

OFFICE OF THE GENERAL COUNSEL

Legal Advisory

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SUMMARY

Ninth Circuit decision says college athletes may be compensated for education-related costs, but questions remain as to future payment limits and how compensation may affect college sports programs.

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APPEALS COURT FINDS NCAA SUBJECT TO ANTITRUST RESTRICTIONS BUT UPHOLDS NCAA'S ABILITY TO LIMIT COMPENSATION FOR COLLEGE ATHLETES BASED ON AMATEURISM MODEL

The U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over California and eight other Western states, recently held that the National Collegiate Athletic Association can restrict payments to college athletes but must allow compensation up to the full cost of college attendance. On December 16, 2015, the Court rejected the plaintiff's petition to have the case reheard by a larger panel of judges.

The case, *O'Bannon v. National Collegiate Athletic Association*, began in 2009 when Ed O'Bannon, a former UCLA basketball player, sued the NCAA and its licensing partners for using college athletes' names and likenesses in television broadcasts and video games without paying the players. O'Bannon claimed that the NCAA rules barring such payments to college athletes constituted an illegal restraint on trade. After a trial on that issue, the lower court agreed, finding the rules violate federal antitrust law and ordering the NCAA to permit (a) compensation to players up to the full cost of college attendance or (b) cash payments of up to \$5,000 per year to be held in trust until after players leave school.

On appeal, the Ninth Circuit first rejected the NCAA's long-standing position that its athletic eligibility rules are immune from antitrust challenges. The court then found the NCAA rules prohibiting payments to athletes for use of their name and likenesses violate antitrust law because they have an anticompetitive effect on the recruitment of college athletes. The Court concluded that modified rules allowing compensation up to the full cost of college attendance — rather than compensation covering only the core expenses of tuition and fees, room and board and required course books — would be a reasonable alternative to existing rules and would comply with antitrust requirements. (Allowing the compensation for non-core expenses such as supplies, transportation, and other education-related costs amounts to a few thousand extra dollars per year at most colleges.) However, the Court rejected the trial court's other solution — allowing cash payments of up to \$5,000 per year — on the grounds that it was untethered to educational expenses and paying amounts above such expenses would undermine the NCAA's amateurism model.

The Court's decision is noteworthy in two respects. First, the Court concluded that NCAA rules are not absolute and may be subject to antitrust requirements. Second, the court highlighted the role amateurism plays in defining the reach of NCAA authority. The crux of the court's rationale was that the NCAA's commitment to amateurism serves procompetitive goals because it increases the appeal of college sports to consumers, and, as a result, certain restrictions on player compensation are permissible.

This is unlikely to be the last word on the issue. Either party may decide to seek review by the U.S. Supreme Court. Meanwhile, similar claims are being fought in other lawsuits; one challenges the NCAA rules that restrict the amount of financial aid players may receive, and another seeks damages for an athlete whose compensation did not cover the full cost of attendance.

The practical impact of the *O'Bannon* decision may be muted because the NCAA and the five largest college sports conferences — including the Pacific 12 Conference, which includes UC Berkeley and UCLA — recently implemented changes that allow athletes to receive scholarships for the full cost of attendance. That move has prompted still more questions. For example, because some colleges are better positioned than others to fund their athletes' full cost of attendance, the change could impact the competitive balance in college sports. Meanwhile, if colleges elect to provide different compensation packages to athletes in different sports based on potential licensing opportunities, Title IX's gender equity requirements will become a central part of this ongoing debate over student-athlete compensation.