Marquette Sports Law Review

Volume 11
Issue 1 *Fall*

Article 4

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ESSAYS

APPLYING ANTITRUST LAW TO NCAA REGULATION OF "BIG TIME" COLLEGE ATHLETICS: THE NEED TO SHIFT FROM NOSTALGIC 19TH AND 20TH CENTURY IDEALS OF AMATEURISM TO THE ECONOMIC REALITIES OF THE 21ST CENTURY*

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The original purpose of intercollegiate athletics was to provide an extracurricular activity for talented students who attended college primarily to earn an academic degree that would enable them to pursue a career outside of professional athletics. According to the National Collegiate Athletic Association ("NCAA"), "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[1] Today, this concept of an "amateur" athlete and the student-athlete model still applies for most sports and most students, especially women's sports and men's non-revenue sports.[2]

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* Presented on January 8, 1999, as part of the Law and Sports Section of the Association of American Law Schools symposium titled *The NCAA's Evolving Role in Governing Intercollegiate Athletics.*

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1. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2000-01 NCAA DIVISION I MANUAL, art. 2.9 (2000-01) (*hereinafter* MANUAL). However, as Dean Rodney Smith observed in his presentation, commercial sponsorship of college athletic events has been present since the mid-1800s.

2. Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities,* 25 RUTGERS L. REV. 269 (1994).

Not all NCAA sponsored sports fit neatly within this amateur model. Athletes participating in NCAA Division I football and basketball often are more interested in developing their skills in hope of a future professional playing career than in earning a college degree. In fact, universities sponsoring "big-time" football and basketball programs effectively serve as a farm system for the National Football League and National Basketball Association by providing the training environment and playing field for talented football and basketball players to hone their physical talents.

The tremendous public popularity of men's college football and basketball creates a substantial revenue-generating capacity and the prospect of increased visibility for universities. The significant economic rewards of winning have generated fierce off-field competition among universities for inputs necessary to produce winning teams (e.g., coaches and players) as well as efforts to fully exploit the economic value of their athletic products by maximizing fan and booster support, television revenues, and commercial sponsorships. The economic realities of this environment contrast sharply with the nostalgic ideal of the college amateur athlete whose participation in a sport is merely incidental to a university's provision of higher education in an academic environment.[3]

The NCAA's basic regulatory objective is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[4] In other words, the NCAA seeks to: 1) preserve the amateur nature of college sports; 2) as a component part of higher education; and 3) to ensure competitive balance on the playing field. Although these are laudable objectives, they are quite difficult to achieve given the economic reality of "big-time" college athletics, namely an existing "athletics arms race" fueled by the multi-million dollar economic rewards of winning teams fielded by members operating "big time" programs.[5]

The NCAA effectively determines the permissible nature and scope of virtually all aspects of both on-field and off-field competition among its members. It appears to function as an economic cartel in its regulation of Division I football and basketball programs. The NCAA's mem-

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3. *See generally*, MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY (1990); MURRAY SPERBER, ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS (1998).

4. MANUAL, art. 1.3.1.

5. John C. Weistart, *Can Gender Equity Find A Place In Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 211-12 (1995).

ber schools are economic competitors that collectively possess monopsony power over the demand for college football and basketball players and monopoly power over the supply of college football and basketball games. They frequently agree to limit (or prohibit) free market forces from determining input prices for players, output of games, and other aspects of economic competition among themselves. The NCAA polices and enforces its rules and agreements by disciplining violators. Although individual NCAA members have an incentive to gain a competitive advantage by not complying with the association's rules, there is an economic necessity to remain a part of this national organization to reap the economic rewards of "big-time" college sports.

Given the economic realities of "big-time" college athletics, many NCAA rules limiting economic competition among universities appear to violate the federal antitrust laws. However, although there have been several antitrust suits challenging the legality of NCAA imposed restraints affecting Division I football and basketball, most litigation has been unsuccessful. In analyzing judicial treatment of the NCAA and its rules for antitrust purposes, it is important to look at the historical evolution of antitrust jurisprudence concerning intercollegiate athletics. Courts initially held that NCAA rule-making, regulatory, or enforcement activities do not sufficiently impact interstate trade or commerce to establish Sherman Act jurisdiction.[6] NCAA rules designed to promote amateurism and protect academic integrity were deemed to constitute regulation of noncommercial activity that does not trigger antitrust scrutiny. Beginning in the mid-1970s, courts began recognizing that the provision and regulation of "big-time" intercollegiate athletics is business activity subject to the Sherman Act, but were reluctant to find that NCAA regulations violated the antitrust laws.[7]

In 1984, in *NCAA v. Board of Regents*,[8] the Supreme Court held that the NCAA does not have a blanket exemption from the antitrust laws, although it is a nonprofit entity with educational objectives, because the "NCAA and its member institutions are in fact organized to maximize revenues."[9] The Court invalidated NCAA restrictions on its members'

6. Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975); College Ath. Placement Serv. v. NCAA, No. CIV. A. 74-1144, 1974 U.S. Dist. LEXIS 7050, at *10 (D. N.J. Aug. 22, 1974), *aff'd*, 506 F.2d 1050 (3d Cir. 1974).

7. Association of Intercollegiate Ath. for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977).

8. NCAA v. Board of Regents, 468 U.S. 85 (1984).

9. *Id.* at 101. The two dissenting justices criticized the Court's majority for "treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which col-

sale of television rights to football games that prevented economic competition among them. However, the Court acknowledged the NCAA's role "as the guardian of an important American tradition" and its "historic role in the preservation and encouragement of intercollegiate amateur athletics."[10] The Court's majority strongly suggested that primarily noncommercial NCAA rules to preserve amateurism, academic integrity, and competitive balance do not violate the antitrust laws.[11]

After *Board of Regents*, courts generally have rejected antitrust challenges to NCAA rules by providing great deference and discretion to the NCAA. These courts have assumed that NCAA rules are ancillary noncommercial restraints necessary to produce intercollegiate athletics and/or to further legitimate higher education objectives. Courts appear eager to find that NCAA regulation that does not directly fix prices for inputs (e.g., coaches' salaries)[12] or the sale of output (e.g., television rights)[13] is either: 1) characterized as noncommercial and not subject to antitrust challenge[14]; 2) not found to have significant anticompetitive effects[15]; or 3) assumed to be procompetitive by being the least restrictive means of furthering the NCAA's stated objectives (which are usually judicially deemed to be legitimate).[16]

On the one hand, courts have held that agreements among NCAA member schools that directly fix prices in input or output markets for college sports are illegal. The *Board of Regents* Court ruled that the NCAA's exclusive football television rights plan violates the antitrust laws because it effectively establishes a set price for televised football games without any offsetting procompetitive justification, such as preserving competitive balance or the integrity of intercollegiate athletics. Consistent with *Board of Regents*, in *Law v. NCAA*, the Tenth Circuit recently held that an NCAA imposed cap of $16,000.00 on Division I

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leges and universities participate solely, or even primarily, in the pursuit of profits" because of the "essentially noneconomic nature of the NCAA's program of self-regulation." *Id.* at 121, 133.

10. *Id.* at 101 n.23.

11. *Id.* at 101-02.

12. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

13. *Board of Regents*, 468 U.S. 85, 119 (1984).

14. Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998), *aff'd on other grounds,* 524 U.S. 982 (1999); Adidas Am., Inc. v. NCAA, 193 F.R.D. 693 (D. Kan. 2000); Bowers v. NCAA, 9 F. Supp. 2d 460 (D. N.J. 1998); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).

15. Banks v. NCAA, 977 F. 2d 1081 (7th Cir. 1992).

16. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Hairston v. Pacific 10 Conf., 101 F.3d 1315 (9th Cir. 1996) (affirming validity of conference sanctions imposed on member university for violation of amateurism rules because no proof this procompetitive objective can be achieved in substantially less restrictive manner).

entry-level basketball coaches' salaries is an unreasonable restraint of trade as a matter of law.[17] Applying the truncated or "quick look" rule of reason, the court found this salary cap has the naked anticompetitive effect of fixing one of the costs of producing Division I basketball games without furthering product availability or competitive balance among NCAA members in the least restrictive manner.[18]

At the other end of the spectrum, courts have uniformly upheld NCAA eligibility standards that athletes must satisfy to participate in intercollegiate athletics. Athlete eligibility requirements promulgated by the NCAA appear to be virtually per se legal under the antitrust laws. Courts have rejected antitrust challenges to NCAA regulations designed to preserve the amateur nature of college sports, such as the "no draft" and "no agent" rules[19] and the imposition of disciplinary sanctions on institutions for violation of the NCAA's amateurism rules.[20]

In *Smith v. NCAA*,[21] the Third Circuit ruled that an NCAA eligibility rule prohibiting a student from participating in intercollegiate sports while enrolled in a graduate program at an institution other than where she earned her undergraduate degree does not violate the antitrust laws.[22] The court distinguished *Law* because the challenged rule is not "a restriction on [any] business activities of [NCAA] institutions."[23] Moreover, *Law* observed that "courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics."[24]

Adidas' recent antitrust challenge to NCAA restrictions on its members' sale of promotional rights to sponsors illustrates judicial unwillingness to acknowledge that universities engage in economic competition among themselves off the playing field and that some NCAA rules may restrain trade. In *Adidas America, Inc. v. NCAA*,[25] Adidas alleged that NCAA limits on the size of manufacturer logos on uniforms and playing equipment unreasonably restrained competition among NCAA member institutions for the sale of advertising rights.[26] The court initially denied Adidas' motion for a preliminary injunction against enforcement of this

17. *Law*, 134 F.3d at 1010.
18. *Id.* at 1016-19.
19. *Banks*, 977 F.2d at 1089, 1091; *Gaines*, 746 F. Supp. at 746.
20. *McCormack*, 845 F.2d at 1345-46; *Hairston*, 101 F.3d at 1318-20.
21. 139 F.3d 180 (3d Cir. 1998).
22. *Id.* at 184-87.
23. *Id.* at 186.
24. 134 F.3d at 1022 n.14.
25. 64 F. Supp. 2d at 1100.
26. *Id.* at 1100.

rule.[27] Observing that *Law* provides no guidance regarding the line between commercial and noncommercial activities, the court characterized the subject NCAA regulation as noncommercial because it does not have the purpose or effect of giving NCAA members a direct economic benefit.[28] Rather, it found the rule furthered the NCAA's legitimate objective of preventing the commercialization of college sports, notwithstanding that patches identifying football bowl game sponsors on player uniforms are not subject to the size limits of this rule (not to mention that athletes may be required to wear a particular manufacturer's shoes as part of a sponsorship agreement with an NCAA university).[29]

Subsequently, the court granted the NCAA's motion to dismiss Adidas' complaint.[30] The court found that Adidas failed to properly allege a relevant market in which competition is adversely affected by the challenged NCAA rule.[31] Adidas only asserted a reduction in competition in the market for the sale of advertising rights on uniforms worn by players at NCAA institutions.[32] However, the court ruled that the appropriate relevant market "includes all advertising vehicles that are reasonably interchangeable with NCAA promotional rights on athletic apparel,"[33] such as uniforms worn by players for professional and Olympic sports teams. In other words, the court concluded that the NCAA's rule restricting the size of manufacturer logos on uniforms has no significant anticompetitive effect as a matter of law.

The *Adidas* trial court's disposition of the case is another example of unwarranted judicial deference to NCAA regulation of economic competition among its member institutions. The *Adidas* holding is inconsistent with the *Board of Regents* and *Law* precedent establishing a framework of antitrust analysis for NCAA regulatory activity with a commercial impact. Adidas' allegations, at the very least, raise a factual issue for discovery regarding the anticompetitive effects of this NCAA rule. If the limitation on logo size has the effect of reducing economic competition among NCAA members, the NCAA must prove that it furthers a valid procompetitive objective that cannot be accomplished by a substantially less restrictive means.

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27. Adidas Am., Inc. v. NCAA, 40 F. Supp. 2d 1275, 1287 (D. Kan. 1999).
28. *Id.* at 1296.
29. *Id.*
30. Adidas Am., Inc. v. NCAA, 64 F. Supp. 2d 1097 (D. Kan. 1999).
31. *Id.* at 1104.
32. *Id.*
33. *Id.* at 1102.

There is no valid justification for permitting the NCAA to determine arbitrarily the permissible degree of economic competition among its members or, in light of these universities significant economic self-interest, for courts to defer to the NCAA's judgment. Courts should abandon anachronistic precedent based on unrealistic ideals of the "amateur" nature of "big-time" college athletics and develop a principled antitrust jurisprudence more consistent with the economic realities of college sports in the 21st century.

I am not advocating that all NCAA regulation of competition violates the antitrust laws. However, courts should not continue to make unrealistic or unwarranted assumptions about the economic effects of NCAA rules reducing or eliminating competition among its approximately 1,100 member schools. NCAA regulation that has anticompetitive, intrabrand effects should be proven to be the least restrictive means of promoting interbrand competition as a matter of fact, rather than being presumed to do so as a matter of law.