Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
"Protecting the Integrity of College Athletics"

Response from:
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For all members of Panel I:

1. What is your best estimate of the number of college athletes who are covered by insurance policies in case of an injury that inhibits or prohibits their future earning potential as professional athletes?
2. What is your best estimate of the breakdown by sport—and, if possible, position—of which college athletes are covered by such policies?
3. To the best of your knowledge, how often have these policies paid out?
4. What are the obstacles to more widespread use of these policies?
5. In your opinion, should the premiums on these policies be paid by universities or student athletes in an ideal world?
6. If you had to choose between universities paying for these policies or allowing student athletes to monetize their NIL, which would you choose and why?

Response:

As a sports law professor, I do not have the necessary data and expertise to respond to questions 1-5. Regarding question 6, from an economic policy standpoint, I do not believe that it would be necessary to choose between permitting student-athletes to receive third-party payments for licensing of their NILs on the one hand and allowing universities to continue facilitating the purchase of loss of professional sports value insurance for qualified student-athletes on the other hand. There probably are only relatively few intercollegiate athletes who have either high-value NIL rights or substantial earning power as a future professional athlete (even fewer who have both), and I would have great difficulty choosing between permitting universities to pay for loss of professional sports value insurance policies or permitting student-athletes to monetize their individual NIL rights.

Senate Judiciary Committee
"Protecting the Integrity of College Athletics"
Questions for the Record
July 28, 2020
Senator Amy Klobuchar

Questions for Professor Matt Mitten, Executive Director, National Sports Law Institute, Marquette University Law School

In your testimony, you expressed skepticism that antitrust litigation can reform intercollegiate athletics and advocated for legislative reform on compensation for student-athletes that includes a "narrow" antitrust exemption.

- Could you elaborate on why you believe legislation on this issue should include a "narrow" antitrust exemption?

Response:

Even if Congress were to enact NIL legislation, which would permit student-athletes to receive payment for the commercial use of their NIL rights, narrow antitrust immunity would be needed for the NCAA, conferences, and educational institutions to adopt and enforce internal governance rules consistent with that legislation (and any regulations established by an independent regulatory entity, should such an entity be created). Otherwise, all of those nonprofit entities would be subject to continuing and constant litigation alleging there should be no limits on student-athlete compensation or benefits. As I explained in my opening statement, antitrust litigation can only take into account economic considerations. Courts have routinely rejected evidence concerning the impact of their decisions on Title IX goals, non-revenue sports, and the number of scholarships available for student-athletes. I believe Congress should establish fair and uniform rules that the NCAA and its members must follow – and then ensure that those rules are not undermined by antitrust litigation. Otherwise, Congressional policy decisions reflected in federal legislation, which by necessity will include regulations that define (and therefore necessarily limit) the NIL rights and compensation opportunities for student-athletes, will immediately be challenged as anticompetitive restraints of trade under the Sherman Act.

This is not merely a theoretical concern. In the recently filed *House* and *Oliver* proposed class actions, plaintiffs' counsel has asserted this argument, even before student-athlete NIL rights and compensation rules have been established and become effective. The complaints in these cases allege that mere consideration of internal NIL legislation by NCAA Divisions I, II, and III, which was directed by the NCAA Board of Governors and precipitated by the enactment of various state NIL laws, is evidence that the NCAA and its member educational institutions have abandoned their commitment to the amateur/educational model of intercollegiate sports for their approximately 460,000 female and male student-athletes. This litigation creates the risk of potentially hundreds of millions of dollars in damages awards against the NCAA and its member conferences based on the current NCAA rules prohibiting student-athletes from receiving any NIL compensation, even though *O'Bannon* validated these rules. Therefore, a limited antitrust exemption is necessary to prevent federal rules establishing the scope of intercollegiate student-athletes' NIL rights and their enforcement from being challenged in pending and future antitrust litigation against the NCAA, athletic conferences, and member educational institutions.

- How do you respond to the critique that many of the most meaningful reforms that the NCAA has made in its treatment of student-athletes are the product of antitrust enforcement?

Response:

This critique is both factually and historically inaccurate. Consistent with *NCAA v. Board of Regents*, 468 U.S. 85 (1984), and prior to the Ninth Circuit's 2015 *O'Bannon* decision, all other federal appellate courts and district courts outside of California ruled that NCAA student-athlete eligibility rules, including those to preserve amateurism, are legal under the federal antitrust laws. *See, e.g.*, *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998); *Banks v. NCAA*, 977 F.2d 1081(7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975). Even after *O'Bannon*, some federal appellate courts have held that "an [NCAA] eligibility rule clearly meant to preserve the amateur character of college athletics . . . is presumptively procompetitive" and does not violate antitrust law. *Deppe v. NCAA*, 893 F.3d 498 (7th Cir. 2018).

While federal courts were upholding the NCAA's student-athlete eligibility and amateurism rules as legal under the antitrust laws, the NCAA, athletic conferences, and their member universities voluntarily and gradually changed NCAA rules to permit all student-athletes to receive more economic benefits and to generally improve their welfare. It is noteworthy that NCAA conferences and universities discussed and debated whether to increase a full athletics scholarship beyond the value of room, board, tuition, books, and fees to the full Cost of Attendance for several years prior to the *O'Bannon* district court's trial proceedings.

I believe it is particularly important to point out that *O'Bannon* effectively holds that the current NCAA bylaws prohibiting all student-athletes from receiving any NIL income, which inherently constitutes "cash sums untethered to education," are lawful under federal antitrust law. Nevertheless, on April 17, 2020, the NCAA Board of Governors, directed Divisions I, II, and III individually to consider and enact NIL legislation by January 31, 2021, which would become effective by the beginning of the 2021-22 academic year. Subsequently, *Alston* confirmed the NCAA's ability to limit student-athletes' economic compensation consistent with *O'Bannon* and that NCAA limits on above-Cost of Attendance payments unrelated to education are procompetitive because "removal of these restrictions could result in unlimited cash payments akin to professional salaries."

In addition, as noted above, antitrust litigation's limited focus on economic justifications also ignores socially important considerations underlying the NCAA's rules and mission including, but not limited to, complying with Title IX and offering non-revenue sports to provide intercollegiate sports opportunities in addition to football and men's basketball. Antitrust litigation also diverts millions of dollars of financial resources from these entities that could have been put to better use by directly benefiting student-athletes. Without Congressional intervention, this socially undesirable cycle of private antitrust litigation will continue as evidenced by the *House* and *Oliver* proposed class actions and likely other antitrust suits further challenging student-athlete compensation limits, from which only the highest-profile college football and men's basketball players would benefit to the probable

detriment of female student-athletes and male nonrevenue sport student-athletes at their own respective schools and possibly other student-athletes on their own teams.