ALSO INSIDE: Annual Meeting • New Attorneys Take Oath
Diversity Awards • Women in Law Conference

THE OKLAHOMA BAR
Journal
Volume 89 — No. 26 — October 2018

SPORTS LAW

The Lasting Impact of *NCAA v. Bd. of Regents of The University of Oklahoma*: The Football Fan Wins

By Mary H. Tolbert and D. Kent Meyers

IN *NCAA V. BD. OF REGENTS OF THE UNIV. OF OKLA.*,[1] the United States Supreme Court struck down the "television plan" of the National Collegiate Athletic Association (NCAA), which was designed to limit the total television broadcasts of college football games and the number of appearances of individual schools, as well as to fix the compensation to be received by individual schools. A 1995 article in the *Oklahoma Law Review* documented the increase in television broadcasts and television revenues – as well as the increase in live attendance – that followed the Supreme Court's opinion.[2] Now, nearly 35 years after the Supreme Court's opinion (and over 20 years after the original article), we take a brief look at the continuing impact of the *NCAA* opinion.

HISTORY OF TELEVISION AND COLLEGE FOOTBALL

In 1938, the University of Pennsylvania televised one of its home games. From 1940 through the 1950 season, all of Pennsylvania's home games were televised.[3] As the Supreme Court noted, "[t]hat was the beginning of the relationship between television and college football."[4]

From the outset, the NCAA felt a need to try to control the relationship between individual schools and television. In 1951, a television committee appointed by the NCAA delivered a report concluding, based on preliminary surveys, that television broadcasts had an adverse effect on live attendance and that, "unless brought under some control threatens to seriously harm the nation's overall athletic and physical system."[5] The report emphasized that collective action was necessary to control the television problem.[6] As a result, a committee was appointed to develop an NCAA television plan.[7]

Beginning in 1951, the NCAA adopted a series of plans which restricted the number of television broadcasts of college football games.[8] The plan at issue in the NCAA litigation was adopted in 1981 for the 1982-1985 seasons (the plan).[9] Under the plan, the Television Committee awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two carrying networks without ever consulting the NCAA members.[10] In separate agreements with each of the carrying networks – ABC and CBS – the NCAA granted each the right to telecast the 14 live exposures in exchange for payment of a specified "minimum aggregate compensation to the participating NCAA member institutions" during the four-year period in an amount that totaled $131,750,000.[11] The plan also contained appearance requirements and appearance limitations that pertain to each of the two-year periods in which the plan was in effect.[12] In essence, the networks were required to schedule appearances for at least 82 different member institutions during each two-year period.[13] No member institution was eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks.[14]

THE ANTITRUST LITIGATION

In 1981, the regents of OU and the University of Georgia brought a private antitrust action against the NCAA seeking an injunction to prevent the NCAA from enforcing

its television plan, which was designed to limit the total television broadcasts of college football games, as well as the number of appearances of individual schools.[15] The district court found the NCAA's television plan to be *per se* unlawful under Section 1 of the Sherman Act and granted the relief sought by the universities. After the 10th Circuit affirmed, the case reached the United States Supreme Court.

Although the Supreme Court held that the plan must be evaluated under the rule of reason, rather than the *per se* rule,[16] the court found the NCAA television plan on its face constituted a restraint upon the operation of a free market.[17] The court further found the universities to have shown the television plan had raised prices and reduced output, both of which were unresponsive to consumer preference.[18] In response to this showing, the NCAA failed to establish any procompetitive efficiencies that might justify the television plan.[19] Accordingly, the Supreme Court affirmed the judgment of the lower courts, holding the NCAA's television plan violated Section 1 of the Sherman Act.[20]

AFTERMATH OF THE *NCAA* LITIGATION

In its opinion, the Supreme Court made the same prediction that each court before it had made: without the plan, output (*i.e.*, broadcasts of college football games) would go up. History has shown this prediction to be accurate. Rather than two networks broadcasting a total of 14 exposures, numerous networks now broadcast virtually every college football game. Current networks for college football games include ABC, ESPN, ESPN2, ESPN3, ESPNU, ESPN+, CBS Sports Network, Fox, Fox Sports 1, Big Ten Network, PAC-12 Network, ACC Network, SEC Network, Longhorn Network, Spectrum and Regional Sports Network. Additionally, games may be streamed on Facebook. Broadcast listings indicate that for the 2018 season more than 50 college football games will be broadcast each week.

As one would expect, in light of the competition among networks to air college football games, the revenues to colleges and universities from television contracts have increased dramatically. In 1982, the plan called for member institutions to receive approximately $130,000 in revenue from television appearances. The most recent athletic department budget for the University of Michigan indicates that that school will receive approximately $51 million in 2018 in television revenue, although this figure includes both football and basketball.

One of the primary justifications offered by the NCAA throughout the litigation in support of the plan was research "which tended to indicate that television had an adverse effect on attendance at college football games."[21] The plan was thus intended "to reduce, insofar as possible, the adverse effects of live television ... upon football game attendance…"[22] If this research had been correct, the surge in television broadcasts previously described would have been expected to nearly eliminate live attendance. It has not been so.

Even by 1994, it was clear that the NCAA had been wrong about the impact of television broadcasting of games on live attendance.[23] As Berry Tramel, sports writer for *The Oklahoman*, recently observed, the NCAA failed to appreciate the general rule that when television access increases more people become interested in a sport, leading to increased live attendance rather than the opposite. Thus, while 100,000 seat stadiums were the exception prior to the *NCAA* litigation, they are now much more common.

Tramel emphasized that one of the significant problems of the plan had been that, due to the limitations on "exposures" for any individual school, the networks were frequently precluded from broadcasting football games between power schools with national interest. For example, in the fall of 1973, No. 8-ranked OU traveled to the Los Angeles Coliseum to play against the No. 1-ranked University of Southern California. OU and USC had been the top two teams in the 1972 football polls

As one would expect, in light of the competition among networks to air college football games, the revenues to colleges and universities from television contracts have increased dramatically.

and national interest in the game was high. Despite the rankings of these two football titans – and despite team rosters featuring Joe Washington and Lynn Swann – the game was not televised anywhere. Clearly, fans of college football are benefited when they are not shut out from viewing highly desirable football contests.

Tramel noted that schools offering less desirable contests have also found ways to increase the appeal of their broadcasts. For example, teams in the Mid-America Conference increasingly play college football games on weekday evenings. Although these games might not attract many viewers on a Saturday afternoon when there are many college football games to choose from, they are able to attract a national audience when there are fewer options.

Tramel did recognize, however, that the market for college football may now be reaching the saturation point. After years of increases in live attendance, college football attendance has declined slightly in the last several years. Students today do not necessarily consider attendance at football games to be an essential part of the college culture. They are more wedded to their phones and favor comfortable seating and protection from the elements. Some fans have also been alienated by conference realignment – driven by television revenues – that has eliminated traditional rivalries (*e.g.*, Oklahoma/Nebraska or Texas/Texas A&M) and added unfamiliar ones (*e.g.*, Maryland's addition to the Big Ten Conference). Further, the drive for television revenue has meant that, while athletic department revenue has increased dramatically over the past 35 years, athletic department budgets have, in certain cases, increased even more dramatically.

CONCLUSION

It is difficult to deny that the *NCAA* litigation has resulted in more improvement for consumer welfare than any other privately brought antitrust case. The NCAA's television plan had severely restricted the number of broadcasts of college football games. Further, the plan had frequently prevented networks from airing the most desirable games and essentially forced them to air less desirable games. Freed from the plan, the market responded to consumer demand with a massive increase in the number of broadcasts of college football games. Rather than reducing live attendance, these broadcasts have increased national interest in college football, leading to increased live attendance.

In its opinion, the Supreme Court recognized that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[24] A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.[25] By this measure, as District Court Judge Burciaga stated:

> The Court considers the result achieved by plaintiffs as an historic one: that by their prevailing in the lawsuit, plaintiffs have conferred a benefit upon a significant industry and a large segment of the public.[26]

Put otherwise, the Supreme Court's decision has been a prescription for the welfare of the consumer, fans of college football.

ABOUT THE AUTHORS

Mary H. (Molly) Tolbert is an advisory director at Crowe & Dunlevy. She is a graduate of the University of Michigan and Yale Law School. She is a regular consumer of college football broadcasts and roots for OU whenever they are not playing Michigan.

Kent Meyers is a director at Crowe & Dunlevy. He has a B.B.A. in finance and a J.D. from OU and a LL.M. from Harvard University. He is primarily engaged in antitrust litigation and teaches antitrust at OU. He co-hosts the TV show *The Verdict* on Cox.

ENDNOTES

1. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).
2. D. Kent Meyers & Ira Horowitz, "NCAA & Private Enforcement of Antitrust", 48 *Okla. L. Rev.* 669 (1995).
3. *NCAA*, 468 U.S. at 89.
4. *Id.*
5. *Id.* at 89-90.
6. *Id.* at 90.
7. *Id.*
8. *Id.* at 90-91.
9. *Id.* at 91.
10. *Id.* at 92.
11. *Id.* at 92-93.
12. *Id.* at 94.
13. *Id.*
14. *Id.*
15. *See Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276 (W.D. Okla. 1982).
16. *NCAA*, 468 U.S. at 103.
17. *Id.* at 106-08, 113.
18. *Id.*
19. *Id.* at 114-15.
20. *Id.* at 120.
21. *NCAA*, 468 U.S. at 90.
22. *Id.* at 124.
23. *See NCAA & Private Enforcement* at 687-697.
24. *NCAA*, 468 U.S. at 107 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).
25. *Id.*
26. *Bd. of Regents of the Univ. of Okla. v. NCAA*, Case No. CIV-81-1209-BU (W.D. Okla. Jan. 9, 1985) (order awarding fees).