Antitrust lawsuit could lead to agents in NCAA

Last year was a big one for lawsuits involving the NCAA and showed the potential for tremendous changes in intercollegiate sports.

For example, the National Labor Relations Board ruled that players from the Northwestern University football team are employees and, therefore, can form a union. A federal court in California ruled that college football and basketball players are permitted to earn a share of licensing revenues from the use of their name, image and likeness.

And the NCAA agreed to settle multiple lawsuits combined into one case in the Northern District of Illinois over whether or not it was at fault over its handling of incidents involving concussions.

In March, Winston & Strawn LLP New York attorney Jeffrey Kessler filed a class-action antitrust lawsuit in a New Jersey federal court on behalf of four college football and men's basketball players and on behalf of the class members whom the players seek to represent. Defendants in the case include the NCAA and its five largest conferences — the ACC, Big 12, Big Ten, Pac-12 and SEC (collectively known as the “Power Five”).

The plaintiffs contend that the NCAA and its member institutions have violated the Sherman Antitrust Act by acting like a “cartel” in that they have engaged in horizontal price-fixing by limiting the compensation that plaintiffs may be paid for their services to the value of an athletic scholarship. Using one of the more underappreciated adjectives in the English language, the complaint states that this practice is “pernicious,” in no way promote competition and are a blatant violation of the antitrust laws.

Essentially, Kessler and the plaintiffs are seeking to eliminate via an injunction all restrictions on remuneration for college football and men's basketball players and instead allow an open market to thrive, one in which individual colleges and universities can decide for themselves how much they want to offer a recruit in exchange for attending and playing a sport at their institution.

Interestingly, there may be an intriguing ancillary outcome of the Jenkins case. If Kessler succeeds in proving his antitrust theory, it is very probable that a Wild West scenario will play out among colleges and universities in their pursuit of superior sports talent. It's not a stretch to fathom an environment wherein agents and/or advisers are retained to assist student-athletes and their families compare scholarship packages and negotiate the best deal possible to attend college.

In fact, in August, the NCAA board of directors granted the Power Five conferences the autonomy to draft their own rules. One of their very first items of business was to raise the value of athletic scholarships to cover the full cost of attending school rather than only covering the cost of tuition. If the new

Power Five measure opened the door for agents to scour the country in search of the best scholarship offer for their clients, Jenkins promises to blow the door off its hinges.

David Williams II, Vanderbilt University's athletics director and vice-chancellor for athletics and university affairs, was quoted as saying, “I wouldn’t relish having to sit down with every kid we sign and they have an agent, but at the same time, I think kids and their parents, when they sign, they need to have a little more information. America produces a lot of lawyers, and they’re looking for stuff to do. So when you start to put variation in there and people having to make decisions, you play right to representation.”

Although I’m not really looking for more “stuff to do,” I do think Williams is right on point. This is a situation that remains fluid and is potentially ripe for an onslaught of agent and adviser infiltration.

The NCAA takes a stab at preventing such infiltration with its Bylaw 12.3.3, but I think it fails short, creates confusion and will easily be circumvented. The bylaw states that if an “athletics scholarship agent” is retained to represent a student-athlete in trying to place said athlete at a college or university as a recipient of “institutional financial aid,” that person is deemed an agent for marketing the student-athlete's athletics ability in direct violation of Bylaw 12.3.1. Subsequently, the student-athlete will be declared ineligible to participate in any intercollegiate sport.

By contrast, Bylaw 12.3.3.1 allows prospective student-athletes to hire a “talent agent” to distribute “personal information” to member schools without triggering a violation as long as the agent takes a fee whether or not a scholarship offer is procured.

The fact that the NCAA prohibits the use of one type of agent in Bylaws 12.3.1 and 12.3.3 but permits the use of another type of agent in Bylaw 12.3.3.1 is confusing and arguably contradictory. Additionally, the NCAA provides a few examples of what it considers to be “personal information.” However, those examples are seemingly vague and fail to provide any clarity.

Kessler has a proven track record of success in arguing antitrust cases. The defendants have retained Jeffrey Mishkin of Skadden, Arps, Slate, Meagher & Flom LLP, who himself is no slouch when it comes to important legal bounties. The potential courtroom battle should prove to be both enlightening and entertaining — and might change the landscape of amateur sports forever.

Said Kessler, “There’s a growing recognition from the courts, the public, the fans and even the schools that the current system is fundamentally unfair. We think change is coming.”

Let’s hope he’s right.