What *NCAA v. Alston* Means for Professional Sports Leagues

Jodi S. Balsam*

The Supreme Court in *Alston* held that the National Collegiate Athletic Association (NCAA) and its member conferences violated the antitrust laws by collectively restricting, in the name of amateurism, the education-related benefits offered to college athletes.[1] While the Court accepted that NCAA amateurism serves consumers by offering a brand of athletic contests distinct from professional sports, it found the NCAA's fluctuating and incoherent definition of amateurism insufficient to justify the breadth of its student-athlete compensation rules.[2] As a result, student athletes will now have access to, for example, graduate or vocational school tuition, payments for academic tutoring, paid post-eligibility internships, and similar education-related benefits, as long as these benefits are not tantamount to a professional athlete's salary.[3]

Despite this defeat for the NCAA joint venture, the Court recognized the value of joint ventures generally, and clarified the framework for evaluating their competitive impact. Specifically referring to sports leagues, the unanimous *Alston* Court warned the lower courts against reflexively condemning joint venture arrangements that are necessary to create a product and advised deference to the business judgments of venture participants.[4] Mining that vein of thought, this essay identifies three significant take-aways for professional sports leagues from the *Alston* decision: (1) "quick look" review is generally not appropriate to summarily disapprove sports league coordinated conduct under the antitrust laws; (2) "rule of reason" antitrust analysis does not require sports leagues to structure their business in the "least restrictive" way; and (3) to the extent a professional sports league is more analogous to an individual college athletic conference, as opposed to the entire NCAA, member clubs may have more latitude to coordinate their conduct without violating the antitrust laws.

First, *Alston* elucidates that "quick look" antitrust review is available not just to condemn, but also to approve a challenged business practice.[5] As articulated in the 1999 *California Dental* decision, abbreviated or quick look review permits "an observer with even a rudimentary understanding of economics [to] conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[6] Accordingly, past decisions have invoked the quick look framework primarily to establish shortcuts to finding antitrust liability when conduct is obviously anticompetitive.[7]

Alston reorients the quick look inquiry around whether some restraints are "so obviously *incapable* of harming competition that they require little scrutiny," for example, if a joint venture commands too small a market share to affect prices.[8] This concept of presumptive *legality* for obviously *procompetitive* conduct was previously announced in the 2010 *American Needle* decision, which acknowledged that the special characteristics of professional sports joint ventures may justify many kinds of agreements among rivals.[9] *Alston* reiterates that "some degree of coordination between competitors within sports leagues can be procompetitive" and even necessary for "the very competitions that consumers value."[10] *Alston* then goes a step further to suggest that "even a sports league with market power" may be eligible for summary exoneration under the antitrust laws, especially as to restraints "necessary to produce a game."[11]

Further, *Alston*'s articulation of quick look review suggests it should rarely be used to condemn horizontal restraints where there exist "inherent limits on a court's ability to master an entire industry" and to comprehend "hard-to-see efficiencies attendant to complex business arrangements."[12] *Alston* would allow quick look condemnation only when the court has "considerable experience" with the restraint and would invalidate it "in all or almost all

instances."[13] This is a welcome message for professional sports leagues, long identified as a "leading example" of an industry in which "horizontal restraints on competition are essential if the product is to be available at all."[14] *Alston* thus confirms that sports leagues will rarely, if ever, face summary disapproval of their business practices, and at worst must defend non-game-related coordination under fuller "rule of reason" review.[15]

Second, *Alston* clarifies how rule of reason review should operate in practice, observing that the three-step burden-shifting framework is not "a rote checklist" and that the lodestar is undue harm to competition.[16] In other words, antitrust enforcement can tolerate some degree of harm to competition if justified by the benefits to consumer welfare. Significantly, in articulating the third step of the rule of reason, *Alston* categorically rejects that businesses must use the least restrictive means to achieve their legitimate business purposes.[17] Consistent with its focus throughout on "market realities," *Alston* warns that "courts should not second-guess degrees of reasonable necessity" lest they fall prey to skillful lawyering and undercut the very aims of the antitrust laws.[18] In the *Alston* Court's antitrust ledgers, permitting some marginally anticompetitive joint venture activity is less risky than "static judicial decrees in ever-evolving markets [that] may themselves facilitate collusion or frustrate entry and competition."[19]

While this more forgiving approach to the rule of reason could not save the NCAA in the *Alston* case, it offers better news to professional sports leagues. As an initial matter, the NCAA admittedly fixed wages for non-employee student-athletes in a labor market where it is a monopsonist.[20] Contrast U.S. professional team sports, where the athletes are typically unionized employees and their collectively bargained terms of employment escape antitrust scrutiny under the non-statutory labor exemption.[21]

But even when the labor exemption is not available, *Alston* allows antitrust defendants to justify labor side restraints "in light of their procompetitive benefits in the consumer market."[22] That is, the *Alston* Court extends the use of multisided market analysis, articulated in its 2018 *American Express* decision, to countenance restraints on the upstream or buyer's market when those restraints promote consumer welfare in the downstream or seller's market.[23] The NCAA failed this test in large part because it had abandoned its downstream arguments that its restrictions helped increase output in college sports and maintain a competitive balance among teams.[24] As to the NCAA's remaining downstream argument that amateurism feeds consumer demand, the *Alston* factual record confuted that notion and established that limiting payments to student athletes mainly served to "depress[] wages below competitive levels and restrict[] the quantity of student-athlete labor."[25]

The lesson for professional sports leagues is to identify and embed legitimate consumer welfare rationales at the outset of coordinating member club business practices.[26] With respect to restraints on labor or other inputs for the downstream product, sports leagues should generate data to establish that indirect effects in adjacent markets enhance efficiency and consumer demand for the product. When a buyer-side restraint is a meaningful component in growing, for example, fan interest, broadcast/advertising revenue, or other seller-side demand, multisided market analysis may be available to avoid antitrust liability.

Third, *Alston* differentiates between the NCAA and individual conferences (such as the SEC or Big Ten), suggesting that certain types of sports joint ventures have more latitude to coordinate their business practices. Specifically, the *Alston* Court affirmed that "individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still."[27] To the extent professional sports leagues are analogous to individual conferences, their members' collective action may better survive antitrust scrutiny. That analogy

could hold, especially since the NCAA more closely resembles a hypothetical consortium of major sports leagues, as opposed to a single league. The professional sports league equivalent to the NCAA conduct condemned in *Alston* would be if, hypothetically, the NFL, NBA, and NHL collectively set pay scales for all non-unionized league headquarters employees.[28] As in *Alston*, such coordination would run afoul of the antitrust laws. But each league may individually set headquarters compensation, just as each college conference may, according to *Alston*, impose whatever student-athlete compensation rules it chooses.[29]

Consider also that professional sports leagues differ organically from the NCAA as a joint venture, in that a pro league has the essential and undiluted purpose of providing entertainment in the form of athletic contests. Even if not entitled to "single entity" treatment under the antitrust laws, NFL member clubs, for example, have little meaningful existence or value unrelated to their membership in the league.[30] The ways in which the member clubs coordinate their business practices and operations are thus more likely to be deemed "necessary to produce a game."[31] By contrast, the NCAA's membership comprises institutions whose primary mission is providing post-secondary education, a sector in which they vigorously compete with each other to attract students, faculty, staff, grant money, and the like. Athletics is an extracurricular activity designed to enhance the academic experience, at least according to the NCAA's self-stated purpose for decades through the conclusion of the *Alston* litigation.[32] That posture made it difficult to justify, on efficiency grounds, wholesale coordination among the full NCAA membership to recruit and superintend one subset of students—college athletes.[33]

Finally, the import of *Alston* to professional sports leagues will also unfold outside the litigation sphere in the decision-making process of college athletes in the revenue sports—namely, football and basketball—as to if and when to transition to the pros. The availability of greater education-related benefits, such as graduate school and study abroad, coupled with the state-by-state legislative revolution empowering student-athletes to exploit their names, images, and likenesses, may well affect the pipeline of pro football and basketball draftees. Pipeline effects will likely intensify with the progress of legal challenges to the remaining apparatus of NCAA amateurism.[34] Justice Kavanaugh's concurrence in *Alston* clearly invites efforts to fully establish college-athlete market freedoms, which eventually would reverberate in the professional leagues.[35]

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* Jodi S. Balsam is Associate Professor of Clinical Law and Director of Externship Programs at Brooklyn Law School. She teaches the Sports Law course there and at NYU School of Law. Professor Balsam, who received her B.A. from Yale and J.D. from NYU, is a frequent commentator on sports law issues, particularly from the perspective of sports leagues, drawing on her dozen years serving as in-house counsel at the National Football League. She is a co-author of the leading law school casebook *Sports and the Law*.

[1] *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

[2] *See id.* at 2163.

[3] *See id.* at 2153. The tale doesn't end here, however, as student-athletes may soon have access to all forms of compensation, now the subject of further antitrust litigation. *See, e.g.*, Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-cv-5230, complaint filed, 2019 WL 5847321 (E.D. Pa. Nov. 6, 2019).

[4] *See Alston*, 141 S. Ct. at 2155, 2163.

[5] *See id.* at 2155.

[6] Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999).

[7] *See, e.g.*, *id.*; N. Tex. Specialty Physicians v. F.T.C., 528 F.3d 346, 362-63 (5th Cir. 2008); Polygram Holding, Inc. v. F.T.C., 416 F.3d 29, 37 (D.C. Cir. 2005).

[8] *Alston*, 141 S. Ct. at 2155-56 (emphasis added).

[9] *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010).

[10] *Alston*, 141 S. Ct. at 2156.

[11] *Id.* at 2156-57 (citing the number of players and time allotted for play as examples of necessary coordination) (citations omitted).

[12] *Id.* at 2156.

[13] *Id.* (internal citations and quotation marks omitted).

[14] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (rejecting rule of per se illegality as applied to sports leagues).

[15] The rule of reason entails a three-step burden-shifting framework under which "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Alston*, 141 S. Ct. at 2160 (internal quotation marks omitted) (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

[16] *See Alston*, 141 S. Ct. at 2160.

[17] *See id.*

[18] *Id.* at 2161 (internal citations and quotations omitted).

[19] *Id.*

[20] *See id.* at 2154 (defining monopsony as monopoly control in the buyer's market).

[21] *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (exempting from antitrust liability collective bargaining agreements, as well as joint action by employers that is ancillary to the collective bargaining relationship).

[22] *Alston*, 141 S. Ct. at 2152.

[23] *See id.* at 2160-61 (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

[24] *See Alston*, 141 S. Ct. at 2152.

[25] *Id.* at 2154.

[26] *See id.* at 2162.

[27] *Id.* at 2164.

[28] Major League Baseball is the one professional sports league that may take less solace from *Alston*, as the decision's language suggests that the Court is open to revisiting its "aberrational" antitrust exemption. *See id.* at 2159.

[29] *See id.* at 2165.

[30] *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010) ("NFL teams share an interest in making the entire league successful and profitable.").

[31] *Alston*, 141 S. Ct. at 2157.

[32] *See What is the NCAA?*, NCAA.COM, https://www.ncaa.org/sites/default/files/WhatIsNCAA.pdf [https://perma.cc/LS9R-6VHJ] (last visited July 15, 2021) (describing the NCAA's purpose as "prioritizing academics, well-being and fairness so college athletes can succeed on the field, in the classroom and for life"). By July 31, 2021, the NCAA had removed this statement from its website, and announced the creation of a Constitution Review Committee to "reimagine the NCAA system of governance." *Constitution Committee Charter*, NCAA.COM, https://www.ncaa.org/constitution-review-committee-charter [https://perma.cc/S8ZX-PU7G] (last visited Aug. 15, 2021); *see also Alston*, 141 S. Ct. at 2148 (observing that the NCAA came into existence primarily as a response to a national call for safety regulation).

[33] Question whether the antitrust laws would tolerate a national association of colleges dictating the terms on which computer science majors or university orchestra members could pursue educational benefits, or for that matter, pre-enrollment or off-campus earning opportunities. *Cf.* United States v. Brown Univ., 5 F.3d 658, 679 (3d Cir. 1993) (requiring full rule of reason analysis of multi-college coalition to set need-based financial aid to undergraduates).

[34] *See, e.g.*, Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-cv-5230, complaint filed, 2019 WL 5847321 (E.D. Pa. Nov. 6, 2019).

[35] *See Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) ("[T]here are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny.").