Final Cut_Antitrust & Sports

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SPEAKERS

Steven Valentino, Introductory Voice, Mr. Kessler

I **Introductory Voice** 00:05

Welcome to a hard look the Administrative Law Review podcast from the Washington College of Law. We'll discuss how administrative law impacts your daily life from regulatory actions by agencies and the litigation over them to the balance of power among branches of the government. This is a hard look.

S **Steven Valentino** 00:30

Hey, sports fans! Welcome to a sports themed edition of a hard look. Today I'm joined by Mr. Jeffrey Kessler of Winston and Strawn. Today we're going to be looking at the intersection of professional and collegiate athletics with the antitrust laws. Before we dive into our subject for today, allow me to introduce our guest. Mr. Kessler is a partner at Winston and Strawn, where he's the CO executive chairman and co chair of their antitrust and competition practice. His specialties lie in the antitrust and sports law world. His legal prowess and tremendous experience and litigation has led him to work on and argue groundbreaking cases in the world of antitrust law before the Supreme Court, such as Zenith versus Matsushita, and the most recent decision in the world of college athletics, NCAA V. Alston. And as a disclaimer to our listeners, the views expressed today by our guests are his own and are not a reflection of the views held by his firm organizations, clients or other individuals, to which his opinion could be imputed. Mr. Kessler, thank you for joining me, and welcome to this episode of A Hard Look.

M **Mr. Kessler** 01:24

So thank you for inviting me.

S **Steven Valentino** 01:28

All right, so let's get started. So the history of the antitrust laws begins with the Sherman Act,

not too long after the statutory regime was augmented by the FTC Act and the Clayton act. Could you illustrate for us the context and regulatory regulatory regime that results as a piece of these legislations?

M Mr. Kessler 01:44

So the laws you're referring to our antitrust laws, and what antitrust laws do is that they prohibit private parties, competitors or others from engaging in agreements that unreasonably restrain competition, or for engaging in conduct that excludes other competitors and leads to a monopoly? It's basically founded on the principle that consumers benefit, competitors benefit, the whole economy benefits, if companies are freely competing with each other, and that if companies can restrict competition or duly, then that's going to cause significant harm.

S Steven Valentino 02:39

Thank you. So I think it's sort of interesting that one of the first sort of challenges under the antitrust laws was actually a challenge with major or baseball, generally, in its early its early years. So the Supreme Court decided federal baseball club of Baltimore versus National League of professional baseball clubs. And Justice Holmes, in his opinion, seems to give a very interesting perspective as to how baseball works in that case. And as more of a matter of commerce, just generally, to what extent has this precedent sort of like informed the the genesis of the antitrust laws.

M Mr. Kessler 03:13

So it's really kind of a, a has not informed the antitrust laws at all. It was a very anomalous decision by the Supreme Court. Justice Holmes had some hostility towards applying antitrust requirements to baseball, I guess he was a big fan. And he wrote this opinion, that basically said that baseball is not commerce. So it's not commerce, therefore, is not subject to antitrust laws. Well, we all know that baseball is very large commerce. It's a multi multi billion dollar business. And so this idea that it's some kind of like pastoral exception, has not been followed by the Supreme Court in any other sport business. And it has not been followed in any other aspect of antitrust law. So it just sort of stands out as a kind of odd, awkward, and, frankly, inexplicable decision what he added today.

S Steven Valentino 04:29

I think we'll elicit that larger piece later when we start talking about media and other and collective bargaining, among other things. So and then recently, the Supreme Court issued a memorandum opinion over a case I believe that came out of the Ninth Circuit, NFL versus Ninth Inning Incorporated, where Justice Kavanaugh mentions that the NFL operates as a joint venture for purposes of the antitrust laws. Does that term have significance and what does it mean in the larger context?

M Mr. Kessler 04:57

M Mr. Kessler 04:57

So yes, sports leagues In our collection of competitors, the teams will compete for players who can compete with each other a sponsorship for fans in some cases, and they form a joint venture together. And this happens in the commercial world. And what that means is, number one, they are still subject to antitrust laws. The Supreme Court made that very clear, specifically discussing the NFL in a case that it had before and in fact, unanimously, ruling, the name of the case was American Needle, ruling that they were subject to antitrust laws. But because of the joint venture structure, and the need to cooperate in some areas, they are given treatment under what's called generally the rule of reason for many of their restrictions. So what does that mean? That means they can try to justify their restrictions on competition by showing that they serve a pro competitive objective in a way that is not more restrictive of competition, that is reasonably necessary. And the court will look on balance, whether they're pro or anti competitive effect. So what that means some restrictions might be okay, some restrictions are not going to be okay. And there may be some restrictions still subject to greater scrutiny. But the league's will argue that their joint venture structure should give them this rule of reason, review. Awesome.

S Steven Valentino 06:49

So we think about the modern context and application, let's let's think about the the needs of the business enterprise that are professional athletics for a moment. We'll talk about college athletics later on in the episode, but I think two of the major areas of interest and especially ones that I think everybody's generally familiar with our collective bargaining and media, but let's start with media and licensing for a moment. So for starters, what are like the significant interests that leagues have, and media generally, in this space?

M Mr. Kessler 07:18

So so the big issue here from an antitrust standpoint, is that the league's want to collectively negotiate for their national media deals. In a sport like football, for example, there are only national media deals, there's some local radio, but for everything else is done on a national basis. In other sports, like, let's say basketball, or hockey or baseball, there's usually a combination of national deals and local deals. For the national deals to bargain jointly, the NFL and other leagues had to get an exemption from the antitrust laws. So legislation was passed by Congress called the sports broadcasting act. And that's what allows them to engage in these joint negotiations without having to pay us antitrust scrutiny. Absent that objection, they would be absolutely absent that exemption, they would be entitled to no particular deference, and they would be subject to regular antitrust review of those agreements. And by the way, that is the case, for example, in they're gone over the air agreements, which are not subject to the sports broadcasting protection.

S Steven Valentino 08:47

So does this also sort of encompass I think, a lot of sports fans who are trying to watch games but don't have access to them? Because of media blackout sounds does this? Is this where this sort of comes from as well? Or is this just a matter of negotiation?

M Mr. Kessler 09:01

Well, some of its negotiation and some of its legislation, part of the sports broadcasting act, for example, the NFL agreed not to compete against college football. On certain days, that's why they gave us historically have been on Sundays. And so there's some of that there are also commitments The NFL has made about when it would have local blackouts or not. And I think frankly, today, the the idea of local blackouts is almost an historical artifact, there really aren't too many anymore because I think it's now widely recognized that having the games available on media does not really detract that much of in person attendance, which was the original concern and so most games and all the sports can be televised if they need to agents to do so regardless of any type of sellout restrictions.

S Steven Valentino 10:00

So let's change to collective bargaining, which I think often strikes at the heart of a lot of, well, a lot of sports fans in general, because they care a lot about their athletes. And in addition, it's it's significant. Every League has a Players Association. And it seems, almost every time you look at the headlines, there's always some sort of disagreement between the owners, the league itself and the Players Association. I mean, most notably, and recently, we just had the MLB Players Association, the owners finally come to terms so we can have major league baseball resume, and I believe in a couple of weeks, we have opening day. And then a decade ago, the NHL had its own lockout, and I own the 90s. The NHL also had a referee lockout that was tremendous and ultimately led to the season being significantly postponed. So one of the major aspects of collective bargaining are minimum salary requirements, salary, caps, luxury taxes, you know, the whole nine yards of really almost anything that goes into really the employment perspective of professional sports. So how, what are the important parts here for the antitrust laws? Where does collective bargaining significance come in?

M Mr. Kessler 11:07

So it's very significant. The reason is that, ordinarily, under the antitrust laws, you could never have something like a salary cap, a salary cap would be a price fixing agreement of labor in the labor market. That's what narrowly, what we call per se illegal means that you don't even get to try to justify it. The reason you can have those provisions in professional sports, is because of the labor exemption to the antitrust laws. And what that exemption says is if a union bargains with the employer for a collective bargaining agreement, what's in that agreement is not subject to antitrust attack. And the reason for that is the union itself is given an antitrust exemption to bargain collectively and the Supreme Court is held. Therefore, if they enter into an agreement with their employers, that agreement as well, must be subject to an exemption from the antitrust laws. So what you see in sports is in bargaining, the unions engage in trade offs, they get free agency, the right to move from team to team, they get substantial benefits, they get salary guarantees, they get substantial minimums, they get large retirement benefits. And all of that might be traded for something like a salary cap. And that's how the bargaining goes back and forth. And, and in some sports like baseball, the players have never made that trade, they've given other things like a competitive balance tax instead. But those types of issues get worked out in the bargaining table. And if they are in the bargaining table, there's not going to be antitrust. One of the big issues that happens when you have for a lockout example, if there's no union, a lockout can be challenged under the antitrust laws as an

antitrust violation. And in fact, in 2012, the NFL Players Association actually stopped being a union. So it could file an antitrust attack against the NFL lockout. And ultimately, that settled before any games were missed. And in fact, I'm a strong believer that that ability to use antitrust against the lockout is a great thing for fans who this is one thing that I think will help lock outs of actually interrupting the seasons, when the players are willing, the athletes are willing to end their union in order to do so.

S Steven Valentino 14:10

It's just like an incredible and significant steps. I think that's super interesting. So also with collective bargaining to some extent, but more so I think, even to some degree between the owners. I know, recently, NFL proposals for changing overtime rules, among other things have been getting tossed around deciding rules of the game for like different leads. Those have regulatory impact for antitrust purposes.

M Mr. Kessler 14:34

Well, again, if they're the product of collective bargaining, no. If they're the product of collective bargaining union, then yes, and the Supreme Court has recognized that's certain restrictions that leagues impose the rules of the game. How long how long is the game last how many players are undefeated? out those types of things you really must agree upon. And so probably those rules are not going to be subject to any successful antitrust attack, even if there was no unit. But when you're dealing with economic Terps, compensation, benefits, you know, intellectual property licensing, sponsorship, those are things which could be subject to antitrust review, if there's no labor exemption that applies.

S Steven Valentino 15:31

And I think we're going to touch on that in a moment here when we start talking about college athletics and the case that you are more than familiar with. So let's let's shift gears, let's talk college athletics. I've had friends that have been athletes, I know a number of people that are athletes, or otherwise know people who were athletes. So the Austin decision not only provided a significant pathway for professional athletes, or I'm sorry, college athletes to obtain compensation for their participation in college athletics. But before we get there, I think it's sort of interesting to highlight the history of college athletics in the anti trust world. I know NCAA v. Board of Regents has studied among anti trust students. I know I've studied it when I took anti trust law. And it's probably one of the more historical landmarks of the past context of college sports in the antitrust world. Could you illustrate for us sort of the historical relationship between the college athletics world and the antitrust laws?

M Mr. Kessler 16:25

Yes, so the case Board of Regents, was about 38 years ago when the Supreme Court and at that time what was happening is the NCAA was restricting the broadcast of college football. It wanted to have total control, and not permit the individual schools or conferences to do their own broadcast deals. They actually got sued by several of the major schools and conferences,

who said no, this is an antitrust violation, we should be allowed to do this broadcasting on our own, and you're restricting output. That's a big antitrust. No, no, if consumers want more college football games broadcast, they should be able to get more college football games broadcast. So that came before the Supreme Court. And the Supreme Court ruled there, that that was an antitrust violation, that it was competitors getting together, that it was unduly restricting competition. And in fact, they even condemned in the what they call the quick walk, that we can quickly decide. There's no pro competitive justifications for this. This is illegal, they struck it down. And that's, by the way, what led to the explosion of college football and television, the creation of all the conference networks, having it on multiple networks, having it on cable channels, having it streaming today, you know, on a given Saturday, you know, you could watch 15 different college football games, you know, from wherever your location, so it's a totally different world. Ironically, in that decision, the Supreme Court had also what we call doctors, lawyers, which means they discuss something that wasn't part of the decision. And what they discussed is they said, Well, what about restrictions on amateurism? You know, that the NCAA has these rules that restrict the athletes are being compensated. Remember, I said that like price fixing their athletes could be a per se, illegal violation. And in that decision and border regions that Victus suggested that well, there was some rule of reason need for the NCAA to be able to have such restrictions, and to have a judge because they had a need to protect this amateurism product of which you know, might be justified under the rule of reason. For the next 37 years, the NCAA used that dicta to argue that they could restrict the compensation to the athletes in college any way they wanted to, and that they weren't subject to normal antitrust review. They should be given some special deference of special immunity like the labor exemption because remember this there are no collective bargaining agreements. In college. There are no unions in college right now. So they don't have any labor exemption. So So they will try to find some other way to restrict and and far more I bet into professional sports. Because basically the restrictions said, other than the scholarship as we define it, you could give the athletes nothing. And what happened over those 37 years is college, the business of college boards just kept getting bigger and bigger. Billions and billions of dollars were earned. So that by 2021, when this came back to the Supreme Court again in the Austin case that I argued college football and basketball alone. In D, one FBS football, the one basketball men's and women had more annual revenues than Major League Baseball, than the National Basketball Association, where the National Hockey League was second only to the National Football League. And, and they had a huge number of schools, something like 60 or 70, that earn more than $100 million a year in revenues, some close to $200 million, now exceeding 200 million. And everybody was getting paid except the athletes. And when I mean everybody, the strength and conditioning coaches in Alabama, which there to each bay for either $50,000 a year, which was more than the President of Alabama University math. And of course, Coach Saban made over $10 million a year just in the school. So the Supreme Court looked at all this. And they said, Wait a minute. We never meant 37 years ago, to say that the NCAA could do this. And even if we thought maybe they could do this 37 years ago, they certainly can't do it anymore. Given that these are not extracurricular activities. These are labor markets of big businesses that are completely being what we call monopsony dyes, which is a monopoly of a labor market of you know, and restricted this way. So they struck down the restrictions of the NCAA, we were challenging. And consequently, after that, the NCAA has been repealing more restrictions, which it did on the licensing of names, images and likenesses of the athletes, which was not a direct challenge. And it also did, but the implications of Austin's ruling was that was now all going to be found in the legal, so the NCAA had a suspended. And that has led to an explosion of economic opportunities for college athletes, not just by the way in the high revenue sports, like basketball or football, but really across the board. You know, we have female athletes and, you know, in volleyball, and in gymnastics, and you know, and then

tiny squats, you know, with no revenues, like rowing, you were athletes, and now getting real opportunities to commercially benefit from their names, images and likeness and their social media activities and many other things that they're doing.

S Steven Valentino 23:36

So also like on that, now that we do have this decision, we have these results that really provide pathways and opportunities for future growth, will we it's impossible to see a manifestation of players associations and organizations representing athletes, are there. Even with the antitrust concerns? Is there a legislative hurdle that also might need to be cleared for all of this since we are dealing with both public and private institutions?

M Mr. Kessler 23:59

So it's very complicated. You certainly could have player associations develop, you already have one called the college players association, led by a gentleman named remota. Uma. It's not terribly organized on each campus. It's more like an overall advocacy group that does great things for the athletes. But it's not like what I think you're thinking of, which is in association with chapters and each college campus and getting the athletes involved everywhere. There are groups who are thinking of forming nets that are going out to colleges and joint to do that, forming a union is more complicated that was tried at Northwestern University, and in fact, remotely human. His organization was very involved with that along with the steelworkers. And they had an election to form a union to collectively bargain and that was appeal to the NLRB. And the reason the the National Labor Relations Board Want to decide those things. The reason the NLRB did not certify a union is because most of the big 10 in which Northwest and born were state schools, who had exemption from unions being formed, or whatever in federal law can couldn't mandate that as it was written. So the NLRB said it didn't wasn't practical to have a union in a league of football teams were only one of the teams was private, and could be unionized, because the rules and things have to be negotiated across the board. Putting aside whether that was the right or the wrong decision, our decision. Since then, there have been no attempt to unionize as aggressively and my own view is to make unionizing successful. You will need congressional legislation that would basically say that the athletes at state schools could also be immunized because most of the most profitable, highest revenue programs are, in fact, at state schools. And so you need them to be part of this. There is legislation pending in Congress to do that, as well as some other things. I don't know whether it's going to get passed. There are a lot of hurdles, as you know, in Congress passing almost anything, particularly in the United States Senate. And so I don't know if that bill could come out as the Senate is now operating. Maybe in the future, that will be different. But I think that might be required to really have lots of unions having said that, the NLRB general counsel has already issued an opinion under the Biden administration, that it views athletes can be employees, and that therefore they should have a right to formulate unions. And there have been some unfair labor charges filed recently complaining of schools, impeding athletes rights to organize and express themselves. So you may see some real activity on this in the next year or so.

S Steven Valentino 27:18

Awesome. And then also with the on the media component of college athletics in the modern sphere. I know, we talked to ncav Board of Regents but thinking now in a post Alston world is

there any is there are we going to see a significant shift in how media rights deals kind of work, like between universities that just want to individually promote their own programs, or even join together and do like a conference wide sort of promotion.

M Mr. Kessler 27:43

So there are two significant issues here. One is a small one, but a lot of college fans will like, which is that I do think you're going to start once again seeing very soon. Video games and other electronic games involving college sports with player names and image likeness is included as well. That was discontinued because of the NCAAs policies against letting the athletes participate. And now that those policies have gone, those commercial talks are already on the way and I think you're gonna see that type of media come back and proliferated a number of the college sports starting with football, but probably going to basketball and other sports as well. Second, on the broadcast deals, I think the big issue is going to be whether the athletes will be able to be compensated for their names, images and likenesses there. That subject is actually part of a lawsuit that I now have against the NCAA with my co counsel Steve Berman, called House versus the NCAA. It's kind of a next step following the Alston case. And what are the issues in that case, is the restrictions which prevent the athletes from getting paid by the schools for their names, images and likenesses and broadcasting? Right now what happens is the schools convey those rights to the network's but they can't pay the athletes anything for them. So they just patiently take them for free to get into the networks. And so we think that's a lawful under the antitrust laws. And we'll find out within a year or two whether we're correct.

S Steven Valentino 29:29

So then also with the scheduling and coordination aspect as well. Are their unique antitrust applications for college athletics, I mean, conference structure, among other things, but what is sort of the interesting questions that spawned from that.

M Mr. Kessler 29:44

So it could come up, for example, there have been proposals to consolidate the conferences. And I think that would be subject to antitrust review if let's say the five power conferences All set, let's just form one, like many NCAA, and not compete with each other. And we'll set common restrictions on how we recruit and compensate the athletes and things like that I think such a merger would have really antitrust issues, if that were to go forward in terms of that. So yeah, there could be issues that come up on the structure in the future of the NCAA. The NCAA right now is trying to decentralize its functions, and it has committees in Division One who was supposed to make proposals, and we'll have to see what they only get repose in terms of how much autonomy to give to the conferences and what the restructuring will be, but I can assure you antitrust principles will play a significant role in limiting what they can and can't do.

S Steven Valentino 30:53

Mr. Kessler, thank you so much for today's episode. This was a really cool and interesting

discussion. I hope sports fans really got to see the sort of legal side of a lot of professional and college athletics today. Do you have any parting comments for our listeners,

M Mr. Kessler 31:08

the parting comment I would make is that something fans don't always appreciate is that for these athletes, this is their livelihood. It's not just playing games. By the way, that's true of college athletes as well, in many cases, many of them aren't always able to graduate. They're, they're, they're have such demands on their time and effort while they're in school. And I'm talking about more than 40 hours a week before they go to even a single class. And so this is their ability to reap what they can. And the restrictions that athletes face, are not only often, in my view, antitrust violations and illegal, but they're also often socially unjust. You know, many of these athletes are people of color. Many of these athletes come from backgrounds and very limited, if any means and the idea of having systems where either the owners repol the rewards, or the college athletic directors or coaches we bought the war rewards, as opposed to these athletes, really is not only illegal, in my view, but it is morally unjust. And what we try to do in a lot of these cases, is achieve outcomes that everyone can appreciate from a labor market standpoint, because we're really talking about here is labor. Yes, some of them do very well and make a lot of money. And I don't we shouldn't begrudge them that, but many of them come away with bodies that are crippled and very short careers. And that's the risk they take by being in this profession.

S Steven Valentino 33:03

Thank you again, for your wisdom and insights. And in conclusion here as always, I would like to thank our guests for his substantial and important contributions to the discussion today, the American Bar Association's Administrative Law Section, the Administrative Law Review, and of course, the podcasts own Kubra Babaturk for their continued support, resources and work on making this podcast a continued contributor to the important discussions happening in the world of Administrative Law. Thank you and see you on the next episode. Have a hard look.