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Competition and Professional Sports – Note by the United States

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United States

1. Introduction

1. By 1890, when Congress passed the Sherman Act, the U.S.' seminal antitrust law, professional sports had become a mainstay of American life. While members of Congress took to the House and Senate floor to debate the future of competition enforcement in the United States, many Americans may have skipped out of work early to catch an afternoon game of the Brooklyn Bridegrooms, who were on their way to winning the 1890 National League baseball pennant.[1] Others may have been among the crowd of a few thousand that witnessed Grace and Ellen Roosevelt, cousins to future President Franklin Roosevelt, compete in tennis doubles and become the first pair of sisters to win a major tennis title together at the 1890 Women's U.S. National Tennis Championships.[2]

2. Concerns with competition issues arising from the organization of professional sports leagues had already begun to arise in 1890, with professional baseball players forming that year a short-lived Players League and confronting "reserve clauses" in the National League's team contracts that restricted baseball players' movement to other teams.[3] The National League filed suit against defecting baseball players in several state courts alleging breach of contract.[4] Though the National League lost the contract disputes in court, the Players League failed after one season.[5] With no competitor left to challenge the reserve clause agreements, the National League continued to use these restrictive clauses, and the use of reserve clauses was widespread in professional major league baseball well into the 1970s. The 1890 state court disputes heralded the start of a long debate about the use of reserve clauses in professional baseball, and competition in sports labor markets more generally, that would eventually be taken up by Congress and U.S. federal courts and is still ongoing today.[6]

3. Sports as a business has grown exponentially since the 1890s and today, as ever, competition issues remain front and center. Competition issues do not just impact the large, professional leagues in the U.S.; competition issues are being debated at all levels of sport. Recent cases brought against Varsity Brands for monopolization of the market for competitive cheerleading events[7] and new state laws and NCAA rules relating to the

[1] The Bridegrooms were the precursor to the Brooklyn Dodgers, now the Los Angeles Dodgers. In the early days of baseball, electricity was not available at many stadiums, so games were scheduled before the sun went down. The advent of "night baseball" did not arrive until stadium lighting become more widely available in the 1930s. "Franchise Timeline", MLB.com, https://www.mlb.com/dodgers/history/timeline-1890s.

[2] The second pair of sisters to clench the Grand Slam title was, of course, the indomitable Venus and Serena Williams, who won the title together over 100 years later, in 1999. "TENNIS; A Consolation for Williamses", The New York Times (June 7, 1999), https://www.nytimes.com/1999/06/07/sports/tennis-a-consolation-for-williamses.html.

[3] Banner, Stuart, *The Baseball Trust: A History of Baseball's Antitrust Exemption* (New York, 2013; online edn, Oxford Academic, 16 Mar. 2015), https://academic.oup.com/book/11629.

[4] *Id.*

[5] *Id.*

[6] The history of the reserve clause debate is discussed further in Part II(B).

[7] Fusion Elite All Stars v. Varsity Brands, LLC, 20-cv-2600-SHL-tmp (W.D. Tenn. Jan. 28, 2022)

monetization of college athletes' names, images, and likenesses[8] following a landmark Supreme Court case[9] show the importance of competition laws to amateur athletes of all ages.

4. This submission will provide an overview of the application of competition law to the business of sports in the United States, highlighting historical precedent in this area as well as recent advocacy actions taken by the U.S. antitrust agencies and private sector antitrust challenges.

2. Application of Competition Law to Sports Leagues

2.1. Sports Leagues & Concerted Action

5. A threshold question regarding the application of competition law to sports leagues is whether or not the conduct of sports leagues satisfies the requirement of concerted action under Section 1 of the Sherman Act. Under U.S. Supreme Court precedent, Section 1 of the Sherman Act does not apply to agreements among subsidiaries of a single firm or agreements among any other parties that are considered members of a single economic entity.[10] It is therefore important to decide when, if ever, a sports league (or other form of joint venture) should be treated as a single entity. This question was answered by the U.S. Supreme Court in the *American Needle* case in 2010, but questions still arise today about the application of the single economic entity rule to sports leagues.

6. Overview of sports leagues in the U.S. The U.S. hosts a number of professional sports leagues involving both team and non-team sports. Among the most popular team sports are Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), and the soccer leagues, Major League Soccer (MLS) and National Women's Soccer League (NWSL). With the exception of the two soccer leagues, each of these leagues is organized as a joint venture of separate businesses. Each has a central office responsible for many operating decisions, such as determining the schedule of games for each season, but the individual teams are separately owned and operated and team owners participate in significant decisions made by the league as representatives of their respective teams. The leagues pool revenues to varying degrees, but each team is a separate profit center and team profitability varies widely within a league. Several large professional leagues also have business relationships with "minor" leagues that develop young players and serve as feeder teams for the major leagues.

7. For individual sports, there are a number of professional associations for golfers, tennis players, race car drivers, and a variety of other athletes. Among these are the PGA Tour (golf), the United States Tennis Association, and the National Association for Stock Car Auto Racing (NASCAR), to name a few. Further, the U.S. has a variety of amateur sports league organizations, the most notable of which are the governing body of college sports, the National Collegiate Athletic Association (NCAA), and the various regional

[8] Interim NIL Policy, NCAA.org, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf; S. 1385, 87th Leg., (Tx. 2021). Discussed further in Part III(A).

[9] NCAA v. Alston, 141 S. Ct. 2141 (2021). Discussed further in Part III(B).

[10] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984).

conferences that make up the NCAA, such as the Big Ten and the Southeastern Conference.[11]

8. *American Needle.* In 2010, the Supreme Court addressed the issue of whether teams in a sports league operating as a joint venture could be held liable for concerted action in violation of the Sherman Act.[12] The case arose from the National Football League's decision to grant a single, exclusive license for use on apparel of all the teams' logos and trademarks. A hat manufacturer denied a license filed suit, arguing that the exclusive license violated the Sherman Act as an unreasonable restraint on trade by competing firms (i.e., the teams). The complaint was dismissed by the district court. The court of appeals, adopting the approach suggested by its precedent, held that the single entity issue had to be addressed "one facet of a league at a time,"[13] and found that, at least with respect to licensing of team logos and trademarks, the NFL acted as a single economic entity.[14] It therefore affirmed the dismissal of the complaint.

9. The Supreme Court unanimously reversed the court of appeals on the basis that the NFL teams "compete in the market for intellectual property" so collective licensing decisions "by the NFL teams . . . 'depriv[e] the marketplace of independent centers of decision-making.'"[15] Consequently, the Court remanded the case to the lower court for further proceedings consistent with the Supreme Court's holding that the collective conduct at issue must be analyzed under the rule of reason.

10. *Recent challenges.* In the years since *American Needle*, numerous private lawsuits have been brought challenging anti-competitive agreements implemented by sports leagues and their members, some of which will be discussed further in this paper. However, the question of how to define "concerted action" in the context of sports leagues continues to be a subject before the courts. In a case currently in litigation, sports promoter Relevent Sports sued the Fédération Internationale de Football Association (FIFA) and the United States Soccer Federation, Inc. (USSF) alleging that they violated Section 1 of the Sherman Act by adopting and enforcing a market-division policy that prohibits the staging of official season soccer matches off home soil.[16] Relevent was working with international soccer leagues in Spain, Argentina, and elsewhere to bring renowned international teams to play games in the United States. Relevent's attempts to stage these games were allegedly thwarted by FIFA and USSF due to the market-division policy.[17]

11. FIFA and USSF moved to dismiss the complaint arguing, among other things, that "[a]llegations that a constituency-based organization's governance processes constitute concerted action are not sufficient to plead an antitrust conspiracy." Rather, they argued that Relevent must also allege an antecedent "agreement [between the members organization] to agree to vote a particular way on a rule or policy" in order to plead

[11] Most universities and colleges with athletic programs are members of an athletic conference within the NCAA; however, some schools participate in some NCAA sports as independent teams, most notably the University of Notre Dame's football program.

[12] American Needle Inc. v. NFL, 130 S. Ct. 2201 (May 24, 2010).

[13] Chicago Professional Sports Ltd. v. NBA, 95 F.3d 593, 596 (7th Cir. 1996).

[14] American Needle Inc. v. NFL, 38 F.3d 736, 742–44 (7th Cir. 2008).

[15] American Needle Inc. v. NFL, 130 S. Ct. 2201, slip op. at 12.

[16] Brief for the United States as Amicus Curiae, ECF No. 44, Relevent Sports v. U.S. Soccer Federation, 21-2088-cv, (2nd Cir. 2023).

[17] Lawson, Alex, "FIFA Antitrust Fight Will Stay In NY As Rehearing Bid Sputters", Law360 (April 21, 2023), https://www.law360.com/articles/1599612.

concerted action. The district court agreed, and Relevent appealed the case to the United States Court of Appeals for the Second Circuit. The U.S Department of Justice (DOJ) filed an amicus brief in the Second Circuit proceeding, noting that there was no legal rule requiring allegations of an agreement to agree among association members for there to be concerted action.[18]

12. The U.S. Supreme Court has treated association rules imposing "duties and restrictions in the conduct of [the members'] separate businesses" as agreements subject to Section 1.[19] It has not demanded details about the manner in which such rules were adopted or which members supported them.[20] Instead, it has treated the rules themselves as concerted decisions by the members, "within the reach of §1 of the Sherman Act."[21] Further, the principle applies equally to all association members adhering to the rule, regardless of whether they voted for the rule, actively supported the rule, merely agreed to follow the rule, or even opposed the rule.[22]

13. The Second Circuit agreed, reversing the district court decision and allowing Relevent's case to move forward. However, USSF has petitioned the U.S. Supreme Court to hear its case and has moved for a stay in the proceedings.

14. In another professional soccer case, the NWSL was sued by a 15-year-old prodigy who was unable to sign with an NWSL team because of a rule requiring that players be at least 18 years old.[23] The NWSL argued that the league is a single economic entity because the league is structured as a single LLC with team owners as shareholders with rights to operate a designated team, and players are hired by the league itself. Relying in part on *American Needle*, the court rejected NWSL's arguments, noting that "the teams compete directly against each other to build the best team, attract fans, and make money, including by selling sponsorships, advertising, and tickets."[24] The court also found convincing the evidence that each team hires and pays its own staff, trains its own players, and is able to make decisions about player compensation using an NWSL "allocation money" mechanism. After finding that NWSL and its teams could face liability under the Sherman Act, the court employed the Rule of Reason test in finding that the age rule was

[18] Brief for the United States as Amicus Curiae, Relevent Sports v. U.S. Soccer Federation, 21-2088-cv, LEXIS 44, (2nd Cir. 2023), at 5.

[19] Associated Press v. United States, 326 U.S. 1, 8 (1945).

[20] *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 692 (considering a Society rule to be an agreement among the Society's engineering members).

[21] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1477 (4th & 5th ed. May 2021); see also id. ("The court [in Professional Engineers] never asked whether the society as an entity had conspired with anyone[, as i]t seemed obvious to the parties that the rule was a contract, combination, or conspiracy among the members.").

[22] *See, e.g.*, NCAA, 468 U.S. at 91, 95, 99 (finding that the NCAA's television plan was a horizontal agreement among the "NCAA member institutions" even though it had been negotiated by an NCAA committee, had not been submitted to the membership for prior approval, and had been actively resisted by many members); see also NCAA v. Alston, 141 S. Ct. 2141, 2154 (2021) ("NCAA issued-and-enforced limits on what compensation [member schools] can offer [constitute] admitted horizontal price fixing in a market where the defendants exercise monopoly control.").

[23] *See* O.M. v. Nat'l Women's Soccer League, LLC, 541 F. Supp. 3d 1171 (D. Or. 2021), and O.M. v. Nat'l Women's Soccer League LLC, 544 F. Supp. 3d 1063 (D. Or. 2021).

[24] O.M., 541 F. Supp at 1179.

unreasonable and granted an injunction in the athlete's favor.[25] The plaintiff later signed with Portland's NWSL team.[26]

2.2. Baseball's Antitrust Exemption

15. The decade of the Roaring Twenties was a watershed moment for competition in the professional baseball business in more ways than one. In the waning days of 1919, Boston Red Sox ownership struck a deal to sell Babe Ruth's contract to the New York Yankees. The deal was announced on January 5, 1920, and Ruth began his career with the Yankees during the 1920 season. This decision to sell Ruth's contract set off a series of events that would change baseball forever. Ruth's record-setting performance as a slugger for the Yankees helped usher in the new "live-ball era" of baseball, created a Yankees championship-winning dynasty, immortalized Ruth as one of the greatest baseball players of all time, and, for the superstitious, marked the beginning of "The Curse of the Bambino," which purportedly led to an 86-year championship drought for the Boston Red Sox. Just two years later came another decision about the business of baseball that would also reverberate through the ages: the Supreme Court's 1922 decision in *Federal Baseball*, which crafted an exception to the Sherman Act for professional baseball, exempting the sport from U.S. antitrust law. The wisdom of both decisions continues to be questioned today.

16. Antitrust law is an exercise of the congressional power to regulate "interstate commerce." Based on the then-prevailing understanding of those words, the Supreme Court in *Federal Baseball* held that the Sherman Act did not apply to the conduct of a professional baseball league because the exhibition of professional baseball games was neither commerce nor interstate.[27] In *Federal Baseball*, a rival baseball team filed suit under Section 4 of the Clayton Act[28] against the two dominant professional baseball leagues—predecessors to Major League Baseball's American and National leagues—alleging a conspiracy to "destroy[]" the upstart Federal League in violation of the Sherman Act.[29] The Supreme Court rejected these claims on the ground that the defendants' "business is giving exhibitions of baseball, which are purely state affairs."[30] Although the Court acknowledged that these "exhibitions" required "repeated travelling on the part of the clubs" across state lines, it concluded that this travel was "not enough to change the character of the business" because it was "a mere incident" to otherwise intrastate exhibitions.[31] It held that baseball was not sufficiently involved in interstate commerce to be subject to the Sherman Act.

17. *Impact of Federal Baseball on labor market competition.* Within two decades, Supreme Court decisions greatly expanded the definition of "interstate commerce," and the

[25] O.M., 544 F. Supp.

[26] "Thorns FC sign midfielder Olivia Moultrie", Timbers.com (Jun. 30, 2021), https://www.timbers.com/news/thorns-fc-sign-midfielder-olivia-moultrie#:~:text=%E2%80%93%20Portland%20Thorns%20FC%20have%20signed,in%20the%202022%20NWSL%20Draft.

[27] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

[28] 15 U.S.C. § 15.

[29] Note 27 at 207.

[30] *Id.* at 208.

[31] *Id.* at 208-209.

Court determined that Congress had not "intended to freeze the proscription of the Sherman Act within the mold of then-current judicial decisions defining commerce power."[32] However, with respect to baseball, the Supreme Court continued to uphold the exemption. This had a particularly acute impact on the market for labor – the baseball players themselves. The reserve clause system first challenged by baseball players in the 1890s continued to thrive. These reserve clauses in players' contracts typically stated that the rights to the player were retained by the team following the expiration of the contract, preventing players from freely making contracts with other teams. Players could also be traded to other teams without any input into the decision.

18. In two separate challenges to the reserve clause system, the Supreme Court gave controlling weight to the doctrine of stare decisis and declined in 1953 and again in 1972 to overturn baseball's judicially created exemption from the antitrust laws.[33] The second challenge was brought by St. Louis Cardinals outfielder Curt Flood, who challenged his trade to the Philadelphia Phillies. Though he lost his case, the Supreme Court in *Flood v. Kuhn* recognized the grounds for the baseball exemption were tenuous. The reserve clause system was largely abandoned in 1975 after collective bargaining and more litigation between MLB and the players. The U.S. Congress finally took up the antitrust issue directly in 1998, over 100 years after the Players League's first challenge to the reserve system. In honor of Flood's activism, Congress passed the Curt Flood Act that eliminated the judicially-created antitrust exemption with respect to employment of major league baseball players, providing that the "conduct, acts, practices, or agreements" that impact employment of major league baseball players are still subject to antitrust scrutiny.[34]

19. *Current state of baseball's antitrust exemption.* Though it is clear that the exemption does not apply to conduct impacting employment of major league baseball players, the precise scope of the exemption is not entirely settled. Some courts have concluded that the *Federal Baseball* exemption is limited to the reserve clause, which MLB largely abandoned in 1975, effectively leaving the exemption a nullity.[35] Other courts have construed the exemption broadly. In *Right Field Rooftops*, for example, the Seventh Circuit exempted the Chicago Cubs' attempt to set minimum prices for seating on rooftops adjacent to Wrigley Field on the grounds that adjacent rooftop pricing was "part and parcel" of "providing public baseball games for profit."[36] Conversely, other courts have held that only conduct "central to the business of baseball" is covered by the Federal Baseball exemption.[37] This limited reading of the exemption is more consistent with the Supreme Court's guidance to "strictly construe[]" exemptions from the antitrust laws.[38]

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[32] United States v. South-Eastern Underwriters Association, 322 U.S. 533, 557 (1944).

[33] See Flood v. Kuhn, 407 U.S. 258, 282–84 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). 541 (7th Cir. 1978).

[34] Curt Flood Act of 1998, Public Law 105-297, § 3, 112 Stat. 2824 (codified at 15 U.S.C. § 26b).

[35] *See* Piazza v. Major League Baseball, 831 F. Supp. 420, 438 (E.D. Pa. 1993); Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1024 (Fla. 1994) (similar).

[36] Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC, 870 F.3d 682 at 689 (7th Cir. 2017).

[37] *See* Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 297 (S.D.N.Y. 2014); Henderson Broad. Corp. v. Houston Sports Ass'n, Inc., 541 F. Supp. 263, 7 Case 22-2859, Document 68, 01/30/2023, 3461058, Page13 of 19 265 (S.D. Tex. 1982).

[38] Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); see also SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969) (explaining that an exemption for the "business of insurance" reaches only

20. Earlier this year, the DOJ filed an amicus brief in a case pending before the U.S. Court of Appeals for the Second Circuit in which minor league teams negatively impacted by an agreement between MLB and the major league teams challenged the legality of the agreement on antitrust grounds.[39] Both the district court and Second Circuit dismissed the case on grounds that the *Federal Baseball* exemption exempted the conduct from the antitrust laws; the plaintiff minor league teams have expressed their desire to appeal the decision to the Supreme Court and bring another challenge to the validity of the *Federal Baseball* exemption. Despite the debate about the scope of the baseball exemption, the Supreme Court has made clear that the exemption does not extend to other sports. [40]

2.3. Non-statutory labor exemption

21. Players in most major professional team sports leagues in the United States are represented by unions, which negotiate pay and working condition issues with the team owners. Restraints on pay and working conditions arising in a collective bargaining relationship are subject to the "non-statutory labor exemption" from the antitrust laws.41 The exemption was crafted by the courts to reflect "a proper accommodation between the congressional policy favoring collective bargaining under [federal labor law] and the congressional policy favoring free competition in business markets."42 In the 1970s, several decisions held that the non-statutory labor exemption did not apply to the rules of major professional sports leagues restricting player mobility, and those decisions led to the negotiation of contracts between the owners and the players' unions providing for substantially greater player mobility.[43]

22. The best-known sports competition case concerned an NFL rule requiring compensation to a team when one of its players is signed by a rival team; in that matter the court of appeals determined that the rule had been imposed on the players union rather than bargained for.[44] In antitrust litigation involving the NBA and NHL, the courts held that the exemption did not apply because the exemption could not be invoked to advantage

"core" aspects of the relationship between an insurance company and a policy holder, not every kind of agreement between an insurance company and any of its trading partners).

[39] Brief for the United States as Amicus Curiae, Nostalgic Partners, ECF No. 68, LLC, et al. v. Office of the Commissioner of Baseball, 22-2859, (2d. Cir. 2023).

[40] *See* Radovich v. NFL, 352 U.S. 445, 449–52 (1957); International Boxing Club of New York, Inc. v. United States, 348 U.S. 236 (1955).

[41] The antitrust laws do apply to labor agreements outside the collective bargaining relationship with "the potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 (1975); see also United Mine Workers of America v. Pennington, 381 U.S. 657, 665–69 (1965); Allen Bradley Co. v. Local Union 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 806–11 (1945).

[42] Connell Construction, 421 U.S. at 622–23; see also Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America v. Jewel Tea Co., 381 U.S. 657, 692–93 (1965).

[43] *See* Lawrence M. Kahn, "Sports, Antitrust Enforcement and Collective Bargaining," 54 Antitrust Bulletin 857, 868–76 (2009).

[44] Mackey v. NFL, 543 F.2d 606, 615–16 (8th Cir. 1976). In an earlier challenge to the same rule, the court held that the exemption did not apply because the rule was adopted unilaterally by the NFL when no contract was in effect. Kapp v. NFL, 390 F. Supp. 73, 85–86 (N.D. Cal. 1974), affirmed, 586 F.2d 644 (9th Cir. 1978).

employers in a dispute with workers.[45] More recent decisions, however, have consistently held that player market restraints are protected by the non-statutory labor exemption whenever they were within agreements negotiated with the players unions.[46] For example, one case held that the exemption applied to the NFL rule barring participation in the player draft for three football seasons after high school graduation.[47]

23. A recurring issue in antitrust litigation between major professional sports leagues and their players is the scope of the non-statutory labor exemption.[48] Some courts limit the exemption to mandatory subjects of collective bargaining and not to collateral matters within the negotiations or agreements. The Supreme Court has held that the exemption continues to apply even after a bargaining impasse is reached.[49] To avoid the application of the non-statutory labor exemption, the union representing NFL players was disbanded in 1989, so the players could pursue antitrust litigation against the league.[50]

2.4. The NFL's sports broadcasting exemption

24. Also exempt from the antitrust laws are some activities related to broadcasting of professional sports. In 1961, the NFL entered into a television deal with U.S. network broadcaster CBS to televise all NFL games, rather than allow individual teams to make their own television deals. The NFL also imposed so-called blackout rules that prohibited teams from allowing their games to be broadcast on local television in a city where another NFL team was located on the same day that the local team had a game, essentially creating a market-allocation scheme that meant football fans around the country could only watch local teams on television. The DOJ filed an antitrust lawsuit against the NFL, alleging the market allocation scheme was a violation of the Sherman Act. The court agreed and, further, enjoined the NFL from moving forward with the CBS contract.[51]

25. Congress intervened to help the NFL and passed the Sports Broadcasting Act of 1961. The Sports Broadcasting Act of 1961 exempted from the antitrust laws the pooling of sponsored broadcast rights for sale as a package by the professional baseball, basketball, football, and hockey leagues.[52] Later, individual MLB and NBA teams licensed their games to television "superstations," which are carried on cable systems throughout the

[45] Robertson v. NBA, 389 F. Supp. 867, 884–89 (S.D.N.Y. 1975); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 496-500 (E.D. Pa. 1972).

[46] E.g. Wood v. NBA, 809 F.2d 954 (2d Cir. 1987); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1986); Zimmerman v. NFL, 632 F. Supp. 398 (D.D.C. 1986).

[47] Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004).

[48] *See, e.g.* NBA v. Williams, 45 F.3d 684 (2d Cir. 1995); Powell v. NFL, 888 F.2d 559 (8th Cir. 1989)

[49] Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

[50] *See* Powell v. NFL, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

[51] *See* United States v. NFL, 196 F. Supp. 445 (E.D. Pa. 1961) (interpreting the prior injunction); United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953) (finding NFL rules on broadcasting in violation of the antitrust laws).

[52] Public Law 87-331, 75 Stat. 732 (codified at 15 U.S.C. § 1291–95). The exemption does not apply if the licensing agreement prohibits televising any games, other than those "within the home territory of a member club of the league on a day when such club is playing a game at home." 15 U.S.C. § 1292.

United States, and the NBA's restriction on the number of games carried was held not to be within the exemption.[53]

26. It is widely believed that part of the NFL's motivation to enter into the television rights pooling contract with CBS was to better compete with an upstart league challenging the NFL at the time, the American Football League (AFL). The NFL and AFL ultimately agreed to merge in 1966. The deal was not subject to scrutiny by the U.S. antitrust agencies because Congress amended the antitrust laws again to specifically exempt the deal.[54] According to accounts at the time, a congressman from Louisiana was promised an NFL franchise in his state in exchange for his work shepherding the merger exemption into law; in 1967 the New Orleans Saints became an NFL team.[55]

27. Since the passage of the Sports Broadcasting Act in 1961, the way in which consumers watch television, including sports, has radically changed with the advent of paid cable and satellite television service and digital streaming services. Courts have held that the antitrust exemption in the Sports Broadcasting Act only applies to television broadcasts that are free, "over-the-air" broadcasts sponsored by advertising, and not to paid cable and satellite broadcasts.[56] However, the contours of the paid vs. unpaid advertising exception-to-the-exemption are still unclear.

28. The NFL's blackout restrictions on local television broadcasts largely remain untouched. The NFL eventually entered into an exclusive deal with DirecTV, a satellite television provider, to broadcast out-of-market games around the country. DirecTV's "Sunday Ticket" gave consumers access to all out-of-market NFL games. So, for fans who wanted to watch an out-of-market NFL game on a Sunday, for example a Dallas Cowboys fan living in Los Angeles, the options to watch the game were: 1) go to a local bar or restaurant that has purchased Sunday Ticket or, 2) purchase the Sunday Ticket package themselves. The catch is that the Sunday Ticket package bundled all out-of-market games and access to the games of one particular team cannot be bought individually. A class of consumers filed suit against the NFL and DirecTV alleging that the exclusive bundled deal violates U.S. antitrust laws. While the suit has been ongoing for over a decade and the court has yet to weigh in on the merits of the claims, the filings from both parties indicate that some of the issues that may come before the court include not only the scope of the broadcasting exemption but also the scope of the *American Needle* decision ruling that NFL was not a single economic entity for antitrust purposes.[57] While the lawsuit is ongoing, the DirecTV/NFL deal has ended and Sunday Ticket will be offered on YouTube beginning with the 2023 football season.

3. Anti-Competitive Conduct and Mergers in Sports Markets

29. The majority of cases brought challenging anti-competitive conduct in the sports industry have been private enforcement actions. However, as referenced previously, the

[53] Chicago Professional Sports Ltd. v. NBA, 95 F.3d 593, 596 (7th Cir. 1996).

[54] Public Law 89-800, 80 Stat. 1515 (codified at 15 U.S.C. § 1291).

[55] Sandomir, Richard, "Congress's Team: Deal for Merger Included Saints", The New York Times (Jan. 26, 2010), https://www.nytimes.com/2010/01/27/sports/football/27sandomir.html

[56] *See* Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299 (3d Cir. 1999).

[57] Defendant's Motion for Summary Judgement, ECF No. 954, "NFL's 'Sunday Ticket' Antitrust Litigation", No. 2:15-ml-02668, (C.D. Ca. Jul. 28, 2023); Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification, ECF No. 686, "Sunday Ticket" Litigation.

DOJ regularly files amicus curiae briefs in private actions involving the application of competition laws to sports. Further, both U.S. competition agencies have brought challenges to mergers and initiated conduct investigations in recent years. This section will highlight some recent private cases and agency enforcement actions challenging anti-competitive conduct and mergers in the sports sector. For more detailed historical information, please refer to the U.S. submission for the 2010 OECD Roundtable on Competition and Sports.[58]

3.1. The ongoing debate in sports labor markets – the UFC case

30. As discussed throughout this note, anti-competitive restrictions placed on professional athletes by sporting bodies have existed since the inception of professional sports, and they continue to be regularly litigated in U.S. courts today. One ongoing example is an antitrust challenge brought in 2014 by professional mixed martial arts (MMA) fighters against the Ultimate Fighting Championship (UFC), the main promoter of live MMA events in the U.S.[59] MMA fighters are independent contractors, who enter into contracts with the UFC for compensation for their participation in MMA fights.[60] In their lawsuit, the MMA fighters allege that the UFC is illegally maintaining monopsony power by eliminating rival promoters through acquisitions, and illegally suppressing fighters' earnings through exclusionary contracting terms and "coercive tactics" that keep fighters locked into contracts perpetually.[61] In an August 2023 ruling on class certification, the court agreed, allowing the lawsuit to move forward with a class of over 1,000 MMA fighters who participated in UFC live MMA events from 2010 to 2017.[62]

3.2. Amateur Athlete Compensation – the NIL Rules

31. The same questions regarding treatment of professional athletes can also arise in amateur sports leagues, in particular, college athletics. As described earlier, the NCAA is the governing body of collegiate athletics in the U.S. To preserve the amateurism of college sports, the NCAA has long had in place rules prohibiting "pay-for-play" deals, which prevent college athletes from obtaining certain types of financial incentives and benefits for their services as athletes. Over the years, college athletic programs have been sanctioned for violations of the rules, perhaps most notably the dreaded "death penalty" imposed on Southern Methodist University that suspended the school's football program after repeated scandals involving violations of the pay-for-play rules.[63]

32. At the same time, college sports have become a multibillion-dollar business for the NCAA, its athletic conferences, and schools. As the "name, image, and likeness" (NIL) of college athletes began to be used more frequently to generate revenue, particularly from video games and broadcasts, without the permission of or compensation to the athletes, it

[58] Note by United States to OECD Competition Committee Roundtable on Competition and Sports (Jun. 8, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2011/05/05/269546.pdf.

[59] Langlois, Anna. "MMA fighers win class certification", Global Competition Review (August 10, 2023), MMA fighters win class certification - Global Competition Review

[60] *See* Order, Le et. al v. Zuffa, 15-cv-01045, ECF No. 839 (D. Nev. 2023)

[61] *Id.*

[62] *Id. See also* Langlois, infra at note 62.

[63] Goodwin, Michael, "N.C.A.A. Bans Football at S.M.U. For '87 Season", The New York Times (Feb. 26, 1987), https://www.nytimes.com/1987/02/26/sports/ncaa-bans-football-at-smu-for-87-season.html.

raised important antitrust concerns about whether NCAA's rules in fact violated the Sherman Act. Lawsuits filed against the NCAA by college athletes ultimately culminated in the Supreme Court's *NCAA v. Alston* decision, in which the DOJ and the Federal Trade Commission (FTC) filed an amicus brief on behalf of the US government in support of the college athletes.[64] The *Alston* decision unanimously affirmed the ruling by the Court of Appeals for the Ninth Circuit finding that NCAA's rules limiting certain benefits to student athletes violated antitrust laws.[65]

33. While the *Alston* decision, notably, addressed a narrow area of "non-cash education-related benefits" and did not open the door to cash payments from schools to athletes, many state governments had already begun to pass or consider legislation authorizing NIL cash compensation.[66] In June 2021, following the *Alston* decision and passage of numerous state laws, the NCAA issued an interim policy suspending NIL restrictions on athletes and allowing college athletes to engage in "NIL activities consistent with law of the state where the school is located."[67]

34. The NCAA distinguishes between NIL deals which provide direct compensation from a third party to an athlete from "pay-for-play" inducements given by schools in order to recruit an athlete to attend and play at a particular school; the NCAA continues to prohibit such "pay-for-play" inducements. In October 2022, NCAA issued further guidance on the extent to which schools can be involved in their student athletes' NIL deals, to avoid potential "pay-for-play" conflicts.[68] This is an area to watch closely as the new NCAA NIL rules and state NIL laws go into effect and athletes begin entering into NIL licensing deals.

3.3. Collusion in Marketing

35. Collusion can take place in the marketing of sports equipment. One of the most effective – and costly – tools for marketing ski equipment is securing endorsement agreements from well-known skiers. Typically, ski equipment companies compete to secure the endorsement of prominent skiers. When an agreement expires, the companies may try to induce the skier to switch from one company to another, for example, by offering more money in exchange for an endorsement. In 2014, the FTC brought a case against Marker Völkl and Tecnica, alleging that beginning in 2004, they had agreed not to compete with each other to secure endorsements by professional skiers. More specifically, the FTC charged that Marker Völkl agreed not to solicit, recruit, or contact any skier who previously endorsed Tecnica skis, and Tecnica agreed to a similar arrangement with respect to Marker Völkl's endorsers. In addition, the complaint states that in 2007, the companies expanded the scope of their non-compete agreement to cover all of their employees. The case was resolved with an agreement that banned such practices.[69]

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[64] Brief for the United States as Amicus Curiae, NCAA v. Alston.

[65] N.C.A.A. v. Alston, 141 S. Ct. 2141 (2021).

[66] *See, e.g.* California Fair Pay to Play Act; Texas Senate Bill 1385 (2021).

[67] "Interim NIL Policy", NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf

[68] "Institutional Involvement in a Student Athlete's NIL Activities", NCAA (Oct. 26, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf

[69] Press Release, Fed. Trade Comm'n, Ski Manufacturers Marker Völkl and Tecnica Settle FTC Collusion Charges Related to Ski Endorsers and Employees (May 19, 2014),

3.4. Competition issues in broadcasting

36. Several recent DOJ enforcement actions have touched on competition in the sports broadcasting industry.[70] In June 2018, the DOJ announced that it would require the Walt Disney Company to divest 22 Regional Sports Networks (RSNs) as a condition of its $71.3 billion acquisition of certain assets from Twenty-First Century Fox, Inc. Without the required divestitures, the transaction would likely have resulted in higher prices for cable sports programming. Disney agreed to divest the 22 RSNs.

37. In November 2016, the Antitrust Division filed a complaint to stop DirecTV and its parent, AT&T, from orchestrating a series of unlawful information exchanges between DirecTV and three of its pay television competitors during the companies' negotiations to carry the Los Angeles Dodgers' pay television channel. The companies settled that case with the Division in March 2017. The settlement enjoined the companies from sharing competitively-sensitive information with their rivals and required corporate monitoring, antitrust training, and corporate compliance programs.

3.5. Fantasy Sports

38. The growth in popularity of professional sports combined with advances in technology have given sports fans new ways to engage in their fandom. Fantasy sports websites allow fans to assemble imaginary, "fantasy," teams of their favorite players in most professional sports and to compete against other fans during the season, often for profit. When an athlete performs well in a season, fans with that athlete on their fantasy team obtain points that help them win their fantasy leagues. Fantasy sports have become wildly popular in the U.S. and fantasy sports games are available for most professional sports.

39. In November 2016, two leading paid fantasy sports websites, FanDuel and DraftKings, announced a merger. The FTC and the attorneys general in California and the District of Columbia filed suit to block the merger, alleging that the combined firm would control more than 90 percent of the U.S. market for paid daily fantasy sports contests.[71] After the FTC obtained an injunction from a federal court halting the merger until the conclusion of the FTC's administrative challenge, the parties abandoned the transaction.[72]

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https://www.ftc.gov/news-events/news/press-releases/2014/05/ski-manufacturers-marker-volkl-tecnica-settle-ftc-collusion-charges-related-ski-endorsers-employees\.

[70] Makan Delrahim, Assistant Attorney General, US Dept. of Justice, Remarks at University of Notre Dame Law School (Aug. 31, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-notre-dame-law-school.

[71] "FTC and Two State Attorneys General Challenge Proposed Merger of the Two Largest Daily Fantasy Draft Sports Sites, DraftKings and FanDuel", Federal Trade Commission (Jun. 19, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/06/ftc-two-state-attorneys-general-challenge-proposed-merger-two-largest-daily-fantasy-sports-sites.

[72] "DraftKings, Inc./FanDuel Limited, In the Matter of", Federal Trade Commission (Jul. 14, 2017), https://www.ftc.gov/legal-library/browse/cases-proceedings/161-0174-draftkings-inc-fanduel-limited-matter.

3.6. E-sports

40. Video games are among the fastest growing forms of entertainment in the world, and the market for e-sports has grown rapidly alongside it. Players are increasingly competing in online e-sports matches and watching others compete on popular streaming sites. Video game companies have sought to capitalize on this popularity by creating professional e-sports leagues, often generating hundreds of millions in franchise fees, sponsorships, and television deals.

41. In April 2023, the DOJ filed a civil antitrust lawsuit against Activision Blizzard, Inc. for imposing rules that limited competition in professional e-sports leagues and suppressed players' compensation.[73] The complaint alleged that Activision imposed a Competitive Balance Tax, where a team would be fined and have the fine re-distributed to other teams if it paid its players over a limit set by Activision. The Tax, "not only harmed the highest-paid players, but also depressed wages for all players on a team. For example, if a team wanted to pay a large salary to one player, the team would have to pay less to the other players on the team to avoid the Tax. Teams also understood that the Tax incentivized their competitors to limit player compensation in the same way, further exacerbating the Tax's anticompetitive effects."[74] Activision settled the lawsuit with the DOJ, agreeing to end all Competitive Balance Taxes in its professional e-sports leagues and revise its antitrust compliance and whistleblower protection policies.[75] The court approved the settlement in July 2023.[76]

4. Conclusion

42. Competitive sports are about more than business, and because of that, competition law issues that arise in sports markets should be a "kitchen table" issue about which all competition enforcers care. Sports occupy a unique place in the lives of American consumers, and in the lives of consumers all over the world. What is happening in the sporting world is often a touchstone for what is occurring in the greater society.

43. Sports give us stories of heroes, stories of Davids versus Goliaths, and stories of justice. Jackie Robinson breaking the color barrier in professional baseball. Jesse Owens on the podium at the 1936 Berlin Olympics. Billie Jean King winning the "Battle of the Sexes" in tennis. American schoolkids grow up learning legends of sports heroes known not just for their athletic talent, but for their battles against inequality and injustice in the U.S. and around the world. After the U.S. Women's National Team won the 2019 Women's World Cup, fans at the stadium in France chanted "Equal Pay!" instead of "U-S-A!" in support of the team's historic employment lawsuit against USSF. Now, 4 years later, young girls who cheered on the U.S. women as they took the field in the 2023

[73] Complaint, ECF No. 1, United States v. Activision Blizzard, Inc., No. 1:23-cv-00895 (D. D.C. 2023).

[74] *Id.*, at 3.

[75] "Justice Department Files Lawsuit and Proposed Consent Decree to Prohibit Activision Blizzard from Suppressing Esports Player Compensation", U.S. Department of Justice (April 3, 2023), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decree-prohibit-activision-blizzard.

[76] Final Judgement, ECF No. 10, United States v. Activision.

Women's World Cup in New Zealand saw a team of professional women who were being paid equally to their male counterparts for the first time ever.

44. These are but a few examples illustrating that the history of sport in America is also the history of our country's struggles to achieve "a more perfect union." The ideals of equality and justice that are inextricably linked with the American sports experience are the same ideals at the root of competition law. While most American consumers of sports may not know the text of the Sherman Act or understand the technicalities of the rule of reason, they instinctively understand the importance of competition laws, because at the heart of any sport is competition, fairness, and justice. These are the goals that we are striving for as competition enforcers, as we work to ensure a level playing field across all sectors of the economy.