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Litigator of the Week: Jeffrey Kessler Takes the Fight to Get NCAA Athletes Compensated from the Trial Court to the High Court

The Winston & Strawn co-chair represents college football players and men's and women's basketball players who this week scored a major, unanimous victory at the U.S. Supreme Court in an antitrust case against the NCAA.

By Ross Todd
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The 9-0 decision Justice Neil Gorsuch penned this week in *Alston v. NCAA* capped a remarkable string of wins for **Winston & Strawn** co-chair **Jeffrey Kessler** and his college athlete clients.

Kessler, our Litigator of the Week, handled oral arguments at the High Court, but he's represented college football players and men's and women's basketball players as co-lead counsel in the case for years now. The testimony and evidence he and his team put on in a 2018 bench trial before U.S. District Judge Claudia Wilken in Oakland helped convince the judge that the NCAA violated federal antitrust law by capping the education-based aid the athletes could receive. Wilken issued an injunction barring the NCAA and its member schools and conferences from capping benefits such as computers, science equipment, postgraduate scholarships, and aid to study abroad to the athlete plaintiffs. Last year the team convinced the Ninth Circuit to uphold that injunction, with Kessler and co-counsel **Steve Berman** of **Hagens Berman Sobol Shapiro** handling oral argument.

This week Kessler and company got those wins to stand up at the U.S. Supreme Court, which issued a landmark decision that will allow these college athletes to get a larger share of the billions of dollars in profits they help generate for their schools.

Litigation Daily: Who were your clients and what was at stake?

Jeffrey Kessler: Our clients were three separate classes of college players in FBS football (the highest level of play), Men's Division I basketball, and Women's Division I basketball. What was at stake was the ability of the class members to receive additional compensation and benefits from their schools beyond the strict limits imposed by the NCAA in the name of "amateurism." For many of the athletes in these classes, the ability to receive greater educational benefits, such as computers, scientific equipment, musical instruments, unlimited tutoring, graduate and vocational scholarships, study abroad programs and internships, and cash academic-achievement awards, had the potential to be life changing. Most class members would never make it to the professional leagues, and this was their one shot to reap some portion of the benefits made possible by the billions of dollars of revenues that they generate for their schools.

Jeffrey Kessler of Winston & Strawn.

Who all was on your team and how did you divide the work?

I was co-lead class counsel along with **Steve Berman** from the firm of **Hagens Berman Sobol Shapiro** and **Bruce Simon** from the firm of **Pearson, Simon & Warshaw**. At Winston, I was joined by my partners **Linda Coberly**, **David Feher**, **David Greenspan**, the late **Derek Sarafa**, **Jennifer Parsigian** and former partner **Sean Meenan**, and a broad team of associates that included **Adam Dale**, **Scott Sherman**, **Aaron Steeg**, and former associates **Tim Nevius**, **Ben Gordon**, **Joey Litman**, and **Georgino Hyppolite**, and paralegal **Corrine Kyritsopoulos**. At the trial, we divided up responsibility for witnesses, motions, and other key projects so that the entire team was afforded the opportunity to work on all aspects of the trial. Before the Supreme Court, I delivered the oral argument, however, many contributed to

the briefing and preparation, with particular credit going to **Linda Coberly**, the chair of Winston's appellate & critical motions practice.

How did you initially get involved in the antitrust challenges to the NCAA's amateurism rules?

I was introduced by DeMaurice Smith, the Executive Director of my client, the National Football League Players Association, to Ramogi Huma, the Executive Director of the National College Players Association. Ramogi believed the time was right to launch a direct antitrust challenge to the NCAA's compensation restraints and he convinced me to bring the action. My sports litigation practice has always centered around the protection of athletes' rights and our firm concluded that this was the right litigation to bring given the tremendous economic exploitation of the athletes in these sports, a majority of whom were persons of color.

What did you do to prepare for the telephonic arguments held in March?

The format for the Supreme Court argument was entirely new because of COVID-19. Not only was the argument to be conducted by telephone, but it was also organized so that each Justice would get an allotted amount of time to ask questions, which meant that nearly all of the argument would be focused on responding to these questions as succinctly and clearly as possible. I knew this would require extensive preparation to master and I participated in three separate moot courts in which we duplicated this telephonic format.

Are there any moments from the argument that stick out to you now, especially considering where the court ended up?

The entire argument was memorable, as each Justice asked questions that were probing, pointed, and challenging. In retrospect, however, the questions by Justice Gorsuch about the monopsony power of the NCAA in the labor markets now stand out, as he wrote the opinion of the Court, as do the **questions by Justice Kavanaugh**, who made clear his views that amateurism was not a valid basis for economically exploiting the athletes.

What was your reaction to Monday's decision?

I was thrilled. No one ever expects to achieve a unanimous win before the Supreme Court. And the opinion of the court adopted virtually every argument that we had made. Further, the opinion made clear that the NCAA will never again be able to argue that the Supreme Court's previous opinion in the *Board of Regents* case afforded it some special status to claim a reduced level of antitrust scrutiny that was not available to other businesses. As Justice Kavanaugh stated, it would now forever be clear that the NCAA is "not above the law." Most importantly, all of this was made possible by the fantastic team who worked so diligently for the athletes on this case, both at Winston and at our co-counsel firms. Each and every one of them should be "Litigators of the Week," and I view myself as simply standing in as their surrogate.

The NCAA appealed the injunction barring the rules restricting the education-related benefits that college athletes may receive and that's what was at issue here before the Supreme Court. Do you regret not pursuing Supreme Court review regarding payments that aren't tethered to education—especially in light of the concurrence by Judge Kavanaugh saying the NCAA's remaining compensation rules "raise serious questions under the antitrust laws"?

I made the decision with my two co-lead class counsel that the priority for our three classes was to do whatever we could to preserve the potentially life-changing educational benefits that had been made possible by the lower courts' decisions. We concluded the best way to do that was to not cross-appeal to the Supreme Court for greater relief and to instead focus all our efforts to defending that which we had already won. Since this led to a unanimous decision in favor of the classes, we have no regrets.

Do you anticipate litigation challenges to the NCAA's structure?

The members of the NCAA have a choice—they can take this 9–0 decision of the Supreme Court to heart and reform their organization so that a fair compensation and benefit system for the athletes will, at long last, be permitted to flourish. Or, they can continue to defy U.S. antitrust laws and face the consequences of additional litigation, which will almost certainly follow. Counting the trial judge and the unanimous Ninth Circuit panel, 13 federal court judges have sent the NCAA a clear message–that it cannot use amateurism as an excuse to violate antitrust law. We will see whether it listens.

What will you remember most about handling this matter?

The joy in the tweets, YouTube videos, and other public reactions of current and former college athletes nationwide when they learned that all nine Justices of the Supreme Court had declared that the NCAA's restrictions could not be justified under the law. The Emperor had no clothes and he was finally being ordered by the courts to put some on.

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