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Could a Ban-But-Not-Break Gamble Lead to NCAA Doomsday Scenario?

Money and power. The NCAA for years has had both but now may end up with neither.

The passing of California's Fair Pay to Play Act has the potential to fundamentally change college sports forever. This groundbreaking legislation allows athletes from in-state schools to earn compensation through endorsements. Trying to prevent the floodgates from opening, the NCAA is firmly planting its foot down, demonstrating its unwillingness to move off the status quo. Instead, they are threatening to ban California schools from competition rather than allow athlete compensation to break through its walls.

Now, in a sign of support for the NCAA, prominent schools like Ohio State and Wisconsin are refusing to play California schools: "Who's going to play (them)? We're certainly not." As other states contemplate similar legislation, and with the ban likely extending in response, one crucial question must be answered: Is the NCAA actually legally permitted to ban schools?

In answering this billion-dollar question, it is important to know that antitrust laws are precisely designed to divest power if and when an industry leader crosses a line. In short, the concept of antitrust is used to describe any conspiracy that illegally restrains trade and promotes anti-competitive behavior. It's a way to ensure that the American public benefits from the freedom of competition.

In our past, the antitrust process has led to the breakup of monopolies—and the subsequent rise in innovation—within the phone, camera, and computer industries—and many more. Similar to the Philadelphia 76ers fans who famously coined the phrase "trust the process" to signify that brighter times were ahead, we, too, must trust that the antitrust process will lead to the right result. Here, that could mean the NCAA losing power if the courts determine that they abused it.

Can the NCAA Ban Schools?

If banning schools sounds like something the NCAA should not be able to do, a history lesson might be in order, because the NCAA has threatened to do so at least twice—once in 1951 and once in 1981. But more about that later.

Despite past precedent, the NCAA either believes it has legal grounds to ban schools since the courts have never dealt with this issue in the context of athlete compensation or, alternatively, it just does not think schools will call its bluff and actually leave the organization. As discussed below, bluff or not, telling compensation-friendly schools to leave could very well lead to the NCAA's doomsday scenario, *i.e.*, the formation of a new "NCAA."

With student-athlete compensation legislation poised to sweep across the country and the NCAA refusing to yield, the issue appears to be on a collision course for a lengthy battle that ultimately ends in the United States Supreme Court. Analyzing the past may give us some clues about any future battle over athlete compensation.

The NCAA has tried twice to ban schools that have threatened its authority at the top of the proverbial food chain. The first instance, in 1951, worked. The NCAA prevailed because the school at issue was not only banned but also subjected to a boycott from all of its on-field opponents and caved under the threat of losing its season. The NCAA's second attempt, in 1981, initially succeeded until it was challenged in federal court. The federal judiciary ruled against the NCAA's blanket ban of all schools who disagreed with its principles and, in so doing, sent a clear message that the "controls over college football make NCAA a classic cartel." *Bd. of Regents of Univ. of Oklahoma v. Nat'l Collegiate Athletic Ass'n*, 546 F. Supp. 1276 (W.D. Okla. 1982). Of note, both prior bans stemmed from disputes concerning TV revenue, the very epicenter of the NCAA's ties to money and power.

The NCAA's Successful Ban Attempt

In 1938, the University of Pennsylvania orchestrated the first commercially televised college football game. By 1951, television contracts had proven to be an incredibly lucrative commodity. That's when the NCAA decided to flex its muscle on the UPenn Quakers.

In advance of the 1951 season, the NCAA decided that it would be taking control of scheduling football games on television and determining how that revenue would be split. Specifically, the NCAA decided that there would only be one televised game every Saturday and that the revenue would be split only between the NCAA and the teams playing in that game, with no team being scheduled to more than two televised games per season.

There was only one problem … UPenn wasn't going to let that happen. The school earned significant revenue from its TV deals and, just the year prior, had all of its home games broadcast on ABC Sports through an exclusive license with the network. They planned to do the same in 1951, having just signed a $200,000 contract with ABC for the upcoming season.

The NCAA's new plan seemed to be directly targeting UPenn. It was an aggressive move by the NCAA against college football royalty—the alma mater of John Heisman (yes, *that* Heisman) and winners of seven college football national championships which, at the time, trailed only Princeton, Yale, Michigan, and Pittsburgh.

UPenn stood its ground on its TV deal and, in response, the NCAA threatened to ban the Quakers from competition. UPenn looked around for support from the other schools to no avail. Instead, in a show of support for the NCAA, all of UPenn's home opponents for the upcoming season announced that they were refusing to play their scheduled games against UPenn. This led to a Congressional threat to hold antitrust hearings into the apparent collective boycott. With nowhere else to play, the Quakers ultimately caved, agreeing to a short-term compromise and, ultimately, signing onto the NCAA's restrictive TV platform.

The compromise, however, spared the NCAA from judicial scrutiny.

The NCAA's Unsuccessful Ban Attempt

From that point forward, the NCAA had full autonomy over college football TV schedules and money. Over time, however, many larger schools grew frustrated with the limits of the NCAA's television platform and set out to challenge the NCAA methodology, principally because the framework of the platform gave smaller schools too much control and too high of a share of the TV profits. So by 1981, 63 schools formally created the College Football Association (CFA) in order to negotiate a joint college football TV contract separate and aside from the rest of the NCAA. On the field, however, those 63 schools wished to remain in the NCAA.

In August 1981, the CFA came to an agreement with NBC on a TV deal for the 1982 through 1985 seasons. The NBC agreement allowed CFA schools to opt out of the deal by September 10, 1981 and, in turn, NBC would have the right to rescind the deal if any opt outs occurred. As that date approached, the NCAA made it known that any CFA school that followed through on the NBC deal risked sanctions, including being expelled from the NCAA. The schools weren't just being banned from football, but from all sports. Under immense pressure from the NCAA, too many CFA schools dropped out by the time the deadline rolled around and, thus, the NBC deal fell through.

Incredibly, the 63 CFA schools were a veritable "Who's Who" of college football: the entire Atlantic Coast Conference, Big Eight Conference, Southeastern Conference, Southwest Conference, and Western Athletic Conference, plus independents Notre Dame, Penn State, Pittsburgh, West Virginia, and the United States service academies. With eight of the top10 teams from the year prior, including the national champion, this was essentially the entire college football landscape. It was a tremendous flex by the NCAA given who these teams were. It, however, was a worthwhile gamble: the threatened blanket ban across all competitions caused the CFA to crumble and their TV deal to fall apart. Another NCAA victory in the battle for money and power? In the immortal words of Lee Corso, "not so fast, my friend!"

The University of Georgia and the University of Oklahoma, two prominent members of the CFA and, respectively, the numbers 1 and 3 ranked teams from the prior season, sued the NCAA in federal court. Unlike UPenn three decades prior, they refused to fade into the background; instead, they sought a ruling from the court that would prevent the NCAA from imposing sanctions against schools that negotiated a separate TV deal in the future.

Though the district court called the NCAA's ban a clear group boycott by the "classic cartel" NCAA, the case ultimately made its way up to the United States Supreme Court, which instead ruled that the NCAA's actions were an unfair restraint of trade

and free competition. In so doing, the Supreme Court held that the NCAA's actions violated antitrust law since they did "not serve any legitimate procompetitive purpose" particularly given that the American public would benefit from having more games televised in a free market rather than the NCAA's restrictive platform would allow for. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984).

This is, at least in part, why on Saturdays we now have multiple college football games, on multiple networks, all throughout the day. A good result? "(Anti)trust the process."

Third Try's a Charm in California?

For as long as there has been an NCAA, there have been heated conversations concerning money and power—namely, whether it was entitled to so much of both. As seen above, the two prior school ban attempts came when schools posed a serious threat to the NCAA's TV contract and its authority, *i.e.*, its money and power.

California's Fair Pay to Play Act becomes effective on January 1, 2023. Cooler heads may prevail in advance of that time but, if not, a California ban could be the third ban in the NCAA's history. And with "round three" on the horizon, it remains to be seen if the NCAA will stick to its guns. But since the NCAA didn't blink when it came to the CFA's 63 schools, why would it blink when it comes to California's 58, plus schools from the other states that are considering their own compensation legislation (New York, Colorado, Pennsylvania, Florida, Illinois, South Carolina, etc.)? Well, in the antitrust realm, it's less about the number of players involved and more about the reasoning behind their actions. Here, the NCAA would be banking on the courts finding that its stated purposes of preventing California's unfair recruiting edge will justify its means. And perhaps it might … if it is only California we are talking about. But what if California's legislation is just a template for other states and, as expected, it's just the first domino to fall?

Moving forward, unless federal legislation is passed, we are bound to live in a world with varying state-by-state athlete compensation laws. New York, for example, is proposing a bill where its schools pay 15 percent of their ticket revenue to student-athletes. (*https://sportslawinsider.com/new-york-introduces-bill-entitling-college-athletes-to-ticket-sale-proceeds/*) If federal legislation doesn't exist to preempt the underlying state-specific legislation, the NCAA will argue that any variations between these laws creates governance chaos. In this sense, the more states that come on board, the stronger the NCAA's antitrust defense arguably becomes.

Either way, the NCAA is making a tremendous gamble on the court system by threatening an outright ban instead of outwardly posturing for an athlete compensation compromise.

The Logic Behind Calling the NCAA's Bluff

The NCAA is a billion-dollar force in the business of college sports. Similar to other industry titans in our history, it, too, is susceptible to antitrust laws, and potentially a loss of power and money. The way the NCAA is acting in the wake of California's new student-athlete compensation legislation, you, however, wouldn't know it. It's almost as if they're playing high-stakes poker and daring someone to call their bluff. Or maybe that's exactly what they are doing.

Ultimately, this is the NCAA's sticking point: the organization argues that adhering to the Fair Pay to Play Act "gives those schools an unfair recruiting advantage." In their view, the California schools would be so loaded with talent that it "would result in them eventually being unable to compete in NCAA competitions."

So, with other schools now refusing to schedule games with them (as they did with the UPenn Quakers more than a half century ago), and the NCAA barring the California schools from all competitions (as what happened with CFA in the 80s), where does that leave schools in states with Fair Pay to Play Acts? Well, if they don't want to wait for the court to rule on antitrust, they can call the NCAA's bluff, pack their bags, and leave. This is a terrifying scenario for the NCAA—but one they have invited.

If the NCAA is correct in their "unfair recruiting advantage" prediction, there will be a war chest of five-star recruits up and down the California coast. In this sense, the most talented teams in the country would all be located in the Golden State.

But unlike UPenn being alone on an island, the 58 California schools likely have the numbers to survive on their own. And learning from the CFA litigation, the California schools can rebrand themselves as, hypothetically, something along the lines

of the "Athlete Compensation Collegiate Association" (ACCA) and, theoretically, have all the leverage that comes with drawing the most talented players within its borders. Could the ACCA survive? To quote a famous movie line, "if you build it, they will come."

Thus, to exclude California from the NCAA would be to admit that the NCAA no longer has the best teams. In addition to that exclusion inviting a clear antitrust challenge, the NCAA would also be drawing the blueprint for what would become its biggest competitor. This hypothetical ACCA—comprised of historic UCLA, USC, Cal, and Stanford, invigorated D1 programs like San Diego State, San Jose State, Fresno State, etc., not to mention the myriad of powers, both old and new, in the states that follow California's lead—would be more than a formidable entity. It would come with its own storied history already steeped in name recognition—not to mention, flushed with talent.

The NCAA's threat of banning compensation schools makes more sense when it's just California. From the looks of it, there, however, are almost certainly more states to follow. After all, if this sort of legislation can pass unanimously in the California State Senate, it's a good bet that this is one of those rare bipartisan issues that will find support across the country. If so, why would California schools (anti)trust the process by pursuing legal action when they might be better off just taking the NCAA's suggestion and leave the organization to play their games elsewhere?

The March Toward 2023

California's Fair Pay to Play Act answered two critical questions: (1) *could* student-athlete compensation happen? (yes, it is already signed into law) and (2) *when* will it happen? (January 1, 2023). With *limited exception*, athletes past and present collectively rejoiced over the news. ("Tim Tebow Doesn't Want College Athletes to Get Paid," *https://www.usatoday.com/story/sports/college/2019/09/13/college-athletes-tim-tebow-speaks-out-against-paying-players/2312200001/*) Also, the NCAA's reaction to the legislation has created a third question: *where* will this happen?

Well, if not in the NCAA, we will get an ultimate decision either in a courtroom or on the playing field of their newest competitor, *e.g.*, the ACCA. Both are options that the NCAA will surely want to avoid. If it's only California, then maybe the NCAA tests the courts with its ban on student-athlete compensation. With the passing of each new legislation, though, the stakes get a little higher, and the banned compensation schools pick up more leverage as the fictional ACCA picks up more school fire-power.

This scenario weighs heavily on the NCAA as it assesses whether breaking down the walls to compensation could really do more harm than outright banning schools.

After all, if you're an athletic director for a California school, why leave the ball in the judges' court when you can call the NCAA's bluff, take your ball, and go (to a new) home.

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