

NCAA, COVID and Paying Players: Negotiating Payment in the Midst of a Pandemic

In May, three judges on the U.S. Court of Appeals for the Ninth Circuit ruled unanimously against the NCAA in its appeal of the lower court decision, finding that the organization's policies that prohibit student-athletes from being compensated are, in fact, anticompetitive.

By Carl W. Hittinger and Jeanne-Michele Mariani

Last year we examined the decision in *Alston v. NCAA*, an opinion by U.S. District Judge Claudia Wilken of the Northern District of California holding that the NCAA was in violation of Section 1 of the Sherman Act, and therefore the organization could not fix or limit the amount of compensation paid to players unless the money offered to the students was "related to education."

In [May](#), three judges on the U.S. Court of Appeals for the Ninth Circuit ruled unanimously against the NCAA in its appeal of the lower court decision, finding that the organization's policies that prohibit student-athletes from being compensated are, in fact, anticompetitive. Of course, there are miles to go with this litigation, as the NCAA has already planned to appeal the decision to the U.S. Supreme Court, which would hear the case in its October 2020 term if certiorari is granted.

As another update, the NCAA is trying to halt the enforcement of the Ninth Circuit decision through a request for a stay to the Supreme Court. Just this month, the Supreme Court [rejected](#) the NCAA's bid to temporarily reinstate caps on education-related compensation for college athletes. Justice Elena Kagan denied the association's request for the stay that would have prevented the lower court order from taking effect as scheduled. The NCAA had argued that the court-ordered injunction would [irreparably harm college sports](#) if it takes effect immediately because its impact will be imposing, costly and irreparably harmful.

The denial of the injunction could be a harbinger of what is to come and might even foreshadow a reluctance by the Supreme Court to even choose to hear the appeal, according to lead counsel for plaintiffs, Jeffrey Kessler. After the ruling, Kessler went on to say, "it's coming. The train has arrived, and it's brought terrific new benefits for all these athletes."

Of course, all these decisions come on the heels of the worldwide COVID-19 pandemic, which has disrupted the normal course of business for months and now intends to do the same to college sports. Due to the concerns from medical officials regarding contact sports, both the Pac-12 and Big Ten have decided to [postpone their seasons](#) – although that decision was made only earlier this month. That sparked criticism from some who felt

the schools should have made such an announcement months prior. In June, two prominent doctors [wrote an Op-Ed](#) in the L.A. Times, where they argued that the COVID-19 pandemic has made the exploitation of student-athletes even more stark. They argued the fact that colleges and universities who were insistent about bringing athletes back during a pandemic, "showed why students playing under the auspices of the NCAA, which generates nearly \$1 billion annually, should be paid." And yet this matter of pay has become increasingly difficult due to the pandemic, with the association losing millions from [the cancellation of tournaments](#) like March Madness and the recorded broadcastings of the like. Member schools usually count on the NCAA for a portion of their athletic budgets, often receiving large payouts every semester; however, with the lack of revenue coming into the association last semester, some of those payments were delayed.

Complicating matters further, on Aug. 12, the NCAA Division I council recommended that student-athletes affected by COVID-19 receive an extension of their [five-year period](#) of eligibility, which would include an additional season of competition if they participate in 50% or fewer competitions allowed in each sport. "The question turns into how do athletics fund those extra scholarships," said David Herbster, director of athletics for the University of South Dakota. "For example, [women's] swimming gets 14 scholarships," [Herbster said](#). "So potentially that could mean for a year or two, they have to have 17 scholarships because you have people that want to come back. Well, then we have to determine where does that money comes from. And how do we fund that?"

While the myriad of problems from the pandemic will not last forever, the short-term monetary impact could be devastating for both the NCAA, its member schools and student athletes looking to be compensated for their talent in the short term. And with pressures mounting on the NCAA to pay out, it could mean more pressure on students to play, even if conditions remain unsafe. Arguments similar to these could potentially be seen in the NCAA's appeal to the Supreme Court, should they decide to hear argument. But of course, potential hardship does not salve an antitrust violation – the law is the law.

There also remains the concern, which we highlighted when we [first addressed this topic](#) last year, that less lucrative programs, those outside of the top-tier teams, may end up struggling more if on top of COVID decreases in revenue they have to pay players, without the NCAA paying out more. If that is the case, smaller sports programs could fold, leaving talented students with high hopes with nowhere to go. And yet at the same time unscrupulous schools might take advantage of the current monetary climate, and lean on financial hardship to assuage the court that paying athletes any more than the standard scholarship cannot be done, but for the sole purpose of bettering their bottom line.

While the paying of student athletes is a complicated matter to sort out regardless of the national environment, it becomes even more complex given the global pandemic, which shows no signs of letting up. Whether these singular historic events will affect future decisions in these cases remains to be seen.

Stay tuned.

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