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INTRODUCTION

One of America's most popular sports has been able to use business practices that restrain competition within its market, while similar practices employed by others in the professional sports world have been widely scrutinized. NASCAR's historical perception as a back-hills pastime has allowed it to employ anticompetitive business practices restricting competition in the auto racing industry. In contrast, all other professional sports leagues have had their authority severely restricted by the judicial scrutiny NASCAR has been able to avoid.

The NASCAR Winston Cup Series is unique to the professional sports world because of its grass roots atmosphere and uncanny ability to capture fans and corporate supporters. NASCAR experienced an unprecedented period of growth in the 1980s. The sport's popularity caught the attention of the major consumer products companies. Corporate sponsorship played a major role as NASCAR expanded its market by adding new racetracks and new racing series, and formalizing its structure.[1] The sport watched as its enormous popularity translated into soaring television ratings on both broadcast and cable television networks. NASCAR racing has been the second highest rated regular-season televised sport since 1996,[2] and is the only sport that has had television ratings increase every year during the last decade. The sport provides a unique advertising forum to major corporations. Sponsors get nearly four hours of airtime on Saturday or Sunday afternoons while an event takes place. No other sport in America can offer such a bargain to corporate sponsors.

NASCAR's unique ability to forge a personal connection with its fans has ushered, in the sport's new era of "big business," an era that in many respects conflicts with the sport's founding principles. Modern day NASCAR revolves around the interests of major corporations like R.J. Reynolds, Coca-Cola, and Budweiser. NASCAR's revenue is expected to reach $3.4 billion by 2006.[3] In 2000, NASCAR sold its broadcast television rights to the next eight seasons for more than two billion dollars.[4] That is four times what NASCAR made under its previous contract and a world away from the three million dollars it made in 1985 for the broadcast rights to NASCAR's then 28 races.[5] NASCAR, like most organized professional sports, is by nature dependant upon its marketability. Yet, NASCAR is unique in that as financial stakes have increased, so too have the dangers commonly associated with the sport.

The rough- and- tumble image of NASCAR racing is the basis of its marketability. As a result, the NASCAR organization has unilaterally implemented periodic changes to league rules in an effort to build a highly marketable form of stock car racing. Market research studies have

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[1] Tony Molla, *50 Years of Thunder*, MOTOR AGE, Mar. 1998, at 34.

[2] STREET & SMITH'S SPORTS BUSINESS JOURNAL, Oct. 8-14, 2001, at 27.

[3] *NASCAR safety is the issue*, ADVERTISING AGE, Feb. 26, 2001, at 28.

[4] *Id.*

[5] *NBC, TBS, Fox win NASCAR's Rights*, PLI, Feb. 2000, WL 592 PLI/Pat 835.

revealed the power of the NASCAR trademark. NASCAR fans are very loyal to the products associated with their sport, even more so than fans of the other professional sports.[6] The sport's unpredictability and close style of racing has increased the profitability of the NASCAR organization. However, profit has come at the expense of the organization's integrity to its fans and participants.

On February 18, 2001, the sport sustained a terrible loss when NASCAR's legendary driver Dale Earnhardt was tragically killed in an accident on the final lap of stockcar racing's greatest race, the Daytona 500. The unique relationship NASCAR drivers have with their fans was never more apparent as both grief and dismay spread with word of the incident. This tragedy single handedly enhanced the marketability of the sport. While the accident itself was unremarkable, its effect was extraordinary.

Dale Earnhardt's death marked the fourth time in the past two years that a NASCAR driver died from injuries sustained on the track.[7] What is more remarkable is the manner in which the NASCAR organization dealt with the incident. Many felt that this event would invoke the organization's compassion and integrity. It could have ended NASCAR's notorious "iron rule" approach to governance.

In the months following Earnhardt's death, NASCAR conducted an internal investigation to assess its responsibility in the matter. After several months, NASCAR officials emerged issuing an official report pointing the finger at other parties involved in the sport.[8] In classic NASCAR fashion, officials implemented minor modifications to its safety rules while failing to address the concerns of most of its teams and drivers.

This article focuses on the legal aspects of the NASCAR phenomenon. Specifically, it will discuss NASCAR's legal structure, acquisition of power, labor history and effect on the relevant sports market. To better understand the current and future status of the sport we must first understand its past.

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[6] *See* Molla, *supra* note 1.

[7] *Drive for safety; what can NASCAR do to prevent fatalities?*, SARASOTA HERALD TRIBUNE, Feb.20, 2001, at A18.

[8] *See*, Don Coble, *Report: No single factor in tragedy: Broken seat belt, impact angle cited in Dale Earnhardt's death,* THE FLORIDA TIMES-UNION, (August 21, 2001), *available at* http://www.jacksonville.com/tu-online/stories/082201/spr_7011925.html (last visited February 6, 2004). NASCAR released the results of its investigation into Dale Earnhardt's fatal accident at Daytona International Speedway. In the report NASCAR concluded that no single factor caused Earnhardt's death. Instead, the report focuses on a number of findings. NASCAR indirectly points the finger at Bill Simpson, owner of Simpson Race Products and manufacturer of Earnhardt's seat belt. NASCAR's report suggests that a broken seatbelt was the most important factor in Earnhardt's death. The 300 page report contains evidence reviewed by 54 experts. NASCAR's report supports the organization's theory that the belt was broken at impact with DNA and blood spatter evidence proving that the belt was in separate pieces during the crash. Bill Simpson concurs with the broken belt theory but contends that the belt was installed incorrectly and suggests that NASCAR failure set appropriate seatbelt standards was the underlying cause of death. In response to the report, NASCAR announced that it plans to hire a medical director to oversee safety and health of the sport's participants. However, it is important to note that the report fails to discuss important aspects of the incident. First, the role NASCAR's restrictor plate mandate may have played in the last lap incident. Second, NASCAR's failure to mandate the installation and maintenance of safety equipment in the racecars.

II. THE HISTORY OF NASCAR

A. Legal Structure

The National Association for Stock Car Auto Racing ("NASCAR") was incorporated on February 21, 1948 in Daytona Beach, Florida. Bill France, Sr. a race driver and promoter organized a group of his peers in an effort to formalize control and bring safety, equality, and honesty to the sport of stock car racing. Bill France wanted to produce a racing series that would achieve nation-wide superiority.[9] At that meeting, Bill France was elected the president of the governing body, effectively becoming the father of modern day stock car racing.[10]

Bill France was concerned with the lack of legality in auto racing and wanted a lawyer involved in his organization, NASCAR. Subsequently, he contacted Louis Ossinsky, a private attorney working in Daytona, Florida. Louis Ossinsky set up the organization as a private for-profit corporation in Florida.[11] At that time the corporation had three stockholders: majority owner, Bill France, Sr., Secretary, Bill Tuthill, and NASCAR attorney, Louis Ossinsky. The business of NASCAR was to sanction stock car races. From the start, NASCAR decided that it would sanction the races, but would have no other business in racing. Specifically, it would never own the racetracks or racecars and would never hire drivers.[12]

In 1949, several stock car racing organizations began sanctioning races in the eastern United States. Bill France saw each as a threat to NASCAR's supremacy in the automobile racing industry. These series featured old model "modified" racecars and all used scoring systems to declare a "national champion" at the season's end. In order to separate NASCAR from its competitors, Bill France sanctioned NASCAR's first "strictly stock" car race on June 19, 1949 in Charlotte, North Carolina. Unlike its competitors' events, NASCAR's event featured production model automobiles, serving as the precursor to modern stock car racing.[13]

Over the next several decades, the sport continued to grow and gain popularity. In the 1980s, this culminated in a growth spurt and corporate sponsorship influx. As the sport continued to develop, NASCAR's organizational structure and behavior did not. Commentators have described NASCAR and its operational behavior as a "benevolent dictatorship."[14] NASCAR makes the rules and has sole authority in their application. Thus, those affiliated with the organization do as they are told, even if they disagree.

Other professional sports leagues can only dream of unrestricted control over the product they produce. NASCAR makes money, and lots of it. Despite its tremendous expansion in the last decade, NASCAR's Winston Cup events are almost always filled to capacity.

B. Dispute Resolution

From the very beginning, there was little doubt about who controlled NASCAR. Bill France used his majority leverage to create his idea of NASCAR and the business of stock car racing. NASCAR's decisions were final as the organization's needs took priority over those of

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[9] MARK D. HOWELL, MOONSHINE TO MADISON AVENUE 16 (Popular Press 1997).
[10] W.E. BUTTERWORTH, THE HIGH WIND 8 (Grosset & Dunlap 1971).
[11] *Id.* at 10.
[12] *Id.* at 11.
[13] *Know your NASCAR, at* http://www.nascar.com/KNOW/history/lokkingback.1949/, (last visited Feb. 6, 2004).
[14] HOWELL, *supra* note 9, at 13.

the sport's participants. This aspect of NASCAR as an organization has caused most of the criticism by race teams, drivers, automobile manufacturers and fans.[15] The organization's arbitrary decisions have fostered a reputation for NASCAR as a dictatorship. NASCAR's power structure dictates everything from the brand of tires used to the placement of sponsors' advertisements on cars.

Unlike other professional sports leagues, which operate through team owners and players' unions, NASCAR is a private corporation controlled by the France family. Because of this familial foundation, the corporation may maintain secrecy regarding revenue and its distribution.[16] NASCAR thrives on control; it understands the cyclical nature of the industry. NASCAR's ability to control the level of competition produces the close finishes that generate fan interest. Interest translates to corporate sponsorship and television revenue.

This is money that NASCAR has no obligation to share with its participants and no duty to disclose to the public. The rules that NASCAR imposes to increase competition and parity are never challenged because of the organization's control. This allows NASCAR to keep a strangle hold on the stock car racing industry. NASCAR has maintained strict control over its participants for over 50 years. Very few have had the courage to challenge the system. Those that have challenged the system subsequently faced severe punishment by the organization.

For example, NASCAR banned a number of drivers from the "strictly stock" race held in Charlotte in 1949. This was NASCAR's first major "stockcar" racing event. In Charlotte, four drivers were not allowed to compete because NASCAR subjectively determined that they were guilty of "actions detrimental to auto racing."[17]

While NASCAR's approach to disciplinary action has changed with the sport, its power has remained constant. Today, NASCAR gives some consideration to the party guilty of an offense. If the offender has a big name corporate sponsor and is popular with the fans, the punishment does not always fit the offense.

The NASCAR rulebook is specific with respect to actual offenses, but it defers great latitude to league officials in assessing penalties. Penalties for violating the organization's rules are determined by the gravity of the violation and its effect on the safety and reputation of stock car racing.[18] Thus, it should come as no surprise that on several occasions NASCAR has faced credibility issues after flexing its absolute control in applying its rules. NASCAR answers to no one and is free to enforce the rules on the whims of those in control of the organization.

Perhaps the most egregious example of NASCAR's arbitrary interpretation of its rulebook came in 1992. NASCAR fined Martin Birrane, owner of one of the league's smaller racing teams (without major corporate support) for running "an illegal engine part."[19] As a result of the violation, and Birrane's subsequent suspension, he was not permitted to compete in the upcoming race. Later that week, he was forced to close his shop and dismantle his team and operations. NASCAR exercised questionable judgment in this case because Birrane purchased the engine from an outside vendor (one with whom he had no personal connection).

One year later Rick Hendrick, team owner of a larger team with major corporate support, committed a similar infraction. However, NASCAR determined that Hendrick had an ownership interest in the manufacturer of his engine, B&R Engines. Initially, Hendrick's punishment was

[15] *Id.* at 18.
[16] *Id.* at 18.
[17] *Id.* at 23.
[18] *Id.* at 24.
[19] *Id.* at 26.

comparable to that of Birrane, a four-race suspension. However, Hendrick, an owner with considerable weight in the sport, appealed the penalties to the National Stock Car Commission, a 21-member governing committee. After the committee held an appeal hearing, NASCAR lifted Hendrick's suspension.[20] This situation outraged many of the sport's participants and fans. In the end, NASCAR's arbitrary wielding of power solidified one team's position and drove another out of business without recourse.

NASCAR makes arbitrary decisions partly because it feels they are necessary due to the nature of the industry. First, the organization knows that it must maintain a certain level of fairness for its participants. NASCAR also recognizes that much of what it provides is entertainment. Therefore, rules may be manipulated depending on the quality of the sport's performance. Second, NASCAR must always be aware of its perception in corporate America. This conundrum often results in the big teams being treated differently than the sport's smaller, less financed participants.

C. Organized Labor

In 1949, the auto racing industry was wide open and many organizations competed for the talented drivers and race teams of the day. Bill France watched idly as another sanctioning body, the National Stock Car Racing Association (NSCRA) competed for the services of many drivers and car owners in the same geographic region as NASCAR.[21] Additionally, three other sanctioning bodies were holding racing events around the country. Organizations like the National Auto Racing League, the American Stock Car Racing Association, and the United States Stock Car Racing Association regulated stock car racing events in various locales.

From the very beginning, Bill France Sr. kept firm control over NASCAR drivers. As previously mentioned, he banned a number of drivers from the organization's first "strictly stock" event in 1949. In 1950, a number of drivers were punished for participating in non-NASCAR sanctioned races. At the organization's inception, loyalty was essential and drivers who raced at events sanctioned by NASCAR's competitors were often punished.

NASCAR exercised sole control over its drivers throughout the 1950s. Drivers had no recourse and had to comply with NASCAR's decisions. However, the following decade exhibited the potential for change as NASCAR caught the attention of organized labor. In 1959, Curtis Turner, a legend of the sport's early days, undertook the task of building a super-speedway near Charlotte, North Carolina. The track was completed and in the fall of 1960 it hosted NASCAR's World 600. Turner's facility failed to attract capacity crowds and his investment partners grew intolerant. In an effort to save his track, Turner solicited a loan from the International Brotherhood of Teamsters (Teamsters). The Teamsters, in exchange, promised to organize NASCAR's drivers into a formal bargaining unit.[22]

Despite his efforts, Turner's initial attempt to organize the NASCAR drivers fell short. Even Jimmy Hoffa could not break France's control over NASCAR. The Teamsters' inability to gain a stronghold over the drivers allowed France to set precedent. If NASCAR made an example of Curtis Turner, it would send a clear message to its participants about the organized labor movement.[23] Bill France exercised his autonomous authority in repressing his labor, the

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[20] HOWELL, *supra* note 9, at 13.
[21] *Id.* at 23.
[22] *Id.* at 30.
[23] *Id.* at 31.

drivers. The legal structure of NASCAR allowed it to repress the labor movement in the 1960s, while other professional sports organizations accepted the reality of dealing with organized participants.

The Teamsters refused to give up the effort to organize NASCAR's drivers. Organization of NASCAR drivers represented one phase of the Teamsters' campaign to organize athletes from all aspects of professional sports. The battle was waged and the Union looked to Curtis Turner's influence once again. A meeting was organized and Union officials met with drivers from various auto-racing divisions, including NASCAR. At that meeting, the Teamsters introduced their project, the Federation of Professional Athletes. This group would advocate collective bargaining against the repression of professional sports leagues' sanctioning bodies, including NASCAR.[24]

Bill France's reaction to the news was fast and furious. He made NASCAR's position very clear: "no known teamster member can compete in a NASCAR race … and I'll use a pistol to enforce it."[25] France disapproved of Turner's involvement and used all of his power to defeat the Union's presence in his sport. Subsequently, he made a final decision and presented it to the drivers; Curtis Turner was suspended for life by the governing body for "conduct detrimental to auto racing." NASCAR officials, like France, had complete control of the organization and they used their authority to weed out the sport's "persuaders." NASCAR's intolerance shows the lengths the organization will go to limit the effectiveness of other groups that want a part of the stock car auto racing business.

Two significant developments occurred as a result of Turner's attempt to organize NASCAR drivers. First, the only two drivers that joined the union, Curtis Turner and Tim Flock, were banned from the sport. Both bans were lifted by the organization in 1965. However, both drivers were near the ends of their careers. Second, NASCAR created its Grand National Advisory Board, predecessor to the National Stock Car Commission, which oversees Winston Cup Racing today.[26]

The organized labor issue was dormant for a number of years as the sport's popularity struggled throughout the sixties. All was well in Bill France Sr.'s autonomous world until 1969 when the issue arose again. In 1969, NASCAR teams met in Brooklyn, Michigan for a race at the Michigan International Speedway. A few days before the event, a number of drivers met to discuss the prospect of starting a union. Richard Petty, one of the most popular and respected names in auto racing, organized the gatherings. The meeting resulted in the formation of an organization called the Professional Drivers Association (PDA). The goal of the PDA was to improve the sport of automobile racing. The distinction between Richard Petty's organization and the one proposed by Curtis Turner is the tie to organized labor. A national union was not involved in the formation of the PDA.

Bill France responded, "we're not planning to change NASCAR … we'll post out prize money and they're welcome to run if they want to. If not, that's their business."[27] A media battle ensued as France told anyone who would listen about how much competition and conditions have improved under NASCAR's reign. NASCAR found itself in a unique situation as the seventies drew near. In 1969, the sport was on the verge of national acceptance as its

[24] *Id.* at 32.
[25] *Id.* at 32.
[26] HOWELL, *supra* note 9, at 13.
[27] *Id.* at 37.

popularity grew to levels once only attained by the elite sports like professional baseball, football, and basketball. Despite their surroundings, the drivers were not organized as a negotiating body and their interests were still largely unprotected.

Other professional sports had bargaining units to negotiate their benefits, but auto racing was unlike other sports. Auto racing's inherent characteristics make collective bargaining less necessary than it is in other sports. Even with factory involvement, where several teams and drivers share the same types of equipment, each team functions independently. If one team does not make the trip, the race will still be held. Even without a collective bargaining unit, the PDA was still a formidable opponent for NASCAR. The PDA had a roster full of perennial superstars, the biggest names in the sport. The board of directors alone was made up of the "who's who" in NASCAR history. Drivers like Richard Petty, Cale Yarborough, Bobbie Allison, Donnie Allison and David Pearson held positions on the PDA's board.

The battle lines were drawn at the outset. The PDA argued that it was devoted to the betterment of the sport whereas France suggested the organization represented disloyalty and greed. That being said, both waited anxiously for the ensuing confrontation. An opportunity presented itself one month later in Talladega, Alabama. France unveiled his latest auto-racing spectacle, Alabama Motor Speedway, a 2.5-mile super-speedway that would accommodate the increasing speeds of the sport. Several NASCAR drivers voiced safety concerns after testing at the new track. When France refused to address the drivers' concerns the PDA refused to participate. By Sunday morning, over thirty teams had left the speedway and the most significant driver boycott in NASCAR history was declared.[28]

The Talladega 500 took place on Sunday, September 14, 1969. Substitute teams were used to fill the starting field. In an effort to win over the fans, each fan in attendance received a printed statement written by Bill France. The statement explained the situation and offered fans a "two-for-one" deal allowing them to exchange the ticket for tickets to attend a race at Daytona Speedway or a future event at Talladega.[29]

On September 18, 1969, the PDA gave its formal and official response. The organization declared that its members "are race drivers first and accept the risks involved, [in the sport] but when life and death risks become both unreasonable and unnecessary corrective action is essential."[30]

As a result of the PDA's "corrective action," Bill France sought a legal approach to the problem that the group boycott presented. In order to prevent more "corrective action," France looked for a way to legally bind the drivers to participate in the race if they entered the event. Soon France added a "good faith to the public pledge" to entry forms issued by NASCAR for future events. NASCAR's cancellation policy was now in writing. Once again, NASCAR used its autonomous power to stifle politicization of its drivers and car owners. The pledge represented an impasse between the PDA and the NASCAR organization.[31]

The PDA continued to raise driver issues throughout the 1970 campaign. Richard Petty and his union members opposed the "Good Faith to the Public" pledge. A new version, found on 1970 NASCAR entry forms, gave NASCAR additional control over each racecar. The new forms required approval by a competition director before withdrawal would be valid. While the PDA was fighting a good fight, the automobile manufacturers were siding with NASCAR.

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[28] *Id.* at 41(normally 35-42 teams participate in a NASCAR Winston Cup event).
[29] *Id.* at 43.
[30] *Id.* at 44.
[31] *Id.* at 46.

Eventually, the financial aspect of the business took over when Chrysler instructed Richard Petty to sign the entry form despite his opposition. Petty gave in and France regained control of his drivers.

Team owners looked into the legality of the entry forms, but found that NASCAR's demands were binding. This meant that even if the drivers acted collectively to boycott an event, the owners would have to find substitute drivers for the event as specified in the pledge. NASCAR played by its rules and had no obligation to negotiate with the PDA. NASCAR drivers operated independently. They were not "employees" of the organization and France had no obligation to bargain with them. NASCAR outlived both the Federation of Professional Athletes and the Professional Drivers Association. By the time the R. J. Reynolds Tobacco Company effectively became the first major corporation to buy naming rights to a professional sports league in 1971, the PDA had all but dismantled.

The NASCAR organization has developed into one of professional sports' most successful enterprises. However, its success is directly attributable to its legal structure, arbitrary rules, and unlimited authority to control the sport it promotes. Like other major professional sports leagues, NASCAR possesses exclusive privileges that enable it to affect the economic, political, and competitive workings within the business of American sports.[32] Yet, it has managed to escape antitrust scrutiny while others have not. Federal Antitrust laws should be applied to the NASCAR organization.

III. THE SHERMAN ANTITRUST ACT

The federal antitrust laws express our country's long- standing principle that agreements that result in unreasonable restraints of trade are prohibited. Such agreements conflict with capitalism's ideology. They stifle economic efficiency and consumer welfare. Enactment of the Sherman Antitrust Act in 1890 codified and expanded common law principles into a federal law prohibiting restraints placed on interstate trade. Section 1 of the Act prohibits contracts, combinations and conspiracies in restraint of trade, therefore, applying to bi-lateral and multi-party conduct.[33] Section 2 prohibits monopolization and attempts to monopolize, therefore, bringing unilateral or single-party conduct within the law.[34] In the context of professional sports, the Act applies to ordinary business transactions and virtually all areas of league conduct, including league rule enforcement, and the prevention of rival league competition.

A. Sherman Antitrust Act, Section 1

Section 1 of the Sherman Antitrust Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states … is declared to be illegal.

There are two elements to a Section 1 offense: (1) the plaintiff must prove the existence of a contract, combination or conspiracy that (2) operates to restrain trade.[35] Initially, this

[32] HOWELL, *supra* note 9, at 13.
[33] 15 U.S.C. § 1 (1997).
[34] 15 U.S.C. § 2 (1997).
[35] M. Randall Oppenheimer, *Selected General Observations on Antitrust Law and Entertainment/Sports Practice*, C425 ALI-ABA 199, 210 (1989).

section was read to include "every" restraint of trade.[36] This construction proved unworkable and the United States Supreme Court adopted the contemporary antitrust standards that distinguish "reasonable" restraints from those that are illegal.[37] In the context of professional sports, Section 1 claims allege the existence of a conspiracy among franchise owners or league officials to restrict competition.[38]

The first level of analysis in a Section 1 claim is deciding which test applies to the trade practice at issue. When determining whether a given trade practice is unlawful, the courts have developed two competing standards of review:

1. Per Se Category Violations

First, are "per se" category violations. These are combinations that have resulted in anticompetitive effects and whose objectives have historically been determined to be so clear that any business justification is irrelevant. Historically, trade practices falling within the "per se" category include the following: group boycotts, price fixing, and horizontal geographic territory allocations.[39] When a trade practice falls within this category, courts find the challenged practice unlawful without further analysis.

2. Rule of Reason Approach

The second method of examining an unreasonable restraint claim under Section 1 allows courts to determine whether a particular practice violates Section 1 on a case-by-case basis. The rule of reason test allows the defendant to show a legitimate business justification for his actions.

There are two approaches that courts use in weighing the evidence under the rule of reason analysis. First, courts can use a *balancing test* to weigh all the circumstances and determine whether the restrictive practice is an "unreasonable" restraint on commerce. Courts apply this test when the particular industry involved is dissimilar to other businesses, as is often the case with professional sports leagues. If the defendant can show that the challenged practice has pro-competitive characteristics, a court may balance these positive characteristics against their negative impact on trade.[40] The balancing test is currently the prevailing method used to examine a trade practice under the rule of reason approach.

Second, a competing approach to the balancing test is available when applying the rule of reason. The common law's *ancillary restraint doctrine* allows courts to consider the unique aspects of certain types of businesses. When unique conditions exist, courts look at the surrounding circumstances that led to the adoption of the challenged practice, including the history of the industry, its unique business conditions and the defendant's business justification for making the restraint. In the context of professional sports, this may be the more appropriate approach as it accommodates the realities of the modern day sports market. Sports leagues sometimes adopt rules to pursue noncommercial objectives. As a result, a challenged practice

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[36] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340-41 (1897).
[37] Standard Oil v. United States, 221 U.S. 1, 58 (1911). The Sherman Act prohibits all contracts or acts which are "unreasonably restrictive" of competitive conditions, by their nature or by contract.
[38] Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 733 (1987).
[39] Oppenheimer, *supra* note 35, at 208.
[40] Rosenbaum, *supra* note 38, at 735.

may be ancillary to the legitimate objective of increasing the marketability of the league's final product.[41]

3. The Single Entity Defense

In some situations, a sports league may assert the single entity defense to a Section 1 challenge of a league-imposed restraint. The single entity defense applies in situations when the defendant is a group of separate actors capable of independent and conspiratorial conduct, but acts as a single integrated unit lacking capacity to conspire with itself.

In the context of professional sports, leagues contend that they are an indivisible product. Without structure and rules to govern the sports enterprise, consumers would have little interest in the outcome of a contest between teams unaffiliated with a league.[42] Leagues argue that no individual team can produce what the consumer really wants--a team to call champion after a long, competitive season.

The single entity defense only applies to claims brought under Section 1 of the Sherman Act because the defense is used to negate the inference of a group's concerted activity. A league must rely on concerted activity to establish and govern a sports league, but the groups involved are always governed by the organization itself, acting as a single entity. Therefore, sports leagues contend that it is impossible for a single team to conspire with others to restrain trade without the league's involvement.

This argument is consistent with many of the characteristics of modern sports league organization. Today, most professional sports organizations share profits from television revenue and gate receipts collected at league events. Most leagues have rules that are designed to spread player talent to assure competitive balance. Sports leagues often subsidize their weaker participants in an effort to maintain parity and increase the sport's marketability. These concerted league activities are designed to promote a superior product and favor the single entity approach to the Sherman Antitrust Act.[43]

The most important aspect of the single entity defense is that when a league is identified as a single entity, and not as a group of individual actors, various league rules that would otherwise violate antitrust laws are justified. As such, the single entity theory may not only survive a Section 1 claim but also may defeat a monopoly claim brought under Section 2 of the Sherman Act.

B. Sherman Antitrust Act, Section 2

Section 2 of the Sherman Antitrust Act provides 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."

Thus, Section 2 specifies three offenses: (1) monopolization, (2) attempted monopolization, and (3) conspiracy to monopolize. In the context of professional sports, Section 2 is available as a means to challenge a sports league's market power. Specifically, section two can be used to determine what conduct a league used to acquire, maintain or attempt to acquire

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[41] *Id.* at 739.
[42] *Id.* at 739.
[43] *Id.* at 743.

the market power in question. There are two elements to a Section 2 claim: (1) the plaintiff must prove that the defendant has possession of monopoly power in the relevant market and (2) the plaintiff must prove the defendant's willful acquisition or maintenance of that power as distinguished from growth of development as a consequence of a superior product.[44]

1. Monopoly Power

Monopoly power exists when an organization has the power to control prices and exclude competition.[45] Judge Learned Hand's "rule of thumb" on market power" contends that a ninety percent market share is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four would be enough; and certainly thirty-three percent would not be enough.[46] Regardless of the industry at issue, it is difficult to determine whether an organization has a disproportionately high market share. By and large, if a defendant's market share is over eighty percent in either or both categories, the defendant possesses a disproportionate market share than that which would occur under true competitive conditions.[47]

2. Market Definition

Market definition is perhaps the single most important aspect of the proper analysis of alleged monopolization. Analysis of such a claim requires that two distinct market definitions be defined. First, courts must identify the relevant *geographic market* for the industry. The geographic market is the national, regional, or local locations in which the industry competes.[48] Second, and more important, is the industry's *product market*. The basic test used to decipher the relevant product market is whether the products comprising a single market are (1) interchangeable with other products in the alleged market and (2) whether there is a cross-elasticity of demand for those products.[49] If this test were applied to NASCAR, a plaintiff would want to show that the demand for auto racing is price inelastic, that customers want NASCAR sanctioned races on Sunday afternoons, and that other sports and alternative forms of entertainment are not sufficient replacements for these events. If this were established, a court could conclude that the product market for the industry consists only of NASCAR-sanctioned races.

In the context of professional sports leagues, liability is almost insurmountable once the evidence establishes that only those cities that host teams for the more popular sports leagues make-up the relevant geographic market. A Section 2 claim will succeed if the court finds that customers are interested in a product, and that the defendant is the primary supplier of that product in the relevant market. On numerous occasions, courts have determined that professional sports leagues possess extreme market power in their relevant product markets.

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[44] United States v. Grinnel Corp., 384 U.S. 563, 570-71 (1966).
[45] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).
[46] United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).
[47] *See*, International Boxing Club, Inc. v. United States, 358 U.S. 242, 249 (1959) (finding that eighty-one percent of championship boxing contests constituted impermissible market share.); Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975) (forty-five to seventy-five percent of the juice market is unlawful) cert. Denied, 425 U.S. 959 (1976).
[48] United States v. Phillipsburg Nat. Bank & Trust Co., 399 U.S. 350, 362 (1970).
[49] *E.I. du Pont de Nemours & Co.,* 351 U.S. at 395.

The professional sports world has changed dramatically since the Sherman Act was originally applied to the industry. In fact, the business side of the professional sports industry has reached levels of economic complexity comparable to even the most mature commercial industries. Most sports leagues have steadily increased both their number of franchises and the number of scheduled games they play each year. Television revenue has an enormous impact on the economic success and long-term security of the various sports leagues. The role collective bargaining plays in the relationship between sports organizations and their participants has developed. Today, almost all major professional sports leagues recognize the important role collective bargaining plays in protecting the rights of their participants. Professional sports organizations no longer have the ability to distribute league revenue in their sole discretion. In most cases, distribution of league revenue is governed by league rules. Typically, the franchise owners create league rules and disbursement of league revenue is done somewhat equally in an effort to raise the level of league competition. NASCAR manages the business of stockcar racing very differently, however.

IV. Application of Federal Antitrust Law to NASCAR

The Sherman Antitrust Act specifically prohibits combinations in the form of trusts. Over the years most, professional sports leagues have had to defend their practices against federal antitrust claims. NASCAR is an exception and there are many possible explanations for this historic distinction. The unique characteristics of auto racing may lead to a higher sense of team among its participants; NASCAR teams act as a family. Perhaps this aspect of the sport has prevented some individuals from taking action against the organization. Maybe the enormous pressure placed on the sport's participants by their sponsors help NASCAR settle disputes before they reach the courts. Maybe the system has worked well enough throughout the years to keep NASCAR participants content with their share of league revenue. Finally, and perhaps most likely, NASCAR's participants still fear the organization's wrath.

The France family's control over the NASCAR Winston Cup Series is nothing short of a monopoly. As is the case in all other professional sports, the league and its owners are possessors of exclusive rights. In the context of auto racing, NASCAR grants racing facilities throughout the country the exclusive right to host a NASCAR sanctioned event. Race teams acquire licenses from NASCAR and then pay race entry fees for the exclusive right to compete for the prize purse.

The NASCAR organization possesses special privileges and powers; it has the ability to interfere with trade by granting others exclusive rights and it exercises control over everyone affiliated with the organization. NASCAR makes the rules, applies the rules, disciplines and limits the effectiveness of all other groups that want to be part of the stock car business.[50]

Historically, NASCAR officials have successfully acted in concert to restrain trade resulting in a monopolization of the business of building and operating racecars. In recent decades, courts have heard a number of claims brought against NASCAR. In most cases, the claims involve disputes over NASCAR's intra-league dispute resolution procedures. Courts have determined that NASCAR promulgates a number of rules governing nearly every facet of stock car racing.[51] As a result of the organization's sanctioning and licensing activities, courts have found that NASCAR is dominant in the field of stock car racing and that anyone that wants

[50] Howell, *supra* note 9, at 33.
[51] *See,* Koszela v. NASCAR, 646 F.2d 749 (2nd Cir. 1981).

to participate in the sport must 'join' NASCAR and pay annual fees for 'membership' and licensing."[52] Membership, however, does not carry with it a right to share in the control of NASCAR's affairs or to elect NASCAR officers. Membership merely entitles members to seek a license to participate in NASCAR sanctioned events.

A. Law of Voluntary Associations

Generally, courts do not have the authority to interfere with the internal affairs of private associations and they must adhere to a rigid "hands off" policy in such matters. However, courts have the authority to interfere with the internal affairs of NASCAR because judicial nonintervention is not justified in cases involving a for-profit organization maintaining a "stranglehold" on a particular occupation. In this case, NASCAR's complete dominance in the field of stock car racing leaves competitors little choice but to join the organization. NASCAR maintains a "stranglehold" on the sport of stock car racing and does not afford its "members" any right of governance.[53] Consequently, a court would have the authority to hear a federal antitrust claim brought against NASCAR.

B. Standing

Section 4 of the Clayton Act states: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore."[54] The Act authorizes private actions for violations of the Sherman Antitrust Act. Antitrust plaintiffs must "prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[55]

The United States Supreme Court has set out seven factors to be analyzed in each case to determine whether requisite standing exists.[56] These factors include: (1) whether the alleged antitrust violation actually caused the plaintiff's injury; (2) whether the defendants specifically intended to cause the plaintiff's injury; (3) whether the plaintiff's injury was of the type the antitrust laws were intended to prevent; (4) whether the plaintiff's injury was direct or indirect; (5) whether there exists an identifiable class of direct victims whose self interest would normally motivate them to vindicate the public interest in antitrust enforcement; (6) whether the plaintiff's damages are speculative; and (7) whether permitting the plaintiff to sue would create a risk of duplicative recoveries or a need for complex damage apportionment.[57] Essentially, antitrust standing ordinarily extends only to consumers or competitors in the relevant market.

Depending on the nature of the specific claim, NASCAR drivers, team owners and track owners could be among the parties with requisite standing in a federal antitrust claim against NASCAR.

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[52] *Id.* at 750.
[53] *Id.* at 753.
[54] 15 U.S.C. § 4 (1997).
[55] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).
[56] Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983).
[57] *Id.* at 537-546.

C. The Single Entity Defense

Numerous decisions handed down in the 1980s reflect judicial willingness to hold antitrust plaintiffs to a high standard of proof in showing the existence of "concerted action" violative of the Sherman Act.[58] In the context of professional sports, the issue is whether the sports league in question is a "single entity" whose joint actions cannot be viewed as concerted activity among competitors. In the last two decades, most major sports leagues have been unable to defend various league decisions and rules against Section 1 claims on grounds that they are single entities.[59] Furthermore, courts have held that groups acting in joint ventures, including sports leagues, are made up of multiple entities and thus capable of violating Section 1 of the Sherman Act.[60]

The definitive case demonstrating application of the single entity defense to a professional sports league is *Los Angeles Mem'l Coliseum Comm'n v. NFL.* ("Raiders").[61] The Oakland Raiders sought a lease with the Los Angeles Coliseum allowing the team to play its home games in Los Angeles. However, the NFL Constitution required unanimous approval of the move by all twenty-eight teams in the League. The NFL teams voted unanimously against the proposal and the Los Angeles Memorial Coliseum Commission brought a federal antitrust claim against the NFL and each of its member clubs. The Coliseum Commission alleged that the League's Constitution was an unlawful restraint of trade in violation of Section 1. The NFL and its member teams defended on the ground that the League was a single entity.

The district court found that the NFL did not qualify as a single entity within the context of Section 1 and that the rule of reason should be applied to the League's Constitution.[62] On appeal, the League reasserted the single entity defense and the Ninth Circuit Court of Appeals upheld the district court's ruling that reasonable minds could not differ in concluding that the NFL is not a single entity for purposes of Section 1. In doing so, the Court gave five reasons supporting its decision.

The Court's first reason for rejecting the defense was that other NFL rules have been found violative of Section 1.[63] Second, the Court agreed with the Second Circuit's reasoning in *North American Soccer League v. NFL*[64] that to allow the single entity defense would create a loophole that the NFL could use to enforce restraints for the purpose of protecting individual

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[58] Monsanto Co. v. Spray –Rite Service Corp., 465 U.S. 752 (1984) (requiring direct evidence of concerted activity); Masushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) (requiring plaintiff to present evidence that tends to exclude the possibility that the alleged conspirators acted independently); O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464 (9th Cir. 1986) (determining the strength of inference of conspiracy in light of competing inference of independent action).

[59] *See*, Los Angeles Memorial Coliseum Comm'n v. National Football League, 519 F. Supp. 581 (C.D. Cal. 1981) (finding that the NFL was not immune from the antitrust laws as a single business entity); National Basketball Association v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987), cert. Denied, (finding that not all sports leagues' franchise relocation rules are unlawful and that they be judged by the rule of reason); Volvo North America v. Men's Intern. Professional Tennis Council, 857 F.2d 55 (2nd Cir. 1988) (finding that the International Tennis Federation and the Men's International Professional Tennis Council could conspire within the meaning of Section 1).

[60] Volvo North America v. Men's International Professional Tennis Council, 857 F.2d 55, 71 (2nd Cir. 1988) (finding that the International Tennis Federation and the Men's International Professional Tennis Council could conspire together in violation of Section 1 in setting tournament rules).

[61] Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984).

[62] *Id.* at 1385.

[63] *Id.* at 1388.

[64] 670 F.2d 1249, 1257 (2nd Cir. 1982).

league members, rather than benefiting the league as a whole.[65] Third, the Court found that the NFL failed to demonstrate the required unified activity of a single entity because its "corporate policies are [not] set by one individual or by a parent corporation."[66] Fourth, the Court found that the NFL's structure and operating procedures were similar to those of the Sealy Company,[67] as described in *United States v. Sealy, Inc.*("Sealy").[68] The Ninth Circuit found that the NFL, and its goal of "promoting and fostering the primary business of League members," was analogous to the organization plan described in Sealy, and therefore also incapable of being a single entity. Finally, the Court found that NFL clubs are separate entities because each produces a product with independent value.[69] To support its finding, the Court asserted that League profits and losses are not shared equally within the organization and that teams compete off the field for personnel.[70] The Court concluded that variations in profit between League members demonstrated the independent value of each team and that off- field competition makes each team an independent business entity.[71]

If the Court's single entity analysis in *Los Angeles Mem'l Coliseum Comm'n v. NFL* were applied to the business of NASCAR, reasonable minds likely would not differ in concluding that like the NFL, NASCAR is not a single entity for purposes of Section 1.
Although the Court did not lend weight to each of its five reasons supporting its decision, a bulk of the analysis seems to center around the NFL's organizational structure. Like the NFL, NASCAR's structure appears to be very similar to that of the Sealy Corporation in *United States v. Sealy*.[72] The organization itself is only in limited respects an entity separate from the individual teams competing at its races. Although NASCAR is an incorporated, for profit "association," it has a Daytona Beach office run by NASCAR president Mike Helton. NASCAR's president, like the commissioner of the NFL, makes day-to-day decisions regarding league operations. Like that of the NFL, the office's primary functions include scheduling, resolving disputes among drivers and teams, supervising officials, discipline and public relations. As in both the Sealy and the Raiders' cases, the court would have to look behind the label offered by the defendants to determine the substance of the entity in question.[73]

Such inquiry would disclose that NASCAR is an association of race teams sufficiently independent and competitive with one another to warrant "rule of reason" scrutiny under Section 1 of the Sherman Antitrust Act. Like the NFL clubs, NASCAR teams are separate business entities whose products have independent value separate of the NASCAR identity. NASCAR's member teams are individually owned. And where as approximately ninety percent of league revenue is divided equally among the NFL teams, revenue is not divided and any profits or losses are not shared by any of the NASCAR race teams, a feature common to partnerships or other "single entities."[74]

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[65] *Los Angeles Mem'l Coliseum Comm'n,* 726 F.2d at 1388.
[66] *Id.*
[67] *Id.* at 1389.
[68] 388 U.S. 350, 352-53 (1967). Sealy licensed manufacturers to sell products under the Sealy name and allocated territories between the licenses. The Supreme Court found Sealy's joint venture arrangement was a per se violation of Section 1, and that Sealy was not a single entity incapable of violating the Act despite the fact that the licensee's owned all the stock and controlled the Company's operations.
[69] *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1389.
[70] *Id.* at 1390.
[71] *Id.*
[72] *Sealy*, 388 U.S. at 350.
[73] *Los Angeles Mem'l Coliseum Comm'n,* 726 F.2d at 1389.
[74] *Id.* at 1390.

As is the case with NFL franchises, the profits between NASCAR teams vary widely and disparity in profits can be attributed to independent team management. In NASCAR, management decisions regarding drivers, management personnel, and team marketing contribute to the level of fan support and thus other sources of income.

In addition to being independent business entities, NASCAR teams, like their NFL counterparts, compete with one another off the track to acquire sponsors, drivers and team personnel. These attributes operate to make each NASCAR team an entity distinct from NASCAR. As is the case with the NFL, cooperation between NASCAR teams is necessary to produce a race. However, as the district court found in the Raider's case, this does not mean, "that each team can produce football games only as an NFL member."[75] By analogy, NASCAR teams must cooperate to produce a race but that does not mean that they can produce races only as NASCAR members. This is especially evident in light of the emergence of the Indy Racing League after its split with the Championship Auto Racing Teams organization.[76] For these reasons, a court should reject a single entity defense by NASCAR and the singular nature of the NASCAR organization should be accounted for while weighing the reasonableness of any league action.

D. Potential Per Se violations of Section 1 of the Sherman Antitrust Act

NASCAR could potentially face judicial scrutiny for its track management procedures. The organization could face liability for the methods by which it allocates its season's 39 events. NASCAR independently and arbitrarily decides when and where its events will be held. NASCAR enters into agreements with various independently owned facilities around the country to host NASCAR sanctioned events. Consequently, NASCAR's scheduling decisions act as horizontal geographic territory allocations of its product, stock car races. These geographic territory allocations are trade practices that courts have historically found "per se" violations of Section 1 of the Sherman Act. Consequently, the practice is found to be unlawful without further analysis.

In order to establish a Section 1 claim against NASCAR for its race allocation practices, the owner of a facility located within the geographic territory of another facility holding NASCAR sanctioned events would have to prove the existence of an agreement between NASCAR and said facility that operates to restrain trade. Furthermore, the excluded owner would have to show that the resulting restraint is unreasonable.

To meet this challenge, an independent track owner may seriously inquire into the leadership structure of the International Speedway Corporation ("ISC"). The International Speedway Corporation is a publicly traded, $500 million dollar company founded by Bill

[75] Los Angeles Memorial Coliseum Commission v. National Football League, 519 F. Supp. 581, 584 (C.D. Cal. 1981).

[76] *See*, *IRL History: Key dates in IRL history,* CINCINNATI ENQUIRER, *available at* http://cincinnati.com/sports/motorsports/irl/history.html (last visited Feb 6, 2004) (Illustrating that race teams can produce races only as members of other sanctioning bodies. In March 1994, Indianapolis Motor Speedway president Tony George announced that he would form the Indy Racing League ("IRL") breaking away from the well-established Championship Auto Racing Teams ("CART") series and competing as another sanctioning body of open wheeled racecars. As a result, many drivers and teams abandon CART joining George's IRL. Today, the IRL has surpassed CART as the most successful sanctioning body of open wheel auto races).

France.[77] The company's president and COO is James C. France, the chairman and CEO is William C. France and the Executive Vice-President is Lesa D. Kennedy, Bill France's granddaughter.[78] ISC promotes motor sports activities in the United States. The company owns and/or operates fourteen racing facilities across the country including some of NASCAR's most lucrative racetracks. ISC's holdings include: Daytona International Speedway, Talladega Superspeedway and Michigan International Speedway. The company has ownership interests in fourteen racetracks in the United States including the newly developed Chicagoland Speedway and Kansas Speedway.[80] ISC's tracks hosted twenty of the NASCAR Winston Cup series' thirty-nine scheduled events in 2002.

One may reasonably infer that since three of the International Speedway Corporation's top executives are members of the France family, the company has an ownership interests in a majority of the facilities hosting NASCAR's Winton Cup sanctioned events. Inside ownership accounts for over 38% of the company's total value.[82] NASCAR and/or the International Speedway Corporation are conspiring to restrain trade in the stock car racing industry.

E. Potential Rule of Reason violations of Section 1 of the Sherman Antitrust Act

1. Collective Bargaining

If the single entity doctrine does not insulate NASCAR from Section 1 of the Sherman Act, the organization could also face antitrust claims for organizational decisions and enforcement of NASCAR's governing rules. Historically, NASCAR has been the subject of judicial scrutiny mainly for its intra-association dispute resolution practices.[83] However, if the organization continues to make and enforce arbitrary changes to its rules, it could ultimately face liability. Although rule changes made during the season to increase the level of competition among race participants would likely be labeled "reasonable" by the judiciary, if race drivers took collective action NASCAR would be forced to handle the situation much differently than it has in the past. Today, safety has become the major concern of most race drivers participating in the Winston Cup Series. While many race drivers have voiced concerns about NASCAR's safety precautions at various events, the organization continues to unilaterally implement league rules. This often results in a new safety mandate and/or recommendation to drivers. The best example of this situation occurred recently when numerous NASCAR drivers voiced their concerns about restrictor-plate racing following the death of Dale Earnhardt at Daytona in February 2001. Restrictor plates have been used by NASCAR for a number of years and have been controversial since their inception in some of NASCAR's sanctioned events. Restrictor-plates are used during NASCAR's superspeedway events. They restrict the flow of air into the engine's carburetor, resulting in reduced speeds and much closer racing. The restrictor plate mandate coupled with other rules implemented to promote more thrilling race finishes have resulted in a number of last-lap shootouts. After three hours of continuous racing, forty-two cars are separated by seconds racing at speeds of over 200 M.P.H. in a dash to the finish line.

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[77] Bill King, *ISC's Kennedy spearheads track growth*, STREET & SMITH'S SPORTS BUSINESS JOURNAL, Oct. 15-21, 2001, at 30.
[78] *About ISC, History, at* http://www.iscmotorsports.com, (last visited February 6, 2004).
[80] *See*, King, *supra* note 77, at 30.
[82] *See*, e.g., *International Speedway Corporation Major Holders*, *at* http://finance.yahoo.com/q/mh?s=ISCA (last visited February 6, 2004).
[83] *See*, Koszela v. NASCAR, 646 F.2d 749 (2nd Cir. 1981); Crouch v. NASCAR, 845 F.2d 397 (2nd Cir. 1988).

Inevitably, one driver makes a mistake and the lives of all the race participants are in jeopardy. Immediately following Earnhardt's death, which occurred on the final lap of Daytona 500 (a restrictor plate race), many drivers called upon NASCAR to remove the restrictor plate mandate. Eight months later NASCAR made no such change and another incident occurred on the last lap of the EA Sports 500 at Talladega Superspeedway. These events have once again spurred discussion about a driver's union. Thus, NASCAR could find itself confronted with collective bargaining and group boycott issues in the near future.

2. Television Revenue

Another context in which a Section 1 claim could be brought against NASCAR involves distribution of the revenue generated by the organization's $2 billion dollar television contract. As a private corporation, NASCAR has no duty to disclose its revenue or how it is divided. When NASCAR negotiated its milestone television contract last year, the organization conveniently reverted to a practice it had maintained until 1979.[84] In February 2000, NASCAR unilaterally revoked its long-standing practice of allowing individual racetracks to negotiate separate television deals. In doing so, it returned to the setup it had through the 1978 season, when it was in charge of the sport's television rights. This move allowed the individual track owners to maximize their product and capitalize on the sport's marketability. It also gave NASCAR the opportunity to collect the revenue and arbitrarily disburse it. Given the history of NASCAR's control over the sport, one may reasonably conclude that the television revenue was not disbursed equitably between the organization and the racetracks. As such, if an individual track were able to show that it received a certain portion of the revenue while another, say a track owned by the International Speedway Corporation, received an inequitable share, it could bring a federal antitrust claim based on Section 1.

F. Potential violations of Section 2 of the Sherman Antitrust Act

NASCAR could face potential liability for its monopolization of the stock car racing business. In the context of professional sports, Section 2 is used primarily to challenge the market power of a professional sports league and the actions it has taken in securing an excessive market share. If Section 2 were applied to NASCAR, the plaintiff would have the burden of establishing that (1) NASCAR has possession of monopoly power over the sport of stock car racing and that (2) NASCAR willfully acquired that power not as a consequence of a superior product.

NASCAR possesses monopoly power because it has the power to control prices and exclude its competition. NASCAR maintains a virtual "stranglehold" on the stock car racing industry.[85] A 1999 survey of sports sponsors conducted by Street & Smith's Sports Business Journal ranked NASCAR the number one professional sports league in licensing, promotional opportunities, retail tie-ins, client endorsement and media coverage, ahead of the NFL, NBA and PGA.[86] The organization controls nearly every aspect of its marketing and consequently controls the prices advertisers and consumers pay for access to NASCAR's product--stockcar racing. Since its incorporation in 1948, NASCAR has successfully excluded competition from the sport,

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[84] NBC, TBS, Fox win NASCAR's Rights, *supra* note 8.
[85] *Koszela*, 646 F.2d at 754.
[86] NASCAR Safety is the Issue, *supra* note 3.

whether the competition came in the form of other racing organizations like the National Auto Racing League, the American Stock Car Racing Association, the United States Stock Car Racing Association or labor unions like the Teamsters and its Federation of Professional Athletes. NASCAR has kept careful watch over the business of stock car racing. When competition has arisen, NASCAR has used innovative practices designed specifically to exclude the competition. Whether the Organization punished drivers for participating in races sanctioned by other race organizations or whether Bill France threatened Union leaders with a gun, the message was clear: NASCAR controls the stock car racing business. The questionable business practices used by NASCAR in the past have secured its ideal market position today.

1. Geographic Market

The first step to analyzing a claim of monopolization is to define the relevant geographic market for the industry. In the context of professional sports, the geographic market is the physical area in which a sports organization has market power. To further our analysis we may once again draw analogy to the NFL's definitive antitrust case, *Los Angeles Mem'l Coliseum Comm'n v. NFL*. Both sides agreed that the relevant geographic market was the United States, the geographic region in which NFL clubs compete. For NASCAR, the relevant geographic market would similarly be the entire United States. Like the NFL, NASCAR schedules a number of events in various cities throughout the United States. In 2002, the NASCAR Winston Cup Series' thirty-nine events were held at twenty-three facilities located in twenty different states.

2. Product Market

The second step in analyzing a Section 2 claim is to define the industry's product market. Generally, this is the more important inquiry since it is used to determine whether the product is interchangeable with others in the relevant market and whether cross-elasticity of demand for the product exists. The party bringing the antitrust claim seeks to show that the product market in the industry is small, so that whatever share of the market the alleged monopolist may have is unreasonably large compared to the amount that its competitors have achieved. As such, courts then have enough evidence to conclude that the market shares presented are inconsistent with those that would exist if competition were truly unrestrained in the relevant industry.

A Section 2 claim will be successful in showing monopolization of the relevant market if the court finds that consumers are interested in a particular product, and that the alleged monopolist is the primary provider of that product. When the evidence presented allows the court to conclude that a provider has acquired excessive market power in the product area, and there are no barriers blocking competitive entry into that market, the market is said to be highly price inelastic. Price inelasticity occurs when there is little if any interchangeability between competing forms of entertainment that consumers will accept as a reasonable substitute for a product.[87] In the context of professional sports, the price inelasticity of the relevant sports market can be significant in establishing the excessive market power of the league in question. Once again, the NFL's antitrust litigation provides analogy to our NASCAR inquiry. In *United States Football League v. National Football League,*[88] the NFL attempted to show that the

[87] Rosenbaum, *supra* note 38, at 754.
[88] United States Football League v. National Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986).

relevant product market was broad, including other professional sports leagues and other forms of entertainment in an effort to reduce the appearance of monopolization of professional football. However, the relevant product market was defined as major league professional football in the United States and the jury found that the NFL had willfully acquired or maintained monopoly power in the relevant market.[89]

Like the NFL, consumer interest in the NASCAR product is seen through the organization's television ratings over the past several years.[90] In *Koszela v. National Ass'n of Stock Car Auto Racing, Inc.*,[91] the Second Circuit found that NASCAR dominates stock car racing in the United States.[92] Thus, this evidence would allow one to reasonably conclude that NASCAR has acquired excessive market power in the sport of auto racing. Historically, barriers blocking entry into NASCAR's market have been plentiful. Today, such barriers are much less apparent. Therefore, the price elasticity of the sport would become a major factor in Section 2 analysis of the NASCAR organization. Under the analysis of the USFL case, one could reasonably conclude that NASCAR's relevant product market consists of auto racing in the United States or more appropriately stock car racing in the United States. The court in the USFL case did not accept the broad market definition offered by the NFL, and a similar claim made by NASCAR should not be accepted under these circumstances. Over the past five years, NASCAR's television ratings have been second only to the NFL,[93] suggesting that NASCAR is as popular among auto racing fans as the NFL is among professional football fans. Consequently, the evidence provided lends support to the strong inference that NASCAR has willfully acquired and maintained monopoly power in the business of building and operating race cars in violation of Section 2 of the Sherman Antitrust Act.

V. CONCLUSION

Times have changed and so should NASCAR's management practices. What was once a back-hills pastime has become one of America's most popular and lucrative professional sports. Mr. France has organized a wonderful sport, but as stock car racing continues to grow into the next century, so should its business practices. Those that want access to the industry have the opportunity to compete. As television revenue continues to generate large sums of capital, the money should be distributed equitably between the sport's participants. As safety issues continue to arise, the drivers should organize and collective bargaining should be used to assure that the rights of NASCAR participants are protected. Over the past fifty years, NASCAR has evolved in the marketplace and on the racetrack. The time has come for the management of the organization to evolve as well.

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[89] *Id.* at 1042.

[90] *See, e.g.* STREET & SMITH'S SPORTS BUSINESS JOURNAL, Oct. 8-14, 2001, at 27. Over the past five years, NASCAR has maintained the second highest cable/broadcast television rating among professional sports leagues averaging a 5.15 rating. The Organization's closest competitors in the general auto racing market were the Indy Racing League with a 1.35 average since its inception in 1998, and the Championship Auto Racing Teams league with a .85 average since 1996. This evidence not only suggests a high level of interest in the sport of auto racing in general but a very high interest in the specific sport of stockcar racing as well. The IRL and CART organizations sanction open wheel events.

[91] *Koszela*, 646 F.2d at 749.

[92] *Id.* at 750.

[93] *See, supra* note 90.