

US Supreme Court Reins in the NCAA in Narrow Ruling

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By Carl W. Hittinger and Julian D. Perlman

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Despite that lengthy history, the court observed that the legal issue before it was narrow—namely, whether to affirm the district court injunction, rendered after a trial, prohibiting limits on education-related compensation and education-related benefits paid to players, which had been affirmed by the U.S. Court of Appeals for the Ninth Circuit. The district court's "50-page opinion that cut both ways" left in place "the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes." Only the NCAA appealed from that decision; while the athletes did not challenge the district court's decision (which left in place limits unrelated to education), they had originally sued more generally over the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services."

Gorsuch observed that the court was presented with an unusual antitrust case that sidestepped many of the central issues that typically dominate antitrust litigation. The parties did not challenge the district court's definition of the relevant market, and they did not dispute that the NCAA enjoys monopsony power in that market (nor was there any argument that the plaintiffs had to show more than harm in just the labor market—for example, harm to the consumer market for college sports). There was no question that the NCAA member schools competed for student-athletes, and there was no dispute that the NCAA's restrictions decreased the compensation that student-athletes would otherwise receive but for those rules (and that such decreases in compensation drove down participation in the relevant labor market). Gorsuch succinctly captured these unique areas of agreement, observing that "this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control."

However, "with all these matters taken as given, we express no views on them," and the court instead focused on the issue on which it granted certiorari, namely the NCAA's argument that the district court applied the wrong standard of review when it conducted a full rule of reason analysis. According to the court, the NCAA had

argued that "the courts should have given its restrictions at most an 'abbreviated deferential review.'" This was the first time the court had been asked to find that admitted anticompetitive conduct was legal on the basis of a so-called quick look analysis, which was akin to asking the court to effectively find that the anticompetitive conduct at issue was per se legal. In rejecting this argument, the court observed that certain agreements among members of a sports league might be upheld in the "twinkling of an eye" (even when that league had market power). For example, this would include agreements regarding how many players could be on a team or on the field, or the duration of play, which are fundamental to the functioning of the league. "But this insight does not always apply. That some restraints are necessary to create or maintain a league sport does not mean all aspects of elaborate interleague cooperation are." Only rules that go to the core of producing the game warrant a quick look analysis, the court explained. The court was complimentary of the district court's handling of the matter, noting that its "judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility." Thus, it is unsurprising that the court was unwilling to throw away that "thoughtful" analysis in favor of a quick look analysis, which some courts have used to spare the courts and litigants the expense and burden of costly discovery and perhaps an antitrust trial (which had already occurred in this case). The Supreme Court acknowledged that thinking but was also crystal clear that federal judges are not necessarily well-equipped to call balls and strikes, particularly in hindsight, involving complex business determinations. As the unanimous court held, a "wide berth" should be given in such cases, which are better suited for a more factual and expert opinion review. "Even under the best of circumstances, applying the antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect."

Regarding the appropriate rule of reason analysis, the court confirmed that its "three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis," emphasizing that the rule is about conducting a reasonable analysis given the circumstances of a particular case. And the court found that the district court's analysis was consistent with established antitrust principles and conformed to that standard; as for the first step, plaintiffs had proved that the alleged restraints produced significant anticompetitive effects in the relevant market. The court observed that the student-athletes in this case had cleared no small hurdle, citing statistics that 90% of all rule of reason cases since 1977 have been decided in

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favor of defendants on the basis that plaintiffs had failed to prove significant anticompetitive effects in the relevant market. Here, by contrast, the plaintiffs met this burden virtually unchallenged. As to the second step, the court was generally unpersuaded by the NCAA's claimed pro-competitive benefits, essentially that its product promoted and was defined by amateurism, i.e., the players are not compensated, unlike in professional sports. (At the district court level, the NCAA had also claimed a positive effect on output and competitive balance between the member schools, but it did not press those arguments before the Supreme Court.) Again, while the district court found that the "NCAA failed to establish that the challenged compensation rules ... have any direct connection to consumer demand," it nevertheless essentially gave the NCAA the benefit of the doubt on its amateurism argument (at least for now) as to rules that prohibit compensation "unrelated to education akin to salaries seen in professional sports leagues." (As for the third prong, given this narrower construction of the resulting pro-competitive benefits, it was not difficult to identify less restrictive alternatives as reflected in the district court's injunction.) Ultimately, the district court's narrowly crafted ruling affected only so-called education-related benefits (which remain to be sorted out). That finding, coupled with the fact that the players did not challenge that ruling on appeal and that the parties had the right to seek any needed clarification from the district court, appeared to make the Court's decision a relatively easier one to reach. This might help explain the unanimous ruling, which is unusual in antitrust cases.

It is inescapable, when reading the court's opinion, that the fundamental dilemma presented to the court by the NCAA was that the defining feature of its product, amateurism, was the very anticompetitive conduct at issue. There simply was no justifying the suppression of wages in a labor market, much less a circular one. In language that should serve as a shot across the bow for nonprofits, including colleges and universities, the court was highly critical of the implication that the NCAA was somehow above the antitrust laws: "It is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree." The court said antitrust immunity granted by the courts has been only applied to Major League Baseball. There, Congress passed on the issue, and the court was clear it is up to Congress to decide such public policy issues, which might justify a congressional grant of antitrust immunity which the court otherwise found was not judicially available under the Sherman Act.

The opinion concludes noting that it leaves open many more issues than it resolves, and quotes the Ninth Circuit when it observed that "the national debate about amateurism in college sports is important. But our task as judges is not to resolve it. Nor could we." Typically, such language would be an invitation to open debate among commentators about what future challenges might face the NCAA and the players. However, Justice Brett Kavanaugh's

blistering concurring opinion, which can only be called a rallying cry for student-athletes, eliminates any need to speculate, and makes clear that the NCAA compensation rules left in place are extremely vulnerable to antitrust challenge. Kavanaugh expressly stated that "the rest of the NCAA's compensation rules [unrelated to education] are not at issue here and therefore remain on the books" and that those remaining compensation rules also raise "serious questions under the antitrust laws." Particularly where such rules rely solely on the claimed pro-competitive benefit of amateurism, they are vulnerable. Kavanaugh even compared the NCAA's amateurism argument to a group of law firms suppressing lawyers' salaries out of a purported desire to ensure their provision of legal services was motivated by "a love for the law." Kavanaugh's concern stemmed from an undisputed trial record showing that college athletics is a big business, that it generates \$1.1 billion annually just from the March Madness basketball tournament, that it pays the president of the NCAA nearly \$4 million per year, and that it provides some Division I head coaches almost \$11 million annually, all as also emphasized by Gorsuch for the court. However, the student-athletes, many of whom are African American and from lower-income backgrounds, share in none of those the revenues and end up with no compensation for their college sports participation, as Kavanaugh hit upon. In urging the NCAA to proactively address its remaining compensation rules, Justice Kavanaugh cautioned that "the NCAA is not above the law." There appears no question that the eight other justices agreed with that premise, thereby affirming the might of the antitrust laws when truly anticompetitive conduct is at play.

Whether through litigation, legislation or collective bargaining, the antitrust laws and their limits on the ability of the NCAA to regulate amateur student-athlete compensation will continue to be carefully scrutinized in Congress or the courts and promises not to be over until it's over. Stay tuned.

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