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NCAA v. Alston: The Supreme Court Has a Chance to Save Joint Venture Law from the Ninth Circuit

by Jack E. Pace III

Regardless of your views about paying college athletes, you should be concerned about the Ninth Circuit's decision in *NCAA v. Alston*. In *Alston*, the Ninth Circuit invalidated the NCAA's limits on compensation for college athletes, addressing an issue on which reasonable people certainly may disagree. But in reaching its result the court created a rule with far-reaching negative consequences for procompetitive joint ventures and other collaborations. The court distorted the test traditionally used to evaluate conduct under the antitrust laws—the Rule of Reason—in a way that creates uncertainty for any businesses or individuals considering a collaboration. The United States Supreme Court has an opportunity to correct the Ninth's Circuit's error.

On March 31, the United States Supreme Court heard oral argument in *National Collegiate Athletic Association v. Shawne Alston, et al.*, No. 20–512, and *American Athletic Conference, et al. v. Shawne Alston, et al.*, No. 20–520. In these consolidated appeals, the NCAA and several college athletic conferences are appealing the Ninth Circuit Court of Appeals' ruling affirming a lower court injunction against the NCAA's amateurism rules.

My firm filed an *amicus curiae* brief in the Supreme Court appeal on behalf of a group of professors interested in the proper application of antitrust law and economics in industries around the world. Our clients submitted their brief based on their concern that the Ninth Circuit misapplied the antitrust Rule of Reason in a manner that would discourage procompetitive joint venture activity.

Here's how the Rule of Reason is supposed to work—and has been applied for decades:

With the rare exception of conduct that is *per se* illegal under the antitrust laws—*i.e.*, agreements between horizontal competitors to restrict output or increase prices—when a plaintiff alleges that conduct violates the antitrust laws, the court evaluates the conduct using the antitrust Rule of Reason. This rule involves three steps:

First, the plaintiff bears the burden to show substantial anticompetitive effects in a well-defined market.

Second, if the plaintiff carries its burden, then the defendant must show that the allegedly unlawful conduct has procompetitive benefits.

Third, if the defendant carries its burden, then the plaintiff can overcome the defendant's showing, and establish liability, if it can prove that a viable and substantially less restrictive, yet

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equally effective, alternative to the conduct exists. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). If the plaintiff fails to show a viable and substantially less restrictive alternative, then the court should weigh the anticompetitive effects against the procompetitive benefits to determine if the conduct is an "unreasonable" restraint of trade under the Sherman Antitrust Act. *See, e.g., Am. Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996).

Here, however, is what the Ninth Circuit did in the *Alston* case:

As readers of *WLF Legal Pulse* will be aware, the NCAA's amateurism rules prohibit student-athletes from being paid to play. But the rules permit many forms of financial payments to student-athletes, including reimbursements for reasonable and necessary academic and athletic expenses (including tuition) and financial awards for individual and team achievements. The plaintiffs challenged the NCAA's rules under the antitrust laws, relying in part on an earlier Ninth Circuit decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). After the district court granted the plaintiffs' motion for a permanent injunction against the NCAA's rules, the NCAA and athletic conferences appealed. On appeal, the Ninth Circuit was required to evaluate the NCAA's rules under the Rule of Reason, as outlined above.

At Step 1, the court concluded that the plaintiffs carried their burden to show potentially anticompetitive effects. At Step 2, the court found that the defendants successfully showed that the NCAA's rules had procompetitive effects. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1260 (9th Cir. 2020)).

But things went wrong at Step 3. Instead of shifting the burden back to the plaintiffs to prove that a substantially less restrictive, but equally effective, alternative to the NCAA's rules existed, the court required the *defendants* to show that each one of the NCAA's rules was the least restrictive rule available. *See, e.g., id.* at 1259, 1261 ("[T]he NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses"), 1262 ("The NCAA fails to explain why the cumulative evidence . . . was insufficient.").

The court proceeded to propose hypothetical revisions to certain of the NCAA's rules to make them less restrictive and found that the hypothetical rules, such as "uncapping certain education-related benefits" and permitting conferences to set individual limits on education-related benefits, would be "virtually as effective as the challenged rules." *Id.* at 1252, 1260–61. By evaluating each of the NCAA's rules separately and holding that each rule must be necessary to achieve the proposed procompetitive objectives, the Ninth Circuit in effect required the defendants to show that they had adopted the most procompetitive—or the least restrictive—version possible of the challenged restraints. *See id.* at 1259, 1264. Having thus changed the Rule of Reason standard in the plaintiffs' favor, the Ninth Circuit ruled for the plaintiffs. *Id.* at 1263.

Why is this a problem?

If the burden falls to the defendants to prove that, even if their conduct has procompetitive benefits (as in *Alston*), a hypothetically more competitive version is not possible, then it is difficult to imagine any joint venture or competitor collaboration surviving a legal challenge. As long as a creative plaintiff's attorney or district judge can imagine a less restrictive version of the defendant's conduct, then the plaintiffs can use the courts to regulate and modify—and potentially collect treble damages from—any routine business conduct.

As a result, the Ninth Circuit's decision has sweeping implications for antitrust enforcement and may call into question collaborations and joint ventures across a host of industries including

healthcare, pharmaceutical development, information technology, consumer electronics, and manufacturing. And the potential exposure to treble damages or injunctive relief for such conduct is likely to chill otherwise procompetitive arrangements, contradicting what was once understood to be the goal of the antitrust laws: promoting competition.

Following oral argument this week, the Supreme Court has an opportunity to prevent this dangerous outcome for competition and innovation. The Supreme Court should reverse the Ninth Circuit's ruling in *Alston* and remand with instructions to dismiss the plaintiffs' complaint.

