

VIOLATIONS OF ANTITRUST LAW OR SIMPLY ANTI-NCAA?

Abstract ID: EASM-2015-234/R1 - (754)

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Date submitted: 2015-03-21

Date accepted: 2015-04-07

Type: Scientific

Keywords: College athletics, Sherman Antitrust Act, student-athlete compensation

Category: 14: Other sport management related issues

Synopsis:

An analysis of antitrust cases against the NCAA seeking fair student-athlete compensation

Abstract:

Intercollegiate athletics in the United States is thriving. There are more participants, college sport fans all over the world, and money flowing to college sport through media rights and sponsorship of the National Collegiate Athletic Association (NCAA) than ever before. In fiscal 2014, the NCAA reported \$989,000,000 in revenue, a record surplus of \$80.4 million, and almost \$708 million in net assets. This has made the NCAA a target for critics who question whether student-athletes are unfairly exploited by amateurism rules that prohibit them from profiting from their "labor." Both former and current student-athletes are seeking their idea of justice by filing antitrust lawsuits against the NCAA.

PURPOSE AND METHODOLOGY

This legal research study examines the current Sherman Act antitrust cases against the NCAA to determine whether the claims are valid or merely a platform to redefine the NCAA's model of amateurism. *O'Bannon v. NCAA* (2014), *Jenkins v. NCAA* (2014) and the consolidated complaints of *In re: National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation* (2014) are analyzed by comparing past NCAA antitrust cases, focusing particularly on commercial purpose, anticompetitive behavior, and buyers, sellers and consumers in relevant markets. .

LEGAL THEORY

The Sherman Antitrust Act was intended to prevent large corporations from engaging in anticompetitive practices that would harm consumers. Practices

such as price fixing are considered by the courts as illegal per se. However, the sport industry requires agreement among competitors in order for competition to even exist, so the court applies Rule of Reason to determine whether the alleged anticompetitive practices have an unreasonable impact on a commercial market that is not outweighed by procompetitive benefits. The court also examines whether there are less restrictive alternatives that still achieve the procompetitive purposes.

ANALYSIS

The O'Bannon case included right of publicity and antitrust claims challenging the NCAA rules that limit student-athlete scholarships as well as compensation for the use of current and former student-athletes name, image and likeness in broadcasts. After a bench trial, Judge Wilken determined that the NCAA rules had an anticompetitive impact on at least two relevant markets and also that the NCAA had valid procompetitive reasons for the rules. However, she applied a least restrictive alternative test and issued an injunction prohibiting the NCAA from enforcing rules that prevent institutions from offering a share of revenues generated from the use of student-athletes' name, image and likeness in addition to a full grant-in-aid. Schools were also ordered to establish trust funds to distribute to student-athletes upon completion of their eligibility. Finally, she upheld the NCAA rules prohibiting student-athletes from endorsing commercial products. The NCAA appealed and oral arguments were heard by a panel of judges in the Ninth Circuit on March 17, 2015.

The In re: National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation (2014) is a consolidation of several class action lawsuits brought on behalf of NCAA Division I football and men's and women's basketball players against the NCAA and Power 5 conferences. Plaintiffs' most recent amended complaint seeks to remove all limitations for student-athlete compensation, allowing student-athletes to compete for stipends that reflect the student-athlete's value in a free market. Plaintiffs also seek individual and class action damages, which are trebled in antitrust cases. The Jenkins (2014) plaintiffs elected not to consolidate, although their claims are now nearly identical to the consolidated cases. Jenkins seeks only individual damages.

IMPLICATIONS

All three cases illustrate the difficult task of applying antitrust law, which was enacted primarily to regulate manufacturing, to the sport industry which defies clear identification of buyers and sellers in a relevant commercial marketplace. When student-athletes and colleges are both buyers and sellers, and fans are also consumers of college sport, determining the impact on consumers is also problematic. Past precedent indicates a clear line of demarcation in application of antitrust law to matters that are regulatory rather than commercial in nature. These lawsuits require the court to substitute its judgment in regulating a voluntary membership national sport governing body, something that courts have historically not supported.

Win, lose or settle, these lawsuits have already had an impact on the future of intercollegiate athletics. NCAA Division I governance has been subdivided to

allow autonomy for the Power 5 conferences to enact rules that cannot be rescinded by the other Division I members. Permissive legislation has been enacted allowing schools to offer benefits that should improve the overall student-athlete experience. These advances are not without cost, and concerns have been expressed about the impact of these policies on non-revenue sports and Title IX compliance.

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