

Key Issues In High Court's Review Of NCAA Antitrust Ruling

By **Baird Fogel, Alexander Reid and Elizabeth Polido** (January 4, 2021, 5:45 PM EST)

On Dec. 16, the U.S. Supreme Court granted certiorari in *NCAA v. Alston* and *American Athletic Conference v. Alston*, cases that could change the landscape of college sports.

By way of background, the case derives from lawsuits brought by Division I football and basketball student-athletes alleging that the NCAA and athletic conferences violated antitrust law by limiting the compensation that schools can offer student-athletes.

In March 2019, U.S. District Judge Claudia Wilken of the U.S. District Court for the Northern District of California held that the NCAA's limits on benefits related to education such as computers, science equipment, musical instruments, and post-eligibility scholarships and internships were an unreasonable restraint of trade.

The court recognized that the NCAA's unique amateurism model warranted some limits, including with respect to compensation and benefits unrelated to education.

On appeal, the U.S. Court of Appeals for the Ninth Circuit upheld Judge Wilken's ruling in May 2020. Significantly, the court upheld NCAA rules that prohibit payments akin to professional salaries because they serve the pro-competitive purpose of preserving amateurism and maintaining a distinction between college and professional sports. According to the court, however, NCAA rules limiting education-related benefits were invalid.

The NCAA filed a petition for a writ of certiorari in October, arguing that the Ninth Circuit's ruling "will fundamentally transform the century-old institution of NCAA sports, blurring the traditional line between college and professional athletes." According to the NCAA, this case goes beyond just antitrust issues and instead addresses the central question of "whether sports organizations and other joint ventures will have the ability to define the character of their own products."

These issues are not new and have been at the center of recent litigation and policy discussions. The NCAA has repeatedly argued that student-athletes should not be paid, pointing to its amateurism model and rules governing student-athlete compensation.



Baird Fogel



Alexander Reid



Elizabeth Polido

Others argue that — particularly at large Division I schools — college sports generate significant revenue for athletic programs and student-athletes should be compensated accordingly. The lower court acknowledged this reasoning, noting the great disparity between the revenue garnered by the NCAA and athletic conferences and the benefits that student-athletes receive relative to the value of their athletic services and the contributions they make.

To further complicate the issue, the legalization of sports betting in various states, and fears over potential match fixing if student-athletes are not compensated via other sources, have created additional pressure to pay student-athletes.

Recently, many states have taken matters into their own hands and enacted legislation permitting student-athletes to be compensated. For example, California passed the Fair Pay to Play Act in 2019, which allows student-athletes to profit from their names, images and likenesses beginning in 2023.

In response to California's law and proposed legislation in other states, the NCAA agreed to modernize its rules and requested that Congress preempt states such as California from enacting more stringent name, image and likeness laws.

In addition, over the last few months, certain member institutions have begun collaborating with sports betting operators through various sponsorship programs setting up yet another potential revenue stream for schools, the NCAA and student-athletes.

Without clear legal guidance, states could continue to enact their own laws, creating a hodge podge of rules regarding student-athlete compensation that may give certain schools and locations an advantage over others. There is the further possibility that some schools and conferences leave the NCAA and form their own separate governing organization.

The Supreme Court's decision to finally weigh in on this dispute could have wide-ranging legal implications for college sports and potentially alter the NCAA's long-standing governance model. If student-athletes are compensated, they may be deemed employees, which may trigger additional benefits such as worker's compensation and union rights.

It could also lead to labor and employment issues that are common in other employer-employee relationships, including related to gender and racial inequality, including equal pay, and workplace culture and wage and hour concerns. There would be difficult issues to consider, including which student-athletes should be paid, how much — particularly at the many schools that do not make a profit off of their athletic programs — and the potential impact of Title IX.

Paying student-athletes also has implications for the tax-exempt status afforded to educational institutions. Traditionally in the U.S., athletics has been viewed as part of a student's education and, therefore, core to the mission of higher educational institutions — rather than an unrelated trade or business activity carried on for profit.

While the line between professional and amateur sports is blurry, compensating student-athletes for participation in high profile and widely viewed sporting competitions may well necessitate establishing a taxable subsidiary to ensure that business taxes are paid and the educational mission of the parent educational institution is preserved.

With so much on the line, the Supreme Court's decision in this case may have lasting repercussions for

athletes, the ideal of amateur athletics, and the NCAA's ability to regulate and manage college sports. The court may issue a narrow decision that leaves most of the questions and issues surrounding student-athlete compensation unsettled.

On the other hand, the court may address the central issues of amateurism and student-athlete compensation head-on and create an entirely new playing field for college sports going forward.

The court will hear arguments on the case later this year, and a decision is expected by June.

Baird D. Fogel and Alexander L. Reid are partners, and Elizabeth C. Polido is an associate, at Morgan Lewis & Bockius LLP.

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