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High Court Hears Argument in Historic NCAA Antitrust Case on College Athlete Compensation

In this article, we discuss the arguments made by counsel for the National Collegiate Athletic Association (NCAA), and questions posed by the justices.

By Carl W. Hittinger and Julian D. Perlman

On March 31, the U.S. Supreme Court heard oral argument in *NCAA v. Alston*, No. 20-512 (S.Ct. Dec. 16, 2020). In this article, we discuss the arguments made by counsel for the National Collegiate Athletic Association (NCAA), and questions posed by the justices; in a future article, we will do the same for the players' arguments, leading up to our coverage of the court's decision, likely this summer.

Previously in this case, the court granted certiorari and agreed to review two U.S. Court of Appeals for the Ninth Circuit decisions that had affirmed the district court's judgment that the NCAA's and several collegiate athletic conferences' rules regarding compensation paid to college athletes violated Section 1 of the Sherman Act. The Ninth Circuit agreed with the district court's judgment, applying the rule of reason following a bench trial, holding that there were procompetitive justifications for those rules that prohibited unlimited cash payments unrelated to education, but that there were no such procompetitive justifications for rules limiting education-related compensation and prohibiting such limits. The NCAA sought to reverse, whereas the players did not challenge the Ninth Circuit's affirmance, which kept in place certain limits unrelated to education.

The arguments in the case have cast a spotlight on the two fundamental antitrust issues that the justices will need to address before the end of this term.

First, the court considered the NCAA's central argument that the defining characteristic of its product, collegiate athletics, is not just that the athletes are students, but that they are not paid for their play. Counsel to the NCAA acknowledged this head on, explaining that "the cost of labor in this unique instance is what is the differentiating feature that provides a procompetitive product." Justice Amy Coney Barrett questioned this reasoning, asking whether it is a "legitimate procompetitive justification to say that consumers love watching … unpaid people play sports."

The justices appeared not ready to embrace the NCAA's implications that it is deserving either of some exemption from the antitrust laws or of more deferential scrutiny because it is historically an amateur organization and not just a business venture. This is similar to the argument made decades ago by Major League Baseball (MLB), in response to which the Supreme Court found that MLB was not just a business, to which the Sherman Act is proscribed, but rather the "national pastime." As Justice Brett Kavanaugh observed, the NCAA's "traditional and history argument" was "very similar to the arguments that were made for exempting baseball from the antitrust laws, *Flood v. Kuhn* … Federal Baseball." Kavanaugh conveyed skepticism of that argument, noting that the "exemption has not been replicated in other sports in other cases." Such industrywide exemptions historically have been for Congress, not the courts, to determine. Indeed, in the MLB cases, Congress had passed on deciding whether an exemption applied to MLB, a fact that was not lost on the Supreme Court justices.

Several of the justices were notably skeptical that the NCAA's primary appeal to consumers is that the college athletes are unpaid for their labor, and questioned the ability of the NCAA to unilaterally define its product without regard to the antitrust laws. Justice Elena Kagan observed of the NCAA's position that "you're saying that the differentiating feature is the lack of pay to play. But the evidence in this trial suggested exactly the opposite" – namely, that demand for the NCAA product was not adversely affected by certain payments to student athletes. Justice Samuel Alito outright challenged the very premise of the NCAA's argument, suggesting with regard to college athletes that "in fact, they are paid. They get lower admission standards. They get tuition, room and board, and other things."

Second, the justices will be forced to provide more clarity on whether the so-called quick look antitrust analysis, which has been emerging in some courts as a lesser standard of review than the rule of reason or the per se analysis, has applicability here, particularly when applied to an organization like the NCAA that is an admitted monopsony. This case presents the unique distinction of being the first where the quick look analysis is argued to apply to conduct alleged as procompetitive and not anti-competitive. As Chief Justice John Roberts observed, "We've never used the quick

look doctrine to uphold restrictions, only to strike them down." While acknowledging there had been a full trial in the district court, the NCAA argued that there is a "continuum of scrutiny" and maintained its position that some sort of abbreviated deferential review was warranted because of the "truly unique situation in which we have a product that is defined by the restraint on competition" – namely, limitations on payments to college athletes, an undeniable price cap in the market for such players. Counsel for the NCAA went so far as to advocate that "when a rule on its face is shown to advance the principle of amateur athletic competition, it should be withheld … in the so-called twinkling of an eye."

In sharp contrast, Kagan urged a far less deferential view of the NCAA's history of amateurism, saying, "There's another way to think about what's going on here, and that's that schools that are naturally competitors as to athletes have all gotten together in an organization, an organization that has undisputed market power, and they use that power to fix athletic salaries at extremely low levels, far lower than what the market would set if it were allowed to operate." When counsel for the NCAA retorted that "we're talking about a product that was created 116 years ago," Kagan quipped, "You can only ride on the history, I think … for so long. … I guess it doesn't move me all that much that there's a history to this, if what is going on now is that competitors as to labor are combining to fix prices."

Kagan's sentiments found an ally in Justice Neil Gorsuch, who noted that "the agreement that's really at the center of the case is an agreement among competitors to fix prices with the labor market, where you have monopsony control, and that's unusual. … Why isn't the monopsony control over the labor market at least an appropriate basis for a more searching rule of reason analysis?" NCAA's counsel responded that while significant restraints undisputedly exist on the relevant antitrust market here (the first part of the rule of reason inquiry), the presumed procompetitive benefits of amateurism (the second part of the inquiry) justify a quick look before proceeding to the third step: the assessment of less restrictive alternatives.

Based on the posture of the case and on questioning by the justices, it appears unlikely that the NCAA has a slam dunk here or will receive any blanket exemption from the antitrust laws from the Supreme Court. It would be an almost unprecedented pass from antitrust scrutiny without Congress weighing in, as it has done for other industries and segments, such as (to varying degrees) labor, insurance, newspapers and agriculture. And again, the players notably did not appeal from the Ninth Circuit ruling, leaving in place NCAA limits on cash payments unrelated to education without challenging those limits (at this time). It remains to be seen, however, whether – out of a concern for waning amateurism and the NCAA's ability to define and offer a product that no one denies is procompetitive – the court will strike down the ban on limits on education-related expenses, in an effort to avoid an eventual slide down a slippery slope with few guardrails, resulting in a disguised pay-to-play scenario. Stay tuned.

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