A Matter of Antitrust

With football being played in the courtroom, fans may need a primer on the key legal term at issue

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It is hard to be a fan of American football these days without hearing the word "antitrust." In college football, as of this writing, Utah Attorney General Mark Shurtleff is threatening an antitrust suit against the Bowl Championship Series, contending that the BCS system is an illegal monopoly by the major conferences that restricts the ability of teams like the University of Utah and Boise State to reach the BCS title game and share in the riches that such a game brings (never mind that Utah is moving to the Pac-12 this fall). Meanwhile, in pro football, on March 11, 2011, the day the collective bargaining agreement between the NFL and the players union expired and the players were "locked out" by the owners, Tom Brady and 10 other players sued the NFL, alleging antitrust violations. Thus, to help football fans who did not take antitrust law in law school, I will take a stab at trying to explain this new landscape.

So what is antitrust law anyway? Antitrust law came into being around the turn of the last century to try to prevent monopoly power and ensure competition in the marketplace. Some of the words in the Brady lawsuit are commonly used when someone is alleging violation of antitrust laws: "Unlawful group boycott," "price fixing arrangement," "anti-competitive restrictions."

How can anyone claim the NFL is anti-competitive when it has 32 teams beating each other's brains out every fall weekend? Sports leagues are an interesting beast when it comes to antitrust law. Is the NFL, for instance, a single entity that competes against other sports —MLB, NBA, NHL, NASCAR—or is it 32 entities that compete against one another, or is it both? After all, if it's a single entity, it would be hard to stage a "group" boycott with itself. Also, activity that might seem anti-competitive in the business arena may be seen as enhancing competition in the sports arena. For instance, could you imagine General Motors and Ford agreeing to a draft of entry-level workers each year in which the chosen worker does not decide where to go? (The thought of Mel Kiper Jr. offering his punditry on autoworkers is chilling.) In sports, however, entry-level drafts and free agent movement are viewed as necessary for competitive balance.

Well then, shouldn't antitrust laws just apply to businesses and not to sports? Here we get to one of the great anomalies in American law. In 1922, the U.S. Supreme Court held in the case of Federal Baseball Club of Baltimore v. National League that Major League Baseball was exempt from antitrust law because baseball was a game, not a business. Try that the next time you get your season-ticket bill. The Supreme Court chooses the cases it takes, and for the last 89 years no one has wanted to be the Supreme Grinch that killed baseball's antitrust exemption, even as the business of baseball and other sports has grown huge. Congress has always had the power to do something about the exemption by passing a law stating antitrust laws apply to baseball. In fact, it is that threat that led MLB to cooperate in matters like the infamous steroid hearings.

So wouldn't the Supreme Court have to decide a case involving the NFL or the BCS the same way? Maybe not. Supreme Court decisions are "forever" in the same sense that when Elizabeth Taylor married it was forever. The Latin phrase is *stare decisis*, which loosely translated means that the Supreme Court is not supposed to flip-flop. In reality, the Court has made some historic flip-flops, such as deciding in 1896 that there was nothing unlawful about racially segregated schools and then 58 years later in Brown v. Board of Education deciding that it was wrong. The Supreme Court could decide the football cases differently, though it is questionable whether antitrust laws as applied to sports is worth reconsidering the way school desegregation was.

IS THE NFL A SINGLE ENTITY THAT COMPETES AGAINST OTHER SPORTS OR 32 ENTITIES THAT COMPETE AGAINST ONE ANOTHER? OR BOTH?

So what's going to happen with the NFL and the BCS? While there may be scrimmages in the lower courts, it is unlikely that the Supreme Court will jump into this dispute. For one thing, Supreme Court justices are humans, too, and most are football fans (in Supreme Court lore, Washington Redskins tickets are a valuable commodity). No one is eager for a major legal decision that decides once and for all the antitrust parameters for professional sports leagues. Look for a negotiated solution to both the NFL and BCS issues.

Class over. Enjoy the rest of your summer vacation. ■

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