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The NCAA, Which Is Tied to Education, May Be a Necessary Monopoly

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By Carl W. Hittinger and Jeanne-Michele Mariani

A class of athletes recently challenged the NCAA's governing policies on antitrust grounds and won, but how much of a victory it is remains to be seen. Judge Claudia Wilken, the California District Court judge who favored players over the NCAA in O'Bannon v. NCAA, has done it again in Alston v. NCAA, which largely piggy-backs on her previous opinion. In O'Bannon, a group of Division I athletes sued the NCAA in an antitrust class action suit, alleging that the organization was using the likeness of players to garner more and more revenue without asking for consent or sharing any of those profits with the players. At the time, NCAA rules estopped schools from offering students any money gained from capitalization in marketing of the players on each team. After finding this to be an unreasonable restraint on trade, the NCAA rules were changed to offer larger scholarship opportunities to student athletes and to also allow schools to place revenue generated from marketing campaigns in trust for players to use after college.

In many ways Alston picks up where O'Bannon left off, arguing that the NCAA has a monopoly on the college athletic market and has misused it. The Alston plaintiffs alleged that through its monopoly power, the NCAA has manipulated players' compensation by forcing all schools to follow their regulations or face the threat of punishment. By creating these compensation limits, the NCAA artificially lowered the prices that might be paid to college athletes if the NCAA had failed to exercise its monopoly power. Finding the NCAA to be in violation of Section 1 of the Sherman Act, Wilken held that the NCAA could not fix or limit the amount of compensation paid to players unless the money offered to the students was "related to education." This type of compensation might include money for computers, musical instruments, furniture for a dorm or other school-inspired expenses. The exact paraments of the phrase were not defined by Wilken and so they remain open for interpretation by the NCAA's governing body. Previously, schools were restricted by NCAA rules from providing benefits outside of grant-in-aid scholarships (room, board, books, tuition, cost of attendance).

Although Alston represents a win for the players, it does not go as far as the plaintiffs in the class action suit had originally hoped. Initially, plaintiffs had asked the court to allow each individual conference the space to create their own individual rules relating to player compensation, which has its own implications. As many sports analysts have suggested, the consequences of the adoption of the Alston class' desired relief could actually shift the face of college sports into uncharted and potentially unfair waters. For example, suppose the Alston class had received the requested relief—rules set by each conference, untethered to education or NCAA regulation—this would have probably created super conferences in basketball, where the most popular and deep-pocketed teams realign into one conference, attracting the most talent by offering the most money, and then in turn attracting the most lucrative media deals. Less wealthier schools, who now benefit from conference-based deals, would probably be pushed to the edges of obscurity, losing talent and marketing offers to bigger, more wealthier schools. As a result, those athletic programs may fold altogether. In a sense, without what some may perceive as the NCAA's monopolistic power, something even worse could be created—splinter monopolies that essentially crush weaker teams and weaker players. It would become the college equivalent of real big time professional sports' buying of the best players. In that way, the textbook ill-effects of a monopoly power, i.e., suppressing competition, could be brought about through some sort of reverse monopoly. Of course, whether one perceives this as good or bad, as usual, hinges on the definition of the market—a narrow market definition of "Division I players" might benefit in such a system, whereas a broader market definition of "college athletic programs" might be negatively affected. Regardless of

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definition, however, a change on the scale that the Alston class is looking for certainly has the power to dynamically affect the future of college sports.

Trying to make everyone happy in the wild world of amateur sports is probably a pipe dream, given the big money and fame at stake, particularly in basketball and football. For example, it has been reported that for the 2019 season, contracts for high profile coaches of lucrative teams were worth millions of dollars, surely far exceeding the pay given to academic professors at those same institutions. In that sense, it makes sense to allow student athletes to share in the profits gained from their own talent. At the same time, many of these coaches and lucrative teams are located at elite institutions, where acceptance rates number in the single digits. It has also been reported by some that top athletic talent at prestigious schools are allowed admission with lower grades and SAT scores than the average matriculant. It is hard to put a price on admittance to an elite university, although owing to the latest college admissions scandal, it could be upwards of $500,000. In that sense, athletes are getting some sort of nonquantifiable benefit from their talent, even if some would argue over whether it is enough or too much.

At the end of the day, college players are still students and not jocks, who are first and foremost in college to get an education and not just play sports games. It is true, particularly in less lucrative athletic programs, that college athletes are often struggling to make ends meet, and many often do not have the time to take advantage of work-study programs or part-time jobs due to their demanding 24/7 sports program. But, the broke college student is not a new trope; all across the country students both athletically gifted and athletically challenged are struggling to pay for expenses, and the latter group often does not receive the same education-related financing that the former does. This is not to say that the system for either group is fair, but it merely suggests that a different solution might be the answer.

The main problem with paying student athletes more is the tension between their star-powered athletic image and their status as a student. Perhaps both cannot exist simultaneously and so maybe the solution for basketball and football hopefuls are farm teams, similar to those used to groom professional baseball players. They could potentially still be arms of the recognized colleges but would operate under different standards, splitting the difference between students and player with oversight regulation in some form, by some watchdog.

The verdict is still out as to whether a drastic change is necessary or even better, but if the status quo of at least the operation of D-I sports is optimal, then it may be that the NCAA's monopoly presence remains necessary. While getting a slap on the wrist for its behavior, it is possible that Wilken also recognized the importance of the organization's regulation of the sport, thereby coming up with a resolution that scaled back the sought-after relief. At least for now, college sports remain largely intact as they were, although the NCAA has already filed an appeal of the ruling to the U.S. Court of Appeals for the Ninth Circuit, and an attorney for the plaintiffs said that while they do not plan to appeal, the NCAA's appeal may open the door for the class to ask the Ninth Circuit whether any cap on player compensation is justified. While the status quo remains, the future promises change. Stay tuned.

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