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Episode 9: How Antitrust Issues Play Out in Sports

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Audio Transcript

I'm really excited about today's episode with David Greenspan. Dave is a partner at Winston & Strawn's New York office, where he focuses on antitrust, sports, and commercial litigation. I'm talking with Dave today about the overlap of antitrust law and sports, which I think will be fun for many of our listeners. Dave, thank you for joining us.

David Greenspan: Thanks for having me. In my remote solitary working environment, it is even nicer than usual to get a chance to connect with you.

You too. I think probably, Dave, most sports fans do not spend time thinking about the impact that antitrust law has had on the industry, but it seems to me that antitrust law has had a major impact.

David Greenspan: So, I agree with you on both points that sports fans probably don't spend a lot of time thinking about antitrust, and that you're absolutely correct that antitrust cases have profoundly shaped the business of sports.

For a long time, American courts thought of sports—even pro sports—as mere exhibitions rather than commerce that was subject to the Sherman Act. Over time as the revenues in the various professional and so-called "amateur" sports leagues have grown into the billions of dollars, even the most unenlightened courts of the old days have come to realize that sports leagues are every bit the commercial enterprises as every other business that's subject to antitrust law.

An example, and really the worst example, of the courts' original approach to antitrust and sports was the Supreme Court's unanimous conclusion in one of their worst antitrust decisions ever rendered in the 1920s that professional baseball was not subject to the Sherman Act. This judicially granted antitrust exemption has been chipped away at over the years, but primarily through Congressional action—specifically the Curt Flood Act, which gave Major League

Baseball players antitrust rights—but that judicially created antitrust exemption from the 1920s still exempts much of Major League Baseball's activity today.

College sports is another area where courts have issued some wrongheaded antitrust decisions, but there, too, the cases are trending in the right direction to make sure that college athletes, in particular, are afforded antitrust rights just like any other workers.

Okay, well, backing up for a second, let's go back to professional leagues. If you can, can you outline the key areas in which antitrust issues come up in the context of professional sports?

David Greenspan: Yeah, they come up in a variety and frankly, a lot of ways, but to try to group them:

Number one, there are occasions when professional sports owners sue one another under the antitrust laws, and as someone who litigates players rights against owners, these owner versus owner suits are not only of great interest, they're also great fun for us player advocates to watch from the sidelines.

A second bucket of sports industry antitrust cases are claims brought by consumers against leagues and leagues' broadcast partners over restrictions that they impose.

But I would say the third category, and probably the category of sports antitrust litigation that has really most fundamentally served to shape what professional sports look like, are those suits that revolve around leagues' and teams' efforts to limit competition for player services. And I'll note—and we can talk about it some more—that these cases not only implicate antitrust law, but labor law can come into play too, because the major professional players associations in the U.S. are all unionized. And so that creates another dimension of these antitrust disputes, which is that labor law will oftentimes have a role to play.

Let's start with your first bucket of owner's suing each other. Do you have some examples of that?

David Greenspan: Yes. This has come up maybe most frequently, and I think most prominently, in franchise relocation disputes. So, for example, in 1980, the Oakland Raiders announced that they intended to move from Oakland to Los Angeles. The Los Angeles Rams were already located in Los Angeles. And at the time, the NFL's rules required three-fourths of owners' approval to permit a team to relocate into the territory of another team. The Raiders couldn't get that approval from the league's ownership, and litigation ensued. The Raiders and the stadium that wanted the Raiders as its tenant claimed that the NFL's restrictions on relocation violated the Sherman Act. Ultimately the league's relocation rule was declared illegal by a jury and upheld by the Ninth Circuit, and the Raiders moved to Los Angeles. Notably, 12 years later, they moved back to Oakland. And now the Raiders are on their way to Las Vegas, which, of course, has resulted in yet another antitrust suit.

A similar scenario played out in California in the NBA in the eighties when the then San Diego Clippers wanted to move to L.A. without league approval. The league and Clippers filed dueling lawsuits. Again, the Clippers asserted, much like the Raiders had, that the restrictions on their relocation violated antitrust law. Eventually though, in that scenario, the lawsuits were dropped after the league permitted the Clippers' move.

Another prominent example of antitrust litigation among owners involved the IP rights of the Dallas Cowboys. In the mid-1990s, the NFL teams had jointly agreed that they were going to assign their respective IP—so the logos, and the colors, and marks of the different teams—to a joint licensing arm of the league. The belief among the owners was that a collective licensor of their combined intellectual property would be more valuable than each team selling its IP on its own. But the Cowboys, in a nutshell, believed that their IP was more valuable than all the other owners, and they didn't want to dilute the value of their intellectual property by going along with this joint plan. The league sued the Cowboys for not participating, and the Cowboys countersued that the bundling of team IP rights violated antitrust law. The league, I think unsurprisingly, quickly settled that antitrust suit. And to this day, the Cowboys license their intellectual property separate and apart from every other NFL franchise.

To give one more example of owner on owner warfare, in 2007 the NHL's New York Rangers sued the NHL over a requirement that the Rangers migrate their website to a common platform that would be managed by the league. In other words, the league wanted to manage all of its team's websites. In a sort of similar way to the Cowboys' belief

and litigation strategy in the intellectual property licensing dispute, the Rangers believed that if they were forced to migrate their website to something controlled by the league, it would dilute its value, it would limit the Rangers' ability to profit off of advertising, et cetera. The Rangers filed or moved for a preliminary injunction against the league to enable the team to not migrate its website, and they lost. The crux of the ruling was that the Rangers had failed to show that there was an actual adverse impact on competition, as opposed to on the Rangers itself, and the Rangers had also failed to show at the preliminary injunction stage that the NHL's pro-competitive justification for a common website platform could be achieved through less restrictive means. So, after the Second Circuit then unanimously upheld the denial of the Rangers request for a preliminary injunction, the team dropped the lawsuit.

Okay. And moving now to your second bucket, I think you said this one was consumers suing leagues over broadcasting. Can you talk about that one a little bit more?

David Greenspan: Sure. Consumer suits against leagues, they come in all shapes and sizes. The past few years, there've been some ticket sales and secondary market related antitrust cases by consumers against leagues. But in terms of the broadcast-related suits, there've been a couple of really important and consequential cases in recent years, and they focused on restrictions that leagues put on selling out-of-market broadcasts.

So, in the *Laumann v. NHL* case, a group of consumers sued the National Hockey League and its broadcast partners, which were Direct TV and Comcast, alleging that those defendants had conspired to require consumers to buy bundled out-of-market games that they didn't want. Their choice was to buy games that they didn't want or not to be able to buy out-of-market games at all. So, for example, if you lived in Los Angeles, but wanted to watch a Philadelphia Flyers game, you would have to buy the NHL's full league package, or you couldn't watch those out-of-market games at all. A similar lawsuit was filed against Major League Baseball. The plaintiffs got as far as successfully certifying their classes at which point the cases settled.

Another example of a consumer lawsuit came up in the context of apparel, which is a case called *Dang v. San Francisco 49ers* where a class of consumers alleged that the NFL's agreement with Reebok to give it the exclusive right to make and sell NFL apparel violated antitrust law and ultimately caused the consumers to pay more for NFL licensed apparel than they otherwise would have. The NFL lost a motion to dismiss, and the parties in that case settled relatively early, even before the case got to class certification.

So, as you can see, these consumer cases come in different shapes and sizes, but those are some of the most, I think, impactful ones of the last few years.

Yeah. Thanks. I want to turn now to your third bucket. To me, this one is the most interesting, it's challenges to owners' attempts to restrict competition among themselves for the services of players, you said. And, my first question is, can you talk a little bit more about the overlap you mentioned between the antitrust issues in this bucket and labor law?

David Greenspan: Yeah. So, in an open market, teams would be able to pay players whatever they want, whatever the free market dictates. Players, on the other hand, they'd be able to sign deals for as long as they liked, as short as they liked, they could move between teams once their contracts expired, there'd be no drafts. And Molly, if you think about it, if you're the best player in college basketball, your "reward" for being the first overall draft pick is that the worst team in the NBA the year before has the exclusive rights to you, whether or not you like it, whether or not you like the coach, whether or not you like the city, whether or not you like the weather. You can't work for anyone else in the NBA. Owners don't like freedom of player movement and free-market competition for compensation. They want to control and set restrictions among themselves, and if they weren't able to obtain an antitrust exemption, things like a salary cap and a draft and restrictions on player movement would violate the antitrust laws. As you know, they'd be *per se* violations of the antitrust laws.

Yeah, absolutely right.

David Greenspan: But there's the player side of the equation too. Just like the owners, they have an interest in being able to, in some capacities, work together and band together to improve their working conditions, and protections, and benefits, and to collectively negotiate for higher salaries and for greater freedom of movement. And so, to accomplish those goals, the players in those leagues have formed unions, and the unions are the counterpart

to the leagues which have their own collective bargaining representative. And all of this creates tension because antitrust law, on the one hand, prohibits coordination among competitors, whereas labor law, on the other, encourages collective bargaining. So, what courts have done to balance these competing considerations of antitrust and labor law is created certain exemptions. Congress created one exemption to antitrust law in unionized industries, and the courts created another one. And the exemption that the courts created is called the "non-statutory labor exemption," and it serves to protect many collective bargaining restraints on competition from antitrust scrutiny. So as a result, when a league and a union agree that the league can impose a draft and a salary cap and the other restrictions we've been talking about, so long as the collective bargaining relationship remains in place, a plaintiff who wants to challenge those rules has to first prove that the non-statutory labor exemption doesn't protect the league and the union's agreements before a court can even consider the merits of the underlying antitrust claim.

The converse of that is when the collective bargaining relationship between the union and the league ends, or when a collective bargaining agreement expires, players may decide—and in the past, they have decided—that the benefits of being a union and of having labor law rights become less beneficial than reclaiming their antitrust rights. And so, players have, like I said, in the past have exercised their right to cease functioning as a union in order to reclaim their antitrust rights. This happened very prominently in 2011. The NFL players disclaimed the NFL Players Association as their union. The Players Association gave up its status as the players' collective bargaining representative under labor law, and it converted into a trade association.

The trade-off is the players and the union lost their labor law rights, but they reclaimed the ability to sue the league under antitrust laws, which they did. At the time the NFL had imposed a so-called lockout of players, which meant it had shut down the entire league. And, by the players disclaiming the NFLPA as their labor union, they regained the ability to sue the NFL, which we did. What the NFL called a "lockout," we called a *per se* illegal group boycott. And that antitrust litigation ultimately led to . . . it created important leverage for the players, and it led to a resumption of football and a resumption of eventually the working relationship between the players and the union.

So, as you can see, the toggling of antitrust and labor law is a very important part of the dynamic of the state of the law in these industries.

Yeah. And this is not an issue just for football players and the NFL, right?

David Greenspan: In 2011, a very similar pattern played out with the NBA where the league imposed a lockout, the players decided that they wanted to challenge that lockout under the antitrust law, rather than through the NLRB or through other labor challenges. So, much like the NFL players, the NBA players reclaimed their antitrust rights and brought an antitrust suit. And eventually, the lockout was ended, and the players got back to work.

And these cases were all brought under Section 1 of the Sherman Act?

David Greenspan: Yeah, that's right. Under Section 1, the threshold question is, are there separate economic actors that have entered into an agreement? In the context of sports, the issue of whether the different teams, the different entities, are separate economic actors is important because, as you know, under Section 1, under the *Copperweld* case, a monolithic economic entity can't conspire with itself. The leagues for years have failed in trying to argue that their teams should be viewed as such a monolithic economic entity, as opposed to what they really are, which is teams that compete quite vigorously against one another for the best coaches, for the best players, for fans, for eyeballs, for merchandise, that they are . . . yes, they collaborate in terms of the rules of the game, but the reality is these are horizontal competitors. Leading up to the lockout that the NFL imposed in 2011, the NFL made a gambit before the Supreme court, in a case called *American Needle* to try to have the Court declare the NFL teams to be a single economic entity and therefore immune from scrutiny under the antitrust law. And that was unanimously rejected, and correctly rejected, by the Supreme Court, which confirmed that the NFL's teams were just as vulnerable to antitrust scrutiny when they enter into rules with one another, when they enter into restrictions with one another, just like any other businesses that compete.

Right. We're running low on time, so I want to be sure to get to college athletics because I know, Dave, that you've done a lot of work on behalf of college athletes against the restrictions of the NCAA. Please tell us about your work in that area and the key issues that are at stake.

David Greenspan: Well, the NCAA, despite claiming to protect the interests of college athletes actually restricts them in every way imaginable. I mean, to give one example, the NCAA restricts a college athlete's ability to move from one university to another. If the athlete wants to switch schools for whatever reason, he or she can be prohibited from playing college sports, where they move on to the next school for a period of time. So that's one form of restriction that, for the life of me, I don't know how the NCAA justifies in the name of doing what's right for college athletes.

But certainly, the most prominent issue of the day in college sports is the extent to which college athletes should be permitted to be compensated, whether it's for the work—and that's what it is—the work that they perform for their schools, or for example, being able to exploit their name, image, and likeness rights. There's a lot of money in college sports, and most of these college athletes will never have the opportunity to turn pro. And so, as a matter of both, frankly, of just decency and fairness and antitrust law, these college athletes ought to be given the opportunity to compete and to have people compete to compensate them for all of the value that they can bring. The NCAA has tried to justify its so-called amateurism restrictions based on a throwaway piece of dicta in a Supreme Court case from a gazillion years called *Board of Regents*, in which the Supreme Court wrote that for the NCAA to maintain its particular brand of football, it must be given ample attitude to superintend college sports, and that athletes must not be paid. What the NCAA always forgets about the *Board of Regents* is that it's an antitrust case in which the NCAA was found guilty in which it's been many times. The NCAA is one of the great antitrust recidivists we have in the industry of sports. And, in recent litigations in the Ninth Circuit—one was the *O'Bannon* case, which challenged restrictions on college athletes' ability to exploit their name, image, and likeness rights, another case was called the *Austin* case, which I litigated, which challenged the NCAA's restrictions on what schools are permitted to pay to college athletes in exchange for their services, the work that they perform for the team—the Ninth Circuit confirmed that the statement in *Board of Regents* is mere dicta, and that when the NCAA wants to attempt to justify its restraints in the name of amateurism, it has to prove that up as a matter of fact. Pro-competitive justifications have to be proven—they're not presumed—and the NCAA has to abide by the Sherman Act, just like any other business. So, *Board of Regents* has been put in its proper place by the Ninth Circuit.

And the last thing I would just mention, Molly, is that various states and now Congress are looking at ways to—and some states like Florida and California too have already enacted legislation that will actually require schools to have their college athletes able to capitalize from their name, image and likeness rights. And so, it's very interesting, the NCAA's now lobbying Congress. They sort of can't get out of their own way in terms of . . . several years ago in the *O'Bannon* case, they violently opposed name, image, and likeness rights for college athletes. Now they go to Congress and purport to support those rights, yet at the same time, they asked for an antitrust exemption.

So, there are a lot of balls in the air. It's very interesting to watch. And although in college sports, sometimes it's two steps forwards and one step backwards for the athletes, the overall trend has really been an important movement in the direction of greater competition and greater fairness.

Yeah. I know you know these issues inside and out, and you've done a lot of important work in this area. So, I really want to thank you for taking the time to join me for today's podcast, which I think our listeners are really going to enjoy. And if any of them have follow-up questions or a more specific topic within the realm of antitrust in sports, maybe we could persuade Dave to come back for a follow-up episode in the future. So thanks again, Dave. I really appreciate it.

David Greenspan: Thank you. In 2020, it's very easy to find me, so you'll let me know if you need me back.

And thanks everyone for listening.

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