



ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

Episode 48: Breaking Down the NCAA v Alston SCOTUS Decision | June 22, 2021

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Intro: Welcome to Porter Wright's Antitrust Law Source.

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sports.

Luke: I'm Luke Fedlam, the host of the protecting your possibilities podcast and the head of sports law at Porter Wright.

Jay: And I am Jay Levine, the editor of the antitrust law source podcast. And I am the co chair of our antitrust and Consumer Protection group.

Luke: We are here today doing this joint podcast because there are times in the sports law world where things just overlap and come together. And this week has been one of those times. And so we had a decision come out of the Supreme Court of United States this week, in the case of NCAA versus Austin, and this case, it deals with sports law, it deals with antitrust. And obviously, in the midst of all this going on in college sports, what a great opportunity for us to have some in depth conversation of what the actual decision says, what it means for the NCAA, what it means for student athletes, but also, just as importantly, what does it mean going forward? And how might it impact college sports? So, Jay, and I wanted to get together, have this conversation today and dig into it a little bit more. So with that, I think the best place to start is, as they say at the beginning. So Jay, do you want to just maybe give a little bit of an overview of what the case was, and kind of what the what the decision of the court was?

Jay: Sure. So this case, is actually a few different cases put together and started several years ago, where a lot of student athletes sued the NCAA, over the NCAA restriction on schools being able to compensate student athletes for education related expenses, as well as for essentially any compensation. Ultimately, the district court in the Northern District of California up in San Francisco, essentially decided that the NCAA violated the antitrust laws by agreeing on these rules, limiting some compensation to student athletes. But the interesting thing is the court sort of split the baby, it decided that rules limiting compensation on education related expenses, things like scholarships for graduate or vocational schools, tutoring and the like, that violated the antitrust laws, but other sort of non education related expenses, those rules can be understood as sort of promoting "amateurism," and that's what the NCAA offers is amateur collegiate sports. It went up to the Ninth Circuit, the Ninth Circuit affirmed the district court opinion and went up to the Supreme Court.

Interestingly, the NCAA basically wanted to overturn and essentially argued that they weren't even subject to the antitrust laws for a variety of reasons. The student athletes did not seek a review of anything other than affirming the district court opinion, meaning they didn't actually try to ask the Supreme Court to overturn the district court and rule that the non education related expenses. Those limitations are violations of the antitrust laws, they simply sought to affirm the district court opinion. And in an extremely detailed and well-seasoned opinion, the Supreme Court upheld and basically said that any agreements, limiting compensation on education related expenses, violates the antitrust laws, and upheld the district court opinion. So that's where they are. Additionally, there's a concurrence by Justice Kavanaugh, which is, I'm sure we'll get into it, but essentially scathing. If I were the NCAA would certainly have me quaking in my boots a little bit. But that's, that's essentially the opinion and where we are now. And, you know, it's gonna have ramification.

Luke: Exactly, thanks. Thanks for that overview. Jay. I think it's important to have a good solid understanding of kind of how we got here, what the court actually said, and the impact this is going to have on sports as we go forward. You know, it's interesting, right? Like, a lot of times when you think about oral arguments and the oral arguments for this case, we're back at the end of March. And you try to listen and try to determine what the courts are going to do based on the questions that they asked.

You know, it was interesting, because it really seemed like the questions they were asking really went after the NCAA, and then, wow, when you see this decision, a unanimous decision to come out against the NCAA in this instance, I think is big. But one of the things that I think is important to understand is the limited scope of this decision, right? And that's that this decision by the court really only gets to the implications on education related benefits, those benefits of laptops and computers and study abroad programs and in internships, all those things that have to do with the benefits that a school can provide to student athletes, that it no longer can be limited, which is interesting, right.

We'll talk, you know, a little bit later about the implications of this on schools and recruiting and things like that. But, but I think it is interesting and important to note, Jay, this limited scope, and as you look at this, especially from your perspective on the antitrust side of things. But I think that this limited scope in their decision has a major impact as we look at going forward and the impact that this will have on the NCAA and those who maybe want to continue to attack the NCAA?

Jay: Oh, absolutely. You got it perfectly. I like to think of it as there's sort of three buckets of compensation that the student athletes have always sort of been suing about. One is education related expenses. And that's the only thing technically the Supreme Court was dealing with and affirmed the district court's finding that any limits on education related expenses is a violation of the antitrust laws.

Then there's the name image and likeness, which there's been a lot of, you know, publicity about. States are enacting laws that you can't restrict a student athletes ability to market his or her name, image or likeness, there's bills in Congress. There's lawsuits about that.

And then there's just sort of generally, what about just paying a kid to come to your school, just like we pay professional athletes. I'm a Raiders fan, I think that's pretty well documented. And, you know, just like the Raiders can go get a free agent, can Ohio State go and pay a million bucks for the next Aaron Rodgers to come play for them? And that, so far, the district court had said no, and wasn't challenged at the supreme court level. But the tone and tenor of the of the

opinion certainly suggests that that may be open to real litigation. And you know, what you can imagine? Would your clients like to be able to market their service across the country that anyone they want to?

Luke: Absolutely.

Jay: You know, it's just, it's mind boggling. If you think about it.

Luke: It really is. It really is. And so when you when you think about it, it's I think one of the areas that that was really entertaining and interesting to me, was justice Kavanaugh's concurring opinion. It seems like to me and, and I will tell you most of my clients know I don't spend a lot of time reading Supreme Court decisions. I did enough of that in law school, in my day to day don't have to deal with it. But this was one that I just wanted to have my popcorn with me as I'm reading it, because, wow, he really set forth almost a challenge for others to come in and take on the NCAA. I mean, am I wrong there? I'm just reading one, he says, I add this concurring opinion. This is, you know, Justice Kavanaugh speaking in this concurring opinion to underscore that the NCAA is remaining compensation rules also raised serious questions under antitrust laws. Right. I mean, it seems like he's just begging, you know, for the next case.

Jay: Right, well. You and I get some listeners know, my background, I started off representing at a firm that we represented football and basketball players suing the leagues, over restrictions on free agency and essentially, where the restrictions in football on free agency were deemed to be an antitrust violation. And again, these issues, these are campaigns and you sometimes win bit by bit by bit, but I mean, Kavanaugh has concurrence to sort of brought up, tears to my eyes. You know, there's just so. Another quote from him, the NCAA's business model would be flatly illegal in almost any other industry in America. He's not talking about just the education related expenses. That's right. He's talking about anything. And he says price fixing labor is price fixing labor, period. So to be honest, I think, while his concurrence is both well written and sort of very strident. I think all these really doing is frankly, giving voice to the undercurrent in the majority opinion. The majority opinion is very circumspect saying we're only going to decide what's before us. But I think he's giving voice to what they're basically saying is, we get another case on other issues, I don't see how the NCAA is ever going to be able to defend it.

Luke: Yeah, I agree with that, I think, I don't know how they're going to be able to defend it going forward, either. I mean, we could get into a lot more technical and if you if you want to hear more of the technical kind of antitrust analysis and the scrutiny that's used and all of that, definitely check out Jays podcast because he'll dig into more of the details and whatnot. But I wanted maybe take this, then a step further to say, so what happens next? So at this point, we know, from a from a school perspective. This decision doesn't then say, hey, schools, you have to spend more money on student athletes for these education related benefits. But it says, Hey, schools, if you want to, you can because guess what, the NCAA can't limit what you're going to spend on your student athletes.

So we could have some of these schools, top schools, big athletic schools, saying, okay, you know, what we're going to offer top of the line laptops, we're going to pay student athletes, the top rate when it comes to internships were going to allow them study abroad programs they get paid for the educational benefit, and all that kind of stuff. So I think that's what we'll see in terms of the actual day to day, right.

It's going to impact recruiting, student athlete most definitely will say, Okay, well, what are the benefits to me, as they already do? Right? What are the benefits to me for going to this school

versus that school? And it takes the totality of decision making to figure that out? Right, the athletic opportunities, the academic opportunities, the potential educational related benefit opportunities, etc. But what do you see? What do you think? What do you think is next, Jay? I mean, clearly this roadmap has been laid, we kind of understand this is very limited in scope, very narrow it related to education related benefits, but what impact do you see this having more broadly on just the NCAA? Right, where do you see it going?

Jay: So I mean, there, there are some who are gonna say this challenges the entire NCAA business model, right. And I'm not sure that's really true. I mean, the majority opinion made it clear that you can still regulate even education related expenses to make sure they're bona fide education related expenses. In other words, the fear that somebody is going to get a Lamborghini out of an internship or, you can still police that. But whether it's going to be a free for all or not, there's going to be if there's already name engine image and likeness cases, there's going to be other cases brought, but I think what the NCAA is going to end up doing is, first they're going to pour even more effort into getting some sort of bill through Congress that will regulate it. There's a sports exemption for leagues being able to negotiate television contracts and the like, the NCAA is going to try to get some bill through Congress that's going to govern the compensation that student athletes can receive what that bill will look like, it's unclear, there's already a patchwork of laws in Florida, California, and other places. And I think they're going to put a lot more effort into that.

But they do have to worry that if they can't do it via legislation, and if it's only going to be decided throughout the courts, bit by bit, these bricks may sort of take apart the foundation. Now, if they do that, think about a world in which any student athlete can go to any school at wants, can get paid whatever it wants to participate in that athletics at that school. So be it and then the NCAA regulates and still sells the product, it still governs for substance abuses and has the like, it doesn't mean the NCAA is out of business. It just means that they can't fix wages.

Luke: Right. I think that that's that is totally that's totally spot on. And, and that that's one of the things I'm so glad that the Supreme Court addressed right. And just this idea that somehow by not paying, that people really want to see this product, where, student athletes aren't getting paid and it's just that's just not that's just not true in some respects. I know that there are some people that are that are big on this. This whole idea but that amateurism is made up because that for the love for the love of the game, which we could spend a whole other episode getting into that and what and what that means. But you talked about Congress and needing to see something through Congress. I'm curious, your thoughts on this, and I'll share kind of my thoughts, which is from a name image and likeness perspective. We know that there has to be, there's going to end up being federal legislation. There are, as Jay mentioned, there are multiple states right now whose laws on name image on state laws on name image and likeness will go into effect here on July 1, and other states that have progressing timelines over the next couple years. And the Commerce Committee of the Senate here recently held a few different hearings, as Senator Cantwell from Washington, who's the chair of the Senate Commerce Committee had really a lot of conversation in the name, image and likeness space.

And a lot of people think that she may be the one that will be able to bring together some type of bipartisan legislation. My question to you in from an antitrust perspective, and from a broader kind of legal perspective, how far do you think that legislation needs to go to, to allow for this, to allow for the NCAA to continue to operate in the way not necessarily the way which it has, but in a way that is, is meaningful, that they still exist, let's say, and then also gives student athletes the rights that they need to be able or that they want to be able to go and, and do what you know, so often, they're non student athlete counterparts in college campuses have been able to

do for years. What do you see? Where does that balance need to be? Where do you need to strike that balance? Figure it out for us, Jay, we want you to figure this whole thing out. What's up?

Jay: Well, I may not be the best person to talk about this. I started my legal career on behalf of athletes. And I, to be honest, my heart is still with them. I'm not entirely sure the NCAA needs any protections? Because think about it. What if they ended up becoming the NFL or the NBA. That's not wrong. It's different. But it doesn't mean the NCAA doesn't have a right to exist or doesn't have a place, it just means that it doesn't necessarily have to govern issues, dealing with what money goes to the student athlete, whether it be education regulated, whether it be non education related, whether it be name, image and likeness related. That said, you're right, this concept of amateurism that people want to see amateurs, I think we debunked that. Remember the Olympics? To play the Olympics, you had to be non paid, and then sort of, well, that went by the wayside. The Dream Team, right?

Luke: Absolutely, 1992, yeah.

Jay: All these guys are pretty well compensated. They were professionals. So having professionals compete in what is otherwise a traditional amateur arena doesn't seem to harm the sport at all. The Olympics are as popular as ever, maybe got a little bit boring after the Dream Team, but just that's because of a talent issue. So I don't think the NCAA needs anything. That said, there may be enough demand on that side, where I think Congress can give the NCAA, some moderate policing functions in regards to compensation. Because I think Kavanaugh points this out. Every league comes out and says, we need restrictions, because competitive balance, right? We don't want the New York Yankees of the world, and we don't want the Dallas Cowboys of the world, or the richest teams to be able to just buy up all the talent. And so we have these collective bargaining agreements and the like, well, it's entirely possible that a congressional framework would allow for somebody to negotiate for student athletes and maybe provide for salary cap type things and the like. There could be a regulatory framework that allows for at least division one, Division Two, division three to be on the same kind of competitive level without having the Ohio State and Notre Dames of the world just uber dominating. But my preference is let the market dictate. Let's see how this plays out. You know, what happens when there's an entrenched institution I just don't see the NCAA giving up yet.

Luke: That's right there. I don't see them giving up either. And I will say this as a diehard Eagles fan. I agree. We don't want the Dallas Cowboys of the world to be able to have a monopoly on everything. But I will say. Justice Kavanaugh hits this right on the head to your point earlier, you know about the traditions of sports and what makes the NCAA unique. And he says, to be sure, the NCAA and his member colleges maintain important traditions that have become part of the fabric of America, game days in Tuscaloosa and South Bend pack gyms and stores and Durham men's and women's lacrosse championships on Memorial Day weekend track and field meeting Eugene, the spring softball and baseball World Series in Oklahoma City in Omaha, the list goes on. But those traditions alone cannot justify the NCAA's decision to build a massive money raising enterprise on the backs of student athletes who are not fairly compensated.

And I think that right there just really kind of puts things into perspective that I think a lot of people would agree with. I think that we can find a way to balance the rights and opportunities of student athletes, along with the traditions of what people have come to love about college sports. And I don't think that what people have loved about college sports has anything to do with the athletes and whether they get paid or not. Athletes are going to compete for their opportunities and to be able to maximize their opportunity and experience. And I'll say this, this

NCAA versus Austin case, specifically, again, as we mentioned earlier, it's very limited, very narrow, and deals with education related benefits. Name, image and likeness, while not dealt with directly in this case, name image and likeness deals with a student athlete being able to contract with a third party to license their name, image and likeness and be compensated for it.

In neither of those scenarios, are we talking about schools paying their student athletes, right? What we're talking about is a school being able to offer things from an academic and education related perspective, and provide opportunities because guess what, not all student athletes come from the same place. Not all student athletes go to college with a laptop, or go to college with the things that they need to be successful outside of their sport and in the classroom. The student side of student athlete, and from a name image and likeness perspective, we're really just talking about student athletes who have this ability to have followers on social media or the ability to teach or train someone through a camp in a clinic to be able to go out and partner with a company to say, hey, I want to help promote your brand and make money off of that. And none of those scenarios, does it take money away from the institutions themselves, and put it in the pockets of the players directly. So I think Congress will strike a balance, it'll be interesting to see what that all looks like in the protections that they do, if any, continue to afford the NCAA. But I think there's so much more to come in this. I think this decision by the Supreme Court sets up some other potential challenges here in the future, that will be really fascinating to see.

Jay: Oh, absolutely. I mean, there, there's no dispute that a lot of these rules affect different constituencies in different communities disproportionately. And you're absolutely right, education related benefits are very narrow, and I'm not exactly sure that it's going to affect a lot, whether I'm going to get a scholarship to grad school, or law school, or dental school. Is it going to affect my decision of where I'm going to play that much. And we got to remember, the vast majority of student athletes do not go on to professional sports.

Luke: That's right. That's right.

Jay: I mean, the cream of the cream of the crop, get to play. So for the vast majority of student athletes, getting that education is entirely focus. And the athletics part is a means, because they may not otherwise have the ability to pay for that. If you think about it, just because something has been an institution doesn't mean it's right. Otherwise, we have no progress in this country.

Luke: Absolutely. Right. And we could look at a lot of institutions that have affected society over time and but we evolve and we and we move on. I think you're spot on. So I guess, Jay, last thoughts as we kind of You know, wrap up this conversation, obviously more conversations will be had. But any last thoughts on things that you've taken from the court's decision here or as you look at the industry, this college sports industry, and the changes that are coming. Any last thoughts for our listeners?

Jay: Yeah, I think, I mean, the takeaway clearly is that, you can't simply support restraints that would otherwise be illegal with claims that we need the product because the product itself is defined by the illegal nature of what we want to do. That that's just not going to fly. And at the same time, the Supreme Court noticed and noted that these compensation rules have been ever so slightly loosened over the years, and yet consumer demand and the desire for collegiate sports has just continued to rocket. So there's no reason we need any of these in order to protect the product itself.

You're absolutely right. We don't love collegiate sports because they're not getting paid. We love collegiate sports, because of the youth, the enthusiasm, the connection to my alma mater. We

relive our lives through these kids, we remember when we were those athlete warriors, although never good enough to play D1. But be that as it may, that's what makes March Madness wonderful, because of just the youth and enthusiasm, not because they're not getting paid. And I think this this, this decision says that fairly, starkly, and I look forward to student athletes getting their fair share in the future.

Luke: I love it, you know I love that passion, Jay, you better bring it. I'll tell you, I agree wholeheartedly with you. And I think when we look at this, and we take even a step back and look at the last 10, 11, 12 years and see the impact and the changes that we're starting to see chip away at this institution that has really controlled so many. Hundreds of thousands, millions of student athletes over the years, and now for student athletes to start being empowered to start have having opportunities for equity in this. And not this whole idea of student athletes making a windfall just for being a student athlete at a school but for having the opportunity to be able to start a business and earn compensation to receive education related benefits when they enter a school, to me, I think that this is the start of, or rather the continuation of what we've seen recently, in terms of player empowerment, and student athletes finally getting some acknowledgement of as they are literally the backbone of what has created this multibillion dollar college sports industry. I'm excited to see these changes continue to come forward. So we just want to say, Yeah, go ahead. Jay.

Jay: I just want to add one more: think about it, if they can get paid, maybe they'll stay in school a little bit longer.

Luke: Great point. Absolutely. Absolutely. And not only see now it's okay, so we were about to end it. But we're gonna keep going for a second because not only might they stay in school a little bit longer, but the academic education takes on a different meaning when student athletes have the ability to apply the learning in the classroom directly. So what they're dealing with on a daily basis. So what I tell student athletes when I'm talking to them to is think about what classes do you have offered in your college on digital storytelling on marketing on entrepreneurial finance on starting a business? Right? I mean, the list goes on and on. And if schools were smart about this, they would start taking across disciplines, the courses that could impact student athletes who are engaging in name, image and likeness, or who have the opportunities that they want to seek how they can earn compensation and say, Hey, here's a curriculum here are classes that you can take across these different areas that will help you.

And so to Jay's point, yes, that may help to help them may desire to stay in school longer, because they can continue to earn compensation and when they and they know that they're part of the 98% that aren't going to go on to professional sports. But now also I can take classes that I actually care about because I can apply the things I'm learning directly to what I'm doing. And when I think about social media marketing and influencing and all that kind of stuff. It has real world practical implications.

I did a podcast episode on the ethical imperative of educating our student athletes, you got me ready to jump up on this desk Jay, because this is what it's all about. And let's look at it from the perspective of what are we doing to prepare and equip our student athletes for success not just within their sport, but outside of their sport as well?

Jay: Well, and think about how good college sports will be when you have people who don't feel that they have to leave school after the first year to cash in on their talent. If they stay there three or four years, how good will that product be? How good will the pros be, when they've got all of that seasoning in there? How good will it be when they've come out with a degree when

they've taken as you said, all of these classes that mean something to them, economics, management, data analytics, and all the like. They've been able to foster relationships for three or four years in school, among their peers, with their professors. I mean the universities can become partners with them. They are now more invested in the system, and the system itself can become so much better. And I just, I just think we can't discount the benefits of having kids stay in school longer and reaping the benefits of their own talent. And, you know, in hard work.

Luke: Absolutely. Jay is now climbing off of his desk. We both have calmed down a little bit. But you as you can see, this is a topic we could talk about at length. And I know that Jay that will be getting together again and talking about this and other issues affecting college sports and the business side of sports.

So he's Jay Levine he leads the Antitrust Law Source antitrust podcast for Porter Wright. I'm Luke Fedlam, the host of the Protecting Your Possibilities podcast. And again, we just want to say thank you for tuning in and look forward to talking to you all again real soon.

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