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## Federal Judge Enjoins NCAA Player Likeness Rules as Illegal Price Fixing

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On August 8, 2014, a California federal judge ruled that college athletes can share in the billions of dollars generated from media contracts, finding that restraints imposed by the National Collegiate Athletic Association (“NCAA”) on student-athletes’ ability to be paid for the use of their likenesses violate antitrust law.<sup>1</sup> The ruling comes amid a series of challenges across the country to the rules that the NCAA has suggested are necessary to protect amateurism in college sports.

In 2009, Ed O’Bannon—a former basketball star at the University of California, Los Angeles who also played briefly as a professional in the National Basketball Association—sued the NCAA in federal court along with 19 other representatives on behalf of a putative class of current and former college student-athletes who competed on a team in the NCAA’s top football and basketball divisions.

The NCAA has roughly 1,100 member schools and regulates intercollegiate athletic competition in about two dozen sports. Football and basketball are the two sports that generate the most revenue for member schools. The NCAA issues and enforces rules that, among other things, establish academic eligibility requirements for student-athletes, govern schools’ recruitment efforts, and limit the number and size of athletic scholarships that each school may provide. NCAA rules also prohibit student-athletes from receiving any compensation for their athletic efforts beyond their scholarships, including payment for the use of their names and likenesses in live television broadcasts, video games, and archival and highlight footage. The *O’Bannon* class argued that this prohibition constitutes an anticompetitive agreement between the NCAA and member schools to ascribe no value to student-athletes’ names, images, and likenesses.

In 2013, the plaintiff class was certified and, in June 2014, after five years of litigation, the matter went to trial before Judge Claudia Wilken of the Northern District of California in Oakland. The fifteen-day bench trial concluded on June 27, and Judge Wilken issued a 99-page decision on August 8, ruling that the NCAA’s absolute prohibition on player compensation beyond the value of their scholarship violates Section 1 of the Sherman Antitrust Act (“Sherman Act”).

Judge Wilken found that this prohibition affected competition in several different markets: a “college education market” reflecting the unique bundle of goods and services provided to student-athletes by member schools in the top football and basketball divisions; a related market for student-athletes’ “athletic services and licensing rights”; and three submarkets for group licenses to use student-athletes’ names, images, and likenesses in (1) live football and basketball game telecasts, (2) video games, and (3) re-broadcasts, advertisements, and other archival footage.

Because the NCAA did not dispute that the challenged rule constituted an agreement among member schools, the trial focused on whether the NCAA prohibition harmed competition in those markets. Judge Wilken’s analysis began by determining that the NCAA prohibition should be

<sup>1</sup> See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 09-cv-3329(CW) (N.D. Ca.).

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analyzed under the rule of reason, where the question is whether a restraint's harm to competition outweighs its procompetitive benefits.

In the college education market, Judge Wilken found that the plaintiffs presented sufficient evidence that the NCAA's rules restrained trade. Specifically, member schools provide a scholarship covering tuition, room and board, fees, and book expenses in exchange for student-athletes' agreement to attend and play for a particular school and acquiesce in the use of their names, images, and likenesses. Judge Wilken concluded, though, that "the schools agree to value the [student-athletes' names, images, and likenesses] at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect."

In the athletic services and licensing rights market, Judge Wilken likewise concluded that "the NCAA's restrictions . . . represent a form of price fixing but create a buyers' cartel, rather than a seller's cartel." In that formulation, the member schools are buyers seeking to purchase recruits' athletic services and licensing rights, providing scholarships in return. She found the agreement similarly anticompetitive under this theory.

Judge Wilken then weighed the NCAA's four proffered procompetitive benefits of the prohibition. She flatly rejected the contention that the prohibition enhanced the "competitive balance" in games between member schools, citing the "academic consensus" that there is no such connection. And she likewise discredited the argument that the prohibition "increased output" by enhancing the appeal of Division 1 NCAA sports, finding no evidence that the prohibition provided an incentive for member schools to participate in games at the top collegiate levels.

Judge Wilken weighed more thoroughly the NCAA's two other justifications—the protection of amateurism and the integration of collegiate athletes into academic life. She found that the prohibition does serve a procompetitive purpose to the extent it is necessary to maintain the popularity of collegiate athletics and to the extent it helps integrate student-athletes into the academic communities, which provides benefits to education.

But she found the NCAA's prohibition was more restrictive than necessary to achieve these objectives. Amateurism, for example, does not justify a blanket prohibition on all compensation to student-athletes, particularly because the NCAA has revised its rules governing compensation numerous times over the years and because some student-athletes, such as tennis players, can receive additional compensation in limited circumstances.

The plaintiffs identified two less restrictive alternative means by which the NCAA could achieve its valid objections. First, the NCAA could permit member schools to award stipends up to the full cost of attendance, covering costs beyond tuition and not included in scholarships such as supplies, transportation, clothing, a computer, and other academic needs. Second, the NCAA could permit its member schools to hold in trust limited shares of their licensing revenue, to be distributed to student-athletes after they leave college.

Because the NCAA's prohibition on compensation beyond the value of a student-athlete's scholarship harmed competition, and because the NCAA could have achieved its procompetitive objectives through less restrictive means, Judge Wilken held that the NCAA's fixing of prices for both college education and student athletic services violated Section 1 of the Sherman Act. This is a major blow to the association's model of unpaid student athletes and a likely harbinger of

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significant change to the college athletics landscape. The remedy the court fashioned, however, suggests that such change may be more measured than the headlines in the popular press suggest.

Judge Wilken issued an injunction prohibiting the NCAA from preventing member schools from allowing student-athletes to benefit from the profits the schools receive from student-athletes' names, images, and likenesses. Her ruling does permit schools to raise the amount of aid given to cover the full cost of attendance and/or place some of the money obtained from players' likenesses into trusts to be released at graduation or upon withdrawal from school. But at the same time, the court allowed the NCAA to set a cap on the amount of money that can be held in trust, provided the cap is not less than \$5,000 for each year the student-athlete remains academically eligible. Further, while the injunction will not be stayed pending appeal, it will not take effect until the start of the next recruiting cycle in 2016. And the court declined to allow student-athletes to receive money for commercial endorsements, ruling that this would undermine the NCAA's legitimate goal of protecting students from commercial exploitation.

The NCAA can claim victory with regard to the plaintiffs' allegations regarding the group licensing markets. Judge Wilken found no evidence that, absent the NCAA's prohibition on compensation, teams of student-athletes would actually compete against one another to sell group licenses for their names, images, and likenesses. This is because any network that wished to broadcast a particular athletic event, or any video game producer that wished to permit players to participate in games involving the names, images, and likenesses of student-athletes, would need to obtain a group license from every team that could potentially participate in the event. In other words, Judge Wilken found that, in the market for group licenses, member schools were not competing for talent but rather collaborating to sell complementary products. As a result, the NCAA's prohibition did not harm any actual or potential competition for the sale of group licenses.

While the NCAA expressed disappointment over the result in this case, its recent actions suggest it was partially prepared. On August 7, 2014—the day before Judge Wilken's decision—the NCAA authorized the "Power Five" conferences of member schools to set certain rules for themselves independent of the rest of the organization. The Power Five conferences represent the most competitive and lucrative athletic programs, and experts expect them to use this autonomy to create a structure that shares at least some revenues with their student-athletes.

In any event, the case marks a landmark moment in collegiate competition, with potential implications both within higher education and beyond. The NCAA has indicated that it will appeal all the way to the Supreme Court if necessary, and that appeal is not the only legal battle it faces. Two additional suits alleging antitrust violations were filed in March 2014. In the first, a different class of plaintiffs filed suit seeking an end to *all* restrictions that limit student-athletes' ability to earn money; in other words, the suit argues that unrestricted free agency should govern collegiate athletics. The second suit claims that current and former student-athletes should receive damages in the amount of treble the difference between the value of their scholarships and their actual costs of attendance. Judge Wilken will hear both cases, and the NCAA must file a response or a motion to dismiss the suits by August 20.

Meanwhile, the *O'Bannon* ruling, coupled with other recent decisions in both the Third and Ninth Circuits, solidifies the strength of student-athletes' right of publicity and their entitlement to benefit from the use of their names, images, and likenesses in broadcasts and video games. Likewise, Judge Wilken's rejection of the NCAA's claim of protecting amateurism may prove relevant as the

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National Labor Relations Board considers an appeal to its recent ruling that Northwestern University football players are employees eligible to unionize.

Regardless of how these issues are ultimately resolved, the *O'Bannon* case provides another example of the complex relationship between American sports and antitrust law. It raises significant issues for those in the higher education and sports businesses, and K&L Gates will continue to provide insight as those issues develop.

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