Legal Sidebar

National Collegiate Athletic Association v. Alston and the Debate over Student Athlete Compensation

June 21, 2021

Against the backdrop of the national debate on student athlete compensation, the Supreme Court issued its decision in *National Collegiate Athletic Association v. Alston* on June 21, 2021. In *Alston*, the Court was asked to determine whether the National Collegiate Athletic Association's (NCAA's) rules capping compensation for student athletes violate Section 1 of the Sherman Antitrust Act (Sherman Act). The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed a lower court decision that held that the NCAA's current rules read together were "more restrictive than necessary" under antitrust law. As a result, the Ninth Circuit held that the NCAA could no longer limit education-related compensation or benefits for student athletes playing Division I football and basketball. In a unanimous decision, the Supreme Court affirmed the Ninth Circuit's decision. This Legal Sidebar discusses the background leading up to the Court's decision, the Court's reasoning, and the implications the decision may have on the overall debate surrounding student athlete compensation.

Legal Background: Antitrust Law

While *Alston* has provided a platform for arguments about student athlete compensation and the importance of "amateurism" in intercollegiate athletics, the legal issues behind the case primarily involve antitrust law.

Contemporary antitrust law is focused on preventing anticompetitive conduct and mergers that enable firms to exercise market power. The theory behind antitrust law, generally, is that "the existence of significant market power harms both consumers and society as a whole." Section 1 of the Sherman Act prohibits the formation of a "contract, combination . . . , or conspiracy in restraint of trade or commerce." The Supreme Court has held that the Sherman Act prohibits only *unreasonable* restraints of trade. According to the Court, some agreements and practices, such as price fixing, are so unreasonable that they are considered "invalid per se," and an extensive analysis into the practices' anticompetitive nature is not required. Other restraints on trade, however, may be illegal "only as applied to particular situations." Courts generally apply a "rule of reason" analysis to determine whether a challenged restraint of trade, while not per se illegal, is unreasonably anticompetitive. Rule of reason analyses are designed to

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"distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." As rule of reason jurisprudence evolved, the Court recognized the need to use "something of a sliding scale in appraising reasonableness." Thus, in certain instances, courts will apply a more abbreviated analysis sometimes referred to as a "quick look." Quick looks are an intermediate type of analysis that courts may apply to restraints that bear some similarities to those considered per se unlawful, but may involve "an additional complicating factor that deserves additional examination."

In cases involving a more detailed rule of reason analysis, there is no officially recognized analytical framework to guide the inquiry; however, most courts take a similar approach in their application of the rule of reason. First, a plaintiff challenging a restraint as anticompetitive under Section 1 must first establish that the restraint has a "substantial anticompetitive effect that harms consumers in the relevant market." The burden then shifts to the defendant to show a "procompetitive rationale for its restraints." If the defendant is successful at establishing a procompetitive justification, the burden shifts back to the plaintiff to show that the stated justification could have been achieved by a less restrictive alternative that offers the same benefits without the threat of competitive harm.

Legal Background: Antitrust Litigation Involving the NCAA

Courts have had several occasions to evaluate challenged restraints of trade under Section 1 that involve the NCAA, the primary regulator of amateur intercollegiate athletics. The NCAA issues and enforces rules that govern athletic competition between its member institutions. These rules further the NCAA's mission of supporting college athletics as an amateur activity. The NCAA promulgates, for example, standards of amateurism and academic eligibility, regulations concerning recruitment of student athletes, and rules governing the size of teams and coaching staffs.

Two prior cases involving the NCAA are important as background for *Alston*. First, in the 1984 case *NCAA v. Board of Regents*, two universities challenged the NCAA's rules regarding television rights for college football games. The universities argued that the NCAA had unreasonably restrained trade by prohibiting NCAA member institutions from selling television rights except in accordance with the NCAA's plan. The Court held that the NCAA's rules violated the Sherman Act. It first reasoned that although the television rules were, in effect, a horizontal restraint of trade among competitors that would ordinarily be illegal per se, league sports present a situation "in which horizontal restraints on competition are essential if the product is to be available at all." In this case, the NCAA and its member institutions market "competition itself—contests between competition institutions," and therefore uniform rules agreed upon by the members, which may in effect be considered a "restraint" on trade, are necessary for the NCAA's existence. Although the Court clarified that "joint ventures have no immunity from the antitrust laws," it elaborated on the unique nature of the NCAA, noting that it is reasonable to assume that "most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." The Court therefore applied the rule of reason to discern any procompetitive effects of the NCAA's telecast rules. It found that the television rules did not serve the NCAA's interest in maintaining a competitive balance among amateur athletic teams, and therefore that the rules violated the Sherman Act.

Second, in *O'Bannon v. National Collegiate Athletic Association*, plaintiffs challenged an NCAA rule of a different kind. NCAA rules state that student athletes may receive "scholarships or educational grants-in-aid administered by an educational institution" within the bounds of NCAA rules, but that any other compensation to student athletes other than "financial aid" for athletic services may render the athlete ineligible for intercollegiate competition.

In *O'Bannon*, the plaintiff sued the NCAA, seeking antitrust review of NCAA rules prohibiting student athletes from being compensated for the use of their name, image, or likeness (NILs) in video games, live game telecasts, and other video footage. In a 2014 decision, the district court held that the challenged NIL rules violated the Sherman Act because, although there were procompetitive justifications for the rules, less restrictive alternatives were available. On appeal, the Ninth Circuit upheld the district court's determination that the NCAA rules violated the Sherman Act, and it affirmed the district court's injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance. The Ninth Circuit rejected the NCAA's argument that the Supreme Court had declared NCAA amateurism rules "valid as a matter of law" in *Board of Regents*, explaining that the Supreme Court's discussion of those rules provided context for its reasoning but were not part of the holding in the case.

O'Bannon primarily examined the NCAA rules related to the use of student athlete NILs; however, both the district court's and Ninth Circuit's decisions implicated the issue of then-applicable NCAA rules setting maximum limits on grant-in-aid. Partly as a result of the district court's decision in *O'Bannon*, in 2015 the "Power Five" conferences—the NCAA-member conferences that generate the most revenue—voted to increase overall grant-in-aid limits to allow scholarships up to the full cost of attendance. The revised "full grant-in-aid" comprises "tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance." Cost of attendance is calculated by each school according to federal regulations. NCAA rules continued, however, to limit compensation and benefits student athletes may receive "on top of a full cost-of-attendance grant-in-aid."

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Further litigation over the "interconnected set of NCAA rules" that limit the compensation student athletes can receive began before the *O'Bannon* case concluded. That case—known as the "*Grant-in-Aid*" litigation in the lower courts—became the case known before the Supreme Court as *Alston*. In *Alston*, plaintiffs argued that the compensation limits in NCAA rules are a form of horizontal price fixing (i.e., price-fixing agreements among competitors). The plaintiffs argued that these limits violate Section 1 of the Sherman Act because absent these limits, plaintiffs would receive "greater compensation in exchange for their athletic services." Defendants—the NCAA and 11 college athletic conferences that are members of the NCAA—responded that the compensation limitation rules were procompetitive because "consumers value amateurism," and therefore the rules help preserve the demand for college athletics."

In determining whether the challenged rules in the *Grant-in-Aid* litigation violated Section 1 of the Sherman Act, the district court recognized that while price-fixing agreements are generally per se illegal, the rule of reason was appropriate in circumstances involving ventures that require a "certain degree of cooperation." The court therefore proceeded to the rule of reason, finding that the challenged rules constituted horizontal price-fixing agreements, but that the NCAA's caps on student athlete compensation have "some effect in preserving consumer demand for [college sports]." Specifically, the district court found that some of the challenged compensation limits "serve to support the distinction between college sports and professional sports," because student athletes do not receive "unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." The court, however, determined that the current rules read together were "more restrictive than necessary" to uphold the procompetitive distinction between college and professional sports, and found that a less restrictive alternative would be to enjoin NCAA limits on most compensation and benefits that are *related to education*. The district court's injunction against NCAA rules that capped education-related benefits opened the door to allow additional compensation for items such as "computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies." On appeal, the Ninth Circuit affirmed the district court's application of the rule of reason and determination that the NCAA rules violated the Sherman Act. The Ninth Circuit also upheld the district court's injunction, which, as a result, took effect in August 2020.

On December 16, 2020, the Supreme Court granted the NCAA's petition for certiorari. Before the Supreme Court, the NCAA argued primarily that the Court had already determined its amateurism rules were procompetitive because they "define the character" of NCAA athletics, and should be upheld using an "abbreviated deferential analysis," rather than requiring the detailed rule of reason analysis applied by the district court. The NCAA argued that the Court in *Board of Regents* had set a unique precedent for evaluating NCAA antitrust challenges because the NCAA offers a "distinct product": athletic competition that is subject to the principle of amateurism, or the concept that athletes are not "paid to play."

In a unanimous decision, the Supreme Court affirmed the Ninth Circuit, holding that the district court's injunction was consistent with established antitrust principles. Writing for the Court, Justice Neil Gorsuch focused on the antitrust approach proposed by the NCAA. Justice Gorsuch first addressed, and rejected, the NCAA's contention that it was entitled to an abbreviated deferential review. Justice Gorsuch noted that competitive restraints should be evaluated by a "quick look" only in extreme cases, not those that fall "in the great in-between" of the competitive spectrum. According to Justice Gorsuch, the challenged restraints in this case involved "complex questions requiring more than a blink to answer." Justice Gorsuch also dismissed the NCAA's reliance on *Board of Regents*, distinguishing that in that case the Court had suggested only that courts should "take care" when assessing the NCAA's restraints on student athlete compensation, not that courts should reject all challenges to the NCAA's restrictions. On that point, Justice Gorsuch also explained that the "market realities" of college athletics had changed significantly since the 1984 *Board of Regents* decision, furthering his point that the NCAA should not be entitled to a blanket deferential antitrust standard.

In rejecting the remainder of the NCAA's arguments related to the lower courts' application of the rule of reason, Justice Gorsuch reiterated that it is within Congress's power—not the courts'—to grant special antitrust treatment to particular industries. He concluded the opinion by reemphasizing the Ninth Circuit's observation that while the debate surrounding college athletics is important, it is not the Court's job to resolve it.

In a concurring opinion, however, Justice Brett Kavanaugh more broadly questioned the legality of the NCAA's remaining restrictions on student athlete compensation. He raised "serious questions" about whether those rules "can pass muster" under the rule of reason framework. Comparing the NCAA's business model to other industries, Justice Kavanaugh emphasized that price-fixing labor is "ordinarily a textbook antitrust problem." He warned that the NCAA cannot rely on its "circular and unpersuasive" rationale that unpaid labor is procompetitive because it defines the NCAA's product—college sports. The NCAA, according to Justice Kavanaugh, "is not above the law."

Considerations for Congress

NCAA v. Alston is an important case for the rule of reason framework in antitrust jurisprudence. The Supreme Court's decision in *Alston* signaled the Court's reluctance to extend antitrust exemptions to industries absent congressional action. Significantly for future cases involving the NCAA, the Court rejected the organization's broad interpretation of *Board of Regents*, emphasizing that the unique elements of the NCAA's product do not make it immune to antitrust law.

Beyond the antitrust context, the underlying issues in *Alston* implicate a theme that has been contested in recent years: whether and how student athletes should be compensated, including for the use of their NIL. As mentioned by both the Ninth Circuit and the Supreme Court, "[t]he national debate about amateurism in college sports is important," but both of those courts were reluctant to allow a judge to decide that debate. Overarching questions regarding student athlete compensation could be considered further by athletic association governing bodies—or alternatively, by Congress and state legislatures.

For example, in response to the *O'Bannon* litigation, California enacted the Fair Pay to Play Act, which requires "the NCAA and its member institutions to permit student athletes enrolled in California colleges

and universities to earn compensation from the use of their NILs." At least 18 other states have implemented similar laws that allow for student athletes to profit from the use of their NIL. Shortly after California passed the Fair Pay to Play Act, the NCAA Division I Council approved an updated draft of proposed amendments to NCAA bylaws which would allow student athletes compensation for some uses of their NIL. The Division I Council postponed the vote on the bylaw amendments after NCAA President Mark Emmert received a letter from the Department of Justice that suggested the DOJ may object to new NIL rules on antitrust grounds. Emmert recently reiterated his commitment to adopting new "loosened" NCAA NIL rules in time for the 2021-2022 school year. The Court's *Alston* decision may impact the extent to which the NCAA will extend NIL rights.

Without action by Congress to preempt state legislation or NCAA rules, the evolving legal and legislative landscape surrounding student athlete compensation may leave educational institutions and student athletes facing different rules in different parts of the country. For this reason, some Members of Congress have expressed interest in implementing various student athlete reforms, and the NCAA continues to encourage Congress to take action. At a July 2020 Senate Judiciary Committee hearing, Emmert urged Members of Congress to pass federal NIL compensation legislation. Emmert emphasized that 36 states had either passed or introduced NIL legislation, and he argued that "a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field . . . for our schools and nearly half a million student-athletes nationwide." In a June 2021 hearing before the Senate Committee on Commerce, Science, and Transportation, Emmert reiterated the need for federal legislation. He outlined several elements the NCAA believes should be included in federal legislation, including the preemption of state laws, safeguarding the nonemployment status of student athletes, Title IX protections.

Perhaps most notably, the NCAA recommends a "limited safe harbor protection" from litigation, which some observers have called an "antitrust exemption." Such protection would immunize the NCAA from future antitrust challenges such as those brought in *O'Bannon* and *Alston*. The Supreme Court declined to create a judicial antitrust exemption for the NCAA in *Alston*, instead reiterating that it is up to Congress—not the courts—to determine when a particular industry should be exempt from antitrust laws. Legislation proposed in the 116th Congress, such as the Collegiate Athlete Compensation Rights Act and the Fairness in Collegiate Athletics Act, would have legislatively provided an antitrust exemption for entities like the NCAA. A recently introduced bill, the Amateur Athletes Protection and Compensation Act of 2021—would provide legal immunity for the NCAA against claims brought by student athletes except as allowed under the Act. Some commentators, however, have argued that without the threat of future antitrust challenges, "the NCAA would have unbounded power to restrain athletes' fair market rights, without facing legal repercussions."

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