



LEGAL VICTORY FOR STUDENT-ATHLETES, PRACTICAL VICTORY FOR THE NCAA

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Introduction

Many Americans look forward to college football and basketball seasons, especially the post-season bowl games and the March Madness Tournament. So too does the National Collegiate Athlete Association (NCAA), which earns millions of dollars in revenue each year on these post-season tournaments alone. The student-athletes, on the other hand, see very little of that revenue beyond the scholarships and cost of attendance stipends that they receive from universities.

This is not soon to change, even after the athletes' recent victory in *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation*,² which concerned the NCAA's regulations on compensation and benefits student-athletes are entitled to receive. Although the U.S. District Court for the Northern District of California ruled in favor of the student-athletes following the bench trial, its prescribed remedy, if upheld on appeal, is unlikely to change materially the landscape of college sports. The court made clear that it was not inclined to allow "unlimited cash payments" unrelated to education, which are commonly found in professional sports, but would not restrict most compensation and benefits related to education.

The Dispute

Student-athletes of Division I Football Bowl Subdivision ("FBS") and Division I basketball brought this lawsuit against the NCAA and eleven of its conferences challenging NCAA regulations limiting the compensation and benefits college athletes can receive in return for their athletic services.

The NCAA generates about \$1 billion in revenue each year, half of which it distributes to the individual conferences. The conferences also generate their own revenue from regular season basketball and regular and post-season football. Pursuant to NCAA regulations, however, individual collegiate athletes are limited in the amount and type of compensation and benefits they can accept from their schools or outside sources. The relevant limitations before the decision were:

- Grants-in-aid: Students can receive athletic scholarships known as "grants-in-aid," which include tuition and fees, room and board, books, and other expenses related to attendance up to the cost of attendance.
- Compensation and benefits unrelated to education paid on top of grants-in-aid: The NCAA limits payments unrelated to education.
- Compensation and benefits related to education paid on top of grants-in-aid: The NCAA limits payments related to education that exceed grants-in-aid, including musical instruments, science equipment, computers, studying abroad expenses, and tutoring, among other items.

In this antitrust suit, the student-athletes alleged that the NCAA and its conferences (collectively, "NCAA") used their monopsony power to horizontally agree to fix the prices of compensation and benefits student-athletes receive in restraint of trade. The NCAA defended that the restrictions promoted consumer demand for college sports and promoted the student-athletes' integration into their education community.

The Analysis: Restraints on Trade Under the Rule of Reason Analysis

On summary judgment, the court found that the NCAA had reached an agreement in restraint of trade that affected interstate commerce: NCAA rules limited compensation that student-athletes could receive for their athletic services, either by capping grants-in-aid at the cost of attendance or limiting other forms of compensation. The court also indicated that, although horizontal price fixing agreements are typically analyzed as *per se* violations of the antitrust laws, a rule of reason analysis was appropriate here because marketing college sports requires a certain degree of cooperation.

Therefore, the only issues before the court at trial were: (1) whether the agreement unreasonably restrained trade and, (2) if so, whether there was a less restrictive alternative that would achieve similar procompetitive effects. The court employed a burden-shifting analysis: the student-athletes first had to define the relevant market and show anticompetitive effects of the restraints in that market; then, the burden shifted to the NCAA to identify the procompetitive effects of the restraints; if the court agreed,

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² See *In re NCAA Grant-In-Aid Cap Antitrust Litig.*, No. 14-md-02541 CW, 2019 WL 1747780 (N.D. Cal. Mar. 8, 2019).



the burden shifted back to the student-athletes to demonstrate that a less restrictive alternative existed that would achieve similar procompetitive effects; and, finally, if the student-athletes could not demonstrate any less restrictive alternatives, the court would weigh the competitive and anticompetitive effects to determine whether the challenged conduct was reasonable.³

A. Relevant Market and Anticompetitive Effects

The court accepted the student-athletes' undisputed definition of the relevant market as "national markets for Plaintiffs' labor in the form of athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market."⁴ The student-athletes essentially sell their athletic services in exchange for compensation permitted by the NCAA regulations. The court then found that these regulations have anticompetitive effects in the relevant market: they limit the amount of compensation student-athletes can receive in a manner that does not correlate with the value of the athletic services the student-athletes provide, and they eliminate price competition in the recruitment of these student-athletes.⁵ It also remarked that the NCAA has monopsony power in the relevant market and exercised that power to fix the compensation offered to student-athletes.⁶ The burden therefore shifted to the NCAA to establish the procompetitive justifications for these regulations.

B. The Procompetitive Justifications: Consumer Demand and Student-Athlete Integration

The NCAA proffered two procompetitive justifications for the NCAA regulations: (1) consumer demand for amateurism and (2) integration of student-athletes within their academic communities.⁷ As to consumer demand for amateurism, the NCAA relied on both expert and lay opinion at trial to argue that viewers of college sports prefer the amateur status of the athletes.⁸ According to the court, however, the NCAA struggled to define "amateurism," and the definition was not found in the NCAA's Bylaws or Constitution.⁹ The NCAA defined amateurism by what it is not: "pay for play."¹⁰ The court noted, however, that NCAA rules and regulations permit a number of "payments" for student-athletes' services (even if it places limitations on those payments), including grants-in-aid up to the cost of attendance; per diem payments for

un-itemized expenses; payment of family members' travel expenses to attend sporting events; funding for post-eligibility graduate school; and compensation from the NCAA's Student Assistance Fund and Academic Enhancement Fund, and Senior Scholar Awards, among others.¹¹ In fact, the NCAA allows schools to compensate student-athletes with cash-equivalent Visa cards as rewards for their athletic performance, which the court found corresponded directly with "pay for play."¹²

Although the court did not adopt the NCAA's definition of amateurism, it agreed that a distinction between professional and college sports is the unlimited cash payments earned by professional athletes.¹³ Maintaining that distinction, the court stated, could have the procompetitive effect of preserving consumer demand for college sports.¹⁴ To that end, the court ruled that, compared to having no limits on compensation, the regulations limiting grants-in-aid to the cost of attendance and limiting compensation and benefits unrelated to education maintained consumer demand for college sports, whereas only some of the regulations limiting education-related compensation and benefits furthered that procompetitive effect.¹⁵

Additionally, the NCAA argued that the challenged regulations promote integration of student-athletes into their academic communities, which improves the overall education they receive in return for their athletic performances.¹⁶ Compensation regulations, according to the NCAA, would avoid creating a wedge between students and student-athletes. The court was unpersuaded by this argument: there was no demonstrated link between the limits on compensation and any "integration" with the school, particularly because "wedges" among students result from any number of factors unrelated to the challenged rules.¹⁷

C. Less Restrictive Alternatives

Because the NCAA demonstrated procompetitive benefits of the challenged regulations (*i.e.*, avoiding the unlimited cash payments common in professional sports that could decrease consumer demand), the burden then shifted to the student-athletes to identify less restrictive alternatives that would achieve the same effects. The athletes provided the court with three alternative solutions: (1) eliminate any limits on compensation and benefits given

³ *Id.* at *29.

⁴ *Id.* at *30.

⁵ *Id.* at *6.

⁶ *Id.*

⁷ *Id.* at *31.

⁸ *Id.* at *31.

⁹ *Id.* at *31-32.

¹⁰ *Id.* at *32.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *34.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at *35.

¹⁷ *Id.*



in exchange for athletic services; (2) allow limits on compensation and benefits, except those related to education or benefits incidental to athletics participation that the NCAA currently allows but caps; or (3) allow limits on compensation and benefits, except those related to education.¹⁸ The court found that the first two options would not be as effective in preserving consumer demand as the existing rules.¹⁹ Instead, the court opted for a modified version of option 3 called “prohibiting limits on *most* education-related benefits.”²⁰ Under this modified option 3, the NCAA can still cap grants-in-aid at the cost of attendance, limit compensation and benefits unrelated to education, and partially limit academic or graduation awards, but cannot limit certain other compensation and benefits related to education (as discussed in greater detail, *infra*).²¹ The court ruled that this alternative would be “less harmful to competition in the relevant market, but would not provide a vehicle for unlimited cash payments, unrelated to education.”²² The court then proceeded to consider whether a balancing of the anticompetitive and procompetitive effects was necessary.

D. Balancing the Anticompetitive Effects Against the Procompetitive Justifications

The court determined that balancing the anticompetitive effects of the challenged restraints against the procompetitive benefits was unnecessary because it accepted the student-athletes’ less restrictive alternative, modified option 3.²³ In so doing, it took an important step forward in resolving a Ninth Circuit case law split as to whether the balancing test is its own factor in the burden-shifting rule of reason analysis; a factor applicable only if the court finds no less restrictive alternative; or an overarching consideration inherent in every rule of reason analysis. Acknowledging that the case law is unsettled, the court ruled that weighing the anticompetitive effects against the procompetitive effects of a challenged restraint is only appropriate where there is no less restrictive alternative. *Id.* at *39-40. Here, according to the court, there was.

The Remedy

The court entered an injunction prohibiting the NCAA from limiting education-related benefits and compensation (except academic or graduation awards or incentives), including “computers[;] science equipment[;] musical instruments[;]...post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre-

and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships.”²⁴ The court allowed the NCAA to continue to limit the grant-in-aid at the cost of attendance and to limit compensation and benefits unrelated to education.²⁵ Individual conferences or schools, however, can independently impose more restrictive limitations on education-related benefits because an individual conference or school would not have the same market power as the NCAA.²⁶

Conclusion

Although a victory for the student-athletes, the practical result appears to favor the NCAA and the conferences. The only major change for the NCAA is that it cannot limit education-related compensation and benefits, and it can partially limit academic or graduation awards or incentives. This leaves the NCAA in the position of determining exactly what constitutes “education-related compensation and benefits” and how to provide those benefits to the schools and student-athletes. What constitutes an education-related benefit to one school may not reasonably qualify as an education-related benefit to another school. And, schools may try to push the boundaries of what qualifies as an education-related benefit to entice student-athletes to attend that school. For instance, perhaps a school where most students live off-campus or commute to school could offer its student-athlete a new car because it transports the student to and from class. Students could also be driven to pursuing majors (such as engineering or computer science) where the newest technologies and computers could qualify as education-related. Only the NCAA will be able to answer those types of questions.

The court also proposed a resolution of the unsettled Ninth Circuit case law split about the burden-shifting analysis under the rule of reason, and whether a balancing of the anticompetitive and procompetitive effects is always required or required only in certain circumstances. If upheld on appeal, the rule of reason analysis is likely to be slightly clearer.

¹⁸ *Id.* at *21-22.

¹⁹ *Id.* at *22.

²⁰ *Id.* at 22 (emphasis added).

²¹ *Id.* at *36, 38-39.

²² *Id.* at *22.

²³ *Id.* at *39.

²⁴ *Id.* at *23.

²⁵ *Id.* at *41.

²⁶ *Id.*