O'Bannon v. Nat'l Collegiate Athletic Ass'n
7 F. Supp. 3d 955 (N.D. Cal. 2014)

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BACKGROUND

Defendant, the National Collegiate Athletic Association (NCAA), is a non-profit association that regulates the athletes and athletic programs of its member schools. Among its regulations is a set of rules that bar student-athletes from receiving a share of the revenue the NCAA and its member schools generate from selling licenses to use student-athletes' names, images, and likenesses. The Plaintiffs are twenty current and former student-athletes who compete or have competed in Football Bowl Subdivision (FBS) men's football teams or Division I basketball teams between 1956 and the present. The Plaintiffs represent a class whose names, likenesses, and/or images may be, or have been, used in game footage or videogames licensed or sold by the NCAA, its co-conspirators, or its licensees.

The Plaintiffs alleged that the NCAA conspired with Electronic Arts, Inc. (EA), a videogame developer, and Collegiate Licensing Company (CLC), a licensing company, to fix the amount current and former student-athletes are paid for their rights of publicity[1] at zero dollars. The Plaintiffs identified two markets in which they alleged the NCAA's price-fixing conspiracy operates to restrain competition for the commercial use of the players' names, images, and likenesses in violation of § 1 of the Sherman Act: (1) the "college education" market, where Division I colleges and universities compete to recruit the best student-athletes to play football and basketball; and (2) the "group licensing" market, where broadcasters and videogame developers compete for group licenses to use the names, images, and likenesses of all student-athletes in live broadcasts, archival footage, and videogames. Although the NCAA conceded that the rules were enacted and enforced pursuant to an agreement among its Division I member schools, it argued that its restrictions do not unreasonably restrain trade. In its defense, the NCAA offered four procompetitive justifications for its restrictions: (1) to preserve amateurism; (2) to maintain a competitive balance among the schools and to protect the popularity of collegiate sports; (3) to maintain the integration of academics and athletics;

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1. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014) (stating that the right of publicity elements at issue pertained to the student-athlete's "names, images, and likenesses").

and (4) to increase the output of its products.

PROCEDURAL HISTORY

In 2009, named Plaintiff Edward O'Bannon, a former student-athlete at the University of California Los Angeles, initiated this action challenging the NCAA's rules restricting compensation for elite men's football and basketball recruits as being anticompetitive and in violation of the Sherman Act. In September of 2013, the Plaintiffs reached a settlement with EA and CLC for all pending antitrust and right of publicity claims. In November of 2013, the Plaintiffs' class was certified, and the U.S. District Court for the Northern District of California heard the remaining antitrust issue against the NCAA.

ISSUE

Pursuant to § 1 of the Sherman Act, are the NCAA rules prohibiting member schools from offering FBS football or Division I basketball recruits a share of the group-licensing revenues generated from the use of their names, images, and likenesses anticompetitive?

DECISION

The district court found that the NCAA rules prohibiting student-athletes from receiving any compensation for the use of their names, likenesses, and/or images, unreasonably restrain price competition in the college education market where FBS football and Division I basketball schools compete in offering a unique combination of educational and athletic opportunities to elite recruits. Additionally, the court held that the NCAA rules unreasonably restrain trade in the market where FBS football and Division I basketball schools compete to acquire the recruits' athletic services and licensing rights. In rendering its decision, the court also issued an injunction, which forbid the NCAA from enforcing a rule that prohibits students-athletes in FBS football or Division I programs from receiving a limited share in the group-licensing revenue generated by the NCAA and its member schools from the use of the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage in addition to full grant-in-aid.[2]

REASONING

Under 15 U.S.C. § 1, the Sherman Act makes illegal any contract, combination, or conspiracy to restrain trade in interstate commerce. In order to prevail on a § 1 claim, a plaintiff must show three threshold requirements: (1) the existence of a contract, combination, or conspiracy;

2. *Id.* at 1007–08 (stating that the injunction will not take effect until the start of the next FBS football and Division I basketball recruiting cycle).

(2) that the agreement unreasonably restrained trained either under the *per se* rule or the rule of reason analysis; and (3) that the restraint affected interstate commerce. In this case, because the NCAA conceded the first two requirements, the only question before the court was whether the challenged rules unreasonably restrain trade. In making this determination, the court applied a rule of reason analysis. "A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects."[3] To resolve this dispute, courts rely on a burden-shifting framework under which the plaintiff bears the initial burden in showing that the restraint produces significant anticompetitive effects within a relevant market. The burden then shifts to the defendant to present evidence of procompetitive effects. If the defendant satisfies this requirement, the burden shifts back to the plaintiff to show that the defendant's objectives can be achieved through substantially less restrictive means.

I. ANTICOMPETITIVE EFFECTS IN THE RELEVANT MARKETS

Under its initial burden, the Plaintiffs addressed two relevant markets in which they alleged the NCAA rule preventing student-athletes from receiving shares of the revenues generated from the use of student-athletes' names, images, and likenesses unreasonably restrained trade: (1) the "college education market," and (2) the "group licensing market."[4]

Analyzing the "college education market," the court found sufficient evidence to establish the existence of a national market in which NCAA Division I schools compete to sell a unique combination of educational and athletic opportunities. The "buyers" in this market are the elite athletic recruits who, in exchange for an offered bundle of goods, provide the schools with their athletic services and an exclusive right to use their names, images, and likenesses while enrolled. Finding no viable substitute for this market, the court determined that because these schools are the only suppliers of the unique goods, they have the power, when acting in concert through the NCAA, to fix the prices of their products.

Despite the NCAA's argument that scholarships drastically reduce the price the recruits pay for their education, the court opined that the recruits nevertheless provide the schools with something of incredible value—their athletic services and the exclusive right to use their names, images, and likenesses while attending school. Accordingly, the agreement to exclude recruits from a share of the licensing revenues derived from the use of their names, likenesses, or images, is a price-fixing agreement that constitutes an unreasonable restraint of trade. In the absence of this rule, schools would compete by trying to offer recruits the best combination of educational scholarship money in addition to paying a share of the licensing revenue.

Under an alternative theory, the Plaintiffs also alleged the § 1

3. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001).

4. *O'Bannon*, 7 F. Supp. 3d at 986.

violation in the same college education market where schools are viewed as the "buyers" of the recruits' athletic services and licensing rights and the recruits are considered the "sellers." From this perspective, the Plaintiffs' antitrust claim arises under a monopsony theory, where the agreement to fix prices is made among the buyers rather than the sellers. The court determined that this alternative monopsony theory mirrored a monopoly price-fixing theory, and was supported by evidence to establish a restraint of trade.

Assessing the "group licensing market," the court addressed three specific submarkets the Plaintiffs claimed provided opportunities to acquire group licenses for the use of student-athletes names, images, and likenesses: (1) live game telecasts; (2) videogames; and (3) game re-broadcasts, highlight clips, and other archival footage. Regarding live game telecasts, the court ultimately held that the Plaintiffs failed to identify any harm to actual competition within this market. Because networks seeking to televise a game would need to obtain group licenses from all the players involved, a group license to use an individual player's name, image, and likeness would have to be bundled with licenses for every other participant to be of value.

Regarding the videogame submarket, the court found that the Plaintiffs presented sufficient evidence to establish that without the NCAA rule, a national submarket would exist in which videogame developers would compete for group license to use student-athletes' names, likenesses, and images. However, similar to its analysis for live game telecasts, the court found that the Plaintiffs failed to identify any injury to competition. Every team would share an interest in ensuring that the videogame developer acquired each group license necessary to create its game, voiding any incentive to compete.

Finally, regarding the third submarket, the court determined that the Plaintiffs failed to present sufficient evidence to show that the NCAA has imposed a restraint on trade in the game re-broadcasts, highlight clips, and other archival footage market. The NCAA already designates a third-party agent to manage all licenses related to its archival footage. This agent, however, can only license footage featuring former student-athletes and must first obtain the right to use their names, images, and likenesses. Under this agreement no current or former student-athlete is actually deprived of any compensation for re-broadcasts or archival footage. Moreover, because the agent would have to obtain a group license from every team that ever competed in FBS football or Division I basketball in order to license archival footage, there would be no incentive for groups to compete even in the absence of the current NCAA rule.

Accordingly, the court held that the Plaintiffs showed an injury to competition only in the "college education market"—the market for the recruits' athletic services and licensing rights. Under the burden-shifting framework, the court then turned to the NCAA's procompetitive justifications for the challenged restraint.

II. PROCOMPETITIVE JUSTIFICATIONS FOR THE RESTRAINT

First, the court addressed the NCAA's assertion that its restrictions on student-athlete compensation are necessary to preserve the amateur tradition of college sports and the popularity of the programs. The court acknowledged that some restrictions on compensation might serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball. Evidence suggested that the popularity of FBS football and Division I basketball may decrease if student-athletes were compensated by large sums of money, but nothing suggested that the absence of compensation drove consumer demand. Rather, other factors like loyalty and geography were found to be the core reasons driving popularity. Therefore, the court determined that although restrictions on student-athlete compensation may play a limited role in driving consumer demand for these programs, this does not justify such a rigid and sweeping prohibition.

Second, the court addressed whether the challenged rules are necessary to maintain the current level of competitive balance among FBS football and Division I basketball teams. The NCAA, however, failed to present sufficient evidence to show that its restrictions had any effect on competitive balance, let alone achieved the optimal level. Consequently, the court ruled that the NCAA could not rely on this justification.

Third, the court addressed whether the restrictions were necessary to help educate student-athletes and integrate them into the schools' academic communities. The NCAA presented evidence suggesting that integrating student-athletes into the academic communities at their schools improves the quality of the educational services they receive. However, the NCAA did not show why the challenged restraints were necessary to achieve these benefits. The court conversely determined that schools would likely continue providing scholarships, tutoring, and academic support to student-athletes regardless of whether they could receive compensation. Nonetheless, the court determined that limited restrictions on student-athlete compensation might help schools achieve a narrow procompetitive goal by preventing student-athletes from being cut-off form the broader campus community.

Finally, the court addressed whether the challenged restraint increased the output of the NCAA's product. The NCAA argued that its restrictions increase the number of opportunities for schools and student-athletes to participate in Division I sports, which ultimately increases the number of FBS football and Division I basketball games played. However, the NCAA failed to present any evidence suggesting that its current rules enable some schools to participate in Division I that otherwise could not afford to do so. Specifically, there is no requirement that high-revenue schools subsidize the FBS football or Division I basketball programs at lower-revenue schools. As such, the court concluded that the NCAA could not rely on increased product output to justify its restraint.

Because the NCAA met its burden by producing sufficient evidence to

support an inference that some circumscribed restrictions on student-athlete compensation yield procompetitive benefits, the burden shifted back to the Plaintiffs to demonstrate the availability of less restrictive alternatives.

III. LESS RESTRICTIVE ALTERNATIVES

Since the NCAA failed to meet its burden with respect to the NCAA's competitive balance or increased output justifications, the court's inquiry focused only on whether the Plaintiffs could identify less restrictive alternatives for preserving the popularity of the NCAA's product by promoting its current understanding of amateurism, and improving the quality of educational opportunities for student-athletes by integrating academics and athletics.

The Plaintiffs identified two legitimate less restrictive alternatives for achieving the NCAA's goals. First, the NCAA could permit FBS football and Division I basketball schools to award stipends to student-athletes up to the full cost of attendance, to make up for any shortfall in the grant-in-aid. Second, the NCAA could permit its member schools to hold in trust limited and equal shares of its licensing revenue to be distributed to the student-athletes after they leave college or their eligibility expires. The NCAA could also prohibit schools from funding the stipends or payments held in trust with anything other than revenue generated from the use of the student-athletes' own names, images, and likenesses.

The court determined that stipends and deferred payments would increase price competition among FBS football and Division I basketball schools in the college education market, without undermining the NCAA's stated procompetitive objectives. Accordingly, consistent with the less restrictive alternatives found, the court enjoined the NCAA from enforcing any rules or bylaws that would prohibit its member schools from offering FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses, which may be capped at an amount not below the cost of attendance for current student-athletes, or below $5,000[5] per year if held in trust.

5. The court noted that the $5,000 minimum is in "2014 dollars," which contemplates adjustments for inflation. *Id.* at 1008.