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With the Ninth Circuit's O'Bannon Decision, The NCAA Must Comply With Antitrust Laws

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Last year, in *O'Bannon v. National Collegiate Athletic Association, et al.*, Ed O'Bannon, a former All-American UCLA basketball player, along with nineteen others, filed an antitrust class action suit against the National Collegiate Athletic Association ("NCAA") for its failure to compensate collegiate-athletes for its use of their names, images, and likenesses ("NILs"). Suit was initiated after the former collegiate-athletes discovered that their NILs were being used in NCAA-licensed videogames. Plaintiffs argued that the use represented an unlawful trade restriction in direct violation of the Sherman Act. The NCAA countered that its compensation restriction was, and continues to be, necessary to promote a procompetitive amateur league.

In a landmark decision, Judge Claudia Wilken of the United States District Court for the Northern District of California held that the NCAA was subject to antitrust laws. This was the first time, since its creation, that the NCAA was found subject to the Sherman Act. Specifically, Judge Wilken found that by failing to apply the least restrictive compensation caps, the NCAA violated antitrust laws. First, Judge Wilken mandated that the NCAA allow its member schools to provide "full cost of attendance" scholarships to collegiate-athletes. Previously, member schools were only permitted to provide collegiate-athletes with grants-in-aid scholarships, which covered only payments for classes, necessary books, and room/board. "Full cost of attendance" scholarships include the former, as well as supplies, transportation, non-school provided meals, etc. Judge Wilken also mandated that the NCAA permit member schools to hold a portion of their licensing revenues, up to $5,000 per year, in trust to be paid to the collegiate-athlete as deferred compensation once the athlete's NCAA eligibility expired. The NCAA appealed to the Ninth Circuit Court of Appeals.

On September 30, 2015, the Ninth Circuit affirmed the district court's finding that the NCAA was subject to antitrust laws, but reversed Judge Wilken's holding that college athletes were entitled to deferred compensation. First, the court rejected the NCAA's argument that the Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma* made the NCAA's amateur rules exempt from antitrust laws. In that opinion, the Supreme Court stated that "in order to preserve the character and quality of the [NCAA's] 'product,' athletes must not be paid, must be required to attend class and the like." For decades, the NCAA has used this to assert antitrust immunity to its amateurism rules. However, the Ninth Circuit dismissed the argument, asserting that the language represented mere dicta, commentary that was nothing more than persuasive on the issue.

Once subjected to antitrust laws, the NCAA's amateur rules had to be examined under the Rule of Reason to determine their legality. The Rule of Reason consists of a three-part test. First, the athletes had to show that the

compensation restrictions produced significant anticompetitive effects in the relevant market. The Ninth Circuit found that because colleges compete for the services of NCAA athletes by offering scholarships and other amenities, like stadiums and weight rooms, there is a "college education market." Furthermore, the NCAA bylaws have limited athlete compensation within the market, significantly limiting competition by fixing the price of an athlete's attendance at NCAA member schools. Thus, the athletes met their burden and the burden of proof shifted to the NCAA to show evidence that the restrictions produce a procompetitive effect. The NCAA met this burden by justifying their amateur rules based on (a) the integration of education and athletics and (b) the preservation of the popularity of collegiate sports through the promotion of amateurism. The burden then shifted back to the athletes to show that the NCAA's objectives could be achieved through substantially less restrictive means.

Looking first to grant-in-aid scholarships, the Ninth Circuit agreed with the district court that permitting institutions to set the cap at collegiate-athletes' "full cost of attendance" was a less restrictive alternative to the NCAA's current restriction to grant-in-aid scholarships. In the words of the court, the NCAA's grant-in-aid restriction had "no relation whatsoever to the procompetitive purpose of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses." Thus, the Ninth Circuit upheld the district court's decision.

Looking to the issue of deferred compensation, the Ninth Circuit reversed the district court, holding compensation should be limited education-related expenses. According to the court, the "difference between offering athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor," it is a "quantum leap … Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point." In other words, the NCAA's "product" is different than minor league sports. It relies, in large part, on a market perspective of amateurism, which can only be maintained by solely compensating collegiate-athletes for education-related expenses. As such, striking down amateurism would fundamentally alter the product of collegiate sports as collegiate-athletes would continue to push the compensation amount beyond the arbitrary $5,000 mark until a true market value was realized.

It is clear that the Ninth Circuit's decision in *O'Bannon* was neither a victory nor a loss for either side. For collegiate-athletes, the Ninth Circuit's decision to hold the NCAA subject to antitrust scrutiny provides more traction for future cases challenging collegiate-athlete compensation. Moreover, even though the decision states that cash payments to collegiate-athletes for their NILs will not be a viable alternative, the Ninth Circuit has opened the door for NCAA member schools to provide increased economic benefits to collegiate-athletes. At a minimum, the "full cost of attendance" will likely include housing, books, and meals. However, the possibilities of what can arguably be included are almost limitless. For the NCAA, the Ninth Circuit's acceptance of the NCAA's definition of "amateurism" (that collegiate-athletes are amateurs because they do not receive compensation), and its acceptance of "amateurism" as a procompetitive goal in the college education market, makes it very difficult for college athletes filing future lawsuits in the Ninth Circuit to argue that they deserve compensation beyond the cost of an education. While this fight is far from over, it looks like headway was made on both sides.

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

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