

Busting Brackets: District Court Rejects NCAA's Summary Judgment Motion and Allows Student-Athletes' Suit for Publicity Compensation to March to Trial

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Nearly five years into the lawsuit, a District Court denied defendant NCAA's summary judgment motion, and ordered that the antitrust claims of current and former student-athletes denied compensation for the commercial use of their name, image, and likeness proceed to trial in June. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 09-1967, 2014 U.S. Dist. LEXIS 50693 (N.D. Cal. Apr. 11, 2014). The decision is noteworthy in its fact-intensive assessment of the NCAA's procompetitive justifications, its repeated reliance on the least restrictive means test, and its demands that the specific restraint be closely tied to the purported procompetitive justifications.

The NCAA's troubles with the antitrust laws began back in 1984 with a Supreme Court decision that loosened its grip on television broadcast rights. *NCAA v. Board of Regents*, 468 U.S. 85 (1984). In that case, a group of universities with major football programs challenged the NCAA's restrictions limiting the number of games on television in one area and the number of times a particular school could be televised. The Supreme Court found the television plan restricted output (*i.e.*, the number of televised college football games) and violated the antitrust laws. The Court also rejected the NCAA's justifications for the plan, including maintaining a competitive balance among collegiate teams and supporting live attendance. This holding has led colleges and universities to negotiate their own television contracts and exponentially expanded the number of games available on television and the price networks pay for the rights. It is a bit ironic that the money derived from the 1984 decision is funding current football programs in their efforts to compete for the best student-athletes. These factors have also led the most recent case to advance to its final rounds.

Background

Plaintiffs, a group of current and former men's football or basketball student-athletes, alleged that the NCAA conspired in violation of Section 1 of the Sherman Act with videogame and licensing companies to "restrain competition in the market for the commercial use of their names, images, and likenesses." Slip Op. at 2. Plaintiffs challenge the NCAA's rule prohibiting student-athletes from seeking compensation for the use of their names, images, and likenesses. Plaintiffs reached a settlement with two co-defendants, Electronic Arts, Inc. and Collegiate Licensing Company, in September 2013, but have yet to seek court approval of the settlement. The court, on November 8, 2013, certified a class seeking injunctive relief against the NCAA, but denied certification of a damages class. Plaintiffs then moved for summary judgment on all antitrust claims against the NCAA, and the NCAA cross-moved for summary judgment.

Court's Analysis on Cross-Motions for Summary Judgment

The court considered the NCAA's compensation ban under the rule of reason, weighing the harm to competition against the procompetitive benefits. Declining to use a "quick look" analysis because the compensation ban "could conceivably enhance competition," Slip Op. at 8-9, the court instead employed a burden-shifting framework under which a plaintiff bears the initial burden of demonstrating significant anticompetitive effects in a relevant market. If the plaintiff's initial burden is satisfied, the defendant then bears the burden of demonstrating the restraint's procompetitive benefits. Finally, the plaintiff has the opportunity to show that those benefits could have been achieved using less restrictive means.

Plaintiffs' Burden: The Restraint Causes Significant Anticompetitive Effects

Under this framework, the court analyzed Plaintiffs' evidence that the prohibition on compensation for commercial use of the student-athletes' names, images, and likenesses "produce[d] 'significant anticompetitive effects' within a 'relevant market.'" Slip Op. at 7 (citations omitted). Plaintiffs were required to provide a threshold showing that the compensation ban harmed competition in the two identified markets: (1) college education, and (2) group licensing.

In both markets, the court found that Plaintiffs had put forth sufficient evidence to support an inference that the compensation ban had an anticompetitive effect and thus shifted the burden to the NCAA. In the college education market, Plaintiffs' evidence showed that colleges were prevented from enticing top talent with offers of television and videogame likeness compensation, thus harming the student-athletes. In the group licensing market, Plaintiffs demonstrated the compensation ban precluded broadcasters and videogame developers "from competing freely for group licenses to use student-athletes' names, images, and likenesses." Slip Op. at 11.

In finding that Plaintiffs met their initial burden, the court rejected the NCAA's argument that former student-athletes were not precluded by any NCAA rule from licensing their name, image, or likeness for two reasons: (1) the NCAA continues use of former student-athletes' names, images, and likenesses without consent long after they stopped competing collegiately, and (2) student-athletes were prevented from selling licenses at the height of their value and they lost all bargaining power once the NCAA had already sold broadcasting rights to the games in which they played. Slip Op. at 12-13.

NCAA's Burden: The Restraint Has Procompetitive Benefits

On finding that Plaintiffs had met their initial burden, the court assessed the NCAA's five procompetitive justifications for the imposition of its ban on compensation for student-athletes for the use of their name, image, and likeness: (1) preserving amateurism, (2) promoting a competitive balance among Division I teams, (3) integrating athletics and education, (4) increasing support for women's sports and less popular men's sports, and (5) increasing output of Division I football and basketball. The court granted Plaintiffs summary judgment on the NCAA's fourth justification, but genuine issues of material fact prevented the court from ruling for either party on the remaining justifications.

Importantly, the court emphasized that the NCAA consistently failed to provide sufficient evidence that *this* restraint, the compensation ban, *caused* the purported procompetitive benefits. For example, the court noted that promoting competitive balance was a legitimate justification under Supreme Court and Ninth Circuit precedent, but noted that the NCAA could not show that the compensation ban played any part in achieving that competitive balance.

The court also found that some of the NCAA proffered justifications were not procompetitive benefits. Neither the integration of education and athletics nor the increased support for other sports increased competition. The court held that such social welfare benefits are not a cognizable justification for otherwise anticompetitive conduct. Similarly, an anticompetitive act, like the compensation ban, could not be validated simply because it created some unrelated benefit in another market, such as increasing support for other sports.

Plaintiffs' Burden: There Are Less Restrictive Means of Achieving the Procompetitive Benefits

The court also found that the NCAA could have achieved many of their justifications by less restrictive means. For its fourth justification that the compensation ban supported other sports, the court found this least restrictive means requirement fatal. The court stated that the NCAA could provide support for other sports by mandating that Division I schools redirect football and basketball revenue to these other sports. Slip Op. at 39-40. In addition, the court found that there was no reason why less restrictive means than a compensation ban could be employed to ensure a competitive balance among Division I teams.

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This decision highlights the challenge for antitrust defendants of securing summary judgment based on procompetitive benefits because such justifications typically involve a fact-intensive analysis that often results in factual disputes fit for trial. The court here also emphasized the need for defendants to utilize the least restrictive means to achieve any purported procompetitive benefits — a view which has gone in and out of favor over time and across circuits. Finally, the specific restraint must be shown to actually result in, or be partial causes of, the procompetitive justifications. Without a causal connection, a court is much less likely to embrace the justification and find no antitrust liability. Each result suggests defendants face greater challenges to resolving the case without a trial.

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