Hogan Lovells

Court of Appeals affirms limited injunction on NCAA compensation restrictions for student-athletes

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On 18 May 2020 the U.S. Court of Appeals for the Ninth Circuit ruled against the National Collegiate Athletic Association (NCAA) in an antitrust case challenging the association's policy of limiting the compensation paid to student-athletes.[1] The decision is the latest concerning the NCAA's amateurism rules, which have been challenged over the past few years as athletes and their advocates have argued for student-athletes to be compensated for their participation in competitive college sports. However, for the time being, the decision will not result in any significant practical changes in compensation for student-athletes at some NCAA member institutions.

In March 2019 the U.S. District Court for the Northern District of California ruled in favor of a plaintiff class comprised of current and former men's Division I (D1) football players and men's and women's D1 basketball players (the student-athletes) in a suit against the NCAA and eleven of its conferences. The student-athletes alleged that the NCAA's rules limiting the compensation they may receive in exchange for their athletic services unreasonably restrained trade and affected interstate commerce in violation of § 1 of the Sherman Act.[2] The district court held that "the Defendants agreed to and did restrain trade in the relevant market" – which it defined as either the market for a college education or the market for student-athlete labor – and that the "challenged limits on student-athlete compensation produce significant anticompetitive effects."[3]

The district court also held that, while there are procompetitive effects stemming from the defendants' rules preventing unlimited cash payments unrelated to education – specifically, that the challenged rules "implement 'amateurism,' which drives consumer interest in college sports because 'consumers value amateurism'"[4] – these procompetitive effects could be achieved through less restrictive means.[5] In its decision, the court identified the following less restrictive alternatives (LRA): "(1) allow[ing] the NCAA to continue to limit grants-in-aid at not less than the cost of attendance; (2) allow[ing] the [NCAA] to continue to limit compensation and benefits

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[1] See *In re: National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation (In re: NCAA Antitrust Litigation)*, No. 14-md-02541-CW (9th Cir. 18 May 2020).
[2] See *In re: NCAA Antitrust Litigation* at 32 (citing *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), 375 F. Supp. 3d 1058, 1062 (N.D.Cal. 2019)).*
[3] See *Alston,* 375 F.Supp. 3d. at 1062.
[4] See *In re: NCAA Antitrust Litigation* at 21 (citing *Alston*, 375 F.Supp.3d at 1070).
[5] See *Alston*, 375 F.Supp.3d at 1087.

unrelated to education; and (3) enjoin[ing] NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future."[6] Under the current rules, the NCAA may impose limitations on certain education-related compensation and benefits for student-athletes including computers, science equipment, musical instruments, and other items that are not included in the cost of attendance calculation but are "nonetheless related to the pursuit of various academic studies."[7] Pursuant to the district court's proposed LRA, limitations on these types of education-related benefits are prohibited.

On appeal to the Ninth Circuit, defendants argued that the widely-recognized dividing line between collegiate and professional sports is that college athletes are not paid to play. According to defendants, this distinction allows schools to provide payments to student-athletes to cover reasonable education-related expenses, but also allows the NCAA to impose limits on non-education-related payments. According to defendants, the court may not simply rewrite the NCAA's reasonable judgments about where to draw those limits; pursuant to the rule of reason, federal courts are prohibited from striking down "broadly reasonable restraints," and may only invalidate procompetitive restraints if the plaintiff successfully proves that the "restraints are significantly more restrictive than necessary to achieve their procompetitive ends."[8] Defendants argued that the district court's proposal, which prohibits the NCAA from limiting education-related benefits to student-athletes, would "eradicate" the no "pay for play" distinction that separates amateur athletes from professional athletes.[9]

The Ninth Circuit's majority opinion

The Ninth Circuit's 18 May 2020 decision affirms the district court's judgment. The Ninth Circuit held that the lower court "properly applied the Rule of Reason in determining that the enjoined rules were unlawful restraints of trade under § 1 of the Sherman Act,"[10] and outlined a three-step framework for applying the rule of reason to the NCAA's amateurism rules: (1) student-athletes bear the initial burden of showing that the amateurism rules produce significant anticompetitive effects within a relevant market; (2) if they meet that burden, the NCAA must produce evidence that the challenged rules have procompetitive effects; and (3) if the NCAA does so, student-athletes must show that those benefits can be achieved in a substantially less restrictive manner.[11]

The lower court correctly determined that the NCAA's limits on education-related benefits for student-athletes violate the Sherman Act

The Ninth Circuit concluded that the student-athletes had "carried their burden" of showing that the alleged restraint produced significant anticompetitive effects within a relevant market. It agreed with the lower court that the student-athletes had properly carried this burden because "elite student-athletes lack any viable alternatives to [D1], they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by [D1] schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services."[12]

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[6] *Id.*
[7] *Id.*
[8] Defendants' Joint Opening Brief at 22, *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 19-15566, 19-15662 (9th Cir. 16 Aug. 2019).
[9] See *id.* at 24.
[10] See *In re: NCAA Antitrust Litigation* at 6.
[11] See *id.* at 36-37 (citing *O'Bannon II*, 803 F.3d 1049, 1070 (9th Cir. 2015)).
[12] See *id.* at 37.

The lower court correctly determined that the NCAA failed to show that procompetitive effects justify limits on education-related benefits

On the second step under the rule of reason, the Ninth Circuit held that only some of the challenged rules fall within the NCAA's proffered procompetitive justification: that the current rules preserve amateurism and widen consumer choice by maintaining a distinction between college and professional sports.[13] The Ninth Circuit agreed with the lower court that the NCAA's procompetitive justification was insufficient to justify caps on non-cash, education-related benefits because those benefits did not adversely affect consumer demand for college sports.[14]

The lower court correctly determined that certain NCAA rules have procompetitive effects, but that they could be achieved through less restrictive means

The Ninth Circuit also agreed that there are less restrictive means of ensuring the NCAA's asserted procompetitive benefits. The Ninth Circuit found that certain NCAA rules "serve the procompetitive end of distinguishing college from professional sports."[15] Accordingly, it allowed the NCAA to impose limits on above-cost-of-attendance payments *unrelated* to education, the cost-of-attendance cap on athletic grants-in-aid, and certain restrictions on cash academic or graduation awards and incentives. But the court affirmed the injunction against the NCAA's limits on most non-cash compensation and benefits related to education.[16]

Judge Smith's concurring opinion

In a concurring opinion, Judge Smith agreed that Ninth Circuit precedent supported the decision in this case, but expressed concern that the "current state of our antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprives the young athletes in this case of the fundamental protections that our antitrust laws were meant to provide them."[17] He explained that the relevant market in this case was defined by the district court as student-athletes' "labor in the form of athletic services."[18] As a result, it was inappropriate in step two of the rule of reason analysis for the majority to "not limit its consideration to the procompetitive effects of the compensation limits in the market for Student-Athletes' athletic services."[19] By holding that the NCAA's limitation on student-athletes' pay was "justified because that restraint drove demand for the distinct product of college sports in the consumer market for sports entertainment," the majority failed to limit step two of the rule of reason to the defined market established in step one. According to Judge Smith, the majority found instead that it "was enough for the NCAA to meet its Step Two burden that it could show (however feebly) a procompetitive effect in a collateral market."[20] In Judge Smith's view, allowing defendants to "offer procompetitive effects in a collateral market as justification for anticompetitive effects in the defined market"[21] is an improper extension of the rule of reason analysis.

Conclusion

The Ninth Circuit's decision demonstrates that the growing opposition to the NCAA's policy regarding student-athlete compensation is finding a voice in the courts. However, for a number of institutions playing D1 football and basketball, this decision will not result in any significant practical changes, as many of those institutions have been providing grants-in-aid up to the full cost of attendance for several years. The Ninth Circuit's decision serves to highlight the difficulty

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[13] See *id.* at 6.
[14] See *id.* at 39 (citing *Alston*, 375 F.Supp.3d at 1076-1080).
[15] See *id.* at 53.
[16] See *id.* at 26.
[17] See *id.* at 57.
[18] See *id.* at 20 (citing *Alston*, 375 F.Supp.3d at 1067, 1097).
[19] See *id.* at 65.
[20] See *id.* at 66.
[21] See *id.* at 61.

that plaintiffs face in trying to alter the NCAA's long-standing rules with respect to student-athlete compensation.

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