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U.S. Supreme Court Declines to Hear O'Bannon v. NCAA

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The U.S. Supreme Court recently decided not to hear the National Collegiate Athletic Association's ("NCAA") appeal of the O'Bannon case, a class-action lawsuit that was filed by the former UCLA basketball star and other college basketball and football players. *O'Bannon v. NCAA* originated in 2009, when Ed O'Bannon, a former All-American UCLA basketball player, along with nineteen others, filed an antitrust class action suit against the NCAA for its failure to compensate collegiate-athletes for its use of their names, images, and likenesses ("NILs"). The 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 Court's decision to deny certiorari means that the U.S. Court of Appeals for the Ninth Circuit's ("Ninth Circuit") September 2015 ruling will remain intact. More specifically, the Ninth Circuit determined that the NCAA was subject to antitrust laws but that college athletes are not entitled to deferred compensation, rather, member schools must only provide up to the cost of attendance to their student-athletes and need not compensate student-athletes beyond the cost of education. The Ninth Circuit found that "offering [student-athletes] cash sums untethered to educational expenses" like compensation for NIL rights, "would transform NCAA sports into minor league status." According to the Ninth Circuit, 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."

Those who advocate for greater compensation for student-athletes have contended that a system where these athletes are not compensated for NIL rights is "exploitative, particularly in an era where the NCAA and top conferences negotiate billion-dollar TV contracts and where college coaches earn millions of dollars a year to coach student-athletes." The NCAA's arguments heavily rely on the Supreme Court's 1984 ruling in *NCAA v. Board of Regents*, which stated, in part, 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." The NCAA has relied on the language of this case to successfully defend its amateurism system in many other lawsuits.

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 in the "full cost of attendance" are quite broad. Conversely, 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.

The issues in *O'Bannon v. NCAA* may be settled for now, but this is certainly not the last time these issues will arise for the NCAA and for student-athletes. Universities, especially those with Division I football and basketball teams, should pay special attention to developments in this area of the law, as any changes might affect NCAA and school policies and regulations regarding the treatment of student-athletes.

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

Thank you to Bridget Hart, a law clerk at Cullen and Dykman, for her assistance with this blog post.