

NCAA Amateurism On The Line As Top Court Takes Pay Case

By **Zachary Zagger**

Law360 (December 16, 2020, 9:01 PM EST) -- The U.S. Supreme Court on Wednesday waded into the contentious debate over NCAA limits on compensation and benefits for college athletes, signaling it may decide once and for all how and even whether the organization can define amateurism in college sports.

The potentially seismic move follows nearly a decade of litigation in California over whether the NCAA's self-defined version of amateurism violates federal antitrust law and amid a wider social and legal debate about the rights of college athletes.

Most recently, the Ninth Circuit affirmed a lower court ruling that opened the door for education-related benefits such as cash academic achievement awards, finding that increasing college athletes' compensation and benefits, at least those tethered to education, will not harm the popularity of college sports.

But now the justices will have a say on amateurism for the first time in nearly 40 years, and attorneys say the high court is not likely to simply rubber-stamp the Ninth Circuit.

"The Supreme Court takes very, very few cases, and you have to think about why they take a case," said Ballard Spahr LLP antitrust and commercial litigator Stephen Kastenberg. "I am not sure what benefit they do to the law or the parties for the purpose of just a straight affirmance."

He added that the case is an opportunity for the court to either open the door to further questioning of the NCAA or to "rein the analysis back in and move this issue toward a greater level of deference" to the organization.

The NCAA has faced a wave of lawsuits over the past decade that have chipped away at its amateurism rules. A pair of cases in California federal court that ended in the Ninth Circuit have had particular effect.

In *O'Bannon v. NCAA*, the Ninth Circuit affirmed that the NCAA is subject to some scrutiny under antitrust law and found that limiting college athlete benefits below the full cost of school attendance was unreasonable. That ruling opened the door for schools to provide athletes typically a few thousand dollars more in their scholarships and packages, although the most powerful sports conferences had already moved in that direction.

In *Alston v. NCAA* — the case the Supreme Court will now review — athletes argued that all of the

NCAA's various rules meant to keep college sports amateur amount to unlawful caps on what schools may offer athletes to attract the best ones. U.S. District Judge Claudia Wilken threaded the needle in her ruling, finding that there was no reason for the NCAA to limit benefits tied to education, but keeping in place much of the broader amateurism system.

"You have had a series of decisions departing from the greater deference that was afforded to amateur athletics and applying more traditional, heightened levels of antitrust scrutiny that you would normally see elsewhere," Kastenbergsaid. "Both the level of scrutiny and the outcomes, which have been critical of and micromanaging in some ways how amateur athletics are going to be defined, really are departures."

Sports attorney Baird Fogel of Morgan Lewis & Bockius LLP said the Alston decision was a "balancing act," but the ultimate effect was that it questions the NCAA's authority to govern college sports, for better or worse.

"The NCAA is obviously concerned with its ability to govern and that it might open up these institutions to more fraud because it is hard to oversee these types of payments to ensure they are not being used to mask improper payments," Fogel said.

The NCAA is further concerned with what it described Wednesday as the "never-ending litigation" over its attempts to change its rules.

Going back before the O'Bannon case, courts had been more deferential to the NCAA, said Mintz Levin Cohn Ferris Glovsky and Popeo PC attorney Tyrone Thomas, who specializes in college athletics issues.

"Even in the cases where they have not been successful, there has been a lot of deference in the courts to the NCAA on why amateurism is important to college athletics — that you had to give deference to a sort of rulemaking structure for college sports to exist," Thomas said.

This is the third time the NCAA will be before the high court over the past 40 years. Its most notable prior foray was in NCAA v. Board of Regents, which opened up the market for television rights to college football games. But while that was technically a loss for the NCAA, the decision contained language favorable to amateurism, calling it a "revered tradition."

Few would argue that the ruling hurt college sports as it resulted in an explosion of college football games on television each weekend, driving up both the popularity and revenue for conferences and schools. That commercialization is now at the heart of the legal challenges seeking to allow athletes a larger piece of the pie.

Still, that case was 36 years ago. Experts note the current environment is different. The NCAA now finds itself under fire on multiple fronts, including over rules that prohibit college athletes from making money from third parties for the use of their names, images and likenesses, or NIL, namely paid sponsorships and endorsements.

Five states have passed laws prohibiting schools in those states from preventing athletes from taking advantage of such opportunities. There are at least three bills in Congress that would open up more opportunities. There is also another proposed antitrust class action in California, filed by some of the same attorneys behind the Alston case, challenging the NCAA's NIL rules.

The NCAA is set to approve its own NIL changes next month, but those rules fall short of the state laws and are unlikely to stave off more challenges.

Attorneys for the athletes in the Alston case did not push for Supreme Court review, but said it is an opportunity for the high court to expand the rights of college athletes.

Fogel, the Morgan Lewis lawyer, said support for that position is growing.

"The voices on the side of the student-athletes being allowed to be compensated are growing and the support is growing," he said. "Changes are coming to the NCAA model. They seem to be embracing some and not embracing others."

--Editing by Jill Coffey.