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PERSPECTIVE

NCAA under scrutiny in grant-in-aid cap antitrust litigation

By Maurice M. Suh and Daniel L. Weiss

March Madness certainly lived up to its name this year. There were Cinderella stories, busted brackets and, most importantly, the student-athletes who dedicated years of their lives for the opportunity to play in "The Big Dance" left everything on the court. But this year, March Madness was more than just a couple of basketball tournaments with Stanford and Baylor cutting down the nets. On March 31, the U.S. Supreme Court heard argument in *In re NCAA Grant-In-Aid Cap Antitrust Litigation (Alston)*, which will determine whether the NCAA's amateurism rules are entitled to special treatment under the antitrust laws.

In *Alston*, the student-athlete plaintiffs challenged the NCAA's strict and draconian restrictions preventing student-athletes from receiving compensation beyond athletic scholarships at the cost of attendance. The plaintiffs argued that the NCAA's amateurism rules unlawfully restrained trade by preventing the NCAA's member conferences and schools from competing with each other for the student-athlete's athletic services (and thereby violate Section 1 of the Sherman Act). As it has done for decades, the NCAA argued that its rules were procompetitive because they protect "amateurism," and that they should be upheld after a truncated antitrust review commonly referred to as the "quick look" approach.

The 9th U.S. Circuit Court of Appeals accepted the premise that college sports are different from professional sports due to certain features associated with "amateurism." However, it did not accept that this meant that the NCAA's rules should be upheld using the "quick look" approach. Based on the full evidentiary record, the 9th Circuit adopted the district court's view that certain rules restricting education-related payments violated the antitrust laws but that many of the other restrictions that had the potential to balloon into professional-like salaries, including payments untethered to education, were permissible. That relief, which was not the sea change they had sought, was nonetheless significant to student-athletes who spend close to 80 hours a week practicing, competing and studying, and make other sacrifices such as not participating in internships and other activities.

The NCAA sought Supreme Court review. Through this review, the NCAA seeks a broad finding that antitrust courts should not apply a rule-of-reason analysis on a full record to the NCAA's "amateurism rules." Rather, the NCAA argues that those rules should be upheld if, on their face, they are "clearly meant to help maintain ... amateurism in college sports."

It is difficult to predict how the court may rule in *Alston*, especially considering that oral argument does not always reflect the ultimate outcome. That said, several of the justices expressed reservations about allowing "amateurism," whatever that term may mean, to justify the NCAA's continued exploitation of student-athletes while the NCAA and its member conferences and schools receive substantial revenue from the student-athletes' labor. The starkest comment to that effect was from Justice Brett Kavanaugh, who stated that "[i]t does seem ... that schools are conspiring with competitors, agreeing with competitors ... to pay no salaries to the workers who are making the schools billions of dollar on the theory that consumers want the schools to pay their workers nothing. And that just seems entirely circular and even somewhat disturbing."

Many of the questions from the justices challenged whether the concept of amateurism is even applicable to today's college sports, notably including two justices who are frequently on opposite sides of issues before the Court. Justice Elena Kagan noted that the NCAA "can only ride on the history ... for so long" because "a great deal has changed since a hundred years ago in the way that student-athletes are treated." Justice Kavanaugh noted that Justice John Paul Stevens' comment in his majority decision in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), that college sports have "a revered tradition of amateurism" and that amateurism is necessary for college sports to compete with professional sports in terms of popularity — which the NCAA heavily relies upon — is not only dicta, but was "from a different era."

Even if the concept of amateurism was applicable to today's college sports, the NCAA's proposed legal standard begs the question of what is amateurism and who should define it. According to the NCAA, amateurism is whatever the NCAA says it is. That is, the NCAA asserts that amateurism is not "pay for play," and that "pay" constitutes anything that is not permitted by its rules. Several of the justices, however, challenged the soundness of NCAA's "pay for play" construct of amateurism, especially considering that the NCAA's own rules are already riddled with exceptions allowing different types of payments to student-athletes.

Chief Justice John Roberts referenced the NCAA rule that allowed schools to pay up to $50,000 for a $10 million insurance policy on loss of future earnings in case of injury. Justice Samuel Alito noted that student-athletes already receive payments in the form of lower admission standards and tuition relief, among other things. The NCAA's responses to these pointed questions reflected the strained rationale in support of its view of amateurism. The NCAA sidestepped the obvious contradiction in its position by arguing that it defines what constitutes "pay" and that the justices' examples do not constitute pay as defined by the NCAA (even though to the reasonable person they are clearly forms

of payments to student-athletes in exchange for playing sports). Justice Amy Coney Barrett directly challenged the NCAA on its assertion that it can define what constitutes "pay," and the NCAA's response that it is entitled to define its "product" left much to be desired.

Justice Sonia Sotomayor and Justice Neil Gorsuch seized on another weakness in the NCAA's position. The antitrust violation in *Alston* is that the NCAA, which has monopsony control, conspired with its member conferences and institutions to enact education-related compensation rules that each member conference must follow. The NCAA claimed that a national agreement was necessary because if each individual member conference had the authority to enact education-related compensation rules, there would be a race to the bottom among the conferences. This response, however, illustrates the flaw in the NCAA's amateurism argument. If restricting education-related compensation were truly necessary to protect the differentiating feature of college sports from professional sports — that is, amateurism — the NCAA would not be so quick to presume that the individual conferences would disregard those restrictions to obtain a competitive advantage in recruiting student-athletes.

Despite reservations about adopting the NCAA's position, the justices expressed concerns about opening the floodgates to perpetual litigation that would result in courts micromanaging the NCAA to the point of destroying college sports as we know them. In theory, such judicial intervention would be troublesome, but, as the student-athletes and the government argued, it is unlikely to occur because the rule-of-reason analysis prevents such incremental or marginal rule changes. Antitrust courts do not use the rule-of-reason analysis to micromanage business dealings, and there is no reason to believe that such a result would occur with the NCAA. In any event, to the extent there are NCAA rules that cannot withstand the rule-of-reason analysis on a full record, they should be struck down, not insulated from meaningful antitrust review and used to prevent the student-athletes from receiving the benefits to which they are entitled.

For years, the NCAA has used the same playbook: It argues that any challenge to its rules will undermine its view of amateurism and, ultimately, the success of college sports. Yet, when courts have struck down rules that the NCAA had argued were critical to its definition of amateurism, college sports still thrived. This is because the NCAA's "amateurism" is nothing more than a self-serving construct the NCAA maintains to justify retaining the massive revenue that student-athletes generate for the NCAA (exceeding $1 billion for the NCAA and more than $18 billion for NCAA-related athletic departments). In fact, after *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) — which found that the NCAA preventing member conferences and institutions from offering scholarships that were capped at the cost of attendance violated antitrust rules — the NCAA shifted its definition of amateurism so that now those types of payments that it once defined as pay no longer constitute "pay."

The NCAA has the right to argue that its rules are reasonable to protect the differentiating features of college sports from professional sports. The NCAA, however, can do so without the need for antitrust courts to rely on the concept of "amateurism." After years of commercialization of college sports and the increasing demands and financial burdens placed on student-athletes, amateurism is not a useful lens through which to conduct an antitrust review of the NCAA's rules and is certainly not a justification for the NCAA's exploitive model. Based on the oral argument, there is a strong possibility that amateurism will finally be placed on the sideline where it can no longer be used by the NCAA to justify depressing the benefits student-athletes may receive in exchange for them providing the NCAA with their athletic services.

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