2023

NCAA v. Alston (Case Notes)

Carson Blakely
INTRODUCTION

In August 2013, I was a thirteen-year-old immersed in the world of NCAA Football 14, a popular video game by Electronic Arts (EA). Through my digital replicas and the actual Tennessee Volunteer football players, my friends and I led the Vols to three consecutive BCS National Championships. My fictional character, a top running back, won three Heisman Trophies, which remains my greatest athletic accomplishment to date. Then, EA announced the discontinuation of the NCAA Football franchise, leaving millions of digital coaches, including myself, perplexed. Little did I know that the issue at hand was the complex legal realm of Name, Image, and Likeness (NIL) and its implications on antitrust restrictions.

The Supreme Court's recent decision in National Collegiate Athletic Association v. Alston has prompted a revision of antitrust safety assessments for NIL and the NCAA. The Court ruled that NCAA regulations barring education-related incentives for student-athletes violate antitrust principles, paving the way for expanded NIL compensation.2

I. THE ROADMAP TO NCAA V. ALSTON

Since 1906, the National Collegiate Athletic Association (NCAA) has regulated intercollegiate amateur athletics. The NCAA initially prohibited student-athletes from receiving compensation for their athletic performances, providing only athletic scholarships. Early
courts refused to apply antitrust law to the NCAA, but later courts began using the rule of reason test to determine if the NCAA violated Section 1 of the Sherman Act. As a result, student-athletes could not receive compensation, including endorsement or licensing deals related to their NIL.

The NCAA’s opposition to compensating student-athletes intensified in the 1980s with the College Football Association’s challenge of the NCAA’s multi-year television broadcasting plans in *NCAA v. Board of Regents of the University of Oklahoma*. Although the Court ruled that the NCAA’s plan violated the Sherman Act, it also maintained that student-athletes should not be paid. This position led to several antitrust rulings justifying the NCAA’s anticompetitive compensation regulations based on the principle of amateurism.

However, the NCAA’s amateurism standard faced significant threats in 2009 with the *Keller* and *O’Bannon* cases. Samuel Keller, a former Arizona State University and the University of Nebraska quarterback, sued the NCAA, the Collegiate Licensing Company (CLC), and EA, claiming that EA’s NCAA Football video game violated NCAA players’ right of publicity. Ed O’Bannon, a former UCLA men’s basketball player, sued the NCAA for violating federal antitrust law by preventing college athletes from being compensated for using their likenesses in EA NCAA video games.

The district court ruled in O’Bannon’s favor, finding that the NCAA’s amateurism standard violated Section 1 of the Sherman Antitrust Act. The Ninth Circuit affirmed this ruling but also held that the NCAA could remedy any antitrust violation by allowing NCAA athletes to receive full-tuition scholarships. Despite this legal precedent, the NCAA continued to prevent NCAA athletes from profiting from their NIL for almost ten more years.

---

7. *Id.*
8. See McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012).
10. O’Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).
11. *Id.* at 1056.
12. *Id.*
II. NCAA V. ALSTON

In NCAA v. Alston, a group of current and former student-athletes filed a class action lawsuit against the NCAA and eleven Division I conferences, challenging the existing NCAA rules that restrict the amount of compensation student-athletes can receive in exchange for their athletic services. The lawsuit argued that these rules violated § 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracies that impede trade or commerce.

Using an antitrust analysis based on the Rule of Reason, District Judge Claudia Wilken concluded in 2018 that the NCAA could prohibit non-educational advantages such as cash payments. However, the court determined that the NCAA’s restrictions violated the Sherman Act by impeding trade since they exceeded what was required to restrict or bar some non-cash educational benefits. The Ninth Circuit upheld the district court’s ruling in May 2020, concluding that the NCAA had breached Section 1 of the Sherman Antitrust Act by imposing restrictions on schools that prevented them from providing specific educational benefits to student-athletes who participate in Division I basketball and Football Bowl Subdivision football programs.

In October, the NCAA successfully petitioned the Supreme Court to review the Ninth Circuit’s decision and overturn the portion where the lower courts favored the student-athletes. The NCAA argued that the courts should have given its compensation restrictions an "abbreviated deferential review" rather than subjecting them to a Rule of Reason analysis. The NCAA claimed that it is a joint venture and that its members must collaborate to provide consumers with the benefits of intercollegiate athletic competition.

In a unanimous decision authored by Justice Neil Gorsuch, the Supreme Court affirmed the Ninth Circuit’s ruling that the NCAA and its member schools violated federal antitrust laws by agreeing to limit the amount of education-related benefits provided to student-

14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
The Court rejected the NCAA's claim that it should have immunity from antitrust laws and that the trial court's ruling would micromanage its business. The Court clarified that the district court only prohibited the NCAA from imposing restrictions on education-related benefits and that relaxing these restrictions would not harm demand for college sports.

Justice Gorsuch acknowledged differing opinions on amateurism in college sports but stated that it is not the Court's job to resolve this debate. Instead, the Court's responsibility is to review the district court judgment through the lens of antitrust law, which led the Court to conclude that the district court acted within the bounds of the law. Justice Kavanaugh joined the Court's opinion but wrote a separate concurring opinion, questioning the legality of the remaining restrictions on benefits for college athletes and stating that the NCAA is not above the law.

III. HOW INTERNATIONAL NCAA ATHLETES ARE AFFECTED

As a result of the Alston decision, athletes from all sports and genders are beginning to secure endorsement deals and other business opportunities through NIL. Unfortunately, F-1 student visa regulations have prevented international intercollegiate athletes from benefitting from NIL deals, such as Tennessee Volunteers basketball player Uros Plavsic, who has to donate the money to charities.

Recent academic writing has suggested that Congress could revise the O-1 visa program by introducing a new O-1A visa category to enable international intercollegiate athletes to benefit from their

22. Id.
23. Id.
24. Id.
25. Id.
NIL. This alternative visa option would exist alongside the F-1 student visa, which most athletes would likely still choose to use. However, in creating this new classification, it is essential to meet several objectives: (A) provide a straightforward way for athletes to legally earn NIL income while in the US; (B) establish measures to prevent human trafficking and exploitation of these athletes; and (C) ensure they can continue attending American colleges and universities and have enough time to finish their degrees.

The NCAA should adopt a similar policy to ensure fairness and equal opportunity for all collegiate athletes to benefit from their unique abilities while furthering their education in the United States.

IV. NIL, NCAA, AND ANTITRUST MOVING FORWARD

While my thirteen-year-old self would selfishly rejoice at the simple fact that EA will resume making college football games as a ripple effect of the Alston decision, the fact remains that NIL has turned compensation in college athletics into a metaphorical Wild West. Schools have committed millions to court the best athletes in the nation and the world. Indeed, we are witnessing a proverbial gold rush from a legal aspect for top athletic talent in collegiate sports. The laws surrounding NIL and antitrust will need to keep pace with the ever-rapid movement of college athletics to maintain a sense of order within the sport.

To address these challenges, lawmakers, the NCAA, and other stakeholders should work together to create comprehensive regulations governing NIL compensation. These rules should strike a balance between allowing student-athletes to profit from their talent and maintaining the principles of amateurism that have long been associated with collegiate sports. Additionally, any regulations should be crafted to ensure that both domestic and international student-athletes can benefit from NIL opportunities without facing undue restrictions or barriers.

29. Id.
Furthermore, the NCAA and its member institutions should work to educate student-athletes about the implications of NIL and the risks and responsibilities associated with entering endorsement deals and other commercial agreements. This educational initiative could help protect student-athletes from exploitation and ensure that they are fully informed when making decisions about monetizing their name, image, and likeness.

Finally, as the landscape of college athletics continues to evolve in response to NIL and the Alston decision, it is crucial for all parties involved to remain vigilant and adaptive to emerging trends and challenges. By working together to create fair and effective regulations, the NCAA, lawmakers, and other stakeholders can help ensure the continued success and integrity of intercollegiate sports in the United States while empowering student-athletes to benefit from their hard work and dedication.

**CONCLUSION**

The Alston decision has undoubtedly changed the landscape of college athletics and introduced new complexities surrounding NIL and antitrust law. As the NCAA and lawmakers grapple with these issues, it is essential that they adopt policies that protect and empower student-athletes while maintaining the integrity of intercollegiate sports. By addressing the concerns of both domestic and international athletes and adapting to the rapidly changing world of college sports, the NCAA and other stakeholders can help usher in a new era of fairness and opportunity for all student-athletes.