Updates
February 20, 2024
State Antitrust Lawsuit Challenges NCAA Recruitment Rules

In January of this year, the attorneys general of Tennessee and Virginia filed a federal antitrust lawsuit against the National Collegiate Athletics Association (NCAA).

The lawsuit seeks to prevent the NCAA from enforcing recruiting rules that allegedly "prevent prospective college athletes and transfer candidates from engaging in meaningful . . . discussions prior to enrollment" about opportunities to monetize their name, image, and likeness (NIL).[1] The plaintiffs compare the NCAA's restriction on NIL discussions during student-athlete recruitment to preventing highly desired job applicants that are considering many options from negotiating their salaries until after they have selected an employer. The "depressive effect" on compensation—according to the states—is painfully "obvious." *Id.* at 4.

A victory for the states would enhance the quality of information available to recruits and forever change the NCAA landscape. It would also serve as a playbook for future NCAA challenges, sending massive ripples across both sports and courts. Of course, this is far from the only antitrust lawsuit pending against the NCAA. Ten states and the U.S. Department of Justice (DOJ) have also filed suit to challenge transfer eligibility rules.[2] Additional challenges to NCAA transfer and compensation policies are possible, even likely. To evaluate the plaintiffs' chances of prevailing, it is important to understand how the decades-long saga between the NCAA and antitrust law has reshaped both college sports and federal law.

Televising College Football

Before the U.S. Supreme Court's landmark 1984 decision in *National Collegiate Athletic Ass'n. v. Board of Regents of the University of Oklahoma*, the NCAA restricted the number of football games that could be televised and threatened to "take disciplinary action" against schools that exceeded their quota. *Id.* Plaintiff universities challenged this restriction under Section 1 of the Sherman Antitrust Act,[3] which covers unreasonable restraints of trade. According to the schools, the NCAA was forcing an "artificial limit on the

quantity of televised football that is available to broadcasters and consumers." [4]

The Supreme Court agreed, finding that the NCAA's television plan created a "price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market." *Id.*

Each of the NCAA's arguments on rebuttal were soundly rejected. First, in response to the defendant's claim that it lacked "market power," the Court highlighted that college football is "uniquely attractive to fans" and therefore constitutes a separate market from other sports and entertainment. *Id.* (citing *International Boxing Club of New York, Inc. v. United States*, 358 U. S. 242 (1959). Second, the Court dismissed the NCAA's justification that restrictions on televising games were necessary to "protect live attendance" because this was essentially an argument that live ticket sales were "unable to compete in a free market." *Id.* Third, addressing whether the rule helped maintain a competitive balance, the Court noted that the "television plan is not even arguably tailored to serve such an interest" because it did not "regulate the amount of money that any college may spend on its football program or the way the colleges may use their football program revenues." *Id.*

Despite losing on competitive harm and failing to articulate a legitimate business justification, the NCAA persuaded the Court that its rules should not be condemned as *per se* illegal. In reaching this decision, the Court recognized that "most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams." This is highly relevant to the recent recruitment lawsuit because it opens the door for the NCAA to introduce evidence that its rules are justified by procompetitive benefits.

Monetizing Name, Image, and Likeness

Three decades later, the U.S. Court of Appeals for the Ninth Circuit grappled with another challenge to the NCAA's rule in *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015). The central issue in *O'Bannon* was whether the NCAA rules could prohibit student-athletes from monetizing their NIL across a diverse array of offerings, including autographs, personal appearances, video games, and non-fungible tokens (NFTs).[5]

The Court found that anticompetitive effects of these rules were apparent because "they fix an aspect of the 'price' that recruits pay to attend college (or, alternatively, an aspect of the price that schools pay to secure recruits' services)."[6]

However, even though price fixing is generally *per se* unlawful under the Sherman Act, the Court held that the plaintiffs' claims must be analyzed under the Rule of Reason standard and allowed the NCAA to offer evidence its rules were procompetitive. On rebuttal, the NCAA offered four justifications: the rules were necessary to (1) "preserve the amateur tradition and identity of college sports," (2) "level the playing field" between schools to maintain a competitive balance, (3) integrate athletics and academics by improving the educational services for student-athletes, and (4) increase output by enhancing opportunities for students to participate in athletics.

The Ninth Circuit found some merit in the amateurism and educational services arguments, even after firmly rejecting the plaintiffs' competitive balance and output justifications. The Court also found that the NCAA's "total ban" on NIL compensation was more restrictive than needed to achieve these amateurism and educational goals. For example, schools could "award stipends to student-athletes up to the full cost of attendance" or "hold a portion of their licensing revenues in trust, to be distributed to student-athletes in equal shares after they leave college." *Id.*

Overall, the *O'Bannon* decision is noteworthy because it reaffirms that most NCAA rules are subject to the Rule of Reason analysis where procompetitive justifications factor into the equation. Further, this case reflects courts' willingness to entertain arguments that rules restricting student-athlete compensation for NIL are procompetitive

because they preserve amateurism. Finally, *O'Bannon* cautions the NCAA that such rules will not be upheld if "substantially less restrictive" alternatives can achieve these same procompetitive results.

Computers, Tutoring, and Graduate School Stipends

The Supreme Court next confronted a challenge to NCAA rules in the 2021 case *National Collegiate Athletic Ass'n v. Alston*.[7] In that case, the Court considered whether the NCAA could limit the "education-related benefits" that schools offer student-athletes. In a unanimous decision, the Supreme Court held that the rule produced anticompetitive effects because it created an artificial cap on compensation offered to recruits.

As in *O'Bannon*, the NCAA argued that the challenged rule was justified because it helped preserve amateurism. The Supreme Court noted that the "NCAA had not adopted any consistent definition" of amateurism, and its "rules and restrictions on compensation have shifted markedly over time."[8] The Court recognized that some restrictions, such as prohibiting "professional-level cash payments" to student-athletes, could be justified as necessary to preserve amateurism in college sports. However, Justice Neil Gorsuch, writing for the majority, identified substantially less restrictive means to achieve this goal. In other words, "rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships" were overbroad and unjustified. *Id.*

Notably, Justice Brett Kavanaugh went even further in a fiery concurrence. He argued that other NCAA rules limiting compensation for athletes "raise serious questions under the antitrust laws." Offering a preview into future cases, Justice Kavanaugh concluded that "the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes." *Id.*

Recruitment Rules

Earlier this year, the NCAA announced that its bylaws prohibit schools from using NIL compensation to "induce an athlete to commit to a particular school."[9] Further, it took the position that "collectives" such as "boosters" similarly cannot discuss NIL compensation with students during the recruitment phase.

According to the plaintiff schools, this effectively "restricts schools from competing to arrange NIL compensation for prospective college athletes and suppresses athletes' NIL compensation by deterring the free movement of labor." *Id.* at ¶ 35. It is not particularly difficult to grasp how deferring frank and open discussions on NIL compensation until after a prospective athlete has selected a school could result in lower NIL compensation.

By analyzing the NCAA's long history of antitrust litigation, we can predict with a degree of confidence how several aspects of this lawsuit will unfold, even at this early stage.

- Plaintiff states will bear the burden of proving that the NCAA's policies have anticompetitive effects, such as reducing competition between schools for athletes or depressing NIL compensation.
- The NCAA's prohibition on engaging in NIL discussions with recruits will likely be evaluated under the more lenient Rule of Reason analysis. The conduct is unlikely to be condemned as *per se* unlawful, which means that the NCAA will have a chance to justify its conduct even if there are also anticompetitive effects.
- On rebuttal, the NCAA will likely argue that its rules are necessary to preserve amateurism and maintain a competitive balance. While the competitive balance argument is unlikely to be persuasive, the amateurism argument has gained traction in the past.

- However, even if a court accepts the amateurism argument, the plaintiffs will still have an opportunity to show that NCAA rules are substantially broader than necessary to achieve this goal. For instance, they could offer evidence that amateurism can be protected in alternative ways, like policies that allow NIL discussions between schools and athletes during recruitment—but only for the purpose of handling specified expenses like housing, meals, and transportation. This is how plaintiffs defeated similar NCAA bans in the past, and it provides the most direct path to victory in this case.

On February 6, 2024, defendants scored first in defeating the plaintiffs' motion for a temporary restraining order based on the states' inability to demonstrate "irreparable harm." See *Tennessee v. NCAA*, 24-cv-33 at 10 (E.D. Tenn. Feb. 6, 2024) (Dkt. No. 29). However, this may prove to be a Pyrrhic victory for the NCAA. Likening the ban on NIL discussions during recruitment to an "absolute ban on competitive bidding" that the Supreme Court condemned in the 1978 case *National Society of Professional Engineers*, the district court found that plaintiffs were "likely to see on the merits of their claim under the Sherman Act." *Id.* (citing *Nat. Soc. Of Pro. Engineers v. United States*, 435 U.S. 689, 692 (1978)).

The outcome of this litigation will turn on extensive factual and economic analysis, but the Supreme Court's 9-0 vote in *Alston* should give the plaintiff states reason for optimism.

To manage potential antitrust risk, associations are encouraged to implement robust compliance programs tailored to their particular industry, regularly train employees on competition laws, and proactively monitor their compliance programs.

Endnotes

[1] *State of Tennessee and Commonwealth of Virginia v. National Collegiate Athletic Association*, No. 3:24-cv-33 (E.D. Tenn. Jan. 31, 2024) at ¶¶ 1, 69-71 (State Recruitment Antitrust Complaint).

[2] *Ohio v. Nat'l Collegiate Athletic Ass'n*, 1:23-cv-00100-JPB (M.D.W.Va.) (Dkt. No. 79) (Jan. 18, 2024).

[3] 15 USC 1.

[4] *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 86 (1984).

[5] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); see also NCSA College Recruiting, Name, Image, Likeness Rule.

[6] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1070 (9th Cir. 2015).

[7] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2165, 210 L. Ed. 2d 314 (2021).

[8] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2165, 210 L. Ed. 2d 314 (2021).

[9] State Recruitment Antitrust Complaint at ¶ 28.

**A previous version of this Update appeared in Law360.*

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