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THE APPLICATION OF THE ANTITRUST LAWS TO JOINT VENTURES TO BE CONSIDERED BY THE SUPREME COURT

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SUMMARY

Joint venture analysis remains an area of confusion in antitrust law. Courts have tended to elevate form over substance, misapply economic principles, and lose focus of the basic purposes of the antitrust laws, *i.e.*, protecting competition and consumer welfare. The latest example of this problem is the Ninth Circuit's 2020 decision concerning the National Collegiate Athletic Association ("NCAA").

The issue will be elevated to the Supreme Court of the United States in *AAC v. Alston* and *NCAA v. Alston,* with oral arguments on March 31, 2021. The cases are consolidated on appeal from the Ninth Circuit, which found that certain NCAA eligibility rules concerning college athlete compensation violated the antitrust laws.[1] The Supreme Court's decision will not only have profound effects for the NCAA, but for all joint ventures, as well as consumers.

The NCAA is a joint venture of academic institutions that facilitates the creation of a distinct "product"—college sports. Indeed, it is well recognized that "some activities can only be carried out jointly. Perhaps the leading example is league sports."[2] The NCAA and its members market "competition itself—contests between competing institutions."[3]

In order to create its unique product, college sports, the NCAA must place restraints on its members to define the nature of the competition. Without restraints, such as rules that limit the number of players on a team, the size of the field, or who is eligible to play for each school, the NCAA would be "completely ineffective," and college sports could not exist.[4]

One of the key NCAA restraints is maintaining the amateur status of college athletes, *i.e.*, that college athletes be student athletes, not professionals. As the Supreme Court recognized in *Board of Regents*, amateur status is a key feature distinguishing college sports from professional sports.[5]

With this restraint, the NCAA created a new product, college sports, that competed against professional sports and offered consumers an attractive product.

It was the NCAA's restriction on student-athlete compensation that was found, in part, to be unlawful by the Ninth Circuit in *Alston*. The Ninth Circuit found that the NCAA could generally restrict compensation, but not with regard to college-related expenses. In reaching this conclusion, the Ninth Circuit made significant errors.

Restraints on compensation of college athletes between NCAA schools—if viewed in isolation apart from the joint venture—would raise serious antitrust concerns. But, these restraints do not exist in isolation. Rather, the restraints are central components in the creation of the NCAA's core product, in that they differentiate NCAA college sports from professional sports. Under a proper application of the antitrust laws, once restraints such as these are determined to facilitate the joint venture's creation of a new competitive product, the restraint should be found lawful.[6]

In *Alston*, the Ninth Circuit correctly determined that the NCAA's restrictions on compensation are procompetitive for the reasons just discussed. That should have been the end of the inquiry. Instead, the Ninth Circuit deviated from established joint venture analysis in two key ways:

- the court went through a full rule of reason analysis of the NCAA's restrictions instead of the more limited analysis applicable to joint ventures; and
- the court erroneously placed the burden on the NCAA to show that its rules on compensation were the least restrictive restraints and that there were no viable alternatives.

On the first point, in a full rule of reason analysis, courts examine "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" to determine the effect of the restraint on trade in the relevant market.[7] It involves a three-step, burden-shifting framework:

1. The *plaintiff* must show that the restraint produces significant anticompetitive effects;
2. If the plaintiff meets the initial burden, the *defendant* must rebut the plaintiff's showing by demonstrating the restraint's procompetitive effects;
3. Then the *plaintiff* must show whether "any legitimate objectives can be achieved in a substantially less restrictive manner."[8]

In the case of joint ventures and other cooperative arrangements, however, where the product's existence is dependent on the restraints, the restraints are so likely to survive rule of reason analysis that it can be done in the "twinkling of an eye" without resort to full rule of reason analysis.[9] Joint ventures are permitted to place restraints on individual members to create and preserve the product the joint venturers created. Once it was determined that the restraint was important to the creation of the college sports product, the antitrust inquiry should have ended.

Next, even if the Ninth Circuit had properly concluded that the restraint required full rule of reason analysis, it made a key error in the third step of the analysis. In step three, the burden should have been on the plaintiffs to prove that there are alternative restraints that are both viable and substantially less restrictive of competition. But instead, the Ninth Circuit required the NCAA to show that there were no possible less restrictive alternatives. That was improper because once the restraint is found to have a pro-competitive benefit, the degree of the restraint is irrelevant.[10] At the very least, the plaintiffs should have been required to show that: (1) there are alternative restraints that are "substantially"—not marginally—less restrictive; (2) the alternatives are viable; (3) the alternatives are virtually as effective as the current restraints in meeting the NCAA's objectives; and (4) the alternatives do not significantly increase the costs of creating and maintaining the product.[11] The Ninth Circuit did not require the plaintiffs to show any of this, and it simply adopted what it felt was a less restrictive alternative out of whole cloth, *i.e.*, restraints on college-related expenses violated the antitrust law, but other restraints on monetary compensation are lawful.[12]

Contrary to the Ninth Circuit's approach in *Alston*, the Sherman Act was not meant to be a tool for the judicial redesign of joint ventures. The Supreme Court has emphasized that courts are ill suited "to act as central planners, identifying the proper price, quantity, and other terms of dealing" among businesses.[13] Yet that is the role the Ninth Circuit assigned to itself.

It is important to remember that there are two types of errors that are of concern under the antitrust laws. The first, and more obvious, is under-enforcement, *i.e.*, the failure to prevent anticompetitive conduct. That currently is a hot topic, as demonstrated by proposed legislation. But an equally important problem is over-enforcement, *i.e.*, preventing competitive behavior that enhances consumer welfare. *Alston* presents a clear example of this second type of error, and unless corrected, it will have an adverse impact on industries and consumers.

The Supreme Court has an opportunity to correct the Ninth Circuit's judicial micromanagement approach to joint ventures. As it stands, however, the decision will impede the creation of procompetitive joint ventures, like the NCAA, and it will deprive consumers of new products and choices.

1. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020).

2. R. Bork, THE ANTITRUST PARADOX 278 (1978).

3. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 102, 104 (1984).

4. *Id.* at 102.

5. *Id.* at 101-102.

6. *Texaco Inc. v. Dagher*, 547 U.S. 1, 7-8 (2006).

7. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

8. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir.2001) (quotation and citation omitted).

9. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (quoting *Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, at 110).

10. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227-28 (D.C. Cir. 1986).

11. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1054 (9th Cir. 2015) (citing *Bd. Of Regents*, 468 U.S. 85, at 120).

12. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d, at 1260-61.

13. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

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