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Plaintiffs Shoot an Airball Defining Labor Market in Monopsony Case Against NCAA

by Gerald A. Stein

Despite increasing calls to eliminate product market definition as a necessary element in merger challenges,[1] the Tenth Circuit recently re-affirmed its critical importance in rule-of-reason cases that allege agreements to unlawfully restrain trade under Sherman Act Section 1.[2] In *Wisne v. National Collegiate Athletic Ass'n,* the Tenth Circuit reversed the U.S. District Court for the District of Colorado's order granting a preliminary injunction that compelled the NCAA to retroactively apply a rule change that allows Division I athletes to compete for up to five seasons during a five-year period. The prior NCAA rule allowed athletes to compete for only four seasons in five years. The NCAA decided against applying the new rule retroactively because it believed that doing so would disrupt settled expectations of countless student-athletes regarding their expected roster spots and playing time. Plaintiffs represented a class of Division I athletes that would have benefitted from a retroactive implementation of the new rule but did not benefit from the actual prospective implementation.

In challenging only the application of the NCAA's rule (and not the substance of the rule itself), Plaintiffs alleged and the district court accepted a product market defined as "Division I athletics in the United States." Plaintiffs' expert supported this definition by arguing that, because the NCAA has monopsonistic[3] power to control which workers are allowed to participate in the Division I labor market, "Division I college sports are a unique labor market . . . distinct from other college divisions, minor league professional sports, and the major league professional sports."

On appeal, the Tenth Circuit explained that the relevant product market "is the arena within which significant substitution in consumption or production occurs" and forms the basis for the court to decide whether "the alleged restraint of trade has a substantial anticompetitive effect in that market." The court noted that, in a labor monopsony case, the relevant market is not of "competing buyers" but rather is "comprised of buyers *who are seen by sellers* as being reasonably good substitutes." Thus, the court carefully reviewed prior caselaw and the analyses presented by the competing expert witnesses to evaluate whether the market realities supported the proposition that all Division I athletes (*i.e.*, all genders in all sports) viewed all Division I universities as interchangeable. The court acknowledged that

[1] *See, e.g., Market Power without Market Definition,* Daniel Crane, Notre Dame Law Review, Vol. 90:1 at 31, 32-33 (2014) (*citing* multiple sources calling for the end of proving market power and concluding that "the handwriting is on the wall for market definition [in merger cases]"); *Remarks of Henry Liu, Guideline 2: The Importance of Direct Indicators of Competition in Merger Review* ("where there is direct evidence that a merger may substantially lessen competition, [the FTC] may choose not to rely on market definition and structural presumptions to make our case").

[2] *Wisne v. National Collegiate Athletic Ass'n,*___ F.3d___, No. 26-1309 (10th Cir. 2026) (finding that the district court committed clear error in finding a likelihood of success on the merits when plaintiffs failed to properly define a relevant market as the first step of the rule-of-reason analysis).

[3] As succinctly explained by the Tenth Circuit, a "monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals."

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the dispositive issue on appeal was "the question of market definition."

The Tenth Circuit rejected Plaintiffs' argument that "the NCAA is the sole 'buyer' for all athletes in the 'submarkets' of individual sports." Rather, the court found that it is the individual Division I universities—not the NCAA—that employ the athletes. Accordingly, the court held that "to the extent the district court's decision hinges on a finding that the NCAA is the relevant employer for purposes of defining the market, that finding is clearly erroneous." The court supported this rationale by finding it obvious that neither a football player nor a female gymnast looking for a Division I roster spot would view schools without those respective sports as reasonably good substitutes. The court reasoned: "Student-athletes do not seek to be 'hired' by any Division I university, but by a particular athletic program within a member university." The court concluded by stating that a "properly defined market is a prerequisite to the assessment of the anti-competitive effects and pro-competitive justifications of the prospective application of the new rule in that market. . . . And in every antitrust case, the relevant market must be properly identified before Sherman Act liability can be determined."

Wisne therefore highlights the importance of market definition in labor market monopsony cases.

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