BIG STAKES ANTITRUST TRIALS: *O'BANNON V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION*

By David W. Kesselman[1]

I. INTRODUCTION

In June 2014, U.S. District Judge Claudia Wilken presided over a three-week bench trial in the high-profile antitrust class action filed by former and present Division I college basketball and football players against the National Collegiate Athletic Association ("NCAA").[2] In this rare rule of reason trial, Judge Wilken was asked to determine whether the NCAA rules that prohibit basketball and football players from receiving compensation for the use of their names, images and likeness ("NIL"), constituted an unreasonable restraint of trade under Section 1 of the Sherman Act.

In a case of first impression, Judge Wilken ruled in late September 2014 that the NCAA's so-called amateurism rules banning compensation beyond the value of a full grant-in-aid scholarship were anticompetitive. Rejecting the NCAA's position that prior Supreme Court precedent should be read to afford it immunity from antitrust scrutiny in this context, Judge Wilken balanced the student-athletes' evidence of anticompetitive effects with the NCAA's proffer of procompetitive justifications, and determined that the NCAA's rules were more restrictive than necessary. In a decision spanning almost 100 pages, Judge Wilken fashioned an injunction requiring the NCAA to refrain from: (1) agreeing to set a cap on payment to student athletes below the cost of attendance; and (2) prohibiting NCAA member schools from depositing a limited share of licensing revenue in trust up to $5,000 per year for each year the student-athlete remained academically eligible to compete.[3] The NCAA appealed Judge Wilken's ruling in full.

On September 30, 2015, the Ninth Circuit Court of Appeal ("Ninth Circuit") issued its ruling, affirming in part and denying in part Judge Wilken's ruling.[4] The Ninth Circuit affirmed that: the NCAA's amateurism rules were not entitled to blanket antitrust immunity, and that the District Court had properly balanced the anticompetitive effects and procompetitive justifications and determined that the NCAA's rules on student aid were overly restrictive and violated the Sherman Act. However, while the Ninth Circuit endorsed that portion of the injunction that limited caps on the cost of attendance, the panel, in a split decision, reversed that portion of the order allowing schools to set aside up to $5,000 per year beyond the cost of attendance.[5]

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1 David W. Kesselman is a founding partner of Kesselman Brantly Stockinger LLP in Los Angeles, where he specializes in antitrust and unfair competition law. He also serves as an adjunct professor of antitrust law at Loyola Law School. He introduced the panelists for the discussion that took place at the State Bar of California Antitrust, UCL and Privacy Section's 25th Annual Golden State Antitrust and Unfair Competition Law Institute on October 29, 2015. The following excerpts of the panel discussion have been edited for publication.

2 *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

3 *Id.*

4 *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

5 After the panel discussion, which took place on October 29, 2015, the Ninth Circuit denied the student-athletes' petition for *en banc* review. The plaintiff student-athletes filed a petition for certiorari to the Supreme Court of the United States on March 14, 2016.

We are fortunate to have two outstanding antitrust lawyers who serve as counsel for the parties in this litigation:

- **Michael P. Lehmann** of Hausfeld LLP. Mr. Lehmann is a business litigation partner with particular expertise in antitrust law. He has worked on numerous class action antitrust cases, and he has particular expertise briefing complex legal issues. He is consistently listed as one of the Best Lawyers in America. He is counsel for the plaintiff student-athlete class members in the *O'Bannon v. NCAA litigation*.
- **Gregory L. Curtner** of Schiff Hardin LLP. Mr. Curtner is a partner and practice leader of the firm's antitrust and trade regulation department. He frequently serves as lead counsel in nationwide antitrust disputes and class actions for clients in a wide range of industries. He is consistently listed as one of the Best Lawyers in America. He is counsel for the defendant NCAA in the *O'Bannon v. NCAA* litigation.

Because the litigation remains active, counsel for the parties are constrained in certain aspects of their comments. To that end, the panelists have decided to separately present their views of the case and trial proceedings, rather than participate in a "back and forth" debate on the merits of the District Court's rulings. It was agreed that Mr. Lehmann would provide the background and overview of the lawsuit. Mr. Lehmann would then present the plaintiffs' view of the trial. Mr. Curtner would then follow with his own view on the trial proceedings. The actual transcript has been edited for purposes of this article.

MR. LEHMANN:

The Facts Giving Rise to the Lawsuit

The case originated in 2008 when Ed O'Bannon, who was a power forward at UCLA and one of the greatest players in UCLA basketball history, visited a friend's house. His friend's child showed Mr. O'Bannon his image in a college basketball video game produced by Electronic Arts ("EA"). Mr. O'Bannon was shocked to see that in the video game he was wearing his jersey which had been retired by UCLA, Number 31, and the avatar was his image. He said, "I hadn't authorized that. I am not getting paid for that. That's wrong."

The Early Stages of the Lawsuit

Mr. O'Bannon approached us, and we filed an antitrust suit for him and others similarly situated in July 2009, raising claims under Section 1 of the Sherman Act. His case was preceded by a second case called *Keller v. NCAA*,[6] filed in May 2009. The *Keller* case included allegations of right of publicity violations on behalf of student athletes.

As our case developed, we alleged that the NCAA, through its member schools and conferences, conspired to deny student athletes any payment for what we call their NIL, as those were used in broadcasts, rebroadcasts and video games.

Initially there was widespread pessimism that this was a case that had any legs. The NCAA relied, as it had in the past, on *dicta* from the U.S. Supreme Court decision in *NCAA*

6 The formal title of the case is *Keller v. Electronic Arts, et al.*, No. 09-1967, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

v. Board of Regents,[7] which in connection with discussing the rule of reason, referenced the connection between product and the prohibition on paying student athletes. Nonetheless, Judge Wilken rejected the NCAA's motions to dismiss over the first two years of the case and again in 2013. Discovery proceeded and the case evolved to include current students as class representatives as well.

We alleged two relevant markets: (1) the college education market in which Division I ("D1") schools competed to recruit men's football and basketball players; and (2) a group licensing market where the players would sell their group licenses to the schools for their NILs, much as athletes do in professional leagues. The District Court found both markets existed, but ruled with respect to the second market that there wasn't enough harm to competition because the student athletes didn't compete with each other across the groups.

Class Certification

In November 2013, Judge Wilken certified a class of all D1 men's basketball and football players whose NILs have been included (or could have been included by virtue of appearing on a roster) in a broadcast or video game. However, she only certified a class for injunctive relief pursuant to Federal Rule of Civil Procedure 23(b)(2). Judge Wilken denied certification of a damages class. She held that there were ascertainability issues. We did not appeal her ruling on damages.

Summary Judgment

Under the Ninth Circuit's standard in rule of reason cases, there is a three-part analysis. First, the plaintiff has the burden of identifying the relevant market and showing that there were anticompetitive effects caused by the alleged restraint in the market. Second, the burden shifts to the defense to show that there were procompetitive justifications for those restraints. Finally, if the defense meets that burden, the burden shifts back to the plaintiff to show that the concerns addressed by those justifications could be satisfied through less restrictive alternatives.

The NCAA largely conceded the anticompetitive restraint, which the court held it would review under the rule of reason. Instead, the NCAA offered a whole slew of procompetitive justifications in its motion for summary judgment, including: (1) protection of "amateurism," (2) safeguarding the education of college athletes, (3) maintaining competitive balance, (4) increasing output of college football and basketball, and (5) the need to maintain viability of other collegiate sports. The court determined that there was sufficient conflicting evidence in the record to support a trial on the first four justifications. However, the court rejected the NCAA's argument on the need to maintain viability of other sports and instead granted Plaintiffs' motion for summary judgment on that issue. The NCAA requested that the District Court certify the summary judgment ruling for interlocutory review under 28 U.S.C. § 1292(b), but the request was denied.

7 465 U.S. 85 (1984).

The Trial: Plaintiffs' Perspective

The trial, which commenced in June 2014, was a highly unusual event. There are virtually no antitrust class action cases against the NCAA that have reached trial on the merits. They are typically dealt with on the pleadings or settled. Only two cases in the last 30 years have reached trial–*NCAA v. Board of Regents*[8] and *Law v. NCAA*[9]–but those were very different situations. It was fairly unique in taking to trial a case involving the rule of reason claims presented here.

We decided shortly before the trial to waive a jury. I am not going to get into the details of that, but I think an obvious factor was that this was no longer a class action for damages. The only damages claims left were for the individual named plaintiffs. And you're talking about older players like Bill Russell, Oscar Robertson, or Ed O'Bannon, many of whom were in the sport at the time when there were no lucrative TV contracts. Their damages would be fairly minor. It was also going to be a complex case, unlike say a case involving a cartel with respect to capacitors or resistors. And people have strong attitudes towards paying athletes, and paying student athletes in general, so we would have to divorce those attitudes from the merits in any case in front of the jury. Finally, we thought that Judge Wilken would provide a full and fair hearing; not that she would rule in our favor on everything—which she didn't as reflected in the class certification decision and some of her decisions in trial—but that she would give a thoughtful reading of the evidence. So we decided to move forward with a bench trial in front of her.

The NCAA raised numerous concerns about proceeding to trial. The *Keller* case was due to go to a jury trial in 2016, and the NCAA filed motions seeking to sever the claims on video games for inclusion in the trial with *Keller*. But those efforts failed.

The trial lasted 15 days. Because it was a bench trial there were no opening statements or closing arguments. Instead, Judge Wilken asked legal questions of counsel after the close of evidence. There were 23 witnesses and 287 exhibits used at trial. Three student athletes testified.[10] An EA executive testified about the market for video games. And the parties called five expert witnesses. Judge Wilken ran an extremely tight ship. She was very involved and asked a lot of questions of the witnesses herself. For example, the Judge asked the plaintiffs' expert, Professor Roger Noll, whether the college education market was a monopoly or a monopsony—and that point was addressed in her ruling.

The trial was expert intensive. But Judge Wilken refused to allow videotape testimony. And she limited expert testimony to opinions expressed in previous written initial briefs; the parties could not rely on opinions expressed in reply briefs or deposition testimony. She declined to accept proposed findings of fact and conclusions of law from the parties—she wanted to write those herself. But the Judge did ask that the parties submit stipulated facts prior to the commencement of the trial. That did limit certain issues. For example, the NCAA conceded that its rules prohibited paying student athletes for their performance.

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8 468 U.S. 85 (1984).

9 134 F.3d 1010 (10th Cir. 1998).

10 The three athletes were Ed O'Bannon, Chase Garnham, who was a linebacker at Vanderbilt, and Tyrone Prothro, who was a wide receiver at the University of Alabama and made probably the most famous catch in the history of the NCAA football program. A month after the catch Mr. Prothro broke his leg in two places and he never played again.

Interestingly, Dr. Dan Rubinfeld, one of the defense expert witnesses, had written a textbook on microeconomics in which he conceded that the NCAA was a cartel, and that it restrained competition in a number of important ways. One of those ways was reducing bargaining power by student athletes by enforcing rules regarding eligibility in terms of compensation. We were able to use the words of their own witness on that point.

In addressing the NCAA's extensive defense of amateurism, we cited to the NCAA's own statements. For example, Myles Brand, the former president of the NCAA, said in a 2006 speech regarding the state of the association that it was necessary for the members to forget the romantic notion of amateurism and respect the fact that the athletic programs of the D1 schools had to be run in accordance with a business model. He said that, "Amateur defines the participants, not the enterprise." We were also able to introduce documents at trial where Mr. Brand raised whether it might not be a bad idea to share some royalties on jerseys and other products that use the amateur athlete's NIL with the student. We were also able to point to the statements of David Berst, vice president of the NCAA, who said in 2008 that the notion of amateurism was not steeped in some revered tradition and it had changed over time. Similarly, a 2010 memo written by an advisor to the NCAA president had noted that college sports were as thoroughly commercialized as professional sports, and all the money that is obtained is done at the expense of the student athletes, whose participation is exploited to make another buck for a bigger stadium, the coaches, or the administrators. He called this the great hypocrisy of intercollegiate athletics.

The NCAA presented survey evidence that if student athletes were paid it would impact consumer demand. We put on an expert witness who testified that the survey was entirely flawed, asked the wrong questions, and didn't deal with the issue of compensation for use of NIL, especially on a deferred basis.

The Liability Ruling

In the end, Judge Wilken found that the NCAA's restrictions did not promote competitive balance. She based this upon internal NCAA memos that contradicted their defense, and noted that schools were spending money on other recruiting incentives, including coaches (Nick Saban received an annual salary of $7 million at Alabama) and opulent training facilities. And while there was some suggestion that certain colleges might drop out of fielding D1 football or basketball teams if the rules were set aside, the NCAA's own witnesses said that was not likely to happen.

The Remedy

It was interesting how the remedy developed. We had initially proposed a form of injunction prohibiting the NCAA members from agreeing to any rule not to pay class members. We didn't put a number on it. We said the market would decide that. But the court wanted more alternatives, so on June 27, near the end of the trial, we proposed (1) a payment of an undefined amount to an escrow account that the athlete could access after graduation, and (2) payments that they could obtain up to the full amount of attendance. Those were the two options that Judge Wilken adopted, with modifications.

As discussed earlier, the Judge allowed, as one less restrictive alternative, the payment of up to a full cost of attendance for each year of attendance by student athletes. She also ruled that a capped amount of money could be held in trust for the athlete to access after college.

She set the cap on deferred money at $5,000 based upon testimony of some of the NCAA's own witnesses.

The Ninth Circuit's recent ruling reversed the remedy allowing payment of $5,000 because it held that those cash payments were untethered to education expenses. Chief Judge Thomas dissented and said that the Ninth Circuit should not have second guessed Judge Wilken in this respect.

MR. GREG CURTNER:

I should note at the outset that I was lead defense counsel in *O'Bannon* for the first five years but was not lead counsel at trial. I am not here today representing the NCAA, and I am not speaking on behalf of the NCAA.

The Rule of Reason

I want to talk about the rule of reason because that's the interesting aspect of this. We are all interested in *O'Bannon* for the concept of paying student athletes, but I am going to try to stay away from the newspaper version of the case.

There is a jury instruction on the rule of reason. There's also a standard instruction in the Eleventh Circuit. It is basically a balancing test, weigh all the factors, including the history, and it is taken from a number of Supreme Court decisions trying to discuss what the rule of reason means. I think we can all agree that it is a bunch of soft concepts that would be very hard for judges or juries to apply. Over the years, various commentators have tried to make it a little more understandable and a little more applicable in a more or less objective way. But while everybody agrees that there is a balancing test or a weighing of the alternatives, I don't think there's much agreement to what that means.

I think Judge Wilken and the Ninth Circuit more or less applied the rule of reason as a burden shifting test: Was there a restraint in a proper market? Did it have anticompetitive effects? If yes, then was there a justification or justifications for the restraint, and what were the competitive effects of the justifications? Having answered yes to both of those questions, the District Court and the Ninth Circuit went to the third question: Was there a less restrictive alternative identified? And having answered yes, they proceeded to a remedy.

It seems to me that in applying the rule of reason you should apply a balancing test. Were the adverse effects, netted out, greater than or worse for competition as a whole than the competitive effects of the justifications, if netted out. I say "netted out" because both the restraint and the justifications may have both positive and negative effects on competition, so it seems to me you need to net them out and then you have to weigh them. And only if the substantial anticompetitive effects outweigh the procompetitive effects, should you then proceed to the less restrictive alternative test.

Application of the Rule of Reason to *O'Bannon*

Let's look at the *O'Bannon* case. What were the constraints in question? Let's try to apply the rule of reason as it was applied by the court, and then as I think it should be applied.

Really the case boiled down to two different restraints. One was the way the case started out. And, as Michael alluded, the case evolved considerably over its five years before trial and

continued to evolve even up to the end of trial. The original version of the case brought by Mr. O'Bannon and some other notables was that they were restrained by NCAA rules from being able to sell and license their NIL in output markets and licensing endorsements. It turned out that wasn't true. Judge Wilken found it wasn't true. Student athletes are not restrained from selling their images and asserting their rights for publicity after they leave school. Many of them do successfully, including Mr. O'Bannon.

Over time the case evolved. And originally the plaintiffs said they were not challenging the amateurism rules of the NCAA, which were upheld by the Supreme Court in what they argued was *dicta* in the *Board of Regents* case. By the time they got to trial, they were challenging the amateurism rules.

Judge Wilken allowed the addition of new plaintiffs who were current student athletes so they would have standing to challenge the rules relating to compensation of current student athletes. The rules about restraints after people are out of school really fell by the wayside. As it went to trial, the restraint of trade issue evolved to whether student athletes be paid as a group for their NIL while they were in school participating under NCAA rules as amateurs. Judge Wilken found it made no sense to talk about individual NIL licenses but only group licenses.

So that is the restraint. There is no doubt the rules did not allow that kind of licensing. It did not allow them to be paid while they were in school—even though there was no such rule expressly on the books.

The allowable forms of aid were limited to a grant-in-aid, which was defined as tuition, room and board, books, and necessary expenses. Over the course of the case this was amended—and that led to the second restraint, which was the limitation on compensation or support to student athletes while they were in school to a grant-in-aid, which was later modified to cost of attendance. And the cost of attendance rule was considered actually before this case came along, and it is now the rule that schools are free to offer cost of attendance if they want.

In short, the anticompetitive effects from the NCAA rules at issue were identified as: (1) no payments due to the inability to enter into group NIL licenses; and (2) no payments due to the failure to pay greater than grant-in-aid allowances. Being smart antitrust lawyers, you know that the restraint and the effects of those restraints look remarkably the same. In fact, that's largely what was found by the trial judge and by the Ninth Circuit: that the rules were anticompetitive, that the student athletes were not allowed to get paid for their NIL and it was anticompetitive for them not to get full cost of attendance or anything more. Those were the anticompetitive effects. But there was no finding of anticompetitive effects other than the lack of compensation.

And this led to one of the issues at trial. Dr. Lauren Stiroh, an NCAA expert from NERA, testified that the plaintiff needed to prove substantial anticompetitive effects, and in order to do so, they had to show some output or other price effects in a downstream market and that simply showing that some money didn't get paid to a student athlete or a group of student athletes kind of begged the question. You didn't know if that was an anticompetitive effect or not without examining its effects on the market. But Judge Wilken rejected that argument.

The NCAA argued that you needed to show some adverse effects in downstream markets or at least in input markets, and that Plaintiffs failed to do so. That the plaintiffs, in effect, were applying a form of a *per se* rule rather than a rule of reason. That issue remains an interesting one. I am not sure we're going to get an answer out of this case, but I think it is going to get litigated further. The issue is really whether the failure to pay more money to a group—to a labor input in this case—is itself anticompetitive and whether you have to look at the actual competitive effects on the market.

Moving on to the procompetitive effects, the NCAA asserted that the rules at issue were needed to preserve amateurism and the integration of athletics into education. Judge Wilken found that there was evidence to support those justifications. The Judge allowed the NCAA to address competitive balance at trial, but decided that the NCAA had not established it as a procompetitive justification. The NCAA also argued that the rules in question expanded output in both the input and output downstream markets and also allowed the maintenance of other sports, including Olympic sports and women's sports. Judge Wilken ruled that the other sports justification was not cognizable at all under the Supreme Court's decision in *Professional Engineers*[11] and other cases, and she wouldn't consider that, but would consider output in general.

The weigh and balancing aspect of the rule of reason is well-established in the case law. I want to speak to some of the broad trends because *O'Bannon* is not on its own. In particular, I want to draw your attention to the *Marshall v. ESPN* case,[12] which came out of Tennessee and is now pending in the Sixth Circuit. It is almost a carbon copy of *O'Bannon*, although the NCAA itself was not named as a defendant. The NCAA conferences and the networks were named. The District Court in *Marshall* reached the opposite conclusion from what Judge Wilken decided, and held that these rights of publicity were not valid under any law, certainly not under Tennessee law, and that he didn't think they had much value. The *Marshall* judge gave the Supreme Court's decision in *Board of Regents* greater weight, and he gave amateurism greater weight. So it is possible, after the Sixth Circuit considers the case, we may have a split of authority on these issues. Stay tuned.[13]

The Use of Experts at Trial

Rule of reason antitrust cases are, of course, expert specific. The NCAA put up at least four experts. I want to talk about them a bit.

Dr. Dennis did a survey. He's very reputable in his field and his survey was very well done. Judge Wilken gave it very little weight and found it not credible because he asked about paying student athletes in amounts of $20,000, $50,000 or $100,000, and the Judge thought he should have asked about $5,000. So she concluded that since he did not ask that

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11 *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679 (1978).

12 *Marshall v. ESPN Inc.*, No. 3:14-019945, 2015 WL 3606645 (M.D. Tenn. June 8, 2015).

13 One other interesting issue that is making its way through the courts is the role of copyright law on these claims for right of publicity or NIL rights. This is an issue because with live sporting events that are broadcast on TV, somebody has a copyright, sometimes there are several copyrights, and those copyrights in many cases arguably trump these rights of publicity. The Ninth Circuit did not think it needed to reach the issue in *O'Bannon*. Judge Wilken didn't reach that issue. But I think it is a trend in the case law that will have to get resolved at some point.

question, it would have meant that $5,000 would not adversely impact consumer views or demand. But Dr. Dennis found that people were consistently opposed to paying student athletes. And his results were completely consistent with at least five other public opinion polls done by a variety of folks over the years. And there are others out there, and all of them come to the same conclusion: about two-thirds of Americans are opposed to paying student-athletes. He also tried to examine effects of paying different amounts to different student-athletes based upon whether the stars did better than the bench players, if some schools could pay a lot more than other schools, and what the effects of that might be on demand for the product. Those are very, very difficult things to measure and to examine. Judge Wilken found the evidence to be less than persuasive on that, even though the plaintiffs did not have a competing expert.

Dr. Rubinfeld, who is a well-known economist, examined the question of amateurism and found that while the NCAA's definition had not been the same over 50 or 70 years, it had varied a little bit, that its definition was very similar to other sporting organizations. He found the same survey evidence was that the public opposed paying student athletes, which translates into demand for the product. Of course, if people don't like the way your product is produced and the character of your product, they are going to stay at home. He also tried to look at the question of competitive balance. Commentators in a number of cases have found that competitive balance is a legitimate goal in sports to some degree. Dr. Rubinfeld tried to show that the results on the field did not correlate very well with the amount of money the school had.

Dr. Jim Heckman, who won a Nobel Prize in economics, also testified as to data showing the effects of being an athlete and outcomes in life across a wide variety of groups. He found very persuasively that being a student-athlete: got you into college earlier, kept you in longer, graduated at a higher rate, gave you a better job out of college, and made you earn more money five years later. That was true across demographic groups. Nobody quibbled with that. Judge Wilken considered it and concluded that it was not sufficiently tied to the question of paying this incremental amount between grant-in-aid and the cost of attendance, or the incremental amount for NIL, and therefore it was irrelevant.

The NCAA In Perspective

I do want to try to put some of this into perspective. Everyone who talks about these issues from the plaintiffs' side always refers to the multibillion dollar revenue streams of the NCAA or the conferences or the schools, but what they don't talk about is where the money goes. The big picture is that the NCAA and its over 1,200 member institutions spend about $13 billion a year on their athletic programs. A significant portion of that is on education for student athletes. Their net revenue is less than $7 million a year. They spend almost $7 billion a year to put on these athletic programs. It is true that a few of the schools make some money on it. But all in, they are losing a lot of money. You can ask yourself why they do that. The answer is they think it is good for education.