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The Electric Seventh Circuit and Its Impact on NCAA Compliance Issues

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By Adam Epstein

Since 2016, there have been several significant decisions emanating from the Seventh Circuit involving the NCAA as a named party. Naturally, given that the NCAA's headquarters are in Indianapolis, Indiana, the fact that litigation appears in the Seventh Circuit should be no surprise since it consists of Illinois, Indiana and Wisconsin. The following three recent cases represent noteworthy Appellate and District Court decisions involving the NCAA within this Circuit.

Deppe

In *Deppe v. NCAA*, No. 17-1711, 2018 U.S. App. LEXIS 17244 (7th Cir. June 25, 2018), the Seventh Circuit Court of Appeals affirmed the dismissal of punter Peter Deppe's claim that the NCAA's "year in residence" rule violated § 1 of the Sherman Act. The rule requires student-athletes who transfer from one FBS Division I college to another to wait one full academic year before they can play for their new school in competition.

Deppe originally walked-on to Northern Illinois University in June 2014, as a preferred walk-on. He redshirted his first season and a coach promised he would receive an athletic scholarship in January 2015. Unfortunately for Deppe, not only did that coach leave NIU, but the head coach then informed Deppe that he would not receive a scholarship. To add insult to injury, NIU then offered a scholarship to another punter in the fall, 2015. Deppe attempted to transfer to the University of Iowa which had shown an interest, but only if Deppe could play in the fall, 2016.

Citing NCAA Bylaw 14.5.5.1, the NCAA remained steadfast that Deppe would have to sit out another year in accordance with its rules. While there are a few exceptions to the transfer rule in which the transfer school could seek a waiver, the University of Iowa decided to offer a scholarship to another punter with immediate eligibility instead and therefore did not seek a waiver for Deppe at all. As a result, Deppe sued the NCAA under antitrust law and his class-action claim was dismissed by the District Court for the Southern District of Indiana on March 6, 2017.

The 2018 affirmation of the 2017 dismissal came as no surprise. Historically, the NCAA has been quite successful in defending its bylaws which relate to student-athlete eligibility. Citing the U.S. Supreme Court decision in *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), the Seventh Circuit in Deppe's case opined that the "...year-in-residence requirement is an eligibility rule clearly meant to preserve the amateur character of college athletics and is therefore presumptively procompetitive..." Throughout the Deppe decision, the Seventh Circuit cited the *Bd. of Regents* decision in addition to its own decision a few years prior in *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

In *Agnew*, the plaintiff unsuccessfully attempted to show that the NCAA's limit on the numbers of scholarships and the prohibition (at that time) of multi-year scholarship offers violated §1 the Sherman Act and had an "anti-competitive on the market for student-athletes..." However, the Seventh Circuit Court of Appeals in *Deppe*-as in *Agnew*-affirmed the dismissal of the case and reminded the parties that the "...year-in-residence requirement is an eligibility rule clearly meant to preserve the amateur character of college athletics and is therefore presumptively procompetitive..."

Kizzang

In *NCAA v. Kizzang LLC*, No. 1:17-cv-00712-JMS-MPB, 2018 U.S. Dist. LEXIS 83180 (S.D. Ind. May 17, 2018), the District Court for the Southern District of Indiana awarded a reduced amount of $220,988.05 in attorneys' fees to the NCAA after the NCAA was previously granted a default judgment by order and opinion January 18, 2018 against Kizzang and its founder Robert Alexander for using the marks "FINAL 3" and "APRIL MADNESS." Obviously, these expressions mimicked the NCAA's trademarked phrases "Final Four" and "March Madness."

According to the NCAA's original complaint of March 8, 2017, Kizzang and Alexander were "...in the business of marketing and providing nationwide Internet-based promotions that award prizes for predicting the results of sporting events, including the results of college basketball games played by and between NCAA member schools, and in particular games played during the NCAA's Division I Men's Basketball Championship." Not surprisingly, the NCAA filed suit alleging federal trademark infringement, trademark dilution and unfair competition alleging that Kizzang and Alexander's use of the use of the marks were "likely to cause confusion or mistake, or to deceive as to Defendants' affiliation, connection, or associate with the NCAA, or as to the origin, sponsorship, or approval of Defendants' services."

The defendants did not answer by the July 15, 2017 deadline, and the NCAA moved for an "Entry of Default." The defendants somehow reappeared on August 10, responding to the Entry of Default, and then on August 31 filed a motion to dismiss or, alternatively, to transfer the case to the District of Nevada. The District Court for the Southern District of Indiana denied the defendants motions and, in fact, found that the circumstances presented an "exceptional case" for the NCAA under the Lanham Act and therefore it was entitled to attorney's fees accordingly under the Act.

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Though the *Kizzang* case only reached the District Court level, the two orders and opinions presented a solid discussion of the role and significance of trademark law and unfair competition, a discourse of civil procedure and also a formidable analysis on calculation of attorney's fees using the lodestar method. The decision also, permanently enjoined Kizzang and Alexander from "using the NCAA's FINAL FOUR or MARCH MADNESS marks and any colorable imitation or simulation of them, including FINAL 3, FINAL THREE, or APRIL MADNESS...doing any act or thing likely to induce the belief that Defendants' products or services are in any way legitimately connected with, or sponsored or approved by, the NCAA; and doing any act or thing that is likely to dilute the distinctiveness of the NCAA's FINAL FOUR or MARCH MADNESS marks or that is likely to tarnish the goodwill associated with those marks..."

Berger

In the Seventh Circuit Court of Appeals decision *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016), the Court affirmed the decision of the District Court to dismiss the claims against the NCAA and holding that former student-athletes at the University of Pennsylvania were not employees though the plaintiffs claimed that they and others at more than 120 other NCAA Division I members should be classified as such and therefore were entitled to a minimum wage under the Fair Labor Standards Act (FLSA). Simply put, the Court of Appeals held that "student athletes are not employees and are not covered by the FLSA."

The *Berger* decision provided a succinct opinion and analysis of how courts-including the Supreme Court of the United States-have interpreted the definition of employer and employee. Indeed, *Berger* cited numerous NCAA-related decisions including the *Bd. of Regents* case (1984),its own*Agnew* decision (2012),and *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) to support the proposition that NCAA eligibility rules are designed to maintain the "tradition of amateurism" and "the reality of the student-athlete experience." The *Berger* court went further and provided a list of state worker's compensation cases in which student-athletes attempted to characterize themselves as employees but failed. *Berger* also looked to the Department of Labor's Field Operations Handbook which "indicated that student athletes are not employees under the FLSA."

These three decisions were not the only decisions since 2016 in which the NCAA was a named party in a decision in the Seventh Circuit. Another includes the District Court decision in *Pugh v. NCAA* (2016) in which Devin Pugh unsuccessfully challenged the "year-in-residence" requirement after losing his one-year football scholarship at Weber State University, transferring to an FCS school and then challenging the NCAA bylaws under the Sherman Act by "prohibiting multi-year Division I football scholarships and capping the number of athletic scholarships that could be awarded by Division I member institutions." As the *Deppe* case noted-a year later as it was at the District Court level-Pugh's case was "virtually identical" to Deppe's and that there were "no legal issues that distinguish" the two cases. Accordingly, Deppe-just like Pugh- had his claimed blocked.

For now, the NCAA and its eligibility rules appear to be on solid ground from legal challenges under violations of antitrust law. There is no doubt that the Seventh Circuit will continue to address major NCAA-related decisions in the future, and this Circuit is not exclusive to hearing NCAA decisions. After all, in 2017 the Ninth Circuit's Northern District of California in *Dawson v. NCAA* dismissed the FLSA claim by former University of Southern California football player Lamar Dawson. Similarly, the Third Circuit's Eastern District of Pennsylvania in *Livers v. NCAA*dismissed on May 17, 2018, an FLSA case brought by Villanova University's Lawrence "Poppy" Livers. Both decisions cited the Seventh Circuit's 2016 *Berger* decision. This fall, the Ninth Circuit will introduce us to a former Clemson University football player Martin Jenkins who seeks to challenge the legitimacy and value of NCAA scholarship limits and-in essence-the NCAA's definition of "amateurism" itself. ■

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Southland Conference Promotes Compliance Chief Thomas Samuel

The Southland Conference has promoted Thomas Samuel to the position of associate commissioner for compliance services.

In his role, Samuel oversees all NCAA legislative services for the Southland, serves as a liaison to campus compliance contacts, athletic administrators, coaches and student-athletes, is the staff conduit to the NCAA Academic and Membership Affairs staff, and administers the Conference's National Letter of Intent and NCAA Coaches' Certification programs.

Samuel joined the Southland in July 2017 after serving on the compliance staff at Texas State University since 2013. The Ruston, La., native earned his bachelor's degree from Centenary College in 1997, and earned a master's degree from Middle Tennessee State. He earned a juris doctorate in 2013 from the University of Memphis Law School.