

End Game? Federal Court Enjoins Enforcement of NCAA's "NIL Recruiting Ban"

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On February 23, U.S. District Judge Clifton L. Corker of the Eastern District of Tennessee, issued an opinion and order granting the Tennessee and Virginia attorneys generals' (AG) request for a preliminary injunction enjoining the National Collegiate Athletic Association (NCAA) from enforcing its so-called "NIL-recruiting ban," *i.e.*, the current NCAA guidance that prohibits boosters and collectives from communicating with student-athletes about name, image, and likeness (NIL) opportunities before they commit to a particular school. The court found the AGs had established both a likelihood of success on the merits and irreparable harm that would occur absent imposition of the preliminary injunction. By granting the preliminary injunction, the court has set off a series of events that are sure to have wide-ranging implications both on the near- and long-term landscape of college sports.

NCAA Interim NIL Policy

In 2021, the NCAA issued an interim policy allowing student-athletes to be compensated for their NIL. The interim policy explicitly states that "NCAA Bylaws, including prohibitions on pay-for-play and improper recruiting inducements, remain in effect." In essence, the interim policy allowed student-athletes to earn money for their NIL while continuing to prohibit schools from using NIL dollars or the promise of NIL dollars to induce a student-athlete to enroll in, transfer to, or remain at a given school. Since the interim policy, the NCAA has issued numerous other guidance documents, which provided additional details concerning what NIL activity is and is not permitted.

Among the NIL activity the NCAA made clear was *not* permitted was involving school boosters and collectives in the recruiting process, *i.e.*, communicating with student-athletes before they enroll in a school. By prohibiting these communications, the NCAA prohibited student-athletes from exploring and comparing NIL opportunities at different schools before choosing where to enroll.

Background of the Litigation

On January 31, Tennessee AG Jonathan Skrmetti and Virginia AG Jason Miyares (collectively the plaintiffs) filed a lawsuit challenging this NCAA guidance, which they termed the "NIL recruiting ban." The plaintiffs asserted that the NIL recruiting ban constitutes an illegal agreement to restrain and suppress competition within the relevant labor market, in violation of Section 1 of the Sherman Antitrust Act. The plaintiffs defined the relevant labor market as the "Division I athletics" market.

In filing the lawsuit, the plaintiffs sought both a temporary restraining order (TRO) and a preliminary injunction, both of which asked the court to enjoin the NCAA from enforcing the NIL-recruiting ban. The court denied the

motion for a TRO, noting the plaintiffs had failed to demonstrate that they would suffer irreparable harm in the absence of a TRO. However, after the submission of supplemental briefing and oral argument, the court considered and ultimately granted the separate motion for a preliminary injunction.

Preliminary Injunction

To prevail on their motion for a preliminary injunction, the plaintiffs were required to demonstrate four key elements, each of which is discussed individually below.

Likelihood of Success on the Merits

First, the court concluded that the plaintiffs had established a likelihood that they would ultimately succeed on the merits of their Sherman Act Section 1 claims. Specifically, the court found that they had adequately shown that the NCAA (1) entered into an agreement that (2) unreasonably restrained trade in the relevant market.^[1]

In concluding that the NCAA unreasonably restrained trade, the court followed the quintessential antitrust “Rule of Reason” test. This is a burden shifting test that first required the plaintiffs to demonstrate substantial anticompetitive effects that harm consumers in the relevant market. The court was satisfied that the plaintiffs met this mark, holding that the NCAA’s market power over the Division I athletics space is “undeniable” and that the challenged rules would “likely harm competition” because they “suppress[] price competition by limiting negotiating leverage, and, as a result, knowledge of value.”

Once the plaintiffs demonstrated anticompetitive effects, the burden under the Rule of Reason shifted to the NCAA to demonstrate a procompetitive rationale for its rules. The NCAA argued that its NIL-recruiting ban (1) promotes the balance of academics and athletics, and (2) maintains a distinction between collegiate and professional athletics. However, the court found these justifications unpersuasive, noting the NCAA had failed to show how the timing of an NIL deal — *i.e.*, entry of a deal prior to enrollment — would destroy the goal of preserving amateurism in collegiate athletics.

In doing so, the court noted that even if it accepted the NCAA’s procompetitive justifications for its NIL-recruiting ban, those same goals could be achieved through less-restrictive means, which encompasses the third and final part of the Rule of Reason test. The court highlighted that the NCAA already maintains rules requiring student-athletes to maintain progress toward degrees, log minimum credit hours, and achieve minimum grade point averages. Moreover, the court pointed to other rules from the NCAA’s NIL guidance that are not part of the NIL recruiting ban and, thus, were not being challenged by the plaintiffs. These other NIL rules include the NCAA’s requirement that (1) all NIL deals include a *quid pro quo*, (2) athletic performance cannot be used as consideration for an NIL deal, and (3) schools are prohibited from compensating student-athletes directly for their NIL. With respect to these other NIL rules, the court found they may, in fact, be “more effective in preserving amateurism than the NIL-recruiting ban.”

The NCAA lodged several additional arguments, all of which the court rejected. Most notable was the NCAA’s argument that the NIL-recruiting ban was necessary to spread athletic talent across member institutions. The court actually found that “spreading competition evenly across the member institutions by restraining trade is precisely the type of anticompetitive conduct the Sherman Act seeks to prevent.” The court was similarly unpersuaded by

the NCAA's rationale that the NIL-recruiting ban was necessary to protect vulnerable students from abusive and unfair NIL agreements, noting the NCAA's concerns do not make its conduct any more lawful.

Irreparable Harm and Private/Public Factors

Having established a likelihood of success on the merits, the plaintiffs were then required to show, and did successfully show, that they would suffer irreparable harm, or harm that could not be quantified and compensated with damages, if the preliminary injunction was denied.

The court began by concluding that the plaintiffs themselves (or even their respective collegiate institutions) had not shown any irreparable harm to them specifically. Particularly, the schools and states had neither shown any impending enforcement action nor any proof that recruiting activities had been impeded. Yet the court also concluded that the student-athletes did face irreparable harm, beyond strictly monetary loss, from the continued enforcement of the NIL-recruiting ban. Specifically, the court noted that “[w]ithout the give and take of a free market, student-athletes simply have no knowledge of their true NIL value.”

This suppression of the student-athletes' negotiating leverage and lack of knowledge as to their own value represented an irreparable and nonmonetary harm to student-athletes. As part of its analysis, the court considered the facts of the collegiate recruiting and commitment process. The court noted that the window of opportunity is small for recruitments, commitments, and transfers; moreover, these are the periods in which the student-athletes have the highest negotiating leverage with NIL collectives and can realize the most value.^[2] Accordingly, the court held that the student-athletes faced irreparable harm in the absence of the requested injunction.

Finally, the court held that neither the NCAA nor any other entity or individual would face substantial harm if it granted the injunction, rejecting the NCAA's argument that imposing the injunction would cause “disarray” in collegiate athletics. Similarly, the court held that imposition of the injunction would serve the public interest by preventing anticompetitive behavior and encouraging free and fair price competition in the NIL market.

Impact of the Decision

Because the plaintiffs established the four factors of a preliminary injunction, the court granted their request. Effectively, this means that, from the date of the opinion, the NCAA may not enforce the policies related to its NIL-recruiting ban on Division I member institutions. It is important to note that the order granting the injunction is narrow, as it applies only to NCAA Bylaw 12.11.4.2 (Rule of Restitution) and *only* to the application of that bylaw to the “foregoing NIL activities.” Since the opinion dealt solely with the NIL-recruiting ban, the practical scope of the injunction means that NCAA cannot enforce its prohibition on the use of NIL as a recruiting inducement until there is a final decision on the merits of this instant case.

To be clear, the court did not hold that the NCAA may not otherwise regulate student-athlete NIL activity, and neither the opinion nor the order reach the other various components of the NCAA's interim policy or its subsequent supplemental guidance. In other words, the court's decision did not turn the NIL space into an unregulated wild west. Though, the implication of the court's decision is of great importance. As schools prepare for the 2024-2025 collegiate athletic season, the NCAA's prior prohibitions on use of NIL opportunities as an inducement no longer apply, at least with respect to Division I schools specifically.

It is important to note however, that while the court's opinion has enjoined the enforcement of the NCAA's NIL-recruiting ban, it does not enjoin enforcement of state laws that would effectively prohibit the same conduct. Accordingly, before engaging in any activity that was now made permissible by the court's ruling, collectives, boosters, and schools should take care to consult counsel and consider all applicable laws and regulations.

Given the court's decision here, we can expect the NCAA to seek immediately appellate review. Moreover, absent a stay of the injunction, we can nevertheless expect the NCAA to seek uniform application of its NIL-recruiting ban even to NCAA member institutions that otherwise would not fall within the reach of the court's order. Regardless of how this plays out, it is clear from this ruling that the battle over NIL-recruiting is far from over. The litigation itself, and the order at issue, show that there are states, schools, boosters, and collectives that have a strong interest in eliminating any bans on NIL-recruiting, and there are courts that will be receptive to their arguments that any such bans violate the Sherman Act. The future of student-athletes' ability to generate revenue from their NIL and utilize their market value in negotiations with schools and collectives, and their decisions regarding which schools to attend, remains in flux. We can expect that collegiate-level leagues like the NCAA will continue to face litigation, with a likely evolution toward increasing ability for interested stakeholders to use NIL money as a recruiting inducement until Congress acts to establish some controls.

[1] In 2008, the Sixth Circuit had found that the NCAA was not subject to the Sherman Act, as its rules were not "commercial in nature." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426 (6th Cir. 2008). In distinguishing this precedent, Judge Corker noted that the opinion in Bassett predated "NIL era of college athletics," and that, in this new era, "[a]greements between NIL collectives and student-athletes are undoubtedly commercial transactions." Indeed, the court suggested that, should the NCAA prefer an exemption from Sherman Act scrutiny, it must appeal to Congress for such an exemption.

[2] The court outright rejected the NCAA's argument that plaintiffs unreasonably delayed bringing the instant lawsuit. In so finding, the court noted that the NCAA's interim policy took effect in July 2021, and supplemental guidance was issued in May 2022 and February 2023.

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