Sports Litigation Alert

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Former Student Athletes' Right of Publicity and Antitrust Claims Will Proceed Against the NCAA and Electronic Arts

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Closely watched class action lawsuits by former student athletes against the National Collegiate Athletic Association ("NCAA"), its licensing arm, the Collegiate Licensing Company ("CLC"), and the popular video game maker, Electronic Arts, Inc. ("EA") will proceed following a May 2, 2011 decision by Judge Claudia Wilken of the United States District Court for the Northern District of California. *See In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case No. 4:09-cv-01967-CW (N.D. Cal. May 2, 2001) (the "May 2 Order").

In the consolidated class actions, former college student athletes seek compensation based on right of publicity and the antitrust laws for licensing revenues generated from the NCAA's licensing deals (through CLC) with EA, which produces the popular NCAA Football, NCAA Basketball and NCAA March Madness video games. Former Arizona State and Nebraska quarterback Sam Keller and former UCLA basketball star Ed O'Bannon filed the initial lawsuits. Additional former student athletes have since joined as plaintiffs, and the cases have been consolidated under the case name *In re NCAA Student-Athlete Name & Likeness Licensing Litigation.*

While the specific legal causes of action that plaintiffs will be permitted to pursue against the NCAA, CLC, and/or EA have yet to be finally determined, in the May 2 Order Judge Wilken ruled that the claims by groups of "Publicity Plaintiffs" and "Antitrust Plaintiffs" will proceed against one or more of those defendants. The Publicity Plaintiffs assert claims based on alleged violations of their statutory and common law rights of publicity and the Antitrust Plaintiffs assert claims based on an alleged conspiracy to restrain trade in violation of Section 1 of the Sherman Act.

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The Publicity Plaintiffs

The Publicity Plaintiffs allege that EA misappropriated their images and likenesses in its video games, and assert seven causes of action, including breach of contract and civil conspiracy claims against EA, NCAA, and/or CLC. Specifically, the Publicity Plaintiffs allege that, despite prohibitions on the use of student names and likenesses in NCAA bylaws, contracts, and licensing agreements, EA utilizes the likenesses of individual student-athletes in its college sports-themed video games. The video games at issue do not explicitly identify any individual athlete by name, but the virtual players in the games share the same jersey numbers, physical characteristics, and home state as their real-life counterparts. In addition, EA allegedly permits gamers to upload team rosters directly into the games that include players' names and other identifying information. Publicity Plaintiffs allege that the NCAA and CLC have permitted these violations to continue in order to increase the popularity of the games and royalties that the NCAA and CLC can collect.

The NCAA previously sought to dismiss these claims, arguing that it did not "use" players' names and likenesses because they only licensed team logos, uniforms, mascots and school stadiums, which belong to the schools in question, not any individual student-athlete. EA also sought to dismiss and filed a motion to strike the complaint under California's statute concerning strategic lawsuits against public participation (anti –SLAPP) asserting "transformative use" and "public interest" defenses under the First Amendment and the California Constitution.

On February 8, 2010, the court denied defendants' motions. *Keller v. Elec. Arts, Inc.*, No. 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010). The court rejected EA's "transformative use" arguments because it held that

the video games' "setting is identical to where the public found [Keller] during his collegiate career" and rejected the "public interest defense" because the NCAA sports games "provide[] more than just the players' names and statistics; it offers a depiction of the student athletes' physical characteristics." The Publicity Plaintiffs' claims against EA have been stayed pending a decision on EA's appeal of the denial of its anti-SLAPP motion.

Prior to consolidation, the court had dismissed the Publicity Plaintiffs' breach of contract claim against the NCAA. However, in the May 2 Order, the court denied the NCAA's motion to dismiss that claim. The court held that, based on Publicity Plaintiffs' amended allegations, it was "reasonable to infer that Publicity Plaintiffs understood that they granted a limited license to NCAA to use their names and likenesses to promote NCAA events and that the license did not permit the use of their names and likenesses for other purposes." May 2 Order at 15. Thus, the Publicity Plaintiffs pleaded a contract sufficient to withstand the motion to dismiss.

The Antitrust Plaintiffs

The Antitrust Plaintiffs also assert claims by student athletes concerning their right to profit from the use of their images and likenesses, but are based on alleged violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The Antitrust Plaintiffs allege that the antitrust laws were violated based on an agreement to artificially fix the price that student athletes received for the use of their names, images, and likenesses, at zero dollars. The Antitrust Plaintiffs also allege that the defendants conspired to engage in a group boycott/refusal to deal. As the court explained, the '"purported conspiracy involves Defendants' concerted action to require all current student-athletes to sign forms each year that purport to require each of them to relinquish all rights in perpetuity for use of their images, likenesses and/or names' and to deny compensation 'through restrictions in the NCAA Bylaws.'" May 2 Order at 11.

The Antitrust Plaintiffs intend to move to certify an "Antitrust and Declaratory Injunctive Relief Class" and an "Antitrust Damages Class." The Antitrust Injunctive Relief Class includes current student-athletes and seeks to permanently enjoin the NCAA and its members from utilizing any student athlete requirements which purport to deprive former student athletes of licensing and/or compensation rights, and from selling, licensing, or using former student-athletes' rights. The Antitrust Damages Class does not include current student-athletes.

Previously, in *O'Bannon v. National Collegiate Athletic Ass'n, No*. 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010), the court held that O'Bannon sufficiently alleged an agreement in restraint of trade between the NCAA and its members related to licensing images of former student-athletes in the collegiate licensing market, and therefore stated a claim under Section 1 of the Sherman Act. EA was named for the first time as an antitrust defendant in Plaintiffs' Consolidated Amended Complaint. However, the court held that the Consolidated Amended Complaint "does not contain any allegations to suggest that EA agreed to participate in this conspiracy." May 2 Order at 11. Therefore, the court granted EA's motion to dismiss the federal and California state law antitrust claims against EA.

The court provided plaintiffs leave to file an amended complaint to remedy the deficiencies in their antitrust allegations against EA and, on May 16, 2011, plaintiffs filed their Second Amended Class Action Complaint. EA will likely file a motion to dismiss the Second Amended Class Action Complaint, but, at a minimum, the antitrust claims against the NCAA and CLC will proceed into discovery.

Conclusion

The debate over whether student athletes should be compensated for the revenues that they help to generate has long been the subject of emotional debates, which are not likely to be resolved anytime soon. Nonetheless, the stakes in the *NCAA Student-Athlete Name & Likeness Licensing Litigation* are high. If the student athlete plaintiffs are successful, the NCAA, as well as its member conferences and universities, could face significant liability, and the NCAA would need to substantially change the way in which it approaches its licensing efforts and student-athlete relationships. The resolution of the licensing and First Amendment issues also has the potential to cause significant repercussions across the entertainment industry, including the motion picture industry, as courts grapple with determining the breadth of First Amendment protection in an age of realistic computer generated depictions that could easily be mistaken for the real thing.