

# Comments

## HUDDLE UP: SURVEYING THE PLAYING FIELD ON THE SINGLE ENTITY STATUS OF THE NATIONAL FOOTBALL LEAGUE IN ANTICIPATION OF *AMERICAN NEEDLE V. NFL*

### I. INTRODUCTION

Baseball has long been recognized as “America’s Pastime,” even by those who cannot tell the difference between a center fielder and a center forward.<sup>1</sup> Baseball is America’s oldest major sport and has long held a place in the hearts of sports fans.<sup>2</sup> In recent years, however, football has clearly emerged as modern America’s most popular sport.<sup>3</sup> In the last decade, the National Football League (“NFL”) has experienced an unparalleled surge in fan turnout and viewer support.<sup>4</sup> This surge has led to increased profits from broadcast revenues, merchandise sales, advertising, and other sources.<sup>5</sup>

---

1. See Bryan Curtis, *Debating America’s Pastime(s)*, N.Y. TIMES, Feb. 1, 2009, available at <http://www.nytimes.com/2009/02/01/sports/01iht-01curtis.19835372.html> (suggesting baseball is being overtaken by football as America’s pastime).

2. See generally Historic Baseball Resources, <http://www.loc.gov/topics/baseball/> (last visited Jan. 22, 2010) (describing baseball’s history).

3. See *In a League of its Own*, ECONOMIST, Apr. 27, 2006, available at [http://www.economist.com/businessfinance/displaystory.cfm?story\\_id=6859210](http://www.economist.com/businessfinance/displaystory.cfm?story_id=6859210) (“[American Football] remains the most popular of the four big American sports on almost every measure, from opinion polls to television ratings.”); see also Kurt Badenhausen, Michael K. Ozanian, and Christina Settimi, *The Business of Football*, FORBES, Sept. 13, 2007, available at [http://www.forbes.com/2007/09/13/nfl-team-valuations-biz-07nfl\\_cz\\_kb\\_mo\\_cs\\_0913nfl\\_land.html](http://www.forbes.com/2007/09/13/nfl-team-valuations-biz-07nfl_cz_kb_mo_cs_0913nfl_land.html) (“The NFL . . . beats the day-lights out of other prime-time programming, including every other sport.”).

4. See *The Business of Football*, *supra* note 3 (“Nearly three out of every four Americans watched an NFL game on television last season.”); see also Sean Leahy, *Blackout Blues? NFL Ticket Sales Slumping in Some Cities*, USA TODAY, Sept. 2, 2009, available at [http://www.usatoday.com/sports/football/nfl/2009-08-31-nfl-tickets\\_N.htm](http://www.usatoday.com/sports/football/nfl/2009-08-31-nfl-tickets_N.htm) (noting many teams have sold out their stadiums for 2009-10 NFL season and kept ticket prices steady with previous years despite economic turmoil).

5. See *In a League of its Own*, *supra* note 3 (“As a business, American football has been beating its rivals handily for years. It has the highest total revenues of the four [major sports leagues], at nearly \$6 billion a year.”). Even at the team level, NFL teams have a market value of roughly 4.0 times revenues, which dwarfs the teams in other leagues that average between 2.2 and 3.0. See *id.* (discussing financial superiority of NFL teams when compared to other sports); see also *The Business of Football*, *supra* note 3 (“The NFL is the richest sports league in the world, with the average team worth some \$957 million.”).

Indeed, as another football season approaches, it is quite appropriate to label the NFL not only as America's most popular sport, but also as its most lucrative.<sup>6</sup> The level of popularity and financial success that the NFL is currently enjoying, however, has not come without costs.<sup>7</sup> Namely, the ever-increasing skepticism regarding the legal legitimacy of the NFL's organization as a business enterprise has made the federal courthouse the league's new playing field.<sup>8</sup> The NFL views itself as a single entity, and conducts business as such, while others argue that the NFL is a group of separate but interrelated firms.<sup>9</sup> The conflict surrounding this disagreement has resulted in protracted litigation, which has imposed a heavy financial burden on the NFL.<sup>10</sup>

The NFL's most recent defense of its single entity status came via the Seventh Circuit's decision in *American Needle Inc. v. National Football League* ("American Needle").<sup>11</sup> In *American Needle*, the Seventh Circuit found in favor of the NFL and against the antitrust plaintiff, American Needle.<sup>12</sup> This article is concerned with the ultimate issue dealt with by the court: whether the NFL should be considered

---

6. See *In a League of its Own*, *supra* note 3 (proclaiming NFL's dominance of American sport-entertainment market). Indeed, the NFL is, in many respects, superior to England's Premier League, arguably the most popular international sports league. See *id.* (comparing NFL to English Premier League); see also *The Business of Football*, *supra* note 3 ("Pro football is . . . the most profitable sport on the planet (mean operating income in 2006 was \$17.8 million on \$204 million in revenue).").

7. See, e.g., Vito Stellino, *Taking a Big Hit – legal problems of football players*, FOOTBALL DIGEST (Aug. 2000) available at [http://findarticles.com/p/articles/mi\\_m0FC/L/is\\_10\\_29/ai\\_62804723/](http://findarticles.com/p/articles/mi_m0FC/L/is_10_29/ai_62804723/) (noting NFL's success as well as its problems).

8. See Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section I to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 269-70 (1984) [hereinafter Roberts UCLA Article] (noting burden on NFL of defending many antitrust lawsuits). Dean Roberts notes that former NFL commissioner Pete Rozelle has testified before Congress that, "Antitrust [has] exploded in professional sports, and antitrust litigation has since become a major, almost daily activity of the League." *Id.* Commissioner Rozelle also lamented that, "I have probably spent more time in courtrooms, in depositions, and in litigation matters than many members of the Bar." *Id.* Another sports commentator has noted that, "The NFL is a popular target for antitrust cases large and small." Lester Munson, *Antitrust Case Could be Armageddon*, ESPN.COM, July 17, 2009, [http://sports.espn.go.com/espn/columns/story?columnist=munson\\_lester&id=4336261](http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261).

9. See generally Transcript of Oral Argument at 4, *American Needle* (No. 08-661) [hereinafter Oral Argument] (identifying arguments of NFL and opponents).

10. See Roberts UCLA Article, *supra* note 8, at 271-72 (noting threat and expense of antitrust litigation impose heavy burden on NFL); Munson, *supra* note 8 (considering NFL's antitrust battles).

11. 538 F.3d 736 (7th Cir. 2008).

12. See *id.* at 744 (affirming judgment of district court against American Needle).

a single entity or a group of separate companies.<sup>13</sup> As the Seventh Circuit indicated, confusion among the circuits has solidified the idea that the correct application of antitrust law to the NFL is an issue ripe for Supreme Court review.<sup>14</sup> As a result, the Supreme Court granted certiorari in this matter and rendered a decision on May 24, 2010.<sup>15</sup>

This Comment analyzes the antitrust issues presented by the NFL's organizational makeup and operating strategy.<sup>16</sup> This comment is limited to analysis of the NFL because of its unique nature and because it is the league involved in the matter before the Supreme Court.<sup>17</sup> Additionally, this comment is limited to analysis of the NFL under Section I of the Sherman Act and the "Single Entity" issue.<sup>18</sup>

---

13. See *id.* at 741 (considering issue raised by American Needle or whether district court incorrectly concluded that NFL teams constitute single entity when collectively licensing their intellectual property).

14. See *id.* (noting NFL's uniqueness when it comes to antitrust law and circuit court confusion from lack of definitive decision by Supreme Court); Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751,761 (1989) [hereinafter Goldman Article] ("Despite the consistent unwillingness of the judiciary to adopt the single entity theory . . . commentators have reasonably argued that there are legitimate bases for questioning existing law: the absence of a Supreme Court ruling on the subject [and] the partial reliance on the now repudiated intra-enterprise conspiracy doctrine.")

15. See *Am. Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 2859 (U.S. 2009) (granting certiorari in *American Needle*). Surprisingly, after winning below, the NFL actually endorsed American Needle's petition for certiorari. See Munson, *supra* note 8 ("[I]n a stunning development, the NFL told the Supreme Court it endorsed American Needle's request for a hearing and a decision. The league's attorneys announced, in a remarkable understatement, that they 'are taking the unusual step of supporting' American Needle's effort to have the case reviewed at the highest level.")

16. For a further discussion of the antitrust issues facing the NFL, see *infra* notes 105-220 and accompanying text.

17. For a further discussion of the unique nature of the NFL, see *infra* notes 64-70 and accompanying text. The NFL is also the league that has garnered the most attention in terms of antitrust litigation. See Roberts UCLA Article, *supra* note 8, at 269-70 (discussing NFL's involvement in antitrust litigation).

18. For a further discussion of Section I single entity analysis of the NFL, see *infra* notes 105-220 and accompanying text. The analysis is limited to Section I and the "single entity" issue, primarily, because that was the issue squarely addressed by the Seventh Circuit in *American Needle*. See *American Needle*, 538 F.3d at 741 (addressing plaintiff's claim under Section I that NFL teams constitute single entity). Also, the "single entity" issue will be the one considered by the Supreme Court when it reviews *American Needle*. See Munson, *supra* note 8 ("The legal doctrine at the center of the case is known as "single entity."); Dan Fletcher, *Five Supreme Court Cases to Watch this Term*, TIME, Oct. 5, 2009, available at <http://www.time.com/time/nation/article/0,8599,1927760,00.html> ("The fundamental question for the Court to decide [in *American Needle*] is whether the NFL should be considered a single entity or a collection of 32 individual businesses."). American Needle also agrees that the single entity status of the NFL is the issue for the Supreme Court to

Section II will provide an overview of the Sherman Act, the relevant precedent on the issues involved, and the NFL, paying particular attention to the factors that make the league so unique for antitrust purposes.<sup>19</sup> Section III will survey the legal landscape concerning the NFL and the single entity antitrust issue.<sup>20</sup> While also touching on judicial treatment of the issue, this Comment will focus on the heated debate between two divergent groups over the single entity status of the NFL.<sup>21</sup> Section IV will provide a summary of the oral argument that took place before the Supreme Court on January 13, 2010.<sup>22</sup> Finally, Section V will conclude by considering both positions advanced in Section III and argues that the NFL should be reviewed from a *per se* approach even though the Court preferred a rule of reason approach.<sup>23</sup>

## II. BACKGROUND

### A. The Sherman Antitrust Act<sup>24</sup>

The Sherman Antitrust Act was adopted by Congress in 1890 to prohibit illegal trusts and to promote a free-market economy.<sup>25</sup>

decide. See Oral Argument, *supra* note 9, at 4 (identifying single entity issue as one before Supreme Court).

19. For a further discussion of the Sherman Antitrust Act, Supreme Court precedent, the NFL, and *American Needle*, see *infra* notes 24-38 and accompanying text.

20. For a further discussion of the antitrust issues facing the NFL, see *infra* notes 105-220 and accompanying text.

21. For a further discussion of the debate over the single entity question as it applies to the NFL, see *infra* notes 105-220 and accompanying text.

22. For a further discussion of the *American Needle* oral argument, see *infra* notes 222-228 and accompanying text.

23. For a further discussion of the ultimate implications of both sides of the single entity argument, see *infra* notes 241-267 and accompanying text.

24. See 15 U.S.C. §§ 1-2 (2004) (detailing law against illegal restraints of trade). Section I of the Sherman Antitrust Act states, in relevant part, that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . is declared to be illegal." 15 U.S.C. § 1 (2004) [hereinafter Section I]. Section 2 of the Sherman Antitrust Act states, in relevant part, that, "Every 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 . . . shall be deemed guilty of a felony." 15 U.S.C. § 2 (2004) [hereinafter Section II].

25. See The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (1890), available at <http://voteview.com/antitrust.htm> (last visited Nov. 21, 2009) (exploring Sherman Act adoption to address government's concern over monopolies); Antitrust Laws and You, <http://www.justice.gov/atr/laws.htm> (last visited Nov. 21, 2009) (noting Sherman Act's "express. . . national commitment to a free market economy."); Antitrust: An Overview, <http://topics.law.cornell.edu/wex/antitrust> (last visited Nov. 21, 2009) ("Because of fears during the late 1800s that monopolies dominated America's free market economy, Congress passed the Sherman Antitrust Act in 1890 to combat anticompetitive practices, reduce market domination

Section I of the Sherman Act “ban[s] business arrangements in restraint of trade.”<sup>26</sup> Section II of the Sherman Act “prohibit[s] attempts to monopolize.”<sup>27</sup> Generally, the Sherman Act is meant to “combat anticompetitive practices, reduce market domination by individual corporations, and preserve unfettered competition as the rule of trade.”<sup>28</sup> Consequently, the Sherman Act is the foundation and the basis for most federal antitrust actions.<sup>29</sup> These actions can be adjudicated following either the “rule of reason” approach or the per se rule approach.<sup>30</sup>

Some commentators have labeled the statute as vague and overly ambiguous as to exactly what sort of concerted action is illegal.<sup>31</sup> According to one commentator, the confusion over the Sherman Act’s application seems to stem from the distinction courts must draw between legitimate unilateral business conduct and un-

---

by individual corporations, and preserve unfettered competition as the rule of trade.”).

26. Robert L. Bradley, Jr., *On the Origins of the Sherman Antitrust Act*, *CATO JOURNAL*, Winter 1990, at 737.

27. *Id.*

28. Antitrust: An Overview, *supra* note 25. It is generally agreed that Congress enacted the Sherman Act because of fears during the late 1800s that monopolies would come to dominate the American free market economy. *See id.* (providing overview of Sherman Act); *See also* Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 *COLUM. L. REV.* 422, 423 (1965) (noting Senator John Sherman’s definition of evils to be met by impending antitrust legislation).

29. *See* Antitrust: An Overview, *supra* note 25 (describing background and use of Sherman Act).

30. *See id.* (“Violations under the Sherman Act take one of two forms - either as a per se violation or as a violation of the rule of reason.”). Under the Sherman Act, a per se violation is one that is so anticompetitive that it does not require the court to look into whether the effects of the practice cause an unreasonable restraint of trade. *See id.* (“A per se violation requires no further inquiry into the practice’s actual effect on the market or the intentions of those individuals who engaged in the practice.”). *Id.* Still, “Some business practices. . . at times constitute anticompetitive behavior and at other times encourage competition within the market.” *Id.* For these cases the court applies the rule of reason, which is “a totality of the circumstances test [that] asks whether the challenged practice promotes or suppresses market competition.” *Id.*

31. *See* Bradley, *supra* note 26, at 738 (noting exact origins and intent of Sherman Act have baffled scholars for years); Sherman Anti-Trust Act, [http://www.usnews.com/usnews/documents/docpages/document\\_page51.htm](http://www.usnews.com/usnews/documents/docpages/document_page51.htm) (last visited Sept. 14, 2009) (“The Sherman Act was designed to restore competition but was loosely worded and failed to define such critical terms as ‘trust,’ ‘combination,’ ‘conspiracy,’ and ‘monopoly.’”).

lawful concerted activity.<sup>32</sup> The policy objectives behind the Sherman Act are equally as unclear.<sup>33</sup>

Despite this confusion, courts have discerned the “critical threshold issues” in terms of antitrust law.<sup>34</sup> First, courts must determine the single entity issue: whether or not the entities alleged to have illegally conspired in violation of the Sherman Act are in fact separate entities.<sup>35</sup> If the action in question was committed by a single entity, the action will be per se dismissed because the Sherman Act only reaches conduct that involves a plurality of actors.<sup>36</sup> Second, if the court finds that multiple entities are involved, a “rule of reason” analysis must be conducted.<sup>37</sup> When conducting a rule

32. See Daniel Lazaroff, *Antitrust Analysis and Sports Leagues: Re-Examining the Threshold Questions*, 20 ARIZ. ST. L.J. 953, 955 (1988) [hereinafter Lazaroff ASU Article] (discussing application of Sherman Act to professional sports leagues). Professor Lazaroff states that, “The Courts have properly recognized that unilateral business conduct must be distinguished from concerted activity because the former is not covered by [Section I], while the latter is clearly reached by the statute.” *Id.* He notes, however, that this distinction is sometimes a difficult one to draw. See *id.* at 956-57 (presenting questions that arise when applying Sherman Act to professional sports leagues).

33. See Blake, *supra* note 28, at 422-23 (portraying ongoing debate over Sherman Act’s policy objectives); Bradley, *supra* note 26, at 738 (questioning textbook view of legislative intent behind Sherman Act); see also 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, 9-10 (1983) [hereinafter Grauer Michigan Article] (“Scholars generally agree that the legislative history of the Sherman Act is so vague that no single underlying enforcement policy can be derived from it and that several possible enforcement policies can be found in the congressional debates leading to its enactment.”).

34. See Lazaroff ASU Article, *supra* note 32, at 953 (introducing issues which courts must decide in order to resolve antitrust claims). Lazaroff also notes that “most courts have properly recognized that unilateral business conduct must be distinguished from concerted activity because the former is not covered by [Section I].” *Id.* at 955.

35. See *id.* at 953 (explaining initial question in antitrust analysis). Lazaroff explains, “First, courts must determine whether [Section I] of the Sherman Act even applies to a particular practice or whether there is an absence of the concerted action necessary to invoke [Section I] on the theory that [the entities involved are actually] a single entity.” *Id.*

36. See *id.* (noting end of antitrust analysis if court finds only single entity was involved in conduct); see also Grauer Michigan Article, *supra* note 33, at 5 (explaining antitrust action dismissal at summary judgment stage if plurality of actors is not found).

37. See Lazaroff ASU Article, *supra* note 32, at 953 (identifying second issue in antitrust analysis). Lazaroff explains that, “Second, assuming that the courts reject single entity status. . .and conclude that [the entities in question] are separate actors for [Section I] purposes, important questions [involving the rule of reason] are raised.” *Id.* The Supreme Court has proclaimed that rule of reason analysis is not to be conducted if the action is found to be per se illegal, which only occurs if the action is “manifestly anticompetitive.” See *Cont’l T.V. v. GTE Sylvania*, 433 U.S. 36, 49-50 (1977) (“*Cont’l T.V.*”) (analyzing per se versus rule of reason antitrust analysis). The Court defined the “rule of reason” standard of analysis as one in

of reason analysis, the court is looking for unreasonable restraints on competition.<sup>38</sup> Additionally, the question of market definition plays an important role in this analysis.<sup>39</sup>

### B. The *Copperweld* Decision<sup>40</sup>

The most recent and relevant Supreme Court decision concerning Section I was issued in 1984, when the Court decided *Copperweld Corp. v. Independence Tube Corp.*<sup>41</sup> In that case, petitioner Copperweld Corp. purchased petitioner Regal Tube Co. from Lear Siegler, Inc.<sup>42</sup> Under the conditions of the sale, Lear was prohibited from competing with Regal for five years.<sup>43</sup> Meanwhile, an officer at Lear Siegler formed respondent Independence Tube Corp.<sup>44</sup> Even though the officer knew of the non-compete agreement, Independence Tube began to compete in the steel tubing

---

which “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Id.* at 49.

38. See *Cont'l T.V.*, 433 U.S. at 49-50 (explaining rule of reason analysis).

39. See Lazaroff ASU Article, *supra* note 32, at 953 (establishing properly defined relevant markets as essential to rule of reason analysis). As the Supreme Court noted, however, the question of market definition is just one question in a totality of circumstances analysis. See *Cont'l T.V.*, 433 U.S. at 49 (noting what must be considered to decide whether practice imposes unreasonable restraint on competition).

40. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).

41. See *id.* (holding that parent corporation and wholly owned subsidiary have complete unity of interest and cannot illegally conspire with each other in violation of federal antitrust law). *Copperweld* is the most recent and relevant antitrust precedent applicable in the professional sports league context. See, e.g., Gary Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117, 126 (1989) [hereinafter Roberts '89 Tulane Article] (resolving issue of single entity status of sports league by using *Copperweld* as authority). It is also the case that is used as authority by commentators debating the single entity status of sports leagues. See, e.g., Goldman Article, *supra* note 14, at 755-56 (basing argument and counterargument of professional sports league single entity status on interpretation of *Copperweld*). At oral argument, one speaker referenced a more recent case. See generally Oral Argument, *supra* note 9 (discussing Supreme Court precedent). The Court has considered the application of the Sherman Act to a joint venture between oil companies to market gasoline to gas stations. See *Dagher v. Texaco*, 547 U.S. 1 (2006). The Court unanimously found that there was no violation of the Sherman Act because the joint venture acted as a single entity when making pricing decisions. See *id.*

42. See *Copperweld*, 467 U.S. at 756 (discussing facts of case).

43. See *id.* (describing terms of sale agreement).

44. See *id.* (detailing formation of Independence Tube Corp.). The officer in question was also a former officer of Regal and thus had extensive knowledge of industry operations and the companies involved in the dispute. See *id.* (considering background of former Regal office).

industry.<sup>45</sup> After learning of this, Copperweld and Regal proceeded to send threatening letters to would-be suppliers of Independence Tube.<sup>46</sup>

Independence Tube retaliated by filing suit in federal court, alleging that Copperweld and Regal conspired against it in violation of Section I.<sup>47</sup> The Supreme Court held that concerted action between a parent company and its wholly owned subsidiary was outside the scope of the Sherman Act because it was not really the conduct of two separate entities.<sup>48</sup> In so holding, the Court established that concerted action between a parent and its wholly owned subsidiary is *per se* legal in terms of Section I.<sup>49</sup>

Weighing heavily on the Court's decision was the notion that a parent and its wholly owned subsidiary are not truly separate entities for antitrust purposes because they do not have truly separate interests.<sup>50</sup> The Court's express language, which has later generated much confusion, was that "a parent and its wholly owned sub-

45. See *id.* (describing Independence Tube's initiation of operations). The officer began by looking for financing and for companies to supply Independence Tube in an effort to establish competition with Lear and Copperweld. See *id.* (noting Independence Tube's search for financing and supply).

46. See *id.* at 756-57 (detailing Copperweld's retaliatory actions). These letters referenced the non-compete agreement signed during the purchase of Regal. See *id.* (describing content of retaliatory letters). The letters threatened legal action against any company that violated the agreement by supplying Independence Tube so that it could compete with Copperweld and Regal. See *id.* at 757 (noting letters' threat of legal action).

47. See *id.* at 757 (detailing initiation of suit). A jury found that Copperweld and Regal had conspired together and thus had violated Section I. See *id.* at 758 (noting trial court outcome). The Seventh Circuit affirmed this ruling, finding that Supreme Court precedent on the issue allowed for subjecting an intra-enterprise conspiracy to Section I scrutiny. See *id.* (noting circuit court outcome).

48. See *id.* at 777 (describing holding of Supreme Court). The Court found that a parent and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of [Section I]." *Id.*

49. See *id.* at 778 (detailing rule laid down by Court). The language of the opinion proclaimed that, "Today the Court announces a new *per se* rule: a wholly owned subsidiary is incapable of conspiring with its parent under of the Sherman Act." *Id.* As a *per se* legal activity, concerted action between a parent and a wholly owned subsidiary requires no rule of reason analysis. See *id.* (noting disposal of rule of reason analysis for *per se* rules).

50. See *id.* at 771 ("[Action between a parent company and its wholly owned subsidiary] does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests."). This distinction is fundamental in coming to the conclusion that the plurality of actors required for antitrust scrutiny is not present between a parent and its wholly owned subsidiary, even though the two companies are technically separate. See *id.* (declaring that a contrary rule "would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.").

sidiary have a complete unity of interest.”<sup>51</sup> Noteworthy also is the Court’s restriction of its holding; the Court made sure to “limit [its] inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of [Section I].”<sup>52</sup>

### C. The NFL<sup>53</sup>

The global giant that is now the NFL came from humble beginnings.<sup>54</sup> In 1920, team owners met in Canton, Ohio, and informally agreed to play a common schedule and name a champion at the end of each season of play.<sup>55</sup> As team profitability became more viable, the league continued to expand in size and reach.<sup>56</sup> In 1959, the rival American Football League (“AFL”) was formed to capitalize on the growing popularity of the sport.<sup>57</sup> The two leagues subsequently announced a merger, which was finalized in 1970.<sup>58</sup> The league thus had twenty-six teams, and has since added six more to arrive at a league of thirty-two.<sup>59</sup>

---

51. *Id.* The court attempted to clarify this assertion by explaining why a parent and its wholly owned subsidiary have a complete unity of interest. *See id.* (“[The objectives of a parent and its wholly owned subsidiary] are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.”).

52. *Id.* at 767. The Court also left open another issue, when it stated that, “We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.” *Id.*

53. *See generally* Constitution and Bylaws of the National Football League (2006 Rev.), [http://static.nfl.com/static/content//public/static/html/careers/pdf/co\\_.pdf](http://static.nfl.com/static/content//public/static/html/careers/pdf/co_.pdf) (last visited Oct. 2, 2009) (outlining rules, bylaws, operating procedures, schedule, and player conduct guidelines of NFL).

54. *See* NFL History, <http://www.nfl.com/history> (last visited Jan. 24, 2010) (outlining history of NFL).

55. *See id.* (describing beginnings of NFL).

56. *See id.* (describing growth of NFL).

57. *See id.* (noting formation of AFL). The AFL was highly successful in its first decade, competing directly with the more established NFL. *See id.* (noting beginnings of AFL).

58. *See id.* (examining merger of AFL and NFL). As counsel for the NFL noted in his oral argument before the Supreme Court, the merger between the AFL and the NFL “would have been subject to Section I challenge because it involved venture formation, but an act of Congress said that that wasn’t necessary.” Oral Argument, *supra* note 9, at 41.

59. *See* NFL History, *supra* note 54 (exploring NFL’s post merger structure). Three teams from the original NFL joined the thirteen AFL teams to form the NFL’s American Football Conference. *See id.* (detailing AFC formation). The remaining sixteen NFL teams thus comprised the NFL’s National Football Conference. *See id.* (detailing NFC formation). The six “expansion” teams have been added over the years to further broaden the NFL’s reach. *See* Oral Argument, *supra* note 9, at 41 (“The venture has expanded its production capability by adding new teams.”).

Currently, the NFL is the governing body that oversees the athletic competition between the thirty-two professional football teams.<sup>60</sup> The league is organized into two conferences – the American Football Conference (“AFC”) and the National Football Conference (“NFC”) – with sixteen teams per conference divided up into four divisions.<sup>61</sup> The teams compete in four preseason games and sixteen regular season games.<sup>62</sup> The best six teams from each conference make the playoffs, with the winner of the AFC facing the winner of the NFC in the Super Bowl game to determine the league champion.<sup>63</sup>

The NFL as a business is tremendously popular, and such popularity is dwarfed only by its profitability.<sup>64</sup> The league, however, is different from traditional profit seeking business organizations.<sup>65</sup> The structure and operation of the league presents a paradox such that labeling the league as one entity or many becomes a signifi-

60. See *In a League of Its Own*, *supra* note 3 (defining NFL structure and detailing financial success); Len Pasquarelli, *Sen. Spector Taking Aim at NFL Antitrust Exemption*, ESPN.COM, Dec. 7, 2006, <http://sports.espn.go.com/nfl/news/story?id=2690171> (detailing league in context of media broadcast antitrust exemption).

61. See National Football League Frequently Asked Questions, <http://www.nfl.com/help/faq> (last visited Sept. 20, 2009) (explaining league operations). The American Football Conference consists of the Baltimore Ravens, the Buffalo Bills, the Cincinnati Bengals, the Cleveland Browns, the Denver Broncos, the Houston Texans, the Indianapolis Colts, the Jacksonville Jaguars, the Kansas City Chiefs, the Miami Dolphins, the New England Patriots, the New York Jets, the Oakland Raiders, the Pittsburgh Steelers, the San Diego Chargers, and the Tennessee Titans. See *id.* (outlining AFC structure). The National Football Conference consists of the Arizona Cardinals, the Atlanta Falcons, the Carolina Panthers, the Chicago Bears, the Dallas Cowboys, the Detroit Lions, the Green Bay Packers, the Minnesota Vikings, the New Orleans Saints, the New York Giants, the Philadelphia Eagles, the St. Louis Rams, the San Francisco 49ers, the Seattle Seahawks, the Tampa Bay Buccaneers, and the Washington Redskins. See *id.* (outlining NFC structure).

62. See *id.* (detailing NFL schedule). Typically, games are held every week on either Sunday or Monday, unless the team has a bye week and is not scheduled to play. See *id.* (explaining team playing schedule and off weeks).

63. See *id.* (explaining playoff structure and participation). The winner of each of the four divisions within each conference automatically makes the playoffs. See *id.* (noting that division winners automatically make playoffs). Also, the next two best teams, records wise, in each conference, make the playoffs as “wild cards.” See *id.* (explaining wild card playoff selection).

64. For a further discussion of the popularity and profitability of the NFL, see *supra* notes 3-6 and accompanying text.

65. See Roberts UCLA Article, *supra* note 8, at 238-54 (explaining how NFL does not resemble cartels, trade associations, joint ventures, commonly owned groups of separate firms, or partnerships); Grauer Michigan Article, *supra* note 33, at 25 (noting courts’ cautious approach to professional sports leagues because of unique organizational makeup).

cantly difficult task.<sup>66</sup> On the one hand, each NFL team is separately owned and internally selects its own legal form.<sup>67</sup> On the other hand, the league negotiates its television broadcast contracts as a single entity as opposed to each team negotiating its own broadcast contracts for its own games.<sup>68</sup>

Further, each team is “required to negotiate independently its home stadium lease, its players’ salaries, and its other expenses.”<sup>69</sup> And yet, certain revenues are pooled by the league and divided up amongst the teams.<sup>70</sup> As one commentator noted, “Virtually every court to discuss the issue, [has found] that sports league management ‘does indeed present unique and difficult problems for the antitrust observer.’”<sup>71</sup>

#### D. *American Needle*

*American Needle* revisits the debate concerning antitrust application to professional sports leagues.<sup>72</sup> *American Needle* is an apparel manufacturer with a long-standing business relationship with

66. See *In a League of Its Own*, *supra* note 3 (“A sports league is an awkward endeavor, since the owners must co-operate on many business decisions despite fielding teams that compete fiercely.”); Roberts UCLA Article, *supra* note 8, at 301 (“Most courts that have addressed sports league issues within the context of Section I have observed that leagues constitute unusual business organizations and involve unusual relationships.”); Goldman Article, *supra* note 14, at 758-60 (detailing judicial confusion over single entity status of NFL).

67. See Roberts UCLA Article, *supra* note 8, at 261 (discussing organizational aspects of NFL teams); See also Sarah Adams, Sports League Economic Structure and Fiscal Focus, <http://www.sportsbusinesssims.com/sports.league.economic.structure.fiscal.focus.sarah.adams.htm> (detailing league structure and economic vitality).

68. See *In a League of Its Own*, *supra* note 3 (noting league broadcast contracts entered into on behalf of league as single entity); Roberts UCLA Article, *supra* note 8, at 262 (describing league policy of negotiating television broadcast contracts); Grauer Michigan Article, *supra* note 33, at 27 (noting judicial consideration of league negotiated broadcast licenses).

69. Roberts UCLA Article, *supra* note 8, at 261. Professor Goldman also notes that teams report separate profits and losses that come via its cumulative income generating activities – i.e., both from the league and on its own. See Goldman Article, *supra* note 14, at 260 (noting judicial considerations given in NFL team status determination).

70. See *In a League of its Own*, *supra* note 3 (explaining that teams share roughly 70% of their revenues with each other). As such, “One team’s losing season and sagging revenues are offset by another team’s banner year.” *Id.*

71. 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, 567 (1986) [hereinafter Roberts ’86 Tulane Article] (arguing for per se characterization of sports leagues as single entities for antitrust purposes).

72. See Munson, *supra* note 8 (describing *American Needle* going to Supreme Court and possible impact on antitrust law decision would have).

the NFL.<sup>73</sup> As an NFL vendor, American Needle held a headwear license for over twenty years.<sup>74</sup> American Needle lost this contract in 2001 when the teams authorized NFL Properties to grant an exclusive apparel contract to Reebok for ten years.<sup>75</sup> Soon thereafter, American Needle filed suit against the NFL, alleging the exclusive contract granted to Reebok violated Section I.<sup>76</sup>

At the outset, the Seventh Circuit conceded that American Needle's claim led the court into "murky waters."<sup>77</sup> This murkiness was brought on because "[Courts] have yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of [*Copperweld*]."<sup>78</sup> Further complicating the issue was the lack of scholarly opinion and legislative commentary on the subject.<sup>79</sup> Nevertheless, the Seventh Circuit began by defining the NFL as "an unincorporated association of . . . 32 separately owned and operated football teams."<sup>80</sup> To pro-

73. See *American Needle*, 538 F.3d at 738.

74. See *id.* In 1963, in order to promote the league brand, the NFL teams formed NFL Properties. See *id.* at 737. This separate corporate entity was charged with "developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia." *Id.* Consequently, NFL Properties had the exclusive authority to grant licenses to vendors so that the vendors could use the teams' intellectual property. See *id.*

75. See *id.* at 738. American Needle was not the only vendor not to have its license renewed. See *id.*

76. See *id.* American Needle took the position that, "Because each of the individual teams separately owned their team logos and trademarks, their collective agreement to authorize NFL Properties to award the exclusive headwear license [pertaining to all NFL logos] to Reebok was, in fact, a conspiracy to restrict other vendors' ability to obtain licenses for the teams' intellectual property." *Id.* In a related claim, American Needle argued that "By authorizing NFL Properties to award the license to Reebok, the NFL teams monopolized the NFL team licensing and product wholesale markets in violation of Section 2." *Id.*

77. See *id.* at 741 ("American Needle argues that the district court incorrectly concluded that the NFL teams constitute a single entity under [*Copperweld*] when collectively licensing their intellectual property. American Needle's argument leads us into murky waters.")

78. *Id.* The court then extrapolated on the confusion caused by this issue by stating that, "The characteristics that sports leagues generally exhibit make the determination [of single entity status] difficult; in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under [Section I]." *Id.*

79. See *id.* at 742 (expressing "skepticism that [*Copperweld*] could provide the definitive single-entity determination for all sports leagues alike."). Moreover, the court noted that the "question of whether a professional sports league is a single entity should be addressed not only "one league at a time," but also "one facet of a league at a time." *Id.*

80. *Id.* at 737. These football teams, the court noted, "Collectively produce an annual series (or 'season') of over 250 interrelated football games. Each season culminates in a championship game—a game better known as the Super Bowl." *Id.*

duce their product – NFL Football – the teams “require extensive coordination and integration.”<sup>81</sup> Along the same line, the court found that NFL teams have a unity of interest.<sup>82</sup>

The court ultimately concluded that NFL teams cooperate and act as one entity.<sup>83</sup> Weighing heavily on the court’s reasoning was the idea that teams, collectively, are a single source of economic power.<sup>84</sup> Further, the teams need to cooperate in order to produce their product and compete in the entertainment market.<sup>85</sup> As such, the Seventh Circuit concluded that NFL teams act as one entity because they are effectively incapable of conspiring with each other to restrain trade in violation of the Sherman Act.<sup>86</sup> The court thus rejected American Needle’s Section I claim and affirmed the district court’s grant of summary judgment in favor of the NFL.<sup>87</sup>

*American Needle*, now in the hands of the Supreme Court, has garnered much attention in the media from both sports and judicial commentators.<sup>88</sup> One writer notes, “Experts agree that the case . . . could easily be the most significant legal turning point in the history of American sports.”<sup>89</sup> A ruling in either direction will have major ramifications throughout the sporting and business worlds, especially considering the multitude of industries that are finan-

81. *Id.* The court stated, “NFL football is produced only when two teams play a football game. Thus, although each team is a separate corporate entity. . . no team can produce a game—the product of NFL football-by itself, much less a full season of games or the Super Bowl.” *Id.*

82. *See id.* at 743. The court also noted that, “Though the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity.” *Id.*

83. *See id.* at 744. The court saw it fit to characterize the league as one entity, with the teams being different departments of the same business organization. *See id.* (noting antitrust law’s encouragement of cooperation within organization).

84. *See id.* The Seventh Circuit proclaimed that, “Since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football.” *Id.*

85. *See id.* at 743 (discussing necessity of cooperation in order to produce product). The court also pointed to the fact that the teams must jointly produce the product so as to compete with others in the entertainment market, which affects all of their interests. *See id.*

86. *See id.* at 744 (relating Seventh Circuit’s holding).

87. *See id.* (rejecting American Needle’s antitrust claim against NFL).

88. *See, e.g.,* Munson, *supra* note 8 (describing background of *American Needle* in preparation for Supreme Court Review); Fletcher, *supra* note 18 (listing *American Needle* as one of most important cases going to Supreme Court in October 2009 term).

89. Munson, *supra* note 8. Munson also quotes an anonymous NFL official as stating that, “[This] is the first time the league has approached ‘so important an issue at so high a level.’” *Id.*

cially linked to professional sports.<sup>90</sup> Ultimately, much is riding on the Supreme Court's decision in *American Needle*.<sup>91</sup>

### III. ANALYSIS

#### A. Issue Presented

The issue presented by *American Needle*, the correct application of Section I to the NFL and sports leagues in general, has been a hot topic of judicial and scholarly debate.<sup>92</sup> This debate has gone on for years and it is abundantly clear that the single entity status of sports leagues is an issue that is ripe for Supreme Court review.<sup>93</sup>

---

90. See Munson, *supra* note 8 (discussing effect of *American Needle* holding). Munson notes that, "If the NFL manages to persuade the Supreme Court that the league is a single entity competing with other providers of entertainment rather than a group of 32 separate businesses competing with each other, the landscape of the sports industry will be transformed." *Id.* Conversely, if the Court finds against the NFL, the league would be opened up to even more, possibly frivolous, antitrust litigation. See *id.* (exploring effects of ruling for *American Needle*). The other major professional sports leagues would also be immensely affected. See Fletcher, *supra* note 18 ("Other sporting leagues are watching the *American Needle* case closely.").

91. See Munson, *supra* note 8 (listing groups, businesses, and industries standing to be affected by *American Needle*); Fletcher, *supra* note 18 ("The answer to this question has repercussions beyond the production of licensed merchandise.").

92. See 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, 72 (1989) [hereinafter Grauer Tulane Article] (portraying debate over single entity status of professional sports leagues). As such, this comment's analysis of the single entity status of sports leagues is centered around the debate engaged by two competing factions. See *id.* (establishing debate between Pro-NFL and Pro-American Needle sides); Roberts '89 Tulane Article, *supra* note 41, at 117-19 (framing debate issue and points of disagreement); Goldman Article, *supra* note 14, at 762-89 (arguing directly with opposing faction).

93. See *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) ("[Circuit Court decisions] do not yield a clear principle about the proper characterization of sports leagues-and we do not think that [*Copperweld*] imposes one 'right' characterization."); Lazaroff ASU Article, *supra* note 32, at 953 ("The evolution of legal doctrine in [antitrust] case law does not reveal a pattern of consistency or provide a model of clarity."); *American Needle*, 538 F.3d at 741 ("We have yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of [*Copperweld*]. The characteristics that sports leagues generally exhibit make the determination difficult; in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under [Section I]."); Roberts UCLA Article, *supra* note 8, at 271 (noting "The uncertainty created by the haphazard and confusing decisions that have been rendered both for and against the leagues," as well as "The confusion over the appropriate standards" for reviewing sports leagues in antitrust context).

*American Needle* is the case that will serve as the vehicle for the Supreme Court's review and ultimate resolution of this issue.<sup>94</sup>

*American Needle* frames the issue as whether or not the NFL and its teams violated antitrust law when the teams collectively agreed to grant Reebok an exclusive apparel contract.<sup>95</sup> The consensus at the Supreme Court oral argument was that the issue concerned the plurality of actors required by Section I, or lack thereof, in the professional sports league setting.<sup>96</sup> A related issue centers on whether league activity should be described as concerted or unilateral.<sup>97</sup> From a broader perspective, the issue is whether or not professional sports leagues will be immune from Section I – that is, whether an antitrust suit against a sports league should be dismissed at the pleadings stage because the action is that of a single entity.<sup>98</sup>

To be sure, however, the main issue presented to the Supreme Court is whether the NFL and its member teams constitute one entity for antitrust purposes and are thus immune from Section I scrutiny.<sup>99</sup> *American Needle* contends the NFL is not a single entity and that its conduct constitutes concerted activity between a plurality of actors in violation of Section I.<sup>100</sup> *American Needle* grounds its argument largely on precedent and the separate ownership of the NFL teams.<sup>101</sup> Conversely, the NFL contends that it is indeed a

---

94. For a further discussion of *American Needle*, see *supra* notes 72-91 and accompanying text.

95. See *American Needle*, 538 F.3d at 740 (addressing issues presented on appeal).

96. See Oral Argument, *supra* note 9, at 4-5 (identifying issues presented by *American Needle*).

97. See *id.* (commenting on related issue). Chief Justice John Roberts articulated this issue as “Whether [the teams’ authorization of NFL Properties to grant an exclusive apparel license to Reebok] are horizontal agreements between the teams or whether they are a single entity’s articulation of the rules.” *Id.* at 11.

98. See *id.* at 56 (noting larger issue at play in case). Justice Ginsburg noted the importance of resolving this issue because of the exceedingly costly discovery process that accompanies antitrust litigation. See *id.* at 21 (“But once you say no [on the single entity issue], it’s got to be a rule of reason analysis, then you have discovery, which can be costly.”). This larger issue is simply another way of asking whether sports leagues should be subject to rule of reason analysis or be the beneficiaries of a per se rule of legality. See *id.* (reframing issue in terms of standard of analysis to be applied).

99. For a further discussion of the specific issue presented to the Supreme Court by *American Needle*, see *supra* notes 95-98 and accompanying text.

100. See Oral Argument, *supra* note 9, at 20 (presenting arguments for *American Needle*). Necessarily, *American Needle* ardently emphasizes that league teams are separately owned entities, which it argues militates in favor of its argument. See *id.* at 21 (arguing against NFL as single entity).

101. See *id.* at 12 (supporting *American Needle*’s arguments). Glenn D. Nager, counsel for *American Needle*, summed up his client’s position by stating that:

single entity – a joint venture of thirty-two teams, but a single organization nonetheless.<sup>102</sup> The NFL maintains that its decisions are the lawful decisions of a lawful venture, and that they are aimed at promoting the organization's product.<sup>103</sup> The Supreme Court is expected to rule on this important issue in July 2010.<sup>104</sup>

### B. The NFL and its Teams Constitute a Single Entity

“The Pro-NFL argument” takes the position that the NFL and its member teams are one entity.<sup>105</sup> The crux of this argument is that, although they are separately owned, NFL teams work together to promote one product.<sup>106</sup> It follows that, the league product –

---

“[NFL] teams are separately owned. They are separate decision-makers joining together, and they are making a decision about how they are going to jointly produce something or not produce something. And that's what makes it concerted activity under this Court's consistent teachings. The distinction between unilateral activity under Section I and concerted activity under Section I has consistently been [based on collective ownership of assets].”

*Id.*

102. *See id.* at 38 (characterizing NFL as joint venture organization).

103. *See id.* at 39 (establishing basis for NFL Argument). Gregg H. Levy, counsel for the NFL, summed up his client's position by stating that:

“[The] decisions by the venture about the venture's product are unilateral venture decisions, unilateral venture actions. They are not concerted actions of the venture's members . . . . The purpose of the licensing [action at issue] is to promote the product. It's to promote the game. And the NFL member clubs are not independent sources of economic power in generating that game.”

*Id.* at 39-44.

104. *See* Jess Bravin, *Justices Look Tough in NFL Antitrust Case*, THE WALL STREET JOURNAL, January 14, 2010, at B4 (discussing expected issuance of opinion in *American Needle*).

105. *See* Roberts '89 Tulane Article, *supra* note 41, at 120 (establishing single entity status of professional sports leagues as leading to league action being exempt from Section I scrutiny); Roberts UCLA Article, *supra* note 8, at 260 (proclaiming that sports leagues should be regarded as single entities); Roberts '86 Tulane Article, *supra* note 71, at 567 (finding that professional sports leagues should be thought of as single economic firms despite having separate ownership); Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 1015 [hereinafter Roberts USC Article] (stating that single entity defense is just one way to arrive at conclusion that internal leagues rules should not be scrutinized under Section I); Grauer Michigan Article, *supra* note 33, at 2 (supporting view that sports leagues as single entities is consistent with antitrust policy); Grauer Tulane Article, *supra* note 92, at 114-15 (concluding that single entity status should be afforded to sports leagues); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1060 [hereinafter Weistart Article] (advocating for sports league single entity status).

106. *See* Roberts '89 Tulane Article, *supra* note 41, at 136 (describing league product as matrix of interrelated regular season and playoff games that require cooperation of each team); Roberts UCLA Article, *supra* note 8, at 229 (“The league product also requires complete integration of all the member clubs, none

NFL football – is thus the product of one entity, which competes against a plethora of other products in the vast entertainment industry.<sup>107</sup> The Pro-NFL argument maintains that one entity, the NFL, which produces one product, NFL football, needs the cooperation of all thirty-two of its teams to produce its product.<sup>108</sup>

The main proponent of the Pro-NFL argument, from a scholarly point of view, is Dean Gary R. Roberts of Indiana University School of Law.<sup>109</sup> Dean Roberts has published numerous articles on the application of antitrust law to professional sports leagues and has testified before many courts on the issue.<sup>110</sup> The Pro-NFL

---

of which is by itself able to produce anything.”); Roberts ’86 Tulane Article, *supra* note 71, at 573 (stating that league cooperation is only way of producing league entertainment product); Grauer Michigan Article, *supra* note 33, at 25 (citing need for economic cooperation among NFL teams); Weistart Article, *supra* note 105, at 1017 (suggesting grounds for supporting intraleague cooperation).

107. See Roberts ’89 Tulane Article, *supra* note 41, at 136 (referring to product league places in entertainment market); Roberts UCLA Article, *supra* note 8, at 227 (noting that nothing other than NFL as it can produce entertainment product called football); Roberts ’86 Tulane Article, *supra* note 71, at 573 (stating that league cooperation is only way of producing league entertainment product); Roberts USC Article, *supra* note 105, at 1015 (finding that production of league product requires cooperation of all teams); Grauer Michigan Article, *supra* note 33, at 6 (noting that NFL competes with other entertainment entities in entertainment market); Grauer Tulane Article, *supra* note 92, at 102 (noting that unaffiliated teams could not hope to produce product that would be accepted by consumers in entertainment market); Weistart Article, *supra* note 105, at 1024 (explaining how league product competes with other entertainment products).

108. See Roberts ’89 Tulane Article, *supra* note 41, at 136 (reiterating requirement of cooperation to produce league entertainment product); Roberts UCLA Article, *supra* note 8, at 227 (proclaiming that current league structure is only way to produce NFL football); Roberts USC Article, *supra* note 105, at 1015 (reiterating that production of league entertainment product requires cooperation of all teams); Grauer Michigan Article, *supra* note 33, at 6 (listing entertainment competitors of NFL); Grauer Tulane Article, *supra* note 92, at 102 (explaining how independent teams could not produce equivalent product).

109. See University of Indiana School of Law Faculty Profiles, <http://indy-law.indiana.edu/people/profile.cfm?Id=313> (last visited Sept. 4, 2009) (profiling Dean Gary Roberts). Dean Roberts has published numerous articles and book chapters on antitrust law as it relates to sports and sports leagues, most while he was a professor of law at Tulane University School of Law. See *id.* (detailing Roberts’ career). Dean Roberts is “a recognized expert in sports law” and has occupied many prestigious posts in this capacity, including president of the Sports Lawyers Association and chairman of the AALS Sports Law Section. See *id.* (listing posts held by Roberts). Even commentators who ardently disagree with Dean Roberts’ views recognize him as an expert and the main proponent of the Pro-NFL argument. See Lazaroff ASU Article, *supra* note 32, at 954 n.4 (“Professor Roberts has been a prolific and consistently ardent supporter of single entity status for sports leagues and an active critic of the major judicial decisions in this area.”); Goldman Article, *supra* note 14, at 762 (“Professor Roberts has been the most ardent supporter of the single entity defense for sports leagues.”).

110. See University of Indiana School of Law Faculty Profiles, *supra* note 108 (listing sample of Roberts’ published works).

side argues two main points: first, that sports leagues, the NFL in particular, should be considered as single entities in terms of Section I.<sup>111</sup> Second, because sports leagues should be regarded as single entities, the Pro-NFL argument follows that their governance rules should be thought of as per se legal.<sup>112</sup>

In making its first point, the Pro-NFL side begins by emphasizing that sports leagues are fundamentally unique business organizations.<sup>113</sup> This is because they exhibit characteristics of many different business forms.<sup>114</sup> Yet, they do not resemble any common business form in all respects.<sup>115</sup> Therefore, the unique nature of the NFL requires special consideration by courts in terms of anti-trust law application.<sup>116</sup>

In attempting to classify teams within a league, the Pro-NFL side maintains that a sports team, by itself, is incapable of any productive activity.<sup>117</sup> Without any manner of independent economic

111. See, e.g., Roberts '89 Tulane Article, *supra* note 41, at 144 (advocating for consideration of NFL as single entity). The Pro-NFL argument justifiable resembles the NFL's argument before the Supreme Court in *American Needle*. See Oral Argument, *supra* note 9, at 38-39 (setting forth NFL's single entity argument).

112. See Roberts '89 Tulane Article, *supra* note 41, at 144 ("[Internal] league rules should be per se legal under Section I."); Roberts UCLA Article, *supra* 8, at 239 (noting that courts do not find leagues to be per se illegal cartels but then contradictorily do not finding their rules to be per se legal); Roberts '86 Tulane Article, *supra* note 71, at 582 (explaining that intra-organizational decisions of single entities should not be subject to Section I review); Roberts USC Article, *supra* note 105, at 950 ("[L]eague practices should be per se lawful when reasonably related to the operation of the league's joint venture business.").

113. See Roberts '89 Tulane Article, *supra* note 41, at 120 ("[There are] fundamental facts distinguishing a sports league from any other type of business organization in our economy."); Roberts UCLA Article, *supra* note 8, at 226 (declaring that sports league are fundamentally different from any other business enterprise); Roberts '86 Tulane Article, *supra* note 71, at 585 ("The unique structural and relational characteristics of a sports league. . .defy its being analogized to any other type of business organization."); Grauer Michigan Article, *supra* note 33, at 24 (considering unique aspects of professional sports leagues); Wiestart Article, *supra* note 104, at 75 (criticizing legal decisions not taking league's unique makeup into account).

114. See, e.g., Grauer Michigan Article, *supra* note 33, at 4 (analogizing sports league to law firm).

115. See Roberts UCLA Article, *supra* note 8, at 239-61 (explaining that leagues are not cartels, trade associations, joint ventures, commonly owned groups of separate firms, or partnerships).

116. See 538 F.3d at 742 (struggling to apply antitrust law to NFL because of "[The] many and conflicting characteristics that professional sports leagues generally exhibit."); *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d 593 at 599 (finding characterization of sports league for antitrust purposes is tough question because of contradicting characteristics that sports leagues exhibit).

117. See Roberts '89 Tulane Article, *supra* note 41, at 120 ("[A] league member team does not and cannot lawfully have any relevant independent productive function."); Roberts UCLA Article, *supra* note 8, at 227 (finding that individual sports teams are incapable of independent economic activity); Roberts '86 Tulane

activity, a team's only avenue for viability is its association with the league.<sup>118</sup> Imagine, as Roberts suggests, that there is only one football team in existence.<sup>119</sup> This team would be stagnant and have no economic purpose because it would need at least one other team with which to compete against.<sup>120</sup>

When adding a second team to the mix, one would consider the two teams to be "competitors."<sup>121</sup> Despite the common academic understanding of economic competitors, Roberts asserts that NFL teams are not economic competitors in the way contemplated by antitrust law.<sup>122</sup> To support this point, Roberts contends that competition is not synonymous with rivalry.<sup>123</sup> Supportive is the work of Robert Bork, who argued that, "The antitrust proscription against actions injurious to competition should not be read to outlaw every integrative or cooperative effort."<sup>124</sup>

---

Article, *supra* note 71, at 564 (dismissing argument that member clubs are independent economic firms); Roberts USC Article, *supra* note 105, at 985 ("An individual member club in a league is incapable of independent production."); Grauer Michigan Article, *supra* note 33, at 16 (agreeing with court's finding that NFL teams can productively operate individually); Grauer Tulane Article, *supra* note 92, at 89 (noting that sports teams cannot produce anything alone).

118. *See, e.g.* Roberts '89 Tulane Article, *supra* note 41, at 120-21 (maintaining teams are not productive without league association); Grauer Tulane Article, *supra* note 92, at 89 (arguing that joint production does not imply Section I liability where joint production is necessary and only form of production).

119. *See* Roberts UCLA Article, *supra* note 8, at 227 (providing example single team example to show that NFL teams are incapable of independent economic activity).

120. *See Id.* (arguing that football team, by itself, has no profit potential because it is incapable of creating revenue without other teams). *But see* Lazaroff ASU Article, *supra* note 32, at 960 (arguing that individual teams do have economic purpose, absent league structure, because they can perform for profit either against themselves or against others without presence of league).

121. *See* Weistart, *supra* note 105, at 1018-19 (noting how teams in league only compete on field); Roberts UCLA Article, *supra* note 8, at 234 (stating that league teams compete athletically).

122. *See* Roberts UCLA Article, *supra* note 8, at 231 (proclaiming that league teams cannot be natural economic competitors); Roberts '86 Tulane Article, *supra* note 71, at 575 (arguing that NFL teams are not horizontal competitors in antitrust sense); Roberts USC Article, *supra* note 105, at 989 ("It is counterintuitive to operate on the premise that each member club is an independent economic competitor of, and required to compete with, the other clubs"); *see also* Grauer Michigan Article, *supra* note 33, at 25 (supporting court findings that NFL teams are not typical economic competitors); Weistart Article, *supra* note 105, at 1028 (suggesting NFL teams are not natural economic competitors).

123. *See* Roberts UCLA Article, *supra* note 8, at 232 (rejecting any definition of competition that equates it to rivalry). Dean Roberts distinguishes the fact that member teams of a league are "Vigorous athletic competitors" from the fact that "In no meaningful way. . . are the clubs natural economic competitors." *Id.* at 231.

124. *Id.* at 232. Robert Bork served as the Solicitor General of the United States from 1973-1977. *See* Robert H. Bork Biography, [http://www.hudson.org/learn/index.cfm?fuseaction=staff\\_bio&eid=BorkRob](http://www.hudson.org/learn/index.cfm?fuseaction=staff_bio&eid=BorkRob) (last visited Oct. 2, 2009)

Having established that league teams do not compete with one another economically, the Pro-NFL side next turns to the cooperation between teams that is necessary to produce the league product.<sup>125</sup> Roberts explains that the cooperation between league clubs is both necessary and legal.<sup>126</sup> He analogizes sports leagues to legal partnerships, whose decisions are not scrutinized under Section I, because they reflect the collective judgment of the various members of a single entity.<sup>127</sup> In arguing for single entity status, Roberts' ultimate selling point is that the league product, NFL Football, cannot be produced without the full cooperation of its member teams.<sup>128</sup> Implicit in this conclusion is the assertion that the league as a whole

---

(chronicling career of Robert Bork). He was also the acting Attorney General of the United States from 1973-1974, and served on the D.C. Circuit from 1982-1988. *See id.* (listing achievements of Robert Bork).

125. For a further discussion of necessary league and team cooperation, see *supra* notes 117-124 and accompanying text.

126. *See* Roberts '89 Tulane Article, *supra* note 41, at 120 ("The product of a league cannot be produced by any one member team, but rather is only produced by the complete integration and cooperation of each and every member of the league"); Roberts UCLA Article, *supra* note 8, at 229 (explaining that league product, NFL football, requires complete integration of all member clubs); Roberts '86 Tulane Article, *supra* note 71, at 589 ("The common purpose and source of economic power in a sports league derive from the inherently co-productive and wholly integrated nature of the league."); Roberts USC Article, *supra* note 105, at 1013 (noting that long run league efficiency depends on full cooperation of member teams); *see also* Grauer Michigan Article, *supra* note 33, at 25-26 (tracing evidence of need for economic competition among NFL teams); Grauer Tulane Article, *supra* note 92, at 84 (exploring competitive versus anticompetitive cooperation); Weistart Article, *supra* note 105, at 1041 (exploring sports team cooperation).

127. *See* Roberts UCLA Article, *supra* note 8, at 294:

[The] form of governance [used by the NFL] is quite similar to that used by partnerships . . . . In a partnership, major decisions are made by vote of the partners, who act as a governing board of the whole . . . . In . . . partnership . . . corporate organizations, the governing body is comprised of individuals whose mission is to manage the firm yet whose actual constituency is only one segment of the ownership of the firm. The same is true of the governing board of a sports league, whose members have been held to have the same fiduciary duty to the league as members of any corporate board.

128. *See* Roberts '89 Tulane Article, *supra* note 41, at 136 ("Every dimension of the production and marketing of every game must be expressly or tacitly agreed upon by every team in the league."); Roberts UCLA Article, *supra* 8, at 229 ("The league product also requires complete integration of all the member clubs."); Roberts '86 Tulane Article, *supra* note 71, at 590 ("The league product is indivisible, with no part attributable solely to the efforts of a single member club."); Roberts USC Article, *supra* note 105, at 986-87 ("Only when all of the joint producers agree to some method for determining where, when, between whom, and how every league game is produced can there be a league schedule and a valuable integrated league product."); *see also* Grauer Michigan Article, *supra* note 33, at 23 (noting that only total cooperation can produce NFL product); Grauer Tulane Article, *supra* note 92, at 92 (discussing league product as function of team cooperation).

is the lowest economic entity capable of producing the league product.<sup>129</sup> As such, league decisions should not be subject to Section I scrutiny because they are the internal decisions of a single entity – the only entity capable of making those decisions in order to produce its product.<sup>130</sup>

Further, the Pro-NFL side reads *Copperweld* and its progeny to work in favor of its single entity argument.<sup>131</sup> Roberts argues that the *Copperweld* holding promotes analyzing the economic realities of a situation over just the form.<sup>132</sup> Such a reading would effectively negate the Pro-American Needle side's contention that NFL teams are separate entities because they are separately owned.<sup>133</sup> Similarly, Professor Weistart maintains that language in *Copperweld* cap-

129. See Roberts UCLA Article, *supra* note 8, at 229 (“The league is the lowest indivisible economic unit capable of producing the league entertainment product.”); Roberts ’86 Tulane Article, *supra* note 71, at 573 (stating that league is lowest form of organization capable of producing league product).

130. See Roberts ’89 Tulane Article, *supra* note 41, at 119 (“Purely internal league rules or decisions that merely define the product that the league joint venture will produce, designate who will produce it, and outline when, where, and how it will be produced are merely the normal business decisions of the only economic entity capable of making those production decisions and as such ought to be beyond the reach of Section I.”); Roberts UCLA Article, *supra* note 8, at 247 (“[The NFL] should be regarded as a single business firm whose internal management decisions lack the necessary plurality of actors to implicate Section I.”); Grauer Michigan Article, *supra* note 33, at 33 (“The internal restraints and agreements made by the League are designed to promote efficiencies in attaining this end. They are only ancillary to the main purpose of producing a more marketable product. Viewed in this manner, these restraints should not be subject to successful challenge under the Sherman Act.”).

131. See, e.g., Grauer Tulane Article, *supra* note 92, at 107-08 (using *Copperweld* to support approach to single entity issue); Roberts ’86 Tulane Article, *supra* note 71, at 588-89 (interpreting *Copperweld* language to support functional instead of formal approach to single entity issue).

132. See Roberts ’86 Tulane Article, *supra* note 71, at 586 (“The Supreme Court noted. . . in [*Copperweld*] that characteristics of an organization which are merely the result of its voluntary choice in the pursuit of optimal efficiency are not relevant in determining if the enterprise is a single entity. Rather, the inherent economic realities of the intra-organizational relationship should govern, for otherwise form would be irrationally elevated over substance.”); Roberts ’89 Tulane Article, *supra* note 41, at 126 (arguing that an antitrust analysis purely based on formalistic factors like separate ownership was rendered invalid by *Copperweld*); see also Grauer Tulane Article, *supra* note 92, at 103 (discussing formalistic versus economic reality approach in light of *Copperweld*).

133. See Roberts ’86 Tulane Article, *supra* note 71, at 586 (“It is erroneous in a single entity analysis to look to whether member clubs of a league are separately organized, separately owned, or maintain separate accounting for profit and loss.”) Roberts then goes on to argue that the economic realities of professional sports leagues warrant concluding that the league and its member teams constitute a single entity for antitrust purposes. See *id.* at 589 (concluding that sports leagues are single firms after economic reality antitrust analysis).

tures the essence of the NFL and thus legalizes its form.<sup>134</sup> This language, he argues, works in favor of the Pro-NFL argument.<sup>135</sup>

After establishing the above argument, Roberts and the Pro-NFL side proceed to lobby for a per se legality rule for sports leagues.<sup>136</sup> Citing his earlier analysis, Roberts asserts that the league is the single, relevant entity for Section I analysis.<sup>137</sup> League rules, such as those regulating play location or broadcast restrictions, are aimed at “defining the league product.”<sup>138</sup> Because league rulings are those of a single entity attempting to manage its own operations, it follows that no Section I analysis is necessary and league rules should be per se legal.<sup>139</sup>

A second reason offered for a per se approach to sports leagues concerns unnecessary judicial oversight and involve-

134. See Weistart Article, *supra* note 105, at 1063 (referring to “no sudden joining of economic resources that had previously served different interests” language in *Copperweld*).

135. See *id.* (noting that “there is no ‘sudden joining’ of interests that previously were separate” in sports league context). Weistart argues that, because league constituent clubs were basically born together, there is no sudden joining of interests, and thus, there are no separate entities to consider. See *id.* at 1064 (concluding that NFL and its teams are one entity for antitrust purposes).

136. See Roberts ’89 Tulane Article, *supra* note 41, at 126-27 (supporting position that league rulings are per se legal); Roberts UCLA Article, *supra* note 8, at 240 (arguing that judicial rejection of per se antitrust approach to sports leagues is counterproductive); Roberts ’86 Tulane Article, *supra* note 71, at 577 (finding that per se approach to sports league antitrust legality is preferable); Roberts USC Article, *supra* note 105, at Section II (presenting case for per se legality of league decisions).

137. See Roberts ’89 Tulane Article, *supra* note 41, at 118 (“The league, not the individual club, is the relevant firm for purposes of antitrust analysis.”).

138. Roberts ’89 Tulane Article, *supra* note 41, at 119 (defining league rules as those that “define the product that the league . . . will produce, designate who will produce it, and outline when, where, and how it will be produced.”); Roberts ’86 Tulane Article, *supra* note 71, at 591 (noting that league rules are those that regulate internal rivalry of league); Roberts USC Article, *supra* note 105, at 975 (suggesting that league rules can pertain to both structure and operations); see also Grauer Michigan Article, *supra* note 33, at 24 (adding that league rules are necessary to equalize playing ability of various teams); Oral Argument, *supra* note 9, at 39 (explaining how league decisions are made to promote league product).

139. See Roberts ’89 Tulane Article, *supra* note 41, at 119 (noting that league rules are “merely the normal business decisions of the only economic entity capable of making those production decisions and as such ought to be beyond the reach of Section I.”); Roberts UCLA Article, *supra* note 8, at Section II-A (explaining that league rules are meant to regulate inter-enterprise rivalry and are thus beyond scope of Sherman Act); Roberts ’86 Tulane Article, *supra* note 71, at Section I-D (arguing that considering league rules as those of single entity does not make leagues immune from liability because actions can still be challenged under Section II of Sherman Act); Grauer Michigan Article, *supra* note 33, at 35 (analogizing sports league rules to internal law firm rules which are meant to promote efficiencies and are thus legal); Grauer Tulane Article, *supra* note 92, at 105 (criticizing approach that allows Section I scrutiny of internal league decisions).

ment.<sup>140</sup> Recall that sports leagues already incur enormous costs associated with antitrust litigation.<sup>141</sup> Subsequently, not dismissing a Section I claim against a sports league early on will further burden the league with superfluous litigation costs.<sup>142</sup> Additionally, antitrust objectives are not accomplished when courts interfere with the legitimate actions of business entities.<sup>143</sup>

The third and perhaps most plausible argument advanced by the Pro-NFL side in support of a per se approach to sports league antitrust claims is based on the “Consumer Welfare Model.”<sup>144</sup> Most, including the Supreme Court, have agreed that consumer wealth maximization is the primary goal of the Sherman Act.<sup>145</sup> As

140. See Roberts ’89 Tulane Article, *supra* note 41, at 145 (explaining that not adopting per se approach will lead to “risk of having misguided or ill-motivated courts overturn generally efficient league rules.”); Roberts UCLA Article, *supra* note 8, at 264-65:

As a practical matter, judicial review and regulation of the countless interpersonal and interdepartmental rivalries existing in any business is impossible. The judicial system simply could not handle the volume of cases that would arise each time [someone claims that a firm’s decision] as to promotion, profit division, budgeting, plant location, pricing, and company equipment purchases caused a reduction in some intrafirm rivalry.

See Also Roberts ’86 Tulane Article, *supra* note 71, at 582-84 (advocating for preclusion of judicial second-guessing of internal management decisions); Roberts USC Article, *supra* note 105, at 989 (“Because member clubs must act jointly to produce the league product, they should have the same freedom as any other firm to make internal business decisions without judicial second guessing.”); Grauer Michigan Article, *supra* note 33, at 9:

Consequently, courts should not interfere with unilateral decisions on how a business should operate unless the business possesses monopoly power and the questioned practices are intended to restrict output. Judicial interference with practices that are not aimed at restricting output and that are therefore attempts to promote efficiency will quite likely interfere with the dynamics of the market place and produce anticompetitive effects.

141. For a further discussion of costs incurred by sports leagues relating to antitrust suits, see *supra* notes 7-9 and accompanying text.

142. See Roberts UCLA Article, *supra* note 8, at 269-70 (noting that prospect of antitrust litigation constitutes major, almost daily, burden on NFL).

143. See *id.* at Section II (explaining negative effects of judicial review of sport league antitrust cases).

144. See Roberts ’89 Tulane Article, *supra* note 41, at Section II-A (noting that consumer welfare must govern analysis of antitrust claims against professional sports leagues); Roberts USC Article, *supra* note 105, at Section II-A (covering policy implications of antitrust claims against professional sports leagues); see also Grauer Michigan Article, *supra* note 33, at Section I-B (answering question of why consumer wealth maximization is only proper goal of antitrust policy enforcement); see generally Grauer Tulane Article, *supra* note 92 (discussing sport leagues single entity status with specific consideration paid to consumer welfare).

145. See Roberts ’89 Tulane Article, *supra* note 41, at 121:

Supreme Court decisions over the past decade and a half have established that the Sherman Act is designed almost exclusively to maximize consumer welfare. Even most populist dissenters from this approach, who

such, identification of an adverse impact on consumer wealth should be the chief consideration in antitrust analysis.<sup>146</sup> The internal league decisions of the NFL are aimed at promoting the league product, stimulating inter-organizational rivalry, and boosting efficiency, all in an effort to benefit the consumer.<sup>147</sup> Thus, subjecting sports leagues to superfluous costs stemming from unnecessary antitrust litigation would be injurious to consumer wealth because it would raise the league's costs and otherwise adversely affect the league's product.<sup>148</sup> Roberts thus concludes that internal league rules should be *per se* legal in terms of antitrust law so as to maintain the benefit to the consumer.<sup>149</sup>

---

believe that social and political goals should also play some role in antitrust enforcement, acknowledge that consumer welfare is and should be the primary goal.

*See also* Roberts '86 Tulane Article, *supra* note 71, at 579 ("The Sherman Act is primarily, if not exclusively, a statute designed to maximize consumer welfare."); Roberts USC Article, *supra* note 105, at 984-85 ("Some scholars maintain that there are social and political goals which should play a role in antitrust enforcement policy, but even these dissenters recognize that the economic interests of the consumer should be the primary goal."); Grauer Michigan Article, *supra* note 33, at 14 ("Only a consumer wealth maximization policy can give predictability and consistently procompetitive results.").

146. *See* Roberts '89 Tulane Article, *supra* note 41, at 121 ("Consumer welfare analysis should determine whether or not internal league rules will be treated as *per se* legal. To allow the analysis to turn on some other standard that has no relationship to the overriding consumer welfare policy of antitrust law would be arbitrary, irrational, and illegitimate."); Roberts '86 Tulane Article, *supra* note 71, at 579 ("The question of whether sports leagues should be treated as single entities or perpetual conspiracies when they make league management decisions ought to be resolved through an analysis of which approach is most consistent with consumer welfare."); Roberts USC Article, *supra* note 105, at 985 ("The lawfulness of a sports league practice should be judged on whether the practice on balance enhances or retards consumer welfare."); *see generally* Grauer Tulane Article, *supra* note 92 (applying consumer welfare considerations to sport league antitrust analysis).

147. *See* Roberts '89 Tulane Article, *supra* note 41, at 140 (noting that internal league rules are meant to promote efficiency); Roberts UCLA Article, *supra* note 8, at 237 (supporting court decisions finding internal league rules promote efficiency). Roberts notes that team competition, in whatever miniscule form it exists, is like competition among different sales departments of the same organization: intra-organizational rivalry is allowed within the larger organization so as to provide incentives for performance and thereby increase efficiency and produce a better product for the customer at a lower cost. *See id.* at 574-76 (explaining team competition as legal); *see also* Roberts USC Article, *supra* note 105, at 968 ("Virtually every league rule or practice reduces intraleague rivalry.").

148. *See* Roberts USC Article, *supra* note 105, at 1015 (finding that application of Section I to internal league rules is illogical, counterproductive, and detrimental to consumer welfare).

149. *See* Roberts '89 Tulane Article, *supra* note 41, at 145 (concluding that not employing *per se* approach can only injure consumer welfare to detriment of antitrust policy); Roberts UCLA Article, *supra* note 8, at 296 (noting that "The proper standard should be that all sports league rules, decisions, or practices are presumed to be the internal operational actions of a single firm" and only in ex-

The Pro-NFL Argument does not draw its muster solely from scholarly opinion, although it is admittedly top-heavy in this regard.<sup>150</sup> A recent case that addressed the antitrust status of a professional sports league, albeit the NBA as opposed to the NFL, was *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Assoc.*<sup>151</sup> In that case, the Seventh Circuit explored the legality of an exclusive television broadcast contract entered into by the league.<sup>152</sup>

The Seventh Circuit declared that the NBA's conduct was permissible after likening the league to a parent of a fast food restaurant chain.<sup>153</sup> To solidify the actions of the league as the actions of one entity, the court turned to the league's collective production of a single entertainment product.<sup>154</sup> The Seventh Circuit thus concluded the league's exclusive broadcast contract looked more like the legal decision of one company trying to compete in its market than the illegal concerted decision of numerous actors.<sup>155</sup>

Support for the Pro-NFL argument also comes from two persuasive dissenting opinions.<sup>156</sup> Justice William Rehnquist, for exam-

---

traordinary circumstances should "consumer-welfare-oriented rule of reason" approach be employed).

150. See Roberts '86 Tulane Article, *supra* note 71 (conceding that most courts have found against sports leagues on single entity issue but growing weight of scholarly opinion is to contrary); Goldman Article, *supra* note 14, at 761 ("All of the major articles exclusively addressing the single entity issue have recommended that leagues be treated as single entities for most, if not all, league decisions.").

151. See *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d 593 at 593 (holding that professional sports leagues are single entities for antitrust purposes). This case supports the Pro-NFL side because of the similarities between the two leagues and because the court in *Chicago Prof'l Sports Ltd. P'ship* made no mention of limiting its holding to basketball leagues. See *id.* (neglecting to limit holding to NBA).

152. See *id.* at 595.

153. See *id.* at 598 (likening sports leagues to fast food restaurant chains). The court found that "[The] functions of independent team ownership do not imply that the league is a cartel, however, any more than separate ownership of hamburger joints . . . implies that McDonald's is a cartel." *Id.* Finding that the league and its teams comprise one entity, the court then proclaimed that antitrust law encourages cooperation inside a company so as to facilitate competition between it and other companies in the same market. See *Id.* (concluding on single entity determination).

154. See *id.* ("We see no reason why a sports league *cannot* be treated as a single firm in this typology. It produces a single product.") (emphasis in original). Because the court saw fit to characterize the league as a single firm competing in a market for entertainment, it found that cooperation amongst the different teams was essential. See *id.* (finding cooperation essential to firm competing in market).

155. See *id.* (accepting single entity defense).

156. See *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari) [hereinafter Rehnquist dissent] (advocating for use of single entity status for NFL); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1405 (9th Cir. 1984) (Williams, J., concurring in part, dissenting in part) [hereinafter Williams dissent] (detailing practical reasons in favor of viewing NFL as single entity).

ple, considered the NFL to be a joint venture and thus incapable of illegal concerted action.<sup>157</sup> He incorporated into his reasoning the idea that the NFL produces one product – NFL Football – which competes in the entertainment market.<sup>158</sup> Rehnquist considered this arrangement, where “The league competes as a unit against other forms of entertainment,” to be a “matter of necessity.”<sup>159</sup> Although he would have applied the rule of reason approach to the NFL, he agreed with the Pro-NFL argument that agreements in the sports context should be valid because they benefit the consumer welfare.<sup>160</sup> Ultimately, Justice Rehnquist would have approved of the league rule in question because such rules do not violate anti-trust laws.<sup>161</sup>

Judge Spencer Williams of the Ninth Circuit has also turned in a strongly worded dissent in favor of the single entity defense.<sup>162</sup> Like Dean Roberts, Judge Williams lobbied against an “unwarranted emphasis upon the formalistic aspects of the relationship of the NFL and the member clubs.”<sup>163</sup> Similarly, he found that NFL clubs are not competitors in the economic sense.<sup>164</sup> Judge Williams’ own words provide clarity on his adoption of the Pro NFL Argument:

---

157. See Rehnquist Dissent, *supra* note 156, at 1077 (describing NFL owners as “joint venturers”). Justice Rehnquist devoted much of his opinion to distinguishing competition on the field versus the economic competition that is the basis of the Sherman Act. See *id.* (noting NFL’s engagement in permissible form of competition).

158. See *id.* (“The NFL owners are joint ventures who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market.”).

159. Rehnquist Dissent, *supra* note 156, at 1077. Rehnquist explains that the cooperation between NFL teams is “necessary to permit the league to create an appealing product in the entertainment market.” *Id.* Further, he notes that, “NFL Football is a different product from what the NFL teams could offer independently.” *Id.*

160. See *id.* at 1976-79 (discussing application of Rule of Reason in present case and benefit to consumer welfare that would result).

161. See generally *id.* (discussing league’s single entity status, consumer welfare implications, and viability of rule in question).

162. See generally Williams Dissent, *supra* note 156 (advocating for single entity defense).

163. *Id.* at 1404. Judge Williams argues that a court should place more emphasis on the “significant interdependency of the member clubs and the indivisibility of the clubs with the NFL.” *Id.*

164. See *id.* at 1405 (commenting that profound interdependency between NFL teams supports conclusion that they are not economically meaningful competitors). Conversely, the majority believed that NFL teams compete in various ways off the field. See *id.* at 1390 (listing ways in which NFL teams compete in economically meaningful ways).

[F]unctionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the wholes “downstream output”. In the case of the member clubs, this “downstream output” is professional football, and the organ of regulation is . . . the N.F.L. There is virtually no practical distinction between the League . . . and the member clubs; the N.F.L. represents to all clubs . . . the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.<sup>165</sup>

Finally, Judge Williams echoed the conclusion of the Pro-NFL side that the single entity defense should apply to the NFL and its member teams.<sup>166</sup>

### C. The NFL and its Teams Constitute Separate Entities

While Dean Gary Roberts is largely considered to be at the forefront of the Pro-NFL argument, Professor Daniel E. Lazaroff of Loyola Law School in Los Angeles is arguably Roberts’ antithesis.<sup>167</sup> Like Roberts, Professor Lazaroff is considered an expert scholarly commentator in the fields of sports and business law.<sup>168</sup> Indeed, Roberts and Lazaroff have spent a great deal of time arguing sports law issues, which makes it appropriate to use their articles as the vehicle for analyzing their respective positions.<sup>169</sup>

---

165. *Id.* at 1406. Judge Williams continued by noting that NFL teams cannot compete economically, because the only product that is in their separate interests to produce can result only as a fruit of their joint efforts. *See id.* at 1407 (discussing unity of economic interests between league teams).

166. *See id.* at 1405-07 (concluding that NFL and its teams constitute single entity for antitrust purposes, placing them outside scope of Section I).

167. *See* Roberts’86 Tulane Article, *supra* note 71, at 563-66 (establishing his article as direct refutation of arguments and conclusions made by Professor Lazaroff).

168. *See* Loyola Law School of Los Angeles, Faculty Profiles, <http://www.lls.edu/academics/faculty/lazaroff.html> (last visited Sept. 4, 2009) (detailing Lazaroff’s career). Professor Lazaroff is the director of Loyola Law School’s Sports Law Institute. *See id.* (listing Lazaroff’s position). He has written extensively in the areas of antitrust and sports law and is a member of the Sports Lawyers Association of America. *See id.* (chronicling Lazaroff’s achievements). Using Professor Lazaroff’s arguments as the example of the Pro-American Needle argument is especially convenient since he, at numerous times, takes direct exception with Dean Roberts’ views, and vice versa. *See generally* Lazaroff ASU Article, *supra* note 32 (refuting assertions made by Roberts).

169. *See* Lazaroff ASU Article, *supra* note 32, at 957 (admitting direct disagreement with Roberts on fundamental points concerning antitrust application to pro-

“The Pro-American Needle” argument concludes that professional sports leagues and their teams should be viewed as separate entities.<sup>170</sup> The core of the Pro-American Needle position is that professional sports teams are separate economic entities capable of competing against each other both on and off the field of play.<sup>171</sup> Ultimately, this argument ardently contends that a rule of reason, and not a *per se* rule approach, should be used in the antitrust analysis of professional sports leagues.<sup>172</sup>

Much of the Pro-American Needle argument is concerned with casting doubt on the single entity theory championed by the Pro-NFL side.<sup>173</sup> The first step is to characterize NFL teams as separate

---

fessional sports leagues); Roberts '86 Tulane Article, *supra* note 71, at 563-66 (noting difference of opinion with Lazaroff on single entity and other sports league antitrust issues).

170. See generally Lazaroff ASU Article, *supra* note 32 (detailing reasons for rejecting single entity defense); Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157 (1984) [hereinafter Lazaroff Fordham Article] (casting doubt on single entity defense); Goldman Article, *supra* note 14 (refuting single entity supporters and providing support for Pro-American Needle position); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991) [hereinafter Jacobs Article] (arguing against single entity defense because sports league teams are separate entities); 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 [hereinafter Edelman article] (advocating against use of single entity defense for NFL teams); see also Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137 (1999) [hereinafter Lazaroff Georgia Article] (exploring single entity defense among other sports league antitrust issues).

171. See Lazaroff ASU Article, *supra* note 32, at 954 (characterizing professional sports teams as separate actors capable of concerted activity for Section I purposes); Lazaroff Fordham Article, *supra* note 170, at 166 (noting that professional sports teams are separately owned and do not share unity of interest); Lazaroff Georgia Article, *supra* note 170, at 150-52 (suggesting that sports teams are economic rivals); Goldman Article, *supra* note 14, at 753-55 (explaining allegiance with Pro-American Needle side of single entity question); Jacobs Article, *supra* note 170, at 30 (“Single-entity status is inappropriate and unnecessary for professional sports leagues.”); Edelman Article, *supra* note 170, at 893 (declaring that courts should find that sports clubs are separate economic entities).

172. See Lazaroff ASU Article, *supra* note 32, at 963 (advocating for rule of reason approach rather than *per se* rule approach in sports law context); Lazaroff Fordham Article, *supra* note 170, at 162 (considering rule of reason versus *per se* rule debate in antitrust cases); Lazaroff Georgia Article, *supra* note 170, at 148 (“When dealing with antitrust claims regarding the business of sports, courts generally reject reliance on *per se* principles and almost always require plaintiffs to satisfy the full-blown rule of reason standard.”); Goldman Article, *supra* note 14, at 772-73 (advocating for rule of reason approach to sports antitrust cases); Jacobs Article, *supra* note 170, at 30 (supporting rule of reason analysis).

173. See Lazaroff ASU Article, *supra* note 32, at Section II (“Rejecting Single Entity Status for Sports Leagues.”); Lazaroff Fordham Article, *supra* note 170, at 175 (“Case law and public policy both militate in favor of a conclusion that sports teams, as separately owned and independent legal entities, are capable of combin-

entities capable of independent economic production.<sup>174</sup> Professor Lazaroff offers several thoughtful examples to support this Pro-American Needle contention: an all-star team that competes internationally, for example.<sup>175</sup> Other commentators also provide practical examples of how NFL teams are economically significant outside of a league setting.<sup>176</sup>

Chiefly, Lazaroff argues that it is possible for a professional team, like the Harlem Globetrotters, to be profitable outside of the league structure through barnstorming and other ad hoc arrangements.<sup>177</sup> Seemingly, while the decision to be part of a league likely adds to a team's profitability, a league is not a team's only option for profit.<sup>178</sup> The argument follows that, if teams were permitted to

---

ing for Section I purposes."); Goldman Article, *supra* note 14, at 761 (characterizing Pro-NFL argument's single entity theory as unpersuasive and potentially dangerous); Jacobs Article, *supra* note 170, at 29-30 (commenting on incorrectness of single entity theory); *see generally* Edelman Article, *supra* note 170 (explaining why single entity defense can never apply to professional sports leagues); *see also* Lazaroff Georgia Article, *supra* note 170, (extrapolating on independence of sports teams).

174. *See* Lazaroff ASU Article, *supra* note 32, at Section II-A ("Sports Teams can be Viable, Independent Economic Entities."); Lazaroff Fordham Article, *supra* note 170, at 175 (noting that NFL teams are not divisions of same organization and are not commonly owned or operated); Edelman Article, *supra* note 170, at 925 (concluding that sports clubs exhibit characteristics of separate economic entities).

175. *See* Lazaroff ASU Article, *supra* note 32, at 958-60 (offering examples to support assertions that it is incorrect to suggest that sports teams are without value unless they exist within league structure).

176. *See* Goldman Article, *supra* note 14, at 763-65 (casting doubt on Roberts' assertions that NFL teams are nothing outside of league structure). Professor Goldman argues against Dean Roberts' view by likening NFL teams to McDonald's franchises. *See id.* at 764 (providing McDonalds analogy). He contends that independent McDonald's franchises are considered separate entities, yet likely would be less productive economically outside of the parent enterprise. *See id.* (concluding that McDonald's franchises, like NFL teams, can operate outside parent structure). Professor Jacobs also joins this argument. *See* Jacobs Article, *supra* note 170, at 30 (arguing that distinctions between NFL and other joint ventures are facially superficial).

177. *See* Lazaroff ASU Article, *supra* note 32, at 959 (discussing barnstorming and ad hoc team capabilities). Other examples of team profit potential external of the league context include: (1) professional players organizing games to raise funds for charity, (2) independent college teams like Notre Dame that are not associated with a particular conference, (3) all-star teams organized to play in extra-league or international competition, and (4) intra-squad scrimmages. *See id.* (listing profitable team ad hoc arrangements). The Harlem Globetrotters fit number (3) above, and are profitable despite not belonging to a particular league. *See* Jack McCallum, *Surely They Jest: The Globetrotters Want to be the Best at a lot More than Clowning Around*, SPORTS ILLUSTRATED, Mar.19, 2001, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1022014/index.htm> (detailing financial and athletic history of Harlem Globetrotters).

178. *See* Lazaroff ASU Article, *supra* note 32, at 962 (arguing for team profit potential outside of league context). Lazaroff notes that:

barnstorm, meaning play outside of the league, they would.<sup>179</sup> This line of reasoning goes to show that individual teams are capable of producing a sports-entertainment product outside the league context.<sup>180</sup> This is because fans are willing to pay to see teams with talented athletes compete, regardless of league setting.<sup>181</sup> Ultimately, the Pro-American Needle side finds that “To state that teams are ‘nothing’ without a league is simply incorrect.”<sup>182</sup>

Next, the proponents of the Pro-American Needle argument contend that the separate ownership of the teams militates in favor of their argument.<sup>183</sup> At a first cut, they argue that team revenues and costs are largely a function of individual team activity.<sup>184</sup> Additionally, individual teams compete for things like players, coaches,

---

Barnstorming versus league play is a matter of choice, not an economic imperative. Individual teams must cooperate to produce a league product, but the same degree of integration is not essential to produce a sport for profit. It is truly a matter of choice.

*Id.*; see also Jacobs Article, *supra* note 170, at 54 (suggesting that league structure adds to profitability but teams have other options).

179. See Goldman Article, *supra* note 14, at 789-90 (evaluating league versus barnstorming options). Goldman notes that, once a team is part of a league, the team is prohibited from staging exhibitions because the league does not want to compete with its own members. See *id.* (explaining teams’ lack of barnstorming options).

180. See Goldman Article, *supra* note 14, at 771 (“Teams are capable of producing a sports entertainment product outside a league venture.”). Goldman sites numerous examples to refute Roberts’ basic premise and exemplify how teams can generate a successful entertainment product regardless of league affiliation. See *id.* at 771-72 (mentioning Notre Dame Football and United States Olympic Basketball as successful, non-league affiliated teams).

181. See Lazaroff ASU Article, *supra* note 32, at 960 (maintaining that notion of independent teams with talented players competing to draw fans is not so far-fetched as to be economically insignificant).

182. *Id.* at 959. Quite simply, Lazaroff argues that team owners could organize teams, schedule a game with another team, rent out venues, charge tickets for admission, and turn a profit, all external of a league context. See *id.* (supporting idea that teams can exist outside of league). Lazaroff bases this argument on the premise that, “A single team consisting of talented players could have great value, irrespective of any league affiliation” because fans are always willing to pay to see good athletes perform. *Id.* According to Lazaroff, “[I]n the eye of the consuming fan, the real product is the sport and not the league.” *Id.*

183. See Lazaroff ASU Article, *supra* note 32, at 962 (“[S]eparate ownership of teams alone may be adequate to qualify them for separate entity status.”); Lazaroff Fordham Article, *supra* note 170, at 175 (commenting that separately owned and operated teams are capable of combining for Section I purposes); Goldman Article, *supra* note 14, at 762 (casting doubt on Roberts’ dismissal of separate ownership as relevant in single entity determination); Jacobs Article, *supra* note 170, at 45 (“Nowhere else in law does the nature of an entity depend upon the particular subject matter that it happens to be considering but not upon its form or its general function.”).

184. See Lazaroff ASU Article, *supra* note 32, at 963 (detailing individual team revenue structure. Lazaroff notes that:

front office personnel, and fan support.<sup>185</sup> The Pro-American Needle side also argues that the “Function over Form” distinction presented in various Supreme Court cases does not hurt their argument.<sup>186</sup>

Like the Pro-NFL side, Pro-American Needle scholars believe that *Copperweld* acts in their favor.<sup>187</sup> Lazaroff and his cohorts stress that the *Copperweld* Court expressly limited its holding to the parent/wholly owned subsidiary relationship.<sup>188</sup> Further, they point out language in *Copperweld* runs contrary to the way the Pro-NFL side would seek to use the case to support their argument.<sup>189</sup> Chiefly, it is argued that the Pro-NFL side inappropriately makes

---

Expenses are not shared, profits and losses are not shared, local radio and televisions revenues are not shared, luxury box revenues are not shares, and parking and concessions revenue are not shared.

*Id.*; see also Goldman Article, *supra* note 14, at 763 (examining teams as independent marketplace entities that have personal stakes in terms of separate profits and losses); Jacobs Article, *supra* note 170, at 43 (noting that NFL teams compete in a variety of economically meaningful ways). *But see* Roberts '86 Tulane Article, *supra* note 71 (considering pooling of team revenues into league pot).

185. See Lazaroff ASU Article, *supra* note 32, at 963-64 (considering non-revenue oriented ways in which teams compete); Lazaroff Fordham Article, *supra* note 170, at 169 (citing judicial opinion that lists additional ways in which professional sports teams compete); Goldman Article, *supra* note 14, at 758 (finding that teams make their own decisions and affect their own profitability when considering ticket prices, player acquisitions and salaries, and hiring of coaches and front office personnel); Jacobs Article, *supra* note 170, at 45-46 (considering team competition that must be quelled by league rules).

186. See Lazaroff ASU Article, *supra* note 32, at 965 (downplaying function over form argument). For a further discussion on the function over form argument, see *supra* note 132 and accompanying text.

187. See Lazaroff ASU Article, *supra* note 32, at 965 (commenting that “An overly expansive and rather imaginative reading” of *Copperweld* is necessary to find that it supports Roberts’ view); Goldman Article, *supra* note 14, at 787 (arguing against Weistart’s reading of *Copperweld*); Jacobs Article, *supra* note 170, at 43 (characterizing Pro-NFL’s view of *Copperweld* as flawed); Edelman Article, *supra* note 170, at 926 (“Not only does denying the ‘single entity defense’ conform to the Supreme Court’s earlier holding in *Copperweld*, but this conclusion is sound public policy.”).

188. See Lazaroff ASU Article, *supra* note 32, at 965 (stressing express limitations in holding of *Copperweld* majority); Goldman Article, *supra* note 14, at 793-94 (arguing that *Copperweld* supports Pro-American Needle viewpoints); Jacobs Article, *supra* note 170, at 35-37 (highlighting narrowness of *Copperweld*).

189. See, e.g., Lazaroff ASU Article, *supra* note 32, at 965-66 (considering *Copperweld* language). Lazaroff notes that, “The idea that a parent company may ‘assert full control at any moment if the subsidiary fails to act in the parent’s best interests’ was critical to the [*Copperweld*] majority’s view.” *Id.* He then notes that, “In contrast, neither the league office nor any team within a league may simply ‘assert full control’ over another team whenever it chooses.” *Id.* at 966.

too much of the *Copperweld* Court's "unity of interest" line of reasoning.<sup>190</sup>

Nor does *Copperweld* stand for the functional, economic reality-based approach advocated by Dean Roberts, according to the Pro-American Needle side.<sup>191</sup> Rather, *Copperweld* presents a structured, formal review of business relationships without rising to the level of "form over function."<sup>192</sup> Even *Copperweld's* progeny, it is argued, has not affected its application to sports leagues.<sup>193</sup> Lazaroff concludes this line of reasoning by stating that, "Rather than characterize the status of teams within a league as the equivalent of a parent and its wholly-owned subsidiary, it seems more accurate to view them as independent firms whose cooperation produces a new and somewhat different product than any could produce alone."<sup>194</sup>

After refuting the single entity defense, the Pro-American Needle argument turns to the application of Section I to professional sports leagues.<sup>195</sup> They believe sports league antitrust cases should always result in a rule of reason analysis.<sup>196</sup> Generally, this ap-

190. *See id.* at 966 (casting doubt on Roberts' use of *Copperweld's* unity of interest reasoning to support his conclusions); Goldman Article, *supra* note 14, at 796 (applying unity of interest reasoning to sports leagues); Jacobs article, *supra* note 170, at 37 (arguing that unity of interest reasoning does not support Pro-NFL side); Edelman Article, *supra* note 170, at 893 (discounting complete unity of interest in sports leagues).

191. *See* Jacobs Article, *supra* note 170, at 41 (noting that *Copperweld* court did not adopt Dean Roberts' approach and actually paid no attention to economic realities of business relationships).

192. *See* Jacobs Article, *supra* note 170, at 41-42 (describing formal aspects, such as direct ownership, focused on by *Copperweld* court).

193. *See* Lazaroff ASU Article, *supra* note 32, at 970 ("[I]f [*Copperweld*] has had any effect on judicial treatment of teams within a league for antitrust purposes, that effect is not apparent from the recent cases."); Jacobs Article, *supra* note 170, at 37-39 (contending that case law since *Copperweld* does not help Pro-NFL argument); Goldman Article, *supra* note 14, at 771 ("Professor Roberts' standard . . . is inconsistent with Supreme Court authority.").

194. Lazaroff ASU Article, *supra* note 32, at 964. This quote is buttressed by arguments against applying *Copperweld* in the league context. *See id.* at 965-70 (providing reasons not to apply *Copperweld* to leagues). For instance, Lazaroff notes that *Copperweld* was limited to the parent-subsidiary context, because a parent can assert full control over a subsidiary at any time – something the NFL cannot do. *See id.* at 965-66 (explaining assertion of full control by parent). Professor Jacobs concludes by proclaiming that "[*Copperweld*] thus provides no support whatsoever to the advocates of single-entity treatment for professional sports leagues." Jacobs Article, *supra* note 170, at 37.

195. *See, e.g.*, Lazaroff ASU Article, *supra* note 32, at 970 (shifting analysis from single entity theory to rule of reason application).

196. *See, e.g.*, Lazaroff ASU Article, *supra* note 32, at 972 (discussing prevalence of rule of reason and referring to it as foundation of antitrust analysis). Professor Lazaroff is not arguing for the per se invalidity of all professional sports league rules, but rather, for a cautious rule of reason approach to each league decision. *See id.* at 963 (advocating for rule of reason approach). This approach, he argues,

proach tends to be preferable because sports league antitrust issues are confusing and have generated incongruous results.<sup>197</sup> This uncertainty militates in favor of a rule of reason approach instead of a per se rule approach.<sup>198</sup>

Lobbying further for a rule of reason approach, Professor Lazaroff notes that, “Although efficiencies may be realized from the contractual arrangements entered into by [league teams], there is also potential for anticompetitive consequences.”<sup>199</sup> Similarly, the Supreme Court prefers a rule of reason approach, except in a narrow category of cases that have nothing to do with the NFL and its teams.<sup>200</sup> Lazaroff concludes by proclaiming that, not only do the facts warrant a rule of reason analysis for professional sports leagues, but the desire to avoid negative policy implications also rationalizes this approach.<sup>201</sup>

---

will neither insulate all intra-league practices nor, at the other extreme, condemn all of them. *See id.* at 963-64 (discussing effects of rule of reason approach). As such, the standard rule of reason analysis would be the happy medium that allows “an antitrust plaintiff to proffer evidence to support a claim that the challenged practice is, on balance, unreasonable.” *Id.* at 964.

197. For a further discussion of the uncertainty concerning the application of antitrust law to professional sports league, see *supra* notes 76-78, 92-94 and accompanying text.

198. *See Lazaroff ASU Article, supra* note 32, at 975 (noting that analysis of sports league practices should follow rule of reason approach because unique structure of league sports has caused courts to be reluctant to apply per se rule); Lazaroff Fordham Article, *supra* note 170, at 175-76 (arguing for rule of reason approach to professional sports leagues); Goldman Article, *supra* note 14, at 796 (advocating for rule of reason approach to sports leagues because of important questions per se rule will miss); Jacobs Article, *supra* note 170, at 44 (explaining negatives to abandoning rule of reason approach).

199. Lazaroff ASU Article, *supra* note 32, at 964. Lazaroff warns that “Fans may have real choices and be insulated from the ‘take it or leave it’ attitude that might flow from monopoly of significant market power.” *Id.* at 964-65.

200. *See id.* at 971 (noting cases where Supreme Court relied on per se rules to resolve antitrust disputes). Only in cases where the illegality if the alleged conduct is so inherently anticompetitive – i.e. price fixing – does the Court prefer a per se rule approach. *See id.* (explaining reasons for per se rule in narrow, inherently anticompetitive circumstances). Rather, the Court has placed emphasis upon the rule of reason approach as “the main guidepost of antitrust analysis.” *Id.* at 972. The Court prefers this approach because it takes all things into account when balancing the “procompetitive and anticompetitive effects” of the challenged practice. *Id.*

201. *See id.* at 984 (summarizing reasons not to adopt Roberts’ approach). Lazaroff points out that, if courts were to adopt a per se rule of allowing sports leagues to operate without Section I scrutiny, they would, in later cases, “fail to even consider the anticompetitive effects of intraleague practices and the accompanying adverse effect on consumer wealth.” *Id.* He argues that rule of reason analysis is absolutely necessary because, while certain league agreements, such as the scheduling of games and the adoption of rules of play, may be valid and produce no anticompetitive effect, other agreements may have significant anticompe-

The Pro-American Needle supporters then present an extensive parade of horrors that would result if Roberts' proposed per se rule is adopted.<sup>202</sup> For instance, Professor Lazaroff argues that a per se rule would completely insulate intraleague practices from Section I scrutiny.<sup>203</sup> Similarly, Professor Jacobs maintains that, contrary to the Pro-NFL argument, a per se approach would not achieve the goals of the consumer welfare model.<sup>204</sup> Finally, Professor Goldman asserts that a per se approach would fail to address numerous considerations in future cases, such as the possible reasonableness of the action.<sup>205</sup>

The Pro-American Needle argument also finds support from the courts.<sup>206</sup> Indeed, the Pro-NFL side has conceded that the majority of judicial decisions interpreting the Section I status of sports leagues follows the Pro-American Needle argument.<sup>207</sup> One such case is *Sullivan II v. Nat'l Football League*.<sup>208</sup> In *Sullivan*, a team owner sued the league claiming that its policy against public ownership of teams illegally prevented him from selling a minority share

---

tive effects and need to be judicially scrutinized. *See id.* at 986 (arguing that per se rule should not be applied even if it is appropriate for some league decisions).

202. *See id.* at 963 (giving reasons in favor of adopting rule of reason instead of per se rule); Goldman Article, *supra* note 14, at 777 (detailing negative effects that would result following application of per se rule); Jacobs Article, *supra* note 170, at 47 n.85 (discussing reasons for courts' acceptance of rule of reason over per se approach).

203. *See* Lazaroff ASU Article, *supra* note 32, at 963 (citing Roberts' tendency to minimize important business aspects in an effort to insulate leagues from Section I scrutiny as reason to reject per se approach). Professor Lazaroff believes it is more appropriate to allow an antitrust plaintiff to proffer evidence in support of his claim then to bar him at the summary judgment stage. *See id.* at 964 (advocating for allowing plaintiff to present evidence to determine if challenged practice is unreasonable).

204. *See* Jacobs Article, *supra* note 170, at 48-49 (framing per se rule versus rule of reason issue as one concerning consumer welfare). Professor Jacobs then lists numerous Supreme Court antitrust cases in which a per se rule was rejected because the Court found it more appropriate to delve into the possible effects on consumer welfare, rather than create a blanket per se rule for all similar situations. *See id.* at 50-53 (listing Supreme Court cases rejecting per se rule in antitrust context).

205. *See* Goldman Article, *supra* note 14, at 778 ("[A per se standard] fails to recognize the significance of co-venturers' independent market-place identities, mistakenly assumes that joint ventures will always further consumer welfare, and threatens to make all vertical restraints per se legal and overrule other major bodies of established precedent.").

206. *See id.* at Section II-B (examining judicial treatment of single entity theory).

207. For a further discussion on the Pro-NFL side's concession that judicial weight backs the Pro-American Needle argument, see *supra* note 149 and accompanying text.

208. 34 F.3d 1091, 1099 (1st Cir. 1994).

in his team.<sup>209</sup> The First Circuit found that, under *Copperweld*, a presumption of single entity status for sports leagues does not exist because the teams are not the league's subsidiaries.<sup>210</sup>

The court resolved the single entity issue by asking whether or not the league's teams could compete with each other in the market in which the owner was alleging injury.<sup>211</sup> After analyzing the league's structure and the relevant market, the court found that teams could indeed compete with each other, economically as well as athletically.<sup>212</sup> Finding that NFL teams constitute separate entities that compete against each other in an economic sense gave the First Circuit a plurality of actors, and allowed it to conclude that the NFL's public ownership policy constituted an unreasonable restraint of trade.<sup>213</sup>

Another case that adopts the Pro-American Needle point of view is *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*.<sup>214</sup> In *LA Coliseum*, the officials of a sports arena alleged that an NFL rule restricting stadium tenancy violated antitrust law.<sup>215</sup> The court again looked to defining the proper market as well as the single

---

209. *See id.* at 1096 (claiming NFL violated Sherman Act by preventing Sullivan from selling his forty-nine percent share to public in equity offering). Although the league did not have an official policy against public ownership of teams, the commissioner wrote to the owner and strongly advised against such a move. *See id.* Consequently, the owner had to sell his team at a fire sale price. *See id.* He then brought an antitrust action against the league, contending that its public ownership rule, or policy, was a conspiracy in restraint of trade. *See id.*

210. *See id.* at 1099 (detailing court's rejection of NFL's *Copperweld* argument). *But see* Williams Dissent, *supra* note 155 (finding credence in NFL's *Copperweld* argument).

211. *See Sullivan*, 34 F.3d at 1099 ("The question [is]. . . whether or not the evidence can support a finding that NFL teams compete against each other for the sale of their ownership interests."). The court concluded on this issue by stating that, "The jury's finding that there exists competition between teams for the sale of ownership interests was based on sufficient evidence." *Id.*

212. *See id.* (maintaining that critical inquiry is whether alleged conspirators have unity of interest). The court noted that "NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under [Section I]." *Id.*

213. *See id.* at 1099-1103 (finding that league-wide policy to restrict public ownership of teams violated Section I). One factor weighing on the court's reasoning was that the policy produced anti-competitive market effects. *See id.* at 1101 (listing negative effects of policy on market). It found that there was a market for ownership interest in teams and the league's policy effectively injured competition in that market. *See id.* at 1100 (defining relevant market and injury to that market as a result of league anticompetitive action).

214. 726 F.2d 1381 (9th Cir. 1984).

215. *See id.* at 1385 (challenging NFL rule as unlawful restraint of trade in violation of Section I). The NFL rule in question stated that no NFL team can relocate to a venue within the home territory of another team without unanimous approval of the other teams. *See id.* (detailing allegedly unlawful NFL rule).

entity question.<sup>216</sup> In deciding the single entity issue, the Ninth Circuit found that the NFL constituted a group of separately owned teams and not one entity.<sup>217</sup>

The court agreed that NFL teams must cooperate to produce a product.<sup>218</sup> Still, it found that NFL teams are “sufficiently independent and competitive with one another to warrant rule of reason scrutiny under [Section I].”<sup>219</sup> In making its conclusion, the court considered the separate ownership of the teams and the negative policy implications that would result from a finding that the NFL teams constitute one entity.<sup>220</sup> Ultimately, the Ninth Circuit affirmed the district court’s rejection of the NFL’s single entity defense.<sup>221</sup>

#### IV. ORAL ARGUMENT<sup>222</sup>

##### A. On Behalf of American Needle<sup>223</sup>

Counsel for American Needle began his argument by solidifying the issue presented in the case: whether a plurality of actors

216. *See id.* (identifying legal questions at issue in case).

217. *See id.* at 1388-89 (upholding district court’s finding based on notion that other organizations had been found to violate Section I through similar acts). The court concluded by saying that, “While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.” *Id.* The court then cited Supreme Court authority to support its position that NFL teams are separate entities and not a joint venture. *See id.* at 1388 (quoting Supreme Court authority on issue).

218. *See id.* at 1389 (“It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a ‘product’ – the NFL season culminating in the Super Bowl.”).

219. *Id.* at 1399. The Ninth Circuit agreed with the district court that “The unique nature of the business of professional football made application of a per se rule inappropriate.” *Id.* at 1387.

220. *See id.* at 1390 (listing reasoning points). In making its ruling, the court relied on the fact that NFL teams are single entities and that profits and losses are not shared, despite the common sharing of revenue. *See id.* (noting reasons for rejecting single entity defense). Second, the court found that the teams compete vigorously off the field for players, coaches, and management personnel. *See id.* (finding ways in which teams compete and thus are not separate entities). Finally, the court voiced concern that a contrary ruling would completely insulate the NFL from Section I scrutiny. *See id.* at 1388 (citing policy reasons for rejecting NFL’s single entity defense).

221. *See id.* at 1389 (rejecting single entity defense by NFL).

222. *See generally* Oral Argument, *supra* note 9 (relating transcript of oral argument). Oral argument in the *American Needle* case took place before the Supreme Court on January 13, 2010. *See id.* at 1 (introducing case to Court for oral argument).

223. *See id.* at 3 (introducing argument of Petitioner). Counsel for American Needle was Glen D. Nager, Esq. *See id.* (introducing counsel for Petitioner). Mr. Nager is a partner at Jones Day and head of the firm’s Issues and Appeals Practice.

exists in the sports league context – i.e. whether Section I should apply to sports leagues.<sup>224</sup> American Needle’s chief allegation then presented:

The 32 teams of the National Football League are separately owned and controlled profit-making enterprises . . . . The 32 teams of the National Football League have entered into an agreement and control the use, collectively, of the trademarks and logos of the individual teams. And for that reason, there is concerted activity [between a plurality of actors in violation of Section I] that is involved.<sup>225</sup>

Much like Lazaroff and his supporters, Counsel for petitioner spent much time arguing that Supreme Court precedent militates in favor of American Needle’s case.<sup>226</sup> While mainly arguing against a single entity defense for sports leagues, counsel for petitioner also strongly advocated, in a related argument, for a rule of reason approach.<sup>227</sup> Ultimately, petitioner maintained that NFL teams are separately owned entities coming together to make a decision that restricts trade, and that such action is a fundamental violation of Section I.<sup>228</sup>

---

*See* Jones Day — Glen D. Nager, <http://www.jonesday.com/gdnager/>, (last visited Jan. 25, 2010) (describing Mr. Nager’s background and practice).

224. *See* Oral Argument, *supra* note 9, at 4-5 (identifying issue). Counsel for Petitioner also identified the secondary issue of whether or not the agreement between the teams to grant an exclusive license to Reebok constitutes concerted activity under Section I. *See id.* at 20 (identifying secondary issue).

225. *See id.* at 3-5 (presenting petitioner’s chief allegation of NFL’s concerted activity).

226. *See id.* at 4 (arguing that Supreme Court precedent justifies a finding that NFL’s conduct amounted to horizontal restraints on competition in violation of Section I).

227. *See id.* at 7 (presenting arguments against per se rule approach and for rule of reason approach). Counsel for petitioner then stated that:

If something is deemed not to be concerted conduct, then it’s per se, not subject to Section I, and per se legal. And I think for the Court’s jurisprudence over the last 30 years, the Court has been trying to get out of per se rules and have a more focused inquiry into what the anticompetitive effects and pro-competitive effects of a particular restraint are.

*Id.*

228. *See id.* at 12 (proclaiming that separate nature of NFL teams necessitates finding against league as single entity). Counsel for petitioner concluded by stating that:

[The teams of the NFL] are separate decision-makers joining together, and they are making a decision about how they are going to jointly produce something or not produce something. And that’s what makes is concerted activity under this Court’s consistent teachings. The distinction between unilateral activity under Section I and concerted activity

B. On Behalf of the United States Government<sup>229</sup>

The United States appeared as *amicus curiae* and supported neither party.<sup>230</sup> Indeed, the government rejected the notion that its position was “four square” in support of either party’s theory of the case or interpretation of the issue.<sup>231</sup> Nevertheless, the United States conceded that the acts of the NFL looked a lot like the acts of a single entity.<sup>232</sup> Each team’s seemingly lawful delegation of decision-making power to the Commissioner was the foundation of the government’s point of view.<sup>233</sup> The deputy solicitor general concluded by proffering that, while the delegations of authority by all thirty two teams to the commissioner looks like a single entity, the concerted conduct of two teams acting alone looks more like a Section I violation.<sup>234</sup>

C. On Behalf of the NFL<sup>235</sup>

Respondent contends that the NFL is a lawful joint venture whose decisions are unilateral venture actions and not the con-

---

under Section I has consistently been the distinction between ownership integration of assets and contract integration of assets.

*Id.*

229. *See id.* at 28 (introducing argument of United States as *amicus curiae*). Mr. Malcolm L. Stewart, Esq., deputy solicitor general, presented the argument for the federal government. *See id.* (introducing Mr. Stewart).

230. *See id.* (beginning government’s argument and showing that its intention was to stay neutral).

231. *See id.* (“The United States is not four-square in support of either party’s theory in this case.”).

232. *See id.* (noting that centralized decisions of league office look like conduct of single entity).

233. *See id.* at 28-29 (considering teams’ delegation of decision making authority to NFL commissioner and NFL Properties). The deputy solicitor general then noted that:

If the commissioner, pursuant to [his] delegation of authority, decides from which company to acquire paper for the League’s offices or decides what the weight scale for secretaries in the League offices should be, our view is that that’s the conduct of a single entity.

*Id.*

234. *See id.* at 31-32 (examining distinction that could decide case). The deputy solicitor general concluded by noting that:

In our view, the NFL commissioner, when carrying out those functions on behalf of the League, would be acting as a single entity, even though his power was derived from the consent of the teams. But if the Jets and Giants agreed among themselves as to what wages they would pay their secretaries or from whom they would buy paper, that would be an entirely different thing.

*Id.*

235. *See id.* at 37 (introducing argument of respondents). Counsel for the NFL was Gregg H. Levy, Esq. *See id.* (introducing counsel for Respondents). Mr. Levy is a partner at Covington & Burling LLP and is the chair of the firm’s

certed actions of the venture's members.<sup>236</sup> Counsel for respondent then stressed that the decision by the joint venture to use its intellectual property as a promotional tool was a lawful one.<sup>237</sup> Much like Roberts and his Pro-NFL supporters, Counsel for respondent urged that the teams of the NFL are not independent sources of economic power.<sup>238</sup> He further argued that the NFL is not seeking absolute immunity from antitrust claims, merely an appropriate ruling on its organizational structure.<sup>239</sup> Counsel for respondent concluded by analogizing the NFL to a law firm in order to drive home his point that, although organizationally complicated, the NFL is a single entity and should be afforded the same legal protections as other businesses.<sup>240</sup>

---

litigation group. See Covington & Burling LLP — Biographies — Gregg H. Levy, <http://www.cov.com/glevy/> (last visited Jan. 25, 2010) (describing Mr. Levy's background, practice, and professional experience).

236. See Oral Argument, *supra* note 9, at 38 (proposing the NFL is lawful joint venture). Counsel for respondent opened by noting that:

There is no dispute that the NFL, including its licensing arm, NFL Properties, is a lawful venture. If venture formation is not an issue, then decisions by the venture about the venture's product are unilateral venture decisions, unilateral venture actions. They are not concerted actions of the venture's members.

*Id.*

237. See *id.* at 39 (presenting respondent's venture promotion argument). Counsel for Respondent posed the question, "How should the league, how should the venture members, best promote the venture product?" *Id.* He then contended that the decision was made to use the teams' licenses for their intellectual property as a promotional tool, and that this decision was a lawful one. See *id.* (maintaining that decision to grant Reebok exclusive apparel licenses was lawful one). Implicit in this argument is the notion that the role of intellectual product licensing is to promote the venture's product. See *id.* at 41 (defining venture choices on how to promote venture product).

238. See *id.* at 44 (arguing that NFL teams are not economically independent). Counsel for Respondent made this argument by stating that, "The purpose of the licensing here is to promote the product. It's to promote the game. And the NFL member clubs are not independent sources of economic power in generating that game." *Id.*

239. See *id.* at 47 (clarifying that respondent does not seek absolute bar to antitrust claims). Counsel for respondent claimed that NFL is only seeking immunity from Section I claims when its member clubs are competing in the marketplace as a single entity and that NFL is still open to subsequent Section II attack. See *id.* at 48 (establishing limited antitrust immunity as scope of request).

240. See *id.* at 62-63 (analogizing NFL to law firm to show that decisions made by NFL are akin to those of other lawful ventures). Counsel for respondent noted that a law firm is a lawful venture that makes lawful decisions that restrict trade, such as deciding to do or not do business with a certain client. See *id.* at 62 (offering law firm analogy to make lawful venture point). Conversely, he then notes that the decision of two partners, who leave the firm and open their own practices, to not do business with a certain potential client, is not the lawful decision of the venture and is the kind of decision that should be subject to Section I review. See *id.* (offering distinction between lawful and unlawful venture decisions). The position of respondent is that the NFL teams acting together resemble the former,

## V. CONCLUSION

In the end, the single entity status of sports leagues, and the application of antitrust law to sports leagues in general, presents a jurisprudential challenge.<sup>241</sup> Understandably, this is an area of the law that has received much judicial and scholarly attention.<sup>242</sup> Most notably, a passionate debate over the single entity question has raged for years between two competing groups of distinguished scholars.<sup>243</sup> On May 24th, 2010, the Supreme Court reversed the lower court opinion in a 9–0 decision, holding that although licensing of intellectual property constitutes concerted action covered by § 1 of the Sherman Act, the competitive and non-aggregational economic character of the NFL teams in a substance (as opposed to form) analysis provides that the rule of reason should apply in this case.<sup>244</sup>

The ramifications of the Supreme Court's decision will forever affect the way sports leagues operate and the way consumers and other industries interact with them.<sup>245</sup> The Pro-NFL side believes that a professional sports league and its teams constitute a single entity for antitrust purposes.<sup>246</sup> This side bases its argument on the idea that league teams are functionally the same entity, with a complete unity of interest, because they must cooperate to produce one product.<sup>247</sup> The Pro-NFL side would have the Supreme Court approve the NFL's single entity status, and grant sports leagues per se antitrust legality in terms of Section I.<sup>248</sup>

---

lawful example, while two teams that act alone resemble the latter, unlawful example. See *id.* at 62-63 (concluding that NFL's collective decision of how to promote its product is decision of single entity).

241. For a further discussion of the ambiguity surrounding the application of antitrust law to professional sports leagues, see *supra* notes 76-78, 92-94 and accompanying text.

242. For a further discussion of the judicial and scholarly treatment of antitrust issues pertaining to the NFL, see *supra* notes 105-221 and accompanying text.

243. For a further discussion of the intense debate over the single entity question between the Pro-NFL and Pro-American Needle sides, see *supra* note 105-221 and accompanying text.

244. See *American Needle Inc. v. National Football League*, No. 08-661, slip op. at 17–20. For a further discussion of *American Needle*, see *supra* notes 72-91 and accompanying text.

245. For a further discussion of the importance of the Supreme Court's decision in *American Needle*, see *supra* notes 88-91 and accompanying text.

246. For a further discussion of the general Pro-NFL argument, see *supra* notes 105-166 and accompanying text.

247. For a further discussion of the Pro-NFL side's single entity argument, see *supra* notes 125-135 and accompanying text.

248. For a further discussion of the Pro-NFL side's per se rule argument, see *supra* notes 136-149 and accompanying text.

Conversely, the Pro-American Needle side finds that professional sports leagues and their teams are separate entities and are capable of conspiring for antitrust purposes.<sup>249</sup> This side bases its argument on the idea that league teams are separately owned and operated, have separate interests, and can produce an entertainment product on their own and without the league.<sup>250</sup> The Pro-American Needle side would have the Supreme Court deny the NFL's single entity status and adopt a rule of reason approach in all sports league antitrust cases.<sup>251</sup>

Ultimately, it seems appropriate to grant the NFL's single entity request and afford its league rules per se legality in terms of Section I.<sup>252</sup> The Pro-NFL side makes a strong argument when it asserts that NFL teams, although technically separate entities, must cooperate as one entity to produce the league product.<sup>253</sup> No single team can produce the product on its own and teams would have little if any value outside the league context.<sup>254</sup> Furthermore, since consumer welfare is the goal of antitrust law, and a contrary ruling would be injurious to consumer welfare, the Pro-NFL side is correct in stating that the Court should rule in the NFL's favor.<sup>255</sup> Despite judicial authority adverse to the NFL, the arguments of the Pro-NFL commentators, which have generally been adopted by the NFL, are compelling.<sup>256</sup>

In refuting these points, the Pro-American Needle commentators promote form over function by overly relying on the separate ownership of NFL teams.<sup>257</sup> Also, their assertions about team viability outside of the league context – i.e., through exhibitions and

---

249. For a further discussion of the general Pro-American Needle argument, see *supra* notes 167-221 and accompanying text.

250. For a further discussion of the general Pro-American Needle argument, see *supra* notes 167-221 and accompanying text.

251. For a further discussion of the Pro-American Needle side rule of reason argument, see *supra* notes 195-205 and accompanying text.

252. For a further discussion of the Pro-NFL side's single entity argument, see *supra* notes 125-135 and accompanying text.

253. For a further discussion of the Pro-NFL side's single entity argument, see *supra* notes 125-135 and accompanying text.

254. For a further discussion of the Pro-NFL side's single entity argument, see *supra* notes 125-135 and accompanying text.

255. For a further discussion of the Consumer Welfare Model, see *supra* notes 144-149 and accompanying text.

256. For a further discussion of the general Pro-NFL argument, see *supra* notes 105-166 and accompanying text. For a further discussion of judicial opinion adverse to the NFL, see *supra* note 150 and accompanying text. For the arguments of the NFL in *American Needle*, see *supra* notes 235-240 and accompanying text.

257. For a further discussion of the Pro-American Needle side's separate ownership argument, see *supra* notes 183-186 and accompanying text.

barnstorming – downplay the value of the league structure in the eye of the consumer, as well as the increased cost of barnstorming.<sup>258</sup> The Pro-American Needle side spends too much time considering the consequences of granting NFL single entity status and per se protection and not enough time on the legal ramifications of such a decision.<sup>259</sup> Single entity status, they argue, would afford professional sports leagues antitrust immunity.<sup>260</sup> However, as noted by counsel for the NFL at oral argument, affirmation of single entity status would not make sports leagues immune from either Section I or Section II suits.<sup>261</sup>

Still, the Court does not favor per se rules and seems likely to side with American Needle, thereby denying the NFL single entity status.<sup>262</sup> Opting for a rule of reason analysis, of course, does not automatically mean that the NFL's exclusive licensing contract is illegal and that American Needle wins.<sup>263</sup> Rather, such a ruling would only mean that American Needle can survive the summary judgment stage and offer evidence as to the alleged unreasonableness and anticompetitive nature of the NFL's contract with Reebok.<sup>264</sup> Ruling in this way would severely impact the NFL financially by requiring it to go through the costly antitrust discovery process.<sup>265</sup> Still, the NFL is more than capable of absorbing these costs, and the Court may prefer to impose costs on an organization able to bear them, rather than create a blanket rule that bars parties

258. For a further discussion of the Pro-American Needle side's external team viability argument, see *supra* notes 173-182 and accompanying text.

259. For a further discussion of the Pro-American Needle policy based argument, see *supra* notes 202-205 and accompanying text.

260. For a further discussion of the Pro-American Needle policy based argument, see *supra* notes 202-205 and accompanying text.

261. See Roberts '86 Tulane Article, *supra* note 71, at 577-78 (“[The Pro-NFL approach] does not imply immunity or exemption from Section I for the firm as a whole. It merely recognizes that a league is a single firm subject to the same anti-trust rules and restrictions as any other single firm. A league would not be insulated from Section I should it conspire with other firms to restrain competition, nor would it ever be insulated from valid Section II claims. Thus, erroneously characterizing single entity status as an immunity or an exemption assumes that the single entity defense is invalid.”); Grauer Michigan Article, *supra* note 33, at 6 (arguing for single entity status and not for Section I or Section II immunity).

262. For a further discussion of the Court's disfavor towards per se rules, see *supra* note 200 and accompanying text.

263. See Oral Argument, *supra* note 9, at 4-7 (discussing legal consequences of Court's ruling).

264. See *id.* (discussing getting past summary judgment). For a further discussion on Rule of Reason analysis, see *supra* notes 30 and 37 and accompanying text.

265. See Oral Argument, *supra* note 9, at 21 (quoting Justice Ginsburg as saying that, “Once you say no [to a per se rule], it's got to be rule of reason analysis, they you have discovery, which can be costly.”).

with legitimate claims from the court house.<sup>266</sup> Ultimately, even though this game has been played fiercely by both teams before the Supreme Court, it is now been reversed and remanded to decide who will win.<sup>267</sup>

*Constantine J. Avgiris\**

---

266. For a further discussion of the NFL's popularity and profitability, see *supra* notes 1-6 and accompanying text.

267. For a further discussion of the Supreme Court's review of *American Needle*, see *supra* notes 11-15 and 92-104 and accompanying text. For a further discussion of the Pro-NFL argument, see *supra* notes 105-166 and accompanying text. For a further discussion of the Pro-American Needle argument, see *supra* notes 167-221 and accompanying text.

\* J.D. Candidate, May 2011, Villanova University School of Law; M.B.A. Candidate, December 2011, Villanova University School of Business; B.S.B.A., Boston University, 2007.

