

BLOWN COVERAGE

TACKLING PROBLEMS WITH THE NCAA'S EXCEPTIONAL STUDENT-ATHLETE DISABILITY INSURANCE PROGRAM

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Introduction	157
I. Problems with the Current ESDI Program.....	161
The Cost Allocation Structure.....	161
Covering Only “Permanent Total Disability”	164
Blind Spots in the Coverage Scheme.....	165
II. The Necessity of Change.....	168
The Necessity of Shifting the Burden Away From Student- Athletes	168
The Necessity of Broadening the Scope of Injury and Athlete Coverage.....	171
III. A Proposed Solution.....	173
Conclusion.....	176

INTRODUCTION

Imagine a college athlete with a serious choice to make—one that will irreversibly change his life. He is the star quarterback for a Division I FBS university that consistently finishes in the Top 25. The university has a formidable academic reputation as

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well. The student is a respectable scholar in his own right—a biology major who, with his well-rounded background and solid grades, stands a good chance of being accepted to a prestigious medical school—that is, if he eschews the siren song of “leaving early” to play in the NFL and graduates instead.

His athletic ability has agents enthusiastically looking forward to the opportunity to sign him. Scouts project that a team might draft him as high as the third round if he declares this year.¹

The student has not decided which direction he will take. He could enter the draft this year, or he could finish his degree and then decide between medical school and the NFL. His coach, unable to fathom how he would fill the absence of this highly touted starter, encourages him to play his senior year, using the time to think about the choice that lies before him.

¹ If this hypothetical student-athlete sounds too fanciful, consider the following examples of intellectually gifted professional athletes: Craig Breslow, relief pitcher for the Oakland A's, who earned a 3.5 GPA as an undergraduate at Yale University studying molecular biophysics and biochemistry, made a 34 on the MCAT, and was accepted to NYU's medical school; Myron Rolle, a safety for the Tennessee Titans who graduated in two-and-a-half years with a 3.75 GPA at Florida State University studying exercise science, going on to earn a master's of medical anthropology at Oxford; Ross Ohlendorf, a starting pitcher for the Pittsburgh Pirates, whose SAT score of 1520 helped him get into Princeton University, where he earned a 3.8 GPA studying operations research and financial engineering; George Parros, of the Anaheim Ducks, who earned a 3.18 GPA majoring in economics at Princeton; Ryan Fitzpatrick, quarterback for the Buffalo Bills, whose 1580 SAT score got him into Harvard, where he majored in economics; Matt Birk, center for the Baltimore Ravens, who earned a 34 on the ACT and also studied economics at Harvard; Shane Battier, forward for the Houston Rockets, who earned a 3.5 GPA studying religion at Duke University; Chris Young, starting pitcher for the San Diego Padres, who majored in politics at Princeton and wrote a thesis titled “The Impact of Jackie Robinson and the Integration of Baseball on Racial Stereotypes in America: A Quantitative Content Analysis of Stories about Race in the New York Times” while playing minor league baseball; Brad Ausmus, catcher for the Los Angeles Dodgers, who never earned any grade below a B studying government at Dartmouth; Grant Hill, of the Phoenix Suns, who studied history at Duke University; Peyton Manning, quarterback for the Indianapolis Colts, who graduated in three years at the University of Tennessee with a 3.61 GPA; Pau Gasol, of the Los Angeles Lakers, who left the University of Barcelona Medical School early to play professional basketball, though the dean has said Gasol is welcome to return. See generally Stan McNeal et al., *Wise Guys: Sports' Smartest Athletes*, SPORTING NEWS (Sep. 27, 2010), <http://www.aol.sportingnews.com/mlb/feed/2010-09/smart-athletes/story/sporting-news-names-the-20-smartest-athletes-in-sports> (This article was written by twenty different authors about twenty different players).

But injury remains possible. One missed block and an outside linebacker could very well take away both of his potential futures.² A surgeon depends on calm nerves and a steady hand at least as much as an NFL quarterback. The dangers of concussion and spinal injury, endemic to the game of football, put more at risk than just a student's ability to play football.

In 1990, the NCAA began to address this dilemma by creating the Exceptional Student-Athlete Disability Insurance ("ESDI") program,³ recognizing the risks student-athletes undertake by continuing to participate in collegiate athletics when professional teams would be glad to pay them for their services.⁴ Prior to the NCAA's ESDI program, student-athletes had to find insurance policies on their own.⁵

Since its inception, the ESDI program has grown in popularity.⁶ According to a 2010 article, "[a]pproximately seventy-five percent of first round picks in the NFL and NBA are enrolled in the ESDI program."⁷ Evan Turner, former Ohio State guard who flouted the NBA to return to play his junior year and earn the

² See generally HUNTER S. THOMPSON, *THE PROUD HIGHWAY: SAGA OF A DESPERATE SOUTHERN GENTLEMAN 1955-1967* 119 (Douglas Brinkley ed., Ballantine Books 1998) (1997) ("[A] man who procrastinates in his choosing will inevitably have his choice made for him by circumstance.") (emphasis omitted).

³ See *Exceptional Student-Athlete Disability Insurance Program*, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html (summarizing the basics of the NCAA plan).

⁴ Glenn M. Wong & Chris Deubert, *The Legal & Business Aspects of Career-Ending Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473, 506 (2010) ("[T]he NCAA started an Exceptional Student-Athlete Disability Insurance (ESDI) program in 1990 to help protect [a] student-athlete's interests against both injury and agents who might attempt to encourage the student-athlete to leave school early for professional leagues.").

⁵ See generally Andy Staples, *Protective Insurance Policies Now Norm for Top College Prospects*, SI VAULT (June 24, 2009), <http://sportsillustrated.cnn.com/vault/article/web/COM1156980/index.htm> (noting that, for instance, in 1981, legendary University of Georgia running back Herschel Walker took out a \$1 million policy with Lloyd's of London).

⁶ See Gary Klein, *Premium Players: Insurance Policies Are Becoming Standard for Elite College Athletes*, L.A. TIMES, Feb. 20, 2005, at D1, available at <http://articles.latimes.com/2005/feb/>

20/sports/sp-leinart20 (noting that University of Miami running back Willis McGahee's 2003 Fiesta Bowl knee injury sparked widespread interest in insurance policies for collegiate athletes).

⁷ See *supra* note 4, at 508.

2010 Naismith National Player of the Year award for his trouble,⁸ told a Sports Illustrated reporter that his coach would “kill” him if he did not buy a policy.⁹

Despite the need for a program like it, the ESDI as it currently exists is problematic for three reasons. First, the cost burden it creates peppers the fictive amateur status of student-athletes with even more holes. To be effective, insurance must be attainable. Students whose families cannot afford to pay for the insurance policy outright may take out a loan through the NCAA. When the loan matures upon expiration of the coverage, the resulting debt immediacy may leave a student-athlete with no realistic job alternative other than playing professional sports.

Second, the policy inadequately covers the wide range of career-jeopardizing injuries that student-athletes suffer. The ESDI policy only covers career-ending injuries, and prohibits any professional play after a payout.¹⁰ It does not cover injuries that diminish professional marketability and potential value, yet fail to meet the “career-ending” threshold characterization.¹¹

Finally, it covers too few athletes. The NCAA winnows out the pool of players eligible for disability insurance based on two criteria: sport played and talent level. Athletes from a wide range of collegiate sports may pursue professional athletics, but only five of those sports qualify for coverage under the ESDI policy. Even within the eligible sports, a given player may fail to qualify for coverage simply because he is not “exceptional enough.” For NCAA football, only players expected to be drafted in the third round or higher qualify, while players in the four other insurance-eligible sports must be first-round talent.

Thus, this article argues that the NCAA should bear the burden of providing insurance, because it and its member institutions reap the various benefits of exposing student athletes to great risk of physical injury. Specifically, the NCAA’s brand viability and its nonprofit status rest entirely upon the amateur

⁸ See Evan Turner Named 2010 Naismith National Player of the Year, OHIOSTATEBUCKEYES.COM (Apr. 4, 2010), <http://www.ohiostatebuckeyes.com/sports/m-baskbl/spec-rel/040510aab.html>

⁹ Staples, *supra* note 5.

¹⁰ See *supra* note 3.

¹¹ *Id.*

nature of the athletic exhibitions it regulates.¹² Further, it is unfair, inequitable, and unacceptable for the NCAA to place the burden of insurance on the student-athletes themselves.

Part I of this paper will explore each of the above-identified problems with the ESDI program. Part II will explain the need for change in these areas. Finally, Part III will propose workable and equitable solutions to the existing problems within the ESDI program. The proposed overhaul leaves in place what works, but shifts the burden of the policy cost to the NCAA and its member institutions in the event that a policy does not pay out and the student does not enter professional sports. Finally, this proposal argues for an expansion of the range of injuries the ESDI policy would cover.

I. PROBLEMS WITH THE CURRENT ESDI PROGRAM

As stated above, there are three primary ways in which the ESDI program is flawed. This section will examine the problems with (1) the cost allocation structure, (2) failures in types of injuries covered, and (3) shortcomings in the scope of the ESDI and its limits on which athletes can receive coverage.

The Cost Allocation Structure

The NCAA's cost allocation within the ESDI program undermines its commitment to amateurism.¹³ The policies can cost anywhere from \$5,000 to \$12,000 for every \$1 million of

¹² See *infra* note 36.

¹³ See Todd L. Erdman, *The Long Awaited Quadruple Play: Proposed Amendments to Four Major Areas of the Alabama Athlete Agents Regulatory Act of 1997*, 8 DEPAUL-LCA J. ART & ENT. L. & POL'Y 191, 193-194 (Fall, 1997) ("Sports agents are the deal makers in the world of athletics. They are the people who represent professional athletes in signing contracts with sports teams, as well as securing endorsements with large companies. While agent representation is normal and nearly required for professional athletes, it is strictly prohibited for student-athletes. This is an effort by the NCAA to prevent the "professionalization" of college sports, and to keep the college sports amateur in nature" [footnote omitted].) See also Amateur Certification Clearinghouse, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Legislation+and+Governance/Eligibility+and+Recruiting/Eligibility/Amateurism+Certification+Clearinghouse/index. The NCAA has established an "Amateurism Clearinghouse" to certify the amateur status of all its players.

coverage, up to the coverage cap of \$5 million.¹⁴ An amateur athlete, barred from earning income of his own in any way that would jeopardize his amateur status, must additionally face an insurance premium that could cost \$60,000.¹⁵ In a move that acknowledges the high cost of the policy as well as the reality that some of its amateur athletes might accept that money from agents,¹⁶ the NCAA offers qualifying athletes low interest rate loans to pay for the premium.¹⁷

The only catch is that the student-athlete must repay the loan in full upon the occurrence of any one of the following three conditions: the policy pays out, the athlete signs a professional sports contract, or “the coverage is no longer in effect and the loan note matures.”¹⁸ In other words, even if the insured does not sign a professional contract, the NCAA deems the loan due when the insured finishes playing college sports and has not incurred sufficient injury to trigger a policy payout.

That third condition insidiously transforms a student-athlete into a *de facto* professional. If unable to afford the face price of the insurance policy, the student-athlete must borrow the money to secure coverage. As noted earlier, the amount of the loan could top \$60,000, which may force that student into professional athletics just to be able to afford the loan payoff. Few other vocations could

¹⁴ Wong and Deubert, *supra* note 4, at 507 (“The NCAA’s ESDI program, administered through HCC Life Insurance Company, caps coverage at \$5 million for projected first-round NFL draft picks and for men’s basketball student-athletes. Coverage for baseball, men’s ice hockey and women’s basketball is capped at \$1.5 million, \$1.2 million, and \$250,000 respectively.”). The ESDI program is only available to student-athletes in these sports. *See id.*

¹⁵ *See id.* This calculation is based on the figures cited by Wong and Deubert and the NCAA’s \$5 million maximum coverage cap. *But cf.* Staples, *supra* note 4. Staples notes that the NCAA’s director for travel and insurance, Juanita Sheely, priced the same \$5 million policy through the ESDI at \$25,000 to \$28,000. Evidently, either the cost-per-million dollars of coverage varies depending on the policy’s bottom line, or there is some discrepancy involved in pricing the actual costs of the NCAA ESDI policy. For their assertion that the cost-per-million dollars of coverage being pegged at \$10,000 to \$12,000, Wong and Deubert cite to Klein, *supra* note 6, who in turn cites Juanita Sheely of the NCAA—apparently the same person cited by Staples, *supra* note 3—as giving him the figures of \$10,000 to \$12,000 for \$1 million of coverage for 18 months.

¹⁶ *See supra* note 13.

¹⁷ *See supra* note 3.

¹⁸ *Id.*

provide a student-athlete the opportunity to make enough money upon leaving college to afford an immediate expense of \$60,000.

Of course, if the ESDI policy loan does push the student into professional athletics, the signing of the professional contract—and not the expiration of coverage—will serve as the triggering condition for the loan payoff. But that does not change the dynamics at work—upon signing the loan, the student-athlete has, for all intents and purposes, declared himself a professional-in-waiting. By signing the ESDI loan, the student manifests his intent to “go pro.”

As far as amateurism is concerned, the student might as well have signed with an agent.¹⁹ Both loan and agent signal financial preparation for a career as a professional athlete. While there may be good reasons for preventing college athletes from taking money for playing sports, the NCAA deceives itself if its leadership actually believes the typical NCAA-sanctioned ESDI loan is repayable in full by most of its student-athletes, absent the kind of income a professional contract provides.

Still more glaring, the NCAA’s decision to place the burden of insurance on its athletes and their families displays a clear weakness of values on behalf of the NCAA. It hamstringing its athletes’ ability to earn money so it can preserve its tax-exempt status, content to allow those players to generate millions upon millions of dollars for the NCAA and its member institutions every year. Yet, it will not offset the effect of those restrictions by purchasing insurance for its athletes.

In short, the NCAA is talking out of both sides of its mouth. It pays lip service to the idea of amateurism, but its ESDI loan policy essentially leaves the most talented student-athletes no option other than a career in professional sports, merely because they attempted to protect their own interests, as any rational actor would.

Some may scoff at the proposition that a talented athlete is “forced” into what amounts to a high-paying dream job. That point is not without merit. But for an organization that markets its product—athletic competitions—on the basis of its amateur

¹⁹ *Cf. supra* note 6 (quoting NCAA spokesperson Sheely as saying the NCAA, in offering the ESDI program, essentially does the same thing an “unscrupulous” agent might).

nature, the NCAA ought to take realistic steps to preserve the amateur ideal and in so doing, preserve its brand.

Given the current financial position of the NCAA, amateur athletics should protect more than a tax-exempt status. It should protect the amateur athletes themselves. Broadening the scope of the current ESDI program and shifting its cost burden not only accomplish that goal, but also serve as a symbol of good faith on the part of the NCAA necessary to truly justify its tax exemption.

Covering Only "Permanent Total Disability"

The next problem with the ESDI program is that it pays out only when a student-athlete suffers, in its words, "permanent total disability" ("PTD").²⁰ The ESDI program defines a PTD as occurring when:

[T]he insured student-athlete's disability has been medically determined to be the result of (a) entire and irrecoverable loss of sight of both eyes or hearing in both ears, or (b) total and irrecoverable loss of use of one hand or one foot, or (c) quadriplegia, or (d) paraplegia; thus preventing him or her from ever participating in his or her sporting activity at the professional level.²¹

The occurrence of death in college sports is rare.²² Far more common are serious injuries from which an athlete may potentially recuperate.²³ Despite the possibility of recovery and rehabilitation, those injuries might do considerable financial damage to the professional prospects of a student-athlete.

²⁰ See *supra* note 3.

²¹ *Id.*

²² David W. Woodburn, *College Athletes Should Be Entitled to Workers' Compensation for Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01*, 28 AKRON L. REV. 611, 613 (1995) ("It should also be noted that, within the last twenty years, the number of incidents involving fatalities directly related to collegiate football has fluctuated between 0.00 and 2.67 per 100,000 participants. In addition, there were three "catastrophic injuries" sustained by athletes in sports other than collegiate football in the last fifteen years. Although this number does not appear to be that high, when it is combined with the fact that approximately twelve college football players suffered permanent paralysis during the 1990 season alone, it becomes obvious that college athletics, as a whole, pose a tremendous risk to an athlete[']s physical health and well-being." [citations omitted]).

²³ See *id.*, and accompanying text.

For instance, an injured student-athlete full of potential, but facing an extensive rehabilitation, could easily drop from a first round draft pick to a fifth round draft pick. In that event, the player has absorbed a substantial loss of potential earnings for doing what the NCAA and his university wanted him to do—play an extra year and work toward a degree. The NCAA wants students to work toward and complete degree programs because it makes the overall nature of collegiate competition appear amateur.²⁴ Amateur competition is what the NCAA purports to showcase. Further, the NCAA's tax exempt status hinges upon the amateur nature of its competition. Thus, the NCAA should welcome a chance to encourage its student-athletes to complete their degree programs, reinforcing the “student” part of “student-athlete.” By doing so, it can persuasively continue to foist the concept of amateurism—a concept some argue is mere fiction—upon the consumers of its products.²⁵

It seems incongruous that the ESDI would cover a career-ending injury, and yet ignore the economic loss caused by a still-serious injury that is not “bad enough” to end an athlete's career. In a more reasonable formulation, the ESDI policy program would protect student-athletes from the wide range of injuries they may suffer, accounting for the corresponding loss in professional marketability and potential value that occurs as a result of such injuries. For example, when an athlete tears his ACL, the athlete may physically recover well enough to play at a professional level. His skill remains intact, but his body and his earning potential may never “fully” recover from the injury.

Blind Spots in the Coverage Scheme

The third problem with the ESDI program is that it does not cover all athletes with professional potential who put themselves

²⁴ See, e.g., *NCAA Research Related to Graduation Rates of Division I Student-Athletes* 1984 – 2002, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/babb88004058023db423b5a8eaf4dbca/Federal+Graduation+Rates+Summary+19+Year+11_09.pdf?MOD=AJPERES&CACHEID=babb88004058023db423b5a8eaf4dbca (noting the graduation rates of student-athletes). The NCAA spends considerable energy generating these statistics that showcase the graduation rates of student-athletes in comparison to their non-athlete peers.

²⁵ See Bryant, *quoted in* Goldman, *infra* note 35.

at risk by playing collegiate sports.²⁶ The ESDI program is currently only available to:

Student-athletes with remaining athletics eligibility at NCAA institutions in the sports of intercollegiate football, men's or women's basketball, baseball, or men's ice hockey, who have demonstrated they have professional potential to be selected in the first three rounds of the upcoming National Football League or National Hockey League draft or the first round of the upcoming draft of the National Basketball Association, Major League Baseball, or Women's National Basketball Association...²⁷

Because of these limitations, a student-athlete who has not demonstrated the potential to be a top draft pick does not qualify for coverage, regardless of any realistic hope that student-athlete might have of "going pro."²⁸ Given that "draft projections are still an incredibly inexact science" and that "[i]t has been shown that NFL roster populations are equally populated with undrafted free agents as they are with first, second or third round draft picks," this coverage limitation seems quite arbitrary.²⁹

With the draft projections that the NCAA uses to decide who is and is not eligible for ESDI coverage being purely speculative, the ESDI program tends to exclude a large percentage of the student-athletes drafted by the major professional sports leagues. But even being drafted early seems to have little to do with NFL success and potential for an athlete to make money, as shown by the number of undrafted free agents on NFL team rosters. Further, professional scouts even have difficulty differentiating between players who will succeed and those who will not. For these reasons, the availability of the ESDI policy ought to be more inclusive.

Additionally, the current ESDI program structure ignores the need for protection against injury for athletes with professional

²⁶ See *supra* note 4, and accompanying text.

²⁷ Exceptional Student-Athlete Disability Insurance Program, *supra* note 3.

²⁸ Wong & Deubert, *supra* note 4 at 509. With respect to professional football, that leaves 155 players each year who are drafted into the NFL without the ability to purchase coverage through the ESDI program. *Id.* In addition, there are many players who are not selected in the draft yet have sufficient talent to eventually sign contracts to play for NFL teams. *Id.* Those players are also unable to receive ESDI program coverage. *Id.*

²⁹ *Id.*

potential in sports other than football, basketball, baseball, or ice hockey.³⁰ Left out are the talented student-athletes who might realistically go pro in sports such as soccer, golf, and tennis.

The values at stake here are not merely economic. Though insurance is inherently an economic decision, the ESDI program's lack of widespread availability sadly exemplifies the attitude of expendability adopted by the NCAA and its member institutions toward the vast majority of its athletes. For example, student-athletes generally only are offered scholarships as long as they remain fit to play; if an athlete breaks his back playing football for a university, the school may reward his risk and effort by withdrawing his scholarship funding.³¹

Currently, the NCAA prohibits multi-year scholarships. All athletic scholarships at its member institutions are offered solely on a one-year basis; it is left to the college's discretion whether to offer to renew the scholarship for each additional year.³²

The entire experience of athletics in any society serves to build trust, character, teamwork—and fairness.³³ These are the values the NCAA should not only seek to develop in its student-athletes, but in itself as an organization. Fairness to student-athletes means that the NCAA should shift the burden of insurance off the backs of the students and onto the balance sheets of those best able to afford it—the NCAA and its member institutions. While student-athletes may, in the case of scholarship athletes, receive an education in exchange for participation in collegiate sports, they are not “paid” for the services they provide.³⁴ The income generated by college sports

³⁰ See generally Woodburn, *supra* note 22, at 615-16. (“Clearly, this scheme of insurance coverage does not provide coverage for the vast majority of athletes and totally ignores participants in [sports not covered by the ESDI].” [citations omitted]).

³¹ See, e.g., *Suit Claims Antitrust Law Violations*, ESPN.COM (Oct. 26, 2010, 3:43 PM), <http://sports.espn.go.com/ncaa/news/story?id=5727755>. The NCAA is currently being sued over this policy.

³² The NCAA was considering changing this policy at the time that this article went to press. See Brad Wolverton, *NCAA to Consider Sweeping Changes in Athlete Aid and Eligibility Rules*, THE CHRONICLE OF HIGHER EDUCATION (Oct. 20, 2011), <http://chronicle.com/article/NCAA-to-Consider-Sweeping/129483/>.

³³ Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 781-86 (Aug. – Sep. 2010).

³⁴ See *Bloom v. NCAA*, 93 P.3d 621, 626-28 (Colo. App. 2004).

does not properly make its way to student-athletes' pockets, but the time has come for a portion of that income to protect student-athletes' futures.

II. THE NECESSITY OF CHANGE

Given the glaring imperfections in the ESDI—the problematic cost burden it creates for student-athletes, and the gaps both in the types of injuries covered and types of student-athletes eligible for coverage—something must change. The next section will explain why change to the ESDI is not just ideal but mandatory.

The Necessity of Shifting the Burden Away From Student-Athletes

The late, great Coach Paul “Bear” Bryant once 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 were 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.³⁵

Despite the sentiment expressed by Coach Bryant thirty-five years ago, the NCAA remains committed to the idea that intercollegiate athletics is an amateur affair.³⁶ The courts have generally taken the NCAA at its word, touting the “line of demarcation” between collegiate athletics and professional or “play for pay” sports.³⁷ Some once opposed to Coach Bryant have now come around to his point of view. In the words of Lee Goldman:

³⁵ Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 242 (1990), *quoted in* J. MICHENER, *SPORTS IN AMERICA* 254 (1976); *accord* D. EITZEN & G. SAGE, *SOCIOLOGY OF AMERICAN SPORT* 230 (2d ed. 1982).

³⁶ *See* *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992). *See also* Bloom, *supra* note 34.

³⁷ *Banks*, 977 F.2d at 1090. *But see id.* at 1098 (Flaum, J., concurring in part and dissenting in part) (noting the commercial dimensions of NCAA sports.).

Amateur athletics at the major college level is big business. It is marketed, packaged and sold the same way as many other commercial products. . . The sale of television and radio rights to regular season games provided additional income to NCAA member schools. A successful college athletic program can also generate substantial indirect revenues. Schools can convert their athletic programs' prestige and notoriety into generous alumni donations and increased enrollment.

Nevertheless, the NCAA prohibits payments, beyond educational scholarships and specified expenses, to the athletes who are responsible for producing those revenues [. . .]

The NCAA's amateurism rules are ripe for review. It is inequitable that student-athletes, who generate millions of dollars for the university, must scrounge for basic expenses[. . .] [citations omitted].³⁸

This article does not seek to undermine the characterization of collegiate sports, as governed by the NCAA, as amateur affairs.³⁹ Its intent is merely, like the courts, to operate within the possible legal fiction of college athletics as an amateur enterprise, even though in reality, intercollegiate athletics have many aspects that raise questions as to whether it is truly an amateur enterprise.⁴⁰ This strategic approach moves beyond the highly contested issue over whether collegiate sports are, in fact, amateur in nature, by conceding the issue and taking the NCAA and its member institutions at their word. But by conceding the

³⁸ See Goldman, *supra* note 35 at 206-07.

³⁹ See generally Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 506-07 (2008) ("In spite of its obviously commercial nature, however, the NCAA "clings to the ideal of the 'amateur' student-athlete" to avoid paying wages to college players...many [of whom] live below the poverty line." [citations omitted]).

⁴⁰ *Id.* at 507-08 ("The NCAA's Division I Manual is peppered with references to amateurism. Its first stated purpose is "to promote and develop...athletics participation as a recreational pursuit," while another is "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of amateurism." [...] [T]he Manual asserts "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived." [citations omitted]).

amateurism question to the NCAA, one can then force the NCAA to live up to its own optimistic language and, to the greatest extent possible, demand that the NCAA treat its student-athletes as amateurs.⁴¹

To that end, the NCAA should protect the interests of student-athlete in remaining healthy while he or she has time to make the choice of whether to go pro—even if that choice seems obvious. The current structure of the ESDI places the burden of policy purchase on the student-athletes themselves. The NCAA may allocate the burden in that manner to advance its own commercial goals, but in so doing, it misses out on an incredible opportunity to take a stand that would reaffirm its founding principle of amateurism by protecting student-athletes from the consequences of serious injury.⁴²

To be clear, an insurance system such as the NCAA's ESDI program, created with the goal of protecting student-athletes in the case of a permanent totally disabling injury, cannot coexist with the NCAA's amateur ideal as long as student-athletes themselves bear the burden of the cost of the policy.

While paying for an insurance policy may seem close to outright, cash-in-hand payment that would obviously compromise the student-athletes' amateur status, insurance differs from payment in one crucial aspect—the aim of insurance is not to improve a person's situation. Instead, insurance seeks to reimburse a person for injury. Though some might argue that purchasing disability insurance for student-athletes—in addition to free tuition, room, board, and training—complicates the issue of amateurism even further, the only immediate benefit of insurance is peace of mind.

By removing the burden of policy cost from the backs of its student-athletes, the NCAA can take a step in deflecting the widespread criticism that “the only time [it] lacks enthusiasm for the purity and amateurism of college and university sports is

⁴¹ *See id.*

⁴² *Id.* at 505-06 (“The NCAA’s founding purpose was to rein in violence, injury, and death in college football. Its primary focus on player safety, however, has changed significantly since its inception.”[citations omitted]).

when their member institutions, but not the players, stand to profit.”⁴³

The Necessity of Broadening the Scope of Injury and Athlete Coverage

If the ESDI policy is worth having at all—and its popularity certainly suggests it fills a significant need of student-athletes—it is worth having in a complete, comprehensive form that protects any student-athlete with professional potential.⁴⁴

As a reason for limiting the scope of coverage to just those collegiate sports whose professional equivalents pay large salaries, some scholars have argued that there is a point at which the ESDI value is simply not worth the cost.⁴⁵ The dynamic that exists within that sentiment poses a hurdle for those who seek to increase the pool of sports whose athletes are eligible for ESDI coverage.

Regardless, it appears to be a hurdle that could be easily cleared by more thoughtful underwriting, coupled with a premium cost assessment in proportion to risk and amount of coverage. The price of insurance is directly affected by exposure to risk. Since the sports currently covered—football, baseball, hockey, and basketball—intuitively represent the highest risk pool, the remaining sports should not create as much additional cost.

The effect of adding student-athletes who play sports currently ineligible for ESDI coverage, to analogize to automobile insurance, would be like that of adding more safe drivers to the highways. The raw number of payouts may increase, but at a much lower rate in proportion to the benefit of coverage. If the

⁴³ Aaron Brooks & David Davies, *Exploring Student-Athlete Compensation: Why the NCAA Cannot Afford to Leave Athletes Uncompensated*, 34 J.C. & U.L. 747, 752 (2008).

⁴⁴ Woodburn, *supra* note 22, at 616 (“In light of the fact that insurance coverage is not a comprehensive solution to student-athlete injuries, there exists a need for some type of unifying coverage.”). Though Woodburn, like many academics, favors making Workers’ Compensation available to student-athletes, that possibility seems foreclosed by the amateurism issue. Still, Woodburn puts his finger on the need within the system for some sort of overhaul.

⁴⁵ Wong & Deubert, *supra* note 4, at 508 (“The fact that WNBA salaries only range from \$35,190 to \$99,500 may make the ESDI cost prohibitive or even unnecessary for women’s basketball players.”).

insurance is “too expensive” for the benefit it conveys, perhaps an inaccuracy lies in either the valuation of the insured’s marketable professional talent or the assessment of risk to which the insured is exposed. With that in mind, there subsequently appears to be no convincing reason why student-athletes with professional potential in sports that currently are not included in the ESDI program cannot also gain coverage.

Also, as with automobile insurance, very rarely does the *availability* of comprehensive coverage depend on the potential value of the car. The price accounts for that factor. The same idea applies here.

Furthermore, the NCAA has already been able to drive down the cost of ESDI insurance because of the structure of the program, which includes all of its member institutions.⁴⁶ That broad structure enables the NCAA to capitalize on economies of scale.⁴⁷ Adding safer sports would enhance this effect. Even though universities would spend more money to insure more athletes, the economy of scale dictates that each dollar would go farther, as the amount of risk per capita would decrease. The outlier sports not currently accounted for in the ESDI program where student-athletes might have a realistic chance of going pro simply do not pose the same level of risk as, for instance, college football.⁴⁸ For the rare, unlucky student-athlete who does sustain a serious injury in one of those sports, an ESDI policy would certainly be a welcome benefit.

To highlight the necessity for coverage under the ESDI for injuries that are serious but do not permanently disable a student-athlete, another automobile insurance analogy suffices. A general, comprehensive policy covers anything from a minor fender bender to a total loss. The analogy is not perfect, but it does point out the inequity of a policy that would only pay for a total loss. A proper ESDI policy should not only cover a career-ending injury, or “total loss,” but also account for “fender-benders” like torn ACLs or

⁴⁶ *Id.* at 510.

⁴⁷ *Id.* (“The advantages of the ESDI group program provide for lower premium costs, almost certainly lower than comparable policies by private insurance companies.”).

⁴⁸ These sports would include soccer, golf, tennis, etc.

broken collarbones that work against the marketability and potential worth of a student-athlete.

III. A PROPOSED SOLUTION

In spite of the problems highlighted above, the ESDI program is not beyond repair. As noted earlier, it unquestionably is a program worth having, as demonstrated by its popularity among currently eligible student-athletes.⁴⁹ The proposed changes are significant, but the result of these changes would be an ESDI program that more completely accomplishes its goal of “diminish[ing] the allure of professional athletics and the money involved therein.”⁵⁰ Likewise, the new and improved ESDI program will more easily comport with the principle of amateurism the NCAA continually seeks to foster.

First, recognizing the problems with the current ESDI program’s scope of coverage, an ESDI overhaul should include eligibility for all NCAA athletes with professional potential for all sports. Because the current ESDI program depends on the opinion of insurance company talent scouts to judge who is “good enough” to qualify for coverage, the NCAA should simply modify the standard by which the scouts judge to include all athletes who could reasonably play at a professional level. Further, that coverage should expand to account for the diminution in professional value a student-athlete may incur because of a non-PTD injury.

Most importantly, this overhaul of the ESDI program must address the problem of the unfairly distributed policy cost burden. To do this, I envision a simple solution.

The entire basis for the claim that the current ESDI program represents an inequitable distribution of the cost burden hinges on the issue of amateurism. Amateurism only becomes an issue because of the inconsistency on the part of the NCAA—the inconsistency being that the NCAA seeks to capitalize off the product of student-athletes while denying those student-athletes a share of the profits beyond a scholarship.

⁴⁹ See Klein, *supra* note 6.

⁵⁰ Wong & Deubert, *supra* note 4.

In the words of one scholar, “[c]ollege and university athletic programs across America enjoy the astonishing pecuniary fruits of the legal myth—that the sports in those programs are amateur. Indeed, while many college sports may genuinely be amateur, others such as football and men’s basketball at major NCAA institutions plainly are not.”⁵¹ Amateurism ought to protect student-athletes from those who seek to capitalize on their talents. This category includes not only agents, but also the profiteering colleges and universities themselves.

That being said, “amateurism” does not seem to be on its way out. The NCAA continues to remind any person in its television audience that most of its athletes are “going pro in something other than sports.”⁵² If the NCAA is so committed to amateurism, let them pay for the insurance that a commitment to amateurism requires.

A cursory glance at the NCAA’s balance sheet for 2008 shows they made over \$636 million.⁵³ The largest single chunk of that \$636 million came from selling TV rights and marketing rights.⁵⁴ For a tax-exempt entity, the NCAA makes a substantial amount of money. More telling, however, is the proximity of the NCAA’s athletes’ amateur status to the NCAA’s tax-exempt, antitrust-exempt status. McCormick and McCormick note:

The myth of amateurism is likewise at the heart of the NCAA’s insulation from the antitrust laws, and any antitrust challenge to NCAA rules governing players will encounter the Association’s amateurism defense. This defense has been variously formulated, but essentially provides that the NCAA produces a singular product, one that is by its nature amateur,

⁵¹ McCormick & McCormick, *supra* note 39, at 496.

⁵² See, e.g., David Pickle, *NCAA’s Cryder Went Pro in Something Other Than Sports*, NCAA.ORG (Aug. 27, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/August+latest+news/NCAA+Senior+Vice+President+Dennis+Cryder+went+pro+in+something+other+than+sports>.

⁵³ Nat’l Collegiate Athletic Ass’n and Subsidiaries: Consolidated Statement of Financial Position, NCAA.ORG (Aug. 31, 2008), http://fs.ncaa.org/Docs/Budget_and_Finance/2008_ncaa_financials.pdf.

⁵⁴ *Id.*

and that the NCAA must be accorded broad latitude to administer and regulate college sports for the regulation of the product.⁵⁵

Similarly, the justification for tax-exempt status is that the amateur product the NCAA produces is educational—and thus, exempt from taxation.⁵⁶

The close relation of amateurism to the tax and antitrust exempt statuses ensures the NCAA's profitability. The NCAA does not pay taxes. Freedom from taxation combined with a desirable product leads to substantial income. Years upon years of income have created a monopoly on collegiate athletics which outside interests cannot seriously challenge.

Despite selling a product for which there is great demand, the NCAA maintains its singular grip on the market revenue by not paying its athletes. Its concept of amateurism is similar to paternalism, but more severely lacking in benefits. Further, it uses the concept of amateurism as part of its unique "brand," again insulating the NCAA from competition. Given that understanding, it is not just feasible, but appropriate and necessary that the NCAA foot the bill for insurance for its exceptional athletes.

The easiest and most workable solution to amending the cost burden of the ESDI program on student-athletes is simply this: strike the third condition of loan repayment that stipulates the loan note for the ESDI premium is payable upon expiration of the ESDI coverage.

To maintain a level playing field among larger and smaller colleges, the NCAA would need to spearhead efforts to determine what sort of membership "tax" would suffice to pay for the increased cost of these reforms. Perhaps a percentage of NCAA or institutional revenue would be fair; perhaps the NCAA should persuade the lucrative Bowl Championship Series ("BCS") to contribute as well.

If asking the NCAA to expand coverage in two directions or to forgive ESDI loans in certain circumstances appears unreasonable, perhaps the NCAA could, at the very least, lift its restriction on multi-year scholarships. While this solution would neither account for the diminution in future professional value

⁵⁵ McCormick & McCormick, *supra* note 39, at 500.

⁵⁶ *Id.* at 504.

created by sports injuries, nor would it serve non-scholarship athletes at all, it would give universities the option to guarantee a student-athlete has a better chance to complete his education, even if he suffers an injury that impedes his performance significantly enough to cost him his spot on the team.

These proposed reforms have a goal beyond simply making participation in intercollegiate athletics cheaper for athletes. Comprehensive reform of the ESDI system will force the NCAA to reevaluate its core values, perhaps returning to a less convenient, but more believable devotion to amateurism. Such a refocusing could actually improve the NCAA's brand strength. A commitment to truly amateur athletics played at an exceedingly high level, with in most cases the best talent available, is what separates college sports from all other large spectator sports in the United States.

CONCLUSION

Because my proposals work within the framework of the current ESDI program, implementing these modifications should have little effect on the overall landscape of the NCAA ESDI program. Reform would certainly increase spending in this area, or at least reapportion current spending. But, a countervailing tendency exists that should work against the increased cost of a reformed ESDI: because of the huge potential to reap financial rewards in the professional arena, most rational-acting student-athletes with the ability to play sports professionally will play sports professionally.

For those who are able to capitalize on their talents by signing a professional sports contract, paying back the loan for insurance coverage should not create a hardship. For this to ring true, premiums must be kept proportional to coverage. Coverage must be kept proportional to the reasonable salary expectations for any given player. Provided these conditions are met, the ESDI program will even account for the lower professional salaries paid to players of less popular sports. Thus, hardship can be averted.

The option of ESDI loan forgiveness enhances amateurism by removing the concern that an athlete will be forced to play professional sports simply because he has the talent, and he took out an insurance policy to protect that talent. While other

exigencies may push students to become professional athletes, the ESDI program should not be one of them.

Further, those student-athletes who suffer injuries will be able to pay back the premium out of the policy's payoff. A sliding scale based on degree of injury, amount of payoff, and projected future earnings can be designed for athletes who endure non-PTD but still serious injuries.

For our hypothetical quarterback who decides to "go pro in something other than sports,"⁵⁷ he can focus on simply repaying his medical school loans.

⁵⁷ See Pickle, *supra* note 52 (exemplifying the NCAA use of the quoted phrase).

