SEPARATING FROM THE SCHOOL: AN ANALYTICAL AND EMPIRICAL STUDY OF THE LEGAL ENTITY STRUCTURES OF FOOTBALL BOWL SUBDIVISION ATHLETIC DEPARTMENTS

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A thesis submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Master of Arts in the Department of Exercise and Sport Science (Sport Administration)

Chapel Hill
2013

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ABSTRACT

ERNEST L. WASHINGTON: Separating From the School: An Analytical and Empirical Study of the Legal Entity Structures of Football Bowl Subdivision Athletic Departments (Under the direction of Barbara Osborne, J.D.)

Athletics departments have a history of operating independently from the school. It has been demonstrated athletics departments operating as separate entities possess the ability to utilize their budgets without having the university as a whole being responsible for those costs (Duderstadt, 2000). The status of athletics departments as separate legal entities as a whole, however, is starting to come into question. As scandals and legal trouble have plagued college athletics recently, more people are pushing for athletics departments to not operate as a separate legal entity from the school in order for the school to have more oversight over the athletic department. Examining whether there is a significant difference between an athletic department’s entity status and various factors is important in determining whether it is worthwhile for an athletic department to operate as a separate legal entity from the school or not.
ACKNOWLEDGEMENTS

I want to thank Barbara Osborne, my advisor, for not only the countless time and effort she has provided with my thesis but throughout the past two years as well. The guidance and experience has been invaluable and will serve me well throughout my professional career.

I also want to thank Dr. Edgar Shields and Martina Ballen, my committee members for their guidance throughout my thesis. Their advice and help has been extremely invaluable during the process of my thesis.

In addition, I would like to acknowledge my classmates within the Sport Administration program as well as the School of Law for all the help and support they have provided me while in graduate school. It’s been a privilege to get to know all of them.

I also would like to thank my parents – Ernest and Beryl – and my sister Cherelle for their encouragement and support during my entire postgraduate education. They are the ones that encouraged me to pursue the education and career path I have taken and I am extremely grateful for everything that they have done for me.
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CHAPTER I

INTRODUCTION

Athletics departments have a history of operating independently from the school. Examples of this are that in the beginning of collegiate athletics, students would coordinate and conduct the sporting events outside from the schools. This trend of independence continued even as schools began to take responsibility for the management of athletics responsibilities (Duderstadt, 2000). As football started to increase in popularity, college athletics started to witness massive growth. Large stadiums were built to accommodate the increased interest, and radio broadcasts of college football games further aided in its growth (Duderstadt, 2000). In the 1960’s and 70’s, college athletics gained even more exposure as television started to play a significant role in promoting and marketing these programs (Duderstadt, 2000). Athletics were becoming the “front porch of the university” (Duderstadt, 2000).

A landmark Supreme Court decision in 1984 became a catalyst for increasing the commercialization of college athletics. In *NCAA v. Board of Regents of the University of Oklahoma* (1984), the Supreme Court ruled that it was an antitrust violation for the NCAA to place broadcasting limits on football games. As a result, conferences as a result started to negotiate their own television deals with networks (Duderstadt, 2000). With the advent of cable television and networks such as ESPN being established, places for college athletics to be broadcast were increasing. Meanwhile, CBS agreed with the NCAA to be the exclusive broadcaster of the NCAA basketball tournament for $1 billion
dollars (Duderstadt, 2000). This growth has continued today, with licensing and sponsorship deals being larger, conferences such as the Big Ten and Pacific-12 having their own networks, the facilities arms-race, and the internet serving as another content provider for college athletics.

As the revenues and expenses in big-time college athletics continued to escalate, some schools opted to legally organize the athletics department as a non-profit entity separate from the university. Athletic departments that are a separate legal entity are able to have more control over their finances (Duderstadt, 2000). Even though athletic departments that operate as separate legal entities must cover their costs, they possess the ability to do so themselves through avenues such negotiating licensing and sponsorship contracts as well as setting prices for ticket sales (Duderstadt, 2000). Furthermore, it has been demonstrated athletics departments operating as separate entities possess the ability incur questionable expenses and justify them by saying that as a separate entity the school as a whole is not responsible for those costs (Duderstadt, 2000).

The status of athletics departments as separate legal entities as a whole, however, is starting to come into question. Richard G. Johnson, an attorney who served as plaintiff’s counsel for Oliver v. NCAA (2009), believes that congress should create an act that requires “any college or university with an athletic department that derives revenue from its athletic program shall operate from within that institution and not from within any separate entity” (Johnson, 2011, ¶6). In response to the Penn State University sexual abuse situation, Dennis Dodd, a columnist for cbssports.com, stated that

“[I]et's hope this is the moment when it begins, a movement to take back college athletics from the current stakeholders. They have failed miserably -- the bloated athletic departments; the overpaid, out-of-touch coaches; the apparel companies; the networks; maybe even the NCAA. This is where the excess has to stop. This
Duderstadt, who was the former president of The University of Michigan, has noted that “[the athletics department’s] more independent financial status has led to many instances not only to different rules and policies governing athletics, but to management values and cultures that depart quite significantly from those of the academic core of the university” (2000, p. 87). As scandals and legal trouble have plagued college athletics recently, more people are pushing for athletics departments to not operate as a separate legal entity from the school in order for the school to have more oversight over the athletic department.

Transparency issues of an athletics department operating as a separate legal entity also exist. Colombo (2010) noted that “the lack of transparency in athletic department operations has been a consistent theme of reformers and has led to well-documented cases of abuse” (p. 115). After the University of Kentucky decided to dissolve the University of Kentucky Athletic Association and have the University of Kentucky Board of Trustees oversee athletics matters, a Kentucky state senator stated "I hate to use the overused word 'transparency,' but I think that's exactly what [the potential move to dissolve the UKAA] brings" (Blackford & Tipton, 2011, ¶21). Noting how athletic departments do not undergo the same level of scrutiny as other aspects of the school and are therefore less transparent, Duderstadt (2000) said:

although universities are highly decentralized, there is nevertheless an intricate set of controls, of checks and balances, that provides guidance to most academic and administrative units…yet, in many universities, the athletic department is allowed to operate relatively autonomously from these controls…athletic
departments that are allowed to operate in such an independent and cavalier fashion can walk the universities far out on a limb that threatens the integrity of their academic mission” (p. 102-103).

Considering that the entity status of athletic departments are starting to come into question, examining whether there is a relationship between an athletic department’s entity status and various factors is important in determining whether it is justifiable for an athletic department to operate as a separate legal entity from the school or not.

**Statement of Purpose**

The purpose of this study was to determine the legal entity status of Football Bowl Subdivision (FBS) athletic departments and discover whether a relationship exists between that status and its success, expenditures, revenue generation, maintaining a profit, and academic ranking.

**Research Questions**

This study is guided by the following research questions:

RQ1: What are the legal entity statuses of FBS athletic departments?

RQ2: Is there a significant relationship between an athletic department’s entity status and the following variables:

- Directors’ Cup Results
- Expenditures
- Revenue
- Profit
Limitations

The main limitation with this study involves gathering the information regarding the entity status of the school. While Freedom of Information Act requests were sent to the schools, not all of the schools complied with the request. The study is also limited by variables that are measurable by secondary databases that already exist.

Delimitations

This study is delimited to schools that competed at the FBS level during the 2011-12 academic year. Furthermore, all statistical data gathered relates to the 2011-12 academic year only.

Definition of Terms

Football Bowl Subdivision (FBS): A subdivision of Division I football in which a maximum of 85 full football scholarships can be given and there is required paid or actual attendance of 15,000 during a rolling two-year period.

Legal Entity: An association, corporation, partnership, proprietorship, trust, or individual that has legal standing in the eyes of law. A legal entity has legal capacity to enter into agreements or contracts, assume obligations, incur and pay debts, sue and be sued in its own right, and to be held responsible for its actions.

Profit: The excess of returns over expenditure in a transaction or series of transactions.

Revenue: The total income produced by a given source.

Separate Legal Entity: A legal entity, typically a business, which is defined as detached from another business or individual with respect to accountability. For this study, an athletics program that does not operate as a department of the university is a separate legal entity.
Significance of the Study

There is significant public discussion concerning the proper role of intercollegiate athletics within the academy, particularly whether athletics is an integrated department within a college or university or an independent organization. This study will be the first to report the prevalence of the legal status of the intercollegiate athletics department as a separate legal entity. While there may be some legal advantages and disadvantages to structuring the athletics department as a separate legal entity, this study will also be the first to determine whether there is a relationship between the legal structure of the athletics department and the ability to generate revenue or maintain profits. Revenue generation and profitability are critically important if athletics departments are to be able to continue offering athletics participation opportunities for student-athletes. The success of an athletic department is also critically important to an athletic department because athletic directors are often ultimately judged on how well the teams perform in competition. Overall, colleges and universities may be able to use this data when considering whether to operate the athletics program as a separate legal entity.
CHAPTER II

LITERATURE REVIEW

The purpose of this research is to discover the legal entity stratus of FBS athletic departments and determine if there is a relationship between the entity status and Director’s Cup competitive success, expenses, revenue, and profit. In order to more fully understand the scope and importance of this study, the literature review includes an examination the advantages and disadvantages of a separate legal entity status, an analysis of intuitional theory and how it relates to this study, and recapping previous studies which compared the success of athletic departments to various factors.

Separate Legal Entities and Athletic Departments

Athletic Departments as an Auxiliary Enterprise

Even though schools generally have the ability to operate auxiliary enterprises and are increasingly doing so, a consideration of whether or not it is better from a legal standpoint to operate separately is a very important consideration that athletic departments need to consider (Kaplan & Lee, 2006). An analysis of a school’s use of auxiliary enterprises is very important in terms of whether or not it is better for an athletics department to operate as a separate legal entity. Auxiliary enterprises are defined as “a broad range of functions that are claimed to be ‘auxiliary’ to the education and research that are the central mission of a higher education institution…such functions must place the institution or one or one of its subsidiary or affiliated organizations in the position of seller and must be (or have the potential to be) income producing” (Kaplin &
Schools are increasingly using auxiliary enterprises in a variety of ways (Kaplin & Lee, 2006). Examples of auxiliary enterprises at schools include graphics, printing and copying services, campus bookstores, and schools renting out its facilities to outside groups for a fee (Kaplin & Lee, 2006).

Athletics departments at most Football Bowl Subdivision schools are considered auxiliary enterprises (Duderstadt, 2000). If the auxiliary enterprises are used for educational purposes and involve goods, services, or facilities not available from local business, then the potential for scrutiny of these enterprises are very low (Kaplin & Lee, 2006). Where issues do arise, however, is when the auxiliary enterprise’s operations extend beyond educational purposes by placing the institution in a competitive position with other entities (Kaplin & Lee, 2006). Examples of this scrutiny are when the customers are drawn to the institution’s activities instead of local business as well as the institution’s activities having unfair advantages such as tax-exempt status and better funding sources (Kaplin & Lee, 2006).

As a result, it is important to figure out the scope to which an athletic department can operate as a separate legal entity from the school. If a separate athletics department is limited in its functions, then it might not be in the best interest for the athletics department to operate as separate legal entity because they could then engage in more functions if they weren’t separate. Public schools and private schools also undergo a different analysis in terms of their ability to operate auxiliary enterprises because for public schools statutory and constitutional considerations become more important, with public schools in particular liable to be subjected to more scrutiny than private schools (Kaplin & Lee, 2006).
For public schools, the key in answering the question of whether or not it is best to operate as a separate entity requires an investigation into how broad the constitutional and statutory provisions delegating the authority to the school are as well as the appropriations acts authorizing expenditures of public funds (Kaplin & Lee, 2006). Separate athletics departments benefit from appropriations acts being broad because it places fewer limits on the activities that they can do. Furthermore, courts also consider the particular functions and objectives of the enterprise, the relation of these functions and objections to the institution’s educational purposes, and judicial precedent in that state indicating how to construe the scope of delegated powers (Kaplin & Lee, 2006).

Even though the cases that are critical in this analysis do not directly involve athletics departments, the issues in these cases – *Iowa Hotel Association v. State Board of Regents* (1962), *Churchill v Board of Trustees* (1982), and *Jansen v Attiyeh* (1987) – as well their outcomes relate to matters involving athletics departments that are separate legal entities and serve as useful tools for analysis.

*Iowa Hotel Association* indicates that a separate athletics department has the ability to construct, renovate, and expand facilities necessary for the benefit of the student-athletes as well as the student body as a whole that benefits and gains entertainment from attending sporting events at these venues. *Churchill* indicates that athletics departments have the ability to sell merchandise for money, in which the athletics department and school can argue that the revenue raised can be used to benefit the student-athletes and therefore help the student-athletes and athletics department promote the mission of the school. *Jansen* provides the athletics departments the opportunity to define terms not defined in the state statues to their benefit if done so
reasonably. One potential limitation for these public school athletics departments comes from *Medical Society of South Carolina v Medical University of South Carolina* (1999) in which the court noted that “an agency created by statute has only the authority granted it by the legislature.” Even so, as long as the athletics departments are created by statute, they possess the ability to engage in a wide array of activities that at least makes it viable for public school athletics departments to be a separate legal entity.

For private school athletic departments, it is necessary to determine whether a private school’s corporate charter and bylaws, made under state corporate law and educational licensing laws, allow the institution to engage in creating athletics departments that are separate legal entities (Kaplan & Lee, 2006). Then it becomes possible to evaluate whether or not a private school’s athletics departments have the ability to and whether or not they should function as auxiliary enterprises. It should be noted, though, that private schools typically encounter fewer obstacles – if any – than public schools in terms of being able to operate auxiliary enterprises (Kaplan & Lee, 2006). As a result, it seems that the only issue private school athletics departments might encounter involves the extent of what they can do as a separate legal entity. *State ex rel. v. Southern Junior College* (1933) indicates that as long as athletics departments abide by the school’s corporate charter and bylaws and those charters and bylaws comply with state laws and rules, private school athletics departments that are separate legal entities should be able to engage in a wide range of activities.

*Eleventh Amendment and Arm of the State Doctrine Implications*

An extremely important consideration in terms of whether or not it is better for an athletic department to be a separate legal entity from the school involves the Eleventh
Amendment and the arm of the state doctrine. The Eleventh Amendment states that “the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State” (U.S. Const. amend. XI). The implication on public schools, therefore, is that they are protected by the Eleventh Amendment from lawsuits arising out of their athletic programs (English v. University of Hawaii, 2005; Graham v. NCAA, 1986). Athletics departments that do not operate as a separate legal entity from the school would benefit by enjoying these same Eleventh Amendment protections since they are the same entity as the school (Graham v. NCAA, 1986). On the contrary, Eleventh Amendment protection issues may potentially arise when athletics departments are separate legal entities from the schools (Kansas State Univ. v. Prince, 2009). In making this determination, the arm of the state doctrine becomes extremely important.

The arm of the state doctrine is “used to bestow sovereign immunity on entities created by state governments that operate as alter egos or instrumentalities of the states” (Kansas State Univ. v. Prince, 2009). Applying the arm of the state doctrine to athletics departments, if the separate athletics department is deemed an arm of the state, it has the same protections as the school’s and is afforded Eleventh Amendment immunity (Kansas State Univ. v. Prince, 2009). The arm of the state doctrine is not applied uniformly to all schools in all states because even though the Eleventh Amendment is a federal matter determined law, state law must be analyzed in making this determination (Regents of the Univ. of Cal. v. Doe, 1997). Therefore, even if a case in a different state examines a state
university’s athletics association, it is not automatically persuasive (*Kansas State Univ. v. Prince*, 2009).

The important factor considering the arm of the state test is whether it should really impact a school’s decision to have its athletics department as a separate legal entity. Based off the Tenth Circuit in *Kansas State University v. Prince* (2006) in which the court could not reach a determination of whether the IAC is an arm of the state as it simply stated “it may be,” public schools should take careful note of the analysis in *Kansas State University* – in particular those schools located in states are part of the Tenth Circuit – because depending on certain factors unique to that state and the school involved, the courts might very well rule that an athletics department organized as a separate legal entity is not an arm of the state, which would not afford that athletics department certain protections that the school as a whole might otherwise have.

Athletics departments that are not separate legal entities from the school are essentially free from Eleventh Amendment issues regarding the arm of the state doctrine because in various courts public schools are have been almost universally deemed as arms of the state (*Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 2005). Courts, however, have been inconsistent in decided whether athletics departments that are organized as separate entities are, or are not, arms of the state. *Braswell v. Bd. of Regents* (2005) ruled that the University of Georgia’s Athletic Department was ruled as being entitled to Eleventh Amendment Immunity because they were an arm of the state, whereas the court in *Kansas State Univ. v. Prince* (2009) was unable to come up with a conclusion to whether the IAC was considered an arm of the state. In comparison, *Plancher v. UCF Athletics Assoc.* ruled that the UCFAA, which is a separate legal entity from the school, was not
entitled to sovereign immunity. If the federal circuit the school is located in had not declared that an athletics department separated from the school is an arm of the state, administrators should either do an extensive analysis of the arm of the state doctrine to make sure that the athletics program would satisfy the requirements of the federal circuit the institution is located in.

**Enterprise Liability and Respondeat Superior**

Athletics departments that operate as separate legal entities also need to consider enterprise liability and respondeat superior-related matters in determining whether or not to operate as a separate legal entity. Enterprise liability is defined as the “liability imposed on each member of an industry responsible for manufacturing a harmful or defective product, allotted by each manufacturer’s market share of the industry” (Black’s Law Dictionary, 2004 p. 997). Very similar to the notion of enterprise liability is respondeat superior, which is “the doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency” (Black’s Law Dictionary, 2004 p. 1426). In the athletics context where injuries and incidents can occur as a result of an athletic department employee’s negligence within the context of his or her job or from property belonging to the athletics department, enterprise liability and respondeat superior issues are significant matters for collegiate athletics departments.

There are no relevant United States cases which deal with enterprise liability and non-profits. However, a significant Canadian case which can be used as influential authority is *Bazley v. Curry* (1999). In *Bazley*, a worker for a non-profit children’s foundation sexually harassed a child who was staying at one of the foundation’s homes.
The child filed suit against the foundation for compensation dealing with the injuries from the sexual harassment. Although the defendants argued that non-profit organizations should be exempt from liability, the court refused to acknowledge such an exemption, noting that “it is difficult to conclude that the fact that the appellant does good work in the community without expectation of profit makes it unjust that it should be held vicariously responsible for the abuse of the respondent” (*Bazley*, para. 51).

*Bazley* aligns with the widely accepted idea that even though athletics departments are generally non-profits, they should not be immune from any sort of financial consequences stemming from legal matters. Christopher D. Stone (1980) noted that “in some circumstances, it becomes necessary to replace or reinforce enterprise liability with various interventionist techniques that restrict the autonomy of the participants. These interventions—overrulings, we might say, of the ordinary presumption in favor of managerial expertise—range from displacing the enterprise from full control over its agents' conduct and compensation, to subjecting the enterprise to certain constraints on the selection of bureaucratic and production variables” (p. 77). As a result, it is crucial to determine whether there is a difference in the impact of potential enterprise liability or respondeat superior suits to employers and coaches working in athletic departments that are separate legal entities from the school in comparison to those who remain a part of the educational institution. In particular, how does enterprise liability and respondeat superior operate in terms of lawsuits where the separate legal entity is held as a party in the case along with a similar- and larger-functioning entity?

While not a sports case, *Coursey v. City of Peoria* (1977) illustrates that athletics departments may benefit under enterprise liability and respondeat superior doctrine by
not operating as separate legal entities because they would be less likely to be able to be properly named as defendants in a lawsuit. In *Coursey*, Jonathan M. Coursey filed a lawsuit against two officers, the city of Peoria, and the Police Department to recover damages incurred when he was arrested. Coursey complained that excessive force was used and that false arrest potentially occurred as well. The defendants argued that the Police Department was not a proper party in the suit because it was not a separate legal entity, and the court agreed. Another non-sports case is relevant in this discussion. In *Cobb v. Mason County* (1989), the plaintiff filed a complaint against a county, a county Sheriff’s Department, and a sheriff stemming from injuries that occurred as a result of work he was doing while in prison. The plaintiff alleged that he was improperly required to do manual labor – including the heavy lifting required to set up a Blood Mobile Drive – and that his early requests for immediate medical treatment in regards to his injuries were ignored. As in *Coursey*, the defendants in *Cobb* moved to dismiss the lawsuit because the Police Department was not a separate legal entity. What is unique about *Cobb*, however, is that the defendants pointed to Rule 17 of the Federal Rules of Civil Procedure, arguing that “Michigan law determines the capacity of the Mason County Sheriff Department to sue or be sued, and there is no constitutional or statutory authority in Michigan which indicates that the sheriff’s department is a body corporate with the capacity to sue or be sued” (*Cobb*, 1989, p. *5). The courts ruled in favor of the defendants, noting that arguments as the plaintiff could not prove that “the Sheriff’s department is a separate legal entity capable of being sued in its own right” (*Cobb*, 1989, p. *7). As a result, the defendants’ motion for summary judgment regarding the Mason County Sheriff’s Department was granted.
Coursey illustrates that athletics departments may benefit under enterprise liability and respondeat superior doctrine by not operating as separate legal entities because if they were not a separate legal entity, they would be less likely to be able to be properly named as defendants in a lawsuit. If an athletics department does exist as a separate legal entity, Cobb illustrates the importance of how much state law can have an impact in making this determination in whether it is better from an enterprise liability and respondeat superior aspect to operate as a separate legal entity. As a result, while separate athletics departments in the state of Michigan might look at Cobb favorably, other states might not have the same laws in place as does Michigan. Even though athletics departments can be held liable for improper actions, they seem to benefit by not operating as a separate legal entity from the school as it is potentially harder for them to be held as parties in lawsuits where the university is also involved. As a result, an intensive look at state law is necessary regarding how athletics departments operating as separate legal entities in that state might potentially deal with respondeat superior and enterprise liability situations as in Cobb and Coursey.

Taxation Issues

Another important consideration in terms of whether it is better for an athletics department to be a separate legal entity involves taxation issues. Even though athletics departments as non-profits are able to have income-tax exemption, they (and the NCAA for that matter) have experienced increased scrutiny over whether they should have this exemption (Colombo, 2010). A major catalyst for this increased scrutiny occurred in 2006 when Representative Bill Thomas of California – who was then the chair of the House Ways and Means Committee – sent a letter to then President of the National
Collegiate Athletic Association (NCAA) Myles Brand which asked the NCAA to defend its status as a tax-exempt organization. This scrutiny also applied to athletics departments as well, in particular with coaches’ salaries (Colombo, 2010). While Colombo (2010) noted that athletics departments rely on the Internal Revenue Code (hereinafter IRC) for tax exemption status, do separate athletics departments need to worry about whether they are legitimately able to enjoy income tax protection status?

While the arm of the state doctrine and enterprise liability/respondeat superior impacts public school athletics departments more than they do private schools, private school athletics departments have bigger implications than their public school counterparts in regards to income-tax issues. In terms of whether athletics departments that are separate legal entities, a major reason why this is a more important consideration for private school athletics departments is because public schools that are a separate legal entity from the school receive additional protection via Section 115 of the IRC. Section 115 provides an exemption for “income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof.” With Section 115, if an entity is separate from the government, its income will be subject to tax unless an exclusion or exemption applies (http://www.irs.gov/pub/irs-tege/eotopice90.pdf.). However, as discussed previously, if the arm of the state doctrine applies to those athletics departments that are separate legal entities, then they should be able to have the same income tax exemptions that the public universities have. Therefore, in terms of public athletics departments operating as a separate legal entity, no IRC problems appear to exist.
Athletics departments affiliated with private schools, however, rely on different sections of the IRC. They rely on Section 170 as well as Section 501(c)(3) of the IRC in order to have income tax exemption, which requires a stricter analysis. Section 170 provides a tax exemption for charitable contributions. Furthermore, Section 170(c)(2)(b) mandates that “the term ‘charitable contribution’ means a contribution or gift to or for the use of…a corporation, trust, or community chest, fund, or foundation…organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.” Section 501(c)(3), which is similar to Section 170 of the Code, provides tax-exempt status for “corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment).” In terms of analyzing Section 501(c)(3), the charitable and educational purposes aspects of Section 501(c)(3) are extremely crucial in evaluating whether athletics departments deserve income-tax exemption, as there is a two-part test to determine whether an entity is allowed to have Section 501(c)(3) protection (Colombo, 2010).

The first part is the organizational test, which requires that “it must be organized as a state-law nonprofit organization…must limit its authorized activities to charitable ones, and must have a provision in its organizing documents that its assets will be transferred to another charity or to the government if it goes out of business” (Colombo,
2010). The second part is the operational test, which requires that “the entity in question actually must engage ‘primarily’ in charitable activities, such as educational activities” (Colombo, 2010). Even if the athletics departments pass the 501(c)(3) test, there are two hurdles, and one in particular that could impact athletics departments that are separate legal entities.

The first hurdle deals with what is known as the Unrelated Business Income Tax (UBIT). John Colombo, the UBIT mandates that “if a business is ‘substantially related’ to the organization’s charitable purpose, then any business profit continues to be tax-free; if, however, the business is not substantially related, any profit is taxed at the usual corporate tax rates” (Colombo, 2010 p. 116). In terms of athletics departments, this becomes relevant in determining whether the activities involved with the athletics departments are related or not to the school’s educational, scientific, or charitable purposes (Kaplan & Lee, 2010 p. 1634). Related to the UBIT is what is known as “commerciality limitation” – “the fact that when charities run significant commercial businesses, they risk losing their tax exemption, even if they also have significant charitable activities” (Colombo, 2010 p. 126). The UBIT and the commerciality limitation (in particular the latter) impacts athletics departments that are separate legal entities because as a single entity, it seems as though athletics departments engage in activities for the primary benefit of the separate athletic department themselves and not the school in general. In particular, Dosh (2011) noted that “there are plenty of schools [whose athletics departments turned a profit] who have shown no evidence giving back to their university for anything other than required expenses.” While a major reason that, in general, athletics departments have income-tax exemption is because they promote
amateur athletics, there is no doubt that big-time athletics departments are focusing on generating large amounts of revenue (Dosh, 2011). Duderstadt (2010), furthermore, notes that athletic departments operating as auxiliary enterprises are “focus[ing] most of the athletic department’s energy…on revenue generation rather than cost management” (p. 145).

With this in mind, even if one believes that athletics departments really do promote amateur athletics in an age of multi-billion dollar television contracts, because an athletics department operating as separate legal entity from the school possesses the ability to generate large amounts of revenue, one could reasonably argue that the commerciality limitation should apply to these athletics departments. In particular, with athletics departments operating as a separate legal entity, legal questions could exist in terms of whether they should benefit from the same income-tax protection as the schools and athletics departments that are not separate legal entities. While no cases which have directly dealt with private school athletics departments that are separate legal entities exist, Community Hospital Linen Services, Inc. v. Commissioner of Taxation (1976) provides some useful guidance relative to these entities. In this case, which dealt with non-profit hospitals and the use of property, the court had to determine “whether the fact that the hospitals own and operate the property through an incorporated association, which is technically a separate legal entity, should disqualify the property for the tax exemption” (Community Hospital Linen Services, Inc., 1976 p. 543). In making its ruling that the hospitals had tax-exempt status in terms of the use of property, the court noted that

“[t]he general rule is that courts are reluctant to disregard the separate legal entities of the parent corporation and the subsidiary
corporation merely to grant tax relief at the expense of the state where the subsidiary is incorporated or acquired for the purpose of advantageously carrying on some phase of the parent corporation’s activities or business. If a corporation elects to treat itself as an independent business for some purposes, it should not be permitted to disavow that identity merely to avoid the resultant tax consequences. However, we expressly recognized an exception to this rule when the subsidiary corporation was created solely for and devoted exclusively to serving the purposes of the parent corporations. Thus in such a situation where the subsidiary corporation ‘could have no purpose or existence apart from the operations of its corporate owners’, the substance of the arrangement should control and the fact that the subsidiary is technically a separate legal entity may be disregarded for tax purposes” (Community Hospital Linen Services, Inc., 454-55).

Noting the analysis in the court’s decision, the key language of “when the subsidiary corporation was created solely for and devoted exclusively to serving the purposes of the parent corporations” makes it seem as though private school athletics departments that are separate legal entities from the school could be entitled to the same tax-exempt status as the school it represents (Community Hospital Linen Services, Inc., 454-55). Athletics departments are created to serve the purpose of the school and the students. Even one that is a cynic of collegiate athletics cannot deny that there would be no athletics department without the school or student-athletes. Whether athletics departments deserve tax-exempt status as a whole is one thing; in terms of separate athletics departments, however, private school athletics departments based off the rationale of Community Hospital Linen Services could argue that they deserve income-tax exemption. However, even with Community Hospital Linen Services, the commercial limitation could prove to be a very strong factor because of how much corporate-like behavior athletics departments perform. Colombo (2010) noted that “a number of court cases have held that a charity risks its exempt status if it conducts substantial activities with a ‘commercial
hue’ - that is, the activity is one that competes with commercial providers, is priced similarly to how a for-profit would price the same service or sale of goods, and in fact produces significant profits” (p. 130).

In summary, it seems as if there are no issues regarding private and public schools being able to operate the athletic department as an auxiliary enterprise. Regarding Eleventh Amendment and Arm of the State doctrine issues, while there are no issues with private schools, public schools need to do an analysis of its school as well as the various factors within its federal circuit to determine if any issues are present. Public schools would benefit more than private schools regarding potential respondeat superior and enterprise liability issues if their athletic departments were not separate legal entities. Also, regarding taxation issues, although public schools likely would not face issues, there might be some doubt regarding private schools being able to utilize tax benefits if they operated as separate legal entities. When deciding what’s best from a legal standpoint, each school must be analyzed separately in order to make the best determination.

**Institutional Theory**

Institutional theory looks at how the behavior of organizations relates to the organizational and institutional systems (Schleinberg & Clemens, 2006)). Institutional theory seeks to answer questions about institutional structure as well as the participants within certain institutions, such as why institutions of the same type are very similar to each other and why the behavior of people within an institution differs from the rules and goals of the institutions (Scott, 1995). In general, there are three elements of institutional theory. The first element involves legitimacy. In terms of institutional theory, this is
defined as “a condition reflecting cultural alignment, normative support, or consonance with relevant rules or laws” (Scott, 1995 p. 45). The second element of institutional theory is isomorphism, which is “the constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions” (DiMaggio & Powell, 1983). Isomorphism notes that institutional characteristics change depending on how the environmental characteristics change; the number of institutions depends on how much the environment can handle the amount of institutions available and how the diversity of institutional forms align with environmental diversity (DiMaggio & Powell, 1983). The third element of institutional theory involves rational myths. Rational myths are “the beliefs generated about the legitimacy of certain actions leading to desired outcomes of organized processes” (Lammers & Barbour, 2006 p. 359).

DiMaggio and Powell (1983) authored one of the seminal articles dealing with institutional theory – in particular focusing on isomorphism. They note that institutional change happens as a result of institutions trying to mirror each other without considering how the changes will impact efficiency. They further note that in the long run this leads to an environment where institutional change in the future will be hard to accomplish. DiMaggio and Powell report that homogenization occurs because of the need for institutional fields to exist. DiMaggio and Powell identified three types of isomorphism that can occur: coercive isomorphism, which comes from the formal and informal pressures that come from other institutions upon which the institution in question relies upon; mimetic isomorphism, which occurs when institutions are either poorly run, structured or operated and they look to other institution’s structures for guidance; and normative isomorphism, which comes from the workers’ desires to control production
and to establish legitimacy for their operational autonomy. According to DiMaggio and Powell, if institutional isomorphism is studied within the institution, such an examination can help institution understand how fields become homogeneous, which will allow for a better understanding of why the institution evolved to its current state. This relates to athletic departments and its entity structure because if there is a significant relationship between the entity structure of an athletic department and variables such as success, expenditures and profit, other athletic departments might evolve towards the entity status which is more likely to yield these positive results.

Oliver (1991) considers how institutions respond to isomorphism. Reasons that companies desire not to conform include: not being resource dependent; desiring autonomy over decision making; having the ability to adapt flexibly if situations arise; and using the institution’s objectives to alter or control the work environment. Five types of strategic responses to conformity pressures were discovered. The first, acquiescence, involves the company succumbing to conformity either via habit, imitation or compliance. Compromise involves the institution attempting to balance, pacify, or bargain with external constituents. Avoidance involves a company hiding their non-conformity, protecting themselves from pressures institutionally or deciding not to follow institutional rules. Defiance involves the company dismissing, challenging, and/or attacking the pressures to conform. Lastly, manipulation involves the company trying to control or influence institutional pressures (Oliver, 1991). Because athletic departments often deal with limited resources and the need to be flexible if the athletic department is not sustaining a profit, in the future athletic departments might be forced to concede to adopting an entity status model which is conducive to being able to spend the most
money and generate the most money, even if negatives exist with adopting the new entity status.

Institutional theory has also been analyzed within the sports realm. In their study designed to determine what elements NCAA Division I athletic administrator value with the sports in its athletic department as well as to develop a further understanding of athletic administration theory, Cooper and Weight (2011) consider how institutional theory helps shape collegiate athletic administrators as well as athletic departments as a whole. Through normative isomorphism, Cooper and Weight also note that the similarities are in large part due to the various decision makers’ value systems. For example, athletic departments within the same conference (such as the Atlantic Coast Conference) would have similar core values, institutional structures and budget priorities. Through their research, Cooper and Weight note that as a result of institutional isomorphism, there is a “warped sense of reality held by many administrators that the football and basketball teams are the answer to their financial ailments” (p. 85). If the research demonstrates that athletic departments have almost the same entity status, Cooper and Weight’s research could help provide an understanding of why this is the case. Also, an athletic department’s entity status could also be tied to the athletic department’s ability to allow the football and basketball teams to achieve maximum success, revenues and profits without taking into account what would benefit the athletic department as a whole.

Overall, one of the implications of institutional theory might be that administrators want legitimacy and approval from similar administrators within their institutional community and therefore want to be similar to each other in terms of the
perceived or implied value systems. If the research determines that there is a relationship between the entity status of an athletic department and other variables, athletic departments might start copying each other and employing the same entity status model. If the research shows that being operating as a completely separate legal entity is the best model in terms of success, expenditures, revenues and profits, athletic departments would have to consider the potential legal issues that exist with operating as a separate legal entity in deciding whether to change its entity status. Even if athletic departments understand the negatives that exist with operating as a separate legal entity, they might start to feel the pressure and as a result change its entity status to being completely separate if it’s determined that operating as a separate legal entity is most likely to yield the best success and financial results.

**Variables Relating to Athletic Department Success**

Past studies have analyzed various factors to determine correlation with the success of a team or an athletic department. Orzag & Israel (2009) investigated whether a relationship exists between increasing the operating expenditures at FBS schools and winning percentage or success as well if a relationship existed between winning percentages and revenue. Their research found a small, positive and statistically significant relationship between operating football expenditures and team success, but that when the various types of football expenditures were investigated, the only type of spending that had a statistically significant effect were “team expenditures” which included recruiting, travel, and other game day expenses (Orzag & Israel, 2009, p. 8). Regarding basketball, even though no statistically significant relationship exists between basketball and winning percentage or the probability of making the NCAA tournament,
there is a significant relationship between “team expenditures” and the probability of making the NCAA tournament. Regarding a relationship between success and revenues, Orzag & Israel found that there was a positive, statistically significant relationship in football between finishing in the top 25 in the Associated Press poll and revenue, but that no relationship existed between revenue and football and basketball winning percentage as well as making the NCAA basketball tournament.

Albert (2006) focused on whether there is a relationship between athletic expenditures and NCAA Division I baseball, softball, men’s soccer, women’s soccer, men’s tennis, women’s tennis, and women’s volleyball. Albert determined whether there were differences between “Elite” (teams that finished in the top 16 in their respective NCAA championships), “Successful” (teams that finished in the 17-32 of their respective NCAA championships), “Qualifying” (teams that qualified for the NCAA championships but lost in the first round) and “Non-qualifying” (teams that did not qualify for their respective NCAA championship tournament) teams (Albert, 2006, p. 4-8). Albert’s research indicated that with some exceptions, the teams that achieved the highest level of success reported the greatest median expenditures and that a relationship existed between athletic expenditures and athletic success for the teams and sports analyzed. Albert cited recruiting and development factors for teams that spend the most money as well as the trickle-down effect for schools that have powerful football and basketball teams as possible reasons for this relationship.

Lassiter (2001) created the “Lassiter rank” – which was determined by weighing equally how a team finished in the Directors’ Cup, the graduation rate differences at a school between student-athletes and the general undergraduate population as well as the
difference at a school between the percentage of female student athletes and female student – and determine if a relationship existed between the Lassiter rank and how it finished in the Directors’ Cup as well as the athletic department’s total budget (Lassiter, 2001, p. 1). Lassiter determined that a moderately significant relationship existed between the Lassiter rank and the Directors’ Cup ranking as well as the athletic department’s total budget. Lassiter also determined that a relationship existed between a school’s athletic department budget and its Directors Cup ranking – in fact, it was the strongest relationship examined in Lassiter’s study.

Jones’ (2012) study focused on the relationship between an athletic department’s expenditures and the overall on-field success of the athletic department. Using NACDA Director’s Cup points as the indicator of on-field success, Jones discovered that at FBS schools there was a statistically significant positive relationship between athletic expenditures and a team’s on-field success. Jones also found that among FBS schools, BCS conference affiliation had no impact on the relationship between athletic expenditures and on-field success. Reasons that Jones cited for this are that athletic directors believe that high amounts of spending are necessary for teams to be successful, the “arms race” that exits with FBS athletic departments, the pressure at FBS athletic departments to win causing schools to assign new funding to aspects directly associated with winning such as recruiting expenses and coaches’ salaries, and how FBS athletic director’s contracts often include incentives if its teams are successful.
This study is an exploratory examination of the legal structure of FBS athletic departments. Questions regarding the legal and organizational structures of FBS athletic departments as well as success, revenues and profits were answered via information gathered online and in direct email communication.

**Subjects**

The populations at interest were the 120 NCAA FBS athletic departments and schools. The university’s general counsel office from each FBS institution was surveyed in order to answer questions of interest. The director of compliance from each FBS conference and the director of compliance from the NCAA Division I schools that are Independent in football were also contacted in order to gain information.

**Instrumentation and Data Collection**

An e-mail was sent to an athletic department administrator or the university’s general counsel in order to obtain the information about the school’s legal entity status. The e-mail asked the respondents to state the entity status of the schools during the 2011-12 school year. For this study, “success” is determined by how many points the school scored in the 2011-12 National Association of Collegiate Directors of Athletics (NACDA) Directors’ Cup standings. Financial information about the revenues, profits and expenditures of the athletic departments were obtained from information provided by
the Equity in Athletics Disclosure Act interactive online database for the 2011-12 school year.

**Data Analysis**

Descriptive statistics were used to identify the athletics department legal status. After the data for the independent variables was gathered, SPSS was used to analyze quantitative data in order to tabulate descriptive statistics, and one-way between subjects analysis of variance (ANOVA’s) were used to compare the information to determine if a relationship exists between the legal entity structure of an athletic department and its success, revenues, and profits.
CHAPTER IV
MANUSCRIPT

Introduction

Athletics departments have a history of operating independently from the school. Examples of this are that in the beginning of collegiate athletics, students would coordinate and conduct the sporting events outside from the schools. This trend of independence continued even as schools began to take responsibility for the management of athletics responsibilities (Duderstadt, 2000). As football started to increase in popularity, college athletics started to witness massive growth. Large stadiums were built to accommodate the increased interest, and radio broadcasts of college football games further aided in its growth (Duderstadt, 2000). In the 1960’s and 70’s, college athletics gained even more exposure as television started to play a significant role in promoting and marketing these programs (Duderstadt, 2000). Athletics were becoming the “front porch of the university” (Duderstadt, 2000).

A landmark Supreme Court decision in 1984 became a catalyst for increasing the commercialization of college athletics. In *NCAA v. Board of Regents of the University of Oklahoma* (1984), the Supreme Court ruled that it was an antitrust violation for the NCAA to place broadcasting limits on football games. As a result, conferences as a result started to negotiate their own television deals with networks (Duderstadt, 2000). With the advent of cable television and networks such as ESPN being established, places for college athletics to be broadcast were increasing. Meanwhile, CBS agreed with the
NCAA to be the exclusive broadcaster of the NCAA basketball tournament for $1 billion dollars (Duderstadt, 2000). This growth has continued today, with licensing and sponsorship deals being larger, conferences such as the Big Ten and Pacific-12 having their own networks, the facilities arms-race, and the internet serving as another content provider for college athletics.

As the revenues and expenses in big-time college athletics continued to escalate, some schools opted to legally organize the athletics department as a non-profit entity separate from the university. Athletic departments that are a separate legal entity are able to have more control over their finances (Duderstadt, 2000). Even though athletic departments that operate as separate legal entities must cover their costs, they possess the ability to do so themselves through avenues such negotiating licensing and sponsorship contracts as well as setting prices for ticket sales (Duderstadt, 2000). Furthermore, it has been demonstrated athletics departments operating as separate entities possess the ability incur questionable expenses and justify them by saying that as a separate entity the school as a whole is not responsible for those costs (Duderstadt, 2000).

The status of athletics departments as separate legal entities as a whole, however, is starting to come into question. Richard G. Johnson, an attorney who served as plaintiff’s counsel for *Oliver v. NCAA* (2009), believes that congress should create an act that requires “any college or university with an athletic department that derives revenue from its athletic program shall operate from within that institution and not from within any separate entity” (Johnson, 2011, ¶6). In response to the Penn State University sexual abuse situation, Dennis Dodd, a columnist for cbssports.com, stated that

“[l]et's hope this is the moment when it begins, a movement to take back college athletics from the current stakeholders. They have failed miserably -- the bloated
athletic departments; the overpaid, out-of-touch coaches; the apparel companies; the networks; maybe even the NCAA. This is where the excess has to stop. This has to be the point when universities quit bowing down to King Football, quit drooling over the prospect of colorful uniforms, stop being beholden to ratings” (Dodd, 2011 ¶7).

Duderstadt, who was the former president of The University of Michigan, has noted that “[the athletics department’s] more independent financial status has led to many instances not only to different rules and policies governing athletics, but to management values and cultures that depart quite significantly from those of the academic core of the university” (2000, p. 87). As scandals and legal trouble have plagued college athletics recently, more people are pushing for athletics departments to not operate as a separate legal entity from the school in order for the school to have more oversight over the athletic department.

Transparency issues of an athletics department operating as a separate legal entity also exist. Colombo (2010) noted that “the lack of transparency in athletic department operations has been a consistent theme of reformers and has led to well-documented cases of abuse” (p. 115). After the University of Kentucky decided to dissolve the University of Kentucky Athletic Association and have the University of Kentucky Board of Trustees oversee athletics matters, a Kentucky state senator stated "I hate to use the overused word 'transparency,' but I think that's exactly what [the potential move to dissolve the UKAA] brings" (Blackford & Tipton, 2011, ¶21). Noting how athletic departments do not undergo the same level of scrutiny as other aspects of the school and are therefore less transparent, Duderstadt (2000) said:

although universities are highly decentralized, there is nevertheless an intricate set of controls, of checks and balances, that provides guidance to most academic and administrative units…yet, in many universities, the athletic department is
allowed to operate relatively autonomously from these controls…athletic departments that are allowed to operate in such an independent and cavalier fashion can walk the universities far out on a limb that threatens the integrity of their academic mission” (p. 102-103).

Considering that the entity status of athletic departments are starting to come into question, examining whether there is a relationship between an athletic department’s entity status and various factors is important in determining whether it is justifiable for an athletic department to operate as a separate legal entity from the school or not.

**Research Questions**

This study is guided by the following research questions:

RQ1: What are the legal entity statuses of FBS athletic departments?

RQ2: Is there a significant difference between an athletic department’s entity status and the following variables:

- Directors’ Cup Results
- Expenditures
- Revenue
- Profit

**Literature Review**

*Separate Legal Entities and Athletic Departments*

Even though schools generally have the ability to operate auxiliary enterprises and are increasingly doing so, a consideration of whether or not it is better from a legal standpoint to operate separately is a very important consideration that athletic departments need to consider (Kaplan & Lee, 2006). An analysis of a school’s use of
auxiliary enterprises is very important in terms of whether or not it is better for an athletics department to operate as a separate legal entity. Auxiliary enterprises are defined as “a broad range of functions that are claimed to be ‘auxiliary’ to the education and research that are the central mission of a higher education institution…such functions must place the institution or one or one of its subsidiary or affiliated organizations in the position of seller and must be (or have the potential to be) income producing” (Kaplin & Lee, 2006 p. 1618). Schools are increasingly using auxiliary enterprises in a variety of ways (Kaplin & Lee, 2006). Examples of auxiliary enterprises at schools include graphics, printing and copying services, campus bookstores, and schools renting out its facilities to outside groups for a fee (Kaplin & Lee, 2006).

Athletics departments at most Football Bowl Subdivision schools are considered auxiliary enterprises (Duderstadt, 2000). If the auxiliary enterprises are used for educational purposes and involve goods, services, or facilities not available from local business, then the potential for scrutiny of these enterprises are very low (Kaplin & Lee, 2006). Where issues do arise, however, is when the auxiliary enterprise’s operations extend beyond educational purposes by placing the institution in a competitive position with other entities (Kaplin & Lee, 2006). Examples of this scrutiny are when the customers are drawn to the institution’s activities instead of local business as well as the institution’s activities having unfair advantages such as tax-exempt status and better funding sources (Kaplin & Lee, 2006).

As a result, it is important to figure out the scope to which an athletic department can operate as a separate legal entity from the school. If a separate athletics department is limited in its functions, then it might not be in the best interest for the athletics
department to operate as separate legal entity because they could then engage in more functions if they weren’t separate. Public schools and private schools also undergo a different analysis in terms of their ability to operate auxiliary enterprises because for public schools statutory and constitutional considerations become more important, with public schools in particular liable to be subjected to more scrutiny than private schools (Kaplin & Lee, 2006).

For public schools, the key in answering the question of whether or not it is best to operate as a separate entity requires an investigation into how broad the constitutional and statutory provisions delegating the authority to the school are as well as the appropriations acts authorizing expenditures of public funds (Kaplin & Lee, 2006). Separate athletics departments benefit from appropriations acts being broad because it places fewer limits on the activities that they can do. Furthermore, courts also consider the particular functions and objectives of the enterprise, the relation of these functions and objections to the institution’s educational purposes, and judicial precedent in that state indicating how to construe the scope of delegated powers (Kaplin & Lee, 2006).

For private school athletic departments, it is necessary to determine whether a private school’s corporate charter and bylaws, made under state corporate law and educational licensing laws, allow the institution to engage in creating athletics departments that are separate legal entities (Kaplan & Lee, 2006). Then it becomes possible to evaluate whether or not a private school’s athletics departments have the ability to and whether or not they should function as auxiliary enterprises. It should be noted, though, that private schools typically encounter fewer obstacles – if any – than public schools in terms of being able to operate auxiliary enterprises (Kaplan & Lee, 2006). As a result, it seems
that the only issue private school athletics departments might encounter involves the extent of what they can do as a separate legal entity.

*Eleventh Amendment and Arm of the State Doctrine Implications*

An extremely important consideration in terms of whether or not it is better for an athletic department to be a separate legal entity from the school involves the Eleventh Amendment and the arm of the state doctrine. The Eleventh Amendment states that “the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State” (U.S. Const. amend. XI). The implication on public schools, therefore, is that they are protected by the Eleventh Amendment from lawsuits arising out of their athletic programs (*English v. University of Hawaii*, 2005; *Graham v. NCAA*, 1986). Athletics departments that do not operate as a separate legal entity from the school would benefit by enjoying these same Eleventh Amendment protections since they are the same entity as the school (*Graham v. NCAA*, 1986). On the contrary, Eleventh Amendment protection issues may potentially arise when athletics departments are separate legal entities from the schools (*Kansas State Univ. v. Prince*, 2009). In making this determination, the arm of the state doctrine becomes extremely important.

The arm of the state doctrine is “used to bestow sovereign immunity on entities created by state governments that operate as alter egos or instrumentalities of the states” (*Kansas State Univ. v. Prince*, 2009). Applying the arm of the state doctrine to athletics departments, if the separate athletics department is deemed an arm of the state, it has the same protections as the school’s and is afforded Eleventh Amendment immunity (*Kansas
State Univ. v. Prince, 2009). The arm of the state doctrine is not applied uniformly to all schools in all states because even though the Eleventh Amendment is a federal matter determined law, state law must be analyzed in making this determination (Regents of the Univ. of Cal. v. Doe, 1997). Therefore, even if a case in a different state examines a state university’s athletics association, it is not automatically persuasive (Kansas State Univ. v. Prince, 2009).

The important factor considering the arm of the state test is whether it should really impact a school’s decision to have its athletics department as a separate legal entity. Based off the Tenth Circuit in Kansas State University v. Prince (2006) in which the court could not reach a determination of whether the IAC is an arm of the state as it simply stated “it may be,” public schools should take careful note of the analysis in Kansas State University – in particular those schools located in states are part of the Tenth Circuit – because depending on certain factors unique to that state and the school involved, the courts might very well rule that an athletics department organized as a separate legal entity is not an arm of the state, which would not afford that athletics department certain protections that the school as a whole might otherwise have. Athletics departments that are not separate legal entities from the school are essentially free from Eleventh Amendment issues regarding the arm of the state doctrine because in various courts public schools are have been almost universally deemed as arms of the state (Md. Stadium Auth. v. Ellerbe Becket, Inc., 2005). Courts, however, have been inconsistent in decided whether athletics departments that are organized as separate entities are, or are not, arms of the state.
Enterprise Liability and Respondeat Superior

Athletics departments that operate as separate legal entities also need to consider enterprise liability and respondeat superior-related matters in determining whether or not to operate as a separate legal entity. Enterprise liability is defined as the “liability imposed on each member of an industry responsible for manufacturing a harmful or defective product, allotted by each manufacturer’s market share of the industry” (Black’s Law Dictionary, 2004 p. 997). Very similar to the notion of enterprise liability is respondeat superior, which is “the doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency” (Black’s Law Dictionary, 2004 p. 1426). In the athletics context where injuries and incidents can occur as a result of an athletic department employee’s negligence within the context of his or her job or from property belonging to the athletics department, enterprise liability and respondeat superior issues are significant matters for collegiate athletics departments.

There are no relevant United States cases which deal with enterprise liability and non-profits. However, a significant Canadian case which can be used as influential authority is Bazley v. Curry (1999). In Bazley, a worker for a non-profit children’s foundation sexually harassed a child who was staying at one of the foundation’s homes. The child filed suit against the foundation for compensation dealing with the injuries from the sexual harassment. Although the defendants argued that non-profit organizations should be exempt from liability, the court refused to acknowledge such an exemption, noting that “it is difficult to conclude that the fact that the appellant does good work in
the community without expectation of profit makes it unjust that it should be held vicariously responsible for the abuse of the respondent” (Bazley, para. 51).

Bazley aligns with the widely accepted idea that even though athletics departments are generally non-profits, they should not be immune from any sort of financial consequences stemming from legal matters.

While not a sports case, Coursey v. City of Peoria (1977) illustrates that athletics departments may benefit under enterprise liability and respondeat superior doctrine by not operating as separate legal entities because they would be less likely to be able to be properly named as defendants in a lawsuit. In Coursey, Jonathan M. Coursey filed a lawsuit against two officers, the city of Peoria, and the Police Department to recover damages incurred when he was arrested. Coursey complained that excessive force was used and that false arrest potentially occurred as well. The defendants argued that the Police Department was not a proper party in the suit because it was not a separate legal entity, and the court agreed. Another non-sports case is relevant in this discussion. In Cobb v. Mason County (1989), the plaintiff filed a complaint against a county, a county Sheriff’s Department, and a sheriff stemming from injuries that occurred as a result of work he was doing while in prison. The plaintiff alleged that he was improperly required to do manual labor – including the heavy lifting required to set up a Blood Mobile Drive – and that his early requests for immediate medical treatment in regards to his injuries were ignored. As in Coursey, the defendants in Cobb moved to dismiss the lawsuit because the Police Department was not a separate legal entity. What is unique about Cobb, however, is that the defendants pointed to Rule 17 of the Federal Rules of Civil Procedure, arguing that “Michigan law determines the capacity of the Mason County
Sheriff Department to sue or be sued, and there is no constitutional or statutory authority in Michigan which indicates that the sheriff’s department is a body corporate with the capacity to sue or be sued” (Cobb, 1989, p. *5). The courts ruled in favor of the defendants, noting that arguments as the plaintiff could not prove that “the Sheriff's department is a separate legal entity capable of being sued in its own right” (Cobb, 1989, p. *7). As a result, the defendants’ motion for summary judgment regarding the Mason County Sheriff’s Department was granted.

Coursey illustrates that athletics departments may benefit under enterprise liability and respondeat superior doctrine by not operating as separate legal entities because if they were not a separate legal entity, they would be less likely to be able to be properly named as defendants in a lawsuit. If an athletics department does exist as a separate legal entity, Cobb illustrates the importance of how much state law can have an impact in making this determination in whether it is better from an enterprise liability and respondeat superior aspect to operate as a separate legal entity. As a result, while separate athletics departments in the state of Michigan might look at Cobb favorably, other states might not have the same laws in place as does Michigan. Even though athletics departments can be held liable for improper actions, they seem to benefit by not operating as a separate legal entity from the school as it is potentially harder for them to be held as parties in lawsuits where the university is also involved. As a result, an intensive look at state law is necessary regarding how athletics departments operating as separate legal entities in that state might potentially deal with respondeat superior and enterprise liability situations as in Cobb and Coursey.
Another important consideration in terms of whether it is better for an athletics department to be a separate legal entity involves taxation issues. Even though athletics departments as non-profits are able to have income-tax exemption, they (and the NCAA for that matter) have experienced increased scrutiny over whether they should have this exemption (Colombo, 2010). A major catalyst for this increased scrutiny occurred in 2006 when Representative Bill Thomas of California – who was then the chair of the House Ways and Means Committee – sent a letter to then President of the National Collegiate Athletic Association (NCAA) Myles Brand which asked the NCAA to defend its status as a tax-exempt organization. This scrutiny also applied to athletics departments as well, in particular with coaches’ salaries (Colombo, 2010). While Colombo (2010) noted that athletics departments rely on the Internal Revenue Code (hereinafter IRC) for tax exemption status, do separate athletics departments need to worry about whether they are legitimately able to enjoy income tax protection status?

While the arm of the state doctrine and enterprise liability/respondeat superior impacts public school athletics departments more than they do private schools, private school athletics departments have bigger implications than their public school counterparts in regards to income-tax issues. In terms of whether athletics departments that are separate legal entities, a major reason why this is a more important consideration for private school athletics departments is because public schools that are a separate legal entity from the school receive additional protection via Section 115 of the IRC. Section 115 provides an exemption for “income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision
thereof.” With Section 115, if an entity is separate from the government, its income will be subject to tax unless an exclusion or exemption applies (http://www.irs.gov/pub/irs-tege/eotopice90.pdf.). However, as discussed previously, if the arm of the state doctrine applies to those athletics departments that are separate legal entities, then they should be able to have the same income tax exemptions that the public universities have. Therefore, in terms of public athletics departments operating as a separate legal entity, no IRC problems appear to exist.

Athletics departments affiliated with private schools, however, rely on different sections of the IRC. They rely on Section 170 as well as Section 501(c)(3) of the IRC in order to have income tax exemption, which requires a stricter analysis. Section 170 provides a tax exemption for charitable contributions. Furthermore, Section 170(c)(2)(b) mandates that “the term ‘charitable contribution’ means a contribution or gift to or for the use of…a corporation, trust, or community chest, fund, or foundation…organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.” Section 501(c)(3), which is similar to Section 170 of the Code, provides tax-exempt status for “corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment).” In terms of analyzing Section 501(c)(3), the charitable and educational purposes aspects of Section 501(c)(3) are extremely crucial
in evaluating whether athletics departments deserve income-tax exemption, as there is a
two-part test to determine whether an entity is allowed to have Section 501(c)(3)
protection (Colombo, 2010).

The first part is the organizational test, which requires that “it must be organized
as a state-law nonprofit organization…must limit its authorized activities to charitable
ones, and must have a provision in its organizing documents that its assets will be
transferred to another charity or to the government if it goes out of business” (Colombo,
2010). The second part is the operational test, which requires that “the entity in question
actually must engage ‘primarily’ in charitable activities, such as educational activities”
(Colombo, 2010). Even if the athletics departments pass the 501(c)(3) test, there are two
hurdles, and one in particular that could impact athletics departments that are separate
legal entities.

The first hurdle deals with what is known as the Unrelated Business Income Tax
(UBIT). John Colombo, the UBIT mandates that “if a business is ‘substantially related’ to
the organization’s charitable purpose, then any business profit continues to be tax-free; if,
however, the business is not substantially related, any profit is taxed at the usual
corporate tax rates” (Colombo, 2010 p. 116). In terms of athletics departments, this
becomes relevant in determining whether the activities involved with the athletics
departments are related or not to the school’s educational, scientific, or charitable
purposes (Kaplan & Lee, 2010 p. 1634). Related to the UBIT is what is known as
“commerciality limitation” – “the fact that when charities run significant commercial
businesses, they risk losing their tax exemption, even if they also have significant
charitable activities” (Colombo, 2010 p. 126). The UBIT and the commerciality
limitation (in particular the latter) impacts athletics departments that are separate legal entities because as a single entity, it seems as though athletics departments engage in activities for the primary benefit of the separate athletic department themselves and not the school in general. In particular, Dosh (2011) noted that “there are plenty of schools [whose athletics departments turned a profit] who have shown no evidence giving back to their university for anything other than required expenses.” While a major reason that, in general, athletics departments have income-tax exemption is because they promote amateur athletics, there is no doubt that big-time athletics departments are focusing on generating large amounts of revenue (Dosh, 2011). Duderstadt (2010), furthermore, notes that athletic departments operating as auxiliary enterprises are “focus[ing] most of the athletic department’s energy…on revenue generation rather than cost management” (p. 145).

With this in mind, even if one believes that athletics departments really do promote amateur athletics in an age of multi-billion dollar television contracts, because an athletics department operating as separate legal entity from the school possesses the ability to generate large amounts of revenue, one could reasonably argue that the commerciality limitation should apply to these athletics departments. In particular, with athletics departments operating as a separate legal entity, legal questions could exist in terms of whether they should benefit from the same income-tax protection as the schools and athletics departments that are not separate legal entities. While no cases which have directly dealt with private school athletics departments that are separate legal entities exist, *Community Hospital Linen Services, Inc. v. Commissioner of Taxation* (1976) provides some useful guidance relative to these entities. In this case, which dealt with
non-profit hospitals and the use of property, the court had to determine “whether the fact that the hospitals own and operate the property through an incorporated association, which is technically a separate legal entity, should disqualify the property for the tax exemption” (Community Hospital Linen Services, Inc., 1976 p. 543). In making its ruling that the hospitals had tax-exempt status in terms of the use of property, the court noted that

“[t]he general rule is that courts are reluctant to disregard the separate legal entities of the parent corporation and the subsidiary corporation merely to grant tax relief at the expense of the state where the subsidiary is incorporated or acquired for the purpose of advantageously carrying on some phase of the parent corporation’s activities or business. If a corporation elects to treat itself as an independent business for some purposes, it should not be permitted to disavow that identity merely to avoid the resultant tax consequences. However, we expressly recognized an exception to this rule when the subsidiary corporation was created solely for and devoted exclusively to serving the purposes of the parent corporations. Thus in such a situation where the subsidiary corporation ‘could have no purpose or existence apart from the operations of its corporate owners’, the substance of the arrangement should control and the fact that the subsidiary is technically a separate legal entity may be disregarded for tax purposes” (Community Hospital Linen Services, Inc., 454-55).

Noting the analysis in the court’s decision, the key language of “when the subsidiary corporation was created solely for and devoted exclusively to serving the purposes of the parent corporations” makes it seem as though private school athletics departments that are separate legal entities from the school could be entitled to the same tax-exempt status as the school it represents (Community Hospital Linen Services, Inc., 454-55). Athletics departments are created to serve the purpose of the school and the students. Even one that is a cynic of collegiate athletics cannot deny that there would be no athletics department without the school or student-athletes. Whether athletics departments deserve
tax-exempt status as a whole is one thing; in terms of separate athletics departments, however, private school athletics departments based off the rationale of *Community Hospital Linen Services* could argue that they deserve income-tax exemption. However, even with *Community Hospital Linen Services*, the commercial limitation could prove to be a very strong factor because of how much corporate-like behavior athletics departments perform. Colombo (2010) noted that “a number of court cases have held that a charity risks its exempt status if it conducts substantial activities with a ‘commercial hue’ - that is, the activity is one that competes with commercial providers, is priced similarly to how a for-profit would price the same service or sale of goods, and in fact produces significant profits” (p. 130).

**Institutional Theory**

Institutional theory looks at how the behavior of organizations relates to the organizational and institutional systems (Schleinberg & Clemens, 2006)). Institutional theory seeks to answer questions about institutional structure as well as the participants within certain institutions, such as why institutions of the same type are very similar to each other and why the behavior of people within an institution differs from the rules and goals of the institutions (Scott, 1995). In general, there are three elements of institutional theory. The first element involves legitimacy. In terms of institutional theory, this is defined as “a condition reflecting cultural alignment, normative support, or consonance with relevant rules or laws” (Scott, 1995 p. 45). The second element of institutional theory is isomorphism, which is “the constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions” (DiMaggio & Powell, 1983). Isomorphism notes that institutional characteristics change
depending on how the environmental characteristics change; the number of institutions depends on how much the environment can handle the amount of institutions available and how the diversity of institutional forms align with environmental diversity (DiMaggio & Powell, 1983). The third element of institutional theory involves rational myths. Rational myths are “the beliefs generated about the legitimacy of certain actions leading to desired outcomes of organized processes” (Lammers & Barbour, 2006 p. 359).

DiMaggio and Powell (1983) authored one of the seminal articles dealing with institutional theory – in particular focusing on isomorphism. They note that institutional change happens as a result of institutions trying to mirror each other without considering how the changes will impact efficiency. They further note that in the long run this leads to an environment where institutional change in the future will be hard to accomplish. This relates to athletic departments and its entity structure because if there is a significant relationship between the entity structure of an athletic department and variables such as success, expenditures and profit, other athletic departments might evolve towards the entity status which is more likely to yield these positive results.

Oliver (1991) considers how institutions respond to isomorphism. Reasons that companies desire not to conform include: not being resource dependent; desiring autonomy over decision making; having the ability to adapt flexibly if situations arise; and using the institution’s objectives to alter or control the work environment. Because athletic departments often deal with limited resources and the need to be flexible if the athletic department is not sustaining a profit, in the future athletic departments might be forced to concede to adopting an entity status model which is conducive to being able to
spend the most money and generate the most money, even if negatives exist with adopting the new entity status.

Institutional theory has also been analyzed within the sports realm. In their study designed to determine what elements NCAA Division I athletic administrator value with the sports in its athletic department as well as to develop a further understanding of athletic administration theory, Cooper and Weight (2011) consider how institutional theory helps shape collegiate athletic administrators as well as athletic departments as a whole. Through normative isomorphism, Cooper and Weight also note that the similarities are in large part due to the various decision makers’ value systems. For example, athletic departments within the same conference (such as the Atlantic Coast Conference) would have similar core values, institutional structures and budget priorities. Through their research, Cooper and Weight note that as a result of institutional isomorphism, there is a “warped sense of reality held by many administrators that the football and basketball teams are the answer to their financial ailments” (p. 85). If the research demonstrates that athletic departments have almost the same entity status, Cooper and Weight’s research could help provide an understanding of why this is the case. Also, an athletic department’s entity status could also be tied to the athletic department’s ability to allow the football and basketball teams to achieve maximum success, revenues and profits without taking into account what would benefit the athletic department as a whole.

Overall, one of the implications of institutional theory might be that administrators want legitimacy and approval from similar administrators within their institutional community and therefore want to be similar to each other in terms of the
perceived or implied value systems. If the research determines that there is a relationship between the entity status of an athletic department and other variables, athletic departments might start copying each other and employing the same entity status model. If the research shows that being operating as a completely separate legal entity is the best model in terms of success, expenditures, revenues and profits, athletic departments would have to consider the potential legal issues that exist with operating as a separate legal entity in deciding whether to change its entity status. Even if athletic departments understand the negatives that exist with operating as a separate legal entity, they might start to feel the pressure and as a result change its entity status to being completely separate if it’s determined that operating as a separate legal entity is most likely to yield the best success and financial results.

Variables Relating to Athletic Department Success

Past studies have analyzed various factors to determine correlation with the success of a team or an athletic department. Orzag & Israel (2009) investigated whether a relationship exists between increasing the operating expenditures at FBS schools and winning percentage or success as well if a relationship existed between winning percentages and revenue. Their research found a small, positive and statistically significant relationship between operating football expenditures and team success, but that when the various types of football expenditures were investigated, the only type of spending that had a statistically significant effect were “team expenditures” which included recruiting, travel, and other game day expenses (Orzag & Israel, 2009, p. 8). Regarding basketball, even though no statistically significant relationship exists between basketball and winning percentage or the probability of making the NCAA tournament,
there is a significant relationship between “team expenditures” and the probability of making the NCAA tournament. Regarding a relationship between success and revenues, Orzag & Israel found that there was a positive, statistically significant relationship in football between finishing in the top 25 in the Associated Press poll and revenue, but that no relationship existed between revenue and football and basketball winning percentage as well as making the NCAA basketball tournament.

Albert (2006) focused on whether there is a relationship between athletic expenditures and NCAA Division I baseball, softball, men’s soccer, women’s soccer, men’s tennis, women’s tennis, and women’s volleyball. Albert determined whether there were differences between “Elite” (teams that finished in the top 16 in their respective NCAA championships), “Successful” (teams that finished in the 17-32 of their respective NCAA championships), “Qualifying” (teams that qualified for the NCAA championships but lost in the first round) and “Non-qualifying” (teams that did not qualify for their respective NCAA championship tournament) teams (Albert, 2006, p. 4-8). Albert’s research indicated that with some exceptions, the teams that achieved the highest level of success reported the greatest median expenditures and that a relationship existed between athletic expenditures and athletic success for the teams and sports analyzed. Albert cited recruiting and development factors for teams that spend the most money as well as the trickle-down effect for schools that have powerful football and basketball teams as possible reasons for this relationship.

Lassiter (2001) created the “Lassiter rank” – which was determined by weighing equally how a team finished in the Directors’ Cup, the graduation rate differences at a school between student-athletes and the general undergraduate population as well as the
difference at a school between the percentage of female student athletes and female student – and determine if a relationship existed between the Lassiter rank and how it finished in the Directors’ Cup as well as the athletic department’s total budget (Lassiter, 2001, p. 1). Lassiter determined that a moderately significant relationship existed between the Lassiter rank and the Directors’ Cup ranking as well as the athletic department’s total budget. Lassiter also determined that a relationship existed between a school’s athletic department budget and its Directors Cup ranking – in fact, it was the strongest relationship examined in Lassiter’s study.

Jones’ (2012) study focused on the relationship between an athletic department’s expenditures and the overall on-field success of the athletic department. Using NACDA Director’s Cup points as the indicator of on-field success, Jones discovered that at FBS schools there was a statistically significant positive relationship between athletic expenditures and a team’s on-field success. Jones also found that among FBS schools, BCS conference affiliation had no impact on the relationship between athletic expenditures and on-field success. Reasons that Jones cited for this are that athletic directors believe that high amounts of spending are necessary for teams to be successful, the “arms race” that exits with FBS athletic departments, the pressure at FBS athletic departments to win causing schools to assign new funding to aspects directly associated with winning such as recruiting expenses and coaches’ salaries, and how FBS athletic director’s contracts often include incentives if its teams are successful.

Methodology

This study is an exploratory examination of the legal structure of FBS athletic departments. Questions regarding the legal and organizational structures of FBS athletic
departments as well as success, revenues and profits were answered via information gathered online and in direct email communication.

Subjects

The populations at interest were administrators at the 120 NCAA FBS athletic departments and schools. The university’s general counsel office from each FBS institution was surveyed in order to answer questions of interest. The director of compliance from each FBS conference and the director of compliance from the NCAA Division I schools that are Independent in football were also contacted in order to gain information.

Instrumentation and Data Collection

An e-mail was sent to an athletic department administrator or the university’s general counsel in order to obtain the information about the school’s legal entity status. The e-mail asked the respondents to state the entity status of the schools during the 2011-12 school year. For this study, “success” is determined by how many points the school scored in the 2011-12 National Association of Collegiate Directors of Athletics (NACDA) Directors’ Cup standings. Financial information about the revenues, profits and expenditures of the athletic departments were obtained from information provided by the Equity in Athletics Disclosure Act interactive online database for the 2011-12 school year.

Data Analysis

Descriptive statistics were used to identify the athletics department legal status. After the data for the independent variables was gathered, SPSS was used to analyze quantitative data in order to tabulate descriptive statistics, and one-way between subjects
analysis of variance (ANOVA’s) were used to compare the information to determine if significant differences exists between the legal entity structure of an athletic department and its success, revenues, and profits.

**Results: Athletic Department Entity Statues**

In total, 60 out of 120 FBS athletic department’s entity status were discovered for a 50% response rate. Of the 60 schools, 47 of those schools are public schools (out of 100 possible for 47 %) 12 were private schools (out of 17 possible for 71 %), and one was a federal service academy (out of three possible for 33%). Schools were grouped according to their self-reported legal entity status: Specifically, 36 of the 60 schools were identified as not being separate, 16 schools were identified as being partially separate, and 8 were identified as being completely separate. Of the 47 public schools, 23 were not separate, 16 were partially separate and 8 were completely separate. All 12 private schools and the federal service academy identified their athletic department as not being separate completely separate or partially separate. Of 16 schools which identified as being partially separate in some capacity, all sixteen cited a separate auxiliary enterprise relating to development/fundraising or financing an aspect of its athletic department.

Schools were also grouped according to conference affiliation: The Atlantic Coast Conference had the most schools that were able to be identified with eight, and the Western Athletic Conference had the fewest schools with one (and was the only conference to not have multiple respondents). Also, of the 10 conferences which had multiple respondents, the Pacific-12 Conference was the only conference to have all of its respondents identify as having the same entity status (not separate). The Mountain West Conference and Mid-American conference had all but one of its respondent schools
identify as being not separate, Southeastern Conference had all but one of its respondent schools identify as being separate in some capacity. The other conferences had multiple schools identify themselves as being separate in some capacity.

Results: Differences Between Entity Status and Revenues, Expenditures, Profits, and Directors Cup Points

The self-reported entity status of the athletic department were grouped (not separate, partially separate, completely separate or separate in some regard) revenues, expenditures, profits, and directors cup points. Schools were also grouped together based on BCS status as well as being private, public, or a federal service academy.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Completely Separate</td>
<td>Athletic departments that were entirely separate legal entities from the school.</td>
</tr>
<tr>
<td>Partially Separate</td>
<td>Athletic departments that had aspects – but not all – of the athletic department which were from the school.</td>
</tr>
<tr>
<td>Not Separate</td>
<td>Athletic departments which were not separate from the school in any fashion.</td>
</tr>
<tr>
<td>Separate in Some Form</td>
<td>A combination of completely separate and partially separate entities.</td>
</tr>
<tr>
<td>Public School Completely Separate</td>
<td>Public school athletic departments that were entirely separate legal entities from the school.</td>
</tr>
<tr>
<td>Public School Partially Separate</td>
<td>Public school athletic departments that had aspects – but not all – of the athletic department which were from the school.</td>
</tr>
<tr>
<td>Public School Not Separate</td>
<td>Public school athletic departments which were not separate from the school in any fashion.</td>
</tr>
<tr>
<td>Public School Separate In Some Form</td>
<td>Public school athletic departments which either had aspect(s) of the athletic department which were separate or were completely separate.</td>
</tr>
<tr>
<td>Revenues</td>
<td>Total revenues of each athletic department during the 2011-12 year according to the EADA reports.</td>
</tr>
<tr>
<td>Expenditures</td>
<td>Total expenses of each athletic department during the 2011-12 year according to the EADA reports.</td>
</tr>
<tr>
<td>Profits</td>
<td>Total profits of each athletic department during the 2011-12 year according to the EADA reports.</td>
</tr>
<tr>
<td>Directors Cup Points</td>
<td>Total Directors Cup points of each school during the 2011-12 year.</td>
</tr>
</tbody>
</table>

The One-Way Between Subjects ANOVA tests produced several significant differences between means at the .05 level. A significant difference was identified for expenses between all FBS athletic departments that were not separate and those that were separate in some capacity (whether partially or completely separate); athletic departments
that were separate in some capacity have higher expenses. A significant difference was also found for expenses between public school FBS athletic departments that were not separate, partially separate, and completely separate; completely separate athletic departments have the highest expenses, then partially separate, then not separate.

The research also demonstrated that there was a significant difference between not only expenses, but also revenues and total director’s cup points between public school FBS athletic departments that were not separate and separate in some capacity. Public school FBS athletic departments that were separate in some capacity spent more, had higher revenues and scored more directors cup points than those that were not separate.

No significant differences existed among being not separate, partially separate or completely separate and revenues, expenditures, profits, and Directors Cup points.

**Table 2 – P-Values of Not Separate, Partially Separate or Completely Separate**

<table>
<thead>
<tr>
<th>Variables</th>
<th>P-Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Separate, Partially Separate, or Completely Separate and Revenues</td>
<td>.078</td>
</tr>
<tr>
<td>Not Separate, Partially Separate, or Completely Separate and Expenditures</td>
<td>.056</td>
</tr>
<tr>
<td>Not Separate, Partially Separate, or Completely Separate and Profits</td>
<td>.771</td>
</tr>
<tr>
<td>Not Separate, Partially Separate, or Completely Separate and Directors Cup Points</td>
<td>.270</td>
</tr>
</tbody>
</table>

Comparing the legal entity statues of athletic departments that are not separate, partially separate, or completely separate and revenues, expenditures, profits, and Directors Cup points, no significant differences in means were found. Expenditures was a variable that was close to being statistically significant, but was not below the necessary .05 threshold.
Comparing the legal entity statues of athletic departments that are not separate or separate in some form and revenues, expenditures, profits, and Directors Cup points, significant differences in means were found with expenditures. Revenues was close to being statistically significant, but was not below the necessary .05 threshold.

Table 4 – P-Values of Public School Not Separate, Public School Partially Separate or Public School Completely Separate

Comparing the legal entity statues of public school athletic departments that are not separate, partially separate, or completely separate and revenues, expenditures, profits, and Directors Cup points, significant differences in means were found with expenditures. Post Hoc Tests that were run demonstrated specific significant differences in means
between those schools with completely separate entities vs. schools that were not separate. Revenues and Directors Cup points were variables that were close to being statistically significant, but were not below the necessary .05 threshold.

Table 5 – P-Values of Public Not Separate or Public School Separate in Some Form

| Public School Not Separate or Public School Separate in Some Form and Revenues | .039 |
| Public School Not Separate or Public School Separate in Some Form and Expenditures | .019 |
| Public School Not Separate or Public School Separate in Some Form and Profits | .965 |
| Public School Not Separate or Public School Separate in Some Form and Directors Cup Points | .045 |

Comparing the legal entity statues of public school athletic departments that are not separate, or separate in some form and revenues, expenditures, profits, and Directors Cup points, significant differences in means were found with revenues, expenditures, and Directors Cup points.

Discussion

The findings about the entity statues of FBS athletic departments demonstrate that the assumption that FBS departments are operating as separate legal entities from the university is inaccurate. Only eight of the 60 schools were identified as having separate legal entities, which is less than 15%. Furthermore, a majority of the schools were identified as not being separate from the school in some capacity. Selection bias could be a factor in the low rate of schools that operate as separate legal entities. Schools might not want the information about the status of its athletic department from becoming public knowledge because of the negative perception the athletic department and school might
receive from being identified as operating separately in some capacity. Even taking into account selection bias, however, a fairly large number of schools were identified as not operating separately from the school in any capacity, which goes against some of the perceptions that exist in the public.

The institutional theory concepts did not play as significant role in the athletic department’s entity status as expected. Although some conferences such as the Pacific-12, Mountain West, Mid-American, and Southeastern Conference demonstrated close similarities among its conference members regarding entity statuses, but other conferences had lower seminaries of schools regarding its entity statuses. With that said, considering that the Southeastern Conference won the last seven BCS national championships (Inabinett, 2013 ¶27), is considered the richest conference in America (Luckerson, 2013 ¶6-8), and only one of its athletic departments were identified as operating not separately from the school, it could very well be that these athletic departments view the athletic department or at least the development/fundraising aspect of the athletic department operating separately are necessary in order to achieve football success and athletic department success for that matter. It will be interesting to see, however, if schools start to copy the Southeastern Conference athletic departments which operate separately in some form from the school in some fashion in order to attempt to duplicate the same success.

The research demonstrating that FBS athletic departments that operate separate in some aspect have higher levels of expenditures than those that are not separate is also not surprising. Duderstadt mentioned that one reason athletic departments operate as a separate legal entity is to be able to spend more money and incur questionable expenses
with the justification that a separate entity the school as a whole is not responsible for those costs (Duderstadt, 2000). As long as the schools are able to balance the budget and not spend more than they have, there should be no issues expenditure-wise with athletic departments operating separately in some capacity. As long as there are no sudden increase of legal issues involving respondeat superior/enterprise liability or Eleventh Amendment implications that could question the athletic department operating as a separate legal entity from the school, the benefits of operating separately as an athletic department as of right now seem to outweigh any sort of legal risk of operating separately from the school because higher athletic department expenditures could lead to more scholarships, better facilities and other recruiting perks which could lead to higher revenues, greater profits and better on-field performance. As University of Georgia president Michael Adams stated, “if you’re going to compete in the Southeastern Conference, that means you have to have very competitive facilities, playing venues, workout spaces, coaches’ offices, indoor training facilities” (Luckerson, 2013 ¶10).

With several schools not earning profits in 2011-12, it is not surprising that there was no significant difference in the means between profits with any sort of entity status or revenues with all of the various entity status groups except for one of them. The non-profit status of FBS athletic departments as well as the taxation benefits that schools are able to receive presently does not create a sense of urgency for schools to generate large profits. In fact, schools have large incentives to spend every cent that they generate to support their athletics programs. At this point, institutions just simply have to spend as much or less than they are earning through revenue.
A major implication of the research, though, was the significant difference between FBS public school athletic departments being not separate or separate in some capacity and expenses, revenues and Director’s Cup points. This potentially demonstrates the importance of operating the development/fundraising component of the athletic department separately to avoid many of the bureaucratic rules limiting these institutions. This may allow public schools to keep up with the arms-race that exist in athletic departments today which is a factor in the athletic success of the athletic department. The more money that is generated by athletic departments, the more money that can be spent on scholarships, coaching/support staff, facilities, and other aspects of the athletic department, which has a domino effect – better recruiting to team operations and ultimately on-field success. Previous research has investigated if there are any variables that are related to athletic department success (Orzag & Israel (2009), Albert (2006), Lassiter (2001), and Jones (2012)), and this research has demonstrated that public school athletic departments having their fundraising/development aspect of the athletic department operating separately from the school could benefit the athletic department. This research could implore FBS public school athletic departments to incorporate its development/fundraising aspect as a separate legal entity. The ability to generate greater revenues along with spending more and having athletic department perform better in Director’s Cup standings is an important consideration for schools in deciding whether to have the athletic department’s development/fundraising arm operate as a separate legal entity from the school or not. The on-field success and benefits could outweigh the possible legal risks such as respondeat superior/enterprise liability as well as Eleventh Amendment implications that could arise.
Conclusions

Overall, it’s up to the school to decide how to incorporate its athletic department. Even though there is some debate about the athletic department being incorporated separately from the school and there are legal benefits to not operating as a separate legal entity, the research has demonstrated that operating the development/fundraising component of the athletic department separately might ultimately result in athletic performance benefits for the school. For schools who are concerned with the escalating costs of college athletics, yet want their athletics program to perform competitively as a whole, the entity status of the department may, in fact, be worthy of consideration relative to accomplishing those goals.

Limitations and Future Research

This study was limited to FBS athletic departments. In the future, this study could be done for all athletic departments in the NCAA to use as a comparison. In addition, even though information was able to be obtained from half of the FBS athletic departments, having the time and money to file FOIA requests in order to obtain information from the other FBS athletic departments could aid in this research as well. There is also the possibility of non-response bias. If institutions believed there may be a perceived stigma associated with a specific status, they may have chosen not to participate rather than report their status. Also, some schools may be in the process of changing status (e.g. Kentucky); this study should be replicated in the future to determine if there is significant movement from one type of entity status to another.

Another important future research consideration is doing an in-depth analysis of FBS athletics departments that operate the development/fundraising aspect of the athletic
department as a separate legal entity. Identifying the specific characteristics of these departments which allow them to spend and help generate revenues compared to those whose development/fundraising components are not operated separately from the school might allow schools to make changes that can improve their bottom line.
APPENDIX A: Survey Instrument

(General Counsel or Athletic Department Staff Member):

I am a graduate student researching the legal entity status of FBS athletic departments to complete a thesis requirement for my dual degree in law and sport administration. Please respond simply by hitting "reply" and then indicating your answer next to the questions below:

During the 2011-12 school year, did the intercollegiate athletics department at your college or university operate:

A. Solely as a department of the university?

B. Solely as a 501(c)(3) auxiliary enterprise or legal entity separate from the university?
   • If so, in what year was the separate entity established?

C. A mixed model, with some component of the athletics program (such as development/fundraising, a golf course, etc.) operating as a 501(c)(3) auxiliary enterprise or legal entity separate from the university?
   • If so, please identify the component(s) that operate as a separate entity:
   • If so, in what years where the components established as a separate legal entity?

Your prompt response is truly appreciated. If you would like a copy of the results of this study, please indicate yes or no:

Thank you for your time and efforts on behalf of my graduate research study!
## APPENDIX B: SCHOOL INFORMATION

<table>
<thead>
<tr>
<th>SCHOOL</th>
<th>Football Conference</th>
<th>Entity Status</th>
<th>Specific Separate Entity</th>
<th>Separation Year (If Provided)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Southeastern</td>
<td>Partially Separate</td>
<td>Crimson Tide Foundation</td>
<td>1993</td>
</tr>
<tr>
<td>Arkansas State</td>
<td>Sun Belt</td>
<td>Partially Separate</td>
<td>The Red Wolves Foundation</td>
<td>1980</td>
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<tr>
<td>Army</td>
<td>Independent</td>
<td>Not Separate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Auburn</td>
<td>Southeastern</td>
<td>Partially Separate</td>
<td>Tigers Unlimited Foundation</td>
<td></td>
</tr>
<tr>
<td>Ball State</td>
<td>Mid-American</td>
<td>Not Separate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Baylor</td>
<td>Big 12</td>
<td>Not Separate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boise State</td>
<td>Mountain West</td>
<td>Not Separate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boston College</td>
<td>Atlantic Coast</td>
<td>Not Separate</td>
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<td></td>
</tr>
<tr>
<td>Bowling Green</td>
<td>Mid-American</td>
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<td></td>
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<td>Mid-American</td>
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<td></td>
<td></td>
</tr>
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<td>Pacific-12</td>
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<td></td>
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<tr>
<td>Duke</td>
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<td></td>
</tr>
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<td>Completely Separate</td>
<td></td>
<td>1974</td>
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Note: A private school requested anonymity with the use of its information.
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U.S. Const. amend. XI.