

## NOTES

# THE DIRECTV NFL SUNDAY TICKET: AN ECONOMIC PLEA FOR ANTITRUST LAW IMMUNITY

### I. INTRODUCTION

Imagine two law students in St. Louis, Missouri, one from San Francisco and the other from New York, taking their Sunday afternoon study break to watch an NFL game. The San Francisco student is a long-time 49ers fan, and the New York student is a die-hard Giants fan. They do not want to watch the local St. Louis Rams game, but instead prefer to watch the teams they grew up cheering for compete against one another. The “DIRECTV NFL Sunday Ticket” makes this possible. Without the Sunday Ticket, they might be able to watch only the local Rams game.<sup>1</sup>

Under the current broadcast contracts with the NFL, ABC, CBS, and FOX collectively cover all the weekend<sup>2</sup> NFL football games each week.<sup>3</sup> However, within a particular region, a viewer has free access to only a few games, which include that market’s home team and other games with local or regional interest.<sup>4</sup> A subscriber to the Sunday Ticket, however, has the option of watching any NFL game live.<sup>5</sup>

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1. DIRECTV is a satellite provider which, among other things, offers the Sunday Ticket to its subscribers. A subscriber to the Sunday ticket can watch all or part of up to thirteen NFL games each Sunday. This amounts to about two hundred games over the entire season. See Wayne Friedman, *DIRECTV Returns to Football Fans to Drive Business*, ADVERTISING AGE, Aug. 2, 1999, at 18, available at 1999 WL 8765011. Perhaps more importantly, DIRECTV’s expansive broadcasts of NFL games ensure a Sunday Ticket subscriber access to his or her favorite team each week, regardless of whether it is broadcast on network television in the fan’s local market. See Dylan Carson, *Third Circuit Holds NFL’s Sunday Ticket TV Broadcasts Are Not Exempt From Antitrust*, SPORTS LAW, May-June 1999, at 1, 12.

A basic DIRECTV subscription costs between \$21.99 and \$82.99 per month depending on the number and selection of channels included in the package. DIRECTV, *DIRECTV Programming*, at <http://www.directv.com/programming/programmingpages/0,1093,135,00.html> (last visited Feb. 6, 2001). A Sunday Ticket subscriber must pay an additional set price per season for the entire package of all regular season NFL games. Carson, *supra*, at 12. See also Friedman, *supra* (indicating the Sunday Ticket cost \$159 for the 1999 season); DIRECTV, *DIRECTV Sports*, at <http://www.directvsports.com/SubscribeNow/NFLSundayTicket> (last visited Feb. 6, 2001) (announcing the price of the Sunday Ticket as \$149 for the 2001 regular season).

2. ESPN usually broadcasts either a Thursday night or Sunday night game each week.

3. See Carson, *supra* note 1, at 1.

4. See *id.* at 1, 12.

5. See *id.* at 12.

Recently, Charles Shaw and two other individuals filed a class action suit against the National Football League (“NFL”) and its member teams, claiming that they had illegally pooled together their broadcasting rights and entered into an agreement to sell the package to DIRECTV in violation of section 1 of the Sherman Act.<sup>6</sup> Shaw alleged that the Sunday Ticket package agreement “has restricted the options available to fans for viewing non-network broadcasts of NFL games, thereby reducing competition and artificially raising prices.”<sup>7</sup>

The NFL filed a motion to dismiss for failure to state a claim on two separate grounds.<sup>8</sup> First, the NFL claimed that the Sports Broadcasting Act (“SBA”) exempts the Sunday Ticket agreement from the Sherman Act.<sup>9</sup> Second, the NFL asserted the single entity defense,<sup>10</sup> claiming that because the NFL alone sold the teams’ broadcast rights, Shaw did not adequately allege joint action necessary to violate section 1 of the Sherman Act.<sup>11</sup> The district court rejected both of the NFL’s arguments, denied the motion to dismiss,<sup>12</sup> and certified for interlocutory appeal the question of whether subscription satellite broadcasts of NFL games deserve SBA exemption from

6. Shaw alleged that the NFL and its teams “combined, in violation of antitrust laws, to fix, raise, maintain, or stabilize the price for satellite broadcasts of NFL games. . . . caus[ing] artificially high and noncompetitive prices for NFL satellite broadcasts.” Shaw v. Dallas Cowboys Football Club, Ltd., No. 97-5184, 1998 WL 419765, at \*1 (E.D. Pa. June 23, 1998).

Section 1 of the Sherman Act states in part: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal . . . .” 15 U.S.C. § 1 (1994).

7. Shaw, 1998 WL 419765, at \*1.

8. *Id.*

9. *Id.* The SBA, which acts as an absolute exemption from the Sherman Act for sports telecasts that fall within its scope, states in part:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football . . . by which any league of clubs participating in professional football . . . contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the *sponsored telecasting* of the games of football . . . engaged in or conducted by such clubs . . . .

Sports Broadcasting Act, 15 U.S.C. § 1291 (1997) (emphasis added). See *infra* Part II.B for a discussion of the facts leading Congress to enact the SBA.

10. See discussion *infra* Part II.C for the history of the single entity defense with a focus on its application to professional sports leagues.

11. Shaw, 1998 WL 419765, at \*1.

12. *Id.* at \*5. While the district court certified for interlocutory appeal the question of SBA exemption arising from the NFL’s first defense, it flatly rejected the NFL’s single entity defense. *Id.* The court initially relied on *L.A. Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984), which held that the NFL alone was not a single entity for antitrust purposes. Shaw, 1998 WL 419765, at \*5. The court further noted that Shaw did not allege that the NFL acted alone to violate the Sherman Act, but instead alleged that all the member clubs illegally conspired in restraint of trade. This, the court said, was a sufficient allegation to survive a motion to dismiss. See *id.*

the Sherman Act.<sup>13</sup>

In *Shaw*, the Third Circuit became the first to address the issue of whether the SBA exemption to the Sherman Act applies to the NFL's sale to DIRECTV.<sup>14</sup> That court conclusively decided that the current SBA applies only to sponsored telecasts on free television and not to DIRECTV and other satellite providers.<sup>15</sup> The NFL conceded that the Sunday Ticket package of satellite broadcasts is not "sponsored telecasting"<sup>16</sup> within the meaning of the SBA.<sup>17</sup> Nonetheless, the NFL argued that after it sold its teams' pooled broadcast rights to a sponsored network like ABC, CBS, or FOX in compliance with the SBA, it reserved residual rights in the sponsored telecasts of each game.<sup>18</sup> The NFL claimed that these residual rights in the sponsored telecast of each game retain the SBA exemption granted to the initial pooled sale of broadcast rights to the sponsored network.<sup>19</sup> The NFL asserted that it sold these residual rights in the sponsored telecasts to DIRECTV for the Sunday Ticket, thus claiming that the sale of these residual rights to DIRECTV deserved the same SBA exemption from the Sherman Act that the initial sale to the sponsored network like ABC, CBS, or FOX enjoyed.<sup>20</sup>

The Third Circuit disagreed with the NFL, holding that the NFL's residual rights are in the "games themselves" and not in the sponsored telecasts of those games.<sup>21</sup> The court found a difference between the initial sale of pooled broadcast rights to a sponsored network and the subsequent sale to a non-sponsored network like DIRECTV.<sup>22</sup> The court held that "[e]ach transaction is a sale of a part of the NFL's underlying right in the

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13. See *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 299-300 (3d Cir. 1999).

14. 172 F.3d at 299.

15. 172 F.3d at 302.

16. The Third Circuit in *Shaw* explained that "sponsored telecasting" refers to broadcasts which are financed by business enterprises (the 'sponsors') in return for advertising time and are therefore provided free to the general public." 172 F.3d at 301. The district court in *Shaw* had earlier defined the "sponsor" of a "sponsored telecast[]" within the scope of SBA exemption, as "[o]ne that finances a project or an event carried out by another person or group, especially a business enterprise that pays for radio or television programming in return for advertising time." 1998 WL 419765, at \*3 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 17411 (3d ed. 1992)). See also 15 U.S.C. § 1291 (1997) (exempting from antitrust laws the "rights . . . in sponsored telecasting").

17. 172 F.3d at 301.

18. See *id.*

19. See *id.* at 301-02.

20. See *id.*

21. See *id.* at 301-03.

22. A sponsored network is one that engages in sponsored telecasting of events so that they are free to the public. See *id.* at 302. DIRECTV is a non-sponsored network, as evidenced by the monthly cost to the public for its general broadcasts and its yearly charge for the Sunday Ticket. See *supra* note 1.

images of the games, but only the former is exempt from antitrust scrutiny.<sup>23</sup> At the time of publication of this Note, the case remained open in the United States District Court for the Eastern District of Pennsylvania while the parties negotiated a settlement.<sup>24</sup>

Part II of this Note discusses the congressional and judicial history of the Sherman Act, the Sports Broadcasting Act, and the single entity defense, focusing on various professional sports leagues' attempts to utilize the defense. Part III further examines the two issues raised by the NFL's defenses to Sherman Act scrutiny in *Shaw* and analyzes cases and commentary that have addressed similar issues. Part IV of this Note proposes two possible solutions that would allow consumers continued benefits from the Sunday Ticket within the confines of antitrust law. First, this Note will argue that even though the Third Circuit's denial of the SBA exemption in *Shaw* appears sound when measured against the language and history of the Act, economic considerations should push Congress to amend the SBA to allow a supplemental exemption for pooled television contracts with DIRECTV and other satellite providers in the future. Under the proposed amendment, a pooled broadcast contract between the NFL and DIRECTV would escape Sherman Act scrutiny so long as the events are also broadcast on free sponsored television in the local market for those consumers who do not wish to pay DIRECTV for the additional games. Second, until Congress amends the SBA, courts should follow the U.S. Supreme Court's structural test utilized in *Copperweld Corp. v. Independence Tube Corp.*<sup>25</sup> when analyzing the applicability of the single entity defense to professional sports leagues. In applying this structural test, courts should recognize that when

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23. 172 F.3d at 301-02. In declaring that the SBA exempted only the sale of pooled broadcast rights to sponsored networks, the court looked both to the language of the SBA itself, *see id.* at 301-02, 15 U.S.C. § 1291 (1997), and to the legislative history of the Act. 172 F.3d at 302-03. See also *infra* Part II.B for a brief discussion of the legislative history of the SBA.

The NFL argued that the DIRECTV broadcasts utilize television images fed from the sponsored network cameras, and therefore the SBA exemption for DIRECTV derives from the exemption granted to the sponsored telecasts. The court disagreed:

The use of the same signal for broadcast over two media, however, does not render the rights in one broadcast derivative of rights in the other. One could just as readily conclude that the network television broadcast rights are derivative, and constitute part of the NFL's rights in the non-sponsored satellite broadcast.

172 F.3d at 301-02 n.9.

24. Telephone Interview with the Office of the Clerk of the Court, United States District Court for the Eastern District of Pennsylvania (May 14, 2001). On May 10, 2001, the district court published a memorandum stating that the case "shall be maintained for settlement purposes as a class action." *Id.* A hearing is scheduled for July 9, 2001 "to consider the fairness, reasonableness, and adequacy of the settlement," which the parties are to have reached by such date. *Id.*

25. 467 U.S. 752 (1984).

selling its pooled broadcast rights to a television network, the NFL is acting as a single entity incapable of conspiring with itself in violation of section 1 of the Sherman Act.

## II. HISTORY OF THE SHERMAN ACT, THE SPORTS BROADCASTING ACT, AND THE USE OF THE SINGLE ENTITY DEFENSE BY PROFESSIONAL SPORTS LEAGUES

### A. *The Sherman Act*<sup>26</sup>

The notion of invalidating all contracts that restrain trade originated in English common law in the early 1700s.<sup>27</sup> A “contract in restraint of trade” initially referred to a contract in which an individual voluntarily agreed to discontinue his trade or calling in order to increase the marketability of his business by eliminating himself as a possible competitor.<sup>28</sup> Eventually, English common law prohibited all contracts designed to bring about at least one of the evils of monopoly<sup>29</sup> and specifically condemned contracts leading to artificially high prices.<sup>30</sup> However, as the English common law developed, individuals could enter into or abstain from entering into any reasonable contract they wished, so long as the resulting restraint of trade did not imply a wrongful purpose of the contract.<sup>31</sup> Present-day courts refer to the common

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26. 15 U.S.C. §§ 1-7 (1994). An extensive discussion of the history of the Sherman Act is beyond the scope of this Note. For an in-depth analysis of the economic conditions and legislative history leading Congress to enact the Sherman Act, see ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 22-37 (1989).

27. *See* *Standard Oil v. United States*, 221 U.S. 1, 51 (1911). *See also id.* at 54 (explaining that the English court termed a monopoly a restraint of trade in 1711 in *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (K.B. 1711)). For a discussion of *Mitchel v. Reynolds*, see *infra* notes 31-32.

28. *See* 221 U.S. at 51. These restraints on a person’s right to carry on his trade were illegal “because it was deemed they were injurious to the public as well as to the individuals who made them.” *Id.*

29. At common law, the public outcry against monopolies stemmed from three general “evil” consequences of monopolies. First, monopolists could fix prices at a higher level than would normally result if competition existed. Second, monopolists could decrease the quantity of the good they produced. Third, the lack of other businesses to compete with the monopolist could lead to a deterioration in the quality of the monopolized product. *Id.* at 52.

30. *See id.* at 54. English courts believed that a monopolist could abuse his place in the market and arbitrarily set prices at an artificially high level, e.g., at a higher level than would naturally result if competition existed and firms had to compete for business by lowering prices to the public. *See id.* at 52. *See also* *Case of Monopolies*, 77 Eng. Rep. 1260 (K.B. 1603) (explaining English common law belief that monopolists will set artificially high prices).

31. *See* 221 U.S. at 56. Due to an interest in the freedom to contract, common law courts only prohibited “general” restraints on a person’s ability to carry on his previous trade. Therefore, the courts allowed restraints that were partial, or specific in time and place, and otherwise reasonable. *See id.* The most famous analysis of “general” versus “specific” restraints of trade at English common law occurred in *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (K.B. 1711). In *Mitchel*, the seller of a bakery

law standard of allowing reasonable contracts in restraint of trade as the “Rule of Reason.”<sup>32</sup>

Around 1880, businesses in the United States began to form “trusts”<sup>33</sup> as a tool for promoting cooperation and progressive corporate development.<sup>34</sup> As large trusts gained monopolistic control over certain markets, the general public quickly turned against them, fearing that the decrease in competition would lead to inefficient business decisions and corresponding high prices.<sup>35</sup> Many states initially attempted to check the growth of trusts and monopolies with state antitrust statutes or state common law.<sup>36</sup>

As in England, early state antitrust law prohibited all contracts that unduly diminished competition and increased prices to artificially high levels.<sup>37</sup> Moreover, the prohibition of restraints of trade in early state laws stemmed from a desire to protect the general public from the same evils of monopoly recognized by English common law.<sup>38</sup> Naturally, then, the Rule of Reason, as applied in England, became the general standard in the United States for judging the legality of contracts in restraint of trade.<sup>39</sup> Thus, early state courts invalidated “all contracts or acts which were unreasonably restrictive of

promised that he would not compete with the purchaser of his business for 5 years in the area in which the bakery had operated. The court upheld the covenant not to compete. The court explained that the covenant only prevented the seller of the business from working in a particular place and therefore declared the contract valid. *Id.* at 351. The court also indicated that it might void a similar covenant if the covenant imposed a “general” duty not to compete throughout the entire kingdom for an undisclosed amount of time. *Id.* at 350.

32. See, e.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) [hereinafter *Society of Engineers*]. The Court in *Society of Engineers* traced the Rule of Reason back to the English common law case of *Mitchel v. Reynolds*, 24 Eng. Rep 347 (K.B. 1711), the “earliest of cases applying the Rule of Reason.” 435 U.S. at 688. The Court noted that the Rule of Reason focuses on the alleged restraint’s impact on competition in the relevant market. *Id.* The Court noted that in *Mitchel*, the English court upheld the covenant as “reasonable, even though it deprived the public of the benefit of potential competition. The long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition.” 435 U.S. at 688-89.

33. Several corporations joined together and formed a “trust” by “turn[ing] their stock over to a board of trustees [and] receiving in return trust certificates of equivalent value.” Each participating corporation retained its individual state charter, but all participants were subject to the control of the newly formed, unincorporated entity that held their stock.” FOX & SULLIVAN, *supra* note 26, at 27 (citation omitted). By forming trusts held by unincorporated entities, the member corporations escaped usual state law limitations on the size and scope of an individual corporation. *Id.*

34. See *id.* at 30-31.

35. See *id.*

36. See *id.* at 33.

37. See *Standard Oil v. United States*, 221 U.S. 1, 56-57 (1911).

38. See *id.* at 58-59. See also *supra* note 29 for a discussion of the three evils that English common law recognized could stem from monopolies.

39. See 221 U.S. at 59. The Court, after explaining the Rule of Reason applied at early state common law in the United States, noted, “But this again, as we have seen, simply followed the line of development of the law of England.” *Id.*

competitive conditions” to the extent they “[gave] rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public . . . .”<sup>40</sup>

In the late 1880s,<sup>41</sup> Congress recognized that state antitrust statutes and state common law had proved ineffective at curbing the effects of trusts on interstate commerce and the public generally.<sup>42</sup> Dissatisfied with the lack of federal common law to govern antitrust offenses in interstate commerce, Congress enacted the Sherman Antitrust Act in 1890.<sup>43</sup>

Section 1 of the Sherman Act states in part: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.”<sup>44</sup> In 1911, the Supreme Court first analyzed the language of section 1 of the Sherman Act in *Standard Oil v. United States*,<sup>45</sup> and courts

40. *Id.* at 58.

41. *See id.* at 50.

42. *See* FOX & SULLIVAN, *supra* note 26, at 33; *Standard Oil*, 221 U.S. at 50. The *Standard Oil* Court noted that:

[T]he main cause which led to the [Sherman Act] was the thought it was required by the economic conditions of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, . . . and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

221 U.S. at 50. *See also, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (noting that the intent of the Sherman Act was to protect from threats against consumer welfare); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 300 n.4 (3d Cir. 1999) (“[T]he antitrust laws were designed for the protection of the public.”).

43. Sherman Act of 1890, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

During a debate in the Senate, questions arose regarding the need for federal legislation to regulate trusts, monopolies, and the resulting restraints of trade. After an explanation of what a “monopoly” referred to in section 2 of the proposed Sherman Act, the following exchange occurred:

Mr. Kenna. If the Senator will permit me, I should like to ask him whether a monopoly such as he defines is prohibited at common law . . . .

Mr. Hoar. I so understand it.

Mr. Kenna. Then why should this bill proceed to denounce that very monopoly?

Mr. Hoar. Because there is not any common law of the United States.

Mr. Kenna. There is a common law in nearly every State in the Union.

Mr. Hoar. I know. The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction. Now we are dealing with an offense against interstate . . . commerce, which the State cannot regulate by penal enactment, and we find the United States without any common law. The great thing this bill does . . . is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.

21 CONG. REC. 3,152 (1890), *reprinted in* FOX & SULLIVAN, *supra* note 26, at 35. *See also Standard Oil*, 221 U.S. at 50 (“The debates show that doubt as to whether there was a common law of the United States which governed that subject in the absence of legislation was among the influences leading to the passage of the act.”).

44. 15 U.S.C. § 1 (1994).

45. 221 U.S. 1 (1911).

still follow this interpretation today.<sup>46</sup> The Court initially observed that judges should construe the words in the statute as having the same meaning they had at common law.<sup>47</sup> To this extent, the Court assumed that Congress drafted the Sherman Act to incorporate the common law disfavor of restraints of trade.<sup>48</sup> The Court acknowledged that Congress intended to formulate a standard for regulating interstate commerce,<sup>49</sup> but because the Sherman Act was so broad,<sup>50</sup> the Court could not read a workable rule written into the statute.<sup>51</sup> The Court recognized that at the time Congress drafted the Sherman Act, many new forms of contracts were evolving.<sup>52</sup> The Court therefore determined that Congress had drafted the statute broadly enough to embrace every conceivable type of future contract that might lead to an undue restraint of trade.<sup>53</sup> However, understanding that every contract restrains trade by limiting future business options to those agreed upon in the contract, Congress probably did not intend section 1 of the Sherman Act to prohibit “[e]very contract . . . in restraint of trade;” doing so would eliminate the right to contract altogether.<sup>54</sup> Thus, because Congress provided no express rule delineating which contracts constituted an unlawful restraint of trade in the Sherman Act’s language,<sup>55</sup> the Supreme Court concluded that courts should apply the Rule of Reason as applied at English common law and in early state law in the United States.<sup>56</sup> Therefore, as a matter of public policy,

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46. See, e.g., *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) (citing *Standard Oil* to support finding that section 1 of the Sherman Act “prohibits only agreements that *unreasonably* restrain trade”).

47. 221 U.S. at 59.

48. *Id.*

49. *Id.*

50. See *id.* at 60.

51. See *id.* at 59 (“[T]he question is, what was the rule which it adopted?”). See also *id.* at 60 where the Court, in deciding Congress had not included a standard for analysis into the Sherman Act’s language, noted, “Thus not specifying but indubitably contemplating and requiring a standard . . .” *Id.*

52. *Id.*

53. *Id.* at 59-60. The Court acknowledged that Congress did not expressly define prohibited contracts so as to allow the statute to “embrace every conceivable contract or combination which could be made concerning trade of commerce.” *Id.* at 60.

54. 15 U.S.C. § 1 (1994). See *Standard Oil*, 221 U.S. at 63 (recognizing that the Court must have room to exercise its own judgment on which contracts to void under section 1, because to hold otherwise would be destructive of all right to contract or trade in all goods in interstate commerce); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687-88 (1978) (“[T]he language of § 1 of the Sherman Act . . . cannot mean what it says. The statute says ‘every’ contract that restrains trade is unlawful. But . . . restraint is the very essence of every contract; read literally, section 1 would outlaw the entire body of private contract law.”); *United States v. Joint Traffic Assn.*, 171 U.S. 505, 510 (1898) (explaining that Congress could not have intended that courts invalidate every contract in restraint of trade because all contracts restrain trade).

55. See *supra* note 51.

56. 221 U.S. at 60. See also *Soc’y of Prof’l Eng’rs*, 435 U.S. at 688 (“The legislative history [of the Sherman Act] makes it perfectly clear that . . . courts [are] to give shape to the statute’s broad



section 1 of the Sherman Act prohibits only those “contracts or acts which [are] unreasonably restrictive of competitive conditions . . . .”<sup>57</sup>

Section 2 of the Sherman Act states in part: “Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . shall be deemed guilty . . . .”<sup>58</sup> Section 1, which Charles Shaw alleged the NFL teams violated with the Sunday Ticket, clearly prohibits only multiple parties from contracting, combining, or conspiring to restrain trade.<sup>59</sup> However, a single person<sup>60</sup> or corporation<sup>61</sup> can violate section 2 of the Sherman Act.<sup>62</sup>

### *B. The Sports Broadcasting Act*

Congress passed the Sports Broadcasting Act<sup>63</sup> in 1961 as a response to the 1953 decision in *United States v. National Football League* (“*National Football League P*”).<sup>64</sup> In *National Football League I*, the District Court for the Eastern District of Pennsylvania held that Article X of the NFL’s bylaws, which restricted telecasts of outside games into a team’s local market while that team played an away game, constituted an “unreasonable and illegal restraint of trade”<sup>65</sup> in violation of section 1 of the Sherman Act.<sup>66</sup>

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mandate by drawing on common-law tradition.”)

57. *Standard Oil*, 221 U.S. at 58 (explaining the Rule of Reason at common law).

58. 15 U.S.C. § 2 (1994).

59. See 15 U.S.C. § 1. It is impossible for a single party to “contract, combin[e] . . . or conspir[e]” with oneself. Therefore, the language of section 1 requires multiple parties working together for a violation. *Id.*

60. See 15 U.S.C. § 2 (stating “[e]very person who shall monopolize”) (emphasis added).

61. See *Standard Oil*, 221 U.S. at 61 (“It is certain that the word ‘person’ clearly implies a corporation as well as an individual”). See also, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (“The conduct of a single firm is governed by § 2 alone . . .”).

62. 15 U.S.C. § 2.

63. 15 U.S.C. § 1291 (1997). See *supra* note 9 for the relevant SBA language.

64. *United States v. Nat’l Football League*, 116 F. Supp. 319 (E.D. Pa. 1953), *superseded by* Sports Broadcasting Act, 15 U.S.C. § 1291 (1997).

65. *Nat’l Football League I*, 116 F. Supp. at 327. To better understand the District Court’s holdings and rationale discussed directly below, assume the following: (1) There are only four teams in the NFL: teams *A*, *B*, *C*, and *D*; (2) Teams *A* and *B* are small market teams with financial problems and a minimal fan base due to poor performance on the field; (3) Teams *C* and *D* are large market teams who prosper financially due to a larger fan base and success on the field.

First, the District Court held that the NFL’s restriction of telecasts of outside games (for instance, *C* vs. *D*) into the home territory of another team (*A*) on days when team *A* played a home game (for instance, *A* vs. *B* at *A*’s home field) was reasonable, and thus not an “illegal” restraint of trade. See *id.* at 326. The court explained that “[t]here can be little doubt that this provision constitutes a contract in restraint of trade.” *Id.* at 322. The court explained that by giving each team the right to market its own games without competition in its own home area, the NFL policy restricts outside competition and is therefore a “clear case of allocating marketing territories among competitors, which is a practice generally held illegal under the anti-trust laws.” *Id.* Nevertheless, the court explained that the policy actually preserved the NFL as a whole by helping the weaker financial teams like *A* and *B*, compete

As noted above, the 1953 decision in *National Football League I* did not pass judgment on a pooled contract between the NFL teams and a single television network.<sup>67</sup> However, certain language in the final judgment prompted questions by the NFL as to whether a court might construe the decree to forbid the teams from pooling their broadcast rights and contracting with a television station to broadcast all league games.<sup>68</sup> Specifically, section V of the decree enjoined the NFL teams from “entering into . . . any contract . . . with the [NFL] or any member club or the [NFL] . . . with the effect of restricting the areas within which broadcasts . . . of games . . . may be made.”<sup>69</sup> In 1961, the NFL filed a petition seeking a determination that a

with the stronger financial teams like *C* and *D*; the policy added to the weaker team *A*'s home attendance and ticket revenue by preventing potential live spectators in the weaker team *A*'s market from staying home from *A*'s game to watch stronger teams like *C* and *D* compete on television. *See id.* at 325. The court concluded that by preserving the NFL as a whole, the policy promoted competition more than it restrained competition and was a reasonable, and therefore legal, restraint of trade. *See id.* *See also Standard Oil*, 221 U.S. at 58 (recognizing that the Sherman Act prohibits only those “contracts or acts which [are] unreasonably restrictive of competitive conditions”).

Second, the court held that the NFL policy which restricted telecasting outside games (for instance, *C* vs. *D*) in a team *A*'s home territory when team *A* was playing an away game (for instance, *A* vs. *B* but at *B*'s home field now) was unreasonable, and thus an “illegal” restraint of trade. *See Nat'l Football League I*, 116 F. Supp. at 327. The court again focused its “reasonableness” analysis on the policy's possible effects on the attendance of a team's home games. *See id.* at 326. Because the weaker team *A* was now playing an away game at *B*'s home field, the threat of *A* losing live spectators to a telecast of an outside game (for instance, *C* vs. *D*) disappeared. Whether the outside game between *C* and *D* was shown in *A*'s market or not, *A*'s local fans would not see *A* play live (without traveling to *B*'s market, of course). *See id.* at 326. The policy of restricting the outside broadcast in no way helped weaker teams compete with the stronger financial teams. Therefore, while the restraint on trade was the same, namely the restriction on competition from outside broadcasts, the latter situation lacked the accompanying promotion of competition that the former situation achieved. *See id.* at 326-27.

66. 15 U.S.C. § 1 (1994). *See also supra* note 6 for relevant section 1 language.

67. *See Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong. 6 (1961) [hereinafter *Aug. 28 Hearings*]. Referring to the 1953 decree, Pete Rozelle, then commissioner of the NFL, stated that “[t]his litigation had nothing to do with single network television programming by the National Football League. Neither the Philadelphia court nor any other court has ever decided that a single network plan violates antitrust laws . . . .” *See also supra* note 65 (discussing the holdings of the 1953 decree in *National Football League I*).

68. *See Aug. 28 Hearings, supra* note 67, at 6 (testimony of NFL commissioner Pete Rozelle).

69. Final Judgment, Section V, *Nat'l Football League I*, 116 F. Supp. 319 (E.D. Pa. 1953), reprinted in *Aug. 28 Hearings, supra* note 67, at 24-26. The NFL questioned the application of Section V of the Final Judgment, which stated in part:

The defendants [NFL member teams] are jointly and severally restrained and enjoined from directly or indirectly entering into . . . any contract, agreement, or understanding with the [NFL] or any member club of the [NFL], through league By-Laws or otherwise, having the purpose or effect of restricting the areas within which broadcasts or telecasts of games participated in by member clubs of the [NFL] may be made . . . .

*Id.* The section V language naturally bothered the NFL because the member teams would necessarily need to agree to restrict the areas of telecasts to make a single network contract successful; a single network could not possibly televise all games into every market nationwide because all teams played

contract between the NFL and CBS, which gave CBS exclusive broadcast rights to telecast all league games,<sup>70</sup> did not violate the 1953 final judgment.<sup>71</sup> The court stated that even though a single network contract was not at issue in the 1953 decision, it felt “obliged” to read the language in Section V of its 1953 decree as prohibiting the pooled contract between the NFL and CBS.<sup>72</sup>

In response to the district court’s construction of the 1953 final judgment in *National Football League II*,<sup>73</sup> Congress enacted the SBA to overturn the decree and to “enable the member teams of a league to pool their separate television rights and to sell the resulting package of pooled rights to a . . . television network.”<sup>74</sup> The Chairman of the House Antitrust Subcommittee recognized that the SBA was necessary “to assure a significant share of television revenue to [the NFL’s] weaker teams, whose economic survival is essential to the continued operation of the league itself.”<sup>75</sup> The legislative history of the SBA indicates that Congress, by specifically addressing “sponsored telecasting”<sup>76</sup> of professional sports contests in the language of

at basically the same time on Sunday afternoon.

70. The 1961 contract between the NFL and CBS granted CBS the exclusive right to televise all NFL games each week nationwide except the Championship Game. *See* United States v. Nat’l Football League, 196 F. Supp. 445, 446 (E.D. Pa. 1961) [hereinafter *Nat’l Football League II*] (construing Final Judgment of 116 F. Supp. 319 (E.D. Pa. 1953)). Prior to the league contract with CBS, each NFL team individually negotiated a separate television contract with whichever network offered the best deal. *See id.* After the 1961 contract, all teams agreed to eliminate competition among themselves in sales of their broadcast rights, and further agreed to pool their broadcast rights together and allow NFL commissioner Pete Rozelle to sell the package as a whole to CBS. *Id.* at 447.

71. *See* 196 F. Supp. at 446.

72. *Id.* at 447. *See Aug. 28 Hearings, supra* note 67, at 6 (testimony of NFL commissioner Pete Rozelle). Mr. Rozelle testified that “a single network contract was not ‘at issue [in *National Football League I*]’ and the court could not remember why ‘[Section V of the Final Judgment] was put into [the decree].’ The court further said, ‘Yet words mean what they say. I have to take the words as they are.’” *Id. But see generally Nat’l Football League II*, 196 F. Supp. 445 (E.D. Pa. 1961) (not containing the language referred to above by Mr. Rozelle).

*See also Nat’l Football League II*, 196 F. Supp. at 447. The district court noted that the NFL, in its petition for construction of the 1953 decree, stated the following regarding the execution of its contract with CBS: “Said contract provides that [CBS] shall have the right to determine, entirely with its own discretion without consulting the commissioner or any club of the [NFL] which games shall be telecast and where such games be televised.” *Id.* The court then concluded:

Clearly this provision restricts the individual clubs from determining ‘the areas within which . . . telecasts of games . . . may be made . . .,’ since defendants have by their contract given to CBS the power to determine which games shall be telecast and where the games shall be televised. I am therefore obliged to construe the Final Judgment as prohibiting the execution and performance of the contract . . . .

*Id.*

73. *Nat’l Football League II*, 196 F. Supp. 445.

74. *Aug. 28 Hearings, supra* note 67, at 1.

75. *Id.*

76. *See supra* note 16 for explanation of “sponsored telecasting” within the meaning of the SBA.

the SBA, intended to exempt the sale of pooled broadcast packages to free television networks only.<sup>77</sup> Because courts must construe exemptions to the antitrust laws narrowly,<sup>78</sup> they have continuously refused to extend an SBA exemption beyond free television to cable<sup>79</sup> and satellite broadcasts of professional sports.<sup>80</sup>

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77. The SBA language only specifically mentions an antitrust exemption for “sponsored telecasting” of professional sports games. 15 U.S.C. § 1291 (1997). Moreover, the legislative history of the SBA clearly shows that Congress’s intent was to exempt only free broadcasts. The legislative report on the SBA states that “[t]he [SBA] does not apply to closed circuit or subscription television.” *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong. 4 (1961) [hereinafter *Sept. 13 Hearings*]. Furthermore, during the congressional hearings, a member of the Antitrust Subcommittee asked Pete Rozelle, “You understand, do you not, Mr. Rozelle, that this Bill covers only the free telecasting of professional sports contest, and does not cover pay T.V.?” Mr. Rozelle replied, “Absolutely.” *August 28 Hearings*, *supra* note 67, at 36. What is missing from the SBA congressional hearings is Congress’s rationale for limiting the SBA to “sponsored telecasting” on free television. *See Aug. 28 Hearings*, *supra* note 67; *Sept. 13 Hearings*, *supra*. It appears that Congress limited the scope of the SBA to “sponsored telecasting” of professional sports because the statute was special interest legislation, enacted specifically to reverse the district court’s invalidation of the 1961 contract between the NFL and CBS in *National Football League II*. *See Shaw v. Dallas Cowboys Football Club, Ltd.*, No. Civ.A. 97-5184, 1998 WL 419765, at \*4 (E.D. Pa. June 23, 1998); *August 28 Hearings*, *supra* note 67, at 1-3. “Thus SBA’s legislative context and the specific concern it sought to address was focused upon but one target: the sale of games to a sponsored television network.” *Shaw*, 1998 WL 419765, at \*4.

78. *See, e.g., Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999) (“Our first task is to consider the plain meaning of the statute, heeding the Supreme Court’s direction that exceptions to the antitrust laws must be narrowly construed.”) (citing *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (holding that antitrust exemptions must be construed narrowly because exceptions compromise Congress’s “longstanding . . . commitment to the policy of free markets and open competition”)); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667, 672 (7th Cir. 1992) (noting that “courts read exceptions to the antitrust laws narrowly with beady eyes and green eyeshades”).

79. *See, e.g., Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 596 (7th Cir. 1996) (holding that the SBA does not exempt from the antitrust laws a contract dividing broadcasts of NBA games between NBC and cable stations such as TBS, TNT, and WGN); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 808 F. Supp. 646, 650 (N.D. Ill. 1992) (concluding that showing NBA games on TNT cable station was not “sponsored telecasting” within meaning of SBA even though it contained commercial advertisements because viewers still had to pay to get the station). *See also* Letter from the Antitrust Division of the Department of Justice to the Senate Judiciary Committee 4-5 (Mar. 30, 1998), *quoted in Chicago Sports P’ship*, 808 F. Supp. at 650 (“While we believe there is some question as to whether programming such as ESPN’s NFL games that is partly supported by advertisers and partly by viewers is ‘sponsored telecasting,’ our view is that it is not and thus does not come within the [SBA’s] exemption.”).

80. *See Shaw*, 172 F.3d at 302 (holding that the SBA does not exempt a contract between the NFL and DIRECTV satellite provider from the Sherman Act).

### *C. The Single Entity Defense by Professional Sports Leagues*

#### *1. Early Single Entity Defense Litigation*

The single entity defense in its most basic form states that two or more organizations acting together as a single economic entity cannot violate section 1 of the Sherman Act<sup>81</sup> because a single entity cannot combine or conspire with itself.<sup>82</sup> A “single economic entity” does not necessarily have a precise definition. Rather, the Supreme Court uses a functional test, treating multiple organizations as a “single economic entity” if they have a common economic objective and a single corporate consciousness.<sup>83</sup>

A professional sports league first prominently asserted the single entity defense in 1980 in *North American Soccer League v. NFL*.<sup>84</sup> The North American Soccer League (“NASL”) sued the NFL, claiming the NFL’s cross-ownership rule, which prohibited NFL owners from concurrently owning a professional sports team in a different league, violated section 1 of the Sherman Act.<sup>85</sup> In its complaint, NASL alleged that the cross-ownership rule excluded it from the market for professional sports capital and the NFL owners’ entrepreneurial skills.<sup>86</sup>

In *NASL*, the district court dismissed NASL’s claim, concluding that the NFL was a single economic entity, that it could not combine or conspire with itself, and therefore that it could not violate section 1 of the Sherman Act.<sup>87</sup> The Second Circuit rejected this view.<sup>88</sup> The Second Circuit claimed that even if the court characterized the NFL as a single economic entity, this characterization did not exempt an agreement among its members to restrain trade from section 1 of the Sherman Act.<sup>89</sup> The Second Circuit reversed the

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81. Section 1 of the Sherman Act states in part: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.” 15 U.S.C. § 1 (1994).

82. Actually, the single entity defense, as approved by the United States Supreme Court, only holds that a wholly owned subsidiary is incapable of conspiring with its parent corporation in violation of section 1 of the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984). However, Part II.C of this note explains how several courts have extended the defense to situations in which two formally distinct organizations act with identical economic interests, i.e., as a single economic entity.

83. *See infra* notes 129-31 and accompanying text.

84. *N. Am. Soccer League v. Nat’l Football League*, 505 F. Supp. 659 (S.D.N.Y. 1980), *rev’d*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982) [hereinafter *NASL*].

85. *NASL*, 505 F. Supp. at 662.

86. *NASL*, 459 U.S. at 1075 (Rehnquist, J., dissenting from denial of certiorari) (quoting *NASL’s* Complaint).

87. *NASL*, 505 F. Supp. at 689.

88. *NASL*, 670 F.2d at 1256.

89. *Id.* at 1257. The court of appeals rejected the single entity defense, stating that “[t]he characterization of NFL as a single economic entity does not exempt from the Sherman Act an

district court and, after applying the Rule of Reason analysis,<sup>90</sup> held that the NFL's cross ownership rule violated section 1.<sup>91</sup> The Supreme Court denied certiorari, but Justice Rehnquist wrote a strong dissenting opinion from the denial of certiorari<sup>92</sup> in which he argued that the NFL operated as a single economic entity.<sup>93</sup> Justice Rehnquist reasoned that the NFL competes as one unit against other sports leagues and other forms of entertainment for the limited entertainment dollar in a given consumer's budget.<sup>94</sup>

In 1984, the NFL again unsuccessfully asserted the single entity defense in the Ninth Circuit in *Los Angeles Memorial Coliseum Commission v. NFL (L.A. Coliseum)*.<sup>95</sup> In *L.A. Coliseum*, the Coliseum Commission sued the NFL under section 1 of the Sherman Act, claiming that Rule 4.3 of Article IV of the NFL Constitution,<sup>96</sup> which prevented Oakland Raiders owner Al

agreement between its members to restrain competition." *Id.* The court of appeals relied in part on two Supreme Court cases that had earlier rejected the single entity defense altogether. *See id.* at 1256 (citing *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), *overruled by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), *overruled by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)). The Supreme Court later reversed its ground and recognized the single entity defense as a viable argument in *Copperweld*, discussed *infra* at notes 111-131 and accompanying text, thereby overruling its prior holdings in *Perma Life Mufflers* and *Timken Roller Bearing*.

90. *See supra* notes 31-32 and accompanying text for a discussion of the Rule of Reason.

91. *NASL*, 670 F.2d at 1260-61.

92. *NASL*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari). *See also* *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599 (7th Cir. 1996) (noting a "strong dissent from the denial of certiorari in the soccer case").

93. 459 U.S. at 1077.

94. *Id.* The Supreme Court would not endorse the single entity defense as a complete bar to section 1 liability until two years after its denial of certiorari in *NASL*. *See infra* notes 114-18 and accompanying text for the Court's recognition of the single entity defense in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Thus, while Justice Rehnquist argued that the NFL acts as a single unit, he still proceeded in his dissent with a Rule of Reason analysis. However, courts have since cited a portion of his opinion as persuasive authority for the application of the single entity defense to professional sports leagues, thereby removing them from the scope of section 1 altogether. *See, e.g.*, *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599-600 (7th Cir. 1996) (citing Justice Rehnquist's dissent while concluding the "NBA is closer to a single firm than a group of independent firms"). Justice Rehnquist explained:

The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the marketplace. The NFL negotiates its television contracts, for example, in a single block. The revenues from broadcast rights are pooled. Indeed, the only interteam competition occurs when two teams are located in one major city, such as New York or Los Angeles. These teams compete with one another for home game attendance and local broadcast revenues. In all other respects, the league competes as a unit against other forms of entertainment.

*NASL*, 459 U.S. at 1077 (Rehnquist, J., dissenting from denial of certiorari).

95. 519 F. Supp. 581 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir. 1984) [hereinafter *L.A. Coliseum*].

96. In 1978, Los Angeles Rams owner Carroll Rosenbloom moved his team from the Los Angeles Coliseum to a new stadium in Anaheim, California. The L.A. Coliseum, without an NFL team,

Davis from relocating his team to Los Angeles without unanimous approval of the other owners, was an unlawful restraint of trade.<sup>97</sup>

In *L.A. Coliseum*, the Ninth Circuit held that the NFL was not a single entity for antitrust purposes.<sup>98</sup> The Ninth Circuit directly followed the district court's three justifications for rejecting the single entity defense. First, the court explained that if it extended the single entity defense to the NFL for the purpose of team relocation, the NFL would naturally attempt to expand the defense to claim exemption for all activities.<sup>99</sup> The court refuted this claim by noting that courts had held that the NFL violated section 1 in other contexts in the past.<sup>100</sup> Next, the Ninth Circuit determined that several prior courts had found that other organizations violated section 1 with cooperation among members similar to the cooperation that the NFL required among its teams.<sup>101</sup> Finally, the court explained that all NFL teams have independent

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attempted to convince a team in another city to move to Los Angeles. See *L.A. Coliseum*, 726 F.2d at 1384. However, Rule 4.3 of Article IV of the NFL Constitution required unanimous approval of all other team owners before one team could move within 75 miles of an existing team. The L.A. Coliseum was within 75 miles of the Rams' new stadium in Anaheim, thus Rule 4.3 required approval before any team could relocate to Los Angeles. See *id.* (citing NFL CONST. art IV, rules 4.3, 4.1). Later in 1978, the NFL amended Rule 4.3 to require only three-quarters of team owners to approve before a team could move within 75 miles of another team. See 726 F.2d at 1385.

97. *Id.* at 1384-85.

98. *Id.* at 1390. While the court would not extend the single entity defense to preclude section 1 scrutiny altogether, the court did at least consider the league's function as a single unit in its Rule of Reason analysis. See *supra* Part II.A for discussion of Rule of Reason. The court noted that "the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement." *Id.*

99. *Id.* at 1387-88.

100. *Id.* at 1388 (citing 519 F. Supp. at 583). The Ninth Circuit acknowledged that other courts had found the NFL in violation of section 1 of the Sherman Act in "other areas" in which league rules operated. *Id.* (citing *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982) [hereinafter *NASL*] (NFL rule preventing owners from also owning professional teams in a different league); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (NFL rules governing player contracts); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (NFL rules governing player contracts); *Kapp v. Nat'l Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), *affirmed*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (NFL rules governing player contracts)).

The court of appeals further showed its fear of creating a blanket exemption to the Sherman Act by quoting *NASL*:

To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

*L.A. Coliseum*, 726 F.2d at 1388 (quoting *NASL*, 670 F.2d at 1257).

101. 726 F.2d at 1388. The court determined that "other organizations have been found to violate § 1 though their product was 'just as unitary . . . and requires the same kind of cooperation from the organization's members.'" *Id.* (quoting 519 F. Supp. at 583). The district court in *L.A. Coliseum* discussed cases in which the Supreme Court found section 1 violations even though cooperation of an

economic values, a characteristic more consistent with several separate economic entities than with a single entity.<sup>102</sup> In further exploring this final justification for rejecting the single entity defense, the Ninth Circuit reasoned that although the League divides approximately 90% of its revenue equally among its member teams, profits and losses were dispersed unevenly among the teams.<sup>103</sup> This variance in profit levels created a different value for each team, a feature inconsistent with the concept of a single economic entity.<sup>104</sup>

The dissent in *L.A. Coliseum* wholly disagreed with the majority's assertion that the NFL is not a single entity as a matter of law.<sup>105</sup> The dissent believed that the district court, as well as the majority which affirmed it, "placed an unwarranted emphasis upon the formalistic aspects of the [NFL and its member teams]," such as the respective teams' independent ownership and legal identity.<sup>106</sup> The dissent believed that in focusing on the formal organization of the NFL and its teams, the majority ignored the way the League actually operated as a single unit.<sup>107</sup> The dissent claimed that the crucial question in determining whether formally distinct teams nevertheless function as a single economic entity for antitrust law is whether they "compete in any economically meaningful sense in the marketplace."<sup>108</sup> The

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organization's members was necessary to promote the organization as a whole. *See* 519 F. Supp. at 583-84 (discussing *Associated Press v. United States*, 326 U.S. 1 (1945) (finding section 1 violation in Associated Press' by-laws, which prevented competitors of existing members from joining the Associated Press, even though cooperation among current Associated Press members was necessary to spread news throughout the entire Associated Press); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (finding section 1 violation even though the Stock Exchange served as a mechanism for exchange of stocks between brokers, a function that no individual brokers could perform alone)).

102. *L.A. Coliseum*, 726 F.2d at 1388. The court agreed with the district court that the NFL's single entity defense was "based upon the false premise that the individual NFL 'clubs are not separate business entities whose products have an independent value.'" *Id.* (quoting 519 F. Supp. at 584).

103. 726 F.2d at 1390.

104. *Id.* NFL teams share revenue resulting from national TV contracts and from sales of T-shirts, jerseys, caps, and NFL videos equally, regardless of how well each team's particular clothing or videos sell. *See* Liz Clarke, *New Builders: As Team Rings In New Season, Snyder Tries to Ring Up Sales*, WASHINGTON POST, Sept. 9, 1999, at G7. The variance in profit margins among teams stems from "independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources." *L.A. Coliseum*, 726 F.2d at 1390.

105. *See* 726 F.2d at 1401 (Williams, J., dissenting).

106. *Id.* at 1404.

107. *See id.* The dissent claimed that the determination of whether the NFL is a single economic entity must be based not only on "formalistic" aspects of the League, such as ownership, joint marketing, legal identity, and corporate law autonomy, but also on "substantive" aspects such as chains of command over League policy decisions, public perception, and economic interdependency of the member teams to the League as a whole. *Id.* To that extent, the dissent noted that substantively, "[t]he N.F.L. cannot truly be separated from its member [teams] . . ." *Id.*

108. *Id.* (citing *Gen. Bus. Sys. v. N. Am. Philips Corp.*, 699 F.2d 965, 980-81 (9th Cir. 1983)). The dissent noted that "[v]irtually every court to consider this question has concluded that [NFL] member [teams] do not compete with each other in the economic sense." 726 F.2d at 1405 (citing *N.*



dissent believed that, realistically, the “interdependency of the member clubs and the indivisibility of the clubs with the [NFL]”<sup>109</sup> make the League a single entity for purposes of antitrust law.<sup>110</sup>

## 2. *The Supreme Court’s Endorsement in Copperweld*

In 1984, the United States Supreme Court acknowledged the single entity defense in *Copperweld Corp. v. Independence Tube Corp.*<sup>111</sup> In *Copperweld*, Copperweld Corporation and its wholly owned tube manufacturing subsidiary, Regal Tube Company, joined forces to keep a new manufacturing firm, Independence Tube Corporation, out of the heavy tube manufacturing market in the United States.<sup>112</sup> The district court and the Seventh Circuit Court of Appeals held that this collaboration was an illegal conspiracy in restraint of trade.<sup>113</sup> The Supreme Court reversed, holding that a parent

Am. Soccer League v. Nat’l Football League, 670 F.2d 1249, 1251 (2d Cir. 1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); Mackey v. Nat’l Football League, 543 F.2d 606, 619 (8th Cir. 1976); Mid-South Grizzlies v. Nat’l Football League, 550 F. Supp. 558, 562 (E.D. Pa. 1982); United States v. Nat’l Football League, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953)). The dissent, distinguishing between competition on and off the field, finally stated:

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a “single entity” is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs . . . which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts.

726 F.2d at 1407.

109. *Id.* at 1404.

110. *Id.*

111. 467 U.S. 752 (1984).

112. See *id.* at 755-57 for the full substantive background of *Copperweld*. Basically, Copperweld and its wholly owned subsidiary, Regal Tube, contacted several banks, realtors, and potential suppliers and customers of upstart Independence Tube to discourage them from doing business with Independence Tube. One threatening letter from Copperweld and Regal caused Yoder Co. to void a contract with Independence Tube in which Yoder had agreed to build a mill for Independence Tube to produce its metal tubing. Because Independence Tube was forced to arrange for another company to build its mill, it began operating nine months later than it would have if Yoder had not voided the original contract. *Id.* Independence Tube sued Copperweld and Regal, claiming they conspired to violate section 1 of the Sherman Act. *Id.* at 757-58.

113. *Id.* at 757-59. The Seventh Circuit questioned the wisdom of holding Copperweld and Regal liable for a section 1 conspiracy violation when, due to the lack of two legal persons, they would escape liability if Regal were an unincorporated division of Copperweld. See *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 316-18 (7th Cir. 1982), *rev’d*, 467 U.S. 752 (1984). However, relying on its own precedent in *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), *overruled by Copperweld*, 467 U.S. 752 (1984), the Seventh Circuit held that liability was appropriate “when there is enough separation between the two entities to make treating them as two independent actors sensible.” *Copperweld*, 691 F.2d at 318. It further held that the jury instructions properly allowed the jury to determine how much separation existed between Copperweld and Regal and that there was sufficient evidence for the jury to conclude they were two

corporation and its wholly owned subsidiary corporation are incapable of conspiring with each other for purposes of section 1 of the Sherman Act.<sup>114</sup>

The holding in *Copperweld* reversed the Court's long time acknowledgment of the "intra-enterprise doctrine," which it had casually cited in several earlier cases.<sup>115</sup> The "intra-enterprise doctrine" provided that "§ 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership."<sup>116</sup> In finally analyzing the doctrine,<sup>117</sup> the Court decided that, contrary to its previous position, "[a] parent and its wholly owned subsidiary have a complete unity of interest,"<sup>118</sup> and courts should therefore treat the two organizations as a single entity for antitrust purposes.<sup>119</sup>

The *Copperweld* Court noted the fundamental distinction between concerted and independent activity for Sherman Act purposes.<sup>120</sup> It concluded that Congress intended to treat concerted activity more strictly because it "is fraught with anticompetitive risk" because it "deprives the marketplace of the independent centers of decisionmaking that competition

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independent actors. *See id.* at 318-20.

114. *Copperweld*, 467 U.S. at 777. The Court limited its inquiry to the narrow issue of whether a parent and its wholly owned subsidiary could conspire in violation of section 1 of the Sherman Act. *Id.* at 767. The Court specifically declined to consider "under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not own." *Id.*

115. In *Copperweld*, the Court noted that while it had cited the "intra-enterprise doctrine" with approval on numerous occasions, it had never considered the merits of the doctrine in depth. 467 U.S. at 760. *See, e.g.*, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) (holding that two wholly owned subsidiaries of a liquor distiller had illegally conspired in violation of section 1 by jointly refusing to supply a wholesaler who refused to follow a maximum resale pricing scheme); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947) (noting that a vertical integration leading to a section 1 violation "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent"). *See also* 467 U.S. at 764 (noting that in *Kiefer-Stewart*, 340 U.S. at 215, the Court, "[w]ith only a citation to *Yellow Cab* and no further analysis . . . stated that the 'suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws'").

116. *Copperweld*, 467 U.S. at 759.

117. *See supra* note 115 (conceding that the Supreme Court never truly analyzed the "intra-enterprise doctrine" before *Copperweld*).

118. 467 U.S. at 771.

119. *Id.*

120. *Id.* at 767. The Court recognized that, unlike concerted action that is prohibited by section 1 of the Sherman Act if it unreasonably restrains trade, "the conduct of a single firm is governed by section 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." *Id.* In further determining that Congress did not intend to restrict a single firm's business strategies with section 1, the Court explained: "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Id.* at 768.

assumes and demands.”<sup>121</sup> The Court initially conceded that nothing in the wording of section 1 affords the single entity defense even to officers of the same company.<sup>122</sup> Nevertheless, the Court determined that an agreement between officers of the same company does not bring about the evils of monopoly that Congress intended the Sherman Act to prevent,<sup>123</sup> and therefore the officers “do not provide the plurality of actors imperative for a § 1 conspiracy.”<sup>124</sup> The Court, applying reasoning parallel to that used in analyzing an agreement between officers of the same company,<sup>125</sup> noted that courts must also treat the coordinated conduct between a corporation and one of its unincorporated divisions as the conduct of a single actor.<sup>126</sup> Finally, following the same line of analysis,<sup>127</sup> the Court extended the single entity defense to a corporation and its wholly owned subsidiary, claiming they “have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate consciousnesses [sic], but one.”<sup>128</sup>

*Copperweld* indicated that the courts should look at the *reality*, and not the *structure* of an enterprise to determine if it is a single entity.<sup>129</sup> In analyzing the reality of an enterprise, the courts should ignore legal or

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121. *Id.* at 768-769.

122. *Id.* at 769.

123. *Id.* at 769. The Court further explained that an agreement among officers of a single firm is not as dangerous as concerted behavior because it does not “bring together economic power that was previously pursuing different goals.” *Id.* Conversely, a conspiracy among formerly independent business entities “reduces the diverse direction in which economic power is aimed [and] suddenly increases the economic power moving in one particular direction. . . . [T]heir anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.” *Id.* For a discussion on the evils the Sherman Act was intended to prevent, see *supra* note 29 and accompanying text.

124. 467 U.S. at 769.

125. *Compare id.* at 769 (noting that agreements among officers of the same company are not section 1 violations because they “do not suddenly bring together economic power that was previously pursuing divergent goals”), *with id.* at 770-71 (“Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.”).

126. *Id.* at 770.

127. *Compare id.* at 771 (“If a parent and a wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.”), *with supra* note 125.

128. *Id.* at 771.

129. *Id.* at 772. The Court, in criticizing the intra-enterprise conspiracy doctrine, noted that it: looks to the form of an enterprise’s structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise’s conduct seriously threatens competition.

*Id.*

economic considerations causing an organization's management to choose one structure of business over another.<sup>130</sup> Instead, the courts should examine whether the parent has control over a subsidiary acting in a manner inconsistent with the parent's best interests.<sup>131</sup>

### 3. *Post Copperweld Litigation*

Since *Copperweld*, several courts have faced the proposition that *NASL* and *L.A. Coliseum* no longer control the issue of whether the NFL constitutes a single entity incapable of violating section 1 of the Sherman Act. Each court has been unwilling to extend the reasoning in *Copperweld* to the NFL.<sup>132</sup> Commentators currently disagree on whether courts should extend *Copperweld's* single entity defense to professional sports leagues.<sup>133</sup>

In 1995, the Fourth Circuit took the first step in allowing a professional sports league to assert the single entity defense in *Seabury Management, Inc. v. Professional Golfers Ass'n of America, Inc. ("PGA")*.<sup>134</sup> Even though the

130. *See id.* at 772.

131. *See id.* at 771-72.

132. *See, e.g.,* St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 154 F.3d 851 (8th Cir. 1998) (noting that the district court had rejected argument that *Copperweld* overruled *Raiders I*, i.e., *L.A. Coliseum*, on the issue of NFL as a single entity and continuing on with section 1 analysis); Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994) ("We do not agree that *Copperweld* . . . affects prior precedent concerning the NFL."); McNeil v. Nat'l Football League, 790 F. Supp. 871, 879-80 (D. Minn. 1992) (holding that *Copperweld* did not apply to the NFL and its member teams and finding teams to be separate entities capable of conspiring together under section 1).

133. *Compare, e.g.,* Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 755 (1989) (noting that several commentators believe that the validity of the single entity defense, as rejected in *L.A. Coliseum*, must be reconsidered after *Copperweld* and concluding that some league decisions should be treated as those of a single entity), and J. Scott Hale, *Jerry Jones Versus the NFL: An Opportunity to Apply Logically the Single Entity Defense to the NFL*, 4 SPORTS LAW. J. 1, 12 (1997) (claiming that the NFL should be treated as a single entity for purposes of pooled merchandise agreements because the teams all share equally in the revenue), with Timothy R. Deckert, *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in Chicago Professional Sports Limited Partnership v. National Basketball Association*, 5 VILL. SPORTS & ENT. L.J. 73, 101-02 (1998) (noting problems with analyzing the single entity defense in professional sports leagues one facet of the league at a time), and Lynn Reynolds Hartel, *Community-Based Ownership of a National Football League Franchise: The Answer to Relocation and Taxpayer Financing of NFL Teams*, 18 LOY. L.A. ENT. L.J. 589, 608-09 (1998) (claiming it is "now well established" that the NFL is not a single entity and discussing the First Circuit's rejection of the defense in *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994)).

134. *Seabury Mgmt., Inc. v. Prof'l Golfers Ass'n*, No. 94-1814, 1995 WL 241379 (4th Cir. Apr. 26, 1995), *aff'g in relevant part*, 878 F. Supp. 771 (D. Md. 1994). *Seabury Management*, the plaintiff, alleged that "the PGA and MAPGA, a PGA section, conspired to limit Seabury's ability to conduct a golf trade show in violation of the Sherman Act." 878 F. Supp. at 777. This obviously differs from the normal fact pattern involving a professional sports league's assertion of the single entity defense, where either (1) the plaintiff accuses a league of conspiring with its member teams, or (2) the plaintiff accuses member teams of conspiring with each other. Nonetheless, the Fourth Circuit became the first

Supreme Court in *Copperweld* specifically limited its holding to a parent corporation and its wholly owned subsidiary,<sup>135</sup> the Fourth Circuit in *PGA* noted that it had earlier used the functional test articulated by the Supreme Court<sup>136</sup> to find other related entities incapable of a section 1 violation.<sup>137</sup> The Fourth Circuit applied *Copperweld's* test to the PGA and the Middle Atlantic Section of Professional Golfers' Association ("MAPGA"), an independently owned and separately incorporated section of the PGA.<sup>138</sup> The court concluded that the two associations constituted a single economic entity incapable of conspiring in violation of section 1 of the Sherman Act.<sup>139</sup>

In 1996, the Seventh Circuit became the first court to extend the single entity defense to a traditional professional sports league and its member teams in *Chicago Professional Sports Limited Partnership v. National Basketball Association*.<sup>140</sup> Using rationale that has commentators at odds,<sup>141</sup> the court concluded that "when acting in the broadcast market the NBA is closer to a single firm than to a group of independent firms."<sup>142</sup> The court's most basic reasoning was that the NBA "produces a single product; cooperation is essential (a league with one team would be like one handed clapping); and a league need not deprive the market of independent centers

to extend the single entity defense to a professional sports league in any context.

135. *Seabury*, 1995 WL 241379, at \*2 (recognizing that the Supreme Court "specifically declined to decide whether a parent corporation may conspire 'with an affiliated corporation it does not completely own'" (quoting *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 767 (1984))).

136. See *supra* text accompanying notes 129-131 (discussing *Copperweld's* functional test for applying the single entity defense).

137. See 1995 WL 241379, at \*2. See also, e.g., *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 703-705 (4th Cir. 1991) (en banc) (examining "the substance, rather than the form, of the relationship" and the degree of control exercised by a hospital's Board of Trustees to find the hospital and its medical staff incapable of conspiring), *cert. denied*, 502 U.S. 1074 (1992); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990) (holding two wholly owned subsidiaries of the same parent corporation are legally incapable of conspiring).

138. 1995 WL 241379, at \*3.

139. *Id.* The court of appeals affirmed the district court's reasoning and conclusion that the PGA and MAPGA constituted a single entity. *Id.* The district court had earlier reasoned that:

[T]he sections [including the MAPGA] are governed by the PGA Constitution . . . . It is true that each section maintains its own revenues, has its own by-laws, elects its own officers and often conducts programs intended to benefit member of that section only. The sections' actions, however, must be approved by the PGA to ensure that they are in the best interest of the organization as a whole.

878 F. Supp. at 777-78.

140. 95 F.3d 593 (7th Cir. 1996).

141. Compare Deckert, *supra* note 133, at 101-02 (noting possible problems with *Chicago Sports Partnership*), with Goldman, *supra* note 133, at 795-96 (arguing for single entity analysis of the NFL one facet at a time in an article written prior to the Seventh Circuit opinion in *Chicago Sports Partnership*).

142. 95 F.3d at 600.

of decisionmaking.”<sup>143</sup> The court decided that the NBA looks more or less like a single entity, depending on which facet of league business the court analyzed.<sup>144</sup> Moreover, relying partly on the Supreme Court’s dictum in *Brown v. Pro Football, Inc.*,<sup>145</sup> the Seventh Circuit decided that more than one characterization of a sports league is possible,<sup>146</sup> and that “[s]ports are sufficiently diverse . . . to investigate their organization and ask

143. *Id.* at 598-99. The NBA conceded that it *formally* consisted of 30 separate corporations or partnerships—29 teams and the league itself. However, it argued that it *functioned* “as a single entity, creating a single product (‘NBA Basketball’) that competes with other basketball leagues (both college and professional), other sports (‘Major League Baseball’, ‘college football’), and other entertainments such as plays, movies, opera, TV shows, Disneyland, and Las Vegas.” *Id.* at 597.

The court of appeals decided that separate ownership gives each owner a great incentive to field a better team to booster local support and make the contests more exciting. When each owner strives to better his or her respective team, the level of competition rises, and the NBA as a whole becomes more attractive to fans when compared against other basketball leagues, other sports in general, and other non-sports related forms of entertainment. *Id.* at 597-598. Noting that these separate owners do not form a cartel, the court of appeals concluded that “antitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate [sic] competition between that organization and other producers.” *Id.* at 598.

The court of appeals had earlier discussed the Supreme Court’s reliance on the fact that, unlike concerted action, a parent-subsidiary combination does not “deprive[] the marketplace of the independent centers of decisionmaking that competition assumes” without also increasing efficiencies that come with integration. *Id.* at 598 (quoting *Copperweld*, 467 U.S. at 769). The court decided that the NBA agreements fit in this middle ground such that they may reduce the number of decisionmakers yet may improve efficiency at the same time. *Id.*

144. *Id.* at 599. The court explained how the appearance of the NBA is different depending on which facet of the league the court examines:

From the perspective of fans and advertisers (who use sports telecasts to reach fans), “NBA Basketball” is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, . . . . But from the perspective of college basketball players who seek to sell their skills, the teams are distinct, and because the human capital of players is not readily transferable to other sports . . . the league looks like a group of firms acting as a monopsony.

*Id.* at 599. A monopsony is generally defined as a “market in which there is only one buyer of a good, service, or resource.” CAMPBELL R. MCCONNELL & STANLEY L. BRUE, MICROECONOMICS G-15 (1996).

145. 518 U.S. 231 (1996). In *Brown*, The Supreme Court held that the NFL’s unilaterally imposed fixed salary for developmental squad players fell within the scope of the nonstatutory labor exemption from the Sherman Act. *Id.* at 235. The Court did not analyze the single entity defense, but in dictum conceded that:

[T]he clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival . . . . In the present context, however, that circumstance makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us.

*Id.* at 248-49 (citation omitted). The court of appeals in *Chicago Sports Partnership*, after quoting the *Brown* dictum above and recognizing that the Supreme Court found it hard to characterize the NFL, decided that “[t]o say the league is ‘more like a bargaining employer’ than a multi-employer unit is not to say that it necessarily is one, for every purpose.” 95 F.3d at 599.

146. 95 F.3d at 599.

*Copperweld's* functional question one league at a time—and perhaps one facet of a league at a time.”<sup>147</sup>

### III. ANALYSIS OF THE ISSUES

#### *A. Application of the Sports Broadcasting Act to DIRECTV*

Should the *Shaw* court have applied the current SBA to exempt from section 1 of the Sherman Act the NFL teams' pooled agreement to sell their broadcast rights to DIRECTV? Both the legislative history and other courts' interpretations of the SBA indicate that it should not.<sup>148</sup>

The Third Circuit in *Shaw* correctly determined on interlocutory appeal that the current SBA does not exempt the NFL's pooled contract with DIRECTV from section 1 of the Sherman Act.<sup>149</sup> The NFL faced a fourth down and long situation when it decided to assert an SBA exemption to its DIRECTV contract. The language of the SBA exempts “sponsored telecasting” of professional sports games.<sup>150</sup> Moreover, when Pete Rozelle, former commissioner of the NFL, testified about the SBA in 1961, he specifically acknowledged that the SBA would only apply to free telecasting of professional sports and not closed circuit or subscription television.<sup>151</sup> Furthermore, the courts have been unwilling to extend the SBA to pay television because the SBA is special interest legislation.<sup>152</sup> Relying on the plain language of the SBA and the legislative history behind it, the *Shaw* court conclusively put the issue of SBA exemption for pay television to rest.

The irony of this well-supported conclusion is that the court's refusal to extend the SBA exemption to the NFL's pooled sale of television rights to DIRECTV injures many of the consumers Congress intended the Sherman Act to protect.<sup>153</sup> Consumers, like the law students in this Note's opening hypothetical, and other consumers who simply want to watch the best NFL game available in the country each week, are economically worse off if the

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147. *Id.* at 600.

148. See *supra* Part II.B for legislative history and judicial interpretation of the scope of the SBA.

149. *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 303 (3d Cir. 1999).

150. See *supra* notes 16, 76-80 and accompanying text.

151. See *Aug. 28 Hearings*, *supra* note 67, at 36; *Sept. 13 Hearings*, *supra* note 77, at 4.

152. See, e.g., *Shaw*, 172 F.3d at 302-03 (“The NFL got what it lobbied for; it cannot now expect the federal courts to transform ‘narrow, discrete, special-interest’ legislation into a far broader exemption.”); *Chicago Prof'l Sports Ltd. P'ship*, 961 F.2d 667, 671 (7th Cir. 1992) (“The [SBA] is special interest legislation, a single-industry exception to a law designed for the protection of the public. . . . Special interest laws do not have ‘spirits,’ and it is inappropriate to extend them to achieve more of the objective the lobbyists wanted.”).

153. See *supra* notes 42-43 and accompanying text.

courts force them to forego their first choice of paying for and enjoying the Sunday Ticket, and instead settle for their second choice of watching whatever happens to be the local free game that Sunday.<sup>154</sup>

### *B. Application of the Single Entity Defense to the NFL*

Should the single entity defense be afforded to the NFL and its teams when pooling together to sell television broadcast rights? The courts and commentators now disagree on this issue.<sup>155</sup>

As discussed earlier, even though a single actor can violate section 2 of the Sherman Act,<sup>156</sup> section 1 only prohibits multiple parties from contracting, combining, or conspiring to restrain trade.<sup>157</sup> This distinction is an important one. The NFL's interaction with DIRECTV in *Shaw* did not constitute a section 2 monopoly violation because the NFL did not monopolize any relevant market of commerce.<sup>158</sup> Rather, Shaw alleged that the NFL's contract with DIRECTV constituted an unreasonable restraint of trade in violation of section 1.<sup>159</sup> Therefore, if the NFL can successfully claim it acted as a single economic entity, it can escape Sherman Act liability altogether; it did not violate section 2, and section 1, which requires a combined act by multiple parties, would not apply.

*PGA*<sup>160</sup> and *Chicago Sports Partnership*<sup>161</sup> indicate that the courts may extend the single entity defense to the sports world more liberally in the future.<sup>162</sup> However, as discussed earlier, the majority of courts to address this

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154. Basic microeconomic theory assumes that the consumer is rational and spends money in a manner which gives the consumer the most satisfaction possible given that consumer's limited income. Thus, if a consumer pays the \$159 for a yearly Sunday Ticket package, the consumer believes that the Sunday Ticket will give that consumer the most satisfaction for that amount of money. If the Sunday Ticket is taken away, the consumer will be forced to spend the same \$159 on something else only because his first choice was unavailable. See generally MCCONNELL & BRUE, *supra* note 144, at 141-44. If the consumer is forced to alter the set of goods purchased with the \$159 previously spent on the Sunday Ticket, the consumer will realize less satisfaction for that amount of money and will therefore be in an economically inferior position. *Id.* at 142.

155. See *supra* Part II.C for judicial treatment of the single entity defense.

156. See *supra* notes 60-62 and accompanying text.

157. See *supra* notes 44, 54 and accompanying text.

158. See generally *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power . . ."). The NFL's conduct does not fall within these confines of section 2.

159. See *supra* note 6 and accompanying text.

160. *Seabury Mgmt. Inc. v. Prof'l Golfers Ass'n*, No. 94-1814, 1995 WL 241379 (4th Cir. Apr. 26, 1995), *aff'g in relevant part*, 878 F. Supp. 771 (D. Md. 1994).

161. *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992).

162. While the single entity defense is obviously recognized in other contexts, praised in



point have still denied the defense to professional sports leagues.<sup>163</sup> Courts that have denied application of the single entity defense to sports leagues and the commentators who applaud these courts' decisions generally have characterized each league as a collective group of multiple economic entities for all purposes.<sup>164</sup> Although this type of blanket characterization creates consistent precedent,<sup>165</sup> it defies *Copperweld's* instructions, ignoring the *reality* of a professional sports league and instead focusing on its *form*. *Copperweld* indicates that the courts should apply a functional test, looking not at the formal organization, but at the reality of the enterprise and the extent a parent controls its subsidiary.<sup>166</sup> The fact that a different individual owns each team should not end the inquiry. As correctly recognized in *Chicago Sports Partnership*, the reality of a professional sports league is that it functions as a single entity in some circumstances and functions as a group of independent competing firms in others.<sup>167</sup> Using the test expressed in *Copperweld*,<sup>168</sup> courts should "ask *Copperweld's* functional question one league at a time—and perhaps one facet of a league at a time . . ."<sup>169</sup>

If courts are still to consider *NASL* and *L.A. Coliseum* good law, they should do so because, after applying *Copperweld's* functional test, they determine that the several NFL teams in each case functioned as competitors with diverse interests and not simply because the teams had different ownership or different economic values. In *NASL*, the NFL enacted the cross-ownership rule specifically to protect the NFL from competition against other sports leagues and other forms of entertainment.<sup>170</sup> Therefore,

dissenting opinions, and widely debated by scholars, *PGA* and *Chicago Sports Partnership* are the first two cases to actually apply the defense to Sherman Act claims against professional sports leagues.

163. See *supra* Part II.C.

164. See, e.g., *St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851 (8th Cir. 1998); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *L.A. Mem'l Coliseum Commission v. Nat'l Football League*, 519 F. Supp. 581 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir. 1984); *N. Am. Soccer League v. Nat'l Football League*, 505 F. Supp. 659 (S.D.N.Y. 1980), *rev'd*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982); *McNeil v. Nat'l Football League*, 790 F. Supp. 871, 879-80 (D. Minn. 1992).

165. See, e.g., Timothy R. Deckert, *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in Chicago Professional Sports Limited Partnership v. National Basketball Association*, 5 VILL. SPORTS & ENT. L.J. 73, 101-02 (1998) (claiming that analyzing each individual facet of the league for single entity status merely complicates the issues and will lead to increased litigation).

166. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1983).

167. See *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599 (7th Cir. 1996).

168. See *supra* notes 129-31 and accompanying text.

169. *Chicago Sports P'ship*, 95 F.3d at 600.

170. See *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1254-55, *cert. denied*, 459 U.S. 1074 (1982). See also *supra* text accompanying note 85 for a brief description of the NFL's cross-ownership rule.

the reality of the relationship in this specific facet of the league is that the team owners had a complete unity of interest, all agreeing to focus their capital solely on improving the NFL and not on a competing sports league. In doing so, the NFL acted like a single economic entity and attempted to make the entire NFL more attractive to fans when compared to other sports leagues like the NASL.<sup>171</sup> Therefore, after *Copperweld*, the courts should no longer give credence to *NASL*'s rejection of the single entity defense in analyzing the issue.

In *L.A. Coliseum*, however, the Ninth Circuit correctly concluded that the NFL did not operate as a single entity in the context of team relocation.<sup>172</sup> Rule 4.3 of Article IV of the NFL Constitution required unanimous approval of all teams whenever a team wanted to move into the home area of another existing team.<sup>173</sup> Therefore, Rule 4.3 protected individual teams from other teams, but did not protect the NFL from other sports leagues or other forms of entertainment. Thus, the reality was that the relationship among the teams was adversarial. Consequently, the NFL did not function as a single economic entity when it enacted or implemented the franchise relocation rule. As *Chicago Sports Partnership* indicates, however, just because the NFL was not acting as a single entity in the context of franchise relocation, this should not necessarily preclude the single entity defense in a different facet of the league.<sup>174</sup>

#### IV. PROPOSAL

The following two proposals are means to an economically desirable end. Consumers, if willing to pay the money and if technology permits, should be able to watch any football game in the country. DIRECTV makes this possible. If those people willing to pay the price for the Sunday Ticket in return for the opportunity to watch a football game in another city are forced to forego their first choice and instead settle for a local game, these consumers are worse off economically.<sup>175</sup> Moreover, the Sunday Ticket is a luxury; people can live without it. The courts should allow the market to

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171. *See id.*

172. This is not to suggest that a blanket characterization of the NFL as a group of multiple entities is always correct. However, in the specific context of team relocation, *Copperweld*'s functional test, discussed *supra* notes 129-31 and accompanying text, leads to a multi-entity conclusion. Each owner of a professional sports team competes for the entertainment dollar in his or her team's home city. If an NFL team moved into the settled home city of another NFL team, they would then compete with each other for the consumer's entertainment dollar, thereby creating diverse economic interests.

173. *See supra* notes 96-97 and accompanying text (discussing NFL Rules 4.3 and 4.1).

174. 95 F.3d at 600.

175. *See supra* note 154 for relevant microeconomic theory.

decide the price of the Sunday Ticket. If the price becomes too high, consumers will stop paying the yearly fee and DIRECTV will lower the price to a level consistent with the value placed on the Sunday Ticket by consumers.<sup>176</sup> If courts invalidate the NFL's pooled agreement with DIRECTV under the Sherman Act, and the consumer is injured by losing the Sunday Ticket altogether, the congressional intent behind the Sherman Act of protecting consumer welfare<sup>177</sup> is actually frustrated.

#### A. Congressional Amendment to the SBA

The most concrete resolution to the antitrust problem of the Sunday Ticket would be an amendment to the current SBA. Congress enacted the original SBA as special interest legislation, driven by the NFL's desire to incorporate all of its league games into a single network television contract.<sup>178</sup> Pete Rozelle testified that when Congress enacted the SBA, it intended the statute to allow the NFL to contract solely with CBS. Rozelle then testified further: "perhaps 20 years from now the television picture will change. The single network may no longer be desirable, and it may become much better for the public and the league to use more than one network."<sup>179</sup>

The proper amendment to the SBA could benefit the public and the NFL, a result that could push Congress to update its special interest SBA. A potential problem with amending the SBA to exempt satellite and other pay television is that sports leagues might attempt to enter into exclusive pooled contracts with the satellite providers, thereby harming those individuals who were content with watching the local game on free television. An effective amendment to the SBA, therefore, should only exempt pooled contracts that *supplement* contracts for sponsored telecasts. I propose Congress amend the existing SBA by adding a *supplemental exemption* directly after the exemption for sponsored telecasting:

In addition, such antitrust law shall not apply to any joint agreement by or among those persons and leagues listed above, by which the league sells or transfers the rights of such league's member clubs in non-sponsored telecasting of the league's games only so long as the

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176. See *supra* note 154.

177. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (noting the purpose of the Sherman Act was to prevent threats against consumer welfare); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 300 n.4 (3d Cir. 1999) (acknowledging that "[t]he antitrust laws were designed for the protection of the public").

178. See *Aug. 28 Hearings*, *supra* note 67, at 31-35.

179. *Id.* at 35.

persons and leagues maintain an agreement for the concurrent broadcast of such games in sponsored telecasting.

Under this amendment, if the NFL wants to offer a pooled package of games through the Sunday Ticket, it could only do so if it were already telecasting local games over a sponsored network as it does now. If the NFL chose to quit broadcasting games completely, it obviously could do so. However, it could not quit broadcasting on sponsored networks without losing the supplemental exemption for its DIRECTV broadcast.<sup>180</sup>

Even though SBA committee hearings show that Pete Rozelle understood that the original SBA was only intended to exempt free telecasting of professional sports,<sup>181</sup> there is no real explanation why only this exemption exists.<sup>182</sup> Therefore, if an SBA amendment would simply allow additional viewing options for those fans who wish to subscribe to the Sunday Ticket, consumers are better off and the amendment would still be consistent with the intent of Congress in writing the SBA.

### *B. NFL Treated as Single Entity in Certain Facets of League Action*

The second and more immediate resolution to the antitrust problem with the Sunday Ticket is that courts should conclude that, when selling pooled broadcast rights to a television network, the NFL teams function as a single economic entity.<sup>183</sup> To avoid the blanket characterization trap into which many courts and commentators in the past have fallen,<sup>184</sup> courts should follow the Seventh Circuit's path in *Chicago Sports Partnership* and analyze the NFL and other professional sports leagues one facet of the league at a

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180. This idea stems in part from the NFL's attempt in *Shaw* to build a derivative exemption for satellite television into the existing SBA. This Note does not, however, argue that Shaw's claim of a built-in derivative exemption to the current SBA is valid, but instead argues that on a similar theory, Congress could amend the SBA to include the supplemental exemption.

181. See *Aug. 28 Hearings*, *supra* note 67, at 36; *Sept. 13 Hearings*, *supra* note 77, at 4.

182. See *supra* note 77 (explaining probable rationale for limiting SBA to free "network telecasting").

183. There is one possible pitfall with a court granting the single entity defense to the NFL for the purpose of entering a pooled contract with a television network: the NFL could conceivably deal exclusively with DIRECTV and other non-sponsored networks when its current television contracts with FOX, CBS, and ABC expire. Exclusive dealing would force fans to subscribe to a program like the Sunday Ticket or forego watching football on television altogether. This outcome does not seem likely, however. The NFL relies on its mass exposure on free television to promote its games in hopes that fans will spend money on NFL merchandise and tickets for viewing games live. Thus, the NFL would probably not discontinue its current sponsored telecasting of games, even if a court accepted the single entity defense.

184. See *supra* notes 164-65 and accompanying text (discussing the blanket characterization of the NFL as not a single entity for all purposes).

time.<sup>185</sup> In *Copperweld*, the Supreme Court admittedly did not conclude that a professional sports league and its member teams are unable to conspire in violation of section 1 of the Sherman Act.<sup>186</sup> However, the driving force behind the single entity defense as announced by the Supreme Court is that courts should look at the reality of the relationship and the control the parent has over the subsidiary in determining whether multiple organizations are actually functioning as a single economic entity.<sup>187</sup>

When selling their pooled broadcast rights to a television network, the teams in the NFL are acting as a single entity. The NFL teams all share evenly in the television revenue,<sup>188</sup> therefore all teams have a unity of interest in negotiating the best possible deal for the NFL as a whole. The different teams do not compete with one another in any economic sense when negotiating together for this common cause.<sup>189</sup> Moreover, the Sunday Ticket contract embodies broadcast rights for the NFL as a whole so that, in this context, the parent league has complete control over the independent teams.<sup>190</sup>

## V. CONCLUSION

The Sunday Ticket is a valuable option for certain sports fans such as the two law students in the opening hypothetical who are unsatisfied with free sports broadcasts. There is no evidence that the sponsored networks intend to create a nationwide means of satisfying these fans' interest in watching games not offered locally. Therefore, if the courts were to invalidate the Sunday Ticket package as an illegal restraint of trade in violation of section 1 of the Sherman Act, certain consumers would suffer by losing their first choice on how to spend their money while no consumers would benefit. This decrease in consumer welfare is the precise harm that Congress intended the Sherman Act to prevent.<sup>191</sup>

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185. See *supra* note 147 and accompanying text.

186. See *supra* note 114 and accompanying text (explaining the holding in *Copperweld* and noting that the Supreme Court specifically declined to address the issue of whether a parent and non wholly-owned corporation could conspire in violation of section 1 of the Sherman Act).

187. See *supra* notes 129-31 and accompanying text (discussing the functional test set out by *Copperweld* for a single entity analysis).

188. See, e.g., Liz Clarke, *New Builders: As Team Rings in New Season, Snyder Tries to Ring Up Sales*, WASH. POST, Sept. 9, 1999, at G7 (noting that each NFL team gets an equal share of the current eight-year television deal with network stations worth \$17.6 billion).

189. See *United States v. Nat'l Football League*, 196 F. Supp. 445, 447 (E.D. Pa. 1961) (stating that teams agreed to allow the NFL commissioner to negotiate with networks to sell a package deal).

190. See *id.*

191. See *supra* note 42.

In order to follow the spirit of the Sherman Act, either Congress or the courts should act. Congress should amend the SBA to allow a supplemental exemption to satellite broadcasts of sports contests so long as the contests are also broadcast on free sponsored television for those consumers who do not wish to pay DIRECTV for the additional games. Until Congress acts, the courts should follow *Copperweld's* structural test when analyzing the applicability of the single entity defense to sports leagues and recognize that, while selling its pooled broadcast rights to a television network, the NFL is acting as a single entity incapable of conspiring with itself in violation of section 1 of the Sherman Act.

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