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Ninth Circuit Issues Stay in O'Bannon Antitrust Lawsuit

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Recently, the U.S. Court of Appeals for the Ninth Circuit (the "Ninth Circuit") granted the National Collegiate Athletic Association's (the "NCAA") request for a stay of a federal judge's ruling that makes it illegal for the NCAA to prohibit colleges from compensating athletes for the commercial use of their names, images, and likenesses. The stay permits higher education institutions to hold back payments to football and basketball players, which were expected to commence on August 1, 2015, pursuant to a ruling issued by U.S. District Judge Claudia Wilken last summer.

By way of brief background, Ed O'Bannon, a former UCLA basketball player and the named plaintiff in the class action, initially filed suit on behalf of Division I men's football and basketball players in July of 2009, after discovering a video game had used his likeness without his permission. After a five-year battle, District Judge Wilken ruled that the NCAA regulations prohibiting athletes from profiting from college sports broadcasts and videogames "unreasonably restrained trade" in violation of antitrust laws. In other words, Judge Wilken held that the NCAA violated anti-trust laws by preventing universities from sharing revenue with football and men's basketball players. As a result, football players at large schools and Division I men's basketball players are now permitted to receive up to $5,000 per year in trust funds for the use of their publicity rights (names, images, and likeness).

"We are pleased that the 9th Circuit today granted the NCAA's motion for a stay," NCAA chief legal counsel Donald Remy said in a statement. "As a result, the NCAA will not be implementing any changes to its rules in response to the district court's injunction at this time. We continue to await the 9th Circuit's final ruling."

But even prior to the Ninth Circuit's stay, it was clear that college administrators would be forced to navigate the many issues left unaddressed by the District Court's ruling. Most obviously, the narrow ruling, which benefited only male athletes, could potentially expose participating institutions to Title IX federal gender equality lawsuits.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. gives women athletes the right to equal opportunity in sports in educational institutions that receive federal funds. The *O'Bannon* ruling is particularly problematic for Title IX compliance because college women's sports undoubtedly do not receive the same publicity as men's college sports, especially as compared to football. Thus, even if colleges implemented a similar pay-out structure for use of a female athlete's name, image, or likeness, the same rule would not result in the same opportunity for compensation; college women's sports are simply less-watched and their athletes' publicity rights less-utilized. Pending the *O'Bannon* appellate court's final ruling, institutions may be forced to reconcile

the impossible: equal opportunity for athletes to profit from publicity rights in a nation where men's college sports generate hundreds of millions in revenue more than women's every year.

The Ninth Circuit heard oral arguments on the NCAA's appeal in March, and the final ruling on the case is still pending. Attorneys from both sides of the case have stated they are prepared to appeal to the U.S. Supreme Court, if necessary, and with the potential emergence of an unregulated free market for college athletes on the horizon, many commentators predict that the issue is ripe for review.

If you or your institution has any questions or concerns regarding employment related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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