

# Class Certification Issues In O'Bannon v. NCAA

4/18/2014

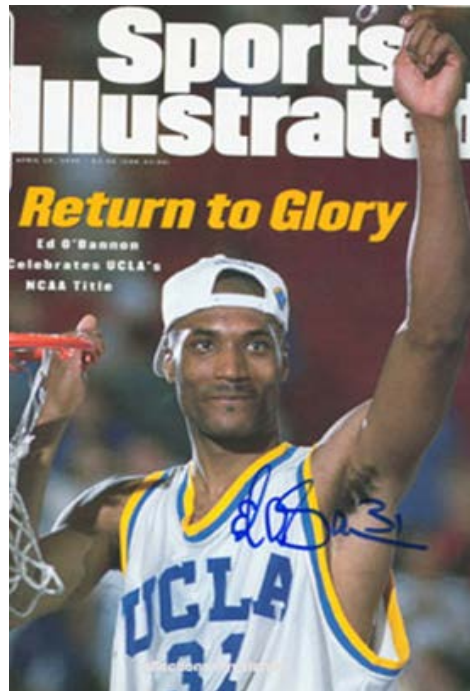


BRADLEY ARANT  
BOULT CUMMINGS  
LLP

# Important Players

---

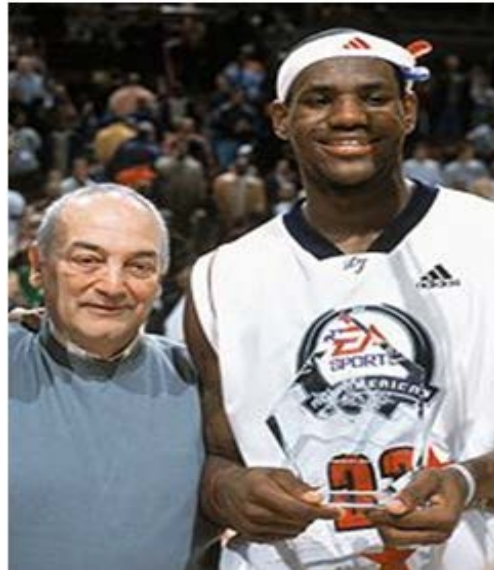
- Ed O'Bannon
  - All-American at UCLA (1995 NCAA Champs)
  - 9<sup>th</sup> pick in 1995 NBA Draft



# Important Players

---

- Sonny Vaccaro
  - Signed MJ to first shoe deal
  - Shoe deals with college basketball coaches
  - High school basketball all-star games and camps



# Important Players

---

- Mark Emmert
  - NCAA President and former President of Univ. of Washington



# Underlying Lawsuit

---

- Plaintiffs: O'Bannon, Oscar Robertson, Bill Russell, Current Athletes
- Defendants: EA Sports, Collegiate Licensing Company and NCAA
  - NCAA uses CLC to market and license trademarks for use by third parties (like EA)



# Underlying Lawsuit (cont'd)

---

- Arguments
  - Sherman Act
    - Defendants (including EA Sports, CLC, and NCAA) conspired to restrain trade by prohibiting student-athletes from entering into group licensing agreements for the use of their names, likenesses, and images
    - “Price fixing to zero”
    - Restrains student-athlete Division I college education market & market for acquisition of licensing rights

# Underlying Lawsuit (cont'd)

---

- Licensing rights include **TV contracts**, rebroadcasts of classic games, DVD game and highlight film sales and rentals, on-demand streaming, sales of games and clips, photo sales, **video game sales**, jersey sales
- Seek damages and injunction of NCAA from restraining competition in group licensing

# Procedural Pre-Class Certification

---

- Multiple Denials of NCAA Motions for Summary Judgment
- NCAA forced to produce all agreements showing compensation to NCAA
- \$40 million settlement with EA and CLC
- Case proceeds against NCAA alone



# Class Certification Issues

---

- Two proposed classes
  - Injunctive Relief Class (under 23(b)(2)) – all current and former Division I men’s football and basketball players
  - Damages Subclass (under 23(b)(3)) – former Division I men’s football and basketball players whose images have been sold since 2005
- Judge allows partial certification
- Analysis
  - 23(a)(1)-(3) factors all met (Numerosity, Commonality, Typicality)
  - 23(a)(4) Adequacy – “star” vs. “regular” athletes likened to pro sports
  - 23(b)(2) – Injunction Class certified
  - 23(b)(3) – Damages Subclass certification denied
    - How to determine harm – “Substitution Effect”
    - Which athletes actually depicted in games and broadcasts?

# Aftermath and Trial

---

- Both sides claimed victory
- Settlement
- Standing?
- Recent summary judgment denials
- Trial set for June 9
- Ramifications – collective bargaining

babc

# Recent Developments

---

- Other Developments
  - Northwestern unionization – vote of current players later this month
  - Kessler antitrust lawsuit – seeks injunction to end capping player compensation at value of athletic scholarship
  - NCAA takes away caps on meals
- Questions

# Questions

---

**Joel D. Eckert, Partner**

**Bradley Arant Boult Cummings LLP**

**[jeckert@babbc.com](mailto:jeckert@babbc.com)**

babbc