1985

Professional Sports and Antitrust Law: The Groundrules of Immunity, Exemption and Liability

Phillip J. Closius
University of Baltimore School of Law, pclosius@ubalt.edu

GOVERNMENT AND SPORT

The Public Policy Issues

Edited by

ARTHUR T. JOHNSON
University of Maryland
Baltimore County

and

JAMES H. FREY
University of Nevada,
Las Vegas

Rowman & Allanheld
PUBLISHERS

Contents

8

Professional Sports and Antitrust Law: The Ground Rules of Immunity, Exemption, and Liability

Phillip J. Closius

Professional sports began in America in 1876 with the organization of the National League of Baseball. From that date until approximately 1972 the legal system regarded professional sports as games or amusements rather than businesses. Professional leagues were therefore not subject to the same degree of legal scrutiny and liability applicable to commercial endeavors. The United States Supreme Court, in its resolution of *Federal Baseball Club of Baltimore, Inc.* v. *National League*,[1] typified this attitude by deciding that baseball was not engaged in interstate commerce, and therefore it was entitled to an immunity from the proscriptions of the Sherman Act.[2] Other courts applied a similiar attitude in examining contract disputes between teams and players.[3] Congress, at the request of the leagues, passed legislation immunizing certain league practices from the reach of the antitrust laws.[4] In the absence of viable player unions to counterbalance their desires, team owners in all sports took advantage of their practical immunity from the legal obligations of antitrust law to implement practices and structures that served their own interests in ways that frequently restrained trade. Public policy during this period dictated that the games be kept on "higher ground" than the world of commercial and profit considerations.[5]

The decline of professional sports' "nonbusiness" status began with increased television exposure that transformed professional athletes into personalities recognizable outside their respective home cities. Televising games was also a clear exploitation of interstate commerce by sports management. This high-profile media exposure established professional leagues as a national presence and eliminated the league argument that any game was merely a local exhibition. Reflecting this change, the federal government,

empowered to control interstate commerce and regulate the broadcast media, began to replace the states as the appropriate tribunal for resolving legal disputes within professional sports. The federal system was more insulated than local governments from the political pressures and influence of a particular sport. Congress and the federal courts were more likely to perceive sports as a business to be regulated rather than a local interest to be protected. Finally, the sheer magnitude of the media dollars earned by professional sports made its "not-for-profit" image less believable.

As professional sports leagues increased their wealth and national prominence, the federal judicial system became uncomfortable with its characterization of sports as something other than a business. The Supreme Court reflected this change in policy in the 1950s by refusing to extend baseball's antitrust exemption to other sports.[6] The application of the Sherman Act to all nonbaseball sports established the foundation for the forceful imposition of antitrust constraints on team owners in the sports litigation of the 1970s. These "revolutionary" decisions substantially eliminated the status of sports as a game or amusement insulated from the legal obligations of profit-making industries. Public policy now called for professional sports to be accorded the same legal treatment as other commercial endeavors. This alteration of the judicial system's perception of the nature of professional sports was employed by players and their unions to destroy management's unilateral control over professional sports and to substitute in its place a collectively bargained equilibrium in which owners and players shared control of a league's structure. This new balance also allowed the players to participate more fully in the increased revenues being furnished by the broadcast industry. In this sense, the courts applied the antitrust laws to give players' unions leverage at the bargaining table that they had never before possessed. The major remaining judicial vestige of the old public policy view of sports is the antitrust immunity still enjoyed by baseball pursuant to the Supreme Court's ruling in *Flood* v. *Kuhn*.[7]

Team owners in the other sports have tried to mitigate the effects of this change in judicial attitude by obtaining some variant of judicial or legislative immunity from the full effects of the antitrust laws. This chapter analyzes the three major forms of immunity sought by team owners since the advent of the modern sports litigation era. These are (1) the nonstatutory labor law exemption to shelter restraints contained within collective bargaining agreements, (2) the single-entity defense to render inapplicable to sports leagues Section 1 of the Sherman Act, and (3) the direct grant of a congressional immunity to foreclose antitrust litigation regarding designated league practices. The chapter then examines the principles of substantive antitrust liability by courts to professional sport practices that are not included within an appropriate exemption.

EXEMPTIONS AND IMMUNITIES

The Nonstatutory Labor Law Exemption

The first exemption to be litigated extensively in the professional sports context was the judicially created nonstatutory labor law exemption. This immunity from antitrust liability emanates from the policy decision that federal labor concerns can, in certain circumstances, outweigh antitrust interests when the restraint at issue is the product of collective bargaining. In professional sports litigation, the exemption was invoked by leagues and team owners when a plaintiff, usually a union or a class of players, challenged a restraint embodied or incorporated within an existing collective bargaining agreement.

The concepts and policy considerations at the core of the exemption were delineated originally by the Supreme Court in the nonsports context. However, before the judiciary created the nonstatutory exemption, Congress established a balance between federal labor and antitrust interests by granting a specific statutory exemption from the antitrust laws to *unilateral* union activity.[8] This statutory exemption reflected congressional policy that the Sherman Act was not intended to be used against a union for practices that primarily influenced the labor market, even if such actions produced ancillary effects in a product market.[9] Therefore, union activity cannot be the basis of antitrust liability if "a union acts in its own self-interest and does not combine with non-labor groups."[10] In order to effectuate fully the statutory immunity granted to unilateral union activity, the Supreme Court realized that at least some bilateral agreements also must be granted an exemption. Failure to extend the statutory immunity to at least some management/union agreements would produce the incongruous result of protecting a union from antitrust liability in its unilateral effort to obtain a certain bargaining goal, but subjecting the union to antitrust sanction if management agreed to implement labor's demands. The Supreme Court therefore decided to expand the congressional exemption to unilateral union activity by creating a nonstatutory exemption that also would immunize qualifying collective bargaining agreements from antitrust liability.

The Supreme Court established the principles for extending antitrust immunity to bilateral, collectively bargained restraints in *Allen Bradley Co.* v. *Local Union 13, IBEW*[11] and the companion cases of *UMW* v. *Pennington*[12] and *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*[13] The Court did not grant the collective bargaining process the same absolute exemption Congress had granted unilateral union activity. Not every provision obtained from an employer as a result of good-faith bargaining was exempt from the antitrust laws. The nonstatutory exemption was instead founded upon weighting the competing policies of antitrust and labor law.

Antitrust considerations balanced in the nonstatutory exemption dictate that management-labor agreements that restrain a product market will not be granted immunity if the agreement can be characterized as either a management conspiracy to monopolize commerce or as a restraint of trade furthering management's competitive interests in the activities of entities not party to the agreement.[14] This liability attached to both management and union, even if the product-market restraint produced benefits for the labor force.[15] However, if a collective agreement did not exhibit such tendencies, the restraint could qualify for the nonstatutory exemption.[16] The nonstatutory exemption reflects the policy underlying the statutory immunity—the agreement must substantially embody the unilateral interest of labor. If the collective agreement primarily embodies the competitive interest of management, it does not qualify for the nonstatutory exemption.

Philadelphia World Hockey Club, Inc. v. *Philadelphia Hockey Club, Inc.*[17] and *Robertson* v. *National Basketball Association*[18] are two of the first cases to consider extensively the exemption's application to professional sports. *Philadelphia Hockey* was a lawsuit initiated by teams of the new World Hockey Association against the established National Hockey League (NHL). The new league claimed that the NHL, primarily through its reserve clause and contractual arrangements with minor league teams, restrained and monopolized the professional hockey market. *Robertson* was a class action filed on behalf of all professional basketball players, contending that a variety of National Basketball Association practices violated the Sherman Act. Both of these decisions applied the principles established by the Supreme Court and rejected the defendant league's claim for the nonstatutory exemption. Although the exemption was created to benefit unions, both courts noted that employers can assert the immunity derivatively when they have participated in bargaining and are sued for provisions encompassing union activity.[19] However, not all agreements on mandatory subjects of bargaining were entitled to the exemption.[20] Labor policy only mandated an antitrust exemption if the provision at issue was a result of union self-interest and the product of extensive good-faith bargaining. The record in both cases failed to satisfy this standard. However, even good-faith bargaining could not exempt a provision that restrained the outside competitors of a defendant league and therefore embodied a management-labor conspiracy proscribed by the Supreme Court.[21]

Philadelphia Hockey and *Robertson* established the framework for the application of the exemption to professional sports. Two subsequent Court of Appeals cases, *Mackey* v. *National Football League*[22] and *McCourt* v. *California Sports, Inc.*,[23] delineate the current exemption standards employed by courts in this context. *Mackey* was a lawsuit brought by players against the NFL, challenging the validity of the league's free agent compensation system, the so-called Rozelle Rule. The players claimed that a system

whereby the commissioner had sole discretion to award a club compensation for losing a player inhibited player movement and restrained trade. The Eighth Circuit reinforced the holdings of *Philadelphia Hockey* and *Robertson* and rejected the NFL's claim for the nonstatutory exemption. After noting that employers, as well as employees, could assert an exemption that attached to the collective agreement, the court formulated a three-part test for granting immunity:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[24]

Although the NFL's evidence had satisfied the first two requirements, the district court record did not reveal any good-faith bargaining concerning the Rozelle Rule. The compensation provision was created by the league and then imposed by the NFL on a weak union in the first two bargaining agreements. The circuit court used its interpretation of good-faith bargaining to fortify the union by giving it increased bargaining leverage through the imposition of antitrust liability. If the NFL wanted to insulate its compensation system from antitrust attack, the league must legitimately engage in meaningful bargaining with the union. The Eighth Circuit, however, expanded the exemption by suggesting that evidence of a *quid pro quo*—union agreement to the unmodified rule in exchange for other benefits—might satisfy this requirement. *Mackey* also subtly extended the scope of the exemption by concluding that the Rozelle Rule was incorporated sufficiently in the bargaining process to qualify for an exemption claim.[25]

McCourt is the most recent sports case to deal with the exemption issue. This case also involved a player's antitrust challenge to the free agent compensation system of the National Hockey League.[26] The Sixth Circuit began its exemption analysis by adopting the three-part test established by Eighth Circuit in *Mackey*. As in the earlier football case, the court quickly noted that the first two aspects of the test were satisfied. A compensation plan affected only veteran players and clearly involved the terms and conditions of their employment. The issue in the case therefore was narrowed to the question of good-faith bargaining. After reviewing the bargaining history of the league in detail, the Sixth Circuit concluded that good-faith bargaining had occurred. The circuit court cited traditional labor law principles in the nonexemption context to support its two-part analysis of the bargaining obligation. The inclusion of the bylaw in the exact form of management's previously imposed rule did not evidence a lack of bargaining, but rather the

union's failure, after intense negotiations, to keep "an unwanted provision out of the contract."[27] Good-faith bargaining does not require either side to make a concession or yield on a particular point. Labor law does not mandate substantive terms of agreement, and the duty to bargain in good faith permits a party to stand firmly on a proposal if its "insistence is genuinely and sincerely held."[28] Second, the opinion noted that the union had applied bargaining pressure to keep the compensation plan out and, when unsuccessful in that effort, obtained considerable benefits from the league as the price of inclusion. The incorporated bylaw therefore was entitled to the exemption and judgment was entered for the defendants.

The three-part test enunicated in *Mackey* appears to be the appropriate standard for application of the exemption in professional sports cases. The first part of the test clearly embodies the Supreme Court's concept of an Allen Bradley conspiracy and the appropriate primacy of antitrust concepts over labor law rules when the restraint significantly affects groups not party to the collective bargaining relationship. The second part correctly implies that labor law policy is not sufficiently implicated in management-labor agreements on nonmandatory subjects of bargaining to justify overriding antitrust concerns. The final part of the *Mackey* test looks at the source of the restraint and its treatment by the parties in their bargaining. Although labor law rules should dominate the conduct of a mature management-labor relationship, this inquiry is required to recognize the prounion orientation of the exemption and to give antitrust concerns their proper weight in the balancing process. If the questioned provision was initiated by the union in substantially the form finally adopted, employer acquiescence to the union demand should be protected by the exemption. If, however, the term at issue was initiated by management or if it significantly reflects management interests, the exemption will be granted only if there has been adequate union participation in the structuring of the final proposal. Adequate union participation in this sense means that the management proposal has undergone some significant modification by the union prior to acceptance or that the union has received a specific, significant *quid pro quo* in exchange for inclusion of the term. The judicial inquiry, in the case of non labor-initiated proposals, would thereby be focused on the integrity of the union as exclusive employee representative.

The exemption should be granted when labor law considerations indicate that an individual employee should not be allowed to "second-guess" the wisdom of the union in making concessions or modifications.[29] The integrity of the bargaining process also dictates that a union should not be free to second-guess itself regarding a provision where bargaining history indicated union involvement in shaping or "selling" the provision. In such situations, the derived employer immunity can be justified by the need to preserve the integrity of the union and the bargaining process, and by management's

reliance upon the exclusive nature of the union's collective representation. Courts can police application of this aspect of the test by searching for a specific *quid pro quo* for unmodified management proposals. The National Basketball Association's salary caps, for example, seemingly would qualify for the nonstatutory exemption on both rationales if it were challenged by an NBA player. The basketball union shaped the final form of the system and received some other benefits, mainly in the job security area, in exchange for their agreement. Such an analysis differs slightly from the reasoning in *McCourt*. The Sixth Circuit should eliminate its initial emphasis on the traditional labor law interpretation of good-faith bargaining and the unilateral insistence of management permitted thereby. Instead, the circuit court should focus on the degree of union participation in the structuring of Bylaw 9–A after the labor group accepted financial benefits specifically offered by the league as *quid pro quo* for the inclusion of the compensation system. If the benefits granted by management were related directly to the acceptance of Bylaw 9–A, the exemption should apply.[30]

Future application of the nonstatutory exemption could occur in a variety of professional sports contexts. New leagues with no collective bargaining agreement in force face potential antitrust action regarding their player restraint and other league rules. The league needs to embody its practices, such as player drafts or territorial drafts, in a collective agreement reflecting union participation in order to insulate those practices from antitrust liability. In this sense, the exemption, as it did in the earlier sports cases, provides the union with additional bargaining leverage in collective negotiations. A new league needs a bona fide union and a creditable bargaining agreement in order to possess even a minimal claim on the exemption.

The nature of the labor law exemption leaves all team owners with a difficult decision: Should a league contend that a particular practice is a management perogative, not collectively bargain over it, and risk antitrust liability regarding its implementation, or, should management agree that a topic is a mandatory subject of bargaining and obtain an arguable immunity at the price of permitting a union to bargain over the practice and refashion its form? Many established leagues have tried to resolve this dilemma by having the league's constitution and bylaws, management's unilaterally adopted practices, incorporated or referenced in the collective bargaining agreement with the union. Professional football provides a convenient context for examining problems in this area. The football collective bargaining agreement states that any terms of the NFL constitution and bylaws that are not inconsistent with the agreement are to remain in full force and effect and all parties agree to be bound by such terms.[31] *Mackey*'s inclusion of such an incorporated term within the exemption's scope arguably allows a league to shelter a unilaterally imposed restraint in this manner. However, this reference combined with management's assertion that general economic benefits

(such as pension payments, minimal salaries) to labor were the *quid pro quo* for its inclusion, should not by itself be sufficient to justify granting the exemption. Courts should require a specific *quid pro quo* for inclusion of a practice or direct evidence of union participation in the shaping of the rule.

A bylaw provision likely to be challenged in the future is the term regulating eligibility for the football draft. NFL teams cannot draft or sign a player unless (1) all college eligibility of the player has expired, (2) five years have passed since the player would have entered college, or (3) the player has received a diploma from a recognized university or college.[32] This eligibility system is now limited to football. Baseball and hockey traditionally have drafted athletes without reference to collegiate competition.[33] Basketball had eligibility provisions similar to football. Those restrictions were declared in violation of the antitrust laws in a suit brought against the league by a college superstar, Spencer Haywood.[34] Following the Haywood litigation, the NBA modified its eligibility requirements to permit the drafting of underclassmen through the hardship process.[35] Significantly, the opinion in *Haywood* did not consider the applicability of the exemption. In addition to the question of an underclassman being a party to the bargainig relationship, the union has not meaningfully participated in the adoption of this rule. Therefore, the suit should proceed to the issue of substantive antitrust liability.

Other provisions in the NFL constitution and bylaws directly affect player movement and salaries. If a veteran player performs his contract obligation to an NFL team and then signs with a different league, the collective bargaining agreement does not deal with the issue of the former team's player rights if that player returns to the NFL following the termination of the other league's contract. NFL teams have maintained that the former club retains the exclusive rights to such a player because, on his departure from the NFL, the player was placed on a reserve or retired status list provided for by the bylaws. A player in such a position should be able to litigate the antitrust validity of the rule restricting his freedom if in fact it has been imposed unilaterally by management.

Additionally, NFL owners split television revenues equally.[36] This method of revenue sharing arguably allows the owners to control player salaries and eliminate the economic incentive for owners to bid on free agents. Players or the union should be free to challenge this practice and its price/salary-fixing effects if in fact the system has not been the product of active union participation.[37]

Another problem in the future application of the exemption is posed by potential litigation initiated by nonbargaining unit players (either college seniors or players of another league) over the entry-level barriers (such as player draft, territorial schools, or veteran allocation) of a particular league. An entry barrier likely to be challenged in the near future by basketball draftees is the NBA salary cap provision contained in the NBA collective

bargaining agreement, which restricts the salary offers that teams over the cap can make to their draftees. Assuming that the entry barriers are a mandatory subject of bargaining and that unions have participated to some extent in forming the entry rules, a question remains as to whether prospective players are parties to the bargaining relationship. The primary issue in such a challenge to entry barriers would therefore be the first requirement of the *Mackey* test: Does the restraint primarily affect only parties to the bargaining relationship? Players are not members of the league until they have gone through the entry process, signed contracts, and made the team. If a nonunit athlete brought suit against a league challenging an entry barrier on antitrust grounds, a court would have difficulty characterizing the player as a party to even the bargaining "relationship" prior to his signing a contract.

A district court opinion, *Smith* v. *Pro-Football, Inc.*,[38] speculated on the exemption's application to the professional football draft. The court commenced its examination by noting that, considering labor law precedent regarding bargaining over hiring halls and seniority benefits, the draft would be considered a term or condition of employment and therefore a mandatory subject of bargaining. The first two requirements of the *Mackey* test could be satisfied. Regarding the nonunit effect of the draft, the court observed that a player draft differs from traditional restraints in that the draft produced a detrimental effect, not on the employer's competitors, but on potential employees—"persons neither party to the agreement nor members of a union which is party to the agreement."[39] Protection of such a group is less central to the purposes of antitrust laws than the prohibition of product-market restraints. Since labor law is deeply concerned with allowing unions freely to negotiate bargains they consider best for their members, the district court concluded that the draft should be immune from antitrust liability if a union, in pursuit of its own interests, agreed to the procedure.

As noted in *Smith,* the arguments supporting the inclusion of prospective union members as parties to the relationship have been based on an analogy to nonsports cases that assert that union hiring halls are a mandatory subject for bargaining.[40] Although this comparison seems relevant for the determination that the draft is a mandatory subject of bargaining, the argument does not apply with equal force to the nonunit effects of the restraint. The use of the analogy in both contexts implies that the first two requirements of *Mackey* are actually one—whether the draft is a mandatory subject of bargaining. This single-issue analysis has been rejected by the Supreme Court. The hiring-hall analogy is a particularly inappropriate vehicle for extending the exemption beyond the parties to the bargaining agreement. Hiring halls are perceived as enhancing union security and increasing employee salaries. The hiring hall is limited to unique occupations, and an employee is free to reject any assignment he obtains from the hall. Since these job assignments tend to be short-term, there can be no long-term prejudicial effect of the procedures.

Hiring halls therefore have been characterized as mandatory subjects because, like the exemption, they concern the integrity of the union itself.[41] Conversely, entry barriers depress player salaries and frequently force the individual player to sign a long-term contract with a club not of his choosing. A series of decisions meant to enhance union status and employee interests should not be used to extend the insulation of an antilabor practice. Requiring the union to bargain over terms of entry should not imply that future employees are parties to the bargaining relationship. This is particularly true in sports, where the union often is hostile to the interests of draftees because of their ability to command large salaries. The union therefore may not truly represent the interests of prospective players.

A final potential problem is that a bargaining agreement might not be in force during the period after a current agreement expires and before a new one can be negotiated.[42] If management continues to enforce player restrictions during such an interval, the issue becomes whether such practices should receive immunity from the antitrust laws. The resolution of this dilemma should focus on the source of the restraint and the extent of the union's participation in shaping it. The clearest case for granting immunity would be that in which management simply continued the exact practices contained in the now-expired agreement. If the restraints are identical, the same principles governing the exemption during the life of the agreement should control the impasse period. If the union participated in the creation of the rule, protection of the bargaining process and labor law interests dictate that the exemption should continue during impasse.[43] If, however, an employer significantly modifies a rule and then seeks to impose it during an impasse period, courts should be reluctant to grant the exemption. Some commentators have argued that, if the employer proposed the modified rule to the union and an impasse is produced, unilateral employer change consistent with past offers to the union satisfies the employer's duty to bargain in good faith and should receive the exemption. The application of good-faith bargaining principles to the granting of immunity distorts the origin and purposes of the exemption. Employer restraints unilaterally imposed should not derive benefit from a labor-oriented exemption. If the union has participated in the molding of the modified practice, the exemption should be granted. If the union has not participated, the employer's unilateral imposition should run the risk of antitrust liability.[44]

The Single-Entity Exemption

Most sports litigation to date has focused on alleged violations of Section One of the Sherman Act, which renders illegal any contract, combination, or conspiracy in restraint of trade or commerce.[45] A necessary predicate for the application of Section One is therefore that the challenged restraint involve

two or more distinct entities, since, by definition, a single entity cannot contract, combine, or conspire with itself.[46] In the nonsports context, the single-entity issue is litigated most frequently in the parent-subsidiary or intraenterprise fact pattern. If the subsidiaries are incorporated separately, the First, Third, and Fifth circuits of the Federal Courts of Appeals have held that the fact of separate incorporation by itself renders the corporations multiple entities.[47] The Second Circuit renders the corporations multiple entities if the corporations hold themselves out as competitors.[48] Finally, the Seventh, Eighth, and Ninth circuits have enunciated an "all the facts and circumstances" test whereby the court in any particular case must make the multiple-entity conclusion on a particular analysis of the corporate entities before it.[49] Decisions in this area are rendered difficult because of the opposing factors of separate incorporation and common ownership. The Supreme Court has recently rejected the multiple-entity theory in the context of parents and wholly owned subsidiaries.[50] The Court decided that separately incorporated, wholly owned subsidiaries, like unincorporated divisions, were parts of the parent and therefore a single enterprise. A legally single entity—a corporation with multiple divisions or a partnership with many partners—is incapable of violating Section One, since it is considered one entity in the eyes of the law.

Sports leagues have not presented the single-entity defense in cases initiated by plaintiffs who were either players or unions. The leagues have conceded that, in such situations, each team within the league is acting on its own behalf in competition with each other team in the league in the acquisition of playing talent. As such, each team is itself a separate entity, and any league agreement embodying a player restraint is an agreement between separate multiple entities.[51] In addition, the defendant leagues may have not raised the single-entity defense because they preferred to rely instead on the application of the nonstatutory labor law exemption. However, in cases instituted by nonlabor plaintiffs, the defendant leagues have raised the single-entity defense. In such suits, the labor law exemption is not available because either the challenged practice is embodied in the league's constitution and bylaws rather than in the collective bargaining agreement (frequently the case when an individual team owner sues his own league), or the challenged practice has a competitive effect outside the bargaining unit (frequently the case when one league sues a rival league).

The National Football League has been the most frequent advocate of the single-entity defense. In such a posture, the league has claimed that it is, in effect, a partnership that shares revenues and produces a unitary product that no individual team could produce by itself. Thus the NFL has argued that it should be entitled to a functional immunity from Section One liability, since, as a single entity, it cannot contract, conspire, or combine with itself. This position also finds support in some of the economic theories that provide a

framework for the enunciation of the goals of antitrust enforcement. If the goals of the antitrust laws are to maximize consumer wealth and promote producer efficiency, the law should encourage a seller to maximize his profits by producing as much of his product as he can at the lowest possible price. This will keep prices down and provide enough of the product to satisfy the entire consumer demand for the good or service. Thus a consumer-wealth economist would argue that the antitrust laws should encourage practices that increase the output of any given product and proscribe those practices that restrict the output. Since the NFL's restraints do not reduce the output of its alleged product—the number of football games—the league can argue that granting it a single-entity exemption is consistent with an economic goal of the antitrust laws.

The NFL claim for single-entity status has been rejected by the Second Circuit in *North American Soccer League* v. *National Football League*[52] and by the Ninth Circuit in *Los Angeles Memorial Coliseum Commission* v. *National Football League*.[53] *North American Soccer League* (NASL) involved a suit in which the newer soccer league challenged an NFL constitution and bylaws provision that prohibited NFL owners from owning a team in another professional sport.[54] The district court in NASL agreed with the single-entity analysis, but the Second Circuit reversed by noting that the Supreme Court has never favored a "joint venture" antitrust exemption.[55] The single-entity immunity is rarely, if ever, granted when the separate corporations involved in a combination are not commonly owned.[56] The Second Circuit looked to prior Supreme Court cases and the decisions of other circuits (including player restraint cases) that had applied Section One to sports leagues and determined that the case at bar was indistinguishable from that precedent. Additionally, the cross-ownership ban not only protected the league from other league competition but also shielded individual teams from home-territory competition by local teams of another league. The Second Circuit therefore reasoned that the team nature of the restraint precluded any single-entity exemption for the league as a whole.[57]

The Los Angeles Coliseum Commission, which desired a professional football tenant, and Al Davis, owner of the Oakland Raiders, challenged the NFL constitution and bylaw provision that prohibited an owner from relocating his franchise without the approval of three-fourths of the league's owners.[58] The Ninth Circuit began its rejection of the NFL's claim for single-entity immunity by citing the extensive precedent that has applied Section One of the Sherman Act to a sports league, including the Second Circuit's opinion in NASL.[59] The court also noted that, unlike cases in which single-entity status was granted, the individual clubs did not have any common ownership, nor were the policies of the NFL set by one individual or a parent corporation. League decisions were more appropriately characterized as action by separate entities acting jointly.[60] Although the NFL did produce a

unitary product that required some cooperation among other teams, the teams were individually owned, made separate decisions on numerous business matters, and competed with each other for personnel, fan support, and media attention. Although league revenues were divided equally to a significant extent, profits and losses were not shared and in fact varied significantly from club to club. The NFL therefore was a combination of twenty-eight entities subject to the full force of Section One proscription.[61]

Both the Second and Ninth circuits realized that the allowance of the single-entity defense would in effect have granted all of professional sports an exemption from Section One of the Sherman Act. Both courts were properly reluctant to grant such an industrywide immunity in the absence of Supreme Court or congressional guidance. The single most influential factor in finding a single entity in the nonsports precedent—common ownership—is absent in the case of a professional sports league. To that extent, the Supreme Court's opinion in *Copperweld Corporation* v. *Independence Tube Corporation*,[62] which is limited to the wholly owned subsidiary context, does not support a league's claim for single-entity status. The individual ownership of teams and the independent function of clubs in the business decisions noted by both opinions should preclude a characterization of a sports league as a single entity. The rejection of the NFL's defense also implied that the economic goals of consumer wealth and producer efficiency were not the only goals of the antitrust laws.[63] The courts did not consider directly the argument that the league's restraints did not restrict output. However, the Ninth Circuit clearly indicated that although such considerations did not justify an immunity from Section One, they were relevant in determining whether the restraints were reasonable pursuant to the rule of reason analysis.[64] In so doing, the Ninth Circuit reflected some of the arguments noted by Justice Rehnquist in his dissent from the denial of *certiorari* in NASL.[65]

The rejection of the single-entity defense reflects a policy decision that restraints embodied in a league's constitution and bylaws, or that produce competitive effects upon another league, are still subject to antitrust scrutiny. The continued antitrust exposure of professional sports in this regard is consistent with the newer judicial policy of treating sports as a normal profit-making industry. One bylaw provision that is a candidate for antitrust challenge in the future is the NFL's provision dictating that television or cable revenue generated by NFL teams be shared equally by all member clubs.[66] If a cable channel were willing to offer NFL games on a pay-per-view basis, an owner in a cable market with many customers and fans (such as Los Angeles) might be reluctant to share those revenues with clubs in smaller television markets. Although such a suit might not satisfy the standards for substantive liability, the rejection of the single-entity defense implies that such an allegation would at least be the subject of a lengthy trial. A league facing such a prospect might well consider bargaining with the league's union

regarding the revenue split in order to obtain at least the arguable defense of the nonstatutory labor law exemption.

Congressional Grants of Immunity

Congress has been willing to entertain the request of professional sports leagues for specific statutory exemption of a league practice from the effects of the antitrust laws. For example, Congress did grant an exemption for the American Football League to merge with the National Football League and produce the modern NFL. Such legislation also allows the teams of a sports league to combine together and negotiate jointly as a league with the members of the broadcast industry.[67] When Congress grants such a specific legislation exemption, the judicial function is limited to interpreting the statute and defining the intended reach of immunity. No suit or litigation would be permitted if the plaintiff's claim or cause of action were determined to be included within the ambit of the congressional immunity.

In light of the judicial rejection of its single-entity defense claims, the NFL has supported legislation that would exempt from antitrust liability (a) any league rule "authorizing the membership of the league to decide that a member club of such league should not be relocated" and (b) any league rule relating to "division of league or member club revenues that tend to promote comparable economic opportunities for the member clubs of such a league."[68] The bill states that it is not intended to exempt any provision relating to player employment within a league. Of course, the nonstatutory labor law exemption already provides immunity for most such practices. Having failed to attain the single-entity exemption in the judicial system, professional sports leagues are attempting to insulate the rules governing the subjects they presumably deem most important to their survival—franchise distribution and revenue sharing—from the stringent sanctions of antitrust law by petitioning Congress for appropriate remedial legislation. The granting of such a congressional immunity would appear to be a return to the old policy of granting professional sports favored treatment. Consistent with the modern judicial perception of the sports industry as a commercially oriented business, Congress should reject any proposed legislation that would only protect the unilateral economic interests of the leagues.

Congressional policy in the immunity setting should incorporate protection of the interests of sports' consumers—the fans. Players are able to safeguard their concerns through individual and collective bargaining. Rival leagues, under most congressional action, will retain their ability to use the antitrust laws to preserve their ability to compete in the markeplace. Fans and the local community, however, are powerless to preserve their "investment" in a franchise. The granting of a congressional immunity to particular league practices is extraordinary and seemingly inconsistent with congressional

distaste for antitrust immunity requests by traditional business organizations. Therefore, if Congress seriously considers such a request, the final statute should not reflect only the narrow concerns of the team owners. Such legislation would be a return to the outmoded policy perspective that government should protect management to preserve the "game." A special grant of immunity should safeguard the interest of the fans in keeping a team they have supported, or in ensuring that the revenue distribution of a particular league does not destroy the owner's economic incentive to win. If the leagues dislike this interference in the management of their business, they should be treated like a traditional business and be denied the antitrust immunity. If the leagues ask for a special exemption not normally available to an industry, they should expect a certain amount of governmental "interference" inappropriate for mainstream commerce.

SUBSTANTIVE ANTITRUST LIABILITY IN THE SPORTS CONTEXT

A court's refusal to grant an exemption should not imply that any particular contract term or market restraint is a violation of the antitrust laws. If a plaintiff successfully has rebuffed a league's defense of immunity, he must still litigate and win the separate and distinct issue of antitrust liability prior to recovery. Many of the professional sports cases to date have alleged a violation of Section One of the Sherman Act.[69] This section, as written, seems to condemn all agreements in restraint of trade. Since every business contract restrains trade to some extent, a literal interpretation of this section would stifle the economy. To prevent such economic chaos, the Supreme Court, in *Standard Oil Co. of N.J.* v. *United States*,[70] adopted the policy that only *unreasonable* restraints of trade were proscribed by the statute. Courts were required to conduct a lengthy analysis, pursuant to this rule of reason logic, to determine if a challenged practice unreasonably restrained trade in its particular business context. As antitrust law developed, however, certain practices were found to be inherently unreasonable, so an exhaustive inquiry on their reasonableness was no longer required. Typical examples of such categories of *per se* liability under Section One of the Sherman Act are price fixing, division of markets, tying arrangements, and concerted refusals to deal.[71] Most league restraints have been challenged as concerted refusals to deal or as group boycotts.

Denver Rockets v. *All-Pro Management, Inc.*[72] and *Robertson* v. *National Basketball Association*,[73] two early district court decisions in modern sports law litigation, declared that certain league player restraints (such as draft, refusal to draft undergraduates, and free agent compensation) were group boycotts of individual players and therefore *per se* violations of Section One of

the Sherman Act. However, later decisions by the Federal Circuit Court of Appeals have held that the *per se* standard of liability of Section One is inappropriate for the imposition of antitrust liability in the professional sports context.[74] The superior courts reasoned that the defendant professional leagues should not be subject to the harsh *per se* substantive criteria, since some league-imposed restraints were at least implicitly encouraged by the judicial attitude of the first half of the 20th century, intimating that sports were not subject to the antitrust laws. Additionally, sports leagues are unique in that each team has a business need for intraleague cooperation (a variant of group boycott) in order to produce an effective on-the-field product. The teams of a given league, while competitors on the field, are not economic competitors in the traditional business use of the term.[75] Finally, the *per se* standard is inappropriate when either the nonstatutory labor law or the single-entity exemption and the complex issues inherent therein are present in a case.[76] A finding of substantive antitrust liability in the professional sports context must be predicated on a rule of reason analysis and on a full judicial inquiry into the reasonableness of the practice and its effects and the history of its origin and implementation mandated thereby. The rule of reason requires the court to evaluate the reasonableness of the restraint within the context of the industry in which the alleged antitrust violation occurs. As explained by the District of Columbia Court of Appeals:

> Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose of effect. In making this evaluation, a court generally will be required to analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "new effect" of substantially impeding competition.[77]

The Eighth Circuit employs a slightly different formulation of the required analysis: "The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary."[78]

In the sports context, management frequently has tried to avoid substantive antitrust liability under this standard by claiming that, although players were harmed and trade restrained to a certain extent, the challenged restraints were reasonable and necessary to maintain competitive balance on the field. This argument has been rejected as support for the anticompetitive effect of most restraints. Competitive equality among teams—even with significant player or income restraints—appears illusory, since the same teams have dominated their respective leagues every season. Other business

justifications offered by the leagues to support the "reasonableness" of their practices have included recapturing of player costs, loyalty to the league, protection of capital investment, and regional balance. The restraints, however, have been declared unreasonable and therefore illegal because (a) some of the business rationales advanced have, under judicial scrutiny, been declared insubstantial and (b) the anticompetitive impact of the restraint sweeps more broadly than the proposed rationales for their adoption would justify.[79]

Most courts have suggested that revised procedures would survive the rule of reason inquiry if they were less restrictive on the rights of players and owners, if they were more closely related to a substantial business purpose, and if they contained procedural safeguards to protect the restrained party's interests from arbitrary and capricious decisionmaking. A professional sports league therefore could reasonably contain some restraints so that arguable parity of talent would exist within the league and those franchises in geographically disadvantageous locations would receive assistance in fielding teams. However, practices that have the effect of unduly depressing player salaries, restricting player or franchise freedom of movement for a significant period of time, or vesting unrestricted control over a player or a team to league management seem suspect under the rule of reason standard of substantive antitrust liability.

Section Two of the Sherman Act also has been used in the sports litigation context. This section sanctions every person who monopolizes, attempts to monopolize, or combines or conspires with another to monopolize any part of trade or commerce.[80] The Supreme Court in *United States* v. *Grinnel Corporation* has stated: "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acrument or historic accident."[81] The relevant market consists of a product market and a geographic market. Products in the same market are those whose uses are reasonably interchangeable and whose demand is cross-elastic.

Philadelphia World Hockey Club v. *Philadelphia Hockey Club*[82] and *Mid-South Grizzlies* v. *National Football League*[83] are the prime examples of Section Two analysis in the professional sports context. *Philadelphia Hockey* determined that the relevant market was major league hockey as is played in the NHL. Of course, with that definition of the market, the NHL possessed monopoly power. *Mid-South Grizzlies* also found that the NFL had a monopoly in the United States in major league football. Courts in the professional sports setting have been willing to accept a narrow market definition that usually coincides with the major sport at issue. Indeed, a market definition also can be conducted in assessing whether a restraint of

trade is unreasonable in a Section One litigation. *NASL* (a special submarket in sports capital)[84] and *Los Angeles Memorial Coliseum* (the unique nature of NFL football)[85] support the conclusion that a narrow sports-market definition also is appropriate in that context. However, a narrow market definition and the existence of monopoly power does not, by itself, mean that Section Two has been violated. *Philadelphia Hockey* found such a violation by concluding that the NHL had willfully and intentionally maintained its monopoly status through the use of numerous predatory practices directed against the World Hockey Association.[86] However, *Mid-South Grizzles* held that the NFL had not abused its monopoly power in denying plaintiff an NFL franchise. The NFL had done nothing to prevent plaintiff from forming a rival team or playing football in Memphis.[87]

Antitrust plaintiffs usually prefer to bring a cause of action pursuant to Section One of the Sherman Act rather than Section Two. A Section One suit usually avoids the difficult questions of relevant market and abuse of monopoly power. However, Section Two frequently is the basis for a lawsuit by a new league against an established league in a similar sport. If the older organization has taken action beyond its own league activities to make operations more difficult for the new league, the charge of at least attempted monopolization has some facial validity. A Section Two violation does not require multiple entities for a finding of substantive violation. However, with the apparent rejection of the single-entity defense, Section One will continue to be the preferred antitrust cause of action in the professional sports context.

CONCLUSION

The nonbaseball sports leagues have tried to achieve the immune status of baseball by obtaining some form of antitrust exemption. The nonstatutory labor law exemption seems to be the most effective exemption achieved by the leagues in that provisions embodied within a legitimate collective bargaining agreement will not be subject to antitrust attack by members of the bargaining relationship. As such, federal labor law rather than antitrust law will be the appropriate legal context for resolving management-labor disputes in a professional league where the two parties possess roughly equal strength. This exemption, however, has two serious drawbacks from the perspective of a professional league: (1) the price of the exemption is allowing a union to bargain over the practice, thereby forfeiting potential unilateral control over what could arguably be considered a management prerogative, and (2) practices with extra-unit effects are not within the scope of the exemption.

The single-entity defense has proved to be less useful to sports management, since the Second and Ninth circuits, the only courts to hear the defense in a sports context, have both rejected its applicability to professional

leagues. Specific statutory immunities are totally effective once written into law, but getting a bill through Congress is, at best, a long and unpredictable process. The leagues will continue to face antitrust liability, generally under the substantive standard of the rule of reason of Section One of the Sherman Act. This antitrust exposure will not destroy professional sports in America. However, league practices will need to be reformed to comply more closely with the business purpose that motivated the restraint and to protect the restrained party from arbitrary decisions.

Antitrust liability will lessen the ability of the established leagues' management to maintain unilateral control of the sports industry. Such a result is consistent with the public policy determination, made by the judicial system in the 1970s, that professional sports should be subject to the same legal restraints and liabilities as any other profit-making industry.

NOTES

1. 259 U.S. 200 (1922).
2. 15 U.S.C. SS 1 and 2 (1976).
3. See Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); American League Baseball Club of Chicago v. Chase, 86 Misc. 411, 149 N.Y.S. 6 (Sup. Ct. 1914); Philadelphia Base Ball Club, Ltd. v. Lajoie, 10 Pa. Dist. Rpts. 309 (1901), rev'd, 202 Pa. 210, 51 A. 973 (1902).
4. See Sports Broadcasting Act, and Merger Addition thereto, 15 U.S.C. SS 1291–95 (1976).
5. Flood v. Kuhn, 309 F. Supp. 793, 797 (SDNY 1970), aff'd 407 U.S. 258 (1972).
6. See Radovich v. National Football League, 352 U.S. 445 (1957) and United States v. International Boxing Club of N.Y., 348 U.S. 236 (1955).
7. 407 U.S. 258 (1972). The baseball players union achieved its bargainig leverage by gaining free agency for players through the arbitration process. See Professional Baseball Clubs, 66 LAB. & DISP. SETTL. 101 (1975) (Seitz, Arb.), aff'd sub nom., Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233 (W.D. Mo. 1976), aff'd, 532 F.2d 615 (8th Cir. 1976).
8. Clayton Act of 1914 S 6, 15 U.S.C. SS 17, 20; 29 U.S.C. S 52 (1976). See also Norris-LaGuardia Act of 1932 SS 1–15, 29 U.S.C. SS 101–15 (1976).
9. See Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).
10. United States v. Hutcheson, 312 U.S. 219, 232 (1941).
11. 325 U.S. 797 (1945).
12. 381 U.S. 657 (1965).
13. 381 U.S. 676 (1965).
14. See Allen Bradley v. Local Union No. 13, IBEW, 325 U.S. 797, 811 (1945) (the origin of the phrase "Allen Bradley conspiracy"), and UMW v. Pennington, 381 U.S. 657, 665–66 (1965).
15. Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 707 (1965).
16. For a more extensive discussion of Supreme Court and other non sports cases analyzing the exemption, see Phillip J. Closius, "Not at the Behest of Non-Labor Groups: A Revised Prognosis for a Maturing Sports Industry," *Boston College Law Review* 24 (1983): 348–62.
17. 351 F. Supp. 462 (E.D. Pa. 1972).
18. 389 F. Supp. 867 (S.D.N.Y. 1975).
19. Ibid., pp. 885–86; see also Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 497–98 (E.D. Pa. 1972).
20. Ibid., p. 888. This result was dictated by the Supreme Court's opinion in UMW v.

Pennington, 381 U.S. 657, 664–65 (1965) and Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965).

21. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club Inc., 351 F. Supp. 462, 498–99 (E.D. Pa. 1972).

22. 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

23. 600 F.2d 1193 (6th Cir. 1979).

24. Mackey v. National Football League, 543 F.2d 606, 610–11 (8th Cir. 1976) p. 614.

25. Ibid., p. 615. The 1970 NFL agreement also contained a "zipper clause," which read: "[T]his Agreement represents a complete and final understanding of all bargainable subjects of negotiation among the parties during the term of this Agreement." Ibid., p. 613. This agreement had expired in 1974 and the union, seeking the elimination of the Rozelle Rule, had been unable to produce an agreement with the league.

26. McCourt v. California Sports, Inc., 600 F.2d 1193, 1196 (6th Cir. 1979).

27. Ibid., p. 1203.

28. Ibid., p. 1201.

29. Such employee-union disputes are best settled through the union election process or through enforcement of the union's duty of fair representation.

30. For a more detailed discussion of this interpretation of the exemption, see Closius, "Non-Labor Groups," pp. 372–77.

31. NFL-NFLPA Collective Bargaining Agreement, Art. I, S2.

32. NFL Constitution and By laws, S 12.1 (A)

33. Baseball traditionally drafts players after their senior year of high school or their junior year of college. Hockey traditionally drafts players of post-high school years from the junior hockey leagues. Neither baseball nor hockey provide for their draft in a collective bargaining agreement. Robert C. Berry and William B. Gould, "A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes, "*Case Western Reserve Law Review* 31 (1981): 790–91.

34. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

35. National Basketball Players Association Agreement, Art. XXII, S 1 (f) (1980–82).

36. NFL Constitution and By laws, S 17.6.

37. The federal statute granting NFL teams an antitrust exemption for the purpose of bargaining as a single group with the broadcast industry does not appear to immunize the method by which the fruits of such negotiations are distributed. See Sports Broadcasting Act, 15 U.S.C.S. 1291 (1976). For a possible challenge to this shared-revenue system by an NFL owner, see note 85.

38. 420 F. Supp. 738, 743–44 (D.C.C. 1976), aff'd in part, rev'd in part, 593 F.2d 1173 (D.C. Cir. 1978). The appellate court did not consider the exemption issue. The actual holding of the district court was that the exemption did not shield the draft at issue, since, at the time Smith was drafted, it was embodied in the league's constitution and bylaws and not in a bargained agreement.

39. Ibid., p. 743.

40. See Smith v. Pro-Football, Inc., 420 F. Supp. 738, 743–44 (D.C.C. 1976), aff'd in part, rev'd in part, 593 F.2d 1173 (D.C.C. 1978); John Weistart and Cym Lowell, *The Law of Sports* (Charlottesville, Va.: Bobbs-Merrill, 1979); S 5.05, pp. 552–54; Michael S. Jacobs and Ralph K. Winter. "Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage," *Yale Law Journal* 81 (1971): 16. Hiring halls are in effect a job referral service provided by unions. In certain industries, usually maritime and construction, employers have short-lived and irregular employment needs. In these areas, prospective employees register with a union hall. The employer, when the need for employees arises, goes to the hall and obtains a qualified and available labor force. The union supplies workers based on "neutral" or "objective" criteria. See Robert Gorman, *Basic Text on Labor Law* (St. Paul, Minn.: West Publishing Co., 1976).

41. See Local 357, International Bhd. of Teamsters v. National Labor Relations Board, 365 U.S. 667, 675 (1961); National Labor Relations Board v. Associated Gen. Contractors of America, Inc., 349 F.2d 449, 452 (5th Cir. 1965), and Gorman, *Basic Text on Labor Law*, pp. 664–65.

42. The NFL-NFLPA Collective Bargaining Agreement expired on July 12, 1982. When the last agreement expired in 1974, management and labor did not conclude a new agreement until

the settlement of the Alexander case in August 1977. Alexander v. National Football League, 1977–2 Trade Cases (CCH), s 61, 730 (D. Minn. 1977).

43. A contrary rule would give the players' unions unwarranted bargaining power in that management could not run its business without fear of antitrust liability unless it produced an agreement with the union. This might unduly force employers to make substantive concessions. Comment, "Application of the Labor Exemption After the Expiration of Collective Bargaining Agreement in Professional Sports," *New York University Law Review*, 57 (1982): 197.

44. Weistart and Lowell, *The Law of Sports*, S 5.06, at 588–90.

45. Section 1 of the Sherman Act, 15 U.S.C. S 1 (1976), states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

46. United States v. Addyston Pipe and Steel Co., 85 F. 271 (6th Cir. 1898), modified and aff'd, 175 U.S. 211 (1899).

47. Milton Handler and Thomas A. Smart, "The Present Status of the Intracorporate Conspiracy Doctrine," *Cardozo* 3 (1981): 40.

48. Ibid., p. 52.

49. Ibid., pp. 40 and 56.

50. Copperweld Corporation v. Independence Tube Corporation, 52 U.S. Law Week 4821 (1984).

51. For a critical view of this analysis in player-restraint cases, see Myron C. Grauer, "Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model," *Michigan Law Review* 82 (1983): 35–49.

52. 670 F.2d 1249 (2d Cir. 1982), cert. denied, 103 S. Ct. 499 (1982).

53. 726 F.2d 1381 (9th Cir. 1984).

54. NFL Constitution and By laws, Art. IX, S 4, quoted in NASL v. NFL, 670 F.2d 1249, 1255 (2d Cir. 1982).

55. NASL v. NFL, 670 F.2d 1249, 1257 (2d Cir. 1982).

56. See Copperweld Corp. v. Independence Tube Corp., 52 U.S. Law Week 4821 (1984); Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1388 (9th Cir. 1984).

57. NASL v. NFL, 670 F.2d 1249, 1257 (2d Cir. 1982).

58. NFL Constitution and Bylaws, Art. IV, S 3, quoted in Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1385 n.1 (9th Cir. 1984).

59. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1388 (9th Cir. 1984).

60. Ibid., p. 1389.

61. Ibid.,p. 1390.

62. 52 *U.S. Law Week* 4821 (1984).

63. Lawrence A. Sullivan, *Handbook of the Law of Antitrust* (St. Paul, Minn.: West Publishing Co., 1977) p. 11.

64. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1390, fn.4 (9th Cir. 1984).

65. NASL v. National Football League, 103 S. Ct. 499, 500 (1982).

66. NFL Constitution and By-Laws, S 10.3.

67. Sports Broadcasting Act, and Merger Addition thereto, 15 U.S.C. SS 1291–95 (1976). This statute does not, on its face, immunize the manner in which broadcast revenue is distributed by a league after it has been negotiated and received.

68. Sports Antitrust Bill, S.2784, 97th Cong., 2d sess. (1982), 128 *Congressional Record*, S. 9330–31 (daily ed., July 28, 1982).

69. See note 58.

70. 221 U.S. 1, 63–70 (1911).

71. See Sullivan, *Hardbook of the Law of Antitrust*; Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 893 (S.D.N.Y. 1975).

72. 325 F. Supp. 1049 (C.D. Cal. 1971).

73. 389 F. Supp. 867 (S.D.N.Y. 1975).

74. See Los Angeles Memorial Coliseum Commission v. National Football League, 726 f.2d 1381 (9th Cir, 1984); NASL v. National Football League, 670 F.2d 1249 (2d Cir. 1982); Mackey

v. National Football League, 543 F.2d 606 (8th Cir. 1976), and Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

75. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1389 (9th Cir. 1984); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976).

76. See Milton Handler and William Zifchak, "Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Law Exemption," *Columbia Law Review* 81, (1981): 510–13.

77. Smith v. Pro-Football, Inc. 593 F.2d 1173, 1183 (D.C. Cir. 1978).

78. Mackey v. National Football League, 543 F.2d 606, 620 (8th Cir. 1976).

79. See Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1396–98 (9th Cir. 1984); NASL v. National Football League, 670, F.2d 1249, 1261 (2d Cir. 1982), and Mackey v. National Football League, 543 F.2d 606, 621–22 (8th Cir. 1976).

80. Section 2 of the Sherman Act, 15 U.S.C. S 2 (1976), states, in relevant part: "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 . . ."

81. 384 U.S. 563, 570–71 (1966).

82. Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462, 501 (E.D. Pa. 1972).

83. Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, 571 (E.D. Pa. 1982).

84. NASL v. National Football League, 670 F.2d 11249, 1259–61 (2d Cir 1982).

85. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1392–94 (9th Cir. 1984).

86. Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462, 510–13 (E.D. Pa. 1972).

87. Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, 571 (E.D. Pa. 1982).