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ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

Episode 51: Antitrust lessons from NCAA v. Alston | July 27, 2021

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Intro: Welcome to Porter Wright's Antitrust Law Source.

Jay: This is Jay Levine, the host of the antitrust law source podcasts and the editor of its blog. And I am thrilled to be joined by my colleague and longtime friend Allen Carter from our Columbus office. Good morning, Alan.

Allen: Good morning, Jay. Good to talk to you.

Jay: So we are here, you know that I hopefully you have heard of the podcast that I did with Luke Fedlam, the head of our sports law practice, and that podcast talked about the recent NCAA case from the Supreme Court that came down on June 21. And our focus there was really, you know, broader as to what it means for collegiate sports, what it means for players, what it means for the NCAA. But Allen and I are going to sort of break it down from a more antitrust legal perspective as to sort of what did the court do here? And what if anything, is novel or not novel about what the court did? So without any further ado, Allen, why don't you tell everybody what actually this case was about?

Allen: So this is sort of a consolidated case. And it was brought by some student athletes and former student athletes against the NCAA, that National Collegiate Athletic Association, and some member institutions, primarily, a few of the leagues that make up the NCAA. The student athletes allege that the NCAA and its member institutions violated the Sherman Act by agreeing to restrict the compensation that colleges and universities will give to student athletes for playing various sports and at particular issue here are the revenue generating sports, football and basketball.

Jay: Exactly. And I think as the Supreme Court said, it was the current interconnected set of NCAA rules that limit the compensation. This really didn't involve name, image and image and likeness, but basically all other forms of payment. And so this was brought sort of years ago, and there was a consolidated trial before the judge in the Northern District of California, and sort of what did the judge in the District Court level? What did she do in this case?

Allen: So judge Wilkins held a long hearing and issued a 50 page opinion. And she, I guess, right to the bottom line, she found that, yes, the NCAA rules, and I'm using the NCAA to sort of encompass all of the defendants like the court did. But the NCAA is rules were anti-competitive and had anti-competitive effects and the pro-competitive benefits of those rules did not outweigh that, and competitive effects, in some instances, and she issued an injunction that enjoined the NCAA from enforcing its restrictions on education related benefits kept in place, the sort of non-

educational compensation benefits and restrictions on benefits that the NCAA has had for a period of time, most notably being that colleges and universities can't pay their players to play.

Jay: They can't treat them like sort of professional athletes.

Allen: they can't treat them like professional athletes. That's exactly right.

Jay: So getting into a guess a little bit more detail. So the district court sort of found and I don't think there's any real disagreement that the NCAA enjoys monopsony power or nearly dominance in the market for athletic services by men and women in Division One, you know, basketball and football and other sports. Essentially, they're the only game in town if you want to sell your labor services, you got to sell it at a collegiate level to a NCAA member institution. And the district court essentially found that the restrictions on that compensation were anti-competitive, because almost by definition, they are designed to make sure that the athletes are not paid as much as they otherwise would be. The District Court turned to the you know, the alleged pro-competitive justifications for the restraints in the in the NCAA had suggested that these restrictions on compensation restrictions on schools giving compensation to student athletes helped, quote unquote, increase output in college sports and maintain a competitive balance. But what are the district court find with regards to those alleged justification?

Allen: The court didn't find any evidence that those alleged justifications actually increased consumer demand or output for college sports. And the NCAA's rules for preservation of amateurism didn't really widen consumer choice by providing a unique product, so to speak. And the district court agreed that, you know, while there's monopsony power in the labor market, the seller side consumer market is worthwhile looking at. And it turned to the task of analyzing the concept of amateurism and how the NCAA his concept of amateurism has changed over the years and ultimately found that the NCAA's concept of amateurism has never been consistently defined by the NCAA.

Jay: Yeah, I think she said there was no coherent definition of amateurism. And she sort of said that I can't see how, how these restraints sort of help it. The interesting thing is, you know, she pointed out that, you know, the compensation rules have been not weakened, but essentially have been become a little bit more lax in recent years. And the consumer demand hasn't suffered a wit, in fact, consumer demand, and the demand for college sports has just increased. So clearly, there's no relationship between these restraints, and the output of collegiate sports, from my own experience, and having, you know, litigated antitrust cases against professional leagues. In the past, that often is the downfall for the league's because they try to loosen the rules a little bit to try to, you know, strike a balance. But the problem is when you loosen the rules, and the consumer demand is competitive balance isn't affected. All that does is evidence of the why that these just these restraints are needed for the justification.

Allen: So, you know, well, and then you look at the revenue of college sports, you know, over the last 20 years, and it's certainly not went down and the athletes were able to point to the significant amount of revenue, the SEC, for instance, another NCAA leagues have been able to generate over the last few years. And there's no doubt I don't think there's any doubt in the district court's mind, at least that demand hasn't suffered. But it's probably been increased down over the years as these restrictions have been sort of loosened.

Jay: Right. But sort of where the rubber really hit the road was, I guess, in the third part, where the judge then sort of looked at the actual rules, and determine whether any pro-competitive effects and she did say that distinguishing student athletes from professionals may be a

legitimate justification. But then the question, do these rules really further or promote those legitimate, or they're substantially less restrictive alternatives? And this is where she kind of split the baby. Right? Right.

Allen: Right. She, looked at, in particular, the education related benefits and said, Well, you know, let's just put it in sort of layman's terms. Why are you restricting the amount of scholarships for instance, that a university can offer? Why are you limiting the amount of cash rewards a university can offer students who graduate or perform well in the classroom? Then she compared that to the sort of what I call the compensation related restrictions, the court calls non-education related compensation and benefits and said, Well, you know, if amateurism really is something worth preserving, and the educational objectives of the universities are something that are worth pursuing, then let's loosen the restrictions on the education related benefits and hold in place the non-education restrictions is so that's what she did. And the Supreme Court sort of looked at the cash rewards for athletic achievement that are allowed and, and said, Well, you know, the district courts, new rules that she said, allowing the cash rewards for education related achievements, up to the amount of athletic achievements is reasonable.

Jay: Right. Well, before we get to sort of the Supreme Court's, It was interesting that you're right. education related benefits are things such as scholarships for graduate or vocational schools or payments for tutoring, or paid post eligibility, internships things in and that seems absolutely appropriate. But as you said, you know, things that would sort of make them feel more like professional athletes just straight out, pay for play those restrictions she left in place. And the Ninth Circuit felt that the district court had sort of struck a good balance and affirmed it. And so it went up to the Supreme Court. Now, one of the things that is very, very important for everybody to understand is that the NCAA wanted an absolute vacate the entire thing. They said everything was wrong. The student athletes had appealed to the Ninth Circuit arguing that even the restrictions on sort of the pay for play, the district court erred in not finding that to be a Sherman act violation. But before the Supreme Court, they sort of left that alone, they did not bring that up to the Supreme Court. So the posture of the case was the NCAA said the district court was wrong and everything. And the student athletes were simply looking to affirm the district court's opinion. So they were no longer arguing about sort of the straight pay for play, which was, you know, an interesting, and we've talked about this before, kind of, I think, a strategic call on the behalf of the of the places where they didn't want, you know, the Supreme, they weren't sure how the Supreme Court would go and kind of wanted to take a longer view of this war. This is a campaign if you will, right. And they didn't want the Supreme Court to come out with any sort of adverse decision that would preclude them from attacking those kinds of restrictions in the future.

Allen: Right. It seems reading the tea leaves a little bit, they had gained enough ground that they were happy with. And they didn't want to lose that ground by allowing the Supreme Court to sort of split the baby. And so they maybe for that reason, or for other reasons, you know, there might be political reasons involve two, given that the amount of legislation that's pending across the country currently. So there might have been some political reasons to not engage in that fight. But whatever reason they had, they chose not to bring the non-education related restrictions before the Supreme Court and, you know, not to get ahead of ourselves. But I think Kavanaugh lamented that decision a little bit in his concurrence.

Jay: The plaintiff's might be lamenting it in hindsight, too. But as you said, we'll get to justice Cavanaugh, his concurrence, which certainly was a lot of fun to read. So just to set the stage, the only thing before is whether the district court's finding that education related expenses, any effort to limit those violated the Sherman act, that was before the Supreme Court, and you

know, justice, Gorsuch sort of comes out saying, Okay, let's, let's remember that there are certain premises that are taken as given, and that we have to follow the analysis, you know, in that, like the district court, essentially, he no one contested, the NCAA enjoyed monopsony, which is essentially monopoly power on the buyer market. In the labor market, they're the only people who can, you know, essentially, “hire” these student athletes, and that if there's any limitation on their wages, there will be an added competitive effect. It's almost a tautology, and that no one also question that depressing their wages would also depress the output. If you think back on it, if there were no rules whatsoever about pay for play, let's say, Would Kobe Bryant have gone to the NBA? Or what you know, with King James have gone to the NBA ever?

Allen: How many more championships? Would Alabama have won in football?

Jay: Yeah, let's not bring that up. That's a sore point. But it is true that there were people who bypassed the NBA because of that, and certainly there are people who stayed in school less because of that. I mean, that there's certainly no question about. But before we get to the actual opinion, I wanted to get to something that we've talked about before. So there, the anti-competitive effects were in this labor market for players services. The Pro competitive justifications were in the what I'll call the consumer market, we're in you know, competitive balance and building a better product facing the consumer. But the question is, Can you can you justify restraints in one market, meaning the labor market with benefits in a separate market? Now, the parties seem to have just assumed, yes, the words said, You can't and it was honored that justice Gorsuch actually sort of discussed this point at some level, and then just says, but the parties before us do not pursue this line. So he's not getting into it. Why do you think he did that?

Allen: You know, that was one of the more intense In parts of the opinion, on the one hand, you know, at the district court level, the universities made the argument that you should look at both the buyer and consumer side of the market. And the district court credited that and went through the analysis that for whatever reason, the universities in the NCAA didn't make that argument at the supreme court level. On the one hand, I sort of think, Well, you know, American Express is out there. And that's sort of a line of cases that is developing, and there is an opportunity for him to say something about it. And on the other hand, I think it's just sort of such a hot topic in the miki and down at the district court level I, I think he thought that he might get criticized for ignoring it altogether. That's sort of that's sort of how I viewed it, because it did come off as a Hey, we acknowledge you guys, we see you. And we're not going to talk about it, because the parties before seven brought it up again here.

Jay: I have a slightly different take. And I have zero proof for my relation. But you know, I wonder if he believes that you cannot justify restraints in one market with benefits in a different market. And I think he would, you know, Amex was a platform type market where you had two sides to the same platform. And the Supreme Court said that a look at the total anti-competitive effects and the total pro-competitive effects from both sides of that same two sided market, whereas here, it's not a two sided market. And they really are two distinct markets. And I'm wondering, of course, it's just sort of putting it out there that he may be amenable to an argument that the anti-competitive effects and the pro-competitive benefits have to be in the same market. And that if you're going to try to justify restraints in market A with benefits and market B, I'm not going to buy that. I'm just wondering if he's sort of putting it out there that he'd be amenable to it. And since he's speaking on behalf of the court, I wonder if that was kind of a signal. Pure speculation? I don’t know.

Allen: I think it's more likely than not that you're right.

Jay: Of course!

Allen: I have to say that. But the you know, this whole opinion sort of strikes as a preview of things to come. So that wouldn't surprise me at all, especially with where that sort of, I guess I'll call it analysis is dropped into the opinion, it's even in sort of an odd spot, you know, you might expect to see it somewhere else other than in the discussion about whether the rule of reason should have been applied at all. Right. But be that as it may, your interpretations, probably, it's at least more interesting than mine.

Jay: Well, but that, but we'll see. But the NCAA put forth two basic arguments to the Supreme Court, they basically said that the rule of reason, essentially, they're almost immune from the antitrust laws, that rule of reason should not have been applied. And if it should have been applied, it should have been applied extremely quickly. And then secondly, that the judge applied it incorrectly, but in taking the first that it shouldn't have been applied at all, they first say that they're a joint venture, and therefore, some rules are necessary for joint venture. So therefore, it should be okay. But, Gorsuch didn't like that argument.

Allen: No, Gorsuch didn't like their quick look approach, you know, sort of deferential quick look approach to their roles under their joint venture, he acknowledges that, in order for a sport to be played, the two sides sort of have to agree to some things, you know, the most obvious being the rules of the game, so to speak, how many players can be on the field, how many scholarships can be given to student athletes and that sort of thing. But at the end of the day, he said, Hey, you might be a joint venture. And sure, rules have to be in place. But that doesn't mean that we are going to just defer to you on every single restriction you put in place. And by the way, NCAA and sports conferences, you have monopoly power. So in those sorts of cases, the rule reason applies. One thing that struck me a little bit interesting here is he didn't get into any analysis of why per se didn't apply at all.

Jay: Yeah, I think that's because the plaintiffs probably never brought it up. Yeah, I'm understanding that, you know, sports leagues, depending on what we're talking about. There hasn't been enough litigation or enough decision on these types of things to basically say it's per se but you're right. He didn't. He didn't mention the words and you know, he did say that just because some restraints are necessary does not mean that all aspects of interleague cooperation are legitimate. So we've kind of dispensed that. He then basically also dealt with the NCAA argument that their board of regents kind of gave them a pass on everything. And he said you're overreaching on that. Right? If you said that, you know, all that said, is that, yeah, certain price fixing rules, which may otherwise have been per se are gonna be under the rule of reason. But again, that wasn't a pass on all NCAA compensation restrictions, even though there was a passing reference to such restrictions in the Supreme Court case. So he did not really read the prior NCAA v Board of Regents case, the way the NCAA reads it or hoped he would read it.

Allen: No, he definitely saw it as dicta. And you know, another factor, you covered that pretty well, another factor he sort of hung his head on was the fact that the Board of Regents case was decided so long ago, the way that the market had the market factors, so to speak, had changed so much in the intervening 30 plus years since board of regents had been decided that even if it wasn't dicta, the court still would need to revisit the actual facts as it applies to this case.

Jay: Yeah. And I think again, that's the theme that comes out of this opinion, theyv'e gotta look at the facts. There's no, you don't get a pass. There's no bright line rules. And that, you know, you got to look at how have they been doing since then. And then they, you know, the last argument was we're a commercial enterprise. And that Gorsuch gave, you know, sort of the back of the hand.

Allen: Or non-commercial enterprise.

Jay: They're not a commercial enterprise, you're right.

Allen: Justice Gorsuch gave it the backhand and said, well, you might have a noncommercial objective, but you're still operating in interstate commerce, and you're still affecting interstate commerce. So your noncommercial objectives don't trump that, right?

Jay: Only baseball's ever gonna be able to have that match just because it was decided 100 years ago, but and then turning quickly, they basically also argued that the district courts application of the rule of reason was wrong. And again, here, Justice Gorsuch, sort of gratuitously throws in a line about this kind of three step framework about proving anti-competitive effects, looking at the pro-competitive justifications, and then seeing whether there's any substantially less restrictive restraints that would still meet those pro-competitive justifications. And then he, he sort of others this line that seems gratuitous, saying these three steps do not represent a rope checklist, nor may they be employed as an inflexible substitute for careful analysis. But yet, nobody was arguing that at all, and again, that sort of seems to pre Sage that he has something in mind. And, again, the tone and tenor of this is, look at the facts, look, the facts, I'm not gonna let you just sort of blindly follow bright line rules or a bright line framework that do not bring the light of day to all of the potential effects and benefits of what we're supposed to be looking at.

Allen: That's right. And then the next line, in the opinion says, basically, that he says, as we've seen, what is required to assess whether a challenge restraint harms competition can vary, depending on the circumstances. And like you said, if there's any big takeaway from this case, and there's several big takeaways outside of just the antitrust fraud, you know, in sports and whatnot, but if there's any takeaway for me, it's what you just said, it depends on the circumstances, we're going to march down this three step process and use that framework. But it's merely a framework for analyzing carefully. And if the three step process doesn't allow you to analyze carefully, then don't engage in three step process is how I read it. Now that said, If I were a court given Amex and this case, and justice Gorsuch walks through the three step process, in this case, I'm probably going to use the three step process. It seems like a safe way to conduct the analysis. You know, it may not be mandated, but I would say that justice Gorsuch is certainly endorsed it to some extent.

Jay: Yeah, I think you're right. I think he's just cautioning. You can use it just don't use it to cover anything up. And somehow not give a full sum examination to the fact but as long as you do that, the three step process or works analytically, the NCAA basically said that the district court forced them to essentially find the least restrictive alternative and that was inappropriate. And you know, Justice Gorsuch said that's not true. You know, the district courts looked at whether there were substantially less restrictive alternatives, which is exactly the standard. And what she did, was it perfectly appropriate. It wasn't micromanaging anything, it left room for the NCAA to maneuver within the injunction, and sort of just didn't find that. And Gorsuch reminded

the NCAA, remember that your anti-competitive effects are absolutely clear. And your pro-competitive benefits are either nonexistent or very murky. So when you sort of look at whether less restrictive alternatives, you kind of have to look at that a little bit. But the other argument, which we've talked about is, and which I found is that the NCAA claim that the district court sort of redefined their product, it didn't give enough to the amateurism of what, wherever, and that, of course, it's just sort of flattened them on.

Allen: He has some good lines in that section. But the bottom line was a party cannot avoid antitrust scrutiny by integrating its restriction or its restraint into the product itself, or redefining the product to subsume the restraint. Whatever ground. Gorsuch didn't cover in his piece. Kavanagh is certainly covered in his concurrence.

Jay: That's a great segue. Kavanaugh basically said, none of these rules are, are legal. It didn't come up before us, but they're even the pay for play. Rules are not and this this concept of an unpaid athlete is our product. Tell us what he said about that. Because to me, that was some of the some of the best lines

Allen: There were some of the best lines, you know, he went through a series of industries where a price fixed restraint, couldn't be rig recombined as part of a product. So you know, he says, if you go into a restaurant, that one of the features of the restaurant isn't that you prefer cooks who work for free, or if you go into hospitals, you know, it's not going to be sufficient that the hospital says, Well, we kept our nurses pay, because we went to a pure form of health care or getting in journalism, we don't pay our reporters, because we want a pure form of journalism. And it went through a series of traditions and that sort of thing and said, you know, really, at the end of the day, that's all the NCAA is doing here is they're arguing that they should be able to have amateurism, but really all that is, is not paying the players in a highly compensated, college football or college basketball.

Jay: In a very rich industry, very rich industry, you can't say the product is unpaid labor. And again, I think that sort of smacks of this, you can't just slap a label on something and avoid scrutiny. Yeah, you know, to me, again, that's part and parcel of the theme of this opinion, is we're going to look at everything at the facts, and we're not just going to allow labels to bypass real examination. You know, it said, the NCAA's business model would be flatly illegal in almost any other industry in America. And he couldn't, you know, he couldn't see how any other how any restrictions could be upheld, and that the traditions of amateurism, I mean here, and again, for someone who is a conservative justice, but I mean, this, those traditions alone cannot justify the NCAA decision to build a massive money raising enterprise on the backs of student athletes who are not fairly compensated. It almost sounds like you know, a union.

Allen: Yeah, a union boss. And, you know, both Gorsuch and Kavanaugh took the NCAA to task for the amount of compensation that athletic directors receive or the commissioners receive. And you're just comparing that to the amount of benefits that the student athletes receive, which is de minimis outside of scholarship.

Jay: It's funny when we litigated years and years ago, the Freeman McNeil case, which brought free agency to football, again, competitive balance was one of the reasons for some of the free agent restriction rules that the NFL had put forward. And, you know, we had shown that that's not true for general managers, you don't restrict them. You don't restrict coach's salaries. So the richest teams can afford the best coaches, which obviously affect the performance of the team. And if you're really serious about a warrant you restricting that and it's sort of you know, you start to feel that the only people who get restricted is the labor. And it was interesting to see

both justice Gorsuch and Kavanaugh sort of explicitly knocked down those kinds of justification. So, obviously, there's a lot of implications here for the NCAA. We've talked about it before, I'm sure and but in terms of antitrust law, to me, the big takeaway is that examine the facts, there's, you know, slapping a label is not going to help try to hide behind some sort of procedural framework or trying to hide behind some procedural label, that is not going to be a substitute for real examination of the effects and benefits and where those effects and benefits must lie. I mean, I don't know. I'm wondering if we're gonna see some movement on in clarity on that in future cases. But for me, that was the biggest sort of takeaway from this opinion, as an antitrust lawyer.

Allen: Yeah, I agree. I'd say maybe three big takeaways for me one, like you mentioned, the circumstances matter, more so than road analysis. Two, there's no new antitrust law made by this opinion, necessarily, you know, as Justice Gorsuch said, the district court applied establish the antitrust principles, and she applied them properly. And they affirmed for that reason. And I think the third big takeaway is the last line of justice Kavanaugh's concurrence, which is the NCAA is not above the law. And you know, that that might not be an antitrust point. But I think it's I think it is an antitrust point, in the sense that the Supreme Court's not going to offer immunity to traditional well-funded highly popular entities, just because they are highly funded popular entities and everybody is subject to the antitrust laws unless Congress gives them an immunity.

Jay: Right. And in fact, that was exactly what the Supreme Court said, if you think you're immune got to go to Congress. Yep. Okay, I think we're pretty much out of time. If anybody has any questions or comments on feel free to contact us, you can reach me on twitter @JLLevine. Also, I'm on LinkedIn, you can email me at jlevine@porterwirght.com. Allen, how to people get a hold of you?

Allen: Oh, you can get a hold of me at acarter@porterwright.com. I'm also on LinkedIn, and I'm on Twitter as double Buckeye.

Jay: Thank you very much again, this is Jay Levine, the host of antitrust lawsuits podcast. Hope you have a great day.