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The New Era of NFL Antitrust Law, the Sunday Ticket Package: Was the Ninth Circuit Ruling a Touchdown or a Penalty?

Maya Rustom

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Abstract

Americans love football, but every year thousands of fans are forced to pay exorbitant annual fees if they chose to have access to out-of-market games. In other words, if fans don't live in the territory of their favorite team, they can either pay an excessive annual fee to watch their team play or miss out on the majority of games every season. This arrangement is a result of DirecTV's Sunday Ticket Package, which is an exclusive distributorship agreement with the NFL that prevents fans from watching live out-of-market games unless they pay the annual subscription fee. This Comment addresses and agrees with the Ninth Circuit's holding that DirecTV's Sunday Ticket Package and the NFL's agreement with its teams to pool their television rights violates §§ I and II of the Sherman Act, but rebuts the court's decision in granting the plaintiffs antitrust standing. Specifically, this Comment will explore the history of antitrust law and how it applies to the NFL, present an analysis on how the NFL injured competition and monopolized the market of football, and address how the Ninth Circuit defied Supreme Court precedent in granting antitrust standing. Ultimately, this Comment addresses the antitrust implications of the Ninth Circuit's ruling for other professional sports leagues, consumers, and future plaintiffs of antitrust litigation, and offers solutions and suggestions for the future of television and sports.

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I. INTRODUCTION

Every football season, thousands of fans are forced to pay excessive annual fees if they want to watch out-of-market games.[1] In other words, if you are a loyal supporter of your hometown team but live outside of your hometown, you can either opt to pay $293 per season to tune in to watch your team play or miss out on the majority of games every season.[2]

The National Football League (NFL) is the only professional sports league in the United States that has an exclusive distributorship agreement with a satellite service provider—DirecTV.[3] This distributorship agreement prevents fans from watching live out-of-market games, unless they pay an annual fee to purchase DirecTV's Sunday Ticket package for access to all games.[4] Being the leading provider of professional football in the United States with an average of over sixteen million viewers per game, the NFL has remained unchallenged since it entered into the agreement with DirecTV in 1994.[5]

Historically, Congress has exempted the NFL from antitrust law to allow the NFL to pool teams' telecasting rights to all live games and negotiate licensing packages with broadcasters collectively.[6] From 1994, when the NFL and DirecTV entered into the exclusive agreement, until 2015, each of the thirty-two NFL teams was "independently incorporated, owned, and operated."[7] However, in 2015 the NFL incorporated as National

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1. *See* Amanda Bronstad, *Antitrust Claims Reinstated Over NFL's Sunday Ticket Package*, LAW.COM (Aug. 14, 2019, 2:43 PM), https://www.law.com/therecorder/2019/08/14/antitrust-claims-reinstated-over-nfls-sunday-ticket-package/.

2. Chantel Buchi, *NFL Sunday Ticket Review 2020*, REVIEWS.ORG (Aug. 19, 2020), https://www.reviews.org/tv-service/nfl-sunday-ticket-review.

3. Jon Brodkin, *NFL's Exclusive Deal with DirecTV Is Illegal Monopoly, Lawsuit Claims*, ARS TECHNICA (July 16, 2015), https://arstechnica.com/tech-policy/2015/07/nfl-directv-colluded-to-raise-prices-of-game-broadcasts-lawsuit-claims/.

4. *See id.*

5. *See* Jabari Young, *National Football League Television Viewership Increases 5% for 2019 Regular Season*, CNBC (Dec. 31, 2019, 2:11 PM), https://www.cnbc.com/2019/12/31/nfl-television-viewership-increases-5percent-for-2019-season.html.

6. *See* Eriq Gardner, *NFL Heads to the Supreme Court in TV Rights Case,* THE HOLLYWOOD REPORTER (Dec. 3, 2019), https://www.hollywoodreporter.com/thr-esq/nfl-tv-rights-why-league-aims-a-block-an-upheaval-1258901.

7. *See* Haig Siranosian, *Ticket to an Antitrust Violation? Why the NFL and DirecTV's Exclusive Distributorship Agreement for Sunday Ticket May Violate Antitrust Laws, and How the U.S. District Court for the Central District of California May Have Gotten It Wrong*, 15 HASTINGS BUS. L.J. 342, 342 (2019).

Football League, Inc. and simultaneously created NFL Enterprises, LLC to pool the telecasting rights of the thirty-two teams and license them to multichannel video programming distributors (MVPDs).[8] Up until a recent Ninth Circuit decision, the teams had the ability to grant the NFL "the right to negotiate pooled television rights on their behalf."[9]

In August 2019, the Ninth Circuit Court of Appeals held that "it was plausible that the 'horizontal' agreement among the NFL's 32 teams to pool TV rights along with the league's 'vertical' agreement with [DirecTV] amounted to an illegal restraint of competition under the Sherman Antitrust Act."[10] Additionally, the court granted antitrust standing to the plaintiffs—consumers who did not directly purchase the Sunday Ticket package from the NFL and historically would not have antitrust standing.[11]

This Note addresses and agrees with the court's holding in finding both § I and § II violations of the Sherman Act, but rebuts the court's decision in granting the plaintiffs antitrust standing.[12] Part II provides background on antitrust law and how it applies to the NFL, and discusses the material facts of the case at bar.[13] Part III offers an analysis on how the NFL injured competition and monopolized the market, and consequently how the Ninth Circuit incorrectly went against Supreme Court precedent in granting standing.[14] Part IV addresses the antitrust implications of the Ninth Circuit's ruling for the NFL, professional sports leagues, and consumers, as well as how the grant of standing to the plaintiffs will open the floodgates to future

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8. *Id.* at 342–43.

9. *Id.* at 343.

> The NFL contracts with five networks, CBS, FOX, NBC, ESPN, and [the] NFL Network, to provide a limited number of live broadcasts every Sunday, Monday night, and Thursday [n]ight. The only way to watch games that are not broadcasted on one of the five networks, (e.g., out-of-market games), is to purchase DirecTV's Sunday Ticket package.

Id.

10. Gardner, *supra* note 6.

11. *See id.* Plaintiffs are generally not granted standing if they are indirect purchasers—meaning they are at least two steps removed from the violator in a chain of distribution—and here, the plaintiffs are a class of residents and business owners who purchased the Sunday Ticket package from DirecTV, rather than the NFL itself. *See In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1156 (9th Cir. 2019).

12. *See infra* Part V.

13. *See infra* Part II.

14. *See infra* Part III.

antitrust litigation.[15] Finally, Part V concludes that the Ninth Circuit was correct in finding antitrust violations with the interlocking agreements, but incorrect in granting standing to the plaintiffs.[16]

II. ANTITRUST LAW AND THE NFL

Historically, antitrust laws have not been enforced as well as they should have been, nor has the government been consistent in such enforcement.[17] Antitrust laws were born into a progressive era aiming to eradicate big businesses monopolizing the market; but, over the years, administrations that favored big businesses and encouraged industry-government relationships halted antitrust enforcement.[18] Although the back-and-forth among administrations' goals surrounding antitrust enforcement continued to shift, in the last fifty years the United States had "neither an antitrust movement nor much enforcement."[19]

A. *A History of Antitrust Law*

Antitrust laws were established to protect marketplace diversification and encourage competition.[20] The enforcement of antitrust law "preserves competition across all private industries by condemning anticompetitive conduct."[21] In 1890, Congress passed the first piece of antitrust legislation, the Sherman Antitrust Act,[22] to protect consumers and allow small businesses to enter into the marketplace with a greater chance of survival.[23] Congress enacted the legislation in response to booming industrialization,

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15. *See infra* Part IV.
16. *See infra* Part V.
17. *See* Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.
18. *Id.*
19. *Id.*
20. Ariel Y. Bublick, *Are You Ready for Some Football? How Antitrust Laws Can Be Used to Break Up DirecTV's Exclusive Right to Telecast NFL's Sunday Ticket Package*, 64 FED. COMM. L.J. 223, 225 (2011).
21. Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 509 (2014).
22. *See* Bublick, *supra* note 20, at 225; *see also* 15 U.S.C. §§ 1–2 (2018).
23. CNBC, *Google, Facebook, Amazon and the Future of Antitrust Laws*, YOUTUBE (Aug. 16, 2019), https://www.youtube.com/watch?v=IcghGCBROR0.

which had led to monopolies in the steel, oil, tobacco, and rubber industries.[24] In 1914, Congress also passed the Clayton Act,[25] which was intended to "proscribe[] . . . mergers, whose effects 'may be to substantially lessen competition'" as an additional means to prevent anti-competitive behavior.[26] Furthermore, the federal government established a regulatory agency, the Federal Trade Commission, to police competition and ensure compliance with both the Sherman and Clayton Acts.[27]

Aggressive antitrust enforcement followed the Sherman Act; by 1910, the federal government had either broken up or regulated nearly all of the existing major monopolies.[28] However, the changing political climate that accompanied the start of World War I shifted away from the aggressive attitude toward antitrust enforcement.[29] The country did not want "antagonism between the federal government and big business."[30] This shift highlighted the ability of antitrust regulations to adapt to the political climate of the country, which negatively impacted the ability of the courts and federal agencies to regulate antitrust violations.[31]

Another shift occurred when World War II began; however, this shift generated antitrust enforcement that was even more aggressive than at the time of the Sherman Act's enactment.[32] The difference in governmental attitude between the two wars can be attributed to Germany's business structure, where "[t]he monopolies . . . got control of Germany, brought Hitler to power[,] and forced virtually the whole world into war."[33]

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24. *Id.*

25. Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 278 (1990).

26. *Id.*

27. *Id.*

28. *See* CNBC, *supra* note 23.

29. *Id.*

30. *Id.* World War I affected the shift in antitrust enforcement because once the United States entered into the war, the government felt that a chasm between the government and big businesses—which fueled the economy in wartime—would cause unnecessary stress among such businesses, political agencies, courts, and the President. *See id.*

31. *See id.* Since every administration prior to the Reagan administration advocated for strong antitrust enforcement, many saw the Reagan administration as a shift because he entered office with the goal of "eliminat[ing] or reduc[ing] government regulation in all areas of business affairs." Willard F. Mueller, *Antitrust in the Reagan administration*, NO. 21/22 REVUE FRANCAISE D'ETUDES AMERICANES 427 (1984).

32. *See* CNBC, *supra* note 23.

33. Tim Wu, *Be Afraid of Economic 'Bigness.' Be Very Afraid.*, N.Y. TIMES (Nov. 10, 2018), https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html.

Consequently, because the United States wanted to foster a competitive and diverse marketplace, Congress enacted the Celler-Kefauver Act in 1950 to strengthen the Clayton Act and ensure avoidance of Germany's mistake.[34]

Although the passage of the Celler-Kefauver Act launched an "era of peak antitrust [enforcement]," the sentiment of the government again shifted against antitrust enforcement with the adoption of the consumer welfare standard by the Supreme Court.[35] The Court adopted this standard in *Reiter v. Sonotone Corp.*,[36] where it "suggest[ed] that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[37] The objective of the consumer welfare standard is to deem an act "anticompetitive 'only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.'"[38] Consequently, this case made the consumer welfare standard the goal of antitrust law, and the election of Ronald Reagan sealed "the fate of aggressive antitrust enforcement" by shifting back to passive regulation of antitrust violations.[39]

In the last forty years since Ronald Reagan's administration and the standard adopted in *Reiter*, antitrust enforcement has been relatively passive,

34. *See* CNBC, *supra* note 23; *see also* Celler-Kefauver Act of 1950, 81 Pub. L. No. 899, 64 State. 1125 (1950).

35. *See* CNBC, *supra* note 23. Individuals have attributed this shift either to the stagnant economy and a "growth of global competition," or to the advent of Ronald Reagan's administration. Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, INFO. TECH. & INNOVATION FOUND. 2 (Oct. 2018), https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf.

36. 442 U.S. 330, 343 (1979).

37. *Id*.

38. Jonathan Hatch & Meghan Larywon, *Congress Hears Challenges to the Consumer Welfare Standard*, JD SUPRA (Mar. 15, 2019), https://www.jdsupra.com/legalnews/congress-hears-challenges-to-the-95586/.

> The consumer welfare standard . . . offers a fairly objective standard for measuring the effect of potential anticompetitive behavior . . . [that] looks at economic benefits more broadly . . . [, and] mergers that harm consumers, at least in the short run, might still be approved when the harm is outweighed by benefits to the overall economy, including higher productivity.

Kennedy, *supra* note 35, at 4–5. While champions of the standard see the benefits come to fruition when society has higher tax revenues and wages, and companies can use additional revenue to invest in "innovation, which . . . eventually benefit[s] consumers," critics would like to see consumer benefits more in the short term, rather than down the line. *Id.* at 5. These critics also have additional concerns about "any policy that transfers welfare from consumers to companies, even when overall welfare increases." *Id*.

39. CNBC, *supra* note 23.

which is evident in data reflecting industry-specific market concentration.[40] Between 1982 and 2012, the economic concentration of industries—such as manufacturing, utilities, and finance—increased exponentially, "sometimes by triple digit percentages."[41] Furthermore, "between 1996 and 2016, the amount of companies on the stock market [declined] by half."[42] Additionally, since 1996, the Federal Trade Commission (FTC) has challenged fewer major mergers than ever before.[43] These statistics reflect the current state of antitrust law, resulting in skepticism about the future of antitrust enforcement.[44] Specifically, there is skepticism about what the next point of contention will be for antitrust law with future administrations and even federal exemptions, such as the NFL's telecasting rights.[45]

While Major League Baseball (MLB) is best known in the antitrust debate for its distinctive exemption from federal antitrust law,[46] the NFL has a similar federal exemption through the Sports Broadcasting Act of 1961 (SBA) that allows NFL teams to act jointly on television contracts.[47]

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40. *See id.*

41. *Id.* Other industries include retail, wholesale trade, and service industries. *Id.*

42. *Id.*

43. *See id.* This passive inaction on behalf of the FTC has resulted in "four major domestic airlines, four major telecommunications carriers, three major drugstores, and two major beer retailers." *Id.* Furthermore, "[t]he FTC's failure to bring cases does not . . . mean anticompetitive conduct has disappeared[,] [r]ather, . . . recessions intensify the pressures and incentives to evade the discipline of competition." Mueller, *supra* note 31, at 431. This is not "'lean and mean' enforcement. It represents a law enforcement famine." *Id.* More recently, in 2020, a federal judge approved the merger between T-Mobile and Sprint. Arriana McLymore & Diane Bartz, *T-Mobile-Sprint Merger Wins Approval from U.S. Judge*, REUTERS (Feb. 10, 2020, 3:44 PM), https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile/t-mobile-sprint-merger-wins-approval-from-u-s-judge-idUSKBN2042MG. The judge approved the deal despite a group of attorneys general from multiple states challenging the transaction on grounds that it would violate antitrust laws. *Id.*

44. *See* CNBC, *supra* note 23.

45. *See* Steven Malanga, *Bench the NFL: The League Enjoys an Antitrust Exemption from Washington That Should Have Been Revoked Years Ago*, CITY JOURNAL (Sept. 28, 2017), https://www.city-journal.org/html/bench-nfl-15465.html.

46. *See id.*; *see also* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1992) (holding that baseball teams are not involved in interstate commerce).

47. 15 U.S.C. §§ 1291–95 (2018); *see also infra* note 133 and accompanying text (explaining the SBA). League leadership successfully lobbied for the NFL exemption in the 1960s. *See* Malanga, *supra* note 45. This came after a court ruling that prevented NFL teams from jointly negotiating broadcasting rights, because a negotiation of such rights would be an antitrust violation that would constitute a monopoly. *Id.* Thus, successful lobbying led to the SBA, "allowing [the] teams to pool their efforts for the sake of negotiating TV deals." *Id.* The result was that prices for broadcasting packages skyrocketed. *Id.* Additionally, the act did not just apply to the NFL, but to professional

Historically, the NFL's federal exemption has been controversial because, although the SBA applies to other professional sports, professional football has significantly fewer games per season compared to other sports.[48] Thus, the benefits to the NFL outweigh those to other sports because the NFL "exclusively and collectively sells *all* its TV rights through monopoly pooling, then distributes the revenues to teams equally."[49] The NFL navigated the benefits of the SBA without challenge until the league began to black out games[50] and entered into its first rights deal with ESPN.[51] Because the SBA had historically only covered telecasting of games through broadcast, this was uncharted territory for determining whether the ESPN cable contract violated the SBA.[52] Although "the NFL [avoided] that crisis when the Justice Department declined to pursue" the matter, the issue of a potential SBA violation came up again with the onset of the NFL Network—the NFL's own cable channel—on which it only aired games to "a limited number of subscribers."[53] Currently, the NFL is again being faced with a potential SBA violation because of its DirecTV Sunday Ticket package and its alleged §§ I and II violations of the Sherman Act.[54]

B. *Sections I and II of the Sherman Act; Vertical and Horizontal Agreements and Monopolies*

Congress enacted the Sherman Act once it had witnessed both the force and momentum of business concentration in the United States.[55] The

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basketball, hockey, and baseball as well. *Id.*

48. *See id.*

49. *Id.* (emphasis added). The significance of this exemption to the NFL is best understood when analyzing how the NFL teams would negotiate TV rights individually without this exemption. *Id.* Specifically, "powerful teams like the Dallas Cowboys" would likely be able to negotiate having their games nationally broadcasted, but this would be "less advantageous for weak[er] teams such as the Cleveland Browns, [who] might struggle even for local coverage." *Id.*

50. *Sports Blackouts*, FED. COMM. COMMISSION (last updated Dec. 10, 2019), https://www.fcc.gov/consumers/guides/sports-blackouts. A black-out means that if tickets for a particular game are still available, the game will not be shown on television in the home city. *Id.*

51. *See* Malanga, *supra* note 45. The new rights deal with ESPN was an additional factor that triggered the controversy of the NFL's television pooling rights under the SBA because this was the first deal of its kind that dealt with cable. *See id.*

52. *See id.*

53. *Id.*

54. *See infra* Sections II.B–II.C.

55. *See* Stucke & Ezrachi, *supra* note 17.

Sherman Act allowed the Justice Department to regulate "unreasonable restraints of trade and monopolistic abuses" before it was too late.[56]

1. The Interplay Between Sections I and II of the Sherman Act

Section I of the Sherman Act establishes the most contested area of antitrust law that has "plagued the NFL the most."[57] Section I states that "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[58] However, the Court in *Standard Oil Co. v. United States*[59] narrowed the reach of the statute by stating that "an agreement is in violation of Section One if the 'contracts or acts . . . were *unreasonably restrictive* of competitive conditions.'"[60] In its analysis of whether such a contract or act is unreasonable, a court must determine whether an agreement is clearly anticompetitive and apply the appropriate test.[61]

Courts assess an agreement's unreasonableness "under either a per se rule of illegality or a rule of reason analysis."[62] A per se violation is reserved for clearly anticompetitive agreements "and require[s] no further analysis."[63] Conversely, if a restraint is not a per se violation, courts use a rule of reason analysis to test whether the agreement is merely regulatory or anticompetitive in nature.[64] A "rule of reason analysis requires the plaintiff to establish (1) an agreement or conspiracy between two or more persons or entities; (2) through which the persons or entities intend to harm or restrain competition; and, (3) that actually does restrain competition."[65] Courts weigh both the competitive and anticompetitive effects of the agreement by examining the rationale behind the restraint and the "degree of collusion associated with" it, which involves the history of the restraint and the

56. *Id.*
57. *See* Bublick, *supra* note 20, at 225.
58. *Id.* at 255 (quoting 15 U.S.C. § 1 (2018)).
59. 221 U.S. 1, 58 (1911).
60. *See* Bublick, *supra* note 20, at 225 (emphasis added) (quoting *Standard Oil Co.*, 221 U.S. at 58).
61. *See* Siranosian, *supra* note 7, at 344–45.
62. *Id.*
63. *Id.* at 345.
64. *See* Bublick, *supra* note 20, at 226.
65. Siranosian, *supra* note 7, at 345.

significance of the restraint "on the relevant market."[66] Initially, the burden of proof is on the plaintiff to establish the anticompetitive nature of the agreement.[67] However, if the defendant can justify the agreement, the burden shifts back onto the plaintiff to show "a less restrictive alternative" than the current agreement "while still achieving the defendant's goal."[68]

Within § I, courts analyze two types of agreements: vertical and horizontal agreements.[69] A vertical agreement is an agreement "entered [into] among different levels of the supply chain, for example between a manufacturer and a distributor."[70] Under a rule of reason analysis, an exclusive deal between a parent and a subsidiary would be a § I violation if its objective was to prevent competition in a sizable share of the affected market.[71] In this situation, the plaintiff would have the burden of proving that the arrangement would likely keep "at least one significant competitor of the defendant from doing business in a relevant market."[72] While vertical agreements may potentially be deemed a violation of antitrust law, they are not per se violations.[73]

On the other hand, a horizontal agreement is an agreement between competitors on the same level of market structure.[74] In other words, a horizontal agreement is "an agreement among competitors on the way in which they will compete with one another."[75] This results in blatant restraints with no objective other than to hinder competition.[76] These types of agreements are generally considered "illegal per se."[77] Customarily, a horizontal agreement is ruled illegal per se because "surrounding circumstances make the likelihood of anticompetitive conduct so great as to

66. Bublick, *supra* note 20, at 226.
67. *See id.*
68. *Id.*
69. *See* Siranosian, *supra* note 7, at 343, 346.
70. *Id.* at 346.
71. *Id.*
72. *Id.*
73. *See id.* at 347.
74. *See id.* at 356 (explaining that a horizontal agreement is "an agreement between competitors that restricts supply").
75. Bublick, *supra* note 20, at 225 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. 468 U.S. 85, 99–100 (1984)).
76. *See id.* at 225–26.
77. *Id.*

render unjustified further examination of the challenged conduct."[78] Because of the increased likelihood that these types of agreements are per se violations, courts will generally hold them invalid without further analysis.[79]

Section II of the Sherman Act states that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[80] There are two separate claims to establish under § II: a conspiracy to monopolize and actual monopolization.[81] To demonstrate a conspiracy to monopolize claim, a plaintiff must show "1) the existence of a combination or conspiracy to monopolize; 2) an overt act in furtherance of the conspiracy; 3) the specific intent to monopolize; and 4) causal antitrust injury."[82] To demonstrate an actual monopolization claim, a plaintiff must establish "a) the possession of monopoly power in the relevant market; b) the willful acquisition or maintenance of that power; and c) causal antitrust injury."[83] Accordingly, a court will likely find that a monopoly power exists if a company can profitably increase prices considerably above the competitive level.[84]

C. The NFL and Its Monopolization of the Football Market

Sections I and II of the Sherman Act lay the foundation for the interplay between competition and cooperation that has landed the NFL in court when it either violated, or came close to violating, federal antitrust law.[85] The NFL has not only faced antitrust scrutiny with its television agreements, but with both its licensing and franchise relocation agreements.[86]

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78. *Id.* (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. 468 U.S. 85, 103–04 (1984)).

79. *See id.*

80. Siranosian, *supra* note 7, at 366 (quoting 15 U.S.C. § 2 (2018)).

81. *See id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Michael McCann, *Why DirecTV's NFL Sunday Ticket Might Be Illegal Under Antitrust Law*, SPORTS ILLUSTRATED (Aug. 14, 2019), https://www.si.com/nfl/2019/08/14/nfl-sunday-ticket-directv-antitrust-violation-lawsuit (discussing the cases involving the NFL's potential violations of §§ I and II of the Sherman Act).

86. *See* Bublick, *supra* note 20, at 228–29.

1. The Single-Entity Defense

Historically, the NFL has been scrutinized for violating antitrust laws, and it has consistently attempted to use a single-entity defense to bypass the legal consequences.[87] This defense was first established in *Copperweld Corp. v. Independence Tube Corp.*, where the Court held:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.[88]

In *Copperweld*, the Court established that because a parent and its subsidiary were considered one entity, their economic interests are also joint.[89] Relying on *Copperweld*'s holding, the NFL began to use the same rationale in an attempt to qualify as a single entity by utilizing its internal structure.[90]

The NFL is currently categorized as an "unincorporated 501(c)(6) association (a tax-exempt, nonprofit association) of separately-owned and operated franchises (teams)."[91] However, if the NFL wanted to be regarded as a single entity, the NFL would have to be considered the parent to all thirty-two subsidiary teams, which are considered franchises.[92] If it were to do so, according to *Copperweld*, the NFL and its teams could be considered a single enterprise and therefore not be in violation of § I of the Sherman Act based on the parent-subsidiary structure.[93]

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87. *See id.* at 227–30 (tracing the NFL's use of the single-entity defense in response to antitrust violations).

88. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984).

89. *Id.*

90. *See* Bublick, *supra* note 20, at 227.

91. *Id.* The thirty-two teams have the option of organizing as their preferred business entity. *See id.* However, most of the teams organize as corporations, partnerships, or sole proprietorships. *See id.*

92. *See id.* at 227–30 (tracing the NFL's attempts to be considered a single entity with its thirty-two subsidiary franchises).

93. *See Copperweld*, 467 U.S. at 771 ("[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman

Franchise relocation and allocation of licensing rights to various apparel companies have been the two most notable areas of antitrust law in which the NFL has faced scrutiny; thus, this is where the NFL has attempted to use the single-entity defense.[94] In 1978, the Oakland Raiders attempted to relocate their franchise to Los Angeles, which was already home to another franchise, the Los Angeles Rams.[95] The Raiders' attempted relocation to the home territory of another franchise required unanimous approval of all NFL franchise owners, who ultimately voted against the Raiders.[96] Consequently, the owner of the Raiders, Al Davis, sued the NFL in *Los Angeles Memorial Coliseum Commission v. NFL*, alleging that the requirement of unanimous approval by all NFL franchise owners was a violation of § I of the Sherman Act.[97] The NFL endeavored to employ the single-entity defense, but its attempt failed.[98] The Ninth Circuit feared that granting the NFL "single entity status would immunize [it] from any § 1 scrutiny."[99] The court held that the "unique structure" of the organization generally precluded the NFL from being per se illegal, and all actions taken by the NFL should be subject to the rule of reason.[100] Thus, the court found that, because the teams were sufficiently independent and competitive with one another, the NFL's single-entity defense failed.[101]

In 2001, the NFL again attempted to utilize a single-entity defense to the litigation that resulted when the NFL permitted teams to "sell nonexclusive licensing rights to multiple apparel companies," resulting in a

Act.").

94. *See* Bublick, *supra* note 20, at 228.

95. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1384 (9th Cir. 1984).

96. *Id.* at 1384–85.

97. *Id*. at 1385.

98. *Id*. at 1387–89.

99. *Id*. at 1388.

100. *Id.* at 1392.

101. *Id.* at 1389. The court emphasized that the independent teams operate as "separate business entities whose products have an independent value." *Id.* Furthermore, each team is independently owned, and although "a large portion of League revenue . . . is divided equally among the teams, profits and losses are not shared." *Id.* at 1390. These qualities of the teams contribute to making each team "an entity in large part distinct from the NFL." *Id.* The court is careful to acknowledge that although it is true the teams must cooperate to put together a football game, it is not true "that each club can produce football games only as an *NFL* member." *Id.* (quoting L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 519 F. Supp. 581, 584 (C.D. Cal. 1981)).

rapid increase of licenses that created an "inventory glut."[102] To remedy the influx of licenses, the NFL granted "an exclusive license to a single company for all the teams' apparel" with all profits equally split among the thirty-two teams.[103] In opposition, American Needle, an apparel company that had a nonexclusive license with the New Orleans Saints to manufacture apparel for the team, brought suit against the NFL for a violation of § I of the Sherman Act.[104] In *American Needle, Inc. v. New Orleans Louisiana Saints*, the NFL succeeded in being categorized as a single entity at the district court level.[105] The Seventh Circuit affirmed, and was careful to acknowledge that although all thirty-two teams may potentially have competing interests with respect to use of their intellectual property, it did not preclude the teams from functioning as a single entity.[106] However, because the NFL is made up of thirty-two teams that compete against one another "on and off the field," they are not one entity but rather competitors meant to compete.[107] Therefore, while the court was willing to recognize the NFL as a single entity in the instance of merchandising licenses, it was careful not to extend single-entity status to *all* NFL business activities.[108]

Rather than accept the Seventh Circuit's decision in being regarded as a single entity solely within the context of merchandising licenses, the NFL wanted to ensure the organization was recognized as a single entity for *all* business activities.[109] Accordingly, it appealed the Seventh Circuit's decision.[110] To the NFL's detriment, the Supreme Court rejected the league's attempt to be recognized as a single entity for any purpose other than merchandising licenses.[111] The Court reasoned that "[i]f the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from [§ I], then any cartel 'could evade [] antitrust laws simply by creating a "joint venture" to serve as the exclusive seller of

102. Bublick, *supra* note 20, at 229 (quoting Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 735–36 (2010)).
103. *Id.*
104. *See id.*
105. *See id.*
106. *See id.*
107. McCann, *supra* note 85.
108. *See id.*
109. *See id.*
110. *See id.*
111. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010).

their competing products.'"[112] Thus, while the Court denied the NFL single-entity status for purposes other than marketing individually owned intellectual property, it recognized there are instances where the organization would need a collective agreement among all the franchises.[113]

2. The Evolution of the NFL and Sports Broadcasting

Since *Los Angeles Memorial Coliseum* and *American Needle*, the NFL has been hauled into court regarding scrutiny over its exclusive distributorship agreement with DirectTV.[114] In the 1950s, the NFL teams independently contracted with broadcast stations to telecast the games.[115] Similar to the proliferation of licenses with merchandising, the numerous contracts spawned fear "that over-competition for attention of each team was going to bankrupt" the teams.[116] In response, the NFL added Article X to its bylaws to prevent individual teams from broadcasting their games into the home territory of another franchise without permission from the home team.[117] However, the effect of Article X put the NFL on the radar of the Department of Justice for potential antitrust violations.[118]

In *United States v. National Football League* (*NFL I*), the court considered, for the first time, a potentially legitimate purpose for a monopoly on local broadcasting by the NFL.[119] Proponents of the monopoly argued that a monopoly would allow both strong and weak teams to "build a strong fan base and generate revenue[;] [o]therwise, 'the stronger teams

112. *Id.* at 201 (quoting Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring)).

113. *Id.* at 204 ("[T]he interest in maintaining a competitive balance . . . is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams."); *see also* Bublick, *supra* note 20, at 230 ("The Court did acknowledge that some decisions by the NFL require an agreement among the thirty-two teams."). Such instances might include the collective bargaining agreement for the salary caps of each franchise and the rules of the game. Bublick, *supra* note 20, at 230.

114. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136 (9th Cir. 2019).

115. *Id.* at 1144.

116. Bublick, *supra* note 20, at 231.

117. *Id.* This permitted each team in "a seventy-five mile radius" to broadcast a game "without fear that another team would broadcast its game on a different station within the same market." *Id.*

118. *Id.*

119. *See id.*; *see also* United States v. Nat'l Football League, 116 F. Supp. 319 (E.D. Pa. 1953) [hereinafter *NFL I*].

would be likely to drive the weaker ones into financial failure.'"[120] Further, such financial failure would lead to the demise of the entire league.[121] Although the court found a portion of Article X to be a "reasonable . . . legal restraint,"[122] it denied the NFL's attempt to "restrict[] the telecast[ing] of *all* outside games [if] the home team was playing . . . away."[123]

In 1950, while navigating the limitations of Article X and the *NFL I* decision, the NFL entered into an agreement with the Columbia Broadcasting System (CBS) "to broadcast 'certain NFL regular season games for $1.8 million per year.'"[124] Under the CBS agreement, individual teams still controlled the right to broadcast games.[125] Eventually, the NFL mirrored the American Football League (AFL) by merging all of the broadcasting rights of the franchises through a multimillion-dollar contract with CBS.[126] This agreement led to a revision of the court's decision in *NFL I* in *United States v. National Football League* (*NFL II*).[127] The court this time found the agreement to be "an unreasonable restraint of trade . . . in violation of the holding in *NFL I*."[128] *NFL II* held that CBS's capacity to dictate where games were to be telecasted amounted to an "agreement among all the teams of a restriction on NFL games."[129] Consequently, the decision in *NFL II* restricted not only the contract between the NFL and CBS, but all similar contracts that "involved pooling revenues."[130]

After facing heightened judicial scrutiny regarding antitrust violations,

120. Bublick, *supra* note 20, at 231 (quoting *NFL I*, 116 F. Supp. at 323).

121. *Id.*

122. *See NFL I*, 116 F. Supp. at 325–26 ("The first type of restriction imposed by Article X is a reasonable one and a legal restraint of trade."). The court found this restraint to be rational because telecasting out-of-market games in the same territory as a home game adversely affects the attendance at the home game. *See id.* at 325.

123. Bublick, *supra* note 20, at 231 (emphasis added); *see also NFL I*, 116 F. Supp. at 326–27. The court reasoned that because the home team is away from its home territory, the telecasting of outside games would not affect attendance. Bublick, *supra* note 20, at 231.

124. Bublick, *supra* note 20, at 232 (quoting U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1346 (2d Cir. 1988)).

125. *Id.*

126. *Id.*

127. *Id.* at 232–33; *see also* United States v. Nat'l Football League, 196 F. Supp. 445, 446 (E.D. Pa. 1961) [hereinafter *NFL II*].

128. Bublick, *supra* note 20, at 232–33.

129. *Id.* at 232; *see also NFL II*, 196 F. Supp. at 447.

130. Bublick, *supra* note 20, at 233.

the NFL sought congressional relief.[131] As a result of the NFL's persistent lobbying, Congress enacted the Sports Broadcasting Act of 1961 (SBA),[132] which states:

> The antitrust laws, as defined in [§] 1 of the Act . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . .[133]

The SBA effectively reversed *NFL II*, allowing the NFL to pool the broadcasting rights of all thirty-two teams together and "earn more money [for the entire league] than would otherwise be possible if teams sold their broadcast rights individually."[134] Importantly, the SBA applied not only to the NFL, but to all other professional sports leagues.[135] Without the SBA, the television contracts of all the professional sports leagues "would be subjected to judicial scrutiny and litigation expenses to determine the antitrust legality of [similar] agreement[s]."[136]

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131. *See id.*

132. *Id.*; *see also* 15 U.S.C. §§ 1291–95 (2018).

133. 15 U.S.C. § 1291 (2018). The SBA allowed the leagues to be exempt from antitrust violations if they entered into pooled-rights contracts. 15 U.S.C. §§ 1291–95. More importantly, the SBA only provided an exemption for broadcast television, *not* for cable or satellite. *Id.*

134. Ross C. Paolino, *Upon Further Review: How NFL Network is Violating the Sherman Act*, 16 SPORTS LAW J. 1, 8–9 (2009).

135. *Id.* at 9.

136. *Id.* While the SBA carved out an exclusive exemption for professional sports leagues, college football remained subject to antitrust law and the Sherman Act. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1146 (9th Cir. 2019). The realm of college football is significant because the Supreme Court's decision in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) [hereinafter *Board of Regents*] impacted the Ninth Circuit's ruling in the case at bar. *Id.* at 1154. Similar to the NFL, the National Collegiate Athletic Association (NCAA) also had a restriction on the number of televised games permitted, which colleges eventually challenged to secure profitable television deals for their respective teams. *Id.* at 1146. The court "struck down the NCAA's restrictive telecast agreements as [a] violati[on] [of] the Sherman Act." *Id.* The court found that by restricting colleges from competing against one another "on the basis of price or [the] kind of television rights that can be offered to broadcasters," the NCAA had effectively created a horizontal restraint in violation of § I of the Sherman Act. *Id.* (quoting *Board of Regents*, 468 U.S. at 99). Because the court's decision

Following SBA guidelines, the NFL entered into an exclusive broadcasting contract with CBS, pooling the rights of the teams between the 1962 and 1963 seasons.[137] The network again succeeded in outbidding other networks for the 1964 and 1965 seasons, but a 1966 merger between the NFL and the AFL required Congress to amend the SBA.[138] The amendment was necessary to absorb the new entity within current antitrust exemptions.[139] However, the amended SBA conditioned that the antitrust exemption would apply only if the NFL contracted with, at minimum, two broadcast networks.[140] Since then, "the NFL has broadcast licenses with CBS, FOX, NBC, and ESPN."[141] Generally, the antitrust exemptions the SBA provides have "prove[n] controversial," and the advent of the DirecTV Sunday Ticket package has complicated the exemption.[142]

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allowed college football teams to compete in the marketplace, "broadcasters collectively [paid] half as much for the rights" to telecast more games than the NCAA's collective deal previously permitted. *Id.* at 1147 (quoting Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 617 (2015)). In comparison, the "NFL's control over the pooled broadcasting rights [under the SBA] increased revenues from telecasting . . . while decreasing the number of telecasts available to consumers." *Id.*

137. *See* Bublick, *supra* note 20, at 234.

138. *See id.*

139. *See id.*

140. *See id.* The purpose for Congress's amendment to the SBA in 1966 was "specifically to confer antitrust immunity on the NFL–AFL merger." U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1347 (2d Cir. 1988). "In passing this legislation, Congress was plainly informed that, upon consolidation of the two leagues, the NFL would have broadcast contracts with at least two networks." *Id.*

141. *See* Bublick, *supra* note 20, at 235. Among these networks, CBS and FOX have the rights to broadcast games on Sundays at 1:00 p.m. and 4:15 p.m. EST, NBC has the exclusive right to broadcast primetime games on Sundays at 7:30 p.m. EST, and ESPN has the exclusive right to broadcast primetime Monday night games. *See id.* Meanwhile, the NFL Network has the right to air eight to sixteen Thursday night games. *See id.* at 236. The NFL established requirements for CBS and FOX, as part of their agreements, to "broadcast the local team's home game, but only if the home team is playing an away game or if the home team sold out its stadium attendance that week." *See id.* at 235. "However, if a home team does not sell out all of its stadium's tickets, the station *must* blackout the home team's game and display another game instead." *See id.* (emphasis added). Both the NFL Network and ESPN, non-broadcast channels, have faced scrutiny for being in violation of antitrust laws because they both generate revenue from sponsored telecasting in addition to cable subscriptions, which some have argued do not fall within the SBA antitrust exemption. *See id.* at 235–36. Furthermore, the NFL Network is a channel that is available only to limited households and is more expensive than an average cable bundle. *See id.* at 236.

142. Malanga, *supra* note 45.

3. The Sunday Ticket Package

The telecasting rights "to free, over-the-air television networks" is unquestionably within the bounds of the SBA.[143] However, the advancement of technology "from over-the-air cable to satellite television" has directed the NFL and other professional sports leagues to use "new methods of distributing telecasts of the games."[144] DirecTV is a "direct broadcast satellite service" that entered into an exclusive agreement with the NFL in 1994 to be "the sole distributor" of the NFL Sunday Ticket.[145] "The NFL Sunday Ticket is an out-of-market sports package" where "a viewer can . . . watch any of the thirteen NFL afternoon games," rather than be limited to the local games being telecast by FOX and CBS networks.[146] The blackout rule that applies to CBS and FOX also applies to the Sunday Ticket package, meaning that DirecTV blacks out the home games of local teams for Sunday Ticket subscribers who reside within the market if the stadium does not sell all of its tickets.[147] In 2002, the NFL renewed its contract with DirecTV once the prior contract expired.[148] In 2009, DirecTV again renewed the contract with the NFL to continue being the exclusive provider of the Sunday Ticket package until the end of the 2014 season.[149] In 2014,

143. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1147 (9th Cir. 2019).

144. *Id.*

145. *See* Bublick, *supra* note 20, at 237–38. The advent of new television technology has resulted in courts weighing the challenges that arise with "telecasting arrangements between sports leagues and satellite television services." *Nat'l Football League*, 933 F.3d at 1147 (quoting Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 301 (3d Cir. 1999)). Courts have concluded that "'sponsored telecasting' refers to broadcasts which are financed by business enterprises (the 'sponsors') in return for advertising time and are therefore provided free to the general public." *Id.* (quoting *Shaw*, 172 F.3d at 301). As a result, contracts with either satellite or cable services that charge subscribers fees are not exempt from antitrust liability under the SBA. *Id.*

146. Bublick, *supra* note 20, at 237. Under this agreement, "the NFL allows DirecTV to obtain all of the live telecasts produced by CBS and FOX, package [them], and deliver the bundled feeds to NFL Sunday Ticket subscribers." *Nat'l Football League*, 933 F.3d at 1148. Thus, DirecTV gives subscribers "access to both local and out-of-market games." *Id.* The Sunday Ticket package benefits those football fans who live outside of the market their favorite team plays in, but who do not want local channels to restrict their access to view out-of-market games. *See* Siranosian, *supra* note 7, at 342.

147. *See* Bublick, *supra* note 20, at 238.

148. *See id.*

149. *See id.* In 2002, "several cable companies acting as a consortium" bid on the valued package to be the nonexclusive carrier of the Sunday Ticket package; however, the NFL rejected their bid and instead chose to renew with DirecTV. *Id.* While the NFL claims this rejection was due to the

the NFL, once more, renewed its exclusive contract with DirecTV for an additional eight years.[150] As of 2020, the cost of a full season package for individual subscribers is $293, compared to the $1,458 cost for commercial subscribers per season.[151]

Currently, all thirty-two teams, "each of which is a separate 'independently owned, and independently managed business,'" have "an agreement with the NFL . . . to pool their telecasting rights and give the NFL the authority to exercise those rights."[152] Consequently, the NFL (acting as the parent to its subsidiary teams) "entered into two . . . agreements licensing the teams' telecast rights: (1) 'the NFL-Network Agreement,' which governs 'local games,' and (2) 'the NFL-DirecTV Agreement,' which governs 'out-of-market games.'"[153] The resulting burdens of these agreements are: (1) football fans who do not subscribe to the Sunday Ticket package will have "access to, at most, two to three local games each Sunday afternoon;" (2) these fans may not purchase games per team or per game, but rather must purchase the entire package; and (3) in addition to purchasing the package, subscribers must have a "basic television package from DirecTV."[154] The resulting deprivation to the NFL football fans, in addition to the "alleged antitrust problem with the Sunday Ticket," has led not only to significant litigation, but has also financially harmed consumers.[155]

bids of the cable companies being late, the cable companies believe the rejection was attributable to the cable companies' refusal to carry the NFL Network. *Id.* at 238–39.

150. Brian Stelter & Frank Pallotta, *DirecTV, NFL Renew Sunday Ticket Deal*, CNN (Oct. 2, 2014, 1:08 AM), https://money.cnn.com/2014/10/01/media/directv/. It is worth noting that the NFL, once again, did entertain other potential bids for the package. *Id.* Ultimately the renewal with DirecTV was important to both parties. *Id.* Notably, when AT&T acquired DirecTV in early 2014, there was a clause in the agreement that stipulated AT&T's ability to withdraw from the agreement if the NFL and DirecTV did not renew the Sunday Ticket package. *Id.*

151. *See* Siranosian, *supra* note 7, at 353; *NFL Sunday Ticket*, NFL (last visited Sept. 10, 2020), http://www.nfl.com/nflsundayticket.

152. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1148 (9th Cir. 2019) (quoting Am. Needle, 560 U.S. at 196). This means that the NFL only has the authority to "enter into . . . agreements with networks, satellite TV providers, or internet streaming services." *Id.*

153. *Id.*

154. *Id.* The price for commercial subscribers varies in response to the "capacity of the establishment, ranging from $2,314 to $120,000 per year." *Id.*

155. *Id.*

D. *Consumers Take on the NFL in* In re Nat'l Football League's Sunday Ticket Antitrust Litigation

A landmark lawsuit resulting from the Sunday Ticket involved "a case brought [in 2015] by a group of Sunday Ticket subscribers against the NFL and DirecTV."[156] Initially, twenty-seven related class action suits against various NFL and DirecTV entities—FOX, CBS, NBC, and ESPN—were filed separately; however, they were eventually consolidated into a single, multidistrict lawsuit.[157] "Four plaintiffs . . . filed a consolidated complaint against the [NFL], NFL Enterprises LLC, all [thirty-two] individual NFL teams, DirecTV Holdings LLC, and DirecTV, LLC."[158] The plaintiffs claimed that the "defendants' interlocking agreements work[ed] together to suppress competition for the sale of professional football game telecasts in violation of [§ I] and [§ II] of the Sherman Antitrust Act."[159]

All of the plaintiffs, including both businesses and residents, had purchased Sunday Ticket packages.[160] The plaintiffs alleged that without both the Teams-NFL and NFL-DirecTV exclusive agreements, other distributors would be able to telecast the games shown exclusively in the Sunday Ticket package.[161] Furthermore, without these agreements, the thirty-two teams could individually arrange their game telecasts and "could contract with competing distribution channels or media, including other

156. McCann, *supra* note 85.

157. *In re* NFL Sunday Ticket Antitrust Litig., No. ML 15-02668-BRO (JEMx), 2017 U.S. Dist. LEXIS 121354, *1–2 (C.D. Cal. June 30, 2017).

158. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1148–49 (9th Cir. 2019).

159. *Id.* at 1149. The plaintiffs represent both "residential and commercial NFL Sunday Ticket subscribers," which makes them both direct and indirect purchasers. *Id.* at 1148. The plaintiffs included Ninth Inning, Inc., 1465 Third Avenue Restaurant Corp., Robert Gary Lippincott, Jr., and Michael Holinko. *Id.*

160. *Id.*

161. *Id.* at 1149. The Ninth Circuit clarified that the Teams-NFL agreement is the agreement between all the NFL teams and the NFL to pool the teams' telecasting rights, giving the NFL the sole authority to those rights. *Id.* at 1148. Furthermore, the NFL-DirecTV agreement is the agreement that permits DirecTV on behalf of the NFL "to obtain all of the live telecasts produced by CBS and FOX, package those telecasts, and deliver the bundled feeds to NFL Sunday Ticket subscribers." *Id.* The NFL-Network agreement is CBS and FOX working together to create a sole telecast for every Sunday afternoon NFL game, and the NFL allows CBS and FOX to broadcast a finite amount of local games on free, over-the-air, television. *Id.* These are the interlocking agreements that the plaintiffs allege violate §§ I and II of the Sherman Act by suppressing competition "for the sale of professional football game telecasts." *Id.* at 1149.

cable, satellite or internet carriers or competing networks."[162] Allowing teams to individually sell the rights to their telecasts would result in considerable growth for NFL telecasts of games and wider accessibility for viewers at lowers costs.[163]

The district court dismissed both the § I and § II claims, and on appeal the Ninth Circuit reviewed the dismissal.[164] The Ninth Circuit highlighted the significance of the NFL's failure to contest the application of the SBA to both the agreements between the teams and DirecTV.[165] Specifically, because the NFL did not contest the SBA's application to satellite broadcasting, the court assumed that the SBA was "not applicable to the Teams-NFL or NFL-DirecTV Agreements."[166] Therefore, its analysis was predominantly based on the Supreme Court's decision in *Board of Regents*.[167] The Ninth Circuit found that the plaintiffs had adequately stated a cause of action for violations of "[§] I and [§] II of the Sherman Act that survive[d] a motion to dismiss" and "therefore [the court] reverse[d] the district court's decision."[168] Ultimately, the court held that the interlocking agreements amounted to both § I and § II violations of the Sherman Act, and it found proper antitrust standing for the plaintiffs.[169]

III. ANALYZING SPORTS TELECASTING: INJURY TO COMPETITION, MARKET MONOPOLIZATION, AND STANDING

The Ninth Circuit, in *In re National Football League's Sunday Ticket Antitrust Litigation*, properly established new precedent in ruling that the various interlocking agreements among the NFL, NFL teams, and DirecTV

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* If the defendants had contested the application of the SBA to the interlocking agreements, they may have been able to show that cable and satellite providers similarly fall within the exemption already given to broadcasters. *Id.* Thus, the DirecTV agreement may have fallen within the exemption. *Id.*

166. *Id.*

167. *Id.* The SBA permitted pooling agreements among the NFL and the teams to "share broadcast revenues" by "offer[ing] the NFL and the NFL teams an exemption from antitrust law." *Id.* *Board of Regents* "analyzed a similar league sport broadcasting arrangement under the Sherman Act, without any applicable statutory exemption." *Id.*; *see also* Board of Regents, 468 U.S. 85, 120–21 (1984).

168. *In re Nat'l Football League's Sunday Ticket Antitrust Litig*., 933 F.3d at 1144.

169. *Id.* at 1158–59.

constituted antitrust violations under § I and § II of the Sherman Act.[170] However, the Court improperly contradicted Supreme Court precedent in granting standing to the plaintiffs, which has alarming consequences for future litigation.[171]

A. To What Extent, if Any, Did the NFL Err in Injuring Competition?

The NFL does not contest that under the first and second elements of a rule of reason analysis they have contracts for the purpose of restraining competition.[172] However, they dispute the third and fourth elements under § I, claiming that the plaintiffs do not adequately allege that this particular restraint (i.e., the Sunday Ticket package) injures competition.[173]

The court found that the plaintiff's allegations adequately alleged an injury to competition based on the similarity of both the Teams-NFL and NFL-DirecTV agreements to the agreement the court struck down in *NFL II*, in the context of college football.[174] However, the NFL denied that the interlocking agreements resembled any precedent set by the courts, and instead argued that the Sunday Ticket package is a joint venture between the league and the teams.[175]

Similar to *NFL II*, where the "agreement among college football teams and the NCAA violated [§ I] of the Sherman Act because [it] eliminated competition in the market for college football telecasts," here the

170. *See* McCann, *supra* note 85.

171. *See id.*

172. *Nat'l Football League*, 933 F.3d at 1150.

173. *Id.* Under a rule of reason analysis, the plaintiff is required to establish the following:

> "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." Additionally, the plaintiffs must plead antitrust standing, meaning they must allege that (4) they are the proper parties to bring the antitrust action because they were harmed by the defendants' contract, combination, or conspiracy, and the harm they suffered was caused by the anti-competitive aspect of the defendants' conduct.

Id. (citation omitted) (quoting Brantly v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)).

174. *See supra* note 127 and accompanying text.

175. *See* McCann, *supra* note 85. Here, McCann highlights that the NFL differentiated its telecasting agreements from those mentioned in prior Supreme Court cases, such as *American Needle*. *See id.* McCann also emphasizes that since Judge Smith sided with the NFL in *Nat'l Football League*, the league can, at minimum, have confidence in having at least one judge on its side. *See id.*

interlocking agreements mirror those same restrictions.[176] Where the agreement in *NFL II* imposed restrictions on the amount of televised intercollegiate football games and the total number of games any single team was permitted to televise, here, both the Teams-NFL and NFL-DirecTV agreements similarly restrict the total amount of televised NFL games that any single team can broadcast.[177] Thus, the court identified the professional sporting version of the same prohibited agreements found in *NFL II* with the Sunday Ticket package here, which constitutes an injury to competition.[178]

Moreover, in both cases the agreements restricted the teams from selling individual telecasting rights of the teams independent of the league.[179] Where the *NFL II* agreement explicitly constituted a horizontal restraint based on the necessity of votes by collegiate teams to enter into a contract, the Sunday Ticket package has an almost identical requirement that the NFL teams vote to approve the DirecTV agreement.[180] Thus, the Court correctly held that both the Teams-NFL and NFL-DirecTV agreements constitute horizontal agreements among competitors, because they "place[] an artificial limit on the quantity of televised football that is available [for sale] to broadcasters and consumers."[181]

The NFL also failed to properly argue that the Teams-NFL and NFL-DirecTV agreements should have been analyzed separately under *In re Musical Instruments*.[182] If the court analyzed such agreements separately, it would consider the NFL-DirecTV agreement a presumptively legal exclusive distribution agreement that does not injure competition.[183] However, *In re Musical Instruments* does not explicitly require courts to analyze such agreements individually.[184] Moreover, the Ninth Circuit cited to *Board of Regents* where the Supreme Court explicitly held that there are

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176. *Nat'l Football League*, 933 F.3d at 1151.
177. *Id.*
178. *See supra* note 130 and accompanying text.
179. *See supra* note 130 and accompanying text.
180. *Nat'l Football League*, 933 F.3d at 1151–52.
181. *Id*. at 1152 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 99 (1984)).
182. *Id.*
183. *Id.*
184. In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1191–92 (9th Cir. 2015) (classifying antitrust claims as "horizontal" or "vertical" and establishing that "horizontal agreements violate the Sherman Act per se" and do not require a fact intensive inquiry that would involve analyzing individual agreements).

activities so inherently rooted in acting cooperatively that their activities can *only* be carried jointly—league sports are a prime example.[185] Additionally, the court looked at the agreements holistically to see how they impact competition.[186] In doing so, the court found that assessing injury to competition requires looking at the conspiracy as a whole, rather than "dismembering it and viewing its separate parts."[187] The purpose of doing this is to give the plaintiffs "the full benefit of their proof without tightly compartmentalizing the various factual components."[188]

Thus, the court's choice to analyze the agreements together here is correct, especially when comparing the case at bar to *In re Musical Instruments*.[189] Because the Supreme Court set clear precedent by carving out an explicit exception for how to analyze professional sports agreements––under a rule of reason analysis and not separately, and the Ninth Circuit found it necessary to analyze the agreements holistically, the league's attempt to use *Musical Instruments* as a defense was weak from its outset.[190]

The NFL again failed when attempting to argue against a § I violation by distinguishing the case at bar from *American Needle*.[191] In *American Needle*, the Supreme Court granted the NFL single-entity status, providing an exemption from antitrust law for merchandising agreements.[192] Here, the NFL failed to show how telecasts are different from separately owned merchandise.[193] The NFL argued that telecasts can only be created through cooperation of the teams and the NFL, which should allow them to be considered a *single entity*.[194] However, there is no precedent that requires both the teams and the NFL to work in tandem to create telecasts, so their

185. Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101 (1984). For example, when a professional sports league, such as professional soccer teams, is formed, "it would be pointless to declare their cooperation illegal on the ground that there are no other professional [soccer] teams." *Id.*

186. *Nat'l Football League*, 933 F.3d at 1151–52.

187. *Id.* at 1152 (quoting United States v. Patten, 226 U.S. 525, 544 (1913)).

188. *Id.* (quoting Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)).

189. *Id.* at 1152–53.

190. *Id.* at 1152–53.

191. *Id.* at 1153.

192. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 200–03 (2010). The instances that allow the NFL to form collective agreements under a single-entity status, among all the franchises, are limited and cannot be considered for all purposes. *Id.* at 200–04.

193. *Nat'l Football League*, 933 F.3d at 1154.

194. *Id.* at 1153.

argument fails.[195] Furthermore, the NFL asserted that the "NFL-DirecTV agreement did not reduce the output of NFL game broadcasts" because every NFL Sunday afternoon game is broadcast somewhere as free television.[196] Thus, the NFL insisted that there was "no [restriction] on output as a matter of law."[197] However, in accordance with *Board of Regents*, the Court explicitly rejected the NFL's argument that "the relevant output is 'the total amount of televised' [games] available to consumers."[198] Instead, the Court held that the interlocking agreements do, in fact, reduce output that causes injury to competition, given that member institutions are not free to sell telecasting rights under such agreements.[199] The league's attempt to justify granting consumers free over-the-air games when their team plays locally as sufficient to *not* reduce output, does, in fact, reduce output and harms their fan base who are either unwilling or unable to pay the annual subscription.[200]

Finally, the NFL argued that the plaintiffs failed to allege "a properly defined market in which [the NFL has] market power."[201] However, because "professional football games have no substitutes," the NFL *does*, in fact, have complete and utter control over the market for professional football game telecasts.[202] The Court correctly held that the interlocking agreements satisfied the injury to competition element of § I of the Sherman Act.[203]

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195. *Id.* The argument fails because the NFL teams can, without the interlocking agreements, compete against each other to sell their telecasting rights instead of having the NFL pool all telecasting rights for every team, and split the revenue among the teams themselves. *Id.* at 1154.

196. *Id.* at 1155.

197. *Id.*; *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 94 (1984) ("[The current plan] limits the total amount of televised intercollegiate football and the number of games that any one team may televise.").

198. *Nat'l Football League*, 933 F.3d at 1155 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. at 94).

199. *Id.*

200. *See* McCann, *supra* note 85 ("[P]laintiffs argue that the league's prohibition financially harms fans since it eliminates competition in the market for live telecasts[, whereas] the NFL reasons that its deal with DirecTV has made life better, not worse, for consumers since they can essentially watch any NFL game regardless of where they live.").

201. *Nat'l Football League*, 933 F.3d at 1155.

202. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984) (examining the NFL's relevant market competition).

203. *Nat'l Football League*, 933 F.3d at 1156.

B. Monopolizing the Market on Its Face

Next, the Court analyzed whether the plaintiffs sufficiently alleged a § II violation of the Sherman Act.[204] Both plaintiffs adequately asserted injury to competition because the interlocking agreements amounted to a conspiracy to monopolize the market for professional football telecasts, and "[the NFL has sufficient] market power in the market for professional football telecasts."[205] The exclusive deal explicitly granted DirecTV monopoly power over each and every out-of-market game, and the NFL willingly granted DirecTV the ability to "acquire and maintain that monopoly power in the relevant product market."[206] If the interlocking agreements were not created to maintain market power and did not maintain such power, then other carriers would be able to bid for the contract when the DirecTV agreement expired.[207]

Nonetheless, the NFL continues to renew the agreement each year with DirecTV.[208] If the NFL opened the bidding to carriers other than DirecTV when the initial agreement with DirecTV expired, or at least *one* other carrier in addition to DirecTV, it is less likely that a § II violation would exist.[209] Thus, the Court correctly concluded that both the Teams-NFL and NFL-DirecTV agreements were created to maintain market power, sufficient to amount to the specific intent necessary to monopolize a relevant market.[210]

Although the Court's analysis was precise in finding both § I and § II violations of the Sherman Act, the Court reached a troubling conclusion in terms of standing.[211]

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204. *Id.* at 1158; *see also supra* notes 43–45 and accompanying text (examining industries where there has been monopolization due to GFTC inaction). A § II violation not only constitutes a conspiracy to monopolize but is an actual monopolization. *Nat'l Football League*, 933 F.3d at 1159. To demonstrate a conspiracy to monopolize claim, a plaintiff must properly show: "1) the existence of a combination or conspiracy to monopolize; 2) an overt act in furtherance of the conspiracy; 3) the specific intent to monopolize; and 4) casual antitrust injury." *See* Siranosian, *supra* note 7, at 366.

205. *Nat'l Football League*, 933 F.3d at 1159.

206. *See* Brodkin, *supra* note 3.

207. *See supra* notes 148–149 and accompanying text.

208. *See supra* notes 148–149 and accompanying text.

209. *See* Brodkin, *supra* note 3.

210. *Nat'l Football League*, 933 F.3d at 1159.

211. *Id.* at 1158 (holding that there was standing because the plaintiffs suffered an antitrust injury due to the NFL and DirecTV's conspiracy to limit output).

C. Opening the Floodgates of Unprecedented Standing

The Ninth Circuit's holding in allowing the plaintiffs to have standing directly contradicts Supreme Court precedent in *Illinois Brick Co. v. Illinois*.[212] In *Illinois Brick*, the Court established a bright-line rule that "only direct purchasers have standing to pursue antitrust claims."[213] The plaintiffs here are indirect purchasers because they are "two or more steps removed from the violator in a distribution chain," as they are bar and restaurant owners who purchased the Sunday Ticket package from DirecTV, not from the NFL directly.[214] This standard is referred to as the "principle[] of proximate cause."[215] The only exception to barring indirect purchasers is referred to as the co-conspirator exception, as established by *Arizona v. Shamrock Foods Co.* and *In re ATM Fee Antitrust Litigation.*[216] If a direct purchaser "conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not [considered] indirect purchasers"; rather, the plaintiffs are considered to be injured directly by the violation and therefore have antitrust standing.[217]

The court should have adhered to the bright-line rule from *Illinois Brick*

212. Matt Bernardini, *NFL Asks 9th Circ. to Reverse Decision Reviving DirecTV Suit*, LAW360 (Aug. 27, 2019) https://www.law360.com/articles/1193007/nfl-asks-9th-circ-to-reverse-decision-reviving-directv-suit.

213. *Id.*

214. *Nat'l Football League*, 933 F.3d at 1156 (quoting Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520–21).

215. *Id*. The Court rationalized "that allowing every purchaser in a distribution chain to claim damages flowing from a single antitrust violation" would result in significant risk of multiple liability for defendants. *Id.* Furthermore, the Court predicted that allowing indirect purchasers to sue would create "evidentiary complexities and uncertainties." *Id.* (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977)). For example, if "'manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A.' However, 'C may sue B if B is an antitrust violator.'" *Id.* (citation omitted) (quoting *Pepper*, 139 S. Ct. at 1521 (2019)). The "principle[] of proximate cause" is applied differently when the plaintiff's injury is the result of a "multi-level conspiracy to violate antitrust laws," which is what the court here compares the interlocking agreements to. *Id.*

216. *Id.* at 1156–57*; see also In re ATM Fee Antitrust Litig*., 686 F.3d 741, 746 (9th Cir. 2012) (explaining that the cardholders who alleged that banks "colluded to fix the . . . interchange fee" for an ATM network, which was "passed on to [the cardholders] as part of the foreign ATM fee" that cardholders were charged when withdrawing money, were indirect purchasers, and thus prohibited from bringing suit under *Illinois Brick*); Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1210, 1214 (9th Cir. 1984) (holding that defendant dairy product producers were not found to be involved in a "wholesale price-fixing conspiracy" because there was no need for "the complicated allocation of an illegal overcharge sought to be avoided in *Illinois Brick*").

217. *In re ATM Fee Antitrust Litig*., 686 F.3d at 750.

prohibiting any indirect purchaser claims, especially because the price-fixing conspiracy exception carved out in the case does not apply here.[218] To show that the plaintiffs properly had antitrust standing, the fourth element of a § II violation of the Sherman Act, plaintiffs must show they were "harmed by the injury to competition" and that the harm was directly caused by the antitrust violator.[219] Here, neither were the plaintiffs harmed by the injury to competition nor was the harm directly caused by the antitrust violator because they did not purchase the Sunday Ticket Package from the NFL directly.[220] Therefore, the NFL was justified in challenging the Teams-NFL agreement.[221]

The plaintiffs' allegation that the interlocking Teams-NFL and NFL-DirecTV agreements amount to a single conspiracy to restrict the output of NFL telecasts is misplaced for three reasons.[222] First, the Ninth Circuit "has already rejected the Majority's notion that the *Illinois Brick* rule does not apply when an alleged conspiracy has the same anti-competitive effect as fixing the consumer price."[223] Second, the argument that the NFL conspired to reduce the output of telecasting rights is not equivalent to the price-fixing conspiracy that *Illinois Brick* sought to prevent.[224] Third, the co-conspirator exception only applies when "the co-conspirators *fix the price paid by the plaintiff*," a claim that even the plaintiffs did not allege.[225]

In *Shamrock Foods Co.*, the Ninth Circuit held that the joint action between dairy producers and grocery retailers amounted to a conspiracy.[226]

218. Lesley E. Weaver et al., *That's The Ticket—Game On for Plaintiffs Challenging Suppression of The Market for Football Broadcasts*, CALIFORNIA LAWYERS ASS'N (last visited Sept. 12, 2020), https://calawyers.org/antitrust-ucl-and-privacy/thats-the-ticket-game-on-for-plaintiffs-challenging-suppression-of-the-market-for-football-broadcasts/.

219. *Nat'l Football League*, 933 F.3d at 1156.

220. *See* Bernardini, *supra* note 212.

221. *See id.*

222. *Nat'l Football League*, 933 F.3d at 1160–62 (Smith, J., dissenting).

223. *Id.* at 1160. The dissent emphasized that it "simply does not matter that the alleged pre-market conspiracy has the same effect as setting a specific market price . . . [and] [s]imilarly it does not matter that the ultimate consumers 'are purchasing from a violator' of the Sherman Act." *Id.* at 1161 (Smith, J., dissenting) (citing *In re ATM Fee Antitrust Litig*., 686 F.3d 741, 755 (9th Cir. 2012)). If the party "challenging anti-competitive behavior relies on a pass-on theory of injury, it may recover damages *only if* it alleges and demonstrates a conspiracy that actually sets the consumer price—not just a conspiracy that may have the same practical effect." *Id.* (emphasis added).

224. *Id.* at 1161–62.

225. *Id.* at 1162 (quoting *In re ATM Fee Antitrust Litig*., 686 F.3d at 752).

226. Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1214 (9th Cir. 1984).

Here, the court likewise concluded that the interlocking agreements amounted to a conspiracy to limit the output of NFL telecasts.[227] However, because the Teams-NFL agreement, on its face, requires a pass-on theory of injury,[228] the co-conspirator exception cannot, and does not, apply; thus, the interlocking agreements are not similar to the conspiracy in *Shamrock Foods Co*.[229] Here, not only do the plaintiffs fail to allege a conspiracy of price-fixing by the NFL teams, but they allege only that the price set by DirecTV was "artificially high" for consumers.[230] Therefore, the co-conspirator exception does not apply.[231] To have standing, the plaintiffs would have to show, at the very least, that the NFL teams either set or conspired to set "the *actual* price paid by *any* consumers"; otherwise, there is no price-fixing, no co-conspirator exception triggered by price-fixing, and the result is a conclusion that goes against the very core of what *Illinois Brick* sought to prevent.[232] Ultimately, the plaintiffs did not allege, either implicitly or

227. *Nat'l Football League*, 933 F.3d at 1159 (majority opinion).

228. *Id.* at 1160 (Smith, J., dissenting). Requiring a pass-on theory of injury means any overcharge between a manufacturer and direct purchaser was "passed-on" to consumers through another level in the distribution chain. *Id.* at 1159. However, if the co-conspirator exception applied because of price-fixing, there would be no complicated equation to figure out the cost of damages because no overcharge was passed on to consumers. *Id.* at 1160.

229. *Id.* The co-conspirator exception is when "a plaintiff alleges a price-fixing conspiracy between a manufacturer and the direct purchaser." *Id.* This is the exception to the bright-line rule in *Illinois Brick* that prevents indirect purchasers from having standing. *Id.* When there is such a "price-fixing conspiracy, the court need not engage in a complex damages calculation, because the overcharge 'was not passed on to the consumers through any other level in the distribution chain.'" *Id.* (citing *Shamrock Foods Co*., 729 F.2d at 1214 (9th Cir. 1984)). On the other hand, under *Illinois Brick*, the Court established a rule that prohibits indirect purchasers from using a pass-on theory to recover damages for antitrust claims. *Id.* at 1159. The rationale for this rule was to reduce concerns that "pass-on theories of recovery would require courts to 'trace a wholesale overcharge through an intermediary and allocate the retail price between an unlawful wholesale overcharge and market forces.'" *Id.* (quoting *Shamrock Foods Co*., 729 F.2d at 1214). Allowing indirect purchasers to use pass-on theories of recovery would potentially inundate the courts with plaintiffs who *may* have "absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers[, namely themselves]." *Id.* at 1160.

230. *Id.*

231. *Id.* The argument made by the plaintiffs here regarding the artificially high price for consumers would require analysis that *Illinois Brick* prohibits. *See id*; *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 745–46 (1977)). This allegation would require the court to analyze "whether the payment DirecTV made to the NFL for the telecast rights was an overpayment, how much of an overpayment it was (relative to what DirecTV would have had to pay had the NFL [t]eams not agreed to pool all of their broadcast rights), and how much of that overpayment was actually then passed on to the consumers." *Nat'l Football League*, 933 F.3d at 1160 (Smith, J., dissenting).

232. Nat'l Football League, 933 F.3d at 1160 (Smith, J., dissenting) (emphasis added); *see also*

explicitly, that the NFL and DirecTV were co-conspirators to fix the price paid by the plaintiffs.[233] Accordingly, the exception cannot apply.[234]

Furthermore, while the majority found that there was in fact a price-fixing conspiracy between the distributor and manufacturer sufficient to apply the standard in *Illinois Brick*, the plaintiffs' allegation that the NFL and DirecTV were involved in an output-reduction conspiracy for television broadcast rights also does not diminish the concerns set forth in *Illinois Brick*.[235] Specifically, consumer injury as a result of an output-reduction conspiracy is still conditional on a pass-on theory of damages.[236] Once again, this calculation of damages, unlike what is involved in a price-fixing conspiracy, is precisely what *Illinois Brick* aimed to avoid.[237]

The court should have followed the Eight Circuit's decision in *Campos v. Ticketmaster Corp.*, where the court addressed the detrimental impact that raises concern here.[238] In *Campos*, music fans attempted to sue Ticketmaster for the inflated prices that various venues charged for admission.[239] However, after weighing concerns of defying *Illinois Brick*, the court held that the plaintiffs did not have antitrust standing because the "complications in assessing responsibility for overcharges" in "[a]llowing the ultimate buyers of tickets to sue would necessitate tough questions about whether the venues were passing on monopoly costs."[240] Therefore, the Ninth Circuit's decision will result in more complex litigation for indirect purchasers

Illinois Brick, 431 U.S. at 745 (arguing that the pass-on theory of damages would both increase the cost and diffuse the benefits of bringing antitrust actions, impairing their effectiveness).

233. *Nat'l Football League*, 933 F.3d at 1160 (Smith, J., dissenting)

234. *Id.*

235. *Id.* at 1161; *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 744–46 (1977) (stating the court's concerns regarding increased complexity and reduced effectiveness of antitrust lawsuits brought by indirect purchasers).

236. *Nat'l Football League*, 933 F.3d at 1161 (Smith, J., dissenting). In these cases, courts have to assess the amount of the consumer price that derives from "ordinary market forces[] and how much of it stems from the distributor's efforts to recoup its overpayment to the manufacturer." *Id.* (citing *Illinois Brick*, 431 U.S. at 744–46).

237. *Id.* at 1162; *see also Illinois Brick*, 431 U.S. at 744–45 (stating that the complex "process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum" would lead to uncertainty, reducing the incentive to sue).

238. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1170 (8th Cir. 1998).

239. *Id.* at 1169.

240. *See* Gardner, *supra* note 6; *see also Campos*, 140 F.3d at 1170 (weighing concerns of defying *Illinois Brick*: either attempting the complex task of apportioning the payment of overcharges between direct and indirect purchasers or allowing duplicative recovery).

looking to fit under the same exception.[241] Additionally, those who traditionally did not fit under the exception will likely see this as an opportunity to secure standing against large corporations and sports leagues, opening the floodgates for an influx of lawsuits that courts are likely unprepared to hear and decide.[242]

Because *Illinois Brick* unequivocally bars any plaintiffs from having antitrust standing to sue if they are an indirect purchaser, unless the co-conspirator exception applies, the Court would be forced to create an entirely new exception in order to properly grant antitrust standing to the plaintiffs here.[243] The Court in *Illinois Brick* both justified and warned against creating additional exceptions "to the [indirect purchaser] rule for particular types of markets," which is precisely what the court is doing here by granting standing to the plaintiffs.[244]

IV. FUTURE IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION: THE NFL, PROFESSIONAL SPORTS, AND THE FLOOD OF PLAINTIFFS WITHOUT LEGAL STANDING

The impact of the Ninth Circuit's decision may cause a revolution in the television industry because NFL teams may have the freedom to individually sell their telecasting rights, which would give consumers greater autonomy to choose a carrier based on price.[245] This decision may also serve as a model for both existing and future agreements for all other league sports.[246]

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241. *See Campos*, 140 F.3d at 1170.

242. *See id.*; *see also Nat'l Football League*, 933 F.3d at 1162 (Smith, J., dissenting).

243. *Nat'l Football League*, 933 F.3d at 1162; *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (precluding indirect purchasers from recovering under a pass-on theory of damages).

244. *Illinois Brick*, 431 U.S. at 736; *see also Campos*, 140 F.3d at 1171 (explaining that "[w]hile the Supreme Court has recognized that the 'economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case,' the Court has also made it [clear] that it considers it an 'unwarranted and counterproductive enterprise to litigate a series of exceptions'").

245. *See* Erin Dingmann, *National Football League's Sunday Ticket Antitrust Litigation: How Broadcasting Exclusivity Is a DirecT(V) Hindrance to Consumers*, 27 SPORTS L. J. 271, 284–85 (2020) (showing that while all other prominent professional sports leagues offer various out-of-market packages that are substantially similar to that of the NFL Sunday Ticket package, only the NFL has an exclusive contract for this package with a single cable provider).

246. *See* Alex Sherman, *Here's How NFL TV Rights Are Expected to Shake Out for the Rest of the Decade, According to Sources*, CNBC (Feb. 23, 2020, 2:54 PM), https://www.cnbc.com/2020/02/22/nfl-tv-rights-up-for-renewal-in-2022-and-big-media-will-pay-more.html (discussing that in the upcoming battle for NFL broadcasting rights, the possibility of a streaming service such as ESPN+ or YouTube TV buying the NFL Sunday Ticket rights from DirecTV may lead to massive

Furthermore, the timing of the decision could not be more significant because all of the NFL's current agreements with broadcasters are set to expire in the coming years, along with the collective bargaining agreement between the league and its teams.[247]

A. The Future of the NFL Without Exemptions

Although consumers who are frustrated paying astronomical fees every football season for the Sunday Ticket package may see the Ninth Circuit's decision as a victory, they may not realize the impact it will have on weaker NFL teams and their future on television.[248] Without the NFL's exemption for pooling the teams' telecasting rights, each team will have to individually negotiate its television contracts.[249] While having teams individually negotiate their agreements appears to adhere to the purpose of antitrust law by allowing competition in the marketplace, it could be detrimental to weaker NFL teams.[250] Weaker teams may struggle to get *local* coverage of games, let alone attempt to nationally broadcast them.[251] Not only will each of the thirty-two individual franchises lose the NFL's oversight of their telecasting rights, but "the Ninth Circuit may have jeopardized the NFL's longstanding broadcast model, an arrangement that currently generates $5.7 billion per year from the TV networks alone."[252] However, a world where each individual team retains all the television rights to its games opens the possibility of individually "producing telecasts and licensing them to digital streamers."[253]

Regardless of how the removal of the pooling arrangement will hurt the NFL and its teams, the current arrangement hurts consumers even more

changes in traditional broadcasting through sports, likely lowering costs for consumers in the process).

247. *Id.* (highlighting that the NFL's broadcasting rights are set to expire in 2022).

248. *See* Malanga, *supra* note 45.

249. *See id.*

250. *See id.*

251. *See id.* Malanga illustrates this point by using the Dallas Cowboys and Cleveland Browns as an example; a powerhouse team such as the Cowboys would likely secure national broadcasting of all their games with ease, whereas the Browns would likely struggle for even local coverage. *See id.*

252. Anthony Crupi, *For NFL Rights-Holders, the Clock on the Wall Reads 'Miller Time*,*'* ADAGE (Dec. 6, 2019), https://adage.com/article/sports/nfl-rights-holders-clock-wall-reads-miller-time/2221086.

253. Gardner, *supra* note 6. These digital streamers may include Disney's ESPN, NBC's Peacock, or even selling individual games to multiple streamers. *Id.*

through inflated prices.[254] The court's decision to make the Sunday Ticket package nonexclusive will not only allow other carriers to properly compete with the individual teams to secure contracts, but will also allow the consumers themselves to have greater autonomy than what is available to them now to choose a carrier based on pricing.[255] Consumers deserve to be offered fair pricing, rather than suffer at the hands of the NFL's desire to equally distribute a hefty chunk of revenue to each team via pooled telecasting rights.[256]

Moreover, the NFL is unlike all other professional sports leagues, which further justifies not applying the exemption.[257] The NFL is one of the *only* major sports leagues in the United States that has an exclusive distributorship agreement with either cable or satellite for out-of-market games.[258] Other professional sports leagues in the United States similarly have "broadcasting deals with cable channels and other subscriber-based networks"; however, they do not rise to the level of exclusive distributorship as the NFL-DirecTV agreement does.[259] If anything, the impact of the Ninth Circuit ruling may positively influence how sports leagues handle their television agreements by serving as a cautionary example for other leagues entering into new agreements.[260] This impact can be seen in the inevitable scrutiny these sports leagues have already faced, and likely will continue to

254. *See* Bublick, *supra* note 20, at 244–45 (Every "few years DirecTV [pays] the NFL exponentially more money for the exclusive right to Sunday Ticket, and consumers are picking up the tab. While the free market dictates that consumers will only pay as much as a service or product is worth to them, this principle does not apply in this case because Sunday Ticket is only available through DirecTV and many NFL fans have no choice but to pay more than they think is fair. Even though other carriers have made offers that, when combined with the likely offers of other carriers, would be more than what DirecTV is currently paying, the NFL has balked for unknown reasons.").

255. *See* Bublick, *supra* note 20, at 245.

256. *See id.* at 243–45.

257. Brodkin, *supra* note 3.

258. *Id.* Among the four major professional sports in the United States—hockey, basketball, football, and baseball—the NFL is the only league with "an exclusive out of market broadcasting arrangement." *Id.* The National Hockey League, National Basketball Association, and Major League Baseball "all distribute live out of market games through multiple MVPDs [multichannel video programming distributors], including, for example, DirecTV, Dish Network, Comcast, Cox Cable[,] and Time Warner." *Id.* Therefore, consumers who watch other sports leagues' games do not pay nearly as much as football fans, and those consumers have a much wider range of access to watching more games per week. *Id.*

259. *See* McCann, *supra* note 85.

260. *See id.*

face, under antitrust law.[261]

The future of the NFL without the exemption stands to benefit *both* consumers and potential carriers, at the cost of weaker NFL teams being overshadowed by powerhouse franchises.[262]

B. *Giving Consumers a Voice in the Courtroom by Contradicting Supreme Court Precedent*

Although the Ninth Circuit scored a touchdown by ruling in favor of removing the exemption, the decision was troubling because it granted standing to plaintiffs who had no legal standing.[263] The rationale for requiring the plaintiffs who have antitrust standing to be the direct purchaser of the service is that they have to be the ones who would be *directly* harmed by the injury to competition.[264] Here, the consumers have not *directly* purchased anything from the NFL,[265] and the core reasoning of *Illinois Brick* was to prevent those who are not direct purchasers from having standing to avoid "the evidentiary complexities and uncertainties" that would arise.[266] Plaintiffs who may be weary of suing powerhouse corporations and entities, such as the NFL and DirecTV, may see the plaintiffs in the case at bar—consumers and business owners—as success stories and be motivated to pursue their own antitrust lawsuits, subsequently inundating the courts with

261. *See id.* In 2016, a lawsuit with the MLB, which challenged the league's broadcasting policies under antitrust law, resulted in restricting the MLB from raising the prices for both "its single-team and league-wide MLB . . . TV packages," meaning the MLB would likely only be able to raise its prices a few dollars annually until the settlement agreement expires. Nathaniel Grow, *More Details on the MLB TV Lawsuit Settlement*, INSTAGRAPHS (Jan. 20, 2016), https://blogs.fangraphs.com/instagraphs/more-details-on-the-mlb-tv-lawsuit-settlement/. The settlement also required the MLB to agree to permit cable and satellite service providers the "option to sell single-team Extra Innings packages . . . [and] [w]hile these providers aren't obligated to offer a single-team service under the terms of the settlement, if they do elect to do so then they must offer packages for all [thirty] teams, and not just the league's most popular clubs." *Id.* Lastly, the settlement gave a voice to fans who have been wronged by allowing "anyone . . . completely unable to receive [a] cable or satellite television service at their home [to] be able to petition [the] MLB for the ability to stream in-market games via MLB . . . TV." *Id.*

262. *See* Grow, *supra* note 261.

263. *See* Bronstad, *supra* note 1.

264. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977).

265. *See* Gardner, *supra* note 6.

266. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1156 (9th Cir. 2019) (quoting *Illinois Brick*, 431 U.S. at 732).

plaintiffs who *may* have been affected by an antitrust violation.[267]

Not only is it concerning that the court directly defied Supreme Court precedent, but if the Ninth Circuit's decision is left "undisturbed" it will impact the economy outside of just sports.[268] Put differently, if the decision takes effect, it will reduce "inter-brand competition whenever affiliated entities get together to create something."[269]

Lastly, the timing of this decision is significant.[270] All of the NFL's current agreements with broadcasters are set to expire in the next few years, and the collective bargaining agreement between the league and its players is on the horizon.[271] Historically, the most significant point of contention for these agreements is the "split of TV money."[272] As a result, the Ninth Circuit's decision is not only going to be pivotal for the league and its teams, but also for the television industry as a whole.[273]

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267. *Id.* at 1159–60 (Smith, J., dissenting).

268. *See* Gardner, *supra* note 6.

269. *See id.* This issue of standing and the Ninth Circuit's decision is also a point of contention for the entertainment industry, as seen most recently in 2019 where Apple's lawsuit in the Supreme Court left open questions relating to who has antitrust standing and the kind of impact granting such standing can have in different contexts. Eriq Gardner, *How Apple's Loss at Supreme Court Could Impact Entertainment*, THE HOLLYWOOD REPORTER (May 13, 2019), https://www.hollywoodreporter.com/thr-esq/apples-loss-at-supreme-court-could-impact-entertainment-sector-1210031 [hereinafter Gardner, *Apple's Loss at Supreme Court*]. In 2019, YouTube TV subscribers were upset when the price for an "online bundle of television networks" was going to rise. *Id.* Google entered into a content licensing deal with Discovery, and the result was that YouTube TV "passed along the cost to consumers . . . [where] [n]o longer would YouTube TV cost $40 a month." *Id.* "Instead, the service would be priced at $50, or even more[, and] . . . those who signed up for the service through Apple had to pay $55." *Id.* Similar to the cost consumers have to pay for the Sunday Ticket Package, here consumers were also stuck paying "supracompetitive prices." *Id.* In this case, the district court rejected the class action against Apple because the court found that the app developer, not Apple, was the one setting the prices and selling directly to consumers, "even if such price was influenced by what Apple was charging the app developer to access its electronic store." *Id.* However, although the Ninth Circuit reversed the case before it reached the Supreme Court, once it did, the court did not find it proper to prevent app purchasers from suing Apple "for the way it allegedly has leveraged its monopoly." *Id.* Justice Kavanaugh stated that "[i]f a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission." *Id.*

270. *See* Gardner, *supra* note 6.

271. *See id.*

272. *See id.*

273. *See id.*

V. CONCLUSION

Picture a world where each NFL team has the ability to own the telecasting rights to its games: a world where consumers are not limited to a choice between a finite amount of free, over-the-air, local football games or paying hundreds of dollars per season to ensure access to every game.[274] This world is possible where all thirty-two teams have the ability to produce and license telecasts to not only other potential satellite and cable providers, but to digital streamers as well.[275]

The Ninth Circuit has made this vision a possibility by holding that both the NFL-Teams and NFL-DirecTV agreements constitute § I and § II violations of the Sherman Act.[276] Thus, the court has removed the exemption that the NFL has hidden behind for years.[277] Such a ruling will not only set the precedent for how the NFL will operate moving forward, but it will serve as a warning for other professional sports leagues when entering into distributorship agreements.[278] Nevertheless, granting standing to indirect purchasers weakens the Ninth Circuit's ruling and undermines the legitimacy of future plaintiffs who aim to sue on similar grounds.[279]

There is no question that football—a game of "strategy, foresight, and intuition"—is one of America's favorite sports.[280] With an average of over 16 million viewers per game, the league should be vigilant moving forward by focusing on their consumers to "[make] its games accessible to as many people as possible."[281] The current interlocking agreements between the NFL, its teams, and DirecTV does not benefit anyone except DirecTV and the league, resulting in dissatisfied consumers who are frustrated with prices *and* carriers who are prohibited from engaging in competition within the market.[282] While scholars have encouraged the NFL in the past to

274. *See* Gardner, *Apple's Loss at Supreme Court*, *supra* note 269.
275. *See id.*
276. *See* Paolino, *supra* note 134, at 45.
277. *See id.*
278. *See supra* Section IV.B.
279. *See supra* Section IV.B.
280. *See* Bublick, *supra* note 20, at 245.
281. Jabari Young, *National Football League Television Viewership Increases 5% for 2019 Regular Season*, CNBC (Dec. 31, 2019), https://www.cnbc.com/2019/12/31/nfl-television-viewership-increases-5percent-for-2019-season.html (highlighting that there was an average of 16.5 million viewers per game in 2019).
282. *See* Bublick, *supra* note 20, at 245.

"relinquish its stranglehold over [the] Sunday Ticket [and] . . . voluntarily terminate the exclusive contract for publicity purposes," the Ninth Circuit has now made the decision for the NFL—albeit at the expense of directly contradicting Supreme Court precedent.[283]

On February 7, 2020, the NFL "[filed] a high-stakes petition to the U.S. Supreme Court" in regards to the Ninth Circuit's ruling.[284] On Monday, November 2, 2020, the Supreme Court "declined . . . to review [the] lower court['s] decision."[285] Justice Brett Kavanaugh stated that although "a decision of such legal and economic significance might warrant [the Supreme Court's] review . . . the case comes to [the high court] at the motion-to-dismiss stage, and the interlocutory posture is a factor counseling against that."[286] Justice Kavanaugh made sure to emphasize that declining to review the case at this point in time does not constitute agreement with the Ninth Circuit's holding, and even went as far as suggesting that the NFL and DirecTV may have "a valid case" to petition the Court once more "if they lose in the lower courts" because the Ninth Circuit's decision is "in substantial tension with antitrust principles and precedents."[287] It is also worth noting that Justice Kavanaugh recognized that the plaintiffs in this case may not have antitrust standing to sue the NFL and its teams, regardless of having a valid case to petition the court in the future, because they are indirect purchasers.[288]

If the case had moved forward, the status quo would not have been immediately disrupted.[289] The NFL likely would have either been able to justify its exemption with a reversal of the Ninth Circuit's holding and "fatten [the] league's profits without benefiting sports consumers," or it would have been subject to "newfound legal scrutiny" with its broadcasting deals set to expire in the coming years.[290] Although it would have behooved the Supreme Court to reverse the Ninth Circuit's holding regarding standing

283. *See id.*
284. *See* Gardner, *supra* note 6.
285. Christopher Cole, *Justices Won't Block Bar Owners' Suit Against NFL, DirecTV*, LAW360 (Aug. 27, 2019) https://www.law360.com/articles/1324991/justices-won-t-block-bar-owners-suit-against-nfl-directv.
286. *Id.*
287. *Id.*
288. *Id.*
289. *See* Gardner, *supra* note 6.
290. *See id.*

to prevent an influx of illegitimate cases moving forward,[291] the future of the Sunday Ticket may nonetheless change for the better with streamers and "[d]igital powerhouses" ready to swoop in once all the NFL's current TV agreements expire after the 2022 season.[292]

Perhaps the solution to the league's issue is lobbying Congress once more to have the SBA extended to include not only broadcasting, but cable and satellite providers as well; however, until such an action takes place, it is clear that the NFL's formerly untouchable reign in the television industry is crumbling.[293]

Maya Rustom*

291. *See id.*

292. Dade Hayes, *AT&T Is Letting Non-Subscribers Stream NFL Sunday Ticket*, DEADLINE (Aug. 14, 2020), https://deadline.com/2020/08/in-a-first-att-is-letting-non-subscribers-stream-nfl-sunday-ticket-1203013890/.

293. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1146, 1159 (9th Cir. 2019).

* J.D. Candidate, Pepperdine Caruso School of Law; B.A. in Political Science, California State University, Northridge. Thank you to my family and friends for their constant support, guidance, and love throughout law school. A special thank you to my parents for inspiring me, reminding me of my goals during challenging times, and being my number one supporters. Thank you to my mentors and colleagues from past internships who have inspired me to stay driven and expand my knowledge within the entertainment industry. And a final thanks to members of the *Pepperdine Law Review* for their hard work and diligence throughout the publication process.