

2023

NCAA v. Alston

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Recommended Citation

Fowler, Emma S. (2023) "NCAA v. Alston," *Tennessee Law Review*. Vol. 90: Iss. 2, Article 13.
Available at: <https://ir.law.utk.edu/tennesseelawreview/vol90/iss2/13>

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Emma S. Fowler, *NCAA v. Alston*, 90 TENN. L. REV. 447 (2023).

ALWD 7th ed.

Emma S. Fowler, *NCAA v. Alston*, 90 Tenn. L. Rev. 447 (2023).

APA 7th ed.

Fowler, E. S. (2023). *Ncaa v. alston*. *Tennessee Law Review*, 90(2), 447-454.

Chicago 17th ed.

Emma S. Fowler, "NCAA v. Alston," *Tennessee Law Review* 90, no. 2 (Winter 2023): 447-454

McGill Guide 9th ed.

Emma S. Fowler, "NCAA v. Alston" (2023) 90:2 Tenn L Rev 447.

AGLC 4th ed.

Emma S. Fowler, 'NCAA v. Alston' (2023) 90(2) *Tennessee Law Review* 447

MLA 9th ed.

Fowler, Emma S. "NCAA v. Alston." *Tennessee Law Review*, vol. 90, no. 2, Winter 2023, pp. 447-454. HeinOnline.

OSCOLA 4th ed.

Emma S. Fowler, 'NCAA v. Alston' (2023) 90 Tenn L Rev 447

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NCAA V. ALSTON

EMMA S. FOWLER

INTRODUCTION.....	447
I. ISSUE: THE RULE OF REASON	448
II. DEVELOPMENT OF THE RULE OF REASON	449
III. ANALYSIS OF <i>NCAA v. ALSTON</i>	450
IV. LEGAL OR POLICY IMPLICATIONS	452
CONCLUSION	453

INTRODUCTION

Student-athletes (the “plaintiffs”) from NCAA member institutions filed a class action lawsuit, claiming that the NCAA and eleven Division 1 conferences (hereinafter, the “NCAA”) were in violation of section 1 of the Sherman Act.¹ Specifically, the plaintiffs argued that the NCAA rules improperly restrained their ability to receive compensation for their roles.² The district court held a ten-day bench trial with witness and expert testimony, as well as a considerable amount of other types of evidence and argument.³

Initially, the district court found some things to be undisputed: the NCAA had agreements with member institutions to limit the compensation of the plaintiffs, the NCAA punished violations of these agreements; and limits on compensation had an effect on interstate commerce.⁴ The district court moved to analyzing the NCAA’s restraints on compensation under the “rule of reason analysis.”⁵ Under *Ohio v. American Express Co.*, this required the district court to “conduct a fact-specific assessment of market power and market structure’ to assess a challenged restraint’s ‘actual effect on competition.’⁶ The goal of such an assessment is to strike a balance between harmful restraints and restraints that are in the best interest of the consumer.⁷ The district court’s assessment began with an acknowledgement of the NCAA’s power in its market, finding that “[t]here [were] no ‘viable substitutes’” to the NCAA. This monopsony gave the NCAA the power to restrain compensation of the plaintiffs however it pleased, without meaningfully risking its place in the

1. Nat’l Collegiate Athletic Ass’n. v. Alston, 141 S.Ct. 2141, 2151 (2021).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* (first quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); and then quoting *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911)).

6. *Id.* (quoting *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2283 (2018)).

7. *Id.* (quoting *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2284 (2018)).

market.⁸ Further, the court found that without the NCAA's restraints, competition would increase.⁹ The court rejected the NCAA's attempted justifications of the restraints, including that the restraints protect the "amateurism" of college sports and that the restraints were relevant to consumer demand.¹⁰

Plaintiffs then had to demonstrate the existence of "substantially less restrictive alternative rules" that "would achieve the same procompetitive effect as the challenged set of rules."¹¹ Here, the district court found a distinction between different types of NCAA restraints.¹² The court upheld "rules that limit[ed] athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education."¹³ However, it enjoined the NCAA's restraints "for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships."¹⁴

Both the plaintiffs and the NCAA appealed the district court's opinion, with plaintiffs arguing that all compensation should have been enjoined and the NCAA arguing that the court's decision went too far.¹⁵ The Ninth Circuit affirmed the district court opinion in full.¹⁶ The Supreme Court issued its opinion on June 21, 2021 and upheld the decision of the district court in full.¹⁷ This case became the gateway for student-athletes to begin profiting off their name, image, and likeness, while still competing for their colleges and universities.

I. ISSUE: THE RULE OF REASON

The primary issue presented is whether the district court properly subjected the NCAA's compensation restrictions to a rule of reason analysis.¹⁸ The NCAA argued that even if the rule of reason was the proper framework, it was applied incorrectly in the case at hand.¹⁹

8. *Id.* at 2152 (quoting D. Ct. Op., at 1067, 1070).

9. *Id.* (quoting D. Ct. Op. at 1067).

10. *Id.*

11. *Id.* (quoting D. Ct. Op. at 1104).

12. *Id.*

13. *Id.*

14. *Id.* (citing D. Ct. Op. at 1088).

15. *Id.* at 2154.

16. *Id.* ("[T]he district court struck the right balance in crafting a remedy that both prevents anti-competitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.").

17. *Id.* at 2141, 2166.

18. *Id.* at 2155.

19. *Id.* at 2160.

Specifically, it claimed that the district court erroneously applied the “least restrictive means” test to its restraints; the court replaced the NCAA’s definition of amateurism with its own; and that the court was exercising too great an interference with the business of the NCAA.²⁰

II. DEVELOPMENT OF THE RULE OF REASON

The rule of reason analysis is one of two ways courts may approach a challenged restraint under the Sherman Act.²¹ The Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”²² This section could seemingly be interpreted to outlaw even “ordinary business agreements,” by its use of the word “every.”²³ And, in fact, in *United States v. Trans-Missouri Freight Association*, the Court found “that the Sherman Act automatically condemned *all* horizontal restraints.”²⁴ However, in *Standard Oil Co. v. United States*, the Court held that antitrust cases must be decided using “reason,” apparently taking a step back from the *Trans-Missouri* decision.²⁵ The Court finally clarified the framework for antitrust analysis in *United States v. Trenton Potteries, Co.*, establishing “that although restraints generally are subjected to a rule of reason, specific types of restraints such as ‘agreements to fix and maintain prices’ are automatically deemed unreasonable.”²⁶

At the heart of rule of reason analysis is the determination of “whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”²⁷ The analysis can shift the burden of proof up to three times, from the plaintiff to the defendant and back to the plaintiff.²⁸ The first step in the analysis is determining whether a challenged restraint “has a significant potential for

20. *Id.* at 2161–2163.

21. However, the Court noted in *National Society of Professional Engineers v. U.S.*, that the rule of reason has origins in the common law that predate the Act. 435 U.S. 679, 688 (1978).

22. 15 U.S.C.A. § 1.

23. *Id.*; Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 85 (2018); see also *Nat’l Soc. of Pro. Engineers* 435 U.S. at 687–88.

24. Hovenkamp, *supra* note 23 at 85 (citing *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 343–74 (1897)).

25. *Id.* (citing *Standard Oil Co. v. United States*, 221 U.S. 502, 516 (1911)).

26. *Id.* (citing *United States v. Trenton Potteries, Co.*, 273 U.S. 392 (1927)).

27. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988), *abrogated* by *Leegin Creative Leather Prod., Inc., v. PSKS, Inc.*, 551 U.S. 877 (2007) (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977)).

28. Hovenkamp, *supra* note 23 at 103–04.

anticompetitive effects.”²⁹ If a court finds such potential, a defendant must then establish “an affirmative defense which competitively justifies [an] apparent deviation from the operations of a free market.”³⁰ Lastly, “if the court finds procompetitive effects, the plaintiff must show the procompetitive benefit could be achieved through less restrictive means.”³¹

III. ANALYSIS OF *NCAA v. ALSTON*

The subjugation of the NCAA’s restraints on compensation to the rule of reason analysis effectively ended the body’s ability to prevent student-athletes from profiting from their name, image, and likeness.³² While the Court did not reach that specific issue, it did hold that the proper scrutiny for the NCAA’s compensation restrictions is the rule of reason.³³ As Justice Kavanaugh noted in his concurrence, these rules are unlikely to withstand such a level of scrutiny.³⁴

The Court’s opinion began with a brief history of the relationship of American colleges and universities to sports and money.³⁵ This history included the founding of the NCAA and its opposition to compensation for athletes from the beginning.³⁶ However, the Court noted that in recent years, the NCAA has relaxed some rules on compensation.³⁷ Finally, even as the rules relaxed, the profits did not dwindle.³⁸ The president of the NCAA, heads of its member institutions, coaches, and conference commissioners all continued to enjoy high salaries.³⁹

After recounting the district court’s opinion, the Court noted that the “suit involve[d] admitted horizontal price fixing in a market where the defendants exercise[d] monopoly control.”⁴⁰ It remained

29. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 (1984).

30. *Id.* at 113 (citing *Nat’l Soc. Of Pro. Engineers v. United States*, 435 U.S. 679, 692–96 (1978)).

31. *Sherman Act-Antitrust Law-College Athletics-NCAA v. Alston*, 135 HARV. L. REV. 471 (2021); *see also* Hovenkamp, *supra* note 23 at 104 (“[A] less restrictive alternative . . . is one that offers more-or-less the same benefits but without the threat of competitive harm.”).

32. *Nat’l Collegiate Athletic Ass’n. v. Alston*, 141 S.Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

33. *Id.* at 2157.

34. *Id.* at 2167.

35. *Id.* at 2148.

36. *Id.* at 2148 (citing A. Zimbalist, *UNPAID PROFESSIONALS* (1999)).

37. *Id.* at 2149–50.

38. *Id.* at 2150.

39. *Id.* at 2151.

40. *Id.* at 2154.

undisputed that NCAA restraints decreased compensation for plaintiffs in comparison to what they could receive in a relevant market.⁴¹ Further, the NCAA did not suggest that the plaintiffs were required to show that its restraints dampened competition in both the buyer and seller markets.⁴² Finally, the plaintiffs did not argue that the NCAA could defend its restraints “by pointing to procompetitive effects they produce in the consumer market.”⁴³

The Court rejected the NCAA’s primary argument that the rule of reason analysis applied by the district court was improper.⁴⁴ It first stated that even if the NCAA was correct in calling itself a joint venture with its member schools, that alone is not enough to abandon rule of reason analysis.⁴⁵ Some joint ventures can be subject to a “quick look” analysis, either because they hold a small percentage of the relevant market, or because they “so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look.”⁴⁶ Ultimately while some policies of the NCAA, such as the rules of games, could be eligible for a quick look, the rules fixing the plaintiffs’ wages were not eligible.⁴⁷

The Court next responded to the NCAA’s argument that even if a rule of reason analysis was appropriate, *NCAA v. Board of Regents* prevented the Court from finding its compensation restraints to be improper. Justice Gorsuch quickly dismissed the argument, writing that while the comment in *Board of Regents* could indicate a standard of care for courts assessing the restraints, it was by no means dispositive.⁴⁸

The NCAA further argued that the fact that itself and member schools were not “commercial enterprises” and instead oversee intercollegiate athletics “as an integral part of the undergraduate experience,” made rule of reason analysis improper.⁴⁹ The Court dismissed this argument as well, stating that the NCAA’s goal of maintaining amateurism in college sports did not grant it “immunity from the terms of the Sherman Act for its restraints of trade.”⁵⁰ Essentially, if the NCAA would like to argue that it should receive

41. *Id.*

42. *Id.*

43. *Id.* at 2155.

44. *Id.* at 2157.

45. *Id.* at 2155–57.

46. *Id.* at 2156.

47. *Id.* at 2157 (“Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on.”).

48. *Id.*

49. *Id.* at 2158 (quoting Brief for Petitioner in No. 20-512, at 31).

50. *Id.* at 2159

special dispensation under the Sherman Act due to the nature of its industry, that is an argument for Congress and not the Court.⁵¹

After affirming that the district court's decision to subject the restraints to the rule of reason was proper, the Court shifted its opinion to the NCAA's issues with the district court's application of the rule of reason.⁵² First, the NCAA did not contest the plaintiffs showing that the restraints produced significant anticompetitive effects, but rather that the court did not find its rules to "collectively bear an anticompetitive effect."⁵³ The Supreme Court found that the district court properly held "the NCAA's restraints 'patently and inexplicably stricter than is necessary' to achieve the procompetitive benefits the league had demonstrated."⁵⁴ Second, the NCAA claimed that the district court replaced its definition of amateurism with one of its own and thus "'impermissibly redefined' its 'product.'"⁵⁵ Again, this argument was rejected. The Court found that even if amateurism was a product feature with a consistent definition, that still would not entitle the NCAA to immunity from § 1 scrutiny.⁵⁶ Third and finally, the Court rejected the NCAA's claims that there were not "substantially less restrictive alternatives" to its restraints that would not disturb the procompetitive benefits of the current rules and that the district court threatened to "'micromanage' its business."⁵⁷ Only certain restraints were enjoined and the NCAA was not left devoid of all decision-making power.⁵⁸

Justice Kavanaugh concurred in the unanimous opinion, writing that it appears unlikely that the NCAA compensation restraints which remained in place could withstand a rule of reason analysis.⁵⁹ While the NCAA may point to "tradition" and "defining characteristics" all it wants, those labels do not stand up to "ordinary principles of antitrust law."⁶⁰

IV. LEGAL OR POLICY IMPLICATIONS

Subjecting the NCAA's compensation rules to rule of reason analysis opened the floodgates of reform. Shortly after the Court

51. *Id.* at 2160.

52. *Id.*

53. *Id.* at 2162.

54. *Id.* (quoting D. Ct. Op. at 1104).

55. *Id.* at 2162–63 (quoting Brief for Petitioner in No. 20–512 at 35–36).

56. *Id.* at 2163.

57. *Id.* (quoting Brief for Petitioner in No. 20–512 at 46, 50).

58. *Id.* at 2164.

59. *Id.* at 2167 (Kavanaugh, J., concurring) ("The NCAA's business model would be flatly illegal in almost any other industry in America.")

60. *Id.* at 2167, 2169 (Kavanaugh, J. concurring).

issued its opinion, the NCAA's Division 1 Council "adopt[ed] an interim policy that [suspended] its amateurism rules related to student-athlete name, image, and likeness ("NIL") monetization."⁶¹ While this changing landscape has increased the earnings potential of many student-athletes, it has also opened the door for a new specialized area of law built around NIL deals. For example, the law firm Foley & Lardner developed an "NIL Task Force" to advise various entities that could be affected by the changes, from brands, to colleges and universities, to athletic conferences, to the student-athletes themselves.⁶² Another firm, Athlete Defender, states on its website the many potential opportunities for student-athletes to profit from their NIL, including product advertisements, social media deals, appearance fees, autograph signings, and coaching sessions.⁶³ Throughout this page, the firm recommends that student-athletes consult with an attorney before entering into agreements and concludes with a list of ways the firm can assist the athletes.⁶⁴ It is likely that opportunities for attorneys to get involved with NIL—whether as counsel for brands, for the rulemaking bodies, or for student-athletes—will only increase as policies from various rulemaking bodies continue to come down.

CONCLUSION

As Justice Kavanaugh noted, college athletics owes its high profits to the work of student-athletes.⁶⁵ While ending the prohibition on NIL monetization was a step in the right direction, it will likely not be enough. Attorneys in this area should keep an ear to the ground for movement in the courts and legislative bodies toward student-athletes gaining their fair share.

61. Gregory Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning*, JDSUPRA (August 5, 2021), <https://www.jdsupra.com/legalnews/ncaa-v-alston-the-beginning-of-the-end-9351737/>.

62. *College Sports: "NIL" Task Force*, FOLEY & LARDNER, LLP, <https://www.foley.com/en/services/industry-teams/sports/college-sports-name-image-likeness> (last visited March 20, 2023, 6:57 PM).

63. *NCAA Name, Image, and Likeness Lawyer (NIL)*, ATHLETE DEFENDER, <https://www.athletedefender.com/ncaa-nil-name-image-likeness-attorney/> (last visited March 20, 2023, 7:06 PM).

64. *Id.*

65. *NCAA*, 141 S. Ct. 2141 at 2168 (Kavanaugh, J., concurring).

