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American Needle, Inc. v. National Football League and its Effect on Professional Sports

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I. INTRODUCTION

The National Football League (NFL), an unincorporated association,[1] is a multi-billion-dollar industry that produces America's favorite sport, football.[2] In 2014, ESPN published a survey revealing that professional football is almost three times more popular than the next closest professional sport, baseball.[3] Professional football's enormous popularity makes it an attractive client, which is why companies that are not afforded the opportunity to equally compete for the NFL's services become disgruntled.[4] That is exactly what happened in *American Needle, Inc. v. National Football League* (*American Needle*).[5] The NFL entered into an exclusive license agreement with Reebok International Ltd. (Reebok), effectively denying American Needle, Inc. (American Needle)[6] the opportunity to renew its previous headwear license.[7] American Needle claimed that the NFL and its organizations conspired to reach the exclusive license agreement with Reebok in violation of § 1 of

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1. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 730 (2010) ("Since 1920, [the NFL] has existed as an unincorporated 501(c)(6) association of separately owned and operated franchises … of varying legal types … that compete in games and in ancillary components of those games, such as the hiring of players, coaches, and staff.").

2. *See* Terry Keenan, *The $45 Billion Reason the NFL Ignores Despicable Behavior*, N.Y. POST (Sept. 13, 2014), http://nypost.com/2014/09/13/the-business-behind-the-nfls-blind-side/ (noting the market value of the NFL is forty-five billion dollars).

3. Darren Rovell, *NFL Most Popular for 30th Year in Row*, ESPN (Jan. 26, 2014), http://espn.go.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd.

4. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187 (2010).

5. *Id.*

6. AM. NEEDLE, INC., https://americanneedle.com/history/ (last visited Mar. 17, 2017).

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

the Sherman Act.[8] The Supreme Court in *American Needle* held that the NFL was not considered a single entity and therefore was within the scope of § 1.[9] While the case itself came to an anti-climactic conclusion,[10] *American Needle*'s holding has had a major impact on professional sports.[11]

This case note details the background of the Sherman Act and delves into the significance of the holding in *American Needle*. While the NFL was the only professional sports league mentioned in the opinion,[12] its impact extends far beyond the limits of the NFL.[13] The Court's narrow interpretation[14] of the structure of the NFL – viewing each individual team as independent decision-makers, instead of a collective unit working together to produce a single product – has changed the landscape of professional sports.[15]

Part II investigates the background of *American Needle*, including how the case started and the decisions rendered before the case reached the Supreme Court. Part III analyzes the evolution of the Sherman Act and considers what actions fall within the scope of § 1. Part IV focuses on the Court's decision in *American Needle*, exploring why the Court believed that the NFL was not considered a single entity and then describing where the case stands today. Part V further analyzes the Court's opinion but argues that through a six-factor analysis the NFL should be considered a single entity. Finally, Part VI explores the impact that the Court's decision has had on the landscape of professional sports in the NFL, NBA, MLB, and NHL.

8. *Id.* "American Needle claimed that the exclusive headwear licensing agreement between NFL Properties and Reebok violated § 1 of the Sherman Act, which outlaws any 'contract, combination . . . or conspiracy, in restraint of trade.'" *Id.* (quoting 15 U.S.C. § 1).

9. 560 U.S. 183, 202–03 (2010).

10. Ken Belson, *N.F.L. and American Needle Agree to Settle Lawsuit*, N.Y. TIMES (Feb. 18, 2015) (explaining that the NFL and American Needle came to an undisclosed settlement).

11. *See infra* Section VI.

12. The National Basketball Association (NBA) and the National Hockey League (NHL) each filed amicus briefs in support of the NFL as they recognized the ramifications that a judgment against the NFL would have. *See* Brief of Amici Curiae Nat'l Basketball Ass'n & NBA Props. in Support of the NFL Respondents' Response, Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009), 2009 WL 164243; Brief for Amicus Curiae the Nat'l Hockey League in Support of the NFL Respondents, Am. Needle, 129 S. Ct. 2859, 2009 WL 164244 (2009).

13. To illustrate the impact that *American Needle* has had on professional sports, I will look at cases involving professional sports leagues and antitrust issues, specifically in the National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA) and National Hockey League (NHL). *See infra* Section VI.

14. *See infra* Section V.

15. James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 517, 519 (2011).

II. THE BACKGROUND: *AMERICAN NEEDLE, INC. V. NATIONAL FOOTBALL LEAGUE*

The NFL consists of thirty-two separately owned teams.[16] Until 1963, each of the separately owned teams made its own decisions regarding trademarked items such as equipment and apparel.[17] The NFL realized that to grow in popularity, the individual teams needed to "collectively promote the NFL Brand—that is, the intellectual property of the NFL and its member teams—to compete against other forms of entertainment."[18] In 1963, the NFL established the National Football League Properties (NFLP) to handle all areas of intellectual property and advertising campaigns, which aligned the interests of each team to collectively promote the NFL.[19] The NFLP proceeded to grant nonexclusive licenses, permitting vendors to promote and distribute merchandise that contain each team's individualized logos.[20] One of these vendors, American Needle, was granted a nonexclusive license.[21]

American Needle held its nonexclusive license with the NFL until 2000 when each team voted to authorize the NFLP to grant exclusive licenses.[22] The NFLP subsequently granted Reebok an exclusive 10-year license to manufacture NFL apparel.[23] With Reebok controlling all NFL merchandise, American Needle's nonexclusive license was not renewed.[24]

American Needle filed a lawsuit in the Northern District of Illinois alleging that the exclusive agreement between the NFL and Reebok violated §§ 1 and 2 of the Sherman Act.[25] The NFL argued that it was a single entity, and therefore "immune from liability" under § 1.[26] The Northern District of Illinois agreed and granted summary judgment in favor of the NFL.[27] The court explained that the NFL's regulation of intellectual property and collective licensing agreement served to promote the NFL as a whole.[28] Through collective licensing, the individual NFL teams acted as one economic unit making them a single entity outside the scope of § 1.[29]

16. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 737 (7th Cir. 2008).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Am. Needle, Inc.*, 538 F.3d at 738.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Am. Needle, Inc.*, 538 F.3d at 738.
27. *Id.* at 739.
28. *Id.*
29. *Id.*

American Needle immediately appealed to the Seventh Circuit, which affirmed the decision rendered by the Northern District of Illinois.[30] The Seventh Circuit limited the scope of its review to the specific licensing of individual teams' intellectual property and its relationship to the NFL.[31] In order to uphold the District Court's decision and avoid scrutiny under § 1 of the Sherman Act, the NFL would have to be considered a "single entity."[32] To "mak[e] a single entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes."[33] The Seventh Circuit affirmed the Northern District of Illinois' holding[34] that § 1 did not apply to the NFL and its individually owned teams because they do not suppress economic competition.[35] The Seventh Circuit's decision was later reversed by the Supreme Court and remanded back to the Seventh Circuit to determine whether there was an antitrust violation under § 1 of the Sherman Act.[36]

III. ANTITRUST LAW

The Sherman Act was developed and passed in 1890 as Congress' first attempt to limit the prevalence of monopolies in America.[37] The main objective with its creation was "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently."[38] Those who are found in violation of the Sherman Act face civil liability as well as criminal prosecution by the Department of Justice.[39]

The litigation in *American Needle* centered upon § 1 of the Sherman Act.[40] The language of § 1 states:

30. *Id.* at 744.

31. *Am. Needle, Inc.*, 538 F.3d at 742.

32. *Id.*

33. *Id.*

34. *Id.* at 737.

35. *Id.* at 744. The Seventh Circuit denied that the NFL was within the scope of § 1 for three reasons. First, the NFL must function as a single entity to produce football games, which is the hallmark of the NFL. *Id.* at 743. Second, the NFL teams are not competitors but share an economic interest to promote the NFL. *Id.* Finally, the court emphasized that the history of collectively licensing intellectual property uninterrupted since 1963 leads to the conclusion that the NFL is a single entity. *Id.* at 744.

36. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010).

37. B. Zorina Khan, *Antitrust and Innovation Before the Sherman Act*, 77 ANTITRUST L.J. 757, 783 (2011).

38. F.T.C, *The Antitrust Laws*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

39. *Id.* Although, criminal prosecutions are usually limited to severe violations that are intentional such as price fixing. *Id.*

40. *Am. Needle, Inc.*, 560 U.S. at 189 (noting the only issue to decide was whether the NFL fell within the scope of § 1).

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[41]

The purpose of § 1, if read literally, is to prevent "[e]very contract, combination . . . or conspiracy, in restraint of trade."[42] Many courts have turned away from such a literal view of § 1, as it would cover the "entire body of private contract law."[43] Congress, in the late 19th Century, did not intend for the provision to have such an expansive coverage.[44] The Court's modified interpretation of § 1 is exemplified in *Texaco v. Dagher*, where the Court refused to take a literal approach to the explicit language of § 1, and instead recognized that "Congress intended to outlaw only *unreasonable* restraints."[45] Later in *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court held that the intent of the parties to dominate the market was the focus of the concerted action question.[46]

A. What is Considered a Concerted Action?

Concerted action is an "action which is planned, arranged, and agreed on by parties acting together to further or fulfill some plan or cause."[47] The "distinction between concerted and independent action" is the type of trade restraint that § 1 was invoked to enforce.[48] An independent action, unlike concerted action, is not enforceable under a § 1 analysis because a single entity's actions are only unlawful where it "threatens actual monopolization."[49] For a contract or conspiracy to fall within the limited coverage of § 1, it must deal with a concerted action that unreasonably restrains interstate or foreign trade or commerce.[50]

41. 15 U.S.C. § 1.

42. *Id.*

43. Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978); *see* Texaco Inc. v. Dagher, 547 U.S. 1, 1–2 (2006) (refusing to take a literal approach to the language of 15 U.S.C. § 1).

44. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (narrowing the literal scope of 15 U.S.C. § 1 to the long-recognized intention of Congress to outlaw only unreasonable restraints).

45. *Texaco*, 547 U.S. at 2.

46. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767–69 (1984).

47. Concerted Action Law & Legal Definition, USLEGAL, http://definitions.uslegal.com/c/concerted-action.

48. Monsato Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984).

49. *Copperweld*, 467 U.S. at 767.

50. *Id.* at 767, 768–69.

Concerted action, which has previously been held to cover parties that are legally distinct entities, now focuses less on the interconnectivity of the parties and more on the parties' intent to dominate the market.[51] The relevant inquiry in a concerted action question is whether parties are using their agreement to deprive "the marketplace of independent centers of decision making," effectively stifling competition.[52] As illustrated in *Copperweld*, the Supreme Court held that a parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other in a concerted action because they are controlled by a single decision-maker placing it outside the scope of § 1 of the Sherman Act.[53] The congregation of "independent centers of decision-making" to prevent competitors from enjoying free competition in the marketplace is the type of violation that the Sherman Act seeks to prevent.[54]

Regardless of whether parties are considered legally distinct entities or not, the Sherman Act prohibits any concerted action in restraint of trade or commerce.[55] The Supreme Court, in *United States v. Sealy, Inc.* (*Sealy*), ruled that a group of mattress manufacturers, Sealy licensees, who owned substantially all of Sealy, Inc.'s stock, conspired in violation of § 1 of the Sherman Act.[56] These licensees came to an agreement with each other to fix minimum retail prices and agreed to only operate in certain geographic areas.[57] The Supreme Court held the concerted activity of the individual manufacturers was in violation of § 1 of the Sherman Act even though they were legally considered a single entity.[58]

Similarly, in *NCAA v. Bd. of Regents of the Univ. of Oklahoma* (*Regents*), the Court held that the horizontal pricing agreement to restrict collegiate football programs from obtaining individual television contracts "place[d] an artificial limit on the quantity of televised football that is available to broadcasters and consumers."[59] The NCAA and its sub-committee, in a concerted action, came to an agreement to implement a plan to limit collegiate football programs' ability to obtain independent television contracts.[60] The Court viewed this proposed plan by the NCAA and its sub-

51. *See id.* at 768–69, 777 (holding that a parent and wholly-owned subsidiary are "incapable of conspiring with each other" for § 1 purposes, even though they are separate legal entities). While a parent and its subsidiary are "separate" for incorporation purposes, they are controlled by a single center of decision-making and have the same economic purposes. *Id.* at 771, 777.

52. *Id.* at 769.

53. *Id.* at 771, 777.

54. *Id.* at 769.

55. *See generally* United States v. Sealy, Inc., 388 U.S. 350, 357–58 (1967) (holding that Sealy and its licensees were part of a price fixing scheme in violation of the Sherman Act).

56. *Id.* at 356–57.

57. *Id.*

58. *Id.* at 357–58.

59. 468 U.S. 85, 99 (1984).

60. *Id.*

committee as an attempt at price fixing, which had an anticompetitive effect on the marketplace.[61] Ultimately, the Court illustrated that the NCAA was not a single entity, and therefore was within the scope of § 1 of the Sherman Act.[62] This was based on the idea that each College Football Association (CFA) member is in competition with one another, competing on and off the field for student-athletes and sponsors.[63] Justice Stevens' decision was a precursor for the decision in *American Needle* and further illustrated the distinctions between classes of violations under § 1 of the Sherman Act.[64]

B. Per Se Violations and the Rule of Reason

Violations under the Sherman Act are categorized as either per se violations or violations under the rule of reason.[65] A per se violation is one that requires little explanation – it is automatically illegal.[66] The Supreme Court has defined a limited number of circumstances that are per se illegal and are therefore violations of the Sherman Act, such as price fixing, collusive bidding, and group boycotts.[67] The most prominent of those examples is an explicit agreement to fix prices.[68] The Supreme Court, as stated in *Catalano, Inc. v. Target Sales, Inc.*, looks at any situation that involves price fixing to be an illegal activity and subject to an automatic violation of § 1 of the Sherman Act.[69]

When the facts surrounding a case do not fall within the limited circumstances of a per se violation, the court reviews the case under the rule of reason.[70] In these circumstances, the court applies a totality of the circumstances approach.[71]

The first step in the rule of reason analysis is for the plaintiff to demonstrate that there is a restraint on competition, which has produced or will produce an

61. *Id.* at 104.

62. *Id.* at 120.

63. *Id.* at 99.

64. *Id.* at 100–04 (explaining the distinction between per se violations and violations under the rule of reason). *Regents* was decided under the rule of reason due to the Court's evaluation of the unique circumstances that accompany the NCAA and its placement to maintain college football as an amateur sport. *Id.*

65. Legal Information Institute, https://www.law.cornell.edu/wex/antitrust.

66. *Id.*

67. Legal Information Institute, https://www.law.cornell.edu/wex/antitrust; *see, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 155 (1940) (concluding that price fixing unreasonably restricts trade and therefore is a violation of the Sherman Act).

68. Legal Information Institute, https://www.law.cornell.edu/wex/antitrust.

69. 446 U.S. 643, 650 (1980). According to the Supreme Court, it is irrelevant whether the agreement to fix prices is reasonable. *Id.*

70. *Am. Needle, Inc.*, 560 U.S. at 203. The rule of reason is implemented by "the factfinder weigh[ing] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

71. Legal Information Institute, https://www.law.cornell.edu/wex/antitrust.

anticompetitive effect.[72] *Regents* provides an example of how a plaintiff can meet its burden of proof.[73] In *Regents*, an NCAA committee developed a plan to reduce the impact that live television has on collegiate football game attendance.[74] The plan provided that collegiate football programs could only negotiate with two networks: American Broadcasting Company (ABC) and Columbia Broadcasting System (CBS).[75] The members of the CFA felt restricted and wanted the ability to negotiate with any network; more specifically, they wanted to enter into a lucrative contract with National Broadcasting Co. (NBC).[76]

Although the restraints of price fixing placed upon CFA members would ordinarily be a per se violation, the Court explained that "it would be inappropriate to apply a *per se rule*… [where it] involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[77] Instead, the plaintiffs turned to three specific areas where the NCAA's plan would produce an anticompetitive effect: (1) the plan fixed prices for specific telecasts; (2) network contracts essentially eliminated the CFA members' ability to negotiate with other networks; and (3) the plan created an "artificial limit on the production of televised college football."[78] The CFA members' ability to show the NCAA's power over both intercollegiate sports and television programming and how its plan restrained market prices and output demonstrated an anticompetitive effect.[79]

Once the plaintiff has met his or her burden of proof, the burden shifts to the defendant to justify why this situation promotes, rather than inhibits, competition.[80] The defendant must only provide a plausible justification for the restraint on competition in the marketplace.[81]

If the defendant meets his or her burden, the burden then shifts back to the plaintiff to show that the restraint is not reasonably necessary or that it can be

72. Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 Antitrust Law Journal 2 (Jan. 22, 2013), http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf; *see, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 (1984) (restraining members' freedom to contract with different broadcast stations proved to be an anticompetitive effect).

73. *Id.*

74. *Id.* at 91–94.

75. *Id.* at 92–93.

76. *Id.* at 94–95.

77. *Id.* at 100–01.

78. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 96, 98–100.

79. *Id.* at 104.

80. Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 ANTITRUST L.J. 2 (Jan. 22, 2013), http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf.

81. *Id.*

achieved in a less restrictive manner.[82] Where the plaintiff is unable to show a less restrictive alternative or that the restriction was not reasonably necessary, the court looks to a balancing approach to consider whether the anticompetitive effects outweigh the pro-competitive effects.[83] According to a study done by the American Bar Association, approximately 90% of the 300 rule of reason cases decided in the last 15 years found that the "plaintiff failed to demonstrate a significant anticompetitive effect."[84] Thus, in cases that are not considered per se violations, the plaintiff often faces an uphill battle to prove that the defendant's actions unreasonably restrain market competition.

There are instances where the court does not require a full rule of reason analysis.[85] This is often referred to as a "quick look analysis."[86] This quick look analysis may apply in situations where no justification exists for the opposing party to prove that its actions promote competition.[87]

The Court in *American Needle* limited its decision to whether the NFL was a single entity and then remanded the case back to the Seventh Circuit to discern whether a § 1 violation existed under the rule of reason.[88]

IV. THE CASE: *AMERICAN NEEDLE, INC. V. NATIONAL FOOTBALL LEAGUE*

American Needle is unique because it involved thirty-two individually owned teams that collectively make the NFL a consistent revenue-generating enterprise.[89] The main controversy involved the NFL's use of a separate entity to handle all areas of intellectual property, the NFLP.[90] The purpose of the NFLP was to align the interests of the individually owned NFL teams and force the owners to have equity in the decisions that were being made collectively as a league in regard to intellectual

82. *Id.*

83. James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 539 (2011).

84. Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 ANTITRUST L.J. 2 (Jan. 22, 2013), http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf.

85. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

86. *Id*. "In each of these cases, which have formed the basis for what has come to be called abbreviated or 'quick-look' analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.*

87. *Cal. Dental Ass'n*, 526 U.S. at 770; James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 531 (2011).

88. Am. Needle, Inc. v. Nat'l Football League 560 U.S. 183, 203 (2010).

89. *See infra* Part V.

90. *Am. Needle, Inc.*, 560 U.S. at 187.

property.[91] The landmark decision in *American Needle* set a precedent for professional sports leagues moving forward that the NFL is not a single entity.[92]

A. Supreme Court's Reasoning

In *American Needle*, the Supreme Court reversed the decision of the Seventh Circuit[93] and held that the NFL is not a single entity.[94] The Supreme Court adopted the framework set out in *Copperweld*, which stated that the concerted action question is not exclusive to legally distinct entities.[95] The Court avoided such "formalistic distinctions in favor of a functional consideration of the parties," focusing on whether an agreement joins together independent decision-makers.[96]

Justice Stevens relied on the Supreme Court's decisions in *Regents*[97] and *Sealy*[98] to conclude that the NFL is not a single entity.[99] Justice Stevens used these cases to illustrate that the Court has "repeatedly found instances in which members of a legally [distinct] entity violated § 1 when the entity was controlled by a group of competitors."[100] These cases were similar to *American Needle* in that they detailed a group of potential competitors coming together for a single cause and effectively extinguishing competition in the marketplace.[101] Ultimately, the key determination was whether the alleged conduct of the NFL joined together separate decision-makers.[102]

In its analysis, the Court looked at the differences between a parent-subsidiary relationship versus joint conduct.[103] The Court illustrated that a parent and its wholly owned subsidiary cannot violate § 1 of the Sherman Act because they are incapable of conspiring with one another.[104] The reason that such a structure can avoid § 1 is because of the centralization of decision-making authority.[105] The subsidiaries are controlled by the authority of the parent who makes decisions that the subsidiaries

91. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law,* 119 YALE L.J. 726, 731–32 (2010).

92. *Am. Needle, Inc.*, 560 U.S. at 201.

93. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008).

94. *Am. Needle, Inc.*, 560 U.S. at 186.

95. *Id.* at 189, 191.

96. *Id.* at 191.

97. 468 U.S. 85 (1984).

98. 388 U.S. 350 (1967).

99. *Am. Needle, Inc.*, 560 U.S. at 191–92, 202–03.

100. *Id.* at 191.

101. *Id.* at 191–92.

102. *Id.* at 195.

103. *Id.* at 194.

104. *Am. Needle*, 560 U.S. at 194.

105. *Id.*

follow.[106] Conversely, joint conduct from separate decision-makers to suppress market competition is the conduct that § 1 was created to prevent.[107] The Court viewed the individual NFL teams as separate decision-makers rather than a single entity working together to create a unified product.[108]

According to the Court, the NFL does "not possess either the unitary decision-making quality or the single aggregation of economic power characteristic of independent action."[109] The Court recognized that the NFL is a single entity in some aspects such as building the NFL brand, but not here.[110] According to the Court, each individual NFL team is a "separate, profit-maximizing entity."[111] The Court likened the surrounding facts to a football game itself, and emphasized that just as football teams compete against one another on the field, for fans and tickets, they also compete for intellectual property.[112] The licensing of each team's valuable trademark creates competition for its individual services, not for the common interests of the league itself.[113]

The Court rejected the NFL's argument that because the NFL teams share revenues as a single unit, they should be considered a single entity.[114] The Court stated that if potential competitors could evade § 1 scrutiny by merely sharing profits, then any cartel could evade antitrust law.[115] Competitors cannot simply create an end-around § 1 of the Sherman Act by "acting through a third-party intermediary or joint venture."[116]

The Court acknowledged that NFL teams do share an interest in creating a successful league, which requires a host of collective decision-making,[117] but the conduct at issue in *American Needle* exemplified that the NFL teams were acting as "separate economic actors pursing separate economic interests" to license individual

106. *Id.*

107. *Id.* at 194–95.

108. *Id.* at 196–97.

109. *Id.* at 196.

110. *Am. Needle, Inc.*, 560 U.S. at 198, 200–02 (illustrating the perception that the NFL is a single entity because of its shared profits structure). The Court further explains that if profit sharing between parties shows a commonality of interest to exclude scrutiny under § 1, then all cartels could evade antitrust laws because all cartels have some form of commonality of interest. *Id.* at 200–02.

111. *Id.* at 198.

112. *Am. Needle, Inc.*, 560 U.S. at 196–97.

113. *Id.* at 197.

114. *Id.* at 201.

115. *Id.*

116. *Id.* at 202 (quoting Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 336 (2d Cir. 2008)).

117. *See Am. Needle, Inc.*, 560 U.S. at 202 (justifying the NFL's single entity status as they "must cooperate in the production and scheduling of games" to ensure the NFL's success); Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (holding that the NFL is a single entity in dealing with collective bargaining activity).

intellectual property.[118] As a result, the Court reversed the Seventh Circuit's decision.[119]

B. Where Does the Case Stand Today?

After the Supreme Court issued its decision, the case was remanded back to the Seventh Circuit for a judgment to be issued on whether the NFL's exclusive license was in violation of § 1 of the Sherman Act.[120] The Supreme Court instructed the Seventh Circuit to judge the case under the rule of reason[121] because *American Needle* did not fall within the limited number of circumstances that the Court has declared to be a per se violation.[122] Unfortunately, the rule of reason has yet to be applied to the NFL as the parties came to an undisclosed settlement in 2015.[123]

V. THE NFL IS A SINGLE ENTITY, AND THUS, OUTSIDE THE SCOPE OF § 1 OF THE SHERMAN ACT

While *American Needle's* holding that the NFL is not a single entity remains good law, there is an argument to be made that the NFL should be considered a single entity.[124] Each of the following factors provides substantial evidence that the NFL is a single entity: (1) treatment of similarly structured entities outside of professional sports; (2) the evolution of the single entity defense applied in professional sports; (3) the source of value for each individual NFL trademark; (4) the impracticality of individually negotiating contracts with each specific team; (5) the NFL's collective decision-making model; and (6) the NFL's longstanding tradition of licensing its intellectual property since 1963.

118. *Am. Needle, Inc.*, 560 U.S. at 197.

119. *Id.* at 201.

120. *Id.* at 204.

121. *Id.* at 203.

122. *Id.*

123. Ken Belson, *N.F.L. and American Needle Agree to Settle Lawsuit*, N.Y. TIMES (Feb. 18, 2015) https://www.nytimes.com/2015/02/19/sports/football/nfl-and-american-needle-agree-to-settle-lawsuit.html. While the practical importance of this decision remains as both Nike and New Era both share exclusive apparel licensing rights to the NFL trademarks, American Needle likely saw that the expense for continued litigation on remand did not outweigh the benefit to recover the undisclosed settlement amount. Marc Edelman, *American Needle Settles Antitrust Lawsuit With the NFL, Preventing An Important Sports Law Trial*, FORBES, 1 (Mar. 3, 2015), https://www.forbes.com/sites/marcedelman/2015/03/03/american-needle-settles-antitrust-lawsuit-with-the-nfl-preventing-an-important-sports-law-trial/#6806342f74f7.

124. *See Am. Needle, Inc.*, 560 U.S. at 202 (justifying the NFL's single entity status as they "must cooperate in the production and scheduling of games" to ensure the NFL's success); *Brown* 518 U.S. at 250 (holding that the NFL is a single entity in dealing with collective bargaining activity).

A. Treatment of Similarly Structured Entities Outside of Professional Sports

Fast-food franchises, like professional sports leagues, have leaned on the single entity defense to avoid scrutiny under § 1 of the Sherman Act.[125] These franchises are similarly structured to NFL teams as they both operate under the umbrella of a larger corporate structure, but at times work to further their own interests.[126] While some courts have allowed the single entity defense to be applied to franchises, others have not.[127]

In the 1993 case, *Williams v. I.B. Fischer Nevada* (*I.B. Fischer Nevada*), a store manager alleged that a no-switching clause in a franchise agreement between the franchisor of Jack-in-the-Box restaurants and the franchisee violated § 1 of the Sherman Act.[128] The no-switching clause stated that the parties could not offer employment to a manager of another Jack-in-the-Box within six months of termination without a waiver from the previous owner.[129] The court upheld the single entity defense by looking at the commonality of interests between the franchisor and franchisee.[130]

The court agreed that because each franchise "serves substantially the same products; the products are served to the public in the same manner; the franchisor develops products and services for all franchises; the employees dress alike; the décor of each franchise is similar; and the franchises are advertised as a single enterprise with a single logo" there is no competition between the parties.[131] This structure is a mutually beneficial relationship where, like the NFL, both parties grow by working together to produce a uniform product that is consumed by the public.[132] The franchisees, like individual NFL teams, prosper because of the use of the franchisor's logo as consumers know and trust the reputation that comes along with it.[133] The franchisor, like the NFL itself, is then able to collect more royalties as the franchisees grow in popularity reaching more people.[134]

125. Barry M. Block, Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems After American Needle,* 30 FRANCHISE L.J. 216, 217–19 (2011).

126. *Id.*

127. *See, e.g.*, Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669–70 (7th Cir. 1985) (illustrating that franchises can be subject to § 1 scrutiny); *but see* Williams v. I.B. Fischer Nevada, 999 F.2d 445, 447 (9th Cir. 1993) (holding that a fast-food franchise was considered a single entity).

128. 999 F.2d at 447.

129. *Id.*

130. *Id.*

131. Williams v. Nevada, 794 F. Supp. 1026, 1031 (D. Nev. 1992).

132. Barry M. Block, Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems After American Needle,* 30 FRANCHISE L.J. 216, 220 (2011).

133. *Id.* at 218.

134. *Id.*

In addition to Jack-in-the-Box, another fast-food franchise, Burger King, faced a § 1 claim.[135] In 1995, it was alleged that a franchisor had conspired with Caucasian franchisees to limit the opportunities for minorities.[136] While the court found no evidence of racial prejudice, it did state that the claim would nonetheless fail because the franchisor and its franchisees are "incapable of conspiring with each other."[137] This ruling – that fast-food franchises can successfully evade § 1 scrutiny – was echoed in a 2005 case involving the McDonald's corporation.[138]

Although numerous courts have allowed franchises to evade antitrust scrutiny, there have been some who have disagreed.[139] One example was *Motive Parts Warehouse v. Facet Enterprises*.[140] In this case, the Tenth Circuit found that a franchisor and franchisee could be capable of conspiring with respect to the prices that were to be paid by warehouse distributors who were in competition with the franchisees.[141] The ability of the franchisor to create a horizontal restraint on competition in the marketplace to the benefit of its franchisees negated the use of the single entity defense and subjected them to liability under § 1 of the Sherman Act.[142]

Part of the single entity defense is whether there are "separate economic actors pursuing separate economic interests."[143] The Court in *American Needle* stated that while NFL teams seek to promote a unified product on the field, they pursue separate economic interests off the field as they are in competition over fans, sales, and use of its trademarks.[144] This structure is like franchisor-franchisee agreements as they have a common interest in promoting the franchisor's brand, but then franchisees are competing with each other for revenue generated by paying customers.[145]

The court in *I.B. Fischer Nevada* permitted the single entity defense because of the centralized control the franchisor exerted over the franchisee's operations.[146] This is like the NFL as the league controls the production of the on-field product and each

135. Hall v. Burger King Corp., 912 F. Supp. 1509, 1548 (S.D. Fla. 1995).

136. *Id.* at 1517, 1548.

137. *Id.* at 1548.

138. Abbouds' McDonald's, LLC v. McDonald's Corp., No. CV04-1895P, 2005 WL 2656591, at *7 (W.D. Wash. Oct. 14, 2005) (holding that the plaintiff did not have antitrust standing to pursue a § 1 claim against McDonalds).

139. *See, e.g.*, Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669–70 (7th Cir. 1985) (allowing franchises to be subject to § 1 scrutiny).

140. 774 F.2d 380, 388 (10th Cir. 1985).

141. *Id.*

142. *Id.*

143. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984).

144. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196–98 (2010).

145. Barry M. Block & Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems After American Needle,* 30 FRANCHISE L.J. 216, 218–19 (2011).

146. 999 F.2d 445, 447–48 (9th Cir. 1993); Williams v. Nevada, 794 F. Supp. 1026, 1032 (D. Nev. 1992).

team has a unified interest to grow the NFL-brand as a centralized group.[147] While the Court's opinion in *American Needle* would distinguish the two by stating that each NFL team controls its own operations in regard to intellectual property,[148] looking at the collective nature by which decisions are made by the NFLP and the unified interests of promoting a uniform product on the field, they are more similar than the Court believes.[149]

Fast-food franchises are not exact replicas of the NFL, but they do share similar characteristics.[150] As demonstrated above, courts have applied the single entity defense to fast-food franchises evidencing that the NFL, a similarly structured entity, should be able to successfully use the defense as well.

B. Evolution of the Single Entity Defense Applied in Professional Sports

Not only has the single entity defense been asserted outside of professional sports, but it has also been applied in professional sports.[151] One of the first cases in which a professional sports league asserted the defense was in *Los Angeles Memorial Coliseum Commission v. NFL*, where the Oakland Raiders asserted that the NFL unlawfully restrained its ability to relocate to Los Angeles.[152] The court acknowledged that while there is a commonality of interest between teams, each are independent business entities, and thus, not a single entity.[153] The court discounted the fact that 90% of league revenues are divided equally among the individual teams.[154] While NFL teams have some divergent interests,[155] those divergent interests would not be a source of significant value without its association with the NFL.[156]

A few years after the decision in *Los Angeles Memorial Coliseum Commission v. NFL*, the NFL asserted the same defense as they sought to prevent the owner of the New England Patriots from raising money through a stock offering on the public market.[157] The court ruled in favor of the NFL but for reasons beyond recognizing

147. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 730–33 (2010).

148. *Am. Needle, Inc.*, 560 U.S. at 201.

149. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 731–33 (2010).

150. *See supra* notes 131–34, 143–49 and accompanying text.

151. *E.g.*, McNeil v. Nat'l Football League, 790 F. Supp. 871, 878 (D. Minn. 1992).

152. 726 F.2d 1381, 1385 (9th Cir. 1984).

153. *Id.* at 1389–90.

154. *Id.* at 1390.

155. *See id.* (illustrating examples of divergent interests such as ticket sales, players, and management personnel).

156. *E.g.*, Matthew Rocco, *TV Deals Boost NFL Revenue to New Record*, FOX BUSINESS (Jul. 21, 2015), http://www.foxbusiness.com/features/2015/07/21/tv-deals-boost-nfl-revenue-to-new-record.html.

157. Sullivan v. Nat'l Football League, 34 F.3d 1091, 1095–96, 1099 (1st Cir. 1994).

the NFL as a single entity.[158] The First Circuit explicitly stated that the NFL and its member clubs compete off the field, preventing the single entity defense from being applicable.[159]

Furthermore, in his decision in *Regents*, Justice Stevens held that the NCAA is not a single entity, but its applicability to *American Needle* is distinguishable.[160] The NCAA consists of individual universities that exist independent of the NCAA.[161] The collegiate football programs of those universities exist to benefit its parent, the university, not the NCAA.[162] The parent-subsidiary relationship that universities have with its football programs is directly comparable to the NFL and its thirty-two teams that exist to benefit the collective group – the NFL.[163]

While the Seventh Circuit's decision in *American Needle* declaring the NFL to be a single entity was a departure from previous circuit court rulings,[164] there have been decisions indicating that courts have viewed the NFL as a single entity prior to the 2010 decision.[165] *Brown v. Pro Football, Inc.* (*Brown*) involved a dispute over a pending collective bargaining revision in which the NFL unilaterally implemented modifications to player contracts after an agreement could not be reached.[166] The Supreme Court held that the NFL resembled a "single bargaining employer" as it related to its individual teams.[167] Although the Court limited the application of this decision to collective bargaining activities, the fact that its holding is limited is not dispositive.[168] *Brown* provides evidence that the Supreme Court saw the NFL in terms of a single entity but limited its decision to avoid an over-expansive application of its holding.[169]

Additionally, more recent cases have looked favorably upon the single entity defense as applied to other professional sports leagues.[170] The Seventh Circuit stated that the NBA was considered a single entity when selling broadcast rights but a joint

158. *Id.* at 1099.

159. *Id.*

160. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 745 (2010).

161. *Id.*

162. *Id.*

163. *Id.*

164. M. Scott LeBlanc, *American Needle, Inc. v. NFL: Professional Sports Leagues and "Single-Entity" Antitrust Exemption*, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 148, 149 (2010).

165. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996).

166. *Id.* at 234–35.

167. *Id.* at 249.

168. *Id.* at 250.

169. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 744–45 (2010).

170. *See, e.g.*, Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 52, 58 (1st Cir. 2002).

venture when competing for player acquisitions.[171] Judge Easterbrook, in his opinion, asserted that "the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment."[172] NFL teams, like the NBA, "are not completely independent economic competitors, as they depend upon a degree of cooperation" to compete against other forms of entertainment; this cooperation is vital to continue to generate value.[173]

C. The Value of Each Trademark

NFL team logos are unquestionably valuable.[174] The NFL's most recognizable team, the Dallas Cowboys, is valued at $4.2 billion while the Buffalo Bills, the least valuable NFL team, is still worth $1.5 billion.[175] With the popularity of the NFL and the net worth of each of its individual teams, it is easy to see the logic in Justice Stevens' argument that the teams are "potentially competing suppliers of valuable trademarks."[176]

The NFL is a $45 billion industry[177] with annual revenues projected to jump to $25 billion by 2025.[178] It is no secret that the NFL is the biggest name around.[179] The use of the NFL's "shield" symbolizes more than just a logo; it is a symbol that is bigger than any one team, and the reason why each of the thirty-two teams are worth more than $1 billion.[180] Market competitors, such as American Needle, have litigated to compete for the teams' trademarks solely because of their association with the NFL as a *single entity*.[181]

Professional football could plausibly be produced outside of the NFL if teams wanted to disband, as evidenced by the United States Football League (USFL), but it would be difficult for those teams to sustain substantial value over a period of more

171. Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996).

172. *Id.*

173. Brown v. Pro Football, Inc., 518 U.S. 231, 248 (1996).

174. *Sports Money: 2016 NFL Valuations*, FORBES, https://www.forbes.com/nfl-valuations/list.

175. *Id.*

176. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 197 (2010) (emphasizing because of the significant value each NFL team's trademark produces, apparel companies should be given the opportunity to compete).

177. Terry Keenan, *The $45 Billion Reason the NFL Ignores Despicable Behavior*, N.Y. POST (Sept. 13, 2014, 10:51 PM), http://nypost.com/2014/09/13/the-business-behind-the-nfls-blind-side.

178. Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTING NEWS (Sept. 5, 2014), http://www.sportingnews.com/nfl/story/2014-09-05/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap.

179. Terry Keenan, *The $45 Billion Reason the NFL Ignores Despicable Behavior*, N.Y. POST (Sept. 13, 2014, 10:51 PM), http://nypost.com/2014/09/13/the-business-behind-the-nfls-blind-side.

180. *Sports Money: 2016 NFL Valuations*, FORBES, https://www.forbes.com/nfl-valuations/list.

181. Emphasis added. *Am. Needle, Inc.*, 560 U.S. at 187.

than a few years.[182] The USFL was a viable professional football league for a period of three years.[183] After that, the USFL tried to directly compete with the NFL by changing from a spring schedule to a fall schedule.[184] This backfired and along with teams changing locations and the lack of financial stability due to uncontrolled spending by USFL owners, the USFL was effectively extinguished.[185] The USFL could not withstand the popularity and presence of the NFL, which has only grown further as time has passed.[186]

Currently, the NFL dominates the media market as its popularity is as strong as it has ever been.[187] The magnitude of the media rights deals that television networks have agreed to illustrates the value that our society places on the NFL and its on-field product.[188] Individual teams who seek to disband from the NFL would face substantial difficulties promoting their brand beyond local markets and obtaining national recognition, which generates substantial revenue from marketing campaigns, merchandise sales, and collectively negotiated media deals.[189]

D. Individually Negotiated Contracts

Most companies, like American Needle, are not interested in negotiating individual contracts with each team but instead are seeking a league-wide license for all thirty-two teams because of their association with the NFL.[190] The Supreme Court suggests that an apparel company should have to contract individually with each of the thirty-two NFL teams separately to use its trademark.[191]

Much of the net worth for each NFL team is not derived from ticket sales, merchandise, or any other individual sales directly tied to consumers; rather, it is due to lucrative media rights deals that the NFL has negotiated on behalf of the entire

182. *About the USFL*, UNITED STATES FOOTBALL LEAGUE, http://www.usfl.info (last visited Mar. 5, 2017).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Matthew Rocco, *TV Deals Boost NFL Revenue to New Record*, FOX BUSINESS (Jul. 21, 2015), http://www.foxbusiness.com/features/2015/07/21/tv-deals-boost-nfl-revenue-to-new-record.html.

188. *Id.*

189. NYU Stern School of Business, *The Dallas Cowboys: Are they America's team? The first $5 billion sports franchise ever?*, NEW YORK UNIVERSITY, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/Valuationofweek/cowboys.htm.

190. *See, e.g.*, Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187 (2010) (illustrating the reason American Needle sued the NFL – because the NFLP granted Reebok an exclusive licensing agreement for all thirty-two NFL teams).

191. *See id.* at 197 (explaining that each company should have to negotiate individual contracts).

league.[192] In 2014, each NFL team received an equal share of the $7.3 billion revenue generated, which equates to $226.4 million per team.[193] Of that $7.3 billion, approximately $3.1 billion came from media rights deals with CBS, NBC, Fox, ABC/ESPN, and the NFL Network.[194] This is a direct result of each team's association with the NFL. Whether each NFL team would be worthless if they were not associated with the NFL could be debated, but what cannot be debated is the significant value that each NFL team generates because of its association under the NFL's "shield" and the media recognition that comes along with it.[195]

While it is true that each team is its own entity in some capacities, its relationship to the NFL as a whole should be viewed more as a parent and subsidiary relationship instead of entirely separate ventures.[196] The negotiation of individual contracts is synonymous with how collegiate football is structured with schools such as Auburn and South Carolina being sponsored by Under Armour while schools like Alabama and Oregon are affiliated with Nike.[197] The distinction between the NCAA and the NFL is that collegiate athletics are an amateur sport structured much differently than the NFL.[198] The collegiate football programs mentioned above generate significant amounts of revenue but that revenue is not to better the NCAA as an organization; instead, it is to benefit the university with whom they are affiliated.[199] The football programs and the universities, not the NCAA, have a parent-subsidiary relationship as "the subsidiary acts for the benefit of the parent."[200] In professional sports, however, it is the league that enjoys the parent-subsidiary relationship with its teams as their collective revenues are pooled together for the betterment of the entire NFL

192. Darren Rovell, *NFL Teams Each Earn $226.4M From National Revenue Sharing*, ESPN (Jul. 22, 2015), http://www.espn.com/nfl/story/_/id/13290743/green-bay-packers-financial-records-reveal-2264m-nfl-revenue-sharing.

193. Matthew Rocco, *TV Deals Boost NFL Revenue to New Record*, FOX BUSINESS (Jul. 21, 2015), http://www.foxbusiness.com/features/2015/07/21/tv-deals-boost-nfl-revenue-to-new-record.html.

194. *Id.*

195. *Id.*

196. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

197. Matt Halfhill, *Brand Breakdown: 2013 College Football Teams* (Aug. 29, 2013), http://www.nicekicks.com/2013/08/29/brand-breakdown-2013-college-football-teams.

198. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 745 (2010).

199. *Id.* During the 2015-16 school year, the University of Alabama reported $103,870,999 in revenue generated by its football program. *See* The University of Alabama, *Equity in Athletics Data Analysis*, U.S. Dep't of Educ. (2016), https://ope.ed.gov/athletics/#/institution/search (providing users the ability to sort through various collegiate athletic department's revenues and expenses).

200. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 745 (2010); *Copperweld*, 467 U.S. at 752 (1984).

and then re-distributed to the teams as part of its revenue sharing plan.[201] As stated in *Copperweld*, a parent's relationship with its subsidiary is considered a single entity and beyond the scope of § 1.[202]

E. Collective Decision-Making Model

Each of the thirty-two NFL teams owns a share of the NFLP.[203] When making binding decisions for the NFL, the NFLP usually must obtain a majority vote from its members to implement a change.[204] Thus, the collective decision-making model implemented by the NFL promotes unity amongst the individual teams as each team has a say in league-wide changes.[205]

However, the Court in *American Needle* viewed this type of collective decision-making as evidence that the individual NFL teams were actual or potential competitors in the licensing of intellectual property.[206] The Court stated that the NFL could not manipulate its structure by creating the NFLP, which would essentially act as a corporate shell to avoid antitrust scrutiny.[207] Looking deeper into Justice Stevens' analysis, if the NFL could have avoided § 1 liability by outsourcing licensing decisions to a third party, collective negotiating would be legal as long as participants transferred negotiating power to a third party and did not communicate directly with each other.[208] This is the type of end-around that the Court wanted to prevent.

While this is a valid concern and one that could impact industries beyond the sports context,[209] the collective nature of the decision-making authority of the NFLP is one that should be treated as a single entity.[210] The purpose of the NFLP when it was formed was to create an interconnected interest amongst the owners in order to promote a unified economic strategy.[211] The commissioner at the time of the NFLP's creation, Pete Rozelle, thought that for the NFL to continue growing economically the owners needed to collectively unify its resources and have equity in the decisions

201. Darren Rovell, *NFL Teams Each Earn $226.4M From National Revenue Sharing*, ESPN (Jul. 22, 2015), http://www.espn.com/nfl/story/_/id/13290743/green-bay-packers-financial-records-reveal-2264m-nfl-revenue-sharing.

202. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771–72 (1984).

203. Oakland Raiders v. Nat'l Football League, 113 Cal. Rptr. 2d 255, 260 (Cal. Ct. App. 2001).

204. *Id.*

205. *Id.*

206. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 197, 201 (2010).

207. *Id.* at 200–01.

208. Craig Wildfang, Ryan W. Marth, *'American Needle' has Repercussions Beyond Sports*, THE NAT'L L.J. (Nov. 1, 2010), http://www.robinskaplan.com/~/media/pdfs/american%20needle%20has%20repercussions%20beyond%20sports.pdf?la=en.

209. *Id.*

210. *Oakland Raiders*, 113 Cal. Rptr. 2d at 260.

211. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 731–32 (2010).

that were being made as profits would be equally shared amongst the teams.[212] This commonality of pursuing a collective economic interest is a characteristic that is shared by single entities, not by independent decision-makers, as the individuals benefit from the prosperity of the whole.[213]

The NFL is a single entity beyond the scope of § 1 because NFL teams do not compete against each other off the field, but instead, they operate to share an economic interest in collectively promoting the NFL.[214] By ensuring that teams share substantial portions of their revenue, the NFL is able to achieve a competitive balance, which ultimately allows the NFL's wealth to be maximized.[215] The Supreme Court cites the dangers of using a profit-sharing argument as a means to escape scrutiny under § 1 and they are right to an extent, but the unified interest of the NFLP indicates that the NFL should be considered a single entity.[216]

F. Intellectual Property License

Not only do the NFL teams have a shared interest in intellectual property, but the NFL has also continually licensed its intellectual property without interruption since 1963.[217] American Needle never disputed that the NFL and its individually owned teams collectively licensed intellectual property to promote a unified interest in professional football.[218] Looking at the NFLP's Articles of Incorporation, it clearly states that the individual teams formed the NFLP "[t]o conduct and engage in advertising campaigns and promotional ventures on behalf of the [NFL] and the member [teams]."[219] There is no evidence to rebut the purpose of its creation, which is to unify the interests of the teams to promote one collective goal – the NFL.[220]

Each of the factors described above provide substantial evidence that the NFL is to be considered a single entity. Collectively, these factors illustrate that the NFL is one unified venture whose overarching goal is not to compete against each other but to "compete against other forms of entertainment."[221]

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 752.

216. *Am. Needle, Inc.*, 560 U.S. at 201 (explaining if sharing profits could escape § 1 scrutiny then any cartel would create a joint venture to exclusively sell its competing products).

217. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008) (citing the tradition of collective licensing as a means for it to continue today).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 737.

VI. ELIMINATION OF THE SINGLE ENTITY DEFENSE: IMPACT ON OTHER MAJOR SPORTS

The central theme of the case law that has developed after *American Needle* is that professional sports leagues cannot avoid the threat of antitrust litigation.[222] *American Needle* has opened the door for antitrust lawsuits by holding that the NFL is not a single entity and is, therefore, within the scope of § 1.[223] Professional sports leagues have been unwilling to litigate substantial antitrust claims for fear of the ramifications that would result if its practices were deemed to be in violation.[224]

As sports leagues have grown, so have the number of potential issues. With sports leagues being subject to antitrust violations, there has been an increase in the threat of litigation, specifically surrounding the collective bargaining process and premium television agreements.[225]

A. Antitrust Litigation Used as a Bargaining Chip

When a collective bargaining agreement's (CBA) term ends without a new agreement, the parties can mutually agree to keep the current CBA in place and continue the negotiation process or initiate a work stoppage.[226] A work stoppage typically occurs when the negotiations become contentious and the two sides seem to be moving further apart.[227] One of two things can happen in a work stoppage: the owners can implement a lockout or the players can initiate a strike.[228] When the owners assert a lockout, the owners impose a ban on the players from working in an official capacity – whether that be roster adjustments, games being played, free agent signings, or trade acquisitions.[229] Conversely, with a strike, it is the players that impose the ban.[230]

If a work stoppage is to occur, the time of year will dictate whether it is a lockout or a strike.[231] During the season, players will strike to force the owners to incur

222. *See infra* Sections VI.A, VI.C.

223. *Am. Needle, Inc.*, 560 U.S. 183, 202–03 (2010).

224. *See, e.g.*, Jeff Zalesin, *MLB Fans Get Initial OK for TV Antitrust Settlement*, LAW360 (Jan. 25, 2016, 8:40 PM), https://www.law360.com/articles/750519/mlb-fans-get-initial-ok-for-tv-antitrust-settlement (illustrating that MLB agreed to a settlement rather than litigating antitrust claims).

225. *See* Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 477 (2013) (focusing on collective bargaining); Laumann v. Nat'l Hockey League, 105 F.Supp.3d 384, 388 (discussing exclusivity issues with television contracts).

226. Nathaniel Grow, *A Roadmap for a Potential MLB Work Stoppage*, FANGRAPHS (Nov. 28, 2016), http://www.fangraphs.com/blogs/a-roadmap-for-a-potential-mlb-work-stoppage.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

substantial revenue losses as no games will be played.[232] If the work stoppage occurs in the offseason, it is more likely that the owners will assert a lockout to gain an advantage in the CBA negotiations because it will freeze all acquisitions – meaning pending free agents are unable to sign lucrative deals.[233] The longer the lockout occurs, the less time teams have to negotiate prior to the season beginning and if it continues into the season, players begin to miss paychecks.[234]

In 2011, as the CBA terms for the NBA and NFL came to an end without a new deal, each of the league's player associations, NFLPA and NBAPA, decertified[235] from their respective leagues to retain the ability to file an antitrust suit against the owners.[236]

The NBAPA was prompted to decertify because the NBA owners commenced a lockout.[237] Decertification was a risky decision,[238] but it provided the players with a significant amount of leverage.[239] Decertification forced the hand of the owners either to come to an agreement on the terms of the new CBA or face antitrust litigation.[240] The players' attempt to pursue antitrust litigation alleged that the owners were negotiating in bad faith and that they violated § 1 of the Sherman Act because the lockout "constituted an unlawful group boycott agreement among the thirty NBA teams."[241]

232. Nathaniel Grow, *A Roadmap for a Potential MLB Work Stoppage*, FANGRAPHS (Nov. 28, 2016), http://www.fangraphs.com/blogs/a-roadmap-for-a-potential-mlb-work-stoppage.

233. *Id.*

234. *Id.*

235. Decertification occurs when members dissociate from a union. *Business Dictionary* (2016), http://www.businessdictionary.com/definition/decertification.html.

236. Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 474 (2013). "Brown v. Pro Football, Inc. [established that] a union wishing to pursue an antitrust claim against management cannot escape the strictures of the non-statutory exemption until its labor dispute is 'sufficiently distant in time and in circumstances from the collective-bargaining process.'" *Id.* at 476. Decertification was necessary because the standard set in *Brown* required that to bring an antitrust lawsuit there must be a separation between labor law and antitrust law, which is accomplished through decertification. *Id.*

237. *Id.* at 474, 477.

238. *Id.* at 477 (noting the risks involved with decertification such as forgoing union-provided benefits like pension and health insurance).

239. Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 477, 500 (2013). In 2011, the NFLPA received a court ruling that enjoined the owners from continuing their lockout. Nathaniel Grow, *A Roadmap for a Potential MLB Work Stoppage*, FANGRAPHS (Nov. 28, 2016), http://www.fangraphs.com/blogs/a-roadmap-for-a-potential-mlb-work-stoppage. Later, this was overturned, but the threat of enjoinment provides the players with a significant amount of leverage. *Id.* Additionally, if the court was not willing to enjoin a lockout, the players would begin to accrue treble damages from the owners by filing suit – resulting in the players being awarded three times the wages lost during the lockout. *Id.*

240. Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 496–97, 500 (2013).

241. *Id.* at 497.

Before the antitrust litigation commenced, both the NFL and NBA signed new CBAs.[242] Even though both leagues eventually came to an agreement, the threat of litigation still exists each time the next CBA is to be decided.[243] Rather than leaving the parties to negotiate new terms through the collective bargaining process, the potential for antitrust litigation is being used as an end-around to implement favorable terms for the players.[244]

Additionally, decertification provides the players with the ability to potentially defeat employer-imposed lockouts by petitioning the court for an injunction.[245] This would cripple the owner's ability to withhold players' paychecks – taking away a key point of leverage for the owners, money.[246] Antitrust law now reaches beyond its intended scope into areas where it was not intended, such as the collective bargaining process, because of *American Needle*.

The threat of antitrust litigation is not just used in collective bargaining. In February 2016, the NFL and Reebok had a class action lawsuit filed against them in California.[247] The complaint alleged that the NFL and Reebok entered into a price-fixing agreement, which drove up prices for NFL apparel to stifle competition,[248] a per se violation under the Sherman Act.[249] The settlement yielded $4.75 million, which will be used to "reimburse anyone in California who purchased an NFL-branded jersey, hat, or shoes, within the state between Oct. 25, 2008 and April 1, 2012."[250] After the settlement, the NFL and Reebok continued to deny any violation but released a statement saying they agreed to the settlement "'to put to rest this

242. *Id.* at 493, 497.

243. In 2016, Major League Baseball saw an end to its current CBA. Nathaniel Grow, *A Roadmap for a Potential MLB Work Stoppage*, FANGRAPHS (Nov. 28, 2016), http://www.fangraphs.com/blogs/a-roadmap-for-a-potential-mlb-work-stoppage. Fortunately, the terms of the new CBA were agreed upon just before the term ended, but there were significant concerns about the potential for a work stoppage and antitrust litigation. *Id.*

244. Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 500 (2013).

245. *Id.* at 495.

246. Nathaniel Grow, *A Roadmap for a Potential MLB Work Stoppage*, FANGRAPHS (Nov. 28, 2016), http://www.fangraphs.com/blogs/a-roadmap-for-a-potential-mlb-work-stoppage.

247. Michael A. Kakuk, *NFL, Reebok Settle Antitrust Class Action for $4.75 Million*, TOP CLASS ACTIONS: CONNECTING CONSUMERS TO SETTLEMENTS, LAWSUITS & ATTORNEYS (Feb. 29, 2016), https://topclassactions.com/lawsuit-settlements/lawsuit-news/329262-nfl-reebok-settle-antitrust-class-action-4-75-million.

248. *Id.*

249. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213 (1940) (concluding that price fixing unreasonably restricts trade and therefore a violation).

250. Michael A. Kakuk, *NFL, Reebok Settle Antitrust Class Action for $4.75 Million*, TOP CLASS ACTIONS: CONNECTING CONSUMERS TO SETTLEMENTS, LAWSUITS & ATTORNEYS (Feb. 29, 2016), https://topclassactions.com/lawsuit-settlements/lawsuit-news/329262-nfl-reebok-settle-antitrust-class-action-4-75-million.

controversy and avoid the *risks inherent in complex litigation*.'"[251] The NFL, like all other sports leagues, understands how vulnerable an antitrust violation would make them and thus yield to any semi-legitimate complaint.

B. Major League Baseball's Exemption

While the NFL and NBA have had antitrust lawsuits filed against them, one sport is noticeably absent from such litigation, Major League Baseball (MLB). Professional baseball is the only major American sport that has an antitrust exemption.[252] In 1922, Justice Oliver Wendell Holmes delivered the opinion in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* that has provided MLB with an antitrust exemption for over ninety years.[253] The Court concluded that MLB was a purely state activity and therefore did not come within the reach of federal antitrust laws.[254] Acknowledging that in order for baseball games to be played players must travel across state lines, the Court stated that any inter-state activity was purely incidental.[255]

Looking through the lens of modern day professional baseball, it is clear that professional baseball is not purely a state activity, but Justice Holmes's decision continues to be upheld.[256] MLB has enjoyed an expansive antitrust exemption for decades, but Congress has attempted, in recent years, to limit its coverage.[257] Congress enacted the Curt Flood Act of 1998 to enable professional baseball players the option to seek antitrust remedies.[258] The Curt Flood Act's limitation is confined solely to conduct that involves the employment of professional baseball players at the major league level.[259] With such a limited reach, the Curt Flood Act provides no relief for a situation like *American Needle*.

MLB's antitrust exemption seems to be an anomaly that has withstood the test of time, but there has been extensive literature written about why MLB's antitrust exemption should be repealed.[260] Even with such extensive literature in favor of

251. *Id.* (quoting the press release from the NFL and Reebok (emphasis added)).

252. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 207–08 (1922).

253. *Id.*

254. *Id.*

255. *Id*. at 208–09.

256. Toolson v. New York Yankees 346 U.S. 356, 356–57 (1953).

257. The Curt Flood Act, 15 U.S.C. § 26b(a) (2010).

258. *Id.*

259. *Id.*

260. *See, e.g.*, Hon. Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201, 206–07 (illustrating why baseball's antitrust exemption must be repealed).

repealing MLB's antitrust exemption, the fact remains that *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs* is still good law today.[261]

C. Legality of League-Wide Broadcasting and Blackout Rules

As the popularity of professional sports has spread across the nation, the competition to broadcast professional sporting events has intensified. In May of 2015, a class action antitrust lawsuit, *Laumann v. NHL*, was filed against the NHL and MLB challenging "territorial exclusivity" restraints placed on the leagues' broadcasts.[262] The plaintiffs argued that the NHL and MLB conspired with regional sports networks to maintain systems of "territorial exclusivity" to limit consumers' viewing options and inflate prices.[263] This exclusivity has become an issue because consumers are forced to buy an entire package of games in order to see one specific team or game if they are located outside of a geographic market.[264] This has significantly increased the cost from what they normally would pay to watch a single team.[265] The threat of a potential antitrust violation against the NHL and MLB forced them to settle quickly.[266] As a result, both the NHL and MLB now permit fans to watch their favorite teams play outside of the teams' local markets and buy single team packages without having to pay extra for a league-wide bundle of games.[267]

A similar case involving the NFL was litigated immediately after *Laumann v. NHL*. In July 2015, a major class action lawsuit was filed against the NFL and DirecTV in regard to its "NFL Sunday Ticket" package.[268] The NFL is the only one of the four major sports leagues – baseball, hockey, basketball, and football – that has an "exclusive out of market broadcasting arrangement."[269] According to the plaintiffs in *Ninth Inning Inc. dba The Mucky Duck v. National Football League, Inc., et al.*, the

261. 259 U.S. 200, 208–09 (1922).

262. Laumann v. Nat'l Hockey League, 105 F.Supp.3d 384, 388 (S.D.N.Y. May 29, 2015). Plaintiffs alleged that MLB, the NHL and regional production networks, have "entered into agreements with multichannel video programming distributors—DirectTV and Comcast—that limit options, and increase prices, for baseball and hockey fans who want to watch teams from outside the home television territory where the fans live. According to plaintiffs, defendants' multilateral agreements impose conditions of 'territorial exclusivity' that restrain individual teams … from selling their content directly to fans." *Id.*

263. *Id.* at 388, 394.

264. *Id.* at 388.

265. *Id.*

266. Max Stendahl, *NHL Settlement Approved in Broadcast Antitrust Case*, LAW360 (Sept. 1, 2015, 2:18 PM), https://www.law360.com/articles/697822/nhl-settlement-approved-in-broadcast-antitrust-case; Jeff Zalesin, *MLB Fans Get Initial OK for TV Antitrust Settlement*, LAW360 (Jan. 25, 2016, 8:40 PM), https://www.law360.com/articles/750519/mlb-fans-get-initial-ok-for-tv-antitrust-settlement.

267. *Id.*

268. Complaint at 1–2, Ninth Inning Inc. dba The Mucky Duck v. Nat'l Football League, Inc., et al., (C.D. Cal. 2015) (No. 2:15-cv-05261), 2015 WL 4294835.

269. *Id.* at 1–2, 6.

arrangement's exclusivity led to competition that was unfair for other providers such as Dish Network.[270] The plaintiffs argue that since the NFL has a monopoly on the "creation, licensing, and distribution of NFL games" combined with DirecTV's market power over commercial subscribers, its agreement monopolizes the market for NFL games, violating § 1 of the Sherman Act.[271]

While *Ninth Inning Inc.*'s case has been terminated,[272] it, along with *Laumann v. NHL*, illustrates that antitrust litigation is not going to diminish in the future. If anything, antitrust litigation, especially in the sports industry, will increase due to the lasting effect of *American Needle*. The threat of antitrust litigation will force the hand of league executives and its contracting parties to settle cases for fear of being deemed in violation of § 1, which could negatively impact the leagues' past, present, and future contracts.[273]

VII. CONCLUSION

In *American Needle*, the Court failed to recognize that competition on the field between the NFL teams does not correlate to competition off the field. Six factors provide substantial evidence that the NFL should be considered a single entity for purposes of § 1 of the Sherman Act: (1) treatment of similarly structured entities outside of professional sports, (2) the evolution of the single entity defense applied in professional sports, (3) the source of value for each individual NFL trademark, (4) the impracticality of individually negotiating contracts with each specific team, (5) the NFL's collective decision-making model, and (6) the NFL's longstanding tradition of licensing its intellectual property since 1963.[274]

The influential decision in *American Needle, Inc. v. National Football League*, which held that the NFL is not a single entity and is, therefore, within the scope of § 1 of the Sherman Act,[275] has had a significant impact on the landscape of professional sports. As a result of this decision, the single entity defense has been effectively extinguished, and the ramifications can be felt throughout professional sports, from the collective bargaining process to negotiating premium television agreements.[276]

270. *Id.* at 5, 7.

271. *Id.* at 41–42.

272. Docket, Ninth Inning Inc. dba The Mucky Duck v. Nat'l Football League, Inc., et al., (C.D. Cal. 2015) (No. 2:15-cv-05261), 2015 WL 4294835.

273. *See, e.g.*, Michael A. Kakuk, *NFL, Reebok Settle Antitrust Class Action for $4.75 Million*, TOP CLASS ACTIONS: CONNECTING CONSUMERS TO SETTLEMENTS, LAWSUITS & ATTORNEYS (Feb. 29, 2016), https://topclassactions.com/lawsuit-settlements/lawsuit-news/329262-nfl-reebok-settle-antitrust-class-action-4-75-million/ (illustrating that professional sports leagues are unwilling to litigate any substantial antitrust claims).

274. *See supra* Part V.

275. 560 U.S. 183, 202–03 (2010).

276. *See supra* Part VI.