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NCAA Asks Justices To Review O'Bannon Student Pay Ruling

By **Zachary Zagger**

Law360, New York (May 13, 2016, 9:21 PM ET) -- The NCAA on Friday asked the Supreme Court to review the Ninth Circuit's landmark decision finding the collegiate athletics governing body's rules prohibiting student-athletes from being paid to be anti-competitive, thereby allowing them to be compensated up to the full cost of attendance.

The NCAA filed a petition for writ of certiorari for review arguing the Ninth Circuit decision, which partially overturned a 2014 district court ruling, was a mistake, characterizing itself as a "joint venture" that can set its own rules in order to operate and arguing that the First Amendment does not support the other publicity rights claims brought by the former student-athlete plaintiffs led by former UCLA basketball player Ed O'Bannon Jr.

"Like other joint ventures seeking to define their product, the NCAA was entitled to exercise its judgment in establishing expense-reimbursement rules to maintain amateurism," the NCAA said in its petition. "Under this Court's decisions, such judgments violate antitrust law only if they produce a restraint not reasonably related to its pro-competitive justifications. That standard was not met here."

In a narrow, split decision in September, [a Ninth Circuit panel ruled](#) that the NCAA was "not above the antitrust laws" upholding part of a 2014 district court decision that found the organization's long-standing amateurism rules banning compensation for student-athletes were anti-competitive.

However, the panel also rejected part of the lower court order that would have allowed college athletes to receive deferred licensing payments from schools for the use of their name, image or likeness, capped at no lower than \$5,000 per year. Instead, the panel said that schools could provide student-athletes with scholarship packages up to to the full cost of attendance — typically a few thousand dollars more than prior scholarships.

"That micromanagement was improper; it was not for the court to determine which expenses must be reimbursed, and certainly not for the court to deem the NCAA an antitrust violator just because it did not

allow reimbursement of every last one of those expenses,” the NCAA argued in its petition. “The Ninth Circuit’s ruling jeopardizes the vitality of not only the NCAA and other amateur sports leagues, but also joint ventures more generally.”

The NCAA pointed to the [U.S. Supreme Court](#)'s 1984 decision in *NCAA v. Board of Regents of the University of Oklahoma*, which it says supports its amateurism rules as pro-competitive.

“In short, we are asking the Supreme Court to reaffirm its antitrust holding in the Board of Regents case, endorse the 9th Circuit’s affirmation of amateurism, and define the appropriate scope of the First Amendment,” NCAA chief legal officer Donald Remy said in a statement Friday. “We believe the Supreme Court can conduct this review properly and dictate the appropriate tests by accepting the questions we have presented and rejecting those presented by O’Bannon.”

The Ninth Circuit’s decision was [widely seen as a win for the NCAA](#) as the so-called “Power 5” athletic conferences — the ACC, Big Ten, Big 12, [Pac-12](#) and [SEC](#) — had already decided to allow the full-cost-of-attendance scholarships and it struck down the part of the district court ruling that would have allowed the deferred name, image and likeness payments.

However, the Ninth Circuit panel did find that the NCAA had violated the Sherman Act, absolving it only after finding “amateurism” serves pro-competitive purposes of “integrating academics with athletics” and “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism.”

The NCAA argued that, in addition to facing a [\\$42 million attorneys fee award](#), the decision’s reasoning could be used as a launching pad for other cases challenging its rules citing the current so-called Grant-In-Aid litigation, which is before the same district court judge who issued the initial O’Bannon decision.

The NCAA said that “a court following the Ninth Circuit’s reasoning here might find merit in a host of challenges that other courts have properly rejected, including a challenge to academic-eligibility requirements, or a challenge to the rules preventing students-athletes from securing agents in anticipation of entering a professional draft.”

“The NCAA should not have to undergo a full trial (and years of litigation) or face treble damages whenever a plaintiff or counsel hits on a supposedly better way to administer college athletics,” it argued.

The former student-athlete plaintiffs [have also asked](#) the Supreme Court to review the case arguing that the Ninth Circuit “embraced the tautology proposed by the NCAA” that “amateurism justifies the nonpayment of college athletes because ‘not paying student athletes is precisely what makes them amateurs,’ ” quoting the Ninth Circuit panel opinion.

In a separate filing Friday, the NCAA opposed that petition arguing that the “pro-competitive benefit, the Ninth Circuit rightly concluded here, would be lost if players were no longer amateurs, as the NCAA would transition from its ‘particular brand of [college sports]’ to minor league status.”

The NCAA’s petition comes after Justice Anthony Kennedy granted its [request last month for more time](#) to file extending the deadline to Friday. The Ninth Circuit in December [declined to rehear the case en banc](#) after a request from the plaintiffs.

Counsel for the former student-athletes did not immediately respond to a request for comment Friday.

The NCAA is represented by Seth P. Waxman, Leon Greenfield, Daniel S. Volckok, David M. Lehn, Matthew Guarnieri, Ari J. Savitzky of [WilmerHale](#) and Dorr LLP, Glenn D. Pomerantz, Kelly M. Klaus of [Munger, Tolles & Olson LLP](#) and Gregory L. Curtner and Robert J. Wierenga of [Schiff Hardin LLP](#).

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 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 Jeff Zalesin, Matthew Perlman and Melissa Lipman. Editing by Patricia K. Cole.

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Case Number

[14-16601](#)

Court

Appellate - 9th Circuit

Nature of Suit

3410 Antitrust

Date Filed

August 21, 2014

Case Title

[Edward O'Bannon, Jr. v. NCAA, et al](#)

Case Number

[14-17068](#)

Court

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