

NCAA weighs risky court filing that could shape organization's future

By LESTER MUNSON via ESPN

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NCAA leaders are facing a potentially historic decision this week that could either lead to the preservation of the organization's idea of athletic amateurism or radically transform college sports into the pay-for-play system that the NCAA has fought for decades.

The decision looming for NCAA president Mark Emmert and his top lawyer, Donald Remy, results from the ongoing court case that first pit former UCLA basketball star Ed O'Bannon against the NCAA in 2014. O'Bannon won the initial court decision when a federal judge ruled that the NCAA violated antitrust laws because it restricted benefits to college athletes beyond providing them scholarships.

Remy and the NCAA appealed, though, to the U.S. Court of Appeals for the Ninth Circuit, **which gave the NCAA a bittersweet victory**: Its schools didn't actually have to pay athletes \$5,000 each, as the initial court decision required, but the NCAA remained in violation of antitrust laws.



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O'Bannon and his lawyers pushed forward and asked the U.S. **Supreme Court** in March to consider reinstating the cash payments to athletes. That request pushed Emmert, Remy and the NCAA into a dicey position, which will lead to a critical court filing on Friday:

Should the NCAA accept the Court of Appeals decision, grateful that its schools will not be paying \$5,000 per season to athletes but, in accepting the decision, actually end up acknowledging that its rules violate antitrust laws? If so, the NCAA could be subject to court scrutiny on all rules it enacts that regulate college athletics. If that's



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the approach the NCAA wants to take, its legal team will file a court brief Friday resisting the O'Bannon request for a Supreme Court review.

Or should the NCAA fight the Court of Appeals decision and join O'Bannon in seeking a final and conclusive ruling from the Supreme Court but one that makes the organization immune to antitrust attacks from athletes? The risk for the NCAA in this option revolves around the fact that if the Supreme Court were to rule in favor of O'Bannon, the court could decide the NCAA must pay players an unlimited amount of money. If the NCAA lawyers, though, want to roll the dice and seek a final ruling, they would file on Friday a petition asking for the court to take the case.

The decision has not been an easy one for the NCAA leadership. Since Remy took over as the NCAA's top lawyer in January 2011, he has been timely, decisive and effective in defending a mass of litigation filed by current and former athletes against the organization. Remy and the law firms he hires have rarely asked for extensions on deadlines for filing long and complex briefs. But for this decision, Remy has twice asked Supreme Court Justice [Anthony Kennedy](#) for extra time to decide whether to appeal the decision. Kennedy granted both requests. The second extension expires Friday.

The extra time gave Remy and his lawyers a chance to ponder the risks they face.

The O'Bannon decision, described as "momentous" by the Ninth Circuit, was the result of "the first trial ever devoted to amateurism in college sports," according to Rutgers Law School professor Michael A. Carrier, an expert on antitrust litigation who has authored three major law review articles on these issues. In 15 days of trial in 2014 before U.S. District Judge Claudia Wilken, two dozen witnesses testified, producing thousands of pages of dense and occasionally difficult descriptions of the economics of college sports.

Although antitrust laws had previously been applied to NCAA attempts to govern the televising of college football and to set a salary cap for assistant basketball coaches, the O'Bannon decision marked the first time antitrust rules were applied to athletes.

Few petitions to the Supreme Court are granted each year, but the notion of athletic amateurism could be of such sufficient importance that justices accept it as one of the 60 to 70 they decide annually. Only four votes from the current eight justices are needed to accept the case. In addition to examining amateurism, the Supreme Court might decide to take the case because of a legal doctrine called the Rule of Reason. The Ninth Circuit made its decision under a bizarre use of this doctrine, which is a highly important one that affects large segments of the American economy.

The doctrine requires a four-step analysis of any rule that restricts market freedoms.

The first step is to determine whether there is a restriction that limits competition. The NCAA's ban on cash payments to athletes obviously restricts competition, preventing schools from offering players money in recruiting. The second step requires the NCAA to offer a justification for the restriction. The NCAA's justification is its commitment to amateurism and its argument that amateurism is responsible for the popularity of college football and men's basketball. The third step requires O'Bannon to prove that the ban on pay is not reasonably necessary. And the final step is a balancing of the effects of amateurism and leads to a determination of whether the ban on pay is a legal restriction.

Most experts who have studied the Ninth Circuit's O'Bannon ruling agree that the court swung and missed on the fourth step -- the balancing of the good and bad effects of the NCAA's principle of amateurism.

Carrier, the Rutgers professor who has studied 700 Rule of Reason cases and is a leading authority on the doctrine, believes the Ninth Circuit "completely ignored the balancing stage" of the required analysis. In a recent article in the University of Michigan Law Review analyzing the O'Bannon decision, he concluded that the "Ninth Circuit's omission of the balancing stage prevents the consideration of the anticompetitive (bad) and procompetitive (good) effects at the heart of the matter."

If Carrier is correct, it might open the door to Supreme Court consideration.

The attorney representing O'Bannon in his petition to the Supreme Court, Jonathan Massey, focused his effort on the failure to complete the fourth step of the process. In a masterful petition, Massey explained that instead of balancing the good and bad effects of amateurism, the Ninth Circuit justified the nonpayment of athletes by saying that not paying them is what makes them amateurs. As Massey observed, the Ninth Circuit's attempt at reasoning resulted in a "tautology," a meaningless repetition of an idea instead of a use of logic.

Remy has been aggressive and steadfast in his defense of amateurism in the five years of the O'Bannon litigation and in similar antitrust attacks on the NCAA. It would not be a big surprise if the NCAA and Remy decided on the high-risk alternative in their filing Friday by seeking a Supreme Court decision that could exempt the NCAA from further antitrust scrutiny. But it would also not be a surprise if the NCAA suggested to the high court that it refuse to consider the O'Bannon petition and instead consider only the NCAA's petition instead.