COLLEGE FOOTBALL

Why the NCAA Lost Its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes

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- U.S. District Judge Claudia Wilken has declared that the NCAA and its 11 major conferences are violating antitrust law by capping the value of athletic scholarships.

By **MICHAEL MCCANN** March 08, 2019

In a 104-page judicial ruling poised to reshape big-time college sports, U.S. District Judge Claudia Wilken has declared that the NCAA and its 11 major conferences are violating antitrust law by capping the value of athletic scholarships. Friday's ruling follows a 10-day bench trial that took place last September and featured former West Virginia running back Shawne Alston and former Cal center Justine Hartman leading a class action on behalf of former men's and women's college players.

Judge Wilken has effectively ordered the NCAA to revise its grant-in-aid rules so that they both permit member schools to compete more fully and enable conferences to establish their own policies for scholarships. Accordingly, schools that already compete for recruits in myriad ways—spending many millions of dollars to fund top coaches' salaries, constructing new stadiums, building state-of-the-art training facilities—will be able to compete in one additional way: by offering athletic scholarships of higher value.

In reaching her conclusion, Judge Wilken highlighted the "great disparity" between the NCAA's "extraordinary revenue" generated by DI basketball and FBS football and "the modest benefits" that college athletes obtain for playing sports.

Should Judge Wilken's ruling be upheld on appeal, this new framework will mark a sharp departure from how recruiting has worked for years. Grant-in-aid rules currently prohibit universities from offering athletic scholarships that are worth more than tuition, fees, room, board, course-related books and other expenses up to the value of the full cost of attendance. Pursuant to Judge Wilken's order, recruits will soon be able to receive athletic scholarship offers that exceed a "full ride" to college. To the extent schools elect to offer more than a full ride, the excess amount can reflect additional compensation for "non-cash education-related benefits and academic awards."

To that end, Judge Wilken has permanently restrained the NCAA from agreeing to fix or limit education benefits related to "computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies." This list is neither exhaustive nor, as Judge Wilken stresses, permanent: it can be amended with court approval. Judge Wilken also permits the NCAA to define "related to education" though any such definition must be in accordance with her antitrust analysis.

In addition, the NCAA will be barred from limiting "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation;

and paid post-eligibility internships." However, the NCAA can restrict academic or graduation awards and related incentives that are paid in cash or a cash-equivalent.

Four important caveats about the victory for the players

While groundbreaking and disruptive, Judge Wilken's ruling does not compel any immediate change, and its eventual effects might prove less impactful than some wish. To that end, there are at least four caveats to consider.

First, Judge Wilken has given the NCAA 90 days to comply with her order. Excluding weekends and holidays, 90 days would run the calendar to July 16, 2019. However, this date could be pushed back—potentially for months or even years—if the NCAA appeals, which it most certainly will, as the 90 days will be stayed (postponed). The delay is for pragmatic reasons: to ensure that the NCAA and its members can review the order and determine how to best comply. The delay also means the NCAA can continue to enforce current grant-in-aid rules through at least the current recruiting season.

Second, Judge Wilken has not authorized a "free market" for athletic scholarships. Instead, she envisions a more dynamic, but nonetheless restrained, market where athletic scholarship amounts must remain, as Judge Wilken and other judges have put it, tethered to academics (a point explored in an accompanying SI legal story on the ruling's impact). Judge Wilken's ruling also indicates that conferences will enjoy discretion in determining appropriate restrictions on scholarship values. This suggests that while major conferences might permit their member schools to spend well above the grant-in-aid, other leagues could gravitate towards less generous limitations.

Third, while Judge Wilken's order will enable the approximately 350 colleges that make up NCAA Division I to offer recruits more than a full ride, none will be compelled to do so. This is a crucial point for schools and their compliance offices. Judge Wilken's order is directed toward how schools conspire with one another, not how each school reaches its individual decision. To that point, while the ruling prevents colleges from

continuing to collude through NCAA grant-in-aid rules, each college, on its own, could land in the same place by deciding to not offer a scholarship that exceeds the grant-in-aid. Stated differently, it's not the grant-in-aid amount that is illegal, but that competing schools and conferences join hands through the NCAA in agreeing to follow it. Considering that only about 20 D-I schools report a profit on athletics and most athletic scholarships are partial rather than full, many if not most colleges will likely decline to offer athletic scholarships that exceed the current levels.

Fourth, the NCAA and its conferences will appeal Judge Wilken's order to the U.S. Court of Appeals for the Ninth Circuit. This is the same appellate court that upheld Judge Wilken's order in Ed O'Bannon's case against the NCAA but modified the accompanying remedy. I break down the appeal prospects in an accompanying story on this ruling.

The key antitrust issue: Schools agreeing to cap athletic scholarships is anticompetitive and unlawful

The central reason for Judge Wilken's decision in the case (formally titled *In Re: NCAA Grant-in-Aid Cap Antitrust Litigation*) is her determination that NCAA grant-in-aid rules constitute an unreasonable restraint on trade. The case turned on Judge Wilken's application of Section 1 of the Sherman Act. Generally speaking, Section 1 forbids competing businesses from conspiring to restrain competition in ways that cause more economic harm than good. While colleges might not seem like competing businesses given their educational missions, they are very much economic competitors. They compete over students, athletes, professors, administrators, staff, media attention, tuition dollars, donations, grants and many other finite resources.

Here, Judge Wilken agreed with the players' attorneys, who include Jeffrey Kessler and David Greenspan from Winston and Strawn and Steve Berman from Hagens, Berman, Sobol, Shapiro. She reasoned that grant-in-aid rules amount to illegal price-fixing. The relevant competitors—the NCAA and its member schools and conferences—conspired to fix the maximum dollar amount allowable under a grant-in-aid. On their own, NCAA member schools can't disregard grant-in-aid rules. These rules are mandatory.

Should a school breach them, the school would accept the risk of expulsion from the NCAA—an untenable position for virtually every major university.

This means that even if schools wish to offer a coveted recruit more than the grant-in-aid, they can't within the boundaries of NCAA rules. As a result, they and their rivals can only offer the same basic package of tuition, fees, room, board, course-related books and other expenses up to the value of the full cost of attendance.

By explicitly preventing competition, then, NCAA rules run afoul of antitrust law.

How competition increases compensation

The antitrust dynamic described above can be illustrated using one of this year's best incoming players: Nolan Smith, a defensive end at IMG Academy in Bradenton, Fla. Over the last year, Smith was ranked as one of the top three recruits in the class of 2019 by every major outlet. Five elite college football programs—Alabama, Clemson, Georgia, Clemson and Tennessee—all aggressively recruited him. During the early signing period in December, Smith officially signed with Georgia, and he will play for the Bulldogs on a full scholarship this fall.

This description of Smith might not seem problematic. In fact, it seems ordinary for a recruit of Smith's caliber. Yet it nonetheless contains an antitrust problem. Smith was denied the full benefits of the competition for his services. If Smith were a coach or a professor, the multiple schools competing for him could have offered him more money as an inducement to select their school. That doesn't mean the school would pay Smith a salary. NCAA rules forbid "paying" college athletes as employees, but a similar "compensatory" outcome could be achieved through a scholarship offer that reflects the market competition for Smith. If Alabama offered $100,000 per year in a scholarship, Clemson could offer $150,000 and then Tennessee could top them both at $200,000 per year—and so on.

You might doubt that schools would enter into bidding wars for elite recruits, but those same schools routinely engage in de facto bidding wars to impress recruits enough to sign. Examples of this trend are readily available in the competition for elite coaches who excel at attracting

recruits to their programs. There is a reason Nick Saban reportedly earned $11.7 million last season as Alabama's coach. He wins games and lands the top recruits, who want to play for him. Meanwhile, *USA Today*'s NCAA salary database shows that more than 20 college football *assistant* coaches earn at least $1 million a year.

Or consider facilities. National champion Clemson recently opened a new $55 million football facility. Among other amenities designed to appeal to college-age athletes, the facility contains a laser tag room, a bowling alley, a movie theater and a lounge to play video games. Georgia, for its part, has made available a $30.2 million indoor practice facility and is eyeing additional facility enhancements for its football team.

There is nothing illegal about schools paying coaches millions of dollars or spending millions of dollars to enhance facilities. Yet those transactions played exactly into the plaintiffs' legal arguments: Schools may claim to lose money on sports, and they may claim to cherish a clear demarcation between professional and amateur sports, but they keep finding ways to spend enormous amounts of money on everything around the players.

It's also not illogical for schools to compete over elite recruits. These recruits help their teams win games, which translates into improved TV ratings, increased gate receipts and higher merchandise sales. To illustrate, take a look at Adam Zagoria's recent empirical findings on "The Zion Effect", which refers to effect of Duke freshman sensation Zion Williamson's impact on Duke men's basketball ticket sales and prices. Williamson is one of the most marketable college athletes in recent memory. His recent knee injury caused by a defective Nike sneaker became a national controversy with potential legal implications. Yet the most Williamson can legally receive from Duke is capped at the grant-in-aid.

A winning team is valuable to a university's admissions office, which often aims to recruit top high school students in part by highlighting the college's successful—and entertaining—athletics program. Likewise, a winning team can also help a university's foundation office convince alumni to donate to their alma mater. As I explored in a column last year on No. 16-seed UMBC's upset of No. 1-seed Virginia in the NCAA tournament, colleges that obtain national exposure through sports success can experience massive

admissions and fundraising gains. This was famously seen in 1984 at Boston College, which attracted many more applications from high school students and thus became more selective in the aftermath of the football team's stunning victory over defending national champion Miami, a phenomenon known as “The Flutie Effect.”

While universities regard elite recruits as potential students, these students are assets to a university in ways that other students are not.

The limitations of the NCAA's defenses

The plaintiffs had the advantage of precedent. In 2014, Judge Wilken ruled in favor of former UCLA star Ed O’Bannon in his antitrust lawsuit against the NCAA over its use of players’ names, images and likenesses. O’Bannon successfully argued that the NCAA and its members had illegally applied amateurism rules to misappropriate players’ names, images and likenesses without those players’ consent or compensation. The NCAA then unlawfully licensed these properties for inclusion in video games, classic broadcasts, player jerseys and other products. At the time, Judge Wilken signaled clear displeasure with NCAA member institutions joining together to restrain competition in ways that adversely impacted players. While players’ identity rights and scholarships are different topics, that same displeasure was apparent in Judge Wilken’s order in the Grant-in-Aid Cap ruling.

The NCAA was also hampered by an inability to convince Judge Wilken that grant-in-aid rules promote competition or that the grant-in-aid cap is a sensible boundary between amateurism and pro sports. The NCAA argued that athletic scholarship restrictions enhance college sports. For instance, the NCAA claimed these restrictions attracted fans to college sports. Its expert witnesses asserted these fans would become less interested in college sports if the players were essentially pro athletes, and those witnesses cited survey data to corroborate that point.

The NCAA also maintained that competition restrictions help colleges integrate academics and athletics in that they purportedly help students “retain a focus on academics.” This integration is also designed, NCAA attorneys argued, to prevent measures that would “further distinguish” student-athletes “from their peers and create a wedge between student-

athletes and the broader school community and also among different student-athletes."

In response, the players' attorneys asserted that the NCAA lacked sufficient empirical evidence to support these assertions. Further, sports economist Daniel Rascher of the University of San Francisco offered testimony that debunked some of the NCAA's arguable fearmongering. He noted that as college athletes have been able to receive more financial benefits post–*O'Bannon*—including annual stipends of roughly $3,000 to $6,000 to reflect the full cost of attendance; unlimited snacks and meals; and ability to borrow against future earnings to purchase loss-of-value insurance—college sports revenues have increased. In other words, athletes receiving more hasn't led to diminished fan interest or consumer investment in college sports. Just the opposite, revenues continue to climb, which suggests that fans and consumers will not be "turned off" by Judge Wilken's ruling.

Indeed, Judge Wilken decisively endorsed this reasoning in her opinion. "Restricting non-cash education-related benefits and academic awards that can be provided on top of a grant-in-aid has not," the judge writes, "been proven to be necessary to preserving consumer demand" in D-I basketball and FBS football. Just as in the O'Bannon case, Judge Wilken was unconvinced that amateurism is a necessary means for college sports to protect education or that it is needed for college sports to preserve a marketable identity.

Next steps and implications

Please see my accompanying SI articles on how the grant-in-aid ruling will impact college sports and where the litigation could next turn. As discussed in those articles, this ruling holds key implications for conference alignment, Title IX, tax law and immigration law.

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