Understanding Johnson v. NCAA, the next case that could upend the college sports model

By Nicole Auerbach and Mik... Aug 12, 2022

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The business of college sports is changing faster than ever before — and often not by choice. Multiple cases snaking their way through the court system carry the potential to blow up the NCAA's fundamental business model, piling on after the Supreme Court challenged some of the NCAA's most antiquated ideas in a unanimous ruling against the organization in *Alston v. NCAA* last summer.

First among those being watched closely by conference commissioners and athletic directors? *Johnson v. NCAA*, a case that demands more external attention than it has received to date.

In Nov. 2019, former Villanova football player Ralph "Trey" Johnson sued the NCAA and nearly two dozen universities in United States Eastern District Court of Pennsylvania, claiming that college athletes should be recognized as employees of the schools they attend under the Fair Labor Standards Act, and that the NCAA is a joint employer alongside the school an athlete competes for. Since then, the case has been amended and grown to include other current or former college athletes, and with the plaintiffs now seeking to be certified as a class action.

The case is taking place while the entire collegiate athletic industrial complex finds itself in the crosshairs of Congress. Elected officials on both sides of the aisle have proposed legislation that would supersede NCAA rules in areas that range from athlete endorsements and other name, image and likeness (NIL) compensation to long-term medical care and potential revenue sharing. A flurry of varied state NIL laws pushed the NCAA last summer to suspend its amateurism rules that prohibited athletes from profiting off of their NIL.

And those are not the only external threats to the collegiate model.

National Labor Relations Board general counsel Jennifer Abruzzo wrote last fall in a memo that she believed college football players and certain other athletes in revenue sports at private universities are employees of their respective schools, which should give them the right to collectively bargain to improve their conditions of employment. Abruzzo also threatened to bring legal action against schools, conferences and the NCAA if they continue to refer to players as "student-athletes," stating that the term purposefully misclassifies

and obscures their employment status. In the ensuing months, two different athlete advocacy groups filed unfair labor practice charges against the NCAA.

"I view (*Johnson v. NCAA*) as just part of the continuing effort by some to professionalize college sports," said Matt Mitten, the executive director of the National Sports Law Institute at Marquette University.

Those who work around college sports often wonder where the next major domino to fall may come from. Here is one distinct possibility.

The case

District court judge John Padova has refused to throw out the case against the NCAA and the schools, despite their attempts to have it dismissed. The case currently sits in the Third Circuit Court of Appeals after Padova certified for appeal the question of whether college athletes *can* be considered employees before the district court rules on whether they *are* employees.

A ruling in favor of the athletes would put the Third Circuit at odds with the Seventh and Ninth Circuits' rulings in the opposite direction (in *Berger v. NCAA* and *Dawson v. NCAA*, respectively). The so-called "circuit split" would increase the likelihood that the Supreme Court steps in to settle the matter before Johnson is decided, to avoid a scenario in which different regions of the country abide by different laws about whether or not college athletes can be considered employees.

Deciding not to dismiss the case was "legally significant," according to trial attorney Nicholas Secco.

"There is a history of precedent, which establishes or appears to establish on its face that student-athletes do not qualify as FLSA employees," Secco said. "However, if you read those decisions, they are predicated in part upon the long-standing recognition of amateurism as the heart of college athletics. In the wake of the Kavanaugh concurrence, the courts are demonstrating a lot less deference towards that notion of amateurism.

"(In Johnson), the court has not determined whether or not the allegations are true. But it has determined that as a matter of law, if they are true, then the students have a colorable claim that they are employees, and Johnson is really the first court (post-Alston) to explore that."

Typically, in order to appeal a federal decision in the trial courts, you have to wait until a final judgment is delivered. But in rare circumstances, you can obtain an interlocutory appeal, which is an appeal in the middle of the trial process concerning a key legal question.

The crux of this appeal: whether Division I student-athletes can be employees of the universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics.

"If the Third Circuit approves of the trial court decision and holds that the students do have a legally viable claim, that will put the Third Circuit in conflict with the other circuits," Secco said. "When you have those sorts of circuit conflicts or inconsistent decisions on a very important question of law, they are often resolved and reconciled by the Supreme Court.

"That would put increased pressure on the NCAA to find another resolution to this problem before an issue like this can go before a Supreme Court that is apparently hostile to their position."

The argument

This case challenges us to consider a student-athlete playing on the field and a student working the concession stands in the stadium concourse. Is there a difference between the two?

"One of the things they used to always tell us was this idea that you can't be both a student and an employee," Paul McDonald, lead attorney for the plaintiffs, told *The Athletic*. "The problem is, there have always been students on campus who are also employees of the

college. … It's a matter of recognizing that the basic lie that has been told by the NCAA and school is that — a lie.

"You have kids working at the games. You have kids working in the library. You have kids working in the dining hall. What makes those kids employees under federal law? Do student-athletes meet the same criteria?"

Some of those college student employees are on academic scholarships or work study — an easy parallel to players with athletic scholarships. To McDonald, the case is rather straightforward, and an outcome that reclassifies college athletes as employees would benefit both male and female athletes, avoiding Title IX implications because the wage requirements wouldn't just apply to athletes in revenue-producing sports.

This case would not automatically allow athletes to unionize. It also would not mean athletes are paid what the market says they are worth; this case concerns hourly wages at or around the minimum wage, like other student jobs on campus — even if McDonald personally believes that athletes should be paid at the top of that hourly wage scale (say, $25 per hour) because they contribute more to the university than students working other campus jobs. In McDonald's view, the money needed to pay athletes hourly wages pales in comparison to the extravagance in coaching and athletic director salaries.

"Our case would not, in any form or fashion, bankrupt them," McDonald said. "Even if there were an argument about, 'Oh, it'd be difficult for us to afford this,' that's not an excuse to not obey the law."

The NCAA's defense

The NCAA leans heavily on precedents in case law, across the circuit courts and the Supreme Court, as amber that encases amateurism as a legally justifiable model. While it may feel as if amateurism's hold on college sports is slowly eroding in the wake of recent court decisions, the NCAA does have decades of other cases in its favor to point to as justification for its current position.

"Over 60 years of unbroken state and federal precedents hold that college student athletes are not employees of their schools simply because they play sport," lawyers for the NCAA write in their brief to the Third Circuit, "culminating in the Seventh Circuit's ruling in *Berger v. National Collegiate Athletic Ass'n,*, that 'student-athletes are not employees' of the schools they attend 'and are not covered by the FLSA' as a matter of law." The Berger decision plays heavily into the NCAA argument. In that case, the Seventh Circuit ruled in 2016 that former University of Pennsylvania athletes could not be considered employees of the school.

With those cases as the backbone of its argument, the NCAA says that amateurism is still at the heart of college sports and that courts have not only maintained their right to keep it that way but also created a legal infrastructure that protects it.

The NCAA also relies on the Department of Labor, which it argues has long said that college athletes are not employees, as evidenced by the DOL's field operations handbook plus decades of silence on the NCAA and its traditional relationship with college athletes.

More surprising, however, is that the NCAA attempts to redirect the Alston ruling in its favor. That 2021 decision — a 9-0 ruling in a polarized Supreme Court — limited the NCAA's ability to curb "education-related compensation" for athletes.

The NCAA claims the Alston ruling was actually, in the big picture, a vote of support for its system. The association argues that the district court was instead "looking to Justice Kavanaugh's solo concurrence in Alston as an indication that a (silent) majority of the Supreme Court intended to undermine Berger. They did not. The Alston majority praised the Ninth Circuit for respecting the same line drawn by the Seventh in Berger — and by state courts for more than half a century."

Later, the NCAA's brief argues that Alston continued the Supreme Court's deference to its amateurism model.

"Alston actually praised the lower courts' care in crafting a remedy that 'would not blur the distinction between college and professional sports,'" the NCAA writes. "The Supreme Court has not backed away from its longstanding view that the NCAA plays a 'critical role in ensuring that professional athletes do not play college sport,' and courts 'should take care when assessing the NCAA's restraints on student-athlete compensation.'"

Kavanaugh's concurring opinion in focus

The Alston ruling was almost universally interpreted as a win for athletes and those who have fought on their behalf, but it did not delve into issues related to athletes' employment status or compensation for playing sports.

Justice Brett Kavanaugh did, though. In a fiery concurring opinion, in which he argued that "the NCAA's business model would be flatly illegal in almost any other industry in America," Kavanaugh wrote that the NCAA's remaining rules restricting athlete compensation deserve further antitrust scrutiny, essentially welcoming future lawsuits against the NCAA.

"The concurrence, while it is very intuitive and quotable, is not controlling law," Secco said.

But it did serve as an effective threat. The NCAA threw up its hands and put out a bare-bones interim NIL policy in 2021 that deferred the national organization's power to states with NIL legislation and individual schools, which would then craft their own policies. It took more than 10 months for the NCAA to take note of booster-backed NIL collectives and state its intention to investigate recruiting inducements and other potential rule violations. Administrators have been largely hesitant to add restrictions regarding anything related to athlete compensation, benefits or rights.

"It is obviously meant to telegraph to the NCAA that the NCAA will have extraordinary difficulty in future litigation justifying constraints on student compensation based exclusively on this quote-unquote tradition of revered amateurism which Kavanaugh seems to reject," Secco said. "I think it was intended as a signal to the NCAA that they would be much better served reaching a collective bargaining agreement with the students or seeking a legislative solution than continuing to litigate."

But based on the NCAA's efforts in this case so far, it's clear that the organization still believes that amateurism is a viable model for college sports.

The NCAA doesn't just reiterate that through its legal filings, it goes out of its way to highlight that Kavanaugh's opinion is not binding and only reflects his own beliefs. Take Footnote 10 of its Third Circuit brief: "Only Justice Kavanaugh, in a concurrence that no other justice joined, questioned the 'ample latitude' or 'care' accorded to the NCAA in *NCAA v. Board of Regents*, another landmark Supreme Court case involving the association."

"My dad was part of the first integrated class at the University of Texas, and he graduated in '64," McDonald said. "One thing he talks about is how, back when people were talking about integrating higher education, there were some states that, you know, went to the mat trying to fight against integration and other institutions that kind of accepted that. Like, 'OK, things are changing, we're going to try to manage that change,' as opposed to fighting until the last dog dies.

"That's one of the things that interests me about the NCAA. You have to understand, you'd think, especially if you've read Justice Kavanaugh's concurrence. You know where this is going. I don't think anyone really thinks, a decade from now, that student-athletes are not going to be paid. This is going to end where everyone thinks it is going to end. … But they're not saying, 'OK, this is going to happen. Let's get ahead of it, and let's try to manage it in a way where the disruption is minimized.'"

Implications of a decision in *Johnson v. NCAA*

The winds of change are shifting against the NCAA, but there has been no singular event that could precipitate the end of amateurism. The legalization of NIL has allowed athletes to make money while they are in college, but the core tenets of amateurism are still in place. For now.

It is clear that the NCAA believes that a loss in Johnson v. NCAA would be the end of the status quo. If college athletes are allowed to be considered employees, it could lead not only to them being paid directly by their schools but also to workplace protections and bargaining rights that could reorient how college labor operates.

Mitten, the Marquette law professor who is also a member of the NCAA's first Board of Directors of the Forum for the Scholarly Study of Intercollegiate Athletics, believes that if the court finds in the athletes' favor, it could have significant downstream effects. One important decision would be whether the NCAA is a joint employer of the athletes; because the NCAA is a private organization, that determination could allow college athletes to unionize as employees and collectively bargain for their rights.

"That's got very broad implications," Mitten said. "Yeah. Very broad implications. At this point, no federal appellate court has agreed with that position."

Mitten believes that the Third Circuit will follow precedents from the other appeals courts, but the players may have some hope yet. Although most of the attention in this case has been on the concurring opinion in Alston authored by Justice Kavanaugh, there is another concurrence that might play a role. It was written by a judge on the Seventh Circuit in *Berger v. NCAA*, a case the NCAA cites often and relies on heavily in its argument against Johnson.

While the appeals court ruled in favor of the NCAA in Berger, agreeing that college athletes are not employees, Judge David F. Hamilton saw room for distinction. The athletes in Berger, he wrote, were track athletes at Penn, a school with no athletic scholarships and a sport without revenue. "In this case, therefore, the economic reality and the sometimes frayed tradition of amateurism both point toward dismissal of these plaintiffs' claims," he wrote.

That made it just theory for those athletes, he added. But, Hamilton cautioned, there are different conditions in other cases.

"I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football," he wrote. "In those sports, economic reality and the tradition of amateurism may not point in the same direction."

That case was decided in 2016, five years before the Alston ruling would fundamentally alter the legal environment. Now it's top of mind for judges at all levels from coast to coast.

For now, it is up to the Third Circuit court of appeals to decide whether college athletes can be employees.

"The only issue that's being decided right now by the Third Circuit is whether the NCAA and the other defendants can prevail on their motion to dismiss," said Mit Winter, an attorney for Kennyhertz Perry and a former Division I college basketball player. "Assuming that the plaintiffs are successful at the Third Circuit on this issue, it could then be appealed to the Supreme Court. Or, if it's not, the case just goes back to the district court level to make a final decision on whether college athletes are employees under the FLSA."

Then a more traditional appeal process could take place, which could still eventually result in the case reaching the high court. If a case such as Johnson were to work its way up to the Supreme Court, it would be heard by a bench that appears rather hostile toward the NCAA's position.

"Then the Supreme Court decides the issue," Winter said. "And that becomes law for the entire country."

It may take a while for that to happen, but it is clear that amateurism is already on trial for the NCAA. The repercussions, if college athletes were to prevail here, would shake the entire foundation.

(Photo: Scott Taetsch / Getty Images)

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