Antitrust Law Daily Wrap Up, TOP STORY: Justices acknowledge threat of continuing litigation over NCAA compensation rules, (Mar. 31, 2021)

Antitrust Law Daily Wrap Up

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By Jeffrey May, J.D.

High Court is being asked to decide whether rule of reason was properly applied in student-athlete challenge to NCAA limits on education-related benefits.

The National Collegiate Athletic Association (NCAA) urged the U.S. Supreme Court today to overturn a decision of the U.S. Court of Appeals in San Francisco that threatens "perpetual litigation and judicial superintendence" with respect to NCAA rules on student-athlete compensation. And a majority of the justices acknowledged that complaining student-athletes could continue to challenge NCAA rules, moving towards a "pay-for-play" model that blurs the line between college and professional sports. However, some of the justices were skeptical of the NCAA's dire predictions. For instance, Justice Sonia Sotomayor questioned the NCAA's "parade of horribles" if the Ninth Circuit decision were to stand. Yet, she also expressed some discomfort about the possible destruction of amateurism in college sports. Arguing for the NCAA, Seth Waxman of Wilmer Cutler Pickering Hale and Dorr LLP—who served as Solicitor General during the Clinton Administration—asked the Court to reject the regime adopted by the lower courts and uphold an NCAA standard reasonably designed to preserve amateurism. While the NCAA faces an uphill battle in overturning the Ninth Circuit's decision, the outcome of the case was unclear from the justices' line of questioning (*National Collegiate Athletic Assn. v. Alston*, Dkt. 20-512).

Background. Student-athletes had sued the NCAA and 11 conferences, alleging that they engaged in a horizontal price fixing scheme to limit the compensation paid to football and basketball players in exchange for their athletic services. In May 2020, the Ninth Circuit ruled that certain limits placed by the NCAA on education-related benefits for student-athletes failed the rule of reason test and violated Section 1 of the Sherman Act. The appellate court rejected the NCAA's arguments that the district court improperly applied the rule of reason's three-step analysis. According to the appellate court, the district court "fairly found that NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits." In addition, the appellate court held that the district court struck the right balance in crafting a remedy in the form of a less restrictive alternative to the challenged NCAA rule.

NCAA's arguments. The NCAA is now asking the Supreme Court to reject the lower courts' application of rule of reason analysis for purposes of student/athletes' antitrust challenges to NCAA rules fixing the compensation and benefits that member schools can offer when competing for their services. In his opening statement, Waxman said that the lower courts agreed that the NCAA conception of amateurism was procompetitive but, in striking down several of the rules, they made two fundamental errors: (1) they defined their own much narrower conception of amateurism; and (2) they then imposed a regime that permits athletes to be paid thousands of dollars each year just for playing on a team and unlimited cash for "post-eligibility internships."

The NCAA suggested that the history of amateurism offered support for the rules. "We're talking about a product that was created 116 years ago in response to abuses that were occurring as a result of instances of professionalism in athletics in order to restore integrity and the social value of college athletics," said Waxman. However, some justices questioned the notion.

"You can only ride on the history ... for so long, said Justice Elana Kagan. "I mean, a great deal has changed since a hundred years ago in the way that student-athletes are treated."

"I guess it doesn't move me all that much that there's a history to this if what is going on now is that competitors as to labor are combining to fix prices," Kagan added.

Justice Brett Kavanaugh also questioned the reliance on history. He noted that the NCAA's "rhetoric and tradition and history argument" was very similar to the arguments that were made for exempting baseball from the antitrust laws, but that exemption had not been replicated in other sports in other cases.

The uniqueness of the case was not however lost on the justices. Justice Stephen Breyer expressed concern about getting into the business of deciding how amateur sports should be run.

"I think, if we really have a case here, it's a tough case for me, and the reason it's so tough is—for me is—because this is not an ordinary product," said Breyer. "This is an effort to bring into the world something that's brought joy and all kinds of things to millions and millions of people, and it's only partly economic."

The NCAA argued that allowing the ruling to stand enables courts to substitute their judgment for the judgment of the association or other joint ventures. Chief Justice John G. Roberts, Jr. seemed to agree.

"The effect it seems to me is to substitute the Court's view for the business judgment of the people responsible for a joint venture that we have upheld as procompetitive," said Roberts, taking a broader perspective. "I just don't know if the judge is the best person to assess the competitive effect of the rules or the people managing the joint venture."

Justice Neil Gorsuch, on the other hand, expressed caution where the agreement of the joint venture was to fix labor prices. "Joint ventures often need to have agreements that would otherwise look anticompetitive, whether they're territorial allocations or price agreements, in order to create a product that wouldn't otherwise exist. And we usually give that a pretty quick look," said Gorsuch. However, he added that: "the agreement that's really at the center of the case is an agreement among competitors to fix price with the labor market, where you have monopsony control, and that's unusual."

Respondents' arguments. Jeffrey L. Kessler of Winston & Strawn, LLP, arguing for the respondents, told the justices that the naked horizontal monopsony restraints that the competing NCAA schools adopted in these labor markets would be *per se* unlawful in any other context but that the lower courts provided the NCAA with ample latitude to prove a procompetitive justification for all their restraints in light of precedent requiring rule of reason analysis. He added that the NCAA lost on the facts and that was not a basis for appealing to the Supreme Court.

The chief justice followed up on the NCAA's argument that litigation chipping away at amateurism rules will persist. He suggested the possibility that courts' "fiddling with" the rules could ultimately destroy the amateur nature of college sports.

"It's like a game of Jenga," said Roberts. "You've got this nice solid block that protects the sort of product the schools want to provide, and you pull out one log and then another and everything's fine, then another and another and all of a sudden the whole thing comes crashing down."

Kessler responded that the remedy that the court imposed was not to micromanage. According to Kessler, "It was a general rule that there's no justification for limiting education-related benefits because, after all, what the consumers and others care about is they be students."

Kavanaugh added that, while the respondents were asking for a narrow ruling from the Court, it was necessary to consider what the next case would look like if the Court ruled in their favor.

Justice Amy Coney Barrett seemed to agree that the lower courts "were trying not to do too much." She did go on to question whether Kessler thought the less restrictive alternative remedy imposed by the court was substantially less restrictive than the NCAA rules.

"The reason we know it's substantially less restrictive is because there are life-changing benefits for these athletes that will be provided," responded Kessler.

In closing, Kessler argued against creating a special antitrust exemption for the NCAA. "The rule of reason already provides ample latitude to joint ventures, to organizations like this, to sports leagues, to assert what

you need to assert to justify the restraints you need," said Kessler. "And *Twombly* allows the dismissal of claims at the outset so there will be no parade of horribles if someone were to challenge a rule that clearly was procompetitive on its face and did not cause anticompetitive effects."

U.S. views. The Court also heard from Acting Solicitor General Elizabeth Prelogar, who supported the respondents. The government asked the Court to reject the NCAA's request to uphold the restraints on educational benefits under a "quick look" or deferential review.

Practitioner's perspective. Carl Hittinger, Antitrust and Competition Practice National Team Leader at BakerHostetler, commented on the next steps for the High Court as it decides the NCAA case.

"The argument today before the Supreme Court in the NCAA case raises two fundamental antitrust issues that the Justices will need to resolve before the end of this term," said Hittinger. "First, will they accept the NCAA's argument that it is deserving of either an exemption from the antitrust laws or at least lesser scrutiny since it argues it is historically an amateur organization and not a business. This is similar to the argument made decades ago by MLB. There, the Supreme Court found that MLB was not a business, to which the Sherman Act is proscribed, but rather the nation's past time."

Hittinger noted that the justices today seemed to be skeptical of that argument as antitrust exemptions for industries historically have been for Congress to determine not the courts. "In the MLB cases, Congress had passed on deciding whether an exemption applied to MLB, which was not lost on the Supreme Court," he added.

"Second, the Justices will be forced to provide more clarity on whether the quick look antitrust analysis, that has been emerging in some courts as a lesser standard of review than the rule of reason or the *per se* analysis, has legal legs, particularly when applied to an organization like the NCAA that is an admitted monopsony," Hittinger said. "This case presents the unique distinction of being the first case I believe where the quick look analysis is being argued to apply to conduct alleged as pro-competitive and not anti-competitive."

Attorneys: Seth P. Waxman (Wilmer Cutler Pickering Hale and Dorr LLP) for Petitioners. Jeffrey L. Kessler (Winston & Strawn, LLP) for Respondents. Elizabeth Prelogar, Acting Solicitor General, for United States. Carl Hittinger (Baker & Hostetler LLP).

Companies: National Collegiate Athletic Assn.

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