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Shutting Down the Offense: Why the Supreme Court Should Designate the NFL a Single Entity for Antitrust Purposes

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SHUTTING DOWN THE OFFENSE: WHY THE SUPREME COURT SHOULD DESIGNATE THE NFL A SINGLE ENTITY FOR ANTITRUST PURPOSES

PETER R. MORRISON*

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“It is emphatically the province and duty of the judicial department to say what the law is.”¹ Justice Marshall set the stage in 1803, and, since the passage of the Sherman Antitrust Act² in 1890, courts in the United States have taken Marshall’s sentiment to heart, bending and twisting antitrust law in every direction.³ The courts have not spared antitrust law with respect to sports leagues,⁴ and their treatment has been anything but consistent.⁵ Virtually every sports league has seen its share of antitrust challenges and inconsistent rulings.

The National Football League (“NFL”) has been defending against antitrust suits for over fifty years.⁶ From draft disputes⁷ to suits from outside leagues,⁸ it has grown accustomed to, and weary of, defending itself against a continuing barrage of lawsuits by groups who are forum shopping for the most favorable circuits.⁹

The most recent chapter of NFL antitrust liability has arisen out of a lawsuit over officially licensed NFL merchandise. Prior to 2001, the NFL had many vendors for its officially licensed apparel. However, in 2001, for multiple reasons, the NFL signed a \$250 million, exclusive ten-year contract for Reebok to produce on-field apparel for all thirty-two teams.¹⁰ One of the NFL’s former vendors, hat manufacturer American Needle, filed a lawsuit in the Federal District Court for the Northern District of Illinois, claiming that the NFL had violated sections 1 and 2 of

¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

² Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2006).

³ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* ix–x (1993). Judge Robert Bork speaks of a Crisis in Antitrust, based on the inconsistencies in law—some cases leading to the preservation of competition and others to its suppression. This constitutes the foundation for the title of his famous 1978 work, *The Antitrust Paradox*. However, in his new edition in 1993, Judge Bork has acknowledged that the law has improved, noting that “[i]t is merely law, not a farrago prima facie amorphous and leftist political and sociological propositions.” *Id.*

⁴ See Gregory J. Pelnar, *Antitrust Analysis of Sports Leagues* 63 (Oct. 12, 2007) (working paper), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1021365.

⁵ Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 264 (1993). In fact, Major League Baseball has the benefit of a complete statutory exemption from the Sherman Act, while other sports remain subject to the Act in varying degrees of rigor. See also *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922).

⁶ See, e.g., *Am. Needle Inc. v. Nat’l Football League*, 538 F.3d 736 (7th Cir. 2008); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Chi. Prof’l Sports Ltd. v. Nat’l Basketball Ass’n (Bulls II)*, 95 F.3d 593 (7th Cir. 1996); *Sullivan v. Nat’l Football League*, 34 F.3d 1091 (1st Cir. 1994); *McNeil v. Nat’l Football League (McNeil II)*, 790 F. Supp. 871 (D. Minn. 1992); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984); *Mid-South Grizzlies v. Nat’l Football League*, 720 F.2d 772 (3d Cir. 1983); *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting); *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957).

⁷ *Smith*, 593 F.2d at 1183. *Smith* found, under the rule of reason analysis, that “the NFL draft as it existed in 1968 had a severely anticompetitive impact on the market for players’ services, and that it went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purposes might be asserted for it.” *Id.*

⁸ *N. Am. Soccer League*, 670 F.2d at 1249.

⁹ Brief of Respondents at 4 for Writ of Certiorari, *Am. Needle Inc. v. Nat’l Football League*, No. 08-661 (Nov. 17, 2008).

¹⁰ MARK YOST, *TAILGATING, SACKS, AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY* 129–30 (2006).

the Sherman Act.¹¹ By 2008, *American Needle Inc. v. National Football League* had worked its way to the Seventh Circuit Court of Appeals.¹²

Throughout this case, the NFL has asserted a single entity defense. Section 1 of the Sherman Act states, in part, that “[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.”¹³ This language ultimately requires multiple actors; common sense would say that a company cannot engage in a conspiracy with itself.¹⁴ Unfortunately, common sense does not always abound in antitrust jurisprudence¹⁵—for a long time it was possible to have a conspiracy within the same entity under the intra-enterprise conspiracy doctrine. The single entity defense, which relies on this common sense argument, has become more popular since the passage of *Copperweld Corp. v. Independence Tube Corp.*, the case that abolished the intra-enterprise conspiracy doctrine.¹⁶

In the *American Needle* litigation, the NFL contends that the “[l]eague and its member clubs are, or at least function as, a single entity and therefore cannot constitute the plurality of economic actors required for a [s]ection 1 conspiracy.”¹⁷ The Seventh Circuit Court of Appeals sided with the NFL; in affirming the holding of the Northern District of Illinois, the court held that “NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property, and we thus cannot say that the district court was wrong to so conclude.”¹⁸ *American Needle* filed a petition for certiorari to the United States Supreme Court, and, after asking the Acting Solicitor General to file a brief expressing the views of the United States,¹⁹ the Supreme Court granted certiorari on June 29, 2009.²⁰

Scholars have been debating the application of the Sherman Act to sports leagues for decades, and this Article adds to the debate by suggesting the proper course of action the Supreme Court should take in the *American Needle* case. Part I of this Article outlines the unique structure of the NFL as a sports league and the structure of its official licensing program for merchandise.²¹ Part II discusses the basics of antitrust law and its application to sports leagues.²² Part III outlines the

¹¹ *Am. Needle Inc. v. New Orleans La. Saints*, 385 F. Supp. 2d 687, 689 (N.D. Ill. 2005) (dismissing the case under a per se analysis).

¹² 538 F.3d 736 (7th Cir. 2008).

¹³ Sherman Antitrust Act, 15 U.S.C. § 1 (2006). Section 1 of the Sherman Act addresses conspiracy while section 2 addresses monopolies.

¹⁴ See discussion *infra* Part III.B and note 164 and accompanying text.

¹⁵ See BORK, *supra* note 3, ix–x (referencing the chaos in the earlier days of antitrust jurisprudence).

¹⁶ 467 U.S. 752, 777 (1984) (holding that a parent corporation and its wholly-owned subsidiary are “incapable of conspiring with each other for purposes of [section] 1 of the Sherman Act”).

¹⁷ Brief of Respondents, *supra* note 9, at 2.

¹⁸ *Am. Needle Inc. v. Nat’l Football League*, 538 F.3d 736, 744 (7th Cir. 2008), *cert granted*, 77 U.S.L.W. 3326 (U.S. June 29, 2009) (No. 08-661).

¹⁹ *Am. Needle, Inc. v. Nat’l Football League*, 129 S. Ct. 1400 (2009).

²⁰ *Am. Needle*, 538 F.3d at 736. As of the date of publication, the Court had not yet set a date for oral argument in the case.

²¹ See *infra* Part I.

²² See *infra* Part II.

jurisprudential rollercoaster of cases pertaining to the single entity status of sports leagues.²³ Part IV discusses the details of the *American Needle* case against the NFL.²⁴ Part V culls the vast amount of scholarly work on this topic into a cohesive argument, confirming the Seventh Circuit's holding that the NFL is a single entity.²⁵

I. STRUCTURE OF THE NFL AND ITS LICENSING APPARATUS

A. History and Structure

The NFL as we currently know it had a rocky start, plagued by problems of rising salaries, the propensity of the best players to jump between teams for more money, and the use of athletes who were still enrolled in college programs.²⁶ In 1920 a loose coalition of football teams joined together, to form the American Professional Football Association, with Jim Thorpe as its first president. This was an effort by these teams to agree to uniform rules and to address systemic problems in football. The league, even then, was a necessary “cooperative venture” that at a minimum allowed teams to determine scheduling, league rules, length of season, and playoff structure.²⁷ In 1966, the NFL and the American Football League (“AFL”)²⁸ were the two dominant professional football leagues, and they sought and gained congressional approval for a merger which exempted their transaction from antitrust liability.²⁹ The merger was not finalized until 1970, and today, there is only one professional football league—the NFL—comprised of thirty-two teams.³⁰ In 2004, the league generated \$6 billion in revenue, and in 2006, approximately \$2.2 billion of the league's revenue came from television alone.³¹ In 2007, attendance at league games topped twenty-two million people for pre-

²³ See *infra* Part III.

²⁴ See *infra* Part IV.

²⁵ See *infra* Part V.

²⁶ NFL.com, History by Decade: 1911–1920, <http://www.nfl.com/history/chronology/1911-1920> (last visited Apr. 18, 2009).

²⁷ Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 757–58 (1989) (noting that these items are really only the basic forms of cooperation, and the NFL franchise members “exhibit significantly greater elements of cooperation”).

²⁸ *Id.* at 757. With the exception of the AFL, every attempt at developing a competing league failed. *Id.*

²⁹ Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 151 (codified at 15 U.S.C. § 1291 (2006)) (extending “exemption from antitrust laws to include a joint agreement by which the member clubs of two or more professional football leagues combine their operations in an expanded single league”); see Bauer, *supra* note 5, at 267 (providing a more in-depth discussion of the antitrust implications of the NFL-AFL merger). This is not the only time that the NFL obtained a congressional exemption from the Sherman Act. Responding to *United States v. Nat'l Football League*, 116 F. Supp 319 (E.D. Pa. 1953), a decision by the District Court for the Eastern District of Pennsylvania finding that the NFL's broadcasting agreement violated the Sherman Act, Congress “agreed to confer a statutory exemption not only on broadcasts of professional football games, but also on those of professional baseball, basketball, and hockey” and passed the Sports Broadcasting Act. Bauer, *supra* note 5, at 270–71; see 15 U.S.C. §§ 1291–1295.

³⁰ See MARK CONRAD, THE BUSINESS OF SPORTS: A PRIMER FOR JOURNALISTS 4 (2006).

³¹ *Id.* at 4–5.

regular-, and post-season games.³² Times have changed since the early days of the NFL, and it is widely considered to be the “most financially sophisticated and market-savvy league on the planet.”³³ Currently, there are nineteen NFL teams individually valued at \$1 billion or more, with the Dallas Cowboys leading the pack at \$1.65 billion.³⁴ The NFL also has the widest fan base in the United States. Among eleven sports tested in a 2001 Gallup survey, sixty-three percent of Americans considered themselves fans of professional football.³⁵

The NFL is a unique entity in that its ultimate success depends on the economic cooperation of its members, rather than the competition.³⁶ The NFL is not a standard business but an unincorporated association, much like a trade organization.³⁷ It has management authority that derives from an executive committee composed of the league commissioner and one representative from each team.³⁸ The NFL commissioner has a wide range of powers, including “disciplinary powers, dispute resolution authority, and decision-making authority, [which grants] the power to appoint other officers and committees.”³⁹ Additionally, the commissioner has the power to punish a player with fines (up to \$500,000), suspension, or banishment from the league.⁴⁰

The NFL has a great deal of control over its franchise members. The first and most glaring example of this is the NFL revenue sharing structure. It was devised in the 1960s when owner Art Modell convinced other owners—George Halas, Dan Reeves, and Jack Mara—that revenue sharing would be good for the competitive balance of the sport.⁴¹ Revenue sharing is also thought to prevent undercapitalization of teams, which can cause harm to a team’s city, the league, and the entire structure of the NFL.⁴² Today, the NFL has the most equitable revenue sharing agreement of all major sports leagues in the United States. Currently, teams share ticket revenue with the home team receiving 60% of ticket sales.⁴³ The NFL then pools the remaining 40% divides it among the member clubs.⁴⁴ In 2004, total ticket sales reached \$1.5 billion, and the NFL split \$2.2 billion in television revenue among the member clubs.⁴⁵

³² NFL.com, NFL Sets Attendance Record in 2007, <http://www.nfl.com/news/story?id=09000d5d8077f84d&template=without-video&confirm=true> (last visited Oct. 29, 2009).

³³ YOST, *supra* note 10, at 122.

³⁴ *Special Report: NFL Team Valuations*, FORBES.COM, Sept. 10, 2008, http://www.forbes.com/lists/2008/30/sportsmoney_nfl08_NFL-Team-Valuations_Rank.html.

³⁵ CONRAD, *supra* note 30, at 5.

³⁶ *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1194–95 (D.C. Cir. 1978) (MacKinnon, J., dissenting) (citing *United States v. Nat’l Football League*, 116 F. Supp. 319, 323–24 (E.D. Pa. 1953)).

³⁷ CONRAD, *supra* note 30, at 4 (citing NFL CONST. and Bylaws, art. IV).

³⁸ *Id.*

³⁹ *Id.* (citing NFL CONST. 3.1–3.9).

⁴⁰ *Id.* (citing NFL CONST. 3.1–3.9).

⁴¹ *Id.*

⁴² See Nathaniel Grow, Note, *There’s No “I” in “League”*: Professional Sports Leagues and the Single Entity Defense, 105 MICH. L. REV. 183, 198 (2006).

⁴³ CONRAD, *supra* note 30, at 12.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 4.

Despite the delegated authority of the league, team owners maintain a great deal of autonomy over the general operation of their teams. There is no common ownership between NFL franchises; they are in a contract relationship with one another under the NFL Constitution and Bylaws.⁴⁶ Teams have hiring and firing prerogative, the ability to sign players (within salary cap restraints), and the ability to sell tickets and to market their product to their community in an effort to gain favorable publicity.⁴⁷

There are three models of sports team ownership rights. The first is a club-based private property system consisting of little cooperation between the teams. The second is a purely common property, league-based system that Major League Soccer first attempted (it is thought that this does not work because people do not want to be faceless investors in a sports franchise, and the fans want to see their owners competing against each other). Finally, there is the mixed-mode property system that blends positive benefits, recognizing that some cooperation is required to make the system work, while respecting the fact that the fans do not want a pre-determined outcome. The NFL falls into the third category.⁴⁸

The NFL Constitution and Bylaws connect each member franchise in a unique structure of economic interdependence.⁴⁹ “For relevant economic purposes, and thus antitrust purposes, separate ownership only entitles each franchise owner to some share of the jointly generated league income, the amount depending on the formula established by the member clubs acting collectively as the league.”⁵⁰ Independent ownership is widely thought to be the best thing for the league—it gives the fans confidence that the competition on the field is genuine—translating this perception into ticket sales and television revenue for all of the league members.⁵¹

B. NFL Licensing and NFL Properties

NFL licensing revenue is a growing part of the NFL’s revenue stream, albeit miniscule in comparison to its television revenue. The NFL merchandising business generates approximately \$3.5 billion per year in annual sales; however, the NFL’s profit is only about 8–12% of the wholesale price of the items—diluted when divided between thirty-two member clubs.⁵² After operating expenses and

⁴⁶ Goldman, *supra* note 27, at 757.

⁴⁷ CONRAD, *supra* note 30, at 13.

⁴⁸ Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 891–905 (2008).

⁴⁹ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1194–95 (D.C. Cir. 1978) (MacKinnon, J., dissenting); Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562, 576 (1986).

⁵⁰ Roberts, *supra* note 49, at 576.

⁵¹ Grow, *supra* note 42, at 194 (citing *Bulls II*, 95 F.3d 593 (7th Cir. 1996)).

⁵² YOST, *supra* note 10, at 124; Grow, *supra* note 42, at 197 (citing Paul Doyle, *Watch While You Can; Lockout May End Careers, Franchises*, HARTFORD COURANT, Oct. 8, 2003, at C8 (reporting that NFL teams each receive \$77 million a year from the NFL’s national television deal)); Gary Haber, *Trophy Won’t Alter Bucs’ Value*, TAMPA TRIB., Jan. 30, 2003, at 5 (“[NFL] owners derive most of their revenue from a national television contract . . .”); see also CONRAD, *supra* note 30, at 271.

taxes, it amounts to about \$4 million per team each year.⁵³ Nevertheless, licensing of logos for merchandising purposes is a large enough revenue generator that it caught the attention of Pete Rozelle in the late 1950s. Rozelle, then head coach of the Rams, thought he could make a great deal of money by correctly marketing merchandise and licensing rights, so he hired the former marketing manager of Roy Rogers, who had successfully earned the restaurant chain \$30 million per year in toy sales.⁵⁴ The Rams opened the first team store, which turned out to be a profitable venture.⁵⁵ Rozelle implemented this strategy league-wide when he became commissioner in 1960.

Seeking to capitalize on the idea that licensees will pay money to use a logo “on the belief that the team’s goodwill will enhance the appeal and perceived value of the licensee’s goods,”⁵⁶ Rozelle founded NFL Properties (“NFLP”) in 1962.⁵⁷ NFLP is a separate corporate entity designed to collectively promote the NFL’s intellectual property and it is charged with “(1) developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia; and (2) ‘conduct[ing] and engag[ing] in advertising campaigns and promotional ventures on behalf of the NFL and [its] member [teams].’”⁵⁸ The teams authorized NFLP to grant licenses for all forms of consumer products that might carry the logo of a team or the NFL itself, including hats like the ones that American Needle Inc. produces.⁵⁹ An exclusive negotiating agent like NFLP is a more efficient and collective mechanism than individual teams negotiating every deal on their own.⁶⁰

The teams created NFLP, in its current form, in 1981 when twenty-six of the then-existing twenty-eight teams entered into a trust agreement, transferring the “exclusive commercial rights of their marks to the trustees of the NFL Trust.”⁶¹ “The NFL Trust then enter[d] into a licensing agreement with NFLP, whereby NFLP would act as the exclusive licensee of all of the NFL and team marks.”⁶² The NFL Trust then distributes revenue equally to the member teams. All four of the major sports leagues in the United States use a trust model because it “requires that any commercial enterprise, seeking to use any, or all, or some of the . . . trademarks, license these trademark rights collectively from NFL properties, rather

⁵³ YOST, *supra* note 10, at 136.

⁵⁴ *Id.* at 123.

⁵⁵ *Id.* at 122.

⁵⁶ Brandon L. Grusd, *The Antitrust Implications of Professional Sports’ Leaguewide Licensing and Merchandising Arrangements*, in *THE BUSINESS OF SPORTS* 183, 183 (Scott Rosner & Kenneth Shropshire eds., 2004).

⁵⁷ YOST, *supra* note 10, at 123.

⁵⁸ *Am. Needle Inc. v. Nat’l Football League*, 538 F.3d 736, 737 (7th Cir. 2008) (alteration in original). It is important to note that this intellectual property does not include the intellectual property of the NFL players. The players, in conjunction with The NFL Players Association, have formed Players, Inc. to represent the images of the players for video games, apparel, etc. CONRAD, *supra* note 30, at 271.

⁵⁹ *Am. Needle*, 538 F.3d at 737–38.

⁶⁰ Grusd, *supra* note 56, at 184.

⁶¹ *Id.* at 184–85.

⁶² *Id.*; CONRAD, *supra* note 30, at 270.

than individually from specific football clubs.”⁶³ This, in turn, makes it easier to compete with other forms of entertainment.⁶⁴ Clearly the NFL member clubs are satisfied with the NFL Trust because, in 2004, owners voted to extend the NFL Trust for another fifteen years.⁶⁵

While the NFL Trust model has been successful, there are critics who believe that it is not an efficient way to market for all league members. For example, Brandon Grusd notes that there are four main reasons why the shared licensing model, and all revenue sharing, is not efficient: (1) sharing merchandise creates disincentives for owners to create competitive teams; (2) the plan exacerbates the free-rider problem; (3) there is no incentive for inefficient teams to exit the market; and (4) the teams promote a league product better individually than they do as a league.⁶⁶ This analysis, however, does not account for the collective benefit of having stronger teams throughout the league.

Critics maintain that the overall purpose of the trust model and collective trademarking is to “reduce the level of competition in the merchandise license and sponsorship markets between the teams within the same league.”⁶⁷ However, the individual teams have not completely relinquished control over their marks. Teams still retain:

(1) [T]he exclusive right to use its team marks in connection with the presentation of a football game; (2) the nonexclusive right to use its team marks in local advertising to promote football games; (3) the nonexclusive right to allow third parties to use its team marks in advertisements in local sections of the team’s program; and (4) the nonexclusive right to use its marks in its own publications⁶⁸

Some teams, however, believe that they have more rights than others. Like any good cartel, the model only works as long as all parties refrain from cheating, and, if too many cheat, the whole system falls apart.⁶⁹

Of course, the cartel members who cheat are the most successful ones, and this has shown to be true in the NFL.⁷⁰ In 1994, Jerry Jones, the owner of the Dallas Cowboys, deviated from the NFL Trust and NFLP agreements and entered into contracts with Nike and Pepsi.⁷¹ That year, Jones’ Cowboys were responsible for 30% of NFL merchandise sales and received only 3.6% of the revenue under the sharing agreement.⁷² Although the NFL and Jones traded lawsuits over this matter,⁷³ they ultimately settled out of court.⁷⁴ Proponents of the sharing

⁶³ Edelman, *supra* note 48, at 920–21.

⁶⁴ *Id.* at 921.

⁶⁵ CONRAD, *supra* note 30, at 271 (citation omitted).

⁶⁶ Grusd, *supra* note 56, at 186.

⁶⁷ *Id.* at 185.

⁶⁸ *Id.*; *see also* CONRAD, *supra* note 30, at 270.

⁶⁹ Grusd, *supra* note 56, at 185–86; *see also* CONRAD, *supra* note 30, at xxiv (likening the NFL and sports leagues in general to the Organization of Petroleum Exporting Countries).

⁷⁰ Grusd, *supra* note 56, at 185–86.

⁷¹ *Id.*

⁷² *Id.*; *see also* YOST, *supra* note 10.

⁷³ Timothy W. Smith, *PRO FOOTBALL; Cowboy Owner Fires Back with Suit Against N.F.L.*,

agreements argued that the Cowboys are actually stronger because they are helping to ensure the strength of all of the other teams.⁷⁵

C. Protecting the Value of Their License

In 1983, the offensive line of the Washington Redskins, known affectionately as “The Hogs” because they averaged over 270 pounds each and were virtually unstoppable, orchestrated a profitable enterprise around their huge success.⁷⁶ The Hogs formed Super Hogs Inc., and, after the Redskins won the Super Bowl in 1983, Super Hogs Inc. sold more than \$500,000 worth of merchandise.⁷⁷ This served as a wakeup call to the NFL that it needed to keep track of its brand and control its distribution in order to maintain the successful profit-sharing structure that made the league so successful.⁷⁸

In the mid-1990s, the NFL started trimming down its number of licensees.⁷⁹ In 1996, as a result of the Atlanta Olympics, as well as from apparel producers like Polo and FUBU, there was a huge glut in the marketplace for logo apparel.⁸⁰ During this time, revenues decreased, and the NFL had over 350 licenses in the marketplace.⁸¹ The NFL hired Chuck Zona, a marketing expert, to help the league streamline its brand because “[o]verlicensing . . . and oversupply put tremendous pressure on profit margins.”⁸² Under Zona’s lead, the NFL cut its licenses from 350 down to 125.⁸³

In 2002, the NFL took this streamlining to the next level by signing an exclusive ten-year contract with Reebok for the right to produce all on-field apparel for each of the thirty-two teams.⁸⁴ This deal has led to a much more efficient marketing strategy for NFL apparel.⁸⁵ The unified look is good for the brand, and the ten-year, exclusive contract allows Reebok to plan ahead in design and solicit opinions from coaches, owners, players, and wives. Reebok designs thirty items for each team with different clothing lines for different climates.⁸⁶

A significant benefit of having fewer licenses in the marketplace is that it allows the NFL to police its licenses much more carefully. It is easier for the

N.Y. TIMES, Nov. 7, 1995, at B11.

⁷⁴ Pelnar, *supra* note 4, at 63. Under the settlement, Jones was able to maintain his licensing agreement and enter into others. Additionally, in the Reebok deal, to which this Note is addressed, Jones was the only owner who exercised his right to act as the sole private wholesaler, retailer, and distributor of its own apparel. *Id.*

⁷⁵ See Grow, *supra* note 42, at 194.

⁷⁶ YOST, *supra* note 10, at 122–23.

⁷⁷ *Id.* at 122.

⁷⁸ *Id.*

⁷⁹ *Id.* at 126.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² YOST, *supra* note 10, at 126.

⁸³ *Id.*

⁸⁴ *Id.* at 128.

⁸⁵ *Id.* at 130.

⁸⁶ *Id.*

league to identify and crack down on counterfeit NFL merchandise, and it gives incentives to its license partners to police the marketplace as well.⁸⁷

II. ANTITRUST LAW AND ITS APPLICATION TO SPORTS LEAGUES

A. General Principles

The purpose of antitrust law is to protect consumers by preserving and ensuring competition in the marketplace.⁸⁸ The Sherman Act of 1890 has two sections, each of which is designed to protect consumers from unreasonable restraints of trade that might negatively impact the market. Section 1 of the Sherman Act outlaws “every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”⁸⁹ Section 2 of the Sherman Act states, in part, that “[e]very person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”⁹⁰ Section 1 applies to multiple actors conspiring in restraint of trade, while section 2 can be applied to a single firm acting to monopolize a product market.

At first glance, section 1 of the Sherman Act might seem to encompass virtually all agreements or contracts; however, the courts have taken a different approach to analyzing antitrust cases in light of this overly broad language.⁹¹ Courts have determined that there are three ways of analyzing an antitrust claim, and courts should choose which method to employ based on the nature of the industry and the nature of the restrictive action.⁹² The three methods are: (1) per se; (2) rule of reason; and (3) a quick-look analysis.⁹³

In 1911, Justice White, in *Standard Oil Co. v. United States*, narrowed section 1, generally applying it to unreasonable restraints of trade.⁹⁴ Justice White went on to describe the notion of per se illegality,⁹⁵ though not coining the term, he explained it in terms of restraint of trade that is inherently unreasonable.⁹⁶ Such actions offer no significant prospect of consumer benefit⁹⁷ and are so heinous that

⁸⁷ *Id.* at 135–36.

⁸⁸ Pelnar, *supra* note 4, at 29.

⁸⁹ *Id.* (quoting Sherman Antitrust Act, 15 U.S.C. § 1 (2006)).

⁹⁰ 15 U.S.C. § 2.

⁹¹ Richard M. Steuer, *Executive Summary of the Antitrust Laws*, <http://profs.lp.findlaw.com/antitrust/> (last date visited Oct. 27, 2009).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 221 U.S. 1, 87 (1911) (“In determining the remedy against an unlawful combination, the court must consider the result and not inflict serious injury on the public by causing a cessation of interstate commerce in a necessary commodity.”); see also Michael A. Flynn & Richard J. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, 111 *ECON. J.* F27, F31 (2001).

⁹⁵ See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

⁹⁶ *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1387 (9th Cir. 1984) (citing *Standard Oil Co.*, 221 U.S. 1).

⁹⁷ Gregory J. Werden, *Symposium: Antitrust Scrutiny of Joint Ventures: Antitrust Analysis of Joint Ventures: An Overview*, 66 *ANTITRUST L.J.* 701, 712 (1998).

the court, with proper experience, can “predict with certainty that the [further in-depth analysis] will condemn that restraint[,] . . . [allowing the court to] hold that the restraint is per se unlawful.”⁹⁸ In these situations, the court will find the action per se illegal without any analysis into the possible benefits of the restraint because they are considered “naked restraints of trade with no purpose except stifling of competition.”⁹⁹ Per se illegality is reserved for only the worst antitrust offenses,¹⁰⁰ and, according to Justice Douglas, “[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.”¹⁰¹

In 1918, in *Chicago Board of Trade v. United States*, Justice Brandeis refined Chief Justice White’s opinion in *Standard Oil Co. of New Jersey v. United States*, wherein Justice White announced a new approach to antitrust analysis, one that requires a more exacting examination of the specific situation.¹⁰² Justice Brandeis held that “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”¹⁰³ Justice Brandeis calls for consideration of the nature of the restraint, the history of the restraint, and the reasons for and against a remedy.¹⁰⁴ He does not claim that a noble motive will bless an otherwise illegal restraint, but rather that “knowledge of intent may help the court to interpret facts and to predict consequences.”¹⁰⁵ This standard is known as rule of reason, and it has become the classic approach that courts use in antitrust analysis, most often when the court lacks “the expert understanding of an industry’s market structure and behavior” sufficient to rule an act illegal without further review.¹⁰⁶

In most circumstances, courts apply a rule of reason analysis, which requires them to “decide whether under all circumstances of the case, the agreement imposes an unreasonable restraint of trade.”¹⁰⁷ Unless it is a thinly veiled cartel, joint ventures and their ancillary restraints also fall under the rule of reason analysis.¹⁰⁸

There is a third standard of antitrust analysis that courts occasionally apply: quick look. This approach generally emanates from Chief Justice Burger’s

⁹⁸ *L.A. Mem’l Coliseum*, 726 F.2d at 1387.

⁹⁹ *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

¹⁰⁰ Werden, *supra* note 97, at 714 (“The per se rule should not be applied if an integration is reasonably calculated to achieve social benefits, even if it fails to do so.”).

¹⁰¹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

¹⁰² 246 U.S. 231 (1918).

¹⁰³ *Id.* at 238.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; see also *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984).

¹⁰⁶ *L.A. Mem’l Coliseum*, 726 F.2d at 1387.

¹⁰⁷ *Id.* at 1387 (citing *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982)); see also Bauer, *supra* note 5, at 285.

¹⁰⁸ Flynn & Gilbert, *supra* note 94, at F43.

dissenting opinion in *United States v. Topco Associates*,¹⁰⁹ refined in *NCAA v. Board of Regents*¹¹⁰ where many turn for a general analysis.¹¹¹ A quick-look approach requires the court to do just that. The court first makes an “initial presumption that the restraint impairs competition,” then the court takes a quick look at the justifications for the restraint.¹¹² If the court determines, based on the quick look, that the justifications are legitimate,¹¹³ then the court engages in a complete rule of reason analysis.¹¹⁴

Based on the language in sections 1 and 2, there are certain exemptions to Sherman Act liability, starting with the interstate commerce exemption. The Sherman Act requires that the prohibited restraints occur in interstate commerce, the origin of Congress’s authority to pass such a law.¹¹⁵ If a court specifically says that a restraint is not occurring in the course of interstate commerce, then such action is exempt from the Sherman Act.¹¹⁶ This is precisely how Major League Baseball (“MLB”) was able to secure a complete exemption from antitrust liability. In 1922, the Supreme Court determined that the business of baseball is a purely state affair.¹¹⁷

Another exemption to antitrust liability comes from a statutory exemption: congressional approval.¹¹⁸ This is the type of exemption that the NFL secured when Congress approved the merger between the NFL and the AFL.¹¹⁹ The most important exemption for sports league analysis, and the focus of this Article, is the single entity exemption. This exemption stems from the argument that conspiracy under section 1 requires multiple actors and a single entity cannot conspire with itself.¹²⁰

B. Consumer Welfare

Judge Robert Bork, in his paradigm work *The Antitrust Paradox*, takes the Chicago School approach, espousing consumer welfare as the exclusive goal of

¹⁰⁹ 405 U.S. 596 (1972) (Burger, J., dissenting).

¹¹⁰ 468 U.S. 85 (1984).

¹¹¹ Timothy R. Deckert, *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in Chicago Professional Sports Limited Partnership v. National Basketball Association*, 5 VILL. SPORTS & ENT. L.J. 73, 83–84 (1998).

¹¹² *Id.* at 84.

¹¹³ Werden, *supra* note 97, at 717–18. Gregory Werden argues that the defendant must do more than present a social benefit; “rather, they must put forward evidence demonstrating a clear causal nexus between the restraint and the social benefit and indicate why the social benefit could not reasonably be achieved in a substantially less anticompetitive manner.” *Id.*

¹¹⁴ *Id.* at 717–18 (“A joint venture and its ancillary collateral restraints should be subject to a quick look if they eliminate independent decision making by participants over price, output . . . or any other strategy central to competition.”); *see also* Deckert, *supra* note 111, at 83–84.

¹¹⁵ Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

¹¹⁶ Pelnar, *supra* note 4, at 30–31.

¹¹⁷ Fed. Baseball Club v. Nat’l League, 259 U.S. 200 (1922).

¹¹⁸ Pelnar, *supra* note 4, at 37.

¹¹⁹ *See id.* at 38.

¹²⁰ *See id.* at 26 n.21.

antitrust law.¹²¹ An in-depth analysis of the consumer welfare doctrine is beyond the scope of this Article; however, at least a cursory understanding is imperative to engage in antitrust analysis. Most scholars agree that the congressional record does not give any insight into the Sherman Act's purpose, but today most scholars, including Judge Bork, espouse consumer welfare as at least one of the primary goals of the Sherman Act.¹²²

Consumer welfare is an analytical model that can take multiple different forms. Chief Justice White, in *Standard Oil*, couched it in terms of restriction of output,¹²³ while others characterize it in terms of actual detriment to consumers of goods and services.¹²⁴ According to Judge Bork, regardless of what one looks at, be it statutes, legislative history, or court precedent, the overall purpose of antitrust law is consumer welfare.¹²⁵

Professor Myron Grauer analogizes consumer welfare theory to the concept of Pareto optimality:¹²⁶

Pareto optimality assumes that society contains limited resources, that consumers as a whole desire as many goods and services as they can obtain at the lowest possible price, and that producers desire to maximize profits. The goal of Pareto optimality is to allocate society's limited resources in a manner such that no rearrangement of those resources (by judicial decree or otherwise) can make any one person better off (or more satisfied) without making another person worse off.¹²⁷

Pareto optimality is not actually attainable because society is dynamic and not static, but it is the role of antitrust law and the consumer welfare model to help bring society as close as possible to this optimality.¹²⁸

Simply because the achievement of Pareto optimality is the ultimate goal, that does not mean that every single transaction must be a "Parteto superior

¹²¹ BORK, *supra* note 3, at 81.

¹²² Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 9 (1983) [hereinafter Grauer, *Recognition*].

¹²³ BORK, *supra* note 3, at 88 (citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)); see also Clifford Mendelsohn, Note, *Fraser v. Major League Soccer: A New Window of Opportunity for the Single-Entity Defense in Professional Sports*, 10 SPORTS LAW. J. 69, 91 (2003).

¹²⁴ BORK, *supra* note 3, at 88 (citing *Apex Hosiery Co. v. Leader*, 310 U.S.469, 493 (1940)). The consumer welfare doctrine is also embodied in the holding of two paradigm antitrust cases, *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) and *NCAA v. Board of Regents*, 468 U.S. 85 (1984). In *Broadcast Music*, the Court used rule of reason analysis rather than per se reasoning to get at the real economic purpose behind the restriction to determine if there was actually any restriction in output. In *NCAA*, the Court held that a business practice is only unlawful if it goes against the consumer preference, which is a goal of antitrust law. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 52 (1991).

¹²⁵ BORK, *supra* note 3, at 89. Judge Bork outlines five benefits of strict adherence to consumer welfare theory: (1) it gives fair warning; (2) it places the political decisions in Congress rather than the courts; (3) it maintains the integrity of the legislative process; (4) it requires real rather than unreal economic distinctions; and (5) it avoids arbitrary or anti-consumer rules. *Id.* at 81.

¹²⁶ Myron C. Grauer, *The Use and Misuse of the Term "Consumer Welfare:" Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act*, 64 TUL. L. REV. 71, 75-76 (1990) [hereinafter Grauer, *Use and Misuse*].

¹²⁷ Grauer, *Recognition*, *supra* note 122, at 7-8.

¹²⁸ Grauer, *Use and Misuse*, *supra* note 126, at 76.

move.”¹²⁹ Grauer points out that to have a Pareto optimal transaction, the two parties involved in the transaction must compensate any third parties affected for any potential damage that might occur.¹³⁰ This is a trial-and-error approach that requires a “long-run” view of consumer welfare rather than a transactional analysis.¹³¹ We should be concerned with the combination of multiple transactions approaching Pareto optimality. Implying that the courts should not be involved in “the actual efficiencies of *particular* practices in general,” nor should they consider the “intent behind the internally determined practices of a single firm, unless it is clear that firm has significant market power.”¹³² Where there is not significant market power, thus not implicating section 2 monopoly restrictions, the courts should let the market punish the single firms who are not acting overall in the interest of consumer welfare.¹³³

This view of using consumer welfare maximization to approach Pareto optimality is employed in this Article’s analysis from here forward.

C. Joint Venture Analysis

A joint venture “refers to a research, production, or marketing enterprise created by several persons other than ordinary investors.”¹³⁴ The overall question in joint venture analysis stems from the fact that “[a] joint venture is both an economic actor in its own right and a collaboration of its participants.”¹³⁵ For the purposes of this Article, I am concerned with whether to treat the NFL as a joint venture of many owners of multiple businesses or as a single entity under antitrust law.¹³⁶ Treating a league as a single entity removes it from the joint venture discussion of section 1 liability.¹³⁷ For general purposes, the single entity is appropriate for venture activities that do not govern members’ conduct, while a continuing conspiracy designation seems wise for rulemaking activities.¹³⁸

When a joint venture is operating in the marketplace as an economic participant, that joint venture is a single entity for antitrust purposes.¹³⁹ Joint

¹²⁹ *Id.* at 76 n.22.

¹³⁰ *Id.* (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 12–13 (3d ed. 1986)).

¹³¹ *Id.* at 78.

¹³² *Id.* (citing Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 CAL. L. REV. 983, 985 (1987) (emphasis added)).

¹³³ *Id.* (citing Easterbrook, *supra* note 132, at 985).

¹³⁴ PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1478a (2d ed. 2003).

¹³⁵ Werden, *supra* note 97, at 701.

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ AREEDA & HOVENKAMP, *supra* note 134, ¶ 1478a.

¹³⁹ *See* Werden, *supra* note 97, at 705 (citing *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 356 (1982) (“In . . . joint ventures, the partnership is regarded as a single firm competing with the other sellers in the market.”)); *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting) (“[T]he league competes as a unit against other forms of entertainment.”); *Bulls II*, 95 F.3d 593, 600 (7th Cir. 1996) (“[T]he NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities.”).

ventures have the unique ability to combine their assets in a way that permits them to act more efficiently, reduce costs, and, in some cases, generate and market a product that, alone, none of the participants could have conceived of. In the same way that joint ventures bring new opportunities, they are also very helpful in pooling and, therefore, reducing risk to any single participant.¹⁴⁰

When a joint venture is not treated as a single entity, it is then nothing more than a conspiracy between competitors to restrain the market, opening them up to section 1 liability.¹⁴¹ Courts should not analyze each individual joint venture restraint of trade in isolation, but rather the courts should look to the relationship between restraints.¹⁴² It may be that one restraint, which on its face might seem unlawful, is actually necessary to facilitate another restraint.¹⁴³

This is the concept of “ancillarity,” which dates back to 1898 when Judge Taft, sitting on the Sixth Circuit Court of Appeals, noted that:

[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.¹⁴⁴

An ancillary restraint is only legal if it is necessary to accomplish the efficiency-enhancing goals of the joint venture. Thus, it is important to analyze the agreement forming the joint venture, as well as all ancillary restraints, before passing judgment on a single restraint.¹⁴⁵

An ancillary restraint can have many benefits that might help the joint venture operate more efficiently.¹⁴⁶ It may prevent a single member from gaining an unfair advantage over the others, it might prevent non-participants from “appropriating joint venture benefits for which they have not shared costs,” or it might prevent “unintended competitive consequences.”¹⁴⁷ Ultimately, restraints within a joint venture cannot be judged in a vacuum, and courts should analyze a restraint in light of “the factual context of each joint venture.”¹⁴⁸ This joint venture analysis is exactly what the courts subject the NFL to each time they determine that the league is not a single entity.

¹⁴⁰ See Werden, *supra* note 97, at 702–03.

¹⁴¹ *Id.* at 705–06.

¹⁴² *Id.* at 706–07.

¹⁴³ *Id.* at 705–06.

¹⁴⁴ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898).

¹⁴⁵ Werden, *supra* note 97, at 706.

¹⁴⁶ *Id.* at 707.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 707–08.

III. JURISPRUDENTIAL TREATMENT OF SPORTS LEAGUES

A. *Early Sports Antitrust Decisions*

The question of whether and how antitrust law should apply to sports leagues has never been answered in any clear and meaningful way. In *Radovich v. National Football League*, the Supreme Court first openly stated that antitrust laws do apply to the NFL and that the NFL does not enjoy the same exemption as MLB.¹⁴⁹ *Radovich* was a conspiracy case in which the plaintiff alleged that the NFL “entered into a conspiracy to monopolize and control organized professional football in the United States, in violation of [sections] 1 and 2 of the Sherman Act.”¹⁵⁰ The Court held that the NFL conducted a requisite volume of interstate business to make it subject to the Sherman Act.¹⁵¹ While *Radovich* did not consider single entity status, it is important because the plaintiff in *American Needle* places great emphasis on the *Radovich* holding.¹⁵²

As sports leagues began to assert a single entity defense for their restrictive actions, an early case offered an indication that this defense could be successful. In *San Francisco Seals, Ltd. v. Nat'l Hockey League*, the San Francisco Seals hockey team sought to exchange its franchise with the one in Vancouver, but the NHL Board of Governors denied the request.¹⁵³ In granting the NHL’s motion for summary judgment, the court said that while the sports teams within the league compete against one another, they are “not competitors in the economic sense in this relevant market.”¹⁵⁴ They are, the court held, “all members of a single unit competing as such with other similar professional leagues.”¹⁵⁵ The court stated that this organizational scheme imposes no restraint on trade or commerce and makes possible a segment of commercial activity that could not exist without the league.¹⁵⁶ The *San Francisco Seals* court distinguished *United States v. Topco Associates, Inc.*, which found a coalition of twenty-five supermarket chains in violation of the Sherman Act because they were engaged in illegal territorial licensing activities.¹⁵⁷ The *San Francisco Seals* court noted that the NHL teams are not economic competitors and their territorial restraints have no effect on trade or commerce.¹⁵⁸ *San Francisco Seals* was short-lived a victory for sports

¹⁴⁹ 352 U.S. 445, 447–48 (1957); see also Bauer, *supra* note 5, at 267.

¹⁵⁰ *Radovich*, 352 U.S. at 447–49.

¹⁵¹ *Id.* at 452. *Radovich* involved an appeal from a dismissal at the pleading stage, which was granted on the ground that football, like baseball, is immune from the antitrust laws. Thus, the only issue before the Court in *Radovich* was whether football is subject to the antitrust laws. Grauer, *Recognition*, *supra* note 122 (citing *Radovich*, 352 U.S. at 446–47).

¹⁵² Brief of Petitioner-Appellant, *Am. Needle Inc. v. Nat'l Football League*, 2009 WL 3004479 (7th Cir. Sept. 18, 2009).

¹⁵³ 379 F. Supp. 966, 967–68 (C.D. Cal. 1974).

¹⁵⁴ *Id.* at 970.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

¹⁵⁸ *S.F. Seals, Ltd.*, 379 F. Supp. at 970.

leagues.¹⁵⁹

The single entity defense would not hold up long, and its acceptance soon became the exception to the rule¹⁶⁰—a trend beginning with *North American Soccer League v. National Football League*.¹⁶¹ The dispute in *North American Soccer League* arose because of an NFL bylaw prohibiting cross-ownership between NFL franchises and other professional sports franchises.¹⁶² The NFL did not want its owners to have an interest in any other professional sports leagues.¹⁶³ The North American Soccer League (“NASL”) sued the NFL alleging antitrust violations.¹⁶⁴ The Second Circuit engaged in a lengthy conversation about the structural nature of the NFL, concluding that NFL members participate jointly in many operations but that “each member is a separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other members.”¹⁶⁵ The court held that NFL franchises are “separate economic entities engaged in a joint venture.”¹⁶⁶

The Second Circuit in *North American Soccer League* based its findings on a line of cases that incorporate the intra-enterprise conspiracy doctrine, and it reasoned that “[t]he theory that a combination of actors can gain exemption from [section] 1 of the Sherman Act by acting as a ‘joint venture’ has repeatedly been rejected by the Supreme Court and the Sherman Act has been held applicable to professional sports teams by numerous lesser federal courts.”¹⁶⁷ After finding that the NFL is a joint venture, not a single entity, the court analyzed the NFL’s restriction on cross-sport ownership and found that the pertinent product market in the case was entertainment products. As such, the NFL was in violation of the Sherman Act for illegally “restricting the sources of capital for new sports leagues and rais[ing] artificial barriers to entry.”¹⁶⁸

Justice Rehnquist wrote an important opinion when dissenting from the Supreme Court’s denial of certiorari in *North American Soccer League*. Among other arguments, he stated that the Second Circuit did not give enough weight to the pro-competitive effects of the NFL’s cross ownership rule.¹⁶⁹ Justice Rehnquist pointed out that while teams might compete on the field, they rarely compete in the marketplace. He argued that the system of revenue sharing and the joint negotiation for television contracts were persuasive proof that the NFL is a

¹⁵⁹ Grow, *supra* note 42, at 185 (citing *S.F. Seals, Ltd.*, 379 F. Supp. at 968).

¹⁶⁰ Mendelsohn, *supra* note 123, at 74.

¹⁶¹ 670 F.2d 1249 (2d Cir. 1982).

¹⁶² *Id.* at 1250.

¹⁶³ *Id.* at 1254.

¹⁶⁴ *Id.* at 1250.

¹⁶⁵ *Id.* at 1252.

¹⁶⁶ *Id.*

¹⁶⁷ *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982) (citing *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 141–42, (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951)); *see also* Goldman, *supra* note 27, at 759.

¹⁶⁸ Flynn & Gilbert, *supra* note 94, at F35.

¹⁶⁹ *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting).

single entity.¹⁷⁰ He analogized this situation to the one in *Broadcast Music, Inc. v. CBS*, noting that the NFL is an arrangement necessary to the production of professional football.¹⁷¹ Justice Rehnquist then applied the *Broadcast Music* holding to the NFL:

The NFL, like ASCAP [The American Society of Composers, Authors and Publishers], is “not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its [product] of which the individual [teams] are raw material. [The NFL], in short, made a market in which individual [teams] are inherently unable to compete fully effectively.”¹⁷²

The next major case, continuing the trend the Second Circuit established in *North American Soccer League*, is *Los Angeles Memorial Coliseum Commission v. National Football League*.¹⁷³ The central question in this case was “whether a professional sports league is a single entity joint venture beyond the scope of the Sherman Act or merely an association of horizontal competitors.”¹⁷⁴ This case arose out of the relocation of the Los Angeles Rams NFL franchise from the Los Angeles Memorial Coliseum to another venue in Anaheim, California. The Los Angeles Memorial Coliseum sought to lure in a different NFL franchise; however, Rule 3.4 of the NFL Constitution and Bylaws required a three-quarters majority vote to move a team, and, because this was still the same territorial market as the Rams, the NFL declined a request for the Oakland Raiders to move to Los Angeles.¹⁷⁵

The Ninth Circuit ruled against the NFL when it affirmed the district court’s decision.¹⁷⁶ The district court found the NFL liable for its restrictive behavior for three reasons: (1) if the court allowed the single entity exception, it would exempt the NFL from all section 1 liability in all instances; (2) courts have found other organizations with a similarly unitary product in violation of section 1; and (3) the district court believed NFL clubs are separate business entities and any arguments to the contrary are false.¹⁷⁷

In arriving at its conclusion that teams are not separate business entities, the Ninth Circuit examined the differences in profits and on- and off-field competition. The court dismissed the NFL’s revenue sharing model as evidence of anything, choosing to focus on its profits and losses instead.¹⁷⁸ The court noted that profits and losses are not shared; rather, they vary widely between the franchises. The court also focused on the competition between the teams vying for the best

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (citing *Broad. Music, Inc. v. CBS*, 441 U.S. 1 (1979)).

¹⁷² *Id.* (quoting *Broad. Music*, 441 U.S. at 21–22).

¹⁷³ 726 F.2d 1381 (9th Cir. 1984). *L.A. Mem’l Coliseum* was the next major case; however, a year earlier the Third Circuit Court of Appeals had the opportunity to rule on the single entity status of the NFL in *Mid-South Grizzlies v. Nat’l Football League*, 720 F.2d 772, 788 (3d. Cir 1983).

¹⁷⁴ Flynn & Gilbert, *supra* note 94, at F34–35.

¹⁷⁵ *L.A. Mem’l Coliseum*, 726 F.2d at 1384.

¹⁷⁶ *Id.* at 1387–88.

¹⁷⁷ *Id.* at 1388; *see also* Goldman, *supra* note 27, at 760.

¹⁷⁸ *L.A. Mem’l Coliseum*, 726 F.2d at 1390.

coaching staff, personnel, and player talent.¹⁷⁹ *L.A. Memorial Coliseum* also mentions the off-field competition between teams in the same market. These teams, the court argued, compete for fan base, local television and radio revenues, and media space.¹⁸⁰

But the Ninth Circuit's single entity argument was flawed. As a part of its single entity analysis, the court refuted the arguments that professional football is unique to the NFL and that cooperation with the NFL is necessary to produce professional football because, at the time, there existed the ill-fated United States Football League that only lasted three seasons.¹⁸¹ Furthermore, the court did not apply *Broadcast Music* to demonstrate that sometimes collaboration is necessary to distribute a unique product into the marketplace, as Justice Rehnquist had suggested.¹⁸² Rather, the *L.A. Memorial Coliseum* court simply used *Broadcast Music* to demonstrate why it was engaging in a rule of reason analysis.¹⁸³

The Ninth Circuit ultimately found that relocating the Raiders would have created competition with the Rams and that the NFL was attempting to "enforce an agreement with one of [its] co-contractors to the detriment of that co-contractor's right to do business where he pleases."¹⁸⁴ The court recognized that the teams are not true competitors, but this finding was not sufficient to avoid section 1 liability for the NFL.¹⁸⁵

B. *Copperweld* and the Death of the Intra-Enterprise Conspiracy Doctrine

Until the Supreme Court's 1984 decision in *Copperweld Corp. v. Independence Tube Corp.*,¹⁸⁶ courts could hold a parent corporation and its subsidiaries in violation of section 1 on the "theory that incorporation created legally separate entities" that were capable of conspiring with one another in restraint of trade.¹⁸⁷ This was possible under the intra-enterprise conspiracy doctrine, which posited that a single company can conspire with itself as long as those it is conspiring with are separate incorporated entities.¹⁸⁸ This doctrine has played an important role in shaping sports antitrust law, as both *L.A. Memorial Coliseum* and *NASL* relied on it, at least in part.¹⁸⁹

Copperweld identified *United States v. Yellow Cab Co.*¹⁹⁰ as the root of the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* However, if there was not sufficient market demand for two teams, it is very unlikely that NFL owners would have permitted more than one team in a single market. This argument goes to the point of the revenue sharing model. It weakens the league when one team is financially weak. See *supra* note 42 and accompanying text.

¹⁸¹ *L.A. Mem'l Coliseum*, 726 F.2d at 1387–88.

¹⁸² See *supra* notes 169–72 and accompanying text.

¹⁸³ *L.A. Mem'l Coliseum*, 726 F.2d at 1389.

¹⁸⁴ Flynn & Gilbert, *supra* note 94, at F34–35.

¹⁸⁵ *Id.*

¹⁸⁶ 467 U.S. 752 (1984).

¹⁸⁷ *Horizontal Restraints*, in 2-11 FEDERAL ANTITRUST LAW § 11.10 (2003).

¹⁸⁸ AREEDA & HOVENKAMP, *supra* note 134, ¶ 1478.

¹⁸⁹ Goldman, *supra* note 27, at 755.

¹⁹⁰ 332 U.S. 218 (1947) (wherein the defendant was the proprietor of multiple taxicab companies

intra-enterprise conspiracy problem because *Yellow Cab* held that an unreasonable restraint “may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.”¹⁹¹ *Yellow Cab* stated that even restraints in a vertically integrated enterprise were not outside the scope of section 1.¹⁹²

Copperweld then went on to criticize claims from previous courts that the intra-enterprise conspiracy doctrine favored the substance of the agreement over the form. The case argued that the intra-enterprise conspiracy doctrine draws an artificial distinction at the expense of substance and that no other courts had engaged in an in-depth analysis of the issue.¹⁹³ *Copperweld* went beyond looking at the traditional form of the business structure, preferring to examine the substance of the relationships and actions to determine if there are any threats to competition.¹⁹⁴

Copperweld actually had a narrow holding¹⁹⁵ but an important one that abolished the intra-enterprise conspiracy doctrine. It held that “the coordinated activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of [section] 1 of the Sherman Act,” because “a parent and its wholly-owned subsidiary have a complete unity of interest.”¹⁹⁶ Some argue, however, that *Copperweld* is not so narrow and actually contains dicta indicating that “other purportedly joint activities might not involve the requisite plurality of actors needed to implicate section 1.”¹⁹⁷

The *Copperweld* court drew a perfect analogy that will prove useful—the entities share a common interest, much like a team of horses drawing a vehicle under the control of a single driver.¹⁹⁸ Furthermore, the court relied on the fact that there is not a sudden joining of economic resources that had previously served disparate interests.¹⁹⁹ Though sports leagues are not parent companies with teams as their wholly owned subsidiaries, this case is an important step toward single entity status for sports leagues.

C. Post-Copperweld Sports Decisions

It did not take long before courts were again slamming the door on sports leagues, despite the fact that *Copperweld* had invalidated the intra-enterprise

that it had acquired in four different cities and was found liable regardless of the vertical integration of his business); *Copperweld*, 467 U.S. at 760.

¹⁹¹ *Copperweld*, 467 U.S. at 760 (quoting *Yellow Cab*, 332 U.S. 218).

¹⁹² *Id.*

¹⁹³ *Id.* at 771.

¹⁹⁴ Brad McChesney, *Professional Sports Leagues and the Single Entity Defense*, 6 SPORTS LAW. J. 125, 134 (1999) (citing *Copperweld*, 467 U.S. at 767–68).

¹⁹⁵ See Jacobs, *supra* note 124, at 35 (pointing out that *Copperweld* is not transforming joint ventures into single entities, merely parent companies and their wholly-owned subsidiaries).

¹⁹⁶ *Copperweld*, 467 U.S. at 759, 771–74.

¹⁹⁷ Grauer, *Use and Misuse*, *supra* note 126, at 107.

¹⁹⁸ *Copperweld*, 467 U.S. at 771.

¹⁹⁹ *Id.*

conspiracy doctrine.²⁰⁰ Courts chose to follow *L.A. Memorial Coliseum*, distinguishing *Copperweld* because sports teams are not wholly-owned subsidiaries.²⁰¹ The next case to address the single entity issue with respect to sports leagues was *McNeil v. National Football League* (“*McNeil IP*”), wherein eight NFL players sued the NFL over a proposed wage scale that the NFL presented to the NFL Players Association.²⁰²

The NFL, in *McNeil II*, argued the single entity theory—espousing that it and its clubs are incapable of conspiring because they are a single economic entity.²⁰³ The NFL relied on the testimony of then-Commissioner Paul Tagliabue that the NFL is not a relationship among competing clubs, but rather “co-owners engaged in a common business enterprise, the production and marketing of professional football entertainment.”²⁰⁴ But the *McNeil II* court immediately deferred to the Ninth Circuit in *L.A. Memorial Coliseum* and the Second Circuit in *North American Soccer League* to argue that there was nothing in the case, or in the NFL’s argument, that distinguished it from the previous circuit court decisions.²⁰⁵ The NFL, anticipating this decision, contended that *L.A. Memorial Coliseum* and *North American Soccer League* are distinguishable because they were decided prior to *Copperweld*.²⁰⁶ However, the *McNeil II* court was quick to point out the difference between a joint venture and the wholly-owned subsidiaries to which *Copperweld* applied.²⁰⁷ Moreover, the court dismissed the NFL’s arguments regarding the uniqueness of its situation—that without collaboration, professional football would not be possible—by relying on *NCAA v. Board of Regents*, wherein the Supreme Court allowed the application of section 1 to the NCAA despite its claim that its restraints were necessary to facilitate college football as a joint venture.²⁰⁸ *NCAA* acknowledged that horizontal restraints were necessary to facilitate the game but still applied a rule of reason analysis, citing precedent stating that “joint ventures have no immunity from antitrust laws.”²⁰⁹ *McNeil II* also noted that the Ninth Circuit in *L.A. Memorial Coliseum* was not deaf to the argument that the teams must coordinate to produce professional football; *McNeil II* acknowledged this, yet held that this cooperation was not enough to find that the NFL is a single entity.²¹⁰

Two years after the District Court of Minnesota handed down its ruling in *McNeil II*, the Court of Appeals for the First Circuit affirmed the joint venture status of the NFL in *Sullivan v. National Football League*.²¹¹ Sullivan was the

²⁰⁰ Analogy borrowed from Mendelsohn, *supra* note 123.

²⁰¹ *Id.* at 80.

²⁰² 790 F. Supp. 871 (D. Minn. 1992).

²⁰³ *Id.* at 878–79.

²⁰⁴ *Id.* (citing Declaration of NFL Commissioner Paul Tagliabue (Dec. 4, 1991)).

²⁰⁵ *Id.* at 879–80.

²⁰⁶ *Id.* at 880.

²⁰⁷ *Id.* at 879.

²⁰⁸ *McNeil II*, 790 F. Supp. 871, 880 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984)).

²⁰⁹ *Id.* (citing *NCAA*, 468 U.S. at 113).

²¹⁰ *Id.*

²¹¹ 34 F.3d 1091 (1st Cir. 1994).

former owner of the New England Patriots (the “Patriots”), a team with outstanding public shares of ownership.²¹² When joining the league, the NFL owners voted to give Sullivan an exemption from the uncodified rule prohibiting public ownership of teams.²¹³ In 1976, Sullivan purchased all of the outstanding public shares, converting the Patriots into a privately held company.²¹⁴ However, when Sullivan needed to raise capital in 1987, he sought to sell forty-nine percent of the Patriots in a public offering of stock.²¹⁵ Sullivan ultimately never asked for a vote from team owners on the proposal because a headcount showed that he would not prevail.²¹⁶ When the NFL hinted that it would prevent the sale based on its public ownership rule, Sullivan sued claiming it violated sections 1 and 2.²¹⁷

In *Sullivan*, the NFL again based its defense on *Copperweld*—that it is not subject to section 1 liability because it is a single entity and *Copperweld* abolished the intra-enterprise conspiracy doctrine.²¹⁸ But the First Circuit, citing *McNeil II*, held that *Copperweld* did not apply in the instant case, nor did it apply to any other cases involving the NFL.²¹⁹ In response, the NFL relied on Judge Arnold’s comment in *City of Mount Pleasant v. Associated Electrical Cooperative, Inc.*,²²⁰ that the economic reality within a cooperative venture “will always” include “varying interests” and coalitions that “come and go according to changing conditions and the interests of the varying factions.”²²¹ The NFL argued, referencing Judge Arnold’s opinion, that “the fact there might be varying interests is immaterial if the economic success of the venture’s members ‘depends, and has always depended, on the cooperation among themselves.’”²²²

The *Sullivan* court disagreed and used the *Mount Pleasant* holding against the NFL by pointing out the court’s emphasis on needing a unity of interest and ensuring that the participants do not pursue interests that are contradictory or divergent from those of the cooperative.²²³ *Mount Pleasant* defined “diverse” as “interests which tend to show that any two of the defendants are, or have been,

²¹² *Id.* at 1095.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1095–96 (1st Cir. 1994).

²¹⁸ *Id.* at 1099.

²¹⁹ *Id.* One student made a persuasive argument that *Sullivan* incorrectly applied *Copperweld* because it overemphasized competition between teams, ignoring their common interest, and it exaggerated the degree to which NFL franchises could really be “cut throat economic competitors.” *Grow*, *supra* note 42, at 197–200.

²²⁰ Brief of Defendants-Appellants at 30–31, *Sullivan v. Nat’l Football League*, 34 F.3d 1091, No. 94-1031 (1st Cir. 1994) (quoting *City of Mount Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 277 (8th Cir. 1988)).

²²¹ *See Mount Pleasant*, 838 F.2d at 277; *see also* Brief of Defendants-Appellants, *supra* note 220 (quoting *Mount Pleasant*, 838 F.2d at 277) (*Mount Pleasant* held “that legally separate members of a rural electric cooperative did not provide the plurality of actors required for [s]ection 1, even when contracting with outside parties, because the restraint at issue—charging higher prices for wholesale electricity—did not involve the joining together of previously ‘independent sources of [economic] power.’”).

²²² Brief of Defendants-Appellants, *supra* note 220 (citing *Mount Pleasant*, 838 F.2d at 277).

²²³ *Sullivan*, 34 F.3d at 1099 (citing *Mount Pleasant*, 838 F.2d at 274–77).

actual or potential competitors.”²²⁴ The NFL maintained that none of the teams are competitors in the arena of team ownership interests,²²⁵ but *Sullivan* deferred to the jury’s finding that there was competition between the teams in this arena, citing expert testimony and the testimony of some owners that there could be competition with other teams for investment capital.²²⁶ *Sullivan* also engaged in a discussion about ancillary benefits and rejected the NFL’s contention that the public ownership rule was necessary to the operation of the joint venture.²²⁷

McNeil II and *Sullivan* seemed to foreclose any possibility that the NFL or any sports league might prevail on a single entity defense in a section 1 case; however, in 1996, the Seventh Circuit came to the rescue in *Chicago Professional Sports Ltd. v. National Basketball Association* (“*Bulls II*”).²²⁸ Amid the Chicago Bulls’ reign as one of the best teams in basketball, the Chicago Bulls ownership group went outside the National Basketball Association (“NBA”) telecasting agreement and entered into its own agreement to televise forty-one extra Bulls games nationwide via Chicago-based station WGN.²²⁹ The NBA claimed that its antitrust exception under the Sports Broadcasting Act permitted it to limit the number of games and impose a tax on the Bulls for each additional game that was nationally televised.²³⁰ The Bulls sued the NBA for sections 1 and 2 violations.²³¹

The NBA conceded it was comprised of thirty entities (twenty-nine teams and the NBA itself), each a separate corporation or partnership, but argued that it was not liable for section 1 violations.²³² The NBA submitted that “it functions as a single entity, creating a single product (“NBA Basketball”)²³³ that competes with other basketball leagues . . . other sports, and other entertainment such as plays, movies, opera, TV shows, Disneyland, and Las Vegas.”²³⁴ The NBA contended that the separate ownership increased competitiveness, which encouraged franchises to field better teams and made the contests more exciting, thereby strengthening the single product of NBA Basketball.²³⁵ The court agreed with the NBA, reasoning that the point of antitrust law is to encourage “cooperation inside a business organization . . . [to] better facilitate competition between that

²²⁴ *Id.* at 1099 (citing *Mount Pleasant*, 838 F.2d at 276).

²²⁵ Brief of Defendants-Appellants, *supra* note 220 (citing *Mount Pleasant*, 838 F.2d at 277).

²²⁶ *See Sullivan*, 34 F.3d at 1100.

²²⁷ *See id.* at 1102–03. This analysis, while necessary, is not pertinent to this discussion because it would only arise after a court has determined that the NFL is not a single entity. An analysis of ancillary benefits is a component of a rule of reason investigation. *See Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).

²²⁸ 95 F.3d 593 (7th Cir. 1996).

²²⁹ *Id.* at 595.

²³⁰ *Id.*

²³¹ *Id.* at 595–96.

²³² *Id.* at 597.

²³³ *See id.* at 601–03. Judge Cudahy, in his concurring opinion, said that this joint product was the most convincing evidence in favor of finding a single entity because, with a joint product, there could not be significant economic competition between the franchises. *See id.* at 603 (Cudahy, J., concurring).

²³⁴ *Bulls II*, 95 F.3d 593, 597–98 (7th Cir. 1996).

²³⁵ *Id.*

organization and other producers.”²³⁶

Bulls II took a broader approach to *Copperweld*, not seeing a narrow holding that only applies to parent corporations and their wholly-owned subsidiaries. The court found fault with the requirement for a “complete unity of interest” as stated in *Copperweld*, calling it “silly” because “even . . . single firm[s] contain many competing interests.”²³⁷ The Seventh Circuit instead interpreted *Copperweld* as distinguishing between unilateral and concerted action and then “assign[ed] a parent-subsidiary group to the ‘unilateral’ side in light of those functions.”²³⁸ The court continued that actions that “deprive[] the marketplace of the independent centers of decision-making that competition assumes[,]” without the efficiencies, accompany integration inside a firm, are considered concerted rather than unilateral actions.²³⁹ The court held that under this reasoning, courts can determine that sports leagues are a single entity, noting that without the necessary cooperation, “a league with one team would be like one hand clapping.”²⁴⁰

Bulls II notes the difficulty of trying to categorize sports leagues as a single firm or a joint venture under *Copperweld* because they have characteristics of both. The court distinguished *NCAA* by noting that the professional leagues have no purpose other than to produce a professional sport while colleges and universities plainly have an alternate purpose of education.²⁴¹ The decision is also problematic because perspective can lead to a very different opinion about the single entity status of a league. For example, to Pepsi Co., the NBA likely looks like a single entity marketing its professional basketball games, but to the starting point guard playing for a Division I school looking to sell his skills, there is a competition for human capital that makes the NBA look like a joint venture rather than a single entity.²⁴² In exploring this conundrum, the *Bulls II* court noted the difficulty that the Supreme Court had in categorizing the NFL in *Brown v. Pro Football, Inc.*²⁴³ Although the Supreme Court in *Brown* hinted that the NFL could be a single entity,²⁴⁴ it did not need to decide status to arrive at its holding in the case—merely finding the NFL was more like a single bargaining employer rather than a multi-employer.²⁴⁵

Bulls II is a good reference source because it points to all of the recent jurisprudence on the single entity status of sports, noting that “most courts that have asked [the question] . . . have preferred the joint venture characterization.”²⁴⁶

²³⁶ *Id.* at 598.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984)) (internal quotations omitted).

²⁴⁰ *Bulls II*, 95 F.3d 593, 598–99 (7th Cir. 1996).

²⁴¹ *Id.* at 599.

²⁴² *Id.* at 599 (citing AREEDA & HOVENKAMP, 7 ANTITRUST LAW ¶ 1478d (1986)).

²⁴³ 518 U.S. 231 (1996).

²⁴⁴ Grow, *supra* note 42, at 189.

²⁴⁵ *Bulls II*, 95 F.3d at 599 (citing *Brown*, 518 U.S. 231).

²⁴⁶ *Id.* (citing *Sullivan v. Nat’l Football League*, 34 F.3d 1091 (1st Cir. 1994); *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978)).

The court considered Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League*²⁴⁷ and also noted that the Fourth Circuit determined that the Professional Golfers Association, a group similar to the NFL, is a single firm for antitrust purposes, even though that firm is less economically integrated than the NBA, therefore exhibiting fewer characteristics of a single firm.²⁴⁸ In the end, *Bulls II* determined that each sport is diverse in its own right and should have its own single entity analysis.²⁴⁹ Stopping there might make sense; however, the court further stated that maybe the analysis should occur one facet of one league at a time, either granting or denying a single entity designation for each facet.²⁵⁰ Yet the court ultimately remanded the case, not even applying its own analysis to the NBA's broadcasting rules.²⁵¹ Some have criticized the *Bulls II* decision as adding nothing constructive to the national debate but rather further muddying the water through its unnecessary dicta.²⁵²

IV. *AMERICAN NEEDLE V. NFL* AND THE CURRENT DEBATE

Up until 2000, NFLP granted apparel licenses to many different companies, including "American Needle, which held a license to make NFL headwear for twenty years."²⁵³ "[I]n 2000, the NFL teams . . . [gave] NFLP the right to solicit bids for exclusive licensing" and in 2001 Reebok's winning bid was accepted, and NFLP granted Reebok a ten year exclusive license.²⁵⁴ Thereafter, NFLP did not renew the licenses of other apparel manufacturers, including American Needle's headwear license.²⁵⁵

"American Needle responded to the loss of its license by filing an antitrust action against the NFL, NFLP, each NFL team, and Reebok" (collectively "Defendants").²⁵⁶ American Needle claimed that the Defendants were in violation of section 1 on the theory that "each of the individual teams separately owned their team logos and trademarks, [and] their collective agreement to authorize NFL Properties to award the exclusive headwear license to Reebok was, in fact, a conspiracy to restrict other vendors' ability to obtain licenses for the teams' intellectual property."²⁵⁷ They also claimed a section 2 violation, reasoning that the grant of an exclusive license to Reebok was in fact the NFL teams monopolizing the NFL team licensing and product wholesale markets.²⁵⁸

One year into the case, the NFL filed a motion for summary judgment on the

²⁴⁷ See *supra* notes 169–72.

²⁴⁸ *Bulls II*, 95 F.3d at 599 (citing *Seabury Mgmt., Inc. v. Prof'l Golfers Ass'n*, 878 F. Supp. 771 (D. Md. 1994), *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995)).

²⁴⁹ *Id.* at 600.

²⁵⁰ *Id.*; see also Deckert, *supra* note 111, at 99–100.

²⁵¹ Flynn & Gilbert, *supra* note 94, at F36.

²⁵² Deckert, *supra* note 111, at 101.

²⁵³ *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 738 (7th Cir. 2008).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 738.

section 1 claim, arguing that under *Copperweld* and subsequent cases, “they were immune from liability under [section] 1.”²⁵⁹ In affirming the district court’s decision granting the motion, the Seventh Circuit explained that the Supreme Court based its decision in *Copperweld* not on whether there was a problem with the form of the relationship, but rather on whether the substance of the relationship carried any anticompetitive²⁶⁰ risks and also on whether there was a unity of interest in the form of a single corporate conscience.²⁶¹ The NFL relied on post-*Copperweld* cases that have gradually extended *Copperweld*’s single entity concept beyond the parent-subsidiary relationship to affiliated companies or individuals.²⁶² The district court’s grant of summary judgment was based on the NFL’s single-entity argument, relying primarily on *Copperweld* and *Bulls II* to hold that “in answering *Copperweld*’s functional question, we believe cooperative marketing does serve to promote NFL football and falls on the ‘unilateral’ action side of the line.”²⁶³

The Seventh Circuit began its reconsideration of the district court’s decision by pointing out the fact that it has never rendered a “definitive opinion as to whether the teams of professional sports leagues can be considered a single entity in light of *Copperweld*.”²⁶⁴ The court then reiterated its conversation from *Bulls II* about how difficult a decision this is and how it can really just depend on perspective,²⁶⁵ citing *Bulls II* for the proposition that a sports league *could* be considered a single entity under *Copperweld*. In keeping with its “one facet of one league at a time” analysis, the court limited its analysis to (1) the actions of the NFL, NFLP, and the teams; and (2) “the actions of the NFL and its member teams as they pertain to the teams’ agreement to license their intellectual property collectively via [NFLP].”²⁶⁶

In opposition, American Needle argued that the district court concluded the NFL is a single entity because it acts as a single entity in licensing its products. American Needle maintained that the district court, rather than inquire as to whether the NFL was acting as a single entity, “should have inquired into whether

²⁵⁹ *Am. Needle Inc. v. Nat’l Football League*, 538 F.3d 736, 738 (7th Cir. 2008).

²⁶⁰ “Anticompetitive effects, more commonly referred to as ‘injury to competition’ or ‘harm to the competitive process,’ are usually measured by a reduction in output and an increase in prices in the relevant market.” *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1096–97 (1st Cir. 1994) (citing *NCAA v. B. of Regents*, 468 U.S. 85, 104–07 (1984) (“Restrictions on price and output are the paradigmatic examples of restraints of trade.”); *Chi. Prof’l Sports Ltd. v. Nat’l Basketball Ass’n*, 961 F.2d 667, 670 (7th Cir. 1992)).

²⁶¹ *Am. Needle*, 538 F.3d at 738.

²⁶² *Id.* (citing *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005); *Eleven Line, Inc. v. N. Tex. State Soccer Ass’n*, 213 F.3d 198, 205 (5th Cir. 2000); *Bulls II*, 95 F.3d 593, 597 (7th Cir. 1996); *City of Mount Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271, 276–77 (8th Cir. 1988)); *see also* Brief of Respondents, *supra* note 9, at 6; Marc Edelman, *Single-Entity Sports Ruling: “Needle” in a Haystack*, N.Y.L.J., Jan. 2, 2008, at 4 (citing *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987) (“[O]ther courts have found that economic realities, rather than any particular ownership percentage, determine the scope of the single entity.”)).

²⁶³ *Am. Needle Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007).

²⁶⁴ *Am. Needle*, 538 F.3d at 741.

²⁶⁵ *See supra* note 243.

²⁶⁶ *Bulls II*, 95 F.3d at 600; *Am. Needle*, 538 F.3d at 742.

the NFL teams' agreement to license their intellectual property collectively deprived the market of sources of economic power that control the intellectual property."²⁶⁷ American Needle maintained that the court can answer this question by looking to whether the teams compete with one another in the intellectual property market.²⁶⁸

The Seventh Circuit agreed with American Needle's analysis of the proper single-entity test, but it did not agree with how American Needle applied that test. The court pointed out that *Copperweld* does not hold that only "conflict-free enterprises may be single entities."²⁶⁹ The court concluded that even though some teams may, at times, have competing interests in the intellectual property market, "those [divergent] interests do not necessarily keep the teams from functioning as a single entity."²⁷⁰ Based on this decision, the court disassembled American Needle's claim that the NFL teams have deprived the market of independent sources of economic power. The Seventh Circuit in *American Needle* pointed out that NFL teams can "function only as one source of economic power when collectively producing NFL football."²⁷¹ It naturally follows that only one source of economic power controls the promotion of NFL football. The court stated that it does not make sense to claim that each individual team is responsible for the promotion of NFL football when they collectively produce it.²⁷² The court cited the uncontradicted evidence in the record that NFL teams share a vital economic interest in the promotion of NFL football and adopted the NFL's argument that it must compete with other forms of entertainment.²⁷³ The Seventh Circuit found it most compelling that since 1963 the teams have acted as one economic entity for the purposes of licensing their intellectual property, and there has been no sudden joining of economic power, as pointed out in *Copperweld*. In addition, American Needle did not dispute the NFLP's articles of incorporation, which state that the teams formed the NFLP to "conduct and engage in advertising campaigns and promotional ventures on behalf of the [NFL] and its member [teams]."²⁷⁴ "Simply put," the court concluded, "nothing in [section] 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers."²⁷⁵

²⁶⁷ *Am. Needle*, 538 F.3d at 742.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 743.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 743 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984) ("[Some] activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams."); *Bulls II*, 95 F.3d 593, 599 (7th Cir. 1996) ("[T]he NBA has no existence independent of sports. It makes professional basketball; only it can make 'NBA Basketball' games. . . .").

²⁷³ *Bulls II*, 95 F.3d at 599.

²⁷⁴ *American Needle*, 538 F.3d at 744.

²⁷⁵ *Id.*

V. ANALYSIS OF THE SINGLE ENTITY ISSUE AND ITS APPLICATION TO *AMERICAN NEEDLE*

The question of whether coordination of professional sports teams harms competition is the central economic issue in antitrust analysis. Thus, courts must decide if coordination's lessening of competition is offset by the benefits to consumers from that coordination.²⁷⁶ As previously discussed, sports teams demonstrate characteristics of both joint ventures and single entities; they are also in the unique position of competing on the field to produce a product that would not be possible without one another. This distinguishes sports leagues from other joint ventures and has resulted in a different sort of treatment.²⁷⁷

Initially, courts did not apply antitrust laws to sports leagues because it was thought that such leagues were not engaged in interstate commerce—the basis for the MLB exemption.²⁷⁸ Although all other leagues remain subject to antitrust laws, their conduct is often held to a lower standard.²⁷⁹ One way in which the courts treat sports leagues differently is that they typically assume that the leagues are comprised of actual or potential competitors and then engage in a rule of reason analysis. In fact, there are reasonable arguments to be made that the leagues are enterprises that are not comprised of competitors and that their venture enables the production of a product that would not otherwise exist. If the courts took this perspective, then they would find that the leagues' actions are presumptively pro-competitive.²⁸⁰ This is the foundation for the single entity argument.

Single entity status for sports leagues is an important issue for the leagues, those with which they conduct business, and end-consumers of their products. The true point is that section 1 does not prohibit anti-competitive actions by a single entity; therefore, a single league, not conspiring with other leagues, can openly act in a manner that unreasonably restrains trade and only section 2 might apply.²⁸¹ “By prohibiting only those restraints of trade imposed by ‘combination, contract, or conspiracy,’ section 1 sets its focus clearly and exclusively on joint activity.”²⁸² This single entity question acts as a threshold issue that courts must address before moving on to a traditional per se, rule of reason, or quick look analysis in a section 1 case.²⁸³

Many contend that the unique nature of sports leagues leads to only one

²⁷⁶ Flynn & Gilbert, *supra* note 94, at F27–28.

²⁷⁷ Jacobs, *supra* note 124, at 32–33.

²⁷⁸ Deckert, *supra* note 111, at 79 (citing Michael Jay Kaplan, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. Fed. 489, 495 (1974)).

²⁷⁹ Bauer, *supra* note 5, at 264.

²⁸⁰ Flynn & Gilbert, *supra* note 94, at F39–40.

²⁸¹ Deckert, *supra* note 111, at 85 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 762 (1984)).

²⁸² Jacobs, *supra* note 124, at 27 (citing *Copperweld Corp.*, 467 U.S. at 767).

²⁸³ See Goldman, *supra* note 27, at 754; see also Flynn & Gilbert, *supra* note 94, at F32 (outlining the two ultimate questions a court must ask in a sports antitrust case: (1) is the league a single entity for antitrust purposes, or are the franchises independent horizontal competitors in the same relevant market; and (2) is the challenged restraint reasonable or unreasonable as determined by whether or not its pro-competitive benefits outweigh any anticompetitive harms).

conclusion on single entity designation: it depends. Advocates and opponents of the single entity designation for sports leagues almost all agree that, no matter the conclusion, sometimes the leagues act as single entities and sometimes they act as joint ventures.²⁸⁴ Most courts, when asked the question of single entity designations, choose joint venture; however, there are exceptions, and the total field of jurisprudence on the matter is unclear—another indication that the mixed approach might be appropriate for sports leagues.²⁸⁵

The general question before us is whether or not courts should consider the NFL a single entity in light of the fact that the teams are separate legal enterprises, all part of a greater entity, co-producing subunits of a league, none capable of generating any revenue on its own and each required to cooperate on many issues in order to produce the league product.²⁸⁶ This section will discuss and apply public policy, the consumer welfare model, and the current case law to arrive at the conclusion that the Supreme Court should uphold the Seventh Circuit's decision in *American Needle*. Furthermore, I predict that the Supreme Court will likely do so in a narrow manner that will leave little resolution, thereby leaving Congress as the only venue able to address this issue with the requisite finality to settle the current inconsistencies among the circuits.

A. Social Policy Against Single Entity Status for the NFL

Of the scholarly work that addresses the single entity issue for sports leagues, very little focuses on a public policy argument, apart from consumer welfare. Some contend that allowing leagues, such as the NFL, to avoid section 1 liability would essentially be a slap in the face to the consumer, thereby violating public policy. Marc Edelman, a professor of sports law and economics, argues that, in light of the massive profits that sports leagues generate, it would be a “twisted sense of irony if the unique property-rights system that has made professional sports so profitable also were to provide them with a loophole to avoid complying with antitrust principles.”²⁸⁷ The *North American Soccer League* court also commented on this would-be “loophole,” arguing that any possible restraint that the NFL members enter into that might benefit the league or enhance its efficiency will be outweighed by the anticompetitive effects.²⁸⁸ The *L.A. Memorial Coliseum* court mimics this sentiment, adding that this loophole would immunize the NFL from any further scrutiny.²⁸⁹

The notion that courts should not apply a law to a certain venture because of seemingly absurd irony or an undesired loophole is not a persuasive argument. Under a single entity designation, the NFL would simply be held to a different

²⁸⁴ Jacobs, *supra* note 124, at 30 (citing Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117, 120 (1989)).

²⁸⁵ For a discussion on how inconsistently courts have treated the single entity issue, see *Bulls II*, 95 F.3d 593, 599–600 (7th Cir. 1996).

²⁸⁶ Goldman, *supra* note 27, at 754; Roberts, *supra* note 49, at 578–79.

²⁸⁷ Edelman, *supra* note 48, at 926.

²⁸⁸ *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982).

²⁸⁹ *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1388 (9th Cir. 1984).

standard, as outlined in section 2 of the Sherman Act, and this standard would remain applicable to all intra-league activities.²⁹⁰ Furthermore, the league would still not be insulated from section 1 if it conspired with other firms.²⁹¹ Preferring not to label the NFL as a single entity because it seems unfair to hold such a profitable enterprise to only section 2 liability is unpersuasive. Courts need to apply the law consistently.. Courts are better off considering and weighing more traditional factors like the purpose of antitrust legislation and the following precedents.

B. The Consumer Welfare Argument in Favor of Single Entity

If the maximization of consumer wealth is the goal, then determining whether a sports league is a single entity “turns on whether the actions of the league have any potential to lessen *economic* competition” among each individually-owned team.²⁹² Any examination of the propriety of a single entity status for sports leagues is going to require knowledge of when “the joint activity in question is efficient without being anticompetitive in the consumer welfare sense.”²⁹³

As previously discussed, the purpose of antitrust law is to protect consumer welfare in an effort to strive toward Pareto optimality.²⁹⁴ The question then becomes: “[g]iven society’s limited resources, how can we simultaneously try to satisfy the seemingly contradictory goals of consumers (the receipt of maximum goods and services at the lowest possible price) and producers (the receipt of maximum profits)?”²⁹⁵ The debate over this question and the impact of a single entity designation for sports leagues has been going on in academic circles for more than thirty years. Three leading scholars on the subject have come to split decisions. Both Myron Grauer and Gary Roberts believe that designating professional sports leagues as single entities actually preserves consumer welfare,²⁹⁶ while Lee Goldman maintains that designating the leagues as joint ventures does not compromise consumer welfare.²⁹⁷ The following discussion will briefly conclude the arguments of these three scholars, however, an in-depth analysis of the consumer welfare doctrine and the surrounding economics are beyond the scope of this Article.

According to Grauer, the consumer welfare analytical model posits that courts should not interfere with the decisions or actions of a single entity that are intended to make it operate more efficiently.²⁹⁸ If an organization exists with the

²⁹⁰ *Id.* at 1409 (Williams, J., dissenting); *see also* Grauer, *Recognition*, *supra* note 122, at 6.

²⁹¹ Roberts, *supra* note 49, at 577–78 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 776–77 (1984) (stating that single enterprises are subject to section 1 and section 2 scrutiny even though incapable of internal section 1 conspiracy)).

²⁹² *Bulls II*, 95 F.3d 593, 602–03 (7th Cir. 1996) (Cudahy, J., concurring).

²⁹³ Grauer, *Use and Misuse*, *supra* note 126, at 90.

²⁹⁴ *See supra* Part II.B.

²⁹⁵ Grauer, *Use and Misuse*, *supra* note 126, at 76.

²⁹⁶ *Id.*; Grauer, *Recognition*, *supra* note 122; Roberts, *supra* note 49.

²⁹⁷ Goldman, *supra* note 27, at 791–92.

²⁹⁸ Grauer, *Use and Misuse*, *supra* note 126, at 114.

primary purpose of increasing its own efficiency, such as the NFL, the single entity status is appropriate, and courts should not engage in a full inquiry into whether any particular practice is designed to promote efficiency.²⁹⁹ As previously mentioned, not every action must be Pareto superior, and, based on Grauer's argument, the Supreme Court should designate the NFL a single entity and preclude courts from dissecting every single transaction to locate a supposed consumer welfare benefit.³⁰⁰ Grauer continues to put faith in the free market to rectify an inefficient action that the single entity takes.³⁰¹ He further argues that any attempts at shoehorning the NFL into a joint venture designation, when it does not satisfy the requirements, simply to find the requisite multiplicity of actors for a section 1 action is nothing more than a misuse of the law in an effort to obtain treble damages.³⁰²

Roberts generally agrees with Grauer in that the question of whether to designate the NFL as a single entity should not focus on a separate rule of reason analysis for a particular practice. Rather, "it should rest on whether consumer welfare is generally enhanced over the long run . . . by assuming that the organization's internal management decisions are adopted in furtherance of organizational efficiency (which in turn maximizes profits)."³⁰³ Roberts and Grauer both believe that the single entity theory preserves consumer welfare over the long run because, among other reasons, the member clubs are not and can never be considered "natural competitors" and could not exist but for the cooperation of the others. Because of this, "there is no consumer-welfare-enhancing intraorganizational competition for the league to diminish."³⁰⁴

Lee Goldman does not agree with Grauer and Roberts; instead, he believes that consumer welfare "is not sacrificed by recognizing teams' independent interests and rejecting a complete single entity defense."³⁰⁵ Goldman believes that the teams are independent decision makers and that courts should engage in a rule of reason review to determine if an action is an unreasonable restraint of trade in violation of section 1.³⁰⁶ He notes that the cooperative and interdependent aspects of the league will entitle it to rule of reason analysis, and, under this standard, truly

²⁹⁹ *Id.* at 86.

³⁰⁰ *See supra* Part II.B.

³⁰¹ Grauer, *Use and Misuse*, *supra* note 126, at 86. Grauer posits that:

[C]onsumers tend to act rationally based upon what is best for them, and, as a result, producers will be forced to operate efficiently to satisfy consumers' demands for as many goods and services as possible at the lowest possible price. If we succeed in satisfying consumers' demands for the most goods and services at the lowest possible prices, we will, of necessity, have allocated society's limited resources in such a way that no one person can be made better off (or more satisfied) without making another person worse off (or less satisfied). If such an allocation occurs, a state of Pareto optimality will have been reached and the economy will be in a state of equilibrium.

Id. at 76.

³⁰² *Id.* at 88.

³⁰³ Roberts, *supra* note 49, at 582.

³⁰⁴ *Id.* at 590–91.

³⁰⁵ Goldman, *supra* note 27, at 791.

³⁰⁶ *Id.*

efficient action will not be sacrificed.³⁰⁷ Goldman believes that a complete grant of single entity paints with too wide a brush and would permit certain actions that would not have withstood rule of reason analysis.³⁰⁸

Goldman is obviously not in favor of complete single entity status as Grauer and Roberts are, but he does acknowledge that the whole of the NFL is greater than the sum of its parts and that the league members must make some decisions jointly for the product of NFL football to exist. Goldman chooses to focus his analysis on *Copperweld's* great emphasis on legal control and “recognizes that an entity must act through its agents, but [he] adheres to the well-established rule that conspiracy is possible where the agent has an independent personal stake.”³⁰⁹ Therefore, he continues, courts should treat “some, but not many, league decisions as those of a single entity.”³¹⁰

Goldman’s theory relies on a short-term perspective of consumer welfare, while Grauer and Roberts posit that only a long-run view of consumer welfare would tolerate the time required for a trial and error approach to lead society toward Pareto optimality.³¹¹ In fact, Grauer accuses Goldman of never actually defining what he believes consumer welfare is, arguing that this lack of definition makes it impossible to analyze the consumer welfare implications of the single entity doctrine.³¹²

A complete analysis of the disagreements between these scholars and the details of their arguments is ripe for its own article.. With this overview, I have laid out merely a few particulars of their views toward consumer welfare in an effort to shed some light on the current environment of the academic debate on this issue.

C. Bringing It All Together

Determining whether to designate the NFL as a single entity in the *American Needle* case requires reexamining NFL product licensing and its relevant product market, determining whose theory of consumer welfare to accept, considering whether to read *Copperweld* expansively or not, and analyzing previous Supreme Court and lower court rulings on the matter.³¹³

1. The Supreme Court Should Consider Professional Football the NFL's Product Within the Entertainment Marketplace

Before being able to argue that the Supreme Court should affirm the Seventh Circuit in *American Needle*, it is first necessary to determine the NFL’s relevant

³⁰⁷ *Id.* at 792.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 795–96.

³¹⁰ *Id.* at 796.

³¹¹ Grauer, *Use and Misuse*, *supra* note 126, at 78.

³¹² *Id.* at 75.

³¹³ See *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008); see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

product and to determine if any of the teams that comprise the NFL are in competition over the sale of this product. *L.A. Memorial Coliseum* states that the definition of the entity impacts the nature of the product and the market;³¹⁴ however, here it is necessary to find a single product before it is possible to find a single entity.

NFL member teams are “inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole’s ‘downstream output.’ In the case of the member clubs, this ‘downstream output’ is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the [NFL].”³¹⁵ There is virtually no practical distinction between the league and the member clubs, except for independent form.³¹⁶

Most scholars agree³¹⁷ that the “product of a professional sports league is season-long competition involving hundreds of individual games among all of the member clubs, leading to divisional or conference titles and, ultimately, to an overall league championship.”³¹⁸ Moreover, though they are at odds on the field, these teams are not natural competitors, but rather partners “which could not exist but for the complete cooperation of others.”³¹⁹ Finally, the teams are not competing in a marketplace for football; rather, the NFL is competing with its product of professional football in the entertainment marketplace.³²⁰ This common purpose among the NFL member teams, to create and promote professional football through the NFL, leads to another common purpose: “the maximization of total league activity.”³²¹ This notion of maximization of league activity (profits) carries through to its licensing activities. Though it is not a major percentage of each team’s revenue, the teams do use this money to become stronger individual enterprises, which allows them to field more talented teams—ultimately increasing the quality of their end product, professional football.

³¹⁴ *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1394 (9th Cir. 1984).

³¹⁵ *Id.* at 1406 (Williams, J., dissenting).

³¹⁶ *Id.*

³¹⁷ Some scholars, however, do not. But such individuals, such as Lee Goldman, who maintain that the NFL teams can operate in a different market apart from the NFL and still produce football are simply not considering the realities of modern professional sport. See Goldman, *supra* note 27, at 771.

³¹⁸ Flynn & Gilbert, *supra* note 94, at F43; see also *American Needle*, 538 F.3d at 737 (stating that the product that teams produce jointly is NFL football); *Smith v. Pro Football*, 593 F.2d 1173, 1195 (D.C. Cir. 1978) (MacKinnon, J., dissenting) (stating that the product being offered to the public is the “league sport,” and the value of this product at the stadium gate and to the television networks depends on the competitive balance of the teams in the league; spectators and television viewers are not interested in lopsided games or contests between weak teams).

³¹⁹ Roberts, *supra* note 49, at 592; Flynn & Gilbert, *supra* note 94, at F43 (“[M]embers of a professional sport do not compete with each other or with the league . . .”).

³²⁰ *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting); Grauer, *Use and Misuse*, *supra* note 126, at 94 (quoting and citing Thane Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729 (1987)).

³²¹ Roberts, *supra* note 49, at 575, 593.

2. *The Supreme Court Should Adopt Grauer and Roberts' Consumer Welfare Theory*

I am most persuaded by Grauer and Roberts and their contention that an organization exists with the primary purpose of increasing its own efficiency, such as the NFL. The overall single entity status is appropriate, and courts should not engage in a full inquiry into whether any particular practice is designed to promote efficiency. Though Goldman makes a good point that some actions that would otherwise be illegal under a rule of reason analysis would go unpunished, I take comfort in the theory that not every single transaction must be a "Pareto superior move."³²²

Surely, there will be some transactions that are more favorable than others, and that is why a long-term approach will best suit consumer welfare rather than the alternative, which is the unending costs and uncertainties that are inherent in seeking a resolution over every transaction within the court system.³²³ These costs and uncertainties would inflict a far greater injury to the efficiency of the NFL and consumer welfare than "any slight benefit it might produce by correcting an occasional management mistake."³²⁴

I am not advocating for a complete Chicago School approach where the sole consideration of the court would be the maximization of consumer welfare.³²⁵ The Supreme Court should consider other factors, such as the nature of the final product and the marketplace. However, if the Supreme Court is going to base its decision solely on consumer welfare, it should designate the NFL as a single entity.

3. *The Supreme Court Should Apply Copperweld Expansively and Give Little Consideration to Lower Court Rulings on Single Entity.*

The fact that lower courts have expanded *Copperweld*, as the NFL in *American Needle* contends, beyond the parent-subsidary relationship to affiliated companies or individuals should serve as an indication to the Supreme Court that *Copperweld's* narrow holding, as it applies to wholly-owned subsidiaries, is capable of expansion. Grauer contends that there is dicta in *Copperweld* that indicates there are other joint activities that might not have the requisite plurality of actors necessary to sustain a section 1 claim.³²⁶ Moreover, the true reason that the Supreme Court should expand *Copperweld* is that, as previously noted, the decision is excessively narrow. It is virtually impossible to obtain a complete unity of interest, even within a single firm; as such, the Court should consider unity of interest as a factor but, as *Bulls II* did, not require it of a single entity.³²⁷

³²² Grauer, *Use and Misuse*, *supra* note 126, at 76.

³²³ Roberts, *supra* note 49, at 583.

³²⁴ *Id.*

³²⁵ See BORK, *supra* note 3, at xi.

³²⁶ See *supra* Part III.C.

³²⁷ *Bulls II*, 95 F.3d 593 (7th Cir. 1996).

The Supreme Court should ignore the progression of circuit and district court cases dealing with single entity application to sports leagues. It is time to bring some consistency to this area of law. There is simply too much uncertainty, and that uncertainty leads to costly litigation and forum shopping. The NFL in *American Needle* is actually the respondent but was in favor of the Court granting because it wants the matter put to rest.³²⁸ Though *Bulls II* issues a favorable ruling for the NFL, and the NFL cites it throughout its brief, the case still advocates individually analyzing each facet of each league. Such an analysis is costly and would not halt this endless stream of litigation.³²⁹

This “one facet of one league at a time” analysis does not distinguish *Bulls II*; rather, *Bulls II* is not different from all the courts who bemoan the complexity of the issue. *Bulls II* once again points out that the leagues exhibit characteristics of joint ventures and single entities and then essentially punts by only issuing the narrowest of holdings. These types of decisions do nothing to further the field of antitrust law and its application to major enterprises generating billions of dollars each year.

D. Final Conclusion and Suggestion

I believe that the Supreme Court should consider the factors and issues presented in this Article and issue a general holding, stating once and for all that the NFL is a single entity and not subject to section 1 liability for its internal decisions, such as the licensing of its trademarks. Though the NFL is a conglomeration of thirty-two teams, it certainly produces its own unique product that is greater than the sum of its parts. Moreover, Grauer and Roberts make persuasive arguments in favor of letting enterprises like the NFL operate on their own, employing a long-term application of the consumer welfare doctrine. Finally, there is room for an expansive reading of *Copperweld* such that the Court could expand single entity status to sports leagues, specifically the NFL.

Although this is what should happen, I do not believe it will. I believe that, based on its hint in *Brown*,³³⁰ the Court will rule in favor of the NFL.³³¹ However, I believe that the Court will likely have trouble granting a sweeping single entity designation to the NFL. Instead, I think that the Court will follow behind *Bulls II* and find that this facet of the league is operating as a single entity. Namely, the decision of the NFL to grant an exclusive merchandise license is one made by a single entity, not a joint venture.

The Court will likely encounter the same struggles that all others have: the NFL and all sports leagues exhibit signs of both joint ventures and single entities. I also think that the Court will fall victim, at least partially, to the immunity argument that any sweeping designation would ignore certain illegal activities that surely would be found as such under a rule of reason analysis. This will probably

³²⁸ Brief of Respondents, *supra* note 9, at 4.

³²⁹ See *Bulls II*, 95 F.3d 593.

³³⁰ See *supra* note 246.

³³¹ Interestingly enough, it was likely this hint that prompted the NFL to support the writ of certiorari.

prevent the Court from issuing a sweeping ruling that the NFL is a single entity for antitrust purposes.

Should my predictions prove correct, the Court will have done very little to bring any sort of finality to this issue. As such, the only proper course of action for the NFL will be to seek refuge in Congress. If the Court comes down as I suspect, seeking legislation exempting it from antitrust liability might make the most sense for the NFL.