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Pay for Play: Should Scholarship Athletes be Included within State Worker's Compensation Systems?

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COMMENTS

PAY FOR PLAY: SHOULD SCHOLARSHIP ATHLETES BE INCLUDED WITHIN STATE WORKER'S COMPENSATION SYSTEMS?

I. INTRODUCTION

"[T]he cost of the product should bear the blood of the workman."[1] This theory, which underlies all worker's compensation law, posits that injuries to employees, like the breakage of machinery, should be part of the cost of production by employers.[2] The theory is applicable to college sports, where the business is college athletics and the employees are the athletes. As one critic has stated, "Amateur athletics at the major college level is big business."[3] The rules of the National Collegiate Athletic Association ("NCAA") support the popular belief that college sports are only part of an overall educational experience,[4] but in reality, sports at major universities are big business.[5] In fact, collegiate sports have become so much of a business enterprise that they now need the benefits of a worker's compensation program. The policies and structures behind worker's compensation systems[6] suggest that scholarship athletes should be included in the protections of that system.

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1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984).

2. *Id.*

3. Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206 (1990). Some argue that the NCAA is operating a cartel for the purpose of restraining competition among its member institutions; thus, the result is to depress compensation to student athletes. Proponents of this view assert that the athletes are treated as "slave laborers" who are exploited for the purpose of expanding university coffers. The argument concludes that the athletes should be paid for providing their services to the universities, with their compensation determined according to market forces. Further, proponents suggest that this would result in a more just allocation of resources and would eliminate much of the hypocrisy which exists in major college sports. *Id.* at 216-17.

4. Generally, the NCAA is designed to maintain the educational focus of college sports. The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

NCAA CONST. art. I § 1.3.1.

5. *See infra* notes 130-46 and accompanying text.

6. *See infra* notes 7-32 and accompanying text.

This comment addresses the relationship between student athletes and their universities, and it discusses the obligations and duties that flow from this relationship. Specifically, this comment analyzes state judicial and legislative reactions to compensation claims brought by student athletes who were injured while playing under athletic scholarships at their universities. After examining generally the worker's compensation system and its possible applicability to college athletes, this comment evaluates the statutory efforts and case law that have allowed universities to avoid liability for injuries in most cases. Finally, this comment considers what should be done, and what is being attempted, to correct the inequities in the current situation.

II. WORKER'S COMPENSATION SYSTEMS IN GENERAL

Every American jurisdiction provides for some type of worker's compensation scheme.[7] The worker's compensation system developed as a reaction both to the harsh working conditions imposed upon most workers and to the slow progress of the common law to mandate improvements.[8] Liability under worker's compensation law is not based in tort, but rather upon a concept of "social insurance."[9] Liability is imposed on an employer because protection of workers is considered good for society. An employer's negligence is not the determinative factor.[10]

Worker's compensation laws are intended to achieve several goals by providing previously determined amounts of compensation to injured employees. The primary goal is to insure that an injured employee, and those who depend on him for support, will be adequately provided for while the employee is unable to work.[11] At the same time, the law aims to insure that the injured employee will receive sufficient medical care to facilitate a rapid recovery.[12] The system also seeks to provide monetary compensation for any permanent disability that may result from the injury.[13] Where it is likely that the injured employee will be unable to resume his prior occupation, compensation is awarded in order to rehabilitate or retrain that employee.[14] In the event that the employee dies as

7. U.S. CHAMBER OF COMMERCE, 1987 ANALYSIS OF WORKERS COMPENSATION LAWS vii (1987); KEETON et al., *supra* note 1, at 573.

8. *See* KEETON et al., *supra* note 1, at 568-71.

9. *Id.* at 568.

10. *Id.* at 573.

11. DAVID W. O'BRIEN, CALIFORNIA EMPLOYER-EMPLOYEE BENEFITS HANDBOOK 3 (6th ed. 1981).

12. *Id.*

13. *Id.*

14. *Id.*

a result of his injuries, the system provides dependents with compensation.[15] In other words,

> [t]he purpose of the award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. . . . In short the award transfers a portion of the loss suffered by the disabled employee from him and his dependents to the consuming public.[16]

In most states, the right to worker's compensation benefits is entirely statutory[17] and is not derived from common law.[18] Further, one court has held that "[r]ights, remedies and obligations rest on the status of the employer-employee relationship, rather than on contract or tort."[19] When a person is injured on the job, he is entitled to compensation under the worker's compensation scheme that has been codified by state law. This entitlement arises as a consequence of the statutory employer-employee relationship, not out of any act or omission of the employer.[20] The injured employee is "compensate[d] for losses . . . to which the fact of employment in the industry exposes the employee."[21] Generally, worker's compensation schemes make the employer strictly liable for an employee injury occurring within the scope of employment.[22] Negligence and, for the most part, fault are not at issue and cannot affect the result. In exchange for the guaranteed, although limited, financial recovery, the employee typically gives up his right to sue for damages.[23]

There are two purposes behind imposition of strict liability: (1) provision of quick and certain recovery; and (2) avoidance of an adversarial situation that may strain future employer-employee relations.[24] The theory behind imposition of strict liability is that the enterprise ought to bear the employee's loss rather than permit it to lie on the unfortunate employee who unluckily incurred the injury.[25] One expert explained, "In the evolution of workmen's compensation legislation and case law there

15. *Id.*

16. O'BRIEN, *supra* note 11, at 5 (quoting Minnie West v. Industrial Accident Comm'n, 12 Cal. Comp. Cases 86 (1947)).

17. Johnson v. W.C.A.B., 471 P.2d 1002, 1006 (Cal. 1970).

18. Carrigan v. California State Legis., 263 F.2d 560, 567 (9th Cir. 1959).

19. Graczyk v. W.C.A.B., 229 Cal. Rptr. 494, 498 (1986).

20. Bell v. Industrial Vangas, Inc., 637 P.2d 266, 272 (Cal. 1981).

21. *Id.*

22. KEETON et al., *supra* note 1, at 573.

23. CAL. LAB. CODE § 3601(a) (Deering 1991); O'BRIEN, *supra* note 11, at 5; *see also* Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169, 174 (1963).

24. O'BRIEN, *supra* note 11, at 5.

25. *See* KEETON et al., *supra* note 1, at 573.

has been an increasing recognition of its purpose to distribute the risk of service-connected injuries . . . by charging all enterprises with [these] costs . . . ."[26] The employer is usually better able to bear the cost of the injury because he or she is in a position to pass the added cost along to the consumer in the price of goods or services sold.[27] Because the employer is held strictly liable, the recovery is generally less than an award of damages recoverable under the common law.[28] An injury to an employee is like the breakage of a piece of business equipment, and the employer is required to pay the cost of repair.[29]

The ability of employers to better bear the cost of injuries has led to liberal construction of the worker's compensation laws in favor of awarding compensation to employees.[30] The courts include as many claims as are reasonably possible under the laws "in order to give meaning to the act's humane purposes and remedial character."[31] Because the existence of an employer-employee relationship is critical to the application of the worker's compensation laws, much litigation focuses on the definition of eligible "employees." Additionally, because the right to receive benefits is wholly statutory, a legislature has "broad power and wide discretion" in defining eligible employees in such a way as to achieve the remedial policies of the act.[32] To obtain employee status under most statutory schemes, the injured party must show that he or she was working for the other party and that a contract for employment existed between them.

A. The Employment Contract

Traditionally, an employment contract includes three elements: "(1) consent of the parties, (2) consideration for the services rendered, and (3) control by the employer over the employee."[33] Thus, the parties must have a consensual employment relationship. Also, the parties must

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26. Laeng v. W.C.A.B., 494 P.2d 1, 8 (Cal. 1972) (quoting *Van Horn*, 33 Cal. Rptr. at 174).

27. KEETON et al., *supra* note 1, at 573.

28. *Id.* at 574; *see also Van Horn*, 33 Cal. Rptr. at 174.

29. KEETON et al., *supra* note 1, at 573; Ray Yasser, *Are Scholarship Athletes at Big-Time Programs Really University Employees?—You Bet They Are!*, 9 BLACK L.J. 65, 66 (1984).

30. *See* Laeng v. W.C.A.B., 494 P.2d 1, 5 (Cal. 1972); Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169, 174 (1963); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1172 (Ind. 1983); University of Denver v. Nemeth, 257 P.2d 423, 426 (Colo. 1953); Barragan v. W.C.A.B., 240 Cal. Rptr. 811, 816 (1987).

31. Yasser, *supra* note 29, at 66.

32. Graczyk v. W.C.A.B., 229 Cal. Rptr. 494, 498 n.2 (1986).

33. Parsons v. W.C.A.B., 179 Cal. Rptr. 88, 94 (1981) (citing 2 HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION, § 30.2 (2d ed. 1981).

mutually agree that an employer-employee relationship is created.[34] This requirement of a contract recognizes that the employment relationship is a mutual arrangement between the parties in which both parties agree to give up something in exchange for something else.[35] The parties' intentions and mutual assents should be determined by evaluating the express agreements between the parties as well as the reasonable inferences drawn from their actions.[36] In other words, "mutual assent to contract is not ascertained by considering the internal actions or subjective motives of a party."[37]

While the traditional contract for hire involves an exchange of services for monetary compensation, "direct compensation in the form of wages is not necessary to establish the relationship so long as the service is not gratuitous."[38] Gratuitous service has been found where the services were rendered by a "mere volunteer" who was providing the services as a gift to the beneficiaries.[39] The term "employed" is not confined to business employment but may also include more informal relationships.[40]

The definition of employee is substantially the same in most jurisdictions.[41] Generally, there must be some agreement, express or implied, in which one party agrees to exchange services for some other thing of

34. *See* Barragan v. W.C.A.B., 240 Cal. Rptr. 811, 815 (1986); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1173 (Ind. 1983).

35. *Barragan*, 240 Cal. Rptr. at 816.

36. *Id.*

37. *Id.* at 817.

38. Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169, 172 (1963). *See also* Union Lumber Co. v. Industrial Accident Comm'n, 55 P.2d 911 (Cal. Dist. Ct. App. 1936); Gabel v. Industrial Accident Comm'n, 256 P.2d 564 (Cal. Dist. Ct. App. 1927).

39. O'BRIEN, *supra* note 11, at 23.

40. RESTATEMENT (SECOND) OF AGENCY § 220 cmt. b (1957).

41. *See* ALA. CODE § 25-5-1(6) (1991); ALASKA STAT. § 23.30.265(12) (1991); ARIZ. REV. STAT. ANN. § 23-901(5) (1991); ARK. CODE ANN. § 11-9-102(2) (Michie 1991); COLO. REV. STAT. § 8-40-202(1)(b) (1990); CONN. GEN. STAT. § 31-275(5) (1990); DEL. CODE ANN. tit. 19, § 2301 (1990); FLA. STAT. ch. 440.02(13)(a) (1990); GA. CODE ANN. § 34-9-1(2) (Michie 1991); HAW. REV. STAT § 386-1 (1990); IDAHO CODE § 72-102(10) (1991); IND. CODE § 22-3-6-1(b) (Burns 1990); IOWA CODE § 85.61(11) (1989); KAN. STAT. ANN. § 44-508 (1990); KY. REV. STAT. ANN. § 342.640(1) (Michie/Bobbs-Merrill 1991); LA. REV. STAT. ANN. §§ 23:971(1)-(3) (West 1990); MASS. ANN. LAWS ch. 152, § 1(4) (Law. Co-op. 1991); MICH. COMP. LAWS § 418.161(1)(b) (1991); MONT. CODE ANN. § 39-71-118(1)(a) (1991); NEB. REV. STAT. § 48-115(1) (1989); N.M. STAT. ANN. § 52-1-16-(A) (Michie 1991); N.Y. WORKER'S COMP. LAW § 355.2(a) (Consol. 1991); N.C. GEN. STAT. § 97-2(2) (1991); OHIO REV. CODE ANN. § 4123.01(A)(1)(a)-(b) (Baldwin 1991); OKLA. STAT. tit. 85, § 3(4) (1990); R.I. GEN. LAWS. § 28-29-2(2) (1990); S.C. CODE ANN. § 42-1-130 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. § 62-1-3 (1991); UTAH CODE ANN. § 35-1-43(1)(b) (1991); VA. CODE ANN. § 65.2-101(A)(1) (Michie 1991); W. VA. CODE § 23-2-1a(a) (1991); WYO. STAT. § 27-14-102 (1991).

value.[42] In California, an "employee" is defined as "every person in the service of an employer under an appointment or contract of hire or apprenticeship, express or implied, oral or written."[43] Additionally, California adopts a rebuttable presumption, under which "[a]ny person rendering service for another, . . . unless expressly excluded herein, is presumed to be an employee."[44] An "employer" is generally defined as any party "using the services of another for pay."[45]

B. Judicial Construction of "Employee" in California

California courts have construed the worker's compensation laws broadly.[46] Academic credit or other educational benefits given in exchange for services rendered have been found to constitute sufficient compensation to establish the necessary relationship of hire.[47] Participation on the sports team of a profit-making enterprise in exchange for non-monetary consideration has also resulted in a finding that the participant is an employee.[48] Generally, any consideration given in exchange for services may create the necessary employer-employee relationship.

Non-monetary compensation was held to be sufficient to create an employment relationship in *Gabel v. Industrial Accident Commission.*[49] In that case, the parties orally agreed to exchange farm operation services of equal value. Afterward, one of the parties was injured while helping the other combat a brush fire.[50] The court rejected the defendant's argument that there was no employment relationship between the two parties because the plaintiff was providing his services voluntarily.[51] Instead, the court agreed with the plaintiff that the services he provided were not gratuitous.[52] The court held that "pecuniary consideration for services is not necessary," and that a party "may compensate for services by means of any property of value, or even by a return of services pursuant to agreement."[53]

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42. *Id.*

43. CAL. LAB. CODE § 3351 (Deering 1991); *see also* CAL. GOV'T CODE § 810.2 (Deering 1991).

44. CAL. LAB. CODE § 3357 (Deering 1991).

45. IND. CODE ANN. § 22-3-6-1(a) (Burns 1990); *see also* CAL. LAB. CODE § 3300 (Deering 1991).

46. *See infra* notes 47-67.

47. *Barragan,* 240 Cal. Rptr. 811; *Union Lumber,* 55 P.2d 911.

48. Krueger v. Mammoth Mountain Ski Area, Inc., 873 F.2d 222, 224 n.4 (9th Cir. 1989).

49. 256 P.2d 564 (Cal. Dist. Ct. App. 1927).

50. *Id.*

51. *Id.* at 565-66.

52. *Id.*

53. *Id.* at 565.

In some circumstances, a promise of possible employment may be sufficient consideration to create a contract. For example, courts have found compensation where a potential employee participates in an employment application process under the employer's control. In *Laeng v. Workmen's Compensation Appeals Board,*[54] Laeng was injured during an agility test that was part of an application for a job with the city.[55] Even though the city was not providing any cash payment or other compensation to Laeng, the California Supreme Court concluded that he was entitled to worker's compensation benefits. The court found that "California workmen's compensation law does not require that an applicant be receiving actual 'compensation' for his 'services' in order to fall within the workmen's compensation scheme."[56] There, the court focused on the language of the definition of "employee" and noted that, by the use of the disjunctive, a "contract for hire" was not required for compensation.[57]

Participation in school-approved work-study programs has been found to be sufficient to turn students into employees when their only compensation is academic credits. In *Union Lumber Co. v. Industrial Accident Commission,*[58] a high school student was injured while working in a butcher shop for academic credits.[59] He was participating in a program in which the school and the butcher shop cooperated to provide students an opportunity to practice their vocations.[60] The California court held that the "consideration for the agreement of employment may be represented by money paid for services or it may consist of valuable instructions rendered to qualify the pupil as a skilled artisan or tradesman."[61] Another California court concluded similarly in the more recent decision of *Barragan v. Worker's Compensation Appeals Board.*[62] In that case, the court found that a student extern assisting in physical therapy at a hospital as part of the necessary training for a degree in physical therapy was an employee of that hospital.[63] The court reached this conclusion despite the fact that the student received neither monetary compensation nor an offer of future employment in exchange for her

54. 494 P.2d 1 (Cal. 1972).
55. *Id.* at 2.
56. *Id.* at 4 n.5.
57. *Id.*; Labor Code section 3351 defines "employee" as "every person in the service of an employer under an appointment *or* contract of hire *or* apprenticeship, express or implied, oral or written . . . ." (emphasis added) CAL. LAB. CODE § 3351 (Deering 1991).
58. 55 P.2d 911 (Cal. Dist. Ct. App. 1936).
59. *Id.* at 912.
60. *Id.*
61. *Id.* at 914.
62. 240 Cal. Rptr. 811 (1987).
63. *Id.*

services.[64]

In *Krueger v. Mammoth Mountain Ski Area, Inc.*[65] ("*Krueger*"), the court found that participation on a sports team in return for non-monetary consideration was sufficient to create an employment relationship. The court in *Krueger* held that a jury could find the necessary employer-employee relationship to exist where a ski team member agreed to represent a corporation in exchange for use of the corporation's skiing facilities and the services of its ski coaches.[66] The court noted that while the team member did not collect a paycheck for his services rendered to the corporation, he received benefits and was thus "paid" for representing it.[67] In holding that sponsored team members may be found to be employed by a corporation, the court distinguished the corporations from educational institutions, stating that a corporation derives an economic benefit from sponsorship of the team.[68]

Finally, courts have simply rejected any requirement that there be a monetary exchange before an employment relationship can be said to exist. Instead, courts have consistently found the necessary relationship to exist where an individual provides some service as part of even the most unconventional exchange. This approach was followed in *Morales v. Worker's Compensation Appeals Board,*[69] where the court held that a prisoner's release from confinement in order to perform community work was sufficient compensation to find the prisoner an employee of the county.[70] The release from confinement was found to be compensation within the meaning of the worker's compensation laws.[71]

The California cases clearly exhibit a broad application of the worker's compensation laws. Almost any exchange may be found to constitute adequate consideration, as long as the injured person was rendering a service under another person's direction, assignment, and control.[72] If the service was not rendered purely gratuitously, an employment relationship can be found. Such a broad application is necessary to give effect to the worker's compensation system's "humane purposes and remedial character."[73] Under this policy, the individual who

64. *Id.* at 816.
65. 873 F.2d 222 (9th Cir. 1989).
66. *Id.* at 224.
67. *Id.*
68. *Id.* at 224 n.4.
69. 230 Cal. Rptr. 575 (1986).
70. *Id.* at 579, 580.
71. *Id.*
72. Laeng v. W.C.A.B., 494 P.2d 1 (Cal. 1972).
73. Yasser, *supra* note 29, at 66; *see also supra* notes 11-16, 30-32 and accompanying text.

makes a gratuitous offer of services may be fairly excluded because no exchange occurs between the parties. Because of the statutory mandate of "liberal construction" of the worker's compensation laws, courts should endeavor to find an exchange between the parties.

III. HISTORICAL APPROACHES TO THE AWARD OF EMPLOYEE STATUS TO ATHLETES

A scholarship agreement has been held to be a contract, at least in situations not involving worker's compensation claims. In *Taylor v. Wake Forest University*[74] *("Taylor")*, the North Carolina Court of Appeals found a breach of contract by a scholarship student athlete who failed to participate on the football team for the last two years of his study as required by his agreement.[75] The District Court for the Eastern District of Tennessee reached a similar result in *Begley v. Corporation of Mercer University*[76] *("Begley")*, where the court held that the university's repudiation of a scholarship was valid because the student had failed to meet the minimum entrance requirements.[77] The *Begley* court reached that result because it found the student athlete had failed to comply with a condition subsequent to the contract.[78] Both the *Taylor* and *Begley* courts expressly found that it was the intent of the parties to enter into a binding contract[79] and that the schools each intended to extend monetary aid in exchange for the athlete's participation on a sports team at the university.[80]

Neither court, however, discussed whether the subject contracts established the necessary employer-employee relationship. Taylor's application for his grant-in-aid specified that it was "awarded for academic and athletic achievement and [was] not to be interpreted as employment in any manner."[81] While it is unclear whether a party's unilateral characterization of the relationship is controlling, an express statement may be indicative of the understanding between the parties.[82]

Several court decisions have held that a scholarship contract be-

74. 191 S.E.2d 379 (N.C. Ct. App. 1972).

75. It is possible that the scholarship could have been viewed as as an academic grant, representing a gift from the university. In that case there would be little argument that it created an employment relationship for worker's compensation purposes. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 6-20 (1979).

76. 367 F. Supp. 908 (E.D. Tenn. 1973).

77. *Id.*

78. *Id.* at 910.

79. *Id.* at 909-10; *Taylor*, 191 S.E.2d at 381.

80. *Begley*, 367 F. Supp. at 909-10; *Taylor*, 191 S.E.2d at 382.

81. *Taylor*, 191 S.E.2d at 380.

82. "Practical construction of instruments by the parties to them should, in case of doubt

tween a student and a university can establish the necessary employer-employee relationship.[83] The decision in *University of Denver v. Nemeth*[84] *("Nemeth")* was the first case to find a scholarship student athlete to be an employee of a university. In *Nemeth*, the Colorado Supreme Court found an athlete eligible for worker's compensation benefits for injuries sustained during football practice.[85] Nemeth, the athlete, was receiving fifty dollars per month from the university for performing maintenance on the campus tennis courts and surrounding areas.[86] Additionally, the university provided him with housing on campus in exchange for cleaning the sidewalks and caring for the furnace on the premises.[87] The court rejected the university's argument that Nemeth was a maintenance worker who also played football, finding that Nemeth's employment in the maintenance positions was dependent upon his continued participation on the university football team.[88] In other words, the court found that Nemeth received his salary in exchange for playing football at the university as well as for doing the maintenance work.[89]

The Colorado Supreme Court narrowed its decision in *Nemeth* a few years later in *State Compensation Insurance Fund v. Industrial Commission of Colorado.*[90] In that case, the supreme court denied death benefits to the widow of a student athlete who died of head injuries sustained in a football game.[91] Noting that the student was employed part-time at the campus student lounge, the court found that this employment was not conditioned upon his continued participation on the football team.[92] The supreme court distinguished *Nemeth* by stating:

> [Nemeth's] employment as a student worker depended wholly on his playing football, and it is clear that if he failed to perform as a football player he would lose the job provided for him by the University. . . . Thus a contractual relationship was cre-

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as to the meaning of the words used, control the intention of the parties and the meaning of their language." Hood v. McGehee, 237 U.S. 611, 612 (1915).

83. University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953); State Compensation Ins. Fund v. Industrial Comm'n of Colo., 314 P.2d 288 (Colo. 1957); Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169 (1963).

84. 257 P.2d 423 (Colo. 1953).

85. *Id.*

86. *Id.* at 424.

87. *Id.*

88. *Id.* at 427, 430.

89. *Nemeth*, 257 P.2d at 427, 430.

90. 314 P.2d 288 (Colo. 1957).

91. *Id.* at 289.

92. *Id.* at 289-90.

ated between the claimant and the University.[93]

From these two decisions, it is apparent that, at least in Colorado, simple participation on a sports team does not create the employer-employee relationship required to receive the protection of the worker's compensation system. Rather, it appears necessary that the student receive some form of financial benefit from the university, conditioned upon the athlete's performance on a university sports team. Such a construction is contrary to the California cases which find employment relationships based on non-traditional forms of compensation.[94] The Colorado Supreme Court's construction, however, is consistent with a finding of employee status where the athlete receives an athletic scholarship based solely on his participation on a sports team.

California first grappled with the question of whether scholarship athletes are employees of their universities in *Van Horn v. Industrial Accident Commission*[95] *("Van Horn")*. In that case, the court found that Van Horn was an employee of California State Polytechnic College based solely on the existence of the scholarship contract, without a requirement of non-athletic service to the school.[96] Van Horn was killed in an airplane crash during a return flight with other members and coaches of the football team following an away game.[97] As an athlete, he was receiving funds identified as an "athletic scholarship" in an amount equal to the approximate costs of tuition, books, and living expenses.[98] The court recognized that the scholarship was conditioned upon academic eligibility but found that the compensation was extended primarily because of athletic ability and participation.[99] In the court's words, "The only inference to be drawn from the evidence is that decedent received the 'scholarship' because of his athletic prowess and participation."[100] The court also suggested that an employee relationship may be found where an athlete does not receive a scholarship, but upon a showing that the services of the athlete were not given gratuitously. The court concluded, "The form of remuneration is immaterial. A court will look through form to

93. *Id.* at 290.

94. *See* Barragan v. W.C.A.B., 240 Cal. Rptr. 811 (1987); Union Lumber v. Industrial Accident Comm'n, 55 P.2d 911 (Cal. 1936); Gabel v. Industrial Accident Comm'n, 256 P. 564 (Cal. 1927); Laeng v. W.C.A.B., 494 P.2d 1 (Cal. 1972); Morales v. W.C.A.B., 230 Cal. Rptr. 575 (1986).

95. Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169 (1963).

96. *Id.* at 174.

97. *Id.* at 170.

98. *Id.* at 171.

99. *Id.* at 174.

100. *Van Horn*, 33 Cal. Rptr. at 174.

determine whether consideration has been paid for services."[101]

A. Legislative Response to Award of Employee Status

Apparently in response to the *Van Horn* decision, the California Legislature in 1965 amended its codified list of persons excluded from its statutory definition of employee. The legislature added to its list of exclusions in the Labor Code "[any] person, other than a regular employee, participating in sports or athletics who receives no compensation for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto."[102] In 1981, the Labor Code was again amended to further exclude:

> [a]ny student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto.[103]

While the amendment appeared to expand the list of exclusions, the legislative history suggests that the legislature intended the further amendment—Labor Code section 3352(k)—to merely clarify existing law, not substantively change the law.[104]

Despite its legislative history, Labor Code section 3352(k) operates to preclude student athletes who participate on university athletic teams from claiming benefits under the worker's compensation system. In *Graczyk v. Worker's Compensation Appeals Board,*[105] section 3352(k) was applied retroactively to a scholarship athlete who was injured while playing in a football game.[106] The court interpreted section 3352(k) to exclude Graczyk, who was playing football for the university pursuant to an athletic scholarship, from the definition of an employee entitled to worker's compensation benefits.[107] Because Graczyk was found not to be an employee of the university, he was denied any benefits under the worker's compensation system.

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101. *Id.*

102. For former CAL. LAB. CODE § 3352(j), see Graczyk v. W.C.A.B., 229 Cal. Rptr. 494, 499 (1986).

103. CAL. LAB. CODE § 3352(k) (Deering 1991).

104. *Graczyk,* 229 Cal. Rptr. at 500 n.4.

105. *Id.* at 494.

106. *Id.*

107. *Id.* at 501.

B. *Recent Judicial Responses to Claims of Employee Status*

In Indiana, the exclusion of student athletes from employee status was accomplished by judicial construction. The Indiana Supreme Court found that scholarship athletes did not come within the definition of "employee" under its worker's compensation scheme in 1983.[108] In *Rensing v. Indiana State University Board of Trustees*[109] *("Rensing")*, for example, the Indiana Supreme Court held that a scholarship agreement was not a contract for employment.[110] The court found that the parties had not intended to enter into an employer-employee relationship at the time of their agreement.[111] Additionally, the evidence showed that the parties had not considered the scholarship to constitute "pay."[112] Further, an important right of an employer was missing because the agreement failed to provide the university with the right to withdraw the scholarship in the event of poor performance by the athlete.[113] Because these three elements were lacking in the scholarship agreement, the court concluded that the necessary employer-employee relationship did not exist.[114]

In Michigan that same year, a state appellate court reached a similar conclusion. The court in *Coleman v. Western Michigan University*[115] *("Coleman")* found that the recipient of an annual, renewable football scholarship was not an employee of the university when he was injured in football practice.[116] The *Coleman* court applied an "economic reality" test to determine whether an employment relationship existed.[117] Under this test, the court considered four factors to determine whether an employment relationship existed:

> (1) the proposed employer's right to control or dictate the activities of the proposed employee; (2) the proposed employer's right to discipline or fire the proposed employee; (3) the payment of "wages" and, particularly, the extent to which the proposed employee is dependent upon the payment of wages or other benefits for his daily living expenses; and (4) whether the task performed by the proposed employee was "an integral

108. Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983).
109. *Id.*
110. *Id.* at 1175.
111. *Id.* at 1173.
112. *Id.*
113. *Rensing*, 444 N.E.2d at 1174.
114. *Id.* at 1175.
115. 336 N.W.2d 224 (Mich. Ct. App. 1983).
116. *Id.* at 228.
117. *Id.* at 225.

> part" of the proposed employer's business. . . . None of the foregoing factors is by itself dispositive. Each factor must be considered in turn, and all of them then taken into account in determining the existence of an employment relationship.[118]

Using its economic reality test, the *Coleman* court decided that the employer's rights to control and to discipline were limited because Coleman's annual scholarship was irrevocable, regardless of the athlete's performance, once it was awarded at the beginning of the year.[119] Second, the control exerted by the university was no more than that exerted over any other student at the university.[120] The court conceded that under the third prong the scholarship constituted "wages" within the meaning of an employment relationship.[121] The court determined, however, that the task performed by Coleman was not integral to the university's business.[122] Although three of the four elements of an employment relationship under the economic reality test were present at least to a limited extent, the court concluded that the necessary relationship for worker's compensation eligibility did not exist because the failure of the fourth factor "weighed heavily against" finding the existence of such a relationship.[123]

IV. SOME SYSTEM IS NECESSARY TO PROTECT ATHLETES

The problem is seen most easily in the context of college football. Football is an inherently dangerous game, and a player runs the risk of suffering a serious injury or even death.[124] Therefore, football players use highly specialized equipment, and the rules of the game have been adapted to minimize the potential for injury. In spite of the efforts made to minimize injuries, however, they are considered to be a part of the game. While it is difficult to gather statistics regarding the frequency and types of injuries that occur in college football, a report from the National

118. *Id.* at 225-26.
119. *Id.* at 226.
120. *Coleman,* 336 N.W.2d at 226.
121. *Id.*
122. *Id.* at 226-27.
123. *Id.* at 227.
124. One example of the potential for serious injury in football involved Darryl Stingley, a professional wide-receiver for the New England Patriots in 1978. Stingley was hit in the head while attempting to catch a pass. The tackle forced Stingley's neck to snap back, leaving him a quadriplegic. Mike Freeman, *There's No Guarding Against Injuries,* L.A. TIMES, June 30, 1991, at C1. In 1989, fifteen football players died from injuries. Additionally, fourteen spinal cord injuries occurred during football-related activities causing permanent paralysis. *Paralyzing Football Injuries Reach 13-Year High in 1989,* UNITED PRESS INT'L, July 16, 1990, newswire.

Football League ("NFL") suggests that injuries are commonplace.[125] The report found that each team suffered almost sixty injuries during the course of the season.[126] Of those injuries, more than one-third were fairly severe injuries with potentially long-lasting, career-threatening effects.[127] One NFL player agent stated that injuries are so common that the likelihood of any player being drafted by the military is low because few could pass an induction physical.[128]

A player faces several problems if he or she is injured in college, especially if the injury is severe. Initially, the player often needs immediate medical care. For most college students, the high cost of medicine may put the necessary care out of reach. Second, recovery from many football injuries is slow, so the athlete may need extended physical therapy. This type of care can also be expensive. Finally, the athlete may be permanently disabled, and this will affect the athlete's future earning capacity. Continuing disability is not unusual, with the most common types of injuries involving the knee, the spine, and the shoulder.[129] This raises the difficult question: who should pay for the athlete's medical care and rehabilitation—the student or the university?

The simple answer would be to require the athlete to maintain his own personal medical insurance. That approach can be attacked for two reasons: (1) often college athletes are from families who cannot afford the cost of medical insurance, so this would result in many athletes being uninsured; and (2) universities are receiving significant financial benefits from the athletes' participation in sports, so the schools should bear the cost of injuries. Because college sports are big business, the question of who should bear the risk of injury should be examined in a business context. The issue of allocating the risks of loss commonly arises whenever two parties contract, especially where one party can be characterized as being in an inferior bargaining position. In the business setting, the cost of injuries is most often placed on the producer because courts believe that the cost of the product should include the cost of injuries resulting in its production.[130] Additionally, the party best able to bear the cost should carry the greater burden of liability. The university seems to be in

125. *Cal. Senate Select Comm. on Licensed and Designated Sports, Official Hearing Transcripts,* Oct. 21, 1985, 17-18 [hereinafter *Transcripts*] (statement of David Meggyesy, Western Director of the National Football League Player's Association).

126. *Id.*

127. *Id.*

128. Thomas S. Mulligan, *It Takes Deep Pockets to Play in This Risky Insurance Game,* L.A. TIMES, Oct. 6, 1991, at D1.

129. *Transcripts, supra* note 125, at 17-18.

130. KEETON et al., *supra* note 1, at 573.

the best position to bear the cost, in light of the student's inexperience and youth, the unavoidable nature of many types of injuries, and the university's superior experience, bargaining position, and ability to pass along the costs to the fans as the "consumers." The extent of that liability should be determined by considering the potential for extended disability or even death caused by the injury.

A. College Sports Are Big Business

The marketing of college athletics has become a profitable business in the United States.[131] Contrary to what many educators may suggest, successful college programs are pursued as more than a source of prestige for a university or as part of an overall educational program.[132] Today, college sports can be viewed as an expensive, though potentially lucrative, source of income for major universities.[133] In 1991, thirty-eight college football teams divided a pool of $64 million for participating in post-season bowl games.[134] While the payoff for participating in some bowl games is better than others, all bowl games are profitable ventures for the participant universities.[135] For example, the Orange Bowl paid $4.2 million each to the University of Colorado and Notre Dame University teams for playing on January 1, 1991.[136] Before a bowl game will even be sanctioned by the NCAA, the organizers of the bowl must guarantee each participating team a minimum payout of $600,000.[137] In 1993, that minimum will rise to $750,000.[138] In addition to college football, college basketball also earns lucrative payoffs for the schools. As a result of television contracts with Columbia Broadcasting Systems, Inc. ("CBS") worth more than $1.1 billion over ten years, the participants in the NCAA championship basketball tournaments will divide over $100 million annually.[139]

The product being sold by the universities is "amateur" athletics, as distinguished from professional athletics.[140] The main component is the

131. Goldman, *supra* note 3, at 206.

132. *Id.*

133. *Transcripts, supra* note 125, app. at 1 (statement by Joseph B. Montoya, senate committee chairman).

134. Mike Penner, *There's Not Enough Payoff for a Playoff,* L.A. TIMES, Apr. 29, 1991, at C1.

135. *See* Jake Curtis, *Bowling Over College Football,* S.F. CHRON., Dec. 19, 1990, at D1.

136. *Id.*

137. *Id.*

138. *Id.*

139. Chuck Stogel, *The 100 Most Powerful People in Sports,* THE SPORTING NEWS, Jan. 7, 1991, at S2.

140. *See Transcripts, supra* note 124, app. at 1; Goldman, *supra* note 3, at 235-36.

"student athlete" who, in many instances, receives a scholarship or other grant-in-aid in exchange for participation on these teams. Some students have even claimed that they received other forms of financial remuneration in violation of the rules governing college sports.[141] The current situation involving college sports has led to what one law professor has called the "All American Non-Sequitur": if a high school athlete is an outstanding football or basketball player, then the player must go to college to continue his athletic training.[142] The player is forced to go to college to develop his skills because, with a few exceptions, the NFL has rules declaring high school athletes ineligible for the professional draft until four years after graduation from high school.[143] The National Basketball Association ("NBA") had similar provisions in their bylaws until

141. As part of a point-shaving scandal surrounding Tulane University's basketball program, star center John "Hot Rod" Williams told prosecutors he received $100 per week from his coach, in addition to a $10,000 lump sum payment, to attend the university. *Tulane Hit Again—Harder; Three Players Are Indicted,* CHI. TRIB., Apr. 6, 1985, at C3.

During the investigation, Kenneth Davis of Texas Christian University ("TCU") admitted that he received cash, clothing and other goods worth a total of $38,000 while playing for TCU. Tony Kornheiser, *NCAA Spot-Checks Have Proved to be an Insignificant Bust,* WASH. POST, Oct. 27, 1985, at C5.

During the 1980s, violations of NCAA rules were widespread. Fifty-seven percent of the 106 NCAA Division I-A football programs were punished in some way by the NCAA during that period. The violations ranged from the subtle—providing the athlete with athletic shoes or game tickets to be sold—to the more obvious—academic fraud or outright cash payments. More disturbing was the finding in a recent study of Division I basketball players that sixty percent of them believed that taking payments was not morally wrong. Goldman, *supra* note 3, at 207-08.

142. *Transcripts, supra* note 125, at 3-4 (statement of Ray Yasser, Professor, University of Tulsa College of Law).

143. In spite of numerous attacks against the program, the NFL has maintained a system designed to protect its "minor league" system. This is done by limiting the class of people who are eligible to enter the annual draft:

> No person shall be eligible to play or be selected as a player unless (1) all college eligibility of such player has expired, or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college, or university, or (3) such player receives a diploma from a recognized college or university prior to September 1st of the next football season of the League.

N.F.L. CONSTITUTION AND BYLAWS § 12.1(A) (1988). The NBA similarly defines the class of persons eligible for its annual player draft:

> The following classes of persons shall be eligible for the annual Draft:
> (a) Students in four-year colleges whose classes are to be graduated during the June of or following the holding of the Draft.
> (b) Students in four-year colleges whose original classes have already been graduated, who indicate that they do not choose to exercise remaining collegiate basketball eligibility, by renouncing such remaining eligibility . . . .
> (c) Students in four-year colleges whose original classes have already been graduated if such students have no remaining collegiate basketball eligibility.
> (d) Persons who become eligible pursuant to the provisions of Section 2.05 of these By-Laws.

NBA BY-LAWS § 6.03 (1991).

the rules were challenged as violating the antitrust laws.[144] Although more and more college athletes are taking advantage of the exceptions and are leaving college early to take a shot at the professional ranks,[145] few actually have the skills to make a successful transition to the professional level without completing their college eligibility.[146] The anomaly is that many athletes go to college solely for sports training, but in the end they leave school without graduating either academically or athletically.

With millions of dollars in tournament or bowl revenues and alumni contributions at stake, some colleges have adopted a "win at all costs" mentality that threatens educational standards. Because the colleges have an interest in developing quality athletic programs that will generate profit, the blue-chip athletes are heavily recruited with minimal regard for their academic skills or the NCAA rules.[147] In many situations, universities make exceptions and stretch the rules governing admission in order to admit blue-chip athletes. This is done in ways the same universities would not stretch to admit marginal non-athlete students.[148] Often, these athletes are not really "college material," meaning that they are not prepared to perform academically in college, but universities tend to accommodate them rather than to fail them.[149] One example of this tendency is the situation involving Dexter Manley, former defensive end for the Washington Redskins. Oklahoma State University admitted Manley even though he was unable to read or write.[150] After playing

144. *See* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

145. *See generally, Inside Stuff,* THE SPORTING NEWS, Feb. 4, 1991, at 23; Howard Balzer, *NFL Draft Spotlight Focuses on Underclassmen,* THE SPORTING NEWS, Apr. 23, 1990, at 38; Vito Stellino, *Joe College: Look Before You Leap,* THE SPORTING NEWS, Mar. 5, 1990, at 48.

146. Goldman argues that "professional sports are not an adequate substitute for college athletics . . ." in sports like football and basketball. In addition to the professional leagues' exclusionary rules, many athletes do not possess the talent to play at the professional level, at least at the time that they enter college. Goldman, *supra* note 3, at 227-28.

147. *But see* Proposition 48, which took effect in 1986, defining minimum academic requirements that must be achieved before a recruited athlete could receive institutional aid. NCAA OPERATING BYLAWS § 14.3.1 (1991-92). The consequences of failing to meet the minimum academic standards were modified at the NCAA convention in 1990 by Proposition 26, which allowed certain recruited athletes to receive institutional aid based on need. NCAA OPERATING BYLAWS § 14.3.2 (1991-92). Effective in 1995, the minimum academic standards will be raised to make it more difficult for marginal students to receive athletic scholarships. Ed Sherman, *NCAA's New Standards Best for the Brightest,* THE SPORTING NEWS, Jan. 27, 1992, at 55.

148. "The commercialization of sport and its concomitant emphasis on winning has unquestionably denigrated the educational component of student-athletes' college experience." Goldman, *supra* note 3, at 241-42.

149. *See id.* at 242.

150. Tom Friend, *Manley to Testify on Illiteracy,* WASH. POST, May 18, 1989, at B1; *Red-*

professional football for a few years, Manley went back to elementary school where it was determined that he could only read at a second-grade level.[151] Another example involves Kevin Ross. Ross left Creighton University, where he was attending on a basketball scholarship, to enroll at a Chicago elementary school because he could not read.[152] Chris Washburn was admitted to North Carolina State University after he achieved a total score of only 470 on the Scholastic Aptitude Test ("SAT").[153] At that time, the average SAT score of an entering freshman at North Carolina State was 1,030.[154] Billy Don Jackson, admitted to UCLA without taking any standard admissions test, was later called a "functional illiterate" by a judge who sentenced Jackson to jail for voluntary manslaughter.[155]

As a response to the growing number of incidents involving illiterate college athletes, the NCAA adopted "Proposition 48." Since Proposition 48 took effect in 1986, universities have suggested that admission of illiterate athletes is unlikely to continue.[156] Under Proposition 48, the NCAA declares as ineligible any athlete who scores less than 700 on the SAT or fifteen on the American College Test ("ACT"), or who has a minimum high school grade point average of less than 2.0 on a 4.0 scale.[157] These regulations, however, do not prohibit the athlete from being admitted into the university. There are only minimal penalties for admission of athletes who fail to meet the minimum standards; the athletes are ineligibile to participate in athletics during their freshman year or to receive athletic scholarship money in the first year.[158]

In 1990, the University of Louisville recruited perhaps the most athletically talented freshman class in the nation, but three of the five re-

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skins' Manley Tells Senators of Graduating Despite Illiteracy, L.A. TIMES, May 18, 1989, at C8; Bruce Newman, *Classroom Coaches; Academic Advisers Are in the Team Picture,* SPORTS ILLUSTRATED, Nov. 19, 1990, at 62.

151. *Redskins' Manley Tells Senators of Graduating Despite Illiteracy, supra* note 148.

152. Newman, *supra* note 148; *see also* Edmund J. Sherman, Note, *Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Creighton University,* 11 LOY. L.A. ENT. L.J. 657 (1991).

153. David G. Savage, *Key Vote Due; NCAA Rules Could Clear the Bench,* L.A. TIMES, Jan. 10, 1986, Part 1, at 1.

154. *Id.*

155. *Id.*; Thomas Bonk, *UCLA Racks up the Titles,* L.A. TIMES, July 19, 1988, C3; *Sports People,* N.Y. TIMES, Mar. 18, 1983, at A23.

156. *Athletes Can't Stay Illiterate Now, Educator Says,* L.A. TIMES, June 3, 1989, Part 3, at 4.

157. NCAA OPERATING BYLAWS § 14.3.1.1 (1991-92). The eligibility standards under this section, however, will be raised in 1995 following approval of the increase at the 1992 NCAA Convention. Sherman, *supra* note 147.

158. NCAA OPERATING BYLAWS, *supra* note 157.

cruits could not meet the minimum standards of Proposition 48.[159] At the Nike basketball camp for top high school players, thirty of the 120 athletes could read at no better than a sixth-grade level, six of them at only a third-grade level.[160] It is from this group of athletes that some of the most highly recruited freshman entering college are chosen. As universities claim that graduation rates of their athletes have increased to levels comparable with those of the general student population, it is unclear how much of the increase may be due to special programs instituted to help athletes perform academically. In 1989, for example, the University of Southern California ("USC") spent over $60,000 on a special tutoring program for athletes.[161] In 1990, Auburn University spent $65,000 on tutors, and the University of California at Los Angeles ("UCLA") expected to spend $175,000 in 1991.[162] In spite of the apparent renewed concern for athletes, all of the talk may just be hot air. In response to the growing concern for academics in college sports, Iowa State University coach Jim Walden remarked, "All of a sudden, the world has gotten down to graduation rates. As long as the world is going to be run by academic bleeding hearts, I guess it's going to have to be that way."[163]

The skimming of academic standards results in a university paying scholarship money to an athlete, who is not on par with the player's non-athletic peers, on the condition that he or she will play sports for the university. Even when the athlete is prepared academically to enter college, however, the athlete may still enter college "motivated by a desire to reap the rewards of a professional career."[164] In this situation, the athlete may view college "as a showcase for professional scouts."[165] In spite of a significant amount of evidence that few athletes view college sports "as an opportunity to play for the fun of the game,"[166] we are still "wedded to this notion that our college athletes, football players and basketball players, particularly at big-time programs, are amateurs."[167] In maintaining that erroneous belief, we refuse to accept the reality that

159. Newman, *supra* note 150.

160. *Id.*

161. Phil Taylor & Shelley Smith, *Exploitation or Opportunity? USC Debates Whether It's Committed to Helping Black Athletes Academically,* SPORTS ILLUSTRATED, Aug. 12, 1991, at 46.

162. *Id.*

163. Jeff Shain, *Criticism of Standards Misdirected,* UNITED PRESS INT'L, Oct. 7, 1991, newswire.

164. Goldman, *supra* note 3, at 234.

165. *Id.*

166. *Id.*

167. *Transcripts, supra* note 125, at 3-4.

student athletes are in fact professionals who generate large amounts of revenue for their schools.[168]

B. Analysis of the Current Exclusionary Approaches

The judicial approaches that exclude student athletes from worker's compensation protection seem to be result-oriented, adhering to the belief that college athletes are amateurs.[169] But the modern reality of college sports is that the "amateur" characteristics of these athletes are far from the "olympic" ideal.[170] In other words, few college athletes participate simply for the love of the game and the excitement of the competition. Rather, they play for some kind of financial consideration or in the hope of making it to the "big leagues."[171] While it is clearly within the prerogative of state legislatures to expressly exclude student athletes from protection under the worker's compensation system, the public policy of every state should recognize a governmental interest in protecting these athletes. College athletes fall within the class of individuals who are protected by the worker's compensation system. Therefore, college athletes should be entitled to receive the same protections as the more traditional employees for the same reasons that the worker's compensation system was adopted in the first place.[172]

1. *Rensing v. Indiana State University Board of Trustees*

The *Rensing* opinion, in which the Indiana Supreme Court denied the existence of an employment contract, has several flaws that render suspect its approach to the issue of whether student athletes are employees of their university for worker's compensation purposes. At least three law review articles have taken exception to the Indiana Supreme Court's approach to the issue.[173] It appears that the opinion was simply

168. Goldman, *supra* note 3, at 234. One Washington magazine estimated that basketball star Patrick Ewing generated $12 million in additional income for Georgetown University during his four years there. Savage, *supra* note 153.

169. *See* Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983); Coleman v. Western Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983).

170. It should be noted at this point that the Olympics do not even adhere to the olympic ideal of amateurism anymore. The International Olympic Committee now allows paid professional athletes to compete in the Olympics in 1992. This is one example of the difficulty that is inherent in any effort to define who is an amateur. For a good discussion of this difficulty, see WEISTART & LOWELL, *supra* note 75, at 9-10.

171. *See Transcripts, supra* note 125 at 3.

172. *See supra* notes 7-32 and accompanying text.

173. Yasser, *supra* note 29; Robert C. Rafferty, Note, *The Status of the College Scholarship Athlete—Employee or Student?*, 13 CAP. U. L. REV. 87 (1983); Mark W. Whitmore, Note, *Denying Scholarship Athletes Worker's Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763 (1991).

an effort to avoid dealing with a host of additional, and perhaps undesirable, results that may flow from a finding that a student athlete is an employee of his university.

The court in *Rensing* gave great weight to the NCAA rules in determining whether the parties had entered into an employment contract. The court attempted to determine the NCAA position on the relevant issues by looking at the NCAA Constitution and Bylaws,[174] but clearly misinterpreted those rules in reaching its result. As a starting point, the court noted that "[a] fundamental policy of the NCAA . . . is that intercollegiate sports are viewed as part of the educational system and are clearly distinguished from professional sports business."[175] While this states the traditional thinking regarding the status of college sports, it fails to recognize the modern realities of major college athletics. Major college sports today are lucrative business ventures, and most college athletes view participation as a stepping stone to the professional levels.[176] The court also noted that the NCAA has "strict rules against 'taking pay' for sports."[177] At the same time, however, the NCAA distinguishes scholarships and grants-in-aid, which are acceptable, from compensation that exceeds certain limits established by the NCAA.[178] The approved limits generally include compensation in amounts not to exceed tuition, books, and boarding expenses.[179] This compensation clearly falls within the type of non-traditional remuneration considered to be pay in *Van Horn.*[180] Additionally, the court asserted that universities are prohibited from making a scholarship award conditional, in any way, upon the athlete's physical ability.[181] That assertion not only mischaracterizes the common practice in every university athletic department but also reflects the court's clear misinterpretation of the express language of the NCAA Operating Bylaws.[182] Apparently, the court based its finding on the NCAA prohibition against decreasing the amount of financial assistance "during the period of the award . . . on the basis of the student athlete's

174. *Rensing,* 444 N.E.2d at 1173.

175. *Id.*

176. *See supra* notes 130-66 and accompanying text.

177. *Rensing,* 444 N.E.2d at 1173.

178. NCAA OPERATING BYLAWS § 15.01.1-.2 (1991-92).

179. NCAA OPERATING BYLAWS § 15.2 (1991-92).

180. Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169, 172 (1963).

181. *Rensing,* 444 N.E.2d at 1173.

182. The NCAA approves of a conditioned scholarship grant where it is appropriately limited in the length of the term: "Where a student athlete's ability is taken into consideration in any degree in awarding unearned financial aid, such aid shall not be awarded for a period in excess of one year." NCAA OPERATING BYLAWS § 15.3.3.1 (1991-92).

ability or his contribution to the team."[183] At the end of the one-year grant period, however, the NCAA expressly allows the university to reduce, or even to cancel, the athlete's scholarship for any reason.[184]

Next, the *Rensing* court analyzed the intent of the parties and determined that "the financial aid which [the student] Rensing received was not considered by the parties involved to be pay or income."[185] Presumably, the court found this to be relevant to the question of whether the parties intended to enter into an employer-employee relationship. The court's logic on this issue is curious. First, the court states that Rensing could not have considered the scholarship to be pay because he did not report it as income to the Internal Revenue Service ("IRS").[186] Then, in the next sentence, the court concedes that Rensing was under no duty to report it as income because the IRS does not tax scholarship proceeds.[187] It is unclear how Rensing's failure to report those proceeds could give rise to any inference of intention if he was under no duty to report his scholarship income to the IRS.

Additionally, the *Rensing* court suggested that the university could not have intended to enter into an employment relationship because it did not consider the scholarship to be pay. In effect, the court's opinion can be characterized as holding that "the NCAA defines an amateur as someone who does not receive more than the NCAA members agree to pay them . . . and if they are paid more, they are no longer amateur."[188] The court determined that neither the university nor the NCAA considered the scholarship to be pay because the university's membership status in the NCAA was not affected by the grant of the scholarship.[189] The court reached this erroneous construction of the NCAA rules by substituting the NCAA's definition of "pay" for the legislature's formulation for determining the proper form of remuneration for services under the worker's compensation system. Although student athletes may not receive compensation at a level equal to their fair market value, they are still "paid" in exchange for their services.[190] Here, the parties entered a "textbook *quid pro quo*[191] arrangement" in which it was agreed that the

183. NCAA OPERATING BYLAWS § 3-4-(c)-(1) (1982-83) (this section is now incorporated into the Operating Bylaws as § 15.3.4.2 (1991-92)).

184. NCAA OPERATING BYLAWS § 15.3.3-.5 (1991-92).

185. *Rensing*, 444 N.E.2d at 1173.

186. *Id.*

187. *Id.*

188. Goldman, *supra* note 3, at 234.

189. *Rensing*, 444 N.E.2d at 1173.

190. Goldman, *supra* note 3, at 234.

191. *Quid pro quo*: "What for what; something for something. Used in law for the giving [of] one valuable thing for another. It is nothing more than the mutual consideration which

university would compensate the student for services rendered on the football team.[192] It is likely that neither party gave much thought to the type of relationship they were creating. A better approach for the court would have been to examine the type of relationship that the contract created. Analysis of the contract indicates that the parties "bargained for an exchange in the manner of employer and employee."[193]

The court went on to find that the Indiana worker's compensation act was not applicable to persons receiving scholarship benefits.[194] Rather, the system applied to students "who work for the university and perform services not integrally connected with the institution's educational program and for which, if the student were not available, the University would have to hire outsiders."[195] In the modern reality of major college athletics, however, a football field may be the furthest thing from the classroom. Since graduation rates for athletes remain at relatively low levels,[196] the business of college sports takes on greater significance as education becomes more peripheral. Arguably, college athletes have become increasingly distanced from the school's educational program. The court's distinction could lead to the anomalous result in which a salaried student equipment manager who is injured on the sidelines in a collision with a charging fullback is covered by worker's compensation, but the fullback injured in the same collision is left unprotected.

Last, the court agreed with Judge Young in his dissent from the appellate court decision. Judge Young had opined that Rensing was not "in the service of" the trustees of the university.[197] In a conclusory statement, the supreme court agreed that the university may have benefited from Rensing's participation on the football team in a general way, but concluded nevertheless that the benefit was insufficient to find

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passes between the parties to a contract, and which renders it valid and binding." BLACK'S LAW DICTIONARY 1248 (6th ed. 1990).

192. Rafferty, *supra* note 173, at 100 (emphasis in original).

193. Rensing v. Indiana State Univ. Bd. of Trustees, 437 N.E.2d 78, 86 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

194. *Rensing*, 444 N.E.2d at 1174.

195. *Id.*

196. A recent NCAA study revealed that only 26.6% of black athletes graduated within five years of entering college. The same study found that only 52.3% of white athletes graduated in the same time. Taylor & Smith, *supra* note 161, at 46.

The chairperson of the United States House of Representatives Committee on Energy and Commerce, subcommittee on commerce, suggested that with the "zillions of dollars" earned by college sports, universities should spend more money to better assist recruits with poor educational backgrounds in order to improve graduation rates. Don Shannon, *Coaches Ask Congress to Keep Hands Off NCAA*, L.A. TIMES, July 26, 1991, at C2.

197. *Rensing*, 444 N.E.2d at 1174 (quoting *Rensing*, 437 N.E.2d at 90 (Young, J., dissenting)).

Rensing in the service of the university.[198] This conclusion "flies in the face of the plain meaning of those words,"[199] and suggests that the court was stretching to justify a position that lacked adequate support. By participating on the football team, Rensing was under the "control" of the coaches, who represented the university in their positions as coaches. This type of control can be extensive where the athlete spends more time on the football field than in the classroom during much of the year.[200] By directing the athlete in his activities on the team, the university receives the benefit of his participation. It was the school's control, combined with the benefit derived from the control, that placed Rensing in the service of Indiana State University.[201]

2. *Coleman v. Western Michigan University*

The *Coleman* court cited the *Rensing* decision with approval and reached the same result, but used the simpler "economic reality" approach.[202] In *Coleman,* the Michigan court supported the proposition that "an athlete receiving financial aid is still first and foremost a student."[203] Concededly, one of the reasons that an athlete attends a university, in many cases, is to obtain an education. In spite of what university administrators would like to believe, however, many athletes enroll at a university simply for the opportunity to play "minor league" sports.[204] Even students who attend the university "first and foremost" to get an education often have a job outside of the classroom. There is no reason why the scholarship athlete cannot be a student primarily and be employed by the university secondarily. Additionally, the *Coleman* court held that the scholarship athlete was not "in the service of" the university.[205] As in *Rensing,* the athlete was under the extensive control

198. *Id.*

199. Yasser, *supra* note 29, at 77.

200. *Transcripts, supra* note 125, app. at 2.

201. *See* Laeng v. W.C.A.B., 494 P.2d 1, 8-9 (Cal. 1972).

202. Coleman v. Western Mich. Univ., 336 N.W.2d 224, 228 (Mich. Ct. App. 1983).

203. *Id.* (quoting Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1173 (Ind. 1983)).

204. Commenting on the proposition that the student athlete is "first and foremost" a student, the late Bear Bryant said:

> I used to go along with the idea that football players on scholarship were "student-athletes," which is what the NCAA calls them. Meaning a student first and an athlete second. We are kidding ourselves, trying to make it more palatable to the academicians. We don't have to say that and we shouldn't. At the level we play, the boy is really an athlete first and a student second.

Goldman, *supra* note 3, at 242 (quoting J. MICHENER, SPORTS IN AMERICA 254 (1976)).

205. *Coleman,* 336 N.W.2d at 228 (quoting *Rensing,* 444 N.E.2d at 1174).

of the coaches for the benefit of the university.[206] The control the university exerts over the life of an athlete should be sufficient to find the athlete "in the service of" the university.

Under the first factor of Michigan's "economic reality" test,[207] the *Coleman* court underestimated the amount of control that a university exerts over an athlete. During the athletic season, athletes are likely to spend more time preparing for their sport than studying or attending class.[208] In order to maintain the eligibility of their athletes under the NCAA rules, many schools direct their athletes toward less demanding, "gut" courses.[209] If the athlete fails to participate in the sport to the extent demanded by the coaches, he risks losing his place on the team. The university's control has several effects. It directly impacts the athlete's ability to retain his scholarship, so that he may not be able to afford to attend the university should he fail to comply with the coaches' demands. It also affects the athlete's ability to develop his skills as an athlete and to gain the exposure necessary to make the jump to the professional level. Because the coach controls the roster and the purse strings in many cases, the coach also controls the college life of the athlete.

Regarding the second factor of the economic reality test, the court concluded that the university's ability to discipline the athlete was limited because the school could not revoke, or even decrease the amount of, the scholarship for one year once the award is made.[210] A university may discipline an athlete, however, by removing him from the active roster or by taking away other privileges, such as access to athletic tutors or priority registration for classes, that accompany the student's status as an athlete. In the business world, a one-year guaranteed contract is not uncommon. Since the scholarship is irrevocable for only one year, the university's ability to discipline the athlete is only minimally limited. Additionally, while the economic reality test identifies the right to discipline the employee as a relevant factor, it does not require that an em-

206. In order to develop and maintain a winning program, which is a prerequisite to a large salary and job security, coaches often demand long hours of practice at the expense of study time. To maintain the eligibility of athletes, these same coaches often overlook, or even encourage, academic fraud. To say that the university does not control the total life of the athlete is to express a completely naive understanding of major college athletics. Goldman, *supra* note 3, at 242.

207. *Coleman*, 336 N.W.2d at 225-26.

208. Goldman, *supra* note 3, at 242, 257.

209. *Id.* at 256-57.

210. *Coleman*, 336 N.W.2d at 226; *see also* NCAA OPERATING BYLAWS § 15.3.4.2 (1991-92); *but see* NCAA OPERATING BYLAWS § 15.3.4.1 (1991-92).

ployer have the unfettered ability to discipline his employees.[211]

The *Coleman* court conceded that the scholarship constituted "wages" within the meaning of Michigan worker's compensation laws under the third prong of the test. Thus, the only factor the court identified as clearly militating against a finding that no employment relationship existed was whether the task performed by the athlete was integral to the university's business.[212] The court's dependence on this single factor contradicts the admonition included in the economic reality test that no "factor[ ] is by itself dispositive."[213] Also, the court's finding that the athlete was not "an integral part of" the university's business ignores the reality of major college sports. As one court found, "[I]t is cavil[214] to suggest that college football . . . is not a business."[215] Another commentator concluded, "College sports is big business and the recruitment and hiring of college athletes is an integral part of that business."[216] Therefore, each factor of the economic reality test taken in turn and considered together leads to a finding that an employment relationship existed.

3. Statutory Exclusion of Athletes from Coverage

The student athlete who is expressly excluded by statute from the definition of employee for worker's compensation purposes is left with few options. If the athlete is uninsured, he or she will be forced to pursue tort remedies or to depend on the goodwill of the university.[217] A tort remedy is unlikely to be available in states like California and New York because the athlete will probably be required to show reckless or intentional conduct as the cause of his injuries.[218] In those states, athletic

211. *See Coleman*, 336 N.W.2d at 225-26.

212. *Id.* at 226-27.

213. *Id.* at 226.

214. "[T]o raise trivial and frivolous objection." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 218 (9th ed. 1990).

215. Board of Regents v. NCAA, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

216. Goldman, *supra* note 3, at 217; *see generally id.* at 241-42, 257.

217. Currently, many universities already voluntarily provide some level of medical insurance, and often even extend disability coverage. Universities, however, are not required to provide these types of coverage to any athlete. *See, e.g., Hearing on LB 765 Before the Nebraska Legislative Committee on Business and Labor*, Jan. 25, 1984 at 19-20, 22 [hereinafter *Hearings*] (statement of Dick Wood, general counsel for the University of Nebraska).

218. *See* Ordway v. Super. Ct., 243 Cal. Rptr. 536 (1988); Turcotte v. Fell, 502 N.E.2d 964 (N.Y. 1986). *But see* Segoviano v. Housing Authority, 191 Cal. Rptr. 578 (1983). The California Supreme Court has granted review of the continuing viability of reasonable implied assumption of the risk, and this decision is still pending. Bay Development, Ltd. v. Super. Ct., 269 Cal. Rptr. 720 (1990); *see generally*, Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191 (1990).

participants impliedly assume the reasonable risks inherent in the game being played.[219] Those risks include the possibility of injury caused by the simple negligence of other participants.[220] In other states, proof of negligence may still pose a significant barrier to recovery of damages. As a result, the athlete will be under-compensated or uncompensated for his injuries in many, if not most, situations.

States must recognize the seriousness of the situation facing the college athlete and take steps to place the burden of compensating the athlete for injuries on the party best able to bear the cost—the university. One state senator suggested that "of grave concern is the injury rate and the lack of compensation or insufficient medical insurance provided by the university to the athlete."[221] The universities, as the parties who get the most direct benefit from the participation of the athletes, should bear some of the cost for any injuries that befall the athletes.[222] Even the general counsel for the University of Nebraska conceded that "there needs to be protection provided to athletes participating . . . not only for football, but for all sports and it should be at institutional expense . . . ."[223]

C. Approaches to Allocating the Risks of Injury

Up to this point, this comment has suggested that student athletes who receive scholarships or other grants-in-aid from universities in exchange for their participation on the school athletic teams should be considered as "employees" of the universities. While most of the cases cited here discuss the California approach, which is more progressive than other systems, the general concept of placing the risks inherent in the operation of a business on the party best able to bear those risks is common to all jurisdictions.[224] Placing the risk of injury on the athlete is simply unfair where it is shown that the athletes are otherwise exploited for the benefit of the universities' financial success.[225] These athletes come within the broad definition of employee for most worker's compen-

219. *Ordway*, 243 Cal. Rptr. 536; *Turcotte*, 502 N.E.2d 964.

220. *Ordway*, 243 Cal. Rptr. 536; *Turcotte*, 502 N.E.2d 964.

221. *Transcripts*, *supra* note 125, at i.

222. *Hearings*, *supra* note 217, at 10 (statement of Ernest Chambers, Nebraska state senator).

223. *Id.* at 20 (statement of Dick Wood, general counsel for the University of Nebraska).

224. *See generally* KEETON et al., *supra* note 1.

225. "Amateur athletics is a multi-million dollar industry in which its primary workers do not share in its rewards. Student-athletes are exploited by schools that defend their regulations as preventing the commercialization of college sports. Major college sports, however, have long been commercialized." Goldman, *supra* note 3, at 260.

In support of that proposition, Goldman notes that the football program at the University

sation laws, and it is appropriate that they receive the benefits of this status. Most importantly, the athlete becomes eligible for compensation for injuries sustained in the course of his participation on a team.

This is not to say, however, that the worker's compensation system is the only appropriate method for insuring the health of student athletes. Another solution currently being pursued involves requiring universities to obtain mandatory insurance for the athletes, with coverage similar to that under the worker's compensation system.[226]

1. Coverage Within the Worker's Compensation System

Protecting the injured student athlete through the state worker's compensation system is an appropriate and workable option. The system is designed to handle all types of injury claims as well as the large volume of claims by student athletes that may follow once this approach is adopted. Still, this approach is not without its weaknesses as far as the athlete is concerned. First, the athlete will be required to show the existence of an exchange between the parties that created the employment relationship.[227] The non-scholarship athletes likely will be required to self-insure, absent some other agreement of exchange. Second, the athlete will have to give up his right to pursue a common law remedy, in exchange for the certain recovery that is provided by the system.[228] In other words, the athlete will be unable to receive compensation for injuries like pain and suffering, and the total recovery will be limited to the statutorily determined levels.[229]

In 1984, Nebraska State Senator Ernest Chambers proposed legislation that would have brought all college athletes within the protection of the worker's compensation system.[230] Recognizing that sports at the University of Nebraska generates large amounts of revenue for the school, Senator Chambers believed such a system was necessary to "provide some certitude about what will happen to [the athletes] if they be-

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of Nebraska generated approximately $11 million in revenues in 1987, but it paid out only $150,000 to the football players in the form of scholarships. *Id.* at 257.

226. *See* NEB. REV. STAT. § 85-106.05 (1989).

227. *See supra* notes 33-45 and accompanying text.

228. *See supra* notes 17-23 and accompanying text.

229. *See supra* notes 24-28 and accompanying text.

230. "The term employee . . . shall be construed to mean . . . [e]very person who prepares as an athlete for or participates as an athlete in any intercollegiate athletic event conducted by, with, or through any postsecondary educational institution in this state which receives tax revenue." NEB. L.B. 765, 88th Leg., 2d Sess. (1984) (This bill was removed from consideration of the full legislature at the request of its author, Senator Ernest Chambers, because substitute legislation was incorporated into Neb. L.B. 764, from the same session, and was subsequently approved by the full legislature on April 9, 1984.).

come injured."[231] Recognizing the inequities of its current system, California proposed similar legislation in 1986 that would have changed the existing exclusions and included scholarship athletes within the definition of employee for worker's compensation purposes only.[232] Additionally, in recognition of the potential returns to a university from participation in college athletics, California State Senator Joseph Montoya noted that "increasing numbers of these young men and women are being left out to fend for themselves if they no longer have their athletic prowess as a consequence of some injury."[233] Neither piece of legislation was ultimately approved, although the Nebraska State Legislature passed a compromise bill which instituted a mandatory insurance program.[234]

The protection of all college athletes under worker's compensation, regardless of whether they are receiving scholarship aid or not, may be desirable for various reasons. First, all college athletes are in the same situation following an injury, regardless of whether they are on scholarship or not. Second, the benefits to the university from the non-scholarship, or walk-on, athlete's participation are the same as, or even greater than, the scholarship athlete's participation, where the participation of a large number of athletes is necessary to field a competitive team. In the case of a walk-on athlete, the bargain to the university is better because the university does not pay a scholarship to procure the athlete's services. While the walk-on athlete's services may be characterized as gratuitous, the benefit to the university may create an obligation for the university to provide some protection against injuries. Once we accept the premise that major college sports are big business and that universities are in the business of promoting amateur athletics in addition to providing education, it is not unfair to impose on the university the minimal obligation of insuring all of its athletes.[235]

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231. *Hearings, supra* note 217, at 10.

232. The California Senate considered the following modification to its list of persons excluded from the definition of "employee" for worker's compensation purposes:

> (a) "Employee" includes any person who is a student enrolled at any public or private 4-year college or university and who competes in college or university sponsored athletics in connection with the receipt of an athletic scholarship. . . .
>
> (b) Nothing in this section shall be construed to make the student an employee for any purposes other than this division. Nothing in this provision shall be construed to make the student a professional athlete.

CAL. S.B. 1760, Feb. 10, 1986 (This bill was removed from consideration by the committee at the request of its author, Senator Joseph B. Montoya, without any recommendation from the committee.).

233. *Transcripts, supra* note 125, at 2.

234. *See infra* notes 240-43 and accompanying text.

235. *See generally* Barragan v. W.C.A.B., 240 Cal. Rptr. 494 (1987); Gabel v. Industrial Accident Comm'n, 256 P. 564 (Cal. Dist. Ct. App. 1927).

In any event, universities should recognize the benefits flowing from their participation in the worker's compensation system. Universities face huge potential liability in the event that an athlete, or his estate, is able to recover on a tort claim arising out of his participation on a sports team. When Nebraska was considering the inclusion of student athletes within its worker's compensation program in 1984, it estimated that the University of Nebraska would incur a total annual cost of only $55,000 in order to participate in the system.[236] The cost to state colleges was estimated to be even less, at only $15,000.[237] Given the potential for large negative jury awards,[238] it seems that a prudent university would do all that it could to avoid tort liability to a player like Rensing.[239] Through participation in the worker's compensation system, a university's liability could be significantly limited.

2. Coverage Through Independent Insurance

Recognizing the problem of significant medical and career costs facing injured college athletes, the lawmakers and the University of Nebraska compromised. Instead of adopting Senator Chambers' worker's compensation proposal, they settled on a mandatory insurance program under which universities within the state were required to obtain coverage for all of their athletes.[240] The approach that was finally approved by the state legislature included both medical care as well as limited disability coverage for the injured athlete.[241] This compromise resulted from the university's expressed fear that the NCAA would not approve any program that implied an employer-employee relationship.[242] Both parties conceded, however, that the NCAA's position on the issue was unclear.[243] But did the NCAA's position really matter? Should the NCAA be able to define the direction of public policy? It seems that the

236. *Hearings, supra* note 217, at 10 (statement of Chambers).

237. *Id.*

238. *See generally,* Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards,* 40 AM. U.L. REV. 805 (1991).

239. Rensing suffered a 95-100% disability as a result of his injuries which were incurred during a spring punting drill. Rensing v. Indiana State Univ. Bd. of Trustees, 437 N.E.2d 78, 80-82 (Ind. Ct. App. 1982).

240. "The Board of Regents of the University of Nebraska shall establish an insurance program which provides coverage to student athletes for personal injuries or accidental death while participating in university-organized play or practice in an intercollegiate athletic event." NEB. REV. STAT. § 85-106.05 (1989).

The law described certain minimum coverage that provided for initial and extended medical care, permanent disability benefits, and payments for accidental death. *Id.*

241. *Id.*

242. *Hearings, supra* note 217, at 21, 25 (statements of Wood).

243. *Id.* at 20-21.

NCAA's interest in promoting "amateurism" ought to give way where a significant need is identified by state legislators, and especially where the definition of "amateur" is affected only marginally.[244]

The University of Nebraska favored the insurance approach simply because it feared that any law that treated athletes as employees would lead to the removal of the existing NCAA limitations on levels of compensation payable to athletes in exchange for their participation.[245] While the issue of whether athletes should be paid fair market value for their services is beyond the scope of this comment,[246] it is relevant to understanding the nature of the objections to the worker's compensation approach. While football and basketball programs may generate significant amounts of money for a university, most sports programs at the universities result in a deficit.[247] These money-generating programs help pay for the operation of the schools.[248] Universities fear, however, that the profits to be earned from these programs will be significantly reduced if the compensation limitations are lifted.[249] For this reason, universities view anything that gives an athlete employee status for any purpose as threatening to the profits of the universities. Additionally, any system that requires the universities to provide protection to the athletes will necessarily involve extra costs. This should not present a real problem, however, because most universities claim to be already providing the necessary medical care or insurance.[250] A legislative mandate that universities provide protection only makes mandatory what many are already doing.

Finally, athletes may derive some advantages where a mandatory insurance program is instituted. For example, such a program would not preclude an athlete from recovering under a common law remedy, over and above the benefits provided under a policy of insurance. Additionally, the amounts recoverable for any specific injury may be more flexible, being subject to negotiation between the insurer and the athlete rather than determined by fixed schedules as under a worker's compensation system. Nevertheless, the choice between the worker's compensa-

244. Goldman concludes that restrictions on payments to athletes are only "marginally effective" in protecting the academic side of college sports. "The elimination of the NCAA's amateurism rules and the acceptance of payments to athletes may actually further educational objectives." Goldman, *supra* note 3, at 242, 244.

245. *See generally Hearings, supra* note 217, at 19-21, 25.

246. *See generally* Goldman, *supra* note 3.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Hearings, supra* note 217, at 19-20.

tion approach or the mandatory insurance approach is one best left to legislators.

V. CONCLUSION

Both the worker's compensation approach and the mandatory insurance approach are significant steps in the direction of solving the liability problem. Both approaches provide some level of protection to the injured athlete, and either approach may be acceptable. This is especially true where the insurance program provides coverage equal to or better than that given by the worker's compensation approach.

Under the current system, athletes are the primary component of the business of college sports. In that capacity, they are exploited for the benefit of the university, and presumably, for the rest of the student body. In addition to solving the physical injury problems of college athletes, legislators may be interested in eliminating the pretense that major college sports are simply part of the complete educational system. In that case, the characterization of the relationship between the university and the athlete as an employment relationship would make adoption of the worker's compensation approach the logical choice.

In any event, the courts should recognize the existence of an employment relationship whenever reliable evidence establishes that a student athlete has agreed to exchange his services as an athlete for a scholarship or other valuable consideration.[251] One commentator who argued that college athletes should be treated as professionals concluded, "Courts willing to honestly appraise the present relationships in American 'amateur' sports must conclude that our big time college scholarship athletes are really employees."[252] When courts and legislatures are willing to make this concededly "uncomfortable and unsettling" decision, they may find that many of the resulting effects are beneficial.[253]

The adoption of a student-as-employee definition may pose initial problems, but these can be resolved. One potential problem is that this definition may raise new tax considerations.[254] A principled approach to scholarships may require a finding by the IRS that such proceeds are income to the athletes.[255] Such an interpretation, however, could now be

251. *See generally* Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169 (1963); University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953).

252. Yasser, *supra* note 29, at 78.

253. *Id.* at 77; *see also supra* notes 150-63 and accompanying text.

254. *See* WEISTART & LOWELL, *supra* note 75, at 15-19.

255. *See* Rafferty, *supra* note 173, at 102.

imposed upon scholarship proceeds by the IRS without a change in the worker's compensation laws.

A second potential drawback is that, after obtaining employee status, college athletes may seek to organize in labor unions.[256] The athletes may collectively bargain for higher minimum salaries or other benefits, like group health or dental plans. But it is difficult to understand how these developments could be considered negatives, especially when Congress has given special status to unions.[257] While collective bargaining may lead to higher costs for universities, economics should ensure that the compensation to the athletes will not exceed their market value to the universities. Additionally, because each college game provides an opportunity to become known and to be seen by professional scouts, it does not seem likely that players will threaten to strike before the "big game" simply to force some concession from the university.

Concededly, any program that gives athletes the protection they need would likely require large amounts of administrative paperwork to implement. The handling of a large number of claims as well as the routine work involved in monitoring the eligibility of participants would generate additional costs. However, this would result from any proposed program. The alternative would be to maintain the *status quo* and to continue to leave athletes in the precarious situation in which they now find themselves. The *status quo* is simply unacceptable.

A third disadvantage to finding that students who receive athletic scholarships are employees of their university is that, eventually, students receiving academic scholarships may also be considered employees of the university. While the risk of injury in the chemistry lab may be lower than on the football field, a lab accident that causes injury may be just as damaging as one caused on the sports field. This raises the question of whether these students really generate the same financial benefit to a university as college athletes. In many situations, the answer may be "Yes," and including these students under any protective scheme may be consistent with the discussion above. Detailed analysis of this topic, however, is beyond the scope of this comment.

The need for protection of the student athlete is real. It takes no stretch of the imagination to characterize these athletes as employees of their schools. Because the worker's compensation system already exists and can provide the necessary protections, this system should be utilized as the most logical mechanism. However, an insurance system that pro-

256. *Id.*

257. *See generally* Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-44, 151-67, 171-83, 185-87, 557 (1988).

vides coverage at least as comprehensive as that provided by worker's compensation laws may also be adequate to accomplish the goal of protecting athletes from the risk of injury.

The state legislatures and courts should make an honest appraisal of the situation. In doing so, they should not succumb to the fear of uncharted waters and allow the "continuation of an admittedly corrupt system."[258] In the current system, young athletes are exploited by the university bosses and are subjected to great risk for little pay. Most college athletes are employees of their universities and should receive all of the benefits that attach to such a status.

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258. Yasser, *supra* note 29, at 78.

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