Antitrust and Its Effect on Professional Sports, NCAA, and NIL.

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Reference for PowerPoint.

Referenced Federal Acts.

Sherman Act, 15 U.S.C. §§ 1-38.

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit *every* restraint of trade, only those that are *unreasonable*. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "*per se*" violations of the Sherman Act; in other words, no defense or justification is allowed. The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.

Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of

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activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.

Clayton Act, 15 U.S.C. §§ 12-27

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.
In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.

Referenced Cases

Los Angeles Memorial Coliseum Commission v. National Football League 519 F.Supp. 581 (D. Ct. Cal. 1981).

The Los Angeles Memorial Coliseum Commission, the cross-claimant Oakland Raiders, and the NFL defendants, sought entry of a directed verdict with respect to the NFL's claim that the NFL is a single economic entity and thus cannot, as a matter of law, have violated section 1 of the Sherman Act. The United States District Court for the Central District of California granted the motions of the Commission and the Raiders and denied the NFL's motion.

On appeal the court concluded that the NFL's member teams are separate business entities for purposes of this lawsuit. Therefore, the motions of the Commission and the Raiders for directed verdict on the single entity issue was granted, and the NFL's motion was denied.

American Needle Inc. *v.* National Football League,560 U.S. 183 (2010).

The Supreme Court held that the National Football League's licensing of intellectual property in this case constitutes concerted action that is not categorically beyond

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Section 1 of the Sherman Antitrust Act's coverage. With Justice John Paul Stevens writing for a unanimous Court, it noted that each NFL team is a substantial, independently owned, and independently managed business, whose objectives are not common. The Court reasoned that while the actions of NFL Properties ("NFLP") are not as easily classified as concerted activity, the NFLP's decisions about licensing are a concerted activity and, thus, are covered by Section 1.

United States v. Grinnell Corp., 384 U.S. 563 (1966)

The Government brought a civil action against Grinnell Corporation and three affiliated companies, which it controlled through preponderant stock ownership, alleging violations of §§1 and 2 of the Sherman Act. Grinnell manufactures plumbing supplies and fire sprinkler systems, and its affiliates supply subscribers with fire and burglar alarm services from central stations through automatic alarm systems installed on subscribers' premises. The affiliates, which had participated in market allocation agreements, discriminatory price manipulation to forestall competition, and the acquisition of competitors, had acquired 87% of the country's insurance company accredited central station protective service market.

Nostalgic Partners v. Office of the Commissioner of Baseball, 637 F.Supp.3d 45. (2022).

Minor league baseball teams brought action alleging that Major League Baseball (MLB) violated § 1 of Sherman Act by orchestrating horizontal agreement among its clubs to exclude them and 36 other minor league teams from MLB's new professional development league. MLB moved to dismiss.

Concepcion v. Off. of Comm'r of Baseball, 2023 WL 4110155, at *1 (D.P.R. May 31, 2023)

The Players allege MLB, and the Teams are a cartel that colluded to depress their wages during their time as minor league baseball players. This, they contend, violated the Sherman Antitrust Act, the Fair Labor Standards Act (“FLSA”), and Puerto Rico wage and hour laws.

Mackey v. National Football League 543 F.2d 606 (8th Cir. 1976).

In Mackey, the court held that only those collective bargaining agreements which are the products of bona fide arm's length bargaining are immune from the application of the antitrust laws. The Eighth Circuit developed a three-part test to determine whether a labor union is entitled to the nonstatutory exemption to the federal antitrust laws: (1) The trade restraint must primarily affect only the parties to the collective bargaining

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relationship; (2) the agreement must concern a mandatory subject of collective bargaining; and (3) the agreement must be the product of bona fide, arm's-length bargaining.

Mickelson v. PGA Tour, Inc., (N.D. Cal. Oct. 25, 2022).

Plaintiffs Phil Mickelson and other professional golfers sued Defendant PGA Tour, Inc. for unlawful monopsonization of the market for elite golf event services in violation of Sherman Act Section 2, unlawful restraint of trade in violation of Sherman Act Section 1 and unlawful agreement to restrain trade in violation of the Cartwright Act. Players alleged that the PGA Tour attempted to depress compensation and competition for elite professional golfers by threatening to expel and impose lifetime bans on players who contract with LIV Golf, imposing unreasonable and anticompetitive restrictions on players' ability to sell their independent contractor services, threatening to harm other agencies, vendors, sponsors and advertisers from working with plaintiffs and/or LIV Golf, and conspiring with the European Tour to boycott golfers who play for LIV Golf.

O'Bannon v. NCAA, No. 14-16601 (9th Cir. 2015)

O'Bannon filed suit against the NCAA and CLC, alleging that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their names, images, and likenesses (NILs), were an illegal restraint of trade under Section 1 of the Sherman Act.

National Collegiate Athletic Association. v. Alston, 141 S. Ct. 2141, 210 L. Ed. 2d 314 (2021).

The National Collegiate Athletic Association (NCAA) limits how schools may compensate college-level "amateur" student-athletes. Current and former student-athletes brought suit under Section 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracies in restraint of trade or commerce. The Ninth Circuit declined to disturb NCAA rules limiting undergraduate athletic scholarships and other compensation related to athletic performance but enjoined certain NCAA rules limiting the education-related benefits, such as scholarships for graduate or vocational school, payments for academic tutoring, or paid post-eligibility internships.

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