FOR THE LOVE OF THE GAME: WHAT NEXT FOR COLLEGE ATHLETICS?

BY GWENDOLYN COOLEY, CALEB PRACHT & HART MARTIN[1]

1 The views contained in this article are those of the authors and should not necessarily be ascribed to their respective Attorneys General, nor any other Attorney General, nor the National Association of Attorneys General.

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By Gwendolyn Cooley, Caleb Pracht & Hart Martin

In this article, we examine the impact of last year's Supreme Court decision in NCAA v. Alston. Not only did the Court confirm that the NCAA's cap on education-related compensation was anticompetitive, but they also questioned the ability of the rest of the compensation scheme to pass antitrust muster. This decision sparked further changes to the NCAA's name, image, and likeness rules for college athletes, provoked new legislative proposals, and inspired more legal challenges. Even professional baseball's notorious antitrust exemption has not been immune from the renewed scrutiny about how sports should be organized. It has been more than a year since the Alston decision, and there will likely be many more changes before these questions are resolved. However, one thing is clear – the next big play for the future of sports will be under review by antitrust officials.

In the wake of the Supreme Court's landmark decision in *Alston*, a re-examination of how we organize amateur and professional sports is underway. This case exposed anticompetitive restraints in the then-current system and has opened the door to rewrite the rules. Post-Alston, there have been challenges to the correct classification of student-athletes, new laws regarding student-athletes' right to compensation for their name, image, and likeness, and questions regarding the appropriateness of professional baseball's antitrust exemption. These examples provide a snapshot of some of the fundamental questions being asked; questions that will likely take many more years to resolve. It has been more than a year since the *Alston* decision, and it will continue to be a guidepost as the NCAA and other sports organizations draft a new playbook.

I. *ALSTON*

In a unanimous decision last year, the Supreme Court held that competition is not limited to the football field or basketball court – colleges and universities must now compete with each other for student-athletes in the education-related compensation they offer.[2] At first glance, the ruling may seem very narrow and not likely to impact the fragile ecosystem of the NCAA's compensation rules. However, parts of the decision and Justice Kavanaugh's emphatic concurrence went beyond the limited question at issue, calling into question all of the NCAA's compensation rules. The rippling effect of this decision can already be seen in new cases, rules, and legislation, and it has inspired and reinvigorated challenges to the established rules that have so long governed organized collegiate sports.

Alston arose from a Section 1 challenge to the NCAA's compensation rules brought by current and former student-athletes in men's Division I Football Bowl Subdivision ("FBS") football and men's and women's Division I basketball.[3] Before this case, the NCAA rules limited compensation to the cost of attendance; student-athletes could also receive limited payments for athletic and educational performance.[4] This was an unusual antitrust case because the defendants, the NCAA and 11 Division 1 Conferences, admittedly engaged in a horizontal price fixing scheme in a market where they hold monopsony power.[5] It was also undisputed that their compensation rules depressed wages and participation of student-athletes.[6] The plaintiffs were able to show that the NCAA's compensation rules produced significant anticompetitive effects in the relevant market, and the burden shifted to the NCAA to justify their compensation restrictions by demonstrating their procompetitive benefits.[7]

The NCAA's case hinged on their definition of "amateurism," which they claimed was a key product feature that affected consumer demand. This proved particularly problematic for the NCAA as their own conception of amateurism changed over the years and was nowhere defined in their rules.[8] The district court struggled to find evidence that the NCAA's entire compensation scheme was necessary to preserve consumer demand, however the court found that unlimited payments unrelated to education may negatively affect consumer demand and blur the lines between amateur and professional sports.[9] As for education-related payments, the district court found 1) the NCAA's restraints were "'patently and inexplicably stricter than is necessary'"[10] 2) removing these restraints would not detrimentally impact consumer demand,[11] and 3) enjoining the NCAA's restraints on education-related payments was a significantly less restrictive way of achieving the same procompetitive benefits that the NCAA argued the current rules achieved.[12]

Both the players and NCAA appealed this case to the Ninth Circuit.[13] The NCAA argued that the district court went too far, and the players argued that the court did not go far enough.[14] The Ninth Circuit disagreed with both sides and upheld the district court's decision in its

2 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

3 *Id.* at 2151.

4 *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1244-45 (9th Cir. 2020).

5 *Id.* at 2154.

6 *Id.*

7 *Id.* at 2152.

8 *Id.* at 2152.

9 *Id.* at 2152-53.

10 *Id.* at 2162

11 *Id.* at 2152-53.

12 *Id.* at 2164.

13 *In re Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239.

14 *Id.* at 1263.

entirety.[15] While the players did not renew their challenge, the NCAA appealed the decision to the Supreme Court.[16] After careful review, the Supreme Court agreed with the Ninth Circuit and refused to disturb any of the district court's findings.[17]

In Justice Kavanaugh's concurrence, he lauded the decision as an "overdue course correction," and invited further reform for the rest of the NCAA's compensation rules.[18] Whether changes come by legislation, collective bargaining arrangements, or future antitrust suits, Justice Kavanaugh could not have been clearer when he wrote, "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."[19] Perhaps worried that this could somehow be misconstrued as subtle, Justice Kavanaugh went on to say that he doubted the NCAA could produce a valid procompetitive justification for the rest of their compensation rules.[20]

At the heart of Justice Kavanaugh's concurrence is the policy question – should student-athletes be paid? While the NCAA may struggle with their own definition of amateurism, common sense defines amateur collegiate sports as those organized with unpaid players. The only meaningful distinction from professional sports is compensation; at this level of competition, differences in skill are marginal. He notes that in any other market, this circular reasoning – an amateur athlete is one who is unpaid, therefore we cannot pay amateur athletes - would not be allowed.

This case presents another puzzling problem – as amateur sports are currently organized, under the NCAA's compensation rules, they may violate the antitrust laws. However, our antitrust laws were not enacted so that judges could scrap an entire market structure and build their own. At least as they are currently written, our antitrust laws are meant to stop anticompetitive conduct in an otherwise competitive market, like pulling weeds to maintain a healthy garden. Does this mean that the NCAA has no choice but to allow some form of compensation? If so, will this ultimately destroy amateurism? Surely, there must be a way forward, even if it requires us to reconsider our ideas of amateurism and the value of student-athletes' work.

Alston opened with a detailed historical examination of the relationship between college sports and compensation. Writing for the Court, Justice Gorsuch noted that as early as 1852, student-athletes were offered compensation in one form or another.[21] Even after the NCAA enacted restrictions against "pay for play," under-the-table payments were still common.[22] While the NCAA's compensation restrictions have depressed the more open and obvious payments, that has not stopped them from occurring.[23] Perhaps, the lofty goals of a system of uncompensated students playing purely for the love of the game is naïve. If the NCAA reforms its systems and compensates the athletes as it does the students who work in university cafeterias, it might escape antitrust oversight.

Practically, it seems like many colleges and universities would have jumped at the chance to use the *Alston* decision to strengthen their recruiting efforts. Less than three months after the Court's decision, the first university began disbursing academic achievement payments.[24] But almost a year later, only 22 of 130 FBS schools have provided or said they plan to provide such academic achievement payments.[25] Undoubtedly, there will be some push and pull as amateur sports change in the wake of *Alston*, but the NCAA's speculation about a parade of student-athletes in Lamborghinis has not been the result.[26] And if compensation for student-athletes is treated as part of the solution, instead of part of the problem, maybe players can get out of the courtroom and back to the game.

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15 *Id.* at 1265-66.

16 *Alston*, 141 S. Ct. at 2154.

17 *Id.* at 2166.

18 *Id.* at 2166 (Kavanaugh, J., concurring).

19 *Id.* at 2166-67 (Kavanaugh, J., concurring).

20 *Id.* at 2167 (Kavanaugh, J., concurring).

21 *Id.* at 2148 (majority opinion).

22 *Id.* at 2149.

23 Top 5 'pay to play' scandals rocking college football, The Week (Jan. 8, 2015), Top 5 'pay to play' scandals rocking college football | The Week.

24 Ross Delenger, Ole Miss Breaks Ground on Post-Alston Ruling 'Extra Benefits,' Sports Illustrated (Nov. 20, 2021), Ole Miss becomes first school to officially give athletes 'academic benefits' - Sports Illustrated.

25 Dan Murphy, Only 22 of 130 NCAA FBS-level schools say they have plans to provide allowed academic bonus payments to athletes this year, ESPN (Apr. 6, 2022), Only 22 of 130 NCAA FBS-level schools say they have plans to provide allowed academic bonus payments to athletes this year (espn.com).

26 *Alston*, 141 S. Ct. at 2165.

II. *JOHNSON*

Working more than 40 hours per week in a manner dictated by the universities, with strict rules on when they eat, shower, what they can post on social media, and when they can take classes, the student athlete plaintiffs in *Johnson v. NCAA*[27] alleged that they are employees of the universities they play for, and as such are entitled to compensation.[28] So far, the Eastern District of Pennsylvania agrees.[29]

Deciding a motion to dismiss, the court held that applying the Glatt factors, the complaint plausibly alleged that Plaintiffs are employees of the universities for purposes of the Fair Labor Standards Act.[30]

Picking up on Justice Kavanaugh's concurrence in Alston, Judge Padova noted the circular logic of the defendants' argument that "colleges may decline to pay student athletes because the defining feature of college sports is that the student athletes are not paid."[31]

In light of this admonishment from Justice Kavanaugh, the court focused on traditional labor analysis when it determined that student athletes were employees of their universities. Under the Department of Labor's Wage and Hour Division Field Operations Handbook, participation in programs conducted primarily for the benefit of the participants as a part of the educational opportunities are not work of the kind contemplated by the [Fair Labor Standards Act] and do not result in an employer-employee relationship…"[32]

The complaint alleged that the NCAA reported total revenues of over $1 billion from television and marketing rights, fees, championships. Tournaments, and sales" in 2018.[33] This enormous benefit to the schools persuaded the court that "D1 interscholastic athletics are not conducted primarily for the benefit of student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend."[34]

Under *Glatt v. Fox Searchlight Pictures*,[35] there are seven factors which would best assess the economic reality of the broader question under what circumstances an unpaid intern must be deemed an employee under the FLSA and therefore compensated.

The seven part test includes 1) an expectation of compensation, 2) similarity of training to education, 3) whether there are academic credits for the "internship" or whether it is part of the integrated coursework, 4) whether it corresponds to the academic calendar, 5) whether the internship is time limited, 6) whether the participant complements rather than displaces paid employees, 7) whether the parties understand that the worker is not entitled to a paid job at the conclusion of the internship.[36]

Balancing these factors the court held that the complaint plausibly alleged Plaintiffs are employees for purposes of the FLSA.[37]

The district court has not yet examined the monopsony buying power of the NCAA, and why it would be able to extract free labor from student athletes, nor did the decision discuss the agreement between the individual schools that make up the NCAA to explicitly not pay wages to the students. As the Johnson case is headed to the Third Circuit, it is unlikely that any of these antitrust issues will be examined in this case, but as this article will discuss, there are other venues for these issues.

27 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491 (2021).

28 *Id.* at 495.

29 *Id.* at 512.

30 *Id.* at 501.

31 *Id.* at 501, citing *Alston, --US--* , 104 S. Ct. at 2167.

32 *Johnson*, 556 F. Supp. at 502. (emphasis removed).

33 *Id.* at 505.

34 *Id.* at 506.

35 *Glatt v. Fox Searchlight Fixtures*, 811 F.3d 528 (2d. Cir. 2016).

36 *Id.* at 509.

37 *Id.* at 512.

III. *NIL*

The debate about student-athletes' right to benefit from their name, image, and likeness ("NIL") began long before the decision in Alston and the NCAA's subsequent repeal of their rules prohibiting NIL compensation. In the most well-known example, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, former and then-current NCAA athletes filed a class action lawsuit against Electronic Arts ("EA") and the NCAA for using their NIL in EA's successful NCAA Football video game, without compensating the athletes.[38] However, under the NCAA's rules, EA could not compensate the plaintiffs. The case ultimately resolved with a $60 million settlement in 2014.[39]

Perhaps the settlement was detrimental to athletes' overall cause, because it would take seven more years before the NCAA repealed their NIL restrictions in full. However, criticism of NIL restrictions remained strong. For instance, one critic noted that the NCAA had to issue a blanket eligibility waiver for any current athletes who received money from the settlement.[40] One might think that the NCAA having to suspend their own rules in order to pay college athletes what they were legally owed might lead to quick change. Stranger still, the NCAA's chief legal officer said of the settlement, "In no event do we consider this settlement pay for athletics performance."[41] If a videogame appearance doesn't constitute pay for athletics performance, then why impose such a restriction?

California increased the pressure in 2019 when they passed the Fair Pay to Play Act.[42] The law, which will go into effect in 2023, outlaws the NCAA's NIL compensation prohibition in California. Similar to their defense in *Alston*, the NCAA expressed concerns that this law would blur the line between professional and amateur sports.[43] Many voices, athletes included, came down on different sides of this issue.[44] Tim Tebow, an ESPN analyst and former college and professional football player, said that allowing NIL compensation would add to a selfish culture and take away from what is special about college ball, while the bill signing was attended and celebrated by NBA legend, LeBron James.[45]

Whether or not *Alston* was the final straw, just nine days after the Supreme Court's decision, the NCAA adopted an interim policy suspending their NIL compensation prohibition.[46] Some state NIL laws, like California's, preceded the *Alston* decision, but many more came in its wake. The National Conference of State Legislatures' tracker shows 27 states currently have NIL laws in place. An additional 10 have pending legislation. 13 states have either taken no action or their proposed legislation failed. Finally, one state repealed their law, and two other states are considering repeals.[47] Some of the earlier state NIL laws, like Florida's, were more restrictive – prohibiting colleges from aiding their student-athletes in securing NIL deals.[48] Since then, states are experimenting with less restrictive laws that specifically allow colleges to help their student-athletes. Kentucky's law, passed this year, allows colleges to establish programs to facilitate NIL deals and provide support to student-athletes, and Alabama repealed their law to prevent their colleges from having to operate at a disadvantage.[49]

These new and differing state laws will undoubtedly factor into an athlete's choice of school. There is also the possibility that a federal law will be enacted and change the rules of the game once again. But in this moment, where different laws are operative, the NCAA might take

38 724 F.3d 1268 (9th Cir. 2013).

39 Darren Rovell, Athletes whose likenesses appeared in Electronic Arts games will share a $60 million settlement, ESPN (Mar. 15, 2016), College football and basketball players to receive an average of $1,600 in settlement with Electronic Arts (espn.com).

40 Jon Solomon, College athletes react on Twitter after receiving EA Sports lawsuit checks, CBS (April 12, 2016), College Football 2.0: Leadership void must be filled to address sport's uncertain, unregulated future (cbssports.com).

41 Solomon, *supra*.

42 Dan Murphy, California defies NCAA as Gov. Gavin Newsom signs into law Fair Pay to Play Act, ESPN (Sept. 30, 2019), California defies NCAA as Gov. Gavin Newsom signs into law Fair Pay to Play Act (espn.com).

43 Murphy, *supra*.

44 Murphy, *supra*.

45 Murphy, *supra*.

46 Michelle Brutlag Hosick, NCAA adopts interim name, image and likeness policy, NCAA (June 30, 2021), NCAA adopts interim name, image and likeness policy - NCAA.org.

47 Student Athlete Compensation Legislation, National Conference of State Legislatures, Microsoft Power BI (last visited May 17, 2022).

48 Bradley Arant Boult Cummings, LLP, Alabama and Florida Call an Audible on NIL Laws, National Law Review, Volume XII, Number 67 (Mar. 8, 2022), https://www.natlawreview.com/article/alabama-and-florida-call-audible-nil-laws.

49 *Supra*.

advantage of the laboratory of democracy to more closely look at the pros and cons of each. They might also evaluate the impact of these NIL deals on consumer demand to reveal if that "something special" wanes in light of compensation.

IV. MLB

Interestingly, *Alston* not only dealt with amateur sports, but called into question 100-year-old precedent regarding professional baseball's antitrust exemption. In Alston, the Court quibbled with the idea that the holding in *Federal Baseball* is truly an "exemption," referring to it as a "dalli[ance]."[50] Justice Gorsuch reiterated that in *Federal Baseball* the Court found that baseball games were not under the purview of the Sherman Act because teams were not engaged in interstate trade or commerce, but then he pointed out the obvious hypocrisy, "even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success."[51] While not going so far as to overturn professional baseball's antitrust exemption, the Court did make clear that this exemption had not and would not be extended to other sports leagues, even repeating their prior acknowledgment of the criticisms of that exemption as "unrealistic," "inconsistent," and "aberration[al]."[52] Baseball's strange, to put it diplomatically, judicially-created exemption is further underscored in the opinion when the Court wrote, "The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is 'properly addressed to Congress.'"[53] Future courts are likely to determine that all professional sports are subject to the antitrust laws, unless they receive a pass from Congress.

Baseball's antitrust exemption has long been the subject of controversy, and a lawsuit filed in December of last year has been filed explicitly to overturn this exemption.[54] In 2019, the MLB decided to shrink the minor league teams' number from 160 to 120, and the plaintiffs in *Nostalgic Partners* allege that this action is a horizontal agreement among the MLB and its 30 franchises to limit competition and cut costs, violating the Sherman Act.[55] The Department of Justice filed a statement of interest in this case, noting that even though the court was bound by *Federal Baseball*'s precedent, it should construe the exemption narrowly.[56] Asking the court to narrowly construe the exemption should not be taken as affirmation of that exemption. The DOJ repeated the Supreme Court's dicta in *Alston*, and even referenced a colorful concurrence from the Second Circuit to highlight longstanding disagreement with the decision, "No one can treat as frivolous the argument that the Supreme Court's recent decisions have completely destroyed the vitality of [*Federal Baseball*] decided twenty-seven years ago, and have left that case but an impotent zombi [sic]."[57] If Nostalgic Partners does make its way on appeal to the Supreme Court, critics wonder if they will take up the issue.[58] The Court has recently rejected three cert petitions regarding baseball's exemption, but in light of Alston, some believe that the Court may be ready to re-examine the issue.[59]

But if the Supreme Court is not ready to confront baseball's "inconsistency," legislators might be. Last year, the "Competition in Professional Baseball Act" was introduced, which would eliminate professional baseball's antitrust exemption.[60] On June 28 of this year, the Senate Judiciary Committee sent a bipartisan letter to the Advocates for Minor Leaguers, asking them to answer questions about baseball's antitrust exemption.[61] Even before sending their official response, the Advocates' Executive Director Harry Marino said he was confident this inquiry would

50 *Alston*, 141 S. Ct. at 2159.

51 *Id.*

52 *Id.* (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957)).

53 *Id.* at 2160 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 689 (1978)).

54 *Nostalgic Partners, LLC, d/b/a The Staten Island Yankees et al. v. The Office of the Comm'r of Baseball*, Civ. A. No. 1:21-cv-10876 (S.D.N.Y. filed Dec. 20, 2021).

55 Rachel Scharf, Minor League Teams Sue MLB to End Antitrust Carveout, Law360 (December 20, 2021), Minor League Teams Sue MLB To End Antitrust Carveout - Law360.

56 Statement of Interest of the United States, *Nostalgic Partners,* Case No. 1:21-cv-10876, ECF No. 35.

57 *Id.*

58 *Id.*

59 *Id.*

60 Competition in Professional Baseball Act, S. 1111, 117th Cong. (2021).

61 Press Release, Senate Comm. on the Judiciary, Durbin, Grassley, Blumenthal, Lee Seek Information About Antitrust and Minor League Baseball (June 28, 2022) Durbin, Grassley, Blumenthal, Lee Seek Information About Antitrust and Minor League Baseball | United States Senate Committee on the Judiciary.

ultimately lead to the overturn of professional baseball's exemption.[62] This scrutiny from the courts, the Department of Justice, and the Senate should signal to the MLB that it is time to throw out their old playbook.

V. CONCLUSION

The Supreme Court's decision in *Alston* undoubtedly has changed the game for both professional and amateur sports. This article only addresses some of those changes, which include lifting the NCAA's prohibition on NIL compensation, further questions and legal action about student-athletes' proper designation and compensation, and the potential overhaul of professional baseball's antitrust exemption.

As antitrust practitioners, we see *Alston* as an important example of what our antitrust laws were designed to do. This case exposed problems in the amateur sports caused by anticompetitive restraints. With the principles of competition firmly in mind, the NCAA (and perhaps the MLB) can now reform their rules. As the Court said in *Alston*, "markets are often more effective than the heavy hand of judicial power."[63] It is now up to the NCAA to issue new rules that promote and preserve student athletics.

62 R.J. Anderson, U.S. Senate Judiciary Committee looking into Major League Baseball's antitrust exemption, CBS (June 28, 2022), U.S. Senate Judiciary Committee looking into Major League Baseball's antitrust exemption - CBSSports.com.

63 *Alston,* 141 S. Ct. at 2166.

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