), <http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/> (the catastrophic injury program kicks in after an athletes medical costs exceed a \$90,000.00 deductible); see also NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, *supra* note 1.

these fundamental articles and cover some student-athletes while requiring others to fend for themselves.<sup>35</sup>

*C. What the Revenue Stream of a (Billion Dollar) Non-profit Entity Actually Looks Like*

Contrary to what one may think when they hear about a non-profit organization,<sup>36</sup> what you will find with the NCAA is that historically it has maintained its' section 501(c)(3) tax exemption status,<sup>37</sup> its revenue streams largely outweigh its annual business expenses.<sup>38</sup> What we are talking about here is a multi-billion dollar sports industry, coined quite literally in the name of protecting student-athletes from the exploitive nature of professional athletics.<sup>39</sup> I know what you are

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<sup>35</sup> *Infra* Part II and accompanying text.

<sup>36</sup> See Andrew Syrios, *The NCAA Racket: \$10 billion 'Non-Profit' Organization*, VALUE WALK (Sep. 16, 2014, 7:38 PM), <http://www.valuwalk.com/2014/09/ncaa-business/> (discussing the 10.8 billion-dollar television contract with CBS and Turner Broadcasting and the compensation for top executive NCAA chairman Mark Emmert, approximately \$1.7 million in 2013).

<sup>37</sup> 26 U.S.C.S. § 501(c)(3) (LexisNexis, Lexis Advance through PL 114-329, approved 1/6/17).

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

*Id.*

<sup>38</sup> See Goodwin, *infra* note 39 and accompanying text.

<sup>39</sup> Drew N. Goodwin, Note: *Not Quite Filling the Gap: Why The Miscellaneous Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 36 B.C. INT'L & COMP. L. REV. 1277, 1281 (2013); see also Jim Abrams, *NCAA Asked to Justify Tax Exemption Status*, THE ASSOCIATED PRESS (Oct. 4, 2006, 5:56 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100401464.html> ("From the standpoint of a federal taxpayer, why should the federal government subsidize the athletic activities of educational institutions when that subsidy is being used to help pay for escalating coaches' salaries, costly chartered travel and state-of-the-art athletic facilities?").

thinking, this is a red flag. On its face this contradiction seems to be an oxymoron. Yet, the reality is that the United States tax code exempts many million dollar organizations, from major hospital systems and charitable organizations to professional sports organizations, as well as the NCAA from heavy business taxation.<sup>40</sup> In exchange for the burdens of tax penalties based on profits and revenues, these non-profit organizations abide by charitable mission statements and “strict” guidelines<sup>41</sup> requiring (amongst other provisions) that profits shall not be paid to shareholders, that the businesses are not operated in the interest of private entities, nor are they action oriented to influence state and federal legislative practices, and are required to disclose annual financial reports.<sup>42</sup>

Per these required annual financial disclosures, we can paint a pretty vivid picture of the current financial status of the NCAA. In 2015 alone, the NCAA generated an estimated \$921.4 million.<sup>43</sup> The bulk of these revenues come from the Men’s Division I basketball tournament television and marketing rights, as well as championship ticket sales.<sup>44</sup> The NCAA claims that this wealth is reinvested into mission enriching programs such as sports scholarship funds, student-athlete services, academic enhancement funds, conference grants, and general administrative expenses; all of which are important to the function and mission of the organization.<sup>45</sup>

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<sup>40</sup> See *Exemption Requirements – 501(c)(3) Organizations*, IRS.GOV, [HTTPS://WWW.IRS.GOV/CHARITIES-NON-PROFITS/CHARITABLE-ORGANIZATIONS/EXEMPTION-REQUIREMENTS-SECTION-501-C-3-ORGANIZATIONS](https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501-c-3-organizations) (last visited Mar. 10, 2017).

<sup>41</sup> The NCAA has been charged with defending its non-profit status due to critics likening the exorbitant coaching salaries to prohibited compensation to private entities, but have withstood the challenges in the courts based on a broad interpretation of what the term, “reasonable,” means. See John Sigety, *Could the NCAA Lose Its Tax-Exempt Status?*, THESPORTSEQUIRE.COM (May 27, 2014), <http://thesportsequires.com/could-the-ncaa-lose-its-tax-exempt-status/>. The court found that a reasonable standard can be determined from comparing salaries to those in similar fields, including the professional realm like the NFL, which happened to forfeit its’ tax-exemption status in 2015. *Id.*; see also Drew Harwell, *The NFL is Dropping its Tax-exempt Status. Why that Ends Up Helping Them Out.*, THE WASHINGTON POST (Apr. 28, 2015), [https://www.washingtonpost.com/news/business/wp/2015/04/28/the-nfl-is-dropping-its-tax-exempt-status-why-that-ends-up-helping-them-out/?utm\\_term=.5ff376e7899a](https://www.washingtonpost.com/news/business/wp/2015/04/28/the-nfl-is-dropping-its-tax-exempt-status-why-that-ends-up-helping-them-out/?utm_term=.5ff376e7899a).

<sup>42</sup> See *Exemption Requirements – 501(c)(3) Organizations*, *supra* note 36 (outlining guidelines for any business or organization to maintain tax-exempt status under §501(c)(3)); see generally 26 U.S.C.S. § 501(c)(3) (2017).

<sup>43</sup> *Where Does the Money Go?*, NCAA.ORG, <http://www.ncaa.org/about/where-does-money-go> (last visited Mar. 10, 2017).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; see also *infra* at Appendix A.

What cannot be ignored is that the total investments are matched by what is given back to the Division I basketball fund and Division I Championships.<sup>46</sup> While every dollar of this revenue has been accounted for in terms of the annual audits, there can be no argument that there is not more than enough wealth to at least contemplate redistributing some small percentage towards a long-term disability or medical care fund for, “retired,” student-athletes. After all, the NCAA is a money making behemoth, capitalizing on student-athletes all in the name of supporting their scholarship and the future well-being; shouldn’t the organization be more than willing to place a heavy emphasis on “student,” coming first and foremost in its actions as well as its campaigns?

### PART III: THE ACTUAL IMPACT OF COVERAGE GAPS

#### *A. Getting to the Specifics, What the NCAA Bylaws actually stipulate*

The NCAA makes their coverage responsibilities crystal clear in bylaw 3.2.4.8, which states that some form of accidental injury insurance coverage is mandatory for student athletes, because they will not be held liable for injuries that are common and incidental to the student-athlete experience.<sup>47</sup> As the policy stands, most injuries suffered by student athletes will be paid for either by a private insurance policy or through a member institution.<sup>48</sup> The deductible itself is a mechanism to prevent the NCAA’s catastrophic injury coverage from kicking in, as most common orthopedic injuries will not carry a price tag quite as lofty as \$90,000,<sup>49</sup> though the deductible on an out of network provider or uncovered diagnostic test or certain individual coverage options available in the marketplace through the Affordable Care Act (ACA) could leave families with thousands of dollars in unexpected medical costs.

Muddying the waters even further, the NCAA is unclear about where this mandatory insurance must come from.<sup>50</sup> Though many universities self-report that they supply their student athletes with primary insurance coverage at the Division I

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<sup>46</sup> See *Where Does the Money Go?*, *supra* note 42.

<sup>47</sup> See NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, *supra* note 1.

<sup>48</sup> See Walsh, *supra* note 34.

<sup>49</sup> “Knee injuries are generally less debilitating, but with around 4,000 incidences per year, they’re the most common in college football and cost roughly \$11,000 to repair.” Walsh, *supra* note 34.

<sup>50</sup> See 2016-2017 NCAA DIVISION I MANUAL art.3 § 3.2.4.8.1.

Such insurance coverage must be of equal or greater value than the deductible of the NCAA catastrophic injury insurance program and may be provided through the following sources: [D] (Adopted: 4/28/05 effective 8/1/05)

- (a) Parents’ or guardians’ insurance coverage;
- (b) Participant’s personal insurance coverage; or
- (c) Institution’s insurance program

level, it is a decision ultimately left to the school.<sup>51</sup> Some schools only supply a secondary form of coverage to athletes, picking up costs that fall outside the scope of the personal insurance plans the student-athletes purchase.<sup>52</sup> Others choose not to self-report on the subject at all.<sup>53</sup> The ambiguity in this bylaw has led to confusion within a healthcare system that is already extremely complex on its own.<sup>54</sup> Sometimes student-athletes or families are unfamiliar with the ins and the outs of their coverage where things like specific testing for brain trauma through CAT scans, MRI's or orthopedic surgery may not be covered.<sup>55</sup> This coverage lapse often results in costly bills that the athlete is not even made aware of, which can adversely affect credit and their financial future.<sup>56</sup> While it is common for universities to help cover costs incurred in these situations, it is a policy that is not enforceable or regulated by the NCAA.<sup>57</sup> If the NCAA is so concerned with the concept of "extra-benefits," how can it justify overlooking this policy decision and the possible unequal advantages it has proven to provide?<sup>58</sup>

It is important to highlight that while the exact number of a member institution's scholarship athletes that come from households at or below the poverty level in many states is unknown, it is safe to conclude that at least one "protected," student-

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*Id.*

<sup>51</sup> See Jon Solomon, *College athletes' rights: NCAA requires health insurance, but schools decide what to pay*, AL.COM, (Feb. 19, 2012), [http://www.al.com/sports/index.ssf/2012/02/college\\_athletes\\_rights\\_ncaa\\_r.html](http://www.al.com/sports/index.ssf/2012/02/college_athletes_rights_ncaa_r.html).

<sup>52</sup> *Id.* (discussing Auburn's policy of secondary coverage for all expenses that are not covered by student-athlete's primary accidental injury insurance provider).

<sup>53</sup> *Id.* (stating a spokesperson for Auburn speculates that differences found in financial reporting for medical and insurance spending could be due to different standards for reporting or the choice not to report at all).

<sup>54</sup> See Walsh, *supra* note 34; *infra* Part III (C) and accompanying text.

<sup>55</sup> Sheely, *supra* note 4.

For example, student-athlete or parent policies may not cover all tests or procedures necessary to evaluate an injury. Or there may be situations where medical services provided on or near campus may be out of network for that policy. In addition, even if a school provides the coverage, the terms of that accident policy may require the parent/guardian or the student-athlete to cover any out-of-network costs or even some co-pays or deductibles.

*Id.*

<sup>56</sup> See Walsh, *supra* note 34; *infra* Part II (C).

<sup>57</sup> See Sheely, *supra* note 4; see also 2016-2017 NCAA DIVISION I MANUAL art.3 § 3.2.4.8.1 (stipulating that the member university certify insurance, omitting any requirement regarding who provides the coverage).

<sup>58</sup> See 2016-2017 NCAA DIVISION I MANUAL art.16 § 16.11.2.1 *supra* note 28.

athlete may be unable to afford adequate personal injury policies. This is an unacceptable demonstration of how the NCAA falls short of its 501(c)(3) mission to put the safety, health and well-being of student-athletes first.<sup>59</sup>

The final and most unsettling flaw in the current structure of the catastrophic injury program, is the time limitations set for reporting and assessing injuries.<sup>60</sup> In order to qualify for the long term benefits outlined in the program, one must report the injury and residual effects, “within twenty-four consecutive months immediately following the date of the accident.”<sup>61</sup> There is no coverage granted to student-athletes who do not realize and report the impacts of severe injuries until later on in life.<sup>62</sup> Because member universities can deny secondary coverage to student-athletes at will, athletes with minimal primary policies are at risk.

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<sup>59</sup> 29 U.S.C §501(c)(3) (2017).

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

*Id.*

<sup>60</sup> See NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, *supra* note 1.

<sup>61</sup> *Id.*

“Covered Accident” means an accident that occurs while the Policy is in effect, which directly results in bodily injury or death (not excluded from coverage by the Policy Exclusions and Limitations) of an Insured Person, and which: a) occurs while he or she is participating in a Covered Event; or b) occurs during Covered Travel to or from the location of a Covered Event; or c) occurs during a temporary stay at the location of a Covered Event held away from the location of the Insured Person’s Participating School while the Insured Person is engaged in an activity or travel that is authorized by, organized by or directly supervised by an official representative of the Insured Person’s Participating School; or d) results from a cardiovascular accident or stroke or other similar traumatic event caused by exertion while participating in a Covered Event; and: a) for which the Insured Person Incurs a Covered Loss, within twenty-four (24) consecutive months immediately following the date of the accident, in excess of the Covered Accident Deductible; or b) that results directly in the death (not excluded from coverage by the Policy Exclusions and Limitations) of the Insured Person within twelve (12) consecutive months immediately following the date of that accident.

*Id.*

<sup>62</sup> *Id.*

Sometimes only so much time has passed as it takes to discontinue a student-athlete's amateurism eligibility, for example, entry into the NFL draft, before the effects of an injury are noticed and reported.<sup>63</sup> Unfortunately, at the point the injury is discovered and then reported the athlete is no longer a student-athlete and therefore ineligible for NCAA catastrophic coverage that he otherwise may have received.

*B. Significance of Such Policies in Light of Current Brain and Spinal Injury Research and Long Term Health Effects*

The policy of accidental injury coverage only being applicable for "covered events" while the student-athlete is still eligible at a member university is paramount today in light of results from research being done on brain trauma and spinal injury from contact sports. Though brain trauma and spinal cord injury are not the only injuries covered by the NCAA's catastrophic injury program,<sup>64</sup> they make up a large portion of the injuries subject to coverage outside the \$90,000 deductible.<sup>65</sup> What is troubling is medical research proving that lasting long-term impacts of these injuries are not assessable immediately upon injury.<sup>66</sup> Among the list of suspected long-term

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<sup>63</sup> See generally Walsh, *supra* note 34. Stanley Doughty, a student-athlete football player for the University of South Carolina, whom upon being drafted and submitted to a mandatory physical examination by the Kansas City Chiefs was informed he had suffered a severe and career ending neck injury previous to training camp. *Id.* Doughty was told that due to the severity of his condition, he was no longer part of the Chief's organization. *Id.* Doughty suffered multiple head injuries while playing for USC, but was diagnosed with and treated for a typical concussion by university medical personnel. *Id.* With a few days' rest he was cleared and back on the field. See Walsh, *supra* note 34. Additionally, as the injury was reported after the severance of Doughty's athletic eligibility, USC maintained they were not responsible for any medical expenses associated with the injury. *Id.*; see also NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, *supra* note 1.

<sup>64</sup> The definition also encompasses "indirect injuries" such as cardiac arrest and heat stroke. See UNIVERSITY OF NORTH CAROLINA CHAPEL HILL, *CATASTROPHIC SPORTS INJURY RESEARCH*, (Spring, 2014), <https://nccsir.unc.edu/files/2013/10/NCCSIR-32nd-Annual-All-Sport-Report-1982-2014.pdf>.

<sup>65</sup> Quinten Plumber, *NCAA faces seven more concussion-related class actions*, (Sep. 30, 2016), <http://legalnewsline.com/stories/511013052-ncaa-faces-seven-more-concussion-related-class-actions>; see also Walsh, *supra* note 34 (detailing that the NCCA reported 841 spinal injuries in the sport of football alone annually).

<sup>66</sup> Current research indicates that CTE, a devastating brain disorder resulting from brain and spinal trauma, is not diagnosable until death. Even more troubling is that it is highly prevalent amongst deceased NFL football players. See Peter Carfagna, *NFL CONCUSSION LITIGATION STUDY GUIDE*, at 24 (Updated 2016).

effects of concussions<sup>67</sup> one will find degenerative diseases such as Alzheimer's Disease, Parkinson's Disease, ALS and Chronic Traumatic Encephalopathy (CTE),<sup>68</sup> with CTE being non-diagnosable until death.<sup>69</sup> These degenerative diseases are extremely expensive to treat,<sup>70</sup> and may not be subject to coverage of post-collegiate employment insurance plans.<sup>71</sup> Even worse, this employment may not offer viable means to purchase and plan for long-term care and the heavy financial burdens associated with its need.<sup>72</sup> Often times, when an athletic scholarship is revoked, the student-athlete does not have the means or motivation to finish and attain their degree.<sup>73</sup> It is unclear whether the future will yield a more efficient diagnostic process, but as it stands currently, these long-term effects should be exactly what the catastrophic injury program aims to cover and yet those that suffer from these at the

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<sup>67</sup> Defined as, "A concussion is a brain injury caused by a force transmitted to the head from a direct or indirect contact with the head, face, neck, or elsewhere, which results either in a collision between the brain and skull or in a strain on the neural tissue and vasculature." Daniel H. Daneshvar, *Long Term Consequences: Effects on Normal Development Profile after Concussion*, 2, (Nov. 1, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3208826/pdf/nihms-316875.pdf>.

<sup>68</sup> *Id.* at 7-9.

<sup>69</sup> See Carlos Dias Jr., *The Long-term Effects of Concussions on NFL Players*, FORBES (Sep. 30, 2015, 3:00 PM), <https://www.forbes.com/sites/carlosdiasjr/2015/09/30/the-long-term-effects-of-concussions-on-nfl-players/#a27c1e711b5d>.

<sup>70</sup> See Lisa Brodoff, Article, *Planning for Alzheimer's Disease with Mental Health Advance Directives*, 17 ELDER L.J. 239, 271 (discussing the high costs of long-term nursing home and live in assistance associated with neural function degenerative diseases).

<sup>71</sup> See *id.* at 273; see also Janemarie Mulvey, *The Importance of LTC Insurance for the Retirement Security of the Baby Boomers*, 21 BENEFITS Q. 48, 48 (2005) (stating that less than 10% of Americans have long-term care insurance).

<sup>72</sup> See Jaime P. Hopkins, Theodore T. Kurlowicz & Christopher P. Whoerle, Article, *Leveraging Filial Support Laws Under the State Partnership Programs to Encourage Long-Term Care Insurance*, 20 WIDENER L. REV. 169, 171-72 (2014).

Chronic illnesses such as diabetes or a permanent disability also increase the likelihood of needing long-term care. Alzheimer's disease is the leading cause for long-term care, and the likelihood of being impacted by Alzheimer's increases with age. For example, Alzheimer's disease impacts one in eight people over age sixty-five, but half of people over age eighty-five. Further, the United States Census Bureau predicts the number of those aged eighty-five or older will more than triple in size from 2010 to 2060, from 5.9 million to 18.2 million.

<sup>73</sup> See Branch, *supra* note 14; see also Walsh, *supra* note 34.

hands of college athletics are exempt from coverage per the strict reporting time tables established in the policy.<sup>74</sup>

*C. Assessing the Outcomes of Ambiguity in Primary Coverage Responsibility.*

The current state of accidental injury coverage leaves significant uncertainties in place for young adults to navigate during their careers as student-athletes.<sup>75</sup> There have been many cases where the member university will in fact supply accidental injury insurance for their athletes.<sup>76</sup> It seems commonplace that even if the student-athlete is required to acquire their own primary policy, the member university is a secondary provider for costs that fall outside the scope of the primary coverage.<sup>77</sup> When attaining coverage, the end is not so much an issue as the means. Per Bylaw 3.2.4.8.1, the NCAA is not concerned with where this coverage comes from, whether it be a parent, the university or the student themselves.<sup>78</sup> But what must be scrutinized here is the ability of these young adults to shop the copious convoluted, and now un-promised,<sup>79</sup> healthcare products available to them effectively and affordably.

For those student athletes not lucky enough to be grandfathered into a parent's coverage until age twenty-six,<sup>80</sup> this can be a stressful and confusing task. Each state was required under the Affordable Care Act to implement and maintain an active healthcare marketplace or exchange by the year 2014.<sup>81</sup> While these websites are available to shop and purchase various coverage packages, the degree to which they are user friendly as well as informative varies greatly.<sup>82</sup> To add to the confusion, the

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<sup>74</sup> See NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, *supra* note 1; see also accompanying text, *supra* note 6.

<sup>75</sup> See generally, Walsh, *supra* note 34.

<sup>76</sup> See Solomon, *supra* note 50.

<sup>77</sup> *Id.*

<sup>78</sup> See 2016-2017 NCAA DIVISION I MANUAL art.3 § 3.2.4.8.1.

<sup>79</sup> *Infra* note 71 and accompanying text.

<sup>80</sup> See *Young Adult Coverage*, HHS.GOV, (last updated Jan. 31, 2017) <http://www.hhs.gov/healthcare/about-the-law/young-adult-coverage/index.html>.

<sup>81</sup> See 42 U.S.C.A. §18001(a) (2010).

<sup>82</sup> "The actual exchanges are all in various states of operation." Dan Munro, *Average Cost of Obamacare 'Silver' plan - \$328 per Month*, FORBES.COM, (Sep. 29, 2013, 10:35 AM), <http://www.forbes.com/sites/danmunro/2013/09/29/average-cost-of-obamacare-silver-plan-328-per-month/#1a9247082ff0>; *infra* note 81 and accompanying text.

current transition between Presidential administrations and uncertainty on the “repeal and replacement” of the ACA could leave the athletes required to fend for themselves without a reliable healthcare industry altogether in the coming years.<sup>83</sup>

To think the NCAA does not consider the fact that a certain portion of its student-athletes are not subjected to these stresses and financial burdens to be an “extra benefit,” to those athletes is questionable. Those student-athletes do not have to find the time to work between practice, mandatory study tables and team workouts in order to pay for the accidental injury insurance coverage they have been provided by the university. If the NCAA will not allow any form of compensation for athletic achievement,<sup>84</sup> how can it explain allowing universities the discretion of choosing which student-athletes will be covered by university policies and which student-athletes must pay for their own? Relying on state exchanges requires time, resources and most importantly creates an uneven environment in which one student may not have money to spend, while another does, all because the NCAA refuses to impose minimum requirements to its member universities.<sup>85</sup>

Additionally, healthcare premiums are by no means affordable to the average income generating American, let alone to the student athlete barred by NCAA policy from receiving any extra benefit or receipt of compensation not commensurate with the going market for services rendered.<sup>86</sup> If a university is requiring a student-athlete to provide accidental injury insurance coverage for themselves, this may put added stress on the individual to forgo studies in order to work. The NCAA claims its policies are meant to prevent a conflicting situation such as this since education is intended to be at the forefront of a student-athlete’s priorities. The NCAA has even taken disciplinary action against coaches who have taken it upon themselves to help a student athlete pay a healthcare premium, for which the coach was reimbursed as soon as the student was able to earn the funds.<sup>87</sup> If the NCAA identifies a coach’s

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<sup>83</sup> *Compare GOP Bill: Repeals Parts of Obamacare, Retains Some Subsidies*, NPR.ORG (Mar. 17, 2017, 5:01 AM), [http://www.npr.org/2017/03/07/518956919/gop-bill-repeals-parts-of-obamacare-retains-some-subsidies?sc=17&f=3&utm\\_source=iosnewsapp&utm\\_medium=Email&utm\\_campaign=app](http://www.npr.org/2017/03/07/518956919/gop-bill-repeals-parts-of-obamacare-retains-some-subsidies?sc=17&f=3&utm_source=iosnewsapp&utm_medium=Email&utm_campaign=app); with Susan Davis, *House GOP Says Health Care Fight Not Over, But Offers No Path Forward*, NPR.ORG (Mar. 28, 2017, 2:23 PM), <http://www.npr.org/2017/03/28/521800963/house-gop-says-health-care-fight-not-over-but-offers-no-path-forward> (quoting House Majority Leader Kevin McCarthy, “We promised that we would repeal Obamacare, and that’s exactly what we’re going to do.”).

<sup>84</sup> See 2016-2017 NCAA DIVISION I MANUAL art.16 § 16.02.3.

<sup>85</sup> See Sheely, *supra* note 4 (discussing scrutiny the NCAA has faced over the confusion that their lack of regulations on this matter has caused student athletes and families).

<sup>86</sup> See 2016-2017 NCAA DIVISION I MANUAL art.12 § 12.4.1.

<sup>87</sup> See NCAA Compliance Assistant LSBDi Database, Division I minor infractions.

assistance in making an on-time insurance payment so that coverage does not lapse as impermissible and subjects the player to ineligibility, it seems unfathomable that those student-athletes belonging to programs who provide the requisite accidental injury coverage are not in receipt of an “extra benefit,”<sup>88</sup> of the same caliber.

Finally, we are left with the issue of treatments and assessments not covered by the primary accidental injury program. While self-reporting studies show member universities often cover these excess expenses, there are cases in which they do not.<sup>89</sup> An example of this can be found in the story of Oklahoma Sooners basketball player Kyle Hardick. As an exceptional teenage athlete, and 6’9” college basketball prospect, Hardick only had eyes for Oklahoma.<sup>90</sup> He and his family created a relationship with then head coach Jeff Capel, who had promised Hardick a place on the Sooner’s roster at age fourteen.<sup>91</sup> Three months into his freshman year at Oklahoma Hardick suffered a painful knee injury. Hardick received an x-ray and MRI but was told by team doctors that there was no tear.<sup>92</sup> It was estimated that he may miss the first few games of the season but the effects of the injury would be minimal.<sup>93</sup> It turned out that Hardick would not play in a single game that season. To literally add insult to injury, a medical clinic began calling Hardick’s mother to collect on a payment for the MRI from the previous fall.<sup>94</sup> The medical facility informed Mrs. Hardick that the MRI results showed a torn meniscus, an injury the school doctors never reported.<sup>95</sup> When Hardick confronted the school about the discrepancy, he claimed that the coaching staff suggested he begin to look for options to play elsewhere.<sup>96</sup> When his mother pressed the university about the costs she was facing for the MRI, they denied her request they be compensated for these costs.<sup>97</sup>

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<sup>88</sup> See 2016-2017 NCAA DIVISION I MANUAL art.16 § 16.11.2.1, (“General Rule. [A] The student-athlete shall not receive any extra benefit. The term “extra benefit” refers to any special arrangement by an institutional employee or representative of the institution’s athletics interests to provide the student-athlete or his or her family members or friends with a benefit not expressly authorized by NCAA legislation.”)

<sup>89</sup> See Burnsed, *supra* note 4.

<sup>90</sup> See Walsh, *supra* note 34 (referencing the story of Kyle Hardick).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See Walsh, *supra* note 34.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

There are multiple concerns in this case; the school's ability to revoke an athletic scholarship for cause including injury incurred while participating in a "covered athletic event," a school's right to deny secondary medical coverage for procedures not covered by an athlete's primary policy, as well as the student-athlete's athletic performance dictating the outcomes of these decisions.<sup>98</sup> Fortunately for Kyle Hardick, his family could afford the medical costs associated with the procedures as well as surgery to reconstruct his meniscus, but what about those who are relying on their athletic scholarships to make health insurance premium payments? This scenario in other cases may result in a student-athlete left with unmanageable medical bills<sup>99</sup> and no ability to pay for the necessary surgery that the school declined to cover.<sup>100</sup> The NCAA should not be given so much arbitrary decision-making power if it means to stay in line with its mission of protecting student-athletes and supporting their successes academically and athletically.<sup>101</sup>

PART IV: POLICY CHANGES THAT IF ADOPTED COULD BRIDGE THE GAPS IN  
STUDENT-ATHLETE ACCIDENTAL INJURY COVERAGE

A. *Recommendation One: A Comprehensive Regulatory Scheme for Student Athletes Primary Accidental Injury Insurance Mandated and Enforced by the NCAA.*

First and foremost, a non-profit organization whose mission is to protect student-athletes and promote their success must be held responsible for setting clear standards for member universities in regards to accidental injury coverage for student athletes. There should be no purposeful ambiguities in the NCAA Bylaws for member universities to confuse student-athletes with and hide behind like those that exist today.<sup>102</sup> The solution is to challenge the NCAA's tax exemption status in Federal Tax Court claiming that it is impossible for the NCAA to be operating under their mission while allowing for these gaps in accidental injury coverage for its student-athletes, the very people the institution allegedly exists to protect. Though

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<sup>98</sup> See Walsh, *supra* note 34; see also Sinha, *infra* note 127.

<sup>99</sup> See Walsh, *supra* note 34. Detailing the story of Ohio University graduate who did not learn of unpaid medical bills from an injury sustained at a covered event, that he was lead to believe was covered by the University. *Id.*

<sup>100</sup> See Walsh, *supra* note 34. Here Walsh discusses the experience of Stanley Doughty, University of South Carolina Football player who was unaware of a debilitating spinal cord injury sustained in his tenure at University of South Carolina. *Id.* The injury lost him his contract with the NFL's Kansas City Chiefs and required surgery that U.S.C. later refused to cover. *Id.* Doughty was left without insurance, a completed degree, any future employment opportunities or the means to afford a surgery he desperately needed. *Id.*

<sup>101</sup> See What We Do, *supra* note 13.

<sup>102</sup> See *supra* Part III (C) (discussing the difficulties student athletes face navigating the complications of the ACA and mandated marketplace).

this has been attempted previously,<sup>103</sup> with current medical discoveries regarding long-term effects of contact sports<sup>104</sup> as well as settlements seen in professional sports,<sup>105</sup> now is the perfect time to leverage the threat of taxation on NCAA's revenue to illicit internal changes.

In order to maintain 501(c)(3) non-profit status<sup>106</sup> the NCAA should be required to amend the current Bylaws in order to require member universities to provide accidental insurance coverage for all academically enrolled student athletes up to the \$90,000 deductible of NCAA catastrophe coverage. To be clear this would be accidental injury coverage, applicable only to injuries sustained by student athletes as specifically outlined in current NCAA Bylaws.<sup>107</sup> This policy change would bear no influence on member universities individual choice to require health insurance packages by all students according to state laws for illness and preventative care.<sup>108</sup> It is a simple administrative shift for NCAA officials as it caters specifically to explicitly defined terminology and criteria already existing within the Bylaws.<sup>109</sup> While simple on an administrative level, leveraging the tax-exemption status of the NCAA is an incredibly influential tool to implement necessary change in long standing policy founded in self-interest and corruption<sup>110</sup> that will hold member

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<sup>103</sup> See Abrams *supra* note 39 and accompanying text.

<sup>104</sup> *Supra* Part II (B) and accompanying text.

<sup>105</sup> See NFL, *ex-players agree to \$765M settlement in concussion suit*, *supra* note 7.

<sup>106</sup> See John D. Columbo, *The NCAA, Tax Exemption and College Athletics*, ILLINOIS PUBLIC LAW RESEARCH PAPER NO. 08-08, 5 (Feb. 18, 2009) <https://pennstatelaw.psu.edu/file/NCAA26.pdf> (detailing requirements to maintain tax exemption status).

<sup>107</sup> See 2016-2017 NCAA DIVISION I MANUAL art.12 § 3.2.4.8. The current provision requires that member institutions, “certify insurance coverage for medical expenses resulting from athletically related injuries sustained by the following individuals while participating in a covered event...” *Id.*

<sup>108</sup> “Young adults in general make up the largest uninsured group nationally, according to a 2008 U.S. Census survey. In Texas, where Simpson lives, 46 percent of people ages 19 to 24 were uninsured in 2008.” Kiah Collier, *More State Schools Require Health Insurance for Students*, ABC NEWS (Dec. 7, 2009) <http://abcnews.go.com/Health/public-universities-require-health-insurance-students/story?id=9228242>.

<sup>109</sup> See 2016-2017 NCAA DIVISION I MANUAL art.12 § 3.2.4.2-3 (defining “Athletically Related Injuries,” and, “Covered Events.”). The suggested policy change would not effect in any terms, what injuries or activities qualify under the required accidental injury insurance. *Supra* note 79 and accompanying text.

<sup>110</sup> See *Friendly Reminder: The NCAA Invented The Term "Student-Athlete" To Get Out Of Paying Worker's Comp*, *supra* note 12 (founding member of the NCAA admits that the term “student-athlete,” is one of convenience and originated from no factual basis).

universities and the NCAA accountable for the health and safety of student athletes through their tenure with collegiate sports programs.

While accountability for student health and well-being is at the forefront of the argument for this suggestion, it is not the only benefit that would result from this policy change. For those of us who are familiar with the landscape of college sports outside the “power five,” conferences<sup>111</sup> made up of the twenty-five largest college athletic programs in the country<sup>112</sup>, this suggestion seemingly dooms many athletic programs with unimpressive and in some cases non-existent revenue streams. It begs the question how programs making little to no profits annually are supposed to afford accidental injury insurance premiums for all of their student athletes. The answer is simple they already are not and cannot sustain these programs.<sup>113</sup> But before this goes down the road of anger and mistrust in the merits of this argument, one must set the concept of insurance premiums aside, and ask how programs with negative profit margins are allowed to continue at all? The logical answer is that it is not in the interest of student’s health, safety or well-being to take resources away from the classroom to continue supporting failing athletic programs. In fact, rising tuition costs are something that most people in the United States are all too familiar with.<sup>114</sup>

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<sup>111</sup> See Jody W. Lipford & Jerry K. Slice, *Is the cost of college sports too high?*, NEWSWEEK (Jan. 5, 2016, 3:53PM), <http://www.newsweek.com/college-sports-basketball-football-411984>.

A recent piece in *USA Today* points out that only 24 of 230 Division I public schools generated sufficient revenues to cover the total costs of their athletic programs, and that each of these schools was a member of one of the “Power Five” conferences (the Atlantic Coast Conference, the Big Ten, the Big 12, the Pacific 12 and the Southeastern Conference).

*Id.*; see also Berkowitz, *infra* note 85.

<sup>112</sup> Just 23 of 228 athletics departments at NCAA Division I public schools generated enough money on their own to cover their expenses in 2012. Of that group, 16 also received some type of subsidy — and 10 of those 16 athletics departments received more subsidy money in 2012 than they did in 2011.

Steve Berkowitz, Jodi Upton & Erik Brady, *Most Division I athletic departments take subsidies*, USA TODAY (May 7, 2013, 10:15PM), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/>.

<sup>113</sup> See Lipford, *supra* note 111 (discussing that in actuality, only six of the two-hundred and one major Division I schools maintain self-sustaining profitable athletic programs).

<sup>114</sup> Matt Willie, Comment: *Taxing and Tuition: A Legislative Solution to Growing Endowments and the rising Costs of a College Degree*, 2012 B.Y.U.L. 1665, 1668 (2012).

Researchers have tracked movements in tuition for approximately thirty years. During that period, published college prices have consistently increased more rapidly than prices for other goods or services. In fact, since 1981, the average total cost, in

One large factor of the rising costs of education bearing a significant impact on the well-being of all students, not just student-athletes, are the costs member universities end up covering to maintain failing and thriving athletic programs alike.<sup>115</sup> Specifically concerning are the salaries demanded by the country's top coaching talent,<sup>116</sup> and the revenue reinvested in the organization to fund the marketing and promotion of the NCAA College Basketball Tournament and newly founded College Football Playoffs.<sup>117</sup> Again, justification for this policy shift lies in the NCAA's mission, if the school cannot afford to protect the health, well-being and future of the student athlete, let alone sustain an annual profit, the program probably shouldn't be spending subsidies intended for the classroom in order to sustain the NCAA's billion dollar business.<sup>118</sup> Member universities budgeting offices will receive the help they desperately need, if programs have to be discontinued because they are unable to provide for the safety and well-being of their student athletes through mandated accidental injury insurance coverage. It should be noted that while the implementation of this policy change may seem monumental, it is made even simpler with the fact that most universities report to cover all costs of injuries to their student athletes.<sup>119</sup> The regulation change just puts every athlete and program on the same footing and understanding, which seems to be the pinnacle of the NCAA's mission to begin with.

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constant dollars, of tuition, fees, room, and board at undergraduate institutions in the United States has more than doubled.

<sup>115</sup> *Id.* at 1670-71; *see also* Syrios, *supra* note 32 (stating that most universities subsidize athletic programs through student tuition and government subsidies).

<sup>116</sup> *See* Abrams, *supra* note 39 ("Paying coaches excessive compensation also makes less revenue available for other sports, causes many athletic departments to operate at a net loss, and may call into question the priorities of educational institutions,"); *see also* Appendix, A, Exhibit 1.

<sup>117</sup> *See* Appendix, A, Exhibit 2.

<sup>118</sup> The annual revenue between different college sports programs varies dramatically from sport to sport and school to school. In a study completed by ESPN in 2008, annual revenue and expense data was requested from all 120 football programs in the Division I Football Bowl Subdivision. *See College Athletics Revenues and Expenses*, ESPN.COM (last updated 2008) ([http://www.espn.com/ncaa/revenue/\\_/page/2](http://www.espn.com/ncaa/revenue/_/page/2)). Though not all programs participated, the gap in revenue between the highest and the lowest school equates to \$115,376,989.00. *Id.* When expenses are taken into account, this picture gets uglier, the lowest revenue generating program actually sustained expenses exceeding their annual revenue and leaving the programs profit margin in the negative. *Id.*

<sup>119</sup> *See* Burnsed, *supra* note 4 ("The survey findings, though, indicate that schools are doing much more than meeting the legislated minimum requirements. Eighty-four percent of Division I schools indicated that they pay all the costs of athletically related injuries even if a student does not have his or her own primary insurance.").

Mandating member universities be responsible for providing all student-athletes with accidental injury coverage, unless they opt to provide their own, will result in at least one of two positive outcomes. First, it will encourage universities to take a critical look at the costs and revenues of their athletic programs as well as their incoming grants and financial support. It is clear that many sports programs and benefits exists in schools that are struggling financially to support academia, let alone an expansive athletic department.<sup>120</sup> Secondly, and more importantly, it results in comprehensive accidental injury insurance coverage for all student-athletes. The latter should be viewed as the crucial underpinnings of the NCAA's mission, and what allows it to continue to operate as a 501(c)(3) non-profit organization.<sup>121</sup> Though it may mean that coverage choices for student-athletes and families may be limited to that offered by the university and that universities will have to allocate more funds to athletics annually to ensure an accidental injury coverage, it would ultimately result in the elimination of surprise coverage gaps that student-athletes may be unaware of until post-graduation, or scholarship revocation when it is far too late.

*B. Individual State Legislation Outlining Guaranteed Rights of Student Athletes Attending "Qualifying" Member Universities.*

While the first suggestion that the NCAA be urged to require that universities be responsible for covering the costs of coverage gaps for their student-athletes through mandatory accidental injury insurance coverage, it would be naïve to rely on the tax court to protect student-athletes given its historical legislative posture.<sup>122</sup> Another viable option is to implement policy changes through state legislature. In light of the recent research showcasing the severity of traumatic head injuries associated with contact sports, the State has a ready-made excuse for action. This can be taken in two

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<sup>120</sup> Though this article does not delve into the implications of Title IX, this proposition is made with the expectation that all equal opportunity criteria continue to be met. It will take a deep analysis of individual university budgeting and distribution of revenues and grants to successfully assess and re-organize any given athletic program. It should not be assumed that the elimination of certain sports programs and teams be based on sex. *See* 20 U.S.C.S. § 1681 (LexisNexis, Lexis Advance through PL 115-9, approved 3/13/17); *see also* Christine I. Hepler, *Symposium: A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 442 (2013) (detailing that though Title IX does not mention athletics specifically in the statutory language it requires that schools offer male and female students equal opportunity to play sports, receive a share of scholarship money, and be treated equally in respects to facilities, equipment and coaching).

<sup>121</sup> *See* 26 U.S.C.S. § 501(c)(3); *see also* Goodwin *supra* note 35.

<sup>122</sup> *See* Pete Thamel, *Amid Questions, Brand Says N.C.A.A. Tax Status is Merited*, THE NEW YORK TIMES (Oct. 31, 2006), <http://www.nytimes.com/2006/10/31/sports/ncaafotball/amid-questions-brand-says-ncaa-tax-status-is-merited.html> (establishing that challenges to tax exemption status have been futile in the past).

routes, the first being modeled after something along the lines of California's Student Athlete Bill of Rights<sup>123</sup>, and the second in the form of mandated research and empirical data of long-term side effects of college injuries to be used in further legislative decision-making processes.

While California's recent legislation is a large step in the right direction, when it comes to the health, safety and futures of student-athletes it is an under-inclusive mechanism to remedy the problem of coverage gaps.<sup>124</sup> The legislature based mandatory participation in this bill of rights on average annual revenue generated from marketing contracts exceeding \$10,000.<sup>125</sup> Consequently eliminating the responsibility of smaller schools to safeguard their student-athletes. It is unacceptable to weigh the value placed on protecting the well-being of student athletes through mandatory accidental insurance coverage with the marketing capabilities of a member university.

States moving forward on this initiative should focus on an all-inclusive program that requires that incoming grants and donations allocated to athletic departments be spent first on ensuring coverage of all student-athletes for accidental injury insurance up to the NCAA's required \$90,000 deductible. Though it would be left to the discretion of individual legislators, it is advised that student-athletes who wish to remain covered under their parent's insurance policies<sup>126</sup> are allowed to waive university provided coverage to do so. Similar to existing California Student Athlete Bill of Rights, new legislation should tackle the far too common occurrence of scholarship revocation based on injury, underperformance of a student-athlete on the playing field, or a change in coaching staff. Guaranteeing four year athletic scholarships up front, regardless of injury, is one suggested route.<sup>127</sup> Another is to have a system in place that replaces revoked athletic scholarships with another academic scholarship to ensure success off of the field for student-athletes that have their scholarships revoked at will due to a debilitating or career ending injury at a

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<sup>123</sup> 2011 Bill Text CA S.B. 1525, Ch. 625 (Sep. 27, 2012), *amended by act Mar. 27, 2012.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> This provision would also be subject to the unstable current political climate. *See GOP Bill: Repeals Parts of Obamacare, Retains Some Subsidies*, *supra* note 81 and accompanying text. If the ACA is successfully repealed, coverage up to age 26 may no longer be available. *See* 42 U.S.C.A. §18001(a)(2010). In this case, schools would be responsible as though the waiver never existed.

<sup>127</sup> The Pac-12 Conference has vowed in recent years to honor four year athletic scholarships, as opposed to annual at will revocable ones. *See* Smriti Sinha, *The NCAA's Shameful Failure to Ensure Its Athletes*, *VICE SPORTS*, (Nov. 5, 2014) [https://sports.vice.com/en\\_us/article/the-ncaas-shameful-failure-to-insure-its-athletes](https://sports.vice.com/en_us/article/the-ncaas-shameful-failure-to-insure-its-athletes). They have also "promised" to cover student-athlete's medical bills for up to four years post-graduation. *Id.* This is a promising start, but no true fix to the realities of long-term care necessary after traumatic head, neck and spine injuries.

“covered event.”<sup>128</sup> The logistics behind funding these mechanisms will inherently vary state by state, but a suggestion to start with would be for member universities to petition the NCAA to create an “Academic Success Assurance Fund,” by divesting a small portion of its annual revenue distribution that goes back to funding the NCAA Division I March Madness Tournament, as this is the largest annual distribution made.<sup>129</sup> The benefit of creating these funds and assurances through state legislation is that if the NCAA declines to change its practices, there will be a mandatory legal funding mechanism ensuring the programs success.<sup>130</sup> This mandatory accidental injury insurance coverage coupled with a scholarship guarantee would allow student-athletes to complete their degrees free from the stress of unnecessary financial burdens and allow them to prepare for the future that the NCAA promises off of the court.<sup>131</sup>

The second measure of this suggested state level legislation is a guaranteed form of long-term care that can be enacted retroactively if symptoms and complications from a recorded injury from a covered event arise. Contrary to the NCAA Bylaws which have strict reporting windows, many of the injuries that plague ex-college athletes do not show up during their time at school.<sup>132</sup> Though some states like California and conferences like the Pac-12 are taking steps in the right direction,<sup>133</sup> the idea of long-term care is far from clearly established, and could be the key to safeguarding student-athletes and the legitimacy of the NCAA and its mission.<sup>134</sup> Here, the best case scenario would be state legislatures mandating the creation of some form of post-collegiate medical relief fund, where student-athletes with documented proof of injury at a “covered event,” could apply for funds to help cover

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<sup>128</sup> As seen in the California Student Athlete Bill of Rights. *See* Cal. Educ. Code § 67452 (West, 2013).

<sup>129</sup> *See* Appendix, A, Exhibit 1. This is a mere suggestion, there are ample other sources of revenue redistribution that could be used if this was not an agreeable suggestion to NCAA officials.

<sup>130</sup> This article does not claim to be an expert suggestion as to the restructure of university budgeting, and leaves the specific details to further empirical data and research.

<sup>131</sup> *See* NCAA, *What We Do*, *supra* note 13.

<sup>132</sup> Many injuries to the neck, back, and head do not manifest until much later on in life. Examples like CTE or chronic back and neck pain can cause serious issues with gaining and maintaining employment over time in many manual labor industries. This does not even take into account the ramifications that repeated contact to the head, as seen in most all contact sports, can do to diminish cognitive function with age.

<sup>133</sup> *See* Cal. Educ. Code § 67452 (West, 2013). *See also* Walsh, *supra* note 34 and accompanying text (discussing California’s new “Student-Athlete Bill of Rights,” enacted in October 2012); *see also* Sinha, *supra* note 127.

<sup>134</sup> *See* NCAA, *supra* note 11 and accompanying text.

actual medical costs resulting from complications from these injuries. This differs from the NCAA Catastrophic Injury Coverage which in some cases ensures payments for living expenses and accommodations along with actual medical costs,<sup>135</sup> because it would only apply to actual medical expenses, and would be funded by member universities.

This suggestion requires that program approval would be subject to high threshold of scrutiny and actual evidence of medical expenses. It would be best for legislatures to base these funding requirements upon revenue standards<sup>136</sup> that apply to all member universities and are tiered based on revenue amounts from their athletic programs annually. It is important to note that these standards are not based on reported profit margins, even the most prosperous of programs rely heavily on state subsidization, grants and donations.<sup>137</sup> In an ideal world, all NCAA member universities would be included by law, and be required to abide by this legislation.<sup>138</sup> Though the numerical values for tiered contributions to the post-collegiate medical relief funds may vary state to state, the content of the legislation should aim to be uniform. This note suggests that this pool of funds be generated based on a mix of the percentage of media rights contracts the university holds, commercial apparel sales, and program size. No member university with an athletic program containing contact sports would be exempt from some contribution to the suggested post-collegiate medical relief fund, however the varying level of contribution would depend on the aforementioned factors. Though the idea of legislation in today's bi-partisan political climate seems cumbersome, safety, health, and well-being of student-athletes should not be an issue divided by bi-partisan politics. Safeguarding the future of young adults in this country, especially those who provide a form a wildly viewed entertainment should be something easily agreed upon by all political affiliations.

The final legislative suggestion, is both the most likely to be successful, but also the least likely to ensure immediate remedy for the coverage gaps plaguing college sports. State legislatures, at minimum, should require member universities to begin studying and reporting the long-term financial and physical effects of injuries common to contact sports.<sup>139</sup> Demanding that studies regarding prevalence, long-

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<sup>135</sup> *Infra* Part II(B) (outlining NCAA's Catastrophic Injury Coverage).

<sup>136</sup> *See* Cal. Educ. Code § 67452 (West, 2013).

<sup>137</sup> *See* Lipford, *supra* note 111; *see also* Lipford, *supra* note 113 and accompanying text.

<sup>138</sup> Again, this note by no means claims to be a source of budgeting expertise, and is aware that revenue standards may in fact be the only way to successfully implement suggested programs, as seen in California. *See* Cal. Educ. Code § 67452 (West, 2013).

<sup>139</sup> This issue, though one that many schools will look to avoid, as it has the potential to be costly, appears to be stepping into the lime light with current pending concussion litigation and emerging scientific evidence of the long term effects of brain and spinal cord injuries fairly common in most contact sports. *See* Solomon, *supra* note 50. "I don't think that's a study the NCAA wants to see," commented Ramogi Huma, the President of the National College Players Association. *Id.* Huma

term effects, and financial burdens is long overdue. Studies have surfaced in the professional realm,<sup>140</sup> in effect guaranteeing that if member universities take the time to look, evidence will surface. This evidence, applicable specifically at the college level, is the catalyst necessary for the changes previously suggested.<sup>141</sup> Though ideally not the only action that should be taken by state legislatures, mandating studies in the realm of long-term effects of injuries sustained during “covered events,” will be the easiest way to get the ball of accidental injury insurance coverage gaps rolling.

Though there are different avenues for state legislatures to take in order to implement reform and bridge the accidental injury insurance coverage gaps plaguing the NCAA, it seems inaction is no longer excusable. Though this note leaves the particulars of budgeting to the experts, state level legislation has an incredible opportunity to right a great wrong in the world of college sports.

*C. Treat the Relationship Between Student Athletes and the NCAA as an Employment Contract in Regards to Long-Term “Post-Career” Benefit Entitlements for those Sustaining Catastrophic Injuries during Athletic Eligibility and Participation.*

Throughout the history of the NCAA there have been challenges to precedent holding there is no employee-employer relationship between student-athletes and member universities. To date these challenges have yielded no substantive legal change, though the door remains closed, it appears there may be a window of hope open for interpretation. To understand this problem fully requires recognition of the uphill legal battle at hand.<sup>142</sup> From cases regarding worker’s compensation claims all the way to the restraint of free trade and violation of the Sherman Act, the NCAA has prevailed through vacated judgments and motion dismissals.<sup>143</sup> The opportunity for future challenge lays in the relief being sought. What all of the previous ruling have in common is that they were searching for the right of player compensation.<sup>144</sup>

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goes further to state that he does not know of any current studies being conducted by the NCAA or member universities to document the long-term health effects of being a college football player. *Id.*

<sup>140</sup> See Hedin, *supra* note 7 (discussing the impacts of concussions on ex-NFL players).

<sup>141</sup> See generally Part III (A)-(B).

<sup>142</sup> *Supra* Part I (A).

<sup>143</sup> See generally Waldrep, 21 S.W.3d 692; see also generally O’Bannon, 802 F.3d 1049.

<sup>144</sup> See Kathryn Kisska-Schulz & Adam Epstein, *ARTICLE: Northwestern, O’Bannon and the Future: Cultivating a New Era for Taxing Qualified Scholarships*, 49 AKRON L. REV. 771, 772-73 (2016) (quoting T. Matthew Lockhart, Comment: *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA’s “Veil of Amateurism,”* 35 U. DAYTON L. REV. 175, 186 (2010) (noting the deference that

It is imperative that student-athletes continue to challenge their status as non-employees in their relationship with the NCAA in Federal court.<sup>145</sup> They must do this seeking new relief - the right to accidental injury insurance coverage during their tenure as a student-athlete as well as in the years to follow.

Recent history has shown us that while precedent may be difficult to overturn, it is not impossible.<sup>146</sup> The scary realities of concussion research on long-term impacts to brain function supply unprecedented evidence to the courts for consideration.<sup>147</sup> In fact, there are currently seven new class actions claims being brought in the Southern District of Indiana regarding concussion protocol bring the pending litigation case count up to twenty-two.<sup>148</sup> This medical evidence is the missing piece needed for the

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courts have given to the manner in which the NCAA defines and regulates amateurism according to its rules, more formally known as bylaws)).

<sup>145</sup> Student-athletes provide universities with many financial advantages. Student-athletes are distinct from private students for three reasons: (1) colleges do not view student-athletes as employees while these students generate both economic and non-economic benefits for colleges; (2) student-athletes are clearly distinct from private students; and (3) student-athletes and colleges have a 'special relationship' characterized by mutual dependence. See Andrew Rhim, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 MARQ. SPORTS L. J. 329, 331 (1996).

<sup>146</sup> An interesting topic similar to the pending concussion litigation and what it may mean for the NCAA, is how the National Football League (NFL) has responded to their concussion crisis. See *NFL Player Contract*, §13, §§33-34, SEC.GOV [https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10\\_3.htm](https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm) (last visited Mar. 30, 2017); see also *NFL, ex-players agree to \$765M settlement in concussion suit*, supra note 7. The NFL built in waivers of liability for new members of the NFL players association through addendums to the 2012 uniform player contract that was established through the collective bargaining process and players that sign when they join the league that cap any injury settlement and limit the scope of the claims. See *NFL Player Contract*, §13, SEC.GOV [https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10\\_3.htm](https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm) (last visited Mar. 30, 2017). General consensus among the public feel the limited billion-dollar total settlement is insufficient to cover the actual expenses of traumatic brain injuries that ex-NFL players have experienced. See Michael O'Keefe, *Experts Rip NFL's \$1B Injury Settlement*, NEW YORK DAILY NEWS (Nov. 19, 2014, 11:19 PM), <http://www.nydailynews.com/sports/football/experts-rip-nfl-1b-injury-settlement-article-1.2017106>. Additionally, the expansion the original waivers of recourse for injury, which are based on the premise of "informed consent," of athletes entering the league, are disturbing. If courts do consider changing the employment status of student-athletes, unionization would be likely and this could be used as relevant and guiding precedent for future decisions.

<sup>147</sup> *Supra* Part II (B).

<sup>148</sup> See Quinten Plummer, *NCAA Faces Seven More Concussion-Related Class Actions*, LEGALNEWSLINE.COM (Sep. 30, 2016, 11:26AM)

advance the country saw when athletes at Northwestern University brought their case to the National Labor Relations Board for consideration.<sup>149</sup> Though the claim ultimately failed on appeal, the language of the holding granted Northwestern right to unionize and collectively bargain, though the NLRB just declined to “assert jurisdiction,” in a case considering player compensation because the court believed it would destabilize labor-relations.<sup>150</sup> The basis for the ruling took into consideration the time spent by athletes, the schedules they adhere to and the amount of control they give to university officials and coaches while student-athletes.<sup>151</sup> There are all the elements of a contract executed between universities and student-athletes, from the signing of national letters of intent to the student-athlete codes of conduct that most student-athletes are required to commit to. Though historic cases hold otherwise, all the elements of a bargained for exchange are present.

It can be reasonably believed that the court would be inclined to consider the claim being brought as the right to unionize and collectively bargain for post-career or quasi-retirement healthcare benefits for injuries incurred during “covered incidents,” as opposed to player compensation. As litigation regarding concussion and other traumatic head, neck and spinal injuries continues to mount, the courts should have the overwhelming evidence necessary to overturn stare decisis. The courts should be willing to carve out an area of medical coverage modeled after an employee-employer relationship caveat without recognizing a relationship that would also include player compensation.

A final consideration regarding litigation against the NCAA is the likelihood it will encourage settlement to avoid court awarded damages or injunctive relief against current policies as was seen in the cases regarding players name, image and likeness rights.<sup>152</sup> Settling cases prior to a courts official ruling is the most common end to litigation brought today especially when the final result could end up being

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<http://legalnewsline.com/stories/511013052-ncaa-faces-seven-more-concussion-related-class-actions>.

<sup>149</sup> Ben Strauss & Steve Eder, *College Players Granted Right to Form Union*, THE NEW YORK TIMES (Mar. 26, 2014), <https://www.nytimes.com/2014/03/27/sports/ncaaf-football/national-labor-relations-board-rules-northwestern-players-are-employees-and-can-unionize.html>.

He ruled that Northwestern’s scholarship football players should be eligible to form a union based on a number of factors, including the time they devote to football (as many as 50 hours some weeks), the control exerted by coaches and their scholarships, which Mr. Ohr deemed a contract for compensation. ‘It cannot be said that the employer’s scholarship players are ‘primarily students,’ the decision said.’  
*Id.*

<sup>150</sup> See Kisska-Schulz, *supra* note 144, at 773.

<sup>151</sup> See Strauss, *supra* note 149.

<sup>152</sup> See generally *O’ Bannon*, 802 F.3d 1049; see also Graham Watson, *EA Sports Settles Lawsuit with College Athletes for \$60 Million*, YAHOO SPORTS (Mar. 15, 2016, 4:30 PM), <http://sports.yahoo.com/blogs/ncaaf-dr-saturday/ea-sports-settles-with-college-athletes-for--60-million-203005134.html>.

extremely costly.<sup>153</sup> Most financially savvy defendants realize the possible long-term effects of a loss in court, cut losses and pay out settlements to keep precedent as it stands. Hopefully enough of these large scale settlements will lead to internal reform, though experience dictates that this appears to be the least likely of outcomes. Until a court speaks specifically to this issue of the gaps in medical coverage and the ambiguities in the NCAA Bylaws that eliminate care for long-term injuries that may be initially underreported or unreported, there is still a chance for much needed change and reform.

The approach most likely to yield desired change would be to use all three suggestions simultaneously to provide necessary coverage for incoming student athletes in this uncertain political climate, clarify for prospective athletes and their families exactly what they can expect from their university as far as accidental injury insurance coverage, and ensuring some form of long-term care for debilitating injuries by the NCAA. While patience is required, implementation of each of these mechanisms, at the state and federal level alike, should yield the change student-athletes desperately need over time.

#### PART V. CONCLUSION

The problems that plague the NCAA are complicated and deeply entrenched in the organizations history.<sup>154</sup> But what is not complicated is the need for change. A non-profit organization generating over a billion dollars in annual revenues, founded in the name of safeguarding student-athletes well-being, safety and success in the classroom and on the field must be held to a higher standard. This article has suggested various plausible means to protect current student-athletes from financial burdens, prevent the unequal playing field that exists today in regards to accidental insurance coverage, and ensure that, "retired," student-athletes are not left paying for medical expenses incurred while funding the NCAA's billion-dollar industry.

The answer could be pushing for NCAA policy reform by challenging their 501(c)(3) tax-exempt status through the U.S. tax courts. However, it is more likely that change will come most quickly through state legislatures. New legislation can be modeled after California's Student-Athlete Bill of Rights, but ideally it will go a step further by applying to all NCAA member schools. It is also imperative that student-athletes continue to challenge the current legal precedent which denies student-athletes the contractual employer-employee relationship between universities and their student-athlete. Precedent denies this relationship exists, and therefore denies any entitlement to any type of post-career health coverage. But the recent NLRB ruling regarding Northwestern's football team seeking the right to unionize and collectively bargain should inspire some creativity in petitioning.

Coupling this acknowledgment of a contractual relationship between student-athletes and universities with the emerging medical research on the severity of the

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<sup>153</sup> According to a recent study, nearly 95% of pending lawsuits end in a pre-trial settlement. See James Hirby, *What Percentage of Lawsuits Settle Before Trial? What are Some Statistics on Personal Injury Settlements?* THE LAW DICTIONARY, <https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/> (last visited Mar. 4, 2018).

<sup>154</sup> *Supra* Part I (A) and accompanying text.

long-term effects of traumatic head, neck and spinal injuries,<sup>155</sup> it is easy to see change on the horizon. Professional sports have legally recognized the dangers of contact sports, and the long-term impacts they can have both physically and financially to athletes through billion-dollar settlements and new waivers of recourse in their player contracts.<sup>156</sup> It is time that the NCAA and the country face the music and hold this organization accountable as well. This note strongly advocates using all three suggestions as a means to ensure the protection of student-athletes and the guarantee of accidental insurance coverage to current and, “retired,” student-athletes.

Although this note neglects to address equal protection of student-athletes, there could be a compelling argument made that the discretion given to universities currently regarding who receives accidental injury insurance and who is required to supply their own is a violation of Title IX.<sup>157</sup> As a final thought, a bigger picture regarding the safety and well-being of student-athletes should be considered. If we have seen proof of the long-term physical and psychological effects caused by contact sports,<sup>158</sup> acknowledged the danger at the professional level through major settlements<sup>159</sup> and published medical studies, and even begun new programs limiting physical contact for minors,<sup>160</sup> shouldn't it be the mission of both the NCAA and member universities to protect the well-being and safety of their student-athletes? Perhaps the real answer here is that contact sports are approaching their end and that maybe contact sports should no longer have a place in college athletics, where the odds of future ramifications are nearly unavoidable, and the costs can be devastating.

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<sup>155</sup> See Dias, *supra* note 69; see also Brodoff, *supra* note 70.

<sup>156</sup> See generally, NFL Player Contract, [https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10\\_3.htm](https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm) (last visited Mar. 4, 2018).

<sup>157</sup> The discretion given to universities about who will receive coverage opens a door to arbitrary assignment of benefits based on factors like sex, race or athletic ability. How does an athletic department quantify the amount revenue generated by any particular student-athlete? And are these decisions made in compliance with what is required by Title IX?

<sup>158</sup> *Supra* Part II (B) and accompanying text.

<sup>159</sup> See *See NFL, ex-players agree to \$765M settlement in concussion suit*, *supra* note 7.

<sup>160</sup> Some states, for example the State of Ohio, have seen declining enrollment numbers in high school football in recent years. Numbers are dwindling by over 12,000 students. See Dallas Jackson, *Ohio High School Football Participation Dropping Dramatically*, *Stats Show*, WPCO CINCINNATI (Aug. 24, 2015, 6:35 AM), <http://www.wcpo.com/sports/high-school-sports/high-school-football/less-ohio-high-school-students-are-playing-football-stats-show>.

APPENDIX A

Exhibit 1

**2017 Revenue Distribution Plan**  
**TOTAL: \$560,034,297**

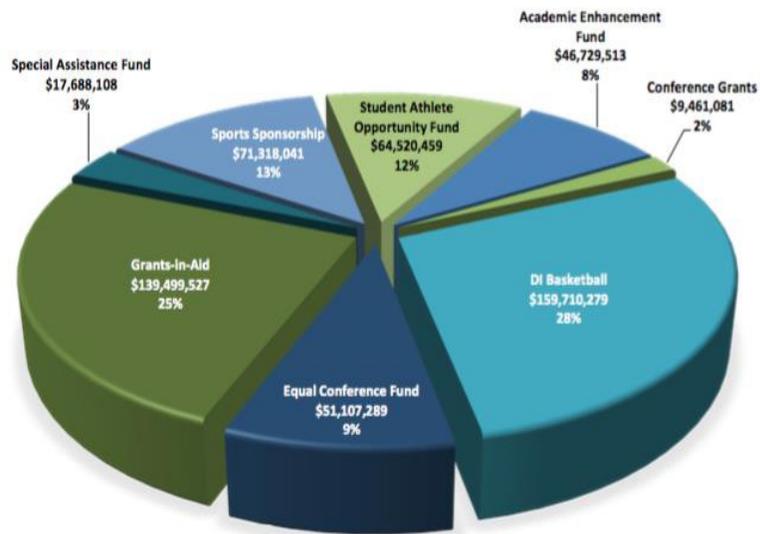


Exhibit 2

**HOW THE NCAA MAKES AND SPENDS MONEY, 2012-2013**

The NCAA made \$912.8 million last year, 84 percent of which came from one, three-week event: The Division I men's basketball tournament. Here's a look at where the NCAA's money comes from and how it's spent.

*Example: how to read the money flow*

Revenue from Division I Men's basketball tournament totaled \$769.4 million → NCAA: \$527.3 million on cash distributions to schools and conferences →

Numbers in millions; hover over for more details.

