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ALERT

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NCAA v. ALSTON Debrief: After Unanimous Supreme Court Sinks NCAA's Limit on Educational Benefits for College Athletes, What Lies Ahead?

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In *NCAA v. Alston*, the Supreme Court confirmed that the NCAA's ability to restrict the amount of educational benefits student-athletes may receive from enrolling institutions is limited. The authors[1] offer reflections on the opinion and predictions as to what might happen next.

This week, in *NCAA v. Alston*, the U.S. Supreme Court, in a rare 9-0 decision, held that restrictions imposed upon National Collegiate Athletic Association ("NCAA") member institutions limiting the educational benefits they can provide to student-athletes violate Section 1 of the Sherman Antitrust Act. Writing for the Court, Justice Gorsuch reviewed in detail the district court's careful analysis, which had concluded that the NCAA and participating athletic conferences enjoyed no special immunity from the antitrust laws with respect to restrictions on the provision of education benefits. The Court rejected the NCAA's numerous arguments as to why its decisions as a joint venture should be given deference despite their anticompetitive effect on student-athletes. In a separate concurrence, Justice Kavanaugh suggested that the NCAA should pause and consider before enforcing other compensation-related restrictions and called into question whether the key distinguishing feature of NCAA competition is that the athletes are not paid a salary for their services.

The outcome in *Alston* is likely of little surprise to those who have followed the case[2] or to antitrust practitioners. The district court compiled a huge record, rejected many of the plaintiffs' challenges to NCAA restrictions, and ultimately decided that the plaintiffs had met their burden of showing that the multi-party arrangements between the NCAA and the so-called power conferences unduly restrain competition in the market for the services of college athletes. The NCAA appealed the district court's injunction to the Ninth Circuit and lost. The NCAA then petitioned for Supreme Court review arguing, among other things, that Court precedent immunized it from the usual rule of reason analysis applicable to legitimate competitor-organized joint ventures. The Court rejected that novel argument and held that because the NCAA and college athletic conferences clearly possess monopoly power over the services of top-tier student-athletes in Division I revenue sports, they cannot collectively fix the price of educational benefits offered to those student-athletes.

Where does the *Alston* decision leave the NCAA and what lies ahead for athletic conferences and member institutions? Here are a few predictions:

- As noted in the Court's decision, Congress has previously passed special legislation exempting certain industries, or certain activities of certain industries, from the antitrust laws. The NCAA will likely continue to lobby for passage of its own exemption, arguing that the Court's decision will be the ruin of "amateurism" in college sports because plaintiffs will now mount a bevy of challenges to the NCAA's rules, including its prohibition on paying salaries to student-athletes. The NCAA, in our view, faces an uphill battle given the public outcry about the disparity between the billions of dollars the NCAA and the power conferences earn each year from the services of student-athletes as compared to the educational and other benefits provided to those athletes. Moreover, Congress does not adopt exemptions to the antitrust laws very often and, over the past several years, has rolled backed some of those exemptions like the McCarran-Ferguson Act for health insurers. Finally, Congress and the Biden Administration are in the process of considering reforms to the antitrust laws that will result in more, not less, active enforcement against industries ruled by companies with market power, like Google, Amazon, Facebook and other tech giants.

- Another possibility is that, under the banner of preserving amateurism, the NCAA may push for federal legislation setting limits to salaries and other benefits colleges and universities can pay or provide to student-athletes. If that effort were successful, the joint effort struck down by *Alston* would then likely be exempt from antitrust scrutiny under the state action doctrine, set forth in *Parker v. Brown*, 317 U.S. 341 (1943), and made applicable to private parties in *California Retail Liquor Dealers Assoc.*

v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). The state action doctrine permits competitors to engage in what otherwise might be unlawful anticompetitive conduct where they are complying with a clearly articulated state policy displacing competition. The theory is that the government should be free to restrain trade as it sees fit for public policy purposes without imposing antitrust liability on private parties that are obligated to adhere to those policies.

- The Court's *Alston* decision makes clear that individual educational institutions, and indeed athletic conferences without the same market power as the combined venture between the NCAA and the power conferences, can lawfully set their own limits on educational benefits offered to student-athletes without running afoul of the antitrust laws. This means that an individual college or university, engaged in unilateral action, can set its own standards regarding educational benefits and that individual athletic conferences can do so as well as long as the standards and limits are not agreed to by its own or a rival conference with market power. We predict more standard-setting between like-minded educational institutions and conferences and less by the NCAA in revenue-generating sports.

- Because not all sports are revenue-generating, the NCAA may still be able to legislate and enforce limits on educational benefits and athletic pay in non-revenue sports without creating the same adverse impact on competition that was found to exist in revenue sports like football and basketball. This means we are likely to see an "arms race" within the power conferences with one school or conference after another offering more lucrative educational benefits to student-athletes in revenue sports now that the NCAA's restrictions have been lifted. But athletic conferences outside the power conferences (such as Division II or III conferences) or with a plethora of non-revenue sports are not likely to be part of such an arms race or the subject of successful antitrust challenges given they lack the market power that doomed the NCCA's practices.

- The Court's decision preserves the NCAA's right to define what are permissible "educational benefits" even while striking down its ability to limit the *amount* of such benefits. For example, the NCAA's rules prohibiting payments to student-athletes by outside boosters under the guise of "helping the student get through college" are presumably lawful and entitled to deference by the courts since they help preserve the integrity of athletic competition. The NCAA has already telegraphed the possibility that it will more precisely—and perhaps more broadly—define "educational benefits," adding to the rules that govern member institutions and student-athletes.

While many will focus on the rejection of the NCAA's argument for special treatment of its activities under the antitrust laws, the Court repeatedly stressed that much of the NCAA's rules governing intercollegiate athletics are not anticompetitive and would pass muster as legitimate since they make available sporting events that would not be possible without agreement between member conferences and institutions. For most institutions of higher education, this should provide comfort that the NCAA rules on such things as recruiting, athletic scholarships, performance bonuses, and sponsorships are not going away any time soon. Nonetheless, institutions with revenue-generating sports should be mapping out their own strategies with their athletic conferences on such issues as how to approach educational benefits, student-athlete compensation, and name, image and likeness rules since the NCAA will not likely be the same source of those rules going forward.

Saul Ewing Arnstein & Lehr will continue to monitor these developments. If you have questions about this alert or related issues, please reach out to your regular Saul contact or the authors.

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1. All from Saul Ewing Arnstein & Lehr LLP, where Ms. Brockway and Ms. Piccola practice in the Firm's Higher Education Group, while Mr. Morsch practices in the Firm's Antitrust and Class Action Groups. The views expressed are those of the authors, not their Firm or its clients.

2. See our prior article here.

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