WINSTON & STRAWN LLP

ARTICLE

The NIL in Amateurism's Coffin: How the NCAA's Policy Reversal Shows Once Again That Compensating Student-Athletes Won't Hurt College Sports

AUGUST 31, 2020

This article was originally published in The Harvard Journal of Sports and Entertainment Law. Any opinions in this article are not those of Winston & Strawn or its clients. The opinions in this article are the authors' opinions only.

In Aesop's fable "The Boy Who Cried Wolf," a young shepherd repeatedly cries for help from the town's villagers to protect his flock from an attacking wolf. But each time the villagers run to the boy's aid, they find him doubled-over in laughter with no wolf in sight. Like the shepherd guarding his flock, the NCAA—which has long aggrandized itself as the guardian of "a revered tradition of amateurism in college sports"[1]—has repeatedly cried for Congress and federal courts to protect collegiate athletics from the threat of supposedly ruinous competition.[2] But with no actual threat to consumer demand in sight, the NCAA and its members have continued laughing all the way to their banks. Eventually, the villagers in Aesop's story learned to ignore the false cries for help. It is time for Congress and the courts to do the same.

The Board That Cried Wolf

The NCAA has long decried increases in market competition or enhanced benefits for student-athletes as the death knell of college sports. In 1984, for example, the NCAA argued to the Supreme Court in *Board of Regents* that allowing schools to freely compete in selling their broadcast rights would "undermine college sports" because consumers would "turn to other sources for entertainment."[3] Ironically—but unsurprisingly—the NCAA's eventual antitrust defeat paved the way for the explosion in college football broadcasts that today provides enormous benefits to consumers and generates billions of dollars each year for the NCAA and its members.[4] In 1998, the NCAA argued, in *Law*, that allowing schools to freely compete in compensating assistant basketball coaches would "place[] in grave doubt the future of competitive intercollegiate athletics."[5] The NCAA was again found guilty of illegal restraints of trade.[6] Competition for assistant basketball coaches is now unrestrained, many of these assistants earn millions per year, and college basketball is more popular than ever.[7]

Which brings us to 2015, when the NCAA contended, in *O'Bannon,* that allowing student-athletes to be compensated for their name, image, and likeness (NIL) rights would be "no less anathema to amateurism than paying football players $100 per sack."[8] The courts rejected this plea for antitrust protection too, and again condemned the NCAA's rules as antitrust violations.[9] Now, only five years removed from its dire warnings about the

consequences of permitting any NIL compensation to student-athletes, the NCAA and the Power Five Conferences —under the pressure of legislation from the states[10]—have announced their *support for* NIL payments to college athletes.[11] And they have concluded that such payments will not cause any damage to consumer demand.[12]

The NCAA's whiplash-inducing about-face on NIL compensation is just the latest re-write of its definition of amateurism—one which federal courts have rightly found to be "malleable"[13] and "[in]coherent."[14] Indeed, the "frequent[,] . . . significant and contradictory" changes to the NCAA's "definition of amateurism"[15] leads to one inescapable conclusion: that "amateurism" is not a "core principle" of the NCAA but rather a pretextual *tool* that the NCAA and its members use to control their costs and maximize their profits.

This truth about what motivates the NCAA's compensation restraints was most recently laid bare in the *NCAA Athletic Grant-in-Aid Antitrust Litigation*. There, the NCAA and the Power Five Conferences opposed student-athletes earning "one penny more" in education-related benefits such as academic awards, tutoring or computer equipment, claiming that such additional benefits would (once again) destroy consumer demand for college sports.[16] But at trial, the NCAA executive in charge of legislating these rules testified that in his thirty years as an NCAA executive, he did not recall a single instance in which the NCAA considered consumer demand when making its compensation and benefit rules.[17] So, what *did* the NCAA membership consider in enacting its compensation restraints? "Cost considerations."[18] Both the district court and the Ninth Circuit have held these restrictions on education-related benefits to be unlawful.

Conclusion

To invoke another fable, it is time for the world to recognize that the NCAA is the emperor with no clothes. NCAA restrictions on compensation to student-athletes are not necessary to preserve consumer demand or any purported principle of amateurism. And NIL compensation should be permitted for all college athletes—without Congress granting the NCAA any new antitrust exemption. It comes as little surprise that the NCAA's and Power Five Conferences' current support for NIL compensation goes only as far as *third parties*—not colleges and the Conferences themselves—making such payments to student-athletes. This new conception of "amateurism" may be the most revealing version of the NCAA's true motivations yet: to the NCAA, "amateurism" no longer means that student-athletes should not be compensated, it just means that the NCAA and its constituents should not foot the bill.

History has shown time-and-time again why the NCAA's repeated requests for judicial and legislative antitrust immunity must be rejected. The only difference between the NCAA's shrill warnings and "The Boy Who Cried Wolf" is the ending. In Aesop's fable, the wolf eventually did appear and slaughtered the shepherd's flock. Here, there is simply no wolf.

---

[1] *E.g.*, Petition for Writ of Certiorari at 4, *NCAA v. O'Bannon*, No. 15-1388 (U.S. May 13, 2016), 2016 WL 2866087; Defendants' Joint Opening Brief at 8, *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020) (No. 19-15566), 2019 WL 3992706.

[2] *E.g.*, *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019); *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014); *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995); *Bd. of Regents v. NCAA*, 546 F. Supp. 1276 (W.D. Okla. 1982). *See also* Exhibit B to Plaintiffs' Opposition to Defendants-Appellants' Motion to Stay Issuance of the Mandate, *Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (No. 19-15566), ECF 139-1 (Letter from Power Five Commissioners to Congressional Leadership).

[3] Brief for Petitioner at 21, 25, *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (No. 83-271), 1983 WL 919058.

[4] *See Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1063.

[5] Petition for Writ of Certiorari at 29, *NCAA v. Law*, No. 97-2004 (U.S. June 11, 1998), 1998 WL 34112335.

[6] *Law*, 902 F. Supp. at 1410, *aff'd*, 134 F.3d 1010 (10th Cir. 1998), *cert. denied*, 525 U.S. 822 (1998).

[7] *See, e.g.*, *March Madness: The 2019 NCAA tournament scores across all platforms*, NCAA.org (Apr. 9, 2019), https://www.ncaa.com/news/basketball-men/article/2019-04-09/march-madness-2019-ncaa-tournament-scores-across-all (showing 20% increase in viewership for Men's National Championship Game compared to previous year).

[8] Brief for NCAA at 57, *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015) (No. 14-17068), ECF 13-1.

[9] *O'Bannon*, 7 F. Supp. 3d at 1007, *aff'd in relevant part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

[10] *See, e.g.*, Cal. Educ. Code § 67456 (effective Jan. 1, 2023); Fla. Stat. § 1006.74 (effective July 1, 2021).

[11] *See* Letter from Power Five Commissioners to Congressional Leadership, *supra* note 2.

[12] *See Board of Governors starts process to enhance name, image and likeness opportunities*, NCAA.org (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities (concluding that NIL compensation for student-athletes is still "consistent with the collegiate model").

[13] *O'Bannon*, 802 F.3d at 1058.

[14] *Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1074.

[15] *O'Bannon*, 802 F.3d at 1058.

[16] *See, e.g.*, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 22, *Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (No. 14-md-02541), 2017 WL 3525667; *Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d at 1258.

[17] *Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1080.

[18] *See* Plaintiffs' Opposition to Motion to Stay Issuance of the Mandate at 16, *Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (No. 19-15566), ECF 139-1 (quoting testimony of Kevin Lennon).

10 Min Read

Related Locations

New York

Related Topics

NCAA

Sports Law

College Sports

Related Capabilities

Litigation/Trials

Sports

Related Regions

North America

Related Professionals

Jeffrey Kessler

Dave Greenspan

© 2024 Winston & Strawn LLP.