O'Bannon Takes Student-Athlete Pay Case To High Court

By **Matthew Perlman**

Law360, New York (March 15, 2016, 5:04 PM ET) -- Former student-athletes asked the U.S. Supreme Court on Tuesday to take up their antitrust suit against the NCAA over compensation for the use of their images and likenesses, challenging a circuit ruling that found they didn't have to be paid beyond the cost of attending college.
Former UCLA basketball player Ed O'Bannon Jr. filed a writ of certiorari, seeking to overturn a portion of a Ninth Circuit ruling that found the NCAA didn't have to pay student-athletes deferred cash payments for the use their likenesses. The ruling upheld a portion of the lower court decision that found the NCAA's ban on compensation for the use of student-athletes' images and likenesses was anti-competitive.

The Supreme Court appeal said that while college sports generate billions of dollars, very little of the money ends up in the pockets of players.

"Division I football and men's basketball command billions of dollars each year, with NCAA executives, conference commissioners, coaches and athletic directors earning eye-popping salaries," the petition said. "But the athletes — 98 percent of whom will never go pro — cannot receive any payments whatsoever, by fiat."

The district court **sided with the players** in a 2014 ruling that found rules preventing college athletes from being paid for the use of their names, images and likenesses violate antitrust laws, and barred the NCAA from continuing to impose those rules. The court also found that athletes could receive deferred licensing payments from schools, and that those payments should be capped at $5,000 per year.

On **appeal by the NCAA**, a Ninth Circuit panel later upheld the first portion of the findings, but said that athletes did not have to be paid beyond the cost of attending college. The Ninth Circuit in December **denied a motion** for rehearing en banc lodged by the former student-athletes.

The Supreme Court appeal said that the Ninth Circuit overstepped its bounds in finding that the NCAA's conception of amateurism required it to ban its players from receiving compensation beyond the cost of their college attendance. The players said that the lower court had rightfully found that "amateurism" only matters to the extent that it promotes consumer demand.

"In overturning that part of the remedy, the Ninth Circuit embraced the tautology proposed by the NCAA — that 'amateurism' justified the nonpayment of college athletes because 'not paying student athletes is precisely what makes them amateurs,'" the petition said. "Thus, despite paying lip service to the point that 'amateurism' was relevant only because of its effect on consumer demand … the Ninth Circuit accepted the prohibition on athlete compensation as a pro-competitive effect of the restraint and, in so doing, validated a (supposedly) pro-competitive effect that was identical to the restraint."

The student-athletes also said that the decision handcuffs the authority of lower courts in antitrust disputes. They said the circuit court ruling questioned the discretion of the district court to impose a remedy for the NCAA's Sherman Act violations, and placed the burden of proof for establishing a proper remedy for violations on the players.

"This court has made clear that the antitrust statutes vest the district courts with broad remedial power, with no requirement that the courts make the kinds of findings on which the Ninth Circuit insisted," the petition said. "The Ninth Circuit would put an unlawful straitjacket on federal judicial authority and create a standard for antitrust remedies that is at odds with decisions of this court and other circuits."

The litigation **dates back to 2009**, when O'Bannon and fellow former student-athlete Sam Keller filed separate suits against the NCAA, Electronic Arts Inc. and Collegiate Licensing Co. over the use of their likenesses. While the disputes over the use of the players' likenesses in video games all settled, the NCAA and the athletes pushed ahead to trial over the antitrust claims.

Earlier this month, the NCAA **asked for additional time** to potentially file its own petition for high court review. The organization said at the time it was also preparing for the possibility of the players petitioning.

In a statement Tuesday, NCAA Chief Legal Officer Donald Remy told Law360 that the move was expected, and that the organization is continuing to contemplate its own appeal.

"As I mentioned last week, we anticipated that [plaintiffs counsel] Michael Hausfeld would submit this filing," Remy said. "We are reviewing the petition and look forward to providing our response to the Supreme Court. We also are continuing to consider whether to file our own petition asking the court to review certain aspects of the Ninth Circuit's decision."

An attorney for the players declined to comment Tuesday.

The plaintiffs are represented by Michael D. Hausfeld, Hilary K. Scherrer, Sathya S. Gosselin, Swathi Bojedla, Michael P. Lehman and Bruce Wecker of Hausfeld LLP and Jonathan Massey of Massey & Gail LLP.

The NCAA is represented by Seth P. Waxman, Leon B. Greenfield, Daniel S. Volchok, David M. Lehn, Weili J. Shaw and Matthew J. Tokson of WilmerHale, Glenn D. Pomerantz, Kelly M. Klaus, Luis Li, Rohit K. Singla, Carolyn H. Luedtke, Thane Rehn, Justin P. Raphael and Jeslyn A. Miller of Munger Tolles & Olson LLP, and Gregory L. Curtner, Robert J. Wierenga, Kimberly K. Kefalas and Suzanne L. Wahl of Schiff Hardin LLP.

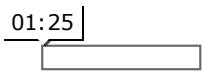
The Ninth Circuit cases are Edward O'Bannon Jr. v. National Collegiate Athletic Association et al., case numbers 14-16601 and 14-17068, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Liz McKenzie, Zachary Zagger, Melissa Lipman and Beth Winegarner. Editing by Mark Lebetkin.

Related Articles

- NCAA Lauds 'Amateurism' In Fighting Athlete Pay In 9th Circ.
- 9th Circ. Won't Rehear O'Bannon Student-Athlete Pay Case
- Attorneys React To NCAA Student-Athlete Pay Ruling
- NCAA Athletes Challenge Payment Ruling In Antitrust Row
- NCAA Says High Court Precedent Supports Athlete Pay Ban

View comments



Documents

- Petition

Related

Sections

- Appellate
- California
- Class Action
- Competition
- Employment
- Intellectual Property
- Media & Entertainment