

e-Competitions

Antitrust Case Laws e-Bulletin

June 2021

The US Supreme Court upholds a decision which said that the restrictions imposed by the sports association on education-related compensation for student-athletes violate the antitrust laws (*NCAA / Alston*)

ANTICOMPETITIVE PRACTICES, PROFESSIONAL ASSOCIATION, CARTEL, JOINT-VENTURE, SPORTS, JUDICIAL REVIEW, HARDCORE RESTRICTION, RULE OF REASON, UNITED STATES OF AMERICA

US Supreme Court, *NCAA / Alston*, No. 20-512, 21 June 2021

Todd Miller | Baker & Miller (Washington)

e-Competitions News Issue June 2021

More to Supreme Court's NCAA decision than just sports*

Introduction

There has been a plethora of articles about the Supreme Court's 21 June 2021 decision upholding a decision that the restrictions imposed by the National Collegiate Athletic Association (NCAA) on education-related compensation to student athletes violate the antitrust laws. Many have opined that the decision signals the death knell of the NCAA; others portend a wave of lawsuits by athletes against the NCAA and US universities. But for those not focused on such matters, the decision is important for the antitrust treatment of joint ventures and to general business decision-making.

In this regard, the NCAA is a joint venture: it comprises member universities that have joined together to create the rules and regulations associated with collegiate sports. There is nothing in the decision itself that would allow a reader to conclude that the Supreme Court has rejected the existence of the NCAA as a legitimate joint venture. While Justice Kavanaugh did write a scathing concurring opinion that will be cited as questioning the premise of the NCAA, no other justices joined.

Importantly, with this understanding of the NCAA as a joint venture that serves a role in governing collegiate athletics, the focus was on the operating rules of that venture, ie, the rules governing the compensation of student athletes. In studying this issue, a unanimous Supreme Court confirmed and articulated various key principles of antitrust jurisprudence, relying heavily on the famous Areeda antitrust treatise and Chicago School-oriented case precedent:

- The Court confirmed that restraints associated with the operation of what may otherwise be viewed as a beneficial joint venture are subject to antitrust scrutiny. This has been part of the traditional analysis of joint ventures since the Department of Justice set forth such an analysis in the late 1970s, but really has its foundation in then-Judge Taft's ancillary restraints doctrine from the late 1800s.
- The Court also confirmed that such restraints will ordinarily be analysed under the so-called "rule of reason", which requires the factfinder to consider all of the facts surrounding the alleged restraints to determine whether, on balance, the restraint is anticompetitive. This continues a clear trend by the Court to embrace broad use of the rule of reason and avoid evidentiary shortcuts for analysis where the conduct at issue is not simply a naked restraint of trade.
- The Court confirmed that alleged societal benefits of the restraint that are unrelated to the competitive effects will be ignored. This embracing of the consumer welfare standard will of course be somewhat anathema to many progressives (or at least a group of them) who seek to restore the importance of some of the original goals of antitrust, including the democratisation of the economy.
- And perhaps most importantly, the Court affirmed that "antitrust courts must give wide berth to business judgments before finding liability" and must be careful not to mistakenly condemn legitimate business practices which will "chill" the very conduct that the antitrust laws were meant to encourage. Again, this will be anathema to many progressives as they desire to broaden the scope of the application of the antitrust laws.

In this instance, none of these principles helped the NCAA, but their articulation should provide comfort to the business community, particularly in an environment of potentially transformative change to antitrust enforcement at the federal level.

At the same time, the case reinforces an important lesson that harkens back to the Supreme Court's 1985 Aspen Skiing decision – when a company (or joint venture) makes important changes to the way that it is doing business that may have an impact on others, it must pause and ensure that those changes are justifiable from an antitrust standpoint. It should also think more broadly and question whether those changes undermine the rationales given for other behaviours. Again, it does not appear that the NCAA engaged in this type of soul-searching, and it was left with a relatively thin defence of the conduct before the Supreme Court. As recounted below, the Supreme Court called out the fact that the NCAA did not change its alleged restraints with reference to the goals of promoting consumer demand for college sports – the NCAA's justification for the restraints in the first instance. Indeed, the Court noted that the court below had found that some of the restraints were not at all necessary to preserve that demand.

Facts

A group of current and former college football and basketball athletes at the largest universities (so-called "Division I" schools) brought suit challenging the NCAA's rules that restricted payments to and other methods of compensation for the athletes as illegal price-fixing. Broadly speaking, the NCAA defended these charges on the grounds that the limits were necessary to preserve the amateur nature of collegiate sports, a distinct product for which there is obvious and substantial demand.

District court decision

After a 10-day trial before a district court judge, the judge upheld the NCAA's rules relating to athletic scholarships and other compensation relating to athletic performance. It condemned, however, the NCAA rules that limited education-related benefits (including internships, scholarships for graduate or vocational school and tutoring). Critical to these rulings were its findings that the NCAA had "near complete dominance of, and exercise[d] monopsony power" in the market for "athletic services" in Division I football and basketball and that the NCAA's limits on compensation produced anticompetitive effects (ie, in a competitive market, athletes would receive higher compensation). Weighed against these anticompetitive effects were the NCAA's justifications for the limits. The NCAA had claimed that the limits increased output of college sports and that the preservation of "amateurism" benefited consumers. The district court rejected the first justification and accepted the second, even though the alleged benefits flowed to people other than the affected athletes and hence were in a different market from the alleged restraint.

Faced with a lack of evidence to support that the restrictions affected consumer demand, the court conceded that the rules limiting compensation relating to athletics did help differentiate collegiate sports from professional sports. As such, the district court found limitations on athletic scholarships and payments related to athletic performance to be reasonable in preserving that distinction. But the district court drew the line when it came to education-related benefits, such as payments for tutoring or scholarships for graduate school, since such education-related matters would not likely affect consumers' perception of the amateur status of collegiate athletes. The district court entered an injunction consistent with its finding. The district court's ruling, and the scope of its injunction, were affirmed by the Ninth Circuit Court of Appeals. The student athlete plaintiffs did not appeal the ruling regarding the restriction on athletic scholarships and payments, but the NCAA sought a Supreme Court review of the ruling on education-related benefits.

Supreme Court decision

In a unanimous decision written by Justice Gorsuch, the Supreme Court upheld the lower courts' rulings and the scope of its injunction. It is somewhat remarkable how truly narrow the decision was. The Court made clear that it did not need address, among other things:

- the propriety of the NCAA justifying the restraint on the athlete labour market by claims of benefits in the market for the consumers (viewers) of collegiate sports;
- that the NCAA has monopsony (buyer) power in the athlete labour market; and
- that the NCAA's restraints on education-related benefits have decreased price and lowered output (the harms of the exercise of monopsony power).

Thus, before the Supreme Court even began its analysis, the Court noted that "this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control". This setting undoubtedly coloured the analysis that followed: it very much laid bare the NCAA's core defence that, as the rule-making body for collegiate athletics, it was entitled to broad latitude, approaching immunity, for setting those rules. It was this defence that the Court picked apart in a very fact-specific application of traditional antitrust principles.

The Court began its own analysis by addressing the NCAA's assertion that the courts below had erred in applying the so-called "rule of reason", the "fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition . . . ". In rejecting the NCAA's request for application of what has been called a "quick look" analysis to confirm that the NCAA's rules were consistent with the antitrust laws, the Court said that the NCAA's admitted market power would preclude such a truncated

approval. The Court distinguished between the education-related benefit rules and other potential NCAA rules, noting that the alleged restraints at issue were not necessary to allow the sport contests to proceed in the first instance. Hence, the Court found that a more complete analysis was appropriate.

The NCAA also took issue with the way in which the district court had applied the rule of reason. Here, its principal complaint appeared to be that district court had required the NCAA to show that each individual rule was the least restrictive means of achieving the result sought by the rule. The Supreme Court took exception to that argument, suggesting that the district court's analysis had not been perfect but had been a fair rendition of the method of analysis that the Court had set forth in its American Express decision several years ago.

Of particular note was the Court's rejection of the NCAA's argument that the district court had "redefined" what it meant to be an amateur athlete. The Court explained that the NCAA was attempting to avoid antitrust scrutiny by defining an "amateur" with reference to the restraints at issue. Instead, the district court had been required to determine whether the NCAA's restraints "harmed competition and whether any procompetitive benefits associated with [the] restraints could be achieved by 'substantially less restrictive alternative' means". The Court noted that the district court had found that the NCAA itself did not have a consistent definition of an amateur athlete and that:

- the rules on compensation had changed significantly over time;
- the rules were established "without any reference to 'considerations of consumer demand,'" and
- some rules "were 'not necessary to preserve consumer demand'".

The NCAA presented other arguments to overturn the result and the injunction, but the Supreme Court patiently rejected each of them, leaving the district court's decision and injunction against the education-related restrictions standing.

Comment

The NCAA decision will undoubtedly generate additional litigation, and Justice Kavanaugh's strongly worded concurring opinion invites as much. Moreover, the many new state statutes (some of which take effect as early as 1 July 2021) allow for payments to successful college athletes for use of their images and likenesses. This important development seems likely to throw the whole issue of compensation for "amateur" athletes in turmoil, while potentially diluting the future role of the NCAA.

Therefore, in the end, the lasting consequences of Supreme Court's NCAA decision may be both inside and outside of the collegiate sports world. This unanimous decision should, at a minimum, cause multi-party joint ventures to re-examine the venture's operating rules which could be alleged to restrain competition among members to ensure that such rules are factually defensible and consistent with the procompetitive purposes of the joint venture.

At the same time, companies may take comfort that in a time of tremendous turmoil in the antitrust sphere, primarily generated by the big digital platforms, the Supreme Court has warmly embraced a fairly traditional, and predictable, approach to Sherman Act analysis of horizontal restraints among competitors.

*Article published on the International Law Office Blog ([click here](#)) ↗, republished in e-Competitions with the courtesy of the author(s). The original title of this article appears below the e-Competitions title. Authors are welcome to write an alternative article on this case/text, provided they have no relationships with a party or related third party. Article will need e-Competitions Board approval before publication.