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Abstract

The business of major league team sports in the United States was once viewed as something different under competition law, with much deference afforded the "sporting" world. However, these industries have become multi-billion dollar enterprises with broad economic impacts. The application of competition law to U.S. major league team sports has been fundamental to the structure and history of these industries. Anachronistic exemptions from the antitrust laws for sports enterprises have been in retreat, and college athletic competitions that generate billions of dollars in annual revenues are now under renewed competition law scrutiny. Notwithstanding the greater application of the antitrust laws to these "sports," they have thrived economically with substantial revenue increases and greater flexibility as teams have more opportunities to compete with one another. The increased application of competition law to major league sports teams in the U.S. has been a great benefit to consumers. This experience should be well considered as the EU and other areas consider how competition law should apply to sporting enterprises.

Le droit de la concurrence portait pendant longtemps un regard différent sur le secteur des sports de ligue majeurs des Etats-Unis, avec une certaine déférence accordée au "monde du sport". L' impact économique de ces ligues est cependant devenu très important. La mise en oeuvre du droit de la concurrence au secteur des sports de ligue majeurs est devenue fondamentale dans la structure et l'évolution de cette industrie. Les exemptions anachroniques aux règles anticoncurrentielles accordées jusqu'alors aux entreprises du sport sont en retrait, et les compétitions athlétiques universitaires, génératrices de plusieurs milliards de dollars de bénéfices annuels, sont désormais soumis au respect du droit de la concurrence. Malgré l'application plus approfondie du droit de la concurrence à ces "sports", ces derniers ont tout de même réussi à s'épanouir considérablement, en accroissant les niveaux des revenus et en gagnant en flexibilité, les équipes ayant plus d'opportunités de s'affronter mutuellement. Cette application revisitée du droit de la concurrence a également joué au bénéfice des consommateurs. L'expérience américaine devrait servir de source d'inspiration à l'heure où l'Union européenne et d'autres régions s'interrogent sur l'application du droit de la concurrence aux entreprises du sport.

I. Introduction

1. This article aims to assist readers with a big picture overview of the structure of major league team sports in the United States, and how competition law has applied to these industries. Most people are aware of some aspect of how the sports business operates, whether through hearing of a Champions League football match or the marketing efforts in the United States surrounding "Super Bowl Sunday"—the day of the championship game in American football, a game very different from football known to the rest of the world. However, a broader perspective sheds light on how these sports in the U.S. arrived at their current condition, and what may take place in the future. It is no overstatement to say that competition law is fundamental to having any knowledge of how major league team sports have developed in the U.S.

II. National Football League (NFL)

2. For anyone unfamiliar with the sport, American "football" is a combination of rugby, Australian rules football, hurling, and wrestling. To simplify, played on a grass field grid that is approximately 110 x 50 meters, competing teams take turns against each other in a series of plays, trying to advance a flattened and pointed ball across the opposing team's goal "line" on the other end of the field. Possession of the ball requires advancement of the ball of at least 10 yards (somewhat less than 10 meters) in four plays, with failure resulting in the opposing team having its own turn to score. A team can choose to kick the ball to its opponent on the fourth play (a "punt"), to force the opposing team to have more distance to cover during its next offensive turn. The ball is either carried by a runner or thrown through the air, and the play ends when the player carrying the ball is wrestled to the ground ("tackled") or an attempted throw fails. All of the players are shielded by plastic helmets and armored pads that are supposed to be designed to protect the players from injury, but also give the players on each team a semi-mechanical, uniform appearance. The game ends after 60 minutes of timed play, with multiple breaks in play that are ideal for television commercials and usually stretch the game to about three hours for each broadcast. With the mixture of high level athletic skill in running and throwing the ball, and the controlled violence between opposing teams that is inherent in the game, American football generates more than US$10 billion in annual revenues, with billions more for its businesses partners—e.g., television networks, concession operators, stadium builders, etc.

3. The NFL is a closed "league" made up of 32 clubs (or "franchises") that are permanently located in home cities scattered across the U.S., with no relegation of teams. Thus, regardless of how badly the worst performing club does on the field and financially, the team remains a member of the NFL.

4. By league rule, NFL franchises cannot be owned by corporations, and a lead owner must hold a minimum percentage of the team. The end result is that franchises are generally owned by very wealthy individuals—a combination of current billionaires and descendants of persons who joined the NFL when it was a much smaller industry. The sole exception is the Green Bay Packers, whose shares are publicly owned by fans, but in effect the shareholders have no practical say over

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how the franchise is run with the team operated by a self-perpetuating board of directors. The anachronistic structure of the Packers was created in the 1920's, and the NFL has not allowed it to be repeated. NFL revenues from national television contracts and other national intellectual property rights deals (such as league sponsorships) are generally split among all teams on an equal basis, but each team also has substantial local revenue sources that vary considerably from team to team. Thus, franchise revenues are not equal, but they are "more equal" than most sports leagues given the size of the national revenues.

5. The NFL has rules limiting the extent to which its owners may have interests in other sports. These restrictions were successfully challenged under the antitrust laws in the 1980's by the now defunct North American Soccer League (NASL), which wished to sell its franchises to NFL owners.[1] These cross-ownership restraints have since been loosened but not eliminated, with several NFL owners also owning teams in other leagues, notably Lamar Hunt, who owned the Kansas City Chiefs NFL franchise and both the Columbus Crew and FC Dallas teams in Major League Soccer (MLS); Stan Kroenke, who owns the St. Louis Rams in the NFL, the Colorado Avalanche in the National Hockey League (NHL), the Colorado Rapids in MLS, and the Denver Nuggets in the National Basketball Association (NBA); and Robert Kraft, who owns the New England Patriots in the NFL and the New England Revolution in MLS. NFL owners have also owned some of the more prominent football teams in Europe, including Malcolm Glazer, who owns the Tampa Bay Buccaneers of the NFL and Manchester United, and Randy Lerner, who owned the Cleveland Browns of the NFL and still owns Aston Villa.

6. From a competition standpoint, the NFL is the sole major professional American football league in the United States and enjoys a monopoly position. Over the years, the NFL has faced new leagues that started franchises in markets that the NFL did not occupy, or in larger markets that could sustain multiple franchises. All of those leagues either failed or had all or some of their teams wholly or partially assimilated into the NFL, and thus joined the monopoly. Starting in the late 1940's, the All-America Football Conference (AAFC) signed many star players—including Cleveland Browns Hall of Fame running back and later Hollywood actor Jim Brown—but in the end three of its franchises joined the NFL. In the 1960's, the American Football League (AFL) followed the same basic strategy, signing star veterans and college players including New York Jets quarterback Joe Namath. All of the AFL's teams joined the NFL in 1970, nearly doubling the size of the league.

7. The NFL faced another challenge with the United States Football League (USFL) in the 1980's, which signed many star players who otherwise would have signed with the NFL. The USFL also filed an antitrust suit against the NFL and won a jury verdict on liability. However, the jury only awarded the USFL US$1 in damages (plus an award of attorney fees), with the jury apparently believing that, even if the NFL engaged in monopolization in violation of the law, the USFL was operated so incompetently that any damages were caused by factors other than the NFL's conduct.[2] The USFL became defunct and disappeared to history.

8. NFL owners have also sued each other from time to time under competition laws, most notably an antitrust suit filed by Oakland Raiders owner Al Davis against league restrictions on franchise relocations, when he wished to move his team from Oakland, California (just outside San Francisco), to Los Angeles. Davis won the suit, which declared the NFL's restrictions to be overly severe, and obtained a multi-million dollar judgment and the ability to move his team to Los Angeles.[3] (Davis later moved the Raiders back to Oakland after finding Los Angeles less hospitable to NFL football than he expected). The NFL subsequently made its franchise relocation rules more flexible, but it remains to be seen whether those rules will withstand antitrust scrutiny if another owner moves a franchise to Los Angeles (which currently has no NFL team) or another location against the wishes of his or her fellow NFL owners.

9. The NFL initially faced major competition law issues regarding its joint sale of television rights by the league. In 1961, the U.S. federal government filed suit against the NFL, alleging that the joint selling of television rights lessened competition and harmed consumers.[4] However, the NFL was able to obtain a specific antitrust exemption from the U.S. Congress—the Sports Broadcasting Act (SBA)—that permitted the NFL to jointly sell its television rights.[5] The SBA provided, and provides to this day, that the NFL would not have that antitrust immunity for broadcasts in competition with college or high school football on Friday nights or Saturdays when those games were typically played. In effect, the SBA reduced competition in two areas to allocate the times when these sports would primarily play (college football has since expanded its schedule to broadcast on other days when the NFL does not typically play). The SBA was later amended to make clear that the NFL could merge with the AFL in the late 1960's without antitrust challenge, an exemption granted at the same time the NFL decided to award a new franchise to New Orleans, the locale of powerful Louisiana lawmakers, who were proud of the tradeoff.[6]

10. The NFL has also faced many antitrust lawsuits over the course of more than a half century in connection with the owners' efforts to restrict competition amongst themselves for the services of their employee players. These competition lawsuits have been complicated by the owners' desire to settle these disputes on the basis of the players forming a labor law union, so that the restraints agreed to in the settlements would be free from future competition law attack, since agreements made between an employer and a union are usually immune from antitrust challenge. The owners also argued that their antitrust immunity should extend beyond

1 *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982). The name NASL has since been adopted by an entirely different, lower level league.

2 *United States Football League v. NFL*, 644 F. Supp. 1040 (S.D.N.Y. 1986).

3 *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984).

4 *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961).

5 15 U.S.C. §1291-1295 (1986).

6 R. Sandomir, Congress's Team: Deal for Merger Included Saints, *The New York Times* (Jan. 26, 2010): http://www.nytimes.com/2010/01/27/sports/football/27sandomir.html.

the time when the settlement expired, so that the owners could employ labor law remedies (such as lockouts) against the players. Ultimately, the U.S. Supreme Court decided that such immunity (called the "nonstatutory labor exemption from the antitrust laws") may extend beyond the expiration of the agreement between the players and owners, but also made clear that the exemption would end when the labor law process no longer needs to be protected.[7]

11. The end result has been that the NFL players have twice decided to dissolve their union so that they could challenge the owners' restrictions on competition for their services under the antitrust laws. In the first such litigation (*White v. NFL*), the owners and the players in 1993 reached an antitrust settlement agreement under which the players received "free agency" for the first time ever in the NFL, with freedom of contract usually vesting for the player after he is employed for a total of four years in the league, but with competition for player services still limited by a "salary cap" that restricts the amount that each franchise can pay its players to a maximum amount (with various complicated accounting rules that apply to payment mechanisms such as signing bonuses that permit the players to receive more in cash each year than the limit in "salary cap" dollars). The antitrust settlement agreement was contingent upon the players re-forming their union, which they did.[8] The settlement was then followed by rapid economic growth for the sport, with the salary cap increasing with revenues from about US$30 million per team in 1994 to US$123 million per team in 2010.

12. In 2011, after several extensions of the 1993 agreement, the players and NFL owners again could not resolve their economic differences. The players dissolved their union followed by another antitrust challenge to the owners' threatened and executed "lockout" of the players (i.e., an industry shutdown designed to exert economic leverage over its workers).[9] That lawsuit (*Brady v. NFL*) again was followed by another antitrust settlement with a corresponding labor agreement with a re-formed union, with the agreement extending through the 2020 NFL season. The salary cap for the upcoming 2014 season has been set at US$133 million per team (not including more than US$33 million per team in player benefits such as pensions, health insurance, etc.). This is a total of more than US$5 billion in aggregate player compensation in 2014, with the amount expected to increase even more in future years with expected future increases in NFL revenues.

13. Before the fight with the players in 2011, the NFL owners tried to obtain a practical exemption from Section 1 of the Sherman Act, which applies to agreements in restraint of trade, on the claimed basis that all NFL teams collectively operate their businesses as a "single entity" and thus could not conspire with one another. Not surprisingly, given the long history of Section 1 applying to competition among NFL owners, the U.S. Supreme Court unanimously rejected the NFL's argument.[10]

7 *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

8 *White v. NFL*, 836 F. Supp. 1508 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

9 *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011).

10 *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

14. The forces of increased competition since the introduction of free agency in 1993 have been accompanied by record financial success. NFL revenues have grown from less than US$2 billion in 1994 to more than US$10 billion in 2013, a more than five-fold increase. It is also estimated that, of the 50 most valuable sports teams in the world, 30 of them are NFL teams (out of 32 teams in the entire league), with the highest ranked team (the Dallas Cowboys) worth US$2.1 billion and the lowest of these (the Oakland Raiders) still worth US$785 million.[11]

III. College football and basketball

15. The status of college sports in the United States is a paradox. About 19 million students are enrolled each year in the U.S. in more than seven thousand post-secondary school institutions.[12] These colleges and universities include some of the best educational institutions in the world, focused intently on their educational mission. College have many of their students participating in sports that are not expected to generate significant revenues, such as swimming, track and field, lacrosse, wrestling, volleyball, etc. However, two college sports—American football and basketball—have mutated into big businesses.

16. College sports are mainly governed in the U.S. by the National Collegiate Athletic Association (the "NCAA"), and college "conferences" which are groups of schools ranging from 8 to 16 conference members that regularly compete against one another in various sports, and for a conference championship. Well known conferences include the "Big-10," with its schools located mainly in the Midwest, the "Pac-12," with its schools located mainly near the Pacific coast, and the Southeastern Conference (SEC), with its schools located mainly in its namesake region.

17. Each college schedules its own athletic competitions but must do so subject to NCAA and conference rules, with limits on the number and timing of games, and requirements as to how many games each season must be against conference opponents. Revenue from the games is generally shared subject to complex rules adopted by the NCAA and conferences.

18. The NCAA was created more than a hundred years ago at the behest of U.S. President Theodore Roosevelt to regulate college football, which at the time resembled barely organized

11 K. Badenhausen, Real Madrid Tops The World's Most Valuable Sports Teams, *Forbes* (July 15, 2013, 10:04 AM): http://www.forbes.com/sites/kurtbadenhausen/2013/07/15/real-madrid-tops-the-worlds-most-valuable-sports-teams; The World's 50 Most Valuable Sports Teams 2013, *Forbes*: http://www.forbes.com/pictures/mli45edmjk/50-oakland-raiders.

12 National Center for Education Statistics, Enrollment in Postsecondary Institutions, Fall 2010; Financial Statistics, Fiscal Year 2010; and Graduation Rates, Selected Cohorts, 2002-2007 (2012), https://nces.ed.gov/pubs2012/2012280.pdf. In the U.S., a college is generally limited to students who have just completed "high school," i.e., after 12 years of public or private primary school education usually ending when the student is about 18 years old. A "university" also has students pursuing "post-graduate" degrees after they complete their "undergraduate" degree. For example, a student will usually receive an undergraduate degree after four years at college or university, and then some of these students pursue degrees such as a "Masters" degree, a Ph.D., a "J.D." in law, an M.B.A. in business, or an M.D. in medicine. College sports almost entirely consist of students participating during their undergraduate years, with rare exceptions.

brawls with many student deaths each year. Since then, the NCAA has transformed into an organization with widely diffused self-governance that now regulates the conduct of all major colleges and conferences in intercollegiate sports, reaching detailed matters such as scheduling, competition rules, recruiting, employment practices, etc. The NCAA also operates championship tournaments for almost all sports, with its college basketball tournament the most prominent.

19. College football and college basketball in the U.S. are multi-billion dollar industries. In 2010, the NCAA signed a 14-year, US$10.8 billion contract with CBS Sports and Turner Broadcasting to televise the NCAA's men's basketball tournament. The contract provides at least US$740 million annually to NCAA members.[13] The NCAA and the major college conferences similarly just agreed in 2012 on a broadcast contract with cable sports network ESPN for a new, four-team "College Football Playoff." ESPN reportedly has agreed to pay the NCAA and NCAA members about US$7.3 billion over 12 years, an average of about US$608 million per year.[14] The five major college football conferences are the greatest beneficiary of the new television revenue. For example, each member of the SEC is expected to receive approximately US$34 million for each institution's football program. This in part is due to conferences forming their own television networks with broadcast contracts for conference games. To illustrate, the Pac-12 conference signed a 12-year contract with Fox and ESPN for more than US$225 million per year, which more than tripled its prior media deal.[15] As these economic rewards have grown, college conferences have gained and lost members as each college has tried to secure and grow its economic future, with schools and conferences frequently suing each other in their disputes about their contractual and monetary obligations to one another.[16]

20. The economic activities of the NCAA, conferences and colleges in sports-related activities are very much subject to the antitrust laws. Thirty years ago, the U.S. Supreme Court upheld a court decision that NCAA restrictions on competition among its member institutions for television contracts for college football games violated Section 1 of the Sherman Act as an unreasonable restraint of trade, which could be condemned by the court under a "quick look" in the blink of an eye.[17] The court rejected the NCAA's efforts to gain an exemption for its business activities such as broadcast contracts under the disguise of claims of amateurism, and the NCAA's business has only grown since then. So too has its practice of engaging in restraints on competition.

13 CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement, NCAA (Apr. 22, 2010): http://ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement.

14 J. Miller, College Football's Most Dominant Player? It's ESPN, *The New York Times* (Aug. 24, 2013): http://www.nytimes.com/2013/08/25/sports/ncaafootball/college-football-most-dominant-player-its-espn.html.

15 Pac-10 announces ESPN/Fox TV deal, ESPN (May 4, 2011 8:04 PM): http://sports.espn.go.com/ncf/news/story?id=6471380.

16 E.g., S. Berkowitz, Maryland lawsuit alleges ACC broke rules on exit fee, *USA Today* (Jan. 14, 2014): http://www.usatoday.com/story/sports/college/2014/01/14/maryland-acc-lawsuit-exit-fees-big-ten/4471441.

17 *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

21. For example, in the 1990's, the NCAA determined that it wished to reduce the cost of college athletics. It chose to do this by imposing a rule on all of its members that limited the compensation of certain assistant athletic coaches to just US$16,000 per year (with no restraints on higher paid head coaches who had leverage over the NCAA, in contrast to the assistant coaches). The assistant coaches sued the NCAA under Section 1 of the Sherman Act on the basis that the rule was a blatant price fixing agreement. The trial court agreed, and the decision was upheld on appeal.[18]

22. The NCAA also was sued under the antitrust laws by five of its own member schools that operated a college basketball tournament (the "National Invitation Tournament," or "NIT") in competition with the NCAA's own season-ending tournament. The NIT was considered the *de facto* national championship before the NCAA started its own championship. The schools alleged that the NCAA had acted to destroy the viability of the NIT to acquire and maintain a monopoly. In the midst of trial, the NCAA and the schools settled, with the NCAA agreeing to pay more than US$56 million to resolve the case.[19]

23. The NCAA and the major conferences do not compete economically for the services or the rights of the athletes whose efforts yield these revenues. Instead, the NCAA has imposed and enforced a series of rules that prevents any NCAA college and conference from providing anything of value to athletes beyond a "grant in aid" covering tuition, room and board, and fees. The colleges may not even provide athletes reimbursement for the additional costs of attendance, such as "laundry money," with certain conferences currently in talks to provide up to US$2,000 per student per year for such costs, but even this step has faced resistance and has no assurances of being implemented.

24. NCAA rules are so restrictive that last year the University of Oklahoma self-reported a violation for serving three athletes more than what the university believed was the "permissible" amount of pasta at a banquet, with the result that the athletes donated US$5 each to charities (this is not a typo, it was the cost of the pasta) to be sure the players would have their NCAA eligibility the following year.[20]

25. The NCAA and major conferences have resisted applying antitrust principles to their multi-billion dollar businesses, even as they have imposed market limiting restrictions and courts increasingly have struck them down under competition law. A recent court decision, in a currently pending case challenging NCAA rules governing the use of player publicity rights (as in video games)—a business in which the NCAA earned millions of dollars—held that a market for college player licensing rights is relevant for antitrust purposes.[21] That case is currently slated for trial in the summer of 2014.

18 *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

19 *Metropolitan Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004); A. Katz, NCAA buys tournaments, ends NIT litigation, ESPN.com (Aug. 17, 2005, 6:24 PM): http://sports.espn.go.com/ncb/news/ story?id=2136724.

20 N. Schwartz, Pocket-dials and too much pasta: Oklahoma's most ridiculous self-reported NCAA Violations, *USA Today Sports* (Feb. 19, 2014): http://ftw.usatoday.com/2014/02/oklahoma-ncaa-violations-pasta.

21 *O'Bannon v. NCAA*, 2010-11 Trade Cases (CCH) ¶ 76,899, at *5 (N.D. Cal. 2010).

26. Moreover, NCAA football and basketball players have just filed an antitrust class action in U.S. federal court against the NCAA and five "power" conferences, challenging the defendants' restrictions on competition for player services.[22] The action asserts claims under Section 1 of the Sherman Act and seeks an injunction to invalidate these restraints. The action does not seek class damages and instead focuses on systemic change. At the same time, a regional director of the U.S. National Labor Relations Board (NLRB) has just determined that football players at Northwestern University—a member of the Big-10 conference—should be treated as employees for purposes of federal labor laws, and have the right to decide in an election by majority vote whether to form a union; Northwestern is appealing that decision.[23] These legal developments are in early stages but have already prompted more extensive media debate than ever before as to whether college football and basketball athletes should receive nothing more than the current NCAA and conference limit of a full grant-in-aid—which does not even cover the full cost of attendance—when the athletes' efforts generate multi-billion dollar businesses.[24]

IV. National Basketball Association (NBA)

27. The NBA has been the third most successful professional sports league in the United States, behind the NFL and Major League Baseball. Like the NFL, the NBA is a closed league, currently with 29 teams in the U.S. and one team in Canada. Unlike the NFL, NBA teams may be owned by corporations. Many of them are so owned, including the New York "Knicks" which are owned by a major cable television company and arena operator; the Toronto Raptors which are owned by Maple Leaf Sports & Entertainment (MLSE), which among other things also owns the Toronto Maple Leafs and which itself is primarily owned by Rogers Communications (a major Canadian media company); and the Boston Celtics which until 2002 was owned by a limited partnership with publicly traded shares.

28. The NBA, like the NFL and other U.S. sports leagues, has rules restricting when franchises may be relocated from city to city, but more than a few NBA franchises have relocated as they sought more profitable home territories, which sometimes has had more to do with arena conditions and leases than with market size. To give a few examples, the Seattle Supersonics moved to Oklahoma City in 2008 (becoming the "Thunder"), and the Charlotte Hornets moved to New Orleans in 2002 (renaming itself the "Pelicans" in 2013). After the Hornets moved, Charlotte then received an expansion franchise (the "Bobcats") which has announced that it will reclaim the name "Hornets" now that the NBA franchise that earlier moved from Charlotte has ceded that name.

29. The NBA's franchise relocation rules were the subject of antitrust litigation when the San Diego Clippers moved to Los Angeles in 1984 without league approval, and the NBA sought an injunction that it was permitted under the antitrust laws to block the move. The NBA and the Clippers fought in court for several years, with a court ruling that a trial would be needed to resolve many disputed factual issues, the NBA changing its franchise relocation rules after the move to make them more objective, and the Clippers remaining in Los Angeles to this day.[25]

30. In the 1960's, the NBA faced serious competition from the American Basketball Association (ABA) with bidding wars for players resulting in increases in player salaries and lost talent. The NBA then agreed in 1970 to merge with the ABA, which would stop the competition between the leagues for players. This resulted in an antitrust case filed by legendary NBA player Oscar Robertson, then-President of the NBA players' union, seeking to enjoin the NBA-ABA merger.[26]

31. Six years after the Robertson suit was filed, the NBA and the players reached a settlement under which the NBA was allowed to merge with the strongest remaining ABA teams and the players receiving increased free agency rights. In the early 1980's, more than a few NBA franchises suffered from financial distress with several teams facing the prospect of bankruptcy. Given the circumstances, the players agreed in 1983 to a salary cap that would limit the total amount of salary that a team could spend on player salaries, but the salary cap was "soft" in that a team was not limited in how much it could spend to retain one of its own players (the so-called "Larry Bird" rule).

22 *Jenkins v. NCAA*, Complaint, No. 3:14-cv-01678-FLW-LHG (D.N.J. Mar. 17, 2014). The author of this article, together with several of his partners, represents the plaintiffs in the *Jenkins* action.

23 *See, e.g.,* J. Palazzo, Northwestern Labor Decision: What Happens Next?, *The Wall Street Journal* (Mar. 27, 2014): http://blogs.wsj.com/law /2014/03/27/northwestern-labor-decision-what-happens-next/; I. Crouch, Are College Athletes Employees?, *The New Yorker* (Mar. 27, 2014): http://www.newyorker.com/online/blogs/sportingscene/2014/03/are-college-athletes-employees.html; S. Soshnick, Calipari Gets $500,000 as NCAA Students Must Change Water, Bloomberg (Apr. 4, 2014, 12 :00 AM) : http://www.bloomberg.com/news/2014-04-04/calipari-gets-500-000-as-ncaa-student-must-change-water.html; C. Dufresne, NCAA Chief Mark Emmert calls unionizing college athletes'ridiculous', *Los Angeles Times* (April 6, 2014, 12:45 PM): http://www.latimes.com/sports/sportsnow/la-sp-sn-mark-emmert-ncaa-union20140406,0,4781840.story#axzz2yCN4m7O8.

24 *See, e.g.,* Should Student Athletes Get Paid?, Meet The Press (Mar. 23, 2013, 10:40 AM): http://www.nbcnews.com/meet-the-press/should-student-athletes-get-paid-n59866; D. Porter, Lawsuit Seeks to End NCAA's 'Unlawful Cartel', AP (Mar. 17, 2014, 5:46 PM): http://bigstory.ap.org/article/lawsuit-seeks-end-ncaas-unlawful-cartel; M. Hunter, Arne Duncan: 'Worth Considering' Giving Athletes Free Grad School Education, cnsnews.com (Mar. 24, 2014, 11:44 AM): http://cnsnews.com/news/article/melanie-hunter/arne-duncan-worth-considering-giving-athletes-free-grad-school; C. F. Arnold, March Madness: NCAA should stop exploiting student-athletes, pass a Bill of Rights, Opinion L.A. (Mar. 19, 2014, 12:28 PM): http://www.latimes.com/opinion/opinion-la/la-ol-march-madness-ncaa-stop-exploiting-student-athletes-20140318,0,684323.story#axzz2wRStxYEe; S. Ganim, 'Amateurism is a myth': Athletes file class-action against NCAA, CNN Justice (Mar. 17, 2014, 3:30 PM): http://www.cnn.com/2014/03/17/justice/ncaa-student-athletes-payment-lawsuit/; G. Schroeder, Attorney Jeffrey Kessler files suit vs. NCAA, five richest conferences, *USA Today* (Mar. 17, 2014, 7:01 PM): http://www.usatoday.com/story/sports/college/2014/03/17/attorney-jeffrey-kessler-files-suit-vs-ncaa-five-richest-conferences/6520093/; S. Soshnick, NCAA, Top Conferences Called a Cartel in Player Pay Suit, Bloomberg (Mar. 17, 2014, 8:30 PM): http://www.bloomberg.com/news/2014-03-17/ncaa-top-conferences-called-a-cartel-in-player-pay-suit.html; E. Nusbaum, The NCAA's Exploitation of Student Athletes Would Make Fidel Castro Proud, *New Republic* (Mar. 17, 2014): http://www.newrepublic.com/article/117059/ncaa-student-athletes-are-exploited-much-amateurs-cuba; I. Crouch, Your Guide to a Guilt-Free March Madness, *The New Yorker* (Mar. 17, 2014): http://www.newyorker.com/online/blogs/sportingscene/2014/03/your-guide-to-a-guilt-free-march-madness.html; The Editorial Board, Pay for Play and Title IX, *SundayReview* (Mar. 22, 2014): http://www.nytimes.com/2014/03/23/opinion/sunday/pay-for-play-and-title-ix.html.

25 *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987).

26 *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

32. The basic agreed-upon free agency and soft salary cap system continued until 1991 when the players discovered that the league had underreported the amount of its revenues upon which the amount of the cap was based. The players union and owners were able to reach a short-term extension of the agreement but the owners claimed that they were increasingly concerned about the ability of teams to sign players to higher contracts under the system then in place. These issues came to a head in 1995 when the players were divided whether to accept new restrictions, the NBA locked out the players, and a bloc of players sought to dissolve the union and pursue antitrust litigation against the NBA. After an election administered by the U.S. National Labor Relations Board (NLRB), the players voted to accept the additional restrictions and continue playing.

33. The NBA and the players had another major battle when the agreement expired in 1998. The NBA locked out the players again and threatened to cancel the entire season if the players did not agree to demands for more restrictions on player salaries. The players did not dissolve their union but endured the lockout. In January 1999, the players accepted what the NBA described as their final offer before the season would be cancelled, with the regular season reduced to 50 games instead of 82. Rookie contracts were restricted and a maximum individual salary was imposed, but new exceptions to the salary cap were added to encourage growth in the middle class of salaries. That agreement was extended in the next round of bargaining.

34. In 2011, the NBA sought to fundamentally change the entire compensation system to gain a "hard cap" on player salaries, and once more locked out the players and shut down the NBA to coerce the players to agree. In response, the players initially attempted to gain relief under the labor laws from the federal government through the NLRB. However, after the NLRB took no action through December, well after the regular season would have started, the players dissolved their union and filed an antitrust action challenging the lockout as a group boycott to depress player wages in violation of Section 1 of the Sherman Act. Shortly after the filing, the players and the NBA reached a settlement that did not fundamentally change the free agency/soft salary cap system, but which did add limited restrictions that were less than those sought by the NBA.

V. National Hockey League (NHL)

35. The NHL is organized much like the NBA, with 30 teams located in the United States and Canada competing in a closed league with regular season and playoff games leading to a single champion (the winner of the "Stanley Cup"). NHL teams are owned by both individuals and corporate entities, with NHL owners also owning franchises in other professional sports league (such as the Toronto Maple Leafs, which is owned by Maple Leaf Sports & Entertainment (MLSE), which also owns the Toronto Raptors in the NBA and Toronto FC in MLS).

36. Like the NFL and NBA, the NHL faced a competing league (the World Hockey Association) that challenged the monopoly position of the NHL in the 1970's, signing prominent players including established legends such as Gordie Howe and Bobby Hull, and new stars such as Wayne Gretzky. Antitrust litigation between the leagues ensued, and, like the NFL and NBA, the NHL eventually incorporated the better teams from the WHA into an expanded NHL.[27]

37. The NHL has also been subject to the same antitrust issues reviewed above arising from restraints on competition for player services, as labor law agreements were made and then expired, and the players considered exercising their antitrust rights in place of their labor law rights. To date these litigations have resolved themselves in negotiated settlements, without the players dissolving their union. However, many of the new labor agreements occurred only after extended work stoppages, including the loss of the entire 2004-05 NHL season—after which the players agreed to a hard salary cap for the first time and a 24% rollback on salaries—and the near cancellation of the 2012-13 NHL season before a new labor agreement was reached.

VI. Major League Baseball (MLB)

38. The sport of professional baseball in the U.S. has had a truly bizarre history when it comes to antitrust, with legal observers agreed that it is a unique case that applies to no other sport.

39. Nearly a hundred years ago, in 1922, Major League Baseball faced an antitrust challenge to its player contracting system—in which a "reserve clause" in a required standard player contract form was interpreted to renew perpetually, so the player was forever bound to the first team with which he signed, unless the team agreed to let him go. Notwithstanding the fact that the restriction eliminated all competition for player services, and indisputably suppressed player wages, the U.S. Supreme Court held that the restriction was immune from antitrust scrutiny.[28] The basis of the exemption, however, had nothing to do with the antitrust laws, but rather the Court's conclusion that professional baseball did not involve "interstate commerce" and thus could not be regulated by the federal government (even though teams were located in many different states). The Supreme Court abandoned this limited interpretation of the commerce clause in cases in the 1930's involving the "New Deal" measures that U.S. President Franklin Roosevelt and Congress adopted to address the Great Depression. However, the Supreme Court's baseball exemption somehow survived this otherwise abandoned commerce clause jurisprudence.

40. In 1972, baseball's reserve system was again challenged under the antitrust laws, and the Court was expected to

27 *See In re Prof'l Hockey Antitrust Litig.*, 352 F. Supp. 1405 (1973).

28 *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

bring baseball into alignment with all other sports industries, which had been subject to the antitrust laws in decisions after the 1930's that held the commerce clause fully applicable to them. However, in the *Curt Flood* decision, the Supreme Court declined to change baseball's antitrust exemption, not because its prior decision was correct, but only because the doctrine as applied to baseball was well-established and Congress had not acted to change the rule when it had the opportunity to do so.[29] Thus, even while players, owners and others had recourse to the antitrust laws in professional football, basketball, and hockey, among other sports, baseball was left with a unique exemption from competition laws available to no one else.

41. The end result was that baseball developed through the 20th century without antitrust scrutiny. The labor laws accordingly were the players' only available remedy to challenge owner restrictions, which led to a series of work stoppages in the sport. Major League Baseball was also able to restrain franchise movements without restraint from the antitrust laws. Structurally, MLB was a closed league like the other major sports in the U.S., culminating in the "World Series" championship, with gradual growth of franchises in the second half of the century to its present 30 teams. MLB teams also may be owned by corporations. For example, the Atlanta Braves have been owned over the years by Turner Broadcasting, Time Warner, and Liberty Media.

42. The labor law process eventually gave practical relief to MLB players from the *Curt Flood* decision, with a labor arbitrator (Peter Seitz) deciding in 1975 that the "reserve clause" could not be reasonably interpreted to perpetually renew itself, and that players would be free agents to sign with any team once they played out the renewed year of the contract. The courts affirmed that arbitral award.[30] This decision eventually resulted in a new labor agreement with the players having much greater leverage, and the introduction of free agency into MLB for the first time in the late 1970's.

43. Ironically, under an agreement between the players and owners in the 1990's, the owners agreed to drop their opposition to Congress reversing the *Curt Flood* decision as it applied to the players. As a result, in 1998, Congress enacted the Curt Flood Act which put MLB players on the same footing as players in other sports when it comes to antitrust rights.[31] The statute, however, did not reverse the decision as applied to other aspects of the business of Major League Baseball, so MLB currently continues to enjoy an anachronistic exemption from the antitrust laws with regard to franchise relocation, relations with minor league baseball teams that develop MLB players, and other matters. MLB players now have the right to pursue antitrust remedies as in other sports, but that occasion has not yet arisen as MLB has managed in recent years, since a work stoppage in 1994 that cancelled the World Series, to extend its labor agreements.

29 *Flood v. Kuhn*, 407 U.S. 258 (1972).

30 *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233, 261 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

31 Public Law 105-297 (1998).

44. As to the impact of increased competition for player services in MLB, the demise of the reserve clause did not impair the ability of MLB to succeed economically, as has also been the case in other sports that gained player free agency. In fact, the pursuit of MLB free agent players during the offseason has caused MLB to be a year-round interest for fans, and revenues for MLB teams have substantially increased even as players move from team to team after an initial period in which players are bound to their team with set salaries and then "arbitration" years that keep the player with his team but under a salary determined by an arbitrator to approximate fair market value. MLB revenues in 2013 exceeded US$8 billion, a record amount.[32]

VII. Conclusion

45. From a competition law standpoint, the U.S. once viewed sport enterprises as something intrinsically different than big business, with their own deferential legal treatment. That notion has almost entirely been relegated to the dustbin. The very structure of each major league team sport in the U.S. has been shaped by competition law, and each of these sports has seen its economic success increase even as each sport has been exposed to greater competitive forces in its market for player services, its market for franchises, and other markets in which individual teams compete.

46. While occasional complaints are still heard from people wishing for the "good old days," hazy memories often forget the economic and social costs resulting from cartelized behavior. Employment bondage in the name of sport is no less justifiable than for any other reason. Competition among economic actors is now the starting premise for economically successful markets in major league team sports, and this is only logical given the billions of dollars at stake in each sport each year.

47. The increase in competition in U.S. major league team sports has increased consumer welfare as underperforming clubs have fewer excuses besides poor management performance. The closed nature of U.S. sports leagues, however, as well as remaining antitrust exemptions, remain a constraining force.

48. The U.S. has also been increasingly exposed to the wider world and has seen the impact of a less homogeneous population with broader sporting tastes. The "other" football is becoming more and more known to U.S. sports fans, with media companies following that interest with increased coverage. The NBC network recently paid hundreds of millions of dollars for Premiership rights, giving it more prominent schedule slots and blanket broadcasts on affiliated cable and internet channels.[33] This has happened even as U.S. sports owners have exported their business practices to the EU with their purchase and management of Premier League teams and other sports.

32 M. Brown, Major League Baseball Sees Record Revenues Exceed $8 Billion For 2013, *Forbes* (Dec. 17, 2013, 4:34 PM): http://www.forbes.com/sites/maurybrown/2013/12/17/major-league-baseball-sees-record-revenues-exceed-8-billion-for-2013.

33 R. Sandomir, Premier League Coverage Pays Off for NBC, *The New York Times* (Sept. 27, 2013): http://www.nytimes.com/2013/09/28/sports/soccer/premier-league-coverage-pays-off-for-nbc.html?pagewanted=all.

49. The future of major league team sports in the U.S. will depend, as always, on the exercise of economic leverage by market participants, and in the results obtained as legal remedies are used and adjusted over time. While the treatment under competition law of major league team sports in other countries such as the EU is a subject for its own debate, the market structures and competition law experiences of major league team sports in the U.S.—both good and bad—are well worth knowing. ■

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