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ANTITRUST TRADE AND PRACTICE

Expert Analysis

'NCAA Student-Athlete' Litigation: Out of Bounds?

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Breaking with numerous cases spanning several decades, a California federal judge denied the NCAA's motion to dismiss a class action alleging that the NCAA's eligibility and amateurism rules violate the antitrust laws in *In re NCAA Student-Athlete Name and Likeness Licensing Litigation*.[1] Although the Supreme Court in *NCAA v. Board of Regents* characterized NCAA amateurism restrictions as "justifiable means of fostering competition" necessary "to preserve the character and quality of the [NCAA's] 'product,'"[2] U.S. District Judge Claudia Wilken left intact the antitrust claim of 21 current and former Division I basketball and football players. For now, then, the NCAA will have to continue to defend its rules under antitrust laws.

Plaintiffs are 25 current and former Division I athletes, of which 21 are antitrust plaintiffs. Their theory of harm is as follows: As a condition of eligibility to compete in NCAA amateur athletics, plaintiffs were required to sign release forms that prohibited them from accepting compensation in exchange for their publicity rights. Absent that release, plaintiffs argued, they would be free to exploit these rights for commercial gain. Plaintiffs further alleged that group licensors such as Electronic Arts Inc. (EA) and the Collegiate Licensing Company (CLC)—the would-be purchasers of student-athlete publicity rights—support and adhere to the NCAA's rules, which allow licensors to exploit the student-athletes' publicity rights without providing compensation. According to plaintiffs, this results in a "price fixing conspiracy and a group boycott/refusal to deal" between the NCAA, EA and CLC that restrains trade in an alleged "group licensing" market.

The NCAA moved to dismiss the case based on three arguments. First, the Copyright Act, 17 U.S.C. §§ 101 et seq., preempts any antitrust claims plaintiffs might otherwise enjoy regarding their rights of publicity. Second, there is no antitrust market for such group licenses because the California Civil Code and the First Amendment protect broadcaster rights to use student-athletes' names, images and likenesses during sports broadcasts without obtaining the consent of or providing compensation to athletes. Finally, the NCAA's amateurism rules are per se pro-competitive under *Board of Regents* and its progeny.

Judge Wilken made quick work of dismissing the NCAA's copyright preemption argument. The court held that the rights plaintiffs assert in this case are "fundamentally different" than those rights the Copyright Act preempts, and as a matter of law, the Copyright Act cannot preempt antitrust claims.

The NCAA's second argument was that in the context of sports broadcasts there is no market for group licenses, and without such a market, the alleged coordinated behavior cannot restrain trade. The NCAA contended there is no market for group licenses because the First Amendment and the California Civil Code limit the publicity rights plaintiffs can claim against a broadcaster during sports broadcasts. If broadcasters are free to use an individual's publicity rights without compensating that individual, there is no market for group licenses. And, without a group licensing market, the plaintiffs failed to identify a relevant market in which trade was restrained.

The court took issue with two aspects of this argument. The California Civil Code does, as the NCAA argued, provide that an individual has no publicity right in the "use of [his or her] name, voice, signature, photograph, or likeness in connection with any news, public affairs, or *sports broadcast or account*."[3] However, because plaintiffs allege harm in a national market, it was not enough that California law precludes plaintiffs from exploiting publicity rights; the NCAA needed to show student-athletes were precluded from asserting publicity rights in every state in order to prove that a group licensing market for sports broadcasting does not exist.

This led the court to a discussion of the First Amendment and its second problem with the NCAA's argument. While the First Amendment does limit publicity rights, it does not do so as explicitly as California law. The First Amendment protects the use of footage for a "newsworthy" purpose, but not for a "strictly" or "purely commercial" purpose.[4] An example, cited by the court, is the difference between an original broadcast of a golfer's hole-in-one (which would likely enjoy protection) and a subsequent unauthorized reproduction (which likely would not).[5]

The court used this distinction to help explain its concerns about the NCAA's position. In the court's view, an athlete's publicity rights in video games, for example, are used more commercially than the same rights are used in broadcast footage (and especially live broadcast footage). As a result, the uses would likely be evaluated differently. After teeing up these issues, however, the court simply claimed that the boundary between commercial and noncommercial speech "has yet to be clearly delineated" and declined to decide anything on the commercial speech issue, choosing not even to weigh in on live game footage. Even more perplexing, the court essentially rewarded the plaintiffs for "provid[ing] only general descriptions" and "scant details" about each of the categories of footage. Because the plaintiffs failed to provide this detail, the court could not determine whether any broadcast categories were primarily commercial, thereby allowing all types of footage to survive to the summary judgment stage.

Amateurism

But the cornerstone of the NCAA's motion to dismiss, and the argument most critical going

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forward, is its argument that amateurism and eligibility rules are per se pro-competitive in light of *Board of Regents*. Unlike the other two arguments, the *Board of Regents* argument goes beyond the group licensing context and presses arguments about the necessary steps the NCAA must be permitted to take under the antitrust laws to protect the "revered tradition of amateurism in college sports."[6]

The NCAA's argument begins (and, one could argue, should end) with *Board of Regents*. Although ruling against the NCAA's television broadcasting scheme, the *Regents* court made a number of specific observations about intercollegiate athletics. The court stated that college sports is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[7] It added, "[i]n order to preserve the character and quality of the [NCAA's] 'product,' athletes *must not be paid*, must be required to attend class and the like."[8] Although not essential to the immediate holding of the case, the NCAA takes the position that this does not make the language dicta.

Before *Board of Regents* reached the Supreme Court, the U.S. Court of Appeals for the Tenth Circuit had found the football television plan per se unlawful. The Supreme Court's argument that, in general, the majority of the NCAA's rules are pro-competitive represents a key finding which allowed the court to hold that NCAA restraints cannot be condemned as per se unlawful.[9]

Further, in the three decades following *Board of Regents*, the NCAA has consistently prevailed in cases where it has argued that amateurism bylaws—including bylaws that prohibit compensation—are pro-competitive as a matter of law. One such case is *Agnew v. NCAA*, decided in 2012, which found "when an NCAA bylaw is clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education, the bylaw will be presumed pro-competitive, since we must give the NCAA ample latitude to play that role."[10]

Agnew found "most if not all" NCAA amateurism and eligibility rules are pro-competitive as a matter of law and challenges to those rules can be disposed of at the motion to dismiss stage.[11] Another case, *McCormack v. NCAA*, threw out plaintiffs' antitrust claims at the motion to dismiss stage and made a similar finding: "The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival."[12]

'NCAA' Court

The court in *NCAA Student-Athlete*, however refused to be persuaded by *Board of Regents* and its amateurism progeny. The court first found that *Board of Regents* was not directly on point. While quoting from the passages cited above that actually bolster the NCAA's position, the court reasoned that *Regents* did not make specific findings on the issue at hand and did not explicitly state that the amateurism rules had a pro-competitive effect. The court also suggested that even if the amateurism rules were held pro-competitive in 1984, the changes in the business of college sports may limit *Board of Regents'* application today.

In turning to the body of case law following and interpreting *Board of Regents*, the court cited three district level cases—*Rock v. NCAA*,[13] *White v. NCAA*,[14] and *In re NCAA I-A Walk-On Football Players Litig*.[15]—for the proposition that courts have allowed challenges to NCAA rules limiting student-athletes' scholarships and financial aid. Although those cases concerned eligibility rules and not compensation rules, the court believed the survival of those cases beyond a motion to dismiss was probative in the present case.

> The cornerstone of the NCAA's motion to dismiss, and the argument most critical going forward, is its argument that amateurism and eligibility rules are per se pro-competitive.

Eventually, the court moved on from district level cases and took it upon itself to discuss *Agnew*, but in doing so, failed to credit the NCAA's arguments about the case. *Agnew*, according to the court, "recognized that a pair of former college players *could have* stated a valid antitrust claim by alleging its scholarship rules stifled competition among NCAA schools in the 'market to attract student-athletes.'"[16] Pointing to language from *Agnew* stating that Board of Regents "implies that all regulations passed by the NCAA are subject to the Sherman Act," the court concluded that *Board of Regents* provides only limited guidance—a conclusion that is not shared by the *Agnew* court.

Finally, although admitting *Board of Regents* gives the NCAA "ample latitude" to adopt rules preserving "the revered tradition of amateurism in college sports," the court found that it did not follow that "student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images and likenesses." The court noted, however, "it is possible the NCAA's ban on student-athlete pay serves some pro-competitive purpose, such as increasing demand for college sports."

The court's approach and ruling is, by all accounts, perplexing. Rather than starting from *Board of Regents* and attempting to articulate how this case either fits or can be distinguished from the core principles articulated in *Regents*, the court strained to limit it to its facts. Yet, the court was perfectly satisfied to apply *Rock*, *White*, and *In re Walk-Ons* to the motion before it, even though those cases dealt with restraints on scholarships and financial aid—not direct player compensation.

The court also referenced that college football had "changed dramatically" since *Board of Regents*, but failed to provide any argument of what specifically had changed that would allow college football to maintain its "particular brand" of athletic competition while also permitting players to be paid. The court's highly selective reading of *Agnew* also appears to eschew critical passages. *Agnew* states that, "most-if not all—eligibility rules…fall comfortably within the presumption of pro-competitiveness."[17] While it does suggest the Sherman Act can apply to NCAA bylaws, it adds, "[a]gain, this does not necessarily mean that any challenge of any NCAA bylaw will survive the motion-to-dismiss stage. Many NCAA bylaws can be deemed pro-competitive 'in the twinkling of an eye.'"

This case gave the court an opportunity to consider the NCAA's arguments and weigh in on the case law granting the NCAA latitude to define the parameters of amateur athletics. The NCAA presented what appeared to be a well-supported argument that amateurism and eligibility rules create the product of collegiate football, allow its survival and are essential for its continuation. These are exactly the types of restraints that *Regents*—and more recently, *American Needle*[18]—highlighted should qualify for easy resolution under the Sherman Act. The court never truly disputes these arguments. Instead, it postponed its decision on these issues until later in the case, even though one would think that no amount of fact discovery is likely to change the need for amateurism and eligibility rules to protect the tradition of college athletics. In any event, it certainly is a case to follow as it goes forward.

1. C 09-1967 CW, 2013 WL 5778233 (N.D. Cal. Oct. 25, 2013).
2. 468 U.S. 85, 102 (1984).
3. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5778233 at *7 (emphasis in original) (citing Cal. Civ. Code §3344(d)).
4. See id. at * 8 (discussing *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (19977); *Pooley v. Nat'l Hole-In-One Ass'n*, 89 F.Supp.2d 1108 (D. Ariz. 2000); and *Dreyer v. NHL*, 689 F.Supp.2d 1113 (D. Minn. 2010)).
5. Id. at * 8 (citing *Pooley v. Nat'l Hole-In-One Ass'n*, 89 F.Supp.2d. 1108, 1114 (D. Ariz. 2000)).
6. *Board of Regents*, 468 U.S. 85, 120. See also *Agnew v. NCAA*, 683 F.3d 328, 342 (7th Cir. 2012).
7. Id. at 101.
8. Id. at 102 (emphasis added).
9. Defendant NCAA's Reply in Support of Motion for Leave to File a Motion to Dismiss Page 7. (Filed Aug. 19, 2013) (Docket 847).
10. 683 F.3d 328, 342-43 (7th Cir. 2012).
11. Id.
12. 845 F.2d 1338, 1340, 1344-45 (5th Cir. 1988).
13. 2013 WL 4479815, at *14 (S.D. Ind.).
14. Case No. 06–999, Docket No. 72, slip op. at 3 (C.D.Cal. Sept. 20, 2006).
15. 398 F.Supp.2d 1144, 1150 (W.D. Wash. 2005).
16. *In re NCAA* at *7 (quoting Agnew, 683 F.3d at 347) (emphasis added).
17. Id. at 343.
18. *Am. Needle v. Nat'l Football League*, 560 U.S. 183, 130 S. Ct. 2201, 2216-17, 176 L. Ed. 2d 947 (2010).

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