

June 28, 2021

# Takeaways From the Supreme Court's NCAA Decision

---

**In overturning the NCAA's rules limiting "education-related benefits" for student athletes, the Supreme Court also (1) appeared to adopt a more pro-defendant standard for assessing joint ventures under the antitrust laws and (2) signaled a willingness to assess broader challenges to the NCAA.**

---

## SUMMARY

On June 21, 2021, the Supreme Court upheld a lower court ruling that certain National Collegiate Athletic Association ("NCAA") rules violated federal antitrust law. The rules at issue barred NCAA members, comprising about 1,100 colleges and universities, from providing certain "education-related benefits" to student athletes—for instance, scholarships for graduate school or vocational school, payments for academic tutoring, and paid post-eligibility internships. The Court's ruling was narrow insofar as it did not address other, more fundamental aspects of the NCAA, including its ban on compensating student athletes through salaries or other benefits unrelated to education. That said, the ruling laid the groundwork for future challenges to the NCAA, and, interestingly, appeared to raise the bar for antitrust liability for joint ventures.

## BACKGROUND AND PROCEDURAL HISTORY

From its founding in the early 20th century, the NCAA, the governing body for college sports, has opposed student-athletes being compensated for their participation in collegiate athletics, and since 1948, the NCAA has been empowered to punish member schools that do not abide by its rules.

The NCAA has long authorized colleges and universities to provide scholarships to student-athletes, and in recent years the NCAA has substantially relaxed the restrictions on the type of benefits that may be provided to student-athletes, while still maintaining the core prohibition against student-athlete compensation.

## SULLIVAN & CROMWELL LLP

In 2014 and 2015, in multiple actions that were later consolidated, current and former NCAA student-athletes in the NCAA men's Division I Football Bowl Subdivision ("FBS") and men's and women's Division I basketball programs brought an antitrust lawsuit in the Northern District of California against the NCAA and a subset of the Division I conferences. They alleged that the NCAA's restrictions on student-athletes receiving compensation violated Section 1 of the Sherman Act, which prohibits anticompetitive agreements that impose an undue restraint on trade or commerce.

Outside certain "per se" violations of the Sherman Act, when determining whether an agreement imposes an "undue" restraint of trade, courts apply what is known as a "rule of reason" analysis. This rule of reason analysis is a fact-specific assessment to determine a challenged restraint's actual effect on competition.

Following an "exhaustive" 10-day bench trial that followed years of pretrial proceedings, the trial court held that certain NCAA rules limiting the education-related benefits that student-athletes may receive violated the antitrust laws, but upheld other restrictions on student-athlete compensation.

Specifically, the trial court found that the NCAA had monopsony power over the elite NCAA basketball and football divisions, and that the NCAA was thus the only viable market for top-tier college football and basketball players. This market power enabled the NCAA and its member schools to restrain student-athlete compensation. The trial court noted that the NCAA did not meaningfully dispute this evidence, but instead argued that the validity of some of the restraints had to be assessed in light of alleged procompetitive benefits in the consumer market for college sports. The District Court ultimately concluded that rules limiting student-athlete compensation could play some role in differentiating college sports from professional sports, and thus help sustain consumer demand for college sports.

The trial court then required the student-athletes to show that there were "substantially less restrictive alternative rules" that would achieve the same procompetitive effects. The Court concluded that (1) the NCAA rules that restricted compensation and benefits unrelated to education were reasonable, but (2) ending caps on education-related benefits would be substantially less restrictive than the current rules and would still preserve consumer demand for college sports.

Both sides appealed, with the student-athletes arguing that the trial court did not go far enough in failing to enjoin *all* NCAA compensation limits, and the NCAA arguing that the trial court went too far by weakening the rules in *any* respect. The Ninth Circuit affirmed the trial court's decision in full. The NCAA then sought certiorari, requesting that the Supreme Court find that all of its existing restraints on student-athlete compensation were permissible under the antitrust laws. The student-athlete plaintiffs did not renew their challenge to all of the NCAA's compensation restrictions. The Supreme Court thus granted certiorari to consider only the NCAA rules restricting education-related benefits that were struck down by the trial court, not the NCAA's compensation restrictions in their entirety.

## THE COURT'S REASONING

A unanimous Supreme Court upheld the trial court's decision that the NCAA's rules restricting education-related benefits violated federal antitrust law. At the outset, Justice Gorsuch, writing for the Court, noted that the case involved "admitted horizontal price fixing in a market where the defendants exercise monopoly control." The Court also noted that it was undisputed that the NCAA's restrictions did in fact decrease the compensation that student-athletes received compared to what a competitive market would yield, but that the NCAA could seek to justify its restraints in the labor market by relying on procompetitive effects in the consumer market.

Operating within that framework, the Court concluded that the trial court had properly subjected the NCAA's compensation restrictions to a "rule of reason" analysis. First, the Court rejected the NCAA's argument that, as a joint venture of its constituent colleges and universities, the NCAA's restrictions should be subject to a more deferential review and receive no more than a "quick look." Instead, the Court explained that the dispute over whether the alleged procompetitive benefits in the consumer market could be attained "using substantially less restrictive means" required a more in-depth review.

Second, the Court also rejected the NCAA's argument that its previous *Board of Regents* decision,<sup>1</sup> which rejected the NCAA's rules restricting member schools' ability to televise football games, expressly approved limits on student-athlete compensation. While dicta in *Board of Regents* "may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation," the Court noted that student-athlete compensation rules were not expressly at issue in *Board of Regents*, and thus that the decision could not stand for the proposition that courts "must reflexively reject *all* challenges to the NCAA's compensation restrictions." The Court also emphasized that market realities in college sports had changed substantially since 1984, especially in the form and amount of benefits the NCAA had authorized colleges and universities to provide to student-athletes, as well as the huge increase in the monetary value of college sports. The Court thus thought it was "particularly unwise" to consider "stray comments" in *Board of Regents* as controlling.

Third, the Court held that the NCAA was not entitled to avoid application of the rule of reason because its goal of maintaining amateurism in college sports was part of the societally important objective of promoting higher education. The Court noted that it "ha[d] regularly refused materially identical requests seeking special dispensation from the Sherman Act" on the grounds that a particular restraint of trade served unique social objectives. In any event, the Court noted that it had already recognized in *Board of Regents* that the NCAA was subject to the Sherman Act, and stated that any exemption for the NCAA from the Sherman Act should be established by Congress, not the courts.

The Court also rejected the NCAA's arguments that the trial court's application of the rule of reason was faulty. The Court favorably referred to its 2018 decision in *Ohio v. American Express*,<sup>2</sup> which described a three-step burden-shifting framework for applying the rule of reason to "distinguish between restraints with

## SULLIVAN & CROMWELL LLP

anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Under that three-step framework, the plaintiff must initially prove that a restraint has a substantial anticompetitive effect. The burden then shifts to the defendant to show a procompetitive rationale for the restraint, at which point "the burden shifts back to the plaintiff to demonstrate the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."<sup>3</sup>

Although the Court cautioned that the three step *American Express* framework was not a "rote checklist," it held that the trial court had correctly applied a similar framework. The Court noted that this case was unusual in that it proceeded beyond the first step, where the vast majority of rule of reason cases fail, and that the NCAA did not meaningfully dispute that the restraint was anticompetitive. The Court also cautioned that trial courts should not require defendants to prove that every rule with some anticompetitive effect is the least restrictive means of achieving a procompetitive purpose, and should be cautious in attacking business judgments that are reasonable.

Nevertheless, the Court held that the trial court had correctly determined that the NCAA's compensation rules lacked any direct connection to promoting consumer demand for college sports, and did not require the NCAA to show its rules were the "least restrictive means." Furthermore, while courts are required to "give wide berth to business judgments" before finding antitrust liability, and that "caution is key" in fashioning remedies, the Court held that the trial court had carefully crafted its injunction, in harmony with those guidelines. Finally, the Court held that the NCAA could not declare a restraint immune from Section 1 scrutiny by relabeling the restraint as "amateurism" and declaring it an essential feature of college sports.

In addition to joining the Court's opinion in full, Justice Kavanaugh wrote a separate concurring opinion "to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."

### IMPLICATIONS

Two aspects of the Court's decision warrant particular attention:

First, the Court appeared to adopt a general standard for assessing the legality of joint ventures that would increase a plaintiff's burden of proof and thus make joint ventures more difficult to challenge under federal antitrust law. Several times, the Court endorsed the trial court's view that a challenged aspect of a joint venture's rules should be found impermissible only when the plaintiff establishes that any procompetitive benefits from the joint venture could be achieved through "substantially less restrictive restraints." The Court characterized that burden as "correspond[ing] to the third step" of the 2018 *American Express* decision, in which the Court framed the appropriate inquiry as whether "the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." Somewhat paradoxically for a decision upholding liability, the addition of a substantiality threshold in deciding whether a less restrictive alternative

## SULLIVAN & CROMWELL LLP

is available may make it more difficult for joint venture activity (at least activity that has some procompetitive benefit) to generate antitrust liability.

Second, the Court signaled a willingness to look more broadly at the NCAA and its restrictions on student-athlete compensation, noting several times that wider challenges to the NCAA were not before it. In particular, Justice Kavanaugh's concurrence pointedly noted that "it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes." Those more fundamental changes will have to wait for future litigation or, as Justice Kavanaugh seemed to urge, congressional action.

\* \* \*

### ENDNOTES

---

- <sup>1</sup> *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).
- <sup>2</sup> *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).
- <sup>3</sup> *Id.* at 2284.

## SULLIVAN & CROMWELL LLP

### ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

### CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to [SCPublications@sullcrom.com](mailto:SCPublications@sullcrom.com).