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NCAA Ruling Clears Path For More Antitrust, Labor Brawls

By **Erin Coe**

Law360, San Diego (August 11, 2014, 11:22 PM ET) -- A California federal judge's ruling Friday that the National Collegiate Athletic Association's ban on paying elite football and men's basketball players broke antitrust laws could incite anti-competition suits from other divisions and sports teams in the NCAA, as well as labor fights over athletes seeking to unionize, experts say.

U.S. District Judge Claudia Wilken determined that the college athletics organization's amateurism rules barring compensation for the use of players' names, images and likenesses unreasonably restrained trade in the market for certain educational and athletic opportunities offered by Football Bowl Subdivision and Division I basketball schools, and she barred the NCAA from continuing to impose the rules.

"Courts have historically given deference when amateur athletics are involved, but over the last number of years, a series of decisions have given less deference to the goal of amateur athletics and applied a more traditional antitrust analysis," said Stephen Kastenberg, a partner at Ballard Spahr LLP. "This decision is another step in that direction … and it's a case of widespread significance involving pay for college athletes."

The ruling marked a setback for the NCAA, which was accused in the class action of illegally depriving student-athletes of the billions of dollars made by licensing their names and likenesses for television broadcasts, video games and merchandise. But the organization has vowed to appeal the judgment.

If the decision remains intact, it could lead to other antitrust challenges to athlete compensation rules, including broader challenges to the NCAA's prohibition on paying athletes as well as narrow compensation-related claims under the rule of reason, according to Russell Steinthal, a partner at Axinn Veltrop & Harkrider LLP. The rule of reason, which is violated if a restraint's harm to competition outweighs its pro-competitive effects, was used in the current case to challenge the names and likenesses issue.

"Once you start to attack the rationale that restrictions that are challenged here didn't substantially advance competitive balance goals, it opens the door to future cases that attack other restrictions on compensation for student-athletes that are not just limited to the rights for names and likenesses," he said. "The fact that the NCAA couldn't successfully defend its restrictions in this core area doesn't bode well for how it will deal with future cases down the road."

For instance, if women's basketball players or Division II sports teams bring litigation over pay

restrictions, they would be in a better position in light of this ruling, according to Steinthal. However, there is no guarantee that they would win similar compensation for the use of their names, images and likenesses, he cautioned.

“I don’t know if there is as much interest by video game companies or TV networks for licensing the names and images of women’s basketball players or men’s golf athletes,” he said. “This case recognized that video game companies and TV networks would pay for the rights of the names and images of players on football and men’s basketball teams at Division I schools, but I don’t know if that fact would exist for Division II schools.”

The court’s finding that student-athletes are providers of athletic services appears to justify a decision by a National Labor Relations Board director in March that**concluded** Northwestern University football players receiving scholarships are “employees” within the meaning of federal labor law and may unionize, according to Joel Chefitz, co-chair of McDermott Will & Emery LLP’s Chicago antitrust practice.

“If the decision stands, we are going to see plenty of litigation before this all sorts out ... and we’ll see antitrust and labor cases going hand in hand,” he said.

The decision also could spur challenges under Title IX, which bars sex discrimination in athletics programs that receive federal funding.

“That could be the next big issue in these cases, since the ruling could open up larger ‘scholarship’ opportunities for men than women athletes, raising the specter of unequal treatment under Title IX,” said Crowell & Moring LLP partner Jason Murray.

Still, the NCAA could have grounds on which to successfully appeal the ruling, according to Chefitz.

In the ruling Friday, the judge recommended that NCAA member colleges increase their scholarships and stipends to cover college athletes’ full cost of attending school. She also told them they could collect revenue from the use of players’ likenesses and hold it in trust for players until they've graduated, as long as that money is limited, distributed equally and based on licensing rather than individual athletic performance.

However, Judge Wilken rejected the plaintiffs’ suggestion that they could earn money from endorsing products, finding that doing so would undermine efforts to protect against the commercial exploitation of student-athletes.

The decision seems inconsistent with the U.S. Supreme Court’s 1984 decision in NCAA v. Board of Regents. In that case, the high court invalidated the NCAA’s limitations on college football television programming but said rules that student-athletes can’t get money for playing sports were justifiable, according to Chefitz.

“Judge Wilken is viewing amateurism as a means toward a competitive balance or consumer interest rather than viewing the amateur status of a student-athlete as a legitimate goal in and of itself,” Chefitz said. “But the Supreme Court has already viewed amateur status as a legitimate goal and pro-competitive.”

Chefitz says Judge Wilken’s remedy, which includes directing the NCAA to let schools set up trusts and pay about $5,000 per player annually in licensing revenue after graduation, is unusual because most

Article III judges don't tend to go into that level of detail in a ruling.

"Viewing amateurism as a means to an end is a critical flaw in the opinion, and it led the judge in turn to devise a remedy that reads more like an agency regulation than a judicial opinion," he said. "I expect the nature of the remedy to be a major issue on appeal."

An appeal is not guaranteed, however, as the NCAA might want to avoid a drawn-out fight, according to Chefitz.

"The judge has given the NCAA a hard-and-fast remedy of $5,000 per student per year that [its member schools] could easily afford," he said. "It might view this as a relatively painless remedy."

Division I schools that are already paying big money for coaching salaries, marketing, stadium renovations and overall investment in their athletics programs aren't likely to have a problem setting up the trusts for football and men's basketball players, and they are going to be encouraged to do so if their competitors are compensating players, according to Steinthal.

The ruling may prompt major universities participating in the NCAA to ask Congress for an antitrust exemption to blunt the effect of the decision, according to Chefitz. However, legislative exemptions can lead to unintended consequences and be a poor substitute for the proper development of antitrust law, he said.

"In the sports area alone, we have exemptions for some but not all of the business of baseball but not of other pro sports; we have an exemption for league packages on over-the-air TV but not over cable — a distinction that once mattered but no longer does," he said. "Instead of an overarching legal principle that might govern different situations, a legislative approach might require micromanaging each situation."

--Additional reporting by Beth Winegarner. Editing by Kat Laskowski.
