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The End Of The Amateur Athlete

Law360, New York (November 09, 2011, 3:52 PM ET) -- Antitrust controversies in major sports have been rife in 2011.

In the spring and summer, the legal battle between the National Football League and its players took front-and-center as Tom Brady and co. tried to convince the Eighth Circuit to enjoin the NFL lockout and save the NFL season. It didn't work, but — not surprisingly — the players and the owners were able to settle their differences out of court and start the season on time.

By contrast, we are currently in real danger of losing the 2011-12 National Basketball Association season due to an impasse in collective bargaining, and rumors have been swirling that the players may try to force their union to decertify, paving the way for an antitrust lawsuit. The NBA owners, for their part, have already filed a declaratory judgment action in the Southern District of New York, asking the court to preemptively nix any player antitrust suit.

These lawsuits are grand in scope and make great headlines but, at the end of the day, are really just means of gaining leverage at the negotiating table. The notion that players would spend years fighting in the courts — instead of on the courts — to obtain antitrust damages doesn't seem likely. For professional athletes, the optimal outcome is to strike a deal in collective bargaining and get back to playing ball.

There is, however, another sports antitrust battle raging in the courts. Although it won't affect whether or not we see any games, it has major consequences for a multibillion dollar industry.

Unlike the NBA and NFL controversies, it is not a tangential power play to an out-of-court negotiation. This is a case that goes to the heart of what many see as true exploitation.

The purported class action, captioned In re NCAA Student-Athlete Name & Likeness Licensing Litigation[1], challenges the hot-button issue of collegiate student athlete compensation — or the lack thereof — and the less-publicized, but no less significant, issue of the perpetual use of former student athletes' images and likenesses.

A number of former college stars are acting as class representatives, including Ed O'Bannon and David Lattin, of "Glory Road" fame. Last month, the great Bill Russell entered the fray.[2] The class takes aim at the National Collegiate Athletic Association; its licensing arm, the Collegiate Licensing Co.; and video-game maker Electronic Arts.

Plaintiffs allege that the NCAA, CLC and EA conspired to artificially fix at zero the price of licensing college athletes' images and likenesses. To accomplish this, the NCAA requires all of its student athletes each year to sign a form authorizing the NCAA to use the athlete's name or picture to "generally promote NCAA championships or other NCAA events, activities or programs."

According to plaintiffs, this "authorization" is obtained entirely by coercion; if a student athlete doesn't sign the form, he can't play. The result is that student athletes relinquish all rights in perpetuity to the commercial use of their images and likenesses for the NCAA's promotional efforts.

Armed with these broad licenses, the alleged conspirators profit from student athletes' likenesses in a multitude of ways, including deals with television networks to televise games, DVD and On-Demand sales and rentals, online sales of game clips from the NCAA's online "vault," video-clip sales to corporate advertisers, premium website content, photo sales, rebroadcasts of classic games, apparel sales, and the ever-popular video-game market.

The defendants reap billions of dollars from this marketing enterprise. The athletes never see a dime.

This arrangement screams of unfairness. In addition to their full-time academic studies, student athletes frequently devote more than 40 hours a week to their sports. Their "full" scholarships often do not fully cover their expenses, student athlete graduation rates frequently are, according to plaintiffs, "abysmal," and former athletes — the vast majority of whom do not go pro — are often left with lingering injuries and continuing medical bills.

To many, this seems like a paradigm case of exploitation. But is it an antitrust violation?

Plaintiffs' antitrust theory is, as noted by the court in the O'Bannon case, quite "novel." Nevertheless, the court has allowed the plaintiffs' case to proceed, although the court held that the plaintiffs had not sufficiently alleged an agreement to fix prices among horizontal competitors; thus, the plaintiffs' antitrust claims are subject to a rule-of-reason analysis.

In that regard, plaintiffs allege a collegiate-licensing market in the United States, the products of which are the rights to use the images and likenesses of current and former student athletes. The NCAA and its members have purportedly obtained a 100 percent share of this market; all licensing goes through them.

According to plaintiffs, the anti-competitive effects of this conspiracy are significant. Current and former athletes are excluded from the market, i.e., unable to sell licenses to their own collegiate likeness, decreasing the number of competitors in the market and decreasing the number of licenses available on the market. The athletes, as a result, are denied any part of the multibillion-dollar licensing purse.

Despite the novelty of plaintiffs' claims, this action has teeth. It has survived multiple motions to dismiss, and the discovery battles have already begun. A quick settlement seems unlikely, as this case goes toward one of the most polarizing issues in sports: compensation of collegiate athletes.

Plaintiffs attack the compensation ban head-on, noting that student athletes may not receive payment beyond educational expenses approved by the NCAA. Nor may they hire an agent, and they are limited in receiving compensation for non-athletic services. The fact that students agree to these unfavorable terms, argue plaintiffs, demonstrates the NCAA's market power.

Plaintiffs assert that, absent the NCAA's restrictions on compensation, colleges and universities would compete against each other by offering post-graduation licensing revenues to student athletes. While this may be true, it may also be a slippery slope to the end of the "amateur" student athlete. As such, this case could totally reshape the landscape of the business, purpose and oft-perceived purity of college sports.

And that might not be a bad thing.

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[1] No. 09-cv-01967, United States District Court for the Northern District of California

[2] Russell v. NCAA, No. 11-cv-04938, United States District Court for the Northern District of California