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Antitrust ADVISORY ■

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NCAA in Foul Trouble After Supreme Court Favors Student-Athletes

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On June 21, 2021, the U.S. Supreme Court issued a unanimous antitrust decision in favor of student-athletes that could lead to dramatic changes in college sports. In *NCAA v. Alston*, the Court held that the NCAA, as a group of independent colleges and universities, cannot prohibit its members from providing student-athletes with certain education-related compensation or benefits. In addition, Justice Kavanaugh issued a concurring opinion where he wrote that the NCAA's rules prohibiting direct payments to student-athletes, which were not before the Court, "raise serious questions under the antitrust laws." This could open the door for future antitrust challenges against the NCAA or possibly to voluntary changes by the NCAA.

Background

The NCAA plays an essential role in the regulation of amateur collegiate sports. To safeguard the distinction between college and professional sports, the NCAA has adopted and promulgated rules governing eligibility, recruitment, and standards for amateurism. These rules would ordinarily qualify as potentially per se unlawful horizontal restraints on competition. But in 1984 the Supreme Court noted in *NCAA v. Board of Regents*, which involved a dispute about television rights, that while the NCAA's rules on eligibility standards, such as rules ensuring that "[college] athletes must not be paid, must be required to attend class, and the like," are horizontal restraints, they also are procompetitive and "essential if the product [of college sports] is to be available at all." The Court in that case held that the television rights in dispute, like most antitrust claims, should be analyzed under the Rule of Reason, which evaluates the competitive effect of particular activity based on factual evidence. And in that case, it found the relevant collective activity did violate federal antitrust law.

Under the Rule of Reason, the plaintiff typically has the initial burden to prove that a challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less-anticompetitive means.

Since *Board of Regents*, several circuit courts, aside from the Ninth Circuit, have considered whether NCAA eligibility rules run afoul of the Sherman Act and have rejected challenges under Section 1 without a trial or detailed antitrust scrutiny. But the antitrust landscape has also changed since *Board of Regents*. The product of college sports—namely, top-tier college basketball and football—has blossomed into a multibillion-dollar industry. For example, the NCAA's current broadcast contract for the "March Madness" basketball tournament is worth $1.1 billion annually.

And as part of the changing landscape, the Ninth Circuit decided *O'Bannon v. NCAA* in 2015. There, the court declined to simply reject a challenge to NCAA eligibility rules without much scrutiny. Instead, the court held that the challenged rules were "more restrictive than necessary to maintain [the NCAA's] tradition of amateurism in support of the college sports market," and affirmed the district court ruling that the NCAA must "permit its schools to provide up to the cost of attendance" to college athletes.

While *O'Bannon* was pending, Division I football and basketball players filed *NCAA v. Alston* seeking invalidation of all NCAA eligibility rules regarding student-athlete compensation. After the Ninth Circuit decided *O'Bannon*, the district court in *Alston* performed a fulsome Rule of Reason analysis (as opposed to a "quick look"). Following a bench trial, the district court enjoined the NCAA from limiting benefits "related to education" but concluded that the NCAA could continue to restrict benefits unrelated to education. The injunction also permitted the NCAA to adopt a definition of "related to education," subject to court approval.

The Ninth Circuit affirmed. It determined that the record supported the district court's findings, and that "[t]he district court reasonably relied on demand analyses, survey evidence, and NCAA testimony indicating that caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification."

The Supreme Court's Unanimous Ruling

The Supreme Court affirmed the Ninth Circuit. Writing for the Court, Justice Gorsuch confirmed that the Rule of Reason applies to the NCAA's rules restricting student-athletes' compensation. The Court also explained that while, as the NCAA argued, some determinations under the Rule of Reason can be made after only a "quick look," most determinations cannot. A quick look is appropriate only for cases at the far ends of the spectrum because they are either obviously incapable of harming competition or obviously threaten to reduce output and raise prices. For cases "in the great in-between," however, a traditional application of the Rule of Reason is the proper approach. Consequently, the Court rejected the NCAA's argument that a quick look was appropriate here because the challenge to the NCAA's rules was more nuanced than could be summarily resolved.

The Court minimized the precedential force of *Board of Regents* to the Rule of Reason. That case can no longer be used to argue "that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions." Rather, *Board of Regents* at most "suggest[s] that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities." The Court thus rejected the NCAA's argument that *Board of Regents* was dispositive.

The Court then explained how the Rule of Reason's three-step burden-shifting framework should be applied. The Court noted that "[t]hese three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis." And for the second step—where the defendant bears the burden of showing a procompetitive rationale for the restraint on competition—the Court explained that "antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes." Based on this, the Court found that "the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand," and thus did not err in its Rule of Reason analysis.

Yet despite these rulings, Justice Gorsuch appeared to cabin the effects of the Court's decision. While the Court recognized that "[t]he national debate about amateurism in college sports is important," it explained that the "task [of] appellate judges is not to resolve it." Rather, the Court merely performed its "task [of] review[ing] the district court judgment through the appropriate lens of antitrust law."

Justice Kavanaugh's Concurrence

In a concurring opinion, Justice Kavanaugh addressed "the NCAA's remaining compensation rules"—i.e., rules generally restricting student-athletes from receiving direct compensation or benefits from their colleges for playing sports or from receiving money from endorsement deals. In his view, those rules "also raise serious questions under the antitrust laws." And given the majority's decision, he explained that "the NCAA's remaining compensation rules should receive ordinary 'rule of reason' scrutiny."

To Justice Kavanaugh, "[t]he bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year … [and] traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated." This business model, he said, "would be flatly illegal in almost any other industry in America.… 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."

Takeaways

- While the Roberts Court has shown itself generally to be business friendly, this decision suggests that it will rigorously maintain and allow enforcement of the fundamental tenets and doctrines of antitrust law.
- The Court clarified and appeared to narrow when courts can apply "quick look" analysis. While some determinations under the Rule of Reason can be made after only a quick look, most determinations cannot. A quick look is appropriate only for cases where the restraint on competition is either obviously incapable of harming competition or obviously threatens to reduce output and raise prices.
- *Board of Regents*—a once seminal case appearing to give great deference to antitrust treatment of NCAA eligibility and compensation rules—has been stripped of most of its precedential force in that area. The Court has signaled a willingness to apply antitrust scrutiny to NCAA policies regarding student-athletes, ending what appeared to be practical immunity from the antitrust laws that the NCAA has enjoyed in certain areas for years.

- The tide is clearly turning against the NCAA's rationale for its much more significant restrictions on student-athlete compensation. The Court's decision reflects an understanding that student-athletes play a significant role in generating billions of dollars in revenue. Other NCAA compensation rules restricting student-athletes from receiving direct compensation or from receiving money from endorsement deals are likely to face antitrust scrutiny. It is possible the NCAA may consider some voluntary changes in light of the Court's ruling, such as the NCAA's recent announcement that it plans to implement interim measures that would allow college athletes to profit from their name, image, and likeness. And it is possible that Congress—as some states have done—will address the issues with pending legislation governing athlete compensation for the use of name, image, and likeness.

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