Note on NCAA regulation of economic rights of players

The NCAA's recent decision to overhaul its regulation of limits on players' economic rights moots a number of issues raised in recent litigation reviewed in the casebook and in subsequent cases. The NCAA's decision was doubtless affected both by the litigation as well as state legislation. One such law as California's SB 206, the "Fair Pay to Play Act." Passed unanimously by both houses of the legislature, the law prohibits students in public or private California universities from penalizing students who elect to monetize their name, image, and likeness (NIL) rights. The relevant statute, codified as Cal. Educ. Code §67456, provides that:

> (a) (1) A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness. Earning compensation from the use of a student's name, image, or likeness shall not affect the student's scholarship eligibility.
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> (2) An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.
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> (b) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not provide a prospective student athlete with compensation in relation to the athlete's name, image, or likeness.
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> (c) (1) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not prevent a California student participating in intercollegiate athletics from obtaining professional representation in relation to contracts or legal matters, including, but not limited to, representation provided by athlete agents or legal representation provided by attorneys.
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> (d) A scholarship from the postsecondary educational institution in which a student is enrolled that provides the student with the cost of attendance at that institution is not compensation for purposes of this section, and a scholarship shall not be revoked as a result of earning compensation or obtaining legal representation pursuant to this section.
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> (e) (1) A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract.
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> (2) A student athlete who enters into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness shall disclose the contract to an official of the institution, to be designated by the institution.
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> (h) This section shall become operative on January 1, 2023.

In considering the developments following the cases excerpted in the Casebook, consider the views expressed by Tom McMillen, CEO of the LEAD1 advocacy group on behalf of college athletic directors, at the October 2019 Intercollegiate Athletics Conference sponsored by the Penn State Center for the Study of Sports in Society: once NIL rights are recognized, McMillen claimed, the dam will break and there is no way to prevent full professionalization of college athletics.

The most recent litigation was more modest, District Judge Claudia Wilken being mindful of the Ninth Circuit's divided decision upholding the NCAA's ability to limit compensation beyond the full cost of education in her most recent decision, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation,* 375 F. Supp. 3d 1058 (N.D. Cal. 2019). She noted a 2013 report to the NCAA Division I Board of Directors from presidents of schools in the "Power Five" conferences that called for further changes because, in part of a "a wish to move away from efforts to "create 'a level playing field,'" because "[t]oo often, our efforts to improve the lives of student athletes have been deflected because of cost implications that are manageable by our institutions but not by institutions with less resources," and ") a sense that efforts to "'level the playing field'" led the Power Five to "spend these resources in almost any way we want EXCEPT to improve support for student athletes."

In rejecting claims that current NCAA limits were reasoning, Judge Wilken applied the rule of reason and, finding a restraint of trade, next rejected the NCAA's argument that the challenged compensation limits are procompetitive because "amateurism is a key part of demand for college sports" and "consumers value amateurism."

> Defendants nowhere define the nature of the amateurism they claim consumers insist upon. Defendants offer no stand-alone definition of amateurism either in the NCAA rules or in argument. The "Principle of Amateurism," as described in the current version of the NCAA's constitution, uses the word "amateurs" to describe the amateurism principle, and is thus circular. It does not mention compensation or payment. The constitution says, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA Constitution Article 2.9. No connection between the "Principle of Amateurism" and the challenged compensation limits is evident. Mike Slive, who served as commissioner of the SEC, one of the Power Five, from 2002 to 2015, testified that amateurism is "just a concept that I don't even know what it means. I really don't."

She went on to detail numerous examples of literal pay being permitted by NCAA rules. These had no effect on dampening student demand. With regard to the defendant's expert testimony by prominent antitrust economist Kenneth Elzinga, she wrote that he

> failed to show that the challenged compensation limits are necessary to preserve consumer demand. First, Dr. Elzinga's opinions on consumer demand are unreliable. He did not study any standard measures of consumer demand, such as revenues, ticket sales, or ratings. The "narrative" evidence that formed the primary basis of his demand analysis was not representative. Trial Tr. (Elzinga) at 477-78, 445-47 (acknowledging that his economic analysis did not include interviews of fans, coaches, student-athletes, broadcasters, or conference commissioners). Instead, he interviewed people connected with the NCAA and its schools, who were chosen for him by defense counsel.

> The only economic analysis in the record that specifically speaks to the effects of compensation amounts on consumer demand is that by [University of San Francisco sports economist Daniel] Rascher. Dr. Rascher analyzed two natural experiments to determine whether increases in student-athlete compensation would have an impact on consumer demand. He concluded that increased student-athlete compensation does not negatively affect consumer demand for Division I basketball and FBS football. The Court finds Dr. Rascher's analysis and opinions to be reliable and persuasive.

She rejected another NCAA witness' conclusion about consumer preferences that athletes not be paid. A survey expert asked 1,086 on-line consumers why they watch college sports. She noted that only 31.7% selected the "amateur and/or not paid" option as a reason why they watch or attend college sports, meaning that the great majority of respondents, 68.3%, gave other reasons. Moreover, the survey did not ask whether respondents would view fewer or more Division I basketball and FBS football events if additional compensation were provided to student-athletes.

Turning to the decision-making leading to NCAA rules, Judge Wilken noted that an NCAA official testified that he could "not recall any instance in which any study on consumer demand was considered by the NCAA membership when making rules about compensation." Although she acknowledged that consumers care about the distinction between college and pro sports, but concluded that this was likely due to the "fact that college sports are played by students actually attending the college, student-athletes are not paid the very large salaries that characterize the professional sports leagues that many student-athletes aspire to, the National Basketball Association and the National Football League."

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