SPORTS LAW TODAY

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As Chairman of the Ropes & Gray Sports Law Group, I welcome you to the Spring 2013 edition of *Sports Law Today*. As the sports industry continues to grow and change, its legal issues become harder to identify and harder to resolve. From the "free agent" feel of conference affiliation to the greater need for protecting amateurism, college athletics is as susceptible as any. Whether we have to protect against agents who push the envelope in Latin America's baseball scouting world or advise potential owners of the risks inherent in owning a major league franchise, the better prepared you are, the better the outcome. We at Ropes & Gray have a long history of representing colleges and universities, athletic conferences, professional sports leagues and teams, coaches, broadcasters, athletic administrators, front office executives, and athletic associations. We also have extensive experience in handling complex transactions ranging from negotiations of television rights deals to venue leasing agreements. We hope you find this edition informative and useful. Please contact me or one of my colleagues if you have any questions or if we can be of service to you.

Sincerely,

Dennis M. Coleman
Chairman, Sports Law Group

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IN THIS ISSUE

HEAD COACHES IN THE CROSSHAIRS OF THE NCAA'S NEW ENFORCEMENT REGIME

By Dan Adams and Naveen Ganesh

In the aftermath of the Penn State scandal and a finding from its own working group that "public trust in intercollegiate sports has eroded," the NCAA announced in October 2012 that it was overhauling its enforcement approach. The new enforcement regime features a streamlined infractions process and a new four-tier violation structure emphasizing the harshest available penalties. The changes send a two part message: (1) that the NCAA intends to be more aggressive with rules enforcement and (2) that head coaches will be held accountable for violations by their programs regardless of their direct involvement. The new enforcement structure had some immediate applicability and becomes fully effective August 1, 2013.

A Clearer, More Efficient, and More Aggressive Approach.

Under the new regime, violations will be slotted into one of four tiers, based on the advantage or the impermissible benefit sought:

Tier	Advantage/Benefit Sought is:
Level I: Severe Breach of Conduct	"substantial and extensive" [Ex: Recruit given house or car]
Level II: Significant Breach of Conduct	"more than minimal but less than substantial and extensive" [Ex: Student-athlete provided phone or dinner]
Level III: Breach of Conduct	"no more than minimal" [Ex: Providing team gear or other inducements]
Level IV: Incidental Issues	"negligible, if any" [Ex: Coach posting on Facebook / boosters tweeting recruits]

Levels I and II encompass what were formerly referred to as "major violations." Levels III and IV cover conduct formerly referred to as "secondary violations." The new tiers allow one to more easily distinguish violations from one another – addressing a common critique of the former binary structure.

The NCAA also unveiled a streamlined infractions process intended to reduce the time that cases take to get to closure. Increased efficiency is sought by authorizing a larger Committee on Infractions. The committee's expansion from ten members to as many as twenty-four will allow for multiple panels consisting of five to seven members each. These panels will be convened approximately ten times a year to hear Level I cases. Panels can also be convened monthly to hear Level II cases. The capacity to convene

close to two dozen times per year is a significant improvement from the previous system, where the Committee on Infractions met only five times per year.

Activity under the new regime is focused primarily on Level I and Level II violations. Oregon State President Ed Ray, chair of the working group that developed the enforcement reforms, was unapologetic about the focus on more serious violations, citing a clear mandate from NCAA members to "stop focusing on the technical petty stuff and focus instead on things that go to the heart of undercutting the credibility, effectiveness, and integrity of the NCAA and its affiliated institutions." Penalty guidelines accompanying the new four-tier structure do exactly that. Postseason bans, scholarship reductions, recruiting limitations, financial penalties and head coach suspensions will be applicable to a wide array of infractions.

Head Coaches: Presumed Responsible

Among the NCAA's changes is a relatively terse addition to Article 11.1.2.1 of the NCAA Division I Bylaws that greatly increases head coaches' liability for rules violations. The change: a presumption of responsibility for the actions of all assistant coaches, administrators and staff reporting directly or indirectly to the head coach. The change is designed to largely eliminate the use of the "head-in-the-sand" defense – where head coaches claim ignorance of "rogue" subordinates' wrongdoings.

Head coaches now face the possibility of harsh penalties even if they had no personal involvement. Subordinates' Level I violations can result in up to a season-long suspension for the head coach. Subordinates' Level II violations can result in up to a half-season suspension for the head coach. Even Level III violations committed by subordinates can result in suspensions.

Level III Violations resulting in suspension have potentially far-reaching consequences. Under the new rules, NCAA enforcement staff will publicly announce the suspension and detail for any interested institution each Level III violation committed by the suspended head coach over the previous five years - a public shaming with potentially serious consequences for future employment.

A Head Coach's Best Defense: A Compliant Atmosphere and an Effective Monitoring Program

To avoid suspensions and other consequences, a head coach's best defense is to prove to the presiding Committee on Infractions panel that he or she (1) promoted a compliant atmosphere and (2) adequately monitored all staff. The NCAA suggests taking the following steps to increase the likelihood of satisfying the new enforcement scheme's two-pronged test.

Promoting Compliance. The development of a dynamic and effective compliance program with the cooperation of both supervisors and subordinates is vital for an effective defense. As an initial matter, head coaches should meet with their university president/chancellor, athletics director, and compliance director to discuss the implementation of an organized compliance plan. This compliance plan should address, *in detail*, the resources, roles and responsibilities, lines of report, and procedures that will constitute the compliance apparatus. The head coach should then meet with his coaching and support staff to present the compliance plan, explaining its details and stressing the need for absolute compliance and the consequences that result from any failure. After the compliance program is initiated, there must be an "ongoing dialogue" about compliance which must include regularly scheduled meetings with both supervisors and subordinates. Compliance staff should be consulted on a regular basis, especially where "gray areas" are implicated. The

NCAA has made clear that this "ongoing dialogue" is critical to proving an atmosphere of compliance. Having the compliance program audited periodically by an independent third party will further enhance the ability of a head coach to defend against sanctions for program violations.

Compliance Monitoring. The duty to monitor staff is affirmative. Head coaches should actively look for potential violations. If any questions are raised or suspicions are aroused, the head coach should follow up and get more information. While the new rule does not require a head coach to investigate wrongdoing, it does require a head coach to recognize potential problems and address or report them. For example, if a prospective student-athlete takes an unofficial visit to campus, the head coach should actively ask about how the trip was funded. Similarly, if a third party or handler is involved in the recruiting process, the head coach should affirmatively ask the coaching staff about this party and the nature of their involvement. If it becomes apparent that an actual violation has occurred, the program should consider hiring an independent third party to conduct the internal investigation.

All efforts described above should be documented. The NCAA suggests documenting all AD, compliance staff and coaching staff meetings, all reports of potential violations, and all monitoring efforts undertaken to prevent violations. Documentation is vital to an effective defense.

Takeaways

In sum, the new NCAA enforcement regime indicates a more aggressive approach toward enforcement in the future. To survive in this new environment, athletic programs and coaches must be vigilant about their obligations to:

- report potential and actual rules violations to the university administration;
- ensure that compliance monitoring systems are effective and operating properly;
- consult with compliance staff to determine if their actions comply with all relevant NCAA rules; and
- proactively identify potential NCAA violations, quickly alert compliance staff of problematic activity and monitor potentially violative activity closely to ensure proper compliance.

Meeting these obligations is non-negotiable under the new NCAA enforcement regime.

THE INCREASING ROLE OF PRIVATE EQUITY, AND THE ATTEMPT TO MAXIMIZE PROFITS, IN PROFESSIONAL SPORTS

By Christopher Hiserman and Matt Byron

In recent years, there has been an increase in private equity investment in professional sports, investment which could have reverberating effects both on and off the field. Private equity investors recently made headlines in Major League Baseball when, in March 2012, Guggenheim Partners contributed a majority of the winning bid of $2.15 billion to purchase the Los Angeles Dodgers. A look at this latest deal provides a good case study for why private equity firms are becoming more interested in professional sports teams and the effect this investment shift could have on the fans that make professional sports a profitable endeavor.

To understand the effect of private equity investment in sports, it is important to understand why private equity investors are investing in sports. When the Guggenheim Partners-backed offer was made, many analysts pointed to the team's expiring broadcast agreement with News Corp's Fox as the reason for the high bid. In the era of the DVR, sports are among the dwindling list of things people want to watch as they

happen. This makes the programming increasingly valuable and potential buyers were interested in cashing in on a new deal.

In January, the Dodgers and Time Warner Cable announced a deal whereby Time Warner will broadcast Dodgers games and other programming aimed at Dodgers fans on SportsNet LA, a new regional sports network developed by Guggenheim Partners. The deal is estimated to be worth $8 billion to the Dodgers over 25 years and the Dodgers, not Time Warner Cable, will program the new channel. Although the group acquiring the Dodgers spent a record amount in doing so, it was quickly able to sign the most lucrative television deal in the history of sports.

While Dodgers' ownership described the television deal as a positive for fans, noting that Dodgers fans "deserve the best experience," shortly after the announcement of the new broadcast deal, Time Warner subscribers were notified that the monthly cost of basic cable would jump 8.2%. Further, and perhaps more importantly in the eyes of many devoted fans, there is a risk that the deal could negatively impact the on-field performance of the Dodgers as the pressure for high rating permeates the front office.

According to former Red Sox manager Terry Francona, such an effect occurred in Boston, where the Red Sox own the regional sports channel NESN. Francona has gone on record stating that sagging TV ratings affected Red Sox ownership's approach toward the roster and prompted an emphasis on acquiring what he termed as "sexy" players, with little regard to whether such players addressed team weaknesses. It is widely understood that with his comments, Francona was referring to the acquisition of Adrian Gonzalez and Carl Crawford prior to the 2011 season. While the acquisitions created arguably the loudest buzz of that offseason, and fans were excited to tune in, many wondered why more attention wasn't spent on the pitching staff, the team's perceived biggest weakness. Despite spending a combined $296 million on the contracts for Gonzalez and Crawford, the Red Sox ended the 2011 season in third place, seven games out of first place – identical numbers to the 2010 season. With one month to go in the 2012 season, the worst season for the Red Sox in 47 years, the Red Sox traded four players, including Gonzalez and Crawford, to the Dodgers amid dwindling fan interest and TV ratings in Boston. It has already been announced that the long-standing sellout streak at Fenway will likely end early in the 2013 season – a clear, negative impact on the investment.

While the trade with the Red Sox made headlines, it did not help the Dodgers on the field. Prior to the trade, the Dodgers were two games behind the San Francisco Giants in the National League West. By the end of the season, the Dodgers had a worse winning percentage than before the trade and failed to make the playoffs. Although the trade made the Dodgers a worse team and they gave up a number of prospects to the Red Sox, the deal did create a buzz and caused a spike in television ratings for Dodgers games. While this was perfect timing for a team with an expiring broadcast agreement and owners looking to sign a lucrative deal, some fans expressed frustration that ownership was more interested in driving up ratings than in winning ballgames.

Seemingly gone are the days when owning a professional sports team was simply a pastime for wealthy families with a passion for their teams and a burning desire to win. The changing media landscape has helped turn teams into profitable, cash generating assets and targets for private equity firms and executives. The purchase of the Dodgers shows groups are willing to spend record

amounts of money in purchasing these teams with the hope that ancillary assets will make the investment worth it. In doing so, however, private equity investors must be careful to focus on both profitability and on-field performance, otherwise they will run the risk of alienating the very fans that make professional sports an enticing and profitable investment.

CONTRACT RESTRUCTURING: DOES TOM BRADY HAVE A TAX PROBLEM?

By Jenny Rikoski

Tom Brady's three-year, $27 million contract extension made headlines in recent weeks. The story generated considerable buzz because it was seen as a good deal for the Patriots, giving them cushion under their salary cap to pursue new players, and because it meant that Brady, who turns 40 in 2017, would likely finish out his career with New England.

Behind every NFL restructuring headline is a complex negotiation in which the player typically seeks to maximize his guaranteed money and the team works to free up space under its salary cap by reducing base salaries or prorating bonuses across multiple seasons. A rarely mentioned, but important, piece of these negotiations is Section 409A of the Internal Revenue Code. Section 409A governs "non-qualified deferred compensation," essentially compensation that a person has a right to receive in a future tax year without a so-called "substantial risk of forfeiture." If an amount is subject to Section 409A, it is very difficult to accelerate or defer its payment date across tax years.

In the world of collegiate athletics, universities, athletic directors, and coaches not only have to consider Section 409A when negotiating employment contracts, but they must also take into account Section 457(f). Whereas Section 409A would permit a guaranteed bonus to be paid out over several years if the payment terms were hard-wired into the contract, Section 457(f) would require the full amount of the bonus to be included in income up front, even though it would not be paid out until future years.

Understanding the requirements of Sections 409A and 457(f) is important when entering into a contract and becomes all the more critical when renegotiating a contract, particularly if existing deferred compensation is at play. The penalties for noncompliance can be harsh–acceleration of the period in which amounts are required to be included in income, a 20% additional tax, plus interest and potentially other penalties. It is well worth seeking the advice of a tax or legal advisor to help navigate these tax rules.

THE LATIN AMERICAN RUNDOWN: INTERNATIONAL SCOUTING AND THE FOREIGN CORRUPT PRACTICES ACT IN MAJOR LEAGUE BASEBALL'S FIELD OF DREAMS

By David Peet and David Mindell

Imagine a federal statute that prohibited the Boston Red Sox from signing the next Pedro Martinez or David Ortiz and subjected team officials to hefty fines and imprisonment. While Yankee fans might consider this a dream, current and future regulations from both Major League Baseball and foreign governments have made this scenario a nightmarish reality. What is more, the chain of events that could lead to such an outcome originates not in a team's own backyard, but in the dusty infields and rural pastures of independent baseball "academies" in the Dominican Republic, Venezuela, and

other Latin American countries.

Independent baseball scouts, or *buscones*, have long operated in a world free of regulation from either the commercial enterprises that eventually compensate them for the talent they promote—the Major League Baseball ("MLB") clubs—or from the governments of the very nations where such talent is sought. Out of this wild west environment have sprouted both a $100 million dollar talent development industry and frequent complaints of fraud and exploitation. Among other things, *buscones* have been accused of bribing government officials to falsify papers in executing age and identity falsification schemes, promoting juvenile steroid use, and scamming players and their families by withholding an exorbitant percentage—as much as 50% according to some sources—from player signing bonuses.

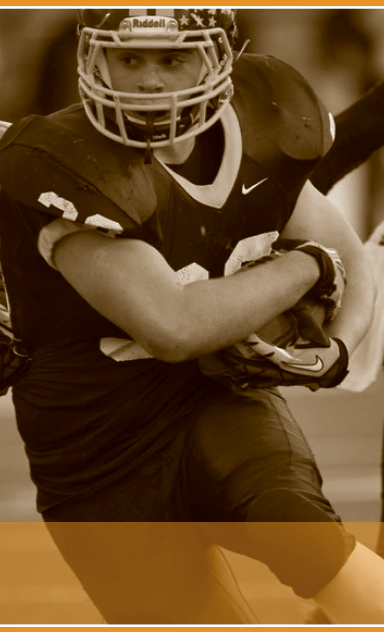
Yet this world has started to change as journalists and industry insiders have slowly started to shed light on the questionable methods of *buscones* in the Dominican Republic, Venezuela, and elsewhere in Latin America. Human rights activists, professors of international law and baseball lifers are just some of the voices calling on Major League Baseball to institute measures that would prevent *buscones* from exploiting future players and their families and tarnishing the sport's international legacy.

MLB has taken small steps toward a response. Following discoveries in 2008 that scouts from the Washington Nationals and Chicago White Sox participated in schemes to deliver kickbacks to *buscones*, the league prohibited clubs from paying signing bonuses to anyone other than a player or his family. Beginning in the 2012-2013 signing season, the league created a tiered bonus system that restricts the amount a team may pay to sign international amateur players. In addition, the league has often debated the idea of instituting an international player draft in order to eliminate the possibility that a player's exorbitant signing bonus ends up in the pocket of a *buscón*.

Calls for reform have also reached the governments of Latin American countries like the Dominican Republic and Venezuela. Legislators from these countries are considering taking action against the baseball industry by instituting regulations aimed at preventing *buscones* from exploiting future players. These measures include, for example, mandatory registration and certification of *buscones* with government authorities, hard caps on fees *buscones* may receive in exchange for their services, and mandatory player registration to minimize the potential for age and identity fraud.

Such measures may very well be necessary to prevent the horror stories of past *buscones* from being visited upon present and future ballplayers. Nonetheless, these potential future regulations should give MLB franchises pause. Increased oversight of "independent" scouts by the league enable federal regulators in the United States an easier path to utilize a familiar weapon in its arsenal, the Foreign Corrupt Practices Act ("FCPA"), to penalize MLB clubs for the conduct of corrupt *buscones*. Moreover, increased regulation of *buscones* by the foreign governments of these countries only increases the risk that these *buscones* will engage in corruption related activities.

The FCPA's anti-bribery provisions prohibit U.S. persons and businesses, issuers listed on the U.S. Stock Exchange, and foreign persons and business operating within United States territory from making corrupt payments of "anything of value" to foreign government officials for the purpose of obtaining or retaining business. The FCPA provides for both criminal and civil penalties. Criminal penalties of the anti-bribery provisions include (i) for business



entities, a fine of up to $2 million, and (ii) for individuals, fines of up to $100,000 as well as imprisonment for up to five years.

Advocates for clubs will question the applicability of the FCPA by arguing that—like shoppers in a grocery store—they rely on *buscones* to make the highest-quality products available for observation and purchase. However, enforcement authorities will focus on two principal factors in assessing a team's FCPA liability: (i) the nature of the team's relationship to the *buscón*, and (ii) the team's knowledge of the *buscón*'s corrupt activity.

Buscones often view themselves as freelance brokers that field offers from multiple clubs and sell off aspiring young players to the highest bidder. While some certainly have operated using this business model, the distinction between team and *buscón* is not always so clear. Some *buscones* may work exclusively for one team and receive a small finder's fee upon delivering new talent. All too frequently they also inform players' families of their close ties to an MLB team. In such circumstances, the *buscón* acts more like an off-book scout affiliated with a franchise than like a salesman willing to ship his prized prospects to the highest bidder. What is more, enforcement authorities may view any team's attempts at self-regulation of the industry as evidence that *buscones* are not independent, but rather are beholden to particular clubs. In these circumstances, the FCPA could impute a *buscón*'s corrupt payment to a foreign baseball regulator to the MLB team for whom he acts as an agent.

Even if a *buscón* is not an agent, a team could still be subject to FCPA liability as a result of the team's knowledge of the *buscón*'s corrupt behavior. The FCPA prohibits payments to "any person, while knowing that all or a portion of such [payments] . . . will be offered, given, or promised, directly or indirectly," to a foreign official. As federal regulators have succinctly warned, "[t]he fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability."

Instead, liability turns on the team's knowledge, as defined by the statute. The FCPA imposes liability on actors for a payment by the actor's agent or a third-party if the actor either authorized such payment or had "knowledge" that the improper payment would be made. Congress broadly defined "knowledge" in order to impose liability on those with actual knowledge as well as those who purposefully avoid actual awareness of improper payments, also known as the "head-in-the-sand" defense. This means that the FCPA imposes liability on an MLB team that either has actual knowledge of a *buscón*'s corrupt payment or "is aware of a high probability of the existence" of such a payment. In other words, if *buscones* corruptly compensate foreign government officials in order to skirt regulations, forge papers or allow for other illicit activity, clubs cannot hope to avoid FCPA liability simply by turning a blind eye.

At the same time that legislation in Latin America increases a *buscón*'s opportunities to make corrupt payments to government regulators, Major League Baseball's augmented oversight enhances the likelihood that the actions of these infamous actors are imputed to MLB clubs. Much like a baserunner caught wandering off of second base, these two forces may cause clubs to find themselves caught in a corruption "rundown" in their attempts to acquire new talent.

In response to this risk, clubs should consider taking steps to avoid the perception that potentially corrupt *buscones* act as agents for the franchise. Potential solutions include drafting standard operating procedures for team employees as well as third parties involved in the talent acquisition process. Clubs should also consider establishing a

regular training schedule for these employees and licensed agents in order to ensure awareness of the franchise's anti-corruption policies. In addition, clubs should consider following the advice of federal regulators by "implementing an effective compliance program, which includes due diligence of any prospective foreign agents" potentially acting on behalf of a team's international scouting department. Finally, clubs that have significant operations in Latin America may want to consider having their operations periodically audited by an independent third party to evaluate FCPA compliance.

Regardless of the format of self-regulation that clubs adopt, their central objective must be the same. That objective is to protect the present and future interests of the clubs' fans, employees, and other stakeholders by divorcing themselves of any actual or perceived association with *buscones* that have a documented history of corrupt activity. With this approach, clubs will increase their likelihood of avoiding the "tag" of enforcement authorities in the Latin American basepaths.

COLLEGE ATHLETICS: THE END OF AMATEURISM?

By Paul Kellogg

Sports fans across the globe spend countless hours - and more importantly, incredible sums of money - playing video games featuring near-identical replications of their favorite current and past college athletes. When not controlling these athletes with joysticks, fans watch, re-watch and re-watch again their favorite college teams defeat bitter rivals, score stunning upsets and win championships on ESPN Classic and on DVDs.

For years this has been a very lucrative business for the NCAA and its members, but not its athletes. However, a suit brought by former student athletes including Ed O'Bannon, Bill Russell and Oscar Robertson is poised to turn this revenue stream for the NCAA on its head. In the suit, O'Bannon and the other named plaintiffs challenge the NCAA's use of the names, images and likenesses - through licenses to video game companies and by selling DVDs of classic games, among other uses - of current and former Division I men's basketball and football players without compensating these individuals. Simply put, O'Bannon believes that the NCAA and its corporate partners may not continue to profit off the names, images and likenesses of current and former student athletes while completely denying these athletes any of the proceeds from these commercial endeavors.

The NCAA has vigorously defended itself against O'Bannon's suit both in the courtroom and in the media. The crux of the NCAA's argument centers around the Form 08-3a which student athletes are required to sign before they participate in a university's athletics program. According to the NCAA, the Form 08-3a gives the NCAA permission to use the images and likenesses of student athletes "to promote NCAA championships or other NCAA events, activities or programs." The NCAA believes that this form permits the NCAA to license the use of current and former student athletes' images and likenesses in video games, DVDs or any other product. O'Bannon has argued that this form is unenforceable because student athletes are effectively forced to sign away their rights due to the grossly unequal bargaining power between the NCAA and a prospective student athlete.

Beyond the Form 08-3a, the NCAA believes that O'Bannon's suit threatens what it believes to be its foundation: the ideal of amateurism. However, O'Bannon scoffs at this notion, pointing out that the NCAA operates a multi-billion dollar industry where all actors are paid except the athletes

themselves who are essential to the NCAA's product. In O'Bannon's eyes, the NCAA and its corporate partners are not motivated by any ideals and are instead solely motivated by greed and avarice.

Despite the NCAA's best efforts, Judge Claudia Wilken, of the Northern District of California, has repeatedly permitted O'Bannon's case to continue in her courtroom. For instance, in 2010, Judge Wilken denied various motions to dismiss filed by the defendants, including the NCAA, thus permitting the case to proceed to discovery. During discovery, plaintiffs have sought all of the documents related to the NCAA's licensing agreements—estimated at more than $4 billion—in order "to examine how student athletes' current and future rights in their images are divided up and sold."

Discovery has not stopped with just the defendants named in O'Bannon's suit. On September 28, 2012, Judge Alfred Covello granted a motion to compel filed in the District of Connecticut against ESPN and ordered ESPN to provide its licensing contracts concerning Division I men's basketball and football since 2005 to the plaintiffs in O'Bannon's suit. With this ruling, all NCAA partners who utilize the likenesses of current and former student athletes have been placed on notice that they may be next.

After much discovery, O'Bannon and the named plaintiffs have moved to certify two separate classes. First, O'Bannon has moved to certify a class consisting of former Division I men's basketball and football student athletes who seek monetary damages. O'Bannon has also moved to certify a class consisting of all *current and former* Division I men's basketball and football student athletes seeking injunctive relief. O'Bannon does not propose that current student athletes receive compensation; rather, O'Bannon argues that the "monies generated by the licensing and sale of class members' names, images and likenesses" be "temporarily held in trust for those individuals until the cessation of their collegiate careers." Defendants, in another attempt to derail O'Bannon's suit, had moved to strike O'Bannon's motion for class certification; however, Judge Wilken recently denied defendants' motion and has ordered defendants to submit their oppositions to O'Bannon's motion for class certification. Judge Wilken has set the hearing on O'Bannon's motion for class certification for June 2013.

Should O'Bannon succeed at the class certification and merits stages of this litigation, the repercussions could only be described as enormous. Beyond the staggering dollar amounts involved in the NCAA's licenses with video game manufactures, ESPN and the like, O'Bannon's suit threatens to shake the NCAA's central value of amateurism to the core. Should former student athletes receive direct compensation and current student athletes become the beneficiaries of a trust that they will enjoy upon graduation, the line between professional and amateur—already murky—will become even harder to grasp. Moreover, what implications would this have, if any, for other NCAA sports that do not generate revenues comparable with basketball and football? While the NCAA attempts to grapple with these questions, one thing is certain: the NCAA and its corporate partners will face a litany of new challenges pushing the envelope for compensation for student athletes.

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