



AMERICAS ANTITRUST REVIEW 2023

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Preface

Global Competition Review's *Americas Antitrust Review 2023* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, and Europe, the Middle East and Africa, this review provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers whose knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

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United States: antitrust in organised sports

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In summary

This article recaps antitrust litigation and enforcement in organised US sports from January 2021 to June 2022, including the ramifications of the Supreme Court's decision in *NCAA v Alston* for amateur athletics and challenges to Major League Baseball's antitrust exemption. It also highlights a recent challenge against the PGA Tour and a successful injunction against the National Women's Soccer League.

Discussion points

- Future of amateur athletics after *NCAA v Alston*
- Baseball's antitrust exemption under attack
- Continuing development of *American Needle*'s legacy
- Active antitrust dispute in professional golf
- Injunction against age restrictions in professional women's soccer

Referenced in this article

- [*National Collegiate Athletic Association v Alston* \(2021\)](#)
- [*Nostalgic Partners et al v Office of the Commissioner of Baseball* \(2021\)](#)
- [*Concepcion v Office of the Commissioner of Baseball* \(2022\)](#)
- [*Casey's Distributing, Inc v Office of the Commissioner of Baseball* \(2022\)](#)
- [*Mickelson et al v PGA Tour, Inc* \(2022\)](#)
- [*O.M. v National Women's Soccer League* \(2021\)](#)



Introduction

Since the first court challenge under the antitrust laws to professional baseball's operations a century ago, antitrust has played a significant role in shaping the sports landscape. The past two years were no exception, producing: the latest challenge to baseball's antitrust exemption; a groundbreaking Supreme Court decision impacting student athlete compensation; ongoing and threatened litigation regarding athletes' compensation restrictions, ability to compete in multiple associations and eligibility to join a professional team; and continued development of *American Needle's* legacy regarding the contours of sports leagues' single-entity status. The matters discussed below highlight the critical legal issues.

NCAA student athlete compensation and control of name, image and likeness

In 1995, Florida State University's Bobby Bowden became the first college head football coach to earn a US\$1 million annual salary.¹ Fast forward to 2020 and the coaches that comprise college football's five major conferences now make an average of US\$4.2 million per season and a combined sum exceeding US\$250 million annually.² Major university athletic programmes can pay these high salaries primarily because they share in lucrative broadcasting deals, such as the US\$1.1 billion per year deal to broadcast college basketball's annual 'March Madness' tournament, which has increased the income available not just to pay college coaches and commissioners, but to fund other school programmes as well.³ Yet, while the National Collegiate Athletic Association (NCAA)⁴ and its member schools profited, the student athletes that drive viewer interest remained classified as 'amateur' (ie, ineligible for compensation).⁵ All that changed with the Supreme Court's decision in *NCAA v Alston* (*Alston*).⁶

1 Alan Schmadtke, 'Bowden Signs Through 2000', *Orlando Sentinel* (17 November 1995), <https://www.orlandosentinel.com/news/os-xpm-1995-11-17-9511170805-story.html>.

2 Bryan Armetta, 'How College Football Head Coach Salaries Have Exploded', GMTM (13 September 2021), <https://gmtm.com/articles/how-college-football-head-coach-salaries-have-exploded> (the combined salaries of Division 1 college head football coaches exceeded US\$312 million in 2020).

3 id.; Joe Reedy, 'CBS, Turner partnership on NCAA Tournament has huge benefits', ABC News (17 March 2021), <https://abcnews.go.com/Entertainment/wireStory/cbs-turner-partnership-ncaa-tournament-huge-benefits-76504960>.

4 National Collegiate Athletic Association: American Organization, Britannica (last edited 11 April 2022), <https://www.britannica.com/topic/National-Collegiate-Athletic-Association> ('The NCAA functions as a general legislative and administrative authority for men's and women's intercollegiate athletics. It formulates and enforces the rules of play for various sports and the eligibility criteria for athletes.').

5 *ibid.*

6 *Nat'l Collegiate Athletic Assoc. v Alston*, 141 S. Ct. 2141 (2021) (*Alston*).



In *Alston*, former West Virginia University running back Shawne Alston brought suit against the NCAA and its conferences on behalf of current and former men's and women's college athletes. Alston's case focused on an NCAA policy that prohibited the 'education-related' compensation that students could receive from exceeding their universities' cost of attendance.⁷ This meant that while student athletes could receive compensation in the form of full tuition, room, books and computers, they received no additional money from the lucrative broadcasting or sponsorship deals.⁸ In Alston's mind, the education-compensation policy violated the antitrust laws as a restriction on the ability of individual schools to compete by offering recruits compensation in line with their athletic contributions.⁹ The NCAA and its member schools disagreed, relying on a 1984 Supreme Court decision, *NCAA v Board of Regents*,¹⁰ to argue that the NCAA had the right to restrict student athletes' compensation to preserve its unique brand of 'amateur' athletics.¹¹

Both the United States District Court for the Northern District of California and the Court of Appeals for the Ninth Circuit agreed with Alston, observing that the NCAA's 'near complete dominance' in the market for 'athletic services' enabled its limits on education-related compensation to 'produce significant anticompetitive effects'.¹² The District Court, in particular, noted that, but for the restraints, college athletes could receive scholarships that 'more closely match[ed] the value of their athletic services'.¹³ Likewise, the Ninth Circuit rejected the NCAA's 'amateurism' justification, finding that the 1984 *Board of Regents* discussion was dicta that does not reflect consumer taste (ie, fans do not demand sports entertainment in which athletes are unpaid).¹⁴

Writing for a unanimous Supreme Court, Justice Gorsuch agreed that the NCAA's education-compensation limits were anticompetitive.¹⁵ While the NCAA insisted that college sports depended on its 'amateur' status to succeed, the Court instead credited Alston's expert testimony evidencing that demand for college sport actually increased despite the NCAA slowly raising the education-related benefits since 1984.¹⁶ The Supreme Court also rejected that its 1984 *Board of Regents* decision provided deference or immunity to the NCAA's compensation restrictions.¹⁷ The Court noted that, while the 1984 case spoke of giving the NCAA 'ample latitude' under antitrust laws, it did not insulate the NCAA from

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *NCAA v Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 119 (1984).

¹¹ *Alston* at 2144.

¹² *id.* at 2151.

¹³ *id.* at 2152.

¹⁴ *id.* at 2154.

¹⁵ *id.* at 2151.

¹⁶ *id.* at 2152 (since 1984, the NCAA has increased the size of permissible benefits 'incidental to athletics participation', including a Student Assistance Fund and Academic Enhancement Fund that distributed over US\$100 million in 2018 alone).

¹⁷ *id.* at 2157–58.



any scrutiny in the presence of anticompetitive behaviour.¹⁸ In the absence of a permissible pro-competitive justification, a unanimous Court found that the NCAA violated Section 1 of the Sherman Act, issuing a permanent injunction against the education-compensation limits.¹⁹

Despite its magnified effect on student athletes, the Court's holding in *Alston* was narrow, invalidating only the NCAA's limits on education-compensation. Thus, one of the more interesting questions in the aftermath of *Alston* is whether non-education-related compensation limits can survive, including whether players can be directly paid to play, whether a marketing agency can represent them and whether they can be compensated via individual sponsorships.²⁰ Justice Kavanaugh's concurring opinion offered insight into how these other NCAA restrictions might fare when he noted that the 'NCAA's business model would be flatly illegal in almost any other industry'.²¹ By many accounts, the *Alston* opinion and Justice Kavanaugh's concurrence invited others to challenge the remaining restrictions.

Perhaps anticipating the Court's willingness to strike down additional compensation limits, the NCAA passed an interim 'name, image and likeness' (NIL) policy just eight days after the *Alston* opinion was issued.²² The interim policy permits student athletes to enter into sponsorship deals licensing their name, image and likeness and permits state governments to establish guidelines for doing so.²³ As at 4 July 2022, 29 states have passed an NIL law, while the federal government continues to debate several related bills.²⁴

As the federal government and the states continue to debate legislation, the NCAA issued a new set of NIL guidelines on 9 May 2022 in response to the creation of 'collectives'.²⁵ Collectives are donor-sponsored efforts that offer schools NIL deals worth millions to 'retain current players, entice high school prospects or poach athletes from other programs'.²⁶ For example, the 'Cougar

18 *ibid.*

19 *id.* at 2141.

20 *id.* at 2154.

21 *id.* at 2167.

22 Michelle Brutlag Hosick, 'NCAA adopts interim name, image and likeness policy', NCAA (30 June 2021), <https://www.ncaa.com/news/ncaa/article/2021-06-30/ncaa-adopts-interim-name-image-and-likeness-policy>.

23 *ibid.*

24 NIL Legislation Tracker, Saul Ewing Arnstein & Lehr LLP (last visited 22 June 2022), <https://www.saul.com/nil-legislation-tracker>; Fairness in Collegiate Athletics Act, Section 4004, 116th Cong. (2020) [protecting student athlete's ability to earn name, image and likeness (NIL) compensation while also insulating the NCAA, conferences and schools from antitrust lawsuits that challenge rules designed to preserve amateur athletics]; College Athlete Economic Freedom Act, H.R.850, 117th Cong. (2021) [giving college athletes the right to organise through collective representation, making restrictions on NIL deals a per se violation and creating a private antitrust action for individuals to challenge new restrictions].

25 Ross Dellenger, 'Big Money Donors Have Stepped Out of the Shadows to Create "Chaotic" NIL Market', *Sports Illustrated* (2 May 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting>.

26 *ibid.*; Liz Clarke, 'NCAA targets boosters with new NIL guidelines', *Washington Post* (9 May 2022), <https://www.washingtonpost.com/sports/2022/05/09/ncaa-nil-boosters-collectives/>.



Collective', associated with Washington State University, reportedly secured the transfer of quarterback Cameron Ward by providing housing, a pick-up truck and US\$50,000.²⁷ The new guidelines attempt to solve this 'problem' by banning collectives and proposing sanctions on schools that violate the rules.²⁸ Yet, while the NCAA and its member schools are focused on stopping the NIL from becoming a proxy for a pay-for-play environment, questions remain over whether this new NIL framework might face antitrust scrutiny for its *Alston*-like restrictions on compensation.²⁹

On the one hand, the NCAA believes that *Alston* still enables it to make 'reasonable rules' around 'what are and are not truly educational benefits'.³⁰ Justice Gorsuch lends some support to this view by noting that 'the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a "no Lamborghini" rule'.³¹ Under that view, the NCAA may have the power to ban collectives that provide compensation before athletes arrive at schools.³² On the other hand, Justice Kavanaugh's concurring opinion hints at the danger the NCAA's new guidelines create, indicating that '[p]rice-fixing labor is price-fixing labor'.³³ Under Justice Kavanaugh's view, the NCAA might face scrutiny for any restrictions on compensation, ultimately forcing the adoption of an unmitigated pay-for-play model.³⁴

For now, it remains unclear how each Supreme Court justice might decide any future challenges, whether the NCAA finds the right balance to limit 'collectives', what Congress will do in response, or whether the new norm in college sports will be, in the words of Alabama head football coach Nick Saban, to 'basically buy players'.³⁵

27 Eric Prisbell, 'NIL collectives are now saying the quiet part out loud', On3NIL (18 April 2022), <https://www.on3.com/nil/news/nil-collectives-are-now-saying-the-quiet-part-out-loud-deal-details-cameron-ward-washington-state/>.

28 Ross Dellenger, 'The NCAA Approval of NIL Guidelines Signals a Crackdown on Boosters Could be Coming', *Sports Illustrated* (9 May 2022), <https://www.si.com/college/2022/05/09/ncaa-nil-guidelines-boosters-athlete-funds>.

29 Marc Edelman, 'NCAA "NIL" Guidance Places Association At Renewed Antitrust Risk', *Forbes* (12 May 2022), <https://www.forbes.com/sites/marcedelman/2022/05/12/ncaa-nil-guidance-places-association-at-renewed-antitrust-risk/?sh=39ccfb83cd>.

30 NCAA statement on US Supreme Court decision, NCAA (21 June 2021), <https://www.ncaa.org/news/2021/6/21/ncaa-statement-on-u-s-supreme-court-decision.aspx>.

31 *Alston* at 2165.

32 John Canzano, 'Canzano: Going rate for a Pac-12 quarterback hits \$90,000' (14 April 2022), <https://www.johncanzano.com/p/canzano-going-rate-for-a-pac-12-quarterback>.

33 *Alston* at 2167.

34 *ibid.*

35 Madeline Coleman, 'Nick Saban Says NIL Rules Creates System Where "You Can Basically Buy Platers"', *Sports Illustrated* (13 April 2022), <https://www.si.com/college/2022/04/13/nick-saban-nil-rules-system-you-can-basically-buy-players#:~:text=%E2%80%9CBut%20that%20creates%20a%20situation,can%20get%20at%20your%20place.%E2%80%9D>.



Challenges to baseball's antitrust exemption relating to league organisation, compensation and merchandising practices

Long before the National Football League (NFL) claimed the top spot as the United States' favourite sport in 1972, the title of 'America's national pastime' belonged to baseball.³⁶ But today, Major League Baseball's (MLB) reality looks different. Viewership of baseball's World Series fell to an 'all-time low' 10.3 million viewers in 2022, while a collective bargaining breakdown lasted 99 days.³⁷ However, amid the turmoil of declining viewership and labour disputes, baseball's most significant concern may be three distinct challenges to its 100-year-old antitrust exemption. The first, brought by four unaffiliated minor league teams and supported by the United States Department of Justice (DOJ), alleges that the MLB is reducing competition by eliminating 40 minor league teams' affiliation with the MLB.³⁸ The second, brought by former player Daniel Concepcion, alleges an MLB conspiracy in the minor leagues to fix wages below minimum wage.³⁹ A third challenge brought by a local apparel company targets the MLB's merchandising practices as an illegal exclusive dealing arrangement.⁴⁰ While each case alleges different antitrust violations, each is a potential vehicle to overturn baseball's antitrust exemption.

To understand the importance of today's challenge, it is necessary to revisit the circumstances that created baseball's antitrust exemption. In the lead-up to the Supreme Court's seminal 1922 *Federal Baseball* case, a Baltimore baseball club in the newly formed Federal League of Professional Base Ball Players (the Federal League) filed suit against the MLB organisation (consisting of the National League teams, American League teams and the MLB Commissioner) for conspiring to monopolise professional baseball.⁴¹ Specifically, the Baltimore club alleged that the MLB was illegally reducing competition in professional baseball by either buying Federal League teams or inducing them to resign their league memberships.⁴² The trial court observed that the MLB had a monopoly in professional baseball that was 'engaged in interstate commerce', leaving the jury to decide whether the alleged conspiracy against the Federal League

³⁶ Jim Norman, 'Football Still Americans' Favorite Sport to Watch', Gallup (4 January 2018), <https://news.gallup.com/poll/224864/football-americans-favorite-sport-watch.aspx>; *Pirone v MacMillian, Inc.*, 894 F.2d 579, 580 (2d Cir. 1990) (baseball is 'central to our common American heritage').

³⁷ Matt Johnson, '2021 World Series television ratings improve, still long-term concerns for baseball', Sportsnaut (9 November 2021), <https://sportsnaut.com/mlb-ratings-tv-viewership-numbers/>; Tom Dart, 'MLB becomes literally unwatchable as baseball self-sabotages again', *The Guardian* (2 March 2022), <https://www.theguardian.com/sport/2022/mar/02/mlb-opening-day-lost-lockout-baseball-talks-players-owners>.

³⁸ *Nostalgic Partners et al. v Off. of the Comm'r*, 1:21-cv-10876 (S.D.N.Y. Dec. 2021); Statement of Interest of the United States, *Nostalgic Partners et al. v Off. of the Comm'r* 1:21-cv-10876-ALC (15 June 2022); *Alston*.

³⁹ Complaint, *Concepcion v Off. of the Comm'r of Baseball*, 3:22-cv-01017 (D.P.R. January 2022).

⁴⁰ Complaint, *Casey's Distributing Inc. v Off. of the Comm'r of Baseball*, 1:22-cv-04832 (S.D.N.Y. 2022).

⁴¹ *Fed. Baseball Club of Baltimore v Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 207 (1922).

⁴² *ibid.*



existed.⁴³ The jury returned a verdict against the MLB.⁴⁴ Subsequently, the District of Columbia Court of Appeals reversed, finding that baseball was not interstate trade or commerce, as required for the antitrust laws to apply, because ‘a game of baseball is not susceptible [to] being transferred’.⁴⁵ Essentially, although baseball players travelled for games, no action occurred until the players came ‘into contact with their opponents on the baseball field’ in one state.⁴⁶ Thus, the antitrust laws could not apply to the MLB.⁴⁷ After the Federal League appealed, the Supreme Court endorsed the District of Columbia Court of Appeals’ interpretation in *Federal Baseball*, holding that professional baseball was not within the scope of the antitrust laws because the transportation of players between states was incidental and did not affect interstate trade or commerce.⁴⁸

In 1952, the Supreme Court declined the opportunity to overrule baseball’s antitrust exemption in *Toolson v New York Yankees* when a minor league pitcher asked the Court to block a contract stipulation that required players to wait one year before signing with a new team after their contracts expired.⁴⁹ Instead, the Supreme Court upheld the exemption, noting that even if *Federal Baseball* was decided incorrectly, Congress could have overruled the exemption at any point in the preceding 30 years.⁵⁰ The Court did, however, acknowledge criticisms of its *Federal Baseball* opinion in 1972’s *Flood v Kuhn*, conceding that the exemption was ‘an aberration’ in antitrust jurisprudence.⁵¹ Most importantly, the Court declared, contrary to *Federal Baseball*, that the MLB was engaged in interstate commerce.⁵²

The Supreme Court’s inevitable recognition that baseball implicates ‘interstate trade or commerce’ means that the antitrust laws can apply to the MLB. The exemption, however, remained relatively secure throughout 2021 because the Court has continuously put the onus on Congress to overrule the exemption. Despite a Senate Judiciary Committee investigation into baseball’s effect on the labour market and legislative efforts similar to the 2022 Save American Baseball Act, a repeal never gained much traction in Congress.⁵³ The biggest question remaining is whether the Supreme Court’s ruling in *Alston* is a signal that the courts might finally consider overruling the exemption themselves.⁵⁴

⁴³ *Nat’l League of Pro. Baseball Clubs v Fed. Baseball Club of Baltimore*, 269 F. 681, 684 (D.C. Cir. 1920).

⁴⁴ *ibid.*

⁴⁵ *ibid.*; *Fed. Baseball Club of Baltimore v Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200 at 208.

⁴⁶ *Nat’l League of Pro. Baseball Clubs v Fed. Baseball Club of Baltimore*, 269 F. 681 at 684.

⁴⁷ *ibid.*

⁴⁸ *id.* at 209; *Hooper v California*, 155 U.S. 648, 655 (1895).

⁴⁹ *Toolson v New York Yankees*, 346 U.S. 356 (1952) (the reserve clause).

⁵⁰ *id.* at 357.

⁵¹ *Flood v Kuhn*, 407 U.S. 258, 283 (1972).

⁵² *id.* at 282.

⁵³ Evan Drellich, ‘U.S. Senate sends bipartisan letter on MLB antitrust exemption’, *The Athletic* (28 June 2022), <https://theathletic.com/news/us-senate-letter-mlb-antitrust-exemption/vjD5010GpTjr/>; Save American Baseball Act, Section 3833, 117th Cong. (2021).

⁵⁴ *Alston* at 2158; *Nostalgic Partners et al. v Office of the Comm’r*, 1:21-cv-10876 (S.D.N.Y. December 2021) (*Nostalgic Partners*).



One challenge to the exemption, *Nostalgic Partners*, stems from the MLB's overhaul of its minor league system. The MLB sought to 'dramatically improve' Minor League Baseball's (MiLB) stadiums and facilities while simultaneously taking direct control over which teams were 'officially' affiliated with MLB teams.⁵⁵ Formally, the MiLB and MLB utilised a professional baseball agreement, which outlined how teams competed for affiliation, shared revenue and developed potential players.⁵⁶ When the new plan took effect in late 2020, the number of affiliated MiLB teams declined from 160 to 120.⁵⁷ Four of the now unaffiliated teams, the Staten Island Yankees, Tri-City Valley Cats, Salem-Keizer Volcanoes and the Norwich Sea Unicorns (collectively, *Nostalgic Partners*), filed an antitrust complaint against the MLB in December 2018, alleging an illegal horizontal agreement to '*reduce output and boycott* the 40 Ousted Teams from MLB affiliation'.⁵⁸

Nostalgic Partners, despite recognising that lower courts remain bound by *Federal Baseball*, believe that the Supreme Court is finally ready to hear a case that would facilitate the reversal of baseball's antitrust exemption. That view is supported by language in *Alston* that stated that *Federal Baseball* was 'unrealistic', 'inconsistent' and 'aberration[al]' within antitrust jurisprudence.⁵⁹ In addition, the Court unanimously rejected the NCAA's position that its education-related compensation limits were protected from antitrust scrutiny as a form of 'amateurism' recognised by the Supreme Court's 1984 *Board of Regents* decision.⁶⁰ The collective disdain the Court showed for antitrust exemptions in *Alston* leads *Nostalgic Partners* to assert in its complaint that they are the case that the current Supreme Court should use to decide whether the exemption should remain.⁶¹ Assuming the Supreme Court eventually uses this case to end baseball's exemption, *Nostalgic Partners* maintain that the MLB's minor league plan is nothing more than an illegal group boycott.⁶² As evidence of the anticompetitive effects of the reduction in affiliations, *Nostalgic Partners* points to the consequences on local economies and the reduced output of professional baseball.⁶³

⁵⁵ J J Cooper, 'MLB Proposal Would Eliminate 42 Minor League Teams', *Baseball America* (18 October 2019), <https://www.baseballamerica.com/stories/mlb-floats-proposal-that-would-eliminate-42-minor-league-teams/>.

⁵⁶ *Nostalgic Partners et al. v Office of the Comm'r*, 1:21-cv-10876 at 11–12.

⁵⁷ *ibid.*

⁵⁸ *id.* at 2 (emphasis added).

⁵⁹ *Alston* at 2159.

⁶⁰ *NCAA v Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 119 (1984).

⁶¹ Complaint, *Nostalgic Partners* at 2, 4.

⁶² *Nostalgic Partners* at 5.

⁶³ ESPN Staff, "'I was wrong": Why MLB's Restructuring of the minors turned out mostly better than expected', ESPN (28 January 2022), https://www.espn.com/mlb/story/_/id/33144413/why-mlb-restructuring-minors-turned-mostly-better-expected.



Also supporting Nostalgic Partner's position is the DOJ, which weighed in with a statement of interest on 15 June 2022.⁶⁴ First, the DOJ argued that the Supreme Court expressly articulated that baseball is interstate trade or commerce in 1972's *Flood v Kuhn* decision, meaning the antitrust laws should apply instead of illogically upholding the exemption solely because of its long-standing practice.⁶⁵ Second, the DOJ urged lower courts still bound by *Federal Baseball* to avoid expanding the antitrust exemption in *Nostalgic Partners* by narrowly applying the exemption only to conduct deemed 'central to the business of baseball' and the offering of professional exhibitions.⁶⁶

The MLB filed a motion to dismiss on 22 April 2022.⁶⁷ The MLB maintains that the '[c]ourt is currently bound by th[e] exemption and will need to dismiss on that basis'.⁶⁸ However, the MLB also argues that its minor league revision has several pro-competitive efficiency justifications, including new '10-year guaranteed contracts' between MiLB and MLB teams, improved scheduling options and the 'prospect of investment in player development and facilities'.⁶⁹ Notably, MLB officials also claim that reducing the number of teams will improve pay for remaining minor league players.⁷⁰

The MLB highly emphasises this wage justification in a second antitrust challenge by former baseball player Daniel Concepcion.⁷¹ *Concepcion* alleges that the MLB 'exploited minor leaguers by paying anti-competitive, fixed salaries below minimum wage'.⁷² While the MLB filed its motion to dismiss Concepcion's case on 23 May 2022 based on an expired statute of limitations, the case represents yet more fallout from MLB's overhaul of its minor league system.⁷³

In addition to *Nostalgic Partners* and *Concepcion*'s challenges to the minor league system, the MLB is facing a third antitrust allegation: that it has monopolised the 'retail market for MLB licensed products'.⁷⁴ Casey's Distributing Inc (Casey's), an Omaha-based apparel seller, alleges in its 9 June 2022 complaint that the MLB violated the antitrust laws by helping sporting goods company Fanatics – in which the MLB has a '\$50 million' ownership interest – gain and maintain an illegal monopoly over licensed MLB products.⁷⁵ Casey's complaint asserts that Major League Baseball Properties, Inc granted Fanatics the 'exclusive rights to

⁶⁴ Statement of Interest of the United States, *Nostalgic Partners et al. v Office of the Comm'r*, 1:21-cv-10876-ALC 7 (15 June 2022).

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ Motion to Dismiss, *Nostalgic Partners*.

⁶⁸ Plaintiff's Opp'n to Def's Motion to Dismiss, Dkt 31, at 3 (27 May 2022).

⁶⁹ John Niesn, 'Following Contraction, Minor League Baseball Is Smaller. But Is It better?', *Global Sports Matters* (19 October 2021), <https://globalsportmatters.com/business/2021/10/19/minor-league-baseball-contraction-smaller-better-union-mlb-housing/>.

⁷⁰ ESPN Staff, footnote 63.

⁷¹ Complaint, *Concepcion v Off. of the Comm'r of Baseball*, 3:22-cv-01017 (D.P.R. 11 January 2022).

⁷² *ibid.*

⁷³ Motion to Dismiss, *Concepcion v Off. of the Comm'r of Baseball*, 3:22-cv-01017, 13 (D.P.R. 11 January 2022).

⁷⁴ Complaint, *Casey's Distributing Inc. v Off. of the Comm'r*, 1:22-cv-04832 at 13.

⁷⁵ Complaint, *Casey's Distributing Inc. v Off. of the Comm'r*, 1:22-cv-04832 at 2, 5.



design, manufacture, and distribute all Nike MLB fan gear' for 10 years while also restricting smaller retailers such as Casey's from advertising online.⁷⁶ This allegedly resulted in more favourable search positions for Fanatics on third-party websites such as Walmart and Amazon.⁷⁷

While, at the time of writing, the MLB has yet to respond to the complaint, agency advocacy and directly relevant precedent suggest the case would be substantively resolved against the MLB, if it gets that far. First, the DOJ's statement of interest from *Nostalgic Partners* is relevant because of its argument that lower courts still bound by *Federal Baseball* should narrowly interpret the MLB's exemption to only include conduct 'central to the business of baseball'.⁷⁸ The DOJ illustrated its point with a hypothetical price-fixing agreement between 'baseball teams and [baseball] card manufacturers' to highlight what should not be deemed central enough to warrant the exemption's protection.⁷⁹ This hypothetical is strikingly close to the alleged merchandising conspiracy in *Casey's*.

Second, the Supreme Court's 2010 decision in *American Needle v National Football League* (NFL) could play a significant role.⁸⁰ *American Needle* concerned a challenge that the NFL illegally reduced competition for NFL-licensed headgear by granting an exclusive 10-year contract to apparel company Reebok.⁸¹ The NFL defended on the grounds that it could not operate without the cooperation of each team in its league, making the NFL one entity incapable of creating the 'agreement' needed for an antitrust violation.⁸² While the United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals agreed with the NFL, a unanimous Supreme Court reversed.⁸³ The Supreme Court emphasised that each team's 'separate corporate consciousness' and substantial independence in finances and licensing meant that the NFL could not escape antitrust liability by acting through a jointly managed entity.⁸⁴

In the context of *Casey's* merchandising allegations, *American Needle* suggests that the MLB may struggle to successfully argue that its jointly organised league is incapable of antitrust 'agreement' with the licence to Fanatics. The success of this argument would centre around the MLB's ability to distinguish baseball as an industry from the NFL, as the Supreme Court in *American Needle* noted that 'special characteristics of this industry may provide a justification' for certain kinds of agreements to survive antitrust scrutiny.⁸⁵ Of course, the MLB's best hope is that the court dismisses the case, finding that the merchandising

⁷⁶ *id.* at 3.

⁷⁷ *id.* at 16.

⁷⁸ Statement of Interest of the United States, *Nostalgic Partners et al. v Office of the Comm'r*, 1:21-cv-10876-ALC 7 (15 June 2022) [emphasis added].

⁷⁹ *id.* at 10.

⁸⁰ *American Needle Inc. v Nat'l Football League*, 130 S. Ct. 2201 (2010).

⁸¹ *ibid.*

⁸² *id.* at 2207.

⁸³ *id.* at 2206.

⁸⁴ *id.* at 2207.

⁸⁵ *id.* at 2212.



deal falls under the umbrella of baseball's existing antitrust exemption without determining if an 'agreement' exists or an antitrust violation occurred.

Antitrust dispute brewing in professional golf: PGA v LIV Golf

In the 1980s and early 1990s, Greg Norman was the poster child for the PGA Tour, spending 331 weeks as the world's best player and winning the British Open championship twice en route to becoming the fifth-richest golfer of all time.⁸⁶ All that changed in 1994 when Norman rattled the sport with the idea of a 'global super league' that would compete with the established PGA.⁸⁷ The idea swiftly ended when the FTC declined to bring enforcement action after the PGA's then Commissioner Tim Finchem threatened punishments and legal action against those who joined Norman's World Golf Tour.⁸⁸ Delayed, but undeterred, Norman is once again setting the stage for an antitrust showdown in the world of golf, announcing on 16 March 2022 the creation of the LIV Golf Tournament, a league with the financial backing to go swing-for-swing with the PGA.⁸⁹

At issue are long-standing rules that impede PGA members from participating in non-PGA events without express permission. No PGA players can participate in LIV Golf's events in North America absent a change to the Conflicting Events Rule and the Media Rights Rule[s], found in chapter 5 of the PGA Tour Handbook.⁹⁰ The Conflicting Events Rule, with limited exceptions, requires PGA members to get an advance release before participating in any other golf tournament that occurs at the same time as a PGA event.⁹¹ The release can be withheld for any reason and is never allowed for tournaments held in North America.⁹² The Media Rights Rule prohibits players from participating in 'any live or recorded golf program without the prior written approval of the [PGA] Commissioner'.⁹³

Recognising the conflict, Norman initially promoted LIV Golf as a 'complement to the annual [PGA] tour schedules', putting the onus on PGA Commissioner Jay Monahan to decide whether PGA-affiliated golfers could play.⁹⁴ Instead of

86 Kent Babb, 'The Shark is on the attack again', *Washington Post* (5 June 2022), <https://www.washingtonpost.com/sports/2022/06/05/last-attack-greg-norman/>.

87 *ibid.*

88 *ibid.*; David Willman, 'PGA Outclubs FTC in Antitrust Fight', *Los Angeles Times* (22 October 1995), <https://www.latimes.com/archives/la-xpm-1995-10-22-fi-59876-story.html#:~:text=The%20FTC%20announced%20on%20Sept,weekend%20and%20received%20little%20attention.>

89 Joel Beall and Dan Rapaport, 'Saudi-backed, LIV Gold announces eight-event, \$255 million series that will visit United States', *Gold Digest* (16 March 2022), <https://www.golfdigest.com/story/liv-golf-announce-schedule-2022>.

90 PGA Tour Handbook, Chapter 5, pp. 127–31.

91 *ibid.*

92 *ibid.*

93 *ibid.*

94 Dan Rapaport, Twitter (15 March 2022), https://twitter.com/Daniel_Rapaport/status/1503920903947964419/photo/1.



waivers, however, Commissioner Monahan responded with the threat of lifetime bans for anyone who joined the LIV Golf Tournament.⁹⁵

On 9 June 2022, the inaugural LIV Golf Tournament teed off in London.⁹⁶ Participants included 17 PGA Tour members, such as top 100 world golfers Dustin Johnson, Kevin Na and Phil Mickelson.⁹⁷ True to its word, the PGA responded to the ‘violation of [its] Tournament Regulations’ by suspending all 17 players from competing in PGA Tour-sponsored events.⁹⁸ In turn, LIV Golf participant Ian Poulter stated, ‘I will appeal for sure, it makes no sense’, ‘[h]aving two tour cards and the ability to play golf all over the world, what’s wrong with that?’.⁹⁹

Foreshadowing the legal battles ahead, Greg Norman expressed in a letter to PGA players that, ‘The PGA Tour Would Violate The Antitrust Laws Were It To Ban Players’.¹⁰⁰ Norman urged the players to file an antitrust lawsuit, alleging that the Supreme Court resolved a similar case in the player’s favour in *Radovich v NFL*, when the Court denied the NFL an antitrust exemption.¹⁰¹ Specifically, the case dealt with the NFL’s ‘blacklisting’ policy, whereby players such as Radovich, who broke their NFL contractual commitments, could not play in rival football leagues.¹⁰² In Norman’s view, the NFL’s abandonment of its blacklisting policy after *Radovich* is what may happen to the PGA Tour’s alleged blacklisting of LIV Golf members.¹⁰³ For the PGA’s part, Commissioner Monahan maintains that the situation is black and white, ‘[t]he specifics of our regs say that a player that causes financial and reputational harm to the PGA Tour faces fine, suspension or disbarment’.¹⁰⁴

Suspended players such as Ian Poulter and Phil Mickelson ultimately followed Norman’s advice and filed a lawsuit against the PGA Tour on 3 August 2022 in *Mickelson et al v PGA Tour, Inc.*¹⁰⁵ The players brought a Section 2 claim under a monopsony theory and a Section 1 claim for group boycott.¹⁰⁶ Like Norman,

⁹⁵ Andrew Wright, ‘How The PGA Tour Has Reacted to Saudi-Backed Super League Threat’, *Golf Monthly* (2 March 2022), <https://www.golfmonthly.com/news/how-the-pga-tour-has-reacted-to-saudi-backed-super-golf-league-threat>.

⁹⁶ John Huggan, ‘London cabs, grenadiers and a little golf: What it was like to be at the first round of the first LIV Golf event’, *Golf Digest* (9 June 2022), <https://www.golfdigest.com/story/liv-golf-first-round-first-event>.

⁹⁷ ‘Commissioner Jay Monahan responds to players competing this week without proper releases’, PGA (9 June 2022), <https://www.pgatour.com/news/2022/06/09/pga-tour-commissioner-jay-monahan-responds-players-competing-without-proper-releases.html>.

⁹⁸ *ibid.*

⁹⁹ Dhruv Munjal, ‘Poulter to appeal PGA Tour suspension over LIV Golf involvement’, Reuters (10 June 2022), <https://www.reuters.com/article/uk-golf-liv-idCAKBN2NR0E6>.

¹⁰⁰ Brad Clifton and Joel Beall, ‘Exclusive: Read the full memo Greg Norman sent to players to challenge PGA Tour on antitrust laws’, *Australian Golf Digest* (24 February 2022), <https://www.australiangolfdigest.com.au/report-norman-liv-golf-asks-players-to-challenge-pga-tour-on-antitrust-laws/>.

¹⁰¹ *Radovich v Nat’l Football League*, 352 U.S. 445 (1957).

¹⁰² *id.* at 448.

¹⁰³ Brad Clifton and Joel Beall, footnote 100.

¹⁰⁴ Michael McCann, ‘Greg Norman’s Golf Tour May Tee Up Courtroom Match Play with PGA’, Sportico (16 March 2022), <https://www.sportico.com/law/analysis/2022/greg-norman-super-league-1234668663/>.

¹⁰⁵ Complaint, *Mickelson et al. v PGA Tour, Inc.*, 5:22-cv-04486 [N.D. Cal. 2022].

¹⁰⁶ *id.* at 92–95.



the golfers allege that the Media Rights Rule and the Conflicting Events Rule are anticompetitive.¹⁰⁷ Rival tours, such as the LIV, may eventually pursue legal action as well. Different leagues may advance Section 2 claims for unilateral refusal to deal or anticompetitive exclusive dealing. Similar to the golfers, rival tours might also pursue a Section 1 claim under a group boycott theory.

While private litigation is just starting, the PGA is also under antitrust pressure. The DOJ announced on 11 July 2022 that it had started an independent investigation into the PGA's by-laws regarding players' participation in other tournaments and the Tour's actions relating to LIV Golf.¹⁰⁸ Some indications suggest that the DOJ's inquiry began months earlier with player interviews, potentially providing the evidence needed for the DOJ to challenge the PGA's conduct before the end of 2022.¹⁰⁹ The theory of harm the DOJ is exploring is whether LIV Golf has been forced 'to spend more in order to do business' than it otherwise would have if players were allowed to compete on both tours.¹¹⁰ Yet, despite the news of the investigation becoming public, the PGA responded that the DOJ probe was not only expected, but that the Tour was 'confident in a similar outcome' to the 1994 FTC probe that ended with a finding that the PGA was not engaged in anticompetitive practices.¹¹¹

Interestingly, the 1990s FTC investigation focused on the same 'conflicting events and television release rules' that Norman and the suspended players believe are anticompetitive today.¹¹² During the previous investigation, FTC attorneys concluded that the two rules unreasonably restrained competition in violation of federal antitrust laws, and recommended legal action against the PGA Tour.¹¹³ FTC economists persuaded the then FTC commissioners, however, arguing that 'the tour's growth justified the rules'.¹¹⁴

With the suspended players seeking a renewed challenge to these rules, the PGA will likely defend itself by arguing that the Tour rules are pro-competitive, as evidenced by the continued growth of the Tour. Since 1995, the PGA Tour

¹⁰⁷ id. at 92.

¹⁰⁸ Louise Radnoffsky and Andrew Beaton, 'Justice Department is Investigating PGA Tour Over Potential Antitrust Violations in LIV Golf Battle', *Wall Street Journal* (11 July 2022), <https://www.wsj.com/articles/pga-tour-antitrust-liv-department-of-justice-investigation-11657557177>.

¹⁰⁹ ibid.

¹¹⁰ ibid.

¹¹¹ ibid.

¹¹² 'FTC Sets Sights on PGA Tour', *Washington Post* (27 June 1995), <https://www.washingtonpost.com/archive/sports/1994/06/28/ftc-sets-sights-on-pga-tour/811c66f2-25a4-4b85-9baa-97ad52a12611/>.

¹¹³ David Willman, 'PGA Outclubs FTC in Antitrust Fight', *Los Angeles Times* (22 October 1995), <https://www.latimes.com/archives/la-xpm-1995-10-22-fi-59876-story.html#:~:text=The%20FTC%20announced%20on%20Sept,weekend%20and%20received%20little%20attention>.

¹¹⁴ ibid.; see, eg, Steve Rushin, 'Hogan's Golfing Heroes', *Sports Illustrated* (7 May 1990), <https://vault.si.com/vault/1990/05/07/hogans-golfing-heroes-ben-hogans-company-has-funded-a-tour-for-pros-aiming-at-the-big-time> (in 1990 the PGA Tour launched the Ben Hogan Tour (now the Korn Ferry Tour)); 1985 Schedule, PGATour.com, <https://www.pgatour.com/tournaments/schedule.history.1985.html> (last visited 24 June 2022) (in 1985 the PGA Tour had a purse of US\$23.2 million); 1995 Schedule, PGATour.com, <https://www.pgatour.com/tournaments/schedule.history.1995.html> (last visited 24 June 2022) (by 1995, the Tour's purse ballooned to US\$69.2 million).



has expanded with the additions of PGA Tour Latinoamérica, Mackenzie Tour Canada, PGA Tour Series-China and PGA Tour University.¹¹⁵ The PGA Tour's purse is also set to increase by at least another US\$54 million in 2023,¹¹⁶ from its current US\$427 million.¹¹⁷ In response, the players are likely to argue that without the rules, they would earn more and total output of golf would increase further. Regardless of which side's evidence is stronger, it is almost certain this fight will end up in the courtroom given the interest of the DOJ as well as players directly affected by the PGA's rules. Initially, 17 players left the PGA Tour for the LIV tour after the PGA did not grant any requests to participate in LIV events, and more defections are to be expected.¹¹⁸

Labour antitrust issues in professional women's soccer

More than any other sport, soccer has traditionally been a young person's game. Top-rated players in Europe often play their first professional games before they reach 17 years old.¹¹⁹ For example, Martin Odegaard made his debut for Spanish super team Real Madrid in 2015 when he was just 16 years old.¹²⁰ Age has likewise not been a barrier in any US Major League Soccer team since DC United professionally signed 14-year-old Freddy Adu in 2004.¹²¹

Despite the established precedent, 15-year-old Olivia Moultrie found herself unable to sign with a team in the US National Women's Soccer League (NWSL) in 2021 because of a minimum age requirement of 18 years of age (the Age

¹¹⁵ PGA Tour History, PGATourMediaGuide.com, <https://www.pgatourmediaguide.com/intro/tour-history-chronology> (last visited 24 June 2022).

¹¹⁶ Rex Hoggard, 'PGA Tour Announces Larger Purses and Enhanced Fall Series for Game's Top Players', Golf Channel (22 June 2022), <https://www.golfchannel.com/news/pga-tour-announces-larger-purses-and-enhanced-fall-series-games-top-players#:~:text=PGA%20Tour%20increases%20purses%20by%20%2454%20million&text=In%20the%20memo%2C%20Monahan%20also,format%20is%20still%20being%20considered>.

¹¹⁷ Matt Craddock, 'PGA Tour Prize Money - How Much Will Players Be Battling for During the Season?', *Golf Monthly* (13 January 2022), <https://www.golfmonthly.com/news/pga-tour-prize-money-how-much-will-players-be-battling-for-during-the-season>; Mark Schlabach, 'U.S. Department of Justice Investigating PGA Tour for Behavior toward LIV Golf', ESPN (11 July 2022), https://www.espn.com/golf/story/_/id/34227586/us-department-justice-investigating-pga-tour-behavior-towards-liv-golf.

¹¹⁸ 'Commissioner Jay Monahan responds to players competing this week without proper releases', PGA (9 June 2022), <https://www.pgatour.com/news/2022/06/09/pga-tour-commissioner-jay-monahan-responds-players-competing-without-proper-releases.html>; David Dusek, 'PGA Tour: All eyes will be on Connecticut for Jay Monahan's response', *USA Today* (21 June 2022), <https://golfweek.usatoday.com/2022/06/21/pga-tour-liv-golf-jay-monahan-travelers-championship/>.

¹¹⁹ Dorian Salazar, 'Top 10 youngest debutants from the biggest clubs in European football', *Sportskeeda* (15 November 2015), <https://www.sportskeeda.com/slideshow/top-10-youngest-debutants-from-biggest-clubs-in-european-football>.

¹²⁰ Rort Marsden, 'Martin Odegaard Breaks Club Record in Debut for Real Madrid vs. Getafe', *Bleacher Report* (23 May 2015), <https://bleacherreport.com/articles/2447224-martin-odegaard-breaks-club-record-in-debut-for-real-madrid-vs-getafe>.

¹²¹ Charles Boehm, 'Sixteen years after Freddy Adu, why 14-year-old pros are no longer an oddity in MLS', *MLS Soccer* (3 April 2022), <https://www.mlssoccer.com/news/sixteen-years-after-freddy-adu-why-14-year-old-pros-are-no-longer-oddiy-mls>; see also 'My Journey So Far', *OliviaMoultrieSoccer.com*, <https://www.oliviamoultresoccer.com/journey>.



Rule).¹²² Moultrie is a prodigy, having been homeschooled since the fifth grade to focus on soccer, and becoming the first female to play for a boys' team in the United States Development Academy at age 10.¹²³ At 11 years old, Moultrie accepted a full scholarship offer to play soccer at the University of North Carolina.¹²⁴ Unsurprisingly, Moultrie never set foot on campus, opting to turn professional at age 13 and sign a multi-year endorsement agreement with Nike. The Nike sponsorship required Moultrie to forgo her collegiate eligibility (for now – see *Alston*).¹²⁵ One month later, Moultrie joined the NWSL's Portland Thorns.¹²⁶ While that allowed her to train with professional coaches and play in preseason games, however, the Age Rule prevented her from signing a professional contract, receiving a salary or being eligible to play in league games.¹²⁷

Fearful over her 'missed opportunit[ies]' to play professionally, Moultrie filed for a temporary restraining order (TRO) on 4 May 2021, asking the District Court for the District of Oregon to enjoin the Age Rule's applicability to Moultrie.¹²⁸ She alleged that the Age Rule effected an illegal horizontal agreement intended to depress the competition for professional players. Moultrie sought neither money nor a guarantee of playing time, requesting only 'the opportunity to compete for a position on a professional soccer team free from the Age Rule's restrictions'.¹²⁹ After securing a TRO on 24 May 2021, Moultrie filed for a continuation in the form of a preliminary injunction on 7 June 2021.¹³⁰ Moultrie maintained that the NWSL's Age Rule violated Section 1 of the Sherman Act as a conspiracy to block women under 18 years 'without regard to their talents or their ability to compete' and requested the District of Oregon to prevent the Age Rule from impeding her ability to join a professional team.¹³¹

Applying the rule of reason, District Court Judge Karin J Immergut granted the preliminary injunction to prevent the Age Rule from applying to Moultrie. First, with respect to Section 1's requirement of an 'agreement', the Court rejected the NWSL's argument that the League was one entity rather than a group of independent teams.¹³² The Court concluded that each team's exclusive 'home territory', local broadcasting agreements, confidential financial records

¹²² Analis Bailey and Chris Bumbaca, '15-year-old soccer player sues NWSL over age restrictions', *USA Today* (6 May 2021), <https://www.usatoday.com/story/sports/soccer/2021/05/06/olivia-moultrie-15-year-old-sues-nwsl-age-restrictions/4972775001/>.

¹²³ Andrew Keh, 'A Soccer Pro at 13? Olivia Moultrie Will Give It a Try', *New York Times* (25 February 2019), <https://www.nytimes.com/2019/02/25/sports/olivia-moultrie-us-soccer.html>.

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ Paul Tenorio, 'Restrictions on 15-year-old Olivia Moultrie present antitrust problem for NWSL', *The Athletic* (13 April 2021), <https://theathletic.com/2516805/2021/04/13/olivia-moultrie-nwsl-mls/>.

¹²⁷ *ibid.*

¹²⁸ *O.M. v Nat'l Women's Soccer League*, 544 F.Supp. 3d, 1171, 1176 (D. Or. 2021).

¹²⁹ *ibid.*

¹³⁰ *O.M. v Nat'l Women's Soccer League*, footnote 128, at 1063.

¹³¹ *ibid.*

¹³² *id.* at 1070.



and independently hired executives demonstrated that individual teams were sufficiently economically independent to conspire.¹³³

Second, with respect to the Age Rule's competitive effect, the Court found the Age Rule unreasonable because half of the teams in the NWSL sought to sign Moultrie when the Court issued the temporary restraining order (ie, that removing the Age Rule restriction immediately enhanced competition among the NWSL teams).¹³⁴ Further, Moultrie demonstrated antitrust injury by being denied the opportunity to play professionally and develop her soccer career in the United States' only professional women's soccer league.¹³⁵ The Court found that the Age Rule's anticompetitive effect was not outweighed by any pro-competitive benefits flowing from avoided administrative costs relating to compliance with laws related to employment of minors.¹³⁶ In particular, the Court did not credit the NWSL's argument that it would have to reduce output by allowing Moultrie (or other minors) to play.¹³⁷

Following the District Court's decision, the NWSL settled with Moultrie, granting her eligibility to be professionally signed.¹³⁸ Moultrie has since officially signed with the NWSL's Portland Thorns on a three-year deal with an option.¹³⁹ She became the youngest goalscorer in NWSL history on 12 June 2022,¹⁴⁰ and the Under-20 United States Women's National League designated her for international duty.

Moving forward, the NWSL could attempt to revive the Age Rule in its next collective bargaining agreement with the NWSL Players Association. Moultrie herself conceded at oral argument that an age provision in the collective bargaining agreement would lawfully bar women under 18 from signing with teams.¹⁴¹ While the current and first-ever collective bargaining agreement in the NWSL extends until 2026, there might be many players, like Moultrie, whose ability to play in the NWSL will depend on the bargaining strength of the players association.¹⁴²

¹³³ *ibid.*; *American Needle Inc. v Nat'l Football League*, 130 S. Ct. 2201 (2010).

¹³⁴ See *O.M. v Nat'l Women's Soccer League*, footnote 128, at 1073.

¹³⁵ *id.* at 1068.

¹³⁶ *id.* at 1074.

¹³⁷ *ibid.*

¹³⁸ Michael McCann, 'Soccer Phenom Olivia Moultrie Settles Age-Rule Suit with NWSL', Yahoo (30 July 2021), <https://sports.yahoo.com/soccer-phenom-olivia-moultrie-settles-202157358.html>.

¹³⁹ Thorns FC Communications, 'Thorns FC sign midfielder Olivia Moultrie' (30 June 2021), <https://www.timbers.com/news/thorns-fc-sign-midfielder-olivia-moultrie#:~:text=%E2%80%93%20Portland%20Thorns%20FC%20have%20signed,in%20the%202022%20NWSL%20Draft>.

¹⁴⁰ Seth Vertelney, 'Olivia Moultrie, 16-year-old Portland Thorns phenom, becomes youngest goal scorer in NWSL history', *USA Today* (12 June 2022), <https://www.usatoday.com/story/sports/soccer/2022/06/12/olivia-moultrie-16-becomes-youngest-goalscorer-in-nwsl-history/50363351/>.

¹⁴¹ *O.M. v Nat'l Women's Soccer League*, footnote 128, at 1066; *Brown v Pro Football, Inc.*, 518 U.S. 231 (1996) (collective bargaining agreements are exempt from antitrust laws to honour Congress' intent to prevent 'judicial use of antitrust law to resolve labor disputes').

¹⁴² Sandra Herrera, 'NWSL players make history with first-ever collective bargaining agreement ahead of 2022 preseason', CBS Soccer (1 February), <https://www.cbssports.com/soccer/news/nwsl-players-make-history-with-first-ever-collective-bargaining-agreement-ahead-of-2022-preseason/>.



It will also be worth watching Moultrie's impact on college athletics. The NCAA's turmoil after *Alston* led many athletes to reconsider whether college was the best path to becoming professional athletes. This attitude shift is demonstrated most in the National Basketball Association (NBA), where talented high school players are starting to forgo college, opting instead to turn professional by signing with the NBA's developmental league (the G-League).¹⁴³ For those as prodigious as Moultrie, the opportunity now exists to play professionally the moment a team sees enough value.

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¹⁴³ Jonathan Givony and Adrian Wojnarowski, 'Top high school player Jalen Green enters NBA/G League Pathway', ESPN (16 April 2020), https://www.espn.com/nba/story/_/id/29043828/sources-top-high-school-player-jalen-green-enter-nba-g-league-pathway.



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