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CRUCIAL CASE SUMMARY

TOPIC:

***National Collegiate Athletic Association v. Shawne Alston, et al.*: Game Over for the NCAA's Business Model?**

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INTRODUCTION:

In *National Collegiate Athletic Association v. Shawne Alston, et al.*,[2] the Supreme Court of the United States considered whether the NCAA violated federal antitrust law by restricting the education-related benefits that could be given to amateur student-athletes by the NCAA's member institutions. In a unanimous opinion, the Court concluded that the NCAA's restrictions were illegal, and it upheld the district court's injunction prohibiting the NCAA from enforcing the restrictions.

After *Alston*, the NCAA rules relating to education-related benefits (such as graduate or vocational school scholarships, payments for academic tutoring, and posteligibility internships) will be dramatically altered. The NCAA and its members have been given some leeway to determine what, exactly, constitutes benefits "related to education," but it is fair to say that student-athletes are now positioned to receive a material increase in benefits. As pointed out in Justice Brett Kavanaugh's concurring opinion, the *Alston* decision also casts into doubt the legality of the NCAA's remaining compensation restrictions.

At bottom, the Court rejected the NCAA's argument that its rules and regulations should be given only a "quick look" for legality by the courts. Going forward, courts will apply a probing "rule of reason" analysis to determine how such rules impact competition in the relevant market. This decision makes clear that the Court will apply similar analysis to for-profit and not-for-profit business models when determining whether they violate federal antitrust law. Based on the *Alston* decision, we may soon see other NCAA compensation restrictions challenged by student-athletes unless the NCAA and its members make significant changes to how they conduct business.

DISCUSSION:

I. Factual and Procedural Background

As recounted by the Supreme Court, intercollegiate athletics competition began in 1852 when students from Harvard and Yale participated in a boat race designed to promote travel to Lake Winnipesaukee, New Hampshire. College sports (and football in particular) soon took off, and schools began offering compensation to talented athletes to compete on their teams.

As the popularity of college sports continued to grow, the NCAA was created in the early 20th century as a standards-setting entity in response to a rash of in-game injuries. From the outset, the NCAA took the view that student-athletes should not be paid for their participation in sports, although it was not until 1948 that the NCAA adopted a "Sanity Code" that limited compensation but also authorized institutions to cover the cost of tuition for student-athletes. Over time, the NCAA modified its rules to permit institutions to pay for other expenses for their student-athletes, including room and board, and further relaxed restrictions on scholarships, but current NCAA rules continued to limit the compensation that student-athletes can receive in exchange for their athletic services.

In *Alston*, a group of current and former student-athletes in men's Division I Football Bowl Subdivision and men's and women's Division I basketball brought a class action against the NCAA and eleven Division I conferences. They alleged that the NCAA's compensation rules violated Section 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce."[3]

Following a trial, the district court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restricted compensation and benefits unrelated to education. But the district court agreed with the student-athletes that the NCAA's caps on education-related benefits violated the Sherman Act. The court entered an injunction that stopped the NCAA from limiting education-related compensation or benefits that conferences and schools can provide to student-athletes playing Division I football and basketball. The court also provided that the NCAA could limit cash awards for academic achievement, but only to the same level for cash awards given for athletic achievement. The court left it up to the NCAA and its members to propose a definition of compensation or benefits "related to education," and

permitted the NCAA to regulate how conferences and schools provided the compensation and benefits. The court also made clear that the injunction only applied to the NCAA and multi-conference agreements, and not to individual conferences and higher education institutions.

On appeal, the Ninth Circuit affirmed the district court's decision. The NCAA took the case to the Supreme Court, asking it to reverse the portions of the lower courts' decisions that sided with the student-athletes.

II. The Supreme Court's Decision

Before the Supreme Court, the parties did not challenge certain aspects of the district court's decision. First, the parties did not challenge the district court's determination that the relevant market for antitrust purposes was the market for athletic services in men's and women's Division I basketball and FBA football. Second, the parties did not dispute that the NCAA enjoys monopsony control over that labor market—i.e., that the NCAA is the only "buyer" in the market for those athletic services—or that the NCAA's limits on compensation restrict what member institutions can offer to student-athletes. Third, the parties also did not dispute that the NCAA's restrictions decrease the compensation that student-athletes receive compared to what they could receive if the market for their services was competitive, and that those decreases in compensation in turn depress participation by student-athletes in that market. Finally, the student-athletes did not argue that the NCAA could not seek to justify the restraints by pointing to procompetitive effects on the consumer market for college sports. Because these matters were uncontested, the Supreme Court did not express any views on them.

The NCAA asserted several arguments before the Supreme Court, which the Court dealt with in turn. First, the NCAA argued that the district court should not have applied a "rule of reason" analysis to its compensation restrictions. As explained by the Court, the rule of reason analysis is "a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition – especially its capacity to reduce output and increase price."[4] The NCAA suggested the district court instead should have applied an "abbreviated deferential review" or "quick look" because the members of the NCAA's joint venture must be allowed to collaborate if they are going to offer athletic competition to consumers. But the Supreme Court noted that most restraints challenged under the Sherman Act are subject to the rule of reason, and because the NCAA's members collectively enjoy monopsony power in the relevant market and the NCAA's compensation restraints harm competition, the NCAA cannot obtain "quick look" approval for these restrictions. The Court agreed that certain agreements made by sports leagues about the rules of competition (such as how many players can be on the field) may only be worth a "quick look," but rules that fix compensation for student-athletes will be subject to a more stringent analysis. The Court further concluded that its prior decision in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*[5], in which the Court approved the NCAA's restrictions on the ability of member schools to televise football games, did not require the Court to turn away all challenges to the NCAA's compensation restrictions. Finally, the Court rejected the

NCAA's argument that it and its member schools should be effectively immune from Sherman Act liability because they are not "commercial enterprises" but instead oversee athletics as part of the undergraduate experience; in the NCAA's words, it sought to maintain "[the] societally important non-commercial objective" of "higher education." But the Court refused to carve out the NCAA and its schools from the reach of the Sherman Act just because they were serving a "social good." The Court noted that Congress could always modify the law to carve out an exemption for college sports if it wanted to do so—but the Court itself could not offer special dispensation to litigants to serve social objectives beyond enhancing competition. Accordingly, the Court held that the district court was correct to apply the rule of reason analysis in this case.

Second, the NCAA argued that the district court had misapplied the rule of reason. In its analysis, the district court had first concluded that the challenged restraints produced significant anticompetitive effects in the market for the student-athletes' services. The NCAA claimed that the restrictions created certain procompetitive benefits: they differentiate college sports and preserve demand for them. The NCAA argued that the district court had improperly required the NCAA to prove that each individual rule was the "least restrictive" means of achieving those procompetitive benefits. The Supreme Court rejected this argument because the district court's judgment actually turned on whether there were "substantially less restrictive alternative rules" to achieve the same procompetitive benefits.

The NCAA also argued that the district court had improperly rejected the NCAA's views about what "amateurism" requires, but the Supreme Court concluded that, as found by the district court, the NCAA had not adopted any consistent definition of "amateurism," and that the NCAA's compensation restrictions had shifted over the years and had been adopted without any reference to considerations of consumer demand.

Lastly, the NCAA argued that the district court was wrong in holding that substantially less restrictive alternatives existed to deliver the same procompetitive benefits as the current compensation rules, and that the court was trying to micromanage the NCAA's business. The Supreme Court concluded, however, that the district court's injunction gave the NCAA an appropriate amount of leeway, in three significant ways. First, the injunction only applied to restrictions on education-related benefits, and not to other sorts of benefits or compensation (such as payments just for participating in college sports). Second, the injunction permitted the NCAA to develop its own definition of education-related benefits, subject to oversight by the court. Third, the injunction only applied to the NCAA and multiconference agreements and not to individual conferences. The Court noted that the injunction did not stop the NCAA from continuing to prohibit compensation from boosters, sneaker companies, and other third parties (although it will be interesting to see how this will play out in practice), and that the NCAA could modify its rules to help ensure that compensation and benefits provided by schools are legitimately related to education and not athletics. Ultimately, the Court concluded that the district court's decision was correct.

In a concurring opinion, Justice Kavanaugh added that he believed that the NCAA's other compensation rules – the rules that do not involve education-related benefits and that

instead restrict student-athletes from receiving compensation or benefits for playing sports – also "raise serious questions under the antitrust laws." As Justice Kavanaugh pointed out, the Court's opinion did not address the legality of these other compensation rules, but it did establish how such rules should be analyzed in future cases. He wrote that the NCAA may lack a valid procompetitive justification for those other rules. He found the NCAA's argument that the "defining feature of college sports . . . is that the student athletes are not paid" to be "circular and unpersuasive." Justice Kavanaugh explained that such a business model would be "flatly illegal" in almost any other industry, and that ultimately, "[t]he NCAA is not above the law."

Looking Ahead

Although the *Alston* decision was, on its face, somewhat limited by only applying to education-related benefits for student-athletes playing Division I football and basketball, the potential impact of the case is tremendous. Justice Kavanaugh suggested that the legality of the remaining NCAA compensation rules for competition-related benefits is now in doubt, and we can expect to see additional litigation in the future over those rules. Furthermore, the NCAA will be forced to defend those rules under a "rule of reason" analysis, rather than by making sweeping statements about how its business model is defined by not paying student-athletes and that it should not be held accountable under the federal antitrust laws. And while the *Alston* decision only concerned football and basketball, its reasoning appears to be equally applicable to student-athletes in other sports.

We have already seen state legislatures around the country take aim at the NCAA's restrictions on student-athletes receiving compensation in exchange for the use of their names, images, and likenesses. The *Alston* decision further chips away at the NCAA's restrictions on student-athlete compensation. It is unclear how the decision may influence attempts by student-athletes to unionize—it may galvanize such efforts—and it also could prompt litigation seeking damages from the NCAA and its members, rather than solely non-monetary relief. We could be approaching a point where the market for the labor of student-athletes is no longer meaningfully restricted by the rules of the NCAA. On the other hand, it is possible that Congress will step in to grant some kind of carveout from the federal antitrust laws for the NCAA and its members, restoring to them the ability to restrict benefits and compensation for student-athletes. This would appear to be an unlikely outcome given public sentiment and the fact that Congress rarely grants such exemptions, but it is not outside the realm of possibility.

At present, however, institutions of higher education should continue to closely follow the developments in this area, including any new guidance or rules issued by the NCAA and the various conferences addressing the *Alston* decision. It remains to be seen whether the NCAA will fight to maintain its business model where it can, or whether it will take a new approach and make changes that go beyond what has been required so far by the courts and legislatures. Furthermore, because the case only applied to the NCAA and multiconference agreements, it is certainly possible that individual conferences will arrive at varying outcomes.

Institutions should also begin thinking through how to deal with the practical effects of the decision. First off, will the institution begin providing new education-related benefits for its student-athletes? For all sports, or only certain sports? How will compensating student-athletes impact the institution's non-revenue-raising sports? What benefits will be provided? What limits (if any) on those benefits will the school put in place, and how will they be enforced? How will the institution adjust its budget to compensate for these changes? Who will be involved in deciding these issues for the institution: the president's office, athletic director, head coaches, faculty representatives, general counsel? What role will current students, student-athletes, and alumni/boosters play in the decision-making process?

As the institution works through these decisions, it will want to watch out for legal pitfalls as well. Obviously, changes in benefits for student-athletes can impact an institution's Title IX compliance program. But an institution also will want to be careful about how it communicates with other institutions about these issues, since an institution could walk into additional antitrust issues if it begins collaborating with other schools to agree on restrictions. Providing benefits to student-athletes also creates potential tax implications and immigration issues, and of course if student-athletes begin to organize and seek to collectively bargain, institutions will need to think through the labor and employment issues that arise from those situations.

Obviously, while the *Alston* decision resolved a significant issue, it has opened the door to a host of new issues and created significant uncertainty for institutions. Further upheavals in this area are likely, and the rules of the game are and will remain in flux for some time to come.

END NOTES:

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[2] *Nat.'l Collegiate Athletic Ass'n v. Alston, et al.*, 594 U.S. ____ (2021).

[3] 15 U.S.C. § 1.

[4] *Alston supra* n. 2 (Internal quotation marks omitted).

[5] 468 U. S. 85 (1984).

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