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Bracketology 101 – A Look Ahead at Legal Issues that May Change the Face of the Final Four

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This year's **NCAA** Division I Basketball Tournament may be the last of its kind. This post explores some of the brewing legal issues that may force big changes to future "Final Fours," and in turn, the legal rights and obligations of the NCAA and its member universities, and athletics personnel and student-athletes.

The Tournament creates four separate geographic regions, each consisting of sixteen teams seeded from one to sixteen, with the winners of each region making the famed "Final Four." This year, the Tournament's No. 1 seeds are the University of Virginia in the East Region, the University of Florida in the South Region, Wichita State University in the Midwest Region, and the University of Arizona in the West Region. By analogy, the No. 1 seeds in a tournament of issues facing the NCAA that may change the face of the Final Four landscape would be:

- *West Region* – the Ed O'Bannon class action antitrust lawsuit set for trial in federal court in California in June 2014.
- *Midwest Region* – the petition with the NLRB's Chicago office for a union certification process on behalf of football players at Northwestern University.
- *East Region* – the general category of safety issues in intercollegiate athletics, which includes the lawsuits related to concussion injuries filed by former Eastern Illinois University student-athlete Adrian Arrington and recently filed by current Stanford University track team member Jessica Tonn.
- *South Region* – the issue of "amateurism status" and the growing divide on acceptable parameters for NCAA oversight and athletic aid by the "Power 5" conferences, which consists of the Big Ten, SEC, ACC, Pac-12 and Big 12.

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We examine the West and Midwest No. 1 seeds in today's post. We will examine the East and South's No. 1 seeds in a later post.

THE WEST REGION – The *O'Bannon* litigation

Last month Judge Claudia Wilken refused to dismiss a lawsuit filed by former UCLA star Ed O'Bannon and others. At risk for the NCAA is that the Cout ultimately cuts off the NCAA's ability to prevent student-athletes from receiving compensation from the NCAA's use of their names, likeness and images. Co-defendants EA Sports and Collegiate Licensing Company settled their claims with the plaintiffs for approximately $40 million. The NCAA apparently viewed the settlement with disfavor, as it later sued both settling co-defendants in Georgia state court.

If the Court stops the NCAA from enforcing these limitations, and student-athletes therefore could capitalize financially on their notoriety from athletics, then players like Johnny "Football" Manziel may well have signed

autographs one year too early. Imagine the Tournament next year: media days for the Final Four could include separate press functions to promote book signings and product endorsements of stars such as Duke's Jabari Parker and Oklahoma State's Marcus Smart. Commercials during the tournament could include the players currently competing against each other. Think about Kansas's Andrew Wiggins raising his MVP trophy, while wearing a hat promoting a sports drink.

Similar to their counterparts at the professional level, we could see a future clash between the commercial sponsors of the NCAA and its member institutions, and the competitors of those sponsors having relationships with star players. One can only imagine the reaction from Phil Knight, a well-known supporter of the University of Oregon's athletics program, the moment a member of the basketball team attempted free throws with a Reebok wristband as a result of his or her product endorsement.

THE MIDWEST REGION – Unionization Efforts of Student-Athletes

Scholarship athletes on Northwestern University's football team have conducted the opening kickoff on a different field – the union recognition process. While few question the serious commitment needed for successful participation in college football in the Big Ten conference, a key question arises over whether that commitment (and the University supplying athletic grants-in-aid in connection with such participation) rises to the level of an *employer-employee* relationship. Such a finding by the National Labor Relations Board would have incredible ramifications, since it would open the door for collective bargaining with the Northwestern players on medical coverage issues and on expanding an athletic grant-in-aid to cover the true cost of attendance. These discussions would be the tip of the negotiating iceberg.

It is hard to imagine the opening round of the NCAA Tournament surrounded by images of picketing student-athletes near arenas or even on-campus. However, the recognition of a group of student-athletes as a collective bargaining unit would be a game-changer because payments and benefits beyond those permitted under the NCAA's amateurism rules would instantly become fair game. Miscellaneous expenses such as travel costs to go home for spring break, a laptop to use for class, cell phone service plans, or even expenses for continued medical coverage beyond college would be open for discussion. It would also create an interesting divide between public and private institutions as the labor rules governing public entities differ from those for private employers (how appropriate that Duke and UNC would be subject to different labor rules).

And if student-athletes do qualify as "employees," universities would now have to find a way to ensure that their employment law compliance efforts extend to these individuals. Further, would student-athletes be governed by HR policies that are intended for faculty and administrative staff? And the million dollar question – how would institutions comply with Title IX when their revenue-generating athletes in men's football (and potentially, men's basketball) are on the college's payroll? Each of these areas would have to be addressed, as an unstable labor situation in the college athletics market could result in a 63 team bracket in which a top team elects to sit out its opening game in protest of a condition of its "employment."

Ironically, the unionization of student-athletes could do federal judges a favor by excusing them from having to split hairs on which NCAA rules are a necessity of its existence to facilitate intercollegiate contests and which rule offend antitrust principles. (Based on our assessment of a recent decision in the *Rock v. NCAA* case, we suspect federal appellate and trial judges of the 7th Circuit have an appreciation for this difficulty).

Whether by successful antitrust challenge or a new collective bargaining unit or trade association authorized on behalf of student-athletes, we may see significant movement in the financial rights of college players before the nets are cut down in Lucas Oil Stadium in 2015.