Not One Penny: The Supreme Court of the United States Tackles NCAA Compensation of Division I Student-Athletes

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The debate about paying National Collegiate Athletic Association (NCAA) Division I student-athletes is nothing new. The argument in support of paying such student-athletes, however, has gained substantial momentum over the past decade or so. As the NCAA agrees to billion-dollar extensions of media rights deals, allows its football coaches to collect seven figure salaries, and its revenues continue to increase—current and former Division I athletes recount nights going to bed hungry as well as struggles to keep up with schoolwork on top of the rigorous team demands. Multiple highly publicized antitrust lawsuits have been filed

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against the NCAA regarding its compensation rules in the last decade or so.

The first case was brought by a former UCLA basketball player named Ed O'Bannon after discovering that an NCAA college basketball video game featured a player that resembled his likeness, including his jersey number.[2] His complaint essentially stated that the NCAA illegally restrained trade in violation of the Sherman Antitrust Act in preventing Football Bowl Subdivision (FBS) football and Division I men's basketball players from receiving compensation for the use of their names, images, and likenesses.[3] The litigation resulted in the United States Ninth Circuit Court of Appeals affirming an injunction against the NCAA's prohibition on name, image, and likeness compensation for student-athletes. The court limited compensation, however, to

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[2] *See* O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

[3] *See id*. at 1055 (detailing background and nature of O'Bannon's claims against NCAA).

fund stipends for the student-athletes covering tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance.[4] The Ninth Circuit struck down the portion of the district court injunction that allowed deferred compensation to student-athletes for their name, image, and likeness "untethered to education expenses."[5]

More recently, however, several FBS football players and Division I men's and women's basketball players brought antitrust actions against the NCAA that were consolidated before the United States District Court for Northern California (*Alston* litigation).[6]

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[4] *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007-08 (N.D. Cal. 2014).

[5] *See O'Bannon*, 802 F.3d at 1076 (explaining decision to vacate portion of injunction unrelated to education expenses).

[6] *See* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1247 (9th Cir. 2020), *cert.*

This time, the student-athletes did not limit the suits to name, image, and likeness compensation, but instead, "sought to dismantle the NCAA's entire compensation framework."[7] After finding that the *Alston* litigation claims were not barred on res judicata grounds by the earlier *O'Bannon* decision, the district court entered judgement for the student-athletes, in part.[8] The court ultimately found that NCAA limits on education-related benefits altogether are unreasonable restraints on trade and enjoined such prohibitions, however, the court declined to extend the injunction to NCAA limits on compensation to student-athletes unrelated to education.[9]

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granted, 141 S. Ct. 972 (2020) (stating background of antitrust litigation against NCAA).

[7] *See id*. (comparing current litigation to earlier *O'Bannon* claims).

[8] *See id*. at 1248 (summarizing district court's findings).

[9] *See id.* (reiterating district court's ultimate conclusion).

Ninth Circuit law dictates that when considering agreements among entities involved in league sports, the court must utilize the Rule of Reason analysis to determine whether a restriction is an unreasonable restraint of trade under the Sherman Antitrust Act.[10] Under the Rule of Reason's three-step framework: (1) the student-athletes bear the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market; (2) if shown, the burden switches to the NCAA to "come forward with evidence of the restraint's procompetitive effects;" and (3) the student-athletes, "must then show that any legitimate objectives can be achieved in a substantially less

[10] *See* In re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1150 (9th Cir. 2019) (describing Rule of Reason application in Ninth Circuit antitrust litigation).

restrictive manner."[11] In applying this framework, the Northern California District Court concluded that the student-athletes met their initial burden of showing the restraint produces significant anticompetitive effects within a relevant market because student-athletes lack any viable alternatives to Division I athletics in their pursuit of playing elite level sports after high school.[12] The NCAA put forth a single procompetitive justification for the second prong; that the challenged rules preserve amateurism, which in turn, increases consumer choice by maintain a distinction between college and professional sports.[13] The district court found that the

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[11] *See In re Nat'l Collegiate Athletic Ass'n*, 958 F.3d at 1256 (applying Rule of Reason three-step framework to litigation in question).

[12] *See id*. at 1256-57 (finding student-athletes met initial Rule of Reason burden).

[13] *See id*. at 1257 (evaluating NCAA's procompetitive justification for restraint on trade).

NCAA's procompetitive justification only applied to rules against compensation above the cost of attendance of school unrelated to education, but did not apply to non-cash education-related benefits.[14] Regarding the third step, the court found a single less restrictive alternative; enjoining NCAA limits on most compensation and benefits that are related to education while allowing the NCAA to continue limiting noneducation-related compensation.[15] The district court's ultimate remedy was to import the less restrictive alternative from step three as the injunction itself.[16]

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[14] *See id*. at 1260 (analyzing district court's finding regarding Rule of Reason's second step).

[15] *See In re Nat'l Collegiate Athletic Ass'n*, 958 F.3d at 1260-61 (upholding decision regarding less restrictive alternative).

[16] *See id.* at 1265 (discussing importation of less restrictive alternative for remedy).

On appeal, the Ninth Circuit Court of Appeals affirmed the district court's finding in regard to each step of the Rule of Reason as well as the scope of the injunction.[17] Following the Ninth Circuit Court of Appeals' decision, the Supreme Court of the United States granted certiorari on December 16, 2020.[18] At the end of March, the Supreme Court Justices held oral arguments for the *Alston* litigation. Although oral argument clearly does not dictate the outcome of the Supreme Court's decision, it has been well documented in the days following the session that the Supreme Court Justices seemed skeptical in regard to the NCAA's position. Some of the main issues that district court judge had with the NCAA's argument seemed to be the focus of the Supreme Court Justices during oral argument.

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[17] *See id*. at 1265-66 (affirming district court in all respects).

[18] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 972 (2020).

For instance, the district court judge took issue with the NCAA's definition and application of the word "amateurism."[19] The NCAA relied heavily on the amateurism of college athletes in its argument for why its rules are procompetitive and therefore should be permitted under the Sherman Antitrust Act.[20] The district court judge noted, however, that nowhere in the NCAA rules or in its argument did the organization offer a stand-alone definition for "amateurism."[21] The judge focused on the testimony of the former commissioner of the Southeastern Conference (SEC),

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[19] *See* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019) (highlighting apprehension with NCAA amateurism argument).

[20] *See id*. (describing NCAA procompetitive argument).

[21] *See id*. (pointing out lack of stand-alone amateurism definition in NCAA rules).

one of the "Power Five" Division I sports conferences.[22] In his testimony the former commissioner stated that amateurism is "just a concept that I don't even know what it means. I really don't."[23] He further went on to testify, "You know, the term amateur I've never been clear on what is meant either by in your question or otherwise, what is really meant by amateurism."[24] The best definition of amateurism that the district court believed it could rely on was that amateurism is not "pay to play"—the court then went on to list a number of situations where NCAA allows its athletes to be paid in some form.[25] The court placed little

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[22] *See id*. at 1070-71 (outlining former SEC Commissioner's testimony).

[23] *See Nat'l Collegiate Athletic Ass'n*, 375 F. Supp. at 1071 (quoting former SEC Commissioner's testimony).

[24] *See id*.

[25] *See id*. at 1071-74 (listing different situations where NCAA allows pay to play in some form).

evidentiary value on the NCAA's definition of amateurism, which contributed to the court's ultimate findings against the NCAA.[26]

The Supreme Court Justices were similarly apprehensive of the NCAA's argument surrounding amateurism. During oral argument, Chief Justice Roberts noted that the NCAA allowance of insurance payments on behalf student-athletes to protect their future earnings sounds a lot like pay to play.[27] He then asked NCAA counsel to explain how the insurance payments do not undermine the NCAA amateurism argument.[28] Immediately thereafter, Justice Clarence Thomas, who is well-known for rarely interjecting during oral argument, asked the NCAA counsel why

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[26] *See id*. at 1074 (observing activities for which NCAA athletes receive money somehow do not constitute pay to play).

[27] *See* Transcript of Oral Argument at 8, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 972 (2020) (No. 20-512) (quoting Chief Justice Roberts).

[28] *See id*.

NCAA Division I coach salaries have ballooned in recent years, but student compensation remains so limited.[29] It struck Justice Thomas as odd that they both participate in the amateur ranks, yet coaches are permitted such high salaries while the student-athletes are unpaid. Justice Alito also questioned the NCAA on how its practices can be defended in the name of amateurism when it is accused of exploiting the students who are recruited to play sports like football, especially in the Power Five conferences, while the schools bring in billions of dollars from those sports.[30] The criticism continued from other justices, including Justice Kagan, who referred to NCAA's description of amateurism as "high-minded."[31]

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[29] *See id*. at 9-10 (questioning NCAA counsel regarding amateurism).

[30] *See id*. at 17 (referencing common criticisms of NCAA structure).

[31] *See id*. at 24 (criticizing NCAA definition of amateurism).

The Supreme Court's virtually unanimous criticism of the NCAA on its conception of amateurism and other points makes it seem likely the Court will affirm the Ninth Circuit decision. After allowance of name, image, and likeness compensation for education-related expenses, subsequent allowance of virtually any education-related compensation to athletes by the Supreme Court will be a significant chipping away of NCAA control over student-athletes in recent years. Regardless of the outcome of the *Alston* litigation, it is clear that the highest court in the nation has highlighted major issues with the current NCAA system and it is sure to be followed by other cases further scrutinizing the NCAA prohibitions against compensating athletes. Whether it happens this year or in twenty years, it seems likely that NCAA Division I athletes will eventually be compensated for more than just education-related expenses—and having written this during the 2021 NCAA March Madness tournament it is safe to say that they should be.