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in this issue

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Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. In *Three Point Shot*, we will attempt to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Ex-Footballers Sacked on First Play from Scrimmage in Antitrust Lawsuit Against the NCAA

Between talks of changing the BCS playoff structure, student athletes trading jerseys for tattoos (*see Three Point Shot, infra),* and convicted sex offenders scaring away star recruits, the harsh glare of the national spotlight seems to almost always be on the National Collegiate Athletic Association ("NCAA"), its member institutions and its top student-athletes. In 2011, far away from the national glare, some lesser known, ex-Division I football players had their day in court against the NCAA regarding certain alleged antitrust violations, but were sacked on their first play from scrimmage.

In March 2011, former Rice University defensive back Joseph Agnew and North Carolina A&T kicker Patrick Courtney filed a federal antitrust action against the NCAA alleging that the NCAA violated Section 1 of the Sherman Act by prohibiting its member institutions from awarding multiyear scholarships to student athletes, and by imposing an artificial cap on the number of scholarships that each Division I team could offer.

In their complaint, Agnew and Courtney alleged that they were recruited out of high school for their football prowess by a number of Division I schools, eventually accepting full football scholarships to play at their respective universities. However, because of the NCAA bylaws, they were only guaranteed one free year of education, room and board. Both Agnew and Courtney suffered football-related injuries and, as a result, their respective universities did not renew their athletic scholarships to cover all four years of school.

Agnew and Courtney argued that, in a competitive market free of the NCAA restrictions, they would not have incurred any tuition expenses because they would have received multiyear scholarships that covered the entire cost of their bachelor's degrees even if they were injured. Further, they argued that the NCAA's scholarship limits forced student athletes who do not have their scholarships renewed to pay a lot more than they would have in a competitive market.

The NCAA's primary response at the district court level was that the plaintiffs had failed to identify a relevant market. This, of course, is necessary to plead a successful Sherman Act claim. Calling a quick audible, the plaintiffs urged the court to use a "quick-look" approach to analyze the anti-competitive effects on the market, which, they argued, allowed them to avoid identifying such a relevant market.

The district court sided with the NCAA and dismissed the case with prejudice, holding that the NCAA's proscription of multi-year scholarships and its restriction on the number of scholarships a school can award did not violate the Sherman Act.

Plaintiffs threw the red flag and challenged the district court's call in the Seventh Circuit. However, the Seventh Circuit affirmed the district court's decision to dismiss the amended complaint. Though the court of appeals disagreed with the district court that the plaintiffs could not have alleged a relevant cognizable market, it agreed that, in this case, the plaintiffs had not sufficiently identified a relevant cognizable market in their complaint. In doing so, the appeals court focused on the removal of two items in the plaintiffs' amended complaint which were in their original complaint: a heading entitled "Relevant Market," and a sentence stating that a bachelor's degree from an accredited university was a distinct product market. The Seventh Circuit interpreted the plaintiffs' omissions to be a strategic maneuver and also to reflect a belief -- albeit an erroneous one -- that they did not need to identify a relevant market. The appeals court also agreed with the district court's analysis that since a bachelor's degree is not earned upon payment, and a student only pays for the opportunity to earn a bachelor's degree, the complaint failed to identify a product market for bachelor's degrees.

Interestingly, in February 2012, while the Agnew-Courtney case was still pending, the NCAA adopted a regulation that will now permit member institutions to award multiyear scholarships. This new regulation was not favored by all NCAA schools and survived an override motion by only two votes. The recruiting advantage that multi-year scholarships might provide apparently troubles some member schools.

Still, the attorney for Agnew and Courtney, Steve Berman, like Herm Edwards, apparently, "plays to win the game." In his version of a postgame press conference, Berman stated that "[although] [t]he court rejected most of the NCAA's arguments, [it provided] us a road map on how to plead this case, and we intend to do so with a new plaintiff."

True to his word, Berman filed another antitrust lawsuit against the NCAA on July 25, 2012, on behalf of former college quarterback John Rock. Let the games begin!

OMG! LOLs No Longer Cause for SMH* from the NCAA

What do you get when you make 233 phone calls to college basketball prospects? No, not a cell phone overage charge. If you were former Oklahoma and Indiana men's NCAA basketball coach,Kelvin Sampson, it would get you a pink slip and a difficult road to re-employment.

At least those were the consequences until recently, when the NCAA deregulated the number of phone calls, texts, and other communications that Division I men's basketball coaches can make to prospective recruits. The NCAA sounded the buzzer on the old

policies to make it easier for college coaches to build relationships with prospects, and to curb the influence third parties have in the recruiting process.

Previously, rule 13.1.3.1.3 of the NCAA's Division I Manual limited the frequency of phone calls recruiters could make to men's basketball prospects, and rule 13.4.1.2 proscribed electronically transmitted correspondence, including texts and instant messages, to prospective student athletes, other than e-mails and faxes. The announced change will presumably amend both rules.

According to at least one source at the NCAA, the change reflects a more relaxed attitude toward phone call violations as the NCAA instead must "d-up" against more pressing issues. It also may have been in response to the building number of infractions and violations by coaches and schools under the previous rule.

In the case of Coach Sampson, the allegations included that he had provided false information to NCAA enforcement staff; but, at their core, they flowed from improper phone calls placed to potential recruits. Under the new rules Sampson may not have fouled out. And the new rules may also have saved Baylor basketball from the three years' probation it received for 738 impermissible texts and 528 improper calls.

The NCAA's recent announcement additionally permits "some contact at a prospect's educational institution during the junior year." While what constitutes permissible contact has not yet been detailed, the amendment may provide men's basketball coaches worried about facing an Urban Meyer-type predicament a much needed timeout. In May, Meyer, the current Ohio State and former Florida football coach, self-reported a secondary violation when visiting recruit Noah Spence at his high school game. Meyer headed to Spence's coach to wish him well when Spence himself approached the coach to say, "Hello." Meyer replied, "Good luck." Those keeping score on whether wishing a recruit "good luck" before a game will still be considered a violation in men's college basketball should probably keep their eyes on rule 13.1.6 of the NCAA's Division I Manual, which governs contact at specified sites and during the day(s) of competition.

The NCAA's deregulation announcement also extends to private messages via social media, but public messages will still receive a full-court press because of the prohibition against publicizing recruiting events, which likely keeps intact section 13.4.3, *Advertisements and Promotions*. This distinction means that the comically impermissible tweet by Memphis basketball coach Josh Pastner, in which he accidentally mentioned a recruit's name, and a student's improper Facebook page begging John Wall to attend NC State, both would still likely run afoul of NCAA rules.

The new policy on recruiting communications still may not be a complete slam dunk for NCAA Division I men's basketball coaches, but at least in many cases they will be able to avoid drawing a charge from aggressive regulators.

* Editor's Note: For those, like me, who are somewhat text-illiterate, SMH stands for "shaking my head."

Not Quite Harvard v. Yale (1968), ESPN Wins When Battle Between Ohio "Sunshine" Law and Federal Student Privacy Statute Ends in a Tie

There are a lot of ways for student athletes (and their coaches) to get into trouble but, until recently, trading school memorabilia for tattoos was probably not on anyone's Top Ten List. In March 2011, a tit-for-tat[too]-related scandal erupted when head football coach Jim Tressel revealed that he had not disclosed to higher-ups certain e-mails implicating starting quarterback Terrelle Pryor and several other players who had made such an exchange with a local tattoo parlor. Under National Collegiate Athletic Association rules, this fell under the category of accepting improper benefits, and Tressel ultimately resigned.

During the resulting NCAA investigation, at least 20 media organizations, including ESPN, sent public records requests to Ohio State to access documents related to the scandal. Among other things sought by the media were e-mails with the key word "Sarniak," which referred to Ted Sarniak, a Pennsylvania businessman and mentor to Terrelle Pryor and a recipient of Tressel's e-mails regarding the tattoo parlor exchanges.

The media companies' requests were made pursuant to Ohio's so-called Sunshine Laws, a/k/a the Public Records, Open Meetings & Personal Information Systems Act. In an effort to avoid disclosure, the University invoked the federal Family Educational Rights and Privacy Act ("FERPA"), which prohibits educational institutions from releasing "education records." The University also argued that certain of the other records were protected by the attorney-client privilege.

In response to the University's action, ESPN picked up the ball and filed a lawsuit asserting that FERPA was inapplicable to the e-mails, and that Ohio State was violating state public records laws by not complying with its request. ESPN advanced two arguments that the e-mails were not educational records. First, ESPN argued that the records concerning Sarniak and compliance by Ohio state coaches and administrators with NCAA regulations did not directly involve Ohio State students or their academic performance. Second, they argued that the e-mails were not "maintained by an educational agency or institution," and thus they did not fall within FERPA's scope.

After wending its way through the lower courts, the Supreme Court of Ohio, on June 19, 2012, made a final decision, finding merit with both parties' arguments on the applicable law.

As to the scope of FERPA, the court found that Ohio State was correct in asserting that FERPA prohibited the disclosure of the requested e-mails. As to the argument that the e-mails were not educational records under FERPA, the court took a broad view of the definition, holding that e-mails only need contain information directly related to students (in this case, information identifying the student athletes) to qualify. The court rejected the argument that the e-mails had to contain information related to students' academic performance in order to qualify as an educational record.

As to the issue of who maintained the records within the meaning of FERPA, the court also agreed with Ohio State, finding that the Ohio State Department of Athletics properly "maintained" the e-mails by retaining copies of all e-mails sent to or by any person in the department, and keeping all documents related to its investigation of the tattoo scandal in secure electronic files.

Although the court agreed with Ohio State that FERPA barred the disclosure of the e-mails identifying student athletes, it also agreed with ESPN that the e-mails should be released. How did the court square that circle? It ordered Ohio State simply to redact the e-mails to delete any information that personally identified any students or their parents, and provide ESPN access to those redacted e-mails.

So, though the score was FERPA - 1, Sunshine Law - 1, it appears that ESPN was the victor and plunged over the goal line with the requested e-mails.

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