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PERSPECTIVE

Ruling in NCAA case has the potential to remake the amateurism system

By Maurice M. Suh, Andrew S. Tulumello and Zathrina Zasell G. Perez

On May 18, the 9th U.S. Circuit Court of Appeals issued its decision in one of the biggest legal cases in the National Collegiate Athletic Association's 114-year history. The decision, issued in *In re NCAA Grant-in-Aid Cap Antitrust Litigation*, 2020 DJDAR 4650 (the Alston lawsuit), has the potential to remake the amateurism system on which the economics of big-time college sports has long relied and provide student-athletes with a narrow opening to receive some compensation in exchange for the extraordinary sacrifices they make for their sports and schools.

Student-athletes are overworked. They labor close to 80 hours a week training, practicing, performing and studying. They are strained mentally and physically while the vast majority of them attain only bleak prospects at ever turning pro after college. Despite their enormous labors, a huge gap exists between the massive revenue that the NCAA receives from college sports and what the players receive — or don't receive — in exchange for generating that revenue. This gap is a result of the NCAA's restrictions on student-athletes receiving compensation in exchange for their athletic services.

New York Times News Service

Former UCLA basketball star Ed O'Bannon in Las Vegas, May 30, 2013.

The plaintiffs in the Alston lawsuit sought to challenge this economic model of exploiting the unpaid labor of student-athletes. The lead plaintiffs — former West Virginia running back Shawne Alston and former Cal center Justine Hartman — sued the NCAA and the 11 major athletic conferences on behalf of a class of FBS football and Division 1 basketball players. They alleged that the NCAA's rules restricting its member conferences and schools from offering players compensation beyond athletic scholarships at cost of attendance unlawfully prevent conferences and schools from competing with each other for the players' athletic services (and thereby violate Section 1 of the Sherman Act).

As it has long done, NCAA attempted to justify its economic model by reference to its amorphous and self-serving theory of amateurism. According to the NCAA, its restrictions are procompetitive because the popularity of college sports visà- vis professional sports depends on maintaining amateurism. However, the NCAA has never offered any affirmative definition of "amateurism." Instead, it has defined it in terms of what it is not — amateurism is not "pay for play." In other words, under the NCAA's theory, consumers watch college sports because student-athletes are not paid to play. Yet "pay for play" and "pay" are themselves amorphous under the NCAA's use of the terms. The NCAA defines "pay" entirely in terms of what it has decided to permit and not permit under its governing legislation.

The 9th Circuit accepted the notion that consumers are interested in college sports because they value certain features that they associate with "amateurism," which are not present in professional sports. However, it rejected the NCAA's argument that amateurism requires that student-athletes not be paid. Critically, the 9th Circuit found that the NCAA's own governing legislation is already riddled with exceptions allowing different types of payments to student-athletes, none of which have decreased consumer demand for college sports.

For example, student-athletes may receive athletic scholarships worth the full cost of attending their schools even if they already receive federal Pell grants (which are calculated to cover the cost of attendance). Because these students are being paid a second time for the same cost-of-attendance expenses that the Pell grant is intended to cover, these payments effectively amount to cash payments. On the other hand, the NCAA generally prohibits post-eligibility financial aid to attend graduate school at a different institution. However, even this prohibition has an exception: Each school is allowed to award two post-eligibility graduate school scholarships per year, of $10,000 each, that can be used at any institution.

Instead of a theory of amateurism that requires student-athletes to receive no "pay for play" at all, the 9th Circuit accepted the district court's alternative. The district court found that consumer demand for college sports vis-à-vis professional sports could be maintained by instead drawing the line at student-athletes receiving "unlimited payments unrelated to education, akin to salaries seen in professional sports

leagues." Pursuant to this alternative theory, the district court issued a split order — it prohibited the NCAA from restricting its conferences and schools from offering noncash education-related benefits to student-athletes but kept in place other compensation restrictions that had the potential to balloon into professional-like salaries, including payments untethered to education.

The 9th Circuit decision is still subject to a potential writ of certiorari to the U.S. Supreme Court. Further, the 9th Circuit did not give the plaintiffs the wholesale change in the NCAA's compensation restrictions that they demanded. Nonetheless, if it stands, the Alston decision is remarkable in a number of respects.

First and foremost, the Alston decision opens the door to student-athletes receiving many more benefits in exchange for their athlete services. The court did not define the outer boundaries of what education-related benefits means. The examples given by the court included post-eligibility scholarships for undergraduate, graduate and vocational programs at any school and paid post-eligibility internships. These might include computers, science equipment and other nonmonetary education-related items of value. These scholarships and other items of value potentially could be worth hundreds of thousands of dollars.

Second, the Alston decision extends the inroads into the NCAA's compensation restrictions made by a prior challenge in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). There, former UCLA basketball player Ed O'Bannon brought a class action arguing that the NCAA and its licensees violated federal antitrust law by preventing them from being paid by schools or other entities for the sale of licenses to use their names, images and/or likenesses. Although O'Bannon was not successful in his main claim, the 9th Circuit held that NCAA rules prohibiting schools from offering athletic scholarships at the full cost of attendance (before, scholarships were limited to just tuition and board) were illegal.

Third, the Alston decision further erodes the NCAA's fundamentally flawed no-pay-for-play theory of amateurism. This is significant because the NCAA has long used its amateurism theory to defend its exploitive economic model against lawsuits and regulation. The 9th Circuit's decision could lend support to student-athletes' further attempts to achieve additional compensation against such a defense. For example, during the pendency of the NCAA's appeal in the Alston lawsuit, California enacted the Fair Pay to Play Act. The FPP Act, which takes effect on Jan. 1, 2023, requires the NCAA and its member institutions to permit student-athletes enrolled in California colleges and universities to earn compensation from the use of their names, images and/or likenesses.

The passage of the FPP Act prompted the introduction of many other similar bills in states across the country. Given their legislative victory in California, student-athletes likely will aggressively pursue the passage of similar bills and possibly additional legislation covering other forms of compensation. In an apparent attempt to preempt these efforts, the NCAA Board of Governors has agreed to rule changes that will allow student-athletes to earn money from endorsements and other uses of their names, images, and likenesses under certain circumstances. However, it also has called for continued lobbying of Congress to protect the NCAA from state regulation, by taking the student-athlete compensation issue out of states' hands, and from lawsuits, by creating a "safe harbor."

Notably, the decision in the Alston lawsuit ultimately leaves it up to the individual conferences and schools to decide whether and to what extent to offer education-related benefits. However, given the intense competition for top talent and recent public pressure on the NCAA and its member institutions regarding their treatment of student-athletes, it is likely that at least some conferences and schools will decide to offer such benefits to student-athletes.

This approach might be well advised. The Alston court specifically recognized the difficulties that student-athletes face — the conflict between the demands of school and sport, the hours of grueling training, and the significant health risks. In the same breath, the Alston court recognized that this was not the result of free-market competition, but rather the result of a cartel of buyers acting in concert to depress the ability of student-athletes to demand value for their sacrifices.

The ruling also leaves open a number of legal questions. For example, Title IX requires educational institutions to ensure that increases in scholarship spending are equitably spent on both male and female athletes. How conferences and schools that decide to offer education-related benefits to student-athletes will address these legal issues is another area that has yet to be explored. ■

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