Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

No Matter The Claims, NCAA Athletes As Employees A Stretch

By **Zachary Zagger**

Law360, New York (October 4, 2016, 8:46 PM EDT) -- Pay for college student-athletes is at the forefront again, with the U.S. Supreme Court ruling Monday it wouldn't examine antitrust and publicity rights issues in college athletics, and experts say two other wage suits arguing college athletes should be treated as employees might be an even greater long shot.

The U.S. Supreme Court on Monday refused to review an antitrust case, O'Bannon v. NCAA, that raised the issue of whether student-athletes can be compensated beyond their scholarship and aid package, referred to as a grant-in-aid. Meanwhile, another more direct antitrust challenge is working its way through the courts.

But where those cases attack the amateurism model of college athletics through antitrust claims, two others that are in progress rely on a different, and perhaps more destabilizing, theory: that college athletes are actually employees who are entitled to minimum wage and overtime.

Lamar Dawson, a former linebacker for the University of Southern California Trojans, hit the NCAA and Pac-12 Conference last week with a proposed class action alleging they violated the federal Fair Labor Standards Act and California labor laws by failing to pay him and other student-athletes minimum wage or overtime.

However, student-athlete-as-employee claims have had less traction in the federal courts than the antitrust issue, and experts say such claims will continue to face hurdles, as college athletes are still viewed as amateurs.

"It is going to be an uphill battle, I would think, for the plaintiffs in these cases, because they come into this academic environment fundamentally through a student relationship," said Morgan Lewis & Bockius LLP partner Harry I. Johnson III, a management-side labor defense attorney.

"If you compare, for example, what an NFL football contract looks like to what a typical grant-in-aid scholarship document looks like, they look very different," he said. "I think it is a very hard case to claim that the grant-in-aid scholarship is a payment to play a certain amount of football."

Employment-based arguments hit a roadblock earlier this year when a Indiana federal judge tossed a case by a group of University of Pennsylvania student-athletes, ruling that their participation on a university sports team does not make them employees.

Two plaintiffs in that case, Penn track and field athletes Gillian Berger and Taylor Hennig, are urging the Seventh Circuit to revive their claims. However, the appeals court judges had tough questions for their attorneys at oral arguments last Wednesday, held just days after Dawson filed his suit.

The big distinction between that case and the one filed by Dawson is that the Penn student-athletes played what are sometimes referred to as “nonrevenue” sports, which don’t bring in the money like major college football and basketball do, and they played at Penn, an Ivy League school known more for academics than for athletics.

USC, on the other hand, in addition to being a high-ranking academic institution, has a nationally recognized college football program that plays its games in the more than 93,000-seat Los Angeles Memorial Coliseum and is regularly featured on national television.

But even with the economic argument, Dawson, like other student-athletes, has to overcome the reasoning that college athletics are fundamentally different from professional sports.

“It is a different kind of relationship, because then the player is judged and paid on performance, on the ability to play a certain number of games, and there are all sorts of provisions related to how compensation is affected if the player goes on injured reserve," Johnson said. "There just aren’t equivalent mechanisms here, and I think what the defense is going to argue is that it is because it is a fundamentally different type of relationship."

When viewed through the lens of the U.S. Department of Labor’s standard for unpaid internships in the private sector, student-athletes start to look like employees, particularly due to the economic benefits they provide for the school and the control and supervision the school has over them, according to University of Illinois College of Law labor law professor Michael H. LeRoy.

But Leroy said Dawson will run into trouble, given the unique nature of college athletics. He pointed to the National Labor Relations Board’s decision last year that put down a unionization effort by Northwestern University college football players. The board dismissed the players’ unionization petition, though it declined to rule on whether they should be considered employees, emphasizing that “case involve[d] novel and unique circumstances.”

“I think that is indicative of how the court might approach this,” Leroy said. “The NLRB in a five-member decision — and this has been a pro-labor board — looked at the Northwestern situation and literally said that NCAA football is a ‘unique’ institution. Whether I agree or disagree, you have to look at what other courts have said and what other agencies are doing, and they are saying it is so unique that they don’t want to even wrestle with the idea of employment.”

Further, even if student-athletes are able to overcome this issue, they face more challenges in trying to bring class claims given the varied experiences of players from school to school and sport to sport.

“The FLSA tests are very fact-specific. So the ways in which student-athletes are trained, the expectations put on them and the ways in which they are already compensated will be big issues in proving both liability and damages,” said sports attorney Mary K. Braza, a partner at Foley & Lardner LLP.

“Trying to argue that students from all 12 schools [in the Pac-12 Conference] — and maybe multiple sports — had common factual issues with respect to the manner of training, practice and game

competition would be difficult," Braza said. "That same fact discrepancy presents a problem with respect to adequacy of the class representatives."

The Supreme Court's unwillingness to review O'Bannon leaves in place a Ninth Circuit decision that found capping student-athlete compensation was anti-competitive but justified by the pro-competitive benefits of amateurism. The ruling thus allows NCAA rules that cap what schools can provide student-athletes at the full cost of attending college.

The ruling highlights the limit with antitrust claims, though another consolidated suit called the Grant-In-Aid Litigation is further pushing the issue. Wage claims in the Dawson and Berger cases could rock the boat even further if the inherent challenges can be overcome.

Still, experts wondered whether pay based on the hours worked would really come out to be more than the aid packages currently offered to players.

"Dawson and Berger would wreak the most havoc on the current system if schools were required to pay student-athletes to train, practice and compete," Braza said. "How would scholarships; medical and training benefits, such as access to equipment and specialized coaching; room and board be valued? Would that system of student-athlete support be eliminated altogether, with student-athletes receiving a weekly paycheck in their place? One wonders whether student-athletes would be worse off in the long run if the economics of the system was turned on its head."

--Additional reporting by Cara Bayles and Diana Novak Jones. Editing by Kat Laskowski.
