Published on *The National Law Review* https://natlawreview.com

NCAA May Not Sidestep Antitrust Law, SCOTUS Holds

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Court refuses to rely on an 'aside' penned in a 1984 decision.

The National Collegiate Athletic Association (NCAA) doesn't get a free pass when it comes to antitrust law, the Supreme Court held today in a unanimous decision written by Justice Neil Gorsuch. The justice said lower courts correctly applied antitrust scrutiny to the NCAA's "amateur" requirement which denies athletes compensation they would command in a competitive market. In a concurring opinion, Justice Brett Kavanaugh said the NCAA is not above the law. He noted the adverse impact of the organization's restrictions particularly on Black and low-income Americans.

The NCAA and its members agree to limit compensation for students who play sports. The NCAA enforces those rules. Current and former students sued the NCAA under Section 1 of the Sherman Antitrust Act which makes contracts and conspiracies that restrain trade illegal. Justice Gorsuch noted what an enormously profitable enterprise collegiate sports really is, generating billions of dollars in revenue and alumni donations, as well as publicity and student enrollment.

Following a bench trial, a district judge let stand the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance, but enjoined certain NCAA rules limiting the education-related benefits schools may extend to athletes.

One year ago, on June 17, 2020, the Ninth Circuit held that the rules limiting education-related benefits for student-athletes are impermissible restraints on trade that violate Section 1 and that the students proved that the rules had significant anticompetitive effects. The decision enabled student-athletes to receive a variety of education-related, non-cash benefits above the "cost of attendance," which previously functioned as the cap on compensation they could receive. The NCAA maintains that demand for college sports is based, at least in part, on the amateur status of the players. Critics say this is a ruse by the NCAA to usurp profits generated by student-athletes. Ninth Circuit Judge Milan Smith, in his concurring opinion, called the NCAA "a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services."

The NCAA argued to the Supreme Court that the lower courts should have given its restrictions at most an "abbreviated deferential review" or "quick look" before approving them rather than applying a deeper "rule of reason" analysis required to determine whether conduct or circumstances cause an illegal restraint of trade. "The NCAA offers a few reasons why," Justice Gorsuch wrote. "Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary

if they are to offer consumers the benefit of intercollegiate athletic competition." But, Justice Gorsuch held:

> "The NCAA accepts that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions."

"That some restraints are necessary to create or maintain a league sport does not mean all 'aspects of elaborate interleague cooperation are.' ... While a quick look will often be enough to approve the restraints 'necessary to produce a game' … a fuller review may be appropriate for others …. The NCAA's rules fixing wages for student-athletes fall on the far side of this line," Justice Gorsuch wrote. "Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute," he wrote, "presents complex questions requiring more than a blink to answer."

Justice Gorsuch dispatched the NCAA's argument that the court must follow its 1984 decision in *NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85 (1984), which dealt with the NCAA's rules restricting schools from televising football games. The NCAA relied on a passage which said, "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."

But, Justice Gorsuch wrote, the 1984 decision did not condemn the broadcast restrictions as *per se* unlawful, it used an abbreviated antitrust review "as a path to condemnation, not salvation." He said it was hard for him to see why NCAA would now object to "a more cautious form of review." While courts must take care in assessing such restraints, he said that does not mean courts should "reflexively reject all challenges to the NCAA's compensation restrictions." The compensation rules were not the issue in the 1984 case.

"When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984," Justice Gorsuch said. "Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes," he wrote.

> "Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be 'infallible only because we are final' … but those sorts of stray comments are neither," Justice Gorsuch wrote.

The NCAA also argued that a rule of reason analysis is inappropriate because the NCAA and its member schools are not “commercial enterprises,” but merely oversee intercollegiate athletics. Justice Gorsuch punted this issue to Congress, saying the legislature has modified antitrust laws for certain industries and could do so again. "[U]ntil Congress says otherwise," he wrote, "the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone — ’competition is the best method of allocating resources’ in the Nation’s economy.”

Look for additional analysis of this decision from the MoginRubin Blog later this week.

Edited by Tom Hagy for MoginRubin LLP.

National Law Review, Volume XI, Number 173