

Antitrust Law v. NCAA Compliance Manual: Can the NCAA become Compliant?

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I. INTRODUCTION

It's no secret that the National Collegiate Athletic Administration (NCAA) is having antitrust issues. From *NCAA v. Board of Regents of University of Oklahoma*, the *NCAA v. Alston*, to transfer rules, the NCAA has never before seen the arguments against their long-established status quo. While the NCAA has faced challenges before, the Supreme Court's decision in *NCAA v. Alston* changed how the NCAA approaches these issues.

Alston decided that the NCAA's current practice of limiting "non-cash education related benefits" and limiting the type of compensation student-athletes could earn was a clear violation of antitrust rules.² The court noted that "...the NCAA's justification for its remaining rules — that they enhance collegiate athletics by distinguishing them from professional sports — impermissibly balances harm in the labor-side market against benefits in the consumer-side market," versus the benefits gained by the student-athletes.³ The NCAA realized that their approach needed to change after a stern warning from Justice Brett Kavanaugh reminding them, "that the NCAA was not above the law."⁴ While the NCAA has relaxed some of its stances, their Compliance Manual has yet to adapt.

The first section will feature a roadmap of NCAA Compliance History and current litigation regarding NCAA Compliance rules. The second section will discuss antitrust law and

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² Tamara H. Bennett, *NCAA V. ALSTON*, 2022 TXCLE-AIP 11-III, 2022 WL 657144

³ *Sherman Act – Antitrust Law- College Athletics – NCAA v. Alston*, 135 Harv.L-Rev.471, <https://harvardlawreview.org/print/vol-135/ncaa-v-alston/>, (2021).

⁴ Bennett, *NCAA V. ALSTON*, 2022 TXCLE-AIP 11-III, 2022 WL 657144; *Natl. Collegiate Athletic Assn. v. Alston*, 141 S. Ct. 2141 (2021).

how the NCAA can adapt their compliance manual. By adapting the manual, the NCAA could approach Congress to receive antitrust exemption.

II. LEGAL BACKGROUND

The NCAA “...is a voluntary, self-governing organization of four-year colleges, universities and conferences committed to the well-being and development of student-athletes, to sound academic standards and the academic success of student athletes, and to diversity, equity and inclusion.”⁵ In order to accomplish those goals, the NCAA has three distinct roles, as “... a legislator, interpreter, enforcer, and arbitrator of college athletics, and analyzes the legal framework that authorizes and informs its performance of these roles.”⁶ To accomplish these goals, the NCAA has created a compliance manual and method of enforcement.

A. NCAA Compliance History

The NCAA was founded in 1906 at the request of President Theodore Roosevelt to create rules and regulations to protect the safety of those participating in college football.⁷ The NCAA expanded with the passage of Title IX in 1973.⁸ After Title IX, more schools began to invest in their sport programs this is multiple sentences.⁹ With the quick and vast growth of college athletics across the country, the NCAA created three divisions (Division I, Division II, and Division III) for member-schools to “...to align like-minded campuses in the areas of philosophy, competition and opportunity,” in 1973.¹⁰ This allowed schools to compete against

⁵ NCAA CONST.pmb1.,

https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf

⁶ Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement and Infractions Processes: The Laws the Regulate them and the Nature of Court Review*, VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW, <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1298&context=jetlaw>

⁷ History, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> (last visited Feb. 28, 2024).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

schools of similar student-body makeup and athletic budgets.¹¹ As of 2023, Division I only accounts for 32% of NCAA member schools, while Division III accounts for the greatest number of members at 40%.¹² As part of their membership, schools are required to follow by-laws that are set forth in the NCAA Compliance Manual.

In 1948, the NCAA passed the Sanity Code, their first attempt at enforcement.¹³ The Sanity Code “covered financial aid, recruitment and academic standards that were intended to ensure amateurism in college sports.”¹⁴ Schools could now provide financial aid to student-athletes that “demonstrate[d] financial neediness.”¹⁵ Coaches were now allowed to recruit off campus, but could not offer financial aid to the incoming recruits.¹⁶ To enforce the Sanity Code, the NCAA created a Constitutional Compliance Committee to interpret the rules, investigate possible violations, and enforce the rules.¹⁷ However under the Sanity Code, the only penalty was expulsion from the NCAA.¹⁸ For a while, the Sanity Code seemed to govern college athletics.¹⁹ In 1950, the NCAA sent questionnaires to member schools to gauge how the Code was being implemented, and stressed honesty.²⁰ Seven universities now known as the Sinful Seven answered honestly that they simply were not following the rules and providing athletic

¹¹ *Id.*

¹² *Our Three Divisions*, NCAA, <https://www.ncaa.org/sports/2016/1/7/about-resources-media-center-ncaa-101-our-three-divisions.aspx> (last visited, Feb. 28, 2024).

¹³ Lee VanHorn, *When the Sanity Code Becomes the Insanity Code: Following O’Bannon’s Lead is the Key to Solving Group Licensing for NCAA Student-Athletes*, ARKANSAS LAW REVIEW, <https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1130&context=alr>.

¹⁴ NCAA, *supra* note 7.

¹⁵ *The Sanity Code*, SPORTS CONFLICT INSTITUTE, <https://sportsconflict.org/the-sanity-code/>, (last visited Feb 28, 2024).

¹⁶ Andy Staples, *A history of recruiting; how coaches have stayed a step ahead*, SPORTS ILLUSTRATED, <https://www.si.com/more-sports/2008/06/23/recruiting-main>, (last visited Feb. 28, 2024).

¹⁷ Rodney K. Smith, *The National College Athletic Association’s Death Penalty: How Educators Punish Themselves and Others*, INDIANA LAW JOURNAL, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2091&context=ilj>.

¹⁸ *Id.*

¹⁹ Staples, *supra* note 16.

²⁰ *Id.*

scholarships.²¹ For the first time, the NCAA responded with rules enforcement.²² However this effort was short-lived as three conferences immediately informed the NCAA they would leave if the seven were expelled from the NCAA.²³

Upon the actions of the Sinful Seven, the NCAA repealed the Sanity Code and replaced it with the enforcement procedures we have today. Today, the NCAA has compliance manual and a Committee on Infractions with expanded power to enforce the rules and to penalize violations.²⁴ With a mission of “...uphold[ing] integrity and fair play among member schools, ensur[ing] that compliance schools and student-athletes are not disadvantaged by their compliance and [to] provide fair procedures and timely resolution of cases,” the NCAA finally developed a way to enforce their rules.²⁵

B. Current NCAA Compliance Litigation

For years, the NCAA’s mechanism of enforcement had been kept intact by the Court regardless of the judgment. While the NCAA was found in violation of Antitrust laws in *NCAA v. Board of Regents*, the court noted that while the NCAA plays a critical role in “...the maintenance of a revered tradition of amateurism in college sports...”, they must be consistent with the Sherman Act.²⁶ From *NCAA v. Tarkanian* to *Bloom v. NCAA*, the NCAA had been hardly challenged. That was until *NCAA v. Alston*. Since the NCAA’s loss in the *Alston* case,

²¹ Andy Schwartz, The NCAA Has Always Paid Players; Now It’s Just Harder to Pretend They Don’t, DEADSPIN, <https://deadspin.com/the-ncaa-has-always-paid-players-now-its-just-harder-t-1727419062>, (last visited Feb. 28, 2024)

²² Staples, *supra* note 16.

²³ *Id.*

²⁴ Smith, *supra* note 17.

²⁵ Infractions Process, NCAA, <https://www.ncaa.org/sports/2021/5/11/division-i-enforcement.aspx>, (last visited, Feb. 28, 2024).

²⁶ *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. at 120.

lawsuit after lawsuit has been filed questioning the legality of many of the NCAA's core compliance rules.

C. Transfer Rules Controversy

The most challenged by-law is the rule regarding transfer eligibility. NCAA Bylaw 14.4.5 discusses Transfer Regulations, specifically the residency requirement and conditions that would affect transfer status.²⁷ In *Deppe v. NCAA*, former Northern Illinois University football player, Peter Deppe opted to transfer to the University of Iowa (Iowa).²⁸ Under the guidelines, Deppe would have to sit out the year following his transfer.²⁹ Citing Deppe's inability to get a waiver from the NCAA, Iowa moved on to another player.³⁰ Deppe on his own requested an exemption from the NCAA without a university.³¹ Frustrated Deppe, filed suit to argue that the NCAA's transfer rule was in violation of section 1 of the Sherman Act.³² The Seventh District ultimately ruled that NCAA's transfer rule was not in violation of the Sherman Act and was "...presumptively pro-competitive under *NCAA v. Board of Regents of the University of Oklahoma...*"³³ The NCAA's victory would be short lived. In December 2023, on behalf of student-athletes, the attorneys general from Ohio, Colorado, Illinois, North Carolina, Tennessee and West Virginia filed suit in West Virginia District Court to challenge bylaw 14.4.5.³⁴ This time, a temporary injunction was granted on behalf of the challenging student-athletes.

²⁷ NCAA, DIVISION I MANUAL BYLAW 12.1.1.2, <https://web3.ncaa.org/lstdbi/search/bylawView?id=105570>, (last visited Feb. 28, 2024).

²⁸ Roger D. Blair, *The NCAA's Transfer Rules: An Antitrust Analysis*, UF LAW FACULTY PUBLICATIONS, <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=2003&context=facultypub>

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Deppe v. National Collegiate Athletic Association*, 893 F.3d 498, 499 (C.A.7 (Ind.), 2018)

³⁴ *Ohio et al. v. National Collegiate Association*, NATIONAL ASSOCIATION OF ATTORNEYS GENERALS, <https://www.naag.org/multistate-case/ohio-et-al-v-national-collegiate-athletic-association-ncaa-no-123-cv-00100-n-d-w-v-dec-7-2023/#:~:text=Case%20Description,labor%20and%20control%20their%20education.,> (last visited Feb. 28, 2024).

D. NIL Litigation

The NCAA's guidance and state law are fairly new; the discussion on Name, Image, and Likeness (NIL) has been prevalent in the college athletics landscape for many years. While *Alston* only challenged the violation of antitrust laws regarding cost of attendance, the NCAA seemingly abandoned their stance towards amateur sports and student-athletes compensation.³⁵ After months of back and forth regarding student-athletes' right to market their own NIL, the NCAA threw their hands up, told their members to follow state laws and provided guidance for those members who did not have state laws on July 1, 2021.³⁶ At the core of the NCAA's guidance, they instructed that there shall be no inducements for pay for play, no recruiting inducements, no institutional involvement, no conflict with Team Activities, no institutional trademarks, and no resale of memorabilia.³⁷ The policy also created agent protocols and included several disclosure requirements.³⁸ While the NCAA's rules regarding NIL are fluid, lawsuits are being filed constantly. Currently the NCAA is facing an antitrust challenge from Tennessee and Virginia alleging that "...the NCAA has breached antitrust law by restricting athletes from fully earning NIL compensation."³⁹ On February 23, 2024, Judge Clifton Corker granted a preliminary injunction finding that "[the] NCAA policy banning college recruits from discussing NIL opportunities before they enroll in university caused "irreparable harm" to student-

³⁵ Anthony M. Dalimonte, *NIL Timeline: The Events that Transformed College Sports*, <https://www.fosterswift.com/communications-timeline-NIL-cases-transform-college-sports.html>

³⁶ *Id.*

³⁷ Mizzou Athletics, *Mizzou NIL Regulations & Guidelines*, <https://mutigers.com/sports/2022/12/28/mizzou-nil-regulations-guidelines>

³⁸ Mizzou Athletics, *Mizzou NIL Regulations & Guidelines*, <https://mutigers.com/sports/2022/12/28/mizzou-nil-regulations-guidelines>

³⁹ Kristi Dosh, *Current College Sports Legal Challenges*, BUSINESS OF COLLEGE SPORTS, <https://businessofcollegesports.com/legal/current-college-sports-legal-challenges/>

athletes.”⁴⁰ To which the NCAA released a statement saying that ““turning upside down rules overwhelmingly supported by member schools will aggravate an already chaotic collegiate environment, further diminishing protections for student-athletes from exploitation. The NCAA fully supports student-athletes making money from their name, image and likeness and is making changes to deliver more benefits to student-athletes, but an endless patchwork of state laws and court opinions make clear partnering with Congress is necessary to provide stability for the future of all college athletes.””⁴¹

III. BECOMING COMPLIANT: SHOULD THE NCAA BE GRANTED ANTITRUST EXEMPTION?

The NCAA is increasingly seeing its enforcement rules turned upside down each day. As The NCAA is asking for antitrust exemptions in several situations in order to enforce the rules that they have prioritized for so long. As Justice Kavanaugh noted in *Alston*, there is no other industry where these practices would be allowed to operate. However, the NCAA has a strong case for antitrust exemption if it were to adjust some of its compliance rules.

A. Federal Antitrust Law

To deal with the monopolies that were infiltrating the market, Congress in 1809 passed the Sherman Act. The Act was “designed to protect and promote economic competition.”⁴² Today, we understand that the Sherman Act ultimately includes a contract, combination, or conspiracy, that there is an unreasonable restraint of trade in the market, and that there must be an injury in

⁴⁰ <https://www.cbsnews.com/news/federal-judge-grants-injunction-tennessee-nil-case-suspends-ncaa-rules/#:~:text=The%20antitrust%20lawsuit%2C%20filed%20by,how%20athletes%20commercially%20use%20NIL>

⁴¹ Rishikesh Rajagopalan, *Federal judge grants injunction suspending NCAA's NIL Rules*, CBS NEWS, <https://www.cbsnews.com/news/federal-judge-grants-injunction-tennessee-nil-case-suspends-ncaa-rules/#:~:text=The%20antitrust%20lawsuit%2C%20filed%20by,how%20athletes%20commercially%20use%20NIL> . (last visited Feb. 28, 2024)

⁴² Keith Starr, *The Path to Antitrust Success Against the NCAA is More Limited Than You Think*, MISSOURI LAW REVIEW, <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4115&context=mlr>, at 1157.

interstate commerce.⁴³ Most of the lawsuits today, are alleging that NCAA compliance rules are violating the Sherman Act. The NCAA can overcome the unreasonable restraint of trade by using the existing framework as a method for a quasi-collective bargaining agreement between the student-athletes and the universities.

B. The Case for Exemption

The Court's attitude towards the NCAA's practices have drastically shifted.⁴⁴ "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law."⁴⁵ The idea of collective bargaining for student-athletes is not new. In 2023, Senators Chris Murphy, Bernie Sanders and Elizabeth Warren reintroduced the College Athlete Right to Organize Act (CARO).⁴⁶ The CARO Act calls for the "...right to collectively bargain across teams and conferences, and that they are able to advocate for rights, protections and compensation..." While the compliance manual does not ultimately discuss labor beyond the notion of pay for play, the compliance manual has a framework where discussion between student-athletes, universities, and the NCAA could come together to collectively decide what rules they must abide by and how to sanction the schools that break the rules.

⁴³ See generally *Id* at 1160-61.

⁴⁴ See generally *National Collegiate Athletic Association v. Alston*, 594 U.S. at 112.

⁴⁵ *Id.*

⁴⁶ *With Support from Major Labor Unions and Players Associations, Murphy, Sanders, Warren reintroduce Legislation to Strengthen College Athletes' Collective Bargaining Rights*, SENATOR CHRIS MURPHY, <https://www.murphy.senate.gov/newsroom/press-releases/with-support-from-major-labor-unions-and-players-associations-murphy-sanders-warren-reintroduce-legislation-to-strengthen-college-athletes-collective-bargaining-rights#:~:text=The%20College%20Athlete%20Right%20to%20Organize%20Act%20is%20the%20first,commensurate%20with%20the%20value%20they>. (last visited Feb. 28, 2024).

For example, the Transformation Committee was established in 2022, to retool the framework.⁴⁷ Included in that committee were several athletic directors, faculty athletics representatives, presidents, and conference commissioners.⁴⁸ Their recommendations were then forwarded to the Division I Board of Governors to a vote.⁴⁹ Finally, the Student-Athlete Advisory Committee (SAAC) supported the Board of Governors decision.⁵⁰

While the student-athletes in SAAC were consulted in some way, if the NCAA opted to utilize the SAAC more like a player union, they would be able to give student-athletes a voice on the rules that ultimately affect them more than any other party. First, the NCAA would need to amend their constitution as currently the SAAC board for each division “must include one-student-athlete from each conference.”⁵¹ Expanding SAAC to include two or more would allow for more voices. The NCAA should expand SAAC to include student-athletes from both revenue and non-revenue sports.

Universities have already given themselves negotiating power when it comes to compliance. In 2014, the NCAA adopted a new Division I model which gave the Power 5 Conference school members autonomy.⁵² This ultimately allowed for the Southeastern Conference (SEC), Atlantic Coast Conference (ACC), Big Ten, Pac-12, and the Big 12 to create

⁴⁷ *Division I Transformation Committee: Building the Future of DI Athletics*, NCAA, <https://www.ncaa.org/sports/2021/11/3/division-i-transformation-committee.aspx>, (last visited Feb. 28, 2024)

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Division I Student-Athlete Advisory Committee*, NCAA, <https://www.ncaa.org/sports/2013/11/18/division-i-student-athlete-advisory-committee.aspx>. (last visited Feb. 28, 2024).

⁵¹ *Division I Student-Athlete Committee Roster*, NCAA, https://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1SAAC. (last visited, Feb. 28, 2024).

⁵² Jon Solomon, *NCAA adopts new Division I model giving Power 5 autonomy*, CBS, <https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy/>. (last visited Feb 28, 2024).

their own rules to adjust for the large gap in athletic budgets.⁵³ Non-Power 5 schools could follow the autonomy rules or not.

The NCAA could also retool the Board of Governors to better assist in this model. While ultimately the Board of Governors could act as the final vote, it would better serve the model by being active in the negotiation process. The Board of Governors would be the voice of the NCAA. It should be noted that even under this quasi-collective bargaining arrangement, the NCAA would still be barred by antitrust law from enforcing an illegal contract.

It is understandable that the NCAA would want to enforce its rules and the court has not barred them from doing so. The Court has only ruled that the NCAA is barred from enforcing unreasonable restraint on the rules. Student-athletes are challenging the compliance framework because they want to be heard. These rules are put in place for student-athletes, not only to provide a collegiate experience but also an education. The NCAA should embrace the student-athletes and find a way to make what all of us love about college athletics work. By creating a system that includes input from student-athletes, universities, and the NCAA, the NCAA can create rules that benefit everyone and punish those who are not following them.

IV. CONCLUSION

While the NCAA notes that it is a voluntary athletic association, “the NCAA is not above the law.”⁵⁴ It is understandable that the NCAA wants a way to enforce its rules but, it needs to do so in a way that follows antitrust laws. If the NCAA were to be granted antitrust exemption, they should use the existing compliance framework to “collectively-bargain” with universities and student-athletes. If both the universities and the student-athletes had more of a say on how

⁵³ *Id.*

⁵⁴ *National Collegiate Athletic Association v. Alston*, 594 U.S. at 112.

the enforcement process would work, the NCAA would be facing less compliance-based lawsuits. While it is true that federal antitrust exemptions can only be given by Congress, if all three parties can come together in the compliance framework this could help push Congress to grant the NCAA limited antitrust exemption.