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TOPIC:

O'BANNON V. NCAA: THE DISTRICT COURT DECISION

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INTRODUCTION:

On August 8, 2014, Judge Claudia Wilken of the United States District Court for the Northern District of California (the "Court") issued a decision in the case of *O'Bannon v. NCAA*.[1] In short, the Court ruled that the National Collegiate Athletic Association's ("NCAA") rules prohibiting payment of compensation to student-athletes violate federal antitrust law as an unreasonable restraint on competition in the college education market. As such, the Court permanently enjoined the NCAA from enforcing certain of its rules as applied to Football Bowl Subdivision ("FBS") football and Division I men's basketball student-athletes, thus allowing institutions to begin compensating these student-athletes within the parameters established by the Court.

DISCUSSION:

1. Background

Ed O'Bannon, a former men's basketball student-athlete at UCLA who contributed to the school's NCAA Division I men's basketball National Championship in the 1994-95 season, filed this class action suit on July 21, 2009 against the NCAA and the Collegiate Licensing Company as the leader in the collegiate licensing market. Video game developer Electronic Arts ("EA") was also alleged to have conspired with the NCAA based on license agreements between the NCAA and EA relating to the use of student-athlete likenesses.[2] The class consisted of former FBS football and Division I men's basketball student-athletes whose images were either sold or licensed. For purposes of the request for injunctive relief, the class also included current student-athletes based on their future rights to compensation.

Plaintiffs alleged violations of federal antitrust law, claiming that the NCAA's rules prohibiting student-athletes from receiving compensation for the use of their names, images, or likenesses were an unlawful restraint on trade. Specifically, O'Bannon claimed that he was unfairly deprived of compensation for the use of his image and likeness by the NCAA and its partners, which he alleged included: the sale of individual game videos and videos commemorating UCLA's National Championship; photographs and stock footage; the rebroadcast of games on the ESPN Classic network; and the use of his likeness by EA in a popular video game.

2. The Court's Decision

a. The Relevant Markets

The Court analyzed Plaintiffs' allegation that NCAA rules that restrict payment of compensation to student-athletes restrain trade in the college education and group licensing markets.

The Court observed that FBS football and Division I basketball schools compete to sell elite recruits unique bundles of goods and services which include, among other things, scholarships covering the costs of tuition and fees, room and board, academic support, high-quality coaching, medical treatment, and opportunities to compete against the best competition in front of nationwide audiences. In exchange for this bundle, the student-athletes provide "their athletic services and acquiesce in the use of their names, images, and likenesses for commercial and promotional purposes."[3] The Court considered the differences between the opportunities offered by FBS football and Division I basketball schools and those offered by other schools and professional sports leagues, and held that FBS football and Division I basketball schools comprised a distinct "college education market" because the unique bundle of goods and services they offered was not available elsewhere.

Plaintiffs also claimed they would be able to sell group licenses for the use of their names, images, and likenesses in the absence of the NCAA's challenged rules and identified three submarkets: (1) live football and basketball game telecasts; (2) video games; and (3) re-broadcasts, advertisements, and other archival footage. The Court found Plaintiffs' evidence of the existence of such submarkets convincing, highlighting the NCAA's own licensing arrangements with television networks, video game developers, and advertisers. However, the Court ultimately ruled that Plaintiffs failed to prove that the NCAA's rules suppressed competition, finding that teams of student-athletes were unlikely to compete against one another to license the rights to their names, images and likenesses in these submarkets.

b. The NCAA Rules Found to Restrain Trade

NCAA rules prohibit student-athletes from receiving "financial aid based on athletics ability" in excess of the value of a full "grant-in-aid."[4] A full "grant-in-aid" means "financial aid that consists of tuition and fees, room and board, and required course-related books."[5] NCAA rules also cap the amount of total financial aid that a student-athlete may receive to the "cost of attendance." The cost of attendance includes not only tuition and fees, room and board, and books, but also supplies, transportation, and attendance-related expenses.[6]

The Court found that these rules represent unreasonable restraints on trade in the relevant markets. In particular, the Court concluded that the current limits on grants-in-aid and costs of attendance constitute price-fixing and that without these limits, institutions would compete for the top recruits by offering compensation in excess of these limits. In this way, the Court determined that the NCAA's rules have an anticompetitive effect.

c. The NCAA's Procompetitive Justifications

The NCAA defended its rules as reasonable based on its assertions that they are necessary to preserve its tradition of amateurism, maintain competitive balance, promote the integration of academics and athletics, and increase total output for its product (measured in terms of increased numbers of FBS football and Division I schools, student-athletes, and games). The Court, while recognizing that certain limited restrictions might be appropriate and would justify the restraint, largely dismissed each of these proffered justifications. To summarize, the Court found, among other things, that:

(i) despite the NCAA's representations relating to its commitment to amateurism, its rules have changed many times over the years and even today are not consistent in that they do not provide a uniform definition of amateurism (based on, among other things, existing exceptions to its rules which permit student-athletes to receive compensation in certain circumstances);

(ii) the NCAA's rules are not the driving force behind consumer interest and demand for FBS football and Division I basketball, as interest and demand stem from other factors, including school loyalty and geography;

(iii) the NCAA's rules are not needed to achieve, and do not promote, competitive balance, according to academic studies, statements made by the NCAA, and numerous other NCAA rules demonstrating that the NCAA is generally unconcerned with achieving competitive balance;

(iv) certain limited restrictions on student-athlete compensation may help to integrate student-athletes into the academic community at their schools and may, in turn, improve their performance and the quality of educational services provided to student-athletes, but the rules that prohibit compensation for the use of student-athletes' names, images, and likenesses do not generally lead to enhanced academic outcomes; and

(v) because the ability to compensate student-athletes for a limited amount beyond current limits would not lead institutions to exit FBS football or Division I basketball, the NCAA's rules do not increase the number of opportunities for student-athletes to participate in these sports and, as such, do not increase the number of games played.

d. Plaintiffs' Proposed Less Restrictive Alternatives

Plaintiffs proposed three less restrictive alternatives to the NCAA's rules, which they alleged would allow the NCAA to achieve its purposes of preserving the popularity of its product, promoting amateurism, and improving the quality of educational opportunities for student-athletes:

(i) raise the grant-in-aid limit to allow schools to award stipends—derived from specified sources of licensing revenue—to student-athletes;

(ii) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; or

(iii) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.[7]

The Court held that the first alternative would limit the anticompetitive effects of the NCAA's rules provided that the stipends do not exceed the cost of attendance. The Court reasoned that increasing the grant-in-aid cap to permit such stipends would not violate the NCAA's own definition of amateurism[8] insofar as such a stipend would only cover educational expenses. The Court also agreed with the second alternative proposed by Plaintiffs, but with the following qualifications: schools would be permitted to make limited payments to student-athletes above the cost of attendance from the school's licensing revenue, such compensation would have to be distributed equally among team members, and such compensation would have to be held in trust and not paid until after the student-athletes leave school or their eligibility expires. Plaintiffs' third proposal, however, was rejected by the Court, with the Court holding that allowing student-athletes to endorse commercial products would undermine the NCAA's legitimate goal of protecting student-athletes from commercial exploitation.

e. Remedy

Having found that the NCAA's rules unreasonably restrained trade, the Court issued an injunction prohibiting the NCAA from enforcing what the Court considered to be the unreasonable elements of such rules. Specifically, the Court enjoined the NCAA's ability to enforce any of its rules that:

(i) prohibit schools from offering FBS football and Division I basketball recruits a limited share of revenues generated from the use of their names, images, and likenesses (although the NCAA could impose a cap on the amount of such compensation not less than the cost of attendance); and

(ii) prevent institutions from offering to deposit in trust a limited share of licensing revenue for FBS football and Division I basketball recruits, which could be paid after graduation or expiration of eligibility (though the NCAA can establish a cap on such amounts not less than $5,000 (in 2014 dollars) for every year the student-athlete remains academically eligible).[9]

The Court concluded by declaring that its injunction does not prevent the NCAA from enforcing its other existing rules, such as those prohibiting student-athletes from endorsing commercial products or limiting practice hours, or from enacting new rules, such as those which would prevent student-athletes from using the funds held in trust for their financial benefit while still in school or which would prevent schools from offering an individual recruit a greater share of licensing revenue than it offers to any other recruit in the same class on the same team.

3. Post-Decision Steps

a. Effective Date

The Court's decision provided that the injunction would not take effect until the start of the next FBS football and Division I basketball recruiting cycle. In response, the NCAA filed a motion seeking clarification of the timing of the injunction. The NCAA's motion was granted on August 19, 2014, with the Court clarifying that the injunction would not impact prospective FBS football and Division I basketball student-athletes who enroll prior to July 1, 2016.

b. Appeal

On August 10, 2014, the NCAA announced its intention to appeal the Court's decision,[10] and on August 21, 2014, announced that it had filed a notice of appeal.[11] The NCAA's Chief Legal Officer, Donald Remy, explained:

> We are appealing the Court's decision because we do not believe the NCAA has violated the antitrust laws. In its decision, the Court acknowledged that changes to the rules that govern college athletics would be better achieved outside the courtroom, and the NCAA continues to believe that the Association and its members are best positioned to evolve its rules and processes to better serve student-athletes. The reform conversation began long before this lawsuit and the changes announced earlier this month are evidence of the NCAA continually working to improve the student-athlete experience.[12]

Although some speculated that Plaintiffs might also appeal so as to challenge the Court-imposed limitations on compensation, CBS Sports reported on September 8, 2014 that Plaintiffs will not appeal.[13] The Ninth Circuit recently agreed to expedite the NCAA's appeal.[14]

4. Impact of the Decision

a. *In re: NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*

In March of 2014, another case, *Jenkins v. NCAA*, was filed on related grounds in the United States District Court for the District of New Jersey by a group of football and basketball student-athletes against the NCAA and certain athletic conferences. In June, the case was transferred to Judge Wilken in the

United States District Court for the Northern District of California.[15] Plaintiffs allege price-fixing and seek an injunction to prohibit the NCAA from enforcing its rules limiting the amount of financial aid student-athletes may receive.

Another group of plaintiffs, consisting of football student-athletes as well as men's and women's basketball student-athletes, also filed an antitrust suit in the Northern District of California against the NCAA and certain athletic conferences in March 2014. Plaintiffs in this suit, *Alston v. NCAA et al.*,[16] contend that the NCAA and the defendant conferences conspired in fixing the value of a full grant-in-aid. They seek substantial monetary damages as well as an injunction preventing the NCAA from enforcing its rules that cap a full grant-in-aid.

In June, the Court consolidated these and other antitrust cases into a case entitled *In re: NCAA Athletic Grant-in-Aid Cap Antitrust Litigation* before Judge Wilken.[17]

Although many commentators speculate that the Court's decision in *O'Bannon* portends victory for the plaintiffs in the various consolidated cases, the decision contains a number of features directly contrary to the consolidated plaintiffs' contentions advocating the elimination of limits on student-athlete compensation. Seizing on these features, on September 4, 2014, defendants in the consolidated case filed a motion seeking dismissal of plaintiffs' claims based on *O'Bannon*. The NCAA issued the following statement after filing the motion to dismiss:

> Today, the NCAA and the member conferences named as co-defendants asked Judge Claudia Wilken to dismiss the Jenkins, Alston and related cases seeking unlimited compensation for certain Division I student-athletes. Last month, in O'Bannon, Judge Wilken issued a decision confirming that the antitrust laws allow the NCAA to set limits on benefits provided to student-athletes, including the amount and nature of awards related to athletics-based scholarships. The NCAA and its co-defendants argue that Judge Wilken should dismiss these complaints based on her decision in O'Bannon and numerous other federal court decisions. These rulings make clear that the current plaintiffs' lawsuits are misplaced. While the NCAA and its co-defendants acknowledge Judge Wilken's legal reasoning on the legitimacy of limiting the amount and nature of financial benefits to student-athletes, the NCAA will continue to appeal the O'Bannon decision because it does not agree with the court's finding in that case that the NCAA violated antitrust laws.[18]

b. Impact on Other Sports

The *O'Bannon* decision provides for financial compensation only for FBS football and Division I men's basketball student-athletes.[19] Such compensation is based on the substantial licensing revenues generated from these sports by the NCAA and its institutions and conferences and the fact that such revenues were not being shared with those primarily responsible for its creation. Since most other collegiate sports programs generally do not enjoy the same types of big-money licensing opportunities, it will be interesting to follow whether any antitrust claims will be brought by those participating in other sports based on the logic of *O'Bannon* and, if so, to hear the outcomes of any such claims.[20]

Even aside from any such legal challenges, it will be interesting to see how the NCAA itself elects to proceed in the face of the decision. Will it continue to enforce its rules unchanged as applied to sports other than FBS football and Division I men's basketball, including women's sports? This could certainly subject the NCAA to criticism and, as such, it would not be surprising if the NCAA ultimately decided to apply *O'Bannon* across the board, thus permitting institutions to offer compensation to student-athletes participating in other sports.

c. Title IX Implications

The *O'Bannon* decision, if upheld on appeal, will permit institutions to compensate FBS football and Division I basketball student-athletes up to the cost of attendance while in school and provide for payments to these student-athletes upon leaving school or when their eligibility expires.

If institutions begin competing for recruits by offering these financial incentives to the maximum extent permitted under *O'Bannon*, the resulting expenditures could cause significant financial pressure on the budgets of athletic departments, many of which already struggle to maintain financial stability, especially in light of other institution-specific interests that compete for funding and the many legal obligations which impact athletic departments' budgets. In particular, athletic departments might consider reductions in budgets for other sports—particularly non-revenue generating sports—or the elimination of such sports. Both of these consequences could compromise institutions' compliance with Title IX, particularly when coupled with the fact that the increased devotion of resources to fund the aforementioned financial incentives would run solely to men's programs. [21]

Commentators have also observed that sharing revenues with student-athletes as contemplated under *O'Bannon* might be independently problematic under Title IX if such compensation is treated in the same manner as scholarships or considered a type of financial aid, where substantially proportionate financial assistance is required.[22] If an institution were to pay *O'Bannon*-authorized compensation to more male student-athletes than female student-athletes, and such compensation is considered financial assistance for purposes of Title IX, this outcome would impact proportionality and potentially expose the institution to a Title IX claim. In addition, even if the shared revenues were not considered part of financial aid, it would mean that male student-athletes would be eligible to receive a benefit not available to female student athletes. That would also raise Title IX issues.

CONCLUSION:

The *O'Bannon* decision, once effective if upheld on appeal, and assuming the NCAA does not change its rules in response to the decision, will permit institutions to pay *O'Bannon*-authorized compensation to FBS football and Division I men's basketball student-athletes. Although institutions will not be required to pay such compensation, they will need to consider how such compensation will impact recruiting and determine if, and to what extent, they are willing to offer such compensation in order to compete with other institutions to attract the most desirable student-athletes. The overall impact of such compensation on specific team and athletic department budgets, and how this may impact other areas of legal compliance, such as Title IX, will need to be carefully considered.

The big-picture impact of the *O'Bannon* decision is unclear at this time and creates uncertainty for institutions for the foreseeable future, as it will take considerable time for the NCAA's appeal to be decided by the U.S. Court of Appeals for the Ninth Circuit, even on an expedited schedule. Even then, there is the possibility that the decision on appeal could be appealed to the U.S. Supreme Court. In the meantime, existing (and potentially yet-to-be-filed) lawsuits against the NCAA and others such as athletic conferences and television networks will be interesting to watch unfold in the wake of *O'Bannon*. Colleges and universities should be alert to changes in NCAA rules and consult with counsel for advice on whether additional actions are necessary or advisable at this time.

For an analysis of the application of antitrust law principles generally in the context of intercollegiate athletics, stay tuned for an upcoming NACUANOTE entitled: "Antitrust Issues Affecting Intercollegiate Athletics."

AUTHORS:

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Paul Avery is an attorney in Bond, Schoeneck & King's Higher Education Practice Group who provides general counsel to colleges and universities on a wide array of legal issues. In the area of athletics, Paul has particular experience with Title IX compliance, NCAA compliance and infractions matters, and athletics business arrangements such as sponsorship, broadcast, tournament, and shoe/apparel agreements, as well as employment contracts for coaches and other athletics personnel. Paul is co-editor of, and a contributor to, Bond's *Higher Education Law Report*.

ENDNOTES:

[1] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. C 09-03329 CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014).

[2] The Collegiate Licensing Company and EA reached a proposed settlement with the Plaintiffs, which was preliminarily approved by Judge Wilken. A "Fairness Hearing" to decide whether to finally approve the proposed settlement is scheduled for May 14, 2015.

[3] *O'Bannon*, 2014 WL 3899815, at *3.

[4] *Id.* at *7.

[5] *Id.*

[6] The Court also discussed other NCAA rules, including the prohibitions on student-athletes receiving payment from outside sources based on their athletic ability and endorsing commercial products or services while in school. *See id.* at *8. Also of note, on August 7, 2014, the day prior to the Court's decision, the NCAA Board of Directors approved a rule affording the "Big 5" conferences (*i.e.*, ACC, Big 12, Big Ten, Pac-12 and SEC) additional autonomy to, among other things, increase the value of scholarships to student-athletes. Div. I Steering Comm. on Governance, Nat'l Collegiate Athletic Ass'n, *Div. I Steering Comm. on Governance: Recommended Governance Model* 1 (2014), *available at* http://www.ncaa.org/sites/default/files/DI%20Steering%20Commitee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf/; *see also* Michelle Brutlag Hosick, *Board adopts new Division I structure*, Nat'l Collegiate Athletic Ass'n (Aug. 7, 2014, 11:49 AM), *available at* http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure.

[7] *O'Bannon*, 2014 WL 3899815 at *16.

[8] The NCAA's current constitution contains an amateurism provision stating that student-athletes "shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.* at *10.

[9] The Court determined that $5,000 was an appropriate amount because: (1) the NCAA's own witnesses testified that capping compensation to a few thousand dollars per year would minimize their concerns about student-athlete compensation; and (2) the amount is comparable to what the NCAA (i) permits student-athletes to receive who qualify for Pell grants, and (ii) permits a tennis student-athlete to earn prior to enrolling without loss of eligibility. *Id.* at *37.

[10] *See* Press Release, Donald Remy, Chief Legal Officer, Nat'l Collegiate Athletic Ass'n, NCAA Will Appeal O'Bannon Ruling (Aug. 10, 2014, 10:29 AM), *available at* http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-will-appeal-o%E2%80%99bannon-ruling.

[11] *See* Press Release, Donald Remy, Chief Legal Officer, Nat'l Collegiate Athletic Ass'n, NCAA Files Notice of Appeal in O'Bannon Case (Aug. 21, 2014, 3:55 PM), *available at* http://www.ncaa.org/about/resources/media-center/ncaa-files-notice-appeal-o%E2%80%99bannon-case.

[12] *Id.*

[13] Jon Solomon, *O'Bannon Plaintiffs Won't Appeal Judge's NCAA Ruling*, CBS SPORTS (Sept. 8, 2014, 12:33 PM), http://www.cbssports.com/collegefootball/writer/jon-solomon/24701112/obannon-plaintiffs-wont-appeal-judges-ncaa-ruling. According to this article, Plaintiffs' lawyers are considering bringing additional antitrust suits against networks for their use of student-athletes' names, images, and likenesses. *Id.*

[14] Andy Thomason, *Court Agrees to Expedite NCAA's Appeal in O'Bannon Antitrust Case*, THE CHRON. OF HIGHER EDUC. (Sept. 24, 2014), http://chronicle.com/blogs/ticker/court-agrees-to-expedite-ncaas-appeal-in-obannon-antitrust-case/86743?cid=at&utm_source=at&utm_medium=en.

[15] *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, MDL No. 2541, 2014 LEXIS 77050 (J.P.M.L. June 4, 2014).

[16] *See Alston v. Nat'l Collegiate Athletic Ass'n*, C.A. No. 4:14-01011 (N.D. Cal. Mar. 5, 2014).

[17] *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, MDL No. 2541, 2014 LEXIS 81845 (J.P.M.L. June 13, 2014).

[18] Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Asks Judge to Dismiss Scholarship Cases (Sept. 4, 2014, 10:11 PM), *available at* http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-asks-judge-dismiss-scholarship-cases.

[19] As noted above, the consolidated case includes plaintiffs other than FBS football and Division I men's basketball student-athletes.

[20] The following articles report that lawyers in the *O'Bannon* case are considering legal claims on behalf of athletes in other sports. *See* Steve Berkowitz, *O'Bannon Plaintiffs Look for Ways to Broaden Ruling's Impact*, USA TODAY (Aug. 10, 2014, 3:01 PM), *available at* http://www.usatoday.com/story/sports/college/2014/08/09/ed-obannon-antitrust-case-vs-ncaa-appeals/13832143/; Solomon, *supra* note 13.

[21] The elimination of collegiate sports programs has been the subject of many Title IX claims over the years, wherein team members and other interested parties have sued institutions based on the discontinuance of a team. *See, e.g.*, *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012); *Cohen v. Brown Univ.*, 991 F.2d 888, 907 (1st Cir.1993); *see also The Title IX Implications of Eliminating an Intercollegiate Sports Team*, 8 NACUANOTE 10, June 22, 2010.

[22] *See* Michael McCann, *What Ed O'Bannon's Victory Over the NCAA Means Moving Forward*, SPORTS ILLUSTRATED (Aug. 10, 2014), *available at* http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights; Ben Strauss et al., *99-Page Ruling in O'Bannon Case Is Missing Something: Clarity*, N.Y. TIMES (Aug. 9, 2014), *available at* http://www.nytimes.com/2014/08/10/sports/court-ruling-in-o-bannon-case-misses-a-key-element-clarity.html?_r=1.

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