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Antitrust: The Emerging Legal Issues (Symposium Introduction)

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SYMPOSIUM

Antitrust Issues In Amateur Sports†

INTRODUCTION: ANTITRUST—THE EMERGING LEGAL ISSUE

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I.

Shortly after collecting her gold medals at the Los Angeles Olympics, Mary Lou Retton flashed her breakfast cereal smile and confessed that her greatest wish was to drive away in a brand new Corvette. This was America's newest sweetheart speaking: role model for thousands of teenage girls propelling themselves into the air in hundreds of gymnasia scattered across America, an athlete so photogenic and agile she put the memory of nimble Nadia in the shade, and permitted the nation to forget—officially at least—that Olga Korbut had ever existed. Given her exalted status, and her role as returning hero, it was not surprising that Mary Lou's fondest wish was granted: when she arrived back in West Virginia, the car of her dreams was there waiting.

As lawyers, educators, athletic administrators, or broadcast representatives we should, I think, have a particular interest in the story of Mary Lou Retton and her car. That interest should be heightened in our present setting,

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at a conference devoted to antitrust issues in athletics, especially amateur athletics. For the story gives us an immediate, somewhat superficial vision of the role sports play in our society, and a means of entering the obscurer regions of sports organization and sports economics. Both, I believe, have considerable legal relevance.

In Olympic sports, the immediate vision focuses on the athlete in mid-vault, the applause and instant adulation. Athletes are honored because they are immensely skilled, because they give us vicarious pleasure, because emotionally, physically, even politically they represent us on the field of sport. In these terms, a Corvette is the symbolic equivalent of the laurel wreathes which were once awarded the winners of the ancient Greek games. Both had economic value—Athenian athletes were technically "amateurs," but they were well fixed for life if they returned home as champions. Yet money, commerce, and industry were all essentially irrelevant to the audience during the moment of competition and during its immediate aftermath.

The Constitution of the National Collegiate Athletic Association (NCAA) defines an "amateur student athlete" as a person "who engages in a particular sport for the educational, physical, mental and social benefits he derives therefrom and to whom participation in that sport is an avocation."[1] That definition, tailored to the collegiate setting, endorses a view of athletics which is very similar to the one I have been describing. Its principal distinguishing feature lies in its endorsement of the educational value of athletics. Thus, another constitutional provision states:

> The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports.[2]

"Maintain[ing] intercollegiate athletics as an integral part of the educational program" can mean any number of things, including—but not necessarily restricted to—a) maximizing the opportunity of students to participate in intercollegiate competition by sponsoring numerous sports, irrespective of the income they produce, or b) substantially integrating a school's athletic program into its overall curriculum. Whatever its practical implications, however, the integration of sports and education suggests that "amateurism" has another potential dimension, best summarized by the classic phrase, "a sound mind in a sound body." Such a dimension, the NCAA suggests, helps to set off its program from "professional sports"—including, it is safe to presume, its more tawdry, money-grubbing aspects.

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1. N.C.A.A. CONST. art. III, § 1.
2. N.C.A.A. CONST. art. II, § 2-(a).

Yet Mary Lou Retton did not get her car merely because she can twist herself into knots in midair, and Doug Flutie did not receive his Heisman Trophy on live national television merely because his last-second pass in the Miami game excited millions. Nor was television present a few weeks later when he signed a $6 million professional contract because quarterbacking had enhanced his skills in the classroom. In the case of both athletes, amateur athletic performance was valued so highly, not only because of its intrinsic physical, aesthetic, or moral appeal, but also because it had become a commodity in some sense equivalent to Mary Lou's Wheaties, marketed in a similar fashion, and for the same general purpose—to secure product recognition and generate revenue. Thus, Mary Lou's car and Doug's Heisman and Jackie Sherrill's immense salary at Texas A&M all help underline a fact that Professor Koch's fine paper will bring into sharper focus: amateur sports in many important respects is a business, a highly specialized industry which converts the raw material of athletic skill into a product which is customarily sold in the competitive television market.

That amateur sports is in some sense a business is of course not news. That the Supreme Court, in its interpretation of the antitrust laws, should explicitly treat the NCAA as a business—albeit a special sort of one—is, however, a new development and a very noteworthy one. For in the case of *NCAA v. Board of Regents of the University of Oklahoma*,[3] *(NCAA)*, the Court, for the first time, brought intercollegiate athletics—and by implication, at least—other forms of amateur sport into the regulatory mainstream, forcing athletic organizations to justify, in specifically economic terms, conduct which has an apparent negative effect on market competition. The Supreme Court's decision was foreshadowed by the earlier decisions of the lower federal courts in the *NCAA* case. But in the main, it marked a sharp departure from several lines of cases effectively immunizing colleges and universities, and their athletic programs, and the activities of amateur athletic associations and organizations from regulation under the antitrust laws. As Ms. Kirby and Mr. Weymouth demonstrate in their comprehensive paper, those cases had granted schools and sports organizations broad latitude in establishing and enforcing a wide variety of constraints on such activities as the setting of minimal educational or participatory standards, the hiring of coaches, and the marketing of broadcast and telecast rights.

The ultimate effect of the Supreme Court's decision will not, of course, be knowable until more cases are decided. Yet it is because those results in one area—the selling of television rights—have already been substantial, and because the language and logic of the *NCAA* decision raises broad and troubling questions about many of the other controls which colleges and amateur athletic organizations still impose that we are meeting here at this conference.

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3. 104 S. Ct. 2948 (1984).

II.

The economist and the lawyers who will be speaking after me are considerably more expert in the ramifications of antitrust law than I will ever be. From them, we will hear the details of the litigation which led to the Supreme Court's decision, and will be given exceptional insight into the Court's logic, its economic and social assumptions, and the probable effect of its reasoning on the organization and conduct of amateur sports. I can add nothing to their scholarship. But by concluding my remarks with a short overview of the present state of the law and a short summary of some of the questions we will be addressing, I hope I can provide some focus to our common enterprise, and perhaps highlight some of the more important issues we ought to discuss.

First, I believe the most important thing the *NCAA* case tells us is that henceforth the courts are going to look much more closely at the economic consequences of amateur sports organizations and of the control that universities, athletic associations, and national governing boards exert over athletic competition and its marketing. However, a strong case can be made for the proposition that Olympic sports, because of their special legislative status, are unlikely to be affected as significantly as intercollegiate sports. Yet even in the Olympic area, the virtual monopoly power that national governing bodies have to schedule and market events, and to dictate the terms of competition *could* have adverse antitrust implications.

Second, the decision in *NCAA* leaves considerable room for the courts to either expand upon its rationale and coverage, or to limit the case to instances where the regulations of organizing bodies result in clear restraints of trade. Philip Areeda, discussing antitrust law generally, has made the following pertinent comment:

> Federal antitrust statutes are very much simpler than commercial codes or tax statutes. The basic statute, the Sherman Act, simply condemns (1) contracts, combinations, and conspiracies in restraint of trade, and (2) monopolization, combinations to monopolize, or attempts to monopolize . . . [T]he prohibition of trade restraints and monopolization is extremely vague and general. Indeed, the Sherman Act may be little more than a legislative command that the judiciary develop a common law of antitrust.[4]

The *NCAA* case represents one of the first stages of such common law development as it affects the legality of restrictive practices employed by amateur—and more specifically—intercollegiate sports organizations. There is dicta in the case which supports the view that some regulations which preserve the special character of the amateur sports "product" will be regarded as permissible, even if they affect the access that athletes and

4. P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 5 (3d ed. 1981).

institutions may have to the sports or television marketplace. Speaking specifically of "college football," for instance, the Court noted:

> the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of this "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.[5]

Third, despite such dicta, the dominant message of the case is that amateur sports are a business, that the athletic contests which they generate are "products," in essence, no different from cellophane, linoleum, or refined oil, and that *every* restriction reached jointly by separate institutions (or presumably, by sports organizations constituting a monopoly) will be measured against the *single standard* of enhanced competition. Thus, the Court's apparent approval of measures designed to preserve the integrity of "college football" is premised, not on the view that ideals of amateurism or of the student-athlete have *any* value in themselves, but on the view that regulations supporting these values help maintain the identity of a unique community. This point can be amply illustrated by completing the quote just given:

> the NCAA plays a vital role in enabling college football to preserve its character *and as a result enables a product to be marketed which might otherwise be unavailable.* In performing this role, *its actions widen consumer choice*—not only the choices available to sports fans but also those available to athletes—*and hence can be viewed as* procompetitive.[6]

The Court, in important sections of the *NCAA* case, states many of its conclusions in the economic language of consumer sovereignty. Mr. Heidt, rightly concerned about this exclusive emphasis on "unrestricted output" and market efficiency, raises some disturbing questions about the potential effect of this approach on athletes subject to discipline or exclusion from competition. The decisions he draws on are professional rather than amateur sports cases, but the issues he presents clearly cross over into the domain of amateur sports.

The potential legal difficulty for athletes is fairly obvious: if various disciplinary or eligibility rules can be justified on the grounds that their enforcement helps strengthen an identifiable "product"—intercollegiate athletics—then even though those rules may restrict the playing opportunities for individual athletes, they will be regarded as consistent with the thrust of the antitrust laws. On the other hand, the potential problems for colleges,

5. 104 S. Ct. at 2961.
6. *Id.* (emphasis added).

universities, amateur athletic associations, and NGB's are probably at least as great. Thus, rules that cannot under the Rule of Reason be *economically* justified as procompetitive will probably be adjudged illegal, even though they may contribute to defensible noneconomic institutional goals. One effect of the *NCAA* case, for example, is that smaller colleges with athletic programs that are not self-supporting are no longer entitled to share in television receipts. A possible consequence may be that institutions fielding teams that emphasize broad opportunity to compete, albeit with no particular distinction, may be forced to discontinue all or part of their athletic programs.

Fourth, I believe that there are other lessons that the professional sports cases can teach us. One such lesson is that many time-honored restrictive practices, once exposed to sharp analysis under the antitrust laws, will in fact be regarded as anticompetitive. Due in large part to a famous 1922 opinion by Justice Holmes that concluded that professional baseball was not a "business," and therefore not subject to antitrust restrictions,[7] professional athletics for many decades remained, figuratively speaking, in their Mary Lou Retton phase. League restrictions on the freedom of individual players to strike their own bargains with teams willing to purchase their services were upheld by the Supreme Court and lower federal courts, as were incidental rules designed to keep under-age and other unwanted players out of the professional draft. However, beginning in 1957, in a case attacking the reserve clause in professional football,[8] the Supreme Court began carving away the antitrust exemption for professional sports, so that now, thanks to stare decisis, it exists only as an anachronistic curiosity in professional baseball.[9] With the demise of this sports exemption, professional teams and leagues in every sport have found it virtually impossible to justify rules which restrict the bargaining rights of present or prospective professional athletes, or which impose artificial limits on output. Only in one area do such restrictions appear to be clearly defensible. Thus, rules which are integral to a sport, establishing for example the number of teams in a league, the permissible size of each squad, and the scheduling of contests can all probably be justified on the grounds that without such rules, an identifiable "product"—professional baseball or basketball or football—could not be said to exist at all. This argument, which was first presented by Judge Bork in a law review article,[10] was specifically adopted by the Court in the *NCAA* case. Not specifically adopted, but almost certainly implicit in the case, is the

7. Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

8. Radovich v. National Football League, 352 U.S. 445 (1957).

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

10. Bork, *Ancillary Restraints and the Sherman Act,* 15 A.B.A. SECTION OF ANTITRUST LAW 211 (1959).

view that anticompetitive barriers to *entry* in amateur sports—such as restrictions on the maximum number of permissible coaches, or on the identity or number of agents seeking to represent athletes turning professional, would be regarded with extreme suspicion.

The net result of the *NCAA* case, then, is to deprive amateur sports of much of its innocence. No longer will paternalistic arrangements negotiated by leagues or associations on behalf of teams or players be regarded neutrally by the courts. Absent a relevant statutory exemption, such as the one which may be in effect for the Olympic sports, or the one which clearly governs the broadcasting of many professional contests, each such arrangement will be evaluated in terms of its potential effect on economic competition. In the amateur sports field, this fact may generate more demands for a statutory broadcasting exemption to the antitrust laws. Alternatively, it may lead to new attempts to design profit-sharing or pooling arrangements which will still meet the requirements of promoting competition. The difficulties of establishing such arrangements are substantial, and will be addressed by Mr. Gregory.

I now leave you to the care and the guidance of the experts whom you have all come to listen to.