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# A slam dunk from the Supreme Court for college athletes: no antitrust immunity for the NCAA

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In a potentially landmark decision on Monday that sets the stage for fundamental changes in the economics and structure of college sports and possibly in labor markets more generally, the Supreme Court unanimously ruled against the NCAA[1] in the long-running dispute over student-athlete compensation.

Over 35 years ago, the Supreme Court held in *NCAA v. the Board of Regents* that rules concerning eligibility standards, including that "athletes must not be paid" and "must be required to attend class," were procompetitive and should be subject to a different and less stringent analysis than typical antitrust cases.

In May 2020, the U.S. Court of Appeals for the Ninth Circuit ruled that the NCAA's limits on providing education-related benefits violate the Sherman Act.

In addition to opening the door to significant competition between schools for athletes and more benefits for collegiate players, the Supreme Court's upholding of the Ninth Circuit also has implications for how the currently constituted Court views the Rule of Reason mode of antitrust analysis and how that analysis is properly applied to labor markets.

## *NCAA v. Board of Regents*

In 1984, the Supreme Court, in a 7-2 decision in *NCAA v. the Board of Regents*,[2] stripped the NCAA of its control over television broadcast rights for college football games.

While the Court held that the NCAA's broadcast restrictions were in the nature of a *per se* illegal restraint on trade, the majority explicitly declined to apply a *per se* rule to the case because "a certain degree of cooperation is necessary if the type of competition that [the NCAA] seek[s] to market is to be preserved."

The Court instead applied the less stringent Rule of Reason to the NCAA's restrictions because the NCAA needed "ample latitude" to play "a critical role in the maintenance of a revered tradition of amateurism in college sports."

Writing for the majority, Justice Stevens advised future courts 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."

Although this language was dicta, Justice Stevens' comments have allowed the NCAA for decades to argue for special treatment under antitrust law with regard to any of its bylaws that further amateurism.

In his dissent, Justice White was concerned that the majority's opinion would not further the NCAA's stated purpose to "keep university athletics from being professionalized to the extent that profit making objectives would overshadow educational objectives."

Some have argued that Justice White's fears have come to fruition — the NCAA has evolved into a monolith generating billions in revenues on the backs of student-athletes.

## *O'Bannon v. NCAA*

The most recent case before *NCAA v. Alston* was a class action brought in 2009 by former UCLA basketball player Ed O'Bannon that challenged the NCAA's use of the images of former student-athletes for commercial purposes.

> *"Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate," Justice Brett Kavanaugh wrote.*

O'Bannon argued that a former student-athlete should be entitled to financial compensation for the NCAA's commercial use of his or her image, while the NCAA contended that paying its student-athletes would be a violation of its concept of amateurism.

In 2014, Judge Claudia Wilken of the U.S. District Court for the Northern District of California found for O'Bannon,[3] holding that the NCAA's rules and bylaws operate as an unreasonable restraint of trade violating federal antitrust law.

In 2015, the Ninth Circuit rejected the NCAA's arguments based on *Board of Regents* and affirmed[4] the NCAA's violation of the Sherman

Act. The court stated "we are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid."

Both sides appealed to the Supreme Court — the NCAA challenged the court's affirmation that its compensation rules were an unlawful restraint of trade, and O'Bannon challenged the court's conclusion that preserving amateurism is an important goal and that any compensation athletes might receive had to be related to education. The Supreme Court declined to hear the case.

### *NCAA v. Alston*

The current case was filed as a class action in 2014 against the NCAA and the major athletic conferences by former West Virginia football player Shawne Alston and other athletes who play Division I football and basketball. Plaintiffs argued that the NCAA's restrictions on eligibility and compensation violate federal antitrust laws by barring athletes from receiving fair-market compensation for their labor.

*Although the Court considered only education-related benefits in NCAA v. Alston, nothing in its opinion could be construed to limit the Court's reasoning to benefits related only to education.*

Applying the Rule of Reason antitrust analysis, District Judge Claudia Wilken held[5] in 2018 that the NCAA could restrict benefits that were unrelated to education (*e.g.*, cash salaries); however, the court found that the challenged NCAA rules were more restrictive than necessary in that they limited or barred certain noncash educational benefits and were a restraint of trade that violated the Sherman Act.

The case did not focus on the contentious issue of pay for college athletes and concerned only non-cash benefits related to education, such as computers, science equipment, musical instruments, study abroad and post-graduate scholarships, and paid internships. Both sides appealed.

On the one hand, the student-athletes argued that the district court did not go far enough and should have enjoined all of the NCAA's challenged compensation limits regardless of whether they were related to education. On the other hand, the NCAA asserted that the district court overstepped its bounds by weakening the NCAA's restraints on education-related compensation and benefits.

In May 2020, the Ninth Circuit affirmed[6] the district court's decision in full, finding that the NCAA violated Section 1 of the Sherman Antitrust Act when it limited schools from offering certain education-related benefits to student-athletes in Division I basketball and Football Bowl Subdivision football programs.

"In our view, the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports."

In *Alston*, the NCAA argued that *Board of Regents* required plaintiffs attacking an NCAA rule promoting amateurism to meet a heavier burden in a Rule of Reason analysis. The Ninth Circuit rejected the NCAA's arguments, noting that it had previously found the *Board of Regents* language relied upon by the NCAA to be dicta in its *O'Bannon* decision.

In his concurring opinion, Judge Milan Smith states his concern that "[t]he treatment of Student-Athletes is not the result of free market competition" and instead "is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion."

Judge Smith's concerns are consistent with the growing weight of academic opinions that the NCAA's amateurism rules should not enjoy a special exemption from antitrust scrutiny. The amateurism rules, like any other trade association's rules, should be defensible under antitrust law only if they yield procompetitive benefits and enhance overall consumer welfare.[7]

### The Supreme Court

After the Supreme Court denied a request[8] from the NCAA to freeze the lower court rulings, the NCAA in October successfully petitioned the Supreme Court[9] to review the Ninth Circuit's decision and to reverse to the extent the lower courts sided with the student-athletes.

The NCAA principally argued that the lower courts erred by subjecting its compensation restrictions to a Rule of Reason analysis, arguing that the courts should have given those restrictions at most an "abbreviated deferential review," or a "quick look," before approving them.

The NCAA asserted that it is a joint venture and that collaboration among its members is necessary in order to provide consumers the benefit of intercollegiate athletic competition.

In a decision authored by Justice Neil Gorsuch, the Supreme Court unanimously affirmed the Ninth Circuit's ruling that the NCAA and its more than 1,200 member schools and conferences violated federal antitrust laws by agreeing to limit how much each can provide student-athletes for education-related costs.

The Court declined to grant the NCAA "immunity from the normal operation of antitrust laws," stating that "even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act — including most joint venture restrictions — are subject to the rule of reason..."

The Court rejected the NCAA's argument that the trial court's ruling would "micromanage" the organization's business, explaining that the district court only barred the NCAA from imposing restraints on benefits related to education and only after determining that "relaxing these restrictions would not blur the distinction between

college and professional sports and thus impair demand for college sports."

In the closing paragraph of the Court's opinion, Justice Gorsuch noted that "[s]ome will think the district court did not go far enough" while "others will think the district court went too far by undervaluing the social benefits associated with amateur athletics."

Although he acknowledged that "[t]he national debate about amateurism in college sports is important," Justice Gorsuch stated that it is not the Court's task to resolve it. Instead, the Court's task "is simply to review the district court judgment through the appropriate lens of antitrust law." "That review," Justice Gorsuch wrote, "persuades us the district court acted within the law's bounds."

*Justice Kavanaugh added that, in his opinion, the NCAA may lack "a legally valid procompetitive justification for its remaining compensation rules."*

Justice Brett Kavanaugh, who has been on the opposite side of Justice Gorsuch on antitrust cases, joined the Court's opinion in full, but wrote a separate concurring opinion in which he went further and questioned the legality of the remaining restrictions on benefits for college athletes.

"... But those traditions alone cannot justify the NCAA's decision to build a massive money raising enterprise on the backs of student athletes who are not fairly compensated," Justice Kavanaugh stated. "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law."

## What now?

The NCAA is prohibited from restricting schools from providing the types of education-related benefits at issue in *NCAA v. Alston*, but individual conferences may restrict such benefits. Even though schools are not required to provide education-related benefits, they likely will need to in order to compete for athletes.

As the Court reviewed only a narrow subset of the NCAA's rules restricting education-related benefits, the NCAA still may set limits on compensation that is not education-based. However, the NCAA's entire structure may be on shaky footing.

Although the Court considered only education-related benefits in *NCAA v. Alston*, nothing in its opinion could be construed to limit the Court's reasoning to benefits related only to education. Justice Kavanaugh stated that he authored his own opinion "to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."

Justice Kavanaugh's concurring opinion, which all but invites challenges to restrictions on non-education-related compensation for student-athletes, emphasized three points.

First, "the Court does not address the legality of the NCAA's remaining compensation rules." As such, the NCAA's other compensation restrictions remain on the books, at least for now. Second, *NCAA v. Alston* has established that, if challenged, the NCAA's remaining compensation rules "should receive ordinary 'rule of reason' scrutiny under antitrust laws. The Court makes clear that the decades-old 'stray comments' about college sports and amateurism" made in *Board of Regents* "were dicta and have no bearing on whether the NCAA's current compensation rules are lawful." And, third, "there are serious questions whether the NCAA's remaining compensation rules can pass muster" under the Court's framework.

Justice Kavanaugh added that, in his opinion, the NCAA may lack "a legally valid procompetitive justification for its remaining compensation rules."

Based on *NCAA v. Alston*, the currently constituted Court likely would apply the ordinary Rule of Reason antitrust analysis to other labor markets, including those involving joint ventures, and hold any limitations unlawful if, in the Court's view, there are less restrictive means to accomplish their procompetitive goal.

## Notes

[1] https://bit.ly/3xN0zRY

[2] https://bit.ly/3j6iuPJ

[3] https://bit.ly/3h4eoFc

[4] https://bit.ly/2TSd0NQ

[5] https://bit.ly/2SPDqQh

[6] https://bit.ly/3j4MMST

[7] See, for example, literature published by Case Western Reserve Law Review, https://bit.ly/3qj3Jue, Michigan Law Review, https://bit.ly/3dpx4yb, Tennessee Law Review, https://bit.ly/35N3hLm, Harvard Journal of Sports and Entertainment Law, https://bit.ly/3qjf3qp, Washington and Lee Law Review, https://bit.ly/3zR5vHC, and The John Marshall Law Review, https://bit.ly/3wLOdJT.

[8] https://cnn.it/2TYshwJ

[9] https://bit.ly/3d6fEGA

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