A COMMENT ON THE *NCAA STUDENT-ATHLETE COMPENSATION* CASES

BY AARON M. PANNER[1]

1 Aaron M. Panner is a partner at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.

As a third-year law student, I was among a lucky five dozen to study antitrust law with Philip Areeda – tragically, the last group to do so. Ill with leukemia (though that was not generally known), Professor Areeda nevertheless agreed when that first semester class ended to supervise an independent study project in my second semester. I was, I believe, his last student.

The topic of my paper was non-commercial boycotts, and it sought to address the circumstances under which antitrust law could reach – and penalize – efforts to pool economic power to achieve ends that were not strictly commercial. On the one hand, there was *FTC v. Superior Court Trial Lawyers Association*,[2] an opinion from the Supreme Court addressing an agreement among trial lawyers to refuse to represent indigent defendants until the District of Columbia agreed to increase the compensation paid for that work. The boycott was effective – leading to higher hourly rates – but gave rise to an FTC complaint, which made its way to the Supreme Court. In an opinion by Justice Stevens, the Court noted that the boycott "may well have served a cause that was worthwhile and unpopular"; that "the preboycott rates were unreasonably low"; and that "the increase has produced better legal representation for indigent defendants."[3] All of that was beside the point. "[R]espondents' boycott constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act."[4] "Prior to the boycott [respondents] were in competition with one another, each deciding independently whether and how often to provide services to the District."[5] "The agreement . . . was designed to obtain higher prices . . . and was implemented by a concerted refusal to serve an important customer."[6] "The horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output" and thus unlawful.[7] In other words, when antitrust law is the hammer, everything looks like a nail.

On the other hand, there was *National Organization for Women v. Scheidler*.[8] In that case, plaintiffs alleged that defendants (anti-abortion activists, groups, and a testing laboratory) engaged in a conspiracy to close women's health centers providing abortions. In addition to RICO claims (dismissed but later restored by the Supreme Court), plaintiffs alleged that the defendants had violated the Sherman Act, including by coercing businesses to refuse to deal with the abortion clinics. There may have been reasons that plaintiffs' claims failed to allege an element of an antitrust claim. But the Seventh Circuit did not decide the case on those grounds. Instead, it found that the activities at issue were *categorically* outside the reach of the antitrust laws because the antitrust laws were not designed to "protect an industry faced with violent opposition from some segment of

2 493 U.S. 411 (1990).

3 *Id.* at 421.

4 *Id.* at 422.

5 *Id.*

6 *Id.* at 422-23.

7 *Id.* at 423.

8 968 F.2d 612 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994).

the public."[9] The case suggests that there is an appropriate domain for antitrust – "prevent[ing] business competitors from making restraining arrangements for their own economic advantage" – and conduct outside that realm is not subject to antitrust regulation.[10]

These two decisions were not too hard to reconcile, but as I continued to read cases from the federal courts involving antitrust actions against groups engaged in non-commercial boycotts, I failed to discover the key to all mythologies. For some courts, non-commercial purpose seemed like a basis for something like immunity from antitrust scrutiny; for others, it was beside the point, and the only question was whether the challenged agreement effectively aggregated the actors' market power. I complained to Professor Areeda that the cases could not be reconciled through any single formulation that I could discern. He dispensed valuable wisdom: it's no surprise that the cases cannot be reconciled, because courts approach these issues in different and mutually inconsistent ways. Some of the cases seem to be in conflict because they are. The law is messy and imperfect. Understanding courts' various approaches and the underlying currents is the job of the antitrust lawyer as much as it is attempting to articulate the best rule.

I was reminded of the non-commercial boycott cases when reading Judge Wilken's March decision ruling on the latest antitrust challenges to the NCAA's limits on student-athlete compensation.[11] A brief history: in 2009, Ed O'Bannon, a former star basketball player at UCLA, sued the NCAA, claiming that the NCAA's amateurism rules, insofar as they barred student-athletes from accepting compensation for the use of their names, images, and likenesses (for example, in video games) violated the Sherman Act; Sam Keller, a former quarterback for Arizona State and Nebraska, also brought suit. The district court (Claudia Wilken, J.) found that challenged rules, evaluated under the Rule of Reason, violated Section 1 of the Sherman Act.[12] The Ninth Circuit largely affirmed.[13] The court of appeals rejected three of the NCAA's threshold arguments: that the Supreme Court had already endorsed the NCAA's amateurism rules in *NCAA v. Board of Regents of the University of Oklahoma*,[14] that the compensation rules are outside the scope of the Sherman Act because they do not regulate commercial activity, and that plaintiffs had not suffered antitrust injury.[15] The court then held that the rules could not be condemned as *per se* unlawful but were instead subject to scrutiny under the Rule of Reason.[16] The Ninth Circuit agreed with the district court that the challenged rules had an anticompetitive effect by blocking an aspect of competition among schools for recruited athletes.[17]

In the district court, the *NCAA* in *O'Bannon* had offered four justifications for the challenged compensation rules – (1) promoting amateurism; (2) promoting competitive balance; (3) integrating student-athletes in the academic community; and (4) increasing output. The district court accepted the first and third justifications but rejected the other two; the Ninth Circuit held that, on appeal, the NCAA relied exclusively on the promotion of amateurism to justify the rules.[18] The Ninth Circuit agreed with the district court that the compensation rules do serve procompetitive purposes by promoting integration of academics and by preserving the popularity of NCAA sports as a distinct product from professional sports.[19] But the court found that the district court had not clearly erred in finding that there were less restrictive ways to promote amateurism than the compensation rules then in effect – namely, raising the grant-in-aid cap (previously limited to the cost of tuition, room and board, and books) – to the full cost of attendance.[20] The court, however, vacated the portion of the district court's opinion that had authorized cash payments of up to

9 *Id.* at 621-22. The court also found that "[t]he plaintiffs have not alleged that the defendants are exercising market power to harm their businesses . . . . [and] have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers." *Id.* at 622-23. But if the complaint had failed to allege any violation of the Sherman Act – irrespective of the goal of the actions – the Court's discussion of violent protest and its relationship to the history of the Sherman Act would have been unnecessary.

10 *Id.* at 621. No doubt, one can dispute whether the trial lawyers' boycott is fairly characterized as non-commercial: they wanted to charge more for their services.

11 *In re National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019). The compensation caps apply to all Division I student athletes; the plaintiff class comprised men's and women's Division I college basketball players and Division Football Bowl Subdivision ("FBS") football players.

12 *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

13 *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) ("*O'Bannon II*").

14 468 U.S. 85 (1984).

15 *O'Bannon II*, 802 F.3d at 1061-69.

16 *Id.* at 1069.

17 *Id.* at 1070.

18 *Id.* at 1072.

19 *Id.* at 1073-74.

20 *Id.* at 1074-75.

$5,000 per year as failing to preserve amateurism as effectively as a rule that barred outright cash payments.[21]

Accordingly, Judge Wilken was not writing on a blank slate in the *Grant-in-Aid* case – far from it – but, at the same time, the parties had been litigating for several years (the first case had been filed in March 2014) and had assembled a substantial factual record to further test some of the premises underlying the decisions in the *O'Bannon* case. The court moved quickly through market definition – defined as the market for student-athletes' services, a market in which the members of the NCAA have substantial market power on the buyers' side – and anticompetitive effect – that is, the reduction in compensation that student athletes would otherwise receive.[22] The bulk of the opinion addressed procompetitive justifications and less restrictive alternatives, and here, the district court broke new ground.

The court began by evaluating the NCAA's claim that preserving amateurism was a "'key part of the demand for college sports.'"[23] Although this justification had been accepted in *O'Bannon*, the district court proved skeptical. For starters, the district court found that the defendants had failed to provide any coherent definition of "amateurism." Amateurism could not be simply defined as not "pay for play," because NCAA rules allowed certain types of compensation, including in the form of "unrestricted cash," for athletic performance.[24] This mattered, the court held, for two reasons: first, it undercut the claim that existing limitations on pay were driven by any defensible concept of amateurism; second, the fact that consumers "enjoy watching sports played by student-athletes who receive compensation . . . belies Defendants' position that the challenged current restrictions . . . are necessary to preserve consumer demand."[25] At this point – the court having seemingly rejected its most important procompetitive justification – things were looking bleak for the NCAA's efforts to limit compensation.

But the district court pulled back from the brink. While refusing to credit any interest in "amateurism," the Court did credit "the importance to consumer demand of maintaining a distinction between college sports and professional sports."[26] And the court (perhaps grudgingly) accepted that "some of the challenged compensation limits may have some effect in preserving consumer demand to the extent that they serve to support the distinction between college sports and professional sports."[27] And it found that "the distinction between college and professional sports arises because student-athletes do not receive unlimited payments unrelated to education, akin to salaries . . . in professional sports."[28] "Rules that prevent unlimited payments . . . therefore, are procompetitive when compared to having no such restrictions."[29] By contrast, "rules that limit or prohibit non-cash education related benefits" – as well as certain other restrictions on compensation – "do not serve to foster consumer demand."[30]

The district court then rejected outright the NCAA's "integration" justification. It found that although "student-athletes benefit from receiving a college education," there was no evidence that the challenged compensation limits promote those benefits or promote academic integration.[31]

The district court then considered plaintiffs' proposed less-restrictive alternatives. It found that eliminating all limits on compensation would not be as effective as current rules in preserving consumer demand; likewise, removing caps on cash or cash-equivalent awards or

21 *Id.* at 1078.

22 *Grant-in-Aid*, 375 F. Supp.3d at 1067-70.

23 *Id.* at 1070. In addition to the NCAA, eleven Division I conferences were named as defendants. See *id.* at 1058 n.1. For convenience, I will sometimes refer to the defendants collectively as "NCAA."

24 *Id.* at 1071; see *id.* at 1071-74 (describing forms of compensation allowed, including through the Student Assistance Fund, the Academic Enhancement Fund, per diem payments, family travel expenses, cash stipends, post-graduate scholarship, and payment from outside sources, including national Olympics committees).

25 *Id.* at 1074-75; see also *id.* at 1075-77 (rejecting testimony by NCAA's expert and accepting testimony by plaintiffs' expert to the effect that increases in compensation had not led to decreases in consumer demand).

26 *Id.* at 1082.

27 *Id.*

28 *Id.* at 1083.

29 *Id.*

30 *Id.*

31 *Id.*

incentives could "lead to unlimited cash payments" and fail to preserve the pro-competitive benefits of the challenged restrictions.[32] The court concluded that allowing the NCAA to limit grants-in-aid and compensation and benefits unrelated to education, as well as academic or graduation awards and incentives in excess of those currently allowed, while prohibiting other limits on education-related benefits, would be virtually as effective as current rules in preserving consumer demand, without giving rise to significantly increased costs.[33]

The district court's decision leaves the reader with the impression that the court was not far away from throwing out the NCAA's compensation limits altogether.[34] The district court began from the premise that the members of the NCAA are producers of an entertainment product – big-time inter-collegiate football and basketball – for which they need personnel – the scholar-athletes – whom the member schools compete to attract. It's certainly possible that, if the NCAA permitted it, certain NCAA member schools might pay cash compensation to star recruits. On that assumption, there may be student athletes who are missing out on an economic opportunity, albeit a short-term one, as a result of the NCAA's limitations on pay for student-athletes. To be clear, the district court's conclusion that big-time intercollegiate sports is a business is nothing new, one that the district court could hardly revisit in light of the Ninth Circuit's decision in *O'Bannon II*.[35] But, as a result, the scope of permissible justifications for the compensation limits was sharply restricted.

We learned in Professor Areeda's class that a defendant cannot justify a restraint of trade by arguing that competition undermines a goal unrelated to competition, that is, an argument that competition brings undesirable side-effects is off limits. Thus, in *National Society of Professional Engineers v. United States*,[36] the defendants defended a "canon of ethics" that "prohibit[ed] competitive bidding by its members" because such bidding would risk producing "inferior engineering work endangering the public safety."[37] The district court found that justification categorically inadmissible, and the court of appeals and then the Supreme Court affirmed. Whether a rule of *per se* illegality or the Rule of Reason applies to a particular restraint, "the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of the members of an industry."[38]

Given that restriction, the NCAA was limited in its ability to argue that its compensation limits were good for the member schools, helping to preserve their character as academic institutions, for the benefit of society as a whole.[39] The most straightforward version of that argument appears to be out of bounds as a doctrinal matter, at least to the extent it is understood as suggesting that unrestrained competition (for student-athletes) is bad for the NCAA's member institutions and society as a whole. To be sure, one can be cynical about whether the members of the National Society of Professional Engineers were primarily concerned about the quality of engineering work (rather than the risk that competition would reduce their compensation); some may be cynical about the motivations of some NCAA member institutions as well. But as the Ninth Circuit explained in *O'Bannon II*, cynicism is not the issue. "Even if the NCAA's concept of amateurism had been perfectly coherent and consistent, the NCAA would still need to show that amateurism brings about some procompetitive *effect* in order to justify it under the antitrust laws."[40]

Accordingly, the NCAA, as it had in *O'Bannon*, argued – successfully – that college sports is a distinct product that consumers value, in significant part, because it involves competition among student-athletes; it is not minor league professional sports. That, of course, begs the question whether consumer demand would be affected if the student athletes on the field were being paid salaries or other unrestricted cash compensation. The district court accepted that it would – and, despite apparent misgivings, preserved the core of the NCAA's prohibition on compensation for student athletes. It might be argued that there is something unsatisfying about the court's conclusion that the member schools of the NCAA can agree to limit student-athlete compensation because consumers prefer to watch competitors who are not being paid. Plaintiffs

32 *Id.* at 1087.

33 *Id.* at 1087-91.

34 This would not have prevented individual conferences from adopting such rules. Today, certain conferences – notably, the Ivy League – have stricter amateurism rules than the NCAA.

35 See 802 F.2d at 1064-65 (rejecting as "not credible" the argument that NCAA compensation rules "are mere 'eligibility rules' that do not regulate any 'commercial activity'").

36 435 U.S. 679 (1978).

37 *Id.* at 681.

38 *Id.* at 692.

39 The NCAA's argument that compensation limits promote integration of student-athletes seems more limited than a broad argument about institutional character – it emphasizes specifically the experience of the student athletes and their place within the university.

40 802 F.2d at 1073.

argued that, at least in football and basketball, student-athletes generally lack any alternative, if they want to pursue an athletic career, to playing college sports. Were the NCAA rules not in place, perhaps certain NCAA member institutions (in, say, the SEC) would adopt more liberal rules about compensating football players than (say) the ACC. Fans could choose the product they liked better.

That said, it is harder to imagine such a world in which the teams from the hypothetical SEC and ACC continue to compete, as the teams of one conference become increasingly professionalized. Moreover, perhaps what makes big-time NCAA sports so attractive to fans is the consumer appeal of truly nationwide competition among all of the leading colleges and universities in the country. Preserving the basic distinction between the amateur and the professional may indeed be a sine qua non for college football and basketball to continue to compete among available sports entertainment options. Moreover, if that is so, the district court may well have gone *too* far – if one accepts that the NCAA has to set limits on compensation for big time athletics to continue to attract fans, it is fair to wonder why the district court has the authority under the antitrust laws to adjust those limits – to rule that the NCAA could have adopted the limits constructed by the district court without violating the antitrust laws, but not the (only marginally different) limits that it had put in place.

A legal realist might fairly ask whether the decisions in the student-athlete compensation cases reflect a different calculus than the one that the Rule of Reason would dictate. Amateurism in college sports – though far from a fixed ideal and for all of its imperfections – is part of a tradition dating back more than a century. It would take a bold court to dismiss it as the mere artifact of unjustified cartel behavior. At the same time, the courts may be responsive to arguments that some student athletes – notwithstanding the value of tuition, room, board, and other benefits – are being exploited. Rather than throw out the entire system, the courts may be trying to nudge the NCAA to offer athletes greater protection and to reward them a bit more generously for the value they deliver. That might be a fair accommodation. But that sort of regulatory oversight is not what the antitrust laws – or federal courts – are generally thought to provide.

For my first two years in college, my roommate was a varsity hockey player; he had a picture on the wall of his older brother, who was an enforcer (or "goon") in the NHL, sitting on Guy LaFleur. My roommate could have played junior hockey in Canada and pursued a professional hockey career as a teen-ager, but instead he pursued an education while playing Division I hockey. He was drafted out of college and was making it as a professional until an injury ended his career. With a degree in engineering, he went into business and is a successful entrepreneur. An academic all-American, he was a genuine scholar-athlete; the NCAA helped to make his career – his careers – possible. The NCAA could credibly argue, in response to an antitrust complaint, that courts should look at the big picture: that the NCAA's system – unique in the world – delivers tremendous benefits to student athletes, fans, and member institutions, and that dismantling one aspect of that system – rather than leaving incremental change to the NCAA – risks removing an element on which the system as a whole depends. That might well be true. But because the lens of antitrust law is limited to the benefits for competition that a challenged restraint delivers, these broader arguments – whatever their intuitive force – remained out of the picture.

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