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High court passes on NCAA case, but players still could get paid

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The Supreme Court's surprising decision Monday to leave in place court rulings that found the NCAA's amateurism rules for college basketball and football players violated federal antitrust law raises questions about paying college athletes and the future of college sports.

Q: In essence, the Supreme Court was not interested in answering the question of whether college athletes can be paid, so what happens now?

A: The rule that now governs college sports is the one issued in a prior ruling in the O'Bannon vs. NCAA case. In that 2-1 decision by the U.S. Court of Appeals for the 9th Circuit, the court ruled that NCAA schools would be permitted to pay a student-athlete's entire cost of attendance but would be prohibited from paying anything beyond that.

In the lawsuit they filed six years ago against the NCAA, O'Bannon and his legal team sought a new rule that would permit schools to pay athletes for use of their names, images and likenesses. They succeeded in a 2014 trial in Oakland, California, persuading a federal judge to authorize payments of $5,000 per player per season. But the NCAA appealed and won a reversal of the $5,000 provision. In their appeal to the Supreme Court, O'Bannon's lawyers hoped to reinstate the $5,000 payments or allow even greater payments. It did not happen, and the O'Bannon quest is over.

Q: So -- who is the clear winner here?

A: There is no doubt that the O'Bannon outcome is a triumph for the NCAA and its top lawyer, Donald Remy. Facing the possibility of unlimited payments to athletes, the NCAA was on the precipice of a radical change when this saga began. It is certain that the NCAA and Remy would have agreed to paying the cost of attendance as a settlement of this case. Even as the case traveled through the court system, the leaders of the five power conferences were deciding voluntarily to pay the cost of attendance for players.

That stated, the result of this case is not a total triumph for the NCAA. The legal precedent set in the O'Bannon appellate decision includes a ruling that the NCAA is a cartel that is subject to the nation's antitrust laws, a ruling that opens the organization to attacks from other athletes.

In his statement in response to the Supreme Court's ruling on Monday, Remy said the NCAA membership agreements "are not violations of the antitrust law" and that the organization would "continue to advance that legal position in other litigation." The NCAA hoped in its appeal to the Supreme Court to obtain a decision that it was immune to antitrust scrutiny.

Q: Is there any chance that athletes will be paid for playing in the multibillion-dollar business that is college sports?

A: Yes, there remains a chance. The next big case facing the NCAA is known as the "Kessler Case." It is an antitrust lawsuit against the NCAA filed by estimable sports lawyer Jeffrey Kessler.

Now pending in federal court in Oakland, Kessler and his clients seek an open market for college athletes in which schools would compete for them. To succeed in this case, Kessler and his team must differentiate their case from O'Bannon's and overcome the appellate court ruling in that O'Bannon case. O'Bannon sought

compensation for use of players' names, images and likenesses. Kessler seeks a much broader payment that covers practices, games and broadcasts.

Kessler's task will be difficult. The majority judges in O'Bannon ruled 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." Kessler must somehow succeed in making the quantum leap from cost of attendance to pay for play.

Q: Is the Supreme Court's refusal to consider the O'Bannon case a surprise?

A: Yes. The 2-1 decision in the U.S. Court of Appeals presented highly significant issues in American antitrust laws. The Supreme Court had previously transformed the televising of college sports in a decision in 1984. It was time to take another look, especially because college sports have become a major element of the nation's economy and culture.

The Supreme Court briefs filed by attorney Jonathan Massey on behalf of O'Bannon were masterly presentations of issues that could easily have captured the attention of the high court. And there was precedent for the court intervening in the sports industry: When the NFL and a paraphernalia manufacturer asked the high court to consider a dispute, the court accepted the case and wrote a historic decision in 2010.

To succeed in persuading the Supreme Court to consider their case, O'Bannon and the NCAA needed four votes from the eight justices now on the court. Were there any votes to accept the case? We will never know. The court denied the appeal without a word of comment.

Q: This kind of complex and lengthy litigation must be expensive. Who is paying for it?

A: The total bill, including the appeals to the Supreme Court, will approach $100 million, all of it paid by the NCAA -- at least as it stands now.

The O'Bannon trial in Oakland encompassed the testimony of 23 witnesses, had 287 exhibits, produced 3,395 pages of transcript and led to a written decision of 99 pages. Many of the witnesses were expensive experts. One of them, a Nobel Prize-winning economist, charged the NCAA a fee of $2,100 per hour.

Because of the ruling that the NCAA is a cartel that is violating antitrust laws, the NCAA must cover all legal fees. The NCAA is appealing the fee ruling, though, in the U.S. Court of Appeals for the 9th Circuit, and Remy believes "it will agree with us and potentially direct a substantial reduction or elimination of the fee request."