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Litigator of the Week: Winston's Jeffrey Kessler Scores for College Athletes

By Jenna Greene
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On the eve of March Madness, the Litigator of the Week crown goes to Jeffrey Kessler for a major win on behalf of current and former college football and basketball players.

The co-executive chairman of Winston & Strawn represented the student athletes in an antitrust class action against the NCAA and 11 of its conferences. The suit in U.S. District Court for the Northern District of California challenged NCAA rules that severely limited any form of compensation students could receive for their athletic services.

On March 8, U.S. District Judge Claudia Wilken issued a ruling that Sports Illustrated called "groundbreaking and disruptive" and said is "poised to reshape big-time college sports."

Kessler discussed the case with Lit Daily.

Lit Daily: Who are your clients and what was at stake?

Jeffrey Kessler: My clients are the classes of athletes who play Division I Basketball—male and female—and FBS Football, the highest level of play.

What was at stake was the NCAA compensation restrictions which have prevented these incredible athletes from sharing in the hundreds of millions of dollars in revenue they generate each year for their schools. Most of these athletes never enter the NBA or the WNBA or the NFL and this was thus their only chance to get additional financial and other benefits from their great athletic skills and the enormous revenues that they garner from broadcasters, sponsors and fans.

How did you come to be involved in the case?

I was initially approached by a group called the College Players Association that supports college athletes' rights and they connected me with the athletes who were interested in serving as class representatives in an antitrust case to challenge the NCAA rules.

How did you work with co-counsel and members of your team at Winston & Strawn?

Just like our athlete clients, we had an incredible team for this fight.

At Winston, I was joined by my partners David Greenspan, David Feher, Sean Meenan and the late Derek Sarafa, with incredible associate support by Joseph Litman, Jeanifer Parsigian, Georgino Hyppolite, Adam Dale and Ben Gordon. We also had key support from our senior paralegal Corinne Kyritsopoulos and our administrative assistants Ramona Van Ness, Heidi Hammon and Maureen Courtney as well as many others.

Jeffrey Kessler of Winston & Strawn

We then had seamless trial coordination with our co-counsel at Hagens Berman, including co-lead class counsel Steve Berman, Jeff Friedman and Emilee Sisco, and at Pearson Simon and Warshaw, including co-lead class counsel Bruce Simon and Benjamin Shiftan. It was a true pleasure to work together with this incredible All Star team of legal talent.

Set the stage leading up to the litigation. What bearing did a prior antitrust suit against the NCAA—a class action led by ex-UCLA basketball player Ed O'Bannon—have on this case? What made this suit different?

The O'Bannon litigation challenged a different issue: the NCAA restraints on compensation for the use of player names, images and likenesses. It sustained the trial verdict that those restraints were antitrust violations, but limited the form of relief granted to full cost of attendance scholarships,

which was an increase from the more limited Grant-in-Aid Scholarships that the NCAA had previously allowed.

We were now seeking to challenge the NCAA restraints on compensation for performing as players—the very source of the billions of dollars in revenue that these athletes generate for their schools.

We also now had available to us new economic evidence that the NCAA was able to permit increased benefits to the athletes—such as full cost of attendance scholarships plus other new benefits—without any adverse impact on consumer demand or athlete integration—the two justifications that the NCAA claimed in *O'Bannon* prevented them from allowing the schools and conferences to offer more to the athletes who contributed so much.

Our goal was to have the NCAA compensation restraints struck down under the antitrust laws so that competition among the conferences—not an NCAA cartel—would decide how to fairly treat the athletes.

What were your overarching themes in litigating the case?

Our first theme was that conferences and schools should have the choice to financially compensate and benefit those athletes who worked so hard—more than 40 hours a week for their teams before attending a single class or studying—in the manner that each conference decided was fair and in the best interests for their schools.

The antitrust laws trust that competition and individual choices produce the best market outcomes and the big businesses of Division I basketball and FBS football were not any different in this regard. There were numerous benefits that schools could provide to their athletes—such as financial incentives to make academic progress and get a degree—that would further both economic fairness to the athletes and educational objectives, yet the NCAA cartel prohibited all of this.

Our second theme was that the evidence at trial established once and for all that "amateurism" was a pretextual myth that the NCAA invented to justify its cartel restraints. It had no substantive content that any NCAA witness could identify. There was no economic evidence that the compensation rules were tied to promoting consumer demand for college sports or student integration, an , in fact, NCAA schools never even discussed these issues when adopting new compensation rules—instead, like any cartel, they discussed costs.

Our third theme was that even if one believed that there was a legitimate consumer demand justification for some limitation on compensation and benefits to the athletes, the NCAA restraints were far broader than necessary. The record showed that there were numerous additional benefits that athletes could be provided without any harm to consumer demand and there was no justification for preventing schools and conferences from providing such additional benefits.

Who was opposing counsel and how would you describe their style?

We had very strong trial lawyers on the other side, including Beth Wilkinson [of Wilkinson Walsh + Eskovitz] leading the charge for the NCAA, and Bart Williams [of Proskauer Rose] leading the defense for the conferences. It was a privilege to litigate against some of the very best trial lawyers in the country and to emerge with a victory.

Tell us about the bench trial. What were some of the highlights?

The bench trial was 10 days and had many highlights. One that stands out was when the NCAA executive responsible for the compensation rules process had to admit on cross examination that there was no rhyme or reason or defined principle of "amateurism" to explain why some benefits were allowed to be paid to the athletes and others were not at various points in time—the only explanation he could provide was that the specific benefits allowed were what the members voted was consistent with amateurism principles at a particular point in time.

He then testified that if the NCAA members changed their mind and allowed more benefits, that would also be consistent with principles of amateurism, and if they then changed their minds again and reduced the benefits allowed, then previously permitted benefits would no longer be consistent with principles of amateurism.

The complete circularity of this reasoning had a dramatic impact at the trial and underscored that the rules were completely arbitrary. He even admitted that some athletic participation benefits permitted had no connection to principles of amateurism at all.

Another highlight was the admission by the NCAA experts that they performed no study of the economic data at all to support their opinions, in comparison to our experts, Dr. Rascher and Dr. Noll, who provided extensive record support for their conclusions that the NCAA compensation rules were not needed either to preserve consumer demand or athlete integration.

It was also an important trial moment when the NCAA's survey expert admitted that he did not and could not use his surveys to predict impacts of NCAA rule changes on future consumer demand while our expert, Hal Poret, presented survey evidence that specifically studied the future demand impact on allowing numerous new benefits to the athletes and found that they would have no adverse effect. The findings of fact on all of this by the trial Judge are extensive and you can get a full flavor of the trial and what the evidence demonstrated by reading them.

Did you make any unconventional strategic choices?

During the trial, we learned that Wisconsin had issued a public statement refuting the trial testimony of its chancellor that the school might consider leaving Division I if the

NCAA rules were struck down. We decided to try to get all of this in the trial record even though discovery was closed and succeeded in getting this before the court. It was another nail in the coffin of the credibility of the NCAA's witnesses.

On Friday, Judge Wilken issued a 104-page ruling. What stands out to you as some of the most noteworthy points?

The findings of fact are a tour de force. They methodically review the record evidence and demonstrate why the NCAA's restraints were anticompetitive and in violation of the law. One finding that I believe is particularly important is that every time the NCAA permitted the schools to offer more benefits to the athletes—whether or not related to education—there was no evidence of any adverse impact on consumer demand or on the integration of athletes into campus life. Yet, before those additional benefits were allowed, the NCAA declared that permitting them would violate principles of amateurism.

The factual record was thus overwhelming that the lines the NCAA drew to cut off athlete benefits had no justification and were far more restrictive than necessary to achieve any plausible consumer demand objective.

Some other critical findings were that the NCAA had no support for its integration justification at all—paying athletes more would not make them less integrated with campus life—and that there was no justification for the NCAA regulating education related benefits at all—such as graduate school scholarships, paid internships, overseas study expenses, vocational training, computers and much more.

While you didn't get everything you asked for, how will this decision benefit student-athletes?

The court did not enter an injunction to stop the NCAA from prohibiting compensation unrelated to education because of its adherence to the dicta in *O'Bannon* by the Ninth Circuit that this would negatively impact consumer demand. We respectfully disagreed and believe that the court's factual findings—which were based on factual developments since *O'Bannon*—supported the entry of an injunction which would have ended these NCAA restrictions as well and leave any further regulation to the individual conferences.

But the relief that the court did provide to the classes was quite substantial with respect to education-related benefits. Once the injunction takes effect, the NCAA will no longer be able to prevent schools from providing cash incentives to the athletes for making academic progress or getting degrees in amounts that will total many thousands of dollars per athlete per year.

In addition to having to permit these substantial cash incentives for educational progress, the NCAA will no longer be able to limit at all the value or number of post-graduate scholarships that can be given to the athletes, the costs of computers or other education-related items, paid post-eligibility internships, the costs of study abroad, the costs of vocational school, tutoring costs or any other benefits that are similarly related to education.

The total amount of education-related value available to the class members is going to be tens of thousands of dollars per athlete over multiple years and might change the lives of the many class members who will not make it to the NFL or the NBA or the WNBA and the communities in which they live. Many of these athletes come from poor backgrounds where the increased benefits will do the most good.

This isn't your only sports case—I noticed the New York Times sports page cover on Saturday featured two stories, and both of them were your cases. Tell us a bit about the U.S. women's soccer litigation and your overall practice in this area.

Friday was an incredible day for me. In the morning, we filed a class action for the Women's National Team in soccer against the USSF for gender pay discrimination against the women. These women are some of the most successful athletes in the world and did the same job as the much less successful members of the Men's National team employed by the USSF—yet they have been dramatically paid less. This is a grievous wrong that has been going on for many years and it is time to end this discrimination.

Later that night, while I was at a movie theater (Captain Marvel), the victory against the NCAA came in (causing me to miss the ending, but my grandson, Jordan, filled me in).

The next day both cases filled the New York Times Sports page and I was incredibly humbled by this combination of stories.

Our sports practice is very varied, but we are probably best known for bringing cases in support of player rights, as our clients include the players unions in the NFL and the NBA as well as many other athlete groups and we have been involved in every major player rights case from Deflategate to Bountygate to Latrell Spreewell to Reggie White to Oscar Pistorious' right to compete in the Olympics.

Are you personally a sports fan? Any favorite for March Madness?

I am a great fan of sports, but an even greater fan of the incredible athletes whom I have had the privilege to represent. Since I represent the entire class of Division I basketball players, I will just wish all of the teams the best of luck in March Madness. It will generate billions of dollars for the NCAA and now some new important education related benefits for the incredible athletes who make it great.

Jenna Greene *is editor of The Litigation Daily and author of the "Daily Dicta" column. She is based in the San Francisco Bay Area and can be reached at jgreene@alm.com*