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NCAA suffers another blow to current amateurism model

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On Monday, the U.S. Court of Appeals for the Ninth Circuit upheld a district court decision, in Alston v. NCAA, that prohibits the NCAA from restricting colleges and universities from granting "non-cash education-related benefits" to student-athletes. Three judges unanimously determined that the NCAA's limitations on education-related benefits violated federal antitrust law. The decision strikes another blow to the NCAA's traditional amateurism model.

This latest ruling permits schools to pay for a broad spectrum of education-related expenses that exceed a school's cost of attendance (i.e., tuition, room and board, meals, and textbooks). As a result, institutions can pay for computers, science equipment, musical instruments, post-eligibility scholarships for undergraduate, graduate, and vocational programs at any school, tutoring, study-abroad expenses, and post-eligibility internships. This list is not exhaustive and will certainly be the subject of future debate.

While significant, the result may not have gone as far as student-athletes wanted. The Court of Appeals did not expand the district court's position on other forms of compensation. Most notably, it declined to permit cash payments that are unrelated to education, noting that such payments would eliminate distinctions between professional and college athletics.

Either party can appeal the decision. In the meantime, NCAA-wide restrictions on education-related benefits are prohibited, but conferences can independently establish limits. How it all works going forward becomes part of the broader discussion regarding the NCAA's evolving amateurism definition.

Most recently, the NCAA faced significant pressure from state and federal lawmakers to allow student-athletes to receive compensation for the use of their name, image, and likeness, or NIL. The pressure was initiated by California's enactment of the Fair Pay to Play Act in September 2019. Other states soon followed with similar legislation, and the NCAA was forced to address the NIL issue seriously.

In April, the NCAA's board of governors announced that it supported NIL rule changes based on recommendations issued by a special working group it established in May 2019 to analyze the NIL issue. The recommendations included allowing student-athletes to receive compensation for endorsements both related to and separate from athletics, and compensation for other student-athlete opportunities, such as social media "influencer" activity, new business ventures, and personal appearances. The board announced that any rule changes would be subject to certain guardrails that ensured, among other things, compensation for NIL activity represented genuine payments for NIL use and not disguised payments for athletic participation, schools and conferences play no role in NIL activities, schools and boosters do not use NIL opportunities as recruiting tools, and the role of third parties in NIL activity is regulated.

The working group also recommended that the NCAA engage Congress to ensure federal preemption over NIL laws and to establish a potential antitrust law exemption that would protect the NCAA from future lawsuits. Unsurprisingly, the NCAA's "Big Five" sports conferences are making sure that any federal discussion also contains their input. Reportedly, the SEC, Big Ten, Pac 12, ACC, and Big 12 have spent more money in the first three months of 2020, than in any prior full year, to lobby Congress regarding NIL legislation.

While the mention of federal preemption and antitrust waivers raises concerns over future anti-competitive restrictions on student-athletes, with some state NIL laws taking effect as early as next year, national uniformity on the subject is necessary. Without consistent legislation and treatment of NIL activity nationally, schools in states with more favorable NIL laws would, among other things, have significant recruiting advantages.

Regardless of how national uniformity on NIL legislation is achieved and other student-athlete compensation matters are addressed, it is clear that federal courts, legislators, and advocacy groups, will be critical of any future anti-competitive restraints.

It is important to note that in Monday's decision, Judge Milan D. Smith issued a passionate concurring opinion. In it, Smith highlighted specific technical issues with the interpretation and application of antitrust law in Alston and its detrimental impact on student-athletes in future antitrust cases. Smith explained that his court and prior courts have broadened applicable antitrust law and, as a result, permitted the NCAA to justify its anti-competitive behavior and restrictions on compensation with the concept of consumer demand for college sports. Smith went on to note that college sports viewership has increased since limitations on student-athlete compensation were relaxed.

"Under the Rule of Reason analysis we affirm today, so long as the NCAA cites consumer demand for college sports, we allow it to artificially suppress competition for collegiate athletes' services by limiting their compensation," Smith wrote. "Instead of requiring the NCAA to explain how those limits promote schools' competition for athletes, we leave student-athletes with little recourse under the antitrust laws." Such an acknowledgment will undoubtedly be used to support future criticism of changes to the NCAA's amateurism model that don't go far enough.

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