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Litigating Change in College Sports

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I. INTRODUCTION

The most important storyline in college sports this past fall had nothing to do with the Bowl Championship Series, conference realignment, or celebrity coaches. Nor did it play out on Saturdays, as one might expect. Rather, in an Oakland federal district court, Chief Judge Claudia Wilken of the Northern District of California issued two rulings in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*[2] ("*O'Bannon*") that may forever alter college athletics.

The *O'Bannon* case represents a frontal assault on the rules imposed by the National Collegiate Athletic Association ("NCAA") that prohibit student-athletes from receiving monetary compensation for the commercial use of their names, images, and likenesses as a condition of their eligibility. In orders issued just two weeks apart, Judge Wilken first denied the NCAA's latest motion to dismiss the case ("Motion to Dismiss Order") and then certified an injunction class seeking to stop the NCAA from enforcing its compensation ban ("Class Certification Order").[3]

This article analyzes Judge Wilken's recent rulings and what they may mean for the outcome of the *O'Bannon* case as well as future litigation against the NCAA. The litigation stakes are far higher than any contested on the field.

II. STUDENT-ATHLETES CHALLENGE THE NCAA'S CORE AMATEURISM RULES AS UNLAWFUL RESTRAINTS OF TRADE

The *O'Bannon* plaintiffs presently consist of five current and fifteen former student-athletes who play, or have played, Division I ("DI") football or basketball. The action was initiated in 2009. Plaintiffs' claims evolved over time, and, on July 19, 2013, they filed a Third Amended Complaint seeking to enjoin the NCAA from imposing and enforcing its ban on certain types of student-athlete compensation and seeking treble damages. One major distinction between the Third Amended Complaint and its prior iterations is that the *O'Bannon* plaintiffs augmented their claims to include revenue derived from *live* NCAA broadcasts and not just *historical* footage, in addition to video games.

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[2] No. 09-cv-01967-CW (N.D. Cal.) The student-athlete litigation encompasses both antitrust claims brought by the *O'Bannon* plaintiffs and right of publicity claims brought by four former student-athletes led by one-time DI football player Sam Keller ("*Keller*"). This article focuses on the antitrust claims; discovery concerning the *Keller* right of publicity claims has been stayed.

[3] Order Den. Mots. to Dismiss, Docket No. 876, Oct. 25, 2013; Order Granting in Part and Denying in Part Mot. for Class Certification, Docket No. 893, Nov. 8, 2013.

In antitrust terms, the *O'Bannon* plaintiffs' claims are framed as attacking a group boycott and price-fixing conspiracy through which the NCAA and its member institutions restrain competition, and fix prices for student-athlete monetary compensation at zero. Plaintiffs allege that there are two relevant markets affected by this conduct. The first is an alleged "college education" market, in which colleges and universities would compete with one another to recruit student-athletes by promising them monetary compensation but for the NCAA prohibitions. The second is an alleged "group licensing" market in which, absent the NCAA restraints, licensors such as television broadcasters and video-game publishers would compete for group licenses to the names, images, and likenesses of DI student-athletes playing basketball and football.

Plaintiffs allege that the NCAA unlawfully restrains these markets by premising a student-athlete's eligibility upon remaining uncompensated and waiving rights to the commercial use of his image during college and after graduation.

III. THE NCAA'S RESTRAINTS MUST BE SCRUTINIZED UNDER THE RULE OF REASON

The NCAA moved for dismissal of this latest *O'Bannon* complaint on three principal grounds: i) the NCAA's right to regulate amateurism is effectively immune from antitrust scrutiny by virtue of the Supreme Court's decision in *NCAA v. Board of Regents*;[4] ii) neither federal nor state law confers protectable name, image, or likeness rights in sports broadcasts upon student-athletes; and iii) the Copyright Act preempts student-athletes' rights of publicity.

The court rejected all three of these arguments. Judge Wilken ruled that the oft-invoked language from *Board of Regents* that has traditionally provided a bulwark for the NCAA—"to preserve the character and quality of the [NCAA's] 'product,' athletes must not be paid"[5]—does not preclude plaintiffs from challenging whether the NCAA's ban on student-athlete competition is an illegal restraint of trade under the rule of reason. She further rejected the NCAA's contention that, regardless of the NCAA's restraints, there would be no demand for student-athlete group licensing rights for live television broadcasts because the First Amendment displaces any individual right of publicity for such live sporting events.

Judge Wilken instead concluded that further development of the evidentiary record as to whether live broadcasts of DI football and basketball games are "primarily commercial" would be required to decide this First Amendment question. Moreover, Judge Wilken held that even though the section of the California Civil Code cited by the NCAA excludes sports broadcasts from recognizable rights of publicity, the *O'Bannon* plaintiffs have alleged a national market, and thus California law alone cannot extinguish their rights of publicity. Finally, the court held that the Copyright Act was inapposite because plaintiffs are seeking to protect personae, not copyrights.

Focusing on the antitrust rulings, Judge Wilken rejected the NCAA's argument that it is entitled to *de facto* antitrust immunity in the name of amateurism under *Board of Regents*. She held that the decision "gives the NCAA 'ample latitude' to adopt rules preserving" amateurism,

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[4] 468 U.S. 85 (1984).

[5] *Bd. of Regents*, 468 U.S. at 102 (citation omitted).

but it does not stand for "the sweeping proposition that student-athletes must be barred…from receiving any monetary compensation for the commercial use of their names, images, and likenesses." Judge Wilken's Motion to Dismiss Order makes clear that the court intends to assess the NCAA's assertion that its restrictions are, on balance, pro-competitive as an evidentiary matter rather than trying to apply dicta from a Supreme Court decision that had little to do with amateurism.

Indeed, *Board of Regents* dealt with restraints in the market for college football broadcasts, not on the NCAA's policies prohibiting student-athletes from receiving compensation. And, as Judge Wilken held, antitrust law is concerned with protecting competition in particular markets for particular periods of time.

College sports, however, have changed dramatically in the nearly thirty years since *Board of Regents* was decided. Consider: the television broadcast plan at issue in *Board of Regents* provided that each of two network partners could broadcast a total of fourteen live football games *per season* and had to feature at least eighty-two different teams in a two-year period.[6] Today, at least a dozen football games are available on live television *week by week*. Further, each "power conference" has launched or will launch a proprietary television network, and certain schools have exclusive television networks of their own. As NCAA athletics have evolved into a commercial juggernaut, the competitive justifications and ramifications of prohibiting student-athletes from receiving monetary compensation have changed too.

On the heels of the Motion to Dismiss Order (and the Class Certification Order), the *O'Bannon* class and the NCAA cross-moved for summary judgment. Although the factual allegations of conspiracy—namely, the NCAA's rules concerning amateurism—are largely undisputed, the parties hotly contest the relevant market definitions and the pro- and anticompetitive effects of the NCAA's rules therein. It seems unlikely that Judge Wilken's eventual decision on summary judgment will resolve *O'Bannon*, although that decision will likely focus the issues for trial. No court (or jury) has ever considered amateurism through the lens of antitrust law, and it appears that *O'Bannon* is heading in that direction.

IV. CHANGE IS ON THE WAY

An *O'Bannon* trial could transform college athletics, as we know them, in large part because of the Class Certification Order, in which Judge Wilken certified an injunctive-relief class. The Order also declined to certify a damages class on the ground that plaintiffs failed to demonstrate a feasible way to determine which members of the putative damages class were actually harmed by the NCAA's restraints. For example, Judge Wilken concluded that it would be an overwhelmingly difficult and burdensome task to identify which class members' name, image, or likeness rights had actually been utilized in live or archived broadcasts or in video games.

[6] *Bd. of Regents*, 468 U.S. at 92-94. The networks could also broadcast "supplemental" and "exception" games after negotiating with various schools individually along narrow guidelines.

Though the NCAA was quick to declare this outcome a victory,[7] the reality is that the *O'Bannon* plaintiffs' pursuit of injunctive relief presents an existential threat to amateurism in college athletics—certification of a damages class and an award of money damages would have simply been the gravy for plaintiffs. There should be little doubt that if the NCAA had the opportunity to make *O'Bannon* go away merely by opening its checkbook—while leaving its current amateurism rules intact—the NCAA would have taken that result. Instead, the NCAA must defend against the very real threat of a permanent injunction that could indelibly transform college athletics by declaring as void and unenforceable the NCAA's most central amateurism rules.

With a potential trial looming, it has been reported that the NCAA and "power conference" members are exploring stipends and other compensation models within the prevailing structure.[8] The timing of such discussions is not coincidental; rather, it punctuates the significance of Judge Wilken's recent decisions and the leverage and momentum they have created for plaintiffs and student-athletes. It would not be surprising to see the NCAA liberalize its strict amateurism rules in the months ahead to begin "voluntarily" moving in the direction of a regime that Judge Wilken or a jury may very well force upon it.

Moreover, *O'Bannon* is not the first, and will not be the last, legal challenge against the NCAA's rules on amateurism. Already, courts have found plausible antitrust causes of action in cases in which plaintiffs have alleged that the NCAA's compensation rules restrict the market for DI talent by limiting the number and distribution of DI football scholarships[9] and forms of financial aid.[10]

And, with greater frequency, courts have been viewing NCAA athletics for what they are: big business. As the Seventh Circuit recently held: "No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high-school football players do not anticipate economic gain from a successful recruiting program."[11]

It also bears mention that, even though Judge Wilken declined to certify a damages class in *O'Bannon*, that does not preclude the availability of treble damages in future actions brought against the NCAA on a non-class basis. Should the *O'Bannon* plaintiffs ultimately succeed in proving antitrust violations by the NCAA, then they might try to use that judgment as a springboard for damages trials by individual student-athletes (most likely, high-profile student-athletes whose notoriety would present the greatest upside for damages).

[7] Statement, NCAA, Judge Denies Plaintiffs' Certification of Damages Class (Nov. 8, 2013) (*available at* http://www.ncaa.org/about/resources/media-center/press-releases/judge-denies-plaintiffs%E2%80%99-certification-damages-class).

[8] Rachel Cohen, *Power Conferences Seeking More Autonomy in NCAA*, ASSOCIATED PRESS, Dec. 12, 2013 (*available at* http://finance.yahoo.com/news/power-conferences-seeking-more-autonomy-121959979.html).

[9] *Rock v. NCAA*, 2013 WL 4479815 (S.D. Ind.); *In re NCAA 1-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1150 (W.D. Wash. 2005).

[10] *White v. NCAA*, No. 06-999, Docket No. 72, slip op. at 3 (C.D. Cal. Sept. 20, 2006).

[11] *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012); MTD Order at 14.

V. COURTS (OF LAW) ARE PROVIDING THE VENUE FOR CHANGE

The *O'Bannon* Motion to Dismiss and Class Certification Orders simultaneously continue the trend and set the table for NCAA reform. They present an existential threat to the NCAA and an opportunity to remake the college sports landscape. The legal system appears primed to address this modern reality, even if the NCAA is not. Regardless of how *O'Bannon* ultimately resolves, it is *in* the courts, not on them, where student-athletes may earn their greatest victory.