



Federal Appeals Court Rejects Payments To College Athletes

Insights

9.30.15

This morning, the 9th Circuit Court of Appeals ruled that the NCAA is subject to antitrust laws and that its payment rules are too restrictive in attempting to maintain amateurism. However, in what can only be deemed a victory for the NCAA, the court also ruled that antitrust law requires only that the NCAA permit its schools to provide up to the cost of attendance to their student-athletes, and nothing beyond that (*O'Bannon v. NCAA*).

This case may very well end up in front of the U.S. Supreme Court, but for now, the NCAA has won this round in its simmering fight with former student-athletes.

The Lawsuit And Lower Court Decision

In 2009, Ed O'Bannon, a former star basketball player at UCLA, sued the National Collegiate Athletic Association (NCAA) for using his name and image in television broadcasts and video games. He was joined in this effort by a group of former student-athletes in the same boat. They initiated an antitrust challenge to the NCAA's amateurism rules that prevent athletes from being paid for participating in college sports.

Their legal team conceded that players sign waivers allowing the NCAA to use their likenesses, but argued that players should be nevertheless entitled to a piece of the revenue because those contracts are worth billions of dollars, and because student-athletes have no choice but to sign the waivers if they want to take the field and play.

The NCAA countered that college athletes are amateurs, and that anything amounting to pay-for-play would professionalize the players. It argued that such a scheme would transform college sports into something unrecognizable and hurt the college sports business model.

Following a lengthy trial in 2014, District Court Judge Claudia Wilken ruled that the NCAA's long-held practice of barring payments to athletes violated antitrust laws. She ordered that schools should be allowed to not only offer full cost-of-attendance scholarships to athletes, but also cover cost-of-living expenses that were not currently part of NCAA scholarships. Further, she ruled that colleges should be permitted to place as much as \$5,000 into a trust for each athlete per year of eligibility. The NCAA appealed this ruling, leading to today's decision.

NCAA Loses A Battle, But Wins The War (For Now)

The NCAA made two substantive arguments on appeal. First, it contended that the Supreme Court's

1984 decision in *NCAA v. Bd. of Regents of the Univ. of Oklahoma* was binding precedent, holding that the NCAA's amateurism rules are valid as a matter of law. Second, it argued that these amateurism rules are not subject to antitrust law because they do not regulate commercial activity. The 9th Circuit rejected both arguments, and affirmed that the amateurism rules are reviewable pursuant to antitrust law.

This first part of the 9th Circuit's decision can be considered somewhat of a setback to the NCAA. The panel of judges concluded that, because the NCAA regulations are subject to antitrust scrutiny, they must be tested in the crucible of the "Rule of Reason." In conducting this review, the court concluded that the NCAA's rules have been more restrictive than necessary in order to maintain its tradition of amateurism in support of the college sports market.

However, in reviewing the lower court's ruling, the 9th Circuit handed the NCAA a victory in the second part of the decision by concluding the District Court judge went too far in allowing cash payments to the student-athletes. The appeals court opinion made clear that "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap." The 9th Circuit panel stated that once that line is crossed, they could not see a way for amateurism to remain intact, as there would be no defined stopping point. If such payments were allowed, they concluded, the NCAA would have surrendered its amateurism principles entirely and "transitioned from its particular brand of football to minor league status."

Where Do We Go From Here?

The bottom line: NCAA rules which bar payments to student-athletes have survived for the time being. However, challenges still exist. There is a good chance that the *O'Bannon* plaintiffs seek review of today's decision before the U.S. Supreme Court, which could rule on the matter as early as next year.

Moreover, a broad antitrust lawsuit filed by noted sports lawyer Jeffrey Kessler is currently pending in a federal court in California. That case seeks to overturn the NCAA's amateurism rules and effectively create a free market for players to be paid in college football and basketball.

The court's fairly robust defense of amateurism principles is a good sign for the NCAA in how the 9th Circuit will ultimately address Kessler's challenge. On the other hand, the 9th Circuit was obviously mindful of the pending litigation, as today's *O'Bannon* decision was very careful to state that it was a limited decision confined to the particular challenge before it.

If you have any questions about this case, or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Education Practice Group.

This Legal Alert provides an overview of a specific 9th Circuit decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation

Should not be construed as, legal advice for any particular fact situation.

Industry Focus

Higher Education

Sports