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Two Important Antitrust Cases Decided by US Supreme Court

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Partners Bevin Newman and Tom Dillickrath authored the chapter "Two Important Antitrust Cases Decided by US Supreme Court" published in *Global Competition Review's* "GCR Insight: US Courts Annual Review - Edition 2." A brief summary, including an update to one of the cases is below:

The United States Supreme Court decided two antitrust cases for October Term 2020.

The first case, *AMG Capital Management v. Federal Trade Commission*, unanimously held that the Federal Trade Commission (FTC) is not authorized to demand monetary relief for the purpose of obtaining restitution under section 13(b) of the Federal Trade Commission Act. Section 13(b) authorizes the FTC to seek temporary and permanent "injunctions" against unfair and deceptive trade practices "if such action would be in the public interest." It has been the FTC's longstanding practice to demand equitable monetary relief under section 13(b), despite the section containing no language explicitly authorizing such relief.

Here, the FTC won a judgment against Scott Tucker, whose companies unlawfully misrepresented the terms of "payday loans" it issued to customers. The district court ordered that Tucker and his companies pay $1.27 billion in equitable monetary relief under section 13(b). Tucker's companies challenged the order, arguing that section 13(b) did not authorize such relief. The Supreme Court agreed, holding that section 13(b) does not empower "the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." It reasoned that while the section authorizes injunctions, injunctions differ from equitable monetary relief. If Congress intended to authorize broad equitable in section 13(b), it could have done so, as it expressly did in sections 5(l) and 19. Thus, while the Commission may still seek restitution and disgorgement under sections 5(1) and 19, which require a prior administrative proceeding, it may no longer do so under section 13(b). The Court left open the prospect of Congress passing new legislation to authorize such relief under section 13(b).

The second case, *NCAA v. Alston*, considered whether the NCAA's eligibility rules regarding compensation of student-athletes violate federal antitrust laws. NCAA bylaws contain an 'amateurism rule,' which prohibits student-athletes from competing in intercollegiate sports if they "[u]se[] [their] athletics skill (directly or indirectly) for pay in any form in [their] sport." In 2014, a group of student-athletes challenged NCAA compensation restrictions in district court. The court held that "NCAA limits on education-related benefits are unreasonable restraints of trade in violation of section 1," and the Ninth Circuit affirmed.

At the Supreme Court, the NCAA cited the Court's previous decision in the 1984 case *NCAA v. Board of Regents* to argue that the NCAA's amateurism rule should not be subject to a detailed rule of reason analysis. Rather, it argued, amateurism is a defining feature of college sports, "necessary for the 'product' of amateur college

sports to be available at all." Thus, the amateurism rule should be upheld as procompetitive. By contrast, plaintiffs argued that increasingly lucrative television contracts, which bring in billions in revenue each year, differentiate the 1984 intercollegiate sports market from its present day counterpart. Thus, the truncated, "quick look" analysis applicable in *Board of Regents* should not apply here. Under a full rule of reason analysis, plaintiffs argued, the anticompetitive harms associated with the amateurism rule outweigh any procompetitive benefits.

At the time of writing, the Court had not yet reached a decision on the merits of this case. However, the Court would go on to find for the plaintiffs and affirm the lower court's opinion. Justice Gorsuch, writing for a unanimous Court, observed that the NCAA never challenged plaintiffs' market definition, allegation of monopsony power, or its fundamental characterization of the challenged activity. Rather, "this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control." On the other side, "the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market." Thus, the only question was whether "the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis."

Harkening back to *Board of Regents*, the Court acknowledged that "[w]ithout some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible." In such cases, a "quick look" analysis may be appropriate. The amateurism rule falls outside the scope of necessary agreement, however, for "[n]obody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined." Thus, the district court was correct to apply a more detailed rule of reason analysis to determine "whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means."

In evaluating the district court's application of the rule of reason, the Court marched through the rule of reason's three-step framework. For the first step, the NCAA "did not meaningfully dispute" that its compensation restrictions "produced significant anticompetitive effects." As to the second step, the NCAA failed "to establish that the challenged compensation rules . . . have any direct connection to consumer demand" but nevertheless demonstrated that "some" of its compensation restrictions "may" be procompetitive effect "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." On the third step, the Court held that the district court permissibly found the challenged restraints "patently and inexplicably stricter than is necessary'" to achieve any purported procompetitive benefits. Thus, the Court affirmed.

Importantly, the Supreme Court's decision extends only to "education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships." It does not extend to the NCAA's restrictions on non-education related compensation. However, Justice Kavanaugh's concurrence signaled that these may also be open to challenge: "[T]here are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification." While no other member of the Court joined Justice Kavanaugh's concurrence, this language signals that the Court may not be done with antitrust challenges to the NCAA's compensation rules.

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