Antitrust Analysis of Sports Leagues

Pelnar, Gregory

Lexecon

12 October 2007

Antitrust Analysis of Sports Leagues

Gregory J. Pelnar

Lexecon
332 S. Michigan Ave.
Suite 1300
Chicago, IL 60604
(312) 322-0238
pelnar@lexecon.com

Draft: October 12, 2007

Table of Contents

Introduction 7

Chapter 1: What Is a Sports League? 9
- A Brief History of the Major Sports Leagues in the United States 9
  - National Football League 10
  - Major League Baseball 12
  - National Basketball Association 13
  - National Hockey League 14
  - National Collegiate Athletic Association 16
  - Major League Soccer 18
  - Women's National Basketball Association 19
- Key Differences Between Sports Leagues 20
- Sanctioning Bodies as a Form of Sports League 22
- Economic Theories of Sports Leagues 23
  - Sports leagues as natural monopolies 23
  - Sports leagues as joint ventures 25
  - Sports leagues as cartels 27

Chapter 2: Basics of Antitrust Analysis 29
- The Antitrust Laws 29
- Exceptions to the Antitrust Laws 30
  - Judicial 'interstate commerce' exemption 30
  - Judicial 'single-entity' exemption 34
  - Statutory exemptions 37
  - Non-statutory exemptions 39
- Proving Antitrust Violations 41
  - Proving violations of section 1 of the Sherman Act 41
  - Proving violations of section 2 of the Sherman Act 43
  - Proving violations of section 7 of the Clayton Act 49

Chapter 3: Sports Leagues vs. Their Own Member Teams 51
Basics of Cartels 51
Basics of Joint Ventures 53
Externalities 56
Organizational problems 56
Joint venture instability 57
Team Antitrust Challenges to Sports League Rules and Policies 57
Public ownership restrictions 58
Sponsorship and licensing arrangements 61
Dallas Cowboys 61
New York Yankees 64
Television restrictions 67
NCAA 68
Chicago Bulls 72
Team relocation 75
San Francisco Seals 76
Oakland Raiders 77
San Diego Clippers 80
New England Patriots 81

Chapter 4: Sports Leagues vs. Rival Leagues 86
Federal League vs. Major League Baseball 86
American Football League vs. National Football League 90
American Basketball Association vs. National Basketball Association 93
World Hockey Association vs. National Hockey League 94
United States Football League vs. National Football League 96
North American Soccer League vs. National Football League 99
Table 4.1: The Impact of Teams in Other Sports Leagues on Live Attendance 102
Table 4.2: The Impact of Teams in Other Sports Leagues on Television Viewership 104

Chapter 5: Sports Leagues vs. Prospective Teams and Owners 106
Prospective Teams Seeking Admittance Into a Closed League 107
Mid-South Grizzlies v. NFL 107
Seattle Totems v. NHL 109
Bowl Championship Series 110
Prospective Owners 113
Levin v. NBA 113
Fishman v. Estate of Arthur M. Wirtz 114
Piazza v. MLB 118
Murray v. NFL 120
Baseball at Trotwood v. Dayton Professional Baseball Club 122

Chapter 6: Sports Leagues vs. Players 125
NCAA 125
Restrictions on player compensation and team sanctions for compensation restriction violations 126
Table 6.1: The Impact of NCAA Player Compensation Restrictions on Rents Earned by Universities on Their Athletes 129
Restrictions on player eligibility – the no-draft and no-agent rules 131
Restrictions on academic eligibility 134
Restrictions on transferring to another academic institution 134
Restrictions on the number of athletic scholarships 137
Restrictions on the dollar value of athletic scholarships 140
MLB 141
The Reserve Clause 142
Table 6.2: The Impact of MLB's Reserve System on Player Salaries 144
Table 6.3: The Impact of MLB's Reserve System on Competitive Balance 149
Amateur Draft 153
Table 6.4: The Impact of MLB's Amateur Draft on Competitive Balance 154
Collusion 154
NFL 157
Blacklisting 158
Rozelle Rule, Revenue-Sharing, and Free Agency 159
Amateur Draft 166
Fixed Salaries 169
NBA 172
Four-year Rule 172
Player Opposition to the NBA-ABA Merger 173
Amateur Draft, Salary Cap, and Right-of-First-Refusal 174
NHL 177
Reserve Clause, Equalization Payments, Standard Player Contract, and Amateur Draft 177
Van Ryn Rule 180
Salary Cap and Luxury Tax 181
MLS 182
LPGA 182

Chapter 7: Sports Leagues vs. Coaches 186
NCAA Limits on the Number of Assistant Coaches 186
NCAA Limits on the Salaries of Certain Assistant Coaches 188

Chapter 8: Sports Leagues vs. Stadium Owners 191
NFL's Los Angeles Rams' Relocation to St. Louis 191
NASCAR's Winston (now Nextel) Cup and Busch Series Dates 197

Chapter 9: Sports Leagues vs. Equipment Suppliers 210
NCAA Baseball 211
Professional Tennis 214
Professional Golf 216
Professional Bowling 220
Auto Racing 224

Chapter 10: Sports Leagues vs. Promoters/Sponsors, For-Profit Sports Camp Operators, Merchandisers, and the Media 230
Promoters/Sponsors 230
NCAA 231
Postseason Rules 231
Two-in-Four Rule 240
NBA 244
Professional Tennis 247
Boxing 251
For-Profit Sports Camp Operators 254
Merchandisers 257
NCAA Restrictions on Manufacturer Logos on Team Uniforms 257
NFL's Exclusive Licensing Arrangement with Reebok 261
The Media 264
Television Stations 265
College Football Association television exclusivity agreements 265
NFL's blackout policy 271
NBA's limit on the number of games broadcast on superstations 272
Other Media 273
PGA's Real-Time Scoring System 273
Websites with Domain Names Similar to that of NFL Teams 276

Chapter 11: Sports Leagues vs. Fans, Taxpayers, and the Federal Government 278
U.S. Government Antitrust Lawsuits Against Sports Leagues 278
Professional Boxing 278
NFL Blackout Policy 283
Table 11.1: The Impact of NFL Local Area Television Blackouts on Live Attendance 292
Sports Fans' Antitrust Lawsuits Against Sports Leagues 293
NFL's Blackout Policy 293
Television Game Packages 296
NFL Sunday Ticket 296
NBA League Pass 299
Tying of Regular Season and Preseason Game Tickets 301
Price-fixing of Licensed Merchandise 305
League Suspensions of Teams 306
Unfair Labor Practices 307
Scheduling 308
Taxpayer Antitrust Lawsuits Against Sports Leagues 308

Chapter 12: Proposals to Curb Leagues' Monopoly Power 311
Proposed Structural Remedies 311
Breaking Up Sports Leagues 311
Regulating Sports Leagues as Natural Monopolies 314
Mandating a Vertical Structure Where a Central Upstream Organization Provides Competition-organizing Services for Independent Downstream Teams 315
Mandating a System of Promotion and Relegation 316
Other Proposed Congressional Actions 318
Legislation Granting an Antitrust Exemption for Sports League Rules Regarding Franchise Relocation 318
Legislation Curbing the Use of Tax Subsidies to Lure or Retain Sports Teams 319
Rejection of the Competitive Balance Defense in Rule-of-Reason Analyses 320
Possible League Responses 321
Reorganization of the Major Sports Leagues Into Single-entity Structures 321

References 323

Cited Cases 342

Introduction

The antitrust analysis of sports leagues, at first glance, appears to be utterly confused. Why does Major League Baseball (MLB) have an antitrust exemption, but the National Football League (NFL), the National Basketball Association (NBA), and the National Hockey League (NHL) do not? Surely, there cannot be that much difference between MLB and these other leagues. And, why didn't the antitrust authorities – the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) – oppose and stop the merger of the two major professional football leagues (i.e., the National Football League and the American Football League) and the two major professional basketball leagues (i.e., the National Basketball Association and the American Basketball Association)? Surely, these were mergers to monopoly (or near monopoly). Their combined market share in the relevant market had to be close to 100%. What were the antitrust authorities thinking? And why do the antitrust authorities allow sports leagues to negotiate broadcast deals on behalf of their members? Surely, this increases the price that broadcasters must pay relative to what they could negotiate with each league member individually.

On the other hand, sports leagues engage in a myriad of activities which have attracted antitrust scrutiny. Leagues typically set rules regarding who is eligible to play, how players will be assigned to teams, and the terms of those assignments. Leagues may also impose a cap on teams' player payrolls, or impose a 'luxury tax' on the teams with the highest player payrolls. Aren't these examples of the exercise of monopsony power by sports leagues over the players?

Moreover, sports leagues typically set rules regarding the entry of new teams, the purchase, sale, and relocation of existing teams, and the sharing of revenue among teams. Leagues may attempt to limit the number of games a team can play, or the number of televised games it can play. Leagues set rules over allowable and banned equipment. Why do sports leagues adopt such rules and policies? Do they have an anticompetitive effect? Do they have a procompetitive rationale?

The antitrust analysis of sports leagues is also interesting because it involves a multitude of controversial economic issues. Are sports leagues cartels or are they better understood as joint ventures? Are sports leagues natural monopolies? Do the rules and policies adopted by sports leagues restrict output or enhance demand for their product? And what is the 'product' produced by sports leagues? How does an incumbent sports league respond to the entry of a rival league? Is it 'vertical foreclosure' if a team in the incumbent league refuses to allow a team in the rival league to play at the same stadium? Is the stadium an 'essential facility'?

This book presents an overview of the antitrust analysis of sports leagues. Chapter 1 gives a brief history of the major sports leagues in the United States, discusses differences among leagues, and examines how economists answer the question: "What is a sports league?" Chapter 2 reviews the basics of antitrust analysis and their application to sports leagues, including antitrust exemptions, rule of reason analysis, evidence of monopoly and monopsony power (or, to use an analogous term, 'market power'), and market definition issues. Chapter 3 discusses antitrust disputes between sports leagues and their own member teams over such issues as restrictions on the purchase, sale and relocation of existing teams and the sharing of revenues. Chapter 4 examines antitrust disputes between rival sports leagues. Chapter 5 addresses disputes with teams from rival leagues that want to join the league and prospective owners who want to purchase an existing league team. Attention then turns to the input market. Chapter 6 addresses antitrust disputes between sports leagues and players concerning issues like eligibility restrictions, free agency, salary caps, and luxury taxes. Chapters 7, 8, and 9 examine antitrust disputes between sports leagues and coaches, stadium owners, and equipment suppliers, respectively. Attention then shifts to the output market. Chapter 10 discusses antitrust disputes between sports leagues and promoters/sponsors, for-profit sports camp operators, merchandisers, and the media. Chapter 11 investigates antitrust lawsuits brought by fans, taxpayers, and the federal government against sports leagues over issues such as team sanctions, league television packages, taxpayer-financed stadiums, and league television blackout rules. Chapter 12 reviews proposals to curb the monopoly power of professional sports leagues.

Chapter 1

What Is a Sports League?

Economists, antitrust lawyers, and the courts have wrestled with the question: "What is a sports league?" Is it a collection of competitors (i.e., teams) acting collusively? If so, the league would seem to be a cartel. Or is the league a single entity, with each team analogous to a subsidiary of a large corporation? If so, the league cannot be colluding, because an entity cannot collude with itself – it has to collude with another entity. Or is a league basically a joint venture undertaken by teams, similar to General Motors and Toyota launching a joint venture to produce automobiles? If so, when is such a joint venture anticompetitive and when is it procompetitive? Irrespective of the answers to these questions is another: is a sports league a natural monopoly? Moreover, is it even possible to answer such questions generally, or is there one set of answers specific to, say, the National Football League and another set of answers specific to the National Collegiate Athletic Association?

Not surprisingly, those who allege that certain activities of sports leagues violate the antitrust laws view teams as engaged in an antitrust conspiracy, with the league functioning as a cartel whose anticompetitive activities enhance the profits of its members (the teams). Alternatively, those who allege a league is a single entity point out that an entity cannot be engaged in an antitrust conspiracy only with itself. In contrast, those who view sports leagues as joint ventures contend that league activities should be evaluated under the "rule of reason."

This chapter explores the question: "What is a sports league?" It begins with an overview of the major sports leagues in the United States. This overview leads to a discussion of some key differences, from an antitrust perspective, between the various sports leagues and a discussion of sanctioning bodies as a form of sports league. It concludes with an examination of competing economic answers to the question: "What is a sports league?"

A Brief History of the Major Sports Leagues in the United States. The four major professional sports leagues in the United States are the National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), and National Hockey League (NHL). The major collegiate sports league is the National Collegiate Athletic Association (NCAA). Two of the newer professional sports leagues are Major League Soccer (MLS) and the Women's National Basketball Association (WNBA). This section provides a brief history of these leagues, focusing primarily on their creation, the rules and sanctions imposed on their members, their competition (and, in some cases, merger) with rival leagues, and their attempt to limit player compensation.

The leagues' histories are interesting because, today, the NFL, NBA, NHL, MLB, and NCAA are entrenched incumbent leagues whose dominance appears unlikely to be eroded by a new entrant. Yet, that dominance was not always the case, nor was their future dominance ensured. Today, the major sports leagues are economic powerhouses and it may be difficult to imagine a time when they were not. Thus, it is useful to review their histories, as well as the (short) histories of some newer leagues, such as MLS and the WNBA.

> *National Football League*.[1] In 1899, a neighborhood football team named the Morgan Athletic Club was formed on the south side of Chicago. Over the years, its name changed a number of times – Racine Cardinals, Chicago Cardinals, St. Louis Cardinals, Phoenix Cardinals. Today, the team is known as the Arizona Cardinals, the oldest professional football team still playing. The first attempt to form a professional football league occurred in 1902; it was named the National Football League. Another attempt to form a professional football league occurred in 1920; it was initially named the American Professional Football Conference, but shortly thereafter changed its name to the American Professional Football Association (APFA). The APFA drafted a league constitution and by-laws, assigned territorial rights to teams, placed restrictions on player movements, developed a membership criteria for franchises, and issued team standings. It also charged its teams a $100 membership fee (which no team ever paid) and scheduling was left up to the individual teams – the result being that teams did not all play the same number of games. The APFA changed its name to the National Football League in 1922; the member teams included the Green Bay Packers and the Chicago Bears.
>
> In 1925, the Pottsville Maroons, an independent pro team, were one of five new franchises admitted to the NFL. Pottsville scheduled a game against a team of former Notre Dame players to be played in Philadelphia. The NFL franchise in Frankford, a section of Philadelphia, protested that the game was to be played in its protected territory (Frankford was playing a home game the same day). The NFL forbid Pottsville from playing the game, but Pottsville played anyway. The NFL fined Pottsville, suspended it, and returned the franchise to the league.
>
> The NFL took a variety of actions against other teams as well. For example, in 1927, the NFL decided to eliminate the financially weaker teams and consolidate the quality players from 22 teams onto just 12 teams. At the depth of the Great Depression in 1932, the NFL had only 8 teams.
>
> The NFL also imposed penalties for violating league rules. In 1931, the Chicago Bears and Green Bay Packers were two of the teams fined $1,000 each for using players whose college classes had not yet graduated. The NFL instituted an annual draft of college players in 1936, with the teams selecting in inverse order to their finish.
>
> The first of several professional football leagues to form and call itself the American Football League occurred in 1926. The first folded after the end of its first season. Another American Football League formed in 1936. A third American Football League was formed in 1940 and folded in 1941. The All-America Football Conference (AAFC), whose eight teams included the Cleveland Browns, was formed in 1946. Three years later, the NFL and AAFC entered into a merger agreement in which three AAFC franchises – Cleveland, San Francisco, and Baltimore – would join the NFL. A fourth American Football League (AFL)

[1] This history is based on the NFL chronology posted on the NFL website.

was formed in 1959 by Lamar Hunt. The AFL signed a five-year television contract with ABC. The NFL and AFL agreed to a verbal no-tampering pact relating to player contracts. In 1961, Willard Dewveall of the Chicago Bears became the first NFL player to play out his option and sign with an AFL team, the Houston Oilers. The AFL brought an antitrust suit against the NFL over the NFL's alleged monopoly and its conspiracies involving expansion, television, and player signings. In 1962, the district court ruled against the AFL; the appeals court affirmed the district court's decision. Secret talks between the NFL and AFL began in 1966 and the leagues agreed to merge. The leagues agreed to maintain separate schedules through 1969 and to play an annual AFL-NFL World Championship Game beginning in January 1967 – an event now known as Super Bowl I. The leagues agreed to hold a combined draft beginning in 1967 and to merge into a single league with two conferences in 1970. Congress passed legislation exempting the AFL-NFL merger from antitrust action on October 21, 1966.

It was not the first time Congress passed a bill concerning sports leagues. On September 30, 1961, President Kennedy signed a bill legalizing single-network contracts by professional sports leagues. In 1973, Congress passed legislation requiring any NFL game sold-out 72 hours prior to kickoff to be made available for local televising. (The legality of the NFL's blackout policy was upheld by a district court judge in 1962.)

Other leagues have formed and attempted to compete with the NFL. The World Football League started play in 1974 and folded the next year. The United States Football League (USFL) started play in 1983 and folded in 1985. The USFL filed a $1.7 billion antitrust suit against the NFL; the jury rejected all of the USFL's television-related claims and awarded $1 in damages. In 1988, the appeals court upheld the jury's verdict.

Throughout its history, the NFL approved the relocation of numerous teams. However, when the Oakland Raiders sought to move to Los Angeles in 1980, the NFL blocked the move and the Los Angeles Coliseum Commission, joined by the Oakland Raiders, filed an antitrust suit against the NFL. In 1982, the jury ruled against the NFL, clearing the way for the move. A state court jury ruled for the NFL in 2001, rejecting the Oakland Raiders' claims that the NFL destroyed its 1995 Hollywood Park stadium deal and that they own the Los Angeles market.

The NFL modified its cross-ownership restrictions in 1997, permitting team owners to own teams in other sports in their home market and in markets without NFL teams. In 2001, NFL owners approved additional league-wide revenue sharing, agreeing to pool the visiting teams' share of gate receipts for all preseason and regular-season games and dividing the pool equally beginning in 2002.

The NFL Players Association, the union representing NFL players, was founded in 1956. In 1982, it called a strike that lasted 57 days, shortening the regular football season from 16 games to 9. Another strike occurred in 1987. A two-week lockout of game officials occurred in 2001.

The NFL launched the World League of American Football (WLAF) in 1991. The WLAF did not play any games in 1993 and 1994. It resumed play in

1995. In 1998, the league was renamed the NFL Europe League, and later, NFL Europa. The NFL folded the money-losing league after its 2007 season.

Major League Baseball.[2] The first professional baseball league was the National Association (NA) founded in 1871 and which folded in 1876 after six of its strongest teams withdrew to form a new league, the National League of Professional Baseball Clubs (NL). The NL began as an eight team league, but that number dropped to six the second year after two teams refused to make western road trips later in the first season and were expelled from the NL.

The American Association (AA) began play in 1882 and offered lower ticket prices, served alcoholic beverages where legal, and scheduled games on Sundays. During seven of the ten years of their coexistence, the NL and AA participated in an early version of the World Series – a series of exhibition games arranged by the teams involved. The AA merged with the NL after the 1891 season.

The NL was torn by internal conflict when some team owners sought to convert the league into a form of a 'trust' – there would be a single common ownership of all 12 teams. Today, such a structure is known as a 'single entity league.' Other team owners strongly opposed the plan and it was not implemented. The NL did impose a $2,400 limit on annual player wages in 1894.

The Western League was founded in 1893 as a minor league based in the Great Lakes states. It renamed itself the American League (AL) in 1899. When the NL contracted to eight teams for the 1900 season, eliminating teams in Baltimore, Cleveland, Louisville, and Washington, the AL responded by placing teams in the abandoned Cleveland market and on the south side of Chicago. The AL declined to renew its National Agreement membership when it expired in October 1900 and, in January 1901, the AL declared itself a major league. The AL was able to hire disgruntled NL players and relocated two teams (Milwaukee and Baltimore) to cities with NL teams (St. Louis and New York, respectively).

In 1903, a new version of the National Agreement was signed, with the AL and NL formally accepting each other as an equal partner in major league baseball. Major League Baseball (MLB) is the entity that effectively operates the NL and AL as a single league. MLB is governed by the Major League Baseball Constitution, an agreement whose origins can be traced back to the 1876 NL Constitution. MLB negotiates television, labor, and marketing contracts and hires umpiring crews.

In 1922, the U.S. Supreme Court ruled in *Federal Baseball Club v. National League* that the business of baseball cannot be considered interstate commerce and thus is not subject to the federal antitrust laws. MLB's antitrust exemption was supported in subsequent court decisions. Courts ruled that the antitrust exemption has been in effect for so long, and Congress has failed to pass legislation removing the exemption, that removal of MLB's antitrust exemption, if it occurs, must be by an act of Congress, not by a court decision. Despite

---

[2] This history is based on the following Wikipedia entries: History of Baseball in the United States, Major League Baseball, American League, and National League.

complaints by some members of Congress, no legislation has ever passed stripping MLB of its antitrust exemption – although the exemption was limited to some extent by the Curt Flood Act of 1998.

In 1947, the unwritten 'gentleman's agreement' barring blacks from playing in MLB games was violated with the signing of Jackie Robinson. The next year other Negro League stars like Satchel Paige were signed by 'white' MLB teams and the Negro National League folded in 1948. (The Negro American League continued play until 1960, but lost its major league talent.)

The Major League Baseball Players Association (MLBPA) was formed in 1966, the same year that two Cy Young winners – Sandy Koufax and Don Drysdale – refused to re-sign their contracts. The reserve clause, which had restricted the free movement of players between teams since the NL's early days, was under challenge. In 1970, Curt Flood, a St. Louis Cardinal outfielder, went to court to negate his trade to another team, making his argument in part on antitrust grounds. Despite losing his case, he won public sympathy. Then, in 1975, two players played the season without contracts and, at season's end, declared themselves free agents. The dispute was sent to an arbitrator, who ruled in favor of the players – and was promptly fired by MLB. MLB owners were forced to accept the collective bargaining package offered by the MLBPA which essentially replaced the reserve clause with the current system of free agency and arbitration. Team owners implemented spring training lockouts in 1976 and 1990; player strikes occurred in 1972, 1973, 1980, 1981, 1985, and 1994. The 1981 dispute concerned compensation for the loss of players to free agency. The 1985 dispute concerned the division of television revenue. The 1994 dispute, which led to the cancellation of the World Series, concerned television revenue sharing and a salary cap.

National Basketball Association.[3] In 1946, the owners of major sports arenas, including Madison Square Garden in New York City, founded the Basketball Association of America (BAA). It was not the first professional basketball league, having been preceded by the American Basketball League (ABL) and the National Basketball League (NBL), and did not have the best players. Four of the BAA's 11 teams folded after the first season. The ABL's Baltimore Bullets moved to the BAA and won the championship the same season. Prior to the 1948 season, four of the NBL's best teams moved to the BAA, including the Minneapolis Lakers with their star player, George Mikan. Minneapolis won the 1948 season championship. In 1949, the six remaining NBL teams were absorbed into the BAA, which was renamed the National Basketball Association (NBA). The next year the NBA reduced the number of franchises from 17 to 11; by 1954, there were only 8 franchises.

The introduction of the 24-second shot clock prior to the 1954 season led to higher scoring (and more exciting) games. Small-market teams continued to relocate to larger markets. After the Fort Wayne Pistons moved to Detroit and the

[3] This history is based on information posted on the NBA website, the Wikipedia entry for the National Basketball Association, Koppett (1976), and Staudohar (1999).

Rochester Royals moved to Cincinnati prior to the 1957 season, only one NBA team (Syracuse) was located in a metropolitan area of less than a million people.

The American Basketball Association (ABA) was created in 1967, with 11 teams playing a 78-game schedule (the NBA's 12 teams played an 82-game schedule). Some cities that had failed to attract an NBA franchise, such as Dallas, Denver, Houston, and Oakland, obtained ABA franchises. The ABA permitted its teams to sign college undergraduates and the ABA succeeded in signing a number of star players, including Julius Erving. Player salaries shot up as the ABA and NBA competed to sign players. The NBA also responded to competition from the ABA by rapidly expanding the number of franchises in an attempt to tie up the most viable cities.

The NBA and ABA attempted to merge in 1970, but an antitrust suit filed by NBA players, who had benefited handsomely from the competition between the two leagues, halted the merger. The two leagues tried and failed to obtain Congressional permission to merge, as the NFL and AFL had done in 1966. The NBA reached an out-of-court settlement of the antitrust suit in 1976, agreeing to a much weaker reserve formula – a 'matching offer' arrangement in which a player who had played out his contract could reach a deal with any other team but the original team could retain the player by matching that offer. The settlement cleared the way for a deal between the NBA and ABA in which four ABA franchises (Denver Nuggets, Indiana Pacers, New York Nets, and San Antonio Spurs) would pay a $3.2 million entry fee and be absorbed into the NBA, raising the number of NBA franchises to 22. The deal was approved by Congress.

The National Basketball Players Association was formed in 1954 and the first collective bargaining agreement with the NBA was reached in 1967. The league experienced financial problems and, in 1983, negotiated a collective bargaining agreement included capped player salaries, guaranteed that players would receive 53% of league revenue, and instituted a drug control program. The salary cap was a 'soft' cap – it did not apply to teams re-signing their own players. The league appeared to flourish and, unlike the NFL, MLB, and NHL, the NBA had no work stoppages. Then, in the 1998-99 season, there was a 202-day lockout when the NBA team owners reopened negotiations on the 1995 collective bargaining agreement and sought a 'hard' salary cap. During the 1997-98 season, player salaries had reached 57% of the $1.7 billion in league revenue, far above the 51.8% required to reopen negotiations. The NBA owners dropped their demand for a hard salary cap, but won a cap on individual player salaries; players won a guarantee for 55% of league revenue in years 4 through 6 of the agreement and 57% in year 7.

The NBA created a women's league, the Women's National Basketball Association, in 1996 and an affiliated minor league, the National Basketball Development League, in 2002.

National Hockey League.[4] The first professional hockey league was formed in 1904 and named the International Pro Hockey League. It had six teams – five in

[4] This history is based on information posted on the NHL and ESPN websites, as well as

the United States and one in Ontario. The league folded in 1907. The National Hockey Association (NHA), which included the Montreal Canadians, played its first game in 1910. In 1911, the Pacific Coast Hockey Association (PCHA) was formed by teams in western Canada. In 1915, the two leagues agreed that the two league champions would face off, with the winner receiving the Stanley Cup – a silver bowl which the English Governor General of Canada, Lord Stanley of Preston, had purchased in 1892 and decreed be awarded to the best amateur team in Canada. The NHA suspended operations during World War I.

The National Hockey League (NHL) was formed in 1917 by four NHA teams after a series of disputes with the owner of the NHA's Toronto Blueshirts. The NHL added a new Toronto franchise – the Toronto Arenas – which became the Toronto Maple Leafs in 1927. By the end of the first season, only three of the five NHL franchises remained. The Quebec Bulldogs shut down temporarily; the Montreal Wanderers folded after a fire destroyed the Westmount Arena which they shared with the Montreal Canadians.

The Western Canada Hockey League (WCHL) was formed in 1921as essentially a 'sister' league to the PCHA. The WCHL and PCHA played interleague games, with the champion of each league facing off to compete against the champion of the NHL for the Stanley Cup. The PCHA had only three teams so when the Vancouver Maroons folded in 1924 the two remaining teams moved to the WCHL, which was renamed the Western Hockey League (WHL).

NHL teams won the Stanley Cup in seven of its first nine years. The last Stanley Cup won by a non-NHL team was in 1925 by the WHL's Victoria Cougars. By 1926, other Canadian hockey leagues could not match the salaries offered by NHL teams. The WHL folded and the NHL purchased the contracts of every WHL player for $258,000. Separate deals were made to stock two NHL expansion teams. The Chicago Black Hawks purchased the players of the Portland Rosebuds for $15,000 and the Detroit Cougars (known today as the Detroit Red Wings) purchased the players of the Victoria Cougars for $25,000. Five of the WHL teams attempted to re-form and created a semi-pro league named the Prairie Hockey League, which lasted only two years, closing after the 1927-28 season.

The NHL had expanded to 10 teams by the 1930-31 season, but with the onset of the Great Depression and then World War II the number dropped to six by 1942. Apparently spurred by the creation of the junior Western Hockey League in 1967, the NHL began to expand rapidly, doubling in size by adding six franchises in 1967 and then adding six more teams between 1970 and 1974.

The World Hockey Association (WHA), a 12-team league, was formed in 1972 and outbid the NHL for several star players, including Bobby Hull, who left the Chicago Black Hawks and signed a 10-year, $2.75 million contract with the WHA's Winnipeg Jets. The NHL responded by continuing to add expansion teams. The result was a dilution of the talent pool and decline in the overall quality of play. By 1976, many WHA teams were on the financial brink and the WHA and NHL began to discuss a merger. By the time an agreement was reached

---

the following Wikipedia entries: Los Angeles Kings, National Hockey League, Pacific Coast Hockey Association, Western Canada Hockey League, Western Hockey League, and World Hockey Association.

on March 22, 1979, only six WHA teams remained. Four of those six teams joined the NHL; the other two were paid to fold.

In recent years a number of NHL teams have encountered financial and legal problems. The Pittsburgh Penguins declared bankruptcy in 1974 and 1998, the second leading to its star player Mario Lemieux taking over the team. The Los Angeles Kings declared bankruptcy in 1995; its owner, Bruce McNall, was convicted of bank fraud. The Ottawa Senators declared bankruptcy in January 2003 after being unable to pay its players. A few days later, the Buffalo Sabres, whose owner John Rigas was embroiled in the collapse of Adelphia Communications, also declared bankruptcy.

The first NHL Players Association was formed in 1957 and was soon crushed. Ted Lindsay, the Association's president, was traded by Detroit to the last place Chicago Black Hawks. The NHL's first and only player strike occurred in April 1992, but lasted only 10 days and all affected games were rescheduled. The NHL's first lockout occurred at the start of the 1994-95 season and lasted 103 days, resulting in a shortening of the regular season from 84 to 48 games. The NHL owners again locked out the players in 2004, eventually leading to the cancellation of the entire 2004-05 season. The NHL sought 'cost certainty' for its teams, which the NHL Players Association rejected as a euphemism for a salary cap. The lockout ended in July 2005 and the 2005-06 season began on schedule. The terms of the collective bargaining agreement included maximum and minimum salaries for individual players, a guarantee that players would receive between 54% and 57% of League revenues, an enhanced revenue sharing plan for teams, and terms for free agency; it did not contain a luxury tax.

National Collegiate Athletic Association.[5] The Intercollegiate Athletic Association of the United States (IAAUS) was formed in March 1906 in reaction to the violent nature of intercollegiate football – during the 1905 season alone there were 18 deaths and more than 150 injuries, leading President Theodore Roosevelt to host a White House meeting with the representatives of several schools. In 1910, the IAAUS changed its name to the National Collegiate Athletic Association (NCAA). Membership increased rapidly as the NCAA standardized the rules in numerous sports.

Beginning in the early 1920s, the NCAA attempted to limit college athletics to amateurs, adopting guidelines regarding player eligibility, recruiting, and financial aid, but leaving enforcement to individual conferences and schools. In January 1948, the NCAA adopted the 'Sanity Code' granting the NCAA enforcement authority, but the only penalty was a schedule boycott whose imposition required a two-third vote of all NCAA members at the annual convention. Two years later, the NCAA failed to get the two-thirds majority needed on a motion to suspend seven institutions for violating the Sanity Code.

[5] This history is based on information posted on the NCAA website, DeBrock and Hendricks (1997), Eckard (1998), and the following Wikipedia entries: Association for Intercollegiate Athletics for Women, National Association of Intercollegiate Athletics, and National Collegiate Athletic Association.

The Sanity Code was repealed in January 1951; not a single sanction was imposed under the Code. A new code was adopted in January 1952. It contained a workable enforcement mechanism whose penalties included a schedule boycott, but also lesser penalties such as public reprimands, probation, reductions in the number of allowable scholarships, and bans on appearances on television and at bowl games.

In 1949, the NCAA financed a study of the impact of television on football attendance and, in 1951, it declared a moratorium on the live broadcasting of college football games. A year later, the NCAA voted to allow limited live television. The NCAA contracted with the television networks to broadcast a limited number of games each season. Individual schools and conferences were prohibited from contracting with the networks to televise additional games. The price of broadcasting rights for NCAA football productions soared and the NCAA attempted to spread the rights fees across its membership. The school generating the bulk of these fees objected and the NCAA decided to restructure into three divisions, with Division I comprised of the largest revenue generating programs. The elite programs were not satisfied and threatened to withdraw from the NCAA, which responded by further restructuring Division I into I-A, I-AA, and I-AAA. Nevertheless, 66 schools formed the College Football Association (CFA) in 1977. The CFA filed an antitrust lawsuit against the NCAA over its restriction on the number of football games a team could have televised in a season. In 1984, the U.S. Supreme Court agreed with the CFA that the NCAA's rule violated the antitrust laws.

The NCAA has also adopted rules regarding minimum grade point averages, recruiting activities, number and amount of financial rewards, squad sizes, coaching staff sizes, and coaches' earnings, among many others. Many of these rules have been challenged under the antitrust laws. On some rules, the courts have sided with the NCAA; on others, the courts have found that the NCAA was in violation of the antitrust laws.

The NCAA is not the lone collegiate athletics association. The National Association of Intercollegiate Basketball (NAIB) was established in 1940 and, in 1948, became the first national organization to permit black student-athletes to compete in postseason competitions. The NAIB transformed into the National Association of Intercollegiate Athletics (NAIA) in 1952 when it began sponsorship of additional sports.

The Association for Intercollegiate Athletics for Women (AIAW) was formed in 1971 to govern collegiate women's athletics and administer national championships. At its peak, the AIAW had almost 1,000 member schools. The NAIA began sponsoring intercollegiate championships for women in 1980 and the NCAA did likewise shortly thereafter. Former AIAW powerhouses like Tennessee and Old Dominion decided to participate in the first Division I NCAA Women's Basketball Tournament in 1982. The AIAW tournament lost its appeal and NBC canceled its television contract with the AIAW. The AIAW filed an antitrust lawsuit. In 1983, the court ruled in favor of the NCAA.

Major League Soccer.[6] The 1994 World Cup was awarded to the United States on the condition that a 1st division (or 'Division One') professional soccer league be established. Major League Soccer (MLS) was formed in December 1993 and the 10-team league began play in 1996. Unlike the NFL, MLB, NBA, and NHL, MLS does not have individual team owners. The league owns the teams; some investors in MLS operate one or more teams, but they do not own those teams. They are 'investor-operators', not 'team owners.' Thus, MLS is a 'single entity' organization. The league enters into contracts with the players, not the team.

MLS initially was viewed in Europe as a 'retirement league' in which stars past their prime could collect an easy paycheck; today, the league is more youth-oriented. A number of young American players have chosen to play for MLS rather than languish on the bench of European teams.

European soccer leagues have a 'vertical' structure – the worst teams in a higher division can be demoted to a lower division, while the best teams in a lower division can be promoted a higher division. This is known as an 'open' league – the specific teams competing in a particular division changes over time. MLS, like the NFL, MLB, NBA, and NHL is a 'closed' league. An MLS team that performs poorly does not fear being relegated to a less prestigious league, whereas a non-MLS team cannot be promoted into the same division as the MLS teams regardless of how well it plays.

While most MLS teams began play in football stadiums, the league intended to build its own stadiums, enabling it to earn additional revenue from parking and concessions. The first such stadium was Columbus Crew Stadium, personally financed by Lamar Hunt, the investor-operator of the Columbus Crew, in 1999. The second was the Home Depot Center, completed in 2003 and home to the Los Angeles Galaxy. It was the work of Anschutz Entertainment Group (AEG) and the Galaxy became the first MLS team to make a profit. In 2005, a new expansion team, Chivas USA, joined the Galaxy in playing its home games at the Home Depot Center. Until recently, AEG was the investor-operator of six MLS teams, including DC United, Houston, and the MetroStars.

Two MLS teams are operated by owners of NFL teams and play their games in the same stadium as the football team. The New England Revolution is operated by Kraft Sports Group, owner of the New England Patriots, and play at Gillette Stadium; the Kansas City Wizards were operated by Lamar Hunt and play at Arrowhead Stadium.

The Major League Soccer Players Association (MLSPA) was formed at the end of the 1996 season and in February 1997 it filed an antitrust lawsuit against MLS. The MLSPA was organized as a trade association instead of a union because unions are prohibited by federal law from suing. In April 2000, the district court ruled that MLS's single-entity structure did not violate the antitrust laws. In April 2000, an appeals court also sided with MLS. Three years later, in April 2003, the players formed a union, the Major League Soccer Players Union. The union and the league reached a collective bargaining agreement in November

[6] This history is based on information posted on the MLS website, the Wikipedia entry for Major League Soccer, as well as various other soccer-related websites.

2004. The agreement's terms included minimum player salaries, but did not directly address the league's salary cap of $1.73 million per team.

MLS was not the first professional soccer league in the United States. The most notable was the North American Soccer League (NASL), formed in 1968 by the merger of the United Soccer Association and the National Professional Soccer League. The league started with 17 teams, of which 12 folded after the first season. The signing of soccer superstar Pele in 1975 transformed the NASL, which had been a 'minor' league – at least relative to the 'major' European leagues. It expanded to 24 teams in 1978, but soaring costs resulted in most teams having financial problems. Within a few years, 17 teams folded. The NASL shut down in March 1985.

Women's National Basketball Association.[7] The first professional basketball league for women was the Women's Professional Basketball League (WBL), which started play in 1978 with eight teams, expanded to 14 teams its second season, but folded after its third season. In 1996, two professional women's basketball leagues were formed. The American Basketball League (ABL) began play in 1996 with eight teams; the Women's National Basketball Association (WNBA) started play in 1997, also with eight teams. The ABL placed teams in cities with strong collegiate women's basketball programs; the WNBA placed teams in cities with NBA teams. The ABL was unable to compete successfully against the WNBA and folded in the middle of its third season.

The WNBA was created by the NBA and, initially, had a single-entity structure. The WNBA league and teams were owned collectively by the NBA; the investor-operator of a specific WNBA team was the NBA owner in that city. After the 2002 season, the WNBA was reorganized so that teams would have owners, not investor-operators, and teams could locate in cities without NBA teams. The WNBA teams were sold to their NBA counterparts or to third-parties. Two teams folded prior to the 2003 season and two others moved. The Orlando Miracle moved to Connecticut after being purchased by the Mohegan Sun casino, which is run by the Mohegan Indian tribe. The WNBA allowed the team's purchase by the casino so long as there is no sports betting at the facility. After the 2003 season, another team folded.

The WNBA and players signed a collective bargaining agreement prior to the start of the 1999 season. The players threatened to strike prior to the start of the 2003 season. The start of the 2003 pre-season was delayed as the players won a limited form of free agency while the league won caps on individual player salaries. Many WNBA players reportedly supplement their salaries by playing in European women's basketball leagues during the WNBA's off-season.

[7] This history is based on various newspaper articles and the following Wikipedia entries: American Basketball League, Women's National Basketball Association, and Women's Professional Basketball League.

Key Differences Between Sports Leagues. The preceding overview of the major sports leagues reveals a number of differences across leagues. Some of these differences are critical to an antitrust analysis of sports leagues. Four key differences are the extent of judicial and/or legislative protection from the antitrust laws, single entity vs. individual team ownership, interleague competition, and closed vs. open leagues.

Major League Baseball is the only sports league in the United States that has immunity from the antitrust laws. That immunity originates in the 1922 decision by the U.S. Supreme Court that the business of baseball is not interstate commerce and since the federal antitrust laws apply only to interstate commerce, they do not apply to the business of baseball. Members of Congress have often threatened to pass legislation stripping MLB of its antitrust exemption, but have failed to do so – although the Curt Flood Act of 1998 did place some restrictions on the exemption. Other leagues have avoided antitrust scrutiny for certain actions by obtaining Congressional approval. Both the NFL-AFL and NBA-ABA mergers received such approval. Exemptions to the federal antitrust laws are examined in more detail in Chapter 2.

Exemption from the antitrust laws can also occur by structuring the league as a single entity. Many of the recently-formed sports leagues have adopted the single-entity organization: MLS, WNBA, and the XFL (the ill-fated Extreme Football League formed by the World Wrestling Federation and NBC which folded after one season). Since an organization cannot engage in an antitrust conspiracy only with itself, the single-entity structure enables the league to hold down player salaries. Players have to contract with the league and thus individual teams cannot drive up salaries bidding for players' services. Interestingly, the WNBA has abandoned the single entity structure, suggesting that there are costs as well as benefits to that form of organization. Investors may be more willing to invest in a league's success if they can own a specific team (and profit by running it well) than if they have to invest in the league itself and operate, but not own, a specific team.

A third difference across sports leagues is the extent of interleague competition. Professional baseball is played not only in North America, but in Japan, Mexico, and other countries. Professional football is not only played in the United States, but in Canada. There are numerous professional basketball leagues around the world other than the NBA. Professional hockey is not only played in North America, but in Europe as well. However, in their respective sports, MLB, the NFL, NBA, and NHL are the premier leagues in the entire world. The elite players from around the world gravitate towards these leagues. The elite players from these leagues do not tend to move to these other leagues. Some MLB players do sign with Japanese teams, but they tend to do so after failing to sign with a MLB team; such players are generally past their prime. Some NBA players sign with European teams, but those players are either past their prime or need to gain experience and improve their skills in the hope of one day playing in the NBA. Professional football players rarely choose to play in the Canadian Football League if they can earn a spot on an NFL team. Professional hockey players rarely choose to play in Europe if they can play in the NHL.

A major exception to the dominant position of North American sports leagues is soccer. It is not true that the top soccer players in the world gravitate to MLS. According to Noll (2003b), most of the best players on the U.S. national team play for European professional teams and MLS does not have the talent of the best English league – the Premier League. Rather, the MLS is more comparable in quality to the bottom Division 1 or top Division 2 English leagues. This competition for talent curbs MLS's monopsony power over players.

A fourth difference across sports leagues relates to their 'openness.' The major sports leagues in the United States are closed – a non-league team can only gain admittance to the league through the consent of the league members, who typically require payment of a substantial entry fee. This is in contrast to the typical sports league in Europe, which has an open, hierarchical structure. Consider the case of English Soccer. The top league is the English Premier League. The second-tier league is Division 1. There are lower-tier leagues as well. The three worst performing teams in the Premier League are relegated to Division 1 the next season, while the top two teams in Division 1 are promoted to the Premier League, as is the winner of a playoff among those finishing in positions 3 through 7 in Division 1.

Open sports leagues are believed to give teams a greater incentive to win since playing against higher quality opponents presumably attracts greater fan interest and thus yields higher revenues for the team. As a result, teams will bid more aggressively for players.[8] This implies that player salaries will be higher in an open sports league than in a closed one, all else equal. Consistent with this prediction, Noll (2002) examines English soccer and finds that 'promotion and relegation' has a net positive impact on attendance and results in higher player salaries. However, Noll finds the impact of promotion and relegation on competitive balance among teams to be ambiguous because some teams may be promoted to a division in which they do not have a realistic chance of fielding a competitive team and, as a result, these teams spend less on players once they are in the higher league (albeit briefly) than they did when they were attempting to be promoted into the higher league.

Sports leagues in the United States seek to maintain 'competitive balance' among teams by a number of means, including the sharing of gate and broadcast revenues and restrictions on player movement and salaries. Such revenue-sharing does not occur in Europe. Nor do European leagues have a reserve clause, draft, salary cap, luxury tax, or collective merchandising agreement – although some European leagues collectively sell broadcast rights.

Individual teams in open sports leagues not only have less market power over players, they have less market power over municipalities seeking to attract or retain a team. As Ross and Szymanski (2002) explain, "a club's threat to relocate without tax subsidies is diluted by the possibility that the team itself may be relegated and, more importantly, by the creation of alternative entry routes for cities that do not possess a major league team." (p. 629)

Of the sports leagues in the United States, only the NHL has seen some of its teams declare bankruptcy. In contrast, Szymanski and Valletti (2003) observe that 16 English soccer teams have fallen into the U.K. equivalent of Chapter 11 in the last three years. They conclude that the system of promotion and relegation may enhance social welfare by dissipating rents earned by teams (which take the form of stadium subsidies, the gap between players' marginal revenue product and their salaries, and so on), but may

[8] See Ross and Szymanski (2002); the economic literature on 'European Football' is surveyed by Matheson (2003).

reduce social welfare by making games less competitive (i.e., the quality of the product is reduced).[9]

A number of economists have advocated that the 'closed' sports leagues in the United States be required to establish a system of promotion and relegation. They believe that introduction of such a system will curb the market power of leagues and individual teams.[10] This proposal, as well as other proposals for the reform of sports leagues in the United States, is discussed in Chapter 12.

Sanctioning Bodies as a Form of Sports League. Some professional sports have 'sanctioning bodies' – auto racing, boxing, golf, tennis, among others. A sanctioning body sets the rules for a competition (including rules regarding who may participate), enforces those rules, guarantees the purse, provides rankings of players or teams, and declares the champion. For example, courts have found that the United States Tennis Association "legitimately functions as a private, nonprofit regulating body to ensure that competitive tennis is conducted in an orderly fashion and to preserve the essential character of the game as played in organized competition."[11] The PGA Tour "sponsors and cosponsors professional golf tournaments conducted on three annual tours" (i.e., the PGA Tour, the NIKE Tour, and the Senior PGA Tour), has rules on how a player can gain entry into a particular tour, and sets rules for each tournament.[12] Boxing has a multitude of sanctioning bodies, each declaring its own champion. The failure of boxing to produce a single undisputed champion at each weight category reduces its appeal to fans.

The National Association for Stock Car Auto Racing (NASCAR) was formed in 1948 by Bill France "to unite all stock car racing under one set of rules; to set up a benevolent fund and a national point standings whereby only one stock car driver would be crowned National Champion."[13] NASCAR also guaranteed the purse for each race it sanctioned – an act that earned NASCAR the respect of the drivers, who in the past sometimes went unpaid. NASCAR developed penalties for those found in violation of its rules. NASCAR is 100% owned by the France family, which also controls about 60% of International Speedway Corporation, which owns numerous tracks that host NASCAR races. NASCAR decides which racetracks get which race dates. The teams that compete in NASCAR races are neither direct, nor indirect, owners of NASCAR. Teams are independent businesses – they enter into their own deals with sponsors. Prior to 1999, the broadcast rights for each race belonged to the racetrack, with NASCAR receiving 10% of whatever the track negotiated with a network. The Fox Sports network told NASCAR it

---

[9] Szymanski and Smith (1997) and Dobson and Goddard (1998) examine the financial performance of the English soccer industry; Medcalfe (2003) finds an improvement in competitive balance after the introduction of promotion and relegation in English soccer and cricket.

[10] Noll (2003b) argues that both the American closed league system and the European open league system produce less than the optimal number of major-league teams, because both have monopoly power.

[11] *Gunter Harz Sports v. United States Tennis Association*, 665 F.2d 222 (8th Cir. 1981).

[12] *PGA Tour v. Martin*, 532 U.S. 661 (2001).

[13] The discussion in this paragraph is based primarily on Hagstrom (1998).

would bid to broadcast NASCAR races if it could negotiate directly with NASCAR instead of having to negotiate separately with each racetrack.[14] NASCAR now negotiates broadcast rights with the television networks. For example, in 2005, NASCAR negotiated a $4.4 billion, 8-year contract with four networks, of which 65% will go to the racetracks, 25% will be split among the racing teams, and 10% will go to NASCAR.[15]

Some economists believe the market power of professional sports leagues such as the NFL, NBA, NHL, and MLB could be curbed by forcing the leagues to function more like sanctioning bodies such as NASCAR. Teams no longer would be direct or indirect owners of the league. Rival sanctioning bodies would compete for the participation of teams. One problem is how to design a system that benefits fans by producing an undisputed champion – the problem that plagues boxing. This proposal, and others, will be discussed in more detail in Chapter 12.

Economic Theories of Sports Leagues. Many, but not all, economists agree that sports leagues are natural monopolies – there are a number of economic factors pushing teams in a particular sport to consolidate into a single league. Economists also generally agree that sports leagues are a type of joint venture. Economists disagree, however, as to whether particular joint ventures/natural monopolies such as the NCAA, NFL, NBA, NHL, and MLB operate as cartels.

> *Sports leagues as natural monopolies*: If total production costs are lower when one firm produces all an industry's output compared to when it is produced by more than one firm, the market is said to be a 'natural monopoly' and the single firm in the market a 'natural monopolist.'[16] In a 1964 article titled "The Peculiar Economics of Professional Sports," Walter Neale argued that sports leagues are natural monopolies.[17] Their products include not only the games themselves, but also the excitement of the pennant race, the league standings, and the championship. A single team alone cannot produce these products – it needs an opponent. Neale argues: "The several joint products which are products joint of legally separate business firms are really the complex joint products of one firm, and this firm is necessarily an all-embracing firm or natural monopoly." (p. 4) The "most useful of all products" is the World Championship, which can only be produced by a single league. As a result, there is a strong tendency toward a single league in each professional sport. At the time Neale wrote, the National Football League and American Football League had not yet merged. Neale did not find the coexistence of the two professional football leagues to be an anomaly. Rather, he predicted that "this is inherently a temporary state of affairs." (p. 6) He was right. A few years later, the NFL and AFL merged.
>
> Ross (1989) disagrees that sports leagues are natural monopolies. He argues that there are two theoretical reasons why sports leagues may be natural

[14] See Schlosser (2001).
[15] See Hiestand (2005).
[16] See Carlton and Perloff (2005), pp. 104-05.
[17] Other studies arguing that sports leagues are natural monopolies include Roberts (1995) and Heintel (1996).

monopolies, neither of which are supported by facts. One possible reason is that the minimum size of a sports league is too large to support more than one league. Suppose a league needs a least eight teams to function, but only 12 franchise locations are viable (each of which can support only one team). A second league could place franchises in the four viable locations without teams but would need to add at least four more teams, either by convincing four teams from the initial league to switch to the new league or by adding second teams to locations already with a team in the initial league. In either case, either some of the teams in the initial league fold, and thus the initial league fails to be of minimum viable size and itself folds, or the second league fails to add enough franchises to achieve the minimum viable size of eight teams and thus the second league folds. In either case, only one league survives. Ross dismisses this argument, arguing that, in practice, sports leagues now contain so many teams that they could be split into a number of smaller, but still economically viable, leagues.

Heintel (1996) counters that Ross's argument "has no bearing on whether the NFL is a natural monopoly, however; it merely shows that the NFL has more teams than absolutely necessary to operate."

A second theoretical reason why sports leagues may be natural monopolies is that it may be less costly to expand an existing league than to form and operate a new league. Ross dismisses this argument, asserting that the only cost savings to having only one league would be the incidental administrative savings from the elimination of duplicate league offices. He contends that there is no evidence that a second league would have to pay higher stadium rental charges, player salaries, or administrative costs than would a monopoly league. It is true that player salaries soar when leagues have to compete for talent, as evidenced by the impact of NBA-ABA competition for professional basketball players and NHL-WHA competition of professional hockey players. The key point, Ross explains, is that a distinction must be drawn between actual dollar expenses and costs (i.e., the value to society of the resource). A monopoly league can depress player salaries and will have actual dollar expenses which are lower than if it had to compete with another league. The higher player salaries which it would have to pay if a second league existed are a higher dollar expense, but they are not a cost – the value to society of the players' services has not changed. Society does not benefit from the monopsonistic exploitation of players. In other words, a single league may be able to add new teams at lower cost than a second league can be formed, but this lower cost is attributable to its monopsony power.

Heintel counters that Ross's assertion that costs for a second league would be no higher than for a monopoly league is incorrect and irrelevant. It is incorrect because a new league would have to invest in intangible capital (e.g., rivalries, fan loyalty) which the NFL has already generated, resulting in higher costs for a new league. It is irrelevant because simply showing a second league could operate at the same cost as the NFL does not prove that the NFL is not a natural monopoly. The question is what happens to the NFL's average cost per unit of output (e.g., games played) as output increases. Heintel asserts that it decreases, and thus the NFL is a natural monopoly.

Ross also addresses the question as to why rival leagues generally do not co-exist for long. In the case of Major League Baseball, Ross answers that MLB "acquired monopoly power by engaging in mergers and anticompetitive acts that clearly would constitute illegal monopolization in violation of section two of the Sherman Act" and "maintained its monopoly position by creating new franchises to deprive new leagues of the base necessary to begin competition," conduct which "also probably would constitute illegal monopolization absent the exemption." In the case of the NFL, Ross argues that the NFL-AFL merger created a giant incumbent which is entrenched in most of the largest markets in the United States. The World Football League and United States Football League were unable to compete with the NFL, in part due to disastrous managerial decisions by the new leagues. The failed entry of these leagues does not imply the professional football industry is a natural monopoly any more than the failure of new entrants to compete against Alcoa implied that the aluminum industry was a natural monopoly.

Ross agrees that fans value championship games, but believes that rival leagues can agree jointly to produce a champion. Heintel counters that the rival leagues would have to coordinate to produce a championship, reaching agreement on a schedule and common rules – and thus the rival leagues would cease to be distinct. However, as discussed earlier in this chapter, during the early 1900s, rival professional hockey leagues did agree to hold a championship, with the winner receiving the Stanley Cup. The NHL supplied one of the teams in the championship; its opponent for the Stanley Cup came from a rival league.

Finally, Ross disputes that competition between leagues for players will result in "ruinous competition." He points out that franchise values are a better indication of a league's financial health than are teams' balance sheets. During the alleged "ruinous competition" between the NBA and ABA, the value of professional basketball franchises rose, not fell.

Sports leagues as joint ventures: A single team can only produce scrimmage (or 'exhibition') games, which are unlikely to generate much fan interest.[18] To produce a 'real' game, it needs an opponent, and it needs to agree with the opponent on the rules and scheduling of the game. Unlike a typical business which benefits if its competitors fold, a single team does not benefit if its opponents fold. The team wants to beat its opponents on the field, and possibly also outperform them financially, but it does not want its opponents to fold. Therefore, the characterization of individual teams as individual firms does not quite fit.

Nor does the characterization of a sports league as an individual firm. The interests of the league do not always coincide with that of each of its member teams (see Chapter 3). The league acts on behalf, and with the consent, of its

[18] The Green Bay Packers hold a scrimmage game during the NFL preseason and tens of thousands of fans attend. However, this does not mean that the same number of fans would attend if the Packers were the sole NFL team. The huge attendance is due to a number of reasons. Fans want a sneak preview of the team for the upcoming regular season; if not for the upcoming season, fans would have little incentive to size up this year's team. Moreover, Packers' home games are always sold-out so securing tickets to games can be difficult and expensive; therefore, the scrimmage game is a poor quality (but also low cost) substitute for attending a regular season game.

members. Sometimes a league may take actions that some of its members do not support. Consider the issue of how many teams to have in the league. Ross and Szymanski (2002) show that, in a simple model of a league seeking to maximize league profits, the number of teams in the league expands to the point where marginal revenue is zero. In contrast, the individual teams comprising the league will want to expand the number of teams only to the point which maximizes average revenue per team. In general, the size of the league desired by the individual teams will be smaller than the size of the league desired by the league itself.[19]

Economists generally prefer to think about sports leagues as joint ventures.[20] As Flynn and Gilbert (2001) explain, the term "joint venture" does not have an exact meaning in economics. Nor does it have an exact meaning in antitrust law. The basic idea, however, is that two or more independent entities collaborate to achieve a commercial objective. Pharmaceutical companies form joint ventures with biotechnology companies to conduct drug-related research. General Motors and Toyota entered into a joint venture to produce automobiles.

Flynn and Gilbert write: "The central economic issue for antitrust analysis is whether the coordination of professional sports teams harms competition, and if so, whether the lessening of competition is more than offset by benefits to consumers from that coordination." (p. F28) Viewing sports leagues as joint ventures does not immediately determine whether their activities are anti-competitive or pro-competitive.[21] A joint venture may engage in either, or some of both. Moreover, an action of a joint venture may be pro-competitive in some respects and anti-competitive in others – it depends on whether the existence of the league and its success are taken as a given (*ex post*) or whether the creation of the league and its future success are taken as uncertain (*ex ante*). An action which appears to be anti-competitive from an *ex post* perspective may be pro-competitive from an *ex ante* perspective. (Chapter 2 examines the basics of antitrust analysis in more detail.)

From the joint venture perspective, a sports league, in the words of Tollison (2000), "competes as a single entity in the relevant product market in both live attendance and television markets" and "has incentives to mute intrabrand competition (among teams) in the interest of promoting interbrand competition so that league revenues (which are partially shared) are maximized in competition with other sports and possibly also with a myriad of alternative ways that consumers can spend their entertainment dollars." (p. 22)

[19] See Ross and Szymanski (2002), pp. 630-31.

[20] The characterization of sports leagues as joint ventures is advocated by Rascher and Schwarz (2000), Tollison (2000), and Flynn and Gilbert (2001), among others.

[21] In contrast, viewing a sports league as a cartel immediately suggests its activities are anti-competitive; viewing a sports league as a single-entity suggests that its activities do not constitute an antitrust conspiracy since a single-entity cannot conspire only with itself.

Sports leagues as cartels: A cartel is defined as "an association of firms that explicitly agree to coordinate their activities, typically to maximize joint profits."[22] Some economists believe sports leagues are a form of cartel. For example, Fort and Quirk (1995) write: "Professional team sports leagues are classic, even textbook, examples of business cartels… However, sports leagues differ from other cartels in one important and paradoxical respect. Sports leagues are in the business of selling competition on the playing field… The special problem for sports leagues is the need to establish a degree of competitive balance on the field that is acceptable to fans." (p. 1265) Adams and Brock (1997) characterize the relationship between a sports league and its players union as a bilateral monopoly.

Sports leagues often cite the need to maintain 'competitive balance' as the pro-competitive rationale for imposing a wide range of restrictions, including salary caps, revenue sharing, luxury taxes, and restriction on free agency. 'Competitive balance' seems like a fairly straightforward concept (fans want to watch 'competitive' games), until one attempts to actually define and measure it (fans want to watch competitive 'good' games, not games between evenly matched, but poor or mediocre quality, teams).[23] Whether restrictions like salary caps and revenue sharing are cartel-imposed anticompetitive practices or in fact maintain competitive balance, and thus have a pro-competitive rationale, will be discussed in Chapter 3 (restrictions on teams) and Chapters 6 and 7 (restrictions on players and coaches).

A joint venture may or may not function as a cartel. The NCAA is frequently cited as an example of a joint venture which functions as a cartel.[24] As the discussion earlier in this chapter reveals, the NCAA historically has attempted to restrict output by limiting the number of televised football games and restrict competition for inputs by limiting the eligibility, recruiting, and financial aid of student-athletes and by limiting the compensation of 'restricted earnings assistant coaches.' These restrictions result in wealth transfers from players and assistant coaches to the schools. (Chapters 6 and 7 examine the market power of sports leagues over players and coaches in more detail.)

According to Tollison (2000), the closest analogy to a professional sports league in college athletics is not the NCAA, but rather the college athletic conferences, such as the Big Ten. The NCAA, in contrast, "is an association of otherwise independent colleges and universities that have come together for the purpose of regulating intercollegiate athletics." (p. 22) Whereas these colleges and universities compete against one another in a number of open markets (e.g., for students, for faculty, for research grants), the NCAA "provides a vehicle through

[22] Carlton and Perloff (2005), p. 780.

[23] See, for example, Sanderson (2002), Utt and Fort (2002), Zimbalist (2002, 2003a), Eckard (2003), Humphreys (2003a, 2003b), Fort and Maxcy (2003), Fort (2003), Kahane (2003), Sanderson and Siegfried (2003), and Szymanski (2005).

[24] See, for example, Becker (1985), Fleisher, Goff, and Tollison (1994), Siegfried (1994), Blair and Romano (1997), Eckard (1998), Rascher and Schwarz (2000), and Tollison (2000).

which competition in intercollegiate athletics can be stifled in both relevant input and output markets." (p. 23)

Not all economists believe the NCAA is a cartel. For example, McKenzie and Sullivan (1987) argue that "the NCAA acts not as a cartel but as a demand-enhancing joint venture." (p. 387) They point out that "the NCAA members are not a *single unified* firm, but are a collection of many independent firms with different cost structures and different market demands" and thus they "have the same incentive to improve their profits by cheating on the cartel – even forming alternative collegiate or semiprofessional sports associations that permit explicit wage payments to athletes – as they do to form the cartel in the first place." (p. 385) McKenzie and Sullivan question "how any effective, exploitive sports cartel can be maintained in the long run in the absence of forced membership or barriers to exit from the NCAA by member colleges and barriers to entry into the sports market by alternative sports associations." (p. 385) They believe that "NCAA rules are an efficient contract among participants in a joint venture" and "are prudent measures by colleges to increase the demand for intercollegiate athletics and college education." (p. 376)

In summary, sports leagues are a form of joint venture by which individual teams cooperatively produce a product, namely games (both live and televised) which culminate in the declaration of a league champion. They typically devise schedules and rules by which their member teams are expected to comply. Some of those rules, such as those imposing restrictions on player salaries and mobility, allegedly are pro-competitive because they maintain 'competitive balance' among teams. Whether this is in fact the case is hotly disputed by economists. Also hotly disputed is whether the existence of only one major sports league in each sport (except for relatively brief periods) is evidence that sports leagues are natural monopolies, or alternatively, evidence that the major sports leagues have engaged in anticompetitive conduct against their rival leagues.

Chapter 2

Basics of Antitrust Analysis

Monopolies and cartels restrict output, thereby raising the price of their product relative to the price that would prevail under competition – the so-called 'competitive price.' A monopsony is the sole buyer of an input and thus can restrict its usage, thereby enabling the monopsonist to pay less than the competitive price for the input. Sports leagues have monopoly power with respect to their output – games – and monopsony power over some of their inputs – the players. Thus, fans are forced to pay a higher-than-competitive price to attend games and players are paid less-than-competitive salaries.

The antitrust laws seek to protect consumers by preserving competition. They do not, however, seek to protect competitors – a critical distinction. Introduction of a superior product, for example, benefits consumers but may have disastrous consequences for competitors. It is not an antitrust violation to simply sell a product which consumers find so superior to its alternatives that it becomes the sole product in the market; in effect, the superior product becomes the market. However, it may be an antitrust violation if the product's producer engages in certain actions to prevent competition to the product.

How does one determine whether a producer's actions are antitrust violations? This chapter provides the answer. It begins with a discussion of the antitrust laws, then examines the several exemptions to the antitrust laws, and concludes with an overview of how to prove antitrust violations.

The Antitrust Laws:[25] The Sherman Act of 1890 was the first federal antitrust legislation and contains two main provisions. Section 1 outlaws "every contract, combination …, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Notice that Section 1 outlaws 'every' such contract, combination, or conspiracy. Thus, a literal application of Section 1 would invalidate virtually every commercial arrangement. As early as 1911, the U.S. Supreme Court ruled that, despite its broad language, Section 1 applies only to contracts, combinations, and conspiracies that are 'unreasonable' restraints of trade or commerce. Courts decide what is 'unreasonable.' Some activities are *per se* illegal; others have to be evaluated under the so-called 'rule of reason' – the anticompetitive effect of the activity in dispute is weighed against its business justification and purported pro-competitive effect.

Section 2 of the Sherman Act states that "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." In other words, Section 2 makes it illegal for

[25] This discussion is based on Carlton and Perloff (2005), the Federal Trade Commission publication "Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws," and "Executive Summary of the Antitrust Laws" by Richard M. Steuer of Kaye, Scholer, Fierman, Hays & Handler, LLP, which is posted on the Findlaw website at http://profs.lp.findlaw.com/antitrust/.

a company to “monopolize or attempt to monopolize” trade or commerce. Notice that Section 2 does not make it illegal simply to be a monopoly. As courts have interpreted Section 2, it is not even necessarily illegal for a company to try to achieve a monopoly; it is illegal to “monopolize, or attempt to monopolize” through ‘unreasonable’ methods. A key factor in the court’s determination of what is ‘unreasonable’ is whether the practice in dispute has a legitimate business justification.

Note that both Section 1 and Section 2 apply to “trade or commerce among the several States.” In other words, the Sherman Act applies to ‘interstate commerce,’ and not to ‘intrastate commerce’ or interstate activity which is not ‘commerce.’ This distinction is the source of Major League Baseball’s antitrust exemption; in 1922, the U.S. Supreme Court ruled that the business of baseball is not interstate commerce and thus the federal antitrust laws do not apply. Interestingly, courts have found other sports leagues to be engaged in ‘interstate commerce’ and thus only Major League Baseball has a judicial exemption from the federal antitrust laws.

The Clayton Act of 1914 covers several specific types of restraints. Section 2, which was amended by the Robinson-Patman Act of 1936, prohibits price discrimination that lessens competition. Section 3 prohibits competition-lessening tie-ins and exclusive dealing. Section 7, which was amended by the Cellar-Kefauver Act of 1950, prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to create a monopoly.” Section 7A, known as the Hart-Scott-Rodino Act, mandates the prior notification of large mergers to both the Federal Trade Commission and the U.S. Department of Justice, the two federal government agencies responsible for enforcing the antitrust laws. Section 8 deals with interlocking directorates among firms.

The Federal Trade Commission (FTC) Act of 1914 created the FTC. Section 5 outlaws “unfair methods of competition” – but does not define ‘unfair.’ Violations of the Sherman Act have been found by the U.S. Supreme Court to also be violations of Section 5, but Section 5 covers some practices not covered by the Sherman Act. In this sense, the Act may be considered a ‘catch-all enactment’ which fills loopholes in other statutes.

Individual states also have their own antitrust laws. Antitrust challenges to sports leagues almost always allege violation of federal, not state, antitrust laws.

Exceptions to the Antitrust Laws. There are four general categories of exemptions from the federal antitrust laws applicable to sports leagues: a judicial ‘interstate commerce’ exemption which applies specifically to Major League Baseball; a judicial ‘single-entity’ exemption which applies to sports leagues structured as single-entities, such as Major League Soccer; statutory exemptions in which Congress mandates that certain transactions be exempt from antitrust scrutiny, such as the NFL-AFL and NBA-ABA mergers; and non-statutory exemptions which facilitate the collective bargaining process between professional sports leagues and their respective players’ unions.

> *Judicial ‘interstate commerce’ exemption*: In 1922, the U.S. Supreme Court decided the case of *Federal Club v. National League*. The plaintiffs were members of a baseball league that attempted to compete with MLB. Plaintiffs alleged that the defendants, MLB’s National League and American League, “destroyed the Federal League by buying up some of the constituent clubs and in

one way or another inducing all those clubs except the plaintiff to leave their League," in violation of the Sherman Act. The Court decided:

> The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in Hooper v. California, 155 U.S. 648, 655, 15 S. Sup. Ct. 207, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.
>
> If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

In other words, the business of baseball is not interstate commerce, and thus is not covered by the Sherman Act.

Two subsequent Supreme Court decisions reaffirmed the decision in *Federal Club v. National League*. In 1953, the Court decided the case of *Toolson v. New York Yankees* concerning an antitrust challenge to MLB's reserve clause, which gave the first team to sign a player a continuing and exclusive right to his services. The Court ruled:

> In Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

In other words, if MLB's antitrust exemption is to be removed, it will have to be by Congressional action.

Another antitrust challenge to MLB's reserve clause was brought by Curtis Flood, who had signed with the Cincinnati Reds in 1956, was traded to the St. Louis Cardinals before the 1958 season, and then traded to the Philadelphia Phillies in 1969. Flood filed a lawsuit in 1970 charging violations of the federal antitrust laws, as well as civil rights and other statutes. The Supreme Court's ruling contained an eight-point summary of its view:

1. Professional baseball is a business and it is engaged in interstate commerce.
2. With its reserve system enjoying exemption from the antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. Federal Baseball and Toolson have become an aberration confined to baseball.
3. Even though others might regard this as "unrealistic, inconsistent, or illogical," see Radovich, 352 U.S., at 452, the aberration is an established one, and one that has been recognized not only in Federal Baseball and Toolson, but in Shubert, International Boxing, and Radovich, as well, a total of five cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.
4. Other professional sports operating interstate – football, boxing, basketball, and presumably, hockey and golf – are not so exempt.
5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of Federal Baseball and Toolson.
6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity…
7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of Federal Baseball. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.

8. The Court noted in Radovich, 352 U.S., at 452, that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.

This emphasis and this concern are still with us. We continue to be loath, 50 years after Federal Baseball and almost two decades after Toolson, to overturn those cases judicially when Congress, by its positive inaction has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

In other words, MLB's antitrust exemption, if it is to be stripped at all, must be stripped by Congress, not by the courts.

Congress did step in to limit MLB's antitrust exemption in one area. The Curt Flood Act of 1998 states that "major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players)." For example, if baseball owners declared negotiations with the players' union at an impasse and sought to impose their own terms, major league baseball players could decertify their union, and then challenge the owners' actions under the antitrust laws – just as professional football and basketball players can. Note that the Act applies only to "major league" baseball players, not players in the minor leagues.

While the Curt Flood Act limited MLB's antitrust exemption in one area, it reaffirmed it in all other areas: the business of baseball at the minor league level; the relationship between major and minor league baseball; decisions about franchise expansion, location, and relocation; decisions about franchise ownership transfers; dealings with umpires; television contracts with the broadcast networks; and so on.

The limits of MLB's antitrust exemption were addressed by the 2003 decision by the Appeals Court for the Eleventh Circuit in the case of *MLB v. Charlie Crist*, which concerned MLB's attempt to stop the Florida Attorney General from investigating MLB's contraction plans (Florida's two teams, the Florida Marlins and the Tampa Bay Devil Rays, were the only teams to oppose contraction and were leading candidates to be eliminated.) The appeals court ruled that MLB's antitrust exemption is not limited to the reserve clause, as the Florida Attorney General argued, by rather extends to the "business of baseball." The contraction issue relates to the number of teams participating in league play and thus is "obviously" part of the business of baseball. Moreover, baseball teams cannot be prosecuted under state antitrust laws for activity which falls under the "business-of-baseball" exemption. However, MLB's antitrust exemption does not apply to dealings between teams and third-parties.

Given MLB's antitrust exemption, the question naturally arises: what can MLB do that the NFL, NBA, and NHL cannot? In terms of restrictions on player salaries and mobility, possibly very little. The reason is that each league has to negotiate a collective bargaining agreement with its players' union. While MLB, in theory, has an antitrust exemption that permits implementation of a reserve clause and other restrictions on player mobility, it ultimately has to reach an agreement with its (very strong) players' union, which invariably will demand some form of *quid pro quo*. When MLB owners purportedly colluded in refusing to sign free agents during the period 1986-88, they did not violate the federal antitrust laws, but they did violate their collective bargaining agreement's anti-collusion provision – Article XX(F).[26] (The impact on players is examined in more detail in Chapter 6.)

On the other hand, MLB may be able to impose restrictions on teams that other leagues cannot. For example, team relocation is far less common in MLB than in other sports leagues. The only recent relocation of a MLB team is the Montreal Expo's move to Washington D.C. The NFL and NHL, in contrast, have experienced numerous team relocations. Sometimes these leagues have succeeded in preventing a relocation (e.g., the St. Louis Blues' move to Saskatoon); sometimes they have not (e.g., the Oakland Raiders' move to Los Angeles). (The impact of relocation restrictions on teams is discussed in more detail in Chapter 3).

What would be the impact if MLB lost its antitrust exemption? Opinions vary.[27] The largest impact may be on baseball's minor league system. As Hylton (1999) explains, baseball's antitrust exemption applies not only to MLB, but to an entity called "Organized Baseball" of which MLB is just one part. There are a number of minor leagues (Class A, AA, and AAA) and they are bound together contractually with MLB by the National Agreement, which dates back to 1883. Hylton observes: "From the time of the first National Agreement in 1883, member teams and leagues have agreed to respect the territorial rights of other teams and to refrain from competing for the services of players except by those rules specifically set out in the agreement… Key to the operation of this system have been the concepts of league classification, salary caps, and reserved rights to players." (p. 393) Without Organized Baseball's antitrust exemption, this system could not continue in its present form. It should be noted that the NFL and NBA, in contrast, have a much less developed minor league system, with college football and basketball programs basically serving as their minor league systems.

Another possible impact could be a wave of team relocations, as small market clubs move to more profitable locations. Such relocations, in turn, could affect MLB owner support for a luxury tax on teams with the highest player payrolls.

Judicial 'single-entity' exemption: In 1984, the U.S. Supreme Court decided the case of *Copperweld v. Independence Tube*, which dealt with the question of whether Copperweld and its wholly-owned subsidiary, Regal Tube, were capable of conspiring with each other in violation of Section 1 of the Sherman Act. The Court ruled they were not:

---

[26] See Ferguson, Jones, and Stewart (2000) and *Silverman v. MLB Players Relations Committee*.

[27] See, for example, Ross (1989), Scully (1989), Roberts (1994, 2003) and Zimbalist (1994).

> The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of §1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's benefit. If the parent and subsidiary "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. In reality, the parent and subsidiary always have a "unity of purpose or a common design." The "intra-enterprise conspiracy" doctrine relies on artificial distinctions, looking to the form of an enterprise's structure and ignoring the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary.

In other words, a parent company cannot engage in an antitrust conspiracy with only its wholly-owned subsidiaries.

Suppose that instead of forming a sports league whose members are independent teams, a newly-formed sports league itself owned the teams and permitted investors in the league to operate, but not own, specific teams. Would such a league be analogous to a parent company and its wholly-owned subsidiaries? If so, the Supreme Court's *Copperweld* decision would seem to suggest that the league and its teams would be incapable of conspiring to violate the antitrust laws. The league would seemingly be free to adopt, for example, restrictions on player salaries and mobility without fear of being found guilty of an antitrust violation.

Major League Soccer adopted such an organizational structure when it formed in 1995. MLS began play the next year. In February 1997, eight MLS players sued the league, the league's operator/investors, and the United States Soccer Federation (USSF) under a number of antitrust theories: Count I alleged that the league and the operator/investors violated Section 1 of the Sherman Act by agreeing not to compete for player services; Count III alleged that the league violated Section 2 of the Sherman Act by monopolizing, attempting to monopolize, or combining or conspiring with the USSF to monopolize the market for the services of Division I professional soccer players in the United States by preventing the sanctioning of any other entity as a Division I professional soccer league in the United States; and Count IV alleged that the operator/investors violated Section 7 of the Clayton Act by combining assets in such a way as to substantially lessen competition and tend to create monopoly.

In its 2002 decision, the Appeals Court for the First Circuit rejected the players' arguments, but declined to express total support for the league's view that it is a single-entity and falls inside the *Copperweld* safe harbor. The appeals court observed: "In many ways, MLS does resemble an ordinary company: it owns substantial assets (teams, player contracts, stadium rights, intellectual property) critical to the performance of the league; a substantial portion of generated revenues belongs to it and is to be shared conventionally with both operator/investors and passive investors." The court then added a number of reservations:

> Nevertheless, it is hard to treat the corporate integration as conclusive. The challenge here is primarily to the operator/investors' role as team managers, not as ordinary stockholders, and to restrictions imposed on them in that role preventing competition for player services. That a stockholder may be insulated by Copperweld when making ordinary governance decisions does not mean automatic protection when the stockholder is also an entrepreneur separately contracting with the company. Above all, there are functional differences between this case and Copperweld that are significant for antitrust policy.
>
> First, there is a diversity of entrepreneurial interests that goes well beyond the ordinary company. MLS and its operator/investors have separate contractual relationships giving the operator/investors rights that take them part way along the path to ordinary sports team owners: they do some independent hiring and make out-of-pocket investments in their own teams; they retain a large portion of the revenues from the activities of their teams; and each has limited sale rights in its own team that relate to specific assets and not just shares in the common enterprise. One might well ask why the formal difference in corporate structure should warrant treating MLS differently than the National Football League or other traditionally structured sports leagues.
>
> This contrasts with Copperweld's observation that the parent and its wholly owned subsidiary in that case shared a "complete unity of interests."…
>
> Second, in this case the analogy to a single entity is weakened, and the resemblance to a collaborative venture strengthened, by the fact that the operator/investors are not mere servants of MLS; effectively, they control it, having the majority of votes on the managing board. The problem is especially serious where, as here, the stockholders are themselves potential competitors with MLS and with each other. Here, it is the MLS that has two roles: one as an entrepreneur with its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e., limiting competition among operator/investors.
>
> From the standpoint of antitrust policy, this prospect of horizontal coordination among the operator/investors through a common entity is a distinct concern.

The appeals court ultimately concluded that it did not have to reach a definite decision on whether MLS is a 'single-entity' for antitrust purposes:

> To sum up, the present case is not Copperweld but presents a more doubtful situation; MLS and its operator/investors comprise a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors. And, of course, there is not one kind of hybrid but a range of possibilities (imagine the operator/investors with their separate entrepreneurial interests but without their control of MLS). The question is what legal approach to take…
>
> In all events, we conclude that the single entity problem need not be answered definitely in this case.

Stuck (2004) explores whether MLS's push to build soccer-specific stadiums jeopardizes and erodes the league's single-entity defense in future antitrust litigation. In February 2000, the league had twelve teams and nine operator-investors. The number of teams has since dropped to ten, while the number of operator-investors plunged to three: Anschutz Entertainment Group (operating six teams – the Chicago Fire, Colorado Rapids, D.C. United, Los Angeles Galaxy, San Jose Earthquakes, and New York/New Jersey MetroStars), the Hunt family (operating two teams – the Columbus Crew and Kansas City Wizards), and the Kraft family (operating one team – the New England Revolution). Lamar Hunt privately financed the Columbia Crew stadium himself, but he insists he needs a dual-purpose football/soccer, not a soccer-specific, stadium for Kansas City. Kraft built a dual-purpose stadium for the New England football and soccer teams, a plan embraced by MLS. The interests of the operator-owners and MLS may diverge as public funding is sought for more soccer-specific stadiums. Stuck argues: "MLS's current inability to coordinate facility issues among its three primary investors further erodes the appearance of a true 'unity of interest,' and thus, further erodes the league's single-entity defense." (p. 569)

MLS's single-entity structure has also been attacked as a 'sham' corporation and therefore not entitled to antitrust immunity.[28]

Statutory exemptions:[29] On a number of occasions, the U.S. Congress passed, and the president signed, bills granting limited antitrust immunity to sports leagues.

In 1953, the U.S. Department of Justice (DOJ) filed an antitrust lawsuit against the NFL seeking an injunction against continued enforcement of Article X of the NFL's Bylaws which prohibited the telecasting of any NFL games into the 'home territory' (generally defined as a 75-mile zone) of a team playing a home game the same day. The league was concerned about the impact of televising games on live attendance. At the time, television rights fees were insignificant relative to ticket and other stadium revenue. Article X, however, also prohibited

[28] See Brill (1999), Sullivan (2000), and Waxman (2001).

[29] The discussion in this section is based primarily on the Voluntary Trade Council (2005), and to a much lesser extent on Cohen (1994).

teams from broadcasting their games in another team's home territory, even if that team was playing an away game (unless permission was received from both teams playing that game). The DOJ contended that Article X was an unreasonable restraint of trade and thus a violation of Section 1 of the Sherman Act. The district court ruled that the restriction on telecasts in the home territories of teams playing a home game was pro-competitive, but the restriction on telecasts in the home territories of teams playing away games was 'unreasonable' and a violation of the antitrust laws.

Prior to 1961, NFL teams negotiated individual television contracts. In 1961, the NFL authorized its commissioner, Alvin 'Pete' Rozelle to negotiate a single national television contract with CBS. Once the contract was signed, the NFL filed a petition asking the district court to find that the deal did not violate the antitrust laws. The district court decided, however, that the contract violated its previous order. (Interestingly, at this time, the AFL, NBA, and NHL also had single network contracts.)

The Sports Broadcasting Act of 1961 was passed in response to the district court's decision. The Act stated:

> 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, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey 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, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

In other words, the four major professional sports leagues in the U.S. could negotiate contracts with the broadcast networks to televise their games and those contracts would be immune from challenge under the antitrust laws.

Note that the Act applies only to "professional" sports. The NCAA, for example, was not given an antitrust exemption to negotiate television deals. Moreover, the Act applies only to the mentioned four sports – football, baseball, basketball, and hockey – and thus a professional soccer league, for instance, would not be covered by the antitrust exemption.

Note also that the Act does not apply to all telecasting, but rather only to "sponsored" telecasting, which has been interpreted as mean 'free' television – broadcast networks such as ABC, CBS, and NBC. As a result, the appeals court ruled in *Shaw v. Dallas Cowboys* that the NFL's deal with the satellite broadcaster DIRECTV to offer 'NFL Sunday Ticket,' an all-or-nothing package, was not covered by the Act's antitrust exemption.

The Sports Broadcasting Act was amended by the Football Merger Act of 1966 to provide an antitrust exemption for the merger of the NFL and AFL. The amendment read:

> In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues … combine

> their operations in expanded single league … if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

Note that the amendment applies only to professional football league mergers, and even more, only to those that do not result in a decrease in the combined number of teams.[30] Thus, when the NBA and ABA sought to merge in the early 1970s, the proposed merger was not covered by the Sports Broadcasting Act and the leagues had to obtain separate congressional approval.

The Football Merger Act was attached to a minor tax bill by Senator Russell Long of Louisiana. Press rumors suggested that the NFL would express its appreciation by awarding the next NFL franchise to New Orleans. Soon thereafter, New Orleans was in fact awarded an NFL franchise.

Non-statutory exemptions: Labor unions have a 'statutory' exemption from the antitrust laws. As the Appeals Court for the Eighth Circuit explained in *Mackey v. NFL*, the Clayton Act and other statutes "declare that labor unions are not combinations or conspiracies in restraint of trade, and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of the antitrust laws." The purpose of this statutory exemption was "to insulate legitimate collective activity by employees, which is inherently anticompetitive but is favored by federal labor policy, from the proscriptions of the antitrust laws." This statutory exemption "extends to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests," but "does not extend to concerted action or agreements between unions and non-labor groups." However, the U.S. Supreme Court had earlier ruled, in the words of the appeals court, "that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the Federal Labor Relations Act … certain union-employer agreements must be accorded a limited nonstatutory exemption from the antitrust sanctions."

Mackey v. NFL was a lawsuit brought by professional football players alleging that the NFL's "Rozelle Rule" violated section 1 of the Sherman Act. The Rozelle Rule, named after the NFL commissioner, required a team signing a player whose contract had expired with another team to pay compensation to the player's former team. One of the questions the appeals court had to decide in 1976 was whether the Rozelle Rule fell under the non-statutory labor exemption, and it enumerated three necessary conditions: (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship"; (2) "the agreement sought to be exempted concerns a mandatory subject of collective bargaining"; and (3) "the agreement sought to be exempted is the product of bona fide arm's-length bargaining." The appeals court concluded that the Rozelle Rule failed to satisfy the third condition because the Rule pre-dated the advent of the

---

[30] The Act specifies a few other restrictions as well. For example, the separate and combined leagues must be not-for-profit tax-exempt associations.

collective bargaining relationship (the Rule was imposed in 1963, well before the collective bargaining agreements of 1968 and 1970) and, furthermore, there was insufficient evidence of a *quid pro quo* (the NFL claimed that there was a *quid pro quo* and players received increased pension benefits and the right to individually negotiate their salaries). Thus, the Rozelle Rule was not covered by the non-statutory labor exemption and the appeals court found that "the Rule, as implemented, contravenes the Rule of Reason and thus constitutes an unreasonable restraint of trade in violation of §1 of the Sherman Act."

While the business practice in dispute in *Mackey v. NFL* was not covered by the non-statutory labor exemption, numerous league activities have been found to be so covered. In 1987, the Appeals Court for the Second Circuit ruled in *Wood v. NBA* that the provisions of the collective bargaining agreement governing a salary cap and the college draft are covered and, in January 1995, ruled in *NBA v. Williams* that "the antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a CBA [collective bargaining agreement], or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws."

In September 1995, the same appeals court ruled in the case of *Caldwell v. ABA*. Caldwell alleged that he was blacklisted for his ABA union activities and rested his antitrust claim on two interrelated propositions: (1) he should have the right to seek the best terms for his services as a professional basketball player and (2) he should have the right not to have teams collusively agree upon the terms upon which he will or will not be hired. The appeals court disagreed: "Once the ABA became obligated to recognize the ABA Players Association as the exclusive bargaining representative of the ABA players, therefore, Caldwell lost the right to seek the best bargain from individual ABA teams" and, moreover, "those teams became exempt from any antitrust rule that might have compelled them to compete individually for players represented by the Union."

In 1996, the U.S. Supreme Court decided the case of *Brown v. Pro Football*. When negotiations with the players' union reached an impasse in 1989, the NFL had unilaterally implemented a plan to permit each team to establish a 'developmental squad' of substitute players, each of whom would be paid the same fixed salary of $1,000 per week. In 1990, 235 developmental squad players sued the NFL alleging the fixed $1,000 weekly salary violated section 1 of the Sherman Act. The Court noted that the question at issue is: "Does it [the non-statutory labor exemption] apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer?" The Court concluded it does.

In 2004, the Appeals Court for the Second Circuit decided the case of *Clarett v. NFL*, which challenged the NFL's eligibility rules for the NFL draft. Those rules required a player to be more than three football seasons removed from high school before being eligible to be drafted by an NFL team. The appeals court observed that, although the eligibility rules do not appear in the collective bargaining agreement (CBA), they do appear in the NFL Constitution and Bylaws, which are mentioned in the CBA. The appeals court ruled:

> Clarett argues that the NFL clubs are horizontal competitors for the labor of professional football players and thus may not agree that a player will be hired only after three full football seasons have elapsed following that player's high school graduation. That characterization, however, neglects that the labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by federal labor law, and that the NFL clubs, as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment and the rules of the sport without risking antitrust liability. For those reasons, the NFL argues that federal labor law favoring and governing the collective bargaining process precludes the application of the antitrust laws to its eligibility rules. We agree.

It should be noted that the boundaries of the non-statutory labor exemption remain imprecise.[31] The U.S. Supreme Court held in *Brown v. Pro Football* that the exemption applied, but did not define its precise contours. The Appeals Court for the Second Circuit does not regard the three conditions set forth by the Appeals Court for the Eighth District in *Mackey v. NFL* as defining the appropriate limits.

Proving Antitrust Violations: Proving an antitrust conspiracy is somewhat different than proving an attempt to monopolize, and both are somewhat different than proving an anticompetitive merger. [32]

Proving violations of section 1 of the Sherman Act: When is a restraint of trade 'unreasonable'? For some types of conduct, the answer is clear. Courts have developed the doctrine of '*per se*' illegality to deal with blatantly anticompetitive conduct. In *NCAA v. Board of Regents*, the U.S. Supreme Court wrote: "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." For conduct which is a *per se* offense, it is sufficient to demonstrate that the defendant engaged in the conduct. If so, the defendant is guilty; it is no defense to argue that the conduct had little anticompetitive effect – the size of the effect is irrelevant to the question of guilt.

Per se violations include horizontal price fixing (i.e., price fixing by producers of competing products), vertical price fixing (i.e., the seller and buyer agree on the specific price at which the buyer will resell the product – as opposed to the seller 'suggesting' a resale price), and allocation of markets or customers. Concerted refusal to deal (i.e., horizontal boycotts such as sellers of competing products agreeing not to deal with a competitor known to have cut prices or

[31] See *Clarett v. NFL*.

[32] This discussion is based, in part, on "Executive Summary of the Antitrust Laws" by Richard M. Steuer of Kaye, Scholer, Fierman, Hays & Handler, LLP, which is posted on the Findlaw website at http://profs.lp.findlaw.com/antitrust/.

buyers of a product agreeing not to deal with a particular seller) formerly was considered a 'classic' *per se* offense, but courts now are somewhat more selective in applying the *per se* rule in such cases.

Conduct which is not a *per se* offense is judged under the 'Rule of Reason.' The U.S. Supreme Court in *NCAA v. Board of Regents* acknowledged that there is no "bright line" separating the two:

> Indeed, there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "per se" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.

The basics of a Rule of Reason analysis were described by the Court of Appeals for the Tenth Circuit in *Law v. NCAA*:

> Courts have imposed a consistent structure on rule of reason analysis by casting it in terms of shifting burdens of proof… Under this approach, the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition… If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct… If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner… Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.

Thus, a rule of reason analysis generally involves three categories of economic evidence: (1) evidence that the conduct had a "substantially adverse effect on competition"; (2) evidence that the conduct has "procompetitive virtues"; and (3) evidence that the conduct "is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner."

A "substantially adverse effect on competition" may be demonstrated, for example, by a showing that players and/or coaches are being paid less – or sports fans and television networks are paying more – than they would be in a competitive market. A "procompetitive virtue" of a league rule or practice may be demonstrated by showing its effectiveness in maintaining competitive balance among teams. Whether the rule or practice "is not reasonably necessary" to maintain competitive balance or whether competitive balance "can be achieved in a substantially less restrictive manner" may be demonstrated by showing the ineffectiveness of the challenged rule or practice in maintaining competitive balance or showing the effectiveness of less restrictive rules and practices in maintaining competitive balance.

Economists have developed a number of measures of competitive balance. One measure is the season-to-season correlation in team winning percentage. If the correlation is relatively low, a 'bad' team one season has a reasonable probability of becoming a 'mediocre' or 'good' team the next season, whereas a 'good' team faces a reasonably probability of being less-good the next season. A second measure of competitive balance is the within-season variance of team winning percentages. The lower the variance, the more 'parity' among teams.

Proving violations of section 2 of the Sherman Act: Section 2 of the Sherman Act prohibits the act of monopolization and the attempt to monopolize; it does not prohibit simply being a monopoly.

Proof of the act of monopolization requires a showing that the defendant (1) possesses 'monopoly power' in the 'relevant market' and (2) willfully acquired or maintained that power. 'Monopoly power,' as defined by the U.S. Supreme Court, is the power to control prices or exclude competition.[33] The 'relevant market' is determined by identifying the 'product market' (i.e., the products that buyers would substitute in response to a small but significant and nontransitory price increase) and 'geographic market' (i.e., the area that buyers would patronize given a small but significant and nontransitory price increase). The question of whether monopoly power has been 'willfully acquired or maintained' is, in the words of one attorney, "ephemeral and difficult to determine."[34] Monopoly power has been 'willfully acquired or maintained' if it is 'abused' or used to intentionally drive out the competition; monopoly power has also been 'willfully acquired or maintained' if the defendant engaged in conscious acts to further or maintain its market position by such acts as acquisitions of competitors, exclusive dealing, and predatory pricing; however, monopoly power has not been 'willfully acquired or maintained' if the defendant's market position is achieved by offering a superior product, possessing superior business acumen, or being the beneficiary of a historical accident (or just dumb luck).

Proof of the attempt to monopolize requires a showing that (1) the defendant had a 'specific intent' to monopolize, (2) the defendant engaged in anticompetitive acts designed to injure actual or potential competition, and (3) a 'dangerous probability of success' existed that the defendant would in fact achieve monopoly power.

Economists have identified several indicators that a defendant possesses monopoly power, including high price-cost margins, high barriers to entry, and

---

[33] Landes and Posner (1981) define 'market power' as "the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded"; they define 'monopoly power' as "a high degree of market power." (p. 937)

[34] See "Executive Summary of the Antitrust Laws" by Richard M. Steuer of Kaye, Scholer, Fierman, Hays & Handler, LLP, which is posted on the Findlaw website at http://profs.lp.findlaw.com/antitrust/.

high risk-adjusted rates of return.[35] To be evidence of monopoly power, however, these indicators must persist for a significant period of time – long enough for new competitors to enter the market if they choose to do so and long enough for the current firms in the industry to adjust their production.

Price-cost margins are generally used to approximate the amount by which the current price exceeds the price that would prevail under competition. Since price equals marginal cost in a 'purely competitive' industry, the price-cost margin is typically calculated as the difference between the market price and marginal cost, expressed as a percentage of the market price. Calculated in this way, the price-cost margin is known as the 'Lerner Index.' The Lerner Index does not reflect risk. Thus, an industry may have an average price-cost margin far above that of other industries not because the firms in that industry have monopoly power, but because the industry is very risky – as would be the case if the cost of developing new innovative products is high and product life is short due to rapid technological change in the industry. The Lerner Index also may be positive simply because there are fixed costs of operating in the industry.

One drawback of the Lerner Index is the need to measure marginal cost – the cost of producing the last unit of output. One way to finesse this problem is to develop an economic model and derive an alternative expression for the price-cost margin whose variables are more easily measured. It can be shown using a simple single-period model that a monopolist maximizes profits at the output level where the price-cost margin equals the inverse of the industry (and, in the case of a monopoly, the firm's) price elasticity of demand, $(p-c)/p = -1/\varepsilon$, where p is the market price, c is marginal cost, and ε is the industry price elasticity of demand.[36] Thus, there is a direct relationship between the Lerner Index and the industry elasticity of demand. If the industry elasticity of demand is -2, for example, then the market price is two times marginal cost.[37] In industries where marginal cost increases as output expands, the Lerner Index gives an upper bound on the deviation of the monopoly price from the price that would prevail under competition because, c, the marginal cost at the monopolist's profit-maximizing output level will be less than the marginal cost at the higher output level under competition.

If instead of a single firm (a monopolist), the industry consists of a 'dominant firm' and a 'competitive fringe,' the Lerner Index for dominant firm *i*, L_i, is

$$L_i = (p_i - c_i)/p_i = S_i/(\varepsilon^d_m + \varepsilon^s_j\,(1\text{-}S_i)),$$

where p_i is the price charged by firm *i*, c_i is the marginal cost of firm *i*, S_i is the market share of firm *i*, ε^d_m is the industry price elasticity of demand, and ε^s_j is the

[35] See Landes and Posner (1981), Brennan (1982), Kaplow (1982), Ordover, Sykes, and Willig (1982), and Schmalensee (1982).

[36] The elasticity of demand, ε, is the percentage change in quantity purchased in response to a 1% change in the market price. See Landes and Posner (1981) for the derivation of this equation.

[37] A profit-maximizing monopolist maximizes output in the elastic area of the industry demand curve and thus ε is at least 1 in absolute value. The closer ε is to 1, the higher the Lerner Index.

elasticity of supply of the fringe firms.[38] Thus, the Lerner Index is higher (1) the larger the market share of the dominant firm, (2) the more inelastic the industry demand, and (3) the more inelastic the supply of fringe firms. Note that the dominant firm's market share, in isolation, may provide a misleading indication of the amount by which the market price exceeds that which would prevail in a competitive market. A dominant firm may have little ability to price above the competitive level if industry demand is very elastic (for example, if there are a lot of good substitutes for the firm's product) and if the supply elasticity of fringe firms is very elastic (i.e., fringe firms significantly increase their output in response to even a small increase in the market price).

If there is no single dominant firm (i.e., if the market is an 'oligopoly'), then the Lerner Index for firm *i* is

$$L_i = (p_i - c_i)/p_i = S_i(1+k_i)/(\varepsilon^d_m + \varepsilon^s_j\,(1-S_i)),$$

where k_i is the 'conjectural variation' of firm *i* (*i.e.,* firm *i*'s estimate of the aggregate amount that its rivals will change their output if it changes its output by one unit).[39] If k_i is positive, firm *i* expects its rivals to parallel its actions – if firm *i* expands output, its rivals expand their output; if firm *i* cuts back its output, its rivals cut back their output. If k_i is negative, firm *i* expects its rivals to counteract its actions – if firm *i* expands output, its rivals cut back their output; if firm *i* cuts back its output, its rivals expand their output. Note that the derivation of the Lerner Index for a dominant firm implicitly assumed $k_i = 0$ – firm *i* does not believe its rivals will change their output in response to a change in its output. Note also that firm *i* has greater monopoly power when it expects its rivals to parallel its actions ($k_i > 0$) than when it expects its rivals to counter its actions ($k_i < 0$).

Another indicator of monopoly power is barriers to entry. If an industry is highly profitable, existing firms in the industry may seek to expand and firms not in the industry may seek to enter. In either case, the profitability of the industry should fall so that, on a risk-adjusted basis, it is no more or less profitable than other industries. Moreover, even if the existing firms refrain from expanding so as to preserve their above-average risk-adjusted returns, potential entrants will nevertheless have an incentive to enter to capture some of those returns. One reason why there may be no entry even if an industry is experiencing a prolonged period of above-average risk-adjusted returns that that there are 'barriers to entry.'

According to Ross (2003), sports leagues engage in practices that create barriers to entry, such as assigning exclusive territories to teams and limiting the number of teams in the league. Rascher (1996) argues that a number of barriers to entry exist in the case of sports leagues. One barrier to entry is the fixed supply of stadiums – exclusive territories prevent teams in the same league from competing with one another and creation of a rival league would require securing sufficient unused stadium capacity to operate a league with the minimum number of teams. A second barrier to entry is the limited number of television outlets (although Rascher observes that this barrier has fallen as the number of television networks has proliferated in recent years). A third barrier to entry is the 'winner-take-all'

[38] See Landes and Posner (1981) for the derivation of this equation.
[39] See Ordover, Sykes, and Willig (1982) for the derivation of this equation.

nature of the market – high fixed costs and low marginal costs mean that consumers will purchase only the highest quality product since it will not cost significantly more than lower-quality products. Thus, "there is no room for second-tier talent in winner-take-all markets." (p. 6)

Persistently high profitability is another indicator of monopoly power. Risk-adjusted rates of return should equalize across industries over time; in the words of Schmalensee (1982), *"persistent* excess profits provide a good indication of long-run power; they show clearly that there is some impediment to effective imitation of the firm in question." (p. 1806) One problem, however, is how to measure risk-adjusted profitability. In theory, it should be possible to calculate the rate of return earned by the original owners of teams in a sports league. It should also be possible to calculate the rate of return earned by buyers of established teams. The rate of return earned by the latter, in theory, should be far lower than that of the former – established teams are far less risky investments than investing in a team that is part of a startup league, as the sports league histories of Chapter 1 would suggest. There have been numerous sports leagues formed since 1900. Only a handful did not fold. While these surviving leagues – the NFL, NBA, NHL, and MLB – appear today to be formidable competitors for any startup league, they were not always so.

One attempt to estimate the profitability of sports franchise ownership was conducted by Scully (1995). He finds that, in the early 1990s, sports franchises earned an average return of 27%; it was larger for franchises located in large metropolitan areas (33.3%) than in smaller ones (20.5%). In comparison, stock market investors tend to earn about 10% annually and the median profit rate of the 500 largest industrial companies is between 3.9% and 5.5% of sales. Scully believes that "it would be fair to conclude that a number of clubs do evidence a monopoly return." (p. 135) He adds: "If a 30-percent or greater return to franchise ownership is taken as evidence of monopoly, then about half of the clubs in professional team sports earn a monopoly return." (p. 135)

Monopoly power may also be inferred from the conduct of firms in an industry.[40] For example, industries with histories of price fixing or dividing markets likely are composed of firms with monopoly power. Similarly, a firm which price discriminates or engages in predatory pricing likely has monopoly power.

Thus, there are a number of indicators of monopoly power. None by itself is infallible, but together they provide strong evidence of whether a firm possesses monopoly power.

Similarly, economists have developed measures of monopsony power. In the sports league context, monopsony power over players is typically inferred by estimating players' marginal revenue product (MRP) net of training costs. Studies generally find that, prior to the introduction of free agency, players were paid far below their net MRP, which has been interpreted as evidence that sports leagues had monopsony power over players. Of course, an alternative explanation is that the estimated net MRPs are measured with considerable error resulting (i.e., a considerable upward bias). Each study has to make some assumptions about how

[40] See Schmalensee (1982).

a player impacts team revenue. An econometric model is needed to link player performance to live attendance or broadcast viewership ratings. There are many possible proxies for player performance. For example, in the baseball context, a pitcher's performance could be proxied by his walks-to-strikeouts ratio, whereas a hitter's performance could be proxied by his slugging percentage. Alternatively, a player's performance could be measured by examining the impact on the team's winning percentage when the player does not play (e.g., the player goes on the disabled list). The player's marginal impact on team winning percentage is multiplied by the marginal impact of team winning percentage on live attendance or broadcast ratings. The player's marginal impact on live attendance or broadcast ratings is then converted into monetary terms. For example, the player's marginal impact on live attendance may be multiplied by average fan expenditures at games to get an estimate of the player's marginal impact on team revenue from live attendance at its games.[41]

Economists have also addressed the question of how to define the 'relevant market' in which the monopoly power, if any, occurs. Unfortunately, little has been written specifically about the relevant market in antitrust litigation involving sports leagues. Seal (1993), however, does tackle this issue. He makes two key points: (1) "the general principles of market definition – with their focus on interchangeability of products and services from the point of view of those utilizing them – are equally applicable to antitrust claims arising in the sports and entertainment industries as they are in other contexts" and (2) courts and litigants "must always focus on the nature of the claim being asserted to make certain that they correctly determine *whose* view of interchangeability is relevant in resolving product market definition issues." (p. 764)

For example, in *NCAA v. Board of Regents of the University of Oklahoma*, a number of universities challenged the NCAA's rules limiting the number of televised games any one team could play and restricting the total amount of televised intercollegiate football. The rules were not being challenged by, for example, television broadcasters or advertisers. Thus, Seal explains, "the issue was whether there were athletic organizations other than the NCAA to which the plaintiff universities could have turned if they were unhappy with the restrictions placed by the NCAA on their ability to televise their football games." (pp. 754-55) If the lawsuit had been brought by television broadcasters or advertisers, in contrast, the issue would have been "whether college football telecasts compete with other sports and entertainment programming." (p. 754) Seal writes: "This restraint caused 'antitrust injury' to the colleges because of the market power the NCAA held over *suppliers* of the product, the universities with college football programs, *not* because of the market power which the NCAA had with respect to the *demand* for the product, broadcasts of college football games." (p. 756) (The U.S. Supreme Court decision in *NCAA v. Board of Regents* will be discussed in more detail in Chapter 3.)

Similarly, restrictions on player mobility may be challenged by the players for depressing salaries below the competitive level (i.e., the exercise of leagues' monopsony power) or by rival leagues for foreclosing access to the market for

[41] See, for example, Baade and Tuttle (1991).

player services. In the case of antitrust lawsuit brought by players, the relevant market depends on players' alternative employment possibilities, whereas in the case of an antitrust lawsuit brought by a rival league, the relevant market depends on alternative potential sources of players for the league. For example, from the perspective of NFL players, is playing in the Canadian Football League a substitute for playing in the NFL? Is the Canadian Football League a source for professional football players that can be tapped by a newly-created rival to the NFL?

In *International Boxing Club of New York v. U.S.*, the United States brought an antitrust suit against promoters of professional boxing matches who allegedly were able to control both championship boxing matches and boxers by means of their control over arenas suitable for professional boxing matches. The question was whether the relevant market was all professional boxing events (as the promoters argued) or just championship boxing contests, as the U.S. argued. Based of the large difference in average revenues, televisions ratings, movie rights, and ticket prices between championship and non-championship bouts, the U.S. Supreme Court ruled that 'a separate, identifiable market' exists for championship boxing contests. Seal agrees:

> The foregoing market definition seems correct whether the antitrust concerns generated by the promoters' market dominance are viewed from the point of view of suppliers in the market (the fighters) or the customers (broadcasters or fight fans). A fighter wishing to be a championship contender does not consider being relegated to participation in nontitle bouts as a substitute for his ability to fight in championship boxing events. The customers, too, apparently felt championship bouts were uniquely different from nontitle bouts as evidenced by their willingness to pay higher admission prices or broadcast fees for the privilege of viewing or broadcasting championship as opposed to nontitle fights. Championship boxing thus represented a distinct product market, whether the restraints being challenged were viewed from the point of view of the customer (broadcasters and boxing fans) or suppliers (boxers). (p. 760)

Likewise, in *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, a rival hockey league brought an antitrust lawsuit against the NHL alleging that the NHL's reserve clause and expansion violated Section 2 of the Sherman Act because it enabled the NHL to tie up virtually every professional-caliber hockey player. The question was whether the relevant market should include not only major league professional hockey leagues, but also minor league professional hockey leagues, semi-professional hockey leagues, and amateur hockey leagues. Given the higher ticket prices, higher television revenues, and higher player salaries of major league professional hockey relative to the other leagues, the district court found "the relevant product market to be major league professional hockey as it is currently played in the NHL." Once again, Seal agrees:

> This provision thus precluded the new league from competing for the supply of workers it needed by foreclosing the league from negotiating with NHL players. Of course, the new league was free to negotiate with players outside the NHL, but the court concluded that availability of such hockey players in minor league, semi-professional, or amateur leagues did not provide the new league with suitable substitutes for professional hockey players bound by the reserve clauses in their contracts with NHL teams. Hockey fans did not view these minor league players' skills as interchangeable with NHL players' skills and thus these minor league players were not properly viewed as part of the market when the NHL's market power over the supply of available players was measured. The court thus correctly focused on the availability of suitable product substitutes (hockey players) to the party challenging the restraint which limited availability of certain players needed by the plaintiff to compete. (p. 761)

Proving violations of section 7 of the Clayton Act: Section 7 of the Clayton Act prohibits corporate acquisitions, whether of whole companies or only specific assets, if the likely result is a 'substantial lessening of competition' or a 'tendency toward monopoly' in any 'relevant market.' According to the Federal Trade Commission, there are at least two necessary conditions for a merger to likely have an anticompetitive effect: (1) the market must be "substantially concentrated" after the merger and (2) "it must be difficult for new firms to enter the market in the near term and provide effective competition."[42]

To summarize, the antitrust laws protect competition, not competitors. The antitrust laws do not outlaw simply being a monopoly (or monopsony) – the antitrust question, instead, is what did the monopoly (or monopsony) do to achieve and/or preserve its market position? In general, the actions of sports leagues are evaluated under a 'rule of reason' analysis. It is not sufficient for the plaintiff to show that the actions had a 'substantially adverse effect on competition.' Nor is it necessarily sufficient, given the plaintiff proves a substantially adverse effect on competition, for the defendant to show that the actions have a pro-competitive (or 'efficiency') rationale – the plaintiff may be able to counter that the pro-competitive benefits could be achieved in a less restrictive manner.

One critical step in a rule of reason analysis is the delineation of the relevant product market. As Seal (1993) explains, the relevant product market would have been different if television broadcasters or advertisers, rather than universities, had been the plaintiffs in *NCAA v. Board of Regents*. As a result, antitrust analysis of a sports league's actions depends on the identity of the party challenging those actions. Consequently, the

[42] See the Federal Trade Commission publication titled "Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws."

following chapters will be organized according to the identity of the challenging party: the league's own team members (Chapter 3), rival leagues (Chapter 4), prospective teams and owners (Chapter 5), players (Chapter 6), coaches (Chapter 7), stadium owners (Chapter 8), equipment suppliers (Chapter 9), promoters/sponsors, for-profit sports camp operators, merchandisers, and the media (Chapter 10), and fans, taxpayers, and the federal government (Chapter 11).

Chapter 3

Sports Leagues vs. Their Own Member Teams

The interests of a sports league are not necessarily identical to the self-interests of its individual member teams. Sometimes an individual team wants to move to a more profitable location, while the league wants it to stay put. Sometimes a team wants to control its own merchandising, while the league wants to negotiate deals covering all teams. Sometimes a team wants to televise additional games beyond those covered by the league's television deal. One common method by which the team seeks to pursue its own self-interest is to file a lawsuit alleging the onerous league rule violates the antitrust laws.

Noll (2003b) observes that teams seeking to form a league have five sets of decisions they have to make regarding league structure: (1) format – how will games be scheduled to determine a champion?; (2) hierarchy – how will the league relate to other leagues with higher or lower quality players?; (3) multiplicity – how many leagues will be at the same level in the hierarchy?; (4) membership – under what conditions can a team enter or exit the league?; and (5) governance – how will league rules and policies be decided and enforced? It is unlikely that teams will be unanimous in how they would like the league to be structured. Moreover, even if they agree on how the league's rules and policies should be decided and enforced, they are unlikely to be unanimous in what those rules and policies should be. Thus, there is ample opportunity for the interests of a particular team to conflict with that of the league, which is determined by majority vote of the team owners.

This chapter begins with a discussion of the basics of cartels and joint ventures, each of which commonly has conflict with its members. Cartels use detection and punishment to hold its members in line. Joint ventures, somewhat similarly, may adopt certain rules to prevent individual member self-interest from destroying cooperation. Sports leagues attempt to prevent the self-interest of their individual teams from destroying the league by imposing a wide variety of rules. This chapter reviews a number of such rules, the antitrust challenges to those rules, and their alleged pro-competitive rationale.

Basics of Cartels. The goal of a cartel is to maximize the aggregate profits of its individual members. Typically, it does so by restricting the output of its members relative to what they would produce if they competed with one another. If the non-cartel members do not expand their output sufficiently in response to the cartel's output restriction, price will rise and the cartel members will earn higher aggregate profits than they could under competition.

Conflict may arise because each cartel member seeks to maximize its own profits, not the aggregate profits of the cartel. Thus, each cartel member would like to expand its output (i.e., sell more than its 'quota' at the higher price) and thus earn even higher profits than it would by obeying the cartel's quota. However, if each cartel member 'cheats' on the quota, aggregate output will not restrict as much as it otherwise would and, consequently, price will not rise as high. The cartel will therefore adopt a system to detect and punish cheating.

Consider NCAA football. Fleisher, Shughart, Tollison, and Goff (1988) analyze data for the period 1953-83 and estimate an econometric model of whether a school's football program has been put on probation. Schools with more variable winning percentages are found to be more likely to be put on probation, whereas schools with consistently high winning percentages are not more likely to be placed on probation. NCAA enforcement apparently protects the top-tier teams from up-and-coming teams. In short, the authors present "theoretical and empirical evidence on the methods that the National Collegiate Athletic Association (NCAA) and its member schools use to detect violations of its cartel agreement" and conclude that "the enforcement of the NCAA rules has a redistributive effect that benefits consistent winners at the expense of up-and-coming schools." (p. 433)

Similarly, Eckard (1998) examines 'competitive balance' before and after the NCAA enforcement system began in 1952. Although the NCAA apparently believes that such enforcement promotes competitive balance, Eckard documents that competitive balance has decreased since 1952, a result consistent with cartel theory: "Economic theory predicts that cartel enforcement should reduce playing-field balance over time; i.e., produce more stability (less 'churning') in conference standings and national rankings." (p. 368)

Thus, there are likely to be conflicts between cartel members and these conflicts may make the cartel unstable. Ferguson, Jones, and Stewart (2000) observe that teams, "through the medium of the league, jointly promulgate rules that determine, in general, interteam behavior and, more specifically, the amount of output to be produced (number of games), all entry conditions, the negotiation and disposition of all national media contracts, interteam revenue sharing, and the basic conditions of player employment," whereas each team simultaneously "is explicitly recognized as a spatial monopolist, setting its own output prices, negotiating local stadium and media contracts, and dealing with players within the general limits set by league-wide rules." (p. 422) They argue that Major League Baseball acts as a cartel in setting rules that restrict teams' willingness to pay for players and impose costs on the transfer of players between teams, but within the cartel, each MLB team acts like a price-taker in the market for player services. Under such a system, it is hardly surprising that the interest of an individual team may sometimes conflict with the interest of the league.

The 'stability' or 'longevity' of cartels has been examined in a number of economic studies. Levenstein and Suslow (2002) review the results of a number of studies and observe that the average duration of a cartel is between 3.7 years and 7.5 years. However, the range of cartel durations is very large. One study reports the shortest duration of a cartel to be one year and the longest to be 18 years; another study gives the range as 1 to 29 years; a third study reports a range of 1 to 13 years. Similarly, one study reports that about 60% of cartels last less than 5 years and less than 20% last 10 or more years; another study reports that 43% of cartels last less than five years and 32% last 10 years or more; a third study reports that 40% of cartels last less than five years and 37% last 10 or more years; a fourth study finds that 39% of cartels last less than five years and 24% last 10 or more years. Levenstein and Suslow conclude that "cartels are neither short-lived nor long-lived; they are both" and, consistent with economic theory, "cheating is a common cause" of cartel breakdown.

As Levenstein and Suslow report, there is conflicting evidence whether the number of firms in a cartel increases, decreases, or has no effect on cartel duration. On the one hand, having more cartel members may make it more difficult to agree on a quota and detect cheating. On the other hand, the more industry output produced by cartel members, the less 'fringe' production and thus the greater the rewards to the cartel from restricting output. Studies reported by Levenstein and Suslow find that between 60% and 79% of cartels have 10 or fewer members.

The major sports leagues have many more members. The NFL has 32 teams; the NBA, NHL, and MLB have 30 teams. Each league has existed for decades. Many other leagues have failed after only a few years. The long life of the NFL, NBA, NHL, MLB, and NCAA may suggest that their league rules successfully prevent cheating on the cartel. Alternatively, their long life may suggest that their league rules facilitate operation of their demand-enhancing joint venture.

Basics of Joint Ventures. Sports leagues are a form of joint venture. One rationale for joint venture formation is to produce a product that requires the skills of a number of independent business firms. In the case of a sports league, the joint venture's product is games leading to the declaration of a league champion. Although a single team can produce 'intrasquad' exhibition games by itself, those games attract fan interest largely because they offer a preview of the team that will later compete against other teams. Unlike most industries where a firm typically profits if its rivals falter, a sports team may be hurt if its rivals falter since their resulting joint product – their games – may become less appealing to fans.

While joint ventures have advantages over other forms of organization, they have disadvantages as well. Chang, Evans, and Schmalensee (1998) identify three categories of disadvantages: divergent objectives, externalities, and organizational problems.

> *Divergent objectives*. Joint venture members may have divergent objectives regarding the venture's purpose and strategy, the division of financial contributions, and the division of the resulting benefits. As an example of conflict over a venture's strategy, consider open-wheel auto racing.[43] In 1978, a rebel group of team owners complained to the United States Automobile Club (USAC) about poor promotion and small purses. After their proposals were rejected by the USAC's board, they left the organization and, in 1979, formed Championship Auto Racing Teams (CART), which quickly dominated open-wheel racing. In the 1990s, the owner of the Indianapolis Motor Speedway, Tony George, vigorously disagreed with CART's strategy and sought to control the high cost of putting a car on the racetrack. When CART failed to adopt George's proposed strategy, he left CART and, in 1994, formed his own racing organization, the Indy Racing League, as a lower-cost open-wheel alternative. CART declared bankruptcy in 2003.
>
> Divergent objectives across sports league members can arise for numerous reasons. For example, some teams have greater revenue potential than others. Major market teams like the New York Yankees can attract more fans to their games and negotiate local television deals many times larger than small market teams like the Pittsburgh Pirates. Krautmann (1999), Zimbalist (1992), and

[43] This discussion is largely based on the Wikipedia entries for Champ Car and Indy Racing League.

Bruggink and Rose (1990) estimate that each additional one million people in a MLB team's market increases team revenue by $2.12 million, $2.40 million, and $1.47 million, respectively; moreover, MacDonald and Reynolds (1994) find that each $1 billion increase in metropolitan income increases MLB team revenue by $750,000. Not surprisingly, the major market teams want to keep their revenue; small market teams want team revenues to be shared. The league has an interest in producing games that fans want to watch. Yankees fans may love watching their team outbid opposing teams for the most talented players and then beating those teams on the field; on the other hand, fans of small market teams may become disgusted as they watch their team's emerging stars depart to the major market teams. Some leagues have implemented revenue-sharing schemes to preserve 'competitive balance' in the league.

Economic studies have shown that revenue-sharing decreases player salaries, but does not necessarily improve competitive balance.[44] If the goal of each team owner is to maximize profits, then revenue-sharing shifts the demand curve for players downward, resulting in lower equilibrium salaries. If the downward demand shift is the same for all teams, the distribution of playing talent across teams will be unaffected, and thus revenue-sharing does not affect competitive balance. If, on the other hand, the downward shift is larger for the large-market teams, those teams will reduce their demand for player talent more than will the small market teams, resulting in a shift in player talent toward the small-market teams and thus greater competitive balance within the league.

Whether the downward shift is the same for all teams is an empirical issue and depends, in part, on what attracts fans to games (e.g., playing a bad team so the home team has a good chance to win, playing a good team so even if the home team loses the quality of play should be high) and on how revenue is shared (i.e., symmetrically as is generally done in U.S. sports leagues or performance-based as is generally done in European sports leagues).[45] For example, Brown (1994b) examines revenue sharing in college football conferences and finds that the conferences which tend to have the weakest teams also tend to engage in the most sharing of revenue. However, Surdam (2002) argues that, in the American League during the 1950s, the stronger a baseball team, the greater its ability to draw fans while on the road, and thus the sharing of gate revenue would actually have had the effect of shifting revenue from the weaker teams to the stronger teams. Therefore, depending on the demand for a sport and precisely how revenue is shared, a revenue-sharing plan may or may not promote competitive balance; such a plan could even exacerbate inequalities among the teams.

Members of sports leagues may also have divergent objectives with respect to profits and winning (or 'sportsmanship'). While Yankees owner George Steinbrenner has his share of critics, no one criticizes him for not trying to field a winning team. The Yankees are the prime example of a 'deep pocketed' team that is willing to reach deeply into that pocket to field a winner. Other teams,

---

[44] See Marburger (1997), Késenne (2000), Sanderson & Siegfried (2003), Késenne (2004), and Szymanski & Késenne (2004).

[45] For a discussion of revenue-sharing in U.S. and European sports leagues, see Palomino and Rigotti (2000) and Palomino and Sákovics (2004).

including the Chicago Cubs, the Chicago Bears, and the Los Angeles Clippers, have a reputation for being tightfisted, more concerned with earning a profit than winning the championship. Sometimes, as with the Cubs, the team is owned by a 'deep pocketed' corporation; sometimes, as with the Bears, the team is owned by a family without 'deep pockets.' Still other teams, such as the former Montreal Expos, excelled at developing young talent which they could not afford to pay once their players became established stars. Some leagues have established a 'luxury tax' system in an attempt to penalize teams with the largest player payrolls.

Economists have explored the operation of leagues under the assumption that team owners seek to maximize profits and under the assumption that team owners seek to maximize their winning percentage. Fort and Quirk (2004) find that, relative to a league of profit-maximizing owners, a league of winning-percentage-maximizing owners will have a greater demand for player talent and will spend more to acquire that talent. However, which of the two leagues will have greater competitive balance is indeterminant. Vrooman (1997a) assumes a 'sportsman' owner jointly maximizes franchise value and the satisfaction from winning and shows that a sportsman owner expands the team's talent beyond the point that maximizes franchise value. Consistent with this effect, he finds that owners looking to sell their franchise often reduce their player costs (and thus increase franchise value) prior to the sale.[46] In fact, if all owners are sportsmen, all franchises will be 'undervalued' relative to what they would be worth if all owners were profit-maximizers. Vrooman also shows that a syndicated sportsman owner expands the team's talent even more than does the sole syndicated sportsman, which Vrooman terms the 'Steinbrenner' effect of syndication. Thus, franchise 'undervaluation' is even greater in a league of syndicated sportsman owners. Vrooman argues that Major League Baseball has moved toward a league composed of highly leveraged team ownership syndicates in the 1980s. MLB adopted a rule that had the effect of limiting the leverage of its larger franchises (e.g., the New York Yankees).

Some studies have attempted to identify the 'true' objective function of team owners. Zimbalist (2003b) argues that these studies have yielded inconclusive results. He contends that team owner objectives vary by team, league, and country and depend strongly on how the team relates to the owner's other assets. DeBrock and Hendricks (1996) examine roll call voting in the NCAA and report that they "cannot attribute NCAA actions entirely to the economic motive or the educational motive." (p. 498)

Still other studies investigate whether teams play in such a way as to maximize their chances of winning. Romer (2006) analyzes play-by-play data on NFL games and, specifically, the choice on fourth down of whether to kick or try for a first down. He documents "systematic, clear-cut, and overwhelmingly statistically significant departures from the decisions that would maximize teams' chances of winning." (p. 340)

[46] Interestingly, the Chicago Tribune – the owner of the Chicago Cubs – dramatically increased the team's payroll prior to putting the team up for sale.

The impact of some league rules will depend on whether team owners are solely profit maximizers, solely winning-percentage-maximizers, or derive utility from both the monetary and non-monetary benefits associated with team ownership. For example, Késenne (2005) finds that revenue-sharing worsens competitive balance in leagues of profit-maximizing owners but improves competitive balance in leagues of winning-percentage-maximizing owners. In contrast, Atkinson, Stanley, and Tschirhart (1988) show that the effectiveness of revenue-sharing in improving competitive balance is mitigated when owners are not exclusively profit-maximizers but enjoy private (i.e., non-shared) non-monetary benefits of team ownership as well.

In short, there are numerous areas in which the interests of an individual team owner can diverge from the interests of the majority of team owners, who determine the league's rules and policies.

Externalities. A joint venture member can take actions that impose costs on the joint venture's other members. For example, a member may attempt to 'free-ride' on the joint venture's investments by using them for its individual gain; alternatively, it may 'free-ride' by supporting the joint venture only to the extent that it benefits individually, rather than to the extent that the joint venture as a whole benefits. Chang, Evans, and Schmalensee (1998) argue that joint ventures generally seek to maximize the total value that all members receive and thus will want to provide incentives for members to increase the joint venture's value, adopt rules to prevent free-riding, and penalize members that engage in actions that impose negative externalities on the other members.

The product of sports leagues is games leading to the crowning of a league champion and sports leagues attempt to maximize the value of those games. Sometimes the actions of an individual team may be optimal for that team but detrimental to the league itself. For example, a team may find it optimal to relocate to another city, but doing so may make it a less attractive opponent for the other teams. Although the team's gate receipts may be higher in the other city, the gate receipts of the other teams may fall because it attracts less fan interest. Such a negative externality may occur if the team relocates to a remote city in a different time zone – fans may feel less rivalry towards a remote team and the different time zone may reduce television viewership of the game. As a result, sports leagues have an interest in teams' relocation decisions.

A deep-pocketed, winning-obsessed team owner could impose a negative externality on other team owners by 'overpaying' for star players to win the championship. Such an owner may be willing to incur losses in order to win the championship and thus be willing for the franchise to be 'undervalued.' Such an owner may also be willing to go heavily into debt in a quest to win the championship. The 'win at any cost' mentality of one owner, however, may depress the value of the franchises of the other owners. Consequently, sports leagues have an interest in the ownership and financing of teams.

Organizational problems. The operation of a joint venture requires that its members cooperate to some extent, even though they may be aggressive competitors in other regards. Such cooperation may be difficult to elicit and sustain, as each member needs to cede some control over its assets to the joint venture, and thus partly to its competitors. Unless the members trust one another, they may refuse to cooperate. The joint venture also must establish a decision-making mechanism. If a subset of members effectively makes decisions on behalf of the joint venture, the other members may become frustrated and uncooperative. Therefore, joint ventures adopt rules and policies to promote member cooperation.

Chang, Evans, and Schmalensee (1998) caution that "it is important for people who engage in antitrust analysis to understand the general nature of these problems and to recognize that joint ventures may require some latitude to implement rules and practices that are designed to deal with them." (p. 247) They add: "This is not to say that antitrust policy should defer to all claims by a joint venture that its practices are necessary for viability. Rather, the courts and regulators should be careful about substituting their judgments for those made by the people who are intimately involved in running the joint venture in question, especially when the challenged practice is not likely to be an effective exercise of market power." (p. 247)

Joint venture instability. Divergent objectives across members, externalities, and organizational problems all may contribute to the instability of joint ventures. Economists have documented that joint ventures tend to be relatively short-lived and many are terminated earlier than planned. Kogut (1989) examined 92 U.S.-based joint ventures and found that about half terminated within six years. Studies by McKinsey & Co. and Coopers & Lybrand reportedly have found that roughly 70% of joint ventures fall short of expectations or are disbanded.[47] Another study suggests that, on average, joint ventures do not survive even one-half as long as the term of their joint venture agreement.[48]

The major sports leagues currently in existence – the NFL, NHL, NBA, and MLB – have survived for decades; other sports leagues like the World Hockey Association, United States Football League, and North American Soccer League survived for only a few years. One possible reason is that the rules and policies of the major sports leagues reduce conflict between members and thus enable the league to operate more smoothly and efficiently. Even if true, this does not mean that an individual member will not bitterly oppose a particular rule or policy and seek to remove it by filing an antitrust lawsuit against the league.

Team antitrust challenges to sports league rules and policies. When a team opposes a particular sports league rule or policy, it has a number of options. It could lobby fellow team owners to oppose it and thereby get the league to change it. If that fails, the team may file a lawsuit alleging that the rule or policy violates the antitrust laws. This has happened on numerous occasions. The remainder of this chapter focuses on four types of league rules or policies that have been challenged by teams on antitrust grounds: public ownership restrictions, sponsorship and licensing arrangements, television restrictions, and team relocation.

[47] *Business Week* (July 21, 1986).
[48] Berg, Duncan, and Friedman (1982).

Public ownership restrictions.[49] The NBA's Boston Celtics, NHL's Florida Panthers, and MLB's Cleveland Indians have publicly traded stock. If one wants to own part of these teams, their shares can be purchased, just like one can buy shares in IBM, Google, and Wal-Mart. The Celtics went public in 1986, selling a 40% ownership stake of dividend-paying stock.[50] The Panthers went public in 1996 and, at least initially, the team did not intend to pay a dividend. In 1997, Major League Baseball passed a rule allowing teams to sell shares to the public, but required an individual or group of no more than 20 persons to maintain at least a 10% economic stake and 90% voting interest in the team. The Indians went public in 1998, issuing two classes of stock with Indians owner and Chairman Richard E. Jacobs retaining 99.98% of the team's voting control.

Some teams are owned by publicly-traded corporations. For example, the Tribune Company owns MLB's Chicago Cubs, the Walt Disney Company owns the NHL's Anaheim Mighty Ducks and has partial control of MLB's Anaheim Angels, and Rupert Murdoch's News Corp. owns MLB's Los Angeles Dodgers. Thus, it is easy to be a part-owner of the owner of such professional sports teams.

No NFL team is publicly-traded. The Green Bay Packers are publicly-owned, but the stock is not publicly traded. The Packers sold 1,000 shares for $5 per share in 1923; each buyer was expected to simultaneously purchase at least six season tickets. The Packers went into receivership in 1935 and were reorganized as a nonprofit corporation, with a $15,000 capital infusion from the sale of 300 shares. A third stock sale occurred in 1950 and raised $118,000 in new capital at $25 per share.

There were about 4,627 shares of Packers stock outstanding in 1997 when the team proposed to sell 400,000 shares at $200 per share to raise funds to make improvements to Lambeau Field and, in the future, finance construction of a new stadium. Some teams, including the Jacksonville Jaguars and Tennessee Oilers, expressed concerned about the Packers' proposal, fearing the Packers would use part of the new capital to buy free agents. Other owners, including Jerry Jones of the Dallas Cowboys, believed the Packers did not need league approval for the stock sale. Although the Packers also believed they did not need the NFL's approval, the team did not intend to proceed without that approval, which it eventually received.

Prospective purchasers of the Packers stock were required to represent that they had not been accused of fraud in any litigation, been convicted of a felony, or participated in sports gambling. The shares would not – and according to the Corporation's Restated Articles of Incorporation could not – pay a dividend. Stockholders would have the right to vote at the team's annual meeting, but their shares could not earn a financial return. Other terms of the Articles of Incorporation made it virtually impossible for the buyer of Packers stock to make a profit on the purchase. For example, the shares could not be resold. The Packers reclassified the 4,627 'original' shares on a 1,000-for-1 basis, resulting in

[49] The discussion in this section is based on Aukofer (1997), Nawrocki and O'Brien (1997), and Lascari (1999).

[50] For an analysis of the stock price behavior of the Celtics shares, see Brown and Hartzell (2001).

4,627,000 shares for the original shareholders, and succeeded in selling an additional 120,000 shares at $200 per share, raising $24 million in new capital.

The Packers are not the only NFL team to desire to raise new capital by selling stock. William H. Sullivan, owner of the New England Patriots since the team's inception in 1959, had sold non-voting shares to the public beginning in 1960 when the team was in the old American Football League (AFL), which did not have a policy against selling shares to the public. The AFL merged with the NFL into a single league in 1966 and the terms of the merger specified that the post-merger league would adopt the NFL's policy against public ownership. The Patriots received a special exception. Article 3.5 of the NFL's constitution and bylaws requires that three-fourths of NFL owners approve all transfers of ownership interests in a team, except for transfers within a family. The NFL also has an 'uncodified' policy against the sale of shares to the public, although members have the authority to approve a given transfer by a three-quarters vote. In 1976, Sullivan acquired the publicly-traded Patriots shares and the team thus became fully privately-owned.

In the mid-1980s, William Sullivan and his son, Charles, who owned the stadium where the Patriots played, began experiencing financial problems and, after observing the Celtics' initial public offering in 1986, decided to similarly raise capital. The plan was for them to receive a loan for $80 million, half of which would go to the Patriots, the other half to the stadium. The Patriots were to repay their half of the debt by selling a 49% stake in the team to the public. William Sullivan raised his planned stock sale at the NFL owners meeting on October 27, 1987. Although Sullivan believed that 17 of the 21 owners would vote to approval the sale, NFL Commissioner Pete Rozelle reportedly told him that he opposed the sale and that league approval was "very dubious." Sullivan did not ask for a vote, believing it to be futile. Sullivan sold the Patriots for $83.7 million in October 1988. On May 16, 1991, Sullivan filed an antitrust lawsuit against the NFL, claiming that the league had prevented him from selling a 49% equity stake to the public and, as a result, he was forced to pay off his debts by selling the team at a fire-sale price to a private buyer. The district court dismissed Sullivan's claims under Section 2 of the Sherman Act, but allowed a trial on his Section 1 claims.

Sullivan claimed that 'but for' the NFL's public ownership policy, he would have been able to sell a 49% equity stake to the public for $70 million, pay off his debts, and retain ownership of a more valuable and profitable team. He argued that the NFL's policy against public ownership restricts competition between teams for the sale of their ownership interests and thereby depresses the prices of such ownership interests. For example, the team's fans may be willing to pay a premium in order to own a piece of the team and thus the inability to sell shares to fans may lower the price at which an ownership interest in the team can be sold. The NFL's policy therefore harms (1) consumers who want to purchase the team's stock and (2) team owners seeking to purchase investment capital. The NFL offered evidence to the contrary and argued that its public ownership policy is ancillary to legitimate joint venture activity.

The jury determined that the relevant market is the "nationwide market for the sale and purchase of ownership interests in the National Football League member clubs, in general, and in the New England Patriots, in particular" and that the NFL's policy had an "actual harmful effect" on competition in this market. The jury awarded damages of $38 million, which the judge reduced to $17 million. The trebling of antitrust damages led the district court to award Sullivan a total of $51 million in damages.

The NFL appealed the judgment, but did not challenge the jury's finding of the relevant market. [51] Rather, the NFL argued "(1) that NFL clubs do not compete with each other for the sale of ownership interests in their teams so there exists no competition to be injured in the first place; and (2) Sullivan did not present sufficient evidence of injury to competition from which a reasonable jury could conclude that the NFL's policy restrains trade." The Appeals Court for the First Circuit countered: "Although we agree with the NFL that conceptualizing the harm to competition in this case is rather difficult, precedent and deference to the jury verdict ultimately require us to reject the NFL's challenge to the finding of injury to competition." The appeals court also rejected the NFL's argument that it is a 'single entity.' Moreover, the appeals court wrote:

> We take no issue with the proposition that certain joint ventures enable separate business entities to combine their skills and resources in pursuit of a common goal that cannot be effectively pursued by the venturers acting alone… We also do not dispute that a "restraint" that is ancillary to the functioning of such a joint activity – i.e. one that is required to make the joint activity more efficient – does not necessarily violate the antitrust laws… We further accept, for purposes of this appeal, that rules controlling who may join a joint venture can be ancillary to a legitimate joint activity and that the NFL's own policy against public ownership constitutes one example of such an ancillary rule. Finally, we accept the NFL's claim that its public ownership policy contributes to the ability of the NFL to function as an effective sports league, and that the NFL's functioning would be impaired if publicly owned teams were permitted, because the short-term dividend interests of a club's shareholder would often conflict with the long-term interests of the league as a whole. That is, the policy avoids a detrimental conflict of interests between team shareholders and the league.
>
> We disagree, however, that these factors are sufficient to establish as a matter of law that the NFL's ownership policy does not unreasonably restrain trade in violation of §1 of the Sherman Act.

There is evidence in the record, according to the appeals court, "of a clearly less restrictive alternative to the NFL's ownership policy that would yield the same benefits as the current policy" – namely, "allowing for the sale of minority, nonvoting shares of team stock to the public with restrictions on the size of the holdings by any one individual." It would be up to a jury to decide whether such a sale would indeed be a less restrictive but equally beneficial policy.

[51] See *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994).

Ultimately, however, the appeals court found that several prejudicial errors were committed during the trial. The judgment was vacated and a new trial ordered. In August 1996, Sullivan and the NFL reached an out-of-court settlement in which Sullivan would receive $11.5 million.[52]

It is unclear why public ownership would interfere with the functioning of the NFL joint venture, and yet apparently not interfere with the functioning of the NBA, NHL, and MLB joint ventures. Perhaps it is because the latter have permitted public ownership, but with certain restrictions. The NFL arguably could adopt a public ownership policy with similar restrictions. If so, the NFL's current public ownership policy may fail the "less restrictive alternative" test of a rule of reason analysis.[53]

Sponsorship and licensing arrangements. Sports leagues often enter into sponsorship and licensing arrangements involving large sums of money and then distribute the revenue to member teams according to set formula, such as equal shares. Suppose a team accounts for a disproportionate share of sponsorship and licensing money, or suppose a team believes it can enter into more lucrative sponsorship and licensing arrangements by itself and should not have to share that revenue with other teams. Conflict between the team and the league is likely. Such conflict has indeed occurred, with two notable cases involving the NFL's Dallas Cowboys and MLB's New York Yankees. In both cases, the team accused the league's marketing arm of being a cartel; in both cases, the antitrust lawsuits were settled out-of-court and on terms generally believed to favor the Cowboys and Yankees.

Dallas Cowboys.[54] In September 1995, Dallas Cowboys owner Jerry Jones signed a deal making Nike an official sponsor of Texas Stadium, the Cowboys' home field. Nike was a competitor of the apparel licensee with which NFL Properties, the NFL's marketing arm, had reached an exclusive apparel licensing deal. Jones also signed stadium advertising contracts with PepsiCo, the competitor of Coca-Cola Co. which had a league-wide sponsorship deal with NFL Properties. In addition, Jones had a sponsorship deal with Dr. Pepper. Jones was in the process of negotiating a deal for American Express to become the official charge card of "Texas Stadium, the home of the Dallas Cowboys" even though VISA was the official charge card of the NFL, having negotiated a license with NFL Properties earlier in the year.

---

[52] *New York Times* (Aug. 12 1996).

[53] For further discussion of sports league restrictions on public ownership, see Lopatka and Herndon (1997) and Cheffins (1999).

[54] The discussion in this section is based primarily on *Abilene Reporter-News* (2001), Kass (1996), *New York Times* (October 24, 1995; February 21, 1996; December 14, 1996), and the complaint in *NFL Properties v. Dallas Cowboys Football Club* (September 18, 1995).

NFL Properties quickly filed a $300 million lawsuit alleging that the Cowboys' sponsorship deals violated the NFL's revenue-sharing agreements, which specified that such revenue would be distributed evenly among teams. NFL Properties alleged that the Cowboys "have engaged in an unlawful plan and scheme, in violation of contractual and fiduciary obligations, to misappropriate for themselves valuable business opportunities and revenues that rightfully belong to plaintiff NFL Properties." NFL Properties stressed the importance of revenue-sharing to the league:

10. The cornerstone of the NFL system, however, is revenue sharing. To produce competitive games, it is essential that teams be well-matched. The NFL and its Member Clubs thus have a strong interest in having strong, viable teams. Revenue sharing is critical to achieve this end: it ensures that all NFL Member Clubs, not just those in larger or better situated markets, will have the financial resources to field a competitive team.
11. The Dallas Cowboys franchise itself is a case in point: revenue sharing has contributed to its present success… The system allowed Jones to rebuild the Cowboys into a commanding NFL team – one that has now made three straight trips to the National Football Conference Championship Game and has won two of the last three Super Bowls.
12. One important source of revenue shared by NFL Member Clubs is that which derives from the various identifying marks of the NFL's teams…
13. The Member Clubs recognized long ago that the Club Marks and NFL Marks would be more competitive in the market place and that their value would be maximized and thus more effective in promoting the NFL, if they were licensed as a package. Accordingly, in 1963, the Member Clubs created plaintiff NFL Properties to market the Club Marks and NFL Marks jointly; from its existence, NFL Properties has conducted advertising campaigns and promotional ventures on behalf of the NFL and all of its Member Clubs. In 1982, NFL Properties' ability to market the Club Marks was greatly enhanced by a series of agreements entered into and approved by the Member Clubs, including the Dallas Cowboys, to facilitate a long-term unified program of promotional activities involving the Club Marks and NFL Marks. Under these agreements (the "Licensing Agreements"), each Member Club transferred exclusive rights to its Club Marks to a trust pursuant to a plan whereby the trust would then exclusively license all such Club Marks to NFL Properties; NFL Properties became solely responsible for licensing the Club Marks for commercial use… The proceeds of NFL Properties' licensing activities would be shared equally among all Member Clubs, with some portion to be used for charitable and educational purposes.

> The Licensing Agreements have served as a critical component of the joint-venture goals of the NFL.

NFL Properties alleged: "While continuing to enjoy all of the other benefits of the NFL joint venture, he [Dallas Cowboys owner Jerry Jones] determined to embark upon a wrongful plan and scheme to destroy the structure and operations of NFL Properties in order to gain for the Cowboys more than an equal share of licensing revenue and to deny that revenue to the other Member Clubs." It also alleged: "Jones understands that, if defendants are permitted to 'cherry-pick' among the benefits and obligations of the NFL and NFL Properties and to enter into separate deals with competitors of sponsors or licensees that have contracted with NFL Properties, the entire collective marketing and revenue-sharing system of NFL Properties will unravel." In particular, if Jones's plans are permitted to continue, there will be two main effects: (1) sponsors and licensees will reduce their willingness to pay for 'exclusive' league sponsorships and licenses and (2) other teams will follow the Cowboys' lead and sign their own side-deals. Both effects will reduce the value of NFL Properties' collective rights and ultimately lead to the abandonment of the system of joint promotion.

The Cowboys tried unsuccessfully to get the court to dismiss the lawsuit, contending that NFL Properties is a "marketing cartel" whose goal in filing the lawsuit "is to punish a critic of the cartel." In November 1995, Jones filed a $750 million antitrust lawsuit against NFL Properties, alleging that it restricted competition between NFL teams. Jones sought to break up NFL Properties and give the Cowboys control over the team's trademarks and logos.

In December 1996, the Dallas Cowboys and the NFL reached an out-of-court settlement. Jones was allowed to not only keep his sponsors, but to sign new ones as well. Other owners were permitted to enter into similar sponsorship deals. Because the revenue from such deals would not be shared with other teams, the settlement was expected to reduce the funds available for the NFL's revenue-sharing pool, thereby harming small-market teams like the Green Bay Packers.

In May 2001, the NFL approved a 10-year, $250 million deal making Reebok the league's exclusive apparel licensee beginning in 2002. The deal contained a clause giving each team the option to be the private wholesaler, retailer, and distributor of its own apparel. The Dallas Cowboys were the only team to exercise that option. The Cowboys had led the league in merchandise sales in four of the last five years and Jones believed he could do a better job of marketing the Cowboys than could NFL Properties. The Cowboys were required to guarantee the league 16% of sales (the team's share of sales over the previous five years). In other words, if the Cowboys accounted for less than 16% of NFL merchandise sales, the Cowboys would have to make up the shortfall and pay the NFL an amount equal to 16% of league merchandise sales, but if the Cowboys accounted for more than 16%, the Cowboys would pocket all sales beyond that threshold.

New York Yankees.[55] After winning the 1996 World Series, the New York Yankees on March 2, 1997 signed a 10-year, $95 million sponsorship deal with Adidas – far more revenue than the team could receive from the league-wide sponsorship deal that divided revenues evenly among all teams. MLB responded by suspending Yankees owner George Steinbrenner from its Executive Council.

On May 6, 1997, the Yankees countered by filing an antitrust lawsuit against MLB and its member teams. The Yankees accused the defendants of engaging in a concerted action "to combine and conspire together to restrain competition in the businesses of the licensing of Club trademarks and of retail and wholesale baseball merchandise sales, and to misappropriate rights and revenues belonging to the Yankees and adidas." In particular, the Yankees alleged that the defendants (1) "have recently undertaken a concerted effort to interfere with a Florida contract between adidas and the Yankees pursuant to which adidas and the Yankees have agreed that adidas will be a Yankees sponsor, that the Yankees will license Yankee trademarks to adidas, and that the two organizations will cooperate in creating and marketing more competitive merchandise using the Yankees and adidas trademarks"; (2) "imposed a requirement that Major League Clubs exchange confidential pricing and other competitive data for the purpose and effect of restraining competition in trademark licensing, corporate sponsorships, and retail and wholesale baseball merchandise sales"; and (3) "have combined to prevent individual Clubs from marketing merchandise under the individual Club's own trademarks, and to impose sanctions on any Club or licensee that seeks to do so." Furthermore, the Yankees alleged:

> 9. Defendants have combined and agreed not to license their trademarks to adidas or to do business with adidas except on monopolistic terms and conditions. By combining and agreeing to prevent Major League Clubs from competing against one another in licensing of trademarks, defendants have created a horizontal restraint – an agreement among competitors on the way in which they will compete with one another. For example, through the 1995 Agency Agreement, defendants have illegally conspired to establish a horizontal division of markets, the sole purpose of which is to stifle competition among Major League Clubs who might wish to do business with adidas. Defendants' conduct in this respect also has included a group boycott, in concert with

[55] The discussion in this section is based on Bambauer (2005) and the complaint in *New York Yankees Partnership and Adidas America v. Major League Baseball Enterprises* (May 6, 1997).

Nike and Reebok, and other restraints of trade without legitimate justification.

10. Defendants have also acted to penalize adidas for entering a sponsorship agreement with the Yankees, including threats of litigation against adidas for entering an agreement with the Yankees, and to restrain competition by adidas which they find against their narrow self interest.
11. Defendants' actions to restrict and prevent competition in trademark licensing, corporate sponsorships, and retail and wholesale baseball merchandise sales are unrelated to, and outside the reasonable scope of, any exception the business of baseball may have from the antitrust laws…
12. The defendants' actions adversely affect consumers and consumer welfare by limiting consumer choice, increasing the prices consumers pay, and adversely affecting the quality of goods available.

The Yankees contended that they have attempted to resolve their differences short of litigation, but to no avail: "Rather than reconsider their decision to implement a cartel for the licensing of club trademarks and for retail and wholesale baseball merchandise sales, defendants have reaffirmed their intent to continue and even expand their cartel." The 'cartel' is MLB Properties, which was established with the January 1, 1984 Agency Agreement, renewed and amended with the January 1, 1991 Agency Agreement, and then established with the Amended and Restated Agency Agreement dated December 1, 1995. Although the Yankees refused to sign any of these agreements, they obtained the support of more than three-fourths of the MLB teams and thus the defendants took the position that the Yankees were nevertheless bound by the agreements.

The 1995 Agreement designates MLB Properties, according to the Yankees' complaint, "as the exclusive agent for the promotional and retail licensing of the marks of the Major League Clubs both in the United States and in international markets" and, under the Agreement, "the individual Clubs retain only certain rights to license and otherwise exploit their marks within their limited Home Licensing Territory (rights which MLB Properties has repeatedly sought to curtail.)" The income of MLB Properties is split evenly among the MLB teams. Small market teams like the Montreal Expos and Milwaukee Brewers were thus strong supporters of MLB Properties – they were able to free-ride on the efforts of the more successful teams like the Yankees that account for the great bulk of MLB Properties' income. The Yankees alleged: "Clubs opposed to the cartel, such as the Yankees, have been routinely harassed, received threats from MLB Properties, and have had contracts clearly outside MLB Properties' agency obstructed by the Office of the Commissioner, the Executive Council, and MLB Properties itself."

The MLB Properties cartel "hinders efficiency by creating the incentive for free-riding," while the equal distribution of MLB Properties' revenues "diminishes the incentives for individual Clubs to promote and invest in their marks and in the success of their own Clubs." The Yankees contended: "In the absence of the cartel established and enforced by Major League Baseball through the Agency Agreement and MLB Properties, the Major League Clubs would compete with one another in the markets for professional baseball trademark licensing, sponsorships, and retail and wholesale merchandise – which would in turn lead to more competitive pricing, increased output, improved quality, and greater market efficiency."

The Yankees identified two relevant product markets: (1) "professional baseball retail licensing markets" and (2) "professional baseball sponsorship markets." The former "involve the sale of rights to use the marks of professional baseball clubs on apparel or other goods" and, at competitive prices, "rights of this type have no close substitutes and are not reasonably interchangeable with any other products or rights, and the prices of rights of this type are not highly elastic with respect to prices of other products or rights." The latter "involve the sale of rights to affiliate a company or a product with a major league professional baseball club or clubs to promote the company or product" and, at competitive prices, "rights of this type have no close substitutes and are not reasonably interchangeable in use with any other products or rights, and the prices of rights of this type are not highly elastic with respect to prices of other products or rights." The relevant geographic markets for evaluating both sets of relevant product markets are the North American market, the non-North American market, and the worldwide market. The Yankees alleged: "As a result of their joint and concerted action, defendants have and exercise market power and monopoly power in the professional baseball sponsorship markets and in the professional baseball retail licensing markets."

The Yankees argued that there is no efficiency rationale for MLB's challenged practices:

> 118. Major League Baseball frequently advances the protection of on-field competitive balance as a justification for organized anticompetitive behavior. However, to the extent such balance is deemed desirable or necessary, the restriction of competition in corporate promotion and retail licensing activities has no reasonable relationship to achieving on-field competitive balance of the Major League Clubs. In fact, such sharing often creates incentives for inactivity by poor-performing Clubs, who will derive revenue from other Clubs more concerned with the success of their teams and their marks. Further, other mechanisms are far more likely to achieve results and far less likely to impede competition between the Clubs.
>
> 119. There is also no efficiency created by the bundling of Club marks for licensing as a unit to promotional sponsors or retail products manufacturers. Rather, corporate sponsors and

licensees often prefer to associate themselves with the marks of one or a few teams beyond the local areas of such teams. The cartel, instead of generating a superior product, forces the 30 Clubs to sell together a product that sponsors and licensees often find unnecessary to pay for and generally unwieldy.

Importantly, the Yankees explained why the defendants' actions fall outside of MLB's antitrust exemption: "Although the Executive Council Defendants and the Major League Club Defendants are involved in the exhibition of major league professional baseball games, their participation in the markets discussed above is not a reasonably necessary facet or unique characteristic of baseball exhibitions" and, furthermore, "the activities of these defendants in the markets described are not a function of, dependent on, or related to the Major League Baseball reserve system or to the ownership and organizational structure of the game of baseball as operated by these defendants." Interestingly, the Yankees admitted: "Major league baseball has supply and demand characteristics sufficiently distinct from the supply and demand characteristics of other baseball exhibitions and other sporting events so that at reasonably competitive prices major league baseball has no reasonably close substitutes and constitutes a separate market."

In the spring of 1998, MLB and the Yankees reached an out-of-court settlement – Steinbrenner was restored to MLB's Executive Council and MLB signed a sponsorship agreement with Adidas.

The Cowboys and Yankees cases are interesting. Both teams explicitly use the term 'cartel' to describe the marketing arms of their respective leagues. A cartel is typically assumed to restrict output and maximize profits. Both teams believe that given their league's revenue-sharing scheme, they can earn greater profits by 'going it alone.' Neither team believes there is an efficiency rationale for assigning exclusive sponsorship and licensing rights to their respective league's marketing arm: Jerry Jones thinks he can market the Cowboys more effectively than can NFL Properties, while the Yankees do not believe that the sharing of sponsorship and licensing revenue promotes competitive balance and that bundling those rights is necessarily efficient. Since neither case went to trial, it is remains to be seen whether league marketing arms can survive a rule of reason analysis.[56]

Television restrictions. The invention of the television slowly changed the economics of sports leagues. Prior to television, teams earned the bulk of their revenue from selling tickets to games. The televising of games thus posed a threat to game attendance. Watching the game on television was a substitute for attending the game in person. Depending on the particular fan and other factors

[56] For further discussion of sports leagues' collective licensing and merchandising arrangements, see Grusd (1999) and Roberts (2001).

such as the weather, watching the game on television may be either a good or bad substitute for watching it in person. Whether it is a good or bad substitute may also depend on the particular sport; the excitement of a hockey game is generally believed to be lost when watched on television – you have to be there. On the other hand, many fans may prefer to watch a December Chicago Bears home football game from the comfort of their living room rather than braving the cold in the stadium.

And there was another concern. Fans may not attend one game because they can watch a different game on television. Suppose a fan's team is poor and unexciting, while top-notch teams are playing a game broadcast on television. A fan may decide to sit home and watch the game between high-quality teams on television rather than attend a game between poor-quality teams, even if the person is a fan of one of those low-quality teams. In a sense, television allows a team to 'encroach' on the 'home territory' of other teams.

Initially, television broadcast rights were tiny relative to the revenue from game attendance. Sports leagues were concerned about the impact of televising games on attendance and sought to assert greater control over the broadcasting of games. Sometimes the rules and policies adopted by a sports league were strongly opposed by one or more league teams, and in some cases these teams filed antitrust lawsuits against the league over its television restrictions. The NCAA was involved in one important case regarding the number of football games a school could have televised each season; the NBA's Chicago Bulls, who had superstar Michael Jordan, were involved in two others regarding the number of Bulls games that could be televised nationally.

> *NCAA*.[57] The first live college football game was televised in 1938; it had only six viewers. Initially, schools individually negotiated the broadcast rights to their team's football games. There were no limitations on such things as the number of games to be televised. After receiving complaints from members that televising games was reducing game attendance, the NCAA in 1950 commissioned the National Opinion Research Center (NORC) to analyze the impact. The NORC study determined that the impact depended on the percentage of homes that had a television in the area – in areas where 30% or more of homes had a television, televising a game reduced game attendance by 10%; in areas where fewer than 5% of homes had a television, televising a game increased game attendance by 10%. The NCAA's television committee decided that televising college football games into an area where another college football game is being played negatively impacts live attendance and gate receipts and therefore recommended a moratorium on live broadcasts of college football games.
>
> The NCAA's policy permitting schools to individually negotiate the broadcast rights to their team's athletic events without limitation was revoked at the NCAA convention in 1951. The revocation was opposed by

[57] The discussion at the beginning of this section is based primarily on Greenspan (1988) and Siegfried and Burba (2004).

the University of Pennsylvania. The NCAA responded by declaring the University of Pennsylvania to be a “member in bad standing” and arranged a group boycott of the school’s football games. Four of the school’s football opponents cancelled their games for the 1951 season, leading the University of Pennsylvania to give up its opposition to the NCAA’s actions.

The NCAA negotiated a 1-year, $1.14 million deal with NBC to broadcast 12 national college football games. A team was limited to two appearances (thereby expanding the number of teams that would appear on national television and securing broader support for the NCAA’s centralized sale of broadcast rights) and the revenue was split between the teams playing the game and the NCAA. NBC could select a game to be broadcast on Saturday afternoons, knowing that no other NCAA college football game would be broadcast on a competing network. Despite the limitation on the number of appearances, only games involving top collegiate football teams tended to be selected. Thus, the top teams complained about the limitation on the maximum number of appearances, while lower-quality teams supported such limitations.

In 1977, members of several major collegiate football conferences (i.e., Atlantic Coast, the Big Eight, Southeastern, Southwestern, and Western Athletic) and some major independent schools (e.g., Penn State, Notre Dame) formed the College Football Association (CFA). All of the CFA’s members also belonged to the NCAA. The Big 10 and Pacific 10 were the only two major conferences not to join the CFA. The CFA sought to secure a larger share of broadcast revenues for the teams that generated most of that revenue – the top-ranked and most popular teams. Although it obtained a modest relaxation of the limitation on the number of appearances, the CFA lacked the votes in the NCAA for more substantial changes.

In 1981, the CFA and NBC negotiated a 4-year, $180 million contract. Splitting that revenue among the CFA’s 62 members would have been much more lucrative than what the schools would receive under the NCAA’s broadcast deal. The NCAA responded by informing CFA members that the CFA-NBC contract would violate the NCAA rule prohibiting members from independently negotiating broadcast rights to individual games. Violators of the rule would be excluded from NCAA meets and tournaments, including the lucrative NCAA men’s basketball tournament. The CFA members did not have enough top men’s basketball teams to form their own tournament and they decided not to sign the deal with NBC.

On September 8, 1981, two members of the CFA, the University of Oklahoma and the University of Georgia (both of whose legal expenses were paid by all CFA members) filed an antitrust lawsuit against the NCAA alleging that the NCAA’s control of college football telecasts violates Section 1 of the Sherman Act.[58] The U.S. District Court for the

---

[58] *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). For a

Western District of Oklahoma defined the relevant market to be “live college football television” and found that competition in this market had been restrained because, for example, the NCAA fixed the price of some telecasts and the NCAA’s restriction artificially limited the production of televised college football. The NCAA defended its restriction by arguing that it protected live attendance at college football games and promoted competitive balance among the football programs. The district court found neither argument persuasive. The U.S. Court of Appeals for the Tenth Circuit sided with the district court in finding that the NCAA’s television plan constituted price fixing.

The case went to the U.S. Supreme Court and was decided on June 27, 1984. The Court found that: (1) “The NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the district court’s findings establish that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference” and “these hallmarks of anticompetitive behavior place upon the NCAA a heavy burden of establishing an affirmative defense that competitively justifies that apparent deviation from the operations of a free market”; (2) “The record does not support the NCAA’s proffered justification for its television plan that it constitutes a cooperative ‘joint venture’ which assists in the marketing of broadcast rights and hence is procompetitive”; (3) “Nor, contrary to the NCAA’s assertion, does the television plan protect live attendance, since, under the plan, games are televised during all hours that college football games are played” and, moreover, “by seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to draw live attendance when faced with competition from televised games, the NCAA forwards a justification that is inconsistent with the Sherman Act’s basic policy”; and (4) “The interest in maintaining a competitive balance among amateur athletic teams that the NCAA asserts as a further justification for its television plan is not related to any neutral standard or to any readily identifiable group of competitors. The television plan is not even arguably tailored to serve such an interest.” As a result, the U.S. Supreme Court ruled that the NCAA’s television plan violated the Sherman Act.

On the issue of market definition, the Court observed that “the NCAA seeks to market a particular brand of football – college football” and “[t]he identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.” The Court noted that the district court “employed the correct test for determining whether college football broadcasts constitute a separate market – whether there are other products

---

discussion of earlier challenges to the NCAA’s control of college football telecasts, see footnote 47 of Greenspan (1988). For a discussion of the eventual demise of the CFA, see Siegfried and Burba (2004).

that are reasonably substitutable for televised NCAA football games" and "found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." Thus, "there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute" and "we agree with the district court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers."

The Supreme Court's findings have been put to the test in a number of economic studies. If the courts were correct that the NCAA's television plan restricted output and raised price, fees for televising college football games should have fallen following the Supreme Court's decision. Greenspan (1988) shows that this is what happened. In 1983, 95 games were televised and fees paid totaled $74.2 million. The number of games televised in 1984, 1985, and 1986 were 63, 97, and 99, respectively (excluding regional telecasts packaged by individual conferences), and the corresponding fees paid were $42.0 million, $50.1 million, and $52.7 million.

If the NCAA's pro-competitive arguments were valid, the U.S. Supreme Court's decision in 1984 should have had a negative impact on (1) attendance at college football games and (2) competitive balance among football programs. The empirical evidence is, at best, weakly consistent with the first prediction and inconsistent with the second. Fizel and Bennett (1989) test the impact of college football telecasts on college football attendance during the period 1980-85. Although they conclude that the general increase in the number of telecasts reduces attendance, the relevant regression coefficients are statistically significant only at the 0.10 level. At the 0.05 significance level, the surge in college football telecasts had no impact on college football attendance. Bennett and Fizel (1995) test the impact of the U.S. Supreme Court's decision on competitive balance in college football, using such measures as the dispersion of winning percentages in conferences and the average team winning percentages of strong and weak football programs. Contrary to the NCAA's claim, they conclude that playing strength among Division I football teams has become more equal following the Supreme Court's 1984 decision. The same conclusion is reached by Eckard (1998), who observes that the number of schools appearing in the Top 10 rose from 27 during the period 1973-81 to 37 in the period 1987-95, and the Herfindahl Index fell from 560 to 449. A similar result is obtained by focusing on the Top 20.

Were the courts correct that there are no good substitutes for college football telecasts? Pacey and Wickham (1985) analyzed the Nielsen ratings of nationally televised college football games during the period 1976-81. They found the number of hours of professional football and baseball televised during the week had no statistically significant impact on the Nielsen rating of the college football game. However, simultaneous broadcast of a World Series game reduced the Nielsen rating of the college football game by 1.9 points. Thus, although professional football and baseball telecasts are not a good substitute for college football telecasts generally, telecasts of professional sports' "championship" games may be.

Did consumers benefit from the Supreme Court's decision? Pacey and Wickham (1985) observe that since the decision, many more college football games are being broadcast and television viewership has increased. They conclude: "Clearly, the short run impact has been beneficial to the consumer while the long run economic consequences cannot yet be determined." (p. 94) However, Greenspan (1988) contends that, although fans who watch college football on television have benefited from the increase in the number of televised games, fans who attend college football games are harmed because, for example, game starting times are set to accommodate television coverage.

Overall, the economic evidence suggests that the U.S. Supreme Court got it right – the NCAA's television restrictions reduced output, raised prices, and lacked a pro-competitive rationale.

Chicago Bulls. In the early 1990s, the NBA's Chicago Bulls were wildly popular, with superstars Michael Jordan and Scottie Pippen. The Bulls had a strong incentive to broadcast their games to as large an audience as possible. A regional cable channel has a smaller potential audience than does a station whose signal is carried nationwide by cable systems, a so-called 'superstation.' As a superstation, WGN had a larger potential audience than did SportsChannel, the regional cable television station that broadcast many Bulls' games, and thus the Bulls had an incentive to broadcast as many games as possible on WGN. The nationwide broadcast of Bulls games, however, meant that on some occasions the Bulls would be playing on WGN while two other NBA teams would be playing on another channel. Quite possibly, a significant number of basketball fans – even fans of the teams playing the other game – would choose to watch the Bulls game. Given the star-power of the Bulls, it is unsurprising that other NBA teams did not want to have their televised games competing against a televised Bulls game. In fact, Hausman and Leonard (1997) document that, during the 1989-90 season, Nielsen ratings for games on Turner Network Television (TNT) were significantly reduced if WGN was airing a Bulls game at the same time.[59]

In 1990, the NBA adopted a 20-game cap on the number of games a team could broadcast nationally, over the objections of the Chicago Bulls and New Jersey Nets. Teams were allowed to broadcast 41 games over-the-air in their home markets and another 41 games could be shown on local cable. The games could not be televised in

[59] Hausman and Leonard served as antitrust litigation consultants to the Chicago Bulls and WGN.

competition with a game being shown on NBC. Moreover, no more than 20 games could be televised on a superstation, and no game on a superstation could be televised in competition with a game airing on TNT.

The Bulls and WGN filed an antitrust lawsuit which characterized the NBA as a cartel whose television restriction limited the output of broadcast games in violation of Section 1 of the Sherman Act. The U.S. District Court for the Northern District of Illinois, Eastern Division, enjoined the NBA from enforcing its restriction. The NBA appealed.[60]

The appeals court held that the NBA's television restriction does not fall under the antitrust exemption in the Sport Broadcasting Act because the NBA has not "transferred" a right to sponsored telecasting. Nor does it fall under the 'single entity' antitrust exemption because the district court "concluded that the best characterization of the NBA is the third we have mentioned: a joint venture in the production of games but more like a cartel in the sale of its output." The appeals court added: "Whether this is the best characterization of professional sports is a subject that has divided courts and scholars for some years, making it hard to characterize the district judge's choice as clear error."

Since the NBA's television restriction is not covered by any antitrust exemption, it must be analyzed under the Rule of Reason. The NBA complained that the district court had condemned the 20-game limit without a finding that the NBA had a significant market share in a particular market. The appeals court interpreted the district court's analysis as a 'quick look' version of the Rule of Reason: "any agreement to reduce output measured by the number of televised games requires some justification – some explanation connecting the practice to consumers' benefits – before the court attempts an analysis of market power."

The appeals court acknowledged that the NBA's contention that its television restrictions control free-riding deserves "serious analysis." The NBA identified three forms of free-riding: (1) "the contracts with NBC and TNT require these networks to advertise NBA basketball on other shows" and "the Bulls and WGN receive the benefit of this promotion without paying the cost"; (2) "the NBA has revenue-sharing devices and a draft to prop up the weaker teams" and the Bulls "took advantage of these while they were weak (and through the draft obtained their current stars) but, according to the league, are siphoning viewers (and thus revenues) to their own telecasts, thus diminishing the pot available for distribution to today's weaker teams"; and (3) "the Bulls and WGN are taking a free ride on the benefits of the cooperative efforts during the 1980s to build up

[60] *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. NBA*, 961 F.2d 667 (7th Cir. 1992).

professional basketball as a rival to baseball and football – efforts that bore fruit just as the Bulls produced a championship team, and which the Bulls would undermine." The appeals court rejected the NBA's free-rider defense:

> When payment is possible, free-riding is not a problem because the "ride" is not free. Here lies the flaw in the NBA's story. It may (and does) charge members for value delivered. As the NBA itself emphasizes, there are substantial revenue transfers, propping up the weaker clubs in order to promote vigorous competition on the court. Without skipping a beat the NBA may change these payments to charge for the Bulls' ride. If the $40 million of advertising time that NBC will provide during the four years of its current contract also promotes WGN's games, then the league may levy a charge for each game shown on a superstation, or require the club to surrender a portion of its revenues. Major league baseball does exactly this and otherwise allows its teams access to superstations… Avoidance of free-riding therefore does not justify the NBA's 20-game limit.

The appeals court ruled that it would not overturn the district court's decision to enjoin the NBA from enforcing its 20-game cap.

A few years later, the Bulls sought to increase the number of games televised on WGN from the 25 or 30 games authorized by injunction since 1991, to 41 games, while the NBA sought to impose a "tax" on games broadcast to a national audience. The Bulls and WGN went to court; the district court made a 30-game allowance permanent, to the chagrin of the Bulls and WGN, but also ruled the NBA's fees to be excessive, leading both sides to appeal the decision.[61] The appeals court vacated the district court's judgment, arguing the district judge erroneously required the NBA to have a complete unity of interest in order to be treated as a single entity. The appeals court ruled that, "when acting in the broadcast market the NBA is closer to a single firm than to a group of independent firms" and therefore "plaintiffs cannot prevail without establishing that the NBA possesses power in a relevant market, and that its exercise of this power has injured consumers." The appeals court distinguished its current decision from its 1992 ruling in favor of the Bulls and WGN: "We affirmed the district court's original injunction after applying the 'quick look' version because the district court had characterized the NBA as something close to a cartel, and the league had not then made a Copperweld argument."

As for the fee sought by the NBA on games broadcast to a national audience, the appeals court criticized the district court's

[61] *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. NBA*, 95 F.3d 593 (7th Cir. 1996).

ruling that the per game fee should be reduced from $138,000 to $39,400:

> The district court's opinion concerning the fee reads like the ruling of an agency exercising a power to regulate prices. Yet the antitrust laws do not deputize district judges as one-man regulatory agencies. The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act… WGN and the Bulls argue that the league's fee is excessive, unfair, and the like. But they do not say that it will reduce output… Lack of an effect on output means that the fee does not have antitrust significance. Once antitrust issues are put aside, how much the NBA charges for national telecasts is for the league to resolve under its internal governance procedures. It is no different in principle from the question how much (if any) of the live gate goes to the visiting team, who profits from the sale of cotton candy at the stadium, and how the clubs divide revenues from merchandise bearing their logos and trademarks. Courts must respect a league's disposition of these issues, just as they respect contracts and decisions by a corporation's board of directors.

Thus, the U.S. Court of Appeals required the Bulls and WGN, pending further proceedings in the district court or an agreement among the parties, to abide by the NBA's limitations on the maximum number of superstation broadcasts.

Team relocation. A team may believe it would be more profitable if it moved to another location. Such a move, depending on league rules and policies, may require approval of the other league members. The league has an understandable interest in the relocation activities of its members. For example, the team may be seeking to move to a city where the league planned to add an expansion team, and thus the team is attempting to seize a new franchise opportunity that 'belongs' to the league. The relocation to a smaller city may reduce the league's broadcast revenue, even if the relocating team's revenue increases due to public subsidies and a more lucrative stadium deal. The relocation of a team from an above-average sized city to an even larger city may decrease competitive balance among the teams in the league. Furthermore, the relocation may disrupt rivalries, hurting fan interest when the team is on the road. When teams wishing to relocate fail to obtain the support of the league for the move, they sometimes file an antitrust lawsuit challenging the league's relocation rules and policies. Teams which have done so include the NHL's San Francisco Seals, the NFL's Oakland Raiders, the NBA's San Diego Clippers, and the NFL's New England Patriots.

San Francisco Seals.[62] In 1969, the NHL's San Francisco Seals formally applied to the league to exchange its current franchise for a new one located in Vancouver. Thus, instead of 'relocating' to Vancouver, the Seals were actually applying for a new franchise in a new location (Vancouver). The NHL's Board of Governors denied the request and the Seals filed an antitrust lawsuit alleging that the defendants combined to prevent it from playing its games in Vancouver, where it believed its gate receipts would be higher. The Seals did not challenge the league's allocation to individual teams of 'home territories' with exclusive rights within those territories. Rather, it wanted to obtain such a home territory in Vancouver.

The district court found that "the relevant product market with which we are here concerned is the production of professional hockey games before live audiences, and that the relevant geographical market is the United States and Canada." Within this market, the Seals and the other members of the NHL are not competitors "in the economic sense" but rather "are, in fact, all members of a single unit competing as such with other similar professional leagues." Consequently, "the organizational scheme of the National Hockey League, by which all its members are bound, imposes no restraint upon trade or commerce in this relevant market, but rather makes possible a segment of commercial activity which could hardly exist without it." Thus, the district court concluded that "the actions of the Board of Governors pursuant to the constitution and bylaws of the National Hockey League do not violate section 1 of the Sherman Act, as they do not restrain trade or commerce within the relevant market."

The Seals also alleged that the defendants violated Section 2 of the Sherman Act by attempting to monopolize the business of major league hockey. In particular, the Seals alleged that the NHL wanted to keep the team in San Francisco to discourage a rival league from expanding into San Francisco. Since the Seals did not belong to a rival league, even if the Seals' accusation was true, they would not have been the target of the NHL's alleged anticompetitive acts and would not have been injured by those acts. Therefore, the district court ruled that the Seals did not have standing to sue on Section 2 claims.

The district court thus granted the NHL's motion for summary judgment in July 1974. By that date, the Seals had already declared bankruptcy and changed ownership. In 1976, the franchise was transferred to Cleveland and became the Cleveland Barons. In June 1978, the financially-troubled Barons were merged with the Minnesota North Stars.

[62] The discussion in this section comes from various hockey-related websites and the district court decision in *San Francisco Seals v. NHL*, 379 F. Supp. 966 (C.D. Ca. 1974).

Oakland Raiders. After the Los Angeles Rams moved to Anaheim in 1978, the Los Angeles Coliseum, where the Rams had played, was left without an NFL tenant. The Coliseum asked the NFL to place an expansion franchise in Los Angeles, but was told it was not possible at the time. The Coliseum attempted to lure an existing NFL team, but such a relocation would have required unanimous approval of all 28 teams under the NFL Constitution's Rule 4.3 of Article IV. In September 1978, the Coliseum filed an antitrust lawsuit against the NFL alleging that Rule 4.3 violated Section 1 of the Sherman Act. The lawsuit failed because the Coliseum did not have a NFL team committed to relocating to Los Angeles. Nevertheless, the NFL responded by amending Rule 4.3 so that a relocation had to be approved by only three-quarters of the 28 teams.

The Oakland Raiders' lease with the Oakland Coliseum expired in 1978 and Al Davis, the Raiders' general managing partner, began negotiations with the Los Angeles Coliseum. A deal was imminent in January 1980 so the L.A. Coliseum reactivated its lawsuit against the NFL in an attempt to thwart the NFL from preventing the Raiders' relocation. Although the district court granted the injunction, the appeals court reversed.

The Raiders and the L.A. Coliseum reached a 'memorandum of agreement' on March 1, 1980 and two days later at an NFL meeting Davis announced his intention to move the Raiders to Los Angeles. The league obtained an injunction preventing the move. On March 10, 1980, the league voted on the move – 22 teams voted against the move and 5 abstained. The L.A. Coliseum renewed its antitrust lawsuit against the NFL and its member teams, with the Oakland Raiders aligned as a party plaintiff. On June 14, 1982, the court permanently enjoined the NFL and its member clubs from interfering with the Raiders' move to Los Angeles. In May 1983, a jury awarded the Raiders $11.55 million in damages and the L.A. Coliseum $4.86 million; the district court then trebled the antitrust damages. The NFL and its member teams appealed the decision.[63]

The NFL argued that (1) it is a single entity and thus incapable of restraining trade in violation of Section 1 of the Sherman Act and (2) Rule 4.3 is not an unreasonable restraint of trade under Section 1. The appeals court sided with the district court in rejecting the single entity argument, noting, for example, that profits vary widely across teams and this "disparity in profits can be attributed to 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."

To determine whether Rule 4.3 is an unreasonable restraint of trade, the appeals courts noted that it "must examine Rule 4.3 to determine whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the

---

[63] *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984).

consuming public.” The appeals court agreed with the NFL that the Rule served legitimate collective concerns:

> We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.
>
> Rule 4.3 aids the League, the NFL claims, in determining its overall geographic scope, regional balance and coverage of major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.
>
> Joint marketing decisions are surely legitimate because of the importance of television…
>
> Last, there is some legitimacy to the NFL’s argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest.

However, the appeals court added:

> All of these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

The appeals court advised:

> To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL “product” and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised… Fan loyalty and location continuity could also be considered.

Thus, the Raiders were free to move to Los Angeles. On June 16, 1986, the appeals court issued its opinion regarding the jury's damage awards and the trebling of damages by the district court.[64] The appeals court ruled that "the jury could properly have found that the amount of the Raiders' lost profits from the delay of two years in moving to Los Angeles amounted to $11,554,382" but "the district court erred in limiting the NFL's damage offset defense, when it excluded from the jury's consideration in calculating damages the benefits the Raiders realized by taking from the NFL the opportunity to establish an expansion franchise in Los Angeles." Al Davis testified that the Raiders' franchise value increased by $25 million when it moved to Los Angeles. Since the appeals court ruled that "Rule 4.3 was illegal only as it was applied in 1980," the NFL "legitimately possessed the value of that expansion opportunity that had accrued until 1980." Therefore, "the excess portion of the injunctive relief can be measured as the value of the NFL's Los Angeles expansion opportunity in 1980, prior to the NFL's illegal conduct, less the value of the Oakland opportunity returned to the league."

In other words, by moving to Los Angeles, the Raiders seized for themselves a valuable expansion opportunity and returned to the NFL a less valuable expansion opportunity in Oakland. The net value of the Raiders' seizure had to be subtracted from the Raiders' damage award.

A few years later, the NFL began imposing relocation fees.[65] In 1988, the St. Louis Cardinals' move to Arizona involved payment of a $7.5 million relocation fee. Relocation fees were also paid for the Los Angeles Rams' move to St. Louis in 1995 and the Cleveland Browns' move to Baltimore in 1996. On the other hand, there was no relocation fee for the Los Angeles Raiders' move back to Oakland in 1995; nor was there a relocation fee for the Houston Oilers' move to Nashville in 1996.

The 1984 court decision in the Raiders case is controversial. Among those who believe it was wrongly decided are Lehn and Sykuta (1997), who have two primary criticisms: (1) "in its rejection of the single entity argument, the court failed to properly distinguish between the cooperation that is necessary to promote the value of the league as a whole and the ability of teams to compete in input markets" and the court "also adopted internally inconsistent arguments with respect to the value of teams independent of the league" and (2) "it failed to recognize that territorial restrictions promote incentives for individual franchisees, or clubs, to invest in product quality and the reputation of the franchisor, the NFL." (pp. 562-63)

In support of the latter criticism, Lehn and Sykuta examine the impact of the Raiders' move to Los Angeles on the Los Angeles Rams and the San Francisco 49ers. They document that the product quality of the Rams, as measured by the Rams' won-loss record, plunged after the Raiders' move to Los Angeles, consistent with the hypothesis that the

[64] *Los Angeles Memorial Coliseum Commission v. NFL*, 791 F.2d 1356 (9th Cir. 1986).
[65] Vrooman (1997b).

Rams' incentive to invest in their team's quality diminished. On the other hand, the product quality of the 49ers soared, suggesting that after the Raiders' move from Oakland, the 49ers had greater incentive to invest in their team's quality. Interestingly, the product quality of the Raiders also fell after moving to Los Angeles. Lehn and Sykuta conclude: "A cursory examination of the evidence suggests that the league has in fact been injured and that the arguments underlying the court's decision were incorrect." (p. 563)

San Diego Clippers. In the early 1980s, prior to the appeals court decision in the lawsuit over the NFL's Oakland Raiders' move to Los Angeles, the NBA's San Diego Clippers sought to move to Los Angeles, but abandoned their quest after the NBA filed suit. After the appeals court decided the Oakland Raiders' case, the Clippers believed they were now free to relocate. On May 14, 1984, the Clippers announced that they would move to Los Angeles the next day and any attempt by the NBA to stop them would be a violation of the antitrust laws. The Clippers complied with Article 9 of the NBA's constitution, which prevents teams from moving into the territory operated by another team, by getting the Los Angeles Lakers to agree in writing to waive their rights under Article 9. The NBA sought to avoid antitrust liability by scheduling the Clippers' games in Los Angeles. However, the NBA also went to court seeking a declaratory judgment that it could restrain the movement of its member teams and that it could impose a fee for the unilateral usurpation of the NBA's franchise opportunity.

The district court granted summary judgment in favor of the Clippers. The NBA appealed and the appeals court reversed the district court's grant of summary judgment because there were numerous issues of fact to be resolved and the case was remanded to the district court for trial.[66] The appeals court stressed: "Neither the jury's verdict in Raiders, nor the court's affirmation of that verdict, held that a franchise movement rule, in and of itself, was invalid under the antitrust laws." It repeated that "a careful analysis of Raiders I makes clear that franchise movement restrictions are not invalid as a matter of law."

Whether the application of the NBA's franchise movement restrictions to stop the Clippers' move would be a violation of the antitrust laws would have to be decided at trial. The NBA sought either the return of the Clippers to San Diego or termination of the franchise.[67] In September 1987, less than a week before the trial was to commence, the NBA and the Clippers reached an out-of-court settlement. The Clippers' owner, Donald T. Sterling, agreed to pay the league approximately $6 million in fines, signed documents stating that the NBA's rules regarding

[66] *NBA v. SDC Basketball Club and Los Angeles Memorial Coliseum*, 815 F.2d 562 (9th Cir. 1987).
[67] *New York Times* (March 9, 1985; October 1, 1987).

franchise moves are valid and binding, and dropped all claims against the NBA including his $100 million lawsuit filed against the NBA in March 1985 alleging "various fraudulent acts." In return, the NBA allowed the Clippers to remain in Los Angeles.

New England Patriots. Victor K. Kiam II acquired majority-control of the NFL's New England Patriots in 1988 and, as a condition for the NFL's approval of his purchase, Kiam signed a contract agreeing to comply with the NFL's Constitution and Bylaws and to obtain advance approval from the NFL before any transfer of ownership of the team. Kiam also agreed to "continue to operate the Patriots' franchise within its existing home territory, unless a transfer of the franchise … to a different city is approved by the member clubs of the League." In 1989, NFL Commissioner Paul Tagliabue issued a statement that sale of a team would require the approval of at least three-quarters of the NFL's members.

At the time, the Patriots played their home games in Foxboro, Massachusetts, and experienced financial difficulties due in part to the inadequate Foxboro facility and the restrictive lease the team had with the facility. The team was not profitable the first two seasons under Kiam's ownership and he had to personally guarantee loans and use personal funds to cover cash flow shortfalls. He attempted unsuccessfully to negotiate with Boston city officials for a new stadium. In 1990, Kiam began to consider moving the Patriots to another region of the country; there appeared no chance of getting a new stadium in New England and, according to Kiam, then-Commissioner Pete Rozelle had told him prior to purchasing the team that if he was unable to secure a new stadium in New England that he would be permitted to move the team.

Kiam negotiated with a group named Touchdown Jacksonville, Inc. (TJI) to move the team to Jacksonville. After TJI officials informed the NFL that they were close to a deal, the NFL told TJI that it "did not favor the move" and that if TJI wanted the NFL's support (without which it could not secure a franchise), it should cease negotiations with the Patriots. TJI did so and, several months later in the fall of 1991, Touchdown Jacksonville, LTD (TJL) was formed, with TJI president David Seldin as the president of TJL's corporate general partner. Some of TJI's assets were transferred to TJL.

In 1991, Kiam informed Commissioner Tagliabue that the Patriots would have to move for financial reasons. Tagliabue opposed any move. The NFL increased the team's debt limit by $10 million after requiring Kiam to agree not move the team before the end of the 1993 season. In 1992, Kiam negotiated to sell the team to James Orthwein, who the NFL required to sign an "iron clad commitment" not to move the team to St. Louis, his hometown. A few weeks prior to the close of the sale of the Patriots to Orthwein, the NFL announced that the sale would not be approved unless Kiam signed a release of all claims against the NFL, including potential antitrust claims. On May 8, 1992, Kiam signed the release and three days later the transaction closed.

> The NFL awarded an expansion franchise to TJL in November 1993. It was around this time that Kiam alleges he first learned of the NFL's role in the collapse of negotiations between himself and TJI. On November 16, 1994, Kiam filed an antitrust complaint against the NFL alleging that its monopolistic and conspiratorial conduct illegally lowered the value of the Patriots franchise and had anticompetitive effects in several markets. Kiam argued that he had signed the claims release under economic duress, and that the release itself was an instrument of the anticompetitive conduct. The jury returned a verdict in favor of the NFL on the issue of economic duress and the district court granted the NFL's motion for summary judgment on the remaining claims.
>
> Kiam appealed.[68] The appeals court found that the antitrust claims involved issues of fact that could not be resolved by means of summary judgment on the current record. However, the appeals court also found that the claims release signed by Kiam was valid. Thus, Kiam could not pursue the antitrust claims against the NFL and its members, but Kiam could pursue them against TJI and TJL because they were not covered by the claims release.

The impact of relocation on professional sports franchise values has been investigated by Alexander and Kern (2004), who estimate a cross-sectional regression model of franchise values using data on the U.S.-based franchises (Canadian-based franchises are excluded from the sample) of the four major North American sports leagues over the period 1991-97. Interestingly, they find that relocation does not have a statistically significant impact on franchise value, but playing in a new facility does. In other words, holding whether the team plays in a new facility constant, whether the team is playing in a new city does not significantly affect franchise value.

This finding suggests that teams may first try to obtain a new facility in their current city and, if that fails, attempt to relocate to a new facility in another city. Of course, the threat to relocate to a new facility in another city may add leverage to the team's negotiations for a new facility in its current city – and this may explain why playing in a new facility, regardless of whether the location is old or new, raises franchise value.

Note, once again, that Alexander and Kern excluded Canadian-based franchises from their analysis. This omission may be particularly important in the case of the NHL, which in its 1979 expansion added three Canadian-based franchises (Edmonton, Quebec City, and Winnipeg) and one U.S.-based franchise (Hartford).[69] In 1980, the Atlanta franchise relocated to Calgary. Thus, there was a trend toward more Canadian-based franchises, although most NHL franchises continued to be based in the U.S. More recently, however, the trend has been for Canadian-based teams to relocate in the United States, despite the continuing huge popularity of hockey in Canada. The Quebec team, which had been

---

[68] *VKK Corporation v. NFL*, 244 F.3d 114 (2nd Cir. 2001).

[69] Jones and Ferguson (1988).

purchased for $15 million in 1988, was sold for $75 million and a side-payment and relocated to Denver; the Winnipeg team was sold in 1996 for roughly the same amount and relocated to Phoenix.[70]

Jones and Ferguson (1988) and Cocco and Jones (1997) examine franchise profitability, viability, and relocation of NHL teams, particularly the Canadian-based teams. Jones and Ferguson analyzed data from the 1977-78 season and concluded that several Canadian cities were more attractive expansion opportunities for the NHL than any potential U.S. cities – and more attractive than at least eight cities with current NHL teams. This finding is consistent with the trend toward more Canadian-based franchises. However, Cocco and Jones, using data from the 1989-90 season, reach a very different conclusion, finding evidence that "the viability of Canadian Small Market Franchises (SMF) is in doubt because of a combination of inadequate revenue (due to the quality of their locations) and escalating salary cost." (p. 1537) They consider a number of possible solutions, including revenue sharing, salary caps, and public subsidies, but conclude that "none are as attractive or as realistic as relocating south to US cities." (p. 1537)

In 1983, the NHL rejected the proposed relocation of the St. Louis team to Saskatoon. Saskatoon was one of the three Canadian cities without an NHL franchise which Jones and Ferguson (1988) had estimated was preferable to all potential, and at least eight existing, U.S. locations. Why then did the NHL reject the relocation?

One possible answer is externalities. In the NHL (as in the NBA), gate receipts were not shared between the home and visiting teams. The home team kept it all, unlike the NFL where 60% of the gate receipts are kept by the home team and 40% are given to the visiting team and unlike MLB which splits gate receipts 85%-15% between the home and visiting team.[71] By moving from St. Louis to Saskatoon, the team may become a less attractive opponent (for example, the rivalry that the St. Louis team has with the Chicago Blackhawks would be disrupted). Since gate receipts are not shared, the negative impact on gate receipts at Blackhawks home games would be borne entirely by the Blackhawks. Thus, it is possible that the negative externality that the move to Saskatoon would have on other NHL franchises would far outweigh the private benefits of the relocation to the St. Louis franchise.

This hypothesis was tested by Carlton, Frankel, and Landes (2004), who examine the impact of the relocation of four NHL franchises on attendance at games where they were the visiting team.[72] The change in 'away' attendance is calculated as the difference between actual attendance and the attendance predicted by their econometric model if the move had not occurred. When California moved to Cleveland, attendance at games where it was the visiting team fell 0.22% the first year and 0.90% the second. When Kansas City moved to Colorado, 'away' attendance rose 2.63% the first year, but then fell 1.59% and

[70] Cocco and Jones (1997).
[71] Alexander and Kern (2004).
[72] The NHL hired Lexecon, an economic consulting firm, to conduct an economic analysis of the proposed move and Carlton served as the NHL's economic expert.

8.79% in the second and third years, respectively. The corresponding declines in away attendance when Atlanta moved to Calgary were 9.22%, 9.70%, and 5.61%. When Colorado moved to New Jersey, away attendance declined 5.59% the first year and 1.04% the second. Since the NHL approved these relocations, one would expect the negative impact on 'away' attendance to be relatively minor. The model is used to predict the impact of the proposed move of the St. Louis Blues to Saskatoon under the assumption that the effect on away attendance will be the same in each of the first three years after the move and then have no effect. The predicted decline in away attendance in each of the first three years is 9.21%, and, not surprisingly, the NHL blocked the move.

Sports leagues may also oppose the relocation of one of their members because of the negative impact on competitive balance. Quirk (1973) uses population as a crude measure of revenue potential and assumes that a move increases competitive balance if the population of the city to which the franchise moves is closer to the average population of franchise cities than the population of the city from which the team moved. Only three of the ten major league baseball franchise relocations which Quirk examines meet his criteria for increasing competitive balance. Moreover, when the effect of the move on the drawing potential of nearby teams is taken into account, Quirk concludes that only one move – the St. Louis Browns to Baltimore – increased competitive balance. Thus, sports leagues – or at least Major League Baseball – have approved relocations even if they negatively impacted competitive balance.

Legislators have been conflicted when it comes to franchise relocation. On the one hand, they often rail against MLB's antitrust exemption; yet, legislation has been introduced to give other professional sports leagues antitrust immunity on issues of franchise relocation. For example, the Fan Freedom and Community Protection Act of 1995 (which did not pass) contained the following provision: "It is not unlawful by reason of the antitrust laws for a professional sports league to enforce rules or agreements authorizing the membership of such league to decide whether a professional sports team that is a member of the league may relocate from one community to another."

The Act would have required leagues to make specific findings on ten issues: (1) "the extent to which fan loyalty to and support for the team has been demonstrated during the team's tenure in the community"; (2) "the degree to which the team has engaged in good faith negotiations with appropriate persons concerning terms and conditions under which the team would continue to play its games in the community"; (3) "the degree to which the owners or managers of the team have contributed to any circumstances which might demonstrate the need for the relocation"; (4) "the extent to which the team, directly or indirectly, received public financial support by means of any publicly financed playing facility, special tax treatment, or any other form of public financial support"; (5) "the adequacy of the stadium in which the team played its home games in the previous season, and the willingness of the stadium, arena authority, or the local government to remedy any deficiencies in such facility"; (6) "whether the team has incurred net operating losses, exclusive of depreciation and amortization, sufficient to threaten the continued financial viability of the team"; (7) "whether any other team in the league is located in the community in which the team is currently located"; (8) "whether the team proposes to relocate to a community in which no other team in the league is located"; (9) "whether the stadium authority, if public, is not opposed to such relocation"; and (10) "whether there is a bona fide investor offering fair market value for the professional sports team and will retain the team in the current community."

Gattuso (1985) makes the case that Congress should not get involved in the NFL's franchise relocation decisions in the aftermath of the court's ruling in the case involving the Oakland Raiders' move to Los Angeles. Ross and Dimitroff (1997) argue that, although the majority of court decisions hold that MLB's antitrust exemption covers the "business of baseball" (and thus covers franchise relocation issues), some courts have held that the exemption applies only to the reserve clause in players' contract (and thus relocation issues would not be covered by the exemption). They contend that if relocation issues are not within MLB's antitrust exemption, "a solid case can be made that the present restrictions on the sale or relocation of major league baseball teams violate section 1 of the Sherman Act." (p. 539)

In summary, sports leagues require the cooperation of their members in order to produce their output. Despite the fact that the four major North American sports leagues have survived (although not necessarily flourished) for decades, many other sports leagues lasted only a few years before they disappeared. One possible reason for the longevity of the major sports leagues is their rules and policies, which reduce conflict between members and between members and the league. Nevertheless, some rules and policies have been attacked on antitrust grounds by disgruntled league members. Four examples are public ownership restrictions, sponsorship and licensing restrictions, television restrictions, and restrictions on franchise relocation.

Chapter 4

Sports Leagues vs. Rival Leagues

The four major North American sports leagues have each been challenged by rival leagues, which either folded without a trace (Federal League of Professional Base Ball Clubs, United States Football League), folded after merging some of their teams with the major league (American Basketball Association, World Hockey Association), or merged completely with the major league (American Football League). Competition between rival leagues occurs in both input (players and coaches) and output (games) markets. One clear effect of such interleague competition is soaring player salaries – player salaries are much closer to their marginal revenue product when leagues have to compete for players than when they do not. Not surprisingly, the incumbent league may attempt to deter or frustrate the entry of a rival league by attempting to restrict the ability of its players to sign with a team in the rival league. Similarly, the incumbent league may attempt to prevent teams in the rival league from playing games in the stadiums used by the incumbent's teams. The incumbent, in addition, could expand by putting new teams into cities which could support a team but lack one. Such tactics have been tried. It should come as no surprise that the newly-created league often brings an antitrust lawsuit against its incumbent competitor alleging, for example, that the incumbent is acting illegally to maintain its monopoly.

Interleague competition occurs in the output market as well. Typically, competition leads to lower prices and/or higher quality. This is not necessarily true in the case of competition between sports leagues, however, because the expanded demand for players results in a dilution of talent, and consequently may reduce the quality of the resulting games. Suppose the new entrant has the same number of teams and the same number of players per team as the incumbent. Unless the incumbent contracts by merging or folding some teams, the demand for players will double. Many players who were not good enough to be on a team in the incumbent league prior to the entry of the new league will now be able to find a spot on a team in one of the leagues. Thus, a reduction in the incumbent league's ticket prices or broadcast fees following the entry of a new league may reflect, at least in part, the poorer quality of the league's product, its games.

This chapter focuses on five instances of antitrust litigation involving a newly-created league and an incumbent league for the same sport: Federal League vs. Major League Baseball, American Football League vs. National Football League, American Basketball Association vs. National Basketball Association, World Hockey Association vs. National Hockey League, and United States Football League vs. National Football League. The chapter concludes with a discussion of an antitrust lawsuit involving leagues in different sports: North American Soccer League vs. National Football League.

Federal League vs. Major League Baseball. The National League introduced the 'reserve clause' in 1879, thereby binding players to the team that originally acquired the right to contract with them and giving National League teams monopsony power over their players. As one would expect, player salaries fell. This fall was rapidly reversed after the formation of a new league, the American

Association, in 1882. Between 1882 and 1891, the average nominal salary of National League players jumped from $1,375 to $3,500 – or about $63,000 in 1998 dollars. After four American Association teams were absorbed into the National League and five other American Association teams were bought out by the surviving teams, average National League players salaries plunged from $3,500 in 1891 to $2,400 in 1892, a drop of 31%, and to $1,800 in 1893, a further drop of 25%. In 1893, the National League capped player salaries at $2,400, and some teams imposed even lower caps. The decline in player salaries coincided with rising, not falling attendance.[73]

In 1901, a new rival league appeared – the American League. By successfully luring players from the National League, the American League in 1902 actually had higher attendance (2.2 million) than the National League (1.7 million). The National League attempted to have state courts enforce its reserve clause but the effort failed because those courts did not have jurisdiction for player movements across state lines. Player salaries soared and, during the 1903 season, the two leagues merged and at the end of the season played the first World Series. That season, player salaries dropped roughly 15%.

In 1913, the Federal League began play as a minor league.[74] The next year the league sought to attract major league players by doing without a reserve clause, thereby giving Federal League players the freedom to move between teams. The Federal League lured a number of star players, although most of the players it lured were past their prime. On the other hand, Federal League teams played in new, state-of-the-art stadiums. The Major League teams responded to the competition from the Federal League by offering higher player salaries and three-year contracts. Between 1913 and 1915, when the Federal League was in existence, player salaries rose 67%, from $3,000 to $5,000.

The Federal League filed an antitrust lawsuit against the National League and American League in January 1915 in an attempt to break their reserve clause and thereby aid the Federal League in attracting players from those leagues. After the 1915 season, a deal was reached whereby the American and National leagues would help the Federal League owners who were in debt in exchange for the disbanding of the Federal League and the dropping of the antitrust lawsuit. Teams in all three leagues were struggling financially. In some cases, a Federal League team played in the same city as an American or National league team, and all teams with such direct competition were having financial problems. The owner of the Federal League's Chicago Whales was allowed to purchase the National League's Cubs and move them to the Whales' new ballpark – known today as Wrigley Field. The owner of the Federal League's St. Louis Terriers was allowed to takeover the American League's Browns. Harry Sinclair, owner of a Federal League team, sold his players' contracts and reportedly made a fortune. By 1917, after the buy-out of most Federal League team owners, player salaries had fallen from $5,000 in 1915 to $4,000 in nominal terms (and even smaller in real terms given the inflation of the World War I period).

---

[73] The information in this paragraph and the next comes from Kahn (2000).

[74] The information in this paragraph and the next comes from Tarantino (2005), except for the player salary figures, which come from Kahn (2000).

The Federal League's Baltimore Terrapins were denied a Major League team, declined a $50,000 settlement, and filed an antitrust lawsuit not only against the National and American leagues but, among others, three executives of the Federal League. The Terrapins alleged, in the words of the U.S. Supreme Court, that "the defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League, and that the three persons connected with the Federal League and named as defendants, one of them being the President of the League, took part in the conspiracy."[75] The U.S. Supreme Court concluded that "the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." In other words, the business of baseball is not interstate commerce and thus not subject to federal antitrust laws.

Another economic threat to Major League Baseball came from the African American league, which prospered from the 1920s to the early 1940s. After the racial integration of MLB in 1947, the exodus of talent from the African American league led to its demise a few years later.[76]

As will be discussed further in Chapter 6, numerous economic studies have documented that MLB's reserve clause had a negative impact on player salaries. For example, Scully (1974) estimates players' marginal revenue products (MRPs) net of training and capital costs for the 1968 and 1969 seasons and finds that 'star' and 'average' players received salaries equal to 15% and 20% of their net MRPs, respectively. Medoff (1976) estimates that, during the 1972-74 seasons, 'star', 'average', and 'mediocre' hitters were paid 41%, 36%, and 30% of their MRP, respectively, while the corresponding figures for star, average, and mediocre pitchers were 49%, 51%, and 55%. Sommers and Quinton (1982) examine the 14 most sought-after players who became free agents after the 1976 season and find that the five pitchers were paid, on average, 99% of their MRPs during the 1977 season and the nine hitters were paid 84%, which suggests that non-free agents (i.e., players still bound by the reserve clause) were underpaid. Lehn (1982) compares average real salaries before (1971-76) and after (1977-80) the introduction of free agency and finds that, in the first year of free agency (1977), average real salaries rose 39%, from $51,501 to $76,066, and rose an additional 22%, to $99,876, the next year. The increases then dropped to 2.2% in 1979 and 1.2% in 1980. In addition, Lehn documents that the number of guaranteed years on players' contracts rose sharply after the introduction of free agency. Raimondo (1983), Hill and Spellman (1983), and Hill (1985) also compare player salaries to their MRPs before and after the introduction of free agency in 1977 and conclude that free agent salaries are much closer to players' MRPs than are non-free agent salaries. Thus, there is little dispute that, prior to the introduction of free agency, MLB's reserve clause enabled teams to pay players less than the value of their marginal revenue product, even after adjusting for the training costs which teams invest in their players.

[75] *Federal Base Ball Club of Baltimore v. National League*, 259 U.S. 200 (1922).
[76] See Fort and Maxcy (2001).

Did the reserve clause have any procompetitive rationale? One possibility is that it maintained competitive balance. Cash-rich teams like the Yankees could not simply outbid other teams for the best players. Since teams were able to trade players, however, a team such as the Yankees could simply acquire the best players by offering the best trades. Therefore, at least in theory, the reserve clause should have no effect on competitive balance in the league – a result known as the "Coase Theorem", named as Ronald Coase, winner of the 1991 Nobel Prize in Economics.

Many economic studies investigate the impact of MLB's reserve clause on 'competitive balance', as proxied by the standard deviation of teams' winning percentages, changes in the relationship between market size and team winning percentage, and the season-to-season correlation in team winning percentage. Evidence of an increase in competitive balance would include a decrease in the standard deviation of team winning percentages, a smaller (albeit positive) correlation between market size and team winning percentage, and a smaller season-to-season correlation in team winning percentage. If the reserve clause maintained competitive balance, then competitive balance should fall after the introduction of free agency. If the Coase Theorem is correct, the introduction of free agency should have no effect on competitive balance. As will be discussed further in Chapter 6, the studies yield conflicting results.

Some studies find little or no impact. For example, Besanko and Simon (1985) compare player movements over the period 1969-81, competitive equality over the period 1970-83, and the relationship between market size and team winning percentage over the period 1970-83; they find no statistically significant change in any of these measures before and after the introduction of free agency. Dolan and Schmidt (1985) examine the period 1969-83 and find no statistically significant change in the standard deviation of team standings and the Gini coefficient for total wins before and after the introduction of free agency; they find that the concentration of team revenue rose significantly in the American League, but not in the National League. Fort and Quirk (1995) compare the standard deviation of winning percentage in the period before (1966-75) and after (1976-85) the introduction of free agency and find no statistically significant change for either the American or National League. Hylan, Lage, and Treglia (1996) examine the movement of free agent and non-free agent pitchers across teams over the period 1961-92 and find that attaining free agent status does not significantly affect the probability of a pitcher changing teams, although pitchers with seven or more years of service are less likely to move to a new team during the free agency era. Cymrot, Dunlevy, and Even (2001) compare the movement of free agent and non-free agent hitters across teams using data on players who played both the 1979 and 1980 season; they document that the impact of the gain from moving on the probability of changing teams is the same for free agents (who pocket the gain) as non-free agents (whose gain is pocketed by the team).

On the other hand, some studies do find that competitive balance has been altered by the introduction of free agency – and not necessarily for the worst. For example, Drahozal (1986) examines the movement of players signing guaranteed contracts of five or more years during the period 1977-81 and found no evidence that free agents moved from teams in small cities to ones in large cities. However, over the period 1972-82, excluding expansion teams, the standard deviation of winning percentage fell in the National League, but rose in the American League, after the introduction of free agency. Likewise, the Spearman correlation coefficient for population and winning percentage fell for the National League and rose in the American League. If the Coase Theorem held, no change should have been detected. Balfour and Porter (1991) examine the period 1961-1989 and find some evidence that the variance of winning percentage fell after the introduction of free agency; they also find that the correlation of winning percentage across seasons fell dramatically after the introduction of free agency, which together suggest that the reserve clause may have hindered, rather than maintained, competitive balance. Butler (1995) examines the period 1946-92 and finds no statistically significant impact of free agency on the standard deviation of team winning percentage within a season, but shows that free agency significantly lowered the season-to-season correlation of team winning percentage. Horowitz (1997) constructs an 'relative entropy' measure of competitive balance for the period before (1903-75) and after (1976-95) the introduction of free agency and finds that competitive balance declined in the National League, consistent with the hypothesis that the reserve clause maintained competitive balance, but not in the American League. Depken (1999) calculates a Herfindahl Index based on each team's percentage of total wins before (1920-76) and after (1977-96) the introduction of free agency and finds that the concentration of wins increased in the American League, as one would expect if the reserve clause maintained competitive balance, but not in the National League. Eckard (2001b) finds that, excluding expansion teams, the variance of team winning percentage falls in the American League between the periods 1961-76 and 1977-92, but rises in the National League; in both leagues, the Herfindahl Index of teams with the highest winning percentage falls, suggesting the reserve clause hindered competitive balance.

Thus, the economic evidence suggests that MLB's reserve clause clearly depressed player salaries. Whether the reserve clause maintained, hindered, or had no effect on, competitive balance is unclear. If the reserve clause had a procompetitive rationale, it is not obvious.

American Football League vs. National Football League.[77] In 1958, and again in 1959, the son and heir of Texas oilman H.L. Hunt, Lamar Hunt, tried unsuccessfully to obtain an NFL franchise to be located in Dallas. He was also offered a 20% stake in the NFL's Chicago Cardinals, but declined. Hunt began formulating plans for a new professional football league which he naively believed – by his own later admission – would not be a rival to the NFL. In fact, he sought the NFL's blessing for the new league. He did not receive it. The American Football League was formed in August 1959 with six teams (Dallas,

[77] The discussion in this section is based primarily on the Wikipedia entries for "American Football League" and "AFL-NFL Merger", the two-part series titled "The AFL: A Football Legacy" posted on the Sports Illustrated website and dated January 22, 2001, and the appeals court decision in *American Football League v. National Football League*.

Denver, Houston, Los Angeles, Minneapolis, and New York), with two more teams (Buffalo and Boston) added later the same year. Team owners were required to post a $100,000 performance bond and contribute $25,000 of earnest money.

The Minneapolis team was owned by Max Winter, who in November 1959 announced that he was leaving the AFL to accept an NFL franchise offer – the Minnesota Vikings. The NFL offered Hunt an NFL expansion franchise in Dallas, which he rejected because he did not think it right to abandon his fellow AFL owners. The NFL awarded an expansion franchise to Dallas in January 1960 which would compete directly with Hunt's AFL team in Dallas. The Minneapolis franchise formally withdrew from the AFL on January 27, 1960 and three days later the AFL awarded a franchise to Oakland. The AFL filed an antitrust lawsuit against the NFL on June 17, 1960 over the NFL's awarding of an expansion franchise to Dallas and alleging the NFL interfered with the AFL's attempt to obtain a television contract. Its first contract with ABC averaged only $2,125,000 a year for the entire league.

The AFL began play in September 1960, drawing about 10,000-20,000 fans per game, whereas NFL games regularly had attendance in excess of 50,000 fans. Among the innovations introduced by the AFL were the two-point conversion, putting the official time on the scoreboard clock, putting players' names on their jerseys, network television broadcasting of league games, and the sharing of gate and television revenues by home and visiting teams.

In 1962, after a two-month trial, a federal court ruled against the AFL. The AFL appealed. In September 1963, the Appeals Court for the Fourth Circuit upheld the lower court's decision.[78] The district court had found that the two leagues competed in a national market for outstanding players and coaches, a national market for television coverage, and 31 metropolitan areas (cities with a population of at least 700,000 persons according to the 1960 census) for spectators. The AFL had argued that the relevant market for spectators should consist only of the 17 cities where the NFL either had a franchise or was seriously considering adding one in 1959. The appeals court rejected the AFL's proposed relevant market:

> It is not unlike the choice a chain store company makes when it selects a particular corner lot as the location of a new store. It preempts that lot when it acquires it for that purpose, but, as long as there are other desirable locations for similar stores in a much broader area, it cannot be said to have monopolized the area, or, in a legal sense, the lot or its immediate vicinity.
>
> The National League was first upon the scene… It now has franchises in fourteen cities, some of which the district court found capable of supporting more than one professional football team. Obviously, the American League was of that opinion, for it placed teams in New York, Los Angeles, and the San Francisco-Oakland area, where National, at the

[78] *American Football League v. National Football League,* 323 F.2d 124 (4th Cir. 1963).

time, had well established teams. Most of the other cities in which each league operates, however, are incapable of supporting more than one professional football team. In such a city, a professional football team, once located there, enjoys a natural monopoly, whether it be affiliated with the National or American League, but the fact that National had teams located in such cities before American's advent does not mean that National had the power to prevent or impede the formation of a new league, or that National's closed cities should be included in the relevant market if American's closed cities are to be excluded…

> Though there may be in the nation no more than some thirty desirable sites for the location of professional football teams, those sites, scattered throughout the United States, do not constitute the relevant market. The relevant market is nationwide, though the fact that there are a limited number of desirable sites for team locations bears upon the question of National's power to monopolize the national market.

The district court had observed that the NFL had franchises in only 11 of the 31 apparently desirable sites, leaving 20 entirely open to the AFL – and several sites were believed to be sufficiently large to support a team from each league. The appeals court rejected the AFL's argument that the NFL had grabbed the most desirable sites:

> There is no basis in antitrust laws for a contention that American, whose Boston, Buffalo, Houston, Denver and San Diego teams enjoy natural monopolies, has a right to complain that National does not surrender to it other natural monopoly locations so that they too may be enjoyed by American rather than by National. When one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly.

The AFL also argued that the NFL's expansion into Minneapolis and Dallas constituted an attempt to monopolize. The court rejected the argument, noting that the NFL had discussed expansion prior to the creation of the AFL. For example, in early 1956, the owner of the NFL's Chicago Bears, George Halas, predicted that the NFL would expand from 12 to 16 teams during the period 1960-65. The appeals court concluded "that the District Court properly held that the plaintiffs have shown no monopolization by the National League, or its owners, of the relevant market, and no attempt or conspiracy by them, or any of them, to monopolize it or any part of it."

In May 1963, having concluded that his Dallas team could not compete successfully with the NFL's Dallas Cowboys, Hunt moved his AFL franchise to Kansas City and renamed it the Kansas City Chiefs. On January 29, 1964, the AFL signed a five-year, $36 million deal to have its games broadcast on NBC beginning with the 1965 season. As a result, the AFL could better compete with the NFL for talent. Sometimes teams from the two leagues drafted the same collegiate player; sometimes the player chose to sign with the AFL team (e.g., Joe

Namath), sometimes the player signed with the NFL team (e.g., Gale Sayers). The competition for player talent increased further when Oakland Raiders general manager Al Davis became AFL commissioner in April 1966. Davis sought to actively recruit players already on NFL rosters.

Meanwhile in April 1966, Hunt and Dallas Cowboy owner Tex Schramm were meeting secretly in Dallas to discuss concerns over soaring player salaries and the practice of player poaching. By the end of May, they had completed the groundwork for a merger of the two leagues. The merger was announced on June 8, 1966, the terms of which included the full merger of the two leagues by 1970 and an agreement by the AFL to pay indemnities of $18 million to the NFL over 20 years due to the potential harm to the NFL's San Francisco Forty-Niners and New York Giants from having to compete with the AFL's Oakland Raiders and New York Jets, respectively. Davis was so furious he resigned as AFL commissioner on July 25 rather than serve until completion of the merger. Davis opposed the merger because he believed that in a competition between the AFL and NFL, the AFL would prevail. As discussed in Chapter 3, despite now being an NFL owner himself, Davis has not been reluctant to oppose NFL rules and policies which he believes harm his Oakland Raiders.

The NFL obtained an antitrust exemption from Congress to allow the merger to occur. An NFL expansion franchise was awarded to New Orleans, the Saints, allegedly because of the support given by several Louisiana politicians to the legislation. Testifying before a Congressional hearing in support of the legislation, NFL Commissioner Pete Rozelle promised that, if the merger was allowed, none of the existing franchises in either league would relocate from their current city. Since then, many of these franchises have, in fact, relocated, including the Oakland Raiders (which moved to Los Angeles in 1982 and back to Oakland in 1995), the Baltimore Colts (which moved to Indianapolis in 1984), the St. Louis Cardinals (which moved to Arizona in 1988), the Los Angeles Rams (which moved to St. Louis in 1995), the Cleveland Browns (which moved to Baltimore in 1996), and the Houston Oilers (which moved temporarily to Memphis in 1997 and then permanently to Nashville in 1998).

American Basketball Association vs. National Basketball Association.[79] The American Basketball Association was formed in 1967 by a group of investors unwilling to pay the NBA's high price for a new franchise. The ABA placed teams in cities believed to have the potential fan base to support an NBA franchise but which had not received one. The backup plan of the ABA team owners was to merge with the NBA. The ABA played without a television contract until the 1969-70 season when its All Star Game and several playoff games aired on CBS.

---

[79] The discussion in this section is based primarily on an article by Pete Madzelan titled "The ABA Changed the Game: Will It Change It Again" which appeared on the MLN Sports Zone website and the description of the *ABA v. NBA* lawsuit appearing on the website of Zelle Hofmann Voelbel Mason & Gette.

The ABA sought to make professional basketball more exciting, promoting superstars and introducing innovations such as the 3-point shot and a red, white, and blue basketball. It also did not follow the NBA's lead in adopting a 'four-year rule' whereby players had to be four years removed from high school before they could be drafted by an NBA team; the ABA recruited college underclassmen. The ABA also signed a number of NBA players. A U.S. district court found the NBA's four-year rule to be a restraint of trade in violation of the Sherman Act and the NBA amended its rule to allow the drafting of underclassmen showing financial hardship. In 1974, the ABA allowed the signing of high school players, once again forcing the NBA to amend its own draft rules. The two leagues competed for talent, to the benefit of the players but to the detriment of some of the financially shaky ABA teams.

In 1969, the ABA brought an antitrust lawsuit against the NBA alleging that it attempted to eliminate competition and restrain trade via the control or monopolization of players, facilities, and television coverage. The two leagues reached a tentative merger agreement in April 1970, which was unanimously approved by the ABA team owners, but an antitrust lawsuit brought by the NBA Players Association sought to block the merger. A federal court issued a restraining order preventing the merger. In 1971, the two leagues agreed to petition Congress for an antitrust exemption so that they could merge. The ABA brought another lawsuit against the NBA in 1974, believing that the NBA was not honoring the agreement and continuing to restrain trade. A few weeks prior to their scheduled trial in 1976, the two leagues reached a settlement in which four ABA teams (i.e., the Denver Nuggets, Indiana Pacers, San Antonio Spurs, and New York Nets) would join the NBA. Each of the four franchises paid $3.2 million to join the NBA, agreed not to receive any television revenue for the first three years, and agreed not to participate in the 1976 college draft.

Between 1967 and 1977, the average player salary in the NBA rose 615%, rising from $20,000 to $143,000; in comparison, player salaries rose 402% in the NHL (rising from $19,133 to $96,000 in the face of competition from the World Hockey Association), 302% in Major League Baseball (rising from $19,000 to $76,349 in the face of an adverse arbitration ruling resulting in the introduction of free agency), and 121% in the NFL (rising from $25,000 to $55,288).[80]

World Hockey Association vs. National Hockey League. The World Hockey Association was formed in 1971 and played its first games in the 1972-73 season. Prior to its formation, the NHL was the only major professional hockey league in North America. The three other professional hockey leagues in existence in North America at that time were the American Hockey League (AHL), the Western Hockey League (WHL), and the Central Hockey League (CHL), with the latter tending to have less talented players than the other two leagues. Among the amateur or semi-professional hockey leagues in existence were the International Hockey League and the Eastern Hockey League. The NHL required its member teams to have an affiliation with at least one 'player development team' and, in

[80] Kahn (2000).

fact, 16 of the 24 professional minor league teams had some form of affiliation with an NHL team – and all teams in the Central Hockey League were owned by NHL teams. Unlike the NFL and NBA which benefit from the talent developed by college football and basketball programs, the NHL had to invest millions of dollars in the amateur and minor leagues to develop potential major league-caliber players.

The NHL has had a reserve clause in its player contracts since at least 1952. In order for NHL teams to invest in young players, they allegedly needed assurance that they would have the right to sign the players they developed. However, player contracts in the AHL, WHL, and CHL also contained reserve clauses.

On August 18, 1972, the WHA filed an antitrust lawsuit against the NHL alleging that the NHL's reserve clause violated both Sections 1 and 2 of the Sherman Act. The district court issued its ruling on November 8, 1972.[81] Given that the WHA was seeking a preliminary injunction against the NHL's enforcement of its reserve clause, the district court refrained from ruling whether the reserve clause violated Section 1; however, the district court agreed with the plaintiffs on the Section 2 charge and therefore granted a preliminary injunction against the NHL.

The district court rejected the NHL's argument that it needed the reserve clause to protect competitive balance, noting that in the past 20 years, Montreal had won the Stanley Cup 12 times, Toronto four times, Detroit three times, and Chicago once. Thus, there did not appear to be much competitive balance even with the reserve clause. The district court also rejected the NHL's argument that the reserve clause is protected by the labor antitrust exemption, noting that (1) NHL players have sought to eliminate the reserve clause but the NHL has not granted any type of concession on the issue and (2) even if the reserve clause was the product of a collective bargaining agreement, a third-party such as a rival league would nevertheless have the right to challenge the reserve clause on antitrust grounds.

The relevant market was found to be major league professional hockey and the relevant geographic market was the United States and Canada. In particular, using the criteria set forth in *International Boxing Club of New York v. United States*, the court observed that major league hockey is quite different from minor league hockey in terms of "higher ticket prices, increased television revenues, and greater players' skill and salaries." Of the 158 players signed by the WHA as of July 21, 1972 to play the 1972-73 season, 111 (70%) were subject to the reserve clause in their contracts with the NHL, AHL, WHL, and CHL for the 1971-72 season. As of November 1972, more than 200 (58%) of the 345 players signed by the WHA for the 1972-73 season were subject to the reserve clause in their contract with the NHL, AHL, WHL, and CHL for the 1971-72 season. The district court found:

[81] *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972).

> The similarities of phraseology and basic incorporation of Clause 17 in the Standard Player's Contract of the AHL, CHL, WHL, and NHL is the result of a common agreement, mutual understanding, and conspiracy by the NHL and its affiliated minor leagues to maintain a monopolistic position so strong that the NHL precludes effective competition by the entry of another major professional hockey league. Through the totality of many interlocking arrangements, including the Joint Affiliation Agreement, the Pro-Amateur Agreement, and Clause 17 in the Standard Player's Contract, the NHL perpetuates a conspiracy and combination with the intent to monopolize and which monopolizes major league professional hockey. These concerted efforts were done not solely to maintain a high level of professional competition among the NHL teams, but rather the major reason was the desire to preclude others from ever having immediate access to the reservoir of players who could become part of another major professional hockey league which could be a material and viable competitor to the NHL.

The WHA folded after the 1978 season and four of its teams (Edmonton, Hartford, Quebec City, and Winnipeg) were absorbed into the NHL. Between 1970 and 1977, the average NHL salary jumped 284% (from $25,000 to $96,000); in comparison, NBA salaries rose 257.5% (from $40,000 to $143,000), MLB salaries rose 163% (from $29,000 to $76,349), and NFL salaries rose 60% (from $34,600 to $55,288).[82]

Jones and Walsh (1987) estimate NHL player salaries for the 1977-78 season and find evidence that some free agents were "overpaid" – their salary exceeded their gross marginal revenue product (GMRP). In particular, of the 14 players appearing in one of their tables, eight were paid more than $5,000 in excess of their GMRP, four were paid within $5,000 of their GMRP, and only two were 'underpaid' by more than $5,000. Moreover, separate analyses of player salaries and marginal revenue products for forwards and defensemen shows that, on average, no category of player was being paid less than his net marginal revenue product. Jones and Walsh argue that "the activities of the WHA were primarily responsible for the increased NHL salaries in the 1970s and brought an end to any presumption of persistent player exploitation." (p. 96) They also observe that, "if press reports are to be believed, … the NHL has not been able to use its reestablished monopolistic position to force salaries to their former levels." (p. 96) Thus, they conclude: "Obviously, institutional changes, partially prompted by WHA entry – antitrust rulings, the strength of the Players Association, and so on – have dulled the NHL's monopsony power." (p. 96)

United States Football League vs. National Football League. The United States Football League was founded in May 1982 as a 12-team league to play professional football in the spring, whereas the NFL plays its games in the fall and winter. The USFL began play in March 1983. It had network and cable

[82] Kahn (2000).

television contracts with ABC and ESPN. The USFL made the fateful decision to switch to a fall season in direct competition with the NFL beginning with the 1986 season. The broadcast and cable television networks, which were interested in showing spring football, were not interested in broadcasting non-NFL professional football games during the NFL season, especially given the fact that they were already under contract to broadcast the NFL games. Without a television contract for the 1986 season, the USFL found itself in a hopeless situation. In three seasons, the USFL lost approximately $200 million. It played its last game in July 1985.

In October 1984, the USFL filed an antitrust lawsuit against the NFL seeking damages totaling $1.701 billion and appropriate injunctive relief. The USFL alleged, for example, that the NFL had (1) prevented it from obtaining a television contract for the fall 1986 season, (2) attempted to co-opt some USFL team owners by offering NFL franchises to Donald Trump, owner of the USFL's New Jersey Generals, and Alfred Taubman, owner of the USFL's Michigan Panthers (Taubman denied being offered an NFL franchise), (3) holding a supplemental draft for players still under contract with an USFL team, and (4) expanding NFL team rosters from 45 to 49 players. The case went to a jury trial in 1986. The jury found that the relevant market was major league professional football in the United States and that the NFL had willfully acquired or maintained monopoly power in that market. Furthermore, the jury found that the USFL had been injured by the NFL's unlawful monopolization. Nevertheless, the jury awarded the USFL only $1 in damages, which were to be trebled – or a total damage award of $3. Following the jury's verdict, the USFL abandoned plans to play the 1986 season and folded.

The jury did not find that the defendants had violated Section 2 of the Sherman Act by attempting or conspiring to monopolize a relevant market. Although the jury found that the defendants had participated in a contract, combination, or conspiracy to restrain trade, the jury did not find it an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Nor did the jury find the NFL's contracts with the three television networks for the right to broadcast NFL games to be an unreasonable restraint of trade in violation of Section 1. The jury also rejected the USFL's 'essential facilities' claim, finding that the NFL did not have the ability to deny the USFL access to a national television contract.

The USFL moved for a judgment notwithstanding the verdict on each of the antitrust counts rejected by the jury and sought a new trial that would be limited to the issue of damages. The NFL filed a motion regarding the jury's determination that the NFL had unlawfully monopolized professional football in the United States. The district court rejected both motions.[83] The USFL appealed. On March 10, 1988, the appeals court affirmed the jury's verdict and held that "the anti-competitive activities on which the jury based its verdict did not justify a large damages verdict or sweeping injunctive relief."[84] The USFL was awarded treble damages totaling $3.

---

[83] *USFL v. NFL*, 644 F. Supp. 1040 (S.D. NY 1986).
[84] *USFL v. NFL*, 842 F.2d 1335 (2nd Cir. 1988).

The appeals court observed that "the USFL candidly admits that 'at the heart of this case' are its claims that the NFL, by contracting with the three major networks and by acting coercively toward them, prevented the USFL from acquiring a network television contract indispensable to its survival"; these claims had been expressly rejected by the jury. The appeals court ruled that the jury "was clearly entitled by the evidence to find that the NFL's fall contracts with the three networks were not an anticompetitive barrier to the USFL's bidding against the NFL to acquire a network contract." It also noted that "there was ample evidence that the USFL failed because it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league." The appeals court added:

> In particular, there was evidence that the USFL abandoned its original strategy of patiently building up fan loyalty and public recognition by playing in the spring. The original plan to contain costs by adherence to team salary guidelines was discarded from the start. Faced with rising costs and some new team owners impatient for immediate parity with the NFL, the idea of spring play itself was abandoned even though network and cable contracts were available. Plans for a fall season were therefore announced, thereby making 1985 spring play a 'lame-duck' season. These actions were taken in the hope of forcing a merger with the NFL through the threat of competition and this litigation. The merger strategy, however, required that USFL franchises move out of large television markets and into likely NFL expansion cities. Because these moves further eroded fan loyalty and reduced the value of USFL games to television, the USFL thereby ended by its own hand any chance of a network contract.

In other words, it was the USFL's own actions that led to its demise, not the actions – lawful or unlawful – of the NFL. The appeals court rejected the USFL's appeal:

> Notwithstanding the jury's evident conclusions that the USFL's product was not appealing largely for reasons of the USFL's own doing and that the networks chose freely not to purchase it, the USFL asks us to grant sweeping injunctive relief that will reward its impatience and self-destructive conduct with a fall network contract. It thus seeks through court decree the success it failed to achieve among football fans. Absent a showing of some unlawful harm to competition, we cannot prevent a network from showing NFL games, in the hope that the network and fans will turn to the USFL. The Sherman Act does not outlaw an industry structure simply because it prevents competitors from achieving immediate parity. This is particularly so in the case of major-league professional football because Congress authorized a merger of the two leagues existing in 1966 and thus created the industry structure in question.

Yet, despite the laughably small damages award, the competition between the USFL and NFL produced a clear winner – the players. Between the years 1977 and 1982, the real (inflation-adjusted) NFL salary grew an average of 4% annually. The average annual increase surged to 20% during the period 1982-85 when the NFL had to compete with the USFL for players. After the demise of the USFL, the increase between the years 1985 and 1989 plunged to 5%.[85] As Kahn (2000) explains, changes in NFL attendance and television revenues cannot account for these changes in player salaries.

North American Soccer League vs. National Football League. The North American Soccer League (NASL) was formed by the merger of two pre-existing soccer leagues in 1968. The NASL's organizer was Lamar Hunt, the founder of the American Football League and owner of the Kansas City Chiefs. Hunt owned the NASL's Dallas franchise, and later the Tampa Bay franchise. In 1975, the wife of the NFL's Miami Dolphins owner Joseph Robbie became majority owner of the NASL's Fort Lauderdale franchise and Joseph Robbie operated the soccer team.

The seasons of the NFL and NASL somewhat overlapped and teams from the two leagues often used the same stadiums. Some fans allegedly switched their interest from the NFL to the NASL. The two leagues competed in the sale of national broadcast rights and for national advertising revenue. NFL and NASL teams located in the same city competed for live attendance, local television audiences, and local advertising revenue.

The NFL had a policy against team owners holding a controlling stake in a team of a competing league since the 1950s, but did not put the policy into writing until January 1967 – when 12 owners of (pre-merger) NFL and AFL teams were involved in the formation of the predecessors to the NASL. In 1972, NFL owners passed a resolution stating that NFL owners were not to acquire operating control of a team in a competing league and any owner who possessed such an interest should make a 'best effort' to dispose of it.

The NFL's Philadelphia Eagles were unprofitable in each year from 1969 to 1974 and again in both 1976 and 1977. Around the same time, the NASL's Philadelphia Atoms were leading the league in attendance. The Eagles' owner Leonard Tose denounced Hunt for saying that soccer was the sport of the future. Tose suggested that fans have only so many dollars to spend on sports entertainment so any dollar they spend on a sport other than football may be one less dollar spent on football. In other words, the NASL's Philadelphia Atoms were taking revenue from the NFL's Philadelphia Eagles. Max Winter, owner of the NFL's Minnesota Vikings, had a similar concern about the NASL's Minnesota Kicks.

In 1978, NFL owners proposed an amendment that would have prevented all majority owners, certain minority owners, officers, and directors of NFL teams (and certain relatives of such persons) from owning any interest in a 'major team sport' franchise. In effect, the amendment would have required both Hunt and

[85] The information in this paragraph comes from Kahn (2000).

Robbie to divest their soccer interests if they wished to continue to own an NFL team. On September 28, 1978, the NASL went to court to prevent the adoption of the proposed amendment. The court issued a preliminary injunction on February 21, 1979, concluding that the NASL would be irreparably injured by the amendment; the NFL did not appeal the injunction. After a lengthy trial, the court ruled that the purpose and impact of the NFL's cross-ownership ban was to suppress competition from the NASL but, because the NFL and its member teams had to be regarded as a 'single economic entity' in competition with the NASL, Section 1 of the Sherman Act did not apply.

The NASL appealed the decision. On January 27, 1982, the appeals court rejected the NFL's 'single entity' defense, noting that courts have repeatedly rejected the theory that, by acting as a 'joint venture', a combination of firms can gain exemption from Section 1 of the Sherman Act:[86]

> The characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. 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. For instance, the cross-ownership ban in the present case is not aimed merely at protecting the NFL as a league or "single economic entity" from competition from the NASL as a league. Its objective also is to shield certain individual NFL member teams as discrete economic entities from competition in their respective home territories on the part of individual NASL teams that are gaining economic strength in those localities, threatening the revenues of such individual teams as the NFL Philadelphia Eagles, owned by Leonard Tose, because of competition by the NASL's Philadelphia team, and the revenues of the NFL Minnesota Vikings because of competition by the successful NASL Minnesota Kicks. The NFL members have combined to protect and restrain not only leagues but individual teams. The sound and more just procedure is to judge the legality of such restraints according to well-recognized standards of our antitrust laws rather than permit their exemption on the ground that since they in some measure strengthen the league competitively as a "single economic entity," the combination's anticompetitive effects must be disregarded.

The appeals court rejected the NASL's claim that the NFL's cross-ownership ban should be condemned as a per se violation of Section 1 of the Sherman Act, deciding instead to analyze the ban under the rule of reason. The NFL defended the ban as being pro-competitive because it was necessary for NFL owners to compete efficiently in the professional sports league market, but the

[86] *NASL v. NFL*, 670 F.2d 1249 (2nd Cir. 1982).

appeals court noted that “the voluminous trial record discloses that the NFL’s cross-ownership ban would foreclose NASL’s teams from continued enjoyment of and access to a significant segment of the market supply of sports capital and skill, thereby restraining at least some NASL teams from competing effectively against NFL teams for fan support and TV revenues” and any resulting restraint “would benefit not merely the NFL as a league but those NFL teams that would be otherwise weakened individually and disproportionately (as compared with other NFL teams) by competing NASL teams.”

The NFL argued that there is no market (or ‘submarket’) for sports capital and skill – any difficulty the NASL or its teams had in obtaining such capital and skill would be due to the poor financial outlook of the franchises and not because of any inability to attract capital and skill due to the ban. The NASL argued that a market for sports capital and skill exists and is limited to existing or prospective major sports team owners. The district court had decided that a sports capital and skill market exists, but it is neither as narrow as the NASL, nor as broad as the NFL, asserts. The appeals court found that a sports capital and skill market exists and is not limited to existing or prospective sports team owners, but such owners constitute a significant portion of the market. The appeals court noted that the NFL does not believe its own argument that all sources of capital are fungible substitutes because, if that were true, the NFL would not have gone through the trouble of adopting the cross-ownership ban. Thus, given that the ban clearly restrains competition in this market, the question is whether its anticompetitive effect is outweighed by its pro-competitive effect.

The NFL argued that the ban was pro-competitive because it (1) assured the undivided loyalty of NFL owners in competing with the NASL in the sale of tickets and broadcasting rights, (2) prevented disclosure of confidential information to NASL competitors, (3) protected the personnel and resources of NFL owners from conflicting or excessive demands, (4) prevented the dilution of goodwill developed by the NFL, (5) avoided disputes between NFL cross-owners and other NFL owners, and (6) prevented interleague collusion in violation of the antitrust laws. The appeals court ruled that the first two pro-competitive rationales can be achieved by less-restrictive means, the third is unsupported since many NFL owners have other business interests, and the other pro-competitive effects are outweighed by the ban’s anticompetitive effect. Thus, the Appeal Court ruled in favor of a permanent injunction prohibiting the NFL’s cross-ownership ban.

The Philadelphia Eagles and Minnesota Vikings were concerned that they were being hurt by competition from NASL teams. There do not appear to any economic studies which test whether this in fact was the case. In general, the evidence from North American sports leagues provides little support for such a concern for the NFL and NBA, although there may be some effect on MLB and NHL live attendance. Table 4.1 summarizes the economic literature. Zuber and Gandar (1988) and Noll (1974) report no statistically significant effect on live attendance at NFL games from the presence of other professional sports teams in the same city. Burdekin and Idson (1991), Kahn and Sherer (1988), and Noll (1974) all report no statistically significant effect on live attendance at NBA games from the presence of other professional sports teams in the same city. On the other hand, Noll (1974) estimates that average NHL per game live attendance is 2,800 lower in the ‘average’ city with 3 other professional sports teams and that inter-sport competition reduces MLB season live attendance by 250,000 (21%) in the 'average' baseball city (3.5 million metropolitan population and 3 other professional sports teams). Demmert (1973) finds that the presence of a team with a winning record in another sport raises the season attendance of the MLB in the same city by 40,000, but reduces per capita attendance by 1.3 attendees.

Mixed results are also reported in England. Baimbridge, Cameron, and Dawson (1995) find no statistically significant effect on First Division rugby match attendance from other major sporting activities in the same area, but Baimbridge, Cameron, and Dawson (1996) find that the presence of an alternative sporting activity reduces English Premier soccer league match attendance by 28%.

Table 4.1

The Impact of Teams in Other Sports Leagues on Live Attendance

Sport	Study	Data	Attendance Measure	Measure of Teams in Other Sports Leagues	Estimate
MLB	Noll (1974)	Major League team season data for the 1970 and 1971 seasons.	Official paid admissions.	Number of other professional sports teams (baseball, basketball, football, hockey) located in the city.	Baseball attendance in the average baseball city (3.5 million metropolitan population and 3 other professional sports teams) is reduced by 250,000 (21%) due to intersport competition.
	Demmert (1973)	Major League team season data for 16 teams over the period 1951-69.	Team season attendance.	Sum of one plus winning percentage of all non-baseball professional sports teams within the same locality (if any).	Presence of one team with .500 record raises season attendance by 40,000 attendees, but lowers season attendance per capita by 1.3 attendees.
NBA	Burdekin & Idson (1991)	NBA team season data from the 1980-81 to the 1985-86 season.	Team season attendance.	Total number of other professional sports franchises (including other NBA teams) in home SMSA.	Not statistically significant.
	Kahn & Sherer (1988)	NBA team season data from the 1980-81 to the 1985-86 season.	Team season attendance.	Number of other major league sports franchises in the locality.	Not statistically significant.
	Noll (1974)	NBA and ABA team season data for the	Average attendance per game.	Number of other professional sports teams (baseball,	Not statistically significant.

Table 4.1

The Impact of Teams in Other Sports Leagues on Live Attendance

Sport	Study	Data	Attendance Measure	Measure of Teams in Other Sports Leagues	Estimate
		1969-70 and 1970-71 seasons.		basketball, football, hockey) located in the city.	
NFL	Zuber & Gandar (1988)	NFL games in the 1983 and 1984 seasons.	Game-day no-shows as a percentage of stadium capacity.	Dummy variable denotes another professional sports event (baseball, basketball, football, hockey) on the same day in the same city.	Not statistically significant.
	Noll (1974)	NFL team season data for the 1970 season.	Official paid admissions.	Number of other professional sports teams (baseball, basketball, football, hockey) located in the city.	Not statistically significant.
NHL & WHA	Noll (1974)	NHL and WHA team season data for the 1972-73 season for games played up to Feb. 15, 1973.	Average attendance per game.	Number of other professional sports teams (baseball, basketball, football, hockey) located in the city.	2,800 fewer attendees per hockey game in average city with 3 other professional sports teams.
Rugby (England)	Baimbridge, Cameron & Dawson (1995)	First Division matches in the 1993-94 season.	Match attendance.	Number of other major sporting activities in the area.	Not statistically significant.
Soccer (England)	Baimbridge, Cameron & Dawson (1996)	English Premier League matches in the 1993-94 season.	Match attendance.	Number of other major winter sporting activities (rugby league, rugby union, speedway, Endsleigh Football League teams) within the team's catchment area.	Presence of an alternative sporting activity reduces attendance by 28%.

There is also some evidence that television viewership of NBA and NCAA football games is reduced by the presence of teams in other sports leagues, particularly if those other teams are competing in playoff (as opposed to regular season) games. Table 4.2 summarizes these studies. Kanazawa and Funk (2001) analyze Nielsen television viewership ratings for local non-cable NBA games in the second half of the 1996-97 season and find that each additional professional franchise (MLB, NBA, NFL, NHL) in the viewing market reduces the Nielsen rating by between 0.50 and 0.68 points in their Generalized Least Squares model (the effect is not statistically significant in the Random Effects model). Hausman and Leonard (1997) analyze Nielsen ratings for NBA games broadcast on NBC from the 1990-91 through the 1992-93 season and find that the simultaneous broadcast of a NCAA basketball tournament game significantly reduces the Nielsen rating of the NBA game, but the simultaneous broadcast of a NCAA basketball regular season game does not. Pacey and Wickham (1985) examine nationally televised NCAA football games during the period 1976-81 and find that the simultaneous broadcast of a MLB World Series game lowers the Nielsen rating of the NCAA football game by 1.9 points, but the total number of hours of NFL and MLB games televised during the week does not.

Table 4.2

The Impact of Teams in Other Sports Leagues on Television Viewership

Sport	Study	Data	Television Viewership Measure	Measure of Teams in Other Sports Leagues	Estimate
NBA	Kanazawa & Funk (2001)	NBA games in the second half of the 1996-97 season.	Nielsen ratings for local non-cable games.	Number of major professional sports franchises (i.e., baseball, basketball, football, hockey) in the viewing market.	Each additional professional franchise reduces the Nielsen rating by 0.50-0.68 points (Generalized Least Squares model); not statistically significant in Random Effects model.
	Hausman & Leonard (1997)	NBA games broadcast on NBC from the 1990-91 through the 1992-93 season.	Nielsen ratings.	Dummy variable denotes games played while an NCAA basketball tournament game is being televised.	Simultaneous broadcast of NCAA basketball tournament game significantly reduces Nielsen rating of the NBA game.
				Dummy variable denotes games played while an NCAA regular season basketball game is being televised.	Not statistically significant.
NCAA Football	Pacey & Wickham (1985)	Nationally televised games during the period 1976-81.	Nielsen ratings.	Number of hours of professional football and baseball televised during the week.	Not statistically significant.
				Dummy variable denotes games played while a World Series baseball game is being televised.	Simultaneous broadcast of a World Series game lowers the Nielsen rating of the college football game by 1.9 points.

In summary, the formation of a rival sports league tends to be good news for players – their salaries invariably rise. Sports leagues have attempted to 'tie-up' their players with a reserve clause, thereby hindering a rival league's access to established players. Sports leagues contend that the reserve clause has a procompetitive rationale – it promotes competitive balance. Economic studies, however, have – at best – produced conflicting evidence on the impact of the reserve clause on competitive balance. Although rival leagues have successfully challenged some restraints on antitrust grounds, eventually the rival league has generally either folded and its teams disappeared, or it has merged in whole – or in part – with the incumbent league. In either case, player salaries suffer when the competition between leagues for players disappears.

Competition between leagues in different sports would not be expected to significantly raise player salaries, except for the relatively rare individual who excels at more than one professional sport, such as Bo Jackson who played in both NFL and MLB games. Cross-ownership bans have pro-competitive effects, such as aligning the incentives of owners, but those pro-competitive benefits have been found by courts to be either outweighed by their anticompetitive effect or achievable by less restrictive means.

Chapter 5

Sports Leagues vs. Prospective Teams and Owners

Sports leagues decide which teams will be members and who can own them. Given the instability of joint ventures discussed in Chapter 3, this should come as no surprise. Sports league members have to cooperate, at least to some extent, in order to produce their product. Just because a team from a rival league, say, is of a quality comparable to that of teams in the incumbent league does not mean that the incumbent will necessarily admit the team into the league – just as an automotive joint venture between General Motors and Toyota would not necessarily admit Ford into the joint venture if it made such a request. The costs of admitting a particular new member may simply not be worth the cost.

On the other hand, by restricting membership, a sports league arguably raises the market price of its product. If more teams were admitted into the league, the supply of tickets to league games would rise, which would tend to have a negative effect on ticket prices.

Sports leagues also have an interest in who owns the member teams. Once again, the league needs cooperation among its members. A prospective owner who is not expected to be a good joint venture partner will not be approved. For example, sports leagues have an interest in ensuring that their games are viewed as honest and fair. Therefore, a league may not approve the sale of a member team, for example, to someone with connections to gambling or organized crime. (Interestingly, the Women's National Basketball Association approved the ownership of one of its teams by a casino.)

This chapter focuses on attempts by prospective teams to gain admittance into a major sports league and by prospective (or current minority) owners to acquire control of a professional sports franchise.[87] One tactic has been to file an antitrust lawsuit against the league if admittance is denied. These lawsuits have generally not succeeded.

---

[87] For an interesting case involving a prospective team owner who allegedly failed to obtain an AFL expansion franchise (this was prior to the AFL-NFL merger) because of a restrictive covenant between the NFL's Washington Redskins and RFK Stadium, where the Redskins played, see *Hecht v. Pro-Football*. The restrictive covenant prevented any team other than the Redskins from playing professional football at RFK and thus Hecht was unable to obtain a stadium lease for the expansion team he hoped to receive. Hecht sued the Redskins and RFK Stadium, arguing that RFK was an 'essential facility' for the hosting of professional football games in Washington, D.C., and the restrictive covenant was a restraint of trade. Plaintiffs and Defendants agreed that the relevant product market was the business of professional football, but disagreed on the geographic market. Plaintiffs contended it was limited to Washington, D.C.; Defendants contended it was national in scope. The district court essentially sided with the Defendants' definition and the jury found in favor of the Defendants. The appeals court, however, ruled that the geographic market was only Washington, D.C. and therefore ordered a new trial.

Prospective Teams Seeking Admittance Into a Closed League. There are numerous reasons why a sports league will want to control who can become a member, as the discussion in Chapter 3 on the instability of joint ventures shows. The refusal to add a new member may harm the prospective member seeking to be admitted, but it does not harm consumers. There is no reduction in competition when a prospective member is refused admission – the prospective member was seeking to share in the league's profits, not compete with the league. This distinction is crucial for understanding why sports leagues' refusals to admit new members were not found to be a violation of the antitrust laws in *Mid-South Grizzlies v. NFL* and *Seattle Totems v. NHL*.

> *Mid-South Grizzlies v. NFL*.[88] The World Football League (WFL) played its first season in 1974 but folded halfway through the 1975 season. The WFL's rules differed from those of the NFL in a number of respects. For example, a touchdown was worth 7 points and an 'action' point (as opposed to an 'extra' point) could only be scored by running or passing – not a kick). One of the WFL's teams was the Memphis Southmen, which had made a splash by signing three players from the NFL's Miami Dolphins – running backs Larry Csonka and Jim Kiick and wide receiver Paul Warfield. The Southmen finished the 1974 season in first place in its division with a record of 17-3, but lost in the playoff semi-finals. After the league folded, the team changed its name to the Memphis Grizzlies and applied for admission to the NFL.
>
> The NFL's Constitution and Bylaws stated that a new league member could only be added to the 'home territory' of a current member by the unanimous consent of league members. A prospective league member who would not encroach on the home territory of a current member would need the approval of at least 20 NFL members or three-fourths of the NFL members, whichever was greater. The NFL did not have a franchise in Memphis and a Memphis-based team would not encroach on the home territory of any NFL member. The NFL rejected the Grizzlies' application. On December 3, 1979, the Grizzlies filed an antitrust lawsuit against the NFL alleging that the rejection amounted to an unreasonable restraint of trade – a group boycott.
>
> The Grizzlies, it should be noted, did not challenge the NFL's franchise exclusivity for designated home territories, the NFL's revenue-sharing arrangement requiring a 60-40 revenue split between the home and visiting team, and the NFL's joint sale of television rights. Rather, the Grizzlies wanted to become a participant in these arrangements and the NFL had refused. The Grizzlies suggested that the NFL's refusal was an attempt to punish, intimidate, and restrain it for participating in the WFL and thereby competing against the NFL. The Grizzlies alleged that the NFL's refusal to admit it as a member violated Section 1 of the Sherman Act and, in addition, the NFL was attempting to monopolize interstate trade and commerce in professional football in violation of Section 2 of the Sherman Act.

[88] The discussion in this section is based primarily on the Wikipedia entry for the World Football League and the appeals court decision in *Mid-South Grizzlies v. NFL*.

The district court granted summary judgment to the NFL. The Grizzlies appealed. On November 4, 1983, the appeals court affirmed the district court's decision.[89]

The Grizzlies had argued that the relevant product market is major league professional football and the relevant geographic market is the United States. The district court agreed and observed that "there is no doubt that the NFL currently has a monopoly in the United States in major league football." The question posed by the Grizzlies on appeal was thus "whether it can be said as a matter of law that defendant neither acquired nor maintained monopoly power over any relevant market in an unlawful manner." The appeals court answered that the NFL's market power is based, at least in part, on the Sports Broadcasting Act of 1961 and its 1966 amendment approving the NFL-AFL merger:

> As to the acquisition of dominant position and monopoly power, the facts are undisputed. Long before the Grizzlies and the World Football League came into existence, Congress authorized the merger of the two major football leagues extant in 1966, and granted to the merged league the power to pool television revenues. That congressional decision conferred on the NFL the market power which it holds in the market for professional football. Congress could not have been unaware that the necessary effect of the television revenue sharing scheme which it approved for the NFL would be that all members of that league would be strengthened in their ability to bid for the best available playing and coaching personnel, to the potential disadvantage of new entrants.
>
> … It would take a court bolder than this to claim that the congressionally authorized acquisition of market power, even market power amounting to monopoly power, was unlawful under Section 1 of the Sherman Act. … Since the 1966 statute is not directed at preservation of competition in the market for professional football, and cannot be construed as conferring any economic benefit on the class to which the Grizzlies belong, we conclude that it does not oblige the NFL to permit entry by any particular applicant to the NFL shared market power.

The appeals court then considered whether any NFL obligation to permit entry to its shared market power arises from the Sherman Act. According to the Grizzlies, the NFL's antitrust violation was the refusal of its application for membership. The appeals court found that "the exclusion was patently pro-competitive since it left the Memphis area, with a large stadium and a significant metropolitan area population, available as a site for another league's franchise, and it left the Grizzlies' organization as a potential competitor in such a league." Thus, the refusal to admit the Grizzlies into the NFL did not harm interleague competition and the question becomes whether it harmed intraleague competition. The NFL argued that there is no intraleague competition – the NFL is a single entity and a joint venture. The Grizzles, according to the appeals court, failed to

[89] *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3rd Cir. 1983).

show that their franchise would compete for the same ticket and team paraphernalia purchasers and local broadcast outlets as the NFL team based in St. Louis, the nearest NFL franchise (which was over 280 miles away). Moreover, the Grizzlies competed for players and coaches when they were in the WFL, so interleague competition for players and coaches was not harmed by the refusal to admit the Grizzlies into the NFL. Finally, the Grizzlies argued that the NFL is an 'essential facility' and thus has an obligation to admit members on fair, reasonable, and equal terms unless there is some pro-competitive rationale for denying admission. The appeals court rejected the essential facilities argument, noting that there is no evidence that competition (in the economic, not athletic, sense) would be improved if the Grizzlies joined the NFL.

As for the Section 2 claims, the appeals court noted that the same analysis applies. The congressional legislation of 1961 and 1966 authorized the NFL's acquisition of market power and the Grizzlies only challenged their exclusion from that shared monopoly. The Grizzlies did not show how their admittance into the NFL would promote competition in the economic sense.

Seattle Totems v. NHL.[90] The Seattle Totems played in the Western Hockey League. Despite winning the WHL championship in both the 1966-67 and 1967-68 seasons, the team's on-the-ice performance plunged in the early 1970s and, after the financially disastrous 1971-72 season, the Totems owners, Vince Abbey and Eldred Barnes, sold a majority interest in the team to the owner of the NHL's Vancouver Canucks, Northwest Sports. The Totems became a farm team for the Canucks. However, the agreement included a provision that said that if an NHL franchise were offered to Seattle, Abbey and Barnes had the right to repurchase the Totems from Northwest Sports.

In April 1974, the NHL announced that Seattle and Denver would receive franchises and begin play with the 1976-77 season. The WHL folded after the 1973-74 season and the Totems moved to the Central Hockey League in anticipation of becoming an NHL franchise. The Totems finished in last place in the 1974-75 season and, even worse, Abbey had difficulty finding money to pay the NHL's franchise fee. Abbey also explored moving either the NHL's San Francisco or Pittsburgh franchise to Seattle to begin play in the 1974-75 season. The Totems had lost $2 million since Northwest Sports had acquired a majority interest in the team.

The NHL's plan to add franchises to Seattle and Denver failed, with neither city obtaining an NHL franchise (the newly-formed World Hockey Association did locate a team in Denver, however). Abbey sued the NHL for antitrust violations, while Northwest Sports sued Abbey for his share of the Totems' losses (eventually winning $1.3 million). In particular, Abbey alleged that the NFL and its member teams had monopolized professional hockey in North America, in violation of the Sherman Act. Abbey also alleged that the

[90] The discussion in this section is based primarily on information posted on the seattlehockey.net website and on the appeals court decision in *Seattle Totems Hockey Club v. NHL*.

NFL's anticompetitive activities prevented the Totems from securing a WHA franchise and from forming a new league with other WHA teams. Abbey's lawsuit against the NHL did not succeed, as an appeals court finally threw out the case in 1986.[91] The appeals court found that there was no reduction of competition because the Totems were seeking to join the NHL and share in its profits, not compete against the NHL:

> The Totems were not competing with the NFL; they were seeking to join it. They were granted a conditional NHL franchise but failed to fulfill the conditions precedent to obtaining a final franchise. The WHA was competing as a major professional hockey league at that time. Without an NHL franchise Seattle constituted a potential WHA site, and the denial, if any, of an NHL franchise under these circumstances did not injure competition… There is no contention or showing that the denial was to protect any other major league team in the Seattle market; there was none…
>
> The Totems argue that there is more here than the mere denial of a sports franchise. They argue that there was a grand scheme on the part of the NHL to destroy the WHA by promising franchises to WHL teams so that those teams would not join the WHA. "Once peace had been made between the NHL and WHA, however, the NHL moved to avoid its responsibilities" under its White Paper agreement with the WHL. One of those alleged "moves" was apparently to deny Seattle a franchise. This argument misses the point. The Totems' allegations of wrongful conduct by the NFL do not establish that competition in the relevant market was injured by those acts. Consequently, the Totems have failed to meet their burden of proof on this issue.

Bowl Championship Series.[92] Prior to the 1998 season, Division I-A college football was unique in that it did not have a formal system for deciding a national champion. Unlike, for example, college basketball with its 'March Madness' post-season tournament, the top college football teams played in a single post-season bowl game and only by chance would the top two teams play each other. (Of course, fans disagreed vehemently over who the top two teams were.) For example, the champions of the Big Ten and Pac-10 conferences would meet each year in the Rose Bowl. Thus, if the Big Ten or Pac-10 champion was ranked #1 or #2, the only way a #1 versus #2 matchup could occur is if its Rose Bowl opponent was ranked #1 or #2 as well. In other words, prior to the 1998 season, a 'true' national championship game, if it was to occur at all, would occur by accident.

---

[91] *Seattle Totems Hockey Club v. NHL*, 783 F.2d 1347 (9th Cir. 1986).

[92] The discussion in this section is based primarily on the Wikipedia entry "Bowl Championship Series", an article on the ESPN website titled "Utah's Attorney General Considers Move" dated November 15, 2003, Carroll (2004), and Moreland (2005).

The conferences participating in a bowl game did not share their bowl revenue with non-participating conferences.

The six most prominent Division I-A football conferences – the Atlantic Coast Conference (ACC), Big East, Big Ten, Big Twelve, Pacific Ten (Pac-10), and Southeastern Conference (SEC) – along with independent Notre Dame, created the Bowl Championship Series (BCS) for the 1998 season. As it was initially formulated, the champions of each of those six conferences would play in the four most prestigious bowl games (i.e., the Rose Bowl, Sugar Bowl, Fiesta Bowl, and Orange Bowl). Thus, at least six of the eight spots in the 'BCS Bowls' would be filled by 'BCS teams.' If Notre Dame finished the season ranked sufficiently highly, it would automatically receive one of the two 'at-large' spots. If a team from a non-BCS conference finished sufficiently highly, it would also automatically receive one of the 'at-large' spots.

The four BCS Bowls alternated hosting the championship game between the #1- and #2-ranked teams based on the BCS formula, which depended on polls, computer rankings, strength of schedule, number of losses, and victories over top-10 ranked teams. The BCS has generated revenues of approximately $100 million annually, with roughly 95% distributed to the six BCS conferences and the remainder distributed to non-BCS conferences.

The non-BCS conferences complained that the BCS made it almost impossible for one of their teams to ever play in the national championship. Moreover, the disparity in revenue received by the conferences made it virtually impossible for a non-BCS conference to improve to the point where its champion would one day play in the national championship. Congress held hearings on the antitrust implications of the BCS in 2003. Utah's Attorney General, whose state was host to three non-BCS teams (i.e., Brigham Young University, Utah, and Utah State) called for an antitrust investigation. The BCS allegedly represented a 'group boycott' of non-BCS conferences.

In response to these complaints, the BCS added a fifth bowl – the national championship game – for the 2004 season. By adding a fifth bowl, there are now four at-large slots (with Notre Dame automatically getting one of those slots if it is ranked sufficiently highly).

Carroll (2004) and Moreland (2005) analyze the antitrust implications of the BCS prior to its addition of a fifth bowl game. Both agree that the BCS's alleged group boycott should not be treated as a *per se* violation of the antitrust laws. Rather, the BCS must be examined under the rule of reason. Both conclude that the BCS does not violate the Sherman Act. Moreland points out that the addition of a fifth BCS bowl game and the consequent increase in the number of 'at-large' slots makes the BCS as it is configured today even less likely to violate the antitrust laws.

The BCS had the pro-competitive effect of creating a new product – a Division I-A national football champion. Not surprisingly, some fans continued to complain that their team was denied a chance to play for the national championship because their team 'deserved' to be ranked either #1 or #2. In other words, if there is no consensus as to which two teams are the best at the end of the regular season, there will be no consensus as to which two teams should play in the national championship game. Nonetheless, compared to the situation prevailing prior to the creation of the BCS, today there is greater consensus as to which team is the 'true' national champion.

Is there a 'less restrictive' alternative to the BCS? BCS critics argue that the national champion should be determined via a playoff system. As Carroll (2004) explains, a playoff would destroy two of the BCS's primary objectives – to remain faithful to college football's long bowl game tradition and to place a premium on success over the course of an entire season. The BCS as it is currently structured makes every game during the season meaningful – one loss makes a team's chances of a national championship precarious and two losses are likely fatal. In a playoff format, in contrast, a few losses may be 'good enough' in that the team may still be sufficiently highly rated to qualify for the playoff, and thus still have a chance for the national championship. Fan interest in regular season games would likely be lower under a playoff system than under the current BCS format.

The 'closed' nature of North American sports leagues enhances the market power of the individual league members. Teams frequently use the threat of relocation to extract public subsidies for new stadiums.[93] The "closed" nature of North American sports leagues is quite different from the relatively "open" nature of European sports leagues. As Ross and Szymanski (2002) explain, European sports leagues for such sports as soccer, rugby, basketball, and cricket are comprised of multiple tiers, or divisions, and each year the worst-performing teams in a division are demoted to the next lower division while the top performers are promoted to the next higher division. Due to the possibility of promotion to a higher quality division, teams in lower divisions have an incentive to invest in higher quality players and fan interest in the lower leagues is enhanced. Moreover, the entry and exit of teams in a division each year hinders the ability of the incumbent franchises to exercise market power, particularly with respect to obtaining tax subsidies for new stadiums. As will be discussed in more detail in Chapter 12, Szymanski and Ross believe that the decision by current North American teams to maintain a closed-league structure constitutes an unreasonable restraint of trade and they advocate a system of promotion and relegation so as to promote entry and curb market power.

Market power may also be curbed by simply adding more teams. As the discussion in Chapter 4 shows, leagues sometimes allegedly expand into new cities in order to make it harder for a rival league to compete. In such cases, expansion may enhance market power. However, not all expansion decisions are driven by a desire to make it more difficult for a rival to enter. Jones and Ferguson (1988) examine the NHL's expansion and find that, according to their model, the most profitable cities to add a NHL franchise were Winnipeg, Quebec City, Edmonton, and Calgary. The NHL did, in fact, expand to the first three cities by absorbing the WHA franchises located in those cities and allowed the NHL's Atlanta franchise to relocate to Calgary.

Not only would adding more teams to a league potentially reduce market power, it may actually improve the league's competitive balance. Schmidt (2001) finds that competitive balance increased markedly when the American League and National League began expanding in 1962 and 1963, respectively. One possible reason is the expansion

[93] See Vrooman (1997b).

draft, in which strong teams lose talented young players, key situational players, and established quality players (albeit ones who are overpaid, suffering from declining skills, or difficult to manage).

A few years ago, the talk in Major League Baseball was not about expansion, but contraction. Noll (2003a) argues that MLB teams create enormous social benefits because the alternative employment of MLB players pays so much less than they earn as MLB players. Nevertheless, Noll estimates that the elimination of the two weakest teams – Montreal and Florida – would benefit the remaining teams by approximately $1 billion. Litigation pushed back the contraction date to no earlier than 2003 and the new collective bargaining agreement pushed it back further to at least 2007. The Montreal franchise has since been relocated to Washington, D.C. and is now known as the Washington Nationals.

Prospective owners. Sports leagues generally require that franchise ownership changes be approved by the league. A prospective owner who fails to receive league approval may challenge the rejection on antitrust grounds, typically alleging an illegal group boycott. This section reviews several such lawsuits. In no case was the league rejection of a purchase by a prospective owner found to be an antitrust violation. It should be noted, however, that the league is not always named as a defendant. In some instances, the named defendant was found to be guilty of an antitrust violation, such as a refusal to deal, but the league's rejection of the purchase was not found to be anticompetitive.

> *Levin v. NBA*. In 1972, Irving Levin and Harold Lipton had an agreement to purchase the Boston Celtics. The purchase had to be approved by at least three-quarters of the NBA Board of Governors, which consists of one governor designated by each league member. At its June 1972 meeting, only two votes were cast in favor of the purchase, thirteen votes were cast against the purchase, and one governor was not present. Thus, the NBA Board of Governors rejected the proposed purchase.
>
> Levin and Lipton filed an antitrust lawsuit against the league alleging that its rejection was the result of an illegal group boycott motivated by the Governors' antipathy for Sam Schulman, owner of the Seattle Supersonics. Levin and Lipton were shareholders and officers of First Northwest Industries, the company that operated the Supersonics. Schulman was the president and principal shareholder of First Northwest. The NBA argued that this business relationship violated the 'conflict of interest' provision of the NBA constitution, which states: "A member shall not exercise control, directly or indirectly, over any other member of the Association." The provision was intended to maintain public confidence that NBA teams compete intensely within the league framework. Levin and Lipton, in contrast, argued that the NBA president and other league members regarded Schulman as a renegade, rebel, and troublemaker – and were concerned that the Celtics would vote the same way as the Supersonics in the future if the proposed purchase was approved.
>
> The district court granted summary judgment in favor of the NBA, noting that "plaintiffs wanted to join with those unwilling to accept them, not to compete with them, but to be partners in the operation of a sports league for plaintiff's

profit" and "no matter which reason one credits for the rejection, it was not an anti-competitive reason."[94] Thus, the court concluded that, "regardless of the financial impact of this rejection upon the plaintiffs, if any, the exclusion of the plaintiffs from membership in the league did not have an anticompetitive effect nor an effect upon the public interest."

Fishman v. Estate of Arthur M. Wirtz. In January 1972, Marvin Fishman and his investors' group had an agreement in principle to purchase the NBA's Chicago Bulls for $3.3 million. The Bulls had been playing at Chicago Stadium, which was controlled by Arthur Wirtz and his son William, under a series of short-term leases. Prior to seeking the NBA's approval for the purchase, Fishman sought a 3-year lease at a lower rate than the Bulls were currently paying; Wirtz refused. When Fishman tried to get the Bulls to lower their selling price, the Bulls refused. Some of the investors in Fishman's group split off and joined with Arthur Wirtz to form Chicago Professional Sports Corporation (CSPC) to attempt to acquire the Bulls. Fishman formed a new group, Illinois Basketball, Inc., (IBI) to pursue the purchase of the Bulls. Peter Graham, a Vancouver investor, also was attempting to acquire the team; when his offer was rejected by the Bulls, he dropped out of the competition.

On June 2, 1972, IBI submitted a signed offer to buy the Bulls for $3.3 million and, the same day, the Bulls' Executive Committee recommended that IBI's offer be accepted. CPSC attempted to renew negotiations with the Bulls, pointing out that IBI did not have anywhere for the Bulls to play and IBI would need the NBA's approval for the purchase. On June 9, CPSC submitted an executed stock purchase agreement to the Bulls along with a cashier's check for $3.3 million. Three days later, CPSC increased its offer by $50,000 in order to top IBI's offer. Nevertheless, on June 14, the Bulls formally accepted IBI's offer.

The NBA Board of Governors is comprised of one representative from each team and the NBA Constitution mandates that the transfer or sale of 10% or more of a franchise must be approved by at least three-quarters of the Board. Thus, IBI's purchase required the approval of at least 13 of the 17 Governors. By the time of the NBA Board of Governors meeting on June 15-16, 1972, the NBA Commissioner and the NBA Finance Committee had approved IBI's financial and 'moral' fitness to be an NBA owner.

Prior to the meeting, the NBA was informed by CPSC that its cash offer for the Bulls was higher than IBI's and that it had reached a 10-year deal with Arthur Wirtz to lease Chicago Stadium. On the evening prior to the meeting, the CPSC's president met with several NBA members and later admitted that "his purpose was to secure nonapproval of the transfer to IBI as this would be the only possible way his group could possibly acquire the Bulls." On June 15, only 10 of the 17 Governors voted to approve the sale to IBI – three less than needed for the NBA's approval.

One of the reasons why the transaction did not receive NBA approval was that IBI did not have a stadium lease and it was suggested that, if IBI could secure

[94] *Levin v. NBA*, 385 F. Supp. 149 (1974).

a lease, the proposed transfer could be voted on at the NBA's upcoming July 11 meeting. IBI attempted to discuss a lease with Wirtz, but Wirtz refused to meet with IBI or return its phone calls. Wirtz did discuss a lease with the Bulls' current owner, who was told that no lease would be entered into directly with IBI and that the Bulls should agree to be purchased by CPSC instead. On July 5, having failed to secure a lease with Wirtz, IBI executed a lease for the Bulls to play at the International Amphitheatre. Prior to the meeting, CPSC lobbied against IBI's purchase and made it clear to NBA members, in the words of the district court, that, "although the Chicago Stadium was not available to the Bulls (and the NBA) if the Bulls were sold to IBI, the Chicago Stadium would be available to the Bulls (and the NBA) if the IBI sale was aborted, and the Bulls sold to the Crown-Wirtz group." Once again, the IBI purchase received only 10 votes in favor, and thus failed to obtain the NBA's approval. Six of the seven no votes based their decision, at least in part, on their belief that the International Amphitheatre was entirely inadequate and unacceptable. (The seventh, Phoenix, could not recall why it voted no.) Some NBA members admitted that they were persuaded by CPSC to aid its attempt to acquire the Bulls.

On July 19, 1972, pursuant to having failed to gain NBA approval, the contract between IBI and the Bulls was terminated. On July 28, the Bulls reached an agreement to be purchased by CPSC. The NBA approved the purchase on August 10.

Fishman and IBI filed an antitrust lawsuit alleging that (1) Wirtz had violated Section 2 of the Sherman Act by his 'refusal to deal' with the plaintiffs regarding a lease for Chicago Stadium, and thus prevented plaintiffs from entering the market for the presentation of live basketball in Chicago, (2) the other participants in CPSC violated Sections 1 and 2 of the Sherman Act by conspiring with Wirtz to withhold a lease for Chicago Stadium from IBI and instead to make such a lease only available to CPSC, and (3) defendants had violated Sections 1 and 2 of the Sherman Act by conspiring with the NBA and certain NBA members in a group boycott to prevent IBI from acquiring the Bulls. On October 28, 1981, the district court ruled in favor of the plaintiffs on all counts.

The defendants appealed, questioning the district court's delineation of the relevant market and its conclusion that the antitrust laws apply to competition for the acquisition of a natural monopoly. The appeals court issued its decision on November 21, 1986.[95]

The district court had found that the relevant market was competition for the presentation of live professional basketball in Chicago, that this was a natural monopoly market, and the bidding competition to acquire a natural monopoly falls within the purview of the antitrust laws. In particular, the district court found that Chicago Stadium was an 'essential facility' for the presentation of live professional basketball in Chicago and the Wirtzes had exercised their 'strategic dominance' of the market for suitable arenas to exclude IBI from the relevant market. Defendants argued that the relevant market was the nationwide market for the purchase of professional sports franchises. The appeals court sided with the district court, observing: "It is not clearly erroneous to define the relevant market

[95] *Fishman v. Estate of Arthur M. Wirtz*, 807 F.2d 520 (7th Cir. 1986).

in these circumstances as the market to which access is sought." Although the case could be viewed from the perspective of a national sports franchise market, doing so would change the 'theory' of the case, with the issue being whether CPSC had acquired a monopsony on basketball franchises in Chicago.

The district court found that the market for the presentation of live professional basketball in Chicago is a natural monopoly because, as a practical matter, the city could not support two such franchises. Moreover, the NBA grants exclusive territories to its teams so if one wanted to present live professional basketball in Chicago, one would have to buy the Bulls. Thus, defendants argued that IBI and CPSC competed for a natural monopoly and it is irrelevant to Bulls fans whether IBI or CPSC acquired the team since they would face a monopolist in any event. Defendants alleged that the antitrust laws do not apply, since they are designed to protect competition, not competitors. The appeals court sided with the district court in concluding that the Sherman Act protects competition to acquire a natural monopoly.

The district court found that Chicago Stadium was an 'essential facility' – it could not be reasonably duplicated and access to it was necessary if one wished to compete – and, therefore, its owner was obligated to make the facility available to competitors on nondiscriminatory terms. By refusing to lease to IBI for no sound reason, defendants had violated Section 2 of the Sherman Act. Defendants argued that Chicago Stadium was not an essential facility and there was no refusal to deal. The appeals court disagreed on both counts. Chicago Stadium "was not duplicable without an expenditure that would have been unreasonable in light of the size of the transaction such duplication would have facilitated" – building a new stadium would cost $19 million, several times the cost of purchasing the Bulls' franchise. Furthermore, Wirtz had no legitimate business reason not to negotiate with IBI regarding a lease.

The appeals court disagreed with the district court's finding that the NBA's refusal to approve the transfer of the Bulls to IBI constituted a 'concerted refusal to deal' or 'group boycott.' The appeals court countered: "We cannot approve the district court's treatment of this alleged violation, however, because the evidence supporting this common scheme shows only that CPSC shareholders successfully lobbied certain NBA members so as to ultimately win league approval for themselves." Citing *Levin v. NBA*, the appeals court argued that the act of voting to reject a proposed transfer of ownership, by itself, is not an antitrust violation. Thus, the appeals court asserted: "In the case before us, the NBA decision, on its own, was not an anticompetitive act."

In his dissent, Judge Easterbrook attacked the court's finding as to the relevant market, arguing that the relevant market is the national market for sports franchises, and in this market, Chicago Stadium has no market power – and thus there is no injury to consumers:

> The market definition in this case shows why you can't pick a market without knowing the purpose of the choice. The court has defined a market of professional basketball in Chicago. This is a plausible market, if the question is whether anything injured consumers. It looks at demand elasticity (can fans travel to Milwaukee? Switch allegiance from

basketball to hockey or opera?) and at a supply elasticity (can new teams sell their product if the Bulls cut back output? can TV pipe other NBA games into Chicago?). Defining the market in this way shows that if the Stadium had contrived to prevent the start-up of a second basketball team – as the stadium in *Hecht v. Pro-Football, Inc.*, 187 U.S. App. D.C. 73, 570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978), contrived to stop the advent of a second pro football team in Washington, D.C. – there would be a serious antitrust problem. This definition also shows that the sale of the Bulls to CPSC rather than IBI could not injure consumers; it did nothing to conditions of either demand or supply.

> If, instead, we seek to learn whether CPSC harmed competition for a sports franchise, we must define a market that looks at the demand and supply possibilities facing Rich [the Bulls' owner] and IBI. Rich could have been injured if IBI and CPSC, in cahoots, rigged their bids, or if CPSC had prevented IBI from bidding. But Rich has not complained. To tell whether IBI's opportunities as a would-be operator of professional sports teams were hampered, we must look at its options, not those of fans in Chicago. There is a national market in sports franchises, as the makeup of IBI and CPSC shows. Each syndicate includes owners of sports teams in other cities (and in other sports) around the country; Fishman himself had an interest in the Milwaukee Bucks basketball team. The Second Circuit has held that there is a national market in "sports capital". *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.), cert. denied, 459 U.S. 1074, 74 L. Ed. 2d 639, 103 S. Ct. 499 (1982). There is also a national market in which arenas compete for teams. See *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984), and consider the saga of the Indianapolis … Colts, *Indianapolis Colts v. Mayor and City Council of Baltimore*, 775 F.2d 177 (7th Cir. 1985). We need not discuss the Brooklyn Dodgers … or the Washington Senators. Which market matters depends on the theory of competition involved… The court today chooses a market (pro basketball in Chicago) the buyers in which were unaffected by the conduct in issue; a market looking at the opportunities of Fishman and IBI, such as a market in sports franchises, would reveal that the Stadium lacked market power; either way, the lack of injury to consumers reveals that there is no violation.

Judge Easterbrook also disputed the contention that Chicago Stadium is an 'essential facility.' The Bulls, in fact, formerly played their games at the International Amphitheatre, until the burning of McCormick Place forced them to move. Moreover, Fishman could have built the Rosemont Center, which was built after 1972, and become its prime tenant:

> The majority's observation (slip op. at 30-31) that $19 million is a lot of money, more than the initial cost of the Bulls (though certainly not more

> than the ongoing cost of running the Bulls) is irrelevant; a new arena would have had more tenants than the Bulls. The observation is like saying that if DeLorean wants to build only 1,000 cars a year, it is "uneconomic" to build a new plant, and therefore General Motors must build DeLorean's cars for him. Antitrust law requires nothing of the sort. A stadium is the place in which sporting contests are "manufactured." A would-be manufacturer cannot hire a crew of employees (the team) and demand that someone else supply the plant.

While Judge Easterbrook seriously disagreed with the court's decision on a number of points, he concurred in the court's decision that the NBA's rejection of the transfer of the Chicago Bulls to IBI, and the lobbying which produced the rejection, did not violate the antitrust laws.

Piazza v. MLB. Vincent Piazza and Vincent Tirendi, both of Pennsylvania, organized a group of investors with the goal of purchasing MLB's San Francisco Giants and moving the team to the Tampa Bay area. On August 6, 1992, Piazza's group executed a Letter of Intent with the Giants' owner, Robert Lurie, to purchase the team for $115 million. Lurie agreed not to negotiate with other prospective buyers and to help the group obtain MLB's approval for the purchase and relocation of the team to the Suncoast Dome in St. Petersburg, Florida. A few weeks later, Piazza's group entered into an agreement with the City of St. Petersburg to use the Suncoast Dome.

On September 4, Piazza's group submitted an application to MLB for the purchase and relocation of the Giants. MLB conducted personal background checks on the investors, which raised, in the words of the Chairman of the Ownership Committee, a "serious question in terms of some of the people who were part of that group." The Chairman announced that "a couple of investors will not be in the group." Another member of the Committee, Jerry Reinsdorf, stated that the Committee was concerned about "out-of-state" money and that the "Pennsylvania People" had "dropped out." Since both Piazza and Tirendi are Italian, they interpreted the comments as suggesting that the background checks raised the possibility that they were connected to organized crime, which they denied. They also denied that they had "dropped out" of the investor group. On September 12, the Chairman admitted to reporters that "there was no problem with the security check."

Meanwhile, MLB was working to obtain other bids. In fact, on the same day as Piazza's group submitted their application, the Chairman of the Ownership Committee asked Lurie to consider other offers for the Giants, despite knowing of Lurie's exclusive agreement with Piazza's group. Five days later, on September 9, the President of the National League invited George Shinn of North Carolina to make an offer to purchase the Giants and keep them in San Francisco. Eventually, another investor group emerged and offered $15 million less than the $115 million offer of Piazza's group, but offered to keep the team in San Francisco. On November 10, 1992, MLB formally rejected the Piazza group's offer.

Piazza sued, alleging both antitrust and constitutional violations.[96] With respect to the antitrust claims, Piazza alleged that the defendants had monopolized the market for MLB teams and placed direct and indirect restraints on the purchase, sale, transfer, and relocation of MLB teams, as well as on the competition for MLB teams. Piazza alleged that these actions unlawfully restrained and impeded his opportunities to engage in the business of major league baseball. The alleged constitutional violations included being deprived of one's liberty and property interests and privileges without due process of law, being denied equal protection of the laws, and being denied freedom of contract and association.

Piazza argued that the relevant market is the market for American League and National League baseball teams and that the Defendants directly and substantially interfered with competition in that market. The district court agreed with Piazza's relevant market delineation.

The Defendants sought to have the case dismissed because MLB is exempt from the antitrust laws, as evidenced by the court decisions in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* (1922), *Toolson v. New York Yankees* (1953), and *Flood v. Kuhn* (1972). (These cases were discussed in Chapter 2.) The district court reviewed these court decisions and concluded: "Although the Supreme Court has not couched its explanation of the exemption in these terms, I believe that the only arguably surviving rule to be gleaned from the Court's baseball trilogy is that if the relevant product market involved is the market defined as the 'business of baseball,' injury to competition in that market may not be redressed under the Sherman Act." Courts have defined the 'business of baseball' as that which is central to the 'unique characteristics and needs' of baseball and, therefore, the exempted market includes (1) the reserve system and (2) matters of league structure.

In other words, the market to which MLB's antitrust exemption applies has the following characteristics: "(1) the product is the exhibition of baseball games; (2) the sellers, as with the market defined by plaintiffs, are team owners; and (3) the buyers are fans and, perhaps, the broadcast industry." However, in this case, the market has the following characteristics: "(1) the product being sold is an ownership interest in professional sports teams; (2) the sellers are team owners; and (3) the buyers are those who would like to become team owners." Thus, the market to which MLB's antitrust exemption applies is not the market at issue in this case. As a result, although the district court dismissed Piazza's constitutional claims, it denied MLB's motion to dismiss the antitrust claims.

In November 1994, with their trial about to begin, Piazza and MLB reached an out-of-court settlement for an undisclosed amount, reported to be $16 million.[97]

[96] *Piazza v. MLB*, 831 F. Supp. 420 (E.D. Pa 1993).

[97] The $16 million figure appears in a blog posted on the Athletics Nation website on February 2, 2005. The settlement became the subject of a lawsuit between MLB and its insurance carrier, Marsh & McLennan.

Murray v. NFL. Francis Murray acquired an option to purchase the NFL's New England Patriots, which were having financial problems in part due to an unfavorable lease for Foxboro Stadium, for $63 million in April 1986; the NFL approved the option. The Patriots were owned by William Sullivan, to whom Murray extended a $21 million line of credit. According to Murray, as of April 1987, he had performed all of the obligations under the option agreement and should have been able to acquire the Patriots from Sullivan, who with the aid of the NFL sought alternative buyers. Although Murray obtained a court order preventing the sale of the Patriots, Sullivan negotiated a sale to Victor Kiam. Murray then joined with Kiam to acquire the Patriots, with Murray as the 49% general partner and Kiam owning the remaining 51%. The partnership deal between Murray and Kiam included a 'put' option for Murray to sell his 49% stake to Kiam in exchange for a $38 million payment.

Murray also held a 40% interest in a venture seeking to bring a NFL franchise to St. Louis and he intended to use the money from exercising the put option for that purpose. According to Murray, if Kiam failed to pay the $38 million, Murray would become the Patriots' sole general partner, in which case he intended to relocate the Patriots to St. Louis or Hartford, Connecticut. In his pursuit to get an NFL expansion franchise for St. Louis, Murray had partnered with James Orthwein, who in July 1990 extended a line of credit to Murray and obtained a secured interest in Murray's 49% stake in the Patriots. Murray also had obtained a loan from National Westminster Bank.

Murray notified Kiam on July 8, 1991 that he would exercise the put option on October 10, 1991. Murray learned on September 30 that Kiam had given a secured interest in his 51% Patriots stake to IBJ Schoeder Bank in exchange for a loan. The NFL had rules regarding the amount of debt a franchise could take on, and the IBJ loan allegedly violated the NFL's limit. Murray notified the NFL of the debt limit violation on October 9. Kiam refused to pay Murray the $38 million and instead requested an extension because he disputed whether the partnership agreement called for Murray to become sole general partner in the event of nonpayment. Pursuant to the NFL's policy, Murray submitted the matter to the league for compulsory arbitration. On October 14, Orthwein informed the NFL that he would foreclose on Murray if Kiam failed to make the payment. On November 4, Murray requested immediate action by the NFL. A week later, National Westminster Bank sued Murray to collect on its loan.

According to Murray, the NFL ignored his pleas for expedited arbitration so that Orthwein could gain ownership of the Patriots and thereby oust Murray from the league so he could not challenge its policies regarding financing, team relocation, and compulsory arbitration. On November 22, 1991, the NFL allegedly offered to purchase the Patriots from Murray; he refused. At Orthwein's urging, Murray attended an NFL owners meeting to convince Kiam to sell the Patriots to Orthwein. According to Murray, Orthwein told him that if he succeeded in getting Kiam to sell, Murray could keep his stake in both the Patriots and the St. Louis venture. Murray agreed to pay Kiam $1 million over three years to get a deal. On March 16, 1992, Orthwein purchased National Westminster Bank's loan to Murray and assumed control of the bank's litigation against him. Orthwein allegedly demanded Murray's stakes in the Patriots and St. Louis venture to settle the bank's loan. On May 11, 1992, Murray and Orthwein reached a settlement in which Orthwein would take possession of Murray's 49% stake in the Patriots and Orthwein agreed that if St. Louis failed to obtain an expansion franchise, he would relocate the Patriots to St. Louis, with Murray allegedly preserving his stake in a St. Louis franchise. Orthwein allegedly undermined Murray's attempt to bring an expansion franchise to St. Louis by cooperating with a competing group. Moreover, he did not relocate the Patriots to St. Louis. Orthwein eventually sold the Patriots to Robert Kraft for $160 million – money to which Murray believed he was entitled.

Murray sued, alleging that the NFL and other Defendants conspired to restrain trade in the market for the purchase and sale of professional football franchises in violation of Sections 1 and 2 of the Sherman Act. In particular, Murray alleged that NFL rules unlawfully restrained and affected his rights to sell the Patriots, causing him to sell his interest in the team at a loss in an anticompetitive market. The allegedly anticompetitive NFL practices were its restriction on the use of public financing to buy out an existing franchise partner or to purchase another NFL franchise, its compulsory arbitration requirement, and its team relocation policy. Murray alleged that the NFL conspired to divest him of his ownership interest in the Patriots and an expansion franchise so as to prevent him from challenging these league practices. The NFL sought to have the lawsuit dismissed because the joint activities of its members cannot form the basis of an antitrust violation.

The district court ruled on a motion to dismiss on June 26, 1996.[98] For the purpose of a motion to dismiss, the district court accepted Murray's assertion that the relevant product market is the "market for the sale and purchase of ownership and control interests in NFL professional football franchises" and that the relevant geographic market is nationwide generally and, specifically, the "market for NFL professional football franchises in the metropolitan areas of Boston, Massachusetts; Hartford, Connecticut and St. Louis, Missouri."

The district court refused to grant the NFL's request for summary judgment (1) on the public financing allegation, concluding that Murray had presented sufficient facts for a Section 1 challenge; (2) on the compulsory arbitration allegation, ruling that whether the policy "restrains competition unreasonably by eliminating competitors from the field of prospective purchasers is a question of fact to be determined by the jury under the 'rule of reason doctrine'"; and (3) on the Section 2 monopolization or attempted monopolization claim that Murray was denied the 'essential facility' of compulsory arbitration. The district court did grant the NFL's request for summary judgment on the relocation allegation because Murray never actually applied to relocate the Patriots and what action the NFL would have taken in that event is speculative. Furthermore, the district court concluded that Murray's failure to obtain an NFL expansion franchise for either St. Louis or Hartford is not an antitrust injury because existing NFL franchises, expansion franchises, and franchises of rival leagues can continue to compete to locate in these two cities.

[98] *Murray v. NFL*, 1996 U.S. Dist. LEXIS 9108 (E.D. Pa 1996).

On April 28, 1998, the district court granted Defendants' motion for summary judgment in its entirety.[99] The district court noted that Murray was not denied arbitration by the NFL because he did not comply with the agreed-upon prerequisites for such a hearing. Thus, Murray failed to present evidence in support of an essential facilities claim. Moreover, Murray did not present evidence that the NFL used its arbitration policy to exclude prospective purchasers of the Patriots who wanted to relocate the team. As for the public financing allegation, the district court observed that Murray did not present evidence that a public offering would have been viable and that he ever implemented a plan to conduct such an offering.

Baseball at Trotwood v. Dayton Professional Baseball Club. In 1997, several groups were competing to bring a minor league baseball team to Dayton, Ohio. In order to do so, a group would have to negotiate the purchase of an existing Midwest League franchise, get approval from the Midwest League for the purchase, and then get the approval of the National Association of Professional Baseball Leagues (NAPBL) and MLB for the purchase – and then the group would have to go back to those organizations to get approval to move the franchise to Dayton. Moreover, since Dayton lies within the 'home territory' of MLB's Cincinnati Reds, the group would have to obtain a territorial waiver from the Reds. Thus, there were many obstacles to bringing a minor league baseball franchise to Dayton.

In January 1997, Sports Spectrum, Inc. (SSI) executed an option agreement giving it the right to acquire the Midwest League's Michigan Battle Cats for $3 million. Afterward, SSI allegedly received assurances from the Reds that if the Reds were to waive their territorial rights, they would only do so for SSI. With that assurance, SSI entered into an agreement for a stadium project. On March 21, 1997, SSI executed a contract to purchase the Battle Cats. A few weeks later, SSI agreed to sell a 55% interest in the team to Rock Newman, Inc. (RNI) for $2 million if permission to relocate the team to the Dayton area was obtained.

Meanwhile, on March 28, a married couple, Sherrie Myers and Tom Dickson, reached an agreement with Downtown Dayton Partnership (DDP) to locate a minor league franchise in the Dayton area and, later, Dayton's City Commission approved the agreement, which stated that Myers and/or Dickson would own or manage the minor league baseball franchise that located in the Dayton area. Dickson was the principal owner of the Midwest League's Lansing Lugnuts and a member of the league's Board of Directors. On May 30, the Reds issued a conditional territorial exclusivity waiver to DDP. Myers succeeded in getting the approval of the Midwest League and the NAPBL for the purchase of the Rockford Cubbies from the Chicago Tribune, but MLB refused to give its approval. The Reds then terminated their conditional waiver and, in November 1997, Myers announced she was terminating her efforts to acquire the Rockford Cubbies and relocate them to Dayton – and that she intended to sue MLB for reverse discrimination.

---

[99] *Murray v. NFL*, 1998 U.S. Dist. LEXIS 5894 (E.D. Pa 1998).

The same month, the Reds granted a conditional territorial exclusivity waiver to SSI that would expire on January 26, 1998. When SSI met with Dayton and DDP, it discovered that SSI would be expected to make a much larger financial contribution than had been expected from Myers and that neither wanted Rock Newman involved in minor league baseball in Dayton. SSI concluded that it would not get a stadium in downtown Dayton and finalized an agreement to locate a stadium in Trotwood, Ohio. However, when SSI filed documents to get the Midwest League's and NAPBL's approval for the purchase of the Battle Cats on January 14, both refused to even consider the application because Myers had not withdrawn her application. Myers refused to withdraw her application and the expiration date on the Reds' waiver passed.

Myers had been negotiating to sell her interest in the Rockford Cubbies to the "Mandalay Defendants", who included Hank Stickney, a trustee of the NAPBL. DDP and Dayton had been negotiating with the Mandalay Defendants to locate a minor league baseball team in downtown Dayton. The Mandalay Defendants ultimately received the necessary league approvals and the waiver from the Reds.

Baseball at Trotwood (which was owned by RNI and four individuals from SSI) sued, alleging that the Defendants, which included the 'Mandalay Defendants', the NAPBL, and the Midwest League, had conspired and acted in concert to restrain trade and to create a monopoly in violation of Sections 1 and 2 of the Sherman Act. In particular, Plaintiffs alleged that the Defendants had imposed direct and indirect restraints on the purchase, sale, transfer, and relocation of minor league baseball teams, as well as on the competition for the purchase, sale, transfer, and relocation of such teams. The Mandalay Defendants asked the district court to dismiss the claims because Plaintiffs failed to allege an antitrust injury. The district court agreed and dismissed the case against the Mandalay Defendants, but noted that "the Court cannot conceive that those claims, as they are presently drafted and as they relate to the other Defendants, retain viability, in light of the Decision herein."[100] Thus, the district court directed the other Defendants named in the antitrust claims to move for dismissal as well.

The district court's reasoning was based on Judge Easterbrook's dissent in *Fishman v. Estate of Arthur M. Wirtz* in which he argued that, for an antitrust injury to occur, consumers had to be harmed, and in the case of a natural monopoly, consumers are in the same position regardless of who wins the contest to be the natural monopolist serving those consumers – in other words, regardless of who wins, the consumer is at the mercy of a monopolist. The district court observed that "given that the Plaintiffs have not alleged that the Defendants' actions limited the number of franchises that would be allowed to be located in the Dayton area, there is no allegation that the actions of the Defendants altered the market structure for minor league baseball in the Dayton area, increased prices or reduced the quality of minor league baseball supplied in that area"; in short, "there are no allegations that the Defendants' actions curtailed competition in the minor league baseball market in the Dayton area, only that those actions curtailed

[100] *Baseball at Trotwood v. Dayton Professional Baseball Club*, 113 F. Supp. 2d 1164 (S.D. Oh W.D. 1999).

the Plaintiffs' ability to be the entity servicing the market." In other words, "there was bound to be one winner and one loser of that competition, and one and only one monopolist would emerge to provide minor league baseball in this area."

The district court also argued that by seeking to join, rather than compete, with the Midwest League, there was no reduction in competition because the Mandalay Defendants rather than the Plaintiffs became the provider of minor league baseball to the Dayton area. The district court noted that the courts in *Levin*, *Seattle Totems*, and *Mid-South Grizzlies* had reached a similar conclusion. The district court summed up its decision as follows:

> In sum, the Court concludes that, where two groups compete for one right, the losing group does not have a valid antitrust claim, merely because the winning side conspired with those who would make the award and acted tortiously. An example demonstrates the Court's point. A and B compete with each other to enter into a contract with C. The fact that A obtains the contract by bribing C does not give B a valid antitrust claim against A, even though its ability to compete for the contract with C has been compromised by the fact that A acted in concert with C, by bribing the latter, in the absence of proof that the concerted activity harmed consumers by reducing output or raising prices.
>
> Based on the foregoing, the Court concludes that the Plaintiffs have not alleged that they suffered an antitrust injury. Rather, they have asserted nothing more than business torts that allegedly harmed a competitor. Accordingly, the Court sustains the Mandalay Defendants' Motion to Dismiss…

In summary, courts have interpreted the antitrust laws in such a way as to give sports leagues broad discretion in selecting which franchises will be allowed as members and who will be allowed to own those franchises. The courts repeatedly stress the distinction between seeking to compete with the league and seeking to join the league. Preventing a franchise or owner from joining the league does not harm competition, but preventing a franchise or owner from competing with the league may.

Courts have not agreed on whether competition to become a natural monopolist can result in an antitrust injury. One view, advocated by Judge Easterbrook, is that consumers are not impacted by which firm prevails in the competition to be the natural monopolist and thus no antitrust injury (which by necessity must be an injury suffered by consumers) can occur – and if there is no antitrust injury, there is no violation of the antitrust laws. However, Judge Easterbrook's opinion was a minority view even in the *Fishman* case where it was issued.

Chapter 6

Sports Leagues vs. Players

Sports leagues have implemented a variety of restrictions that players have generally opposed. These restrictions fall into three broad categories: eligibility, sanctions, and compensation. Eligibility standards include the NCAA's requirement that players be 'amateurs', the NFL's requirement that players be out of high school for a number of years before they can be drafted, and the NBA's (now discarded) policy against drafting high school players. Leagues also impose sanctions on players who violate league rules. The compensation-related restrictions of sports leagues include reserve clauses, rookie drafts, salary caps, luxury taxes, and player transfer fees. Players have challenged all of these restrictions on antitrust grounds, with fairly little success. As discussed in Chapter 2, in some instances, these restrictions were topics of the collective bargaining agreements between the sports leagues and their respective players unions and thus were exempt from the antitrust laws.

One may expect the impact of such restrictions to be more onerous in some leagues than in others. NFL players do have other employment options, including the Canadian Football League (CFL), but the best CFL players are more likely to move to the NFL than the best NFL players are to move to the CFL. Likewise, MLB players could play in Japan, but they generally choose not to unless they have difficulty signing with an MLB team. There are numerous professional basketball and hockey leagues throughout the world, but they do not generally attract established NBA and NHL players, but rather attract marginal players hoping to eventually sign with an NBA or NHL team. On the other hand, it is not unusual for a top U.S. soccer player to sign with an European team instead of playing Major League Soccer. Thus, sports leagues vary in the extent of their monopsony power over players.

For the NCAA and the four major North American professional sports leagues, economists have documented that league restrictions on players have succeeded in maintaining player compensation below the value of the players' marginal revenue product. One strong piece of evidence is the behavior of players' salaries when a rival sports league forms. As discussed in Chapter 4, the formation of a rival sports league leads to a surge in player salaries as the leagues compete for players. When the rival league either folds or merges with the incumbent league, the growth in player salaries slows dramatically. Economists have documented similar surges in player salaries when players become eligible for salary arbitration or free agency.

This chapter will analyze the restrictions on players imposed by the NCAA, MLB, NFL, NBA, and NHL. It then discusses players' antitrust challenge to Major League Soccer (a 'single-entity' league). The chapter concludes with a discussion of an interesting case involving the Ladies Professional Golf Association (LPGA) and its attempt to sanction a player for allegedly cheating.

NCAA. The NCAA produces and markets 'amateur' athletics and thus imposes numerous restrictions on collegiate players so as to preserve their 'amateur' status. Some of these restrictions relate directly to player eligibility – for example, a player cannot have signed with an agent or entered a professional sports league draft. Other restrictions are placed on player compensation – schools can offer players a limited number of scholarships, but cannot pay the players for their athletic services. The NCAA also has the authority to sanction teams for violating NCAA rules – for example, if a school's coach is found to be secretly paying his or her players, the entire team may be suspended from competition. The NCAA also imposes numerous other restrictions, including academic eligibility requirements and transfer restrictions. Collegiate players have challenged these restrictions on antitrust grounds, largely without success. Collegiate players are currently challenging on antitrust grounds limits on the number of scholarships an athletic program can award and limits on the dollar value of those scholarships.

Restrictions on player compensation and team sanctions for compensation restriction violations. In 1983, several student-athletes challenged the NCAA's sanctions on the University of Arizona football team making the team ineligible to participate in post-season competition in the 1983 and 1984 seasons and prohibiting the team from making television appearances in the 1984 and 1985 seasons. On May 17, 1983, the NCAA's Committee on Infractions had issued a confidential report which documented that, during the period 1975-79, representatives of the University's football program had provided current players and players under recruitment with compensation or extra benefits such as free airline transportation, free lodging, as well as cash and bank loans for the athletes' car payments, rental payments, and personal use. The athletes did not dispute that the violations occurred, but alleged that the vote of the Infractions Committee imposing the sanctions represented an agreement among member institutions to exclude the University of Arizona from the market for televised and post-season competition, and thus constituted a group boycott in violation of Section 1 of the Sherman Act. The district court granted the NCAA's request for summary judgment on the antitrust claim, ruling that "the attributes of a per se illegal boycott simply do not exist."[101] The district court explained:

> There has been no showing by the plaintiffs that the NCAA, its member institutions, or the Infractions Committee had any purpose to insulate themselves from competition by imposing sanctions on the University of Arizona or any of the other universities currently on probation. To the contrary, the purpose of the sanction is not only to preserve amateurism but to enhance fair competition among the association's member institutions.

Similarly, Southern Methodist University's (SMU's) football program was suspended by the NCAA for the entire 1987 season and other restrictions were imposed for the 1988 season. The NCAA found that SMU had exceeded limits on compensation for student-athletes. An antitrust lawsuit was brought by David McCormack, an attorney and SMU alumnus. The plaintiffs included several members of the football team. Plaintiffs alleged that (1) the limitations on compensation to football players constitute illegal price fixing in violation of

[101] *Justice v. NCAA*, 577 F. Supp. 356 (D. Az 1983).

Section 1 of the Sherman Act and (2) the suspension of SMU constitutes a group boycott by other NCAA members, also in violation of Section 1 of the Sherman Act. The plaintiff football players argued that they had suffered an injury to their business (i.e., playing football), that they effectively sold their labor to SMU, and that the NCAA rules restrict the amount that they can be paid, preventing them from selling their labor to the highest bidder. The appeals court decided that the NCAA rules had to be analyzed under the rule of reason and that, on this basis, the rules are reasonable:[102]

> The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.
>
> After amending their complaint once and withdrawing another amendment, the plaintiffs still produce only two allegations to support their claim that the NCAA's rules are designed to stifle competition: that the NCAA permits some compensation through scholarships and allows a student to be a professional in one sport and an amateur in another. Accepting these facts as true, however, they do not undermine the rationality of the eligibility requirements. That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable. We therefore conclude that the plaintiffs cannot prove any set of facts that would carry their antitrust claim and that the motion to dismiss was properly granted.
>
> Because the eligibility rules do not violate the antitrust laws, enforcement of them through suspension and other restrictions does not constitute an illegal group boycott.

Thus, courts have found that the NCAA's restrictions on player compensation do not violate the antitrust laws – the compensation restrictions are reasonable given that the NCAA produces and markets 'amateur' athletics. Moreover, suspension of teams found in violation of the restrictions on player compensation is also 'reasonable.'

Some commentators disagree. A 1992 *Harvard Law Review* article titled "Sherman Act Invalidation of the NCAA Amateurism Rules" argues that "the defining characteristic of intercollegiate athletics is merely the college attendance of all of its athletes" and that the NCAA's 'amateurism' requirements "are based on the outdated ideal of amateurism that is in no way necessary to the product of college sports." (p. 1301) Therefore, the article concludes: "Courts should thus invalidate these rules as clear restraints of trade in the market for the skills of student-athletes." (p. 1301)

[102] *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).

As discussed in Chapter 1, some economists view the NCAA as a cartel with monopsony power over student-athletes, while others view the NCAA as a demand-enhancing joint venture. The NCAA's monopsony power is typically demonstrated by comparing the compensation of student-athletes to their marginal revenue product (MRP). Most such studies conclude that student-athletes receive far less than their MRP in the two major revenue-generating NCAA sports – football and basketball. Table 6.1 summarizes the economic literature.

Star players are particularly valuable to their teams – not only athletically, but financially as well. Brown and Jewell (2004) estimate that, during the 1995-96 men's college basketball season, having an additional player who is subsequently selected in the NBA draft on a basketball team raises the team's revenue by $1,194,469. Tollison (2000) presents a back-of-envelop-type calculation of the MRP of a typical player in the NCAA men's basketball tournament and finds that the MRP for a tournament victory in the early rounds is $30,000, but soars to $220,000 if the team advances to the Final Four – whereas the implicit annual compensation of tuition, room, and board at most schools is in the $5,000-$10,000 range. Brown (1994b) examines the revenue of 46 Division I basketball teams for the 1988-89 season and finds that team revenue increases by between $871,310 and $1 million for each additional player subsequently drafted by the NBA, even though the NCAA limits the value of a scholarship to a maximum $20,000 annually – which suggests that a future NBA draftee generates rents for his collegiate basketball team of approximately $1 million annually.

Similar results are found for men's football. Brown and Jewell (2004) estimate that, during the 1995 college football season, having an additional player who is subsequently selected in the NFL draft on a football team raises the team's revenue by $406,914. Brown (1993) examines the revenue of 39 Division 1-A football teams for the 1988 season and finds that team revenue increases by between $538,760 and $646,150 for each additional player subsequently drafted by the NFL – whereas even adding in recruiting costs, scholarship players cost less than $30,000 per year. Leonard and Prinzinger (1984) analyze data on 40 Division I college football teams for the 1981 season and estimate that MRP ranges from $37,825 to $129,435 depending on ticket price, whereas scholarships for college football players are valued at only $4,150 – which suggests that college football players receive only between 3% and 11% of their MRP.

Likewise, similar results are found for women's basketball. Brown and Jewell (2006) estimate that an additional 'premium' women's basketball player generates almost $250,000 annually for her team. However, the impact is considerably larger (in excess of $400,000) for the 'elite' women's basketball programs than for the less-successful ones. Brown and Jewell (2006) conclude: "Since a college player's effective pay is limited to a maximum $36,000 value of an athletic scholarship, schools appear to extract sizable rents from the best college players." (p. 96)

Table 6.1

The Impact of NCAA Player Compensation Restrictions on Rents Earned by Universities on Their Athletes

Sport	Study	Test	Result
Basketball (Men's)	Brown & Jewell (2004)	Estimates MRP of a premium (subsequently drafted into the NBA) player using data for the 1995-96 season.	Adding a premium player raises team revenue by $1,194,469 annually.
	Tollison (2000)	Estimates MRP of typical player in the NCAA tournament via a back-of-envelop-type calculation.	MRP for a tournament victory in the early rounds is $30,000. If the team advances to the Final Four, MRP rises to $220,000. However, the implicit annual compensation of tuition, room, and board at most schools is in the $5,000-$10,000 range.
	Brown (1994b)	Estimates rents (the difference between MRP and the maximum compensation allowed by the NCAA) for premium (subsequently drafted into the NBA) players using data on 46 Division I teams for the 1988-89 season.	NCAA limits the value of a scholarship to a maximum of $20,000 annually. Adding an additional premium player raises team revenue by between $871,310 and $1,283,000 annually. Thus, future NBA draftees generate rents for their teams of approximately $1 million annually.
Basketball (Women's)	Brown & Jewell (2006)	Estimates MRP of a premium (subsequently drafted into the WNBA) player using data for the top 10 women's basketball conferences during the 2000-2001 season.	Adding a premium player raises team revenue by $241,337 annually, on average. However, for elite programs, adding an elite player raises team revenue by an average of $403,303 annually. The maximum value of an athletic scholarship is $36,000.
Football	Brown & Jewell (2004)	Estimates MRP of a premium (subsequently drafted into the NFL) player using data for the 1995 season.	Adding a premium player raises team revenue by $406,914 annually.
	Brown (1993)	Estimates rents (the difference between MRP and the maximum compensation allowed by the NCAA) for premium (subsequently drafted into the NFL) players using data on 39 Division I-A teams for the 1988-89 season.	NCAA limits the value of a scholarship to a maximum of $20,000 annually. Even if other costs, such as recruiting costs, are added, scholarship players cost less than $30,000 annually. Adding an additional premium player raises team revenue by between $538,760 and $646,150 annually.
	Leonard and Prinzinger (1984)	Compares MRPs and scholarship values using data on 40 Division I teams for the 1981 season.	Depending on ticket price, the MRP ranges from $37,825 to $129,435. Since scholarships were valued at $4,150, collegiate football players received only between 3% and 11% of their MRP.

Similarly, Brown and Jewell (2004) conclude:

> Our updated MRP estimates from these 1995-96 data underscore Brown's earlier estimates: Athletic departments extract sizable monopsony rents from college football and basketball players. Given that the NCAA limits effective compensation for student athletes, our estimates suggest that a college program can extract nearly $400,000 from a premium college football player and over $1 million from a premium college basketball player per year. These rents, in turn, often amount to transfers to coaches and administrators in the form of higher salaries as well as to support non-revenue producing sports or even academic programs. (pp. 160-61)

Tollison (2000) makes a similar point:

> The revenue is there to have a pay system; it is simply not presently flowing to the players in proportion to their contribution to revenue. It is flowing to (head) coaches, athletic departments to prop up non-revenue sports, and, yes, to the English Department. This redistribution of wealth is real, large, and ongoing in any major athletic program in the country. (p. 24)

Some commentators have rejected analyses comparing the value of scholarships received by student-athletes to their marginal revenue product. One problem is how to incorporate the training costs incurred by collegiate athletic programs. Moreover, McKenzie and Sullivan (1987) argue that the NCAA compensation rules enhance the demand for student-athletes and that the relevant question is not whether MRP is less than the actual compensation received by student-athletes, but whether MRP is less than the expected compensation of student-athletes (which would include not only the value of the athletic scholarship but also the present value of the expected future income stream from professional employment).

NCAA sanctions can have a large impact on the disciplined member. Brown (1993) estimates that a one-year 10% reduction in the number of allowed football scholarships would reduce the sanctioned team's revenues by roughly $600,000 annually, or more than $2 million over a four-year collegiate career, and a one-year prohibition on television appearances would reduce the sanctioned team's revenues by $543,925 – ignoring the effect of revenue-sharing within the sanctioned team's athletic conference.

From an economic standpoint, NCAA sanctions can be viewed as (1) a means by which a cartel polices its members so as to prevent cheating on the cartel, (2) a system via which a joint venture maximizes the venture's joint revenue, or (3) a method by which a franchisor sets and enforces rules on its franchisees so as to prevent free-riding. The latter interpretation is suggested by McKenzie and Sullivan (1987), who liken the NCAA's rules to the rules that McDonald's imposes on its fast-food franchises, which benefit the franchisees collectively even though each individual franchisee has an incentive to cheat on those rules. Somewhat similarly, DeBrock and Hendricks (1997) argue on the basis of a median voter model of NCAA roll-call voting on important policy matters that the median NCAA member may find it optimal to force poor quality teams to improve and to restrict the quality of the strongest teams, thereby leading to greater competitive balance, which in turn may lead to higher joint revenue. Depken and Wilson (2006) analyze data for 11 major Division I-A football conferences over the period 1953-2003 and find that a greater level of NCAA enforcement actions (i.e., investigations and probations) in a conference is associated with an improvement in competitive balance, whereas a greater severity of punishment is associated with a reduction in competitive balance; they conclude that, "on average, the net effect of NCAA enforcement is an improvement in competitive balance." (p. 826) Likewise, Depken and Wilson (2004b) analyze data for 10 major Division I-A football conferences over the period 1888-2001, but they reach a more ambiguous conclusion: "Our pooled results do support the claim that NCAA enforcement may have the unintended consequence of reducing competitive balance, although we do find evidence that might support the NCAA's stated goal of enforcement, namely to improve competitive balance." (p. 241)

Eckard (1998), however, argues that cartel theory predicts that the NCAA will attempt to inhibit poor teams from improving and work to protect the strong teams from competition. Consistent with this prediction, Eckard finds that year-to-year changes in national rankings and conference standings declined in 1952 when the NCAA introduced a workable mechanism for enforcing player eligibility, recruiting, and financial aid restrictions. Also consistent with Eckard's prediction is the finding of Fleisher, Shughart, Tollison, and Goff (1988) that enforcement of the NCAA's rules benefit teams which have been consistent winners at the expense of lower quality (but rapidly improving) teams.

Restrictions on player eligibility – the no-draft and no-agent rules. Compensation restrictions are not the only restrictions that the NCAA imposes on players who wish to compete in NCAA events. The NCAA also places restrictions on players' signing with agents and taking part in the entry drafts of the professional sports leagues. Moreover, the NCAA has a rule preventing a player from competing in intercollegiate athletics while in a graduate program other than one at the student's undergraduate institution. Student-athletes have been unsuccessful in challenging these restrictions on antitrust grounds.

The NCAA's no-draft and no-agent rules were challenged as illegal restraints on trade in violation of Section 1 of the Sherman Act by Braxston Banks, a Notre Dame football player who entered the 1990 NFL draft after sitting out his senior year (1989) due to a knee injury. Banks was not selected in the draft and failed to join a team as a free agent. Therefore, Banks wanted to return to Notre Dame to play one more year, but by entering the NFL draft and signing with an agent he had violated two NCAA eligibility rules and thus lost his final year of intercollegiate eligibility. Banks filed an antitrust lawsuit alleging that the NCAA rules restricted the labor market opportunities for collegiate football players and constituted a group boycott by NCAA and NFL teams. The district court dismissed Banks' claims, finding that Banks failed to tie his allegations to any competitive impact on any identifiable market. The appeals court agreed, and noted that the no-draft rule and other similar NCAA regulations preserve the bright line of demarcation between college and "play for pay" football.[103] The appeals court also rejected Banks' contention that NCAA member schools are 'purchasers of labor' via grant-in-aid athletic scholarships because the value of those scholarships depends on a school's tuition and room and board, and not on the supply and demand for players. Moreover, the appeals court argued that the NCAA is not, and should not become, a minor league farm system for the NFL:

> The involvement of professional sports agents in NCAA football would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a "minor-league" farm system out of college football that would operate solely to improve players' skills for professional football in the NFL. We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes' proper focus on their educational pursuits and direct their attention to the quick buck in pro sports.
>
> The no-agent and no-draft rules are vital and must work in conjunction with other eligibility requirements to preserve the amateur status of college athletics, and prevent the sports agents from further intruding into the collegiate educational system.

In his dissenting opinion, Justice Flaum argued that Banks had identified a relevant market – the college football labor market – and explained how the NCAA no-draft and no-agent rules harmed competition in that market. Schools compete for football players by not only offering scholarships covering tuition and room and board, but also by offering non-monetary benefits such as the football coach's or program's reputation and the quality of the school's academic program. Thus, schools pay a 'price', not limited to monetary terms, to obtain the services of football players. The no-agent and no-draft regulations eliminate some forms of competition in the college football labor market and, therefore, are anticompetitive – and, consequently, Banks' claims should not have been dismissed. However, the fact that the no-agent and no-draft rules are anticompetitive does not mean that they necessarily would not survive a rule of reason analysis. In other words, the no-agent and no-draft regulations may be shown to have a pro-competitive rationale. As Justice Flaum observed, "It may very well be that the no-draft and no-agent rules are essential to the survival of college football as a distinct and viable product, in which case Banks would lose."

Bradford Gaines, a Vanderbilt University student, was ineligible to compete in the 1990-91 college football season because he 'irrevocably' renounced 'any and all' remaining football eligibility so he could enter the 1990 NFL draft. Gaines was not selected by any NFL team and failed to sign a free

---

[103] *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

agent contract with either an NFL or Canadian Football League (CFL) team. Gaines sought to return to Vanderbilt to play another year of college football, in violation of the NCAA's no-draft and no-agent rules. Gaines filed an antitrust lawsuit alleging that the NCAA's refusal to allow collegiate players who unsuccessfully enter the NFL draft to return to play NCAA football is an unlawful exercise of monopoly power in violation of Section 2 of the Sherman Act. The district court noted that Gaines would have to show that the NCAA (1) possesses monopoly power in the relevant market and (2) willfully acquired or maintained that monopoly power – as opposed to possessing that monopoly power due to growth or development as a consequence of a superior product, business acumen, or historic accident.[104] Gaines argued that the relevant product market is 'major college football services' and consisted of players in Division 1-A football programs; the NCAA controls 100% of the market. The NCAA argued that there were other 'buyers' for major college football player services, including the NFL, CFL, the World League of American Football, and the Arena Football League; the NCAA does not have monopoly power over this broader market. The district court noted that it "is hard-pressed to see any validity to the parties' interpretation of college football players like Brad Gaines as 'sellers' and NCAA schools and professional football leagues or teams as 'buyers' in an economic market." However, the district court found it unnecessary to decide the proper market definition since Gaines had failed to demonstrate that the NCAA willfully acquired or maintained its monopoly power:

> This Court is convinced that the NCAA Rules benefit both players and the public by regulating college football so as to preserve its amateur appeal. Moreover, this regulation by the NCAA in fact makes a better 'product' available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs. Therefore, Gaines cannot succeed on the merits of his §2 claim because the NCAA has shown legitimate business justifications for the Rules at issue.
>
> It seems obvious to this Court that rules which are justified by legitimate business reasons necessarily cannot be deemed 'unreasonably exclusionary' or 'anticompetitive.' Thus, the legitimate business reasons of the NCAA justifying enforcement of the eligibility Rules negate any attempt by Gaines to show the second element of a §2 claim – willful maintenance of monopoly power. Consequently, regardless of whether the NCAA justifications are viewed as a defense to a §2 challenge or rather as proof contradicting an assertion of willful monopolization, they necessitate a ruling by this Court in favor of the Defendants at this preliminary injunction stage of the proceeding.

[104] *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tn 1990).

Thus, like restrictions on player compensation, the NCAA's no-draft and no-agent rules are 'reasonable' means employed by the NCAA to offer its unique product – 'amateur' athletics.

Restrictions on academic eligibility. The NCAA imposes academic requirements on student-athletes. In 1965, the NCAA required incoming student-athletes to have a minimum high school grade point average of 1.6 out of a possible 4.0. Such a requirement acts as an entry barrier, which may be welcomed by some schools and opposed by others. For example, schools with high academic standards may favor a high minimum high school grade point average for incoming student athletes because it improves their ability to compete against schools with lower academic standards. On the other hand, schools with major revenue-generating athletic programs may oppose a minimum high school grade point average because such a rule may impair their ability to field an elite team, thereby reducing the revenue generated by their athletic programs. Interestingly, Depken and Wilson (2004a) estimate a model of the competitive balance among Division I-A football teams over the period 1888-2001 and find some evidence that competitive balance declined after the adoption of the minimum high school grade point average in 1965.

In 1986, the NCAA voted on Proposition 48, a Scholastic Aptitude Test (SAT) requirement for freshmen eligibility which included a provision that a student-athlete's high school grade point average could offset a low SAT score. An earlier proposition would have made freshmen eligibility exclusively dependent on the student-athlete's SAT (or ACT) score. As in the case of the minimum high school grade point average requirement, the 'exclusive' SAT requirement may be supported by schools with high academic standards and opposed by those with low academic standards, whereas the more flexible Proposition 48 may be favored by institutions with low academic standards and opposed by those with high academic standards. Fleisher, Goff, and Tollison (1991) examine voting on Proposition 48 by the 82 institutions with Division I-A football programs and, consistent with the hypothesis that schools vote in their competitive self-interest, find that athletic conferences with higher average SAT scores were less likely to vote in favor of Proposition 48. Fleisher, Goff, and Tollison comment: "Proposition 48 works like an entry barrier whether it was conceived as such or not." (p. 178)

Restrictions on transferring to another academic institution. The NCAA requires that a student-athlete who transfers to another academic institution 'sit out' a year before participating in intercollegiate athletics. Some athletic conferences, such as the Pacific-10, have their own set of transfer restrictions. The NCAA also has a Postbaccalaureate Bylaw, which prohibits a student-athlete from participating in intercollegiate athletics after enrolling in a graduate program at an institution other than the student-athlete's undergraduate institution. Both sets of 'anti-transfer' rules have been challenged on antitrust grounds, albeit unsuccessfully.

Rhiannon Tanaka, a star high school soccer player, enrolled at the University of Southern California (USC), a member of the Pacific-10 (Pac-10) athletic conference, for the 1994-95 academic year. In the spring of 1995, dissatisfied with the quality of USC's education, Tanaka sought to transfer to the University of California, Los Angeles, another Pac-10 member. Pac-10 Rule C 8-3-b governed intra-conference transfers and held that, before a transferring player could compete for his or her new team, the student-athlete first had to fulfill a residence requirement of two full academic years, would be charged two years of eligibility in all Pac-10 sports, and, for the two years of athletic ineligibility, could not receive any athletically-related financial aid. USC was satisfied with a less severe sanction, insisting that Tanaka 'sit out' a single academic year and lose one year of eligibility. Tanaka also did not receive any athletically-related financial aid during her first semester at UCLA.

Tanaka filed an antitrust lawsuit against USC, the Pac-10, and the NCAA, alleging the Pac-10 transfer rule violated Section 1 of the Sherman Act. The district court dismissed her complaint because the Pac-10 transfer rule was "noncommercial" in nature (recall that establishing a claim under Section 1 requires a showing that the agreement unreasonably restrains "trade") and, even if it was "commercial" in nature, it would still not violate the antitrust laws because the rule would not be found to be unreasonable under a rule of reason analysis. Tanaka appealed.

The appeals court declined to decide whether the Pac-10 transfer rule was "commercial" in nature and instead assumed it was and proceeded to analyze the rule under a rule of reason analysis.[105] The appeals court rejected both the relevant product market (i.e., UCLA women's soccer program) and relevant geographic market (i.e., Los Angeles) identified by Tanaka, arguing that just because Tanaka's personal preference was to play in Los Angeles did not imply that Los Angeles was an "area of effective competition" for student-athletes competing for positions in women's intercollegiate soccer programs. Rather, the geographic market was national in scope, as evidenced by the fact that Tanaka was recruited by schools throughout the United States. Moreover, those schools were from a number of athletic conferences, not just the Pac-10, and thus these athletic conferences had to be included in the relevant product market. The appeals court also argued that Tanaka failed to allege that the Pac-10 transfer rule has an anticompetitive effect in a relevant market, however defined, because the rule governs only intra-conference transfers and thus would likely have no anticompetitive effect on a national market and, furthermore, Tanaka alleges that the application of the transfer rule was an isolated act of retaliation against her – an injury to herself as opposed to an injury to a definable market. The appeals court noted that an analogy could be drawn between the Pac-10 transfer rule and the "Rozelle Rule" which was found to fail a rule of reason analysis in *Mackey v. NFL*. The Rozelle Rule gave the NFL Commissioner the authority to award one or more players from a team that signed a free agent to the team losing the free agent as compensation, thereby discouraging the signing of free agents by other teams; however, unlike the Pac-10 transfer rule, the Rozelle Rule applied to every NFL player. (The Rozelle Rule and *Mackey* decision are discussed in more detail later in this chapter.)

---

[105] *Tanaka v. USC*, 252 F.3d 1059 (9th Cir. 2001).

Tanaka included the NCAA as a defendant even though the NCAA transfer rule was not applied to her. She alleged that the NCAA "contracted, combined or conspired" with the other plaintiffs. The appeals court rejected her argument. Thus, the appeals court affirmed the district court's decision dismissing Tanaka's complaint.

Although Tanaka's antitrust challenge to the Pac-10 transfer rule was unsuccessful, Konsky (2003) argues that the NCAA's transfer rules do not survive a rule of reason analysis and therefore they violate Section 1 of the Sherman Act.[106] Konsky contends that the NCAA transfer rules are subject to the antitrust laws because they are "sufficiently commercial" – the rules are motivated by commercial rationales (e.g., the rules facilitate the maintenance of high-quality athletic programs at low cost by enabling coaches to "lock in" student-athletes); the rules are not motivated by academic goals (e.g., the rules do not take into account transfers done for academic reasons other than the discontinuation of the student-athlete's academic program at the school); and the rules are not motivated by the NCAA's amateurism goals (e.g., the amateur nature of college athletics would not be threatened by the mobility of student-athletes). Following a rule of reason analysis, Konsky then explains that the transfer rules affect a significant market, namely, the market for student-athlete services, and constitute a horizontal restraint on trade within that market. In particular, the transfer rules restrict the movement of players between schools and remove some players from the market altogether (e.g., players who have one year of eligibility remaining after four years of school due to being 'redshirted' one year and thus who cannot transfer without losing their remaining eligibility). Moreover, Konsky argues that the NCAA transfer rules have few, if any, pro-competitive effects – the rules are not needed to preserve the 'unique' product of college athletics, do not necessarily enhance public interest in (i.e., demand for) college sports, and do not necessarily enhance competitive balance because the bench players from the elite programs may transfer to lower-ranked programs to get more playing time, thereby increasing the quality of the lower-ranked teams and reducing the depth of talent at the elite programs. Furthermore, any pro-competitive effects of the transfer rules could be achieved via less restrictive means, such as allowing more exceptions for academically-related transfers and transfers of players recruited by a coach who has left the team.

The NCAA's Postbaccalaureate Bylaw has also been unsuccessfully challenged on antitrust grounds. Renee Smith graduated from St. Bonaventure in two and a half years, having played two seasons of intercollegiate volleyball (she chose not to play a third season). She then enrolled in a postbaccalaureate program at Hofstra and enrolled in a second postbaccalaureate program at the University of Pittsburgh. Neither postbaccalaureate program was offered at St. Bonaventure. The NCAA would not allow Smith to play volleyball for either Hofstra or the University of Pittsburgh. Smith filed an antitrust lawsuit alleging that the Postbaccalaureate Bylaw is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The district court dismissed Smith's claim

[106] For an argument that the NCAA transfer rules can be successfully challenged under the laws regarding covenants not to compete, see Yasser and Fees (2005).

because “the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied.” Smith appealed, but the appeals court agreed with the district court:[107]

> We agree with these courts that the eligibility rules are not related to the NCAA’s commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics. Based upon the Supreme Court’s recognition that the Sherman Act primarily was intended to prevent unreasonable restraints in ‘business and commercial transactions,’ … and therefore has only limited applicability to organizations which have principally noncommercial objectives …, we find that the Sherman Act does not apply to the NCAA’s promulgation of eligibility requirements.

Moreover, the appeals court ruled that the NCAA’s Postbaccaluareate Bylaw would survive a rule of reason analysis:

> We agree with these courts that, in general, the NCAA’s eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field… Likewise, the bylaw at issue here is a reasonable restraint which furthers the NCAA’s goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive. Clearly, the rule discourages institutions with graduate or professional schools from inducing undergraduates at other institutions to forgo participating in the athletic programs at their undergraduate institutions in order to preserve eligibility to participate in intercollegiate athletics on a postbaccalaureate basis. Likewise, the rule discourages undergraduates from forgoing participation in athletic programs on their own initiative to preserve eligibility on a postbaccalaureate basis at another institution. Indeed, we think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith’s antitrust count for failure to state a claim on which relief can be granted.

In summary, collegiate transfer rules have thus far been found by the courts to not violate the antitrust laws. However, some commentators believe that the transfer rules could be successfully attacked on antitrust grounds.

Restrictions on the number of athletic scholarships.[108] In August 2004, a group of non-scholarship (‘walk-on’) student-athletes in Division I-A football

---

[107] *Smith v. NCAA*, 139 F.3d 180 (3rd Cir. 1998).

[108] The discussion in this section is based primarily on the Consolidated Class Action Complaint, Defendant’s Motion for Judgment on the Pleadings, and Order in *In re: NCAA I-A Walk-on Football Players Litigation*.

programs filed a consolidated class action lawsuit alleging that the NCAA's limit on the number of athletic scholarships such programs could award violated Sections 1 and 2 of the Sherman Act. At the time, the average Division I-A football roster had roughly 117 players, but the NCAA only allowed programs to award 85 scholarships. Thus, the average team had 32 'walk-on' players. Plaintiffs alleged that, but for the NCAA's scholarship limit, all walk-on players in Division I-A programs would have received full scholarships because schools attempting to make their teams more competitive on the field would offer more scholarships, which would force other schools to offer more scholarships as well. In particular, Plaintiffs alleged:

> The NCAA's artificial limit on the number of football scholarships is classic cartel behavior. The NCAA and its member institutions control big-time college football. The NCAA uses that control to maximize revenues and minimize costs. According to the NCAA's own figures, Division I-A schools earned on the average $25.1 million in athletic revenue in 2003, up from $13.6 million in 1993. The agreed restrictions on football scholarships have allowed Division I-A schools to generate that revenue at a lower cost, but at the expense of the class of "walk-on" players who are excluded from the scholarship system by this horizontal and unlawful restraint of trade.

The NCAA did not always limit the number of scholarships. In 1956, the NCAA allowed the awarding of scholarships solely on the basis of athletic ability and, prior to 1977, there was no limit on the number of scholarships a Division I-A football program could award. In 1977, the NCAA capped the total number of scholarships at 95 and the number of new scholarships that could be awarded each year to 25. The cap on the total number of scholarships was lowered to 92 in 1992, 88 in 1993, and 85 in 1994.

Plaintiffs argued that the relevant product market is NCAA Division I-A football and the relevant geographic market is the United States. They allege that "the NCAA's members have created a horizontal restraint of trade – an agreement among competitors on the way in which they will compete with one another, whereby they have agreed to restrict competition for one of the major inputs to the product." Plaintiffs contend that the scholarship limit was implemented to reduce the cost of one of the inputs, not to improve competitive balance among Division I-A football programs or achieve any other procompetitive effect.

As evidence that the NCAA's scholarship limit has a 'commercial" purpose, Plaintiffs observe that the scholarships are not awarded based on financial need or academic merit. Rather, the scholarships are used to obtain players, one of the inputs needed to produce NCAA Division I-A football. And schools tend to profit enormously from the sale of that product – in 2001, the average Division I-A school obtained almost $11 million from its football program, while total football-related expenses averaged only $6.2 million.

The NCAA asked the district court to dismiss the case, setting forth four main arguments, each of which the district court found unconvincing.[109] First, the NCAA argued that NCAA rules preserving amateurism and fair competition have been found by the courts not to violate the Sherman Act and that athletic scholarships are not "compensation" for athletic participation – student-athletes are not employees of the school who are "paid to play." According to the NCAA, there is no "trade" in student-athlete services – there is no commercial market for college football players – which implies that the NCAA scholarship limit cannot restrain "trade" or "commerce." Competition between schools for student-athletes is not "trade" or "commerce" simply because football scholarships have a monetary value. The district court countered that, while courts have upheld NCAA bylaws protecting amateurism in college athletics, the NCAA is not exempt from the antitrust laws and some courts have found that NCAA rules and regulations implicate "trade" or "commerce." Moreover, the district court found that the NCAA scholarship limit "is not on all fours with those cases which hold that NCAA eligibility rules are not subject to the Sherman Act." Plaintiffs are not challenging amateurism in Division I-A football.

Second, the NCAA argued that Plaintiffs have not alleged a legally cognizable relevant market. According to the NCAA, Plaintiffs' relevant market was not defined with reference to reasonable interchangeability and the cross-elasticity of demand. Other potential substitutes for Division I-A college football include Division I-AA football, Division II football, Division III football, professional football, college football at non-NCAA institutions, junior college football, other fall sports (e.g., baseball, basketball, hockey, soccer, lacrosse), and other forms of entertainment (e.g., movies, concerts). Thus, a high school football player who wants to play collegiate football has numerous options other than attending a Division I-A school. The district court countered that, at this stage of the litigation, "Plaintiffs have alleged a sufficient 'input' market in which NCAA member schools compete for skilled amateur football players."

Third, the NCAA argued that Plaintiffs did not allege an injury to competition. According to the NCAA, Plaintiffs failed to explain how consumers are harmed in any relevant market by the scholarship limit. The district court countered that Plaintiffs have described an injury to the input market – walk-ons are left with enormous student loans while the NCAA and its members save hundreds of millions in scholarship money.

Fourth, the NCAA argued that the Plaintiffs provided insufficient factual allegations showing that the NCAA possessed monopoly power in any relevant market. According to the NCAA, Plaintiffs failed to show that (1) the NCAA has monopoly power in any relevant market and (2) the NCAA has willfully acquired or maintained its purported monopoly. The district court countered that the traditional definition of 'monopoly power' is "the power to control market prices or exclude competition" and Plaintiffs have alleged that the NCAA is a "classic cartel" which "exercises an almost absolute control over intercollegiate athletics."

---

[109] *In re: NCAA I-A Walk-on Football Players Litigation*, Case No. C04-1254C, W.D. Washington at Seattle (September 14, 2005).

Thus, the district court declined the NCAA's motion to dismiss the case. Of course, that by no means implies that the district court believed that Plaintiffs had actually proved their allegation that the NCAA scholarship limit violates the Sherman Act. Whether Plaintiffs will succeed in doing so remains to be seen. The Plaintiffs' case suffered a blow on May 3, 2006 when the district court denied class certification because it was not convinced that all walk-on players would have received scholarships but for the NCAA scholarship limit.[110]

Sutter and Winkler (2003) cite two pieces of evidence which cast doubt on any pro-competitive rationale for the scholarship limit. First, they compare competitive balance before and after the adoption of the scholarship limit and find that competitive balance in Division I-A football has not increased since 1977. Second, they show that NCAA members with stronger Division I-A football teams were more likely to vote in favor of a reduction in the number of football scholarships, which suggests that the scholarship limit functioned to protect the elite football programs from competition from programs seeking to field a top quality team. Sutter and Winkler conclude: "If traditional powers attract more and better walk-ons, this would suggest that marginally lower scholarship limits will not increase parity and may even entrench incumbents." (p. 16)

Restrictions on the dollar value of athletic scholarships.[111] On February 17, 2006, a group of student-athletes on athletic scholarships filed an antitrust lawsuit against the NCAA over its cap on the dollar value of such scholarships. The student-athletes competed in the NCAA's two "revenue sports" – Division I-A football and basketball. The NCAA permits "full ride" athletic scholarships to cover only tuition, mandatory fees, room and board, and required books. Expenses such as school supplies, recommended textbooks, laundry expenses, health and disability insurance, travel costs, and other incidental expenses are not covered. As a result, the NCAA caps the value of athletic scholarships at a level below the "full cost of attendance." Plaintiffs allege that, but for the NCAA cap, competition among Division I-A schools would drive the value of athletic scholarships up to at least the full cost of attendance. According to the Plaintiffs, the NCAA's own estimate is that a student-athlete on a full athletic scholarship must cover an average of $2,500 in out-of-pocket expenses. Plaintiffs allege that there is no cognizable justification for the NCAA's cap on the value of athletic scholarships – it is not reasonably necessary to preserve 'amateurism' in NCAA athletics; it is simply a cost-containment measure.

Effective August 1, 2004, the NCAA relaxed the cap in the sense that student-athletes can now receive need-based grants and loans in addition to the athletic scholarship. However, student-athletes still cannot receive, in excess of the athletic scholarship, financial aid based in whole or in part on their athletic talents and accomplishments. Thus, Plaintiffs allege that the NCAA continues to cap the value of scholarships based on athletic talent and accomplishment that student-athletes can receive.

[110] *In re: NCAA I-A Walk-on Football Players Litigation*, 2006 WL 1207915 (W.D. Wash. May 3, 2006).

[111] The discussion in this section is based on the complaint in *White v. NCAA* (2006).

According to the Plaintiffs, the relevant product markets are the markets for major (Division I-A) college football and basketball. The relevant markets do not include the Army, Navy, and Air Force Academies because they do not offer athletics-based financial aid. The colleges and universities in the relevant markets compete with one another in the recruitment of student-athletes by offering prospective student-athletes grants of athletics-based financial aid. The relevant geographic market is the United States.

The cap on the value of athletic scholarships is binding, as evidenced by the fact that all (or nearly all) of such scholarships are for the maximum amount permitted by the NCAA. Thus, Plaintiffs argue, in the absence of the cap, the value of the athletic scholarships they received would have been (at least) the full cost of attendance.

As evidence that the NCAA cap affects interstate commerce, Plaintiffs report that during the academic year 2004-2005, revenues for Division I-A football and basketball programs exceeded $2.2 billion and their profits exceeded $900 million. During academic year 2002-2003, 68% of Division I-A football programs were profitable, with an average profit of $9.2 million, and 70% of Division I-A basketball programs were profitable, with an average profit of $3 million. The average profit at Division I-A schools from football and basketball was $8 million. Plaintiffs allege that athletic scholarships awarded to student-athletes are "commercial transactions that affect interstate commerce."

Plaintiffs also allege: "There is no practical alternative to NCAA membership for any academic institution that wishes to sponsor a major college sports program." There is not a single academic institution with a major college sports program that is not a member of the NCAA, and thus must abide by NCAA rules. Academic institutions that violate the NCAA cap may be subject to an array of sanctions and the individual student-athlete who receives athletics-based financial aid in excess of the cap may be declared ineligible to compete in NCAA sports.

As a result, Plaintiffs allege that, in violation of Section 1 of the Sherman Act, the NCAA and its members, via the cap on the value of athletic scholarships, have "contracted, combined and conspired to fix, depress or stabilize the amount, terms and conditions of athletics-based financial assistance to student athletes."

It will be interesting to see how this case is decided. One question is whether the cap is a reasonable means to preserve the unique character of collegiate athletics – amateurism. If there are no limits to what schools can 'bid' for the services of student-athletes, would NCAA athletics become a different product?

MLB. As discussed in Chapter 2, Major League Baseball has been found by the U.S. Supreme Court to be exempt from the federal antitrust laws, at least with respect to MLB's actions pertaining to the "business of baseball." Two of the cases upholding MLB's antitrust exemption involved players challenging MLB's reserve clause. One of those cases, *Flood v. Kuhn*, was decided on a 5-3 vote, leading MLB to offer some concessions to the players, one of which – arbitration – would quickly lead to the introduction of free agency. Somewhat ironically, despite their antitrust exemption, MLB owners were found to have engaged in collusion in the mid-1980s, not in violation of the federal antitrust laws, however, but rather in violation of the "anti-collusion" clause in their collective bargaining agreement with MLB players. In 1998, Congress passed the Curt Flood Act, the purpose of which was "to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity." Thus today, MLB's antitrust exemption is limited in labor matters.

The Reserve Clause. When the National League was organized in 1876, the teams competed to sign players and the best players earned as much as $4,500 per season (a large sum given that a skilled laborer working 60 hours per week might earn between $1,200 and $1,500 annually). [112] Raiding of each other's rosters occurred, with some players jumping to a different team in mid-season. Thus, competition for players was not only costly to the team owners, the "integrity of the game" was brought into question as the quality of a team could swing dramatically in the course of a single season as top players jumped to (or from) a team. Team owners met to discuss roster jumping during the winter of 1878-79 and secretly agreed not to raid each other's rosters during the season and to "restrain" themselves during the off-season. Specifically, each team would draw up a list of five players it wanted to keep on its roster the next season and teams agreed not to offer a contract to any of these "reserved" players. In 1883, the agreement was expanded from five "reserved" players on each team to all players. In 1887, it became a formal clause in players' contracts.

Minor league teams also implemented a reserve clause, which the National League refused to honor since it sought to be the league with the top players. Eventually the minor league teams reached a deal with the National League in which the latter could select players from the former in exchange for a fixed payment.

In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, the U.S. Supreme Court in 1922 ruled that the business of providing baseball games for profit between teams of professional players was not interstate commerce, and thus was not covered by the federal antitrust laws. The Court upheld MLB's antitrust exemption in 1953, in the case of *Toolson v. New York Yankees*, where the Plaintiff professional baseball player challenged MLB's reserve clause on antitrust grounds, and again in the 1972 case of *Flood v. Kuhn* where the Plaintiff challenged MLB's reserve clause on antitrust grounds after being traded without his consent to another team. The Court did not affirm the *Federal Baseball* decision because it necessarily believed that the 1922 decision that the exhibition of baseball games was not interstate commerce was correct, but

[112] The discussion in this paragraph and the next is based on Haupert (2003). For another discussion of the origins of the reserve clause, see Eckard (2001a), who concludes that the likely motive for the reserve rule was "monopolistic collusion."

rather because MLB had operated under the antitrust exemption for so long that the exemption should be removed by an act of Congress, not by the Court.

However, the Court decision in *Flood v. Kuhn* was close, 5-3.[113] With three dissenting justices and one abstaining justice, MLB reportedly decided it was time to cut a deal with the players and, in 1973, MLB owners agreed that (1) players with 10 years of MLB experience and five years with the same MLB team could veto trades and (2) contract disputes involving players with at least two years of MLB experience would be handled via binding arbitration. In 1975, two players – Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos – on the advice of their agents, played the entire season without a contract and, when the season ended, claimed that the reserve clause no longer applied to them. In other words, the reserve clause only bound the player to his original team for one year after the player's contract expired. The dispute went to professional arbitrator Peter Seitz, who ruled in favor of Messersmith and McNally – and was promptly fired by MLB. MLB owners responded by shutting down training camps and threatened to cancel the season unless the MLB Players Association (MLBPA) agreed to limits on the movement of players between teams. Nevertheless, the 1976 season began on schedule and, in the summer of that year, MLB and MLBPA signed an agreement that players would become free agents after six years in the major leagues and teams who lost players would receive compensation in the form of an additional pick in the amateur draft. Between 1976 and 1979, the average MLB salary more than doubled, from $45,000 to $100,000.

The primary curb on what the MLB owners could do became not the federal antitrust laws, but rather the MLBPA. When, in 1979, MLB owners sought to change the form of compensation for the loss of a player to free agency from an additional pick in the amateur draft to a player from the free agent's new team, the MLBPA objected, leading eventually to a 50-day strike during the 1981 season. Similarly, the players went on strike during the 1994 season to oppose MLB's attempt to implement a salary cap.

Numerous economic studies have documented how MLB's reserve clause depressed player salaries and how player salaries soar as they first become eligible for binding arbitration and finally become free agents. The economic literature is summarized in Table 6.2.

[113] The discussion in this paragraph and the next comes primarily from the Encyclopedia of American Industries website entry for "Professional Sports Clubs and Promoters" and an article from the ESPN website titled "Free Agency: How It Happened" and dated November 20, 2000.

Table 6.2

The Impact of MLB's Reserve System on Player Salaries

Study	Test	Result
Krautmann, Gustafson & Hadley (2000)	Compares salaries and MRPs of players ineligible for both arbitration and free agency ("apprentices") and those eligible for arbitration but not free agency ("journeymen") during the period 1988-94.	The average apprentice is paid $475,000 less than his MRP, while the average journeyman is paid slightly more than his MRP. The typical team extracts $3 million from its players bound by the reserve clause, but average team player development expenses are roughly $6 million per season.
Miller (2000)	Estimates separate salary regression models for free agents and arbitration-eligible players using data on players who became free agents or filed for arbitration during the 1991-94 seasons.	For hitters, the salary obtained via arbitration is approximately 10% less than the salary the player would have obtained in free agency; the corresponding figure for pitchers is 22%.
Krautmann (1999)	Imputes the market value of hitters under the reserve clause by estimating a model explaining free agent wages (which are assumed to equal free agent MRPs) using data on 215 hitters eligible for free agency in the period 1990-93.	"Apprentice" hitters are paid, on average, 25% of their MRP. Surplus extracted from the apprentices roughly equals the team's training expenses.
Bodvarsson & Banaian (1998)	Estimates salary regression equation model using data for the 1986-88 season. Also estimates model of whether a player files for final offer arbitration. Focuses on 237 players eligible for final offer arbitration during the 1986 and 1987 seasons but not eligible for free agency at the end of the 1987 season.	For hitters, a one percent increase in the probability of filing for final offer arbitration increases salaries by 1.10% and those who do file increase their salaries by 29.3%; the corresponding figures for pitchers are 0.81% and 21.6%.
Blecherman & Camerer (1996)	Compares salaries and MRPs of hitters signing contracts after the end of the 1989 season and before the start of the 1990 season.	The non-free agents signed contracts for an average of $712,023 and had an average MRP of $704,317. In contrast, the free agents obtained an average salary of $934,115 but had an average MRP of only $604,678.
Krautmann & Oppenheimer (1996)	Uses MRP estimates of Zimbalist (1992), but nets out training costs.	The present value of the excess of MRP over salary for players bound by the reserve clause approximately equals the cost of training.
Gustafson & Hadley (1995)	Compares the salaries of players eligible and ineligible for arbitration for the 1990 season.	For both hitters and pitchers, arbitration-eligible players earn higher salaries than arbitration-ineligible players; 25.1% ($174,079) of the gap between the salaries of hitters eligible and ineligible for arbitration cannot be explained by other factors and thus is attributed to monopsony power; 40.5% ($242,965) of the corresponding gap for pitchers is attributed to monopsony power.

Table 6.2

The Impact of MLB's Reserve System on Player Salaries

Study	Test	Result
Telser (1995)	Re-examines net MRP estimates of Scully (1974).	The ratio of salary to net MRP is lower for star players than for average or mediocre players because of the 'ultimatum game.'
MacDonald & Reynolds (1994)	Compares salaries of pitchers and hitters with 1-2, 3-6, and 7+ years of experience during the 1986 and 1987 seasons.	At the margin, hitters with 1-2 years of experience earn 5% of an additional increment in their career MRP, those with 3-6 years earn 58%, and those with 7+ years earn 106%. The corresponding figures for pitchers are 8%, 86%, and 122%.
Marburger (1994)	Compares salaries of pitchers and hitters (1) ineligible for both final-offer arbitration and free agency, (2) eligible for final-offer arbitration, and (3) eligible for free agency during the 1991 and 1992 seasons.	For hitters, becoming eligible for final-offer arbitration raises average salary from $438,000 to $675,000, a 54% increase. For pitchers, the increase is 32%. As players eligible for final-offer arbitration near eligibility for free agency, their average salaries rise to roughly equal that of free agents.
Kahn (1993)	Compares salaries of 4 classes of players: (1) players under the reserve clause and more than one year away from free agency, (2) players eligible for arbitration but more than a year away from free agency, (3) players in their last year before free agency, and (4) players who are free agents. The sample period is 1987-90.	Players eligible for arbitration but more than a year from free agency have higher salaries than players under the reserve clause. Players in their last year prior to free agency have salaries similar to free agents, and both have higher salaries than those eligible for arbitration. Free agents and players in their last year prior to free agency use their bargaining power to secure longer, guaranteed contracts.
Fort (1992)	Calculates Gini coefficients for salaries before (1965-74) and after (1986-90) free agency.	Gini coefficient rose from 0.354 to 0.505, implying that salary inequality has increased after free agency.
Johnson (1992)	Compares salaries of black and white players who were and were not eligible for free agency during the 1987 season.	No statistically significant impact of free agency eligibility on salaries of white players; black players eligible for free agency have significantly lower salaries than black non-free agents.
Zimbalist (1992)	Estimates MRPs for "apprentice" hitters under the reserve clause without salary arbitration rights, "journeymen" hitters with arbitration rights and the imminent prospect of free agency, and "master" hitters. The sample period is 1986-89.	Apprentice hitters are paid 17-25% of their MRP; journeymen hitters are paid 50-64% of their MRP; master hitters are paid more than their MRP.
Hadley & Gustafson (1991)	Compares salaries of pitchers and hitters (1) ineligible for both final-offer arbitration and free agency, (2) eligible for final-offer arbitration, and (3) eligible for free agency during the 1989 season.	The average hitter and pitcher, respectively, experiences a 60.7% and 70.7% salary increase when eligible for arbitration. The average salary increase for free agents versus players ineligible for both free agency and arbitration is 43.3% for hitters and 35.2% for pitchers.

Table 6.2

The Impact of MLB's Reserve System on Player Salaries

Study	Test	Result
Hill (1985)	Estimates MRPs for hitters and pitchers before (1976) and after (1977) free agency, with the 1977 sample restricted to players who were not free agents in the 1977 season.	In 1976, below-average hitters received salaries in excess of their net MRP, while average and star hitters received 13-34% of their net MRP. Average and below-average pitchers and some star pitchers received salaries in excess of their net MRPs. The most "exploited" star pitchers receive 30% of their net MRP. In 1977, "exploitation rates" generally declined.
Hill & Spellman (1983)	Compares salaries in the season before (1976) and after (1977) free agency.	Holding ability and experience constant, free agents in 1977 received higher salaries than non-free agents; for both pitchers and hitters, compensation in 1977 was based more on past performance and less on seniority.
Raimondo (1983)	Estimates MRPs for the 1977 (post-free agency) season using the methodologies of Scully (1974) and Medoff (1976); compares results to those of Scully (1974) and Medoff (1976) for the pre-free agency period.	Holding player type (hitter, pitcher), quality (star, average, mediocre), and methodology (Scully, Medoff) constant, salary as a percentage of MRP is much higher for the free agents relative to both (1) players in the pre-free agency period and (2) non-free agents in the post-free agency year of 1977.
Lehn (1982)	Compares average real salaries before (1971-76) and after (1977-80) free agency.	In 1977, the first year of free agency, the average real salary rose from $51,501 to $76,066, a 39% increase. In 1978, it rose to $99,876, an additional 22% increase. Increases in 1979 and 1980 were only 2.2% and 1.2%, respectively. The number of guaranteed years on players' contracts rose sharply after free agency.
Sommers & Quinton (1982)	Estimates MRPs for the 14 most sought-after players who became free agents after the 1976 season using data for the 1977 season.	Although the five pitchers generated gross MRPs roughly equal to their annual contract costs and 7 of the 9 hitters also had gross MRPs in excess of their annual contract costs, only one free agent's signing had a net benefit exceeding net cost (under the assumption the free agent would have been replaced on the roster with a non-free agent). Suggests non-free agents are underpaid.
Medoff (1976)	Estimates MRPs and compares them to players' salaries for the 1972-74 seasons.	Star, average, and mediocre hitters are paid 41%, 36%, and 30% of their MRP, respectively; star, average, and mediocre pitchers are paid 49%, 51%, and 55% of their MRP, respectively.
Scully (1974)	Estimates net MRPs and compares them to players' salaries for the 1968 and 1969 seasons. Net MRP equals MRP net of training and capital costs.	Star and average players receive salaries equal to 15% and 20% of their net MRPs, respectively. Mediocre players have salaries above their net MRPs, which are negative.

Several studies focus on the period prior to the introduction of free agency. Scully (1974) examines data for the 1968 and 1969 seasons, prior to the introduction of free agency, and finds that ‘star’ and ‘average’ players received salaries equal to 15% and 20%, respectively, of their marginal revenue product net of training and capital costs, whereas ‘mediocre’ players had salaries in excess of their net MRP, which is negative. Medoff (1976) examines data for the 1972-74 seasons and finds that ‘star’, ‘average’, and ‘mediocre’ hitters are paid 41%, 36%, and 30% of their MRP, respectively, while the corresponding figures for star, average, and mediocre pitchers are 49%, 51%, and 55%. Telser (1995) shows that the ratio of salary to net marginal revenue product (NMRP) was a decreasing function of NMRP – the larger a player’s NMRP, the greater the team’s bargaining power with the player in salary negotiations. The reason was that the team could issue an “ultimatum” by offering a relatively small fraction of the player’s (large) NMRP and the player would find it extremely costly to decline the offer. In contrast, a player with a small NMRP would find it less costly a refuse a salary set at a small fraction of the player’s (small) NMRP. Thus, prior to the introduction of free agency, MLB players were paid far less than their MRP, with the possible exception of the worst players, who may have been overpaid.

A number of studies focus on the period just before and after the introduction of free agency. Sommers and Quinton (1982), Lehn (1982), Raimondo (1983), Hill and Spellman (1983), and Hill (1985) all present evidence consistent with the hypothesis that MLB possessed monopsony power over baseball players prior to 1976 and that MLB’s monopsony power has diminished since that time.

Economic studies also document that MLB’s monopsony power has been diminished by the introduction of binding arbitration. Using data for the 1989 season, Hadley and Gustafson (1991) compare the salaries of three groups of pitchers and hitters: (1) those ineligible for both final-offer arbitration and free-agency, (2) those eligible for final-offer arbitration, and (3) those eligible for free agency. They find that the average hitter who becomes eligible for arbitration experiences a 60.7% salary increase, while the corresponding figure for the average pitcher is 70.7%. Likewise, the average hitter and pitcher who become free agents (relative to players who are ineligible for both arbitration and free agency) experience an average salary increase of 43.3% and 35.2%, respectively. Similarly, Zimbalist (1992) examines data for the period 1986-89 and finds that ‘apprentice’ hitters under the reserve clause and without salary arbitration rights are paid 17-25% of their MRP, ‘journeyman’ hitters with arbitration rights and the imminent prospect of free agency are paid 50-64% of their MRP, and ‘master’ hitters are paid more than their MRP. Kahn (1993) examines data for the period 1987-90 and finds that players eligible for arbitration but who are more than one year from free agency have higher salaries than players under the reserve clause. Moreover, players in their last year prior to free agency have salaries similar to that of free agents; both have salaries higher than players eligible for arbitration and both use their bargaining power to secure longer, guaranteed contracts. Using data for the 1991 and 1992 seasons, Marburger (1994) finds that becoming eligible for final-offer arbitration raises the average salaries of hitters and pitchers by 54% and 32%, respectively. Furthermore, as players eligible for final-offer arbitration near eligibility for free-agency, their average salaries rise to roughly equal that of free agents. MacDonald and Reynolds (1994) find that, during the 1986 and 1987 seasons, hitters with 1-2 years of experience earned 5% of an additional increment in their career MRP, hitters with 3-6 years of experience earned 58%, and hitters with 7 or more years of experience earned 106%; the corresponding figures for pitchers were 8%, 86%, and 122%. Gustafson and Hadley (1995) find that, for the 1990 season, 25.1% ($174,079) of the gap between the salaries of hitters eligible and ineligible for arbitration cannot be explained by other factors and thus is attributed to MLB's monopsony power; the corresponding figure for pitchers is 40.5% ($242,965). Blecherman and Camerer (1996) find that the average non-free agent signing a contract between the end of the 1989 season and prior to the start of the 1990 season was paid roughly his MRP, whereas the average free agent signing a contract during this period was paid roughly 50% more than his MRP. Bodvarsson and Banaian (1998) examine a sample of 237 players eligible for final offer arbitration during the 1986 and 1987 seasons but who were not eligible for free agency after the 1987 season. They document that players benefit from both the mere possession of final offer arbitration rights and from actually filing for arbitration. Moreover, they argue that these benefits are not due to player-sorting (i.e., teams are more likely to offer arbitration to higher-quality players). Miller (2000) examines players who became free agents or filed for arbitration during the 1991-94 seasons and shows that, although arbitration is associated with a lower salary than free agency, higher free agent salaries tend to lead to higher salaries awarded in arbitration.

Some studies find that the 'surplus' extracted from the players bound by the reserve clause approximates (or may even be less than) the training costs incurred by the player's team. Using the MRP estimates of Zimbalist (1992), Krautmann and Oppenheimer (1996) conclude that the present value of the excess of MRP over salary for players bound by the reserve clause approximately equals the cost of training. Likewise, Krautmann (1999) analyzes data for the period 1990-93 and concludes that, while 'apprentice' hitters are paid an average of 25% of their MRP, the surplus extracted from those players roughly equals the team's training expenses. Krautmann, Gustafson, and Hadley (2000) examine data for the period 1988-94 and conclude that the typical team extracts $3 million from its players bound by the reserve clause, but the team's player development expenses average $6 million per season.

Several pro-competitive rationales for MLB's reserve clause have been proposed. Miceli (2004) presents a model in which the reserve clause benefits players because it gives teams an incentive to invest in a player's development, thereby increasing the likelihood that the player will be able to play at the major league level. The problem is that once a player is sufficiently developed, the team that invested in the player's development may find itself outbid for the player's services by other teams – and if teams cannot obtain a "return" on their investment in a player's development, teams have little incentive to make such an investment. In other words, players face a trade-off between the salary they receive assuming they make the major leagues and the probability of making the major leagues. By accepting a lower salary initially at the major league level, a player provides his team with an incentive to invest in his development and thereby increases the probability that he will develop into a major league player. Thus, both players and teams benefit from the reserve clause.

Another possible pro-competitive rationale for MLB's reserve clause was to improve competitive balance. By preventing wealthy teams from bidding for the players of other teams, wealthy teams could not simply offer the largest salaries to the league's best players and thereby "buy" a championship. The dynamics of the reserve clause are not that simple, however, because teams are allowed to trade players and thus the wealthy teams can attract the league's best players by offering the most lucrative trade. In other words, the distribution of players across teams should be independent of whether players are bound by a reserve clause or whether free agency exists. This is known as the "Coase Theorem." The difference is that, under free agency, the team who loses a player may not receive anything in return (it depends on what free agent compensation rules have been agreed to by the league and the players' association), whereas, under the reserve clause, the player may still go to a new team but the player's original team will demand and receive something in return.

Many studies test whether the Coase Theorem holds in major league baseball, with conflicting results. The economic literature is summarized in Table 6.3.

Table 6.3

The Impact of MLB's Reserve System on Competitive Balance

Study	Test	Result
Fishman (2003)	Estimates a regression model of the standard deviation of team winning percentage using data for the 1950-2001 seasons.	The regression coefficient on the number of players who declared free agency the prior year is positive and statistically significant.
Depken (2002)	Compares Herfindahl Indices based on each team's share of total home runs and total opponent strikeouts before (1920-76) and after (1977-96) free agency.	Concentration of home runs fell in the American League, but not in the National League. Concentration of opponent strikeouts fell (at the 90% confidence level) in the American League, but not in the National League.
Cymrot, Dunlevy & Even (2001)	Compares the movement of free agent and non-free agent hitters across teams using data on players who played in both the 1979 and 1980 seasons.	The impact of the predicted gain from moving on the probability of changing teams is the same for free agents (who pocket the gain) and non-free agents (whose gain is pocketed by the club).
Eckard (2001b)	Compares variance of team winning percentage and the relative concentration of league championships (team with highest winning percentage at the end of the regular season) before (1961-76) and after (1977-92) free agency, excluding expansion teams. Also calculates average annual number of players traded or sold before (1973-75) free agency.	The variance of team winning percentage falls in the American League, but rises in the National League. In both leagues, the Herfindahl Index of teams with the highest winning percentage at the end of the regular season falls. Only 3.6% of "regular" and 2.3% of "impact" players were sold or traded during the 1973-75 period.

Table 6.3

The Impact of MLB's Reserve System on Competitive Balance

Study	Test	Result
Depken (1999)	Compares Herfindahl Index calculated based on each team's percentage of total wins before (1920-1976) and after (1977-96) free agency.	Concentration of wins increased in the American League, but not in the National League.
Horowitz (1997)	Compares entropy measure of competitive balance before (1903-75) and after (1976-95) free agency.	Competitive balance declined in the National League; no statistically significant change in the American League.
Ross & Lucke (1997)	Examines several measures of competitive balance using data from the period 1961-92: regresses a team's winning percentage in the current season on its winning percentages for the prior three seasons; examines incidence of teams finishing the season within five games of first place in their division; examines incidence of teams going from 'good-to-bad' or 'bad-to-good'; examines movement of pitchers on teams going from 'good-to-bad' or 'bad-to-good.'	The coefficient on the one season lagged winning percentage is 0.444 in the period before free agency (1961-76) and 0.327 thereafter (1977-92); the incidence of teams finishing within five games of first place in their division is 1.94 during the period 1961-76 and 4.58 during the period 1977-92; incidence of teams going from 'good-to-bad' or 'bad-to-good' is higher after the introduction of free agency; after the introduction of free agency, there is a greater migration of pitching talent away from 'good-to-bad' teams and towards 'bad-to-good' teams.
Hylan, Lage & Treglia (1996)	Compares the movement of free agent and non-free agent pitchers across teams during the period 1961-92.	Probit analysis shows that attaining free agent status does not affect the probability of the pitcher changing teams; however, pitchers with seven or more years of service are less likely to move in the free agency era.
Vrooman (1996)	Compares season-to-season correlation of team winning percentage over the period 1970-93.	Regression coefficient on lagged winning percentage declines from 0.715 in 1970-76 to 0.717 during 1978-80, 0.450 during 1983-85, 0.311 during 1986-89, and 0.036 during 1990-93.
Butler (1995)	Compares the standard deviation of team winning percentage within a season and the season-to-season correlation of team winning percentage over the period 1946-92.	No statistically significant impact of free agency on the standard deviation of team winning percentage within a season; free agency significantly lowers season-to-season correlation of team winning percentage.
Fort & Quirk (1995)	Compares the standard deviation of winning percentage in the period before (1966-75) and after (1976-85) free agency.	No statistically significant change for either the American or National League.
Balfour & Porter (1991)	Compares variance of winning percentage and correlation of winning percentage across seasons before (1961-76) and after (1977-89) free agency.	Variance of winning percentage falls from 56.6 to 48.3, which is significant at the 90% confidence level; correlations of winning percentage across seasons using lags of one, two, and three years are sharply lower in the free agency era.

Table 6.3

The Impact of MLB's Reserve System on Competitive Balance

Study	Test	Result
Drahozal (1986)	Examines movement of players signing guaranteed contracts of five or more years during the period 1977-81; compares standard deviation of winning percentage (excluding expansion teams) before (1972-76) and after (1977-82) free agency; compares rankings by population and winning percentage before (1972-76) and after (1977-82) free agency.	No evidence that free agents move from small cities to large cities. Standard deviation of winning percentage fell from 0.0607 to 0.0497 for National League teams, but rose from 0.0475 to 0.0561 for American League teams. Spearman correlation coefficient for population and winning percentage ranking fell from 0.329 to 0.231 for National League teams, but rose from 0.140 to 0.230 for American League teams.
Besanko & Simon (1985)	Compares player movements (1969-81), competitive equality (1970-83), and relationship between market size and team winning percentage (1970-83) before and after free agency.	No statistically significant change in any of the measures.
Dolan & Schmidt (1985)	Compares the concentration of team revenue, the standard deviation of team standings, and the Gini coefficient for total wins before (1969-76) and after (1977-83) free agency.	Concentration of team revenue (Gini coefficient, Herfindahl Index) rose significantly in the American League, but not in the National League; no statistically significant change in the standard deviation of team standings and Gini coefficient for total wins for either league.

Consistent with the Coase Theorem, Cymrot, Dunlevy, and Even (2001) find that, for players who played both the 1979 and 1980 season, the impact of the predicted gain from moving to a new team on the probability of changing teams is the same for free agents (who pocket the gain) and non-free agents (whose original team pockets the gain). They conclude that "the invariance property of the Coase Theorem is empirically supported by the analysis of the 1980 baseball labour market, and 'Who's on first' and team competitive balance are indicated to not be dependent on the institution of player free agency." (p. 602) Fort and Quirk (1995) compare the standard deviation of winning percentage in the period before (1966-75) and after (1976-85) free agency and find no statistically significant change in either the American or National League. Drahozal (1986) finds that, following the introduction of free agency, there was no significant movement of players from small market to large market teams, which suggests that "the reserve system did not significantly affect the distribution of playing talent." (p. 117) Besanko and Simon (1985) find no statistically significant change in player movements, competitive equality, or the relationship between market size and team winning percentage before and after the introduction of free agency. In fact, Besanko and Simon document that "free agents (especially good ones) tend to end up signing with *worse* teams than the ones they leave", which suggests that "diminishing returns to quality place a limit on the economic incentives for a large city team to dominate a league." (p. 83) Dolan and Schmidt (1985) find no statistically significant change in the standard deviation of team standings and the concentration of total wins before (1969-76) and after (1977-83) the introduction of free agency.

On the other hand, in violation of the prediction of the Coase Theorem, there is some evidence that the introduction of free agency has impacted the movement of players across teams. Depken (2002) finds that free agency reduced the concentration of home runs across teams, but did not affect the concentration of strikeouts or runs scored. He concludes that his results are consistent with an increase in player mobility after the introduction of free agency, but are not consistent with a monopolization of player talent by a minority of teams. Using data for the period 1961-92, Hylan, Lage, and Treglia (1996) document that "after the introduction of free agency, the pitchers with greater longevity in the major leagues are less likely to move relative to their mobility in the pre-free agency period" and, "in general, better pitchers are less likely to move and that pitchers playing on teams with higher winning percentages or in large market cities were less likely to move." (p. 1030)

Some studies report evidence suggesting that the demise of the reserve clause has led to a decline in competitive balance. For example, Fishman (2003) estimates a model of the standard deviation of team winning percentage using data for the period 1950-2001 and reports that the greater the number of players declaring free agency in the prior year, the greater the standard deviation of team winning percentage the following year. Fishman concludes that "free agency does have an effect on competitive balance (harmful) and that (due to transaction costs or economic distortions) the Invariance Proposition does not perfectly hold for Major League Baseball." (p. 90) Depken (1999) finds that, after the introduction of free agency, the concentration of wins increased in the American League (but not in the National League), leading him to conclude that "free-agency has statistically reduced parity in the AL while it has had no statistically significant influence on parity in the NL." (p. 216) Horowitz (1997) shows that competitive balance in MLB has been on an upward trend in the 20th century, but there have been a number of events that have reduced that upward trend. One of those events was the introduction of free agency – at least in the National League (but not in the American League).

In contrast, a number of other studies find that the demise of the reserve clause may have improved competitive balance. For example, Eckard (2001b) documents a diminishing return to pennant contention after the introduction of free agency, in the sense that there is a greater decline in attendance for teams in the mist of several consecutive years of pennant contention. Thus, following the introduction of free agency, player talent is more likely to be reallocated to potential new contenders rather than the same contenders year-after-year. Eckard documents that "year-to-year fluctuations in league standings increased after free agency; cumulative win percent variance decreased; and the concentration of pennant winners declined in both the AL and the NL" and, therefore, "the 1976 introduction of free agency in MLB caused an increase in competitive balance." (p. 442) Ross and Lucke (1997) state that "studies of Major League Baseball, where the labor market was transformed within a 1-year period in 1976 from a regime of almost complete monopsony – the famous reserve clause tying a player to a team for life – to virtually unlimited free agency for players with more than 6 years of major league service, now point to the conclusion that player restraints do indeed affect the allocation of players and the competitive balance among teams." (p. 655) Ross and Lucke – as well as Vrooman (1996), Butler (1995), and Balfour and Porter (1991) – find that the correlation between a team's current and lagged winning percentage since the introduction of free agency has declined. This suggests that the introduction of free agency has made it easier for bad teams to improve and more difficult for top teams to stay on top.

Amateur Draft. MLB introduced a 'reverse order' amateur draft in 1965. The team with the worst winning percentage gets the first pick in the draft; the team with the second-worst winning percentage gets the second pick, and so on. Assuming teams have roughly similar abilities in scouting and developing talent, the worst teams should be able to draft higher quality players than the better teams, thereby improving the quality of the bad teams relative to the good teams. In other words, the reverse order amateur draft should improve competitive balance.

The economic evidence, summarized in Table 6.4, is mixed. Fishman (2003) estimates a regression model of the standard deviation of team winning percentage over the 1950-2001 seasons. Although he finds that the dummy variable denoting the presence of the reverse order draft is negative, which is consistent with the hypothesis that the draft improves competitive balance, the coefficient is not statistically significant at the 5 percent level. On the other hand, Fort and Quirk (1995) and Daly and Moore (1981) report results generally consistent with the reverse order draft improving competitive balance.

Table 6.4

The Impact of MLB's Amateur Draft on Competitive Balance

Study	Test	Result
Fishman (2003)	Estimates regression model of the standard deviation of team winning percentage using data from the 1950-2001 seasons.	Coefficient on the dummy variable denoting the presence of the reverse order amateur draft is negative, but not statistically significant at the 5 percent level.
Fort & Quirk (1995)	Compares the standard deviation of winning percentage in the period before (1952-63) and after (1964-75) the rookie draft.	No statistically significant change for the National League; significant decrease for the American League, possibly due to the 1964 purchase of the Yankees by CBS and a large drop in the team's winning percentage.
	Compares the Gini coefficient for the concentration of championships in the period before (1952-63) and after (1964-75) the rookie draft.	Gini coefficient fell significantly for both American League (0.892 vs. 0.699) and National League (0.710 vs. 0.571).
Daly & Moore (1981)	Compares coefficient of variation of winning percentage and rank correlation coefficient of league standings (excluding all games involving expansion teams) before (1955-64) and after (1965-73) the rookie draft.	Coefficient of variation of winning percentage fell from 0.127 to 0.082 for American League teams and from 0.087 to 0.077 for National League teams; rank correlation coefficients of league standings fell sharply for both leagues.
	Compares Major League player trading activity before (1955-64) and after (1965-73) the rookie draft, excluding the expansion years of 1961, 1962, and 1969.	Average annual number of trades per team fell from 8.73 to 7.74.

Collusion.[114] The 1985 collective bargaining agreement between MLB and the MLB Players Association contained Article XVIII, Section H, which read:

> The utilization or non-utilization of rights under this Article XVIII is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.

In other words, MLB owners agreed not to act jointly in signing free agents – Article XVIII(H) was an "anti-collusion" provision.

Following the 1985 season, the new crop of free agents found that there was little demand from other teams for their services. Of the 29 free agents, only

[114] The discussion in this section is based primarily on Edelman (2004).

one received a bona fide contract offer from another team. On January 31, 1986, the MLBPA filed a collusion grievance against MLB owners, alleging violation of Article XVIII(H). The MLBPA pointed to statements by MLB Commissioner Peter Ueberroth (1) encouraging MLB owners to take 'fiscally responsible' actions such as avoiding long-term contracts and agreeing not to negotiate with other teams' free agents and (2) berating owners and general managers who did not heed his message. For example, the Kansas City Royal's interest in signing free agent Kirk Gibson allegedly disappeared after a 1985 MLB owners' meeting. MLB owners countered that the lack of free agent signings emerged from the rational, individual business decisions of each team based on legitimate baseball, business management, and financial factors. On September 27, 1987, MLB teams were found by an arbitration panel headed by Thomas Roberts to have violated Article XVIII(H). The MLBPA was awarded damages of $10,528,086.71.

Prior to Arbitrator Roberts' decision, the MLBPA, on February 18, 1987, had filed a second grievance against MLB teams alleging collusion with respect to the players who became free agents at the end of the 1986 season. The MLBPA pointed to the fact that only one free agent signed with a different team – and that signing was highly unusual in that Andre Dawson was so willing to leave his current team, the Montreal Expos, that he unilaterally called a press conference announcing that he would sign a blank check for the Chicago Cubs. Cornered, the Cubs had little choice but to sign Dawson, but they did so for $500,000 – about half of Dawson's salary the previous season. The MLBPA also alleged that when the Philadelphia Phillies expressed an interest in signing the Detroit Tigers' free agent catcher Lance Parrish, two MLB owners – Milwaukee Brewers owner (now MLB commissioner) Alan [Bud] Selig and Chicago White Sox owner Jerry Reinsdorf – 'asked' the Phillies' president not to sign Parrish. Once again, MLB owners argued that the lack of interest in signing free agents reflected the economic conditions of MLB teams (some of which were losing money). Arbitrator George Nicolau decided that case in favor of the MLBPA and awarded it $38 million in damages.

The MLBPA filed a third grievance during the 1987-88 off-season, during which MLB owners had resumed bidding for free agents but had created a so-called "Information Bank" which provided teams with detailed information about every contract offer made to a free agent, thereby letting each team know the demand for each free agent. Although 12 of 76 free agents received offers from other teams, only three received sufficiently lucrative offers for them to actually switch teams. Arbitrator Nicolau again decided in favor of the MLBPA and awarded it $65 million in lost salaries for the 1988 season.

Rather than appeal the three decisions, MLB decided to settle with the MLBPA. In exchange for the MLBPA agreeing not to file a grievance for any collusion that may have occurred during the 1989-90 off-season, MLB agreed to pay the MLBPA $280 million.

Economic studies have presented evidence consistent with the hypothesis that MLB owners engaged in collusion in the mid-1980s. Haupert (2003) calculates the average MLB payroll as a percentage of total team revenue and shows that the payroll averaged 20.5% of total team revenue in 1974, jumped to 25.1% in 1977 after the introduction of free agency, rose to 39.1% in 1980 and 39.7% in 1985, but then dropped to 34.2% in 1988 and 31.6% in 1989. This decline is consistent with the finding that MLB owners colluded in the mid-1980s. The percentage then began to climb, going from 33.4% in 1990 to 42.9% in 1991, 50.7% in 1992, and 60.5% in 1994. After the strike-shortened 1994 season, it began to decline, dropping to 53.6% in 1997. In 2001, the average MLB payroll was 54.1% of total team revenue.

Similarly, Scully (2004) calculates player compensation as a percentage of revenue for major league baseball. During the period 1970-73, prior to the introduction of free agency, player compensation was 15.9% of revenue. In 1980, a few years after the introduction of free agency, it was 31.3%. Scully unfortunately does not report the percentage for any years between 1981 and 1989; in 1990, however, the percentage was 31.6%, almost the same as a decade earlier. The percentage then soared in the early 1990s, rising to 45.3% in 1991, 57.8% in 1992, 56.3% in 1993, and peaking at 63.4% in the strike-shortened 1994 season. By 1998, player compensation was 48.4% of revenue.

Several other studies compare the period of MLB owner collusion to the period either before or after the collusion. For example, Ferguson, Jones, and Stewart (2000) estimate a hedonic model of team salaries using data for the period 1986-91 and test the hypothesis of a common hedonic price vector. In other words, they test whether teams paid the same "price" for the same team characteristics, such as total years of major league experience by all players, team slugging average for the current season multiplied by the number of hitters, the ratio of strikeouts to walks for all pitchers during the current season multiplied by the number of pitchers, and the number of 'star' players on the team. In a competitive market, one would expect hedonic prices to be the same across teams. The hypothesis of a common hedonic price vector is rejected, which suggests that hedonic prices differed across teams. Thus, their evidence is consistent with collusion by MLB owners during the period 1986-88.

Durland and Sommers (1991) examine a sample of 236 pitchers and 336 non-pitchers who played the 1987 season and had at least one year of MLB experience. They then divide each group depending on whether the player signed his contract before or after November 1985, when the alleged collusion began. They hypothesize that if collusion occurred, there should be a structural change in the determination of player salaries. They perform a regression analysis of player salaries, using player performance and experience as explanatory variables. Consistent with the collusion hypothesis, Durland and Sommers find that a structural shift in their model of salary determination occurred around November 1985.

Bruggink and Rose (1990) estimate the gross MRPs of the free agents for the 1984 season (the last season before the MLB owners began colluding), as well as of the free agents for the 1985 and 1986 seasons. Consistent with the collusion hypothesis, the unweighted average of salary to gross MRP fell from 0.96 in the 1984 season to 0.69 during the 1985-86 seasons, a drop of 28%, and the weighted average likewise fell from 1.22 to 0.75, a drop of 38%. Bruggink and Rose observe that their results are consistent with the hypothesis that MLB owners exhibited 'financial restraint', but caution: "Although financial restraint is the natural economic consequence of collusion, these results do not empirically establish that collusion occurred, since financial restraint could have been due to the independent decisions of the 26 baseball clubs." (p. 1038)

After settling three collusion-related grievances for a total of $280 million and after the 1990 collective bargaining agreement added a provision specifying a treble damages remedy, one would expect MLB owners to have a strong incentive to refrain from colluding. Yet, on December 20, 2002, MLB teams simultaneously released 46 arbitration-eligible players from their rosters rather than offer them arbitration to determine their salary for the upcoming 2003 season. The MLBPA suspected that MLB was increasing the free agent supply so as to drive down free agent salaries, which in turn would have the added benefit (to MLB owners, not MLB players) of driving down the salaries awarded in arbitration. The 72 arbitration-eligible players received an average salary increase of 92%, compared to a 130% salary increase for arbitration-eligible players a year earlier. Of the 72 arbitration-eligible players, 65 reached a contract with their team prior to going before an arbitrator. Of the 7 players would went before an arbitrator, only two 'won' – the arbitrator chose the player's salary request over the team's offer. Edelman (2004) argues that "a concerted agreement among baseball clubs to increase the supply of free agent players violates baseball's collusion clause, and therefore, MLB clubs are at risk of losing another collusion grievance." (p. 160)

NFL. Players in the National Football League have brought antitrust lawsuits against the NFL over the structure of the labor market for NFL players. This system, as of the early 1970s, was summarized in *Mackey v. NFL*:[115]

> For a number of years, the NFL has operated under a reserve system whereby every player who signs a contract with an NFL club is bound to play for that club, and no other, for the term of the contract plus one additional year at the option of the club. The cornerstones of this system are §15.1 of the NFL Constitution and Bylaws, which requires that all club-player contracts be as prescribed in the Standard Player Contract adopted by the League, and the option clause embodied in the Standard Player Contract. Once a player signs a Standard Player Contract, he is bound to his team for at least two years. He may, however, become a free agent at the end of the option year by playing that season under a renewed contract rather than signing a new one. A player "playing out his option" is subject to a 10% salary cut during the option year.
>
> Prior to 1963, a team which signed a free agent who had previously been under contract to another club was not obligated to compensate the player's former club. In 1963, after R.C. Owens played out his option with the San Francisco 49ers and signed a contract with the Baltimore Colts, the member clubs of the NFL unilaterally adopted the following provision, now known as the Rozelle Rule, as an amendment to the League's Constitution and Bylaws:

[115] *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

> This provision, unchanged in form, is currently embodied in §12.1(H) of the NFL Constitution. The ostensible purposes of the rule are to maintain competitive balance among the NFL teams and protect the clubs' investment in scouting, selecting and developing players… The NFL has adopted a number of other rules and practices designed to maintain competitive balance and protect the clubs' investment in player development costs which are not at issue here. Among them are the option clause and Standard Player Contract, discussed above, the college draft and no-tampering rules.

Some of the provisions challenged by NFL players on antitrust grounds were blacklisting, restrictions on free agent movements (i.e., the "Rozelle Rule"), the amateur draft, and the fixing of player salaries.[116] Players succeeded in winning many of these lawsuits, thereby strengthening the bargaining power of the NFL's Players Association in its negotiations with the league.

Blacklisting. Bill Radovich played for the NFL's Detroit Lions from 1938 to 1942, left the team to serve in the Navy during World War II, and then returned to the Lions for the 1945 season. At the time, each NFL team used a standard

[116] The NFL has also tried to use the antitrust laws to its advantage. In *Five Smiths v. NFL Players Association*, the league sued the NFLPA on antitrust grounds, alleging that, in violation of Section 1 of the Sherman Act, the NFLPA "has engaged, and continues to engage, in a combination and conspiracy with agents representing NFL players ("player-agents"), the purpose and effect of which is to fix, raise and/or maintain compensation paid to NFL players." On March 30, 1992, the district court dismissed the NFL's complaint for failing "to state a cognizable antitrust claim under either the per se rule or the rule of reason." The district court rejected the NFL's argument that (1) "the NFLPA's agreement to exchange price information with agents is a per se antitrust violation because it indicates the existence of a broader conspiracy to fix, raise, stabilize or maintain prices, that is, players' salaries" and (2) "the salary exchange constitutes a rule of reason violation because it has the anti-competitive effect of forcing them to pay higher player salaries than they would otherwise have to pay in the absence of such an exchange."

player contract which prohibited a player from signing with another team without the consent of the team holding the player's contract and teams enforced these contracts by blacklisting players who violated them. In 1946, Radovich asked the Lions to be transferred to the NFL's Los Angeles team so he could be closer to his ill father. When the Lions refused, Radovich broke his player contract and signed and played the 1946 and 1947 seasons with the Los Angeles Dons of the rival All-America Conference. In 1948, Radovich was offered the position of player-coach of the San Francisco Clippers of the Pacific Coast League, which was affiliated with the NFL. The NFL advised the Clippers that Radovich was blacklisted and any affiliated team signing Radovich would suffer severe penalties. The Clippers then refused to sign Radovich.

Radovich filed an antitrust lawsuit against the NFL alleging that NFL owners violated Sections 1 and 2 of the Sherman Act by conspiring to monopolize and control organized professional football in the United States and that, as part of that conspiracy, they sought to (1) destroy the All-America Conference, (2) boycott him, and (3) prevent him from becoming player-coach in the Pacific Coast League. The U.S. Supreme Court decided the case on February 25, 1957, ruling that the Court's decisions in *Federal Baseball Club v. National League* and *Toolson v. New York Yankees* did not apply to the NFL – in other words, "the business of football comes within the scope of the Sherman Act."[117] As a result, the Court held that "Radovich is entitled to an opportunity to prove his charges", although the Court added: "Of course, we express no opinion as to whether or not respondents have, in fact, violated the antitrust laws, leaving that determination to the trial court after all the facts are in." Three justices dissented, pointing out that they could not understand how the business of major league football could be within the scope of the federal antitrust laws if the business of major league baseball is not.

After the Supreme Court's decision, NFL owners reportedly "quietly granted many of the demands from the players association", knowing that players would file more antitrust lawsuits unless the league made some concessions.[118] However, players continued to seek an injury protection clause, a pension plan, hospitalization, and other benefits. In November 1958, Billy Howton of the Green Bay Packers and then-president of the NFL Players Association threatened to file an antitrust lawsuit, resulting in the NFL creating a benefit plan for NFL players that included hospitalization, medical, and life insurance, as well as retirement benefits at age 65.

Rozelle Rule, Revenue-Sharing, and Free Agency. Joe Kapp was drafted by the NFL's Washington Redskins but the two sides failed to negotiate a satisfactory contract and Kapp went to the Canadian Football League, where he played for seven seasons from 1959 to 1966. By keeping Kapp on their reserve list until April 1966, the Redskins prevented other NFL teams from negotiating with him – in accordance with the NFL's "tampering" rule. Although Kapp's Canadian team had an option to renew his contract for the 1967 season, Kapp

---

[117] *Radovich v. NFL*, 352 U.S. 445 (1957).
[118] The information in this paragraph is based on an article posted on the NFLPA website.

covertly negotiated a contract with the NFL's Houston Oilers. The NFL Commissioner declared the contract invalid because the NFL and the Canadian League had an understanding that players under contract could not negotiate a contract to move to the other league. The Minnesota Vikings paid Kapp's Canadian team and apparently made satisfactory arrangement with the Redskins so that Kapp could play for the Vikings, which he did for three seasons from 1967 to 1969. Kapp then declined the Vikings' offer of a two-year contract. In accordance with the "Rozelle Rule", any team that signed a free agent who played out his contract, as Kapp did, had to make a satisfactory arrangement with the free agent's former team, or, absent such an arrangement, the NFL Commissioner (Pete Rozelle) had the power to award one or more players from the team signing the free agent to the team losing the free agent. The New England Patriots made such an arrangement with the Vikings, surrendering their first round draft choice in 1972 as well as their number-one draft selection in 1967. Kapp and the Patriots reached an agreement whereby he would play the rest of the 1970 season and the 1971 and 1972 seasons. After playing the 1970 season, the Patriots asked Kapp to sign a standard player contract, as required by the NFL's Constitution and Bylaws. Signing a standard player contract binds the player by all the rules contained in the NFL's Constitution, including the 'draft rule', the 'tampering rule', the 'option rule', the Rozelle Rule, and the 'one-man' rule. Kapp refused and thus was barred from practicing with or playing for the Patriots, who nevertheless placed Kapp on their reserve list so he would still be covered by the Rozelle Rule lest another NFL team try to sign him.

Kapp's football career came to an end and he brought an antitrust lawsuit against the NFL alleging that various NFL provisions such as the draft rule, tampering rule, option rule, Rozelle rule, and standard player contract requirement violated the antitrust laws and caused his 'unlawful expulsion' from the NFL in 1971. On December 20, 1974, the district court found that "league enforcement of most of the challenged rules is so patently unreasonable that there is no genuine issue for trial."[119] With respect to the Rozelle Rule, the district court wrote:

> The "Ransom" or "Rozelle" rule provides in effect that a player, even after he has played out his contract under the option rule and has thereby become a free agent, is still restrained from pursuing his business to the extent that all league members with whom he might otherwise negotiate for new employment are prohibited from employing him unless upon consent of his former employer or, absent such consent, subject to the power of the NFL Commissioner to name and award one or more players to the former employer from the active reserve or selection list of the acquiring club – as the NFL Commissioner in his sole discretion deems fair and reasonable.
>
> A conceivable effect of this rule would be to perpetually restrain a player from pursuing his occupation among the clubs of a league that holds a

[119] *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Ca. 1974).

> virtual monopoly of professional football employment in the United States.
>
> We conclude that such a rule imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL and that it imposes upon the player-employees such undue hardship as to be an unreasonable restraint and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test and there is no genuine issue about it to require or justify trial.

Furthermore, the district court found that "the NFL's rules were not exempt from antitrust laws by having become the subject of collective bargaining between the NFL and the players' association because the collective bargaining agreement was not in effect at the time of the alleged illegal conduct" and "there was no genuine dispute as to any material fact that the rule, under which the player was discharged from his employment, had not been contractually accepted by player or the players' association as the result of collective bargaining." The trial was thus limited to a determination of the damages suffered by Kapp from the league rules that violated the antitrust laws. The jury found that Kapp failed to prove that he suffered any damages from those rules. Kapp appealed, arguing that the jury was given erroneous instructions, but, on August 4, 1978, the appeals court rejected Kapp's argument.[120]

Less than two years after the district court in *Kapp v. NFL* found that the Rozelle Rule violated the antitrust laws, an appeals court in 1976 reached a similar conclusion in *Mackey v. NFL*.[121] In 1971, the president of the NFL Players Association, John Mackey, and 15 other football players filed a lawsuit alleging that the Rozelle Rule violated Section 1 of the Sherman Act. The district court found that the Rozelle Rule (1) constituted a concerted refusal to deal and a group boycott, and thus was a *per se* violation of the Sherman Act, (2) would be invalid under a rule of reason analysis because the alleged pro-competitive effects were insufficient to justify such a restrictive measure, and (3) was not immune from the antitrust laws because it had been the subject of a collective bargaining agreement between NFL owners and the NFL Players Association. The NFL appealed.

On October 18, 1976, the appeals court issued its decision. It observed that the NFL "presently enjoys a monopoly over major league professional football in the United States." It also observed that the first collective bargaining agreement between NFL owners and the NFL Players Association was concluded in 1968 and was in effect from July 15, 1968 to February 1, 1970 and that the second collective bargaining agreement was signed on June 17, 1971, made retroactive to February 1, 1970, and expired on January 30, 1974. At the time of the appeals court decision, no new collective bargaining agreement had yet been reached. The appeals court reviewed the collective bargaining history and concluded that "the

[120] *Kapp v. NFL*, 586 F.2d 644 (9th Cir. 1978).
[121] *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

agreements between the clubs and the players embodying the Rozelle Rule do not qualify for the labor exemption." The appeals court explained:

> On the basis of our independent review of the record, including the parties' bargaining history as set forth above, we find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements. The Rule imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963. The provisions of the collective bargaining agreements which operated to continue the Rozelle Rule do not in and of themselves inure to the benefit of the players or their union. Defendants contend that the players derive indirect benefit from the Rozelle Rule, claiming that the union's agreement to the Rozelle Rule was a quid pro quo for increased pension benefits and the right of players to individually negotiate their salaries. The district court found, however, that there was no such quid pro quo, and we cannot say, on the basis of our review of the record, that this finding is clearly erroneous.

Given that the Rozelle Rule did not qualify for the labor exemption to the antitrust laws, the appeals court examined whether the Rozelle Rule violated Section 1 of the Sherman Act. The appeals court argued that the Rozelle Rule should be examined under a rule of reason analysis, rather than as a *per se* violation. The appeals court agreed with the district court that there was substantial evidence that the Rozelle Rule "significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another."

The NFL countered that the Rozelle Rule was pro-competitive for three reasons, each of which the appeals court (agreeing with the district court) found unconvincing. First, the NFL argued that, without the Rozelle Rule, star players would flock to cities with natural advantages such as warmer climates and greater media opportunities, thereby destroying the league's competitive balance, which in turn would diminish spectator interest in the league, lead to NFL franchise failures, and possibly lead to the demise of the NFL itself. The district court concluded that the existence of the Rozelle Rule did not have a significant impact on competitive balance in the NFL. The appeals court wrote:

> We need not decide whether a system of inter-team compensation for free agents moving to other teams is essential to the maintenance of competitive balance in the NFL. Even if it is, we agree with the district court's conclusion that the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might

> have in this regard. First, little concern was manifested at trial over the free movement of average or below average players. Only the movement of the better players was urged as being detrimental to football. Yet the Rozelle Rule applies to every NFL player regardless of his status or ability. Second, the Rozelle Rule is unlimited in duration. It operates as a perpetual restriction on a player's ability to sell his services in an open market throughout his career. Third, the enforcement of the Rozelle Rule is unaccompanied by procedural safeguards. A player has no input into the process by which fair compensation is determined. Moreover, the player may be unaware of the precise compensation demanded by his former team, and that other teams might be interested in him but for the degree of compensation sought.

Second, the NFL argued that the Rozelle Rule protected teams' investment in scouting and player development. The district court concluded that such investment expenses were similar to those incurred by other businesses, which had no right to compensation for such investment expenses.[122] The appeals court wrote:

> We agree that the asserted need to recoup player development costs cannot justify the restraints of the Rozelle Rule. That expense is an ordinary cost of doing business and is not peculiar to professional football. Moreover, because of its unlimited duration, the Rozelle Rule is far more restrictive than necessary to fulfill that need.

Third, the NFL argued that, to function well as a team, players have to work together for long periods and, without the Rozelle Rule, the increase in player movement would result in a deterioration in team quality, thereby reducing spectator interest, which would hurt both the NFL teams and the players. The district court concluded that elimination of the Rozelle Rule would impact all teams equally and thus quality of play would not suffer – and even if quality of

[122] The economics literature distinguishes between "general" and "firm-specific" human capital. Firms will pay for training which increases an employee's firm-specific human capital because they can recoup their investment by paying the employee less than his or her marginal revenue product (i.e., the employee's firm-specific human capital is, by definition, only valuable to the current employer). In contrast, in a perfectly competitive labor market, an employer will be unwilling to pay for training which increases the employee's general human capital since it will be unable to recoup its investment (i.e., if it pays the employee less than his or her marginal revenue product, the employee can quit and be paid his or her MRP by another employer). An employee can give his or her employer an incentive to provide general human capital by accepting an initial salary which is less than MRP. See, for example, Becker (1964), Acemoglu & Pischke (1998, 1999a, 1999b), and Casas-Arce (2004).

play did suffer, this fact would not justify the anticompetitive effects of the Rozelle Rule. The appeals court agreed.

Thus, the appeals court concluded that "the Rozelle Rule, as enforced, unreasonably restrains trade in violation of §1 of the Sherman Act." However, it added:

> We note that our disposition of the antitrust issue does not mean that every restraint on competition for players' services would necessarily violate the antitrust laws. Also, since the Rozelle Rule, as implemented, concerns a mandatory subject of collective bargaining, any agreement as to interteam compensation for free agents moving to other teams, reached through good faith collective bargaining, might very well be immune from antitrust liability under the nonstatutory labor exemption.
>
> It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this. We encourage the parties to resolve this question through collective bargaining. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts.

The appeals court decision finding the Rozelle Rule to violate the antitrust laws occurred on October 18, 1976. Less than six months later, in March 1977, the NFL owners and NFL Players Association reached a new collective bargaining agreement which did not include the Rozelle Rule. Instead, in return for greater financial benefits for players, the agreement included a first refusal/compensation system whereby a team signing a free agent would give up its first-round draft choice. From 1977 through 1981, there was little movement of free agents to new teams, apparently because giving up one's first-round draft choice was considered by teams to be too high a price to sign a free agent.[123]

The NFLPA's willingness to trade away free agency in its collective bargaining negotiations with the NFL has been examined in a number of economic studies. These studies identify a number of ways in which the NFL differs from other sports leagues, such as extensive sharing of revenue (which allegedly diminishes the incentive to field a winning team), larger team size (which diminishes the impact of adding any one player on the team's quality), and shorter player careers (which reduces the probability of ever becoming a free agent).

One argument is that the extensive revenue-sharing in the NFL smothers teams' incentive to bid for free agents. For example, Scott, Long, and Somppi (1983) summarize the NFLPA's lack of support for free agency as follows:

[123] The information in this paragraph is based on an article posted on the NFLPA website.

> A free agent system will not work in the NFL because the way football revenues are split eliminates the financial incentive to win. Gate revenues are split 65-35 percent between the home and visiting teams, but television revenues and playoff revenues (both television and ticket) are split evenly. As a result, it is argued that teams with persistently poor records do as well financially as those teams that contend for the league championship. Since the link between winning and revenues has been broken, NFL owners would not compete for free agents and average salaries would not increase under free agency. (p. 258)

Scott, Long, and Somppi document that, contrary to the NFLPA's claim, team revenue is an increasing function of the team's winning percentage. Specifically, the difference in team revenue between winning and losing one game during the 16 game regular season is $169,500. This financial return to winning in the NFL is of the same order of magnitude as in professional baseball and basketball. Thus, NFL owners have an incentive to win and, consequently, have an incentive to bid for free agents. In order to increase the impact of bidding for free agents on player salaries, Scott, Long, and Somppi suggest that (1) free agents should be allowed to move to a new team without that team paying compensation to the free agent's former team, thereby increasing the mobility and bargaining power of free agents, and (2) changes should be made in the NFL's revenue-sharing to strengthen the incentive to win, such as dividing the gate receipts in playoffs games between only the competing teams or giving teams in the playoffs a larger share of playoff television revenue.

On the other hand, Vrooman (2000) compares the impact of average winning percentage on team revenue in the NFL, NBA, and MLB using data for the period 1990-92 and finds that the impact is much smaller in the NFL than in the other two leagues. Specifically, a 10% increase in average winning percentage is associated with a 1.2% revenue increase in the NFL, a 4.9% revenue increase in the NBA, and a 6.0% revenue increase in MLB. This suggests that, relative to the NBA and MLB, NFL owners have relatively little incentive to bid aggressively for free agents to significantly improve the quality of their team.

Staudohar (1988) discusses a number of ways in which the NFL differs from other sports leagues and how it allegedly decreases the benefits of free agency to players. He writes:

> The rationale for negotiating away the free agency won in court is that free agency may not be as meaningful in football as it is in other sports. The players gained increased pension and other benefits for giving up free agency, and felt it was a wise tradeoff. Why don't football players receive higher salaries under free agency? One reason is that a single player doesn't make that much difference on a team. Football is played with 22 players – 11 on offense and 11 on defense. By contrast, one player can have a big impact on a five-person basketball team, but is far less important in football. Second, the NFL owners already operate in stadiums that typically average 95 percent of capacity, so they would not be able to sell many more tickets to justify acquiring a star free agent player. Also,

> there are fewer games played in football than in other team sports. More important, most teams fill their stadiums regardless of their won-lost record. Third, because football careers are much shorter, there are fewer opportunities for players to become free agents. Finally, the owners proved determined not to fundamentally change the free agency system.
>
> Supposing the players were able to achieve free agency, there may not be much they could make of it because the football owners would not likely fall victim to a bidding game for reasons stated above. (pp. 28-29)

The predicted reluctance of NFL owners to bid for free agents is cast into doubt by their behavior in response to competition from the newly-created United States Football League (USFL) for professional football player services. Staudohar (1988) reports that average NFL salaries rose from $90,000 in 1982 to $230,000 in 1987, which he attributes largely to the competition between the NFL and USFL for players. Kahn (1992) discusses a study by Flanagan (1989) that estimates that NFL salaries grew an average of 24% annually during the period 1982-85 when the USFL was in operation, but grew only 8% annually during the period 1985-87 when the USFL had ceased operation.

Two studies explain the NFLPA's preference for a collectively negotiated salary schedule based on experience rather than free agency using a median-voter model. White (1986) shows that, in 1982, 45.1% of players had three years or less of experience and 57.1% of players had 4 or less years of experience. Thus, the median-voter model predicts that the terms of the 1982 NFL-NFLPA agreement will favor players with about four years of experience. White argues that the 1982 NFL-NFLPA contract resulted in substantial redistribution of compensation in favor of players with median experience. Overall, White concludes that "it is not unreasonable to believe that a majority of the players expected to gain more from self-interest redistribution through a salary schedule and severance pay than from seeking free agency." (p. 678)

Bishop, Finch, and Formby (1990) predict that (1) the adoption of unconditional free agency would increase the average NFL salary, (2) the adoption of unconditional free agency would increase the variance in NFL salaries because NFL owners and less-talented NFL players would not share the rents generated by the superior NFL players, (3) the NFLPA will only support free agency if the median player benefits, and (4) the median players' attitude toward risk may affect their support for free agency. They argue that "the median player's attitude toward risk, particularly downside risk, may be an important determinant of his willingness to support free agency" and, "under risk aversion, the restricted form of free agency recently adopted in the NFL may well be preferred by a majority of players to unconditional free agency." (p. 115)

Amateur Draft. In 1974, the district court in *Kapp v. NFL* not only found the Rozelle Rule to violate the antitrust laws, but found that the NFL draft rule does as well. The district court determined that the draft rule "is also patently unreasonable insofar as it permits virtually perpetual boycott of a draft prospect even when the drafting club refuses or fails within a reasonable time to reach a contract with the player."[124]

A similar conclusion was reached by the appeals court in *Smith v. Pro Football*. James McCoy (Yazoo) Smith, an All-American football player from the University of Oregon, was the twelfth player selected in the 1968 NFL draft. Smith signed a one year contract with the Washington Redskins, which included an 'option clause' giving the Redskins the right to unilaterally renew the contract for a second year at 90% of the previous year's salary. During the final game of the 1968 season, Smith sustained a career-ending neck injury. The Redskins paid Smith an additional $19,800 – the amount that Smith would have received had he played out his second ('option') year of his contract. Two years later, Smith filed an antitrust lawsuit alleging that the NFL draft, as it existed in 1968 when he was drafted, was an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and, but for the draft, he would have negotiated a far more lucrative contract when he signed with an NFL team. The district court rejected the Redskins' and NFL's argument that the NFL competes with the Canadian Football League (CFL) for the services of top American college football players "due to its limits on Americans permitted on CFL teams, its lack of attraction or glamour for the athletes, and the differences in the nature and rules of the football played there." [125] Thus, the district court held that "the relevant market for this action is professional major league football in the United States" and, in 1968 and at present, "the National Football League was the sole source of purchasers of the product which plaintiff sought to market." The district court ruled that the NFL draft constituted a "group boycott" and thus violated the antitrust laws regardless of whether it is judged on a *per se* or rule of reason basis and awarded treble damages totaling $276,600 (net actual damages of $92,200 × 3).

The Washington Redskins and the NFL appealed. The appeals court decided the case on November 9, 1978, affirming the district court's finding that the draft is a group boycott in violation of the antitrust laws, but remanding the case for further damage computations.[126] However, the appeals court argued that the NFL draft was not a *per se* antitrust violation and, rather, must be tested under the rule of reason. In a 'classic' group boycott, there is "a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level." The NFL draft differs from the classic group boycott in two respects: (1) NFL teams "are not Competitors in any economic sense" and "operate basically as a joint venture in producing an entertainment product football games and telecasts" and (2) NFL teams have not combined to exclude competitors or potential competitors from the market – Smith was not seeking to 'compete' with the NFL teams. As a result, the appeals court concluded that "the NFL player draft cannot properly be described as a group boycott at least not the type of group boycott that traditionally has elicited invocation of a Per se rule."

[124] *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Ca. 1974).
[125] *Smith v. Pro-Football*, 420 F. Supp. 738 (D.C. 1976).
[126] *Smith v. Pro Football*, 593 F.2d 1173 (D.C. Cir. 1978).

The appeals court found, however, that the draft failed a rule of reason analysis. The draft is "significantly anticompetitive" because it "inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power" and the "predictable effect of the draft, as the evidence established and as the district court found, was to lower the salary levels of the best college players." The appeals court rejected the Defendants' argument that the draft was pro-competitive because it maintained competitive balance in the league. The appeals court argued that (1) the evidence on the impact of the draft on competitive balance is at best equivocal and thus there is no basis to say the district court erred in its determination and (2) "it is doubtful whether the draft was effective in maintaining whatever competitive balance did exist in the League" – competitive balance in the NFL appears to be related to the NFL's revenue-sharing system and the impact of coaches on the success or failure of a team. The appeals court wrote:

> The justification asserted for the draft is that it has the legitimate business purpose of promoting "competitive balance" and playing-field equality among the teams, producing better entertainment for the public, higher salaries for the players, and increased financial security for the clubs. The NFL has endeavored to summarize this justification by saying that the draft ultimately has a "procompetitive" effect, yet this shorthand entails no small risk of confusion. The draft is "procompetitive," if at all, in a very different sense from that in which it is anticompetitive. The draft is anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers for the services of sellers. The draft is allegedly "procompetitive" in its effect on the playing field; but the NFL teams are not economic competitors on the playing field, and the draft, while it might heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost. Because the draft's "anticompetitive" and "procompetitive" effects are not comparable, it is impossible to "net them out" in the usual rule-of-reason balancing. The draft's "anticompetitive evils," in other words, cannot be balanced against its "procompetitive virtues," and the draft be upheld if the latter outweigh the former. In strict economic terms, the draft's demonstrated procompetitive effects are nil.

Thus, the appeals court concluded that "the football player draft system then in effect was a group boycott that was illegal when measured under the rule of reason."

In March 1977, after the district court's decision in *Smith v. Pro-Football* but before the appeals court decision in that case, a new collective bargaining agreement was reached between NFL owners and the NFL Players Association. The NFLPA agreed to terms sanctioning the NFL draft in return for greater financial benefits for players.

The economic evidence on the effect of the NFL draft on competitive balance is mixed. Recall that the Coase Theorem, which assumes no transaction costs, implies that the initial distribution of players does not matter since players will be traded to the teams where they are more valuable. Consistent with this prediction, Fort and Quirk (1995) find no statistically significant change in either the standard deviation of winning percentages or the concentration of championships before (1930-35) and after (1936-41) the introduction of the NFL draft. On the other hand, Grier and Tollison (1994) examine the impact of lagged draft order on winning percentage over the period 1983-90 and find that a higher position in the draft order raises a team's future winning percentage, which suggests that the NFL draft promotes competitive balance. However, Grier and Tollison also find that relative success in the draft is positively correlated with on-field success, which suggests that some teams are better able to use the draft to improve their winning percentage than others.

Fixed salaries. On several occasions, the NFL has attempted to implement a wage scale for at least some players. The players challenged the wage scale on antitrust grounds and successfully opposed implementation of 'Plan B", but failed in their opposition to the fixing of salaries of developmental squad players. A key legal issue was whether the NFL's actions were protected by the nonstatutory labor exemption.

The question of when the NFL's nonstatutory labor exemptions ends became a key issue when NFLPA President Marvin Powell filed an antitrust lawsuit against the NFL.[127] In January 1988, the district court ruled that the NFL's nonstatutory labor exemption ended with the 1987 collective bargaining impasse. The NFL appealed the decision. On November 16, 1988, the NFL presented the NFLPA with a proposal for a new system of player restraints called "Plan B", which would, among other things, replace as of February 1, 1993 the current system of individually negotiated player contracts with a wage scale setting the price of NFL player services. Plan B would also permit teams to restrict 37 players so that they would be subject to the first refusal/compensation system, while unrestricted players could sign with other teams. On February 1, 1989, without the consent of the players or the NFLPA, the NFL implemented some of the provisions of Plan B, but not the wage scale provision. On November 1, 1989, the appeals court reversed the district court's decision, arguing that as long as the players were represented by a union, they did not have the right under the antitrust laws to individually sue the NFL. In response, the players ended the NFLPA's status as a union on December 5, 1989, thereby opening the way for them to individually sue the NFL on antitrust grounds. The NFLPA was re-formed as a professional association dedicated to protecting the individual contracting rights of players. The NFLPA's new bylaws prohibited it from engaging in collective bargaining.

In May 1990, 235 players on the 'developmental squads' of NFL teams filed an antitrust lawsuit alleging that teams' agreement to pay developmental

[127] The information in this paragraph is based primarily on an article posted on the NFLPA website.

squad players a $1,000 weekly salary violated Section 1 of the Sherman Act. In March 1989, the NFL had adopted Resolution G-2 permitting teams to establish a developmental squad of up to six rookies or 'first-year' players who failed to secure a place on the team's regular player roster. The NFL unilaterally implemented the developmental squad system after reaching an impasse in negotiations with the NFLPA. The NFL advised teams that they would be subject to disciplinary action if they paid their developmental squad players more or less than $1,000 per week. The district court denied the NFL's argument that its actions fell under the nonstatutory labor exemption. The jury returned a verdict in favor of the players, awarding treble-damages of more than $30 million. The NFL appealed and, on March 21, 1995, the appeals court reversed the district court's decision, ruling that NFL owners were immune from antitrust liability under the federal labor laws.[128] On June 20, 1996, the U.S. Supreme Court upheld the appeals court's decision.[129]

Meanwhile, in the spring of 1990, eight players whose contracts expired on February 1, 1990, led by the New York Jets' Freeman McNeil, filed a lawsuit alleging that the proposed wage scale violated Section 1 of the Sherman Act. In spring 1991, the district court ruled that NFL owners were not exempt from the antitrust laws because the NFLPA was no longer a union. The players sought summary judgment, arguing that the wage scale was a horizontal price-fixing agreement and thus a *per se* antitrust violation.[130] The NFL countered that the wage scale had a pro-competitive rationale – the promotion of competitive balance in the league – and should be judged by the rule of reason. On April 15, 1992, the district court refused to grant summary judgment for the players, but did grant the players partial summary judgment on two issues: (1) there exists "a relevant market for the services of professional league football players in the United States" and (2) "major league professional football in the United States constitutes a relevant market for purpose of plaintiffs' claims." However, the district court refused to grant the players partial summary judgment on the issue of whether the NFL has monopoly power in the relevant market of professional football player services in the United States.

The trial began in June 1992 and lasted 50 days.[131] The jury deliberated for two days and, in September 1992, announced its verdict: Plan B violated the antitrust laws because it was more restrictive than necessary to achieve its goal of competitive balance. Damages totaling $543,000 were awarded to four of the eight player-plaintiffs. Within a week, another lawsuit was filed on behalf of several players who were unsigned as of the date of the jury's verdict, most prominently Keith Jackson of the Philadelphia Eagles. In late September, the district court granted the players' motion for an injunction against Plan B, thereby making those players unrestricted free agents who could sign with any team. In

[128] *Brown v. Pro Football*, 50 F.3d 1041 (D.C. 1995).
[129] *Brown v. Pro Football*, 518 U.S. 231 (1996).
[130] *McNeil v. NFL*, 790 F. Supp. 871 (4th D. Mn 1992).
[131] The information in this paragraph and the next is based primarily on an article posted on the NFLPA website.

October 1992, a class-action antitrust lawsuit in the name of the Philadelphia Eagles' Reggie White was filed against the NFL.

Settlement talks between the NFL and its players turned serious in November 1992 and, in January 1993, a deal was struck: NFL owners would accept free agency, while NFL players would agree to a salary cap so long as player costs exceeded 67% of league revenues. Moreover, the various court actions, including Reggie White's class action, would be settled for $195 million in damages. The district court preliminarily approved the deal on February 26, 1993. In March 1993, with the nonstatutory labor exemption no longer a concern, the NFLPA once again became a certified union. On May 6, 1993, the NFL and NFLPA reached a tentative agreement on a collective bargaining agreement.

Free agents began to be signed for large increases in salary, often with new teams. In 1993, unrestricted free agents saw their salaries increase by an average of 85% and 120 (43%) of the 276 unrestricted free agents signed with a new team. In 1994, unrestricted free agents received an average salary increase of 25% and 140 (48%) of the 293 unrestricted free agents signed with a new team. In 1995, the average salary increase was 56% and 184 (62%) of 298 unrestricted free agents signed with a new team. In 1996, the salary increase averaged 52% and 125 (51%) of the 245 unrestricted free agents changed teams.

The size of player signing bonuses soared, as it offered a means to circumvent, to some extent, the salary cap.[132] Between 1992 and 1993, the average signing bonus (for players receiving a signing bonus) more than doubled, jumping from $224,000 to $458,000. By 1995, it had almost doubled again, averaging $906,000. In 1996, the average signing bonus (for players receiving a signing bonus) was $1,064,000.

Interestingly, in the years following the 1993 collective bargaining agreement, player compensation as a percentage of revenue declined sharply.[133] Between 1980 and 1992, player compensation as a percentage of revenue soared from 35.4% to 59.6%, and then jumped to 69.8% in 1993. However, in 1994, it dropped to 64.1%, slid to 60.1% in 1996, and plunged to 53.4% in 1997.

Kowalewski and Leeds (1999) examine the impact of the 1993 collective bargaining agreement (CBA) and find that it has resulted in a two-tier player market. They document that the distribution of player salaries was more unequal in 1994 than in 1992; salary became less a function of position (e.g., quarterback, running back, linebacker) and more a function of whether the player was a starter. They write:

> The new CBA thus brought great gains for players already at the top of the salary distribution while bringing substantial losses for those players in the middle. The new CBA is pushing the NFL toward a two-class system with a small group of very wealthy players and a much larger group of (relatively) poor players…

[132] The figures in this paragraph come from Staudohar (1998).
[133] The figures in this paragraph come from Scully (2004).

> Our results show that the new CBA led teams to reward players for performance on the field rather than the position they played. The premium teams pay to starters are much larger under the new CBA. Holding position constant, starters generate more victories and revenue for a team and thus receive higher salaries than "less skilled" or marginal players. Thus, while free agency has increased the bargaining power of the most-desired players, the salary cap ensures that less money remains available for lesser players. (pp. 219-20)

Similarly, Leeds and Kowalewski (2001) examine the determinants of player salaries but conduct separate regressions for players in the 0.25 and 0.75 salary quantiles. They find that, under the 1993 CBA, players in the lower salary quantile could dramatically increase their pay by improving their performance, whereas under the old regime their performance did not significantly impact their pay. On the other hand, players in the higher salary quantile were relatively less able to raise their pay via their performance on the field. Thus, Leeds and Kowalewski conclude that, under the 1993 CBA, "a player's bargaining power from having a good year is greater when he is relatively underpaid than when he is relatively highly paid." (p. 256)

NBA. Basketball players have challenged a number of NBA practices on antitrust grounds, including its 'four-year rule', the amateur draft, the Uniform Player Contract, right-of-first refusal, and salary cap. Some of these practices became part of the collective bargaining agreement between the NBA and its players.

Four-year rule. Spencer Haywood graduated from high school in 1967, played basketball at Trinidad Junior College during the 1967-68 season, played on the 1968 U.S. Olympic Basketball Team, and played basketball at the University of Detroit during the 1968-69 season. In August 1969, Haywood signed a contract with the American Basketball Association's Denver Rockets and was named "Rookie of the Year" and "Most Valuable Player of the ABA" for the 1969-70 season. Although the ABA had a rule requiring all players to be at least four years out of high school (i.e., a 'four-year rule'), Haywood received a 'hardship' waiver from the ABA. Haywood signed a new six-year contract with Denver in June 1970. A few months later, Haywood discovered that the terms of the contract which he signed differed from those he had understood it to contain. He informed Denver that he considered the contract invalid due to Denver's fraudulent misrepresentations.

In late 1970, Haywood signed a six-year contact with the NBA's Seattle Supersonics. The NBA also had a four-year rule, By-Law 2.05, but did not waive it for Haywood. He sought a temporary restraining order, which the district court granted on December 30, 1970. Seattle then included Haywood on its player roster.

Haywood filed an antitrust lawsuit against the NBA, alleging that the four-year rule violates Section 1 of the Sherman Act. In other words, the four-year rule constitutes a group boycott. On March 22, 1971, the district court agreed, granting

Haywood partial summary judgment "to the limited extent of ruling that the NBA's four-year college rule – as embodied in Sections 2.05 and 6.03 – is a violation of Section 1 of the Sherman Act."[134] The district court argued that the group boycott at issue is a *per se* violation because the NBA Constitution and Bylaws have no provision "for even the most rudimentary hearing before the four-year college rule is applied to exclude an individual player" and no provision "whereby an individual player might petition for consideration of his specific case."

Player Opposition to the NBA-ABA Merger. Having observed what happened to professional football player salaries before and after the merger of the NFL and AFL, and having themselves experienced soaring salaries as the NBA competed for players with the American Basketball Association, NBA players were determined to stop the proposed NBA-ABA merger. In 1970, a group of NBA players, led by Oscar Robertson, filed an antitrust lawsuit against the NBA and ABA alleging violations of Sections 1 and 2 of the Sherman Act. The players alleged that the NBA conspired to restrain trade via the college draft, the reserve clause in the Uniform Player Contract, the compensation plan attached to the reserve clause, and a number of boycott and blacklisting techniques. The players also alleged that the NBA and ABA sought to effectuate a non-competition agreement, merger, or consolidation. In May 1970, the district court preliminarily enjoined the NBA and ABA from entering into a merger, consolidation, or acquisition, but did allow the two leagues to negotiate a proposed merger for the sole purpose of petitioning Congress to pass antitrust exemption legislation that would place the merger outside the scope of the antitrust laws. Congress and the two leagues were unable to reach a deal. In August 1973, the district court modified its earlier order to allow the two leagues to negotiate a merger, but the negotiations had to occur in the presence of representatives of the Plaintiffs or the NBA Players Association and any agreement would have to indicate the disposition of uniform player contracts, the college draft, and the reserve clause. As of February 14, 1975, when the district court reached its decision, the NBA and ABA still had not reached an agreement. The district court granted the players' request for the lawsuit to be maintained as a class action, with the class consisting of the approximately 365 players who have been active in the NBA since the commencement of the lawsuit.[135]

The lawsuit was settled out-of-court on April 29, 1976. The players received $4.3 million and substantial modifications to the practices they had challenged. Four ABA teams were merged into the NBA; the other three ABA teams folded.

The same year, the NBA negotiated a new collective bargaining agreement with the NBA Players Association.[136] In return for dropping their opposition to the merger, the NBA Players Association obtained a collective bargaining agreement that eliminated the reserve clause from non-rookie

[134] *Denver Rockets v. All-Pro Management*, 325 F.Supp. 1049 (C.D. Cal., 1971).
[135] *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975).
[136] Most of the information in this paragraph and the next comes from Staudohar (1998).

contracts. Also, similar to the NFL's Rozelle Rule, the NBA Commissioner could award players, draft choices, or cash to a team losing a free agent. However, beginning in 1980, the NBA's version of the Rozelle Rule was replaced by a right-of-first-refusal – in other words, a team about to lose a free agent to another team had the right to match that team's offer.

Amateur Draft, Salary Cap, and Right-of-First-Refusal. With the elimination of the reserve clause, player salaries rose. Scott, Long, and Somppi (1985) compare the marginal revenue products and salaries of free agents and non-free agents in the 1980-81 season and find that the 15 non-free agents in their sample earned an average salary equal to 44% of their MRP, whereas the 11 free agents in their sample earned an average salary of 93% of their MRP.

Some teams experienced financial problems. The NBA sought to implement a salary cap. On March 31, 1983, the NBA and NBA Players Association agreed on the first salary cap in a major professional sports league. In return for agreeing to the salary cap, the players were guaranteed to receive in the form of salary and benefits 53% of gross revenues. The 1983 agreement included a provision whereby teams above the salary cap could only sign their first-round draft choices to a one-year contract for $75,000 and their lower-round draft choices to a one-year contract for $65,000. As a result, there were huge disparities in pay to rookies. Whereas Akeem Olajuwon signed a 6-year, $6.3 million contract with the Houston Rockets, who were not above the salary cap, Charles Barkley signed a 1-year, $75,000 contract with the Philadelphia 76ers, who were above the salary cap.

Not surprisingly, one NBA player brought an antitrust lawsuit challenging the salary cap. O. Leon Wood, a point guard for California State University at Fullerton and a member of the 1984 gold medal-winning United States Olympic Basketball Team, was drafted in the first round of the 1984 college draft by the Philadelphia 76ers, who were above the salary cap and thus could offer Wood only a one-year $75,000 contract. Wood refused to sign the contract and, on September 13, 1984, went to court seeking a preliminary injunction against enforcement of the collective bargaining agreement. The district court rejected Wood's claims because both the salary cap and college draft provisions of the collective bargaining agreement fell under the statutory labor exemption to the antitrust laws – the provisions involved mandatory subjects of bargaining and were the result of arm's-length bargaining.

Eventually, the 76ers were able to adjust their roster so they would not be over the salary cap. They signed Wood to a four-year $1.02 million contract that included a $135,000 signing bonus. Wood was later traded.

On February 5, 1986, the district court granted judgment in favor of the defendants. Wood appealed. The appeals court affirmed the district court's decision, ruling that "plaintiff's claims were intimately related to mandatory subjects of collective bargaining, and the claims subverted the prime importance that federal labor policy attached to freedom of contract between parties to a collective agreement."[137]

[137] *Wood v. NBA*, 809 F.2d 954 (2nd Cir. 1987).

The collective bargaining agreement was set to expire at the end of the 1986-87 season. The question thus arose as to whether provisions such as the salary cap and college draft would lose their antitrust immunity the moment the collective bargaining agreement expired. In October 1987, a group of players, headed by Junior Bridgeman, filed a lawsuit alleging that the college draft, the salary cap, and the right of first refusal violated the antitrust laws. The district court ruled that the collective bargaining process would be inhibited if such provisions lost their antitrust immunity immediately, as the plaintiffs argued, and if the provisions maintained their antitrust immunity indefinitely as long as the league maintained the status quo by not imposing any new restraints, as the NBA argued. Thus, the question remained: at what point do the restraints lose their antitrust immunity? The district court found that "the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement."[138]

The NBA Players Association attempted to eliminate the salary cap and college draft in the collective bargaining agreement of 1988. The union threatened to decertify, thereby circumventing the statutory labor exemption to the antitrust laws. However, decertification did not happen. The NBA and NBA Players Association reached a deal whereby the salary cap remained at 53% of gross revenue and the number of rounds in the college draft was reduced from seven to three in 1988, and then to two in the years thereafter. When that agreement expired, the Players Association once again attempted to negotiate an end to the salary cap, college draft, and right of first refusal. The league and its players failed to reach a deal and the 1994-95 season was played without a collective bargaining agreement.[139]

In May 1994, the players intended to let the collective bargaining agreement expire before resuming negotiations. The NBA filed a lawsuit on June 17, 1994 seeking two declarations: (1) the disputed provisions of the collective bargaining agreement concerning the salary cap, college draft, and right of first refusal do not violate the antitrust laws because of the statutory labor exemption and (2) even if the antitrust laws do apply, those provisions do not violate the antitrust laws because they would survive a rule of reason analysis. The district court agreed with the NBA, finding, for example, that the provisions promoted competitive balance. The players appealed. The appeals court ruled against the players, holding that "the antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a CBA, or from using economic force to obtain agreement to those proposals."[140]

The district court's finding regarding the effect of the salary cap on competitive balance is inconsistent with the conclusions of a number of economic studies. Endo, Florio, Gerber, and Sommers (2003) regress the Gini index (a measure of competitive balance) for the period from the 1974-75 season through

---

[138] *Bridgeman v. NBA*, 675 F. Supp. 960 (D. NJ 1987).
[139] The information in this paragraph is based primarily on Staudohar (1998).
[140] *NBA v. Williams*, 45 F.3d 684 (2nd Cir. 1995).

the 2001-2002 season on a time trend and a dummy variable denoting the post-1984 era (the period since the adoption of the salary cap). The dummy variable's coefficient is found to be positive, but not statistically significant. They conclude: "The distribution of playing talent and hence competitive balance in the NBA appears to be no more equal now under a cap than it was before." (p. 388) Berri, Schmidt, and Brook (2004) point out that the NBA has the least competitive balance of the four major North American sports leagues. Vrooman (2000) is particularly critical of the NBA's salary cap, arguing that it makes the NBA a virtual cartel and decreases competitive balance:

> A third conclusion of this paper is that the payroll cap is a unique form of cost-sharing collusion, and that, because of its implementation in the NBA over the period studied, the NBA is virtually a cartel of teams acting as a single firm. If NBA teams collusively behave as the firm, then profit maximization is reduced to revenue maximization for the league. The salary cap and the cost-sharing collusion of the NBA predictably lead to the least competitive balance of the three leagues over the period studied. The imposition of a payroll cap allows a cartel of teams to collusively behave as the firm, and the capping of team payrolls leads to the increased exploitation of players and decreased competitive balance within the league. (p. 394)

Hausman and Leonard (1997) agree with Vrooman's conclusion that a binding salary cap shifts rents from the players to the owners. However, unlike Vrooman, Hausman and Leonard argue that a binding salary cap results in all teams having the same quality – in other words, a binding salary cap leads to too much competitive balance.

In 1995, the NBA and players reached a deal on a six-year collective bargaining agreement that raised players' guaranteed share of gross revenues from 53% to 57.5%, expanded the definition of gross revenues to include luxury box revenues, addressed the underreporting of revenue by NBA team owners for determination of the salary cap, permitted teams to sign a replacement for an injured player at 50% of the injured player's salary without counting it against the salary cap, and placed a cap on all rookie salaries.[141] Gius and Johnson (1998) examined player salaries for the 1996-97 season and found a surprising result: being a free agent, particularly a free agent who changed teams, is associated with a lower, not higher, salary. They attribute the lower free agent salaries to the salary cap:

> In a free market, it would be expected that this variable would be positive. The NBA is not truly a free market though. Unlike most labour markets, NBA teams have a salary cap. Teams can exceed the cap if they sign their own free agents, but teams cannot exceed the cap if they sign free agents from other teams. Since many teams in the league are very close to or over the salary cap, many free agents who changed teams signed for much

[141] Staudohar (1998).

lower salaries than they previously earned. Hence, when free agents changed teams, their salaries were usually lower than free agents who signed with their old teams. The result was that some players, such as Michael Jordan (US$30.14 million), Juwan Howard (US$9.75 million), and Alonzo Mourning (US$9.38 million), received very high salaries, while most other free agents do not appear to have gained from 'free agency.' The overall effect was that free agents earned lower salaries than nonfree agents. (p. 705)

The huge disparity in player salaries led to conflict within the NBA Players Association.[142] The conflict flared when the owners voted to exercise their option set out in the 1995 collective bargaining agreement enabling them to terminate the agreement after any season beginning with the 1997-98 season if player salaries exceeded 51.8% of gross revenues from basketball-related income (BRI). For the 1997-98 season, player salaries were approximately 57.2% of BRI and, on March 23, 1998, NBA team owners voted to exercise their option to terminate the 1995 collective bargaining agreement. The owners imposed a lockout after the NBA Players Association rejected adoption of a 'hard' salary cap to replace the current 'soft' cap. When G. William Hunter, the executive director of the Players Association, met with players on January 5, 1999 in what was supposed to be a show of support for the union's position, he was instead met with demands to get a deal done by the non-elite players. In other words, a hard salary cap would hurt the NBA's superstars, but not necessarily the majority of NBA players, who were not superstars. On January 6, 1999, the NBA and the Players Association agreed on a 6-year deal which included maximum limits on the salaries that could be paid to individual players. For example, a player with six years or less of experience could not have an annual salary of more than $9 million (or 25% of the salary cap), a player with 7-9 years of experience could not have an annual salary in excess of $11 million (or 30% of the salary cap), and a player with 10 or more years of experience could not have an annual salary in excess of $14 million (or 35.5% of the salary cap). Hill and Groothuis (2001) show that the 1999 collective bargaining agreement redistributed rents from the NBA's superstars to its much more numerous non-star players.

NHL. Hockey players have challenged a number of league practices, including the reserve clause, equalization payments, and the 'Van Ryn Rule.' The NHL fought for a luxury tax on team payrolls, but succeeded in getting the players to agree to a salary cap.

Reserve Clause, Equalization payments, Standard Players Contract, and Amateur Draft. In the early 1970s, the legality of the NHL's reserve clause became an issue in a breach of contract dispute between the NHL's Boston Bruins and two of its players – Gerry Cheevers and Derek Sanderson – who were attempting to play in the World Hockey Association (WHA), the NHL's rival

[142] The discussion in this paragraph is based primarily on Hill and Groothuis (2001).

league. The standard NHL player contract signed by the two players included a reserve clause. The Bruins tendered a new contract to both players, who refused to sign. The Bruins brought breach of contract lawsuits against both players and sought a preliminary injunction. The players argued that the standard player contract violates the antitrust laws because the reserve clause operates as a restraint on trade. The Bruins countered that the standard player contract is covered by the nonstatutory labor exemption because it arose from a valid collective bargaining relationship. In September 1972, the district court rejected the Bruins' argument after finding no evidence that the reserve clause was a subject of negotiation between the NHL and the NHL Players Association.[143] The district court ruled that "the Bruins have not shown a probability that these Standard Player's Contracts will be found to be legally valid and enforceable in the face of the serious threat to their legality posed by the provisions of the Sherman Act." Thus, the court refused to grant the Bruins' request for a preliminary injunction.

Also in 1972, the World Hockey Association sought a preliminary injunction enjoining the NHL and its member teams from enforcing the reserve clause. This case, *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, was discussed in Chapter 4. The district court found that the reserve clause was not the subject of bona fide, good faith collective bargaining and granted the WHA's request for an injunction. After a breakdown of negotiations with the Players Association, the NHL unilaterally incorporated a new reserve clause into the 1974 Uniform Standard Player's Contract (paragraph 17) and adopted a new bylaw (Section 9A). Paragraph 17 explained that at the expiration of a player's contract, the player could be required to contract with the team for an additional year (the 'option' year). After playing out the option year, the player would become a free agent. Bylaw 9A was the NHL's version of the NFL's Rozelle Rule. A NHL team signing a free agent was required to make an equalization payment in the form of the assignment of player contracts, draft choices, and/or cash to the free agent's former team. If the two teams could not agree on an equalization payment within three business days of the player's signing, both teams had two business days to submit their 'last best offer' to an arbitrator who was required to choose between only those two offers.

Paragraph 17 and Section 9A were challenged on antitrust grounds by Dale McCourt, whose contract with the Detroit Red Wings was assigned to the Los Angeles Kings as an equalization payment for the Red Wings' signing of free agent Rogatien Vachon, who had played for the Kings. McCourt sought a preliminary injunction enjoining the arbitrator's award, arguing that the two provisions were unreasonable restraints of trade in violation of Section 1 of the Sherman Act. In September 1978, the district court granted McCourt's request for an injunction, concluding that there was evidence that Section 9A unreasonably restrained McCourt from marketing his services and deterred NHL teams from signing free agents due to the uncertainty surrounding the required equalization payment, and since Section 9A applied to all players – both superstars and

[143] *Boston Professional Hockey Association v. Gerry Cheevers*, 348 F. Supp. 261 (D. Ma 1972).

average players alike – it was broader than necessary to promote competitive balance and preserve the economic solvency of teams.[144] The district court was persuaded by the testimony of McCourt's expert witness, economist Dr. Koch, who argued that the NHL has monopsony power over its players, despite the existence of a rival professional hockey league, the WHA:

> Plaintiff next called Dr. Koch, an eminent economist whom we credit fully. Dr. Koch testified that a cartel theory was applicable to the input side of the market for hockey players in the NHL. He testified that the NHL had monopsony power as indicated by the draft, the Standard Player's Contract and the reserve clause. He testified that the existence of the World Hockey Association was not a significant factor affecting the monopsony power of the NHL. In his judgment, this is because the NHL is qualitatively superior and because hockey players would rather play in the NHL. In Dr. Koch's opinion, public perception of the NHL is greater and players' salaries are higher. He concluded that, in economic terms, the NHL is a distinct market for player services because there is insufficient substitutability between the NHL and the World Hockey Association. The evidence developed prior to and after Dr. Koch's testimony supports his conclusion that the World Hockey Association has not made a significant impact upon the NHL.
>
> Dr. Koch testified that economic analysis applied to bylaw 9A and that it had the effect of eliminating the market for free agent services. He concluded that the equalization provision unreasonably restrains trade and commerce for three reasons. First, the acquiring team must pay both a salary and compensation for the free agent. This higher price adversely impacts the market for the free agent's services. Second, because the acquiring team does not know what compensation will be required, an uncertainty, which has the effect of reducing if not completely eliminating competition, is introduced into the market. Finally, the bylaw has the effect of depressing salaries in the NHL. On cross-examination, Dr. Koch stated that the new reserve clause was one factor explaining higher salaries in the NHL because a club knows if a player plays out his option he can seek a higher salary with another member club or in the World Hockey Association. However, Dr. Koch testified that without the compensation requirement salaries would be even higher.

The district court concluded that Section 9A was more restrictive than necessary to promote competitive balance and protect the economic solvency of NHL member teams because it applies to all players regardless of skill and their ability to attract fans and because draft choices could serve as equalization payment rather than the assignment of player contracts. The district court also noted that the fact that Section 9A was incorporated into the collective bargaining

[144] *McCourt v. California Sports, Incorporated*, 460 F. Supp. 904 (E.D. Mi S.D. 1978).

agreement of May 1976 does not immunize it from the antitrust laws because the NHL and the Players Association did not bargain for that bylaw.

Several economic studies examine the impact of the reserve clause, free agency, and equalization payments in the NHL. In contrast to the district court's finding that the World Hockey Association had little competitive impact on the NHL, Jones and Walsh (1987) find that player salaries soared when the two leagues competed for players and, moreover, during the 1977-78 season, NHL player salaries approximated their marginal revenue product. Jones, Nadeau, and Walsh (1997, 1999) compare the salaries of players for the 1989-90 season who signed a free agent contract at some point in their career with those who had never signed a free agent contract. They find no statistically significant difference, which is consistent with the hypothesis that the required equalization payments imposed by the NHL discourage bidding for free agents. However, it is also consistent with the hypothesis that the player reservation system is ineffective in holding down the salaries of non-free agents. Richardson (2000) compares the salaries of players who were free agents in the 1993-94 season with those who were not and finds that free agents do not earn significantly more relative to their marginal revenue product than do non-free agents. Richardson argues that NHL owners have an incentive to bid for players despite the player reservation system because the high degree of competitive balance in the league means that an owner can easily believe the team is 'one player away' from the Stanley Cup. Moreover, Richardson finds that the entry draft promotes competitive balance in the NHL.

Van Ryn Rule. Another rule that was challenged on antitrust grounds was the so-called 'Van Ryn Rule' of the Ontario Hockey League (OHL), a Canadian amateur hockey league for players between the ages of 16 and 20 years. The OHL's eligibility rules stated that teams could have no more than three 20-year-old players. In August 2000, the OHL added another rule – any 20-year-old player signed by an OHL team must have been on a Canadian Hockey Association's or USA Hockey Player's Registration the previous season. The rule had the effect of preventing OHL teams from signing 20-year-old collegiate players since the NCAA barred players with either of those registrations from playing NCAA hockey.

Despite being drafted by an OHL team at the age of 16, Anthony Aquino decided to play NCAA hockey. After his third season, he was drafted by the Dallas Stars. Aquino did not want to sign with the Stars because he would be a restricted free agent with that team for the next eleven years. Instead, he wanted to play one season in the OHL, at which point he would be an unrestricted free agent. The problem was that the Van Ryn Rule prevented any OHL team from signing him since he played NCAA hockey the previous season. On March 12, 2001, the NHL Players Association brought an antitrust lawsuit alleging that the OHL and its member teams conspired with the NHL in violation of Section 1 of the Sherman Act. Although the district court found that the Van Ryn Rule constituted a group boycott and thus was a *per se* violation of Section 1, the appeals court reversed the district court's grant of a preliminary injunction, arguing that sports league rules should be analyzed under the rule of reason.[145] Wilkinson (2004) argues that the anticompetitive effects of the Van Ryn Rule outweigh any procompetitive effects and thus it would not survive a rule of reason analysis.

The NHL Players Association responded to the appeals court's ruling by filing an amended complaint which attempted to address issues raised by the court. The district court dismissed the suit for failure to state a claim upon which relief could be granted. The NHLPA appealed, but the appeals court affirmed the order of the district court.[146] The appeals court acknowledged that the OHL could not be treated as a single economic entity and thus the Van Ryn Rule was an agreement between multiple actors. The appeals court ruled that "the relevant market in this case is the pool of players from which the OHL draws its players, i.e., the market for sixteen- to twenty-year-old hockey players in North America", and thus the market includes the NHL, OHL, and other North American leagues. This was one of the relevant markets proposed by the NHLPA. The NHLPA's other proposed relevant markets (i.e., the market for player services in the Canadian Hockey League, the market comprised of North American organizations that compete for the services of 20-year-old hockey players, and the market for player services in the NHL) are too narrow. Although the NHLPA identified a relevant market, the appeals court found that the NHLPA failed to sufficiently identify the anticompetitive effects of the Van Ryn Rule. The Rule has the effect of substituting less skilled hockey players for more skilled players, but the resulting diminished quality of play is not an anticompetitive effect within the meaning of the antitrust laws. Moreover, even if some players are harmed by the inability to achieve free agency in the NHL, that harm should be ascribed to the NHL's collective bargaining agreement and not to the Van Ryn Rule. The appeals court explained:

> The reason Anthony Aquino and Edward Caron (assuming they possessed the requisite talent) were unable to achieve free agency in the NHL is not that the Van Ryn Rule prohibited them from playing in the OHL; it is that the CBA governing eligibility for NHL free agency says that they are not eligible for free agency.

Salary Cap and Luxury Tax. Before 1992, there had never been a strike in the NHL.[147] A change in the Players Association's leadership, however, resulted in it adopting tougher tactics. During their 10-day 1992 strike, the union sought to reduce the number of rounds in the player draft and increase the opportunities for free agency. The strike hurt the NHL team owners by disrupting the latter part of the season. The collective bargaining agreement expired in September 1993 and the union agreed to play the 1993-94 season without a contract. When NHL owners feared the union would call another late-season strike, the league locked-

[145] *NHLPA v. Plymouth Whalers Hockey Club*, 325 F.3d (6th Cir. 2003).
[146] *NHLPA v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005).
[147] The discussion in this paragraph is based on Staudohar (1998).

out the players. The lockout lasted 103 days and cost each team an average of $5 million. The owners had sought to implement a payroll (or 'luxury') tax system whereby the teams spending the most on players would have to pay a 'tax' to the league. The lockout ended without an agreement on a luxury tax, but the league did obtain a cap on rookie salaries, an increase in the draft choice compensation for the signing of a free agent, and an increase in the age at which a player becomes an unrestricted free agent.

On September 16, 2004, one day after the collective bargaining agreement resolving the 1994-95 lockout expired, NHL owners again locked-out the players in an attempt to win 'cost certainty' by linking player salaries to league revenues. The NHL argued that many of its teams were losing money. The Players Association disputed the figures and opposed the linking of player salaries to league revenues, viewing it as essentially a salary cap. The 2004-05 season was eventually cancelled. When the 310-day lockout ended, the NHL and the Players Association had agreed on a salary cap. The cap would be $39 million for the first year of the collective bargaining agreement.

MLS. The case of *Fraser v. MLS* was discussed in Chapter 2 and thus will be only briefly summarized here. Recall that Major League Soccer was (arguably) organized as a 'single entity' and began play in 1996. The following February, a group of players filed an antitrust lawsuit alleging that (1) MLS and its operator/investors agreed not to compete for player services in violation of Section 1 of the Sherman Act and (2) MLS monopolized, attempted to monopolize, or combined or conspired with the United States Soccer Federation to monopolize the market for the services of Division I professional soccer players in the United States in violation of Section 2 of the Sherman Act. The district court granted MLS's request for summary judgment on the Section 1 allegation, finding MLS to be a 'single entity' and thus unable to conspire with itself. A jury found in favor of MLS on the Section 2 count because it rejected the players' proposed relevant market. The jury found that the players failed to prove that the relevant geographic market is the United States and the relevant product market is limited to Division I professional soccer players. The players appealed. The appeals court did not find it necessary to rule on the question of whether MLS is a single entity given that the jury rejected the relevant market proposed by the players.[148]

LPGA. Barbara Jane Blalock was the Ladies Professional Golf Association Rookie of the Year in 1969. By the time she retired from full-time tournament competition in 1986, she held the record for the most LPGA victories (27) without a major championship win (although she was the runner-up at the LPGA Championship twice).

During the week of May 15, 1972, Blalock played in the LPGA Tournament in Louisville, Kentucky. The LPGA Tournament Director appointed four observers to observe Blalock's play during the second round of the

[148] *Fraser v. MLS*, 284 F.3d 47 (1st Cir. 2002).

tournament. The observers reported that Blalock had moved her ball in violation of golf rules (i.e., 'illegally'). The LPGA's Executive Board, which was comprised of professional women golfers who regularly competed in LPGA tournaments, convened on May 20 and decided to disqualify Blalock from the Louisville tournament, place her on probation for the remainder of the 1972 season, and impose a $500 fine for cheating. Blalock was informed of the Executive Board's decision on May 26. However, two days later, at an Executive Board meeting that included two non-Board members – Marlene Hagge and Kathy Farrer, both also player-competitors of Blalock – the Executive Board discussed Hagge's recommendation on behalf of the tournament committee that Blalock be suspended. The Executive Board voted to suspend Blalock for one year. At a May 30 meeting with the Executive Board, Blalock was informed that she was suspended from June 1, 1972 until May 31, 1973 and that all members of the Executive Board agreed with the suspension.

Blalock filed an antitrust lawsuit against the LPGA and the members of the Executive Board, alleging that the suspension constituted a group boycott and a *per se* restraint of trade in violation of Section 1 of the Sherman Act. The district court issued its opinion on June 21, 1973.[149] The district court immediately noted that "professional golf is subject to the antitrust laws" – the LPGA "conducts its business in such a manner as to constitute interstate commerce." The district court also noted that, although the legality of conduct under the Sherman Act is generally judged under the 'rule of reason', there are exceptions, one of which is group boycotts. Group boycotts are *per se* illegal – it is sufficient to show that such a boycott exists; there is no need to evaluate the 'reasonableness' of the boycott.

According to the LPGA Constitution and Bylaws, LPGA members cannot compete for prize money in any non-LPGA-sponsored event. Thus, a suspended LPGA member is not only excluded from LPGA tournaments, she is excluded from winning prize money at any tournament. Moreover, the members of the Executive Board that suspended Blalock were Blalock's competitors on the golf course – they were competing with Blalock for the same prize money. Consequently, the district court argued that the persons who suspended Blalock stood to gain financially from Blalock's exclusion from the market. As a result, the district court determined that the suspension was a *per se* violation of the antitrust laws and thus there was no need to inquire into the 'reasonableness' of the suspension. However, the district court added that its ruling "does not reach the self-policing activities of defendant LPGA which are less than exclusionary in their effect."

The district court attempted to distinguish the present case from two others in which the leagues' suspensions were not found to violate the antitrust laws. In *Molinas v. NBA*, a professional basketball player was suspended for gambling by the NBA's president acting pursuant to a clause in Molinas's contract and an NBA rule prohibiting gambling.[150] Molinas's suspension was not imposed by his competitors (i.e., other NBA players). In *Deesen v. PGA*, a professional golfer had

[149] *Blalock v. LPGA*, 359 F. Supp. 1260 (N.D. Ga 1973).
[150] *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961).

his approved tournament player status terminated by the PGA's national tournament committee, which with one exception was composed on non-competitors of Deesen.[151] Moreover, Deesen was not completely excluded from the market (golf tournaments) because he could participate by becoming a golf teacher employed by a golf club. Furthermore, Deesen's termination was the result of a virtual mathematical application of pre-determined standards, rather than the subjective and discretionary determination of Deesen's competitors.

From a strictly economic perspective, it is not obvious that a golfer's competitors would necessarily stand to gain financially from his or her exclusion from a golf tournament. It is true, of course, that reducing the number of competitors can only increase the odds of winning for the remaining competitors. But in the long run, this may not be true. Consider the case of Tiger Woods, who appeared on the Professional Golfers Association (PGA) Tour in 1996. Even early in his professional career, it was estimated that ticket and concession revenues were an extra $300,000 to $400,000 higher in tournaments in which he played, and television ratings for tournaments also depended considerably on whether Tiger was 'in the hunt'; moreover, in 1999, a new television deal doubled annual TV revenues for the PGA, Senior PGA, and Nike Tours – a deal negotiated only weeks after Woods' stunning victory at the Masters, which attracted the largest-ever television audience for a golf tournament.[152]

Woods' competitors have benefited enormously from the opportunity to play against him. In 1997, the bottom-ranked PGA players earned about $160,000 per year; in 2000, they were earning about $300,000.[153] While few players won $2 million in prize money in 1997, $2 million was the norm a few years later. Another television deal – this one for four-years and $850 million – was negotiated in 2001 after Woods had won all four major tournaments in succession (albeit not all in the same season). One author commented: "What is good for him is good for golf – which is why every professional golfer should be breathing a big sigh of relief that Tiger is back to kicking their asses again."[154]

Therefore, even if they could, Woods' competitors would be worse off in the long-run if they managed to exclude him from tournaments, although they may benefit in the short-run. The PGA itself would also be harmed – probably in both the long- and short-run. However, the PGA would probably suffer even more in the long-run if Woods was caught moving his ball in violation of golf rules and the PGA failed to take action against him.

In summary, sports leagues have developed numerous means of controlling one of their major expenses – player costs. Not surprisingly, players have frequently challenged these practices on antitrust grounds. There is strong evidence that the reserve clause significantly depresses player salaries. Free agency is generally associated with higher player salaries, particularly for a league's superstars. The result has been a corresponding

[151] *Deesen v. PGA*, 358 F.2d 165 (9th Cir. 1966).
[152] Osterland (1997).
[153] Friedman (2000).
[154] Kedrosky (2005).

rise in the inequality of player salaries. Sports leagues argue that the amateur draft, revenue-sharing, salary caps, and luxury taxes promote competitive balance because teams differ in their ability to generate revenue and thus some means of 'leveling the playing field' is needed. The economic evidence as to whether such practices have in fact enhanced competitive balance is, at best, mixed. The experience of the NBA suggests that salary caps may be a means of redistributing rents from superstars back to the league and its non-superstar players (who comprise a majority of the players union).

Chapter 7

Sports Leagues vs. Coaches

Professional sports leagues have not attempted to impose restraints on coaches similar to those placed on players. For example, there has been no 'reserve clause' for coaches and no cap on their salaries. In the case of the NCAA, however, an attempt has been made to limit the number of assistant coaches and the salaries of certain assistant coaches. Not surprisingly, the affected assistant coaches filed lawsuits alleging violation of Section 1 of the Sherman Act. The courts ruled that the NCAA's limit on the number of assistant coaches did not violate the antitrust laws, but the NCAA's limit on the salaries of certain assistant coaches did.

> *NCAA Limits on the Number of Assistant Coaches*. The NCAA held a special convention in August 1975 at which it adopted Bylaw 12-1 which effective August 1, 1976 limited the maximum number of assistant football and basketball coaches that Division I members could employ. One school that had to adjust to the new Bylaw was the University of Alabama, which reduced to part-time status Lawrence Hennessey, who had been an assistant football coach for 16 years, and Wendell Hudson, who was in his second year as an assistant basketball coach. Although Hennessey suffered a reduction in his annual basic compensation from $20,000 to $2,100, Hudson was assigned other non-coaching duties and suffered no such reduction in basic compensation. Hennessey and Hudson filed a lawsuit alleging that Bylaw 12-1 was a tortious interference with their contract rights, denied them equal protection of the law and deprived them of liberty and property without due process in violation of the Fourteenth Amendment, and violated Section 1 of the Sherman Act. An August 1976 trial ended with a judgment in favor of the NCAA. Hennessey and Hudson appealed.
>
> The appeals court affirmed the decision on December 16, 1977.[155] With respect to the antitrust claims, the appeals court began by addressing a number of preliminary matters raised by the NCAA. For example, Hennessey and Hudson sued only the NCAA even though a single person or entity alone cannot form a 'contract, combination, or conspiracy.' The appeals court did not consider this a 'fatal' objection because Bylaw 12-1 could be viewed as the result of an agreement or 'concert of action' of various members of the NCAA, as well as of the NCAA itself, and plaintiffs have the right to sue some co-conspirators but not others. The appeals court also rejected the NCAA's contention that, as a voluntary, non-profit organization whose activities and objectives are educational and involve amateur athletics, it is exempt from Section 1 of the Sherman Act. The appeals court pointed out that "there is a business aspect in the providing of coaching for the athletes or in the providing of athletic events to an interested public." Furthermore, the appeals court rejected the NCAA's argument that the Bylaw did not affect interstate commerce and thus was outside the scope of the

[155] *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977).

federal antitrust laws. For example, the appeals court observed that the employment market for coaches is multi-state (if not national) and the Bylaw has the effect of reducing the movement of coaches between institutions located in different states.

Hennessey and Hudson argued that the Bylaw was a 'group boycott' and thus *per se* illegal. The appeals court disagreed, suggesting that the Bylaw was more similar to a market share allocation scheme. Group boycotts "typically have involved situations where there was some concerted refusal to deal with persons or companies because of some characteristic of those persons and companies", whereas the Bylaw does not prevent NCAA members from dealing with members of the target group, namely assistant coaches. The Bylaw does limit the freedom of NCAA members in changing their assistant coaches given that it sets a maximum number. However, the appeals court determined that the Bylaw should be analyzed under the rule of reason.

The appeals court acknowledged that assistant coaches such as Hennessey and Hudson could be injured as their institutions adjusted to Bylaw 12-1 and, more generally, the Bylaw could have the effect of depressing the compensation of assistant coaches. However, the NCAA attempted to mitigate the impact by granting grace periods in circumstances of academic tenure enforceable contracts, and formal employment commitments. Moreover, the Bylaw had a pro-competitive rationale – the promotion of competitive balance. The NCAA felt that the expansion of the more successful football and basketball programs was a detriment to the whole system of intercollegiate athletics. Some institutions reportedly were considering scaling back some sports to focus on the two big money-makers – football and basketball. Other institutions reportedly were considering abandoning football and basketball due to the difficulty of 'keeping up' – not to mention 'catching up' – with the elite programs. By preventing the abandonment of sports programs, the Bylaw arguably could benefit assistant coaches overall even if some specific assistant coaches are hurt in the short-run. The appeals court observed:

> There are, or will be, a not insignificant number of assistant coaches displaced or reduced, like Hennessey and Hudson, by the Bylaw. However, the effects upon them are not likely to be as severe or prolonged, except perhaps with respect to a few older coaches such as Hennessey, as suggested by plaintiffs. There are, indeed, many opportunities for coaches to pursue their vocations in addition to those now partially limited with Division I members of the NCAA: colleges which are in other divisions of the NCAA; colleges which are not in the NCAA; professional teams; and high schools. While these opportunities may not be as rewarding, either financially or emotionally, to many coaches, the fact of their existence must be taken into account in measuring the "market power" of the NCAA Division I teams and the economic effects of the rule.

The appeals court rejected the plaintiffs' argument that the benefits of the Bylaw could be achieved via less restrictive means by either extending the grace period or replacing the limit on the number of assistant coaches with a limit on the salaries of assistant coaches. Extending the grace period would only delay the benefits of the Bylaw, whereas a limit on the salaries of assistant coaches may not be less of a restraint than a limit on the number of assistant coaches.

The appeals court concluded that, under a rule of reason analysis, Bylaw 12-1 is not an unreasonable restraint of trade.

NCAA Limits on the Salaries of Certain Assistant Coaches. The NCAA established a Cost Reduction Committee in January 1989 to formulate means and strategies to reduce the cost of intercollegiate athletics without disturbing the competitive balance among NCAA members. A report commissioned by the NCAA, known as the "Raiborn Report", had found that in 1985 42% of NCAA Division I schools had a deficit in their overall athletic program budgets, with the average deficit being $824,000. Between 1978 and 1985, athletic expenses at Division I schools had shot up more than 100%. Moreover, 51% of Division I respondents reported suffering a net loss in their basketball program, with the net loss averaging $145,000 per school. In January 1990, the Committee's chairman told NCAA members that the Committee's goal was to "cut costs and save money."

At the time, Division I basketball programs were permitted to have one head coach, two assistant coaches, and two part-time coaches. The latter could be part-time assistants, graduate assistants, or volunteer coaches. The NCAA placed limits on the compensation received by the part-time coaches. Nevertheless, many part-time coaches could earn between $60,000 and $70,000 annually by working at summer sports camps or part-time in the physical education department. Many part-time coaches had years of experience and thus were hardly the type of student assistant envisioned by the rule. The Cost Reduction Committee proposed Bylaw 11.6.4 which would limit the staff of Division I basketball programs to one head coach, two assistant coaches, and one entry-level coach – a so-called "restricted-earnings coach" (REC). The Committee also proposed Bylaw 11.02.3 (the 'REC Rule') which would restrict the earnings of RECs in all Division I sports other than football to a total of $12,000 per academic year and $4,000 for the summer months. The annual figure of $16,000 was roughly the amount that had been paid to part-time graduate assistant coaches. Although the objective of the REC Rule was reportedly to save money, the Rule did not prevent the cost-savings from being spent on other aspects of the athletic program. The NCAA adopted the proposed bylaws in January 1991 and they became effective on August 1, 1992.

A group of restricted-earnings men's basketball coaches at NCAA Division I schools during the 1992-93 academic year filed a lawsuit alleging that the REC Rule restricting their compensation violated Section 1 of the Sherman Act. In May 1995, the district court temporarily enjoined the NCAA from enforcing the REC rule. A few months later, in August 1995, the district court applied a 'quick look' rule of reason analysis and awarded summary judgment to the plaintiffs.[156] On January 5, 1996, the district court permanently enjoined the

[156] *Law v. NCAA*, 902 F. Supp. 1394 (D. Ks 1995).

NCAA from enforcing or attempting to enforce any restricted-earnings coach salary limitations against the named plaintiffs. The NCAA appealed only the part of the injunction finding that the REC Rule violated the antitrust laws.

The appeals court noted that the NCAA's 'product' in this case is college basketball and that some horizontal restraints, such as those forbidding payments to players and requiring players attend classes, are necessary for the 'product' to exist.[157] Thus, even price and output restrictions need to be analyzed under the rule of reason. The NCAA argued that the district court erred because it failed to define a relevant market and failed to find that the NCAA possessed market power in a relevant market. Moreover, the NCAA argued that the relevant market includes coaching positions at Division I, Division II, and Division III schools, as well as at junior colleges, high schools, and professional teams, and restricted-earnings coaches comprise, at most, 8% of this relevant market. The appeals court countered: "The NCAA misapprehends the purpose in antitrust law of market definition, which is not an end unto itself but rather exists to illuminate a practice's effect on competition." The appeals court explained:

> No "proof of market power" is required where the very purpose and effect of a horizontal agreement is to fix prices so as to make them unresponsive to a competitive marketplace…. Thus, where a practice has obvious anticompetitive effects – as does price-fixing – there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a "quick look" rule of reason…
>
> We find it appropriate to adopt such a quick look rule of reason in this case. Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces… Under this standard, the undisputed evidence supports a finding of anticompetitive effect. The NCAA adopted the REC Rule to reduce the high cost of part-time coaches' salaries, over $60,000 annually in some cases, by limiting compensation to entry-level coaches to $16,000 per year. The NCAA does not dispute that the cost-reduction has effectively reduced restricted-earnings coaches' salaries. Because the REC Rule was successful in artificially lowering the price of coaching services, no further evidence or analysis is required to find market power to set prices. Thus, in the case at bar, the district court did not need to resolve issues of fact pertaining to the definition of the relevant market in order to support its decision on summary judgment that the REC Rule is a naked price restraint.

[157] *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

The NCAA offered three pro-competitive rationales for the REC Rule: to retain entry-level coaching positions, to reduce costs, and to maintain competitive balance. The appeals court rejected each of these rationales. The NCAA failed to show that the restricted-earnings coaching positions had been filled by entry-level applicants or that such applicants would eventually fill those positions. Moreover, while opening positions to younger applicants may have social value, any pro-competitive rationale must be based on the impact on competition, not social value. The appeals court rejected the cost-reduction rationale because "cost-cutting by itself is not a valid procompetitive justification." If it were, buyers could collude in their input market, thereby driving down the price they pay for the input. In other words, buyers could collude to exercise monopsony power over input suppliers. Although the NCAA argued that cost-reduction is necessary to maintain the existence of competitive intercollegiate sports, the appeals court noted that the cost savings from the REC Rule could simply be used to increase other expenditures in a school's athletic program, such as equipment or the salaries of other coaches. The appeals court concluded:

> The undisputed record reveals that the REC Rule is nothing more than a cost-cutting measure and shows that the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance. Thus, on its face, the REC Rule is not directed towards competitive balance nor is the nexus between the rule and a compelling need to maintain competitive balance sufficiently clear on this record to withstand a motion for summary judgment.

The appeals court thus affirmed the district court's order granting a permanent injunction barring the NCAA from enacting compensation limits such as those specified in the REC Rule.

A damages trial took place in May 1998, resulting in a jury award of $22.3 million, which was trebled to $67 million. The lawsuit was eventually settled for $55.5 million, or approximately $12,000 per coach per year. Just over 1,000 coaches received compensation.[158]

In summary, courts have ruled that the NCAA did not violate the antitrust laws by imposing limits on the number of assistant coaches, but did violate the antitrust laws by imposing limits on the salaries of 'restricted earnings' coaches. Limiting the number of assistant coaches arguably promoted competitive balance, whereas limiting the salaries of certain assistant coaches may have resulted in cost-savings but lacked a pro-competitive rationale.

---

[158] The information in this paragraph comes from Hamilton (2003), which discusses the appropriateness of class certification in *Law v. NCAA*. Hamilton was retained by the plaintiffs.

Chapter 8

Sports Leagues vs. Stadium Owners

As discussed in Chapter 3, sports leagues have attempted to exercise control over the relocation of their member teams to different cities. Such relocation rules may prevent a stadium owner from securing a team to play in its stadium. Not surprisingly, stadium owners have sometimes filed lawsuits alleging that league relocation rules violate Sections 1 and 2 of the Sherman Act. The Los Angeles Memorial Coliseum was a party to the lawsuits concerning the NFL's Oakland Raiders' and the NBA's San Diego Clippers' moves to Los Angeles.[159] A discussion of these cases appeared in Chapter 3 and will not be repeated here.

A number of other antitrust lawsuits have been filed by stadium owners against sports leagues. One concerned the relocation of the NFL's Los Angeles Rams to St. Louis and the allegedly high cost that St. Louis had to incur due to the NFL's relocation rules and the relocation fee the NFL imposed. The lawsuit was unsuccessful, with all the antitrust charges dismissed prior to the case reaching the jury. More recently, NASCAR has been sued by a number of speedways (or, in one case, a shareholder of a speedway) seeking to obtain a NASCAR-sanctioned race. While the NFL prevailed in its case, NASCAR settled one of its cases out-of-court by, among other things, granting Texas Motor Speedway a 'second' Winston (now Nextel) Cup race. An earlier antitrust lawsuit by a racetrack seeking NASCAR Busch series dates was voluntarily dismissed. A subsequent lawsuit brought by the Kentucky Speedway against NASCAR continues to make its way through the judicial system.

> *NFL's Los Angeles Rams' Relocation to St. Louis*. In 1988, the St. Louis Cardinals relocated to Phoenix. The Missouri legislature assigned responsibility for procuring another NFL team to the St. Louis Convention and Visitors Center (CVC), which had originally been created to promote the city's convention and tourism business. CVC initially sought to procure an NFL expansion franchise to be established in 1993. To make the city more attractive to a prospective franchise, a new convention center (which included a new football stadium) was constructed. The football stadium was named the Trans World Dome and cost $258 million, which was paid from state and local government funds. CVC was assigned the stadium lease, and in turn subleased the right to present football in the stadium to private parties. The NFL decided to award expansion franchises to Jacksonville, Florida, and Charlotte, North Carolina – passing over St. Louis reportedly because of problems with control over the lease and the ownership group.

---

159 *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984); *Los Angeles Memorial Coliseum Commission v. NFL*, 791 F.2d 1356 (9th Cir. 1986); *NBA v. SDC Basketball Club and Los Angeles Memorial Coliseum*, 815 F.2d 562 (9th Cir. 1987).

Having failed to procure an NFL expansion franchise, CVC began to seek out an existing NFL team which would be willing to relocate to St. Louis. Negotiations began with the Los Angeles Rams, who informed CVC that it would discontinue any business dealings if CVC contacted any other team about relocating to St. Louis. Accordingly, CVC did not solicit additional bids for the Trans World Dome lease. CVC entered into a written agreement with the Rams, but the proposed relocation was voted down by NFL owners (relocations had to be approved by at least three-fourths of team owners). A revised deal, which included a $29 million relocation fee to be paid by the Rams to the NFL, was approved by team owners and the Rams began play in St. Louis in 1995. Although the deal between CVC and the Rams allowed either party to cancel the deal if the NFL demanded a relocation fee of more than $7.5 million (the relocation fee paid by the St. Louis Cardinals to relocate to Phoenix), CVC agreed to pay $20 million of the relocation fee for the Rams.

During the Rams' very first season in St. Louis, CVC experienced financial problems and was unable to make some payments totaling approximately $14 million to the Rams. On December 18, 1995, CVC filed an antitrust lawsuit against the NFL, alleging violations of Sections 1 and 2 of the Sherman Act. CVC also entered into an agreement with the Rams promising the team half of any recovery obtained from the lawsuit in return for the Rams forgiving the money owed it by CVC. At trial, CVC argued that the NFL's relocation rules created an atmosphere in which teams were unwilling to relocate, and this anti-relocation atmosphere had the effect of discouraging interested teams from bidding for the St. Louis lease. The result was that the only bidder for the Trans World Dome lease was the Los Angeles Rams, who thus was able to negotiate more favorable terms than would have been possible in a competitive market. In particular, CVC alleged that the favorable terms obtained by the Rams caused CVC to lose between $77 million and $122 million. CVC sought treble damages of between $241 million and $366 million and attorneys fees.

In a pretrial motion, the NFL attempted to get summary judgment on the Section 1 claim on the grounds that the league and its teams are a single economic enterprise and therefore are incapable of conspiring among themselves. The district court rejected the NFL's motion, but determined that CVC could not argue that the NFL's relocation rules are *per se* illegal – CVC was required to prove that the anticompetitive effects of the rules outweighed their procompetitive benefits. The district court decided that, in order to prove its Section 2 leveraging claim, CVC would have to show that the NFL used a monopoly position in the professional football market to obtain an advantage in the market for stadiums.

After CVC presented its case, the NFL asked the district court for judgment on the Section 2 claim. The district court ruled in favor of the NFL, finding that CVC failed to show that the NFL had a monopoly in the professional football market or that there is a 'secondary market' in NFL stadiums. The district court also ruled that, in order for the Section 1 claim to go to the jury, CVC would have to show more than a theoretical connection between the NFL's relocation rules and the events surrounding the relocation of the Rams to St. Louis. After the NFL presented its case, the NFL asked for judgment on the Section 1 claim. The district court determined that CVC did not prove that any other team was interested in relocating to St. Louis, that the lack of rival bidders for the Trans

World Dome lease was due to the NFL rules, or that CVC suffered an antitrust injury. Thus, the district court ruled in favor of the NFL on the Section 1 claim as well.

CVC appealed the district court's dismissal of the Section 1 claim and sought a new trial, while the NFL appealed the district court's failure to dismiss the Section 1 claim on the grounds that the NFL and its teams are a single economic entity. On September 3, 1998, the appeals court affirmed the district court's judgment.[160] The appeals court observed that CVC could only prevail on its Section 1 claim if it proved: (1) the existence of an agreement between the NFL and its teams in restraint of trade, (2) an injury to CVC as a direct and proximate result of that agreement, and (3) the damages can be ascertained and are not speculative. The appeals court noted that CVC failed to present evidence that any other team failed to bid on the Trans World Dome lease due to the NFL's rules. Nor did CVC provide evidence ruling out the possibility that each team owner, acting independently, declined to bid on the lease. Moreover, CVC made a conscious decision to negotiate with one team at a time. The appeals court also pointed out various problems with the testimony of CVC's expert witness:

> CVC contends that the testimony of its expert, Professor John Siegfried, establishes a causal link between the NFL's actions and the lack of competitive bidding on the lease. A jury may not rest its verdict on an expert's conclusion "without some underlying facts and reasons, or a logical inferential process to support the expert's conclusion."… Here, there was no evidence on which the jury could have drawn a logical inference from Siegfried's opinion. Siegfried testified that he would have expected to see bidding on the lease, but there was no evidence to support a finding that there were teams that were actually able and desiring to bid, but were prevented from doing it. Moreover, Siegfried rested his conclusions on economic theory that states that in a freely competitive market NFL teams would want to move to the most advantageous lease opportunity, but there was no evidence which tended to show that this was actually the case, especially in light of admissions by CVC witnesses that several team owners would not move because of loyalty to their communities or ownership of their stadia. Siegfried also testified that he had not seen any of the lease agreements involved in the case, any relocation agreement, or any documentation on the lease negotiations. Without evidence tending to show that Siegfried's economic model actually applied to the NFL and the CVC efforts to obtain a team, his testimony is insufficient to create a jury question on the issue of causation.

The appeals court concluded:

> In sum, CVC did not make out a claim under Section 1 of the Sherman Act, and appellees were entitled to judgment as a matter of law. It failed to present sufficient evidence to prove that the lack of expressed interest

---

[160] *St. Louis Convention & Visitors Commission v. NFL*, 154 F.3d 851 (8th Cir. 1998).

> from other teams in the St. Louis opportunity was caused by Article 4.3 and other acts of a conspiracy consisting of the league and its members, and there was no evidence of antitrust injury.

The appeals court added that since it is affirming the district court's dismissal of the Section 1 claim, it is not necessary to consider the issue of whether the NFL and its teams are a single economic entity.

Professor Franklin Fisher served as the NFL's expert witness and co-authored an article – Fisher, Maxwell, and Schouten (2000) – which discusses various aspects of the case. Consistent with the discussion in Chapter 3, Fisher argues that sports leagues have a pro-competitive interest in the relocation of their member teams:

> An important example of free-riding arises in team relocation and was illustrated by the St. Louis case. The value of the Rams in St. Louis was created by the promotion and development efforts of the League, not by the Rams. Indeed, the demand in St. Louis was for NFL football, not for the Rams' franchise specifically. Unless the League and its other member teams were appropriately compensated for its efforts to develop that demand, which was reflected in the extraordinary deal that the Rams were offered to move, the Rams would have enjoyed a free-ride, and an inefficient outcome would have resulted. The incentives of the League and its teams to improve its product would be reduced if one of the teams could simply take advantage of such efforts by moving to a city where fan interest was great. (p. 210)

Thus, there is a pro-competitive rationale for imposition of a franchise relocation fee. In the St. Louis case, a mutually beneficial outcome was obtained – the Rams, the NFL as a whole, the CVC, and consumers all benefited from the Rams' move to St. Louis as evidenced by the Rams' willingness to pay the relocation fee, the NFL team owners' willingness to vote to approve the relocation, CVC's willingness to pay for the Rams, and consumers' gain in quality-adjusted output.

Fisher, Maxwell, and Schouten also question the NFL's alleged monopsony power in the "market for stadiums meeting NFL requirements." They argue that such a market is defined too narrowly:

> To begin such an analysis in the present case, one must ask what it is that the owners of football stadiums are actually selling. It is too narrow an answer to this question to look only at the situation after the stadium has been built and negotiations with a particular team are underway. In thinking about this question, it is useful to distinguish private builders of stadiums and public authorities.
>
> Private builders of stadiums are not in a narrowly-defined business of providing only stadiums to NFL teams. Rather they are in the business of large-scale real estate development. Similarly, public authorities building

> or assisting with football stadiums are not in a narrowly-defined business of attracting NFL teams. Rather they are in the business of making their cities attractive to individuals and businesses, with NFL football only one way of accomplishing this.
>
> Hence, the relevant input market here includes both large-scale private investments in real estate development and public investments designed to make cities attractive. While this includes *existing* and *potential* facilities suitable for a number of activities of which the exhibition of football is one, it also includes other large development projects in which public and/or private developers may invest (for example, The Arch, representing St. Louis as the Gateway to the West, and other local public goods in which cities may invest such as museums, parks, hospitals, or public schools). (pp. 214-15)

A team such as the Rams which is considering relocating has greater bargaining power in negotiations over the lease of an existing facility than over the lease of a facility not yet constructed. The Trans World Dome was constructed prior to CVC striking a deal with the Rams. Thus, the CVC was in a weak negotiating position and this explains why the Rams succeeded in negotiating such a favorable deal. In contrast, the NFL's relocation rules may place teams at a bargaining disadvantage when negotiating a lease with the stadium where the team currently plays. In other words, lease terms reflect the parties' relative bargaining power, not necessarily the monopsony power of the team or league:

> Since both the private investment funds and city funds have many alternative uses, the NFL can have no monopsony power over facilities suitable for exhibiting professional football that have not yet been constructed. Stadium investors, both communities and private parties, have a large number of attractive alternative investment opportunities. Stadiums do not offer investors any economic investment return not easily obtained elsewhere.
>
> Focusing on the case of the St. Louis CVC, St. Louis did not have to build the convention center-stadium complex. It could have built the convention facility without the stadium, or it could have devoted its resources to other investments. Municipalities provide an array of services to their citizens, and face a number of options when investing in public goods. On an ongoing basis, they must decide how to allocate their budgets between competing projects such as schools, fire and police protection, libraries, trash collection, recreation, and stadiums…
>
> … But we are here considering the alleged monopsony power of the NFL as a *buyer*. The fact that it has special requirements does not limit the alternatives available to sellers.

> This can be described with the following analogy. Suppose that there is a maker of address labels who, without prior agreement, were to print address labels with a specific name and address on them. Those address labels would meet special requirements, but would be essentially useless to anyone but the addressee. Having printed the labels, the maker could not then reasonably claim that the addressee had monopsony power because he or she had insisted on labels with a specific name and address.
>
> So it was with the St. Louis CVC. Any negotiating leverage possessed by the Rams was created when the St. Louis parties committed the funds to construct and began building the Trans World Dome facility. By deciding to build the stadium facility prior to signing long-term leases with potential occupants, the CVC placed itself in a far weaker negotiating position than would have been the case had the CVC first negotiated long-term leases. This had nothing to do with the Rams or the NFL, or whether or not the League has monopsony power. (pp. 215-16)

Not all economists agree with Fisher. John Siegfried, CVC's expert witness, coauthored an article with Andrew Zimbalist titled "The Economics of Sports Facilities and Their Communities." They argue that the four major sports leagues have monopoly power over the placement of league franchises in their sport, which in turn enables them "to extract subsidies from communities that might otherwise enjoy considerable surplus from hosting a franchise at a competitive price." (p. 98) Each major sports league has between two and four potential cities that could host a franchise but do not. This number is sufficiently small that it would be difficult for a rival sports league to form by placing franchises in these cities, but the number is sufficiently large to create vigorous bidding for expansion franchises and franchises considering relocating. Siegfried and Zimbalist argue that the major sports leagues have monopsony power, although they do not explicitly define the relevant product and geographic market:

> The leagues can control the competition among established teams for attractive vacant locations by requiring that relocations be approved by a supra-majority of the existing teams in the league, and then can use this control as a negotiating tool. For example, owners can help a fellow team owner to negotiate an attractive subsidy from the current host city by threatening both to approve that team's relocation if a sufficient subsidy is not forthcoming, and to rebuff any other team's attempt to fill the void created if the team should depart. The effect of such threats is to create monopsony power for teams seeking stadium services. (p. 99)

An obvious question is: why are state and local governments willing to provide such subsidies? Siegfried and Zimbalist suggest three reasons: (1) consumer surplus may be substantial if the demand for attendance at live sporting events is inelastic, (2) hosting a sports franchise may create external benefits for local residents even if they do not attend the games, and (3) hosting a sports franchise generates free advertising for the community and may attract tourists, industries, and job hunters. They write:

> None of these benefits identified above – consumer surplus to fans who attend games, external benefits to non-attenders, and public image enhancement – can be captured directly by a team through traditional revenue channels. The sum of these benefits in a community may approach or exceed the cost of constructing a new playing facility, however, making it worthwhile for communities to pay for sports facilities when such a facility is necessary to secure or retain a franchise. Thus is created a situation in which sports teams have the monopoly power to extract some of the consumer surplus, external benefits, and public image enhancement from their host communities, and the host communities (or at least their political leaders) believe that these benefits are sufficiently large to justify paying for a stadium or arena. A deal can be struck. (p. 100)

Empirical studies (at least 'independent' academic studies as opposed to 'commissioned' consulting industry studies) generally find that the economic benefits of sports stadiums generally do not exceed their costs. For example, Rappaport and Wilkerson (2001) argue that the benefits of attracting a sports franchise generally only exceed the costs if one includes in the benefits the admittedly hard-to-measure impact on the city's 'quality of life.' The presence of a professional sports franchise is one variable influencing a city's attractiveness as a place to live, along with other variables such as the weather, natural scenery, and natural recreational opportunities. Coates and Humphreys (2001) examine data on cities with NFL or MLB franchises over the period 1969-96 and find no impact on the economies of those cities from a work stoppage (i.e., a player strike or a player lockout by the team owners). Moreover, they examine data on cities with NBA franchises and find no impact on the economies of those cities when the team leaves. Coates and Humphreys (1999) examine data on 37 cities with professional sports franchises over the period 1969-94 and find that "some professional sports franchises reduce the level of per capita personal income in metropolitan areas and have no effect on the growth in per capita income, casting doubt on the ability of a new sports franchise or facility to spur economic growth." (p. 601)

NASCAR's Winston (now Nextel) Cup and Busch Series Dates. NASCAR sanctions stock car races in the United States. The top-tier race series is the Nextel Cup, which was formerly known as the Winston Cup. The next-highest tiers of NASCAR-sanctioned races are the Busch Series and Craftsman Truck Series. NASCAR has been sued on multiple occasions regarding its awarding of NASCAR-sanctioned race dates to racetracks. The allegations include violations of Section 1 and 2 of the Sherman Act. At least three such lawsuits have been filed in the last few years. One lawsuit was dropped, one was settled out-of-court, and one continues to work its way through the judicial system.

In December 1986, Michael Liberty purchased the Oxford Plains Speedway (OPS) located in Maine from Robert Bahre for approximately $4.3 million.[161] Bahre retained the exclusive rights to sell tires at OPS. According to Liberty, Bahre agreed to use his personal and business contacts at NASCAR to obtain a steady flow of NASCAR-sanctioned races at OPS and agreed not to take any action for 10 years in Maine to compete in the auto-racing business. During Bahre's ownership of OPS in the 1970s and early 1980s, OPS had hosted a number of NASCAR-sanctioned races. Bahre also 'brokered' NASCAR-sanctioned events for other racetracks, including Beech Ridge Motor Speedway, Wiscasset Motor Speedway, Las Vegas Motor Speedway, and North Wilkesboro Motor Speedway. In February 1987, Liberty and NASCAR signed a three-year deal for OPS to host a regular schedule of NASCAR-sanctioned races, including the inauguration of the Busch Grand National North Tour stock car racing series. During the period 1987-89, OPS hosted 20 NASCAR-sanctioned races, including more than 10 Busch North series races and at least one Busch Grand National Tour race.

In 1987, Liberty developed a proposal to build a super-speedway on the OPS site. A super-speedway is generally at least one mile in length and designed to host premier auto-racing events such as NASCAR Winston Cup races. According to Liberty, Bahre agreed to broker a multi-year Winston Cup sanction if Liberty paid him a $1 million annual fee for his services as a sanctioning broker and track manager. When Liberty discussed his proposal with NASCAR's president and chairman William France in the fall of 1987, France informed Liberty that NASCAR did not grant multi-year sanctions and Liberty abandoned plans to build the super-speedway. According to Liberty, within a few months, Bahre began planning a super-speedway to be built in New Hampshire based on the exact same design as Liberty had developed for the OPS site. The New Hampshire International Speedway (NHIS) in Louden, New Hampshire opened in July 1990 and began hosting a regular schedule of NASCAR-sanctioned races. Over the next three years, OPS hosted 14 NASCAR-sanctioned events.

According to Liberty, NASCAR promised him that it would take steps to minimize any adverse impact of NHIS on OPS, such as bringing the Winston Cup drivers to OPS in the 1992 season – which did not occur. Moreover, in 1991, NASCAR gave a key race date to NHIS, even though that date coincided with OPS's annual running of the Oxford 250, the track's premier auto-racing event. The two events also coincided in 1992. In both years, the Oxford 250 produced losses. OPS attempted in the fall of 1992 to host a race sanctioned by NASCAR's only competitor in the Northeast – the American-Canadian Tour (ACT), a sanctioning body formed in 1985 by the former manager of NASCAR's North Tour. Liberty asked NASCAR's Brian France if hosting an ACT race would jeopardize OPS's relationship with NASCAR and the four Busch North series races planned for OPS for the 1993 racing season and was told it would not. The planned ACT event for September 1992 was canceled, however, after Bahre filed

[161] The discussion of this lawsuit is based primarily on the Complaint and Demand for Jury Trial in *Liberty v. Bahre*, filed in the U.S. district court (Maine) on April 21, 2000.

an injunction over his exclusive right to sell tires at OPS. Shortly thereafter, Liberty alleges that Brian France told him that it is not in NASCAR's best interest to sanction races at racetracks that host (or attempt to host) races sanctioned by NASCAR's competitors.

In order to hold ACT-sanctioned races at OPS, Bahre was paid $100,000 for his exclusive tire concession. Over the period 1992-95, OPS hosted a regular schedule of ACT-sanctioned races, but the ticket prices for those races were substantially less than they had been for NASCAR-sanctioned races. NASCAR and Bahre allegedly convinced the Beech Ridge Motor Speedway to replace its ACT-sanctioned races with NASCAR-sanctioned races and encouraged and pressured race car drivers not to participate at OPS races. ACT went out of business in late 1995 and the 1995 season was the last stock car racing season held at OPS.

Liberty made an ultimately unsuccessful attempt to convince NASCAR to return to OPS. Liberty claims Bahre told him that he could broker at least three NASCAR-sanctioned races for the 1996 season at OPS if the exclusive tire concession was returned to him at no cost and if a roughly $11,500 sanctioning fee was paid to NASCAR. In January 1996, Liberty agreed to both conditions, but on April 23, 1996 Bahre informed Liberty that OPS would not get any races that season but things "looked good" for the 1997 season. In the spring of 1996, Liberty alleges that Bahre agreed to broker NASCAR-sanctioned races at OPS if Liberty guaranteed payment of an unsecured $1 million non-recourse debt obligation owed to Bahre by the insolvent Katahdin Corporation, in which Liberty had a controlling ownership interest. On July 31, 1996, Liberty signed an agreement personally guaranteeing the debt and releasing Bahre from liability for any and all past conduct. Liberty made a $400,000 payment to Bahre in October 1996. By spring 1997, OPS still had not been notified that it would receive any NASCAR-sanctioned races in the 1997 season. Liberty alleges that, in spring 1997, Bahre demanded additional payments on the Katahdin debt before he would secure any NASCAR dates. Liberty made a $200,000 payment to Bahre in May 1997. When Liberty spoke with a NASCAR official in July 1997, he claims that he was told that OPS would get race dates once he paid the remaining $400,000 due on the Katahdin debt. Liberty alleges that in the late spring of 1998, he was informed that Bahre would not broker any NASCAR-sanctioned events unless he was paid the remaining $400,000. Liberty terminated communications with Bahre and NASCAR in June 1998 and, later that year, Liberty sold half his equity interest in OPS to a third party and relinquished his entire ownership interest in the general partner and management entity.

Liberty filed a lawsuit against Bahre, William and Brian France, NASCAR, and International Speedway Corporation (which is controlled, albeit not wholly-owned, by the France family) on April 21, 2000. The allegations were not limited to violations of Sections 1 and 2 of the Sherman Act, but also included fraud, interference with advantageous relationships, civil criminal conspiracy, breach of contract, breach of fiduciary duty, promissory estoppel, negligent misrepresentation, and RICO counts against some or all defendants.

Regarding the Section 1 count, Liberty alleged that "defendants agreed and/or conspired to engage in conduct that had the effect of restraining trade or commerce in the markets for motor speedway services and stock car racing sanctioning services in Northern New England." The defendants allegedly sought to harm plaintiffs for doing business with NASCAR's competitor ACT, drive the plaintiffs from the auto-racing business, drive ACT out of business, enhance the value of Bahre's NHIS and pave the way for its eventual purchase by NASCAR, drive down the value of OPS and pave the way for its eventual purchase by defendants, control and/or limit the number of sanctioned car racing events in New England, and gain ownership and control of most, if not all, super-speedways in the U.S. This conduct produced anti-competitive injury:

> Among other anti-competitive effects of defendants' conduct, stock car racing fans in Northern New England who wish to attend competitive stock car racing events have no choice but to attend NASCAR-sanctioned events and pay the high ticket prices associated with such events; stock car racing fans in Northern New England no longer have the option of attending competitive stock car racing events at Oxford Plains; and fans of premier stock car racing such as the Winston Cup Tour face the dangerous probability of a market that is substantially if not entirely vertically integrated and the effect that such vertical integration is having and/or would have on the quality and/or price of premier stock car racing events.

There were two counts of Section 2 violations. One concerned the alleged monopolization of sanctioning services – that Bahre, William and Brian France, and NASCAR "have monopolized, attempted to monopolize and/or conspired to monopolize the market for stock car racing sanctioning services in Northern New England and throughout the Northeast" and that, as a result of such conduct, "NASCAR has achieved monopoly power over the market for stock car racing sanctioning services in Northern New England and/or throughout the Northeast or has a dangerous probability of succeeding in monopolizing that market in either or both of those geographic areas."[162] NASCAR's monopoly was maintained or extended by such exclusionary conduct as withholding or conspiring to withhold NASCAR's sanction from Liberty and OPS, engaging or conspiring to engage in conduct to drive Liberty and ACT out of business, preventing or conspiring to prevent drivers from participating in auto races at OPS, and using NASCAR's sanction to retaliate against Liberty, enrich Bahre, and enhance the value of International Speedway and its control over the market for super-speedway services.

---

[162] The Complaint's use of the term 'sanctioning services' "is meant to encompass the panoply of functions and services performed and provided by NASCAR in connection with putting its name behind a stock car racing event or competitive touring series, including but not limited to the following: scheduling, booking and promoting stock car racing events; organizing, managing and promoting competitive touring series; negotiating and entering into contracts with motor speedway owners, television stations, sponsors and advertisers; attracting and licensing race car drivers; promulgating and enforcing rules and regulations for stock car racing events; and hiring and furnishing officials to preside over racing events and enforce NASCAR rules and regulations."

The second Section 2 count concerned the alleged monopolization of super-speedway services – that the defendants have "monopolized, attempted to monopolize, and/or conspired to monopolize the market for super-speedway services in the Northeast and/or throughout the United States" and, as a result of such conduct, "International Speedway has achieved monopoly power over the market for super-speedway services in the Northeast and/or throughout the United States or has a dangerous probability of succeeding in monopolizing that market in either or both of those geographic areas." Of the approximately 18 super-speedways in the U.S., nine were owned by International Speedway. Bahre owned one (i.e., NHIS) and had a half-interest in another (i.e., the North Wilkesboro track). Most of the others were owned by Speedway Motorsports, which is substantially owned and controlled by Bruton Smith. Liberty alleges that Bahre claimed that he acquired the half-interest in the North Wilkesboro track at the urging of William France and NASCAR, who did not want the half-interest to be sold to the holder of the other half-interest, Speedway Motorsports, whose growing prominence was of great concern to NASCAR, and was rewarded by NASCAR for his efforts with a second Winston Cup date for NHIS.

On August 21, 2000, four months after filing the lawsuit, Liberty had the case voluntarily dismissed.[163] Shortly thereafter, Liberty filed a lawsuit in state court alleging breach of contract and fraud, but did not allege antitrust or racketeering violations because those allegations were believed to be drawing attention away from the main charges.

Less than two years later, NASCAR and International Speedway Corporation (ISC) were defendants in a breach of contract and antitrust lawsuit brought by a minority shareholder of Speedway Motorsports Incorporated (SMI) regarding NASCAR's alleged 'promise' to give a Winston Cup date to Texas Motor Speedway (TMS), which was built by SMI. SMI's Bruton Smith claims that in 1995 then-NASCAR president William France implored him to "help me improve NASCAR" and SMI responded by revamping Charlotte (now Lowe's) Motor Speedway, acquiring and vastly improving Atlanta Motor Speedway, and acquiring Sears Point (Infineon) Raceway, Bristol Motor Speedway, and Las Vegas Speedway.[164] SMI also constructed the 180,000 seat Texas Motor Speedway after, according to Bruton Smith, France promised Smith a Winston Cup date at TMS. Smith asserts that NASCAR never followed through on its promise, while NASCAR denies there ever was such a promise.

TMS gained a Winston Cup date in 1996 after SMI acquired a half interest in North Wilkesboro Speedway, which had two Winston Cup dates, and transferring one date to TMS. The other date was transferred to Bahre's NHIS since Bahre had acquired the other half interest in North Wilkesboro. Although NASCAR had to approve the transfer of the Winston Cup date to TMS, Smith did not consider this approval a fulfillment of NASCAR's promise of a Winston Cup

[163] The information in this paragraph comes from the website 'Jayski's Silly Season Site' at www.jayski.com.

[164] Blake (2006).

date for TMS. A second Winston Cup race at TMS was estimated to be worth more than $40 million.[165]

ISC began as Bill France Racing Inc. with the construction of Daytona International Speedway in 1959 and later either built or acquired Alabama International Raceway (renamed Talladega Speedway), Darlington Speedway, Watkins Glen Speedway, and Phoenix International Raceway. In 1999, ISC acquired Penske Motorsports Inc., owner of speedways in Michigan, Richmond, Rockingham, and Southern California. ISC also had a minority interest in the Miami-Homestead Speedway, which was given a Winston Cup date in 1999. In 2001, Winston Cup dates were given to ISC's newly constructed Kansas City track and the Chicagoland Speedway, in which ISC owned an interest.

In all, SMI owned six speedways which hosted nine of the 36 Winston Cup races, whereas ISC had 12 speedways with 18 Winston Cup races. The France family also owned a half-interest in Martinsville Speedway, which had two Winston Cup dates. There were 'independent' speedways in Dover, Indianapolis, New Hampshire, and Pocono with Winston Cup dates.

The last three speedways to get Winston Cup dates were Homestead, Kansas City, and Chicagoland – all ISC tracks. In 1998, SMI's Las Vegas track had been given a Winston Cup date. Thus, since TMS went into operation, one Winston Cup date was given to an SMI track and three went to ISC tracks. The question arose whether NASCAR was favoring ISC. There had been speculation for years that Bruton Smith could set up a rival auto racing sanctioning body to NASCAR, although Smith denied he would do so.

Francis Ferko, an SMI shareholder, tried to persuade SMI to bring a lawsuit to get NASCAR to give TMS its promised Winston Cup date. When SMI declined, Ferko filed a lawsuit against NASCAR and ISC himself. His complaint, filed on February 13, 2000, alleged breach of contract and violations of Sections 1 and 2 of the Sherman Act. Ferko alleged that NASCAR and ISC conspired to award Winston Cup dates to speedways in which ISC had an ownership interest and, but for the conspiracy, the Winston Cup dates awarded to ISC's Homestead and Chicago tracks would have instead been awarded to SMI's Texas and Las Vegas tracks. Although SMI was not a plaintiff in the lawsuit, the judge required that SMI submit a written statement in support of Ferko's allegations.

Given that the Texas and Las Vegas speedways had much larger seating capacities than the Homestead and Chicago tracks, track revenue (at last in the short-run) arguably would have been higher if the dates had been given to Texas and Las Vegas.[166] However, NASCAR presumably seeks to maximize its own profits, not the revenues of speedways that host Winston Cup races. NASCAR had been pursuing a strategy of broadening its geographic appeal by reducing the concentration of races located in the southeastern United States. Thus, it could have been in NASCAR's unilateral interest to award Winston Cup dates in 'new' areas rather than award 'second' Winston Cup dates to existing speedways.

[165] Cross (2004).

[166] Professor Dennis Carlton of Lexecon served as an expert witness for NASCAR. Professor Keith Leffler served as an expert witness for Ferko.

Moreover, NASCAR did not have to 'conspire' with ISC to award Winston Cup dates to Homestead and Chicago – it could make that decision unilaterally.

Moreover, NASCAR's business practices were the opposite of what one would expect of someone monopolizing or attempting to monopolize a market. As Oxford Plains' Michael Liberty learned from William France, NASCAR does not give multi-year sanctions. A Winston Cup date is awarded for a single season, after which NASCAR evaluates the track's performance before deciding whether the track will receive a date the following season. Nor has NASCAR entered into multi-year deals with drivers. Thus, NASCAR has not attempted to lock-up the inputs which a rival sanctioning body would need to enter the market.

If NASCAR is a natural monopolist, it may be difficult for a new sanctioning body to enter. However, anecdotal evidence suggests entry could occur and NASCAR could be dislodged from its dominant position. As discussed in Chapter 3, CART, the once-dominant open-wheel racing organization in the U.S., was displaced by the Indy Racing League (IRL) formed by Tony George, owner of the Indianapolis Motor Speedway. The Indianapolis Motor Speedway also hosts a Winston Cup race. Although it may seem implausible that an upstart auto race sanctioning organization could displace NASCAR, Tony George has shown that it can be done.

On May 14, 2004, Ferko and NASCAR agreed on an out-of-court settlement that had a ripple effect on a number of speedways.[167] NASCAR awarded TMS a second Winston Cup and a second Busch Series race to be held in November 2005, while SMI purchased the North Carolina Speedway in Rockingham from ISC for $100.4 million. In effect, SMI purchased Rockingham's Winston Cup date and transferred it to TMS. NASCAR also decided on a further realignment, transferring one Winston Cup date from Darlington Raceway to ISC's Phoenix International Raceway and pushing one of Atlanta's dates to later in March due to weather concerns. ISC also acquired control of Martinsville Speedway, in which the France family had held a half-interest. One commentator suggested NASCAR wanted to undertake such a geographic realignment of Winston Cup dates all along, moving dates from the old Southeastern tracks to the new, more profitable tracks, and that the Ferko lawsuit offered NASCAR the chance to do so while painting Bruton Smith as 'the bad guy.'[168]

Texas Motor Speedway was constructed, according to Smith, only after NASCAR promised it a Winston Cup date. What about a speedway that was constructed without such a promise? Would NASCAR have to, under threat of violating the antitrust laws, give it a Winston Cup date? Or would such a speedway be like the World Football League's Mid-South Grizzlies or the Western Hockey League's Seattle Totems discussed in Chapter 5. The Grizzlies sought to join the NFL; the Totems, the NHL. Both teams' attempt to join the

[167] 'Jayski's Silly Season Site – Lawsuits' at www.jaski.com. As reported by Wilson (2005), in retrospect, Ferko regrets filing the lawsuit – he lost his job, moved from Plano, Texas to a new job in Atlanta, endured the suicide of his son who had remained in Texas, and was now heading for a divorce.

[168] Blake (2006).

league by bringing an antitrust lawsuit failed, at least in part, because the teams were attempting to share in the league's profits, not compete with the league. Thus, the failure to accept them into the leagues resulted in no harm to competition.

Kentucky Speedway is a 1.5-mile tri-oval racing facility that opened in 2000 and was designed and built to host premium stock car racing events such as Winston Cup races. The owner of the Kentucky Speedway acknowledges that it was built with no promise from NASCAR that it would ever receive a Winston Cup date. There were rumors that Kentucky Speedway hoped to buy Bahre's New Hampshire International Speedway and move one or both of NHIS's Winston Cup dates to Kentucky Speedway. Bahre also reportedly refused to 'lease' Kentucky Speedway one of NHIS's Winston Cup dates.[169]

The Nextel Cup (formerly the Winston Cup) race schedule includes 36 races. Since the number of weekends in a year is fixed and only one Nextel Cup race can be run each weekend, there is an upper bound on the number of races that can be added to the Nextel Cup schedule. The Nextel Cup racing season already extends from February to November. NASCAR has said that it will only consider adding 'new' Nextel Cup dates if race locations can be found near New York City or Seattle. As a result, NASCAR gave the Kentucky Speedway Busch Series and Craftsman Truck Series race dates, but refused to give it a Nextel Cup date. Kentucky Speedway's general manager, Mark Cassis, commented: "We thought we could earn our way into the series."[170]

On July 13, 2005, Kentucky Speedway filed an antitrust lawsuit against NASCAR and ISC alleging violations of Sections 1 and 2 of the Sherman Act.[171] Kentucky Speedway identified the relevant geographic market as the United States and two primary relevant product markets: (1) "the market for premium stock-car races and related testing and events" and (2) "the market for hosting a premium stock car racing event":

> 27. There are two primary relevant product markets for Kentucky Speedway's claims. The first product market is the market for premium stock-car races and related testing and events. The NEXTEL Cup Series Races, which are controlled by NASCAR, are the only premium stock-car racing events sanctioned in the United States. Premium stock-car racing does not have a reasonably interchangeable substitute. Other stock-car racing, such as NASCAR Busch Series races, are in different product markets due to differences in consumer demand, consumer pricing, television revenue, and corporate sponsorship. Racetracks, such as the Kentucky Speedway, would

---

[169] "Jayski's Silly Season Site – Past New Hampshire International Speedway News/Rumors" at www.jayski.com.

[170] Wolf (2006).

[171] The discussion of this lawsuit is based primarily on the Complaint and Jury Demand in *Kentucky Speedway v. NASCAR and ISC*, filed in the U.S. district court (Eastern District of Kentucky at Covington) on July 13, 2005.

derive substantially different economic benefits from hosting a NEXTEL Cup race, as opposed to a Busch Series race.

28. The second product market is the market for hosting a premium stock car racing event. Very few racetracks in the United States are capable of hosting a premium stock-car racing event, because of issues relating to television broadcasting, fan accommodations, track conditions, and track facilities. Racetracks capable of hosting a premium stock car race do not have a reasonable interchangeable substitute.

Kentucky Speedway alleged that, in violation of Section 1 of the Sherman Act, NASCAR and ISC "have acted, and continue to act, individually and in combination and collusion with each other and other companies that control tracks hosting the NASCAR NEXTEL Cup Series, to illegally restrict the award of NASCAR's primary product races, the NASCAR NEXTEL Cup Series". NASCAR and ISC allegedly restrict the award of Nextel Cup dates so as to:

(a) assure that ISC racetracks or racetracks in which ISC has an equity interest are awarded the majority of these races;
(b) award to ISC racetracks the majority of NASCAR NEXTEL Cup Series and NASCAR Busch Series back-to-back weekend races to assure that the greatest financial benefits from NASCAR-sanctioned racing events are obtained by ISC racetracks;
(c) institute policies and procedures that have the purpose and effect of restraining the ability of non-ISC racetracks to develop competing products;
(d) schedule, and realign when necessary, NASCAR NEXTEL Cup Series races in order to maximize current revenue to ISC racetracks and injure competing racetracks, such as Kentucky Speedway;
(e) award NASCAR NEXTEL Cup Series races to ISC substantially in advance of the award of NASCAR NEXTEL Cup Series races to competing racetracks;
(f) reserve NASCAR NEXTEL Cup Series race dates for award to newly constructed or purchased ISC racetracks, or racetracks ISC is considering purchasing, while withholding the award of these race dates to other qualified competing racetracks, such as Kentucky Speedway;
(g) award multiple NASCAR NEXTEL Cup Series races to ISC racetracks while awarding no NASCAR NEXTEL Cup Series races to qualified competing racetracks such as Kentucky Speedway; and
(h) award NASCAR NEXTEL Cup Series races to ISC racetracks while withholding award of these races to competing racetracks, such as Kentucky Speedway, irrespective of seating capacity, ticket sales, attendance, facility amenities, track location, track condition and safety, television ratings, race sponsorships, and/or consumer preference.

Kentucky Speedway alleged that, in violation of Section 2 of the Sherman Act, NASCAR "has illegally maintained a monopoly in the premium stock car racing market by, among other things, refusing to sanction a NEXTEL Cup Series racing event at the Kentucky Speedway and instituting rules and procedures that effectively prevent Kentucky Speedway from staging a competing premium stock car race" and "has also illegally leveraged its monopoly in the premium stock car racing market in an attempt to monopolize the market for hosting premium stock car races through ISC – a company that is owned in part by NASCAR's principals." Kentucky Speedway identified numerous types of anticompetitive conduct by NASCAR:

31. NASCAR is a monopolist in the market for premium stock car races. NASCAR's NEXTEL Cup series are the only premium stock car races that are currently sanctioned and hosted in the United States. NASCAR has the ability to control prices in connection with premium stock car races, including sanction fees, purses, merchandising rights and broadcasting revenue. NASCAR also has the ability to control output in the premium stock car racing market, and has artificially restricted the supply of premium stock car races well below consumer demand. In addition, NASCAR, through various anticompetitive rules and practices, has excluded competition in the premium stock car racing market.
32. NASCAR has developed and implemented a NASCAR NEXTEL Cup Series points system, and other rules and regulations, through which NASCAR controls both NASCAR-related and non-NASCAR-related activities of drivers, crews, owners, and sponsors. The NASCAR point system effectively prevents participation in a non-NASCAR race in lieu of a NASCAR race, due to the substantial financial penalty involved…
33. Another anticompetitive action taken by defendants is charging Kentucky Speedway disproportionately large purse and sanction fees, as compared to ISC tracks. For example, Kentucky Speedway purchased Louisville Speedway, and realigned a Craftsman Truck Race from Louisville Speedway to Kentucky Speedway. NASCAR raised the total awards to drivers from approximately $284,000 to $702,000, dramatically increasing the cost to Kentucky Speedway. However, when ISC's tracks have moved races, the purses have either not increased or have increased by small amounts, and the purses required at ISC's tracks for Craftsman Truck races are generally much lower than NASCAR requires of Kentucky Speedway. Similarly, Kentucky Speedway, Kansas Speedway and Chicagoland Speedway all received Busch Series races within the same year. Kentucky Speedway receives "B" television revenue while the other tracks, affiliated with ISC, receive higher "A" television revenue, with no rational basis.
34. By starving competing racetracks of revenue, NASCAR and ISC are able to maintain and enhance their monopoly power through either: 1)

purchase of those racetracks at fire-sale prices by ISC; 2) financially crippling those racetracks to reduce their potential competitive threat in the premium stock car race market; or 3) eliminating those racetracks from the market. Once ISC owns a racetrack, NASCAR will then increase the revenue to the newly-owned ISC racetrack by either scheduling a NEXTEL Cup race or directing other NASCAR-related revenue to that racetrack. Homestead-Miami is an example of this conduct – it was unable to obtain a NEXTEL Cup race until ISC assumed ownership. The scheme also benefits ISC, which has gained increasing control of the market for racetracks capable of holding a premium stock car race.

35. The actions of defendants not only stifle current competition in the markets for premium stock car racing and hosting, it also inhibits future competition as well. Any investor interested in spending the hundreds of millions of dollars necessary to build a state-of-the-art racetrack would be deterred with the knowledge that its ability to host a NASCAR NEXTEL Cup race would not be decided by a competitive process. Rather, the defendants would make a decision based upon whether it would increase NASCAR's and ISC's market power. Moreover, the defendants' practices make it impossible to enter with a competing product in the premium stock car race market.

Kentucky Speedway argued that it is a victim of NASCAR's and ISC's illegal behavior, along with NASCAR fans, drivers, sponsors, and radio and television broadcasters:

> The illegal actions of NASCAR and ISC have harmed every aspect of stock car racing. They have hurt race fans by causing higher ticket prices and creating fewer options to watch their favorite drivers. They have hurt the drivers by limiting the amount of money awarded by the tracks to the competitors, by restricting the races in which they can compete, and by discouraging the construction of new tracks. They have hurt sponsors by giving them fewer options in deciding to align with a particular race. They have hurt television and radio broadcasters by limiting the number of races featuring the highest-caliber drivers. And they have hurt independent racetracks such as Kentucky Speedway by doling out NEXTEL Cup races to those tracks that will best protect the market power of NASCAR and ISC – to the detriment of Kentucky Speedway and of all those who want to see true competition in the stock car racing industry.

Kentucky Speedway sought an injunction requiring NASCAR "to institute a competitive bidding process to permit full and fair competition for the right to host a NEXTEL Cup Series race." It also sought $400 million in damages (which would then be automatically trebled in accordance with the antitrust laws), a Nextel Cup date for the 2006 season, and the right to compete to host a Nextel Cup race in each subsequent year. On January 27, 2006, the district court denied NASCAR's and ISC's motion to dismiss and set a discovery deadline of February

1, 2007. In an interview with *The Wall Street Journal* published on September 13, 2007, Brian France offered these comments on the Kentucky Speedway lawsuit:[172]

> I think he's wrong. They're just very selfish about that. We have about as free a market in our situation as you can have.
>
> They built a facility, in our view, in the wrong place. They built the facility in a market that's pretty heavily saturated with Nascar events. We're happy to run there with some of our other things when we have space and availability. But they're taking a position that somebody owes them something.
>
> It's not different than me and you building a car dealership and saying, 'Hey Toyota, I think I could do a nice job; I've got a really nice dealership. Everything looks good. I'll take a franchise.' Things don't work that way. In our system, it's hard to say consumers are harmed in any way. All the stakeholders – from stockholders to drivers, teams, anybody in between – have done nothing but benefit from our business model.

Forcing NASCAR to put its Nextel Cup race dates up for competitive bidding could hurt NASCAR's product, as well as the speedways themselves. NASCAR has pursued a long-term strategy of increasing premium stock car racing's appeal outside of its historic base – the southeastern United States. By sanctioning Nextel Cup races across the United States, NASCAR has been able to generate national interest in its product. As a result of its geographic expansion strategy, NASCAR has been able to negotiate multi-billion-dollar television deals and attract corporate sponsors. Those benefits may disappear if NASCAR is forced to award Nextel Cup dates to the highest bidder. Moreover, if speedways have to bid for Nextel Cup dates, their profits will fall. Under NASCAR's current system, most of the rents generated by Nextel Cup races go to the speedways – NASCAR has not increased its sanctioning fee so as to extract those rents. Under a competitive bidding system, those rents would be transferred from the speedways to NASCAR.

At least some of the allegedly anticompetitive conduct of which Kentucky Speedway complains has a procompetitive rationale. For example, fan interest is created by standings and championships and therefore it is hardly surprising that NASCAR has devised rules to determine a Nextel Cup series champion. To a driver hoping to win the championship, those rules may make participation in non-NASCAR races unappealing, which in turn may make it difficult for a rival sanctioning body to attract drivers for its races. Yet the overall effect of such rules may be to enhance the demand for Nextel Cup races.

---

[172] Thompson (2007).

In summary, stadium owners have brought a number of antitrust lawsuits against sports leagues. In the case of the NFL, the league's relocation rules were successfully challenged by the Los Angeles Memorial Coliseum, enabling the Oakland Raiders to relocate to Los Angeles. However, the NFL's imposition of a relocation fee was not successfully challenged. The St. Louis Convention and Visitors Center could not even get its antitrust case to the jury before being dismissed.

Antitrust disputes between speedways and NASCAR involve a somewhat different set of issues. It is not a question of league rules regarding franchise relocations, but rather the awarding of extremely valuable race dates. None of the three recent cases has gone to trial. In one case, the antitrust charges were voluntarily dismissed. In another, there was a settlement in which Texas Motor Speedway ultimately received a 'second' Nextel Cup date. The third case is making its way through the judicial system.

Chapter 9

Sports Leagues vs. Equipment Suppliers

One function of sports leagues is to set the 'rules of the game.' Sports leagues are interested in setting rules that enhance the demand for the league's product. Major League Baseball, for example, was rumored to be using 'juiced' baseballs to reinvigorate interest in the sport after a disastrous strike (although the rumors now are that it was some of the players, not the baseballs, that were 'juiced'). Some sports equipment innovations, however, may be so radical as to change the very nature of the sport. There is talk of golf courses being made obsolete by improvements in clubs and balls. Sports leagues have to decide (or decide not to decide) which innovations to permit and which to ban.

Obviously, those rules (or the lack of rules) will impact the suppliers of sports equipment to league teams. For example, Major League Baseball does not permit players to use aluminum bats despite their 'superior' performance over wood bats. The NCAA currently permits the use of only those aluminum bats whose performance does not exceed that of wood bats. Thus, wood bat manufacturers would be impacted by the lack of any NCAA rule limiting the performance of aluminum bats, whereas aluminum bat manufacturers would be impacted by a rule limiting the performance, or even worse banning the use, of aluminum bats. However, simply because an equipment supplier is impacted by a sports league's rules does not imply that the supplier has suffered an antitrust injury. League rules regarding equipment generally affect competitors, not competition in a relevant market.

Lazaroff (1999) discusses how to apply the rule of reason to sports equipment standards, including delineation of the relevant geographic and product market as well as pro-competitive rationales for such standards. He argues that for products such as golf clubs and baseball bats, the relevant geographic market is the United States since manufacturers of those products sell throughout the country and purchases may be in person or by mail. A more difficult question arises as to the relevant product market, which "is generally defined as the cluster of products that are reasonably interchangeable taking price, use and quality into account." (p. 156) The question arises over the extent to which high-price, high performance equipment and lower-price, lower performance equipment are substitutes, which ultimately depends on consumers' purchasing behavior:

> Considering the fact that titanium golf clubs with graphite shafts often retail for several hundred dollars and many times the price of other clubs, one could reasonably contend that they constitute a relevant submarket separate from all other golf clubs. Similarly, the cost and quality of the best aluminum baseball bats arguably separate them from the lower cost, less powerful wooden models. This would be as economically realistic and sensible as arguing that top of the line luxury automobiles do not compete with the low end, economy models because luxury car buyers would simply not view the cheaper cars as a reasonable substitute.

On the other hand, some differences in price and quality do not necessarily remove products from the market. Consumers may factor in the price and quality differentials when making a purchase and opt for either the higher quality/higher price item or the lower quality/cheaper product. The products may still be competing for the consumers' dollars. At some point the differences in price and quality may suggest separate markets, but products need not be identical in quality and price to be considered part of the same competitive market. At their widest, the relevant markets will include all baseball bats and all golf clubs. More narrowly circumscribed markets consisting of only the more expensive, high-tech clubs and bats may be asserted, but the buying patterns of consumers should ultimately determine the relevant markets. (pp. 158-59)

The anticompetitive effects of sports leagues' equipment standards may include a reduction in the quality of the available equipment, an increase in the price of that equipment, and a reduction in research and development. On the other hand, the pro-competitive effects of sports leagues' equipment standards may include increased safety of the sport (and thus possibly greater participation), as well as preventing the sport from being "fundamentally altered by technological advancements." If sports equipment became of such superior quality that athletic performance was no longer dependent on the athlete's skills, consumers' interest in participating in and viewing the sport may diminish. Thus, sports leagues may enhance the demand for their product by imposing equipment standards.

Sports equipment suppliers have filed a number of (ultimately unsuccessful) lawsuits against sports leagues alleging that their equipment-related rules (or lack of rules) violated the antitrust laws. This chapter will focus on those involving NCAA baseball, professional tennis, golf, and bowling, and auto racing.

NCAA Baseball. Aluminum baseball bats, which have been manufactured since the early 1970s, have never been allowed in Major League Baseball games. The NCAA, in contrast, has permitted the use of aluminum bats in NCAA baseball games since 1974. The early aluminum bats were not clearly superior to wood bats – aluminum bats were marketed more for their durability than their bat speed. However, as aluminum bats became lighter and more powerful, they enabled batters to swing faster and to make more precise contact with the ball. The result was that collegiate baseball games became 'home run derbies' with football-like scores. The NCAA was hit with antitrust lawsuits from both sets of bat manufacturers. First, it was sued by a wooden bat manufacturer for not adopting a rule limiting the performance of aluminum bats, and then it was sued by an aluminum bat manufacturer for adopting a rule limiting the performance of aluminum bats.

Given the superior performance of aluminum bats, the leading wood bat manufacturer – Baum Research and Development – saw its sales to collegiate teams plummet. On July 13, 1998, Baum filed an antitrust and tortious interference lawsuit against the NCAA and three aluminum bat manufacturers – Hillerich & Bradsby Co., Easton Sports, and Worth, Inc. Baum alleged that, in the words of the district court, "the bat manufacturers have conspired with the NCAA to manipulate the standard for baseball bats used in NCAA-sanctioned baseball games to perpetuate their dominance and exclude Baum from the market for baseball bats used in amateur baseball." The defendants filed a motion to dismiss, arguing that, once again in the words of the district court, "Baum's alleged injury is from competition rather than a lack of competition, and thus Baum's injury does not arise from a violation of the antitrust laws." On November 19, 1998, the district court granted the defendants' request to dismiss the antitrust claim.[173]

The district court stated that the relevant market is "the market for baseball bats used in amateur baseball, which includes, but is not limited to, collegiate baseball." The defendant aluminum bat manufacturers account for 90% of the sales in this market because their bats have superior performance relative to wood bats, but also cost more. At the time Baum filed the lawsuit, the NCAA did not have rules restricting the performance of bats that could be used in NCAA-sanctioned baseball games. Baum argued that the lack of such rules (1) made such games unsafe due to the speed at which the ball travels after being hit with an aluminum bat, (2) compromised the 'integrity' of the game by favoring the offense over the defense and thus resulting in more high-scoring games, and (3) led aluminum bat manufacturers to aggressively compete with each other to design and produce high-performance aluminum bats. Baum contended that the lack of such rules was the result of a conspiracy by the NCAA and the aluminum bat manufacturers to drive Baum's wood bat out of the market by, for example, the signing of exclusive agreements between the aluminum bat manufacturers and NCAA schools. The district court noted that Baum had suffered no antitrust injury – Baum's harm was the result of it having an inferior product relative to that of the aluminum bat manufacturers, not because there had been harm to competition:

> Baum has not averred that competition in the amateur baseball bat market is at all reduced by virtue of the alleged conspiracy to manipulate the rules for baseball bats. Instead, Baum focuses exclusively on the fact that it cannot sell its bat in the relevant market without a rule regulating the performance of its competitors' bats. Indeed, Baum acknowledges that H&B, Easton, and Worth have "aggressively competed with each other." Thus the fatal flaw in Baum's case: the NCAA rules, even if the result of a conspiracy that violates the antitrust laws, pose no threat to competition in the relevant market. In fact, there is a logical inference that the absence of a rule regulating bat performance actually fosters competition…
>
> Baum has only alleged an injury to a single competitor: itself. Baum has not alleged an injury to the amateur baseball bat market as a whole. In fact, it has alleged the opposite: that lax standards have allowed its competitors to compete "aggressively" with each other by designing and manufacturing superior products. Baum's alleged injury – its inability to sell the Baum Bat – is not the result of any anticompetitive effect on the market. Rather, Baum's injury stems from the competition itself: the

[173] *Baum Research and Development v. Hillerich & Bradsby*, 31 F. Supp. 2d 1016 (E.D. Mi S.D. 1998).

> performance of Baum's wooden composition bat is inferior to that of the bats manufactured by H&B, Easton, and Worth.

On December 4, 1998, Baum filed a motion for reconsideration and to amend its complaint. On October 28, 1999, the district court ruled that both Baum's original and proposed amended complaints stated no antitrust claim, but the proposed amended complaint did state a claim for tortious interference with business relations:[174]

> None of the proposed amendments would alter the flawed theory which is the basis for Baum's antitrust claims. The Michigan court properly concluded that even if Baum suffered injury as a result of antitrust violations by defendants, Baum's injury was not the result of any anticompetitive effect on the market, but rather stemmed from competition itself. Baum's effort to evade the ruling by alleging that it claims injury to a competitor rather than to competition are to no avail. The assertion that defendants' conduct injured Baum and other wood and wood composition bat manufacturers and the liberal use of the word "competition," throughout the allegations of antitrust injury, do not alter the nub of Baum's case. The proposed complaint still alleges that non-restrictive bat performance standards granted a competitive advantage to aluminum bat manufacturers, "which had the effect in the markets of excluding competitors such as Baum," and that Baum was the "specific target" of the aluminum bat manufacturers. The gravamen of the proposed complaint remains the same as the original, legally insufficient, complaint.

As the Baum litigation was making its way through the judicial system, the NCAA was taking steps to set limits on the performance of aluminum bats. On August 12, 1998, only a month after Baum filed its original antitrust lawsuit, the NCAA's Executive Committee approved a rule setting specifications and performance standards for baseball bats to be used in NCAA-sanctioned games, with the goal of making aluminum bats perform more like wood bats. Five days earlier, on August 7, one of the aluminum bat manufacturers, Easton Sports, had preemptively filed a $267 million lawsuit against the NCAA alleging that the rule constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The NCAA delayed implementation of the rule, which would have limited the speed at which a baseball leaves a bat to 93 miles per hour, limited the diameter of bats, and altered bats' length-to-height differential. On September 28, 1999, the NCAA Executive Committee accepted a research panel's recommendation to limit the speed at which a baseball leaves a bat to 97 miles per hour for at least three years, beginning January 2000. Since its existing bats complied with the revised rule, Easton chose to settle its lawsuit against the NCAA.

[174] *In re: Baseball Bat Antitrust Litigation (MDL No. 1249)*, 75 F. Supp. 2d 1189 (D. Ks 1999).

Cusimano (1999-2000) examines whether the revised NCAA rule constitutes an unreasonable restraint of trade. Easton had defined the relevant market to be “the purchase of high performance bats for use by college baseball players.” Since the majority of schools with baseball teams are NCAA members, Easton argued that the NCAA had substantial market power in this market and that the rule discriminated against the makers of high performance aluminum bats since the rule required them to produce bats which possessed the same performance characteristics as Baum’s wood bats. Easton alleged that, as a result of the rule, the quality of baseball bats in the relevant market would be reduced, which in turn would reduce the quality of the games. The NCAA countered that the rule did not limit who could make or sell bats to NCAA teams and thus did not harm competition in the relevant market. Moreover, the NCAA identified a number of pro-competitive rationales for the rule: (1) to preserve the integrity of the game and (2) safety. Easton disputed both alleged rationales. Overall, Cusimano concludes:

> The NCAA is undoubtedly a unique entity. Although the NCAA is not involved in manufacturing and selling athletic equipment, and NCAA rules only govern college sports, NCAA activities can have a significant impact in the marketplace. The NCAA is a formidable opponent to Easton or any other bat manufacturer who chooses to step up to the plate and challenges the NCAA’s new baseball bat regulations.
>
> The restriction’ s potential incidental anticompetitive effect on certain manufacturers does not, in itself, render the performance standards unreasonable under rule of reason analysis. The NCAA has offered legitimate non-economic pro-competitive justifications for the stricter limits, and there is sufficient evidence showing that the regulations are reasonably related to the NCAA’s objectives. (p. 1088)

Professional Tennis. The United States Tennis Association (USTA) sanctions amateur and professional tournament tennis in the United States. The USTA is a member of the International Tennis Federation (ITF), an international organization consisting of the 104 national tennis associations worldwide. A condition of ITF membership is that the ITF Rules of Tennis will be used in all tournaments sanctioned by the national organization. Changes to the ITF Rules of Tennis require at least a two-thirds majority vote by members at the annual meeting.

The ‘double-strung’ racket was developed in the 1970s in West Germany. It had two layers of main strings, in contrast to the conventional tennis racket which has interlaced and interwoven strings that are all on the same plane. A question arose as to whether hitting a tennis ball with a double-strung racket resulted in a ‘double hit’, which is not permitted in the game of tennis. On May 2, 1977, the Swiss Tennis Association contacted the ITF to inquire whether it accepted a newly-marketed tennis racket that had double strings. The ITF’s Committee of Management (COM) examined information about the racket, including written reports from various national associations where the racket had been used and player reactions. Relative to a conventional racket, a double-strung racket generates more spin to a ball hit with a topspin stroke, resulting in fewer service returns. Thus, allowing the use of double-strung rackets would favor players who develop a very efficient serve and such matches will be characterized by relatively fewer service returns than matches with conventional rackets, thereby changing the ‘integrity’ and ‘character’ of the game of tennis. The COM decided that, effective October 3, 1977, only single-string rackets could be used in official tournaments. The purpose of the temporary ban on the use of the double-strung racket was to give the ITF time to conduct further research on how use of the racket affects match play. On October 18, 1977, the USTA announced that it would honor the ITF’s temporary ban. At the July 1978 annual ITF meeting, members unanimously approved a rule that defined a tennis racket in such a way as to exclude double-strung rackets, as well as other non-conventional rackets.

Gunter Harz Sports manufactured and distributed tennis rackets, as well as tennis racket strings and stringing systems, in the United States and internationally. Gunter Harz had obtained the exclusive rights to market the double-strung racket from its inventor, Werner Fischer. Harz modified Fischer’s design and, prior to the July 1978 ITF vote, Harz and Fischer began lobbying the tennis community to support double-strung rackets. On December 28, 1979, Gunter Harz Sports brought an antitrust lawsuit against the USTA alleging, in the district court’s words, “a group boycott of double-strung tennis rackets, having the express purpose as well as effect of restraining competition in the manufacture and distribution of tennis rackets and tennis racket stringing systems in violation of Section 1 of the Sherman Act.”[175] The USTA’s position, once again in the district court’s words, was that “the actions of the USTA are exempt from the jurisdiction of the Sherman Act under the circumstances of this case because the USTA bears no competitive or other business relationship to Harz Sports or to any other manufacturer of tennis equipment and, therefore, has no commercial or profit motivation for restraining trade by banning plaintiff’s racket.”

The lawsuit was tried without a jury and on March 4, 1981 the district court issued its opinion finding that the USTA did not violate the antitrust laws. The district court noted that the case did not involve “an agreement between ‘business competitors in the traditional sense’” and that the USTA’s actions in adopting a rule defining tennis rackets cannot “be labeled as lacking in ‘any redeeming virtue.’” Thus, the district court proceeded with a rule of reason analysis and set forth a four-part test applicable to “areas where a need for self-regulation is inherent in an industry” (which includes professional and amateur sports organizations): “(1) whether the collective action is intended to accomplish an end consistent with the policy justifying self-regulation; (2) whether the action is reasonably related to that goal; (3) whether such action is no more extensive than necessary; and (4) whether the association provides procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.”

[175] *Gunter Harz Sports v. USTA*, 511 F. Supp. 1103 (D. Ne 1981).

The district court rejected the USTA's argument that, as a member of the ITF, it had no choice but to abide by the ITF's decision to define tennis rackets in such a way as to exclude non-conventional rackets such as the double-strung racket. Nevertheless, the district court concluded that the USTA's actions survived the four-part rule of reason test:

> In sum, the Court ultimately finds under the rule of reason analysis, that the concerted action engaged in by the defendant, USTA, was intended to further the legitimate goals of preserving the essential integrity of the game of competitive tennis and conducting that game in an orderly fashion; that the temporary freeze of double-strung rackets and the subsequent adoption of Rule 4 were rationally related to those goals and no more extensive than necessary; and that adequate procedural safeguards were provided. Any effect the USTA's actions had on plaintiff's ability to compete in the market for tennis rackets and tennis racket stringing systems was incidental to the USTA's primary purpose in promoting tennis competition.
>
> The Court, therefore, concludes that the defendant's actions do not constitute a violation of Section 1 of the Sherman Act.

Gunter Harz Sports unsuccessfully appealed the district court's decision. On December 2, 1981, the appeals court concluded that the district court's findings "have substantial support in the record and we find no merit in the contrary assertions by Harz Sports."[176]

Professional Golf. The United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews (R&A) jointly formulate, copyright, and publish the Rules of Golf. The R&A is the ruling body for golf in countries other than the United States, Canada, and Mexico. The USGA has more than 6,000 member golf clubs and courses, which are not required to adhere to the USGA rules, although most do. Golf balls, clubs, and shoes are all subject to the Rules of Golf.

An example of a golf ball innovation opposed by the USGA was the Polara 'asymmetric' golf ball which was designed to fly straighter than 'ordinary' (i.e., symmetrical) golf balls due to its smaller, shallower dimples at the ball's poles.[177] Polara submitted the ball for the USGA's approval, but the USGA refused to put it on its list of approved balls even though the Polara ball met all existing rules and specifications. In 1981, the USGA adopted a new rule requiring golf balls to be aerodynamically spherically symmetrical. Polara sued the USGA alleging that the USGA conspired with golf equipment manufacturers to keep the

[176] *Gunter Harz Sports v. USTA*, 665 F.2d 222 (8th Cir. 1981).

[177] This paragraph is based primarily on the discussion of *Polara Enterprises v. USGA* in Carton (1991). Gelberg (1996) presents a case study of the Polara golf ball and the USGA's attempt to prevent new technologies from harming the game of golf.

Polara ball out of the market. The case went to trial, with the USGA arguing that keeping the Polara ball off its approved list was in the best interest of the game of golf because the Polara ball took the skill out of the game. The jury disagreed, awarding Polara $1,475,000 in antitrust damages. Notwithstanding the jury verdict, the court entered judgment for the USGA, ruling that "the verdict was substantially contrary to the weight of the evidence."[178] An out-of-court settlement was reached shortly afterwards.

The Rules of Golf also have been used to limit the performance of golf clubs. In 1942, the USGA and R&A adopted a rule that required the grooves on the face of a club to be V-shaped and the space between the grooves had to be at least three times the groove's width. In 1984, the USGA and R&A adopted a new rule which permitted U-shaped grooves but did not specify how the width of a groove would be measured. Karten Manufacturing Corporation, which designs, manufacturers, and sells golf equipment in the United States and throughout the world, then introduced PING EYE2 irons with U-shaped grooves, which became very popular with golfers and accounted for 99% of Karsten's production of irons. More than 150 professional golfers were sponsored by Karsten and played with PING EYE2's.

In 1987, the USGA devised the "30-degree method" for measuring groove width. The R&A later adopted the method and ruled that, beginning January 1, 1990, it would be used for all USGA/R&A championships and, beginning January 1, 1996, it would be used for all events played under the Rules of Golf. The USGA and R&A determined that the PING EYE2 did not conform because the distance between its U-shaped grooves was less than three times the width of a groove as measured by the 30-degree method. Other golf club manufacturers also were found to have nonconforming clubs. Interestingly, the USGA and R&A found that some PING EYE2 clubs did conform.

On August 10, 1989, Karsten filed an antitrust lawsuit against the USGA and R&A seeking $100 million in damages. Five months later, on January 11, 1990, the district court dismissed the charges against R&A and its individual defendants for lack of personal jurisdiction.[179] Shortly thereafter, Karsten and the USGA reached an out-of-court settlement, which had three key components: (1) the USGA agreed to clarify its measurement rules so as to properly describe the measurement of grooves with rounded edges, (2) Karsten agreed to re-tool its PING clubs to the rules as written, and (3) PING clubs which had already been sold would be 'grandfathered.'[180]

The Professional Golfers' Association of America (PGA) administers professional golf tournaments for the regular Tour and the Senior Tour and is a separate organization from, and independent of, the USGA. After the USGA changed the rules of golf to permit U-shaped grooves, players on the PGA Tour began to complain that the U-shaped grooves were, in the words of the appeals court, "detracting from the skill level of the game" because "the U-grooves

---

[178] *Polara Enterprises v. USGA*, C-78-1320-RHS (D. Ca 1984).

[179] *Karsten Manufacturing v. USGA*, 728 F. Supp. 1429 (D. Az 1990).

[180] The settlement terms come from "The Great Square Groove Controversy" by Dave Tutelman which is posted on the tutelman.com website.

imparted more spin on the ball and thus provided greater control for shots from grassy lies of the rough" which "offsets the advantage of players with the skill necessary to keep the golf shot in the fairways." In 1987, the USGA and PGA both conducted tests confirming that U-shaped grooves impart more spin on the ball, although in June of that year the USGA concluded that there was not yet sufficient evidence to bar clubs with U-shaped grooves. (However, as discussed above, the USGA did adopt a new method of measuring the space between the grooves which had the effect of banning PING EYE2 clubs.) The PGA surveyed Tour golfers and found that 73% used clubs with U-shaped grooves, 74% indicated that U-shaped grooves provide greater control from the wet grass and rough, and 60% believed the PGA should ban the use of clubs with U-shaped grooves.

On May 12, 1988, the PGA Commissioner recommended a proposed rule change banning clubs with U-shaped grooves. The PGA received comments from club manufacturers and made some changes to the proposed rule. In the meantime, the USGA finished tests confirming that U-shaped grooves produced a different spin rate on balls hit from the rough than clubs with V-shaped grooves, although the USGA also determined that the difference was not sufficiently significant to justify a ban on clubs with U-shaped grooves. Nevertheless, the PGA Commissioner recommended that the PGA adopt a U-groove ban. At its February 28, 1989 meeting, with all of the player directors and PGA officer directors abstaining due to conflicts of interest, the three independent directors unanimously voted in favor of the ban, with the effective date of the rule being January 1, 1990. On December 1, 1989, Karsten filed a lawsuit against the PGA alleging violations of Sections 1 and 2 of the Sherman Act.

Evidentiary hearings were held on December 15, 19, and 20, 1989. Karsten's vice president testified that U-shaped grooves do not improve player performance. Karsten's expert witness, economist Richard Smith, testified that U-shaped grooves have not had a negative impact on the PGA. Smith testified that the PING EYE2 does not give the players who use it an advantage, as evidenced by the fact that the percentage of prize money won by players using that club is less than the percentage of players using it. Smith also testified that consumers' choice of golf clubs is correlated with professional golfers' choice of clubs and the PGA ban had caused a drop in Karsten's market share of golf clubs and other products. Moreover, Smith testified that Karsten's reputation would be harmed if it was forced to produce a club conforming to the PGA rule. On the other hand, the Tour's all-time leading money-winner, Tom Kite, testified U-grooves diminish the skill factor of the game of golf by offsetting the advantage of being able to hit the ball on the fairway. The PGA Commissioner testified that, if a preliminary injunction against implementation of the PGA rule were granted, the PGA would be unable to propagate any rules for the professional tournaments it oversees. At the conclusion of the hearing, the district court granted a preliminary injunction enjoining the PGA from implementing the rule banning U-shaped grooves. The PGA appealed. On June 12, 1991, the appeals court affirmed the district court's decision.[181]

[181] *Gilder v. PGA Tour*, 936 F.2d 417 (9th Cir. 1991).

Six days prior to the trial's start, Karsten and the PGA reached an out-of-court settlement. The PGA agreed to respect the USGA's primacy in rulemaking, as did Karsten (although it had already done so three years earlier). Furthermore, in exchange for Karsten's vow to respect the USGA's primacy in rulemaking, the PGA dropped its rule against U-shaped grooves.[182]

More recently, a dispute between the USGA and golf club manufacturers has arisen over a proposed rule to limit the spring-like effect off the face of drivers.[183] On October 18, 2000, Callaway Golf introduced the ERC II, a nonconforming club designed to exceed the USGA's test for spring-like effect. However, Calloway did not file a lawsuit against the USGA. Callaway's position is that there are two levels of golf – 'elite' and 'recreational' – and the ERC II is for recreational golfers, who comprise the vast majority of all golfers. As long as the USGA did not attempt to 'stigmatize' users of the ERC II, Callaway said it would not sue.

Golf shoes have also been at the center of an antitrust dispute between the USGA and an equipment manufacturer. Weight-Rite Golf Corporation manufactured and distributed a golf shoe with a patented wedge design that incorporated an angled wedge on the outside of the sole which assisted golfers by distributing their weight so as to better resist the tendency to push away from the ball when swinging. On March 1, 1990, the USGA's Technical Director determined that the Weight-Rite shoe violated Rule 14-3 of the Rules of Golf, which states that a player "shall not use any artificial device or unusual equipment … which might assist him in gripping the club, in making a stroke or in his play." Six days later, the USGA notified Weight-Rite and other professional golf associations of its determination. Some retailers reportedly stopped ordering the Weight-Rite shoes and returned their previously-ordered stock. Weight-Rite responded by marketing its shoes directly to consumers. It also appealed the USGA's determination to the Equipment Standards Committee and the USGA Executive Committee, both of which concluded that the Weight-Rite shoe violates Rule 14-3.

Weight-Rite sued the USGA alleging violation of Sections 1 and 2 of the Sherman Act. The USGA motioned for summary judgment. On March 12, 1991, the district court granted the USGA's motion, finding that "there is no genuine issue of material fact for trial and the USGA is entitled to summary judgment as a matter of law."[184] Weight-Rite did not oppose summary judgment in favor of the USGA on the Section 2 claim. Regarding the Section 1 conspiracy claim, the court noted that Weight-Rite has "identified no direct evidence in the record which shows that USGA members must disqualify golfers from play on their courses if the golfer uses non-conforming equipment" and "identified no record evidence to show that the USGA has taken adverse action against a member for allowing a golfer to use non-conforming equipment on the member's course."

---

[182] The settlement terms come from "The Great Square Groove Controversy" by Dave Tutelman which is posted on the tutelman.com website.

[183] Barr (2000). For a discussion of USGA and R&A's attempt to agree on a rule limiting the spring-like effect, see Barr (2002).

[184] *Weight-Rite Golf v. USGA*, 766 F. Supp. 1104 (M.D. Fl 1991).

Regarding the unreasonable restraint of trade claim, the court noted that on September 12, 1990 it had held that the challenged conduct did not fit within the class of restraints held to be *per se* unlawful and thus the present question is whether a fact finder could reasonably find a violation of the rule of reason. The court observed that Weight-Rite had not clearly defined the relevant market but for the purposes of the summary judgment motion it would assume that the relevant market is "the market for golf shoes in the United States." The district court commented on the affidavit submitted by Samuel J. Kursh on behalf of Weight-Rite:

> The affidavit contains no specific facts to support the conclusion that the USGA's determination that the Weight-Rite shoe does not conform to the Rules of Golf substantially restrained competition in the golf shoe market in the United States. There also is no other evidence in the record to support this conclusion. At most, Plaintiffs have presented evidence from which a fact finder could find that the USGA has the power to substantially decrease the marketability of certain types of golf shoes and that the marketability of Plaintiffs' shoe (as currently designed and manufactured) has been substantially diminished. Evidence that a single competitor has been removed from a relevant product market, in and of itself, is insufficient to establish a violation of the rule of reason…
>
> Plaintiffs have not presented evidence from which a fact finder could find that the USGA's determination has significantly restrained the operation of the free market with respect to the golf shoe industry. Plaintiffs also have not submitted evidence to controvert the USGA's showing that the purpose of Rule 14-3 of the Rules of Golf is to "preserve the traditions of the game, and to insure that a player's score is the product of his skill, rather than his equipment." The USGA is, therefore, entitled to summary judgment on Plaintiffs' claim under section 1 of the Sherman Act.

Weight-Rite appealed the district court's decision. On January 17, 1992, in a one-word opinion, the appeals court affirmed the district court's grant of summary judgment in favor of the USGA.[185]

Professional Bowling. The Professional Bowlers Association of America (PBA) organizes and promotes televised bowling tournaments in the United States. There are about 34 PBA tournaments annually, for which the PBA receives licensing fees from television networks and sponsorship fees from corporations which want to associate their name with a particular tournament. The PBA also establishes rules and regulations for PBA-sanctioned tournaments, including product standards for bowling balls and other bowling equipment. For example, PBA rules prohibit bowlers from wearing the logos of more than three commercial

---

[185] *Weight-Rite Golf v. USGA*, 953 F.2d 651 (11th Cir. 1992).

sponsors on their shirt and pants and the PBA must approve each logo a bowler wants to wear.

In 1985, Eureka Urethane, a bowling ball manufacturer, introduced the 'Bud Ball' – a 'Budweiser red' bowling ball with the Budweiser bow tie logo on its side. Eureka had obtained a license from the maker of Budweiser beer, Anheuser-Busch. A year earlier, Eureka had introduced the Blue Tank, which had a picture of a military tank on its side. The Blue Tank was approved by the PBA; the Bud Ball was not.

The Bud Ball elicited negative reactions from both the corporate sponsors and networks televising PBA tournaments. One of the sponsors of PBA tournaments was Miller Brewing Company, Anheuser-Busch's competitor. Miller's contract with the PBA gave Miller the right to exclude advertising for competing products during the tournaments it sponsored. After the introduction of the Bud Ball, Miller's contract with the PBA was changed so that bowling items containing commercial logos would be banned from Miller-sponsored tournaments. NBC, the television network which was to air the 1986 Fall Tour, also objected to the Bud Ball, saying it would not show the Bud Ball if used during a televised tournament and threatened not to televise the tournament at all. In televising a bowling match in which the Bud Ball was being used, NBC would basically be providing free 'intra-program' advertising to Anheuser-Busch, which would make the commercial spots during the tournament less valuable.

Although the Bud Ball was approved for use by the American Bowling Congress on December 5, 1985 and by the Ladies Professional Bowlers Tour in November 1986, the PBA Executive Board refused to approve the Bud Ball's use in PBA-sanctioned tournaments. It was the first ball ever submitted to the PBA which did not receive its approval. The Timber Lane ball – named after a bowling alley – had been approved for use, but only in regional tournaments in the Northwest, not in national televised tournaments.

After failing to obtain the PBA's approval of the Bud Ball, Eureka introduced the Black Tank, which was identical to the Bud Ball in construction and composition but was black instead of 'Budweiser red' and had a logo of a military tank on its side instead of the Budweiser logo. The PBA approved the use of the Black Tank in PBA-sanctioned tournaments beginning April 18, 1988.

Eureka filed a lawsuit against the PBA alleging seven counts of violations of Sections 1 and 2 of the Sherman Act, as well as one count of tortious interference with business relations. The PBA filed a motion for summary judgment on the antitrust counts. On September 6, 1990, the district court granted the PBA's motion and exercised its discretion to dismiss the tortious interference claim.[186]

The PBA argued that the seven antitrust counts had to fail because it did not possess monopoly power in the relevant market. Eureka had defined the relevant market to be "items used by professional bowlers during televised tournament play." While the district court believed this definition to be too narrow, it stated that the PBA has "failed to present the Court with sufficient evidence to expand the relevant product market to include other means of

[186] *Eureka Urethane v. PBA*, 746 F. Supp. 915 (E.D. Mo 1990).

advertising a bowling ball." For example, the PBA had not presented evidence regarding the cross-elasticity of demand among the various means of advertising bowling balls, such as spot commercials, tournament sponsorships, print advertisements, and paid endorsements.

The district court found that, for the purposes of summary judgment, "the product market to be defined is that for the advertisement of a bowling ball." It explained that "plaintiff seeks to advertise the Bud Ball in order to sell bowling balls, not beer," and: "The mere fact that the bowling ball contains the logo of a beer manufacturer does not change the nature of the product from bowling balls to beer." The court noted that Anheuser-Busch was not a plaintiff and had not alleged that it had been injured by the PBA's refusal to approve the Bud Ball. The district court thus assumed that the relevant product market is "the items used by professional bowlers during televised tournament play."

Regarding the Section 2 claims, the district court found that the PBA does possess monopoly power in the relevant market, where 'monopoly power' is defined as "the power to control prices and to exclude competition with respect to a particular product and within a particular geographic market." However, the PBA did not engage in anticompetitive behavior. Its actions "were neither unreasonable nor anticompetitive but a valid exercise of business judgment to protect that enterprise." Approval of the Bud Ball would have endangered the 1986 Fall Tour because NBC was threatening not to televise the tournaments, Miller Brewing may have refused to be a sponsor, and (assuming the tournaments were televised) the value of spot commercial time may have fallen, thereby reducing the prize money and in turn hurting professional bowlers.

One Section 2 count alleged that the PBA denied Eureka an 'essential facility', which Eureka defined as "the items which professional bowlers may use during televised tournament play." Eureka argued that this facility is essential for the effective promotion of its commercial bowling items and that the PBA has monopoly power over this facility. As the district court explained, "The essential facilities doctrine requires (1) control of an essential facility by a monopolist, (2) the inability to practically or economically duplicate the facility, and (3) the unreasonable denial of the use of the facility to a competitor when such use is economically and technically feasible." For the purposes of summary judgment, the court assumed (1) and (2), and then explained why condition (3) was not satisfied – Eureka and the PBA are not competitors.

The district court rejected Eureka's claim that the PBA employs an illegal tying arrangement, with the tying product being the right to enter PBA-sanctioned tournaments and the tied product being membership in the PBA. The court noted that "the laws against tie-in arrangements were designed to protect competition in the tied market" and added: "Although plaintiff's injury may be causally related to the alleged illegal tie-in, plaintiff's injury is only tangential to that which the antitrust laws were designed to protect."

Regarding the Section 1 claims, the district court found that "Miller was not a participant in any concerted action." Miller's action to alter its sponsorship contract "was taken independently and unilaterally." As for the other alleged conspirators, which included NBC, ABC, and some PBA Executive Board members, none are competitors of Eureka and group boycotts "are considered to be per se illegal only when they are engaged in by competitors of the plaintiff."

Similarly, regarding the price fixing count which alleged that the PBA and the networks maintained an artificially high level of advertising prices for spot commercials by prohibiting advertising on bowling balls, the court could not "characterize the price restraint as horizontal because the alleged co-conspirators are not competitors of each other or of the plaintiff" and could not "characterize the price restraint as classically vertical because defendants do not sell to the networks a product or service for which a resale price is fixed." Therefore, "the alleged price restraint is not a per se violation of Section 1 and will instead proceed to a rule of reason analysis." The court argued:

> As was explained supra, the intention of defendants was not to harm or unreasonably restrain competition. Instead, defendants' refusal to sanction the Bud Ball was a sound exercise of business judgment designed to secure its continued efficacy in serving the interests of professional bowlers.
>
> The restraint does have an anticompetitive effect in that it forecloses the Bud Ball from entry into the submarket defined, supra. The Court, however, has weighed the anticompetitive effects of the foreclosure against the rights of defendants to administer the sport of professional bowling and the networks to earn revenue from the sale of advertising spots, and concludes that any competitive effects are not significant. The Court has considered the ramifications of plaintiff's position to the television broadcasts of sporting or other events. The heart of this suit is not a conflict between plaintiff, a manufacturer of sporting goods, and defendant, an organizer and promoter of sporting events. Instead, the conflict is between plaintiff and the networks that televise sporting events. Plaintiff's position is that the athlete in a televised sporting event should be able to endorse the product of a sporting goods manufacturer by his use of the product. The sporting goods manufacturer receives a valuable endorsement from the athlete; the athlete is handsomely paid by the manufacturer in the form of an incentive payment. Therefore, both the sporting goods manufacturer and the athlete benefit by this arrangement. The networks, which are in the business of selling advertising, suffer in two ways. First, the networks are compelled to permit advertising during their telecast for which they are not compensated. Second, the intra-program advertising decreases the price of spot-commercial programming. The antitrust laws do not require, and this Court will not compel, the networks to give away the product or service that they are in the business of selling.

The district court thus granted the PBA's motion to dismiss all antitrust counts and the court exercised its discretion to dismiss the tortious interference count. Eureka appealed the district court decision. On June 28, 1991, the appeals court ruled that it was "not persuaded that the district court made any error of law in its thorough and carefully researched opinion."[187]

Auto Racing. There are numerous auto racing sanctioning organizations, including the National Association of Stock Car Auto Racing (NASCAR), the United States Auto Club (USAC), the International Motor Contest Association (IMCA), and the Sports Car Club of America (SCCA). These organizations set performance standards for the multitude of pieces of racing equipment in each car. The goal is to ensure that the winner of the sanctioned race is determined by the skill of the driver, not by the quality of the driver's equipment. Presumably the demand for auto racing is greater when drivers compete with cars using similar equipment and the winner is determined by drivers' skills than when the race winner is largely determined by which driver is willing to spend the most for high-performance equipment. On a number of occasions, the racing organizations have been sued for antitrust violations involving equipment standards, albeit unsuccessfully.

On January 18, 1968, STP Corporation filed an antitrust lawsuit against the USAC over a change in engine specification for turbine powered cars. In the words of the district court, STP alleged that "USAC has used a monopoly power in restraint of trade and commerce by adopting rules and regulations which are neither reasonable nor reasonably related to the attainment of any of the lawful purposes of USAC, and by applying its rules, regulations and technical specifications arbitrarily, capriciously, unreasonably, and discriminatorily against plaintiffs, all in violation of Sections 1 and 2 of the Sherman Act" and that "USAC together with certain of its members and other persons who do business with said members have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in championship auto racing, in violation of Sections 1 and 2 of the Sherman Act."[188] On July 2, 1968, the district court ruled in favor of the USAC:

> While the evidence tends to establish that championship class racing as here involved constitutes a separate relevant market for antitrust purposes, the evidence fails to establish that USAC's sanctioning of such races, so far as the plaintiffs here are concerned, could have any more than an indirect, insubstantial, fortuitous effect upon plaintiffs' business in interstate trade and commerce. The evidence here is that there are many automobile racing sanctioning organizations and cars and drivers who are members of USAC who may and have participated in racing events sanctioned by other such organizations and drivers who are F.I.A. licensed or members of other sanctioning organizations, in good standing with USAC, and who are qualified but many of whom are not USAC members do race in USAC championship divisions sanctioned events. The defendant USAC has not, nor has it attempted to unlawfully monopolize,

[187] *Eureka Urethane v. PBA*, 935 F.2d 990 (8th Cir. 1991).
[188] *STP Corporation v. USAC*, 286 F. Supp. 146 (S.D. In 1968).

> nor has it combined or conspired with any persons to monopolize automotive racing or any division thereof, and the Court so finds.

The International Motor Contest Association (IMCA) was organized in 1915 and is the oldest auto racing sanctioning body in the United States. IMCA created the 'modified' car class in 1979 and adopted a rule governing modified car transmissions. In 1993, Gail and Ernie Brookins introduced the 'Ernie Glide' automatic transmission and the next year a car using that transmission won the national championship race. Many drivers and two competing automatic transmission makers questioned whether the Ernie Glide's novel design complied with the IMCA rule and, prior to the 1995 season, the IMCA ruled that the Ernie Glide transmission violated the rule's intent, although not its letter. The IMCA's executive committee revised the rule so that all automatic transmissions were required to have a functioning pump, a rule change that affected only the Ernie Glide. In 1995 and 1996, the Brookins developed modified versions of the Ernie Glide that included a functioning pump. They also developed a new 'Ernie Glide' standard transmission. The IMCA's executive committee responded with additional rule modifications aimed at barring the use of Ernie Glide transmissions in IMCA-sanctioned races.

In mid-1996, the Brookins filed an antitrust and tortious interference lawsuit against the IMCA, IMCA president Kathy Root, and Billy Joe Bushore, a competing transmission manufacturer, alleging violation of Section 1 of the Sherman Act. Although the district court granted a preliminary injunction allowing drivers to continue to use Ernie Glide transmissions for a reasonable period, the district court later granted summary judgment dismissing the Brookins' antitrust claim. A jury awarded the Brookins $109,000 on their tortious interference claim. The Brookins appealed the dismissal of their antitrust claim.

The Brookins had claimed that the relevant market was the "oval track racing transmission market." Given that many other auto racing sanctioning bodies exist (e.g., NASCAR), the district court concluded that the exclusion of Ernie Glide transmissions from modified car races would not have an adverse impact in that market. On appeal, the Brookins claimed that IMCA had market power in the market for "IMCA-approved transmissions for modified racing." The appeals court rejected this proposed relevant market, noting that it "requires proof there is no cross-elasticity of demand between this game and other games that modified car racers might choose to play."[189] The appeals court concluded: "Given the evidence of many other classes of auto racing, and many other auto racing sanctioning bodies, on this record no reasonable jury could find that races governed by the IMCA modified car rules are a separate relevant market for antitrust purposes."

The appeals court explained that "exclusion is an incidental and inevitable by-product of defining the game":

> The Brookins' analysis is flawed because IMCA is not a typical standard-setting organization. Its rules do not tell transmission manufacturers or

[189] *Brookins v. IMCA*, 219 F.3d 849 (8th Cir. 2000).

> drivers what types of products or services they may sell or use in an open market. Rather, the IMCA modified car rules help define a game or sport in which the end product is a form of competition among race car drivers. If the game as defined is exciting for participants and spectators, it will prosper in relation to other games with which it competes in the broad recreational marketplace…
>
> Without question, the way IMCA defines the rules for modified car racing will exclude some types of equipment. But the exclusion is an incidental and inevitable by-product of defining the game. A rule making body's impact on equipment manufacturers will vary depending on the popularity of the game, and the extent to which its rules are followed by the game's players – in other words, the extent to which they are seen as the rules of the <u>game</u> itself, rather than the rules of that body's <u>league</u> of game-players. For example, major league baseball's decision not to approve the use of metal bats has probably had only a modest exclusionary impact, because metal bats have become extraordinarily popular with millions of amateur baseball players who are not bound by major-league rules. On the other hand, when the United States Golf Association refuses to sanction a "revolutionary" golf ball guaranteed to fly 20% farther, the exclusionary impact is probably severe, because most amateur golfers want to play the game under uniform nationally-sanctioned rules.

The remaining question is therefore whether IMCA's decisions were 'tainted' by the coercion of other transmission suppliers. IMCA's president argued that the IMCA's goal in setting its rules for the modified division was "to keep it as close to the 1979 rules as possible and to keep technology out of racing." The appeals court concluded that there was no evidence that either Bushore, the defendant transmission supplier, or the non-defendant transmission supplier TCI, coerced the IMCA into revising its rule to exclude the Ernie Glide:

> The Brookins simply failed to present probative evidence that Bushore or TCI coerced the IMCA rulings in question, or that IMCA's decisions were made for reasons other than those explained by Ms. Root. To be sure, Bushmore and TCI – as well as many drivers – raised with IMCA the question whether the novel Ernie Glide and Ernie Glide transmissions were consistent with IMCA's modified car rules. But it is to be expected that contestants and competing suppliers will complain, or at least question, whether a new technology complies with "the rules of the game." This type of complaint is not proof that IMCA's rulings were the product of collusive rather than independent action… It is also unsurprising that IMCA, when faced with a new transmission technology, consulted other transmission manufacturers, as well as the Brookins, in investigating the rule compliance issue. There is no evidence that IMCA had a financial incentive to accede to the wishes of the Brookins' transmission competitors – sponsors of IMCA-sanctioned events pay only modest fees to IMCA and spend most of their money on advertising and

driver prizes. There is no evidence that IMCA's rulings were made for reasons other than its overall purpose to define a set of rules for a popular game. Thus, the Brookins failed to present sufficient evidence of concerted action in restraint of trade.

The appeals court thus affirmed the district court's dismissal of the Brookins' antitrust claim.

In all of the sports equipment-related litigation discussed thus far in this chapter, the sanctioning organization's performance standard did not require the use of a particular manufacturer's equipment. However, some tracks have required that auto racers in the same division use the same racing tire, although several manufacturers may nevertheless supply the track because they supply tires for different race divisions. In one case, where a single manufacturer won a bidding contest to be the sole tire supplier to a set of tracks for the entire racing season, an 'excluded' tire manufacturer filed an antitrust lawsuit. Although the district court found the 'same tire' requirement to be a *per se* violation of the antitrust laws, the appeals court reversed the district court's decision.

The Auto Racing Club (ARC) is a nonprofit Massachusetts corporation which promotes racing at Seekonk Speedway by segregating division, supplying insurance, handicapping racers, paying referees and officials, disbursing prize money, and promulgating rules. Most of the racers at Seekonk Speedway, as well as at Stafford Motor Speedway, are amateur drivers who race several times each week during the racing season. The New England Drivers and Owners Club (NEDOC) was formed in 1970 and is an association of race car drivers and owners who compete in organized race events in the northeastern United States. The NEDOC includes many of the drivers and owners who compete at Stafford Motor Speedway, Seekonk Speedway, Thompson Speedway, and Riverside Speedway.

In early 1981, there was an attempt by the NEDOC to adopt a 'single brand' rule for the 1981 season at these four tracks, but no rule was adopted. The NEDOC tried again in the fall of 1981, announcing that a single manufacturer would be selected to supply tires for all four tracks for the entire 1982 season. The NEDOC told prospective suppliers that the required tire had to be priced in the \$90-\$100 range, about \$40-\$50 less than the prevailing price of the modified tires that had been used in the 1981 season. Four manufacturers submitted tires for testing. At a December 17, 1981 meeting, track promoters and NEDOC officials unanimously agreed to require that all cars in the modified division use the Hoosier 13 inch Budget tire for the 1982 season.

On March 11, 1982, M&H Tire, one of the manufacturers who had submitted a tire that was not selected, filed an antitrust lawsuit against the winning bidder (i.e., Hoosier Racing Tire Corporation), the NEDOC, ARC, and others. M&H alleged that the 'single tire rule' constituted an illegal group boycott, a tying arrangement, and a tortious interference with its advantageous business relations. On March 29, 1983, the district court ruled in favor of M&H, finding that the single tire rule was a *per se* violation of the antitrust laws and, even if it was not a *per se* violation, the single tire rule would fail a rule of reason analysis.[190] On May 3, 1984, the appeals court reversed the district court's decision.[191]

The appeals court noted that "the facts do not present a classic group boycott" and this is "a major stumbling block to per se analysis." The court explained:

> Because Hoosier did not join with other tire manufacturers against M&H, the single tire rule clearly fell outside the classic horizontal group boycott paradigm… Here, there is no suggestion of complicity between Hoosier and other tire manufacturers: Hoosier did not join with other tire manufacturers and put pressure on any group in order to limit competition among tire manufacturers or to protect a group of tire manufacturers from 'non-group' tire makers.
>
> M&H would find horizontal activity from the fact that the drivers agreed among themselves and the tracks agreed among themselves… The drivers are not in economic competition with one another and while they are specifying the parameters within which they will compete on the race track, what is missing is any effect upon economic competition among the drivers… While the tracks may be economic competitors in some sense, the rule does not limit economic competition among them either.

The appeals court also disagreed with the district court as to whether the single tire rule would fail a rule of reason analysis. The rationale for the single tire rule was two-fold: (1) "to control the steadily increasing cost of auto racing, which threatened to reduce the field of (mostly amateur) participants" and (2) "to promote greater parity among the competing cars." M&H itself conceded that "specifying a single brand was the only feasible method to insure that a single rubber compound was being raced on."

The appeals court agreed that the relevant product market was racing tires (or, possibly, short oval modified racing tires), but rejected the geographic market as being limited to the four above-mentioned northeastern U.S. tracks. At least 15 other northeastern tracks feature modified short oval racing. Some of these tracks also have a single tire rule and have designated M&H as their supplier. In fact, M&H's sales of short oval modified racing tires soared from $52,000 in 1981 to $250,000 in 1982 – the year during which M&H alleges that it was the victim of a 'group boycott.'

The appeals court argued that 'less restrictive' schemes to achieve the same goals were not available. For example, selecting a single supplier for each track or for each race would raise the cost of participating in the races and thereby possibly reduce the number of participants. Moreover, M&H and the other two losing bidders would have the opportunity to become the designated supplier for the 1983 season.

Overall, the appeals court concluded:

[190] *M&H Tire Company v. Hoosier Racing Tire*, 560 F. Supp. 591 (D. Ma 1983).
[191] *M&H Tire Company v. Hoosier Racing Tire*, 733 F.2d 973 (1st Cir. 1984).

> We are satisfied that the conduct defendants engaged in was justified as a reasonable way to regulate and improve modified class auto racing, and that it did not in all circumstances have anti-competitive ramifications so severe as to warrant a finding that it was illegal.

In summary, a sports equipment supplier faces a difficult task in establishing that a sports league's equipment-related rules violate the antitrust laws unless it can be shown that the league adopted those rules under the coercion of the equipment supplier's competitors. As the appeals court for the 8th Circuit noted in *Brookins v. IMCA*, "exclusion is an incidental and inevitable by-product of defining the game."

Chapter 10

Sports Leagues vs. Promoters/Sponsors, For-Profit Sports Camp Operators, Merchandisers, and the Media

Sports leagues produce a valuable product on which others seek to profit. Promoters/sponsors want to use a league's players to stage their own competitions. Operators of for-profit sports camps want to host forums where aspiring athletes can showcase their skills before league coaches. Merchandisers want to sell replica team jerseys, game balls, apparel, and other goods with the league's (or a league member's) logo. The media (e.g., television stations, newspapers, internet websites) want to broadcast games or provide information about the league or a league team so as to profit by attracting viewers.[192] Each of these groups has come into conflict with sports leagues and resorted to filing antitrust lawsuits to achieve their objectives.

> *Promoters/Sponsors*. In some sports, like tennis, sponsors organize competitions using players who compete in the events sanctioned by the sport's governing body. In other sports, such as boxing, promoters stage bouts 'certified' or 'sanctioned' by one of the sport's sanctioning organizations. Organizing such events requires promoters/sponsors to attract 'independent contractors' to their competitions. Other promoters sometimes attempt to stage their own competitions using players/employees (or even entire teams) from an independent sports league, such as the NIT preseason and postseason college basketball tournaments involving NCAA member teams.
>
> In some respects, the objectives of the sponsors/promoters bear some resemblance to establishment of a rival league. Not surprisingly, professional sports leagues like the NBA have generally refused to permit their players to participate in non-NBA basketball competitions. Other sports governing bodies for events whose participants are 'independent contractors' create incentives for those players to participate in their events (and thus not to participate in non-sanctioned events) during the season.
>
> Promoters/sponsors have brought a number of antitrust lawsuits against sports leagues, including the NCAA, the NBA, the Men's International Professional Tennis Council, and the World Boxing Council.

---

[192] Fantasy sports leagues enable fans to create and manage their own 'teams' and may enhance fan interest in games, especially that of fans of teams unlikely to win the championship. Using player statistics from actual games, fantasy sports leagues create a product that may be a complement to, or substitute for, the actual games. Thus, fantasy leagues also free-ride on the product of major professional sports leagues, which may lead to a future antitrust showdown. It has already led MLB to go to court alleging that a fantasy league's use of players' names and identities is a violation of players' "right of publicity." See Mehra & Zuercher (2006).

NCAA. The NCAA places numerous rules on games played by Division 1 men's basketball teams. For example, NCAA rules limit the number of allowed games a team can play per season, determine whether the games played as part of a single tournament will count as a single allowed game, restrict the participation of each team to one 'certified' basketball event in one academic year (and not more than two certified basketball events every four years), prohibit teams from participating in more than one post-season tournament, prohibit teams which have qualified for the NCAA post-season tournament from participating in any other post-season tournament, and prohibit teams from playing games after the conclusion of the NCAA post-season tournament. Not surprisingly, organizers of collegiate basketball tournaments have filed lawsuits challenging these rules on antitrust grounds. Interestingly, the NCAA purchased the rights to the only other post-season tournament as part of the settlement of one of those lawsuits – and the antitrust authorities (i.e., the Antitrust Division of the Department of Justice and the Federal Trade Commission) did not object.

Postseason Rules. The Postseason National Invitation Tournament ('Postseason NIT') began as a six-team collegiate basketball tournament in 1938 and was conducted by the Metropolitan Intercollegiate Basketball Association (MIBA), an unincorporated association of five New York-area colleges and universities: Fordham University, Manhattan University, New York University, St. John's University, and Wagner College. The Postseason NIT was held at Madison Square Garden. The following year, in 1939, the NCAA began an 8-team post-season basketball tournament.

Until 1953 when the NCAA adopted a rule prohibiting teams from participating in more than one post-season tournament, a team invited to both tournaments was allowed to participate in both and, in fact, City College of New York won both tournaments in 1950. In 1961, the NCAA adopted a rule stating that teams invited to the NCAA post-season tournament were "expected" to participate. Nevertheless, after adoption of the 'One Postseason Tournament' and 'Expected Participation' Rules, a number of teams invited to both tournaments chose the NIT tournament. The last team to do so was Marquette University in 1970, whose coach was upset over his team's seed in the NCAA tournament.

The NCAA also took steps to expand the number and quality of teams in its post-season tournament. In 1975, the NCAA changed a rule so that a team finishing second in its conference would be eligible for an 'at large' invitation to the field of 32 teams. The number of invited teams was increased to 40 in 1979 and 48 in 1980, the same year as the NCAA dropped its limit on the number of teams that could come from any one conference. The NCAA considered expanding the field to 64 teams in 1981, leading the MIBA to complain that doing so would likely destroy the Postseason NIT. The NCAA decided to expand the field to 52 teams in 1982, 53 in 1984, and 64 in 1985. The NCAA asserts that this expansion was in response to the increased consumer demand for Division I men's basketball beginning in the 1970s and to the increase in the number of schools with Division I men's basketball programs (26 teams were added between 1975 and 1980).

In 1981, the NCAA revised the Expected Participation Rule so that any team invited to a NCAA post-season championship in any sport was required to participate in that championship or in no post-season competition at all. This 'Commitment to Participate' Rule has been in effect (with minor revisions) since the 1982-83 season, except for the 1991 Tournament due to timing problems in publishing a revision of the Rule. In 2000, an 'antitrust subcommittee' appointed by the NCAA's Division I Management Council recommended eliminating the Rule, but the Management Council did not vote on the recommendation.

In 1985, the MIBA began conducting a Preseason NIT Tournament.[193] Doing so first required that the NCAA adopt special legislation exempting all Preseason NIT games from the maximum number of games a team was allowed to play. Although the Preseason NIT became quite popular, the NCAA considered eliminating the exemption. As of 2001, when a new rule was proposed, a team was charged only one game for competing in a preseason tournament regardless of how many games it actually played in the tournament. The proposed new rule would require teams to count all preseason tournament games to be counted against the maximum.

In March 2001, the MIBA filed an antitrust lawsuit against the NCAA over its rules regarding pre-season and post-season tournaments. The MIBA alleged, in the words of the district court, that (1) "several of the NCAA rules, which affect Division I men's college basketball, reduce competition from preseason and postseason non-NCAA sponsored tournaments and are unreasonable restraints of trade in violation of Section 1 of the Sherman Act" and (2) "the NCAA uses the rules affecting postseason competition to achieve or attempt to gain monopoly power in the market for Division I men's college basketball tournaments, in violation of Section 2 of the Sherman Act."[194] The MIBA challenged the NCAA's 'Commitment to Participate' Rule, 'One Postseason Tournament' Rule, and 'End of Playing Season' Rule, as well as the NCAA's automatic qualifier procedure and bracket expansions. The MIBA also challenged proposed NCAA rules which would eliminate certain exemptions benefiting the Preseason NIT – the exemption permitting the Preseason NIT to take place prior to the start of the regular season and the exemption of games played at the Preseason NIT from being counted towards the maximum number of games a team is allowed to play.

Both the MIBA and NCAA motioned for summary judgment. The MIBA sought summary judgment only on the Commitment to Participate

[193] The information in this paragraph comes primarily from Matthew Roberts (2001) and Matisik (2005).

[194] *Metropolitan Intercollegiate Basketball Association v. NCAA*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004).

Rule, whose effect when combined with the effect of the other rules allegedly prevents the Postseason NIT from competing for teams to participate and from moving the tournament until after the conclusion of the NCAA's post-season tournament. On September 29, 2004, the district court denied MIBA's motion.[195]

The district rejected the NCAA's argument that it should be exempt from Section 1 scrutiny because it is a single entity, ruling that the Commitment to Participate Rule "constitutes an agreement among the member institutions and subjects the NCAA to § 1 scrutiny." On the other hand, the district court rejected MIBA's argument that the Commitment to Participate Rule should be condemned as *per se* illegal and, if not, the Rule should be examined under a 'quick look' analysis:

> Even assuming for the moment that the MIBA is correct to characterize the Commitment to Participate Rule as a facially unreasonable restraint of trade such as a group boycott, the Supreme Court made clear in Board of Regents that a per se analysis would not be appropriate. Because sports activities can only be carried out jointly and the NCAA must create certain horizontal restraints in order to function, the rule is not invalid in and of itself. At a minimum, the rule's possible procompetitive effects must be examined…
>
> Because a per se rule should not be applied, the summary judgment evidence must be examined in accordance with "rule of reason" analysis… Under the rule of reason, whether the Commitment to Participate Rule is reasonable depends on its actual effects on the market and its procompetitive justifications…
>
> Under a "quick look" analysis, a plaintiff is relieved of its initial burden of showing that the challenged restraints have an adverse effect on competition because the anticompetitive effects of the restraint are obvious… The Supreme Court has clarified that the use of the "quick look" approach is only appropriate when, "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."…
>
> The MIBA argues that the Commitment to Participate Rule should be examined using the "quick look" approach used in Board of Regents and Law. In its view, the Commitment to Participate Rule obviously suppresses competition by prohibiting NCAA members who are invited to the NCAA Tournament from participating in competing postseason tournaments like the Postseason NIT. The

[195] *Metropolitan Intercollegiate Basketball Association v. NCAA*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004).

> NCAA objects and argues that only a full rule of reason analysis in which the MIBA must prove the anticompetitive effects of the rule is appropriate…
>
> Similarly, under the Commitment to Participate Rule, the MIBA may choose from any of the 260 teams which are not invited to the NCAA Tournament and invite those teams to the Postseason NIT. The Postseason NIT has expanded from a six-team tournament to a 40-team tournament and the MIBA has not presented any evidence that it has been unable to fill its Postseason NIT bracket each year. It cannot be said that "an observer with even a rudimentary understanding of economics" would find the Commitment to Participate Rule's adverse effect on competition so obvious. Therefore, a "quick look" analysis is not appropriate and the MIBA is required to meet its burden under the full rule of reason analysis to show the anticompetitive effects of the rule. The MIBA does not argue that it is entitled to summary judgment under the rule of reason.

Regarding the MIBA's claim that the NCAA engaged in a conspiracy to monopolize in violation of Section 2 of the Sherman Act, the district court noted that the MIBA has to give proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize. The district court wrote:

> Even assuming that the MIBA has provided sufficient proof of the first two elements, there remains a material question of fact as to whether the Commitment to Participate Rule was enacted with the specific intent of suppressing competition from the NCAA Tournament's competitor. The MIBA has come forward with evidence of statements made during the 1940's, 50's, and 60's by NCAA committee persons and argues that these prove the illegal motivation behind the adoption of the Rule. However, the NCAA responds that these statements are unrelated and show nothing about the reason for the implementation of the Commitment to Participate Rule. Considering this evidence in a light most favorable to the NCAA, the MIBA has not established specific intent to monopolize as a matter of law on its § 2 Sherman Act claim, 15 U.S.C. § 2.

A few weeks later, on October 13, 2004, the district court denied the NCAA's motion for summary judgment on all five "Postseason Rules."[196] The district court rejected the NCAA's argument that the Rules are 'noncommercial' and thus Section 1 scrutiny is inappropriate:

---

[196] *Metropolitan Intercollegiate Basketball Association v. NCAA*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

> The only "noncommercial" justification NCAA proffers for the Commitment to Participate Rule and the bracket expansions is that they were enacted in response to the "membership's changing characteristics and the growth in the number of Division I basketball teams."… That explanation has little to do with whether the rule is noncommercial. Moreover, one of NCAA's procompetitive justifications for the rule is that it ensures the best teams will participate in the NCAA Tournament which makes it more attractive to broadcasters, advertisers, and fans. Thus, the rule cannot be said to be noncommercial.

The district court also rejected the NCAA's argument that the Postseason Rules are sanctioned by the Supreme Court's *NCAA v. Board of Regents* decision:

> NCAA points out that all sports leagues structure their postseason championships, and require their member teams to participate in the final championship games, if selected. NCAA argues that it is reasonable as a matter of law for a league to require its member institutions to share the responsibility of enhancing their joint product by requiring that all selected teams participate in the league's final championship game, especially since the member institutions benefit from consumer interest in the championship. Even assuming that NCAA is a sports league and that the above statements have merit, MIBA is not challenging only the Commitment to Participate Rule. MIBA argues that the combination of the Commitment to Participate Rule and the One Postseason Tournament Rule make it impossible for them to host a postseason tournament in which invitees of the NCAA Tournament participate. In combination, the rules do not simply require teams to participate in the NCAA Tournament if invited. They also prevent teams from competing in both tournaments. Therefore, the challenged rules and expansions are not so obviously reasonable as to fall into the group of restrictions sanctioned by the Board of Regents.

Thus, the district court ruled that the five Postseason Rules need to be examined under the rule of reason. The court found that the NCAA and MIBA have a "genuine dispute" as to the relevant market. MIBA's expert, Professor Noll, argued that the relevant market is Division I men's college basketball postseason tournaments, while the NCAA's expert, Professor Willig, argued that the relevant market for the NCAA postseason tournament is "marquee sports programming" – which in addition to the NCAA postseason tournament includes the NHL's Stanley Cup, MLB's World Series, NFL's Super Bowl, the NBA finals, the Masters Tournament in golf, and the Olympic Games. The district court ruled:

> MIBA and NCAA are marketing reasonably interchangeable products in that each of their tournaments features competition between Division I men's college basketball teams after the conclusion of the regular season and these games are played around the country and are nationally televised. Although NCAA tries to place itself in the market of "marquee sporting events," MIBA has produced sufficient evidence to show that college basketball is a very different product from professional basketball or other professional championships and that it appeals to fans in a different way. As the Supreme Court noted in Board of Regents, college athletics is a unique product, whose amateur rules distinguish it from professional sports and widen consumer choice… In that case, the Supreme Court went on to affirm the district court's determination at trial that the relevant market was "live college football" rather than the broad "entertainment market" advocated by NCAA… Despite NCAA's urging to the contrary, MIBA has made a sufficient showing that it will be able to prove at trial that the relevant market is Division I men's college basketball postseason tournaments.
>
> MIBA has also made a sufficient showing that NCAA has power in the market for Division I men's college basketball postseason tournaments… Professor Noll has calculated that in 2002, NCAA had over 70 percent of attendance, over 90 percent of game revenues, over 98 percent of total revenues and over 99 percent of television revenues in the market of Division I men's college basketball postseason tournaments. This evidence suggests that NCAA earns monopoly profits and has the power to exclude competing tournaments, such as the Postseason NIT, from the market through its control over the athletic participation of its member universities and conferences.

The district court discussed a number of additional issues that preclude summary judgment. On the issue of antitrust injury, the court observed:

> The rules limit to one the number of postseason contests a team may enter. Professor Noll has concluded that this injures competition because even a low-seeded team, which has little chance of advancing in the NCAA Tournament, must participate even though it might have a good chance of doing quite well in the Postseason NIT. If these lower-seeded teams had a choice about which tournament to attend, they might well choose to attend the Postseason NIT, where the chance to advance deep into the Tournament is greater. These facts tend to show that the Postseason Rules adversely affect competition by depriving

colleges and fans of a potentially attractive postseason tournament choice and possible participation in an additional tournament. The quality of the competition the Postseason NIT produces would then be better, without any real detriment to the NCAA Tournament, because low-seeded teams do not advance much past the first round. Although NCAA relies on the fact that a few of the teams in the NCAA Tournament actually are ranked lower than some teams in the NIT by virtue of conference championship upsets, there is no dispute that the vast majority of NCAA teams rank above the best NIT teams. MIBA has submitted the declarations of two coaches and the athletic administrators of MIBA's member schools who state that if the Postseason Rules were different and the NIT became a more competitive tournament, their schools would seriously consider an invitation from both tournaments. While it remains to be seen whether MIBA will be able to meet its burden to prove anticompetitive effects at trial, the combination of the anticompetitive nature of requiring invitees to participate in the NCAA Tournament to the exclusion of any other postseason tournament and a sufficient showing of market power raises a genuine issue of disputed fact as to the challenged rule's effect on competition.

Regarding the NCAA's alleged procompetitive rationales for the Commitment to Participate Rule, the district court noted the NCAA argues that the Rule is necessary because: (1) if schools chose not to attend the NCAA Tournament, the legitimacy of the National Champion would be jeopardized, (2) the Rule contributes to efficient scheduling since the NCAA can count on all invited teams to attend, and (3) the Rule prevents a rival tournament from 'free-riding' on the NCAA's product by offering last minute incentives for the top teams to compete in its tournament rather than the NCAA Tournament. However, the district court also pointed out that the NCAA argues that the Rule is unnecessary because the goal of every Division I men's basketball team is to compete in the NCAA Tournament and become the National Champion:

> If all of the teams selected for the NCAA Tournament would participate in that Tournament regardless of this rule, then it is difficult to see its procompetitive justifications. Therefore, it seems that there is at least a question of fact as to whether the Commitment to Participate Rule has real procompetitive justifications.

The district court ended its opinion by noting that there are also questions of fact regarding whether the Postseason Rules are the least restrictive means of accomplishing the NCAA's goals: "For instance, if the Tournaments were scheduled so as not to conflict and the One

Postseason Tournament Rule were abolished, participation in both Tournaments might be a reasonable possibility."

The trial began on August 1, 2005. Two weeks into the trial, the MIBA and NCAA reached an out-of-court settlement in which the NCAA agreed to purchase the NIT preseason and postseason tournaments for $40.5 million and to pay the MIBA $16 million in damages, with the combined amount to be paid over ten years.[197]

The NCAA's acquisition of the NIT tournaments was controversial, with the American Antitrust Institute (AAI) sending a letter dated September 12, 2005 to the Antitrust Division of the Department of Justice, the Federal Trade Commission, and New York's Attorney General calling on them to carefully scrutinize the proposed settlement. The AAI believed that "there is a significant probability that the effect of the proposed merger may be to significantly lessen (or eliminate entirely) competition between organizers in acquiring men's Division I basketball teams for participation in post-season tournaments." The AAI wrote:

> Concentration in this market is already high enough such that *any* merger-related increase would trigger intense antitrust scrutiny under the DOJ/FTC *Horizontal Merger Guidelines*.
>
> Even a cursory look into the proposed settlement raises serious questions about the health of competition in post-merger markets. For example, the NCAA would be in a position, post-merger, to impose its "mandatory participation" rule for both the NIT and its own tournaments. This would erect an insurmountable barrier to entry into post-season play. In enhancing their market power in acquiring tournament teams, the NCAA would in turn enjoy significantly more market power in sales of broadcast rights, sponsorships, concessions, and event tickets. The proposed deal thus packs a double punch for consumers. Schools would have fewer options and face potentially non-competitive terms for post-season tournament play. And sponsors and consumers of the tournament games would potentially face higher prices.

The AAI therefore proposed:

> In light of the foregoing, the AAI urges one or more of you to initiate an inquiry into the proposed merger. The merger would spell an end to the NIT which, once upon a time, was an equally-matched and vigorous competitor to the NCAA. But a series of actions by the NCAA has diminished that competition, to the detriment of consumers. The proposed consolidation would further hurt consumers and preclude the emergence of a stronger rivalry

[197] Van Riper (2006); NCAA press release titled "NCAA, MIBA End Litigation; NIT Tournaments Purchased" (August 17, 2005).

> between the NCAA and NIT (and with respect to new upstarts). An antitrust investigation of the merger could focus on such key issues as market definition (which was controversial in the MIBA v. NCAA litigation); the significant potential for unilateral exercise of market power; and entry barriers created by the merger. Moreover, the inquiry should extend to the likely effects of the merger on pre-season tournaments by giving the NCAA the "green light" to enact a pending rule that would replace independent tournaments with events the NCAA can control.

It is not clear how closely, if at all, the proposed settlement was scrutinized by the DOJ, FTC, and New York Attorney General. It is clear, however, that none decided to publicly oppose the settlement.

Would the MIBA have prevailed over the NCAA if the case had not settled? In an article written prior to the settlement, Fellin (2006) argues that it would have. He argues that the NCAA's actions would fail a rule of reason analysis and thus be found to violate Section 1 of the Sherman Act. Regarding the antitrust injury caused by the NCAA's actions, Fellin writes:

> Under a traditional rule of reason analysis, the MIBA must show adverse effects on competition because of NCAA actions. The MIBA must show more than mere harm to itself, because competition as a whole must be adversely affected. The most harmful effect on competition is the lack of choice that colleges have for postseason play. Though this may not greatly affect the 'power schools' of college basketball, it can have a large effect on smaller schools. The prime example is the young, inexperienced team who barely makes it into the NCAA Tournament, and will probably play only one game before having its season end abruptly. By not having an option to play in the NIT, a team such as this is unable to make a long run in the tournament, generating more fan interest and gaining important experience for the athletes. Also, because the NIT allows schools to host some of the early games on their home campuses, the NCAA restrictions prevent these schools from earning added revenues from ticket sales of NIT games. (pp. 521-22)

According to Fellin, the NCAA's two alleged pro-competitive rationales for its actions are: (1) to limit the amount of time that student-athletes devote to basketball so as to limit interference with the academic demands of college and (2) to maintain the legitimacy of the NCAA championship. With respect to the latter, Fellin observes that the NCAA "helps to make MIBA's argument that there is no need for the rule simply because the evidence shows that the NCAA should have no worries that a school will choose the NIT over the NCAA Tournament." (p. 523) Regarding the former procompetitive rationale, Fellin argues that, even accepting it as a legitimate justification, the NCAA's goal can be achieved via less restrictive means. Specifically, by eliminating the 'Commitment to Participate' Rule and only enforcing the 'One Postseason Tournament' Rule, the NCAA would accomplish its goal of promoting academics while allowing schools to choose the post-season tournament in which they wished to participate.

Fellin also argues that the MIBA would prevail on its Section 2 claims. He agrees with the MIBA that the relevant market is Division I men's college basketball postseason tournaments and points to Professor Noll's market share statistics when he comments: "These large percentages give rise to the presumption that the NCAA possesses monopoly power." (p. 525) Moreover, Fellin argues that the NCAA's dominant position resulted from unlawful practices: "History shows that the NCAA has consciously enacted rules over the past 50 years to turn the NIT from a worthy competitor to the afterthought that it is today." (p. 526)

In a postscript, Fellin offers his assessment of the MIBA-NCAA out-of-court settlement:

> In the long run, this shortsighted decision by the MIBA will harm not only college basketball, but college athletics as a whole. What was shaping up to be an excellent case for the MIBA was quickly swept under the rug by the NCAA and its large pool of resources. That this suit was settled so easily only speaks to the unfair bargaining power that the NCAA has when going up against any competitors. The only positive thing that can come out of this settlement is that the NCAA can no longer argue that it does not hold a monopoly in the arena of college basketball. Now, they are truly the only game in town, despite the continuing existence of the NIT. The NCAA owns both tournaments, and, at any point in time, it can pull the plug on the NIT, or change eligibility rules to the point that the NIT becomes even less of a factor than it already is today. With a private suit now impossible, one can only hope that the Department of Justice can step up to the plate and see the big picture. If the NCAA is able to muscle out a plaintiff who had a very strong case just by the use of money, what other potential anticompetitive threats will it pose in the future? (pp. 529-30)

Two-in-Four Rule. Another NCAA rule which was challenged on antitrust grounds is the so-called '2-in-4' Rule, which was part of Rule 98-92 adopted in 1999. The '2-in-4' Rule limits NCAA Division I men's basketball teams to playing in (at most) one 'exempted' event per season and not more than two exempted events every four years. For decades, the NCAA had exempted (or 'certified') certain multiple-game early-season tournaments from the maximum number a team was permitted to play so as to make it easier for schools in Hawaii and Alaska, given their inconvenient locations, to schedule games with schools from the mainland. In 1985, the NCAA began certifying some mainland events as well, such as the Preseason NIT. Rule 98-92 also stated that an exempt tournament would count as a single 'game' towards the season limit and the maximum number of 'games' per season was increased from 27 to 28.

A group of sports promoters filed a lawsuit against the NCAA alleging that the '2-in-4' Rule violated Sections 1 and 2 of the Sherman Act and sought a permanent injunction enjoining the NCAA from enforcing the rule. In July 2002, the district court declined to issue the requested injunction. The district court wanted to see the Rule's impact in its third and fourth years. In February 2003, with evidence of the Rule's effect in its third year now available, the plaintiffs once again requested a permanent injunction.

On July 28, 2003, the district court granted the plaintiffs' request for a permanent injunction against the '2-in-4' Rule.[198] The plaintiffs offered the testimony of four sports promoters who testified to the difficulties encountered in organizing exempt tournaments since introduction of the Rule, resulting in the cancellation of some events. Plaintiffs also offered the testimony of Professor Tollison, while the NCAA offered the expert testimony of Louis Guth. Both experts agreed that, compared to the 2001-02 season, the 2002-03 season had (1) 72 fewer 'exempt' games – a 3.3% reduction in 'school-scheduled' games, (2) 107 fewer games played in 'certified' events – a 43% reduction in total certified games, and (3) 8 fewer 'certified' tournaments – a 32% reduction. Guth countered that these declines are not evidence of the Rule's anticompetitive effect because there are close substitutes for the events (i.e., other 'school-scheduled' games) and the decline may simply represent the market's reasonable adjustment after promoters scurried to stage events after the Rule's introduction. The district court found "no reason to reject Tollison's opinion that this decline constitutes an anticompetitive effect."

Tollison argued that the Rule does not have any pro-competitive benefits because, in the district court's words, "the rule does not advance the concern of athletes missing class time, since no specific provisions of the rule relate to scheduling around classes, vacations, travel, or other factors as to potential missed classes" and (2) "the rule has not advanced the ability of lesser known schools to participate in certified events." Guth countered that the Rule promotes competitive equity by standardizing the number of games played in a season. Moreover, Guth argued that when the three provisions of Rule 98-92 are considered jointly (as he argues they must), the overall effect is to increase output and create a framework for handling certified events.

The district court observed that the number of games played in exempt events by lesser-known, 'non-power' conference teams (i.e., the Rule's alleged beneficiaries) declined sharply in 2002-03. Moreover, the court noted that the Rule does not limit such things as the number of

198 *Worldwide Basketball and Sports Tours v. NCAA*, 273 F. Supp. 2d 933 (S.D. Oh E.D. 2003).

games that can be played while school is in session and thus does little, if anything, to improve the welfare of student-athletes. Moreover, the court found that the Rule did virtually nothing to standardize the playing season since it does not equalize the number of games ultimately played by each team. Thus, the district court concluded that the NCAA failed its burden under a rule of reason analysis of showing that the Rule's anticompetitive effects are overcome by its pro-competitive benefits. Therefore, the district court granted plaintiffs' motion for a permanent injunction enjoining the NCAA from enforcing the '2-in-4' Rule. The NCAA appealed.

On November 15, 2004, the appeals court reversed the district court's judgment.[199] The appeals court noted that the district court correctly determined that this case is not suitable for a 'quick-look' analysis but nevertheless proceeded to apply such an analysis:

> Far from being a case in which "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," … here the relevant market is not readily apparent and the Plaintiffs have failed to adequately define a relevant market, thereby making it impossible to assess the effects of 98-92 on customers rather than merely on competitors. While it is true that "the rule of reason can sometimes be applied in the twinkling of an eye," … this abbreviated or "quick-look" analysis may only be done where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition. Under the "quick-look" approach, extensive market and cross-elasticity analysis is not necessarily required, but where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice. The district court therefore erred in applying a quick-look analysis.

Regarding the district court's determination of the relevant market, the appeals court wrote:

> The district court found the relevant market in this case to be Division I men's college basketball, and noted that both the Promoters and the NCAA agreed with this definition of the relevant market… Although the NCAA does not appear to have disputed the Promoters' view that the relevant market is Division I Men's Basketball as a whole, the basis for that view is not established… Dr. Tollison, the Promoters' expert witness, admitted

[199] *Worldwide Basketball and Sports Tours v. NCAA*, 388 F.3d 955 (6th Cir. 2004).

> that he did not look at those in competition with the Promoters (their competitors), the competitors' output, or their output relative to the Promoters. And he did no test to determine which events are in competition with others. Finally, Dr. Tollison, when pressed, admitted that his testimony regarding the Big Six market was instead derived from "common sense."
>
> Furthermore, the district court concedes that Dr. Tollison "did not perform a study on the effect of the Two in Four Rule on consumers of Division I men's games. According to Tollison, the loss of games necessarily constitutes a loss to consumers in the relevant market because college basketball events are not fungible. However products need not be fungible to be market competitors for the purposes of antitrust analysis. The Supreme Court has repeatedly held that "it is improper 'to require that products be fungible to be considered in the relevant market.'"… Rather than fungibility, the proper analysis "is an appraisal of the 'cross-elasticity' of demand in the trade."... Indeed, Dr. Tollison admitted that a cross-elasticity study is necessary to determine the relevant market, yet he concedes that he failed to perform such an analysis.

The appeals court also criticized the district court's determination of the relevant submarket:

> The district court, however, did not base its decision that the Two in Four Rule is anticompetitive simply on the Division I Men's College Basketball market taken as a whole. Instead, the court held that "it is undisputed that the relevant market in this case is Division I men's college basketball together with the appropriate submarket consisting of school-scheduled games," where school-scheduled games are defined as games that a team is not required to play but rather are selected by a school's scheduling coach… Contrary to the district court's findings, however, the record suggests that the submarket is not undisputed.
>
> Dr. Tollison did not testify that school-scheduled games are the relevant submarket, nor did he provide any basis for arriving at that conclusion. Rather, he opined that the relevant submarket is pre- and post-season tournaments, but because Tollison failed to provide any basis for that opinion, the district court correctly found it unreliable. Because the Promoters failed to define the relevant market, and with it the submarket, the district court had ample basis to dismiss the claim… Instead, however, the district court relied on what it found to be the opinion of the defendant's expert, Mr. Guth – that the relevant submarket is school-scheduled games – an opinion with which the court said Dr. Tollison agreed. However, it is less than clear that Mr. Guth defines school-

> scheduled games as the relevant submarket… Given this record, it would be difficult to conclude that Mr. Guth named school-scheduled games as the relevant submarket. Accordingly, we decline to relieve the Promoters of their burden based on such a dubious stipulation by the defendants' expert.

Overall, the appeals court concluded: "Because the Promoters failed to meet their duty to define the relevant market and submarket, this court has insufficient information to reach the question of whether the Promoters suffered an antitrust injury – that is, an injury resulting from interference with 'the economic freedom of participants in the *relevant market*.'" Thus, the appeals court reversed the district court's judgment.

In a concurring opinion, appeals court justice Julia Smith Gibbons explained that she agreed with the court's decision, but "would decide this case based on the plaintiffs' failure to establish that they have suffered an antitrust injury." Gibbons argues that the NCAA is basically providing a subsidy to sports promoters and it is not an antitrust injury for the NCAA to limit that subsidy. The 2-in-4 Rule limits the subsidy enjoyed by sports promoters, and promoters understandably dislike the Rule for that very reason, but the Rule does not interfere "with the promoters' freedom to compete in the market for Division I men's college basketball games." Gibbons explains:

> Nothing about the Two in Four Rule prohibits these promoters from continuing to compete in that market. It does not deny the plaintiffs access to the necessary resources to compete in the market for college basketball games. Those resources are still available. If the promoters want Kentucky, they can get Kentucky every year (provided Kentucky wants to come), by promoting non-certified tournaments or a series of single-game events similar to the ACC-Big Ten Challenge. To do that, they would have to give up the advantage the subsidized format provides them and thus it may be more difficult for the promoters to schedule high profile teams, but forcing the promoters to make this choice has not caused them to suffer antitrust injury. If anything, the Two in Four Rule *increases* competition in the relevant market because it limits an advantage the promoters of certified events have had over the promoters of non-certified events and member institutions, and injury resulting from an increase in competition is certainly not the type of injury the antitrust laws were designed to prevent.

NBA. The 1988 collective bargaining agreement (CBA) between the NBA and its players' association, as well as the amendments to that agreement, contain a number of provisions relating to the exclusive employment obligations of all NBA players. For example, Article XX, Section 6 prohibits all NBA players from participating in "off-season" basketball games unless approved by the NBA and the players' association. To be eligible for approval, such games must meet a number of requirements, such as (1) all proceeds must be used for charitable purposes and the games must generate at least $100,000 for charity, (2) the games must not be televised, and (3) the players must not be compensated for playing. The Uniform Player Contract (UPC) also contains provisions prohibiting players from participating in non-NBA basketball games.

In 1989, Independent Entertainment Group (IEG), which promotes, organizes, and produces entertainment events, and ProServ, a sports marketing and management company, decided to stage a one-on-one basketball competition involving NBA players to be televised on a pay-per-view basis. The event was to be called "King of the Court" and would be held at the conclusion of the NBA season. The Chicago Bulls' Michael Jordan and the Los Angeles Lakers' Earvin 'Magic' Johnson agreed to participate if the NBA gave its approval. The NBA did not, and IEG and ProServ filed a lawsuit against the NBA and its member teams alleging violations of Sections 1 and 2 of the Sherman Act.

Specifically, the plaintiffs alleged that the NBA and its member teams unreasonably restrained trade and monopolized, or attempted to monopolize, "the market for 'major league' basketball events, including the sale of all forms of television rights that showcase 'major league' professional basketball players, and the market for major league basketball players." The defendants motioned for summary judgment, which the district court granted on May 20, 1994.[200]

For the purposes of summary judgment only, the defendants conceded many points, including that the relevant markets are those alleged by the plaintiffs, that they possess a monopoly and monopoly power in the relevant markets, and that the alleged anticompetitive agreements between the NBA and the players' association foreclosed plaintiffs from the relevant markets. Nevertheless, with respect to the Section 1 claims, the district court reached the following Conclusions of Law:

> 2. This Court finds that it is reasonable as a matter of law for the member teams of a professional sports league to require their player-employees to remain loyal to the team and the league and not work for any competing entity while they remain employed…
>
> 3. Professional athletes employed by a sports league, therefore, may lawfully be restricted during the term of employment from playing for any competitive entity…
>
> 5. For the purposes of defendants' motion, the Court finds that the exclusive employment obligations of NBA players are

[200] *Independent Entertainment Group v. NBA*, 853 F. Supp. 333 (C.D. Ca 1994).

> contained in the UPC, the 1988 CBA, Article XX, Section 6, the 1986 GLA [Group Licensing Agreement] and the 1989 Events Agreement. Since all of these agreements require exclusivity only while an NBA player is under contract, they are reasonable as a matter of law under Section 1 of the Sherman Act.
>
> 6. … This Court finds that the term of an employment contract is a matter of contract interpretation for the Court, and that in this case NBA players sign player contracts that run for the entire calendar year…
>
> 7. Moreover, the Court rejects plaintiffs' argument that they seek to use NBA players under contract only in the "off-season." Plaintiffs' revised market definition is for basketball events involving NBA players at any time during the calendar year… Thus, the Court finds there is no meaningful distinction between the "off-season" and any other time during which an NBA player is not actually engaged in a game or practice for his team.
>
> 8. This Court also rejects plaintiffs' attempt to cast this case as an unlawful "restriction of output" of basketball events involving NBA players. NBA member teams may contract for the exclusive services of player-employees during the term of employment as a matter of law. While the natural effect of this lawful contractual relationship is to prevent third parties such as plaintiffs from using NBA players under contract to produce more basketball events, any resulting effect is reasonable as a matter of law.
>
> 9. Because the exclusive employment by NBA member teams of NBA players is reasonable as a matter of law, summary judgment for defendants on plaintiffs' Section 1 claim is warranted.

Similarly, regarding the Section 2 claims, the district court reached a number of Conclusions of Law:

> 14. Conduct that is reasonable under Section 1 of the Sherman Act should not be considered anticompetitive under Section 2… Accordingly, because of the exclusive employment obligations embodied in the challenged agreements are reasonable as a matter of law under Section 1 of the Sherman Act, these restrictions cannot form the basis of a Section 2 claim.

15. Alternatively, this Court finds that exclusive personal services contracts with employees cannot be "predatory" as a matter of law under Section 2 of the Sherman Act. By analogy, a monopolist cannot be sued for "predatory" hiring of employees unless they are hired solely to keep them from a rival… Here, it is indisputable that the NBA did not hire Jordan or Johnson solely to prevent them from playing for plaintiffs.

16. Further, a monopolist does not have to share its employees with a competitor even if it had done so in the past and even if its refusal to share harms plaintiffs' business…

17. Indeed, even if defendants intended to exclude plaintiffs from the alleged market by entering into exclusive employment obligations with their player-employees, Section 2 is not violated because the intent to exclude competitors through lawful means cannot be predatory as a matter of law…

18. It appears to this Court that this case, at bottom, is about plaintiffs' attempt to free-ride on the NBA's investment in its star players and in rebuilding the League during the 1980's. Exclusive employment agreements lawfully prevent such free-riding as a matter of law…

19. Finally, because plaintiffs have not alleged any conduct which could support a monopolization claim under Section 2, plaintiffs' attempted monopolization and conspiracy to monopolize claims must also fail.

Overall, the district court concluded that "Article XX, Section 6 of the 1988 CBA, the 1986 GLA and the 1989 Events Agreement are exclusive employment arrangements with NBA players that cannot be unreasonable or predatory under the Sherman Act as a matter of law."

Professional Tennis. Since 1974, the Men's International Professional Tennis Council (MIPTC) has organized and overseen the Grand Prix Circuit, a series of men's professional tennis tournaments which includes Wimbledon, the U.S. Open, the French Open, the Australian Open, the Masters Tournament, and the Davis Cup. Between 1974 and 1981, the number of Grand Prix events increased from 50 to 90. The MIPTC also began requiring, as a condition for participation, that men's professional tennis players sign 'Commitment Agreements' requiring a player to participate in a minimum number of Grand Prix events and limiting participation in non-MIPTC-sanctioned events.

Although Volvo is primarily a producer of automobiles and trucks, it also produces and sponsors men's professional tennis events. Volvo purchased the rights to be the overall sponsor of the Grand Prix during the period 1980-84. On February 1, 1984, MIPTC selected Nabisco Brands, not Volvo, to be the 1985 Grand Prix sponsor, despite the fact that Volvo had already acquired contractual rights to use Madison Square Garden for the January 1985 Masters Tournament and have it televised on NBC. Volvo then assigned its contracts with the Garden and NBC to MIPTC and, in return, MIPTC agreed to sanction several individual Grand Prix events where Volvo would be a "subsidiary" sponsor. However, relations between Volvo and the MIPTC soured, with Volvo complaining that the MIPTC was attempting to "dissuade and intimidate" tournament owners and producers from associating with Volvo and the MIPTC complaining that Volvo was attempting to create the public impression that it was still the overall sponsor of the Grand Prix.

In April 1985, Volvo filed an antitrust lawsuit against the MIPTC, its administrator, M. Marshall Happer III, and its chairman, Philippe Chatrier. Five months later, in September, two other companies in the business of producing men's professional tennis events – IMC and ProServ – joined Volvo as plaintiffs. The plaintiffs alleged that the defendants' actions constituted (1) a combination and conspiracy to restrain trade and a group boycott in violation of Section 1 of the Sherman Act and (2) a combination, conspiracy, and attempt to monopolize trade in violation of Section 2 of the Sherman Act. The relevant markets were alleged to be: (1) the submarket for the production of men's professional tennis events; (2) the submarket for the tennis-playing services of men's professional players; and (3) the submarket for the rights to broadcast men's professional tennis events on television in the United States.

The plaintiffs alleged that the MIPTC violated the antitrust laws by (1) denying the plaintiffs the opportunity to produce tennis events in the manner they would so choose (e.g., the MIPTC allegedly refused to sanction a tournament unless the owner agreed to a ceiling on player compensation), (2) inhibiting the development of competing events by entering into an agreement with World Championship Tennis (WCT) – a rival sanctioning organization formed in the late 1960s but which later agreed to obtain MIPTC sanctions for its entire circuit of events – whereby WCT events would be integrated into the Grand Prix, (3) decreasing the number of non-sanctioned tournaments in which players can compete due to the MIPTC's requirement that the players sign Commitment Agreements, (4) requiring owners and producers of sanctioned events to contribute to a 'bonus pool' which provides additional compensation to players who perform well at sanctioned events, and (5) proposing additional restrictions such as a 'Special Events' Rule requiring owners of sanctioned events not to 'promote' any Special Event during the week of any Grand Prix tournament, a 'Best Interest' Rule giving the MIPTC the right to refuse to sanction any event it determines would not serve 'the best interest of the sport', a 'Conflicts of Interest' Rule enabling the MIPTC to prohibit owners and producers from inviting certain players to participate in their tournaments as 'wild cards', and a rule that would allow the MIPTC to serve as the exclusive representative and agent for the pooled sale of television broadcasting rights to sanctioned events.

Although a motion for summary judgment was submitted in January 1986, the district court's decision did not appear until August 10, 1987.[201] It began:

> The decision on this motion for summary judgment submitted in January of 1986 has been a long time in coming. The reason for this is that I had difficulty (as often happens) in articulating the obvious. Sometimes it is necessary to explain the obvious, something that district court judges are competent to do… It is necessary in this case.
>
> When hiring an employee, an employer may make that employment dependent on certain conditions. Such conditions may include length and hours of employment, rate of pay, vacation time, sick leave policies, and restrictions on whether the employee may work at other jobs, so long as they are not imposed for longer than a reasonable period of time. The employment contracts at issue bind the employee tennis players to such conditions for a period of approximately thirty-six weeks per year. The basic charge here is that these employment contracts for tennis players preclude the plaintiffs from hiring those players during the period, so that plaintiffs cannot successfully compete in exhibiting those players. Sophist arguments advanced by plaintiffs would turn this into an illegal monopoly and a violation of the antitrust laws. The real relief sought by plaintiffs is a declaration by this court that exclusive employment contracts even for a reasonable period of time monopolize the employees' time and are thus illegal.

Regarding the conspiracy claim, the district court observed that the only co-conspirator named by plaintiffs is the International Tennis Federation (ITF), with which the MIPTC cannot be said to have conspired:

> The ITF formed MIPTC originally, participates in MIPTC's operation, and ITF members make up one-third of MIPTC. Because ITF makes up part of MIPTC, and because it is legally impossible to conspire with oneself, … plaintiffs can make out no claim of conspiracy to restrain trade or to monopolize against ITF and MIPTC. Plaintiffs also allege that other co-conspirators exist, "some of whom may not be known to the plaintiffs at this time." … However, no conspiracy claim can stand against unidentified and unknown parties.

[201] *Volvo North American Corporation v. MIPTC*, 678 F. Supp. 1035 (S.D.N.Y. 1987).

The district court also found the plaintiffs' Section 2 claim to be unconvincing:

> Furthermore, MIPTC does not possess an illegal monopoly power in the men's professional tennis market. Nothing other than perhaps economics bars any of the plaintiffs from entering the market for men's professional tennis events. However, plaintiffs are unwilling to compete in that market. Because they are unwilling to expend the funds necessary to enter the market, plaintiffs claim that MIPTC has a monopoly power, which assertion is not borne out by the facts alleged in the Complaint.

As a result, the district court dismissed the plaintiffs' antitrust claims. Plaintiffs appealed. On August 30, 1988, the appeals court issued its opinion vacating much of the district court's order – apparently what the district court found to be "obvious", the appeals court did not.[202]

The appeals court began by rejecting MIPTC's argument that the plaintiffs lacked 'antitrust standing' because, to the extent a conspiracy occurred, the plaintiffs were participants in that conspiracy. In other words, the appeals court declined to "adopt a per se rule prohibiting putative cartel members from asserting antitrust claims against other members of the cartel." The reason is that the interest of a cartel member does not necessarily coincide with the interest of the cartel. The court explained:

> Thus, a restraint that merely prevents a cartel member from acquiring a greater share of the fruits of the cartel would not cause the member to suffer antitrust injury… But to the extent a cartel member credibly asserts that it would be better off if it were free to compete – such that the member's interest coincides with the public interest in vigorous competition – we believe that the individual cartel member satisfies the antitrust injury requirement.

With respect to the plaintiffs, the appeals court found that their "individual interests may coincide with the public interest in promoting competition" and thus the plaintiffs "have satisfied the first element of the standing analysis."

As for the district court's opinion that the Section 1 claim fails because the MIPTC cannot conspire with itself, the appeals court disagreed:

> Although we agree with the principle that it is impossible to conspire with oneself, we do not believe that the district court was correct to apply this principle in the present case. As we have noted, MIPTC is an association consisting of representatives of

---

[202] *Volvo North American Corporation v. MIPTC*, 857 F.2d 55 (2nd Cir. 1988).

> national tennis associations, tournament owners and directors, and professional tennis players. Courts have consistently held that, since joint ventures – including sports leagues and other such associations – consist of multiple entities, they can violate Sec. 1 of the Sherman Act… We therefore hold that appellants have adequately alleged the element of contract, combination, or conspiracy.

The court concluded that the plaintiffs had adequately alleged a number of restraints of trade, including price-fixing, horizontal market division, and group boycott (or a concerted refusal to deal).

As for the Section 2 claim, the appeals court found that the plaintiffs had clearly alleged that MIPTC engaged in monopolization (i.e., MIPTC possesses monopoly power and willfully maintained that monopoly power), attempted to monopolize by engaging in exclusionary conduct with the specific intent to monopolize, and conspired to monopolize.

Overall, the appeals court concluded:

> In our view, appellants have standing to attack MIPTC's administration of the Grand Prix circuit, the MIPTC-WCT Agreement, the Commitment Agreements, the bonus pool system, and the Special Event Rule. The complaint adequately alleges that appellees have engaged in price fixing, horizontal market division, and that they have threatened a concerted refusal to deal. The complaint further alleges, properly, that appellees have engaged in monopolization, and conspiracy to monopolize. Finally, we believe that Volvo has adequately stated a claim for relief for interference with prospective business relations. Accordingly, we remand for further proceedings consistent with this opinion.

Note that the appeals court was not ruling that MIPTC's alleged behavior violated the antitrust laws – it was only ruling that those antitrust claims should not have been dismissed on summary judgment. The Volvo-MIPTC litigation apparently ended prior to a verdict on those claims.

Boxing. The two primary boxing regulatory organizations are the World Boxing Council (WBC) and the World Boxing Association (WBA). Both promote championship boxing matches throughout the world, recognize world champion boxers in various weight classes, prescribe a system of ranking boxers, designate minimum defense requirements for champions, and establish rules governing bouts.

On January 28, 1978, Alexis Arguello defeated Alfredo Escalera for the WBC super featherweight championship and, the next day, Arguello's manager signed a contract with promoter Don King for a rematch. Six months later, on July 26, Arguello and his manager signed a deal with New York's Madison Square Garden giving the Garden the right of first refusal for all of Arguello's bouts for one year. The deal contained the stipulation that it would remain in effect only as long as Theodore Brenner remained the Garden's president of boxing. A little over a month later, on September 1, Brenner left his position with the Garden to become an independent boxing promoter and, one month after that, Brenner signed a deal with Arguello and his manager giving Brenner the right to promote Arguello's bouts for three years. Brenner then reached a deal with CBS Sports for the telecast of the Arguello-Escalera rematch. The Arguello-Escalera rematch was to take place on February 3, 1979.

Despite signing a three-year exclusive deal with Brenner, Arguello's manager later signed contracts with King for a Arguello-Arturo Leon bout and a Arguello-Bobby Chacon bout. Moreover, in December 1978, King informed CBS and the WBC that he had the rights to the Arguello-Escalera rematch, not Brenner. Needless to say, at the WBC annual convention from December 4-7, 1978, there was great confusion over who would be promoting which Arguello bouts.

The WBC executive committee refused to 'certify' these proposed fights, deciding that, in accordance with its rules, Arguello would first have to defend his title against the WBC's number one ranked contender, Rafael Limon. The WBC had a 'mandatory defense' rule which required the champion to defend his title at least once a year against the highest ranked contender who was willing and able to fight. Brenner informed the WBC that he already had a television deal for the Arguello-Escalera rematch and the WBC's president said he would ask the WBC executive committee to reconsider. The next day, the committee voted to certify the rematch if three conditions were met: (1) Limon agreed to step aside; (2) the rematch was not postponed; and (3) Brenner and King resolved their dispute over the rematch either by agreement or in court. The Arguello-Escalera bout occurred on February 4, 1979, but was televised on ABC because on December 20, 1978 CBS had cancelled its contract with Brenner after its legal department determined that Brenner did "not own all of the necessary ancillary rights to grant CBS Sports exclusive television broadcast rights to (the fight)."

In late February 1979, the WBC executive committee voted unanimously to suspend Brenner because he failed to pay the WBC's annual registration fee for promoters, failed to submit to the WBC his contracts for the Arguello-Escalera rematch, failed to submit proof to the WBC that he was registered as a promoter in any state, and violated his commitment to the WBC that he would pay $25,000 to King, which had been a condition for the WBC certifying the Arguello-Escalera rematch. Brenner was informed of his suspension in a letter dated May 2, 1979.

On February 14, 1980, Brenner filed a lawsuit against the WBC and its president, Jose Sulaiman Chagnon, alleging that, in violation of Section 1 of the Sherman Act, they engaged in an unlawful conspiracy with boxing promoters, including Don King, to eliminate Brenner as a competitor and in a group boycott by suspending Brenner from promoting WBC championship bouts. A jury trial was held and the district court judge entered a directed verdict for the defendants on the conspiracy count, finding that "there (were) no facts in this record from which a jury may draw a reasonable inference that a conspiracy existed between King and Sulaiman to have the World Boxing Council suspend Brenner and restrain competition in the field of boxing promotion."

On the group boycott claim, the district court judge instructed the jury that it could reach a verdict in favor of Brenner only if a fair preponderance of the evidence indicated that (1) the WBC suspended Brenner for the purpose of preventing him from engaging in his trade as a boxing promoter and (2) the defendants' conduct did not fall within the recognized exception to *per se* group boycotts. According to the test spelled out in *Denver Rockets v. All-Pro Management*, conduct falls within the exception to *per se* invalidation of group boycotts if three conditions are met: (1) a legislative mandate for self-regulation "or otherwise" exists; (2) the conduct is (a) intended to accomplish an end consistent with the policy justifying self-regulation, (b) reasonably related to that goal, and (c) no more extensive than necessary; and (3) the association has procedural safeguards so that the restraint is not arbitrary and there is a basis for judicial review. The jury returned a verdict for the defendants on the group boycott count. Brenner sought a motion for judgment notwithstanding the verdict or, alternatively, a new trial on the group boycott claim. The district court judge denied Brenner's motion. Brenner appealed.

On March 18, 1982, the appeals court issued its opinion affirming the judgment and orders of the district court.[203] Regarding the conspiracy claim, the appeal court wrote:

> This record does not support a reasonable inference of a conspiracy among appellees and King to advance the interests of King over those of Brenner. Rather, the only conclusion that can be drawn is that the WBC and Sulaiman aided Brenner: they permitted his Arguello-Escalera fight to take precedence despite having denied a similar request by King; Sulaiman acted as intermediary, upon Brenner's request, in settling the dispute with King; and Sulaiman refused to halt the fight when King so requested. Furthermore, the record is devoid of evidence that the WBC and Sulaiman actually knew at any time that King's contracts were defective, if in fact they were… We find no conspiracy in Sulaiman's adherence to the terms laid down by the WBC convention. The WBC convention had decided to take a position of neutrality. In light of the refusal of the court and of CBS to find King's contracts invalid, we can hardly say that Sulaiman's adherence to the convention's mandate was suspect. Neither can we conclude that a determination to allow the parties to settle this matter in court or by agreement should be

---

[203] *Brenner v. WBC*, 675 F.2d 445 (2nd Cir. 1982).

interpreted as conspiratorial or as favoring of one promoter over another…

Brenner next points to the repeated attempts of Don King to undermine the fight as evidence of the conspiracy. The district court provided the answer when it said that this evidence "shows that King isn't a nice guy, the people he deals with don't think he's a nice guy but that doesn't prove that he entered into a conspiracy with Sulaiman to have Brenner suspended."

As for the group boycott claim, the appeals court rejected Brenner's contention "that discipline imposed by a sports organization for the violation of rules and regulations aimed at achieving reasonable objectives other than participant parity, safety and league integrity serve no purpose beyond the stifling of competition." The appeals court also rejected Brenner's contention that he presented sufficient evidence that the *Denver Rockets* requirements are not met in this case. Although Brenner claimed to have presented evidence "establishing that the WBC is corrupt and that its rules are administered in an arbitrary and ad hoc fashion", the appeals court found "no merit in these claims." Furthermore, the appeals court explained:

> Similarly, we cannot conclude that Brenner's failure to honor his agreements with the WBC or with its rules were improper bases under Section 1 of the antitrust laws for suspending him from promoting WBC world title fights. Brenner has not presented, nor can we discern, a patently anticompetitive purpose behind the adoption of the WBC's rules or its agreement with Brenner. Neither can we conclude that the executive committee which suspended Brenner was composed of competitors who stood to gain from his suspension.

In summary, promoters/sponsors have brought a number of antitrust lawsuits against sports leagues. The lawsuits that have concluded with a judicial decision have tended to be unsuccessful. However, some lawsuits were settled prior to a verdict.

For-Profit Sports Camp Operators. Although the NCAA does not own, sponsor, or operate any youth basketball camps, some NCAA members do. These camps are known as "institutional camps." Camps operated by non-NCAA members, in contrast, are known as "non-institutional camps." Institutional camps are subject to NCAA rules, including the NCAA's amateurism- and recruiting-related bylaws. Thus, for example, institutional camps must be open to any and all entrants and cannot pay a prospective student-athlete's expenses to attend the camp. Non-institutional camps, while not under the NCAA's direct control, are nevertheless indirectly affected by the NCAA's recruiting rules. While a non-institutional camp can be 'selective' in accepting participants (unlike institutional camps), a non-institutional camp (1) must be 'certified' by the NCAA before Division I coaches can attend the camp to evaluate prospects, (2) must be held during a narrow window of a few weeks because Division I coaches can only attend such camps during that window, and (3) cannot employ Division I coaches, among other restrictions.

The NCAA's certification requirement has been in effect since 1993. To be certified, a non-institutional camp must meet certain requirements. For example, camp participants and attending coaches (and their relatives) cannot receive gifts, inducements, or air/ground transportation. Prospective student-athletes cannot retain athletic equipment or apparel (other than an event T-shirt) unless they pay the item's normal retail value. The camp cannot be operated or managed by any sports agents. Nor can the camp receive financial support from a sports agent.

The time window during which Division I coaches can attend non-institutional camps has fluctuated over time. In 1981, the NCAA developed a recruiting calendar which divided a year into four types of periods: contact, evaluation, quiet, and dead. Permitted coaching activities differ each period. For example, during an 'evaluation period', authorized athletic department staff can attend off-campus events to evaluate prospective student-athletes. In 1981, the summer evaluation period was set at 45 days. It was shortened to one month in 1983, reset to 45 days during the period 1984-86, cut to 21 days in 1987, set at 27 days during the period 1989-94, after which it was reduced to 24 days. At the time the lawsuit was filed, the evaluation period was 24 days but was to be shortened to 14 days in the summer of 2001. In 2002, the evaluation period was 20 days. Since Division I coaches can only attend non-institutional camps during an evaluation period and attendance of those coaches is allegedly essential to the camps' success, those camps have to consider the NCAA's recruiting calendar when scheduling their events.

The NCAA prohibited Division I basketball coaches from being employed by (or lecturing at) non-institutional camps in 1990, although the coaches could be employed by and lecture at institutional camps. The restriction was in effect through 2001, but was lifted for the summer of 2002.

On November 9, 2000, five operators of for-profit summer basketball camps for children and teenagers filed an antitrust lawsuit against the NCAA alleging violations of Sections 1 and 2 of the Sherman Act. Plaintiffs alleged that the NCAA enacted the certification requirement, reduced the evaluation period, and prohibited Division I coaches from working at non-institutional camps "in order to protect institutional basketball camps and to harm non-institutional basketball camps." The NCAA countered, in the words of the district court, that "its regulation of the recruiting of student-athletes is intended to protect the young prospects from being exploited, and that this regulation has been in place for decades."

The NCAA requested summary judgment on all counts and, on April 30, 2004, the district court granted the NCAA's motion.[204] The district court noted

[204] *Pocono Invitational Sports Camp v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa 2004).

that none of the plaintiffs offered evidence as to the harm caused by the certification requirements, which they all satisfied. Moreover, the district court noted that the plaintiffs "offer no evidence suggesting that a Division I coach who is not employed by an institutional camp can observe and evaluate prospects at that camp outside of the official evaluation period, nor any evidence that Division I coaches employed by institutional camps are permitted to formally evaluate players while coaching them." On the other hand, the district court found the NCAA's rationale for the regulations convincing:

> The NCAA has provided substantial evidence in support of its position that the rules were enacted to protect young players from being exploited… Plaintiffs have offered no evidence that rebuts the evidence disclosed by studies demonstrating abuse under the prior system.
>
> The evidence shows that the NCAA enacted the certification requirement in response to basketball recruiting becoming a "showplace" that seemed "inconsistent and inappropriate for college athletic recruiters." … In this regard, many of the certification requirements, such as the requirement that camp staff not have a history of illegal involvement in sports, the prohibition of gifts and inducements, and the requirement that camp events not be financed by marketers, are grounded in the paternalistic goal of separating high school athletics from the realm of professional sports.
>
> The evidence also shows that the NCAA reduced the summer evaluation period so that prospects would have more recruiting time when parents and coaches were available to supervise the process… This finding supports the NCAA's position that the rules were enacted in the spirit of promoting amateurism, and with the prospects' best interests in mind.

The district court thus concluded that one reason why the plaintiffs' Section 1 claim fails is that the challenged restrictions are not "commercial" restraints, even though they may impose costs on camp operators. A second reason why the Section 1 claim fails is that the plaintiffs failed to present sufficient evidence in support of their proposed relevant market – summer basketball camps in the United States:

> Plaintiffs have not alleged specific facts or brought forth evidence establishing that the market for summer basketball camps is distinct from the market for other kinds of summer camps, or from camps run during the academic year. There are no allegations in the complaint, nor any evidence relating to the price of or demand for summer basketball camps. Thus, plaintiffs have not alleged or proven whether there are reasonably interchangeable alternatives for their product. Defendant has suggested that many prospective basketball summer camp attendees would consider other kinds of athletic camps reasonable substitutes for basketball summer camp, and would also consider basketball camps run during the school year as reasonable alternatives.

> Without plaintiffs properly setting forth a relevant product market, a court cannot conclude that the proposed market of summer basketball camps is a separate and distinct market, and therefore a relevant market for antitrust purposes… Therefore, plaintiffs have failed to adequately set forth the relevant market, which is another reason that the § 1 claim fails.

Plaintiffs' failure to plead a relevant market also caused the Section 2 claim to fail. In addition, the district court dismissed the plaintiffs' tortious interference claim. As a result, the district court granted the NCAA's motion for summary judgment on all counts.

Merchandisers. As discussed in Chapter 3, the major North American sports leagues typically enter into league-wide licensing and merchandising arrangements and some teams have challenged these arrangements on antitrust grounds. For example, Adidas America and the New York Yankees entered into a merchandising deal and filed an antitrust lawsuit against Major League Baseball and its other member teams, accusing them of operating "a cartel for the licensing of club trademarks and for retail and wholesale baseball merchandise sales." Whether the collective sale of merchandising and television rights is anticompetitive is a controversial subject. Roberts (2001) objects even to the term "collective sale" since he argues that the league is the owner of these rights, not the individual teams. He contends that consumers only want to purchase a particular team's merchandise and view its games because the team is part of the league. Thus, there is no "pooling" or "collectivizing" of rights – it is the league which owns the rights in the first place. Grusd (1999), on the other hand, disagrees: "While the value of a team's logo depends in part on the league, the independent efforts of the owner to differentiate his team and the team logo play a more significant role in determining price." (p. 25)

Since the Yankees' and Adidas's antitrust lawsuit against MLB was discussed in Chapter 3, which focused on antitrust disputes between leagues and their member teams, it will not be addressed in this chapter. Rather, the focus will be on two other antitrust disputes – Adidas America's lawsuit challenging a NCAA Bylaw regarding manufacturer logos on collegiate team uniforms and American Needle's lawsuit against the NFL over the league's exclusive licensing contract with Reebok.

> *NCAA Restrictions on Manufacturer Logos on Team Uniforms*. In 1983, Patrick Ewing, a star basketball player at Georgetown University, wore, under his uniform, a Nike t-shirt which bore the Nike logo on each shoulder. At the time, the NCAA did not have a specific rule addressing the wearing of apparel exhibiting a manufacturer's logo or trademark, but did have a rule against a student-athlete promoting commercial enterprises. In 1978, the NCAA had considered whether the wearing of apparel bearing the manufacturer's logo or trademark would violate its rule against promoting commercial enterprises and decided that as long as

the logo or trademark is generally available on the product sold to the public, the wearing of such apparel would not be considered promotion of a commercial enterprise. However, the NCAA revisited the issue following the Ewing incident and, in its 1984-85 manual, changed the logo rule so that a student-athlete could wear apparel that bore the manufacturer's normal logo, but the number and size of those logos was restricted. In particular, the apparel could bear only one manufacturer's logo, which could not exceed 1 ½ inches in height or width. The new rule was eventually codified as NCAA Bylaw 12.5.4.

Apparel manufacturers attempted to circumvent Bylaw 12.5.4 by adding design elements to uniforms that resembled the manufacturer's logo. In April 1994, the NCAA adopted an interpretation of the Bylaw which stated that a team's official uniform cannot bear a design element similar to the manufacturer's logo. For example, Adidas apparel is distinguished by three descending stripes along the apparel's sleeve or pants leg and thus an Adidas soccer shirt would not be permitted to bear three descending stripes on the shirt's shoulders. Bylaw 12.5.4 eventually became Bylaw 12.5.5 and was revised so that the manufacturer's logo could be any four-sided figure with an area not exceeding 2 ¼ square inches. The Bylaw did not prohibit a team from wearing a three-striped uniform designed by a manufacturer whose logo was not three stripes.

Once in 1993 and twice in 1998, the NCAA determined that certain Adidas soccer uniforms violated the Bylaw. In 1993, the NCAA decided that the three stripes constituted a 'second' logo (since the uniform also contained a small Adidas logo) and, moreover, the three stripes exceeded the logo size limit. In 1998, the NCAA decided that two Adidas soccer uniforms violated the Bylaw because the stripes resembled Adidas's logo. In September 1998, the NCAA offered to review Adidas's proposed uniforms to provide a definitive answer whether a particular uniform violated the Bylaw, but Adidas did not accept the NCAA's offer.

Adidas filed an antitrust lawsuit against the NCAA alleging that the NCAA unreasonably restrained trade and engaged in a group boycott in violation of Section 1 of the Sherman Act and attempted to monopolize in violation of Section 2 of the Sherman Act. Adidas submitted a motion for a preliminary injunction enjoining the NCAA from enforcing Bylaw 12.5.5. On March 26, 1999, the district court denied Adidas's motion.[205]

The district court ruled that Adidas had failed to demonstrate that it faces irreparable harm in the absence of a preliminary injunction. Moreover, Adidas failed to demonstrate that there was a likelihood that it would eventually prevail on the merits of its claims. Regarding the latter, the district court argued that Bylaw 12.5.5 has three purposes and objectives, all of which are "noncommercial" – the Bylaw (1) "is designed to accomplish the NCAA's principle of maintaining amateurism by protecting student-athletes from commercial exploitation", (2) "attempts to preserve the integrity and uniqueness of intercollegiate sports by

[205] *Adidas America v. NCAA*, 40 F. Supp. 2d 1275 (D. Ks 1999).

preventing member schools from turning their student-athletes into billboards in the pursuit of advertising revenue", and (3) "is designed to avoid excessive advertising that could potentially interfere with the basic function of the student-athletes' uniforms, which is to provide immediate identification of the athlete's number and team to his or her teammates and to the referee or umpire officiating the contest." The district court observed that there "is no evidence before the court to suggest that the purpose of Bylaw 12.5.5 is to provide the NCAA or its member institutions with any commercial or economic advantage" and thus the court concluded that "Bylaw 12.5.5 has noncommercial purposes and objectives."

In a footnote, the court pointed out that "Adidas' briefing focuses almost solely on the issue of whether 12.5.5 is necessary and whether its application is reasonable." The court commented: "Adidas fails to recognize that Bylaw 12.5.5 does not violate antitrust laws merely because it is potentially unnecessary, over-restrictive, or unfairly applied to Adidas."

The district court then observed that it "is not difficult to conceive of a facially noncommercial activity that confers an intentional and direct economic or competitive benefit to an antitrust defendant" and, therefore, "the court must next determine if the contested activity, despite its noncommercial nature and purposes, is objectively noncompetitive", which requires the court to "determine whether the NCAA or its member institutions receive a direct economic or competitive benefit from the enforcement." The district court concluded that "the NCAA and its member institutions are not competitors of Adidas and do not realize any financial or competitive advantages by limiting the amount of advertising allowed on the backs of student-athletes" and, furthermore, "if Bylaw 12.5.5 places any restraint on the advertising market, it is an incidental by-product of the NCAA's legitimate attempt to maintain the amateurism and integrity of college sports, and it does not economically benefit the NCAA or its member institutions."

The NCAA motioned for judgment on the pleading, which the district court granted on August 26, 1999.[206] The court summarized Adidas's allegations as follows:

> According to Adidas, the NCAA and its member institutions, acting as a cartel, are using Bylaw 12.5.5 to illegally restrict the sale of NCAA promotional rights. This intentional restriction of promotional rights artificially limits the price and quality options available to apparel manufacturers as consumers of promotional space, forces manufacturers to pay additional amounts for billboard space or other advertising, decreases the selection of apparel offered to the end consumer, increases the price of the apparel for end consumers, and financially benefits the NCAA and

[206] *Adidas America v. NCAA*, 64 F. Supp. 2d 1097 (D. Ks 1999).

> its member institutions. The complaint further alleges that the NCAA benefits from its enforcement of Bylaw 12.5.5 as follows. The NCAA competes directly with Adidas and other manufacturers for promotional space on NCAA member institutions' uniforms. This competition is the result of the NCAA's commercialization of its own "NCAA" logo. The NCAA, in partnership with the Collegiate Licensing Company, is actively licensing use of the NCAA logo to apparel manufacturers at exorbitant royalty rates. Furthermore, the NCAA asked that all member institutions place the NCAA logo on their student-athlete's uniforms and equipment for the purpose of enhancing the commercial value of the logo. Once member institutions place the NCAA logo on its uniforms, manufacturers such as Adidas will be forced to pay royalties to the NCAA in order to include the NCAA logo on replica uniforms sold to end consumers.

The district court observed that the NCAA countered that Adidas's antitrust claims should be dismissed on seven different grounds: "(1) the enforcement of Bylaw 12.5.5 is not a commercial activity; (2) Adidas has not alleged that it suffered an 'antitrust injury;' (3) Adidas has not alleged a plausible or legally cognizable relevant market; (4) Adidas has not alleged concerted action; (5) Bylaw 12.5.5 is reasonable as a matter of law; (6) Adidas has failed to show that the NCAA has monopoly power; and (7) Adidas has failed to allege facts showing that the NCAA acted with the requisite intent to monopolize." The district court agreed with the NCAA that Adidas "has failed to allege a plausible or legally cognizable relevant market" and thus there was no need for the court to consider the other six alternative grounds for dismissal.

Adidas alleged that one of the relevant markets for its Section 1 and 2 claims was "the market for the sale of Promotional Rights by an individual Member Institution or by Member Institutions on the athletic apparel and footwear of a Member Institution or Member Institutions used in connection with NCAA-controlled intercollegiate athletics in which the Member Institutions participate." Adidas argued that its sponsorship agreements with NCAA member institutions are a critical component of its marketing strategy, as well as that of competitors. Adidas also argued that the sponsorship agreements drive the demand for the company's apparel and footwear. The district court countered:

> Adidas' allegations establish, for purposes of this motion, that NCAA promotional rights are excellent advertising vehicles for increasing demand for athletic apparel and footwear. They do not, however, establish that such promotional rights are, in and of themselves, a relevant market for purposes of Adidas' instant antitrust claims. The allegations in Adidas' complaint fail to define the relevant market in terms of interchangeability and cross-elasticity of demand. As a result, Adidas has failed to explain or

> even address why other similar forms of advertising, namely sponsorship agreements with teams or individuals competing in the National Football League, the National Basketball Association, the Women's National Basketball Association, Major League Baseball, Major League Soccer, or the Olympics, are not reasonably interchangeable with NCAA promotion rights or sponsorship agreements. Similarly, Adidas has not explained why sponsorship agreements with teams or individuals in any of the above organizations would fail to satisfy Adidas' goals of enhancing the "visibility of adidas' trademarks on the playing field" and authenticating Adidas as a "high quality athletic brand, with products that serve the high performance needs of these athletes." Accordingly, the market for the sales of NCAA promotional rights cannot be considered a relevant market for purposes of Adidas' instant claims under § 1 or § 2 of the Sherman Act.

Adidas also alleged that the NCAA's unreasonable restriction of output in the NCAA promotional rights market caused injury to competition in the market for the sale of sports merchandise, which Adidas defined as "markets for the sale of certain athletic uniforms, related athletic apparel and athletic footwear to consumers in which adidas competes." The district court countered that Adidas's complaint "does not contain factual allegations sufficient to support the conclusory allegation that the NCAA's enforcement of Bylaw 12.5.5 restricts the 'markets for the sale of certain athletic uniforms, related athletic apparel and athletic footwear to consumers in which adidas competes.'"

NFL's Exclusive Licensing Arrangement with Reebok. Prior to 2001, clothing manufacturers competed with one another to license NFL team trademarks for use on their headwear and apparel – and the NFL (via National Football League Properties, Inc.) granted multiple licenses. In December 2000, the NFL decided to instead offer an exclusive license to a single company, which turned out to be Reebok. American Needle, a maker of headwear, had a licensing agreement with the NFL that expired in March 2001 and was not renewed.

On December 1, 2004, American Needle filed an antitrust lawsuit against the NFL, NFL Properties (NFLP), the individual NFL teams, and Reebok alleging that the exclusive license constituted an unreasonable restraint of trade under both the *per se* rule and the rule of reason, in violation of Section 1 of the Sherman Act, and constituted a monopolization of, a conspiracy to monopolize, and an attempt to monopolize various markets. The defendants moved to have the complaint dismissed, but, on May 5, 2005, the district court dismissed only the count alleging a *per se* Section 1 violation, agreeing with the defendants that the exclusive licensing agreement must be analyzed under the rule of reason.[207]

The defendants argued that the other counts should be dismissed because American Needle failed to identify a relevant market. The district court observed that American Needle identified six relevant markets impacted by the defendants' conduct: "(1) the market for licenses to use NFL and NFL teams' trademarks in the design, manufacture and sale of apparel, (2) the market for licenses to use these trademarks in the design, manufacture and sale of headwear, (3) the wholesale market for the sale and distribution of apparel with these trademarks, (4) the wholesale market for the sale and distribution of headwear with these trademarks, (5) the market for the manufacture of apparel with the NFL and NFL teams' trademarks, and finally, (6) the market for the manufacture of headwear with these trademarks." The defendants argued that all six proposed relevant markets are defined by the use of trademarks and thus are inadequate as a matter of law.

The district court observed that a relevant market "is composed of products whose use is interchangeable and for which there is a 'cross-elasticity of demand'" and noted that "courts have repeatedly rejected markets that are defined by a company's trademark." For example, Amoco gasoline, Mobil gasoline, and Shell gasoline are not three separate product markets. Nor is the market for Mercedes-Benz automobiles a separate product market, despite the prestige of the company's trademark. However, the court added:

> Yet, the analysis from these trademark cases cannot be readily applied to the facts of the instant case… The NFL team names and logos that appear on apparel and headwear are not a "symbol" of the T-shirt or cap on which they appear. In fact, the NFL teams' trademarks carried on a T-shirt or cap may be more properly viewed as the product itself, rather than the T-shirt or cap.
>
> In Generac, the Seventh Circuit recognized the absurdity in claiming that one brand of gasoline was not interchangeable with another, and therefore constituted its own separate market. The same would be true in claiming that one brand of t-shirt or cap could not substitute for another brand. However, we must acknowledge that some portion of the market for headwear and apparel carrying NFL teams' trademarks has little to do with the items carrying the logos. Certainly some people purchase a shirt or hat with an NFL team's logo simply because they need a shirt or a hat. As defendants argue, apparel with a different logo or with no logo would serve as a reasonable substitute for these consumers. But, just as certainly, a significant segment of the market for NFL-

[207] *American Needle v. New Orleans Louisiana Saints*, 385 F. Supp. 2d 687 (N.D. Il E.D. 2005).

branded headwear and apparel is purchasing the team logo. If a store sold out of hats carrying the Chicago Bears logo, these individuals would not necessarily find caps carrying logos for SpongeBob, the University of Michigan, or even the Chicago Bulls to be reasonable substitutes. More likely, they would purchase a different item of apparel, such as a T-shirt or sweatshirt, or even a non-apparel item like a mug or key chain that carries the Bears logo. The product for these consumers is the trademarked logo. This is not the case with the trademarks Pine-Sol, Olympian, Rolex, or Shell. Though customers may prefer those brand names for any number of reasons, what they are buying is a disinfectant household cleaner, … an electric generator, … a high-end watch, … or gasoline…, all of which have reasonable substitutes under other brand names. But for many people purchasing headwear or apparel with an NFL team's logo, they are purchasing the ability to be identified with a particular team – the right to be recognized as a fan. Defendants state that "Relevant markets include not just brands that consumers could 'practicably turn' if 'prices become anticompetitive.'" For consumers seeking to wear something in support of an NFL team, what is the alternative to which they can practically turn if the NFLP's exclusive contract with Reebok allows this headwear and apparel to become anticompetitive?

> … If a unique, separate market exists for the television rights of NCAA football games and NBA basketball games, we do not see how, as a matter of law, a unique market cannot exist for the manufacture and distribution of merchandise carrying NFL trademarks.

The district court stressed that it had "not determined whether the markets plaintiff alleges do in fact exist, thereby supporting its claims", but rather had "found only that the law does not preclude an antitrust claim based on such markets." In fact, the court acknowledged that American Needle's market definitions may be improper and that many questions remained concerning the viability of its claims:

> As indicated in our analysis, if the true product in this case is NFL teams' logos, not the items that carry them, then there may be no justification for limiting the relevant market to headwear and apparel that carry these logos. Perhaps, the market would more properly include all merchandise carrying NFL logos. Of course, this broader market definition would then alter the impact of the exclusive contract with Reebok, which is allegedly limited to the manufacture and distribution of headwear and apparel.
>
> Many questions concerning the viability of plaintiff's claims remain. For example, it is far from clear, for a different reason, that

> NFLP's control over the trademarks and logos is subject to the antitrust laws. The same reasoning that has led courts to reject the per se concept, when somewhat extended, can lead to the conclusion that the NFL should be viewed as a single source for the purpose of protecting the clubs' trademarks and logos. The league may be viewed much like a franchisor. The NFL may license others to use its trademarks and logos to affix to merchandise and apparel they make, just as McDonald's licenses its trademarks for use by others, who make hamburgers. The NFL may have as great an interest as McDonald's in protecting the good will inherent in their marks by selectively choosing who may use them… It is a rather dramatic assertion that the antitrust laws prohibit the NFL from determining who may use its trademarks and logos and, therefore, its good will. But we leave that consideration to another day, as the present contention is confined to whether or not there can be relevant markets.

In a footnote, the district court also observed that, although "it is not relevant to the inquiry before us and carries no weight at this stage in the litigation", Reebok's 2004 annual report states that its agreement with the NFL is exclusive for some distribution channels, but that it is "a non-exclusive distributor of NFL-branded apparel through catalogs, in retail stores that primarily carry NFL-branded products and in other retail channels." This appears to contradict American Needle's assertion in its complaint that Reebok is "the exclusive provider of apparel and headwear bearing the Trademarks of the individual NFL Teams and the NFL."

Given the district court's ruling, it is not clear whether American Needle is continuing to pursue its lawsuit.

The Media. Broadcast media (i.e., television and radio), print media (i.e., newspapers, magazines), and internet websites have all attempted to profit from the sports leagues' product – games. Of course, sports leagues want these media to publicize the games and, for a fee, broadcast them. As a result, sports leagues enter into exclusive contracts with television and radio networks to broadcast certain games (thereby giving the network an incentive to extensively promote the game), may withhold authorization of the broadcast of a non-soldout game into the home team's territory (thereby giving the home team's fans an incentive to attend the game), may limit the number of games a league member can televise on a superstation (which draws a national audience and thus may draw viewers away from the games of other league members), may prevent internet sites from reporting real-time scores as quickly as the league's own website (thereby allowing the league to earn a return on its investment in reporting real-time scores), and may protect the league members' trademarks by seeking to prevent non-league members from operating websites with domain names resembling that of league members. Media companies have challenged these league actions on antitrust grounds.

Television stations. In general, sports leagues want their games televised – the broadcast fees they can negotiate are often enormous.[208] But to obtain an agreement, a league may have to promise a broadcaster exclusivity – at least during a particular time-slot – and possibly the ability to choose which of the league's games will be broadcast in that time slot. Thus, broadcasters compete to become the 'exclusive' broadcaster during a particular time slot and, not surprisingly, the 'losing' broadcasters may not be content with broadcasting 'inferior' games in 'inferior' time slots and therefore may decide to challenge the exclusivity agreement on antitrust grounds. In addition, sports leagues may seek to help teams that have difficulty selling-out their home games by allowing the home team to withhold authorization for the televising of its non-soldout home games. Not surprisingly, a broadcaster prevented from televising the home game may challenge the 'blackout' on antitrust grounds. Sports leagues also generally want their members to obtain as large an audience for their games as possible, but if doing so results in the league member's games draining audiences away from the games of other league members, the league may seek to limit the number of such games the team can play. Such games are likely to appear on 'superstations', which have a national broadcast audience, and these superstations may challenge the league's limit on antitrust grounds.

> *College Football Association television exclusivity agreements*. The College Football Association (CFA) was formed in 1977 by 62 of the largest NCAA Division I football programs, who were frustrated in their attempts to divert more college football broadcast revenues to the major programs. The CFA included all of the major football conferences except the Big Ten and the Pac Ten. As discussed in Chapter 3, in 1981, the CFA was offered a 4-year $180 million contract by NBC to pull its games from the NCAA television package with ABC, but the CFA backed down after the NCAA threatened to expel any institution accepting the NBC offer. Such an expulsion would have hurt those institutions with strong Division I men's basketball programs, which would have been prohibited from participation in the NCAA's post-season tournament. Since the CFA institutions did not believe they could host a successful basketball tournament outside the NCAA, the CFA did not attempt to form a rival organization to the NCAA. However, the CFA did cover the legal expenses of the Universities of Oklahoma and Georgia when they sued the NCAA over the collective sale of football broadcast rights, arguing that the

[208] For discussions of the sale of sports broadcast rights in Europe and how it differs from that in the U.S., see Cameron (1997), New & Le Grand (1999), Cave & Crandall (2001), Hoehn & Lancefield (2003), Tonazzi (2003), Falconieri, Palomino & Sákovics (2004), and Forrest, Simmons & Szymanski (2004).

collective sale constituted an illegal cartel. After the U.S. Supreme Court's 1984 decision against the NCAA, the CFA negotiated a one-year deal with ABC for $12 million, while the Big Ten and Pac Ten signed a one-year deal with CBS for $9.6 million. The games on ABC and CBS were in the same time slot so, as Siegfried and Burba (2004) observed, "in 1984 a duopoly emerged to replace the monopoly that previously had sold college football television broadcast rights." (p. 806)

The 1984 CFA-ABC contract was exclusive during the afternoon time slot in the sense that other teams in the CFA could not broadcast their games during that slot. However, teams not selected by ABC to play the afternoon game could sell their games to other syndicators or cable networks for broadcast in an earlier time slot. ABC had to give at least 12 days advance notice when selecting which game it would broadcast in the exclusive Saturday afternoon time slot, except for September games which had to be selected prior to the start of the season.

The CFA also entered into a contract with ESPN in 1984 for a Saturday evening game. The slot was not perfectly exclusive because, for example, it did not prevent the 'pay-per-view' broadcast of other CFA games. ESPN had to provide advance notice of which game it would air. Both the ABC and ESPN contracts contained limits on the number of times a particular team's game could be chosen for the exclusive slot.

The CFA's contracts with ABC and ESPN were challenged on antitrust grounds by the Association of Independent Television Stations (INTV) and Sports View Company (SVC), which brought suit against the CFA, the Big Eight conference, ABC, and ESPN. The plaintiffs alleged, in the words of the district court, that (1) "by these agreements the defendants fixed prices, limited output, divided markets, excluded competition, and restricted viewers' choices among games, and thus unreasonably restrained trade" in violation of Section 1 of the Sherman Act and (2) "the defendants have conspired and attempted to monopolize the college football television market" in violation of Section 2 of the Sherman Act. INTV and SVC asked for summary judgment establishing the defendants' antitrust liability and enjoining many of their collaborative activities.

On March 20, 1986, the district court denied the plaintiffs' motion for summary judgment.[209] The court noted that there were genuine issues of material fact and thus the plaintiffs were not entitled to judgment as a matter of law. For example, with respect to the Section 1 claim, the court found that "INTV and SVC have not established beyond factual dispute that the challenged

[209] *Association of Independent Television Stations v. CFA*, 637 F. Supp. 1289 (W.D. Ok 1986).

arrangements constitute per se illegal price fixing, output restrictions, or division of markets" and "INTV's and SVC's rule of reason claims are burdened with material factual disputes concerning market definition and power, the anticompetitive effects of the agreements, and the business reasons offered to justify them."

In arguing that the challenged actions are not obviously *per se* illegal, the district court referred to the U.S. Supreme Court decision in *NCAA v. Board of Regents* and explained:

> In the marketing of television rights, just as in the management of the live contest itself, some cooperation is necessary if the product, live college football television, is to be available at all…
>
> Even if it were already established beyond factual dispute that the challenged television rights agreements worked price distortions or restricted output, it would be premature to condemn them per se. It is clear that we find the restraints in an industry in which agreements among competitors are necessary if the product is to be available at all. The reasoning of the United States Supreme Court is as applicable to restraints by the CFA as it is to restraints imposed by the NCAA. It is not the nature, purpose, or membership of the organization engaged in the conduct that determines whether a restraint may be condemned per se or whether it may pass under the rule of reason; it is the nature of the industry in which the restraint appears. If the industry is such that cooperation among competitors is a commercial necessity, the agreements which permit such cooperation should ordinarily warrant the discriminating review afforded by the rule of reason. Only if the cooperative arrangements are revealed to be naked restraints should they be condemned per se.

The plaintiffs and defendants did not agree on the relevant product market. The plaintiffs asserted that the relevant product market is live college football television. The CFA and the Big Eight asserted that the market includes professional football (including not only NFL games, but USFL games as well since the USFL planned to move to a fall schedule in 1986). ABC argued that the relevant market includes all fall sports programming.

With respect to the Section 2 claim, the district court observed:

> In order to establish monopolization, INTV and SVC thus must prove that the defendants have monopoly power in a

relevant market; that is, the power to control price and prevent entry to the market…

Having argued that the relevant product market is live college football television, INTV and SVC curiously then assert that CFA's monopoly power should be judged by reference to a product market that includes only CFA, Big 10 and PAC 10 games. Since CFA has 63 members, these 63 institutions constitute approximately 75 percent of the relevant market of 83 competing institutions.

INTV's summary elimination of all other college football from the relevant product market is unexplained. INTV and SVC also take no account of the market share commanded by CFA's own members marketing telecast rights outside the CFA and Big Eight plans. Because each of the member institutions is free to sell television rights to its games, CFA argues that the market power of CFA cannot be inferred from mere reference to the number and quality of its members. Unlike NCAA members under the NCAA plan, CFA members individually may enter the marketplace along with CFA.

Finally, the court notes that INTV accuses the Big 10-PAC 10 collaboration with monopolization of the same geographical and product markets as INTV alleges in these actions. Certainly, two or more entities may combine to establish monopoly power – a shared monopoly – in the same market; but there is no allegation of concerted action by CFA and the Big 10-PAC 10 collaboration. Moreover, control of less than half of a market may prove absence of monopoly power. INTV and SVC have not shown the defendants' monopoly power beyond genuine factual dispute.

The district court pointed out numerous other 'genuine issues of material fact' with respect to the Section 1 and 2 counts and thus concluded that the plaintiffs were not entitled to summary judgment as a matter of law.

In 1986, at the time of the district court's denial of summary judgment, the CFA was in the second year of a 2-year contract with ABC and ESPN. It then reached a 4-year contract for the years 1987-90 with CBS and ESPN, followed by a 5-year contract for the years 1991-95 with ABC (which had acquired ESPN). Interestingly, ABC also won the 1991 Big 10-Pac 10 contract. Given it was able to broadcast a single game in the Saturday afternoon slot and believing that few college teams had a truly national following, in order to air all the games it had promised, ABC developed regional telecasts of games. However, one CFA member which did have a huge national following was Notre Dame, which resigned from the CFA and signed a 4-year, $38 million deal with NBC. After the Fox network outbid CBS for NFL games in 1995, CBS approached the Southeastern Conference (SEC) and offered a 5-year, $85 million deal. The SEC decided to conclude a deal outside the CFA. With the loss of its most prominent member, Notre Dame, and the loss of the SEC, the CFA lacked a sufficient number of attractive games to strike another television deal, thereby ending its role in televising college football in 1996. In June 1997, the CFA was dissolved and its net worth distributed to its member institutions.

Siegfried and Burba (2004) argue that the CFA behaved like a "classic cartel" because it "restricted output – broadcasts of live college football contests held on Saturday afternoon – below competitive levels and then auctioned the artificially scarce supply to the highest bidder." (p. 810) As evidence that the CFA restricted output, they point out that, since the CFA's dissolution, there are now simultaneous broadcasts of games from numerous conferences on Saturday afternoon. Moreover, they argue that CFA broadcast rights fees substantially exceeded marginal costs in each of its contracts – in other words, over time, broadcast rights fees for CFA games were not competed down to marginal cost.

Siegfried and Burba attribute the lack of competition to the lack of overlap between the geographic territories of the CFA and the Big 10-Pac 10 coalition, as well as the inelastic demand for advertising on Saturday afternoon. They argue that one college football game may not be a good substitute for another:

> To the extent that television viewers in Atlanta or Dallas do not view a football game between Michigan and Wisconsin to be a good substitute for a Tennessee-Florida or Texas-Oklahoma game, respectively, the CFA may have enjoyed a substantial amount of market power in spite of a rival game broadcast on Saturday afternoon…
>
> The effect of regional parochialism among college football fans is to minimize the amount of actual competition among games televised into any particular area. While the duopoly that began broadcasting games simultaneously on Saturday afternoons in September 1984 constituted twice as many competitors as did the NCAA monopoly that preceded it, the games were not perfect substitutes in the eyes of potential viewers, leaving both the network broadcasting CFA games and the network broadcasting Big Ten/Pac Ten games facing a less than perfectly elastic

> demand for advertising. That circumstance translated into downsloping demand for the broadcast rights to the games that are particularly popular in specific geographic regions. While the post-1984 market for Saturday afternoon college football broadcasts was more competitive than the market it supplanted, it remained far from perfectly competitive. (pp. 813-14)

In addition to a lack of competition among games, Siegfried and Burba explain how the lack of good advertising substitutes drives up the price of advertising, which in turn drives up the price of the broadcast rights for the programs on which the advertising is to appear:

> The demand for broadcast rights is a derived demand, arising from the demand by advertisers for time to tout their products during game telecasts. Television networks are thus intermediaries. They buy broadcast rights from universities that try to get the highest possible price, sell advertising time to firms that desire to communicate with a target audience – primarily young males – and are largely indifferent as to how they reach that audience. The fewer alternatives available to reach the target audience, the more inelastic is demand, and the higher will be the price of advertising time.
>
> The demand for advertising on Saturday afternoon college football games is inelastic because the alternatives are abysmal. The prime-time hits, "Seinfeld" and "Friends," were not shown on Saturday afternoons. Reruns of "Lassie" and "Leave It to Beaver," or World War II documentaries are the best alternatives to Saturday afternoon football, and young men do not flock to these classics. At an advertising price reflecting marginal cost for a college football broadcast, advertisers can reach so many target consumers per dollar that their demand is quite inelastic. But in the absence of good substitute programming, the networks push prices above the competitive level, at least to the point that advertisers begin to consider alternatives, thereby providing the networks with rents that, in turn, boost their demand for broadcast rights. (pp. 814-15)

According to Siegfried and Burba, the "key impediment to entry into the market for college football games that are attractive to television networks is established brand capital." (p. 815) They explain:

> A tradition of success on the field, membership in a respected conference, and a large number of alumni (or residents in the case of state universities) all help to propel the same institutions onto the screen year after year. The accumulated brand capital of Penn State, Nebraska, USC, or Notre Dame can attract more viewers with a mediocre season than Tulane, Northwestern, Brigham Young, or Kansas State can when they are undefeated. Because much of this brand capital was accumulated by pioneers in the early post-World-War-II broadcasting era, it may be more expensive for new entrants to match these respected programs than it was for the established teams to achieve their dominance in the first place. (p. 815)

A second impediment to entry is the challenge of constructing a "credible" schedule:

> Unlike entry into most other industries, successful entry of individual teams into sports requires the cooperation of incumbents. To gain recognition, a new entrant needs to compete (and win) against high-caliber opponents. But strong incumbents have little incentive to schedule upgraded teams. If Michigan or Alabama were to schedule a new entrant, it would forfeit the chance at television broadcast rights revenues for that game. Mismatches do not draw large viewing audiences. In addition, scheduling weaker opponents, as upgraded programs inevitably are, reduces the strength of an established team's playing schedule, thus diminishing its chances at the financial payday associated with a premier bowl game. (pp. 815-16)

In summary, although the CFA was never found to be a cartel by a court, at least some economists believe it was a cartel and that its dissolution was followed by an expansion in output.

NFL's blackout policy. Until 1961, NFL teams individually negotiated the sale of television rights to their games, subject to certain NFL bylaw provisions preventing teams from broadcasting their games into the "home territory" of another team while that team was also playing, either at home or away. The "home territory" was defined as the area within 75 miles of the city where the team played its home games. As will be discussed in more detail in Chapter 11, the U.S. Department of Justice filed an antitrust lawsuit against the NFL over its television restrictions, many of which were found to be illegal in 1953.[210] However, the district court did not find illegal the NFL's blackout policy related to the broadcast of "outside games" within the home territory of a team playing at home.

Around 1961, after the newly-created American Football League had negotiated a joint television pooling arrangement, the NFL attempted to do the same but the district court ruled that such an arrangement would violate the court's 1953 decree and voided the NFL's contract.[211] Seventy-two days later, the U.S. Congress enacted an antitrust exemption permitting NFL teams to pool their rights to televise their games and to sell them as a package to television networks. However, the antitrust exemption contained an exception with an exception – it was illegal to restrict the televising of games except within the home territory of a team playing at home.

Television station WTVX began broadcasting from a new, more powerful transmitter located 96 miles north of Miami and its television signal penetrated 40 miles into the NFL's Miami Dolphins' home territory. The Dolphins refused to allow WTVX to broadcast their home games that were not sold-out. WTWV, the owner and operator of WTVX, filed an antitrust lawsuit against the Dolphins and the NFL, arguing that the Dolphins can legally restrict the "televising" of their games only within their home territory and since the transmitter is located outside the Dolphins' home territory, the Dolphins cannot prevent WTVX from televising the games. The Dolphins and NFL countered that whether WTVX is televising in the Dolphins' home territory depends on where its television signal penetrates, not where its transmitter is located. The district court ruled in favor of the Dolphins and the NFL. WTWV appealed.

On June 11, 1982, the appeals court affirmed the district court's judgment, concluding that Congress's intent on passing the antitrust exemption was "to permit football teams to engage in limited antitrust activity to protect home game ticket sales."[212] Interpreting "televising" in the way proposed by the plaintiff "would go a long way toward defeating that purpose." The appeals court commented: "If at all possible, courts should interpret statutory language in a way that accomplishes the obvious purpose of Congress in enacting the statute."

NBA's limit on the number of games broadcast on superstations. The NBA imposed limits on the number of games the Chicago

[210] *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa 1953).
[211] *U.S. v. NFL*, 196 F. Supp. 445 (E.D. Pa 1961).
[212] *WTWV v. NFL*, 678 F.2d 142 (11th Cir. 1982).

Bulls could televise on superstation WGN. The Bulls and WGN sued the NBA twice, winning an injunction enjoining the NBA from enforcing its 20-game limit in 1992, but failing to persuade the court to require the NBA to raise the limit to 41 games and to find the NBA's "tax" on games broadcast to national audiences to be excessive in 1996.[213] Since these two cases were discussed in Chapter 3, which addressed conflicts between sports leagues and their members, they will not be discussed in this chapter.

Other Media. Television stations are not the only media companies to challenge sports leagues on antitrust grounds. Newspapers, both print and electronic, want to publicize the results of sporting contests, even those still in progress, as soon as possible. Sometimes a media company's desire to publicize results as soon as possible (and to sell those results to others) clashes with the sports league's desire to earn a return on its investment in reporting results – and the result is an antitrust lawsuit, as in the case of Morris Communications' lawsuit against the PGA Tour. An antitrust dispute has also arisen between the owner of websites with domain names similar to that of NFL teams. In the former case, the court observed that the sports league was simply seeking to prevent free-riding on its investment for reporting results; in the latter, the court ruled that the sports league was simply protecting its trademarks.

PGA's Real-Time Scoring System. Since the early 1980s, the PGA Tour has invested tens of millions of dollars in developing its Real-Time Scoring System (RTSS), an electronic relay system which relies on both state-of-the-art computer technology and dozens of trained workers and volunteers stationed throughout a golf course to enable the PGA to monitor play around the entire course. The information is sent to a remote processing truck, where the player scores are processed and transmitted to the PGA's website, various electronic leaderboards stationed around the golf course, and an online media center where members of the media can access the scores.

Prior to 1999, a credentialed member of the media could view the scores in the media center and then immediately re-key the scores directly into its own computers. As a result, credentialed media members could publish real-time scores on their websites as fast as, if not faster than, the PGA did on its website. One such media member was Morris Communications, a publisher of both

[213] *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. NBA*, 961 F.2d 667 (7th Cir. 1992); *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. NBA*, 95 F.3d 593 (7th Cir. 1996).

print and electronic newspapers, which began selling the scores to third parties. However, in January 1999, the PGA Tour and *USA Today* entered into an exclusive syndication deal and instituted Online Service Regulations which applied to all credentialed media.

The Online Service Regulations stated that credentialed media members could publish a score on any website no sooner than 30 minutes after the shots occurred, thereby giving the PGA Tour the first opportunity to post the real-time scores. In April 1999, the Regulations were amended so that the scores could not appear on an unaffiliated website until 30 minutes after the shots occurred or when the information became publicly available. Shortly afterwards, the PGA Tour permitted Morris Communications to immediately publish scores it obtained from the online media center on its own website, but not the websites of non-credentialed third-parties. The Regulations were amended again in January 2000 so that "no scoring information may be used by, sold, given, distributed or otherwise transferred to, any party other than the Credentialed Site in any manner whatsoever, without the prior written consent of the PGA Tour."

Despite the Online Service Regulations, Morris planned to sell scoring information obtained from the online media center to the *Denver Post*. The PGA Tour agreed to permit Morris to do so, but only for one tournament. In August 2000, the PGA Tour agreed to permit Morris to sell real-time golf scores so long as Morris collected the scores from the PGA Tour's website, not from the online media center. Morris found such a method unworkable given the delay in re-keying information from the PGA Tour website. On September 13, 2000, Morris asked the PGA Tour to permit it to sell real-time scores obtained directly from the online media center. The PGA Tour refused and, on October 11, 2000, Morris filed an antitrust complaint against the PGA Tour alleging monopolization of the Internet markets, unlawful refusal to deal, monopoly leveraging, and attempted monopolization of the Internet markets in violation of Section 2 of the Sherman Act.

The PGA Tour asked for summary judgment, which the district court granted on December 13, 2002.[214] Morris appealed. On March 31, 2004, the appeals court affirmed the judgment of the district court.[215] The appeals court explained:

> Ordinarily, when determining whether a defendant has violated § 2 of the Sherman Act, we first determine the relevant market and then decide whether the defendant possessed monopoly power in that market. In this case,

---

[214] *Morris Communications v. PGA Tour*, 235 F. Supp. 2d 1269 (M.D. Fl J.D. 2002).
[215] *Morris Communications v. PGA Tour*, 364 F.3d 1288 (11th Cir. 2004).

> however, we do not pursue such an inquiry because we agree with the district court that even if PGA possessed monopoly power in the relevant market, Morris's § 2 claims cannot prevail because PGA has a valid business justification for its actions. Therefore, even if PGA is monopolistic, and even if PGA refused to deal with Morris, it has not violated § 2 of the Sherman Act…
>
> In this case, PGA met its business justification burden by showing that it seeks to prevent Morris from "free-riding" on PGA's RTSS technology… To achieve its business purpose, PGA has refused to grant Morris access to PGA tournaments unless Morris agrees not to sell the product of PGA's proprietary RTSS – compiled real-time golf scores – to non-credentialed third-party internet publishers. Morris responds that it has a right to sell such product notwithstanding that RTSS was developed and paid for, and is operated by, PGA. We disagree with Morris. The compiled real-time golf scores acquired through RTSS are not a product that Morris has a right to sell because they are a derivative product of RTSS, which PGA owns exclusively. We agree with the district court that PGA "has a right to sell or license its product, championship golf, and its derivative product, [compiled] golf scores, on the Internet in the same way the [PGA] currently sells its rights to television broadcasting stations."…
>
> If Morris wishes to sell PGA's product, it must first purchase it from PGA… PGA is willing to sell its product to its competitors, including Morris, thereby allowing credentialed media organizations like Morris to syndicate compiled real-time golf scores after paying a licensing fee to PGA. Accordingly, we conclude from the record that PGA has satisfied its burden to show a valid business justification.

The appeals court concluded:

> The district court correctly found that a company – even a monopolist company – that expends time and money to create a valuable product does not violate the antitrust laws when it declines to provide that product to its competitors for free. PGA has accommodated Morris at every step along the way, has agreed to sell its product to Morris, and has acted appropriately to protect its economic interests and investments. Yet Morris demands that it be given access to the product of PGA's proprietary RTSS, without

> compensating PGA, so that Morris can then sell that product to others for a fee. That is the classic example of "free-riding," the prevention of which, under antitrust law, constitutes a legitimate pro-competitive reason for imposing a restriction.

Websites with Domain Names Similar to that of NFL Teams. In May 1997, Steven Weber registered and paid for the rights to the domain names "jets.com" and "dolphins.com" and shortly thereafter listed the domain names for sale on his website. Weber received a letter from counsel for the NFL, NFL Properties, the NFL's New York Jets, and the NFL's Miami Dolphins claiming that he had violated their trademark rights. The company through which the domain names were registered and purchased, pursuant to its policy, responded by putting the domain names on hold and barred their sale or use pending an outcome of the dispute.

Weber filed an antitrust lawsuit against the NFL, NFL Properties, the Jets, and the Dolphins alleging that the defendants "agreed, colluded, and/or conspired to restrain trade" in violation of Section 1 of the Sherman Act and "used the ordinary lawful act of infringement enforcement as the vehicle for an unlawful scheme to attempt to extend their legal monopoly in the [jets dolphins] word market into an illegal monopoly" in violation of Section 2 of the Sherman Act.

The defendants motioned for the district court to dismiss the case, which it did on July 31, 2000.[216] As evidence of collusion and conspiracy, Weber pointed to the letter from counsel alleging that he was violating the defendants' trademark rights. However, the district court observed:

> Courts have found that efforts to protect trademark rights, even those that go as far as bringing suit against a party who has allegedly infringed upon or diluted the trademark owner's rights, represent fair competition, further general trademark policies, and do not constitute violations of antitrust laws…
>
> The weight of the authority dictates that legal efforts to protect trademark rights simply do not constitute a restraint of trade in violation of antitrust laws. That does not mean that there has been no violation of law on the part of the trademark holder, it simply means that it cannot be characterized as violating antitrust legislation where there is no showing by the plaintiff that the action itself was

[216] *Weber v. NFL*, 112 F. Supp. 2d 667 (N.D. Oh W.D. 2000).

> illegal. Here, plaintiff merely has alleged the bald elements of a private antitrust claim in vague and conclusory terms… More significantly, plaintiff must do more than allege that a defendant has sought to enforce his trademark rights to state an antitrust claim. He has not done so.

Regarding the Section 2 claim, the district court argued that Weber mischaracterized the relevant market:

> Plaintiff argues that the relevant market should be defined by the demand for the domain names "jets.com" and "dolphins.com." I disagree.
>
> … The football defendants argue that the market should not be defined in terms of their specific marks, but rather in terms of domain names in general, and since the number of domain names is essentially limitless, their actions could not possibly be seen as an attempt to control or monopolize that market.
>
> The logic of the football defendants' argument is sound, and there is support for their contention in a recent Seventh Circuit decision…
>
> … In this case, the market is defined in terms of domain names in general, not "jets.com" and "dolphins.com." Therefore, I find that plaintiff has not demonstrated that the football defendants have attempted to control the market, and there is no possibility for monopolization thereof.

In summary, numerous entities seek to profit from the product produced by sports leagues, including promoters/sponsors, operators of for-profit sports camps, merchandisers, and the media. Some want to use a league's players and coaches for their own profit and have challenged the league's rules in this regard on antitrust grounds, generally unsuccessfully due to the pro-competitive effect of such rules. Merchandisers have had difficulty challenging league rules because the league is typically not a competitor of the merchandiser. The media has successfully challenged some league rules, but not others.

Chapter 11

Sports Leagues vs. Fans, Taxpayers, and the Federal Government

An individual can be a rabid sports fan and yet be upset by the actions of the team (and/or the sports league) which he or she supports. Even rabid fans may complain about 'excessive' prices for game tickets, television game packages, and licensed merchandise. They may be upset about the tying of the purchase of preseason tickets with the purchase of regular season tickets or the television blackout of non-soldout home games. They may be outraged by unfair labor practices that lead to cancellation of some or all of a season due to a player strike or owner lockout. They may feel unfairly treated by the league's suspension of 'their' team for violating league rules. Similarly, taxpayers, regardless of whether they are fans, may be upset at having to pay for a sports stadium to be used by a professional sports team whose owners and players are multimillionaires. The federal government, the representative of 'the people', acts to enforce the antitrust laws against sports leagues – and to grant sports leagues antitrust exemptions.

U.S. Government Antitrust Lawsuits Against Sports Leagues. In the 1950s, the U.S. government launched two significant antitrust attacks involving sports leagues: (1) the government attacked an alleged antitrust conspiracy among organizations in the business of promoting professional championship boxing contests, which ultimately led to the court ordering the organizations' dissolution (as well as other remedies) and (2) the government challenged the NFL's television 'blackout' policy which prevented the broadcast of 'outside' games into a team's home territory on days when it played – whether at home or away. The former led the U.S. Supreme Court to stress that its previous decisions support an antitrust exemption for the business of baseball only, not for all sports leagues generally. The latter eventually resulted in the U.S. Congress passing the Sports Broadcasting Act (SBA) of 1961, which permitted the collective sale of television rights by sports leagues on behalf of their members and allowed the blackout of the broadcast of home games in the home team's territory. In 1973, Congress passed an 'anti-blackout law' which prohibited the blackout of the broadcast of a home game in the home team's territory as long as the game was sold-out within 72 hours of gametime. The anti-blackout law expired at the end of the 1975 season, but the NFL continued to comply with the spirit of the law. A number of fans and local businesses attempted to challenge the NFL's blackout policy on antitrust grounds, without success.

> *Professional Boxing*. In January 1949, the heavyweight champion of the world, Joe Louis, who wished to retire, entered into an agreement with James D. Norris and Arthur M. Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena, and the St. Louis Arena. Louis agreed to obtain exclusive promotion rights (including radio, television, and movie revenues) from each of the four leading contenders, who would fight a series of elimination matches to determine the new champion. Louis then assigned the exclusive rights to the International Boxing Club, Illinois (IBC-I), which was organized by Norris and Wirtz,

and, in return, Louis received $150,000 in cash, an employment contract, and a 20% stock interest in IBC-I.

Norris and Wirtz also held stock in Madison Square Garden (MSG), which had an exclusive lease with Mike Jacobs. In March 1949, Norris and Wirtz lobbied MSG to buy out Jacobs' interest, which included exclusive leases not only with MSG but also with Yankee Stadium and the St. Nicholas Arena, as well as a contract with then-welterweight champion Sugar Ray Robinson. MSG did so and assigned the contracts to International Boxing Club, New York (IBC-NY).

The only remaining significant competitor in the promotion of championship boxing matches was Tournament of Champions, Inc. (TC), which was part-owned by the Columbia Broadcasting System (CBS) and had an exclusive lease with the Polo Grounds as well as an exclusive promotion contract for the next two fights by the then-middleweight champion. In May 1949, MSG acquired TC for $100,000 plus 25% of the profits on the two middleweight matches and assigned the assets to IBC-NY. In a simultaneous but separate five-year deal, CBS promised not to invest in or promote any professional boxing matches and, in return, CBS obtained the first refusal right to broadcast certain boxing matches held at MSG.

Thus, Norris, Wirtz, IBC-I, IBC-NY, and MSG had exclusive control of three championship divisions (i.e., heavyweight, middleweight, welterweight) and perpetuated their hold by requiring each contender in a championship fight to grant them an exclusive promotion contract (including film and broadcast rights) to his championship fights for a period from three to five years. The arenas which they controlled had staged 50% of all championship boxing contests fought during the period 1937-48. Norris and Wirtz increased their stock ownership in MSG to the point where they were able to control it and dictate its boxing activities.

In March 1952, the U.S. government filed an antitrust lawsuit against Norris, Wirtz, IBC-I, IBC-NY, and MSG. The complaint alleged, in the words of the U.S. Supreme Court, that "the defendants have restrained and monopolized this trade and commerce – 'the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests in the United States' – through a conspiracy to exclude competition in their line of business", in violation of Sections 1 and 2 of the Sherman Act.[217] During the period from June 1949 (when the defendants staged their first championship bout) until March 1952 (the date of the complaint), the defendants promoted (or participated in the promotion of) 19 (90%) of the 21 championship boxing matches held in the U.S. From June 1949 until May 15, 1953 (the date of the amended complaint), the defendants staged 36 (82%) of the 44 championship boxing matches held in the U.S. In fact, the defendants staged every heavyweight and middleweight championship bout held in the United States during this period.

[217] *U.S. v. International Boxing Club of New York*, 348 U.S. 236 (1955).

The district court granted the defendants' motion to dismiss on the grounds that the defendants were engaged in the live presentation of local exhibitions (and thus not in interstate commerce) and, in accordance with the U.S. Supreme Court's decisions in *Federal Baseball* and *Toolson*, the defendants' business was outside the reach of the federal antitrust laws. The appeals court reversed the district court's judgment, ruling that businesses were not exempt from the antitrust laws simply because they were based on the performance of local exhibitions.

The matter went to the U.S. Supreme Court, which issued its decision on January 31, 1955.[218] The Supreme Court explained:

> The question thus presented is whether the defendants' business as described in the complaint – the promotion of professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission – constitutes "trade or commerce among the several States" within the meaning of the Sherman Act.
>
> The question is perhaps a novel one in that this Court has never before considered the antitrust status of the boxing business. Yet, if it were not for Federal Baseball and Toolson, we think that it would be too clear for dispute that the Government's allegations bring the defendants within the scope of the Act. A boxing match – like the showing of a motion picture … or the performance of a vaudeville act … or the performance of a legitimate stage attraction … -- "is of course a local affair." But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. Apart from Federal Baseball and Toolson, it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights.

The Supreme Court also noted that four recent bills before Congress would have granted an antitrust exemption to all professional sports enterprises and all four were unanimously opposed by the House's Subcommittee on Study of Monopoly Power of the Committee on the Judiciary. Thus, "the defendants in the instant case are now asking this Court for precisely the same exemption which enactment of those bills would have afforded." The Court stated that if the defendants are to be exempted from the antitrust laws, the exemption will have to come from Congress.

---

[218] *U.S. v. International Boxing Club of New York*, 348 U.S. 236 (1955).

In a dissenting opinion, Justice Frankfurter pointed out the lack of logic in upholding the antitrust exemption for the business of baseball, but denying the antitrust exemption to the business of other sports:

> It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a "trade or commerce." … Indeed, the interstate aspects of baseball and the extent of the exploitation of baseball through mass media are far more extensive than is true of boxing. If the intrinsic applicability of the Sherman Law were the issue, no attempt would be made to differentiate the two sports.

In another dissenting opinion, Justice Minton argued that boxing is not trade or commerce:

> Of course, there was at that time only one champion, Joe Louis. He had a monopoly on that, and while he got it by competition, he did not get it in trade or commerce. I do not suppose that Joe Louis had to go back into the ring and be walloped to a knockout or a decision before he could surrender his championship. And if he arranged with four other fellows to fight it out in elimination contests for the championship and no one else was restrained from doing the same, it is difficult for me to see how there was any conspiracy. If other promoters wanted to start an elimination contest, they were free to do so. Whether they received public acceptance depended upon something other than trade or commerce. What does a boxer or athlete have for sale but "personal effort, not related to production," which, as Justice Holmes said, is not commerce? Such services they may contract about free from any control of the Sherman Act. Suppose the appellee did, as the Court states, control what the parties called all but two of twenty-one championship contests, what trade or commerce have they restrained?
>
> As I see it, boxing is not trade or commerce. There can be no monopoly or restraint of nonexistent commerce or trade. Whether Congress can control baseball and boxing I need not speculate. What I am saying is that Congress has not attempted to do so. If there is a conspiracy, it is not one to control commerce between the States.

The case went to trial and the government prevailed. The district court ordered the dissolution of IBC-I and IBC-NY, the divestiture of certain stock owned by Norris and Wirtz, and injunctive relief, in the words of the U.S. Supreme Court, "designed to open up the market in the business of promoting professional world championship boxing matches."[219] The defendants appealed, arguing that the district court had carved out too narrow a relevant market – the market for championship boxing contests. Once again, the case ended up in the U.S. Supreme Court, which issued its opinion on January 12, 1959, upholding the district court's judgment.[220]

In support of the district court's definition of the relevant market, the Supreme Court stated:

> With this in mind, the lower court in the instant case found that there exists a 'separate, identifiable market' for championship boxing contests. This general finding is supported by detailed findings to the effect that the average revenue from all sources for appellants' championship bouts was $154,000, compared to $40,000 for their nonchampionship programs; that television rights to one championship fight brought $100,000, in contrast to $45,000 for a nontitle fight seven months later between the same two fighters; that the average 'Nielsen' ratings over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs (reflecting a difference of several million viewers between the two types of fights); that although the revenues from movie rights for six of appellants' championship bouts totaled over $600,000, no full-length motion picture rights were sold for a nonchampionship contest; and that spectators pay 'substantially more' for tickets to championship fights than for nontitle fights. In addition, numerous representatives of the broadcasting, motion picture and advertising industries testified to the general effect that a 'particular and special demand exists among radio broadcasting and telecasting (and motion picture) companies for the rights to broadcast and telecast (and make and distribute films of) championship contests in contradistinction to similar rights to nonchampionship contests.'
>
> In view of these findings, we cannot say that the lower court was 'clearly erroneous' in concluding that nonchampionship fights are not 'reasonably interchangeable for the same purpose' as championship contests.

As for the relief granted by the district court, the Supreme Court explained: "The decree should (1) put 'an end to the combination or conspiracy when that is itself the violation'; (2) deprive 'the antitrust defendants of the benefits of their conspiracy'; and (3) 'break up or render impotent the monopoly power which violates the Act.'" The Court concluded that "the relief granted was not beyond the allowable discretion

---

[219] *International Boxing Club of New York v. U.S.*, 358 U.S. 242 (1959).
[220] *International Boxing Club of New York v. U.S.*, 358 U.S. 242 (1959).

of the district court." The Court noted, for example, that since May 15, 1953, there have been 37 championship boxing matches held in the U.S., excluding one bantamweight match. The defendants had "promotional control" of 24 (65%) of the 37 bouts, and "were not financial strangers to the other 13 championship contests which were held in cities other than New York and Chicago." Three justices – Frankfurter, Harlan, and Whittaker – dissented on the issue of relief.

NFL Blackout Policy. On October 9, 1951, the U.S. government filed an antitrust complaint against the NFL seeking an injunction against the enforcement of the provisions of Article X of the NFL's Bylaws, which the NFL had adopted earlier that same year. Article X, in the words of the district court, "provides that no club shall cause or permit a game in which it is engaged to be telecast or broadcast by a station within 75 miles of another League City on the day that the home club of the other city is either playing a game in its home city or is playing away from home and broadcasting or televising its game by use of a station within 75 miles of its home city, unless permission for such broadcast or telecast is obtained from the home club."[221] The NFL played most of its regular season games on Sunday and thus the effect of Article X was to prevent audiences within 75 miles of the home city of any participating team that Sunday from watching any NFL games not involving that team, unless that team granted such permission – a seldom occurrence. Article X included special provisions for cases where the home territories of two teams overlapped.

Article X contained four basic provisions: it (1) "prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing at home"; (2) "prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing away from home and permitting the telecast of their games into their home territories"; (3) "prevents the broadcasting by radio of outside games into the home territories of other teams both on days when the other teams are playing at home and on days when the other teams are playing away from home and are permitting the games to be broadcast or televised into their home territories"; and (4) "gives the Football Commissioner an unlimited power to prevent any and all clubs from televising or broadcasting any or all of its or their games."[222]

The district court issued its opinion on November 12, 1953.[223] Each of the four basic provisions was analyzed separately. Regarding the provision preventing outside telecasts into the home territory of a team playing at home, the district court observed: "There can be little doubt that this provision constitutes a contract in restraint of trade." The question was

[221] *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa 1953).
[222] *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa 1953).
[223] *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa 1953).

whether it was an unreasonable restraint of trade. The district court also noted that the provision "is a clear case of allocating marketing territories among competitors, which is a practice generally held illegal under the anti-trust laws." However, it is not always illegal – and thus a rule of reason analysis is needed. The court acknowledged that professional football "is a unique type of business" and teams in a professional sports league "must not compete too well with each other in a business way" or else "the stronger teams would be likely to drive the weaker ones into financial failure", and thus "eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably." The court noted that "in the National Football League less than half the clubs over a period of years are likely to be financially successful" and, therefore, "it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance." One such rule would be to "reasonably restrict the projection of games by radio or television into the home territories of other teams." The district court explained:

> The evidence indicates that television audiences and sponsors have so little interest in games between weak teams that it is very difficult to obtain sponsors for outside telecasts of such games. Consequently, the weaker teams lose practically nothing by this television restriction. But they benefit greatly from it in that the restriction adds to their home game attendance by preventing potential spectators from staying home to watch on television exciting outside head-on games between strong teams. The competitive position of the weaker teams is improved by this increase in home attendance, while the competitive position of the stronger teams is weakened somewhat by their inability to sell to sponsors the right to televise their desirable head-on games into the home territories of the weaker teams when the weaker teams are playing at home.

The court pointed to several pieces of evidence to support its position that the telecast of an outside game would adversely affect attendance at home games. One concerned attendance at Los Angeles Rams games during the 1950 season when all of its home games were televised into its home territory. The evidence "shows quite clearly that the telecasting of a home game into a home territory while the home game is being played has an adverse effect on attendance at the game" and this "clearly indicates by implication that the telecast of an outside game, particularly a head-on game, also adversely affects attendance at a home game." Other evidence comes from studies of college football attendance, since "the conclusions in these reports concerning the adverse effect of telecasts of college outside games on attendance at college home games do indicate that the telecasting of outside professional football games would have a similar effect upon attendance at home games of the professional teams." The district court concluded:

> The greatest part of the defendant clubs' income is derived from the sale of tickets to games. Reasonable protection of home game attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football as we know it today.
>
> … This particular restriction promotes competition more than it restrains it in that its immediate effect is to protect the weak teams and its ultimate effect is to preserve the League itself. By thus preserving professional football this restriction makes possible competition in the sale and purchase of television rights in situations in which the restriction does not apply.
>
> The purposes of the Sherman Act certainly will not be served by prohibiting the defendant clubs, particularly the weaker clubs, from protecting their home gate receipts from the disastrous financial effects of invading telecasts of outside games. The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists. The League is truly a unique business enterprise, which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs. The first type of restriction imposed by Article X is a reasonable one and a legal restraint of trade.

The district court then addressed the restriction on the telecasting of outside games into the home territory of a team playing an away game and telecasting its own game into its home territory. In this case, the restriction cannot serve to protect the game's gate attendance since few fans in the home territory would be expected to attend the away game even if the game was not televised in the home territory. The district court rejected the argument that the restriction protected the home team's gate attendance at future home games by protecting the team's 'good will', stating that "there is not one shred of evidence, not one specific example based on actual experience, to support this opinion which, more accurately stated, is nothing more than conjecture." Rather, "the primary reason for the restrictions in this situation actually is to enable the clubs in the home territories to sell monopoly rights to purchasers of television rights to away games." The district court concluded:

> The record in this case contains no factual justification for Article X's suppression of competing telecasts of League games when, for example, the Philadelphia Eagles' away game is being televised in its home territory. Defendants' speculation or conjecture that without such restriction gate attendance would decline a week or

> two later at the Eagles' home game has little probative value. Article X's restriction on this type of competition is an unreasonable and illegal restraint of trade.

Next, the district court addressed radio broadcasts of outside games into home territories of teams either playing a home game or playing an away game and televising or broadcasting the game back to the home territory:

> There is no evidence whatsoever indicating any adverse effect of radio broadcasts of outside games in the home territory of another club. Since each of the defendant clubs permits the broadcasting in its home area of all of its own games (both away games and home games), it is apparent that none of them feels that such broadcasts have any significant adverse effect on gate attendance at their own games. Indeed, the evidence indicates that broadcasts of outside games when there is no home game have a stimulating effect on attendance at home games because of the interest thereby created in professional football generally. Granting monopoly rights to broadcasts of away games (that is, the right to broadcast away games in the home territory coupled with the suppression of competition from "outside" broadcasts or telecasts) enhances the value of such rights to purchasers, but has no significant effect on attendance at football games. There is no factual justification for Article X's territorial restrictions on the sale of radio broadcasting rights. Therefore, they are illegal under the Sherman Act.

The district court then addressed Article X's requirement that the NFL Commissioner approve in writing the telecast or broadcast of all games. The court noted that the Commissioner's decision of whether or not to give his approval "is final, binding, conclusive, and unappealable" and thus the Commissioner has "unlimited and arbitrary power to prevent the broadcasting and televising of any and every game", which in turn gives him "the power to set up and enforce the very same restrictions hereinbefore held to be illegal." The district court concluded:

> Therefore, it is apparent that the Commissioner must be prohibited from exercising his veto power over contracts for the purpose of maintaining and enforcing these illegal territorial restrictions. Unless his power is limited in this manner, it would be a futile act for the Court to enjoin these illegal restraints. Accordingly, the enforcement of Section 1(a) of Article X will be enjoined in such a way that the Commissioner will be prohibited from exercising his power to disapprove contracts for the purpose of effecting and maintaining the territorial restrictions hereinbefore held to be illegal.

Finally, the district court rejected the NFL's argument that professional football is not interstate commerce and thus is not subject to the federal antitrust laws. The court explained:

> Defendants contend that the action against them must be dismissed because professional football is not commerce or interstate commerce. This contention must be rejected. Radio and television clearly are in interstate commerce… The restrictions by professional football on the sale of radio and television rights impose substantial restraints on the television and radio industry. Since the League by-laws restrict substantially something which is in interstate commerce it is immaterial whether professional football by itself is commerce or interstate commerce…
>
> I am not unmindful of the decisions of the Supreme Court in Federal Base Ball Club v. National League … and in the very recent cases, decided November 9, 1953, of Toolson v. New York Yankees, Inc…. In those baseball "reserve clause" cases the Court dismissed anti-trust suits against the major professional baseball leagues on the theory that big-league baseball is a sport, local in its nature, and not interstate commerce. The only restriction alleged in the baseball cases was in the internal operation of professional baseball itself. The only question involved in those cases was whether professional baseball itself is interstate commerce. No question of restrictions on the sale of radio and television rights was involved in those cases. The present case, on the other hand, primarily concerns restrictions imposed by the National Football League on the sale of radio and television rights. Therefore, the present case basically concerns the League's restraint of interstate commerce in the radio and television industries. It is obvious that whether professional football itself is or is not engaged in interstate commerce is immaterial in the present case and that the decisions in the baseball cases referred to do not control the present case.

The district court ordered the U.S. government and the NFL to each submit a proposed decree within 30 days. Final judgment in the case was entered on December 28, 1953.

On April 24, 1961, the NFL and the Columbia Broadcasting System (CBS) entered into a contract granting CBS the sole and exclusive right to televise NFL games for two years, with certain limited exceptions. Prior to that date, each NFL team negotiated its own broadcast deals. Under the 1961 contract, the NFL would receive $4,650,000 from CBS annually, which (after certain deductions) would then be distributed equally to the NFL's 14 teams. The NFL changed its policy after the upstart American Football League signed a single broadcast contract with NBC in 1960 (the NBA and NHL had entered into similar broadcast contracts).[224] The NFL petitioned the district court to find that the NFL-CBS contract does not violate the 1953 Final Judgment. The government opposed the NFL's petition. The district court decided the case on July 20, 1961, finding that the NFL-CBS contract does violate the 1953 Final Judgment.[225]

The district court observed that Section V of the Final Judgment prohibits agreements "having the purpose or effect of restricting the areas within which broadcasts or telecasts of games … may be made." The NFL-CBS contract, however, gives CBS the right to determine which games will be telecast and where such games will be televised and therefore the contract "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." Therefore, the district court was "obliged to construe the Final Judgment as prohibiting the execution and performance of the contract dated April 24, 1961, between the National Football League and the Columbia Broadcasting System."

Seventy-two days after the district court's decision, Congress passed the Sports Broadcasting Act, which President Kennedy signed into law on September 30, 1961. The Sports Broadcasting Act stated:

> 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, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey 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, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

The Sports Broadcasting Act contained certain exceptions aimed at protecting NCAA football from NFL football. Specifically, the antitrust exemption would not apply to professional football broadcast contracts that permitted the televising of games on Fridays and Saturdays (the days on which most NCAA football games were played) within 75 miles of where an NCAA football game was scheduled to be played. When the Sports Broadcasting Act was expanded in 1966 to give an antitrust exemption to the NFL-AFL merger, the broadcast exception was expanded to protect both NCAA and high school football games.

Note that the Sports Broadcasting Act provides an antitrust exemption only for professional sports leagues – therefore the Act does not, for example, give the NCAA an antitrust exemption to collectively

[224] Voluntary Trade Council (2005).
[225] *U.S. v. NFL*, 196 F. Supp. 445 (E.D. Pa 1961).

negotiate a broadcast deal on behalf of all of its members. Also note that the Act provides an antitrust exemption only to professional football, baseball, basketball, and hockey – therefore the Act does not give an antitrust exemption to, for example, professional soccer. Moreover, note that the antitrust exemption is restricted to "sponsored telecasting" and thus arguably does not apply to games televised on satellite TV (e.g., DirecTV) or cable TV (e.g., ESPN) because such telecasts are not 'sponsored.' Nor would the antitrust exemption apply to radio broadcasts of games because they are not 'telecasted.'

According to Noll (2007), the immediate effect of the Sports Broadcasting Act was a reduction in the number of televised games in baseball and football and a more than tripling of rights fees. Similarly, Cave and Crandall (2001) argue that the result of the passage of the Sports Broadcasting Act was "a dramatic increase in the value of national network television sports rights throughout the 1960s as a network triopoly bid aggressively for the right to broadcast NFL games, and – more modestly – for the rights to other professional league broadcasts." (p. F9) One interpretation of the increase in the value of national network television sports rights is that, by collectively negotiating on behalf of all of its members, the NFL was able to exercise monopoly power over broadcasters, thereby resulting in a reduction in social welfare.

Several recent economic studies suggest that this interpretation may be overly-simplistic. Heubeck (2004) compares the collective and individual sale of games and analyzes two models: (1) the league acts as a monopolist in selling the games of its members and (2) a broadcaster has to obtain broadcast rights from each of the two teams involved in a specific game. She finds that price is higher (and quantity lower) when the games are sold individually by the participants. The reason is that the value of a broadcast right from one participant is worthless unless the broadcaster can also obtain a broadcast right from the other participant. Heubeck shows that a broadcaster would have to pay more in total to the two participants for each individual game than it would have to pay the monopolist sports league for the package of all games. An alternative to the individual sale of games by both participants would be to have a rule whereby the home team owns the broadcast right to the game, which it is free to sell to the highest bidder. Heubeck concludes that "in order to internalize externalities in demand and, hence, get an outcome that is optimal in the social welfare sense, the rights to all games have either [to] be bundled and sold collectively by one single economic entity, e.g. the league or association, or they have to be sold individually, i.e. each game by one party." (p. 18)

Falconieri, Palomino, and Sákovics (2004) compare social welfare under the individual and collective sale of broadcast rights. They argue that social welfare depends on three effects: a bargaining power effect, a prize effect, and a free-riding effect. The bargaining power effect may be positive or negative depending on the relative bargaining powers of the parties The prize effect may also be positive or negative (i.e., collective sale is welfare improving if the exogenous performance-related prize is small so that the league could boost teams' incentives to invest by implementing a performance-based revenue-sharing system). The free-riding effect is negative under a collective sale and more negative the greater the number of teams in the league (i.e., under collective sale with revenue-sharing, the greater the number of teams in the league, the less incentive a team has to invest in its performance). They conclude that "collective sale is socially preferable when (a) leagues are small and relatively homogeneous in terms of clout and (b) teams get little performance-related revenues." (p. 833)

Several pro-competitive rationales for the collective negotiation of broadcast deals have been suggested. As just discussed, some studies contend that, at least under certain circumstances, social welfare is higher under collective sale of sports broadcast rights than under the individual sale of each game's broadcast rights. Moreover, Roberts (2001) contends that (1) collective selling creates substantial cost-saving efficiencies by reducing the number of people employed by each team to negotiate, draft, and manage the broadcast deals and by simplifying the negotiations of broadcasters who would be able to negotiate with a single entity instead of with 30 or more individual teams and (2) collective selling enhances the quality of the league's product by preventing huge revenue disparities across teams.

However, whether the reduction in revenue disparities translates into greater competitive balance is a matter of dispute. As Cave and Crandall (2001) explain, a team's incentive to invest in talent depends on the marginal value of talent. Even if broadcast revenue is shared equally, large market teams may receive more revenue from a given amount of talent (due, for example, to higher gate revenue). As a result, large market teams will still have an incentive to acquire more talent than small market teams and thus the sharing of broadcast revenue will not promote competitive balance: "This pooling of broadcast revenues does not eliminate the advantages of large-market teams in securing talent, and therefore it does not necessarily contribute to competitive balance." (p. F14) Similarly, Noll (2007) concludes that "centralization of rights sales does not improve competitive balance or benefit financially weak teams." (p. 400)

Gürtler (2005) argues that whether a league prefers collective (i.e., "central") or individual (i.e., "decentral") sale of games depends on the nature of the demand for the league's product:

> It was found that a sports association that is only interested in competitive balance will always market centrally. In contrast, a sports association that is interested in one extremely high-performing team or that wishes to maximise the aggregate performance in the league for some parameter constellations chooses central marketing, while for others it chooses decentral marketing.

Usually, a sports association cares for both, intense competition between the clubs and high absolute performance. Central marketing is then always preferred when TV revenue allocation under decentral marketing is extremely unjust. Under central marketing, revenue could be redistributed such that the aggregate number of high-ability players in the league increases. In this case, competition becomes more intense and absolute performance gets higher. On the other hand, decentral marketing might be optimal, if the creation of a very strong team is desired that cannot be reached under central marketing.

Moreover, it was shown that we have extreme conflicts of interest between the more and less famous clubs and the more and less able players. The "weak" parties, i.e., the small clubs and less able players, always prefer central marketing, while the big clubs and more able players wish to exploit their superior position by means of decentral marketing. (p. 18)

In 1973, Congress passed Public Law 93-107, which, in the words of Siegfried and Hinshaw (1979), "provided that if any game of a professional sports club was to be televised on a network pursuant to a league contract and all tickets offered for sale had been sold 72 hours before game time, blackout agreements prohibiting the simultaneous telecast of the game in the home territory were invalid" – with the definition of "home territory" left somewhat ambiguous. (p. 1) This so-called 'anti-blackout law' expired at the end of the 1975 season, but the NFL continued to comply with the spirit of the law. The alleged rationale for the NFL blackout rule was that the televising of a non-soldout home game increased the number of no-shows at the game, which in turn reduced food, parking, and other concession revenues.

Several economic studies investigate the NFL's blackout policy and test whether blacking-out the local telecast of a home game raises live attendance at the game. The early evidence is that it did not, but more recent studies indicate that blacking-out home games that are not sold-out within 72 hours of gametime raises live attendance by reducing the number of no-shows. Table 11.1 summarizes the economic literature.

Table 11.1

The Impact of NFL Local Area Television Blackouts on Live Attendance

Study	Data	Attendance Measure	Blackout Measure	Estimate
Putsis & Sen (2000)	NFL games played by the 8 teams in the 1996-97 season that did not sell out all of their games (Baltimore, Buffalo, Cincinnati, Detroit, Indianapolis, Los Angeles, Minnesota, Seattle).	Individual game ticket sales.	Estimated probability of blackout.	11,310 more fans at blacked-out games.
		Game-day no-shows.	Estimated probability of blackout.	4,959 fewer no-shows at blacked-out games.
Welki & Zlatoper (1994)	NFL games in the 1991 season.	Game attendance.	Dummy variable denotes blacked-out games.	5,300 fewer fans at blacked-out games.
Zuber & Gandar (1988)	NFL games in the 1983 and 1984 seasons in which the blackout was always or partially lifted.	Game-day no-shows as a percentage of stadium capacity.	Dummy variable denotes not blacked-out games.	Not statistically significant.
	NFL games in the 1983 and 1984 seasons in which the blackout was never or partially lifted.	Game-day no-shows as a percentage of stadium capacity.	Dummy variable denotes not blacked-out games.	2,201 and 3,305 fewer no-shows at blacked-out games in 1983 and 1984 seasons, respectively.
Siegfried & Hinshaw (1979)	NFL games in the 1973-1977 seasons, excluding the home games of two expansion clubs (Seattle, Tampa Bay).	Game-day no-shows as a percentage of tickets distributed.	Dummy variable denotes not blacked-out games.	Not statistically significant.

Siegfried and Hinshaw (1979) did not find a statistically significant impact on game-day no-shows using data for the 1973-77 seasons, excluding the games of two expansion teams (i.e., Seattle, Tampa Bay). Welki and Zlatoper (1994) estimate that there were 5,300 fewer fans at blacked-out games during the 1991 season, which is hardly surprising since it is the non-soldout games that get blacked-out.

On the other hand, although Zuber and Gandar (1988) did not find a statistically significant impact on game-day no-shows for those NFL games in the 1983 and 1984 seasons in which the blackout was always or partially lifted, they found that, for games in which the blackout was never or partially lifted, blacking-out a game was associated with 2,201 and

3,305 fewer no-shows during the 1983 and 1984 seasons, respectively. In other words, it appears that if fans knew there was little or no chance the game was going to be televised, they were more likely to attend. Similarly, Putsis and Sen (2000) analyze data on the NFL games played by the eight teams that did not sell out all of their home games in the 1996-97 season and estimate that there were 4,959 fewer no-shows and 11,310 more fans at blacked-out games.

Putsis and Sen emphasize, however, that the gain in on-site stadium revenue due to the blackout is more than offset by the societal losses from not broadcasting the game in the home territory. As a result, they suggest a number of possible policy interventions, including the passage of legislation outlawing blackouts:

> It is possible to argue that the antitrust exemption given to professional sports organizations (allowing them to bargain as a cartel) is the reason why the blackout rule exists in the first place, and hence is the cause of any market failure. More specifically, one could argue that it is this antitrust exemption that allowed the NFL to generate sufficient bargaining power to negotiate the 72-hour blackout contracts into all broadcast agreements. Clearly, the television networks would prefer local broadcasts since each game generates the most interest (and ratings) in the local market, even for blacked out games. However, legislating against local blackout (if constitutional) does not produce a Pareto superior market outcome (since the policy intervention results in a reduction in team revenue, the NFL is made worse off and the redistribution cannot be Pareto superior). (p. 1506)

Sports Fans' Antitrust Lawsuits Against Sports Leagues. Sports fans have often attempted to use the antitrust laws to overturn sports leagues' rules, policies, or actions with which they disagree. For example, sports fans have challenged the NFL's blackout policy which prevents the televising of home games within a 75-mile radius of the game site, the NFL's and NBA's pricing of television game packages, the tying of regular season and preseason game tickets, the pricing of licensed merchandise, league suspensions of teams, a league's alleged unfair labor practices, and scheduling of contests. In general, such antitrust challenges by sports fans have been largely unsuccessful.

NFL's Blackout Policy. Sports fans have made numerous attempts to challenge the NFL's blackout policy, without success. For example, several plaintiffs filed an antitrust lawsuit against the NFL, the New York Giants, and the National Broadcasting Company (NBC) seeking a preliminary injunction which would have required NBC to either televise nationally the NFL's championship game to be held on December 30, 1962 in Yankee Stadium or not to televise it at all. Under the NFL's blackout policy, the game was to be televised nationally except within the

75-mile radius surrounding Yankee Stadium. The plaintiffs contended that the blackout policy was an unreasonable restraint on interstate commerce and trade. The district court issued its decision on December 28, 1962, denying the plaintiffs' request for a preliminary injunction.[226]

The district court disagreed with the plaintiffs' assertion that the blackout policy authorized by the Sports Broadcasting Act applied only to regular-season games, not to post-season games (and thus not to the championship game). The district court reasoned that if Congress had wanted to exclude the championship game from the blackout authorization, it would have explicitly done so. The district court also rejected the plaintiffs' assertion that championship games are automatic sellouts. Although the upcoming championship game was a sellout, 10 of the 13 championship and playoff games during the period 1950-61 were not sellouts. Moreover, the court noted: "The rights of the defendants are neither diminished nor enhanced by the fact that Sunday's game is sold out." The court added:

> The defendants, on the other hand, contend that were the injunction to be granted it would be to their extreme detriment as it would bring about the very adverse economic effects which the restrictive broadcasts were intended to eliminate. They point out that to compel them to lift the area blackout would seriously diminish the sale of box office tickets for future championship games – and the circumstance that the current game is a sellout does not eliminate the need for protection. Their contention is that suspicion in the public mind that a championship game might be televised in the local area of a home team would, in succeeding years, bring into play the same factors which resulted in nonsellouts in earlier years – that sales would be hampered; that many fans would prefer, particularly at times of inclement and cold weather, to view the game at their homes instead of at stadia.
>
> The defendants make the further contention that many fans who bought tickets for the current championship game acquired them as a result of the purchase of season tickets for seven regular home games, which carried an option to buy tickets for the championship game; that if it is known or suspected that the championship game might be televised locally on the day of the home game, then the purchase of regular season tickets, a substantial source of revenue, will be greatly curtailed. Of course, whether or not the dire consequences which defendants envisage will materialize cannot now be determined with certainty, but the concern expressed by the defendants that ticket sales will be impaired in the future bears a degree of plausibility based upon prior experience.

---

[226] *Blaich v. NFL*, 212 F. Supp. 319 (S.D.N.Y. 1962).

In denying the plaintiffs' request for a preliminary injunction, the district court commented: "Undoubtedly, plaintiffs and millions of other football fans within the seventy-five mile area eagerly desire to see Sunday's championship game in the comfort and warmth of their homes, but their preferences cannot overcome the right of these defendants, as authorized by Congress, to impose the local area restriction, believing as they do that it serves their economic interest, however ill advised the public may view their policy."

Another antitrust challenge to the NFL's blackout policy concerned the 1972 Super Bowl to be played in New Orleans. The owner of two Ramada Inns in New Orleans brought an antitrust lawsuit against the NFL because the game was to be telecast locally on a delayed basis. For the past 20 years, the NFL had followed its practice of not televising locally a World Championship or Super Bowl game. The district court issued its opinion on December 17, 1971, denying the plaintiffs' motion for summary judgment and granting the NFL's motion for summary judgment.[227]

The district court observed that the plaintiffs' Ramada Inns would likely be completely filled during Super Bowl weekend and thus the plaintiff "has produced no evidence of possible irreparable damage and no concrete evidence of actual or probable damage." The court added:

> There is no evidence that the arrangements made by the Commissioner for the telecasting of the 1972 Super Bowl Game have any effect on hotels and motels like the Ramada Inn by reason of the local blackout of the Super Bowl Game. Carriage Inn, Inc., as the owner of a motel, is not within the area of the economy which may be endangered by a break-down of any competitive conditions. Nor has it been shown that any damages to the plaintiff under the antitrust laws will result directly from the NFL practices of which plaintiff has made complaint. No competition in which the plaintiff participates has been foreclosed.

The provision of the Sports Broadcasting Act protecting high school football games from competition with televised NFL games also was the subject of an antitrust lawsuit. The Colorado High School Activities Association (CHSAA) brought an antitrust lawsuit against the NFL for televising games within the 75-mile radius of a high school game. The blackout provision of the Sports Broadcasting Act required that notice of the high school game date and "game site" be published in a newspaper with general circulation. On or before August 1, 1977, the CHSAA published an announcement that the Colorado state 4A football championship game would be held "in Denver" on December 10, 1977 at 1 p.m. The CHSAA could not identify the exact game site since its practice was to designate one of the two finalists as the 'home team.'

[227] *Campo v. NFL*, 334 F. Supp. 1181 (E.D. La 1971).

The district court issued its opinion on September 28, 1981, denying the plaintiffs' motion for summary judgment and granting the NFL's motion for summary judgment.[228] The court ruled that the term "game site" means "the football field or stadium where the game is to be played" and thus the CHSAA failed to give notice of the 1977, 1978, and 1979 championship 'game sites', "and therefore these games did not qualify for § 1293's exception to the antitrust exemption conferred upon professional football television broadcast agreements by § 1291."

Television Game Packages. The NFL and NBA have deals with DirecTV, a satellite television provider, which allow sports fans to watch most regular season games. However, fans cannot purchase only those games they wish to watch – they have to buy the entire season package. As a result, sports fans have filed antitrust lawsuits against the NFL, the NBA, and their member teams alleging a price-fixing conspiracy. The NFL attempted to settle its lawsuit out of court, but the district court rejected the settlement agreement, finding it to be "not fair, reasonable, and adequate."[229] On the other hand, the district court granted the NBA's and DirecTV's motions to dismiss.[230]

NFL Sunday Ticket. During a given week of the NFL regular season, only a few games are available on 'free' television. For example, NFL fans in Chicago would be able to watch the week's Bears game and a few others, but would not be able to regularly watch the week's Packers game. Beginning in 1994, however, NFL fans with satellite television service from DirecTV could subscribe to the NFL Sunday Ticket program, which would enable them to watch non-network broadcasts of NFL games for an entire season – for an additional fee.

On August 13, 1997, three sports fans filed an antitrust lawsuit against the NFL and five of its member teams alleging that they, together with the other 25 NFL teams, conspired to artificially raise the price of satellite broadcasts of NFL games by restricting fans' viewing options. The defendants filed a motion to dismiss, arguing that plaintiffs failed to state a claim under which relief could be granted and that the Sports Broadcasting Act specifically exempted their conduct from the antitrust laws. In June 1998, the district court denied the defendants' motion.[231]

The district court rejected the NFL's argument that there was no concerted action because it alone sold the NFL Sunday Ticket. The court noted that plaintiffs "complain that all the

[228] *Colorado High School Activities Association v. NFL*, 524 F. Supp. 60 (D. Co 1981).
[229] *Schwartz v. Dallas Cowboys Football Club*, 157 F. Supp. 2d 561 (E.D. Pa 2001).
[230] *Kingray v. NBA*, 188 F. Supp. 2d 1177 (S.D. Ca 2002).
[231] *Shaw v. Dallas Cowboys Football Club*, 1998 WL 419765 (E.D. Pa 1998).

member clubs, through and with the NFL, have conspired to restrain the trade in televised football" and therefore the plaintiffs "have adequately pled plural participation."

Regarding the Sports Broadcasting Act, the court observed that the question was basically: what is the definition of "sponsored telecasting"? The court defined a "sponsor" 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." The defendants argued that "the Sunday Ticket package is simply a sale of their residual rights in the games which were broadcast on 'sponsored telecasts,' and, so, the package is a sale of 'part of the rights' to the 'sponsored telecasts.'" The district court argued that the defendants' interpretation cannot possibly be correct given the SBA's legislative history. First, the SBA was drafted so that it focused specifically on the sale of games to sponsored television networks. Second, the legislative report on the SBA states: "The bill does not apply to closed circuit or subscription television." Third, in his testimony before the U.S. House of Representatives, NFL Commissioner Pete Rozelle was asked "You understand, do you not, Mr. Rozelle, that this Bill covers only the free telecasting of professional sports contests, and does not cover pay T.V.?" and he answered "Absolutely." Thus, the district court concluded:

> In the SBA, the NFL got what it lobbied for at the time. It cannot now stretch that law to cover other means of broadcast. Accordingly, I find that the defendants' conduct is not exempt from antitrust liability under the SBA.

The NFL appealed the district court's denial of its motion to dismiss. On April 9, 1999, the appeals court agreed with the district court, ruling that because "we find that the subscription satellite broadcast of NFL games is not a part of the NFL's rights to the sponsored telecasting of those games and therefore not within the Sports Broadcasting Act's exemption to the antitrust laws, we will affirm the district court's decision."[232]

The NFL and the other defendants reached an out-of-court class action settlement with the plaintiffs on February 5, 2001. The class included all persons in the United States who purchased one or more residential subscriptions to NFL Sunday Ticket at any time from January 1, 1994 through May 25, 2001. The terms included a $7.5 million settlement fund to be established by the defendants, a separate $2.3 million to be paid by the defendants to notify class members and administer the settlement, an additional $3.7 million to be paid by the defendants to cover attorneys' fees and expenses,

---

[232] *Shaw v. Dallas Cowboys Football Club*, 172 F.3d 299 (3rd Cir. 1999).

a 10% discount to all class members on all merchandise purchased at the NFL Shop website for up to $75 (except for class members who purchased NFL Sunday Ticket for three or more seasons, who were entitled to a 15% discount for up to $150), and an "incentive award" of up to $1,000 for each class representative. Also, for the 2001 season, the NFL would offer a "Single Sunday Package" which would enable fans to purchase all out-of-market NFL broadcasts on a single Sunday for $29.99. The NFL was permitted, at its sole discretion, to cancel the "Single Sunday Package" offering after the 2002 football season (or even after the 2001 season if the NFL's net subscription revenue was sufficiently low). In return, the plaintiffs agreed to release the defendants of all liability regarding the NFL Sunday Ticket – under the condition that the defendants continued to offer the Single Sunday Package (if the NFL discontinued the Single Sunday Package but continued to sell the NFL Sunday Ticket, the release would become null and void).

The district court gave its preliminary approval to the settlement on May 9, 2001, concluding that the settlement agreement "appears, upon preliminary review, to be fair, adequate, and reasonable."[233] Plaintiffs submitted an unopposed motion for final approval of the settlement agreement on July 5, 2001. However, on August 13, 2001, the district court ruled that it "finds that the Settlement Agreement is not fair, reasonable, and adequate and, therefore, will deny the motion for final approval."[234] Specifically, the court concluded that the settlement "is not fair, reasonable, or adequate" for six reasons: "1) it fails to provide sufficient and non-final prospective relief; 2) the amount of the settlement fund is too low; 3) the merchandise discounts do not ameliorate the antitrust violation alleged and are not convertible to cash; 4) the release bars later claims for future conduct which was not the subject of the litigation and provides defendants broad protection for inadequate compensation; 5) the attorneys' fees are too large and are not commensurate with the limited success achieved in the litigation; 6) by failing to properly balance the interests of the class with those of counsel and the defendants, it offends sound notions of public policy." The district court added:

> The court rejects the notion that, given the weaknesses of the plaintiffs' claims, "a bad settlement is better than no settlement at all." Instead, the court finds that rejection of the Settlement Agreement will serve the following public purposes: 1) it will act as an incentive to class action counsel in the future to exercise a high degree of care and

---

[233] *Shaw v. Dallas Cowboys Football Club*, Civil Action No. 97-5184 (E.D. Pa 5/9/2001).
[234] *Schwartz v. Dallas Cowboys Football Club*, 157 F. Supp. 2d 561 (E.D. Pa 2001).

> diligence before initiating class action litigation; 2) it will afford defendants protection from payment of unmeritorious claims simply because the claims are joined and aggregated with other equally unmeritorious claims; 3) it will reassure the public that the significant judicial resources expended in superintending class action litigation do not generate payment of claims of doubtful validity and/or to recompense counsel who has failed to obtain significant results for the class.

NBA League Pass. Beginning with the 1994-95 season, residential and commercial satellite dish owners could purchase the "NBA League Pass", a bundled package of more than 1,000 out-of-market NBA games that sold for a fixed price. Fans were not permitted to purchase individual games at a reduced price. The package did not include all out-of-market games because some games were subject to blackout (e.g., a game was scheduled to be telecast nationally on a cable channel).

Initially, only satellite service customers of DirecTV could purchase NBA League Pass. However, on April 22, 1998, the NBA and DirecTV entered into a deal whereby DirecTV would not have exclusive rights to the package – a second license was to be given to PrimeStar, another satellite television provider. Within a week, DirecTV had acquired PrimeStar and exercised its contractual option to be the exclusive distributor of NBA League Pass. As a result, another satellite television provider, Echostar, was barred from distributing NBA League Pass. In 2000, the NBA League Pass was made available to cable television customers on a pay-per-view basis via iN Demand.

Several DirecTV residential and commercial customers, as well as a customer of a cable television service provider, all of whom had purchased NBA League Pass, filed an antitrust lawsuit against the NBA, some of its member teams, and DirecTV. In the words of the district court, plaintiffs alleged that "the NBA Defendants conspired with DirecTV for the broadcast of a bundled package of NBA out-of-market basketball games, agreeing to restrict output of those games according to geographical market, price, and quantity."[235] The district court summarized the plaintiffs' arguments:

> Plaintiffs allege the agreement to restrain the sale of rights to any NBA game outside of the team's assigned geographic territory except through the "NBA League Pass" is not reasonably necessary to achieve any legitimate

[235] *Kingray v. NBA*, 188 F. Supp. 2d 1177 (S.D. Ca 2002).

> business objective… According to Plaintiffs, the system of exclusive geographic territories is not necessary to preserve the viability of any individual NBA Team in attracting fans to live games, but only serves to artificially increase prices and reduce output… Plaintiffs further contend that the system of exclusive territories is not necessary to preserve the quality and attractiveness of NBA games by promoting competitive balance among NBA teams as this concern could be addressed, as it is in Major League Baseball, by a system of revenue-sharing… According to Plaintiffs, the continuing agreement and conspiracy among the Defendants was to fix, raise, stabilize, and maintain prices for the rights to, and to restrict the output of, video broadcasts of out-of-market NBA games.

The defendants asked the district court to dismiss the plaintiffs' complaint. On February 1, 2002, the district court granted the defendants' motion.[236] The court observed that plaintiffs' Section 1 claims rest on four theories: "first, that the NBA Defendants and DirecTV engaged in vertical price-fixing; second, that DirecTV and the NBA Defendants engaged in a vertical conspiracy to limit output; third, that the exclusive distribution agreement between the NBA Defendants and DirecTV unreasonably restrains trade; and finally, that the NBA Defendants engaged in a horizontal conspiracy to divide the market and fix prices." The court concluded that plaintiffs had failed to adequately support any of these theories.

For example, the district court noted that the contract between the NBA and DirecTV requires DirecTV to pay a wholesale price to the NBA for the NBA League Pass, but does not set the retail price at which DirecTV can sell the package to its customers. Thus, plaintiffs failed to state a claim for vertical price-fixing. Furthermore, the only games blacked-out on NBA League Pass are those that are broadcast on other channels and thus "the NBA League Pass's black-out provision does not restrict output; it only affects what channel the game is available on." The court explained:

> Accordingly, output of out-of-market NBA games increased by virtue of the NBA League Pass, rather than decreased.
>
> Insofar as Plaintiffs contend that output of out-of-market games could be increased if satellite users were not required to purchase the entire NBA League Pass on an all-

[236] *Kingray v. NBA*, 188 F. Supp. 2d 1177 (S.D. Ca 2002).

> or-nothing basis, Plaintiffs have already waived this argument in their opposition to DirecTV's motion to dismiss the original complaint where they stated they were not alleging the bundled nature of the NBA League Pass is an illegal tying arrangement… Further, Plaintiffs have not cited, nor is this Court aware of, any authority indicating that when a defendant offers a new product in a competitive manner (e.g., all out-of-market games via the NBA League Pass), a party can allege a Section 1 violation on the basis the product is not being offered in the manner the plaintiffs would prefer (out-of-market games in a non-bundled format). Antitrust laws are to ensure competition is not unlawfully harmed; economic market forces will dictate whether the product will be successful.

Regarding the plaintiffs' exclusive distributorship theory, the court observed that "the fact that other satellite providers such as Echostar are not authorized to broadcast the NBA League Pass does not, standing alone, properly allege a violation of antitrust laws" and "[t]o so hold would mean that exclusive distributorships would be a per se violation of Section 1" – which they are not. Finally, with respect to the NBA Defendants' horizontal conspiracy alleged by the plaintiffs, the district court explained:

> Further, DirecTV and iN Demand could not engage in horizontal conspiracy with the NBA Defendants. Horizontal price fixing occurs when competitors agree to set prices and thereby interfere with free market forces… As alleged in the FAC [first amended complaint], DirecTV is "a provider of high power direct broadcast satellite service," … and iN Demand "provides 'pay-per-view' programming to cable companies and their subscribers nationwide." … The NBA Defendants, in contrast, govern and participate in a professional basketball league… Accordingly, the NBA Defendants are not competitors with DirecTV and iN Demand and therefore cannot engage in a horizontal conspiracy.

Tying of Regular Season and Preseason Game Tickets. In the early 1970s, a number of NFL fans filed lawsuits against their local NFL team, the NFL itself, and NFL Commissioner Pete Rozelle alleging that the tying of the purchase of season tickets to the purchase of tickets for preseason games violated the antitrust laws. The district courts granted the defendants' motions for summary judgment, and the appeals courts affirmed the district courts' rulings.

Angelo Coniglio was a fan of the AFL's Buffalo Bills and began regularly attending their games in 1960. He became a season ticket holder in 1964 and thereby acquired additional benefits over purchasers of single-game tickets, including preferential seat selection, preferential access to post-season playoff tickets, and preferential seat selection for the following season. Coniglio purchased a season ticket again in 1965. In 1966, the year of the tentative merger of the NFL and AFL, the team altered its season ticket policy by requiring season ticket purchasers to buy a ticket to one preseason game. In 1968, the team required season ticket purchasers to buy tickets to two preseason games and, in 1970, the requirement was raised to three preseason games. Coniglio decided not to continue as a season ticket holder, although he continued to purchase individual game tickets to some games.

On September 9, 1970, Coniglio filed an antitrust lawsuit against Highwood Services (the owner and operator of the Buffalo Bills), the NFL, and NFL Commissioner Pete Rozelle alleging that the conditioning of season ticket purchases on the purchase of preseason tickets constituted an unlawful tying arrangement in violation of Section 1 of the Sherman Act and constituted an abuse of the Bills' monopoly power over professional football in the Buffalo area in violation of Section 2 of the Sherman Act. Furthermore, Coniglio alleged that the unlawful tying arrangement was the result of a conspiracy between Highwood Services, the NFL, and Pete Rozelle in violation of Section 1 of the Sherman Act. The defendants moved for summary judgment, which the district court granted on August 1, 1973. Coniglio appealed.

On April 17, 1974, the appeals court issued its decision affirming the district court's ruling.[237] The appeals court identified "four factors essential in determining whether a particular sales practice constitutes an illicit tying arrangement: (1) two separate and distinct products, a tying product and a tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) anti-competitive effects in the tied market; (4) involvement of a 'not insubstantial' amount of interstate commerce in the tied market."

The appeals court noted that the fourth factor is easily satisfied since the total value of tied preseason tickets in 1970 was $483,000. Moreover, the court argued that the first factor may be satisfied since preseason games are arguably of sufficiently inferior quality that preseason and regular season games are separate products (whether they are in fact separate products is a question requiring factual determinations and thus is an issue more appropriately determined at trial than by summary judgment). Furthermore, the court argued that the second factor may be satisfied even though more than half of the 46,206 seats at War Memorial Stadium could be purchased on an individual game basis because a buyer is not free to purchase a season ticket by itself. In other words, the fact that roughly 23,000 fans were willing to purchase season

[237] *Coniglio v. Highwood Services*, 495 F. 2d 1286 (2nd Cir. 1974).

tickets “is certainly some evidence of the ‘desirability’ of these tickets, sufficient at least to persuade us that the existence of the requisite economic power is a triable issue of fact.”

The appeals court explained, however, that the third factor was not satisfied – Coniglio had failed to demonstrate that there was an anticompetitive effect in the tied market:

> Quite simply, just as the Bills has a monopoly over the presentation of regular season professional football games in the relevant geographic market, which is Buffalo, so too does it have a monopoly over the presentation of exhibition professional football games – the tied product. Thus, Highwood is not using its economic power in the tying (season ticket) market to ‘restrain free competition in the market for the tied product,’ … for it is undisputed that, at the time this complaint was filed, there were neither actual nor potential competitors to the Bills in the professional football market. Accordingly, the tying arrangement attacked by Coniglio does not fall within the realm of contracts ‘in restraint of trade or commerce’ proscribed by Section 1 of the Sherman Act…
>
> Coniglio tries strenuously but unsuccessfully to skirt this obstacle. He argues that the tying arrangement foreclosed competition in what could only be characterized at oral argument as the ‘general entertainment market in Buffalo.’…
>
> … Viewed in this light, Coniglio’s claim that plays, movies, and musicals are all within the boundaries of the same product market as exhibition football amounts to nothing more than the boundless contention that, by extracting extra dollars from season ticket holders, the Bills leave less in their pockets to spend on any other form of diversion, from a trip to the zoo to a night at the opera. Suffice to say that the extraordinary breadth of the market encompassing such diverse yet assertedly competitive products is far beyond that ever contemplated for a relevant product market.

The appeals court emphasized that “the proprietary of summary judgment in this case rests upon Coniglio’s total failure to demonstrate any adverse effect on competition, actual or potential, an issue perfectly well suited to objective, statistical analysis.” Regarding Coniglio’s Section 2 claim, the court noted that, “since we have made plain that Highwood has not used the tying arrangement either to prevent competition or destroy it, its ticket sale practice does not represent an unlawful abuse of its monopoly power.” As for the conspiracy claim regarding the NFL and Commissioner Rozelle, the appeals court argued that “it is readily apparent that if Highwood’s tying arrangement is not unlawful, an agreement among the defendants to establish that practice, even if it could be proven, would not be unlawful either."

Similarly, Richard Driskill was a fan of the NFL's Dallas Cowboys who filed an antitrust lawsuit against the Cowboys, the NFL, and Commissioner Rozelle over the Cowboys' tying of season tickets to the purchase of less desirable items – specifically, preseason tickets and low-interest stadium bonds. The district court granted summary judgment in favor of the defendants. Driskill appealed and, on August 9, 1974, the appeals court affirmed the district court's ruling:[238]

> The district court granted summary judgment in favor of defendants, holding as follows: (1) since single game tickets have been available for every home game in the past, Driskill has not been coerced to buy preseason tickets in order to gain admission to the regular season games; (2) the granting of preferred parking to season ticket holders is a reasonable business practice with no anticompetitive effect; (3) since individual home game tickets have always been available, Driskill has not been coerced to buy a stadium bond in order to gain admission to regular season games; and (4) forcing the purchase of a stadium bond or bonds as a prerequisite to the purchase of a season ticket package has no anticompetitive effect. We affirm on the ground that Driskill has not pleaded that the tying of season tickets to preseason tickets and stadium bonds has an anticompetitive effect, nor has he alleged with particularity any material facts in issue that would support a finding of anticompetitive effects or coercion to purchase the bonds so as to avoid an adverse summary judgment.

The appeals court noted its agreement with the appeals court decision in *Coniglio v. Highwood Services*:

> There has been a spate of cases alleging Sherman Act violations in the tying of preseason tickets to season tickets by various National Football League teams. These cases have all resulted in summary judgment for the defendant teams… Summary judgments have been granted or upheld on appeal on three different theories: (1) that fans are not in fact coerced into buying tickets to preseason games (as part of a season ticket package) in order to gain admission to regular season games; (2) that no tying of one product to another is possible, since there do not exist two different products – preseason and regular season games – but rather only one indivisible product – professional football games; and (3) that the tying of preseason to regular season tickets has no anticompetitive effect in the tied market. We agree with the conclusion reached by the Second Circuit after a very careful

[238] *Driskill v. Dallas Cowboys Football Club*, 498 F.2d 321 (5th Cir. 1974).

> analysis in Coniglio, that, although neither of the first two theories is sufficient to sustain the summary judgment here, the last provides a basis for affirmation…
>
> … As in Coniglio, however, the Cowboys have a complete monopoly in the tied market – preseason professional football games in Dallas – and there can thus be no adverse effect on any competitors, even if a tying scheme exists. There being no anticompetitive effect in the tied market, the fourth requirement for a Sherman Act tying scheme is not met, and the portion of Driskill's suit dealing with preseason game tickets was properly dismissed on summary judgment for the defendants.

As for the tying of season tickets to the purchase of stadium bonds, the appeals court observed that the tickets and the bonds are clearly two different products and that the Cowboys have a monopoly over the former. However, the court noted that "Driskill failed to forestall summary judgment on this part of his claim by failing to assert specific facts tending to show either exploitation of their monopoly by the Cowboys to coerce the purchase of the bonds or any anticompetitive effect in the tied market for long-term bonds."

Price-fixing of Licensed Merchandise. NASCAR was named as a defendant, along with independent vendors of NASCAR souvenirs and merchandise, in a lawsuit brought by a class of purchasers of such souvenirs and merchandise. The purchasers alleged that the defendants engaged in a price-fixing conspiracy by agreeing on minimum prices for souvenirs and merchandise sold at NASCAR races, monitoring the prices at which souvenirs and merchandise were sold at those races, and disciplining vendors who violated the price-fixing agreement. The price-fixing conspiracy allegedly began as early as January 1991.

In general, the licensor (e.g., NASCAR, the speedway, the sponsor) is paid a percentage of gross receipts from sales of the licensed merchandise by the licensee. Vendors wishing to sell at a NASCAR race must be licensed by the speedway, which receives a fee and a percentage of gross sales from each vendor. The speedway, in turn, pays a percentage of gross receipts to NASCAR.

On May 12, 1998, the district court dismissed NASCAR as a defendant. The remaining defendants reached an out-of-court settlement with the plaintiffs.[239]

[239] *In re: Motorsports Merchandise Antitrust Litigation*, 112 F. Supp. 2d 1329 (N.D. Ga 2000); *In re: Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392 (N.D. Ga 2001).

League Suspensions of Teams. Southern Methodist University's football program was suspended for the 1987 season by the NCAA for violating NCAA rules regarding compensation for student-athletes. An antitrust lawsuit challenging the NCAA's compensation rules was brought by David McCormack, an SMU alumnus, on behalf of SMU 'as an institution', its graduates and current students, some members of the football team, and some cheerleaders. As discussed in Chapter 6, the court found that the football players lacked standing to sue. The district court also found, and the appeals court affirmed, that the SMU alumni and cheerleaders lacked standing to sue.[240] The appeals court explained:

> Not every person who complains of injury as a result of violation of antitrust laws has standing to assert claims under the statutes. Only a person injured "in his business or property" may seek damages for violation of the antitrust laws, and only a person who can show a significant threat of such injury from impending violations can obtain injunctive relief. Even a plaintiff injured in his business or property must, in order to sue for damages, show "antitrust injury," that is, "injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." Finally, even if the plaintiff meets these requirements, the court must consider whether he is a "proper plaintiff" to sue for damages, examining such factors as (1) whether the plaintiff's injuries or their casual link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment.
>
> Neither McCormack nor any of the cheerleaders satisfies these requirements. The cheerleaders assert only the loss of the opportunity to lead cheers, which clearly does not qualify as an injury to business or property. The only injuries McCormack alleges are the devaluation of his degree, the loss of the opportunity to see football games, and the damage to his contact and association with current and prospective student athletes derived from his membership in the Mustang Club, "an athletic fund-raising organization." Of these three, only the first is even arguably an injury to business or property. Although the Supreme Court has emphasized that "property" in this context "has a naturally broad and inclusive meaning," we cannot conclude that the devaluation of McCormack's degree is an injury for which the antitrust laws were designed to afford a remedy. The alleged connection, moreover, between the NCAA's actions and the devaluation of his degree presents the sort of "speculative" and

[240] *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).

> "abstract" causal chain that the Supreme Court has held insufficient to support antitrust standing.

Unfair Labor Practices. The collective bargaining agreement between Major League Baseball and the MLB Players Association expired on December 31, 1993 and, after months of failed negotiation, the players went on strike, ultimately resulting in the cancellation of the remainder of the 1994 regular season, the 1994 playoffs, the 1994 World Series, and part of the 1995 regular season. The MLB team owners and MLB Players Association accused each other of unfair labor practices and filed charges with the National Labor Relations Board (NLRB). The NLRB granted a temporary injunction after finding reasonable cause to conclude that the MLB team owners had engaged in unfair labor practices.

A class action lawsuit was brought against MLB and the 28 MLB teams on behalf of baseball fans and businesses that operate in the vicinity of baseball stadiums, alleging violation of the antitrust laws. The defendants filed a motion to dismiss on the grounds that (1) plaintiffs' claims are barred by MLB's antitrust exemption and the nonstatutory labor exemption and (2) plaintiffs lack antitrust standing to bring the claims.

The district court granted the defendants' motion to dismiss on November 2, 1995.[241] The court agreed with the defendants that MLB's antitrust exemption, as established in the *Federal Baseball*, *Toolson*, and *Flood* decisions of the U.S. Supreme Court, barred plaintiffs' claims. However, even ignoring MLB's antitrust exemption, the plaintiffs lacked standing to bring their claims:

> Even if the Court had accepted plaintiffs' invitation to narrowly construe the antitrust exemption, dismissal pursuant to Rule 12(b)(6) would have been appropriate because neither class of plaintiffs have standing to bring this action. Antitrust standing is given to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws…" … The "any person" language of the statute is not to be read literally; rather, the Court must determine whether Congress intended to protect the interest asserted by the plaintiff… In making this determination, the Court "must 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants and the relationship between them.'"…
>
> As defendants assert, the fans lack standing. There is no evidence that the Owners intended to harm the fans. In addition, the injury suffered by the fans is not direct, that is, the injury can be fairly characterized as an indirect "ripple effect."… Finally, the fans'

[241] *McCoy v. MLB*, 911 F. Supp. 454 (W.D. Wa 1995).

> damages do not arise out of the allegedly illegal conduct that the antitrust laws are intended to remedy…
>
> Similarly, the businesses lack standing. The antitrust laws were not intended to apply to "ripple effect" injury sustained by third parties… That the businesses have a symbiotic relationship with the business of baseball is insufficient to allow them to have antitrust standing.

Scheduling. As discussed in Chapter 8, Francis Ferko, a NASCAR fan and shareholder of Speedway Motorsports (the owner of Texas Motor Speedway) filed an antitrust lawsuit against NASCAR over the scheduling of Winston Cup races. In order to proceed with the lawsuit, the court required Speedway Motorsports (which was not a plaintiff in the lawsuit) to confirm that it agreed with Ferko's allegations. The Ferko litigation was ultimately settled out-of-court, with Texas Motor Speedway receiving a 'second' Winston Cup date.

Taxpayer Antitrust Lawsuits Against Sports Leagues. As discussed in Chapter 8, professional sports teams are often able to convince their local governments to supply at least some of the financing for a new stadium and to offer the team a favorable lease. Not surprisingly, taxpayers – even those who are fans of the team – are sometimes less than thrilled with the prospect of paying higher taxes to pay for a new stadium, where the multi-millionaire players and owners will generate annual earnings many times that of the average taxpayer. Sometimes taxpayers have resorted to filing antitrust lawsuits against the team (and sometimes against the government officials who approved the financial deal) in attempt to change the financing and lease terms.

For example, the citizens of Allegheny County contributed to the construction of a new stadium for the NFL's Pittsburgh Steelers – Heinz Field. Under the terms of the lease, the Steelers do not pay annual base rent, receive almost all of the new revenue from the stadium, and the Sports & Exhibition Authority of the City of Pittsburgh and Allegheny County are responsible for capital repairs and future expenditures. Robert Warnock, an Allegheny County taxpayer, filed an antitrust lawsuit against the NFL and its member teams alleging that "by limiting the number and barring public ownership of NFL franchises, defendants forced Allegheny County to pay … far more to build Heinz Field and to agree to more onerous lease terms to keep the Steelers in Pittsburgh than a marketplace free of these restraints would have demanded." Warnock asked the court to declare the Heinz Field lease voidable at Allegheny County's discretion and to award compensatory and punitive damages of more than $200 million to Allegheny County.

The defendants filed a motion to dismiss on the grounds that Warnock did not have standing to sue. On February 9, 2005, the district court granted the defendants' motion.[242] The court summarized the plaintiff's case as follows:

> Under these factual circumstances, plaintiff is essentially bringing derivative claims on behalf of Allegheny County and the Sports & Exhibition Authority. Plaintiff does not allege he was injured in any way by Allegheny County or the Sports & Exhibition Authority. In fact, plaintiff alleges that he and the other taxpayers of Allegheny County were "willing to build a new football stadium" for the Steelers and "to agree to lease terms that allowed the franchise to field a competitive team while remaining profitable."… Plaintiff contends, however, that defendants' actions "forced" Allegheny County to pay far more tax revenue than what the taxpayers, himself included, expected to contribute toward the Steelers becoming "a competitive team while remaining profitable."… Thus, under the allegations in plaintiff's complaint, Allegheny County and the Sports & Exhibition Authority are characterized as victims beholden to defendants in order to keep the Steelers in Pittsburgh.

The district court observed that Allegheny County and the Sports & Exhibition Authority have not joined the lawsuit as plaintiffs and explained why the taxpayer plaintiff lacked standing to sue:

> Plaintiff's allegations, taken as true for purposes of defendants' motion to dismiss, do not rise to standing in this case. The court will assume for purposes of defendants' motion that plaintiff alleged a sufficient "injury," i.e., that plaintiff's tax dollars were improperly expended on the disputed practice… The court also accepts for purposes of the motion to dismiss that plaintiff's injury could be redressed by a favorable decision finding that the stadium lease was voidable at Allegheny County's discretion… Plaintiff does not have to demonstrate that his taxes will be reduced as a result of a favorable judgment…
>
> The court, however, cannot find that plaintiff's injury is "fairly traceable to the conduct" of defendants… Plaintiff's injury, as demonstrated above, is that his tax dollars are allegedly being improperly spent on a disputed practice. Plaintiff in effect alleges that defendants committed an antitrust violation that caused Allegheny County to spend tax dollars in order to keep the Steelers in Pittsburgh. In this respect, however, plaintiff's theory is missing a critical link in the chain of causation. Defendants are not the entity that allegedly improperly distributed plaintiff's tax dollars. Defendants are not a municipal or state body, they do not have any characteristics of such an entity, and they certainly do not have the ability to levy and collect taxes from the citizens of Allegheny County. While the

[242] *Warnock v. NFL*, 356 F. Supp. 2d 535 (W.D. Pa 2005).

> standing doctrine may be an elastic concept, extending the doctrine to fit plaintiff's theory would stretch standing beyond the breaking point.

In summary, the U.S. government in the 1950s actively enforced the federal antitrust laws against sports leagues, with significant success. However, the major professional sports leagues were able to do an 'end run' around the antitrust laws, at least to some extent, by successfully lobbying Congress to pass the Sports Broadcasting Act in 1961 and then to amend the Act in 1966 to provide an antitrust exemption for the NFL-AFL merger. Sports fans and taxpayers have been generally unsuccessful in bringing antitrust lawsuits against sports leagues. Often, the fan or taxpayer is found to lack standing to sue.

Chapter 12

Proposals to Curb Leagues' Monopoly Power

The preceding chapters have identified numerous concerns about the market power of sports leagues. For example, their ability to artificially restrict the number of teams in the league provides teams with bargaining power over their host cities, enabling them to extract lucrative subsidies for the construction of new stadiums and to demand (and receive) extremely generous stadium lease terms. Prior to the introduction of free agency, teams generally did not have to pay players their 'full' value (i.e., their marginal revenue product) because the players had few good alternatives – only for brief periods have the major North American sports leagues of today been challenged by rival leagues. The competitive threats of the most successful of those rival leagues – the American Football League, the American Basketball Association, the World Hockey Association – were negated by the dominant sports leagues by merging with their rivals, either in whole or in part – sometimes with an antitrust exemption to the merger thanks to the U.S. Congress.

In the 1950s, the U.S. government attempted to enforce the antitrust laws against sports leagues, with some success. However, the leagues' ability to lobby Congress to pass legislation exempting certain of their activities from the antitrust laws negated much of the antitrust enforcement authorities' achievement. Today, there is a call for the antitrust authorities to once again vigorously challenge the actions of sports leagues. There is also a call for Congressional action to 'do something' about franchise relocations. One proposal calls for legislation banning public subsidies for sports leagues and teams. Another proposal is to grant leagues an antitrust exemption so that they can prevent franchise relocations. Still another proposal is for courts to reject the competitive balance defense in antitrust cases.

Proposed Structural Remedies. Some commentators have called for the U.S. government to aggressively enforce the antitrust laws against sports leagues and to seek a structural remedy (or have Congress impose such a remedy). The structural remedy proposals include (1) breaking up each league into three or more independent leagues that are permitted to coordinate their activities only with respect to arranging a national championship, (2) regulating sports leagues as natural monopolies, (3) reorganizing sports leagues into a vertical structure similar to that of NASCAR, with a central upstream organization supplying competition-organizing services for independent downstream teams, and (4) implementing a system of promotion and relegation similar to that of European sports leagues (i.e., change from a 'closed' to an 'open' league structure).

> *Breaking Up Sports Leagues*. The most radical proposal is for the U.S. government to seek the breakup of the major North American sports leagues, similar to the government's attempt to address AT&T's monopoly power by breaking the company up into a number of smaller companies. For example, at a congressional subcommittee hearing on November 29, 1995, Stephen Ross of the University of Illinois called on Congress to correct its "mistake" in permitting the

NFL-AFL merger. He argues that legislation repealing the NFL-AFL merger would (1) benefit fans in cities without teams by increasing the likelihood that each league will expand into new cities, (2) benefit taxpayers in cities without teams by forcing the rival leagues to bid for a chance to play in new stadiums, (3) benefit fans in cities with teams by reducing the probability that the team will leave since the most lucrative markets will already have teams, (4) benefit taxpayers in cities with teams by reducing popular support for tax subsidies since the local team will be unable to credibly threaten to relocate to a desirable market, (5) benefit elected representatives who do not depend on the political support of the NFL, (6) benefit television networks by potentially reducing broadcast fees, and (7) benefit young and average players by increasing the number of professional football teams and thus the demand for players. Legislation repealing the NFL-AFL merger would harm NFL owners by removing their ability to exploit taxpayers by threatening to relocate their teams. Currently "over-paid" stars could either benefit or be harmed from such legislation because, on the one hand, the NFL's monopoly income would be reduced, but, on the other, the newly-created leagues would have to compete for players. Ross argues that there would be no antitrust obstacles to the newly-formed leagues agreeing on inter-league play, including a Super Bowl.

Instead of federal legislation, a break-up of sports leagues could also be pursued through the courts. Ross (2001) observes that "plaintiffs would probably need to prove willful monopolization or conspiracy to monopolize in violation of the Sherman Act to secure a court-ordered divestiture." (pp. 158-59) The problem with pursuing the break-up through the courts is that Major League Baseball has a judicially-created antitrust exemption and the National Football League has a special merger-authorizing statute.

Critics of breaking up sports leagues, such as Roberts (1995), counter that sports leagues are natural monopolies – if a league is broken up into a number of rival leagues, eventually one of those newly-created leagues will emerge as the 'premier' league. The natural monopoly argument was discussed in Chapter 1. If the proponents of the natural monopoly view of sports leagues are correct, breaking up sports leagues may temporarily reduce their market power, but, in time, there will re-emerge one dominant league in each of the major sports. Roberts (1995) argues:

> Some (like Professor Steve Ross) argue that Congress or the Courts should require each league to split into three or more competing leagues that operate completely independently of each other, and that the resulting competition will greatly diminish any one league's market power. The underlying theory of this approach is reasonable and if it worked as planned the legal mechanism created would be principled and legitimate. The problems with this approach are that it is politically unfeasible and that as a factual matter I doubt it would work over the long term. I believe that within a few years, inevitably one league in each sport would become perceived by the public as having the highest-quality product, which in turn would result in the dominant league expanding to fill the national market and reestablishing the major league monopoly in the sport.

> The more technical explanation for this phenomenon is that sports leagues face average fixed costs that greatly exceed marginal costs. In highly competitive product markets, each league would thus price their output at levels somewhat above marginal cost but well below average fixed costs, which means that the leagues would inevitably lose money and one-by-one go out of business until only one remained that had the market power to charge prices high enough to allow it to recoup its fixed costs. Thus, I strongly suspect that each major sports league is a natural monopoly whose market power in many markets cannot (and probably should not) be diminished for very long by forced market competition.

Ross (1989), not surprisingly, does not believe that sports leagues are natural monopolies:

> Baseball and football are not natural monopolies; two or more rival leagues can compete in each sport. There is no apparent economic reason why stable competition cannot exist. That single leagues historically have monopolized these sports does not suggest they are natural monopolies. Rather, termination of inter-league rivalry through mergers and predatory practices and the expansion of Major League Baseball and the National Football League to a size that now virtually precludes new entrants explain their persistent monopoly status.
>
> Were baseball and football characterized by competing leagues, the antitrust laws could effectively regulate competition in the industry. (p. 755)

Ross is not alone in calling for the break-up of sports leagues. For example, Quirk and Fort (1999) advocate that MLB's antitrust exemption be ended and that the U.S. Department of Justice file antitrust lawsuits against the major sports leagues with the goal of obtaining court-ordered divestitures. Quirk (1997) concludes:

> A real breath of fresh air in pro team sports would result from using the antitrust laws to split up the existing leagues into competing leagues, each free to locate franchises where it wished. This would obviate any need for a salary cap or other kinds of restrictions on the player market, and, as a side benefit, would eliminate most of the subsidies from cities that teams currently obtain by exploiting their monopoly position. Expedients such as salary caps or luxury taxes are poor substitutes for old fashioned marketplace competition. (p. 108)

Regulating Sports Leagues as Natural Monopolies. Traditionally, governments have addressed the economic problems posed by natural monopolies (or at least what were believed to be natural monopolies) by regulating them. Examples include the electricity generation and transmission, natural gas utility, telephone, railroad, and airline industries.

Roberts (1995), who believes that sports leagues are natural monopolies, proposes that "Congress should create and empower a regulatory body to identify the markets in which sports leagues possess extraordinary unchecked market power and then to regulate what leagues may do in those markets so as to prevent exploitation beyond that necessary to guarantee a fair rate of return." Roberts argues that "regulating natural monopoly power is far more principled, predictable, and rational than subjecting an enterprise to the vagaries of unprincipled, arbitrary, and unpredictable section 1 antitrust enforcement by courts, each of which has its own agenda – and I say this even after fully taking into account the dangers of incompetence, conflict of interest, and corruption that can plague government regulatory schemes."

Heintel (1996) calls for the regulation of the National Football League as a natural monopoly. He observes that courts have difficulty even defining the 'output' produced by a sports leagues – it is not simply individual games – and thus courts "have invented many different definitions of the NFL's product and output market to try to warp the NFL into a structure with which antitrust laws can deal." (p. 1049) Heintel argues against applying the antitrust laws to sports leagues:

> Antitrust law rests on the assumption that consumer interests are best served through competition in the market. Such an assumption may not be valid in the case of the NFL; a fan's interest may not be served by competition between leagues in a market. Competition between leagues will divide the best players between leagues, preventing fans from seeing all the best players compete against each other. Competition between leagues has resulted in player bidding wars. Increasing player salaries would probably lead to the need for leagues to charge higher prices, either in the form of higher ticket and peripheral prices or perhaps in shifting games from free to pay television. Antitrust laws designed to promote competition could produce results diametrically opposed to results that would be in the interests of fans. Since the NFL's product and output market are not definable to the extent necessary for an antitrust analysis and since application of antitrust law to the NFL does not serve the purpose for which it was created, courts cannot properly apply antitrust law to the NFL. (pp. 1049-50)

Heintel advocates that the NFL be given a statutory exemption to the antitrust laws and, instead, an arbitration board should be formed to regulate the league's activities. One-fourth of the board's members would be chosen by the NFL, with the other members selected by some 'reasonable' method, such as congressional appointment. Board decisions would be determined by majority vote. The board would operate under the basic guideline that "the league cannot take actions that are contrary to fan interest." (p. 1065) Thus, league actions that may be to fans' detriment (e.g., the movement of players and/or franchises, game broadcasts, the number of games) would be subject to the board's regulation, whereas other league actions (e.g., playing rules, allocation of league profits) would not. Board decisions would be subject to limited judicial review, similar to that permitted in labor arbitration contract situations.

Ross (1989) argues that regulation is not a workable means of preventing the harm caused by monopoly sports leagues. One reason is that the regulator will likely be 'captured' by the league since the league will have a much greater stake in the regulator's decisions than will the general public. Consequently, the league is likely to be the most vigorous and effective lobbyist of the regulator. Moreover, even in the absence of 'regulatory capture', the regular would have to make "enormously difficult, if not impossible," determinations as to "the location of football franchises, the proper number of baseball franchises, the proper allocation of games between free television and cable, the best method of allocating players among teams, and what constitutes ineffective management." (p. 703)

Mandating a Vertical Structure Where a Central Upstream Organization Provides Competition-organizing Services for Independent Downstream Teams. As discussed in Chapter 1, NASCAR is organized and functions as a sanctioning body which sets and enforces race rules and guarantees prize money, among other things. In other words, NASCAR provides 'competition-organizing services' for independent racing teams. An entrepreneur who assembles a sufficiently high quality race team will be able to enter NASCAR-sanctioned races and compete against the sport's top racers. This situation is quite unlike that of the NFL, NBA, NHL, and MLB, which are closed leagues, and thus, for example, an entrepreneur cannot simply assemble an elite football team and then schedule games against NFL teams.

Couldn't the NFL, NBA, NHL, and MLB be reorganized into sanctioning bodies on the model of NASCAR? In a series of papers, Ross and Szymanski (2004, 2005a, 2005b) make the case that such a reorganization can, and should, occur. This is a second-best alternative which assumes that the sports leagues cannot be split into competing leagues.

Ross and Szymanski (2004) propose the creation of "The League" as "an entity organizing a sporting competition that is separate from the owners." (p. 72) They "suggest that sports leagues would be more profitable and fans' welfare improved if sports leagues looked more like McDonald's and less like the United Nations, by restructuring the leagues to create a separate company (NFL, Inc.) that would make key decisions and limit the club owners to participating in the competition." (p. abstract)

As Ross and Szymanski (2005a) explain, "McDonald's Corporation is vertically separate from its franchised restaurant outlets, who do business pursuant to a detailed franchise agreement." (p. 6) They argue that "club-run leagues forego attractive business opportunities because they are unable to overcome the significant transactions costs involved in agreeing on how to distribute the proceeds from the opportunity." (p. 7) They explain:

> Club owners need not insist on collectively controlling the sporting competition in which they participate. If, like NASCAR, relevant rules were decided by an independent Board of Directors of "NFL, Inc.," "MLB, LLC," or the like, we suggest that (a) franchises will be more likely to be located in a manner responsive to consumer demand; (b) broadcast rights will be sold in a manner to maximize overall revenues (which often means increased viewership); (c) incompetent ownership would be more likely to be replaced; (d) marketing and sponsorship opportunities would be divided between the league and local clubs based on which entity can most efficiently sell rights and products; (e) collective bargaining agreements will be easier to reach (no approval of a supermajority of owners) and more likely to be designed in a manner to enhance the consumer appeal of the sport. (pp. 7-8)

If such a vertical structure has so many advantages, why haven't owners adopted that organizational structure for the league? Ross and Szymanski suggest three reasons: (1) the team owners are unable to agree on how to divide the gains from such a reorganization, (2) the owners' egos (e.g., the owners would have to forfeit the power to make the rules and would have to accept the directives of others), and (3) there is little competitive pressure on sports leagues.

Ross and Szymanski (2005b) observe: "Government intervention is welfare-enhancing if it can reliably require an industry restructuring to eliminate collective action problems that cause inefficient and exploitative output reductions not likely to be subject to market correction." (pp. 67-68) They suggest two avenues by which such government intervention may occur. One is to apply conventional antitrust principles to the relevant anticompetitive agreement – "the agreement among competing clubs to arrogate to themselves the control of the organization of the dominant competition in their sport."(p. 69) The vertically-integrated league structure "raises prices, lowers output, and renders output unresponsive to consumer demand." (p. 69) Structural antitrust relief would involve the divestiture of the competition-organizing function of the league by the member teams. An alternative form of government intervention would be Congressional legislation: "… Congress may properly legislate to require divestiture under a clarifying amendment to the Sherman Act or via direct regulatory legislation, or to secure divestiture through the use of Congress' eminent domain power by acquiring from the clubs the property rights necessary to create a business entity, The League, separate from clubs that participate in its competition." (p. 68)

Mandating a System of Promotion and Relegation. Although divestiture is the preferred option of some experts, they concede that the political will to implement such a system may be lacking and, as a result, second-best alternatives should be considered. One of those alternatives is to require that North American sports leagues adopt a system of promotion and delegation such as exists in Europe. In other words, the North American sports leagues should be required to convert from their current structure as 'closed' leagues into 'open' leagues.

For example, Ross (2001) argues that the best legal argument to secure a court-ordered open-league structure "is to establish that the current agreement among club owners to operate their leagues with a closed structure is in itself an agreement that unreasonably restrains trade in violation of section 1 of the Sherman Act." (p. 167) Competition is foreclosed by the agreement to operate a closed league. One reason is that "existing clubs have agreed to exclude potential rivals for stadium subsidies and other benefits now obtained through relocation." (p. 167) Another reason is that, "because in an open-league structure all teams would compete each year against each other to remain in the major league, the decision to operate as a closed league constitutes an agreement to foreclose competition among existing clubs." (p. 167)

There would be a number of legal obstacles to obtaining a court-imposed open league structure. One is baseball's antitrust exemption. Another, possibly the league's best argument against a court-imposed open league structure, is that "requiring an open-league structure is tantamount to compulsory access to their joint venture, and such access is often disfavored because of concerns that new entrants will free ride on the prior investment of the existing members of the venture, with consequent adverse effects on the incentive of firms to invest in the venture." (p. 170) Ross finds this argument unpersuasive since (1) "the institution of open competition will lead to efficient output increases through increased investment" and thus the free rider defense would not be valid and (2) "to the extent that a portion of the prior investment by clubs in the major leagues can be considered as capital specific to membership in the league, a reasonable fee might be imposed upon clubs being promoted to the major league, to be paid out to those clubs being demoted (similar to capital fees paid by attorneys or accountants upon admission to and exit from partnership at their firms)." (p. 170)

Ross argues that sports leagues would likely choose to adopt an open league structure by "maintaining the existing league as the top-tier league and adding one or two junior leagues, the lowest tier featuring easy entry." (p. 166) He would require that "a new entrant who makes skillful business and sport-related decisions to be in a position to viably compete in the top-tier league within two years." (p. 166)

Ross and Szymanski (2002) describe the system of promotion and relegation as "an ideal structure for surgical intervention to promote entry, since it involves replacing the least efficient incumbent (in terms of wins) with the most efficient entrant" and, yet, "entry is only conditional on continuing success, so that a relegated incumbent has an opportunity to recapture its position the following season." (p. 629) They conclude that, "in the current controversy over baseball's contraction, government-ordered promotion and relegation seems clearly preferable to either the continued monopolistic exploitation by owners or to some court-supervised freeze on franchises, mandatory relocations, or other highly regulatory approach." (p. 629)

Other Proposed Congressional Actions. A number of other proposals have been suggested, including enactment of legislation granting an antitrust exemption for sports league rules concerning franchise relocation and curbing the use of tax subsidies to lure or retain sports teams.

Legislation Granting an Antitrust Exemption for Sports League Rules Regarding Franchise Relocation. A number of Congressional bills have been introduced to protect sports fans from the threat of their local team relocating. The bills sought to provide such protection by granting leagues an antitrust exemption for restrictions on franchise relocation. For example, on May 4, 1999, Senator Arlen Spector proposed the Stadium Financing and Franchise Relocation Act of 1999 (SFFRA), whose terms are explained by Oram (2000):

> The SFFRA would amend the Sports Broadcasting Act of 1961 to require MLB and the NFL to place 10% of their national broadcasting revenues into a trust fund to be used solely to finance stadium renovation and construction costs. Money from the trust fund would be available to pay for up to 50% of facility construction or renovation so long as local governments agree to provide at least one dollar of financing for every two dollars from the trust fund. If MLB or the NFL did not comply with these trust fund provisions, the leagues would lose their antitrust broadcasting exemption originally granted in the SBA. However, the bill would provide all four major professional sports leagues an antitrust exemption with regard to franchise relocation, allowing MLB, the NFL, the NBA and the NHL to deny a member team's request to move to another city. (pp. 187-88)

Oram adds: "Due to MLB's broad antitrust exemption under the common law, MLB arguably already enjoys this statutory exemption." (p. 188) Scibilia (1996) also argues that MLB's antitrust exemption applies to franchise relocation decisions.

Ross (1995) explains that legislative attempts to give the NFL an antitrust exemption with respect to franchise relocation decisions are misguided because they "will not solve the real problems of the exercise of the NFL's monopoly power." He gives five reasons why he opposes an antitrust exemption for league restrictions on franchise relocation: (1) "such an immunity does nothing to prevent cities, fans, and taxpayers from exploitation when the league works in concert with a team owner to threaten or actually relocate"; (2) "depending on the language of the legislation, such immunity could block what I believe is a potentially viable antitrust challenge to the current problems in the NFL"; (3) "such immunity would also improperly immunize the inefficient and anticompetitive vote by a minority of NFL owners to block a desirable relocation solely to protect an existing owner from competition"; (4) "such an immunity is not really necessary to enable the NFL to effectively prevent franchise free agency if it chose to do so"; and (5) "although on balance carefully drafted and narrow legislation might represent a slight improvement over the *status quo*, Senators representing states without NFL franchises (obviously including

Senators Thompson and Heflin of this Committee) are likely to come under tremendous constituent pressure to strongly oppose such legislation."

Roberts (1995) agrees that an antitrust exemption for league restrictions on franchise relocation would not solve the problem caused by sports leagues' monopoly power. However, Roberts endorses such an antitrust exemption as a second-best solution given the apparent political infeasibility of regulating sports leagues as natural monopolies or forcing them to divest. He explains:

> The ability of major league franchise owners to extract huge subsidies of various kinds from communities by auctioning their teams to the highest bidder demonstrates enormous market power in the sports franchise market. By restricting the supply of franchises well below the demand for them, team owners can reap classical monopoly profits – driving up the value of a commodity by restricting output and forcing consumers to bid up the price for the scarce item. But the only way to mitigate significantly the monopoly wealth transfers from community taxpayers to franchise owners (and in turn to the players who share in the owners' largesse) would be to create structures that would increase the number of franchises available so almost every viable community could have one, and this could only be accomplished through radical measures like direct government regulation or forced breaking up of each league, ideas which are apparently not politically viable.
>
> Thus, if we must accept a fixed number of unregulated franchises in each sport, two things are inevitable. First, many communities that could support a franchise in a sport won't have one (a "misallocation of society's resources" effect). Second, in order to have a franchise, a community will be required to pay huge subsidies (a "monopoly wealth transfer" effect). So assuming a set number of teams, Congress' ability to mitigate the effects of the leagues' market power is quite limited. The question we are focusing on today is simply whether it is in the public's interest for decisions affecting franchise location to be made by individual franchise owners or by the full league/joint venture partnership. I believe that in virtually every case, the answer is that such decisions are better made by the league, and thus an antitrust exemption from section 1 suits should be granted in these types of cases.

Legislation Curbing the Use of Tax Subsidies to Lure or Retain Sports Teams. There have been a number of Congressional attempts to curb the use of tax subsidies to lure or retain sports teams. For example, Senator Moynihan introduced a bill that would have ended the federal tax exemption for bonds used to finance sports stadium construction or improvements. Bernstein (1998) notes: "Given the desperate desire of cities to keep and attract teams, the Moynihan bill could have the perverse incentive of making matters worse if cities simply issued taxable bonds instead." (p. 53) Other proposals include (1) declaring bonds issued for sports stadium construction/improvements to be "private activity bonds" and thus force states into a tradeoff given that there is a limit on the amount of private activity bonds a state can have outstanding at a point in time and (2) requiring league revenue-sharing agreements to apply to public subsidies. Bernstein comments: "If Art Modell had stood to collect only one-thirtieth of the generous payment Maryland offered him to move the Browns, it is unlikely he would have left Cleveland." (p. 54)

Ross (1995) supports the curbing of tax subsidies to lure or retain franchises as a second-best solution: "Although restoring competition to professional football and allowing the marketplace to allocate franchises would be most consistent with general public policy, one legitimate congressional response to the immediate problem of franchise free agency would be to directly target the social harm caused by this process – the exploitation of taxpayers – by prohibiting special tax subsidies to lure or retain franchises from leaving a state." He points out that the European Community has historically had such a prohibition. Given that Congress passed the legislation enabling the NFL and AFL to merge, it would be "entirely appropriate" for Congress "to insist that such a league not play one community against another through tax subsidies." Ross adds: "If federalism concerns are perceived to prevent Congress from limiting the ability of states to use their spending or taxing authority in a way that Congress believes is inimical to interstate commerce, legislation could be drafted that would provide that, notwithstanding the 1966 merger legislation, the NFL would be subject to a monopolization challenge under §2 of the Sherman Act if it or its member teams accepted tax subsidies as a lure to remain or relocate a franchise."

Ross also supports a requirement that the NFL's revenue-sharing system include public subsidies and stadium-related income (e.g., skybox revenues). He argues that, "by requiring teams to share all revenues from live gate, television, and souvenirs, but permit teams to keep for themselves all revenues from local tax subsidies, the NFL owners have illegally channelled their entrepreneurial competition away from making their games exciting and entertaining to fans and toward exploiting taxpayers."

Rejection of the Competitive Balance Defense in Rule-of-Reason Analyses. Sports leagues often defend their practices by arguing that the practices promote 'competitive balance.' As discussed throughout the preceding chapters, economic studies generally find, at best, mixed support for the leagues' arguments. One possible reason is that it is difficult to capture quantitatively just what is meant by 'competitive balance.' An alternative explanation, however, is that the leagues are using 'competitive balance' arguments as a smokescreen to justify their anticompetitive practices.

Mehra and Zuercher (2006) argue that the competitive balance argument is based on three "imperfect" assumptions: (1) "there is and must be only one championship competition per sports league", (2) "leagues can and will successfully engineer balance in that competition", and (3) "fan interest is directly related to a championship." (p. 1501) They contend that each of these assumptions is doubtful. They introduce the concept of "competing competitions."

Consider the Premier League for English football, which is wildly popular even though a handful of teams are dominant year after year. Despite the lack of competitive balance, fan interest is maintained by holding 'within league' competitions throughout the season. Lower quality teams must compete to avoid relegation to a lower league.

Moreover, there are two single-elimination tournaments involving Premier League and 'minor league' teams held during the course of the season, so even if a team has a lousy record, it nevertheless might play a few great games in a row and win a tournament. Thus, in addition to an overall league champion, there are 'champions' of each tournament. There are also tournaments in which Premier League teams play against teams from other European countries. Mehra and Zuercher point to the Premier League as a counterexample to the three imperfect assumptions on which the competitive balance argument relies.

Fantasy sports leagues are another prominent counterexample. Fans can create and 'manage' their own teams. Even if a fan's 'real' team is terrible and has no chance of winning the league championship, his or her 'fantasy' team may win the fantasy league championship. Mehra and Zuercher point out that fantasy leagues are another form of 'within league' competition.

Given these counterexamples, Mehra and Zuercher contend that "a sports league can itself incorporate several different competing competitions among its constituent teams and thus maintain fan interest even in the absence of competitive balance in that league." (p. 1501) They assert that "continued acceptance of the competitive balance argument may represent an aesthetic judgment about what an attractive sports league looks like, but does so unsupported by empirical study." (p. 1501) Mehra and Zuercher conclude that, "in light of new experience and economic research, competitive balance should be thrown out of the ballgame." (p. 1500)

Possible League Responses. Sports leagues have limited options in responding to government challenges to their monopoly power. They could lobby Congress to expand antitrust exemptions, as they have in the past. Although there may be some Congressional sentiment in favor of expanding leagues' antitrust exemptions in some areas (i.e., franchise relocation), Congress is unlikely to grant a sweeping antitrust exemption to protect leagues from adverse court decisions in antitrust cases brought by the DOJ's Antitrust Division or the FTC. Sports leagues could attempt to protect themselves from Section 1 cases by reorganizing into 'single-entity' leagues.

> *Reorganization of the Major Sports Leagues Into Single-entity Structures*. As discussed in Chapters 1 and 2, Major League Soccer, the Women's National Basketball Association, and a number of other recently-formed sports leagues have been structured as single entities so as to receive an antitrust exemption – a single entity cannot engage in an antitrust conspiracy only with itself. Thus, the leagues would be protected from lawsuits alleging violations of Section 1 of the Sherman Act. Leagues would still be vulnerable to lawsuits alleging Section 2 violations.
>
> Mathias (1999) proposes that each of the major North American sports leagues convert to a single entity structure by forming a limited liability corporation that purchases all of the league's franchises from their owners. The bought-out owners would become 'investor-owners' much as in Major League Soccer. The franchises would either be directly owned by the league or be wholly-owned subsidiaries of the league. Of course, such a reorganization would require the consent of the owners, who may find the disadvantages of such a plan to outweigh the antitrust benefits. For example, owners may fear that such a

reorganization would interfere with their ability to run their teams without interference from the league. Moreover, the reorganization may protect the league from Section 1 charges (this question would probably not be settled until decided by the U.S. Supreme Court), but would still leave the league open to Section 2 charges. The players' union also would likely oppose the reorganization, although it may not have the legal ability to prevent the league and its owners from deciding how the league will be organized.

In closing, there is little dispute that sports leagues possess monopoly power. Obviously, sports are a form of entertainment and thus compete with other forms of leisure, but these are rather poor substitutes. Numerous proposals have been suggested to address sports leagues' monopoly power, with the most radical being divestiture into three or more leagues, divestiture of the league's competition-organizing services, and government regulation. It will be interesting to see if the federal antitrust authorities (i.e., the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission) and/or the U.S. Congress decide that sports leagues' monopoly power require their attention.

References

Abilene Reporter-News. 2001. "Jones: Cowboys Only NFL Team to Accept Marketing Clause in League's New Agreement," (May 25).

Acemoglu, Daron, & Jorn-Steffen Pischke. 1998. "Why Do Firms Train? Theory and Evidence," 113 *Quarterly Journal of Economics* 79-119.

Acemoglu, Daron, & Jorn-Steffen Pischke. 1999a. "Beyond Becker: Training in Imperfect Labour Markets," 109 *Economic Journal* F112-42.

Acemoglu, Daron, & Jorn-Steffen Pischke. 1999b. "The Structure of Wages and Investment in General Training," 107 *Journal of Political Economy* 539-72.

Adams, Walter, & James W. Brock. 1997. "Monopoly, Monopsony, and Vertical Collusion: Antitrust Policy and Professional Sports," 42 *Antitrust Bulletin* 721-47 (Fall).

Alexander, Donald L., & William Kern. 2004. "The Economic Determinants of Professional Sports Franchise Values," 5 *Journal of Sports Economics* 51-66.

American Antitrust Institute. 2005. "Re: Proposed Settlement in *Metropolitan Intercollegiate Basketball Association (MIBA) v. National Collegiate Athletic Association (NCAA)*," letter to the DOJ Antitrust Division, FTC, and New York Attorney General (September 12).

Atkinson, Scott E., Linda R. Stanley & John Tschirhart. 1988. "Revenue Sharing as an Incentive in an Agency Problem: An Example from the National Football League," 19 *Rand Journal of Economics* 27-43.

Aukofer, Frank A. 1997. "Tough Sell: Some Owners Skeptical of Stock Plan," *Milwaukee Journal Sentinel* (October 14).

Baade, Robert A., & Carolyn Tuttle. 1991. "Owner Collusion or Sound Fiscal Management: An Analysis of Recent Events in Baseball's Labor Market," 1 *Seton Hall Journal of Sport Law* 41-60.

Baimbridge, Mark, Samuel Cameron & Peter Dawson. 1995. "Satellite Broadcasting and Match Attendance: The Case of Rugby League," 2 *Applied Economics Letters* 343-46.

Baimbridge, Mark, Samuel Cameron & Peter Dawson. 1996. "Satellite Television and the Demand for Football: A Whole New Ball Game?" 43 *Scottish Journal of Political Economy* 317-33.

Balfour, Alan, & Philip K. Porter. 1991. "The Reserve Clause in Professional Sports: Legality and Effect on Competitive Balance," *Labor Law Journal* 8-18.

Bambauer, Derek. 2005. “Legal Responses to the Challenges of Sports Patents,” 18 *Harvard Journal of Law & Technology* 401-33.

Barr, Adam. 2000. “Where There’s Smoke, Callaway and the USGA Could Start a Fire,” thegolfchannel.com (December 8).

Barr, Adam. 2002. “Is There a Thorn on the Rose of the Spring-Like Settlement Proposal?”, thegolfchannel.com (May 17).

Becker, Gary S. 1964. *Human Capital*, Columbia University Press.

Becker, Gary S. 1985. “College Athletes Should Get Paid What They Are Worth,” *Business Week* 18 (September 1).

Bennett, Randall W., & John L. Fizel. 1995. “Telecast Deregulation and Competitive Balance: Regarding NCAA Division I Football,” 54 *American Journal of Economics and Sociology* 183-99.

Berg, Sanford V., Jerome Duncan & Philip Friedman. 1982. *Joint Venture Strategies and Corporate Innovation*, Oelgeschlager, Gunn & Hain.

Bernstein, Mark F. 1998. “Sports Stadium Boondoggle,” *Public Interest* 45-57 (Summer).

Berri, David J., Martin B. Schmidt & Stacey L. Brook. 2004. “Stars at the Gate: The Impact of Star Power on NBA Gate Revenues,” 5 *Journal of Sports Economics* 33-50 (February).

Besanko, David A., & Daniel Simon. 1985. “Resource Allocation in the Baseball Players’ Labor Market: An Empirical Investigation,” *Review of Business and Economic Research* 71-84.

Bishop, John A., J. Howard Finch & John P. Formby. 1990. “Risk Aversion and Rent-Seeking Redistributions: Free Agency in the National Football League,” 57 *Southern Economic Journal* 114-24.

Blair, Roger D., & Richard E. Romano. 1997. “Collusive Monopsony in Theory and Practice: The NCAA,” 42 *Antitrust Bulletin* 681-719.

Blake, Ben. 2006. “Bruton Force,” special to Speedtv.com from *Racer Magazine* (May 31).

Blecherman, Barry, & Colin F. Camerer. 1996. “Is There a Winner’s Curse in the Market for Baseball Players? Evidence from the Field,” Social Science Working Paper 966, Division of Humanities and Social Sciences, California Institute of Technology.

Bodvarsson, Örn B., & King Banaian. 1998. "The Value of Arbitration Rights in Major League Baseball: Implications for Salaries and Discrimination," 37 *Quarterly Journal of Business and Economics* 65-80.

Brennan, Timothy J. 1982. "Mistaken Elasticities and Misleading Rules," 95 *Harvard Law Review* 1849-56.

Brill, Pepper. 1999. "Major League Soccer or Major League Sham? Players Bring Suit to Bite the Hand that Feeds Them," 1999 *Columbia Business Law Review* 585-615.

Brown, Gregory W., & Jay C. Hartzell. 2001. "Market Reaction to Public Information: The Atypical Case of the Boston Celtics," 60 *Journal of Financial Economics* 333-70.

Brown, Robert W. 1993. "An Estimate of the Rent Generated by a Premium College Football Player," 31 *Economic Inquiry* 671-84.

Brown, Robert W. 1994a. "Measuring Cartel Rents in the College Basketball Recruitment Market," 26 *Applied Economics* 27-34 (January).

Brown, Robert W. 1994b. "Incentives and Revenue Sharing in College Football: Spreading the Wealth or Giving Away the Game?" 15 *Managerial and Decision Economics* 471-86 (September/October).

Brown, Robert W., & R. Todd Jewell. 2004. "Measuring Marginal Revenue Product in College Athletics: Updated Estimates," in John Fizel & Rodney Fort, eds., *Economics of College Sports*, Praeger.

Brown, Robert W., & R. Todd Jewell. 2006. "The Marginal Revenue Product of a Women's College Basketball Player," 45 *Industrial Relations* 96-101.

Bruggink, Thomas H., & David R. Rose, Jr. 1990. "Financial Restraint in the Free Agent Labor Market for Major League Baseball: Players Look at Strike Three," 56 *Southern Economic Journal* 1029-43.

Burdekin, Richard C., & Todd L. Idson. 1991. "Customer Preferences, Attendance and the Racial Structure of Professional Basketball Teams," 23 *Applied Economics* 179-86.

Business Week. 1986. "Corporate Odd Couples," 100-05 (July 21).

Butler, Michael R. 1995. "Competitive Balance in Major League Baseball," 39 *American Economist* 46-52.

Cameron, Samuel. 1997. "Regulation of the Broadcasting of Sporting Events," 17 *Economic Affairs* 37-41 (September).

Carlton, Dennis W., Alan S. Frankel & Elisabeth M. Landes. 2004. "The Control of Externalities in Sports Leagues: An Analysis of Restrictions in the National Hockey League," 112 *Journal of Political Economy* S268-S288.

Carlton, Dennis W., & Jeffrey M. Perloff. 2005. *Modern Industrial Organization*, Addison Wesley, fourth edition.

Carroll, M. Todd. 2004. "No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act," 61 *Washington & Lee Law Review* 1235-86.

Carton, Peter J. Jr. 1991. "Sports Self Governance: Is It the Noblest Form or Arbitrariness?" 1 *Seton Hall Journal of Sport Law* 95-108.

Casas-Arce, Pablo. 2004. "Firm Provision of General Training and Specific Human Capital Acquisition," discussion paper no. 198, Department of Economics, University of Oxford (July).

Cave, Martin, & Robert W. Crandall. 2001. "Sports Rights and the Broadcast Industry," 111 *Economic Journal* F4-F26 (February).

Chang, Howard H., David S. Evans & Richard Schmalensee. 1998. "Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures," 1998 *Columbia Business Law Review* 223-329.

Cheffins, Brian R. 1999. "Playing the Stock Market: 'Going Public' and Professional Team Sports," 24 *Journal of Corporation Law* 641-80.

Coates, Dennis, & Brad R. Humphreys. 1999. "The Growth Effects of Sport Franchises, Stadia, and Arenas," 18 *Journal of Policy Analysis and Management* 601-24.

Coates, Dennis, & Brad R. Humphreys. 2001. "The Economic Consequences of Professional Sports Strikes and Lockouts," 67 *Southern Economic Journal* 737-47.

Cocco, Angelo, & J.C.H. Jones. 1997. "On Going South: The Economics of Survival and Relocation of Small Market NHL Franchises in Canada," 29 *Applied Economics* 1537-52.

Cohen, Edwin S. 1994. *A Lawyer's Life: Deep in the Heart of Texas*, Tax Analysts.

Cross, B. Duane. 2004. "Ante Up: Ferko vs. NASCAR Lawsuit Is About Money – Specifically, the Fans'," sportsillustrated.cnn.com (March 31).

Cusimano, Michelle A. 1999-2000. "National Collegiate Athletic Association Strikes Out Aluminum Bat Manufacturer," 43 *New York Law School Law Review* 1061-89.

Cymrot, Donald J., James A. Dunlevy & William E. Even. 2001. "'Who's on First': An Empirical Test of the Coase Theorem in Baseball," 33 *Applied Economics* 593-603.

DeBrock, Lawrence, & Wallace Hendricks. 1996. "Roll Call Voting in the NCAA," 12 *Journal of Law, Economics and Organization* 497-516.

DeBrock, Lawrence, & Wallace Hendricks. 1997. "Setting Rules in the NCAA Cartel," 2 *Advances in the Economics of Sport* 179-201.

Demmert, Henry G. 1973. *The Economics of Professional Team Sports*. Lexington, MA: Lexington Books.

Depken, Craig A. II. 1999. "Free Agency and the Competitiveness of Major League Baseball," 14 *Review of Industrial Organization* 205-17.

Depken, Craig A. II. 2002. "Free Agency and the Concentration of Player Talent in Major League Baseball," 3 *Journal of Sports Economics* 335-53.

Depken, Craig A. II, & Dennis P. Wilson. 2004a. "Institutional Change in the NCAA and Competitive Balance in Intercollegiate Football," in John Fizel & Rodney Fort, eds., *Economics of College Sports*, Praeger.

Depken, Craig A. II, & Dennis P. Wilson. 2004b. "The Impact of Cartel Enforcement in NCAA Division I-A Football," in John Fizel & Rodney Fort, eds., *Economics of College Sports*, Praeger.

Depken, Craig A. II, & Dennis P. Wilson. 2006. "NCAA Enforcement and Competitive Balance in College Football," 72 *Southern Economic Journal* 826-45.

Dobson, Stephen, & John Goddard. 1998. "Performance, Revenue, and Cross Subsidization in the Football League, 1927-1994," 4 *Economic History Review* 763-85.

Dolan, Robert C., & Robert M. Schmidt. 1985. "Assessing the Competitive Effects of Major League Baseball's Reentry Draft," 29 *American Economist* 21-31.

Drahozal, Christopher R. 1986. "The Impact of Free Agency on the Distribution of Playing Talent in Major League Baseball," 38 *Journal of Economics and Business* 113-21.

Durland, Dan, & Paul M. Sommers. 1991. "Collusion in Major League Baseball: An Empirical Test," 14 *Journal of Sports Behavior* 19-29.

Eckard, E. Woodrow. 1998. "The NCAA Cartel and Competitive Balance in College Football," 13 *Review of Industrial Organization* 347-69.

Eckard, E. Woodrow. 2001a. "The Origin of the Reserve Clause: Owner Collusion Versus 'Public Interest'," 2 *Journal of Sports Economics* 113-30 (May).

Eckard, E. Woodrow. 2001b. "Free Agency, Competitive Balance, and Diminishing Returns to Pennant Contention," 39 *Economic Inquiry* 430-43 (July).

Eckard, E. Woodrow. 2003. "The Anova-Based Competitive Balance Measure: A Defense," 4 *Journal of Sports Economics* 74-80 (February).

Edelman, Marc. 2004. "Has Collusion Returned to Baseball? Analyzing Whether a Concerted Increase in Free Agent Player Supply Would Violate Baseball's 'Collusion Clause'," 1 *Loyola of Los Angeles Entertainment Law Review* 159-84.

Endo, Melanie G., Kellan M. Florio, John B. Gerber & Paul M. Sommers. 2003. "Does a Salary Cap Improve Competitive Balance?" 31 *Atlantic Economic Journal* 388 (December).

Falconieri, Sonia, Frédéric Palomino & József Sákovics. 2004. "Collective Versus Individual Sale of Television Rights in League Sports," 2 *Journal of the European Economic Association* 833-62 (September).

Fellin, Paul. 2006. "The Commitment to Participate Rule: The NCAA Fights to Keep the March Madness Ball in Its Court," 20 *St. John's Journal of Legal Commentary* 501-30.

Ferguson, Donald G., J.C.H. Jones & Kenneth G. Stewart. 2000. "Competition Within a Cartel: League Conduct and Team Conduct in the Market for Baseball Player Services," 82 *Review of Economics and Statistics* 422-30.

Fisher, Franklin M., Christopher Maxwell & Evan Sue Schouten. 2000. "The Economics of Sports Leagues and the Relocation of Teams: The Case of the St. Louis Rams," 10 *Marquette Sports Law Journal* 193-218.

Fishman, Peter. 2003. "Competitive Balance and Free Agency in Major League Baseball," 47 *American Economist* 86-91.

Fizel, John L., & Randall W. Bennett. 1989. "The Impact of College Football Telecasts on College Football Attendance," 70 *Social Science Quarterly* 980-88.

Flanagan, Robert. 1989. "Competition and Pay: Rival Leagues in Professional Football," unpublished paper, Stanford University.

Fleisher, Arthur A. III, Brian L. Goff & Robert D. Tollison. 1991. "NCAA Voting on Academic Requirements: Public or Private Interest?" in Brian L. Goff & Robert D. Tollison, eds., *Sportometrics*, Texas A&M University Press.

Fleisher, Arthur A. III, Brian L. Goff & Robert D. Tollison. 1994. *The National Collegiate Athletic Association: A Study in Cartel Behavior*, University of Chicago Press.

Fleisher, Arthur A., William F. Shughart, Robert D. Tollison & Brian L. Goff. 1988. “Crime or Punishment? Enforcement of the NCAA Football Cartel,” 10 *Journal of Economic Behavior and Organization* 433-51.

Flynn, Michael A., & Richard J. Gilbert. 2001. “The Analysis of Professional Sports Leagues as Joint Ventures,” 111 *Economic Journal* F27-F46.

Forrest, David, Rob Simmons & Stefan Szymanski. 2004. “Broadcasting, Attendance and the Inefficiency of Cartels,” 24 *Review of Industrial Organization* 243-65.

Fort, Rodney. 1992. “Pay and Performance: Is the Field of Dreams Barren?” in Paul M. Sommers, ed., *Diamonds Are Forever: The Business of Baseball*, Washington, D.C.: Brookings Institution.

Fort, Rodney. 2003. “Thinking (Some More) about Competitive Balance,” 4 *Journal of Sports Economics* 280-83 (November).

Fort, Rodney, & Joel Maxcy. 2001. “The Demise of African American Baseball Leagues: A Rival League Explanation,” 2 *Journal of Sports Economics* 35-49.

Fort, Rodney, & Joel Maxcy. 2003. “Competitive Balance in Sports Leagues: An Introduction,” 4 *Journal of Sports Economics* 154-60 (May).

Fort, Rodney, & James Quirk. 1995. “Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues,” 33 *Journal of Economic Literature* 1265-99.

Fort, Rodney, & James Quirk. 2004. “Owner Objectives and Competitive Balance,” 5 *Journal of Sports Economics* 20-32.

Friedman, Wayne. 2000. “Bulging Purses and New Sponsors Help Rejuvenate the PGA,” 71 *Advertising Age* (February 28).

Gattuso, James L. 1985. “Why Congress Is Out-of-Bounds If It Makes Rules for Football,” Backgrounder #444, Heritage Foundation (July 9).

Gelberg, J.N. 1996. “The Rise and Fall of the Polara Asymmetric Golf Ball: No Hook, No Slice, No Dice,” 18 *Technology in Society* 93-110.

Gius, Mark, & Donn Johnson. 1998. “An Empirical Investigation of Wage Discrimination in Professional Basketball,” 5 *Applied Economics Letters* 703-05.

Greenspan, David. 1988. "College Football's Biggest Fumble: The Economic Impact of the Supreme Court's Decision in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*," 33 *Antitrust Bulletin* 1-65 (Spring).

Grier, Kevin B., & Robert D. Tollison. 1994. "The Rookie Draft and Competitive Balance: The Case of Professional Football," 25 *Journal of Economic Behavior and Organization* 293-98.

Grusd, Brandon L. 1999. "The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements," 1 *Virginia Journal of Sports and the Law* 1-43 (Spring).

Gürtler, Oliver. 2005. "A Rationale for the Coexistence of Central and Decentral Marketing in Team Sports," discussion paper 4/2005, Bonn Graduate School of Economics (February).

Gustafson, Elizabeth, and Lawrence Hadley. 1995. "Arbitration and Salary Gaps in Major League Baseball," 34 *Quarterly Journal of Business and Economics* 32-46.

Hadley, Lawrence, and Elizabeth Gustafson. 1991. "Major League Baseball Salaries: The Impacts of Arbitration and Free Agency," 5 *Journal of Sports Management* 111-27.

Hagstrom, Robert G. 1998. *The NASCAR Way*, John Wiley & Sons.

Hamilton, Bruce W. 2003. "Class Action in Price-Fixing Litigation When the Fixed Price Is a Wage Rate: *Law et al. v. NCAA*," 48 *Antitrust Bulletin* 505-29 (Summer).

Haupert, Michael J. 2003. "The Economic History of Major League Baseball," EH.Net Encyclopedia, edited by Robert Whaples (August 27).

Hausman, Jerry A., & Gregory K. Leonard. 1997. "Superstars in the National Basketball Association: Economic Value and Policy," 15 *Journal of Labor Economics* 586-624.

Heintel, Robert C. 1996. "The Need for an Alternative to Antitrust Regulation of the National Football League," 46 *Case Western Reserve Law Review* 1033-69.

Heubeck, Tina. 2004. "The Collective Selling of Broadcasting Rights in Team Sports," paper 13, German working papers in law and economics (February 1).

Hiestand, Michael. 2005. "NASCAR Agrees to Eight-Year TV Deal," *USA Today* (December 7).

Hill, James Richard. 1985. "The Threat of Free Agency and Exploitation in Professional Baseball: 1976-1979," 25 *Quarterly Review of Economics and Business* 68-82.

Hill, James Richard, & Peter A. Groothuis. 2001. "The New NBA Collective Bargaining Agreement, the Median Voter Model, and a Robin Hood Rent Redistribution," 2 *Journal of Sports Economics* 131-44 (May).

Hill, James Richard, & William Spellman. 1983. "Professional Baseball: The Reserve Clause and Salary Structure," 22 *Industrial Relations* 1-19.

Hoehn, Tom, & David Lancefield. 2003. "Broadcasting and Sport," 19 *Oxford Review of Economic Policy* 552-68.

Horowitz, Ira. 1997. "The Increasing Competitive Balance in Major League Baseball," 12 *Review of Industrial Organization* 373-87.

Humphreys, Brad R. 2003a. "The Anova-Based Competitive Balance Measure: A Reply," 4 *Journal of Sports Economics* 81-82 (February).

Humphreys, Brad R. 2003b. "Comments on 'Thinking about Competitive Balance'," 4 *Journal of Sports Economics* 284-87 (November).

Hylan, Timothy R., Maureen J. Lage & Michael Treglia. 1996. "The Coase Theorem, Free Agency, and Major League Baseball: A Panel Study of Pitcher Mobility from 1961 to 1992," 62 *Southern Economic Journal* 1029-42.

Hylton, J. Gordon. 1999. "Why Baseball's Antitrust Exemption Still Survives," 9 *Marquette Sports Law Journal* 391-402.

Johnson, Bruce K. 1992. "Team Racial Composition and Players' Salaries," in Paul M. Sommers, ed., *Diamonds Are Forever: The Business of Baseball*, Washington, D.C.: Brookings Institution.

Jones, J.C.H., & D.G. Ferguson. 1988. "Location and Survival in the National Hockey League," 36 *Journal of Industrial Economics* 443-56.

Jones, J.C.H., Serge Nadeau & William D. Walsh. 1997. "The Wages of Sin: Employment and Salary Effects of Violence in the National Hockey League," 25 *Atlantic Economic Journal* 191-206 (June).

Jones, J.C.H., Serge Nadeau & William D. Walsh. 1999. "Ethnicity, Productivity and Salary: Player Compensation and Discrimination in the National Hockey League," 31 *Applied Economics* 593-608.

Jones, J.C.H., & W.D. Walsh. 1987. "The World Hockey Association and Player Exploitation in the National Hockey League," 27 *Quarterly Review of Economics and Business* 87-101.

Kahane, Leo H. 2003. "Comments on 'Thinking about Competitive Balance'," 4 *Journal of Sports Economics* 288-91 (November).

Kahn, Lawrence M. 1992. "The Effects of Race on Professional Football Players' Compensation," 45 *Industrial and Labor Relations Review* 295-310.

Kahn, Lawrence M. 1993. "Free Agency, Long-Term Contracts and Compensation in Major League Baseball: Estimates from Panel Data," 75 *Review of Economics and Statistics* 157-64.

Kahn, Lawrence M. 2000. "The Sports Business as a Labor Market Laboratory," 14 *Journal of Economic Perspectives* 75-94.

Kahn, Lawrence M., & Peter D. Sherer. 1988. "Racial Differences in Professional Basketball Players' Compensation," 6 *Journal of Labor Economics* 40-61.

Kanazawa, Mark T., & Jonas P. Funk. 2001. "Racial Discrimination in Professional Basketball: Evidence from Nielsen Ratings," 39 *Economic Inquiry* 599-608.

Kaplow, Louis. 1982. "The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative," 95 *Harvard Law Review* 1817-48.

Kass, Mark. 1996. "Score Another Victory for Jerry Jones' Dallas Cowboys," *Business Journal of Milwaukee* (December 20).

Kedrosky, Paul. 2005. "Tiger, Tiger Burning Bright," 78 *Canadian Business* (March 14).

Késenne, Stefan. 2000. "Revenue Sharing and Competitive Balance in Professional Team Sports," 1 *Journal of Sports Economics* 56-65.

Késenne, Stefan. 2004. "Competitive Balance and Revenue Sharing: When Rich Clubs Have Poor Teams," 5 *Journal of Sports Economics* 206-12.

Késenne, Stefan. 2005. "Revenue Sharing and Competitive Balance: Does the Invariance Proposition Hold?" 6 *Journal of Sports Economics* 98-106.

Kogut, Bruce. 1989. "The Stability of Joint Ventures: Reciprocity and Competitive Rivalry," 38 *Journal of Industrial Economics* 183-98.

Konsky, Sarah M. 2003. "An Antitrust Challenge to the NCAA Transfer Rules," 70 *University of Chicago Law Review* 1581-1607.

Koppett, Leonard. 1976. "What the Rhubarb Is All About," *The Nation* 587-92 (May 15).

Kowalewski, Sandra, & Michael A. Leeds. 1999. "The Impact of the Salary Cap and Free Agency on the Structure and Distribution of Salaries in the NFL," in John Fizel, Elizabeth Gustafson & Lawrence Hadley, eds., *Sports Economics: Current Research*, Westport, CT: Praeger.

Krautmann, Anthony C. 1999. "What's Wrong with Scully-Estimates of a Player's Marginal Revenue Product," 37 *Economic Inquiry* 369-81.

Krautmann, Anthony C., Elizabeth Gustafson & Lawrence Hadley. 2000. "Who Pays for Minor League Training Costs?" 18 *Contemporary Economic Policy* 37-47.

Krautmann, Anthony C., & Margaret Oppenheimer. 1996. "Training in Major League Baseball: Are Players Exploited?" in John Fizel, Elizabeth Gustafson & Lawrence Hadley, eds., *Baseball Economics: Current Research*, Westport, CT: Greenwood.

Landes, William M., & Richard A. Posner. 1981. "Market Power in Antitrust Cases," 94 *Harvard Law Review* 937-96.

Lascari, Scott C. 1999. "The Latest Revenue Generator: Stock Sales by Professional Sports Franchises," 9 *Marquette Sports law Journal* 445-66.

Lazaroff, Daniel E. 1999. "Sports Equipment Standardization: An Antitrust Analysis," 34 *Georgia Law Review* 137-94.

Leeds, Michael A., & Sandra Kowalewski. 2001. "Winner Take All in the NFL: The Effect of the Salary Cap and Free Agency on the Compensation of Skill Position Players," 2 *Journal of Sports Economics* 244-56 (August).

Lehn, Kenneth. 1982. "Property Rights, Risk Sharing, and Player Disability in Major League Baseball," 25 *Journal of Law and Economics* 343-66.

Lehn, Kenneth, & Michael Sykuta. 1997. "Antitrust and Franchise Relocation in Professional Sports: An Economic Analysis of the *Raiders* Case," 42 *Antitrust Bulletin* 541-63.

Leonard, John, & Joseph Prinzinger. 1984. "An Investigation Into the Monopolistic Market Structure of Division One NCAA Football and Its Effect on College Football Players," 10 *Eastern Economic Journal* 455-67.

Levenstein, Margaret C., & Valerie Y. Suslow. 2002. "What Determines Cartel Success?" working paper (January 31).

Lopatka, John E., & Jill B. Herndon. 1997. "Antitrust and Sports Franchise Ownership Restraints: A Sad Tale of Two Cases," 42 *Antitrust Bulletin* 749-91.

MacDonald, Don N., & Morgan O. Reynolds. 1994. "Are Baseball Players Paid Their Marginal Products?" 15 *Managerial and Decision Economics* 443-57.

Marburger, Daniel R. 1994. "Bargaining Power and the Structure of Salaries in Major League Baseball," 15 *Managerial and Decision Economics* 433-41.

Marburger, Daniel R. 1997. "Gate Revenue Sharing and Luxury Taxes in Professional Sports," 15 *Contemporary Economic Policy* 114-23.

Matheson, Victor A. 2003. "European Football: A Survey of the Literature," working paper, Williams College (August 1).

Mathias, Edward. 1999. "Big League Perestroika? The Implications of *Fraser v. Major League Soccer*," 148 *University of Pennsylvania Law Review* 203-37.

Matisik, Edward N. 2005. "NIT Sues Under Sherman Anti-Trust Act," collegehoopsnet.com (February 4).

McKenzie, Richard B., & E. Thomas Sullivan. 1987. "Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation," 32 *Antitrust Bulletin* 373-99 (Summer).

Medcalfe, Simon. 2003. "Does Promotion and Relegation Improve Competitive Balance: Evidence from Two Natural Experiments from England," working paper, Lehigh University (May).

Medoff, Marshall H. 1976. "On Monopolistic Exploitation in Professional Baseball," 16 *Quarterly Review of Economics and Business* 113-21.

Mehra, Salil K., & T. Joel Zuercher. 2006. "Striking Out 'Competitive Balance' in Sports, Antitrust, and Intellectual Property," 21 *Berkeley Technology Law Journal* 1499-1545.

Miceli, Thomas J. 2004. "A Principal-Agent Model of Contracting in Major League Baseball," 5 *Journal of Sports Economics* 213-20.

Miller, Phillip A. 2000. "A Theoretical and Empirical Comparison of Free Agent and Arbitration-Eligible Salaries Negotiated in Major League Baseball," 67 *Southern Economic Journal* 87-104.

Moreland, David Scott. 2005. "The Antitrust Implications of the Bowl Championship Series: Analysis Through Analogous Reasoning," 21 *Georgia State University Law Review* 721-49.

Nawrocki, Tom, & Richard O'Brien. 1997. "Investing in Diamonds," 87 *Sports Illustrated* (September 29).

Neale, Walter C. 1964. "The Peculiar Economics of Professional Sports," 78 *Quarterly Journal of Economics* 1-14.

New, Bill, & Julian Le Grand. 1999. "Monopoly in Sports Broadcasting," 20 *Policy Studies* 23-36.

New York Times. 1985. "Clippers Sue League," (March 9).

New York Times. 1987. "Clippers, N.B.A. Settle," (October 1).

New York Times. 1995. "Pro Football: Dallas Seeks Suit Dismissal," (October 24).

New York Times. 1996. "Pro Football: Judge Rules Against Dallas," (February 21).

New York Times. 1996. "N.F.L., Sullivan Settle," (August 12).

New York Times. 1996. "N.F.L. Settles with Cowboys," (December 14).

Noll, Roger G. 1974. "Attendance and Price Setting," in Roger G. Noll, ed., *Government and the Sports Business*. Washington, D.C.: Brookings Institution.

Noll, Roger G. 2002. "The Economics of Promotion and Relegation in Sports Leagues: The Case of English Football," 3 *Journal of Sports Economics* 169-203.

Noll, Roger G. 2003a. "The Economics of Baseball Contraction," 4 *Journal of Sports Economics* 367-88 (November).

Noll, Roger G. 2003b. "The Organization of Sports Leagues," 19 *Oxford Review of Economic Policy* 530-51 (Winter).

Noll, Roger G. 2007. "Broadcasting and Team Sports," 54 *Scottish Journal of Political Economy* 400-21 (July).

Oram, Marc D. 2000. "The Stadium Financing and Franchise Relocation Act of 1999," 2 *Virginia Journal of Sports and the Law* 184-211 (Spring).

Ordover, Janusz A., Alan O. Sykes & Robert D. Willig. 1982. "Herfindahl Concentration, Rivalry, and Mergers," *95 Harvard Law Review* 1857-74.

Osterland, Andre. 1997. "Into the Woods," 166 *Financial World* (June 17).

Pacey, Patricia L., & Elizabeth D. Wickham. 1985. "College Football Telecasts: Where Are They Going?" 23 *Economic Inquiry* 93-113.

Palomino, Frederic, & Luca Rigotti. 2000. "The Sport's League Dilemma: Competitive Balance versus Incentives to Win," working paper, Department of Economics, University of California, Berkeley.

Palomino, Frederic, & József Sákovics. 2004. "Inter-League Competition for Talent vs. Competitive Balance," 22 *International Journal of Industrial Organization* 783-97.

Putsis, William P. Jr., & Subrata K. Sen. 2000. "Should NFL Blackouts Be Banned?" 32 *Applied Economics* 1495-1507.

Quirk, James. 1973. "An Economic Analysis of Team Movements in Professional Sports," 36 *Law and Contemporary Problems* 42-66.

Quirk, James. 1997. "The Salary Cap and the Luxury Tax: Affirmative Action Programs for Weak-Drawing Franchises," in Daniel R. Marburger, ed., *Stee-rike Four! What's Wrong with the Business of Baseball?*, Praeger.

Quirk, James, & Rodney Fort. 1999. *Hard Ball: The Abuse of Power in Pro Team Sports*, Princeton University Press.

Raimondo, Henry J. 1983. "Free Agents' Impact on the Labor Market for Baseball Players," 4 *Journal of Labor Research* 183-93.

Rappaport, Jordan, & Chad Wilkerson. 2001. "What Are the Benefits of Hosting a Major League Sports Franchise?" *Economic Review*, Federal Review Bank of Kansas City 55-86 (first quarter).

Rascher, Daniel A. 1996. "A Model of a Professional Sports League," working paper (September 1).

Rascher, Daniel A., & Andrew D. Schwarz. 2000. "'Amateurism' in Big-Time College Sports," 14 *Antitrust* 51-56 (Spring).

Richardson, David H. 2000. "Pay, Performance, and Competitive Balance in the National Hockey League," 26 *Eastern Economic Journal* 393-417.

Roberts, Gary R. 1994. "On the Scope and Effect of Baseball's Antitrust Exclusion," 4 *Seton Hall Journal of Sport Law* 321-36.

Roberts, Gary R. 1995. "Testimony," Hearing before the Subcommittee on Antitrust, Business Rights, and Competition, Senate Committee on the Judiciary (November 29).

Roberts, Gary R. 2001. "The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues," 3 *Virginia Journal of Sports and the Law* 52-78 (Spring).

Roberts, Gary R. 2003. "The Case for Baseball's Special Antitrust Immunity," 4 *Journal of Sports Economics* 302-17.

Roberts, Matthew. 2001. "NIT Sues NCAA on Antitrust Claim," sportslawnews.com (March 28).

Romer, David. 2006. "Do Firms Maximize? Evidence from Professional Football," 114 *Journal of Political Economy* 340-65.

Ross, Michael E., & Sashe D. Dimitroff. 1997. "Antitrust Relief Against Restrictions on the Sale or Relocation of Major League Baseball Teams," 42 *Antitrust Bulletin* 521-39.

Ross, Stephen F. 1989. "Monopoly Sports Leagues," 73 *Minnesota Law Review* 643-761.

Ross, Stephen F. 1995. "Testimony," Hearing before the Subcommittee on Antitrust, Business Rights, and Competition, Senate Committee on the Judiciary (November 29).

Ross, Stephen F. 2001. "Antirust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues," 52 *Case Western Reserve Law Review* 133-71.

Ross, Stephen F. 2003. "Competition Law as a Constraint on Monopolistic Exploitation by Sports Leagues and Clubs," 19 *Oxford Review of Economic Policy* 569-84.

Ross, Stephen F., & Robert B. Lucke. 1997. "Why Highly Paid Athletes Deserve More Antitrust Protection Than Ordinary Unionized Workers," 42 *Antitrust Bulletin* 641-79 (Fall).

Ross, Stephen F., & Stefan Szymanski. 2002. "Open Competition in League Sports," 2002 *Wisconsin Law Review* 625-56.

Ross, Stephen F., & Stefan Szymanski. 2004. "Designing Sports Leagues as Efficient Monopolists Rather than Inefficient Cartels," working paper.

Ross, Stephen F., & Stefan Szymanski. 2005a. "Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations," Law and Economics Working Paper no. 20, University of Illinois College of Law.

Ross, Stephen F., & Stefan Szymanski. 2005b. "The Law & Economics of Optimal Sports League Design," Tanaka Business School Discussion Paper no. TBS/DP05/36, Imperial College London.

Sanderson, Allen R. 2002. "The Many Dimensions of Competitive Balance," 3 *Journal of Sports Economics* 204-28.

Sanderson, Allen R., & John J. Siegfried. 2003. "Thinking About Competitive Balance," 4 *Journal of Sports Economics* 255-79 (November).

Schlosser, Joe. 2001. "Revved Up for NASCAR," *Broadcasting & Cable* 18-20 (February 12).

Schmalensee, Richard. 1982. "Another Look at Market Power," 95 *Harvard Law Review* 1789-1816.

Schmidt, Martin B. 2001. "Competition in Major League Baseball: The Impact of Expansion," 8 *Applied Economics Letters* 21-26.

Scibilia, Frank P. 1996. "Baseball Franchise Stability and Consumer Welfare: An Argument for Reaffirming Baseball's Antitrust Exemption with Regard to Its Franchise Relocation Rules," *Seton Hall Journal of Sport Law* 409-68.

Scott, Frank A. Jr., James E. Long & Ken Somppi. 1983. "Free Agency, Owner Incentives, and the National Football League Players Association," 4 *Journal of Labor Research* 257-64.

Scott, Frank A. Jr., James E. Long & Ken Somppi. 1985. "Salary vs. Marginal Revenue Product Under Monopsony and Competition: The Case of Professional Basketball," 13 *Atlantic Economic Journal* 50-59.

Scully, Gerald W. 1974. "Pay and Performance in Major League Baseball," 64 *American Economic Review* 915-30.

Scully, Gerald W. 1989. *The Business of Major League Baseball*, University of Chicago Press.

Scully, Gerald W. 1995. *The Market Structure of Sports*, University of Chicago Press.

Scully, Gerald W. 2004. "Player Salary Share and the Distribution of Player Earnings," 25 *Managerial and Decision Economics* 77-86.

Seal, James L. 1993. "Market Definition in Antitrust Litigation in the Sports and Entertainment Industries," 61 *Antitrust Law Journal* 737-64.

Siegfried, John J. 1994. "The National Collegiate Athletic Association: A Study in Cartel Behavior: Review Article," 39 *Antitrust Bulletin* 599-609 (Summer).

Siegfried, John J., & Molly Gardner Burba. 2004. "The College Football Association Television Broadcast Cartel," 49 *Antitrust Bulletin* 799-819 (Fall).

Siegfried, John J., & C. Elton Hinshaw. 1979. "The Effect of Lifting Television Blackouts on Professional Football No-Shows," 32 *Journal of Economics and Business* 1-13 (Fall).

Siegfried, John J., & Andrew Zimbalist. 2000. "The Economics of Sports Facilities and Their Communities," 14 *Journal of Economic Perspectives* 95-114 (Summer).

Sommers, Paul M., & Noel Quinton. 1982. "Pay and Performance in Major League Baseball: The Case of the First Family of Free Agents," 17 *Journal of Human Resources* 426-36.

Staudohar, Paul D. 1988. "The Football Strike of 1987: The Question of Free Agency," 111 *Monthly Labor Review* 26-31.

Staudohar, Paul D. 1998. "Salary Caps in Professional Team Sports," *Compensation and Working Conditions* 3-11 (Spring).

Staudohar, Paul D. 1999. "Labor Relations in Basketball: The Lockout of 1998-99," *Monthly Labor Review* 3-9 (April).

Stuck, Thomas D. 2004. "Facility Issues in Major League Soccer: What Do Soccer Stadiums Have to Do with Antitrust Liability?" 14 *Marquette Sports Law Review* 551-69.

Sullivan, Heike K. 2000. "*Fraser v. Major League Soccer*: The MLS's Single-Entity Structure Is a 'Sham'," 73 *Temple Law Review* 865-904.

Surdam, David G. 2002. "The American 'Not-So-Socialist' League in the Postwar Era: The Limitations of Gate Sharing in Reducing Revenue Disparity in Baseball," 3 *Journal of Sports Economics* 264-90.

Sutter, Daniel, & Stephen Winkler. 2003. "NCAA Scholarship Limits and Competitive Balance in College Football," 4 *Journal of Sports Economics* 3-18.

Szymanski, Stefan. 2005. "Tilting at the Playing Field: Why a Sports League Planner Would Choose *Less*, Not More, Competitive Balance," Tanaka Business School Discussion Paper TBS/DP05/35, Tanaka Business School, Imperial College London (October).

Szymanski, Stefan, & Stefan Késenne. 2004. "Competitive Balance and Gate Revenue Sharing in Team Sports," 52 *Journal of Industrial Economics* 165-77.

Szymanski, Stefan, & Ron Smith. 1997. "The English Football Industry: Profit, Performance and Industrial Structure," 11 *International Review of Applied Economics* 135-53.

Szymanski, Stefan, & Tommaso M. Valletti. 2003. "Promotion and Relegation in Sporting Contests," working paper, Imperial College London (June).

Tarantino, Anthony. 2005. "A Federal Case: Baseball's Last Rival 'Major' League Struck Out in 1915, but Its Effects Were Long-Lasting," *San Diego Union-Tribune* (May 30).

Telser, Lester G. 1995. "The Ultimatum Game and the Law of Demand," 105 *Economic Journal* 1519-23.

Thompson, Adam. 2007. "Keeping Nascar's Pedal to the Metal," *Wall Street Journal* B1 (September 13).

Tollison, Robert D. 2000. "Understanding the Antitrust Economics of Sports Leagues," 14 *Antitrust* 21-24 (Spring).

Tonazzi, Alessandra. 2003. “Competition Policy and the Commercialization of Sports Broadcasting Rights: The Decision of the Italian Competition Authority,” 10 *International Journal of the Economics of Business* 17-34.

Tutelman, Dave. 1998. “The Great Square Groove Controversy,” tutelman.com (July).

Utt, Joshua, & Rodney Fort. 2002. “Pitfalls to Measuring Competitive Balance with Gini Coefficients,” 3 *Journal of Sports Economics* 367-73.

Van Riper, Tom. 2006. “No Competition,” forbes.com (March 13).

Voluntary Trade Council. 2005. “Fumbling the Antitrust Football: The NFL Blackouts of 2004-2005,” Voluntary Trade Reports No. 6 (December).

Vrooman, John. 1996. “The Baseball Players’ Labor Market Reconsidered,” 63 *Southern Economic Journal* 339-60.

Vrooman, John. 1997a. “A Unified Theory of Capital and Labor Markets in Major League Baseball,” 63 *Southern Economic Journal* 594-619 (January).

Vrooman, John. 1997b. “Franchise Free Agency in Professional Sports Leagues,” 64 *Southern Economic Journal* 191-219 (July).

Vrooman, John. 2000. “The Economics of American Sports Leagues,” 47 *Scottish Journal of Political Economy* 364-98 (September).

Waxman, Michael P. 2001. “*Fraser v. MLS, L.L.C.*: Is There a Sham Exception to the *Copperweld* Single Entity Immunity?” 12 *Marquette Sports Law Review* 487-99.

Welki, Andrew M., & Thomas J. Zlatoper. 1994. “US Professional Football: The Demand for Game-Day Attendance in 1991,” 15 *Managerial and Decision Economics* 489-95.

White, Michael D. 1986. “Self-Interest Redistribution and the National Football League Players Association,” 24 *Economic Inquiry* 669-80.

Wilkinson, Mark. 2004. “*National Hockey League Players’ Association v. Plymouth Whalers Hockey Club*: Antitrust’s Rule of Reason and the Van Ryn Rule,” 50 *Wayne Law Review* 1277-94.

Wilson, Jeff. 2005. “Fan Wishes He Hadn’t Filed Suit,” thatsracin.com (November 2).

Wolf, Jeff. 2006. “Litigation on Track Causes Caution Flag: NASCAR, ISC Accused of Violating Antitrust Laws,” reviewjournal.com (March 12).

Yasser, Ray, & Clay Fees. 2005. “Attacking the NCAA’s Anti-Transfer Rules as Covenants Not to Compete,” 15 *Seton Hall Journal of Sports and Entertainment Law* 221-52.

Zimbalist, Andrew. 1992. "Salaries and Performance: Beyond the Scully Model," in Paul M. Sommers, ed., *Diamonds Are Forever: The Business of Baseball*, Brookings Institution.

Zimbalist, Andrew. 1994. "Baseball Economics and Antitrust Immunity," 4 *Seton Hall Journal of Sport Law* 287-320.

Zimbalist, Andrew. 2002. "Competitive Balance in Sports Leagues: An Introduction," 3 *Journal of Sports Economics* 111-21.

Zimbalist, Andrew. 2003a. "Competitive Balance Conundrums: Response to Fort and Maxcy's Comment," 4 *Journal of Sports Economics* 161-63 (May).

Zimbalist, Andrew. 2003b. "Sport as Business," 19 *Oxford Review of Economic Policy* 503-11 (Winter).

Zubar, Richard A., & John M. Gandar. 1988. "Lifting the Television Blackout on No-Shows at Football Games," 16 *Atlantic Economic Journal* 63-73 (June).

Cited Cases

Adidas America v. National Collegiate Athletic Association, 40 F. Supp. 2d 1275 (D. Ks 1999).

Adidas America v. National Collegiate Athletic Association, 64 F. Supp. 2d 1097 (D. Ks 1999).

American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963).

American Needle v. New Orleans Louisiana Saints, 385 F. Supp. 2d 687 (N.D. Il E.D. 2005).

Association of Independent Television Stations v. College Football Association, 637 F. Supp. 1289 (W.D. Ok 1986).

Banks v. National Collegiate Athletic Association, 977 F.2d 1081 (7th Cir. 1992).

Baseball at Trotwood v. Dayton Professional Baseball Club, 113 F. Supp. 2d 1164 (S.D. Oh W.D. 1999).

Baum Research and Development v. Hillerich & Bradsby, 31 F. Supp. 2d 1016 (E.D. Mi S.D. 1998).

Blaich v. National Football League, 212 F. Supp. 319 (S.D.N.Y. 1962).

Blalock v. Ladies Professional Golf Association, 359 F. Supp. 1260 (N.D. Ga 1973).

Boston Professional Hockey Association v. Gerry Cheevers, 348 F. Supp. 261 (D. Ma 1972).

Brenner v. World Boxing Council, 675 F.2d 445 (2nd Cir. 1982).

Bridgeman v. National Basketball Association, 675 F. Supp. 960 (D. NJ 1987).

Brookins v. International Motor Contest Association, 219 F.3d 849 (8th Cir. 2000).

Brown v. Pro Football, 50 F.3d 1041 (D.C. 1995).

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

Caldwell v. American Basketball Association, 66 F.3d 523 (2nd Cir. 1995).

Campo v. National Football League, 334 F. Supp. 1181 (E.D. La 1971).

Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. National Basketball Association, 961 F.2d 667 (7th Cir. 1992).

Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. National Basketball Association, 95 F.3d 593 (7th Cir. 1996).

Clarett v. National Football League, 369 F.3d 124 (2nd Cir. 2004).

Colorado High School Activities Association v. National Football League, 524 F. Supp. 60 (D. Co 1981).

Coniglio v. Highwood Services, 495 F. 2d 1286 (2nd Cir. 1974).

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

Deesen v. Professional Golfers Association of America, 358 F.2d 165 (9th Cir. 1966).

Denver Rockets v. All-Pro Management, 325 F. Supp. 1049 (C.D. Ca 1971).

Driskill v. Dallas Cowboys Football Club, 498 F.2d 321 (5th Cir. 1974).

Eureka Urethane v. Professional Bowlers Association of America, 746 F. Supp. 915 (E.D. Mo 1990).

Eureka Urethane v. Professional Bowlers Association of America, 935 F.2d 990 (8th Cir. 1991).

Federal Base Ball Club of Baltimore v. National League, 259 U.S. 200 (1922).

Fishman v. Estate of Arthur M. Wirtz, 807 F.2d 520 (7th Cir. 1986).

Five Smiths v. National Football League, 788 F.Supp. 1042 (Minn., 1992).

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

Fraser v. Major League Soccer, 284 F.3d 47 (1st Cir. 2002).

Gaines v. National Collegiate Athletic Association, 746 F. Supp. 738 (M.D. Tn 1990).

Gilder v. PGA Tour, 936 F.2d 417 (9th Cir. 1991).

Gunter Harz Sports v. United States Tennis Association, 511 F. Supp. 1103 (D. Ne 1981).

Gunter Harz Sports v. United States Tennis Association, 665 F.2d 222 (8th Cir. 1981).

Hecht v. Pro-Football, 570 F.2d 982 (D.C. Cir. 1977).

Hennessey v. National Collegiate Athletic Association, 564 F.2d 1136 (5th Cir. 1977).

In re: Baseball Bat Antitrust Litigation (MDL No. 1249), 75 F. Supp. 2d 1189 (D. Ks 1999).

In re: Motorsports Merchandise Antitrust Litigation, 112 F. Supp. 2d 1329 (N.D. Ga 2000).

In re: Motorsports Merchandise Antitrust Litigation, 160 F. Supp. 2d 1392 (N.D. Ga 2001).

In re: NCAA I-A Walk-on Football Players Litigation, Case No. C04-1254C, W.D. Washington at Seattle (September 14, 2005).

In re: NCAA I-A Walk-on Football Players Litigation, 2006 WL 1207915 (W.D. Wash. May 3, 2006).

Independent Entertainment Group v. National Basketball Association, 853 F. Supp. 333 (C.D. Ca 1994).

International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1959).

Justice v. National Collegiate Athletic Association, 577 F. Supp. 356 (D. Az 1983).

Kapp v. National Football League, 390 F. Supp. 73 (N.D. Ca 1974).

Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978).

Karsten Manufacturing v. United States Golf Association, 728 F. Supp. 1429 (D. Az 1990).

Kingray v. National Basketball Association, 188 F. Supp. 2d 1177 (S.D. Ca 2002).

Law v. National Collegiate Athletic Association, 902 F. Supp. 1394 (D. Ks 1995).

Law v. National Collegiate Athletic Association, 134 F.3d 1010 (10th Cir. 1998).

Levin v. National Basketball Association, 385 F. Supp. 149 (S.D.N.Y. 1974).

Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir. 1984).

Los Angeles Memorial Coliseum Commission v. National Football League, 791 F.2d 1356 (9th Cir. 1986).

M&H Tire Company v. Hoosier Racing Tire, 560 F. Supp. 591 (D. Ma 1983).

M&H Tire Company v. Hoosier Racing Tire, 733 F.2d 973 (1st Cir. 1984).

Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

Major League Baseball v. Crist, 331 F.3d 1177 (11th Cir. 2003).

McCormack v. National Collegiate Athletic Association, 845 F.2d 1338 (5th Cir. 1988).

McCourt v. California Sports, Incorporated, 460 F. Supp. 904 (E.D. Mi S.D. 1978).

McCoy v. Major League Baseball, 911 F. Supp. 454 (W.D. Wa 1995).

McNeil v. National Football League, 790 F. Supp. 871 (4th D. Mn 1992).

Metropolitan Intercollegiate Basketball Association v. National Collegiate Athletic Association, 337 F. Supp. 2d 563 (S.D.N.Y. 2004).

Metropolitan Intercollegiate Basketball Association v. National Collegiate Athletic Association, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3rd Cir. 1983).

Molinas v. National Basketball Association, 190 F. Supp. 241 (S.D.N.Y. 1961).

Morris Communications v. PGA Tour, 235 F. Supp. 2d 1269 (M.D. Fl J.D. 2002).

Morris Communications v. PGA Tour, 364 F.3d 1288 (11th Cir. 2004).

Murray v. National Football League, 1996 U.S. Dist. LEXIS 9108 (E.D. Pa 1996).

Murray v. National Football League, 1998 U.S. Dist. LEXIS 5894 (E.D. Pa 1998).

National Basketball Association v. SDC Basketball Club and Los Angeles Memorial Coliseum, 815 F.2d 562 (9th Cir. 1987).

National Basketball Association v. Williams, 45 F.3d 684 (2nd Cir. 1995).

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984).

National Hockey League Players Association v. Plymouth Whalers Hockey Club, 325 F.3d (6th Cir. 2003).

National Hockey League Players Association v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005).

North American Soccer League v. National Football League, 670 F.2d 1249 (2nd Cir. 1982).

PGA Tour v. Martin, 532 U.S. 661 (2001).

Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa 1972).

Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa 1993).

Pocono Invitational Sports Camp v. National Collegiate Athletic Association, 317 F. Supp. 2d 569 (E.D. Pa 2004).

Polara Enterprises v. United States Golf Association, C-78-1320-RHS (D. Ca 1984).

Radovich v. National Football League, 352 U.S. 445 (1957).

Robertson v. National Basketball Association, 389 F. Supp. 867 (S.D.N.Y. 1975).

San Francisco Seals v. National Hockey League, 379 F. Supp. 966 (C.D. Ca. 1974).

Schwartz v. Dallas Cowboys Football Club, 157 F. Supp. 2d 561 (E.D. Pa 2001).

Seattle Totems Hockey Club v. National Hockey League, 783 F.2d 1347 (9th Cir. 1986).

Shaw v. Dallas Cowboys Football Club, 1998 WL 419765 (E.D. Pa 1998).

Shaw v. Dallas Cowboys Football Club, 172 F.3d 299 (3rd Cir. 1999).

Shaw v. Dallas Cowboys Football Club, Civil Action No. 97-5184 (E.D. Pa 5/9/2001).

Silverman v. Major League Baseball Player Relations Committee, 67 F.3d 1054 (2d Cir. 1995).

Smith v. National Collegiate Athletic Association, 139 F.3d 180 (3rd Cir. 1998).

Smith v. Pro-Football, 420 F. Supp. 738 (D.C. 1976).

Smith v. Pro Football, 593 F.2d 1173 (D.C. Cir. 1978).

St. Louis Convention & Visitors Commission v. National Football League, 154 F.3d 851 (8th Cir. 1998).

STP Corporation v. United States Auto Club, 286 F. Supp. 146 (S.D. In 1968).

Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994).

Tanaka v. University of Southern California, 252 F.3d 1059 (9th Cir. 2001).

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

United States v. International Boxing Club of New York, 348 U.S. 236 (1955).

United States v. National Football League, 116 F. Supp. 319 (E.D. Pa 1953).

United States v. National Football League, 196 F. Supp. 445 (E.D. Pa 1961).

United States Football League v. National Football League, 644 F. Supp. 1040 (S.D. NY 1986).

United States Football League v. National Football League, 842 F.2d 1335 (2nd Cir. 1988).

VKK Corporation v. National Football League, 244 F.3d 114 (2nd Cir. 2001).

Volvo North American Corporation v. Men's International Professional Tennis Council, 678 F. Supp. 1035 (S.D.N.Y. 1987).

Volvo North American Corporation v. Men's International Professional Tennis Council, 857 F.2d 55 (2nd Cir. 1988).

Warnock v. National Football League, 356 F. Supp. 2d 535 (W.D. Pa 2005).

Weber v. National Football League, 112 F. Supp. 2d 667 (N.D. Oh W.D. 2000).

Weight-Rite Golf v. United States Golf Association, 766 F. Supp. 1104 (M.D. Fl 1991).

Weight-Rite Golf v. United States Golf Association, 953 F.2d 651 (11th Cir. 1992).

Wood v. National Basketball Association, 809 F.2d 954 (2nd Cir. 1987).

Worldwide Basketball and Sports Tours v. National Collegiate Athletic Association, 273 F. Supp. 2d 933 (S.D. Oh E.D. 2003).

Worldwide Basketball and Sports Tours v. National Collegiate Athletic Association, 388 F.3d 955 (6th Cir. 2004).

WTWV v. National Football League, 678 F.2d 142 (11th Cir. 1982).