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O'Bannon And Alternative Forms Of Injunctive Relief

Law360, New York (November 19, 2015, 10:13 AM ET) -- In O'Bannon v. NCAA, the Ninth Circuit held that NCAA regulations barring compensation to student-athletes are subject to antitrust scrutiny under the Sherman Act's rule-of-reason analysis. The court upheld the district court's order enjoining the NCAA from prohibiting its member schools from giving student-athletes scholarships up to the full cost of attendance at their respective schools. In an interesting twist, however, the court reversed the district court's injunction that would have entitled student-athletes to up to $5,000 per year in deferred compensation, to be held in trust for student-athletes until after college.[1]

The court's decision attempts to retain the amateur nature of college sports even though the proof of the antitrust injury demonstrates that the student-athletes are anything but amateurs given their ability to generate enormous revenues for their respective schools. O'Bannon raises important considerations on the type of evidence necessary to maximize the chances of retaining injunctive relief on appeal.

The District Court's Decision

In a case brought in 2009 in the Northern District of California, famed UCLA basketball star Ed O'Bannon and fellow class representatives alleged that the NCAA agreed to fix at zero the compensation for the commercial use of the plaintiffs' name, image and likeness ("NIL") in violation of Section 1 of the Sherman Act.[2] On Aug. 8, 2014, after a 14-day bench trial, the district court entered judgment for the plaintiffs, concluding that the NCAA's rules prohibiting student-athletes from receiving compensation for their NILs was an unlawful restraint of trade.

In its rule-of-reason analysis, the district court concluded that rules prohibiting compensation for the use of student-athletes' NILs "are thus a price-fixing agreement: recruits pay for the bundles of services provided by colleges with their labor and their NILs, but the sellers of these bundles — the colleges — collectively agree to value [NILs] at zero." Having found anti-competitive effects, the district court acknowledged two pro-competitive purposes for the NCAA's compensation rules: amateurism increased consumer demand for college sports and prevented the formation of a "wedge" between student athletes and other students. The district court then reasoned that these pro-competitive purposes could be achieved with less restrictive means than a total ban on compensation — allowing NCAA members to give scholarships up to the full cost of attendance and permitting schools to hold a portion of their licensing revenues up to $5,000 in trust.

The court concluded that deferred payments of $5,000 held in trust would not harm consumer demand for NCAA sports.[3] The court relied on testimony of (1) NCAA industry expert Neal Pilson, a television sports consultant formerly employed at CBS, who testified that he would not be troubled by payments of $5,000, (2) NCAA witness Bernard Muir, Stanford's athletic director, who acknowledged that paying student-athletes modest sums causes less concern that paying them large amounts, and (3) NCAA survey research expert J. Michael Dennis, who testified that if the NCAA restrictions on student-athlete pay were removed, the popularity of college sports would likely depend on the size of payments

awarded to student-athletes.[4] There was also evidence that the NCAA allows student-athletes who receive federal Pell grants to receive assistance in excess of the cost of attendance,[5] that Division 1 tennis recruits can preserve his amateur status if they accept $10,000 in prize money in the year before college enrollment,[6] and that the public opposed the Olympic Committee's decision to permit professional athletes to compete, yet continued to watch the Olympics at high rates.[7]

The Ninth Circuit's Decision

On Sept. 30, 2015, the Ninth Circuit affirmed the NCAA's antitrust liability but ruled that NCAA can prohibit its members from paying student-athletes anything above the cost of attendance, including small payments of deferred compensation.[8]

In reaching its decision, the Ninth Circuit concluded that the district court relied on "threadbare" evidence to find that small payments in deferred compensation are a substantially less restrictive alternative restraint than no compensation, reasoning that the court addressed the wrong question. "Instead of asking whether making small payments to student-athletes served the same procompetitive purposes as making no payments, the evidence before the court went to a different question: Would the collegiate sports market be better off if the NCAA made small payments or big payments?"[10] The Ninth Circuit concluded that there is a stark difference between finding that small payments are less harmful to the market than large payments — and finding that paying students small sums is virtually as effective in promoting amateurism as not paying them.[11]

The Ninth Circuit rejected the suggestion that Pell grants supported small payments in deferred compensation because it improperly equated compensation intended for education-related expenses with pure cash payments and noted that the fact that such grants have not eroded the NCAA's amateurism culture says little about whether deferred cash payments would do so.[12] The court also reasoned that the Olympics are not fit analogies to college sports because they "have not been nearly transformative by the introduction of professionalism as college sports would be."[13] The Ninth Circuit rejected the evidence regarding Division 1 tennis recruits, reasoning that allowing college-bound tennis players to accept award money from outside athletic events implicated amateurism differently than allowing schools to pay student-athletes.[14]

The Ninth Circuit was ultimately concerned about the floodgate implications of allowing even small amounts of deferred compensation, reasoning that "[t]he 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. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defining the stopping point."[15]

What We Can Learn

Under antitrust law, injunctive relief is intended to prevent future antitrust violations.[17] The Ninth Circuit's O'Bannon decision demonstrates the importance of thinking about alternative forms of injunctive relief for those violations and the nature and amount of substantive evidence required at trial to preserve the result on appeal. As with other things at trial, choices must be made. When multiple alternative forms of relief are offered, the court too is presented with choices about the least restrictive means to accomplish the goal of the injunctive relief. However, in the pursuit of the least restrictive means, parties and the trial courts must consider whether the proposed forms of relief all achieve the same palliative or remedial purpose. Thinking creatively and presenting various alternative injunctive remedies with supporting substantive evidence increases the odds of avoiding the waste of effort and resources pursuing remedies that won't survive and appeal.

In spite of the creativity of the remedy suggested and the strength of the evidence offered, O'Bannon highlights the degree of deference afforded the district court's determinations of fact notwithstanding

the clear error standard. It also highlights, in yet another way, the need to plan for appeal before expert reports are exchanged, long before trial begins.

(Perhaps considering the adequacy of the proof, and the standard of review, the court ordered defendant-appellant NCAA to respond to plaintiff-appellee O'Bannon's petition for rehearing en banc. As of this writing, that petition remains under submission.)

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DISCLOSURE: David Martinez was counsel for one of the amici in the appeal. Michael Geibelson is counsel for a third party in a related action.

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[1] 2015 U.S. App. LEXIS 17193 (9th Cir. September 30, 2015)

[2] 7 F. Supp.3d 955 (N.D. Cal. 2014).

[3] Id. at 983, 984.

[4] Id. at 983.

[5] Id. at 974.

[6] Id. at 1000.

[7] Id. at 976-977.

[8] 2015 U.S. App. LEXIS 17193 (9th Cir. September 30, 2015). On October 14, 2015, Plaintiffs filed a Petition for Rehearing En Banc with the Ninth Circuit.

[9] Id. at *81, n. 23 (italics in original).

[10] Id. at *76-77.

[11] Id. at *77.

[12] Id. at *82.

[13] Id. at *78.

[14] Id. at *78, n. 21.

[15] Id. at *81-82.

[16] Id. at *82.

[17] United States v. Oregon State Med. Soc'y, 343 U.S. 326, 333 (1952)(Sherman Act case)("All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur.")