THE STATE OF PAY-FOR-PLAY

College Athletes as Employees and the Implications for Workers' Compensation

BY ANTHONY NATALE, III

The National Collegiate Athletic Association (NCAA) was recently found to be in violation of antitrust laws regarding "benefits" to student-athletes. That statement is so powerful, slightly reminiscent of professional sports, yet, at the same time, enigmatic to those who have not dissected the Supreme Court's unanimous ruling underscored in *NCAA v. Alston, et. al.*

This is not the first time (and surely not the last) that federal antitrust laws work to ensnare athletic associations. In 1982, the National Football League was held to have violated federal antitrust laws by refusing to allow the Oakland Raiders to move to Los Angeles—a ruling that remained contentious until the parties were able to settle their differences in 1989. Even so, the endless hours of study of President Theodore Roosevelt's "trust-busting" years in junior high could not have prepared us for the use of antitrust legislation in athletics—not to mention the monumental grasp it now has in the setting of collegiate sports.

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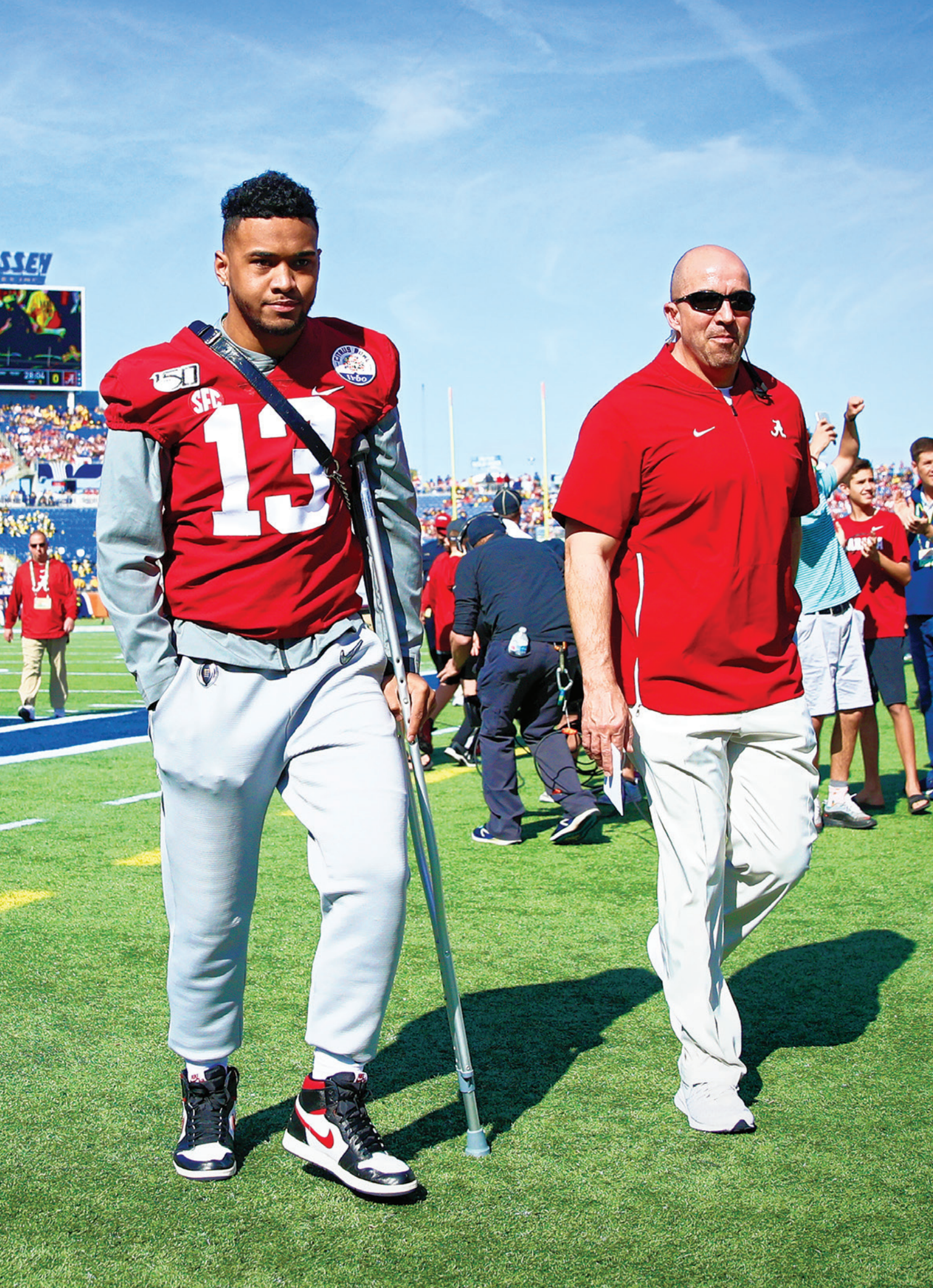
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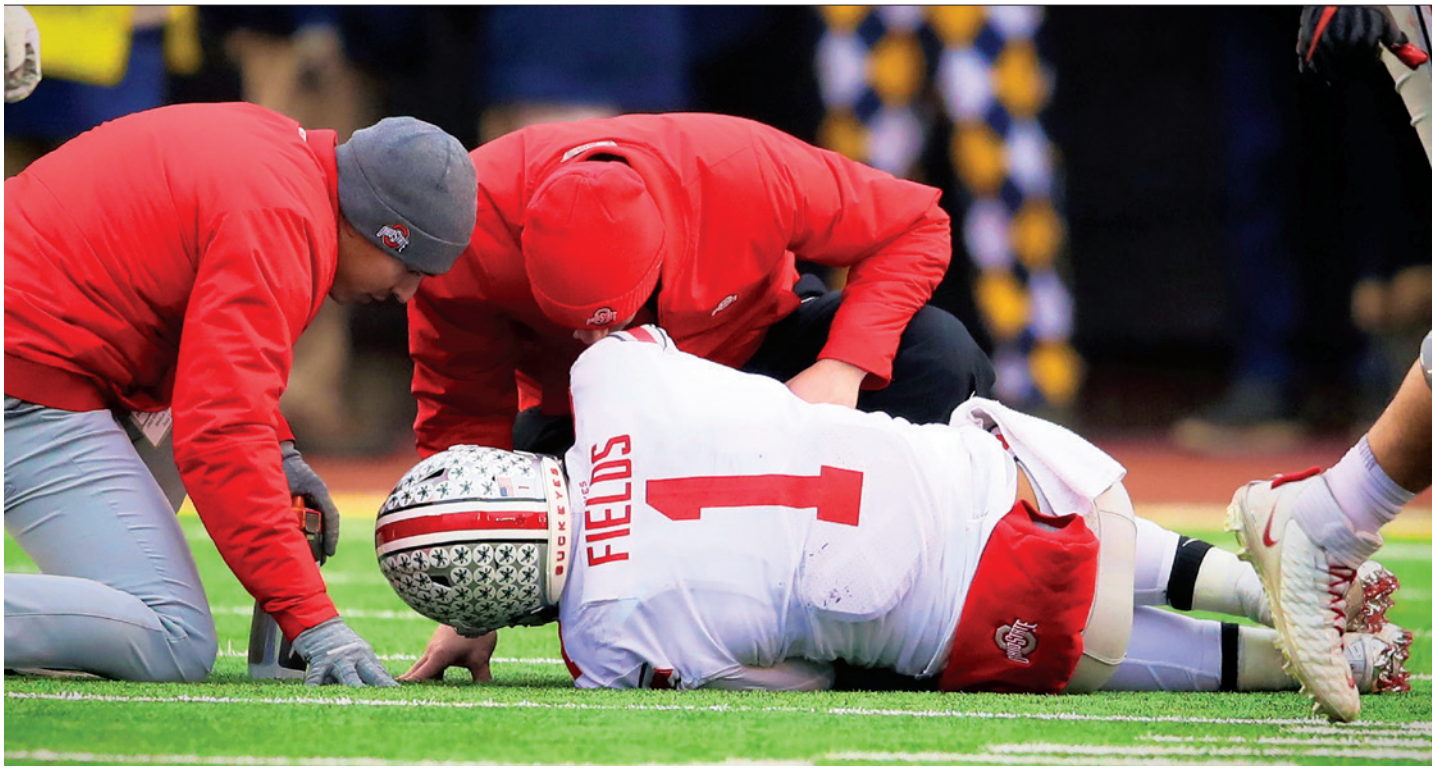

PAVING THE WAY FOR COMP

On its face, the decision in *Alston* answers the simple question of whether the NCAA and its members violated antitrust laws by creating rules that limited "education-related benefits" to student-athletes. Not surprisingly, this decision came on the heels of the NCAA announcing that it would allow student-athletes to sign endorsement deals to cash in on their names, images, and likenesses.

As attorneys and claims professionals, we don't view this trend in a vacuum. Every new move is but another step leading to the three words that student-athletes have been taught to accept as a swan song: pay-for-play. Although this slogan was not the hot topic of oral argument to the Supreme Court and did not form the rationale for the decision in *Alston*, it is clear *Alston* may be the springboard to pay-for-play. No one can tell if pay-for-play is a good thing or a bad thing, but we do know that if student-athletes command "salaries" for "labor," then we necessarily implicate the relevant workers' compensation statutes where the NCAA member schools reside.

Harkening back to the grand bargain, a question arises as to whether student-athletes are indeed ready for the rigors of workers' compensation benefits and the litigation it encompasses.

To the non-lawyer, the *Alston* decision stands for the proposition that NCAA rules limiting education-related benefits available to student-athletes is an unreasonable restraint on trade or commerce. The Supreme Court noted that these rules limit

the effect of interstate commerce, since decreasing education-related "compensation" likewise decreases participation by student-athletes in the relevant labor market. In other words, a competitive market would yield something greater than what the student-athlete currently collects.

The oral argument and most of the decision, however, are framed in an analysis as to what "rule of scrutiny" the Supreme Court should use to analyze antitrust laws as they relate to *any and all* of the collegiate compensation rules for student-athletes. The Supreme Court will use the "rule-of-reason" scrutiny standard in applying antitrust laws to the student-athlete compensation dilemma—hence the true significance of this decision. The practical effect of this standard was summarized prophetically by Justice Kavanaugh: "There are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule-of-reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such justification."

It is clear the landscape of education-related and non-education-related "compensation" for the student-athlete "labor market" is moving in the direction of pay-for-play. The result of this decision is not just a slippery slope; it is a veritable primrose path to changing compensation rules in college sports forever. Against this backdrop, looming silently and unforeseen, is the specter of workers' compensation.

Any attorney or claims professional handling workers' compensation litigation understands the grand bargain. The statute (for the most part) eliminates an injured employee's right to sue the employer in any other forum except for workers' compensation. This, in turn, limits monetary and medical damages. One need not pontificate long on the savings that employers receive from this system: no large jury verdicts, no monetary benefits for pain and suffering, and limits on the calculation of weekly benefits. In exchange, employees enjoy what is tantamount to a no-fault system where negligence cannot be used against them. When we analyze pay-for-play, it is almost a foregone conclusion that the student-athlete would be considered an employee of their member school under workers' compensation laws. The metamorphosis from student-athlete to employee, while a long-held muse among advocates of college sports, may carry an unexpected and unwanted burden not previously contemplated by the student-athlete population.

Most workers' compensation statutes are built around common law of master and servant—that is, any natural person who enters a relationship

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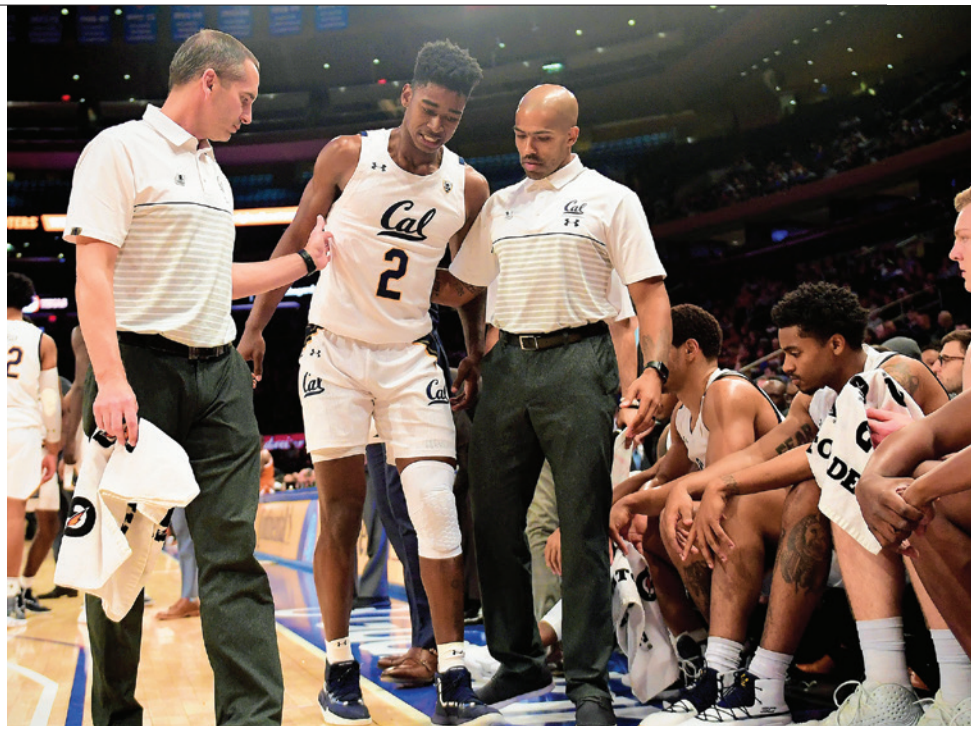

involving the performance of services for another for valuable consideration may be considered generally to be in an employment relationship. Clearly, if pay-for-play becomes reality, a very good argument can be made for such an employment relationship existing among student-athletes. But let's look at the student-athlete as an employee from a different perspective: How it affects the students themselves.

Justice Kavanaugh raises questions in his concurring opinion as to how to implement a fair system in which student-athletes are remunerated. How would paying greater compensation to student-athletes in one sport affect athletes who work just as hard in non-revenue raising sports? Do those athletes who are not paid for services or do not receive scholarships on the basis their talents, or involve a sport that is not revenue-producing, fail the employment relationship test? If so, how does Title IX come into play in this scenario? Even more compelling—but not addressed by the Supreme Court—is how at-will employment would affect the educational and athletic careers of student-athlete employees. Many student-athletes are not prepared for these issues, which are inextricably linked to pay-for-play scenarios.

A GRAND COMPROMISE?

Harkening back to the grand bargain, a question arises as to whether student-athletes are indeed ready for the rigors of workers' compensation benefits and the litigation it encompasses. To be entitled to benefits, an employee must be engaged in the course and scope of employment at the time of injury. Whether an employee is in the course and scope can be the subject of time-consuming litigation. While on the field in practice or a game, this is a no-brainer. But consider off-the-field injuries that may fall outside the course and scope, even if common to athletics. If you are unable to "work" due to an injury or condition that did not arise in the course and scope or is not related to work duties, no benefits are due. In a sense, the student-athlete is no longer an athlete and is now just a student—maybe. Any pay-for-play "salary" is eliminated, and without financial assistance, so is the student's college career.

If an athlete is injured during the course and scope of employment, benefits are limited on both the indemnity and medical fronts. By way of indemnity, most workers' compensation statutes pay much less than the determined pre-injury average weekly wage. More importantly, insurance companies do not simply pay benefits indefinitely. Challenges will be made to disability status as a claimant is receiving benefits. This could involve students being forced to work modified duty jobs to offset workers' compensation exposure. As an employee, the injured student-athlete could find themselves on laundry patrol washing and folding towels in the locker

room as part of a light-duty job under the same employment rules as any other university employee.

Another avenue of concern in the employment context is discharge for cause. If a student-athlete "employee" violates company policy—i.e., attendance at practice, violation of alcohol consumption agreements, violation of team rules and curfews—the result may be discharge from employment. As an employee, labor laws and rules apply, human resources personnel are involved, and even minor infractions of team or school policy could now translate into dischargeable offenses in violation of company rules. That could mean no more payments, no scholarship, no education-related benefits, and likely no college degree in the end. Most student-athletes are ill-prepared for these rules of engagement.

The law surrounding medical treatment in workers' compensation matters does not favor the injured employee, as most contain provisions that allow the employer to control medical benefits. Some states cut medical benefits when an injured employee reaches maximum medical improvement. Others control the medical doctors with whom an injured employee can treat in the crucial first few months after an injury or even throughout the entire claims process. Many states allow employers to challenge the reasonableness or necessity of medical treatment, including surgery, and force employees to be responsible for such treatment if they are successful. Even if an employee can overturn such a challenge to a ruling on reasonableness and necessity, so much time has passed during the litigation that the treatment at issue may no longer be available or warranted. This is a far cry from what most student-athletes are taught about ramifications of pay-for-play.

We are at the beginning of this journey; not the end, so these issues are but one possible future in the world of differing outcomes. Claims professionals and their defense counsel would be wise to monitor upcoming developments that could create a paradigm shift in this sector of workers' compensation. Student-athletes need to understand the full, dynamic consequences of pay-for-play before jumping on board. Our Supreme Court foresees the inevitable result of the current trend in student-athlete benefits. The not-so-veiled advice given in *Alston* is to iron out differences without litigation, if possible. Perhaps changes in legislation, revenue distribution, or even ideal changes among both sides could be an effective tool for change. ■

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