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SINGLED OUT: APPLICATION AND DEFENSE OF ANTITRUST LAW AND SINGLE ENTITY STATUS TO NON-TEAM SPORTS

I. INTRODUCTION

Each day the competition of professional athletes on the field of play captivates millions of people in the United States.¹ Behind the scenes, however, an entirely different type of competition is being waged in federal courtrooms.² Federal antitrust laws create a constant struggle to balance the interests of teams, individual players, leagues, and fans.³ Thus, it is with good reason that no other area of the law has so greatly impacted the development of professional sports.⁴

The Sherman Antitrust Act (“Sherman Act”) and The Clayton Antitrust Act (“Clayton Act”) regulate the contractual interactions of businesses so as to limit collusion and monopoly formation, and together provide the basis on which nearly all antitrust actions are brought against professional sports teams and leagues.⁵ Both laws, passed near the turn of the twentieth century, far preceded the lucrative world of modern

¹ See Paul D. Staudohar & James A. Mangan, *Introduction* to THE BUSINESS OF PROFESSIONAL SPORTS 1, 1 (Paul D. Staudohar & James A. Mangan eds., Univ. Illinois Press 1991) (indicating professional sports provide “considerable” entertainment and pleasure).

² See Gary R. Roberts, *Professional Sports and the Antitrust Laws*, in THE BUSINESS OF PROFESSIONAL SPORTS 135, 135 (Paul D. Staudohar & James A. Mangan eds., Univ. Illinois Press 1991) (explaining impact of antitrust law on professional sports).

³ See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 504 (E.D. Pa. 1972) (discussing some trade restrictive measures necessary for success of leagues). In *World Hockey*, the court noted that while not all trade restrictive measures will survive a Sherman Act challenge, the degree to which such restrictions help sustain the league must be balanced against their effect on player mobility. *Id.*; see also Michael Jay Kaplan, Annotation, *Application of Federal Antitrust Law to Professional Sports*, 18 A.L.R. FED. 489 (1974) (explaining the difficult trade-offs teams must consider in antitrust litigation). If antitrust laws are administered for the protection of players, the teams will suffer. *Id.* Conversely, administering the laws so as to protect the teams and leagues will be to the detriment of the players. *Id.*

⁴ Roberts, *supra* note 2, at 135 (indicating over past twenty years, antitrust law has significantly impacted sports). Since 1966, the National Football League (“NFL”) alone had litigated more than sixty antitrust actions. *Id.* Nearly every sport, with the exception of Major League Baseball, has litigated many antitrust actions. *Id.*

⁵ See *id.* (explaining Sherman Act is basis for most antitrust litigation).

professional sports.⁶ In order to effectively apply such legislation to the evolving world of professional sports, judges and lawyers have developed tests and defenses—such as the single entity defense—to help navigate the myriad of factual inquiries antitrust litigation requires.⁷

The Supreme Court initially recognized the single entity defense as a viable means of defending antitrust actions in a case far removed from professional sports.⁸ Various circuits rejected initial attempts to apply it to professional sports.⁹ Recently, however, the concept has received favorable treatment from several courts.¹⁰ Although professional sports are often league-centric entities, this Note explores the application of the single entity defense to an altogether different type of sports league: that which operates without teams.¹¹ These non-team sports (e.g. golf, tennis, auto racing) conduct business quite similarly to team sports, yet the very nature

⁶ See *id.* (noting Sherman Act passed in 1890). The first case to directly address the applicability of the Sherman Act to a professional sport came more than thirty years after the passage of the Act. See generally *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (applying Sherman Act to professional baseball in 1922). The bulk of professional sports antitrust litigation did not begin until the 1960s. See Roberts, *supra* note 2, at 135 (noting increase in antitrust litigation starting in 1960).

⁷ See *infra* notes 8-10, 30-33 and accompanying text (demonstrating several defenses and varying levels of acceptance among different courts).

⁸ See *Copperweld Corp. v. Independence Tube Corp.* 467 U.S. 752, 759-60 (1984) (marking first instance of Supreme Court's recognition of single entity defense available to corporate defendants). In its most basic form, the defense asserts that an entity and its constituent parts operate with a single unity of interest so as to functionally be one entity for antitrust purposes. *Id.* at 771-72, 774.

⁹ See *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League (Raiders II)*, 726 F.2d 1381, 1387-90 (9th Cir. 1984) (rejecting NFL's single entity defense claim). In the wake of *Copperweld's* favorable holding regarding the single entity defense, the NFL sought to utilize the defense in a move to stop one of its teams from relocating. *Id.* at 1384, 1387. The court rejected this approach noting "[t]he necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act." *Id.* at 1389; see also *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) (rejecting district court's finding that plaintiffs failed to allege agreement "between two or more persons").

¹⁰ See, e.g., *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 744 (7th Cir. 2008) (holding single entity defense applicable to NFL intellectual property licensing agreements); *Madison Square Garden, L.P. v. Nat'l Hockey League (MSG)*, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *12-13 (S.D.N.Y. Oct. 10, 2008) (refusing to preclude single entity defense based only on pleadings); *Seabury Mgmt., Inc. v. Prof'l Golfers' Ass'n. of Am., Inc. (Seabury I)*, 878 F. Supp. 771, 778 (D. Md. 1994), *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995) (finding golfer's association and trade organization is a single entity). The Fourth Circuit summarily affirmed the district court's finding relative to the defendants' single entity status. *Seabury Mgmt., Inc. v. Prof'l Golfers' Ass'n. of Am., Inc. (Seabury II)*, 52 F.3d 322, *3 (4th Cir. 1995) ("[W]e are convinced that no reasonable trier of fact could have found [the defendants] to be separate entities.").

¹¹ See discussion *infra* Part III.A-B (analyzing application of single entity defense to non-team sports).

of their enterprise makes them uniquely situated to take advantage of the single entity defense.¹²

This Note argues that attorneys representing non-team sports should always seek to advance the single entity defense and provides suggestions for the most effective way to do so.¹³ Part I provides a detailed history of the applicability of antitrust law to professional sports and the common defenses asserted by sports leagues.¹⁴ Part II examines the disparate treatment the same sports have received by different circuits.¹⁵ Parts III-A and III-B analyze the elements needed to advocate the single entity defense and analyze the single entity defense's gradually increasing acceptance.¹⁶ Part III-C offers practical advice for advocating the single entity defense and urges increased acceptance of the defense as it applies to non-team sports.¹⁷

II. HISTORY

A. *Antitrust Underpinnings*

The Sherman Act provides the basis on which nearly all antitrust actions are levied against professional sports leagues.¹⁸ The Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or within foreign nations, is declared to be illegal.”¹⁹ The expansive language of § 1 is limited somewhat by the Clayton Act, which exempts unions and other labor organizations from the Sherman Act for the

¹² See *Seabury I*, 878 F. Supp. at 777 (finding golf association legally incapable of violating antitrust law). In *Seabury I*, the district court noted that the entities in question functioned as a single unit; because the sport had no teams, it could not conspire with itself or its subsidiary partners. *Id.*

¹³ See analysis *infra* Part III.C (explaining single entity defense should always be advanced in antitrust actions against non-team sports).

¹⁴ See *infra* Part I (describing history and development of antitrust law in professional sports).

¹⁵ See discussion *infra* Part II (noting how different courts will treat same sport differently).

¹⁶ See analysis *infra* Part III.A-B (analyzing application of single entity defense to professional sports).

¹⁷ See analysis *infra* Part III.C (advancing practice suggestions and urging increased acceptance of single entity defense).

¹⁸ See Roberts, *supra* note 2, at 135 (noting first two sections of Sherman Act provide basis for most antitrust litigation).

¹⁹ Sherman Antitrust Act, 15 U.S.C. § 1 (2004) (codifying illegality of restraints of trade). The Sherman Act declares a wide range of activities to be illegal. *Id.* The Sherman Act makes it illegal to monopolize or attempt to monopolize trade or commerce, and applies to all corporations and associations organized under United States law. *Id.* at §§ 2, 7.

purpose of collective bargaining.²⁰

B. Application to Professional Sports

The earliest application of federal antitrust law to professional sports came in 1922 when the Federal Baseball Club of Baltimore alleged that the National League of Professional Baseball Clubs (a predecessor to Major League Baseball) illegally limited the competition of the league to which it belonged.²¹ The Supreme Court ruled that professional baseball was not involved in interstate commerce and affirmed a decision for the defendants.²² Although in a modern context it is clear that professional baseball has extensive interstate activity, the courts have only minimally limited this decision.²³ Following *Federal Baseball*, other sports have been

²⁰ Clayton Act, 15 U.S.C. §§ 12-27 (2004) (exempting labor organizations from antitrust scrutiny). Section 17 of the Clayton Act recognizes that the federal labor laws seek to balance the Congressional desire for competition within the market with the rights of employees to act together and organize to improve working conditions and wages. See *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 830 F. Supp. 1083, 1091 (N.D. Ill. 1993) (explaining § 17's impact on antitrust labor exemption). See generally ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW: CASES AND MATERIALS* 30, 37-38 (14th ed. 2006) (noting Sherman Act's sanctioning of unions and Clayton Act's "charter of freedom" for unions). Frequently, in the years directly following its passage, the Sherman Act was more often applied to unions than corporations. *Id.* The passage of the Clayton Act in 1914 sought to protect unions from Sherman Act violations. *Id.*; see also *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995) (noting nonstatutory labor exemption designed to protect multiemployer bargaining); *Ehredt Underground*, 830 F. Supp. at 1091 (explaining need for limitations on Sherman Act to protect union bargaining). Therefore, the aim of the Sherman Act should not be to limit union activity, especially in the area of collective bargaining. *Id.*

²¹ See generally *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (discussing baseball's exemption from antitrust law because not involved in interstate commerce). The plaintiff alleged that the defendants violated §1 of the Sherman Act by illegally buying the plaintiff's rivals and inducing them to join the defendant's league, thus leaving the plaintiff without any competition. *Id.* at 207.

²² See *id.* at 208-09 (explaining the basis for the decision). The Court noted that although some interstate activity was indeed necessary for the baseball games to be played, the actual "incident" in question, that is, the playing of the games, was purely an intrastate affair, and thus not subject to the federal antitrust laws. *Id.*

²³ See *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (holding only legislative action should remove baseball's antitrust exemption). The Court reached six primary conclusions regarding the status of MLB's antitrust exemption: 1) baseball is engaged in interstate commerce; 2) baseball's exemption is an anomaly; 3) the exemption should be confined to baseball; 4) those cases recognizing the exception should be afforded the full weight of *stare decisis*; 5) the exemption rests on recognition of baseball's unique circumstances; and 6) confusion would result from judicial overturning of the exemption, thus it should be left to legislative action. *Id.* at 282-83; *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (per curiam) (holding Congress can strip baseball of antitrust exemption if it desires); *Major League Baseball v. Crist*, 331 F.3d 1177, 1188 (11th Cir. 2003) (noting antitrust exemption should be read narrowly). The *Toolson* Court explained that Congress has not yet seen fit to bring baseball under the purview of the federal

subject to antitrust lawsuits.²⁴ Antitrust laws do not give these sports such a broad exemption as baseball, but do still enjoy some limited protections, especially in collective bargaining.²⁵

Antitrust actions involving professional sports typically take two forms: intraleague actions and extra-league actions.²⁶ Intraleague actions commonly involve a players' association suing a team or league claiming the latter has somehow conspired to restrain mobility or wages.²⁷ Extra-league actions typically involve a dominant sports league facing a challenge from either a rival league or a league outsider.²⁸ A plaintiff will allege a sports league has conspired with others to preclude the plaintiff's access to the market, and thus it is this action in which the single entity defense is most often used.²⁹

labor laws and absent such Congressional action, it is not the province of the Court to do so. *Tooltson*, 346 U.S. at 357. Recently, Congress limited the near blanket exemption in *Federal Baseball* to labor matters between MLB and its constituent teams and Players' Association. See Curt Flood Act of 1998, 15 U.S.C. § 26b (2002) (narrowing scope of MLB's antitrust exemption); *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D. Pa. 1993) (finding only MLB's reserve clause protected from antitrust scrutiny); Lacie L. Kaiser, Note, *Revisiting the Impact of the Curt Flood Act of 1998 on the Bargaining Relationship Between Players and Management in Major League Baseball*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 230, 248-50 (2004) (indicating limitations Curt Flood Act places on MLB's antitrust exemption).

²⁴ See Roberts, *supra* note 2, at 135 (listing sports that defend antitrust actions). The NFL, National Basketball Association ("NBA"), National Hockey League ("NHL"), and many other now defunct leagues have all defended antitrust actions. *Id.*

²⁵ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 142 (2d Cir. 2004) (holding league draft requirements exempt from antitrust law). Maurice Clarett challenged an NFL league rule requiring all players to be at least three full seasons removed from high school before being eligible in the NFL draft. *Id.* at 125. The court upheld the provisions noting they resulted from the collective bargaining process and not from an attempt by the NFL to conspire with its players union. *Id.* at 143; see also *Williams*, 45 F.3d at 688-93 (affirming district court's finding that antitrust immunity applies if there is a collective bargaining relationship).

²⁶ See Roberts, *supra* note 2, at 135 (describing intraleague and interleague actions).

²⁷ See *id.* at 136-43 (providing examples of intraleague disputes). Examples of intraleague actions have included circumstances where a player believed teams conspired against hiring him or where issues of compensation, player mobility and scheduling were involved. *Id.* at 140. Typically, these actions involve matters strictly concerning league business or rules promulgated by the league for its operation. *Id.*

²⁸ See *id.* at 136 (providing examples of interleague and extra-league disputes). Extra-league actions can occur when a rival or start-up league challenges a dominant league because it has monopolistic control over the market. *Id.* Alternatively, extra-league actions also occur when a league outsider, such as a television provider or stadium operator/lessor, sues the league. *Id.* at 137. These suits typically contend that the league has made it impossible for other teams to gain access to stadium venues or broadcast rights. *Id.* To succeed in such a suit, the plaintiff must prove that the defendant had a monopoly over a defined market and acted improperly in obtaining the monopoly. *Id.* at 136.

²⁹ See, e.g., *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n*, 665 F.2d 222, 223 (8th Cir. 1981) (describing action brought by tennis racket manufacturer, a league outsider); *Deutscher Tennis Bund v. ATP Tour, Inc.*, No. 07-178, 2008 WL 2520809, at *1 (D. Del. June 23, 2008)

C. Common Antitrust Defenses

Sports leagues have relied upon several defenses to justify what might otherwise be antitrust violations.³⁰ The statutory and nonstatutory labor exemptions are the most prevalent defenses in intraleague disputes.³¹ When disputes involve extra-league plaintiffs, sports leagues typically seek to advance the rule of reason and, more recently, the single entity defense.³²

D. The Single Entity Defense

The Supreme Court first recognized the single entity defense as a

(explaining action brought by tournament organizers, all league outsiders); *Seabury I*, 878 F. Supp. 771, 774 (D. Md. 1994), *aff'd in relevant part*, 52 F. 3d 322 (4th Cir. 1995) (noting action brought by trade show organizer, a league outsider).

³⁰ See, e.g., *Williams*, 45 F.3d at 686 (indicating NBA advanced nonstatutory labor exemption defense); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (recounting NFL advanced single entity defense); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League (Raiders II)*, 726 F.2d 1381, 1387 (9th Cir. 1984) (explaining parties mutually consented to rule of reason inquiry).

³¹ See *Caldwell v. Am. Basketball Ass'n.*, 66 F.3d 523, 527 (2d Cir. 1995) (quoting *Wood v. Nat'l Basketball Ass'n.*, 809 F.2d 954, 959 (2d Cir. 1987)) (holding nonstatutory labor exemption applicable where claim would "subvert fundamental principles of federal labor policy"). *Caldwell* sued the American Basketball Association ("ABA") claiming the teams of the league had conspired not to hire him. *Id.* at 526. The court noted that a collective bargaining agreement ("CBA") would invoke the statutory labor exemption of the Clayton Act; but, even without such an agreement, the nonstatutory exemption protected the conduct *Caldwell* complained of because federal labor policy governed *Caldwell's* claims. *Id.* at 527. Thus, if a CBA is in place, the statutory labor exemption protects both unions and management from antitrust liability. *Id.* at 530. In the absence of such an agreement, however, common law, nonstatutory protections still exist to further the goals of federal labor policy. *Id.*; see also *Williams*, 45 F.3d at 693 (holding nonstatutory exemption valid where teams are in process of renewing CBA). In *Williams*, the court noted that even where a CBA has expired, if management is still in good-faith negotiations for its renewal, the nonstatutory exemption protects management from antitrust actions by a player. *Id.*

³² See James J. LaRocca, *No Trust at the NFL: League's Network Passes Rule of Reason Analysis*, 15 UCLA ENT. L. REV. 87, 92-93 (2008) (defining rule of reason). The rule of reason is a judicially created test that examines the pro-competitive effects of seemingly anti-competitive actions. *Id.* at 92-93. When the "pro-competitive effects outweigh the anti-competitive effects, the court should not find an antitrust violation." *Id.* at 92-93. The courts have developed two versions of the test: a "full blown" analysis of the power, purpose and reason behind the actions, and a simpler "quick-look" test, which provides only a simple analysis to determine if an action is a per se violation of federal labor law. *Id.* at 93. The fundamental purpose behind the rule of reason test is an acknowledgement that not all anti-competitive actions subvert federal labor law. See *Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) (holding necessity of cooperation preempts per se rule in favor of rule of reason). Conversely, some actions are, on their face, so far contrary to the goals of federal labor law that the courts have declared them as per se violations of the Sherman Act. See *LaRocca, supra*, at 92-94; *Raiders II*, 726 F.2d at 1386-87 (explaining rule of reason test and its application).

viable means to avoid antitrust liability in *Copperweld Corp. v. Independence Tube Corp.*³³ The Court acknowledged that in some circumstances, subsidiary divisions of the same company cannot be guilty of antitrust violations because a company cannot collude with itself to monopolize a market.³⁴ Thus, the parent and its subsidiary is a single entity incapable of conspiring in violation of antitrust laws.³⁵ In the context of professional sports, the single entity defense has required a showing of cooperation to increase economic efficiency, a convergent economic interest, and several other indicia of unity of interests unique to professional sports.³⁶

In order for a sports league to show it cooperates to increase economic efficiency, it will need to prove that league management and the league's constituents operate collectively to increase the economic success of the league.³⁷ This task has proven to be difficult in the team sports

³³ 467 U.S. 752 (1984). *Copperweld Corporation* and its wholly owned subsidiary, Regal, attempted to prevent a former Regal employee from establishing his own tubing company on the basis of a non-competition agreement. *Id.* at 756. The former Regal employee sued and alleged that the two companies violated § 1 of the Sherman Act. *Id.* at 757-58. A jury returned a verdict for the plaintiff and the Seventh Circuit affirmed, but noted its trepidation in allowing intra-corporation violations of § 1 of the Sherman Act. *Id.* at 758. The Supreme Court reversed and held the parent and its subsidiary were incapable of conspiring with each other for the purpose of antitrust liability under § 1 of the Sherman Act. *Id.* at 777.

³⁴ *See id.* at 771 (explaining coordinated activity between parent and subsidiary is action of single entity). The Court explained that there is no debate that the conduct of a corporation and its unincorporated divisions is consistently viewed as the conduct of only the parent company because it reflects nothing more than a corporation's decision to divide its labor. *Id.* at 770. In following this reasoning, the Court held that a rule that punishes a corporation for seeking economic efficiency via a division of labor would not serve the goals of federal labor law. *Id.* at 771. The legal name given to a division is not the proper inquiry (e.g., subsidiary, wholly-owned subsidiary, or division), but rather whether the parent and subsidiary have a "complete unity of interest." *Id.* at 771-73.

³⁵ *See id.* at 771 (explaining parent and subsidiary "always have a 'unity of purpose or a common design'").

³⁶ *See* Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n (*Bulls II*), 95 F.3d 593, 598 (7th Cir. 1996) (describing purpose of single entity to internally increase economic efficiency). The court illustrated that convergent economic interests do not require a "conflict-free" enterprise. *Id.* at 598-99. The court noted that *Copperweld's* "complete unity of interest" language should not be read as a "proposition of law about the limits of permissible cooperation." *Id.* at 598. Rather, the courts look to whether an action is unilateral or concerted. *Id.* The former encompasses parent-subsidiary actions; thus, although intra-enterprise disputes may exist, there is still a convergent economic interest shared by the parent and subsidiary. *Id.* at 598-99; *see also* Marc Edelman, *Why the "Single Entity" Defense can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 925 (2008) (explaining indicia of single entity in professional sports). Professor Edelman suggests a single entity defense would require the existence of a "complete unity of interest" in each of the following areas: individual gate receipts, corporate proceeds, broadcast revenues, licensing/merchandising fees, and internet/new media revenue. *Id.*

³⁷ *See* Michael D. Tucker, Note, *Exploring the Copperweld Analysis in Kentucky Speedway*:

context because most teams retain independent ownership and profit interests.³⁸ Most courts have denied the National Football League (“NFL”), National Basketball Association (“NBA”), and Major League Soccer (“MLS”) single entity status.³⁹ Former Chief Justice Rehnquist expressed dissatisfaction with this treatment of sport league’s status, and instead suggested the NFL should be granted single entity status.⁴⁰

In addition to increasing economic efficiency, a sports league must also prove that it and its constituents share convergent economic interests.⁴¹

Single Entity Treatment for NASCAR and International Speedway Corporation, 15 SPORTS LAW. J. 99, 108 (2008) (discussing cooperation between NASCAR and independent racetrack operators). NASCAR provides the entertainment of stock car racing but also relies upon independent venue providers for a place to hold races. *Id.* Without the cooperation of race track owner/operators, NASCAR races could not take place. *Id.* Therefore, it is possible for NASCAR to argue that racetrack owner/operators are a distributor of their product, working collectively with NASCAR to increase the economic efficiency of the sport. *Id.*

³⁸ See *Fraser v. Major League Soccer, LLC (Fraser I)*, 97 F. Supp. 2d 130, 134 (D. Mass. 2000) (noting MLS is a limited liability company incorporated in Delaware). Based upon substantive corporate law of Delaware, “an LLC is a separate legal entity distinct from its members.” *Id.* (citation omitted); see also *Bulls II*, 95 F.3d at 597 (indicating NBA teams have separate ownership).

³⁹ See *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League (Raiders II)*, 726 F.2d 1381, 1389 (9th Cir. 1984) (holding NFL is not single entity). The court acknowledged that some degree of cooperation is required among NFL teams and NFL management for the league to function effectively. *Id.* at 1390. It held, however, that this cooperation was not enough to preclude the league from scrutiny under § 1 of the Sherman Act. *Id.*; see also *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972) (holding major sports other than baseball presumably not exempt from antitrust scrutiny); *Fraser v. Major League Soccer, LLC (Fraser II)*, 284 F.3d 47, 55 (1st Cir. 2002) (noting First Circuit does not recognize single entity status for sports leagues). *But cf.* *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 744 (7th Cir. 2008) (holding NFL is single entity for the purpose of intellectual property licensing); *Bulls II*, 95 F.3d at 600 (concluding NBA akin to single firm when “acting in the broadcast market”). In *American Needle*, the Seventh Circuit issued a narrowly tailored ruling, holding that insofar as intellectual property licensing is concerned, NFL teams act “as a single source of economic power” to promote NFL football. *Am. Needle*, 538 F.3d at 744.

⁴⁰ See *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari). The North American Soccer League (“NASL”) challenged a rule imposed by the NFL prohibiting its teams’ owners from cross-ownership of a team in the NASL. *Id.* at 1074. The district court found the NFL operated as a single entity but the Second Circuit reversed this decision. *Id.* at 1075. Justice Rehnquist contended that the NFL should be considered a single entity because if the teams were truly independent, there would be inconsistency in staffing, rules, scheduling, and other necessary features of a league. *Id.* at 1077. He noted the NFL is a market in which individual teams cannot compete effectively. *Id.* Accordingly, Justice Rehnquist reasoned that the NFL is a single entity because the teams collectively produced a product that no one team could produce alone. *Id.*; see also Myron C. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 2-3 (1983) (discussing Rehnquist’s view and analogizing to law firm partnership). Professor Grauer notes that the NFL is like a law firm: the teams are similar departments or partners that make operating rules without subjecting the firm to antitrust scrutiny. *Id.* at 3.

⁴¹ See Tucker, *supra* note 37, at 112 (noting requirement of convergent economic interests).

This element does not require every team to have complete unity of interest, but rather that the economic success of each entity is linked.⁴² This characteristic of a single entity is difficult for sports leagues to prove because, although the league's constituents' common goal is profit maximization, individual ownership allows them to achieve this goal in a variety of ways.⁴³

The unique structure of sports leagues has led some commentators to suggest additional requirements to help define "unity of interest" in the context of professional sports.⁴⁴ Professor of law Marc Edelman, suggests that the most successful sports leagues operate in a "mixed-mode" property allocation system.⁴⁵ In this model, Edelman suggests a unity of interest should be identifiable in five key revenue streams: individual gate receipts, corporate proceeds, broadcast revenue, licensing/merchandising fees, and internet/new media.⁴⁶ Edelman concludes the premier American sports

⁴² See *Bulls II*, 95 F.3d at 598 (explaining mere competing interests do not qualify divergent interests). The *Bulls II* court made the important point that even within a single entity, various divisions may have competing interests. *Id.* Judge Easterbrook noted that a company such as IBM undoubtedly will have competing interests among its various divisions and that "[c]onflicts are endemic in any multi-stage firm." *Id.* Thus, the requirement of convergent economic interests does not mandate "only conflict-free enterprises." *Id.*

⁴³ See *Raiders II*, 726 F.2d at 1389 (explaining mere cooperation by otherwise independent teams will not, without more, preclude rule of reason analysis). The court noted that although individual clubs often act for the common economic good of the league, the clubs are still separate business entities with separate economic values. *Id.* Thus, profits and losses are not shared, and teams make independent management decisions regarding the best way to raise revenue through hiring/firing, ticket prices, concessions, luxury box seat sales and franchise location. *Id.* at 1390.

⁴⁴ See Edelman, *supra* note 36, at 893-94 (discussing sports leagues' lack of unity of interest).

⁴⁵ *Id.* at 903-04 (defining mixed-mode structure). The mixed mode property system is one where individualized ownership exists for each team, but collectively, the teams relinquish some control to a central league for organizational and competitive purposes. *Id.* at 904. The teams in such a system recognize that while winning is important, so too is league parity created from a central management system. *Id.* Without such parity, fans will lose interest in the league, which will be detrimental to all those involved. *Id.*

⁴⁶ *Id.* at 911 (listing five key revenue streams). Edelman explains in detail why the premier sports leagues lack unity of interest in each revenue stream he identifies. *Id.* at 911-25. He notes that gate receipts are allocated differently in each league, but that these allocation schemes do not demonstrate a complete unity of interests. *Id.* at 911-13. He explains that corporate proceeds, such as those derived from stadium naming rights, are among the most fiercely sought after revenues within a sports league. *Id.* at 913-14. Member clubs actively compete for contracts with potential stadium name suitors on both a national and international level. *Id.* at 914. Edelman explains that various clubs within the same league allocate broadcast rights differently; some allow for extension into competitors' markets, while some do not. *Id.* at 919. The merchandising policies that individual teams follow also differ. *Id.* at 921. Most leagues have a loose collective structure in place for the pooling of IP licensing, which permits clubs to share equally in revenue derived from selling licensed apparel; however, teams may choose other options, like the NHL's Atlanta Thrashers who choose to forego nearly \$75,000 annually by prohibiting the sale of other

leagues lack unity of interest in these categories and thus advocates that the courts deny these leagues single entity status.⁴⁷

One final element of all antitrust actions is the concept of market size; specifically, a plaintiff must allege that it has suffered harm in a particularized market.⁴⁸ Often, defendants will seek to escape antitrust liability by asserting that the plaintiff has failed to establish the relevant market or, in the alternative, that the stated market is either overly broad or erroneously construed.⁴⁹ Market size and definition take on particular importance to the single entity defense because defendants increasingly assert that although they may not be a single entity in all respects, they are such in the given market at issue in the litigation.⁵⁰

teams' merchandise by their concessionaires. *Id.* Finally, Edelman notes that internet/new media revenues are very profitable, yet clubs often differ on whether they must surrender such rights to the league. *Id.* at 923-24; *see also* Madison Square Garden, L.P. v. Nat'l Hockey League (*MSG*), No. 07 CV 8455 (LAP), 2008 WL 4547518, at *2 (S.D.N.Y. Oct. 10, 2008) (explaining suit by New York Rangers against NHL for centralization of new media rights).

⁴⁷ *See* Edelman, *supra* note 36, at 925 (concluding premier American sports lack complete unity of interest).

⁴⁸ *See* Ky. Speedway, LLC v. Nat'l Ass'n Stock Car Auto Racing, Inc., No. 05-138 (WOB) 2008 WL 113987, at *5 (E.D. Ky. Jan. 7, 2008) (finding failure to prove relevant market "fatal to [plaintiff's] claims"). The court explained that demonstration of the relevant market is a key component of the rule of reason analysis because that test requires an anticompetitive effect "within relevant product and geographic markets." *Id.* at *6. Absent a showing of such markets, a company is free to choose (or not to choose) any distributor of its products without such an arrangement violating the Sherman Act. *Id.* at *1; *see also* Fraser II, 284 F.3d 47, 59 (1st Cir. 2002) (explaining plaintiffs must prove MLS exercised significant market power in defined market). Demonstrating power in *any* market is not sufficient for a § 1 claim. *Id.* Rather, the plaintiffs must properly define the market in which they allege injury and prove that competition in said market was adversely affected by the actions of the defendant. *Id.* Defendants may seize upon the opportunity of a poorly defined market to move for judgment as a matter of law with respect to market size. *See* Defendants' Motion for Judgment as a Matter of Law As to Relevant Product and Geographic Markets at I, Deutscher Tennis Bund v. ATP Tour, Inc., No. 07-0178 (D. Del. July 30, 2008), 2008 WL 3048973 [hereinafter *Defendants' Motion*] (asserting plaintiffs failed to properly allege market and suit should be dismissed). The defendants also sought to bar the plaintiff's market size expert testimony. *See* Defendants' Motion in Limine No. 1 to Exclude Expert Opinions Proffered by Andrew Zimbalist, Deutscher Tennis Bund v. ATP Tour, No. 07-0718 (D. Del. May 13, 2008), 2008 WL 2900898 (moving to exclude expert testimony). If the plaintiff fails to properly establish the market, the § 1 claim is incomplete and should be dismissed. *See* Fraser II, 284 F.3d at 59 (noting plaintiffs *must* have shown defendant's "significant market power in a properly defined market").

⁴⁹ *See* Fraser II, 284 F.3d at 59 (noting jury did not credit plaintiffs' market definition); *see also* Defendants' Motion, *supra* note 48, at I (alleging suit must be dismissed for failure to properly define market).

⁵⁰ *See* Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 742 (7th Cir. 2008) (noting court's decision will be limited to NFL member teams' IP licensing agreement). The *American Needle* court noted, "a single entity [issue] should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Id.*

III. FACTS

Due to the difficulties in determining single entity status, courts have reached inconsistent results concerning the same sport.⁵¹ Although the purpose of this Note is to advocate the use of this defense as it applies to non-team sports, its application to team sports is important in order to understand what a defendant must prove to successfully advance the defense.⁵²

A. *Professional Football: The National Football League*

For many years since *Copperweld*, several circuits rejected the NFL's attempt to utilize the single entity defense. Key among these decisions were *North American Soccer League v. National Football League*⁵³ and *Los Angeles Memorial Coliseum Commission v. National Football League (Raiders II)*.⁵⁴ In *North American Soccer*, the Second Circuit explained that to grant single entity status would effectively immunize the NFL from § 1 of the Sherman Act and thus from any sort of rule of reason analysis.⁵⁵ The court concluded this immunity would allow the NFL to adopt anti-competitive policies immune from analysis which could benefit a team or group of teams more than the league.⁵⁶ The Ninth Circuit echoed many of the Second Circuit's concerns when it too denied the NFL single entity status.⁵⁷ The court reasoned that the teams' need to

⁵¹ See discussion *infra* Part II.A-D (explaining different decisions courts have reached regarding same sport).

⁵² See Tucker, *supra* note 37, at 100 (discussing single entity applicability to NASCAR). The factors involved in *any* single entity analysis are the same. *Id.* at 112.

⁵³ 670 F.2d 1249 (2d Cir. 1982).

⁵⁴ 726 F.2d 1381 (9th Cir. 1984).

⁵⁵ *N. Am. Soccer*, 670 F.2d at 1257 (explaining single entity status would create a loophole allowing league members to escape antitrust liability). The court explained that by allowing the NFL to claim it is a single entity, its actions would no longer be subject to weighing the benefits of against the action's anticompetitive effect. *Id.*

⁵⁶ See *id.* (explaining how a policy would benefit a team more than league). The policy in question in *North American Soccer* was a league rule banning cross-ownership of teams in different sports. *Id.* at 1250. In other words, the rule prohibited an NFL team owner from owning a team in the NASL. *Id.* The court noted that this rule not only protects the league as a "single economic entity" but also serves to protect certain individual teams as "discrete economic entities." *Id.* at 1257. For example, the rule protects the economic integrity of individual teams by shielding them from competition from NASL teams in their respective home markets. *Id.* Accordingly, it would not make economic sense to grant blanket § 1 immunity to the NFL simply because the rule provides some measure of protection to the league as a single economic unit because doing so would disregard the anticompetitive effects of the rule. *Id.* at 1257-58.

⁵⁷ See *Raiders II*, 726 F.2d at 1388 (citing *North American Soccer*'s reluctance to grant total immunity from § 1 scrutiny). The court quoted from *North American Soccer* extensively in

collaborate for the survival of the league, should not alone preclude a rule of reason analysis any time the league adopts a policy with possible anticompetitive effects.⁵⁸

The Seventh Circuit has taken a much broader view of single entity status and granted such to the NFL in *American Needle, Inc. v. National Football League*.⁵⁹ The court contradicted the Ninth Circuit in holding that

agreeing that to grant single entity status would be to provide a loophole to the NFL and total immunity from § 1 scrutiny. *Id.*

⁵⁸ *Id.* at 1389 (holding NFL is not single entity despite need for cooperation). The court explained that acting for the common good of the league is not enough to qualify as a single entity. *Id.* Rather, as the NFL's constitution explains, the goal of the NFL is to "promote and foster the primary business of *League members*." *Id.* (emphasis added). Furthermore, the court concluded that the NFL consists of teams that are sufficiently independent to warrant a rule of reason test. *Id.*; see also Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 968-69 (1988) (explaining basis for courts denial of single entity status). Importantly, the league's teams are economic competitors of each other and thus cannot also be a single economic entity. *Id.*

⁵⁹ 538 F.3d 736, 744 (7th Cir. 2008) (granting single entity status for the purpose of IP licensing rights). Although the court took a broader view of the single entity defense, it limited its application to certain activities, specifically, "promoting NFL football through licensing the teams' intellectual property." *Id.* at 742, 744. The court articulated the limitation of its ruling by cautioning that a single entity defense evaluation should be taken not only one league at a time, but even one aspect of a league at a time. *Id.* at 742. In this case, the issue was only whether the NFL was a single entity for the purpose of "the teams' agreement to license their intellectual property collectively via NFL Properties." *Id.* Although the NFL narrowly framed the single entity issue as it pertained to IP licensing, following the decision in *American Needle* the NFL supported American Needle's petition for certiorari in an attempt to expand this ruling. See Brief for the NFL Respondents at 4, *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661 (U.S. Jan. 21, 2009), 2009 WL 164245 [hereinafter *NFL Respondents' Brief*] (responding to and supporting petitioner's request for certiorari). The NFL explained its position, stating:

Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule that (i) recognizes the single-entity nature of highly integrated joint ventures and (ii) obviates the uncertainty, chilling effects, and forum shopping that inevitably result from the current conflict among the circuits. If the petition is granted, the NFL will argue that professional sports leagues, which produce a product that no member club could produce on its own, and other joint ventures that involve a similarly high degree of economic integration, should be deemed single entities for Section 1 purposes, at least with respect to core venture functions, notwithstanding that the venture participants are separately owned and may not have a complete unity of interests.

Id. at 4. Not surprisingly, the NFL was supported by amicus briefs from the NBA, NBA Properties, and the NHL. See Brief of Amici Curiae National Basketball Association and NBA Properties in Support of the NFL Respondents' Response at 1, *Am. Needle*, No. 08-661 (U.S. Jan. 21, 2009), 2009 WL 164243; Brief for Amicus Curiae the National Hockey League in Support of the NFL Respondents at 1-2, *Am. Needle*, No. 08-661 (U.S. Jan. 21, 2009), 2009 WL 164244 (supporting certiorari and NFL's request to expand single entity recognition). The Supreme Court granted the petition for writ of certiorari on June 29, 2009. *Am. Needle*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (U.S. June 29, 2009) (No. 08-661).

the league should be a single entity precisely because NFL teams must cooperate to produce and promote NFL football.⁶⁰ In an admittedly philosophical passage, the court ponders, “[w]ho wins when a football team plays itself?”⁶¹

B. Professional Hockey: The National Hockey League

In contrast to football, the National Hockey League (“NHL”) successfully advocated the single entity defense in *San Francisco Seals, Ltd. v. National Hockey League (Seals)*.⁶² Moreover, the league continues to advance this claim in a case currently pending in the Southern District of New York.⁶³ *Seals* marked a pre-*Copperweld* decision in which the court held the NHL and its member teams operated within its league structure as

⁶⁰ *Am. Needle*, 538 F.3d at 743 (explaining necessity for cooperation is crucial to single entity analysis). The court adopted the exact opposite approach of the Ninth Circuit, by reasoning:

Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football It thus follows that only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football. Indeed, the NFL defendants introduced uncontradicted evidence that the NFL teams share a vital economic interest in collectively promoting NFL football.

Id. But see *Nat’l Collegiate Athletic Ass’n. v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101-03 (1984) (holding necessity of cooperation preempts per se rule in favor of rule of reason); Posting of Professor Gabriel Feldman to Sports Law Blog, <http://sports-law.blogspot.com/2008/08/return-of-single-entity-defense-for.html> (Aug. 19, 2008 21:30 EST) (disagreeing with *Am. Needle*’s holding). Professor Feldman argues the Seventh Circuit erred in its decision because the cooperation necessary among NFL teams should serve to avoid per se violations under § 1, but should not immunize the NFL from a rule of reason analysis. *Id.*

⁶¹ *Am. Needle*, 538 F.3d at 743.

⁶² 379 F. Supp. 966, 970 (C.D. Cal. 1974) (finding NHL and its teams are one single business enterprise).

⁶³ See *Madison Square Garden, L.P. v. Nat’l Hockey League (MSG)*, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *12-13 (S.D.N.Y. Oct. 10, 2008) (noting decision on single entity status not appropriate at current stage in litigation). Judge Preska explained that the circuit courts show disparity in how to properly determine single entity status. *Id.* at *12. Given the complexities of this determination, facts outside of the pleadings must be considered. *Id.* at *13; see also Memorandum of Law in Support of Defendant’s Motion to Dismiss or in the Alternative for Partial Summary Judgment at 14-18, *Madison Square Garden, L.P. v. Nat’l Hockey League*, 2008 WL 2364210 (S.D.N.Y. June 2, 2008) (No. 07 CIV. 8455 (LAP)) [hereinafter *NHL’s Mot. to Dismiss*] (arguing *Copperweld* mandates single entity treatment of NHL’s new media strategy). The NHL contends that *North American Soccer* should not control because it was pre-*Copperweld* and did not properly consider a league’s economic structure. *Id.* at 13-14. Rather, the NHL points to *Bulls II* and asserts that no single NHL team is an independent source of economic power for NHL related products. *Id.* at 17-18.

a single unit.⁶⁴ The court noted that despite the teams' relationship as athletic competitors, their only appreciable economic competition is with other similar leagues, and not with each other.⁶⁵

C. Professional Soccer: Major League Soccer

Courts have also subjected professional soccer to inconsistent and ultimately ambiguous treatment regarding its single entity status.⁶⁶ Perhaps the first league intentionally designed to combat antitrust allegations, MLS was still the subject of alleged violations of §§ 1 and 2 of the Sherman Act.⁶⁷ At the district court level, a judge granted MLS's motion for summary judgment and found the league was a single entity for antitrust purposes.⁶⁸ Upon review by the First Circuit, the court expressed doubt as to MLS's single entity status, but ultimately held that because the plaintiffs would still lose on other grounds, the decision of the district court should be affirmed.⁶⁹

⁶⁴ See *Seals*, 379 F. Supp. at 969 (noting defendant's assertion of single business enterprise). In *Seals*, the San Francisco Seals sued the NHL and its member teams when the league prohibited the Seals from relocating. *Id.* at 967. The court determined that the critical market in question was the entire product market of professional hockey, rather than the team's geographic area. *Id.* at 969. Therefore, within this given market, the plaintiffs and defendants were not economic rivals, but instead members of the same single business enterprise, the NHL. *Id.*

⁶⁵ *Id.* at 969-70 (explaining lack of economic competition between teams of the same league). The court determined that the plaintiff and defendant were not economic competitors in the relevant market because they were members of a single unit competing economically against other leagues who produce the same product (professional hockey). *Id.* But see *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League (Raiders II)*, 726 F.2d 1381, 1390 n.4 (9th Cir. 1984) (distinguishing case at bar from *Seals*). In *Raiders II* the Ninth Circuit did not overrule *Seals*' grant of single entity status, but rather chose only to exclude the NFL. *Id.*

⁶⁶ Compare *Fraser I*, 97 F. Supp. 2d 130, 137 (D. Mass. 2000) ("[T]here is no reasonable basis for imposing § 1 liability."), with *Fraser II*, 284 F.3d 47, 58-59 (1st Cir. 2002) (expressing doubt that MLS is single entity, but declining to take up the issue).

⁶⁷ See *Fraser I*, 97 F. Supp. 2d at 132 (outlining unique circumstances involved in formation of MLS). In 1995 Attorney Alan Rothenberg, who was familiar with the antitrust challenges faced by other sports leagues (in particular the NFL), helped form MLS. *Id.* He consulted with antitrust counsel to circumvent any future antitrust liability. *Id.* Despite his efforts, antitrust litigation ensued. See *id.*; see also Tim Bezbatchenko, Comment, *Bend it for Beckham: A Look at Major League Soccer and its Single Entity Defense to Antitrust Liability After the Designated Player Rule*, 76 U. CIN. L. REV. 611, 624 (2008) (explaining organizational structure of MLS). MLS is organized as a limited liability company owned by independent investors and managed by a centralized committee. *Id.* The league retains control over all individual teams and players. *Id.*

⁶⁸ *Fraser I*, 97 F. Supp. 2d at 137, 139 (describing facets of the league demonstrating single entity). The court found no reasonable basis to impose § 1 liability because the league owns the teams, contractually controls the terms by which an operator may run a team, and retains the power to terminate an operator's right to operate a team. *Id.* at 137. Therefore, economic power was centralized in one single entity governing the sport. *Id.*

⁶⁹ See *Fraser II*, 284 F.3d at 58-59 (expressing doubt as to MLS's single entity status but

D. Non-Team Sports: Golf & Tennis

Non-team sports differ from team sports in several important areas that help them to defend antitrust actions; for example, because non-teams sports typically do not have a player's union or a collective bargaining agreement with their sanctioning body, the statutory and nonstatutory labor exemptions are not available as antitrust defenses.⁷⁰ Perhaps more importantly, ownership in non-team sports is uniquely centralized because the sport's governing body is the sole ownership and rulemaking contingent.⁷¹ Another common characteristic among non-team sports is that the sport's governing body often does not own the facilities that the sport utilizes.⁷² These differences are critical to the single entity defense because they affect the cornerstones of single entity status—promotion of economic efficiency and common unity of economic interest.⁷³

In *Blalock v. Ladies Professional Golf Association*⁷⁴ (a pre-*Copperweld* case), a participant in the Ladies Professional Golf Association ("LPGA") sued the LPGA when it suspended her from competition for one year for cheating.⁷⁵ The LPGA advocated a rule of reason analysis but the

affirming on other grounds). The court explained that MLS represents a hybrid organizational structure that neither *Copperweld* nor its progeny were designed to evaluate. *Id.* at 58. The court recognized two options: either expand *Copperweld* and create new tests, or choose to reshape § 1's rule of reason analysis to account for such hybrid arrangements. *Id.* Rather than adopt either course of action, the court sidestepped the single entity issue altogether, and affirmed the district court's grant of summary judgment on grounds that the plaintiffs failed to demonstrate a market. *Id.* at 59; *see also* *Bezbatchenko*, *supra* note 67, at 630 (observing court's inaction left MLS's single entity status intact).

⁷⁰ *See* sources cited *supra* note 20 and accompanying text (explaining development of Clayton Act to protect collective bargaining).

⁷¹ *See Seabury I*, 878 F. Supp. 771, 777 (D. Md. 1994), *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995) (indicating the Professional Golfers' Association ("PGA") has ultimate control over all of its sections); *Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260, 1262 (N.D. Ga. 1973) (describing governing and ownership structure of LPGA). The LPGA Tournament Players Corporation Executive Board exclusively controls the "policies, business and affairs" of the Ladies Professional Golfer Association ("LPGA"). *Blalock*, 359 F. Supp. at 1262. The officers of the Executive Board are also LPGA members. *Id.*

⁷² *See generally* *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 57-58 (2d Cir. 1988) (explaining tennis tournament requires cooperation of several participants). For example, the various tennis tours do not generally own tennis venues large enough to support a tournament and thus must contract with venue providers. *Id.* at 58; *see also* *Tucker*, *supra* note 37, at 100 (noting NASCAR uses facilities owned by International Speedway Corporation).

⁷³ *See* *Tucker*, *supra* note 37, at 112 (explaining basic requirements for single entity defense).

⁷⁴ 359 F. Supp. 1260 (N.D. Ga. 1973).

⁷⁵ *Id.* at 1262-63 (explaining the facts of the case). The LPGA suspended the plaintiff after she moved her ball during tournament play in violation of the LPGA's rules. *Id.* at 1262. As the sole owner of the LPGA Tournament Players Corporation ("TPC"), the LPGA has exclusive

court rejected this approach and found the LPGA's conduct was per se illegal pursuant to § 1 of the Sherman Act.⁷⁶ This case was decided more than ten years prior to the Supreme Court's recognition of the single entity defense, and subsequently other courts have questioned the soundness of the *Blalock* decision.⁷⁷

The Professional Golfers' Association of America ("PGA") defended another antitrust lawsuit in *Seabury I*.⁷⁸ There, a trade show promoter claimed the PGA illegally conspired with the Middle Atlantic Section Professional Golfers' Association ("MAPGA") to limit its ability to conduct a golf trade show.⁷⁹ The PGA claimed it should be treated as a single entity because although not wholly owned, the MAPGA was a "member section" of the PGA.⁸⁰ The court agreed and held the PGA and MAPGA was a single unit legally incapable of conspiring.⁸¹

governing authority over all business matters of the LPGA. *Id.* The Executive Board of the LPGA voted to suspend the plaintiff; consequently, she claimed that her exclusion from golf represented a group boycott and a per se violation of § 1 of the Sherman Act. *Id.* at 1263.

⁷⁶ *Id.* at 1265-66 (finding LPGA's conduct illegal per se). The court noted that the plaintiff's competitors imposed the suspension because the members of the Executive Board were also fellow competitors on the LPGA tour. *Id.* at 1265. Moreover, the Executive Board stood to gain financially from excluding the plaintiff from participation in LPGA tournaments (i.e., there would be one less person against whom to compete). *Id.* The LPGA contended that the suspension was a valid exercise of regulatory power over its sport and thereby subject to the rule of reason analysis. *Id.* at 1266. The court found this argument unpersuasive and instead focused on the fact that the suspension was a "discretionary determination of an exclusionary sanction by a tribunal wholly composed of competitors." *Id.* at 1268.

⁷⁷ See *Brant v. U.S. Polo Ass'n*, 631 F. Supp. 71, 75-77 (S.D. Fla. 1986) (tracing substantial development of case law since the *Blalock* decision). Like *Blalock*, this case concerned the suspension of a player by the league's governing body. *Id.* at 71. However, the court rebuffed the plaintiff's reliance on *Blalock*, because it found "[the per se] standard no longer applicable in a sport context where the challenged rule is facially neutral." *Id.* at 75-77.

⁷⁸ 878 F. Supp. 771 (D. Md. 1994), *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995).

⁷⁹ *Id.* at 774-75 (describing plaintiff's allegations).

⁸⁰ *Id.* at 777. The court explained the substance of the relationship between parent and subsidiary is not as important as the functional relationship. *Id.* Thus, the unity of interest analysis trumps corporate structure in making a single entity determination. *Id.*

⁸¹ *Id.* at 777-78 (describing nature of relationship between PGA and MAPGA). The court acknowledged that the PGA and MAPGA are not the typical single entity envisioned by *Copperweld*. *Id.* at 777. Each maintains its own revenues, by-laws, corporate officers, and programs. *Id.* at 778. The court emphasized, however, that the PGA must approve all MAPGA actions to ensure they are in the PGA's best interest. *Id.* Indeed, the contract in question was approved by the PGA's general counsel. *Id.* Such an "ability to control" is at the heart of the unity of interest analysis. *Id.* Thus, although the two groups may not structurally be a single entity, the court viewed the degree of control and economic unity as the most important factors for the single entity determination. *Id.* Several commentators have criticized the holding in *Seabury I* because it places too much emphasis on the substantive economic relationship between the entities while seemingly overlooking the structural nature of the entities. See Posting of Professor Gabe Feldman to Sports Law Blog, <http://www.sports-law.blogspot.com/2008/10/msg-new-media-antitrust-claim-survives.html> (Oct. 13, 2008, 23:42 EST). Feldman notes that in

Tennis has also been the subject of antitrust litigation and has utilized the single entity defense with varying success on three notable occasions: *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*,⁸² *Volvo North America Corp. v. Men's International Professional Tennis Council*,⁸³ and most recently *Deutscher Tennis Bund v. ATP Tour, Inc.*⁸⁴ In each of these cases, the defendant tennis association asserted that it should be immune from § 1 scrutiny.⁸⁵ Yet, with the exception of *ATP* (and despite a governing structure similar to that in *Seabury*), the courts denied single entity status.⁸⁶ In *Gunter Harz* the defense was perhaps before its time, but *Volvo* represents an instance in which the court expressly rejected the defendant's single entity claim strictly because the defendant's structural business organization was a joint venture corporate structure.⁸⁷

The most recent case to involve professional tennis and antitrust litigation is unique in that it alleges not that the ATP is itself in violation of the antitrust laws, but rather that it, in combination with its tournament directors and organizers, has conspired to limit the ability of other "outside" tournament organizers from attracting top tier players.⁸⁸ The

Seabury: I the defendants were a trade organization and its subsidiary (the PGA and MAPGA) and not the governing body of men's professional golf (PGA Tour, Inc.). *Id.* This has spawned a secondary debate as to whether sports trade organizations are the functional and legal equivalent to sports governing bodies for the purpose of antitrust analysis. *See id.*; Posting of Professor Marc Edelman to Sports Law Blog. <http://www.sports-law.blogspot.com/2008/10/msg-new-media-antitrust-claim-survives.html> (Oct. 14, 2008, 12:35 EST).

⁸² 665 F.2d 222 (8th Cir. 1981).

⁸³ 857 F.2d 55 (2d Cir. 1988).

⁸⁴ No. 07-178, 2008 WL 2520809 (D. Del. June 23, 2008).

⁸⁵ *See Gunter Harz*, 665 F.2d at 223 (explaining defendant's assertion that it is immune from antitrust laws); *Volvo*, 857 F.2d at 70-71 (describing district court's ruling that defendant cannot conspire with itself); Answer and Affirmative Defenses at Affirmative Defense ¶ 4, *Deutscher Tennis Bund v. ATP Tour, Inc.*, No. 07-0718 (D. Del. May 4, 2007), 2007 WL 4425679 [hereinafter *Answer*].

⁸⁶ *See Gunter Harz*, 665 F.2d at 223 (applying antitrust law when "association wields enormous economic clout by virtue of its exclusive control"); *Volvo*, 857 F.2d at 71 ("[S]ince joint ventures-including sports leagues and other such associations-consist of multiple entities, they can violate § 1 of the Sherman Act."). In *ATP*, the jury found that ATP had not conspired with a separate entity or entities. Verdict, Agreement and Settlement, *Deutscher Tennis*, No. 07-0718 (D. Del. Aug. 5, 2008), 2008 WL 3857711 [hereinafter *Verdict*].

⁸⁷ *See Volvo*, 857 F.2d at 70-71 (rejecting district court's finding of § 1 immunity). The Second Circuit's brief discussion of the single entity issue indicated it rejected the district court's finding because the defendant was a joint venture and such organizations in other similar sports leagues were subject to § 1 scrutiny. *See id.* at 71. *But cf.* PHILLIP AREEDA, LOUIS KAPLOW & AARON S. EDLIN, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 196-97 (6th ed. 2004) (noting joint ventures connote no specific meaning or antitrust consequence). The joint venture corporate structure has no necessary antitrust implication. *Id.* at 197. Rather, it reflects a system wherein those in the venture act as a single productive unit for the sake of the venture, but retain independence for other purposes. *Id.*

⁸⁸ *See* Complaint and Jury Demand at ¶ 1, *Deutscher Tennis Bund v. ATP Tour, Inc.*, No.

defendants denied these allegations and asserted, inter alia, that the ATP was a single entity and thus immune from § 1 scrutiny.⁸⁹ The jury's special verdict further illustrates the importance of the single entity as a threshold issue, as the first question asked was whether the jury found a conspiracy "with any separate entity or entities."⁹⁰ The jury's negative response to this question absolved the defendants from any liability.⁹¹

IV. ANALYSIS

A. Preliminary Considerations

The single entity defense, like most of antitrust law, requires extensive fact specific inquiries.⁹² Thus, it is difficult for courts to agree upon common tests or common applications of tests.⁹³ Further complicating the analysis of antitrust cases is the recent trend in several courts to focus the single entity analysis on one specific facet of the league or one particular aspect of litigation.⁹⁴ Despite the near impossibility of developing a uniform system for single entity analysis, recent decisions indicate a gradually increasing acceptance of the single entity defense, especially as it applies to non-team sports.⁹⁵ For this reason, sports league

07CV00178 (D. Del. Mar. 28, 2007), 2007 WL 4425678 (alleging antitrust violations). The plaintiffs alleged the ATP decreased the number of top tier events and thereby increased the value of those events the ATP sanctions. *Id.* at ¶¶ 41, 89 (alleging ATP and its member tournaments are independent entities).

⁸⁹ See Answer, *supra* note 85, at Affirmative Defense ¶ 4 (asserting single entity defense). The defendants employed the customary language here arguing that "[t]he Complaint and the relief sought therein are barred . . . because ATP is a single entity and is legally incapable of conspiring with its officers, directors, or members." *Id.*

⁹⁰ See Verdict, *supra* note 86, at Question I (inquiring as to finding for § 1 liability).

⁹¹ See *id.* (showing "no" response as to defendant's liability).

⁹² See Edelman, *supra* note 36, at 925 (describing various inquires that must be made to determine if a league is a single entity).

⁹³ See sources cited *supra* note 87 and accompanying text (noting opinions differ on importance placed on structural organization of a league). In *Seabury I*, for example, the court chose to look beyond the corporate structure of the defendant and instead, considered the unity of interests between the divisions. *Seabury I*, 878 F. Supp. at 778, *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995). Conversely, in *Volvo* the court conducted a corporate structure analysis and summarily concluded a joint venture was not a single entity. *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988).

⁹⁴ See *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 742 (7th Cir. 2008) (limiting decision to NFL's IP licensing initiative); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n (Bulls II)*, 95 F.3d 593, 600 (7th Cir. 1996) (holding NBA more like single firm than group of firms insofar as broadcast rights are concerned); see also sources cited *supra* note 59 and accompanying text (describing the limits of *Am. Needles'* holding).

⁹⁵ Compare *Am. Needle*, 538 F.3d at 744 (holding single entity defense valid in 2008), and *Fraser II*, 284 F.3d 47, 55-58 (1st Cir. 2002) (failing to overturn single entity finding of lower

defendants should always seek to advance the single entity defense.⁹⁶

The judicial analysis of a plaintiff's claim differs depending on whether the case concerns a labor relations issue, or the organizational structure of the league as a business entity.⁹⁷ Courts are much more apt to entertain the single entity defense in the latter claims because the former are typically controlled by the statutory or nonstatutory labor exemptions.⁹⁸ The effect of the single entity determination undoubtedly played a role in this trend; total immunity from § 1 is a broad grant of power to sports leagues.⁹⁹

B. *Early Errors & Gradual Acceptance*

More recent decisions show increased partiality to the single entity defense.¹⁰⁰ In part, this change is due to a deliberate effort by leagues to organize their corporate structure and sports governance in a way that would fulfill single entity status.¹⁰¹ As a result, in most of the decisions granting single entity status, the league is either newly created or the

court in 2002), and *Madison Square Garden, L.P. v. Nat'l Hockey League (MSG)*, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *12-13 (S.D.N.Y. Oct. 10, 2008) (acknowledging single entity defense, but declining to resolve issue because it was not ripe), and *Fraser I*, 97 F. Supp. 2d 130, 137 (D. Mass. 2000) (finding MLS a single entity in 2007), and *Seabury I*, 878 F. Supp. at 778 (finding PGA a single entity in the year 1994), with *Volvo*, 857 F.2d at 75 (rejecting single entity claim in 1988), and *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League (Raiders II)*, 726 F.2d 1381, 1410 (9th Cir. 1984) (dismissing single entity claim in 1984), and *Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260, 1265-66 (N.D. Ga. 1973) (failing to discuss single entity claim in 1973).

⁹⁶ See sources cited *supra* notes 63, 85 and accompanying text (describing defendants' pleadings asserting single entity defense).

⁹⁷ Compare *supra* note 31 and accompanying text (examining *Caldwell* holding), with *supra* note 59 and accompanying text (reviewing *Am. Needle* holding).

⁹⁸ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 142 (2d Cir. 2004) (explaining nonstatutory labor exemption quashes antitrust action based upon rules promulgated in collective bargaining); *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 686 (2d Cir. 1995) (discussing trial court's finding of antitrust immunity by virtue of nonstatutory labor exemption). The very purpose of these two exemptions is to give a narrow grant of immunity in the area of union/management relations and collective bargaining. See *supra* note 25 and accompanying text (explaining *Clarett* holding); see also cases cited *supra* note 31 and accompanying text (asserting nonstatutory exemption should control where labor dispute is at issue). Courts are not likely to give the very broad immunity of the single entity defense in cases where the more narrow exemptions are available. See cases cited *supra* note 31 and accompanying text.

⁹⁹ See cases cited *supra* notes 55-57 and accompanying text (recognizing single entity status as broad grant of § 1 immunity).

¹⁰⁰ See sources cited *supra* notes 55-58, 87 and accompanying text (noting *N. Am. Soccer, Raiders II*, and *Volvo* rejected the single entity defense and were decided prior to 1989).

¹⁰¹ See sources cited *supra* note 67 and accompanying text (explaining organizational structure of MLS was contrived to avoid antitrust liability).

decision is limited to a newly created aspect of the league.¹⁰²

The arguments advanced against single entity status for the “premier” American sports are either greatly diminished or all together moot for non-team sports, which operate outside of the league environment.¹⁰³ First, the unity of interest analysis advanced by Professor Edelman has only limited application to non-team sports because the lack of teams systematically unifies the five key revenue streams in the sport’s governing body.¹⁰⁴ Second, the fact that these sports do not have teams means that the governing bodies retain sole directorial control over the sport.¹⁰⁵ Third, the governing bodies of non-team sports have complete unity of interest even when they collaborate with sponsors and venue providers because this collaboration increases efficiency and is a necessary aspect for the survivability of the sport.¹⁰⁶ A professional golfer, for example, without the PGA and the courses at which it holds its tournaments, is without a job.¹⁰⁷

¹⁰² See *supra* notes 59, 63 and accompanying text (demonstrating challenge to specific league aspect in form of IP licensing and new media strategy).

¹⁰³ See *infra* notes 104-107 and accompanying text (advocating traditional arguments against single entity status should not apply to non-team sports).

¹⁰⁴ See *supra* notes 45-46 and accompanying text (explaining mixed-mode property allocation and five key revenue streams). Edelman’s premise of the five key revenue streams is based largely on the fact that the premier American sports leagues operate in a mixed-mode property system. See *supra* note 45 and accompanying text (examining mixed-mode system). By contrast, non-team sports have no property to allocate because their constituents (i.e., athletic participants) have no vested property interest in the league. See *supra* notes 45, 70-73 and accompanying text (comparing differences between team and non-team sports).

¹⁰⁵ See *supra* note 71 and accompanying text (recognizing that LPGA and PGA have sole directorial control over their respective organizations).

¹⁰⁶ See Tucker, *supra* note 37, at 108 (advocating single entity application for NASCAR and International Speedway Corporation (“ISC”) based on interdependent relationship). Non-team sports often do not own the venues at which the sport is played, thus contracts between the sport’s governing body and venue providers are essential to the continued success of the sport. *Id.* Tucker suggests that NASCAR should advocate a “distribution” argument wherein it would claim that ISC is a distribution subsidiary of NASCAR. *Id.* This reasoning is sound because, regardless of whether the venue is a race track, golf course, or tennis stadium, these sports cannot function without the venue subsidiary. See *id.* (advancing distribution argument); see also *supra* note 48 and accompanying text (explaining district court’s findings in *Kentucky Speedway*). Moreover, the *Kentucky Speedway* court explained that a company may choose or exclude whomever it wishes as a “distributor,” and a “jilted distributor” may not seek redress via the antitrust laws absent a showing of harm in a defined market. *Ky. Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, No. 05-138 (WOB), 2008 WL 113987, at *5 (E.D. Ky. Jan. 7, 2008).

¹⁰⁷ See *supra* notes 75-76 and accompanying text (explaining *Blalock* decision). When the LPGA suspended Blalock it prevented her from playing golf in any LPGA tournament (hence her group boycott allegation) and effectively rendered her unemployed. See *Blalock v. Ladies Prof’l Golf Ass’n*, 359 F. Supp. 1260, 1262-63 (N.D. Ga. 1973). Therefore, a professional golfer who does not belong to some type of league is essentially unemployed. See *id.* at 1265-68 (indicating

In the *Blalock* case, both the defendants and the court missed an opportunity for an application of the single entity defense.¹⁰⁸ Although the concept of the single entity defense was not a novel idea when *Blalock* was decided, courts' understanding of it was limited at the time of the decision.¹⁰⁹ Had the single entity defense been more prevalent, and had the defendants more carefully framed the single entity issue, the court could have reached a different conclusion.¹¹⁰ The LPGA could have asserted that in formulating its rules and the sanctions pursuant thereto, the LPGA acted with a complete unity of interest in furthering the integrity and economic prosperity of the game of women's golf.¹¹¹ The case would have then become a battle of the per se arguments: per se liability as a group boycott, or per se immunity as a single entity.¹¹² Due to the fact that liability for a

Blalock's alternative employment options were limited).

¹⁰⁸ See *supra* note 76 and accompanying text (describing the reasoning of the *Blalock* court). The court focused on the per se standard in deeming a group boycott as illegal. *Blalock*, 359 F. Supp. at 1265-66. *But see* *Brant v. U.S. Polo Ass'n.*, 631 F. Supp. 71, 75-77 (S.D. Fla. 1986) (indicating per se standard should no longer be applicable in sports context). The *Blalock* defendants did not advance the theory that the illegality of the group boycott is derived from § 1 of the Sherman Act, and therefore a valid single entity claim would obviate the need for a § 1 analysis. See *Blalock*, 359 F. Supp. at 1266 (explaining defendants relied upon rule of reason analysis); *supra* note 57 and accompanying text (explaining single entity status grants immunity from § 1).

¹⁰⁹ See *San Francisco Seals, Ltd. v. Nat'l Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974) (marking an early recognition of single entity status in 1974); see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759-66 (1984) (providing first in-depth analysis of the single entity defense).

¹¹⁰ See *supra* note 76 and accompanying text (explaining arguments by *Blalock* defendants and findings of *Blalock* court). The court alone did not miss the single entity opportunity; the defendants also failed to adequately advance the issue in their arguments. *Blalock*, 359 F. Supp. at 1266. Instead, the defendants chose to combat the plaintiff's claims by justifying their actions with the rule of reason. See *id.* A better approach would have been to advance the single entity defense thereby negating the need to present any justification at all. See *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982) (explaining single entity status eliminated need for rule of reason analysis).

¹¹¹ See *supra* note 80-81 and accompanying text (indicating unity of interest analysis is critical in single entity determination). The *Blalock* defendants could have argued that their actions represent their ability to control the game, and it is this centralized ability that represents a unity of interest in the LPGA. See *id.* (comparing similar argument by *Seabury I* defendants). Critics point to the fact that in *Seabury I* the defendant organization was not the governing body of men's professional golf. See *supra* note 81 and accompanying text (explaining arguments of Professor Feldman). What the defendant controls, however, is immaterial in comparison to its ability to control. See *id.* (explaining *Seabury I* court's "ability to control" reasoning); see also sources cited *supra* notes 34, 36, 42, 81 and accompanying text (explaining various unity of interest analyses). Thus, if a defendant's unity of interests provides it with the ability to control its constituent parts, single entity status is proper. See *Seabury I*, 878 F. Supp. 771, 778 (D. Md. 1994), *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995).

¹¹² See *supra* note 76 and accompanying text (indicating the *Blalock* court decided the case using per se analysis pursuant to § 1); see also *supra* note 55 and accompanying text (indicating

group boycott is derived from § 1, that claim would be moot because the single entity defense would create immunity under the same section.¹¹³ As a result, the PGA could have argued it was entitled to judgment as a matter of law.¹¹⁴

The *Volvo* court also erred because it based its denial of single entity status almost entirely on the defendant's business organization structure.¹¹⁵ The *Volvo* court recognized the defendant was a joint venture and concluded that because other joint ventures and other sports leagues had been denied single entity status, so too should the Men's International Tennis Council.¹¹⁶ In doing so, the court focused narrowly on one aspect of the defendant's business and failed to consider the defendant's unity of economic interests or whether economic interests were increased under the collaboration.¹¹⁷ In effect, the court deemed joint ventures as per se excluded from single entity status without engaging in the fact intensive reasoning required by the single entity defense.¹¹⁸

Two of the more recent cases, *American Needle* and *MSG*, have both demonstrated sound reasoning and analysis of the single entity

single entity status grants immunity from § 1).

¹¹³ See *supra* note 76 and accompanying text (discussing *Blalock* court's use of per se analysis under § 1); see also *supra* note 55 and accompanying text (demonstrating single entity status grants immunity from § 1). The per se illegal argument pursuant to § 1 and the single entity argument are mutually exclusive. See *N. Am. Soccer*, 670 F.2d at 1257. Thus, the finding of single entity status immunizes the defendant from § 1 claims. *Id.*

¹¹⁴ See *NHL's Mot. to Dismiss*, *supra* note 63, at § II (requesting dismissal or partial summary judgment on single entity issue); see also *Verdict*, *supra* note 86, at Question 1 (indicating single entity issue is threshold question for § 1 liability).

¹¹⁵ See sources cited *supra* note 87 and accompanying text (describing Second Circuit's rejection of single entity defense).

¹¹⁶ See *supra* note 87 and accompanying text (discussing Second Circuit's reasoning in rejecting single entity defense). The Second Circuit's decision spans twenty-one pages yet devotes only one paragraph to the single entity claim. *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 70-71 (2d Cir. 1988). Moreover, the decision holds that joint ventures may violate § 1, but never contextualizes the facts specific to this particular joint venture. *Id.* at 71; cf. *AREEDA ET AL.*, *supra* note 87, at 196-97 (noting joint ventures have no inherent antitrust implications).

¹¹⁷ See *supra* note 87 and accompanying text (explaining Second Circuit's analytical approach); see also *supra* notes 34, 36, 80 and accompanying text (describing *Copperweld's* requirement of a functional single entity inquiry over a structural inquiry). *Copperweld* cautioned that the single entity inquiry must center on the unity of interests between parents and subsidiaries, and not in the structural nomenclature of the division. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-73 (1984).

¹¹⁸ See *Copperweld*, 467 U.S. at 770-71 (noting function of corporate divisions more important than nomenclature of divisions). The legal name given to a division is not the proper inquiry; rather, whether the divisions have a complete unity of interest is of paramount importance. *Id.* at 771-73.

defense.¹¹⁹ *American Needle* represented a common sense application of single entity status; instead of granting the NFL the broad privilege of § 1 immunity, the court limited its ruling only to the specific aspect of the league being challenged in the litigation.¹²⁰ This application helps to curb criticism that the defense is too broad and would grant leagues too much leeway.¹²¹ Likewise, the *MSG* court recognized the status of the NHL was not the true issue, but rather the issue concerned the status of the NHL relative to its new media strategy.¹²² Application of the defense in this way is sound because it tackles the heart of the issue of any litigation, and avoids the broad grant of immunity that opponents of the defense criticize.¹²³

¹¹⁹ See sources cited *supra* notes 59, 63 and accompanying text (addressing single entity reasoning in *American Needle* and *MSG*).

¹²⁰ See *supra* note 59 and accompanying text (discussing court's limited application of single entity status). The Seventh Circuit realized that although the single entity defense is a broad grant of immunity, this should not limit its application where circumstances dictate it should apply. *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 742, 744 (7th Cir. 2008). Thus, instead of foreclosing the defense, it is best to limit its application. See *id.*

¹²¹ See sources cited *supra* notes 55-58 and accompanying text (explaining single entity status confers too much immunity to NFL); Feldman, *supra* note 60 (explaining Professor Feldman's arguments against the *Am. Needle* decision). Feldman's contention that the Seventh Circuit erred in *American Needle* is based on his belief that cooperation among teams should preclude per se liability in favor of a rule of reason analysis. *Id.* This point, however, broadly expands the court's ruling beyond what the court intended. See *Am. Needle* 538 F.3d at 742 (limiting holding to NFL's IP licensing plan). The court did not grant the NFL single entity status and instead limited its holding only to the NFL's IP licensing plan. *Id.* It took such a limiting approach for the specific reason that "NFL teams share a vital economic interest in collectively promoting NFL football." *Id.* at 743. Thus, the Seventh Circuit did not say that the NFL shares a collective interest in controlling team relocation, broadcast rights, or interleague ownership. *Id.* Rather, the court narrowly tailored its holding to apply only "when promoting NFL football through licensing the teams' intellectual property." *Id.* at 744. With this narrow victory, the NFL is perhaps overzealously attempting to expand this ruling to "core [league] functions." See *NFL Respondents' Brief*, *supra* note 59, at 4 (describing NFL's support of certiorari in *Am. Needle*). This decision may be motivated by the impending expiration of the NFL's CBA and the NFL's desire to obtain antitrust exemption other than the nonstatutory labor exemption. See cases cited *supra* note 25 and accompanying text (noting antitrust immunity stemming from collective bargaining relationship). The NFL's attempt to establish itself as a single entity is not without judicial support. See sources cited *supra* note 40 and accompanying text (elucidating Justice Rehnquist's support for granting the NFL single entity status). A better strategy, however, is a compartmentalized approach to the defense in order to avoid criticism that the defense is overly broad. See *Am. Needle*, 538 F.3d at 742, 744 (holding breadth of single entity status should limit, but not foreclose application).

¹²² See *Madison Square Garden, L.P. v. Nat'l Hockey League (MSG)*, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *13 (S.D.N.Y. Oct. 10, 2008) (demonstrating single entity determination not properly decided on pleadings alone). The fact specific inquiry of the single entity defense requires the judge to examine the specific aspects of the challenged plan, and not simply the league as a whole. See *id.*

¹²³ See *supra* note 59 and accompanying text (noting the issues in *Am. Needle* and holding of the court). In granting single entity status, the *American Needle* court did no more than structure

The newest breed of antitrust cases seeks to apply § 1 of the Sherman Act to the contracts between sports leagues and those that organize, sponsor, and provide venues for the leagues' events.¹²⁴ Opponents of this collaboration point to the fact that a sponsor or venue provider is typically an independent corporation, and thus it cannot have a complete unity of interest with the sport.¹²⁵ This assertion is misplaced, however, when examined on the micro-level as in *American Needle* and *MSG*.¹²⁶ In effect, for the purpose of perpetuating the sport, a venue provider (or title sponsor, etc.) becomes a venue subsidiary, resulting in a complete unity of interest between the sport and its venue subsidiary for the purpose of any specific event.¹²⁷

C. Practical Suggestions

As a practical matter, when defending an antitrust action, non-team sports should always seek to advocate the single entity defense as early in the litigation as possible.¹²⁸ Attorneys must demonstrate the unity of

its holding to the precise issue raised by the defendants: single entity status relative to IP licensing. *Am. Needle*, 538 F.3d at 744.

¹²⁴ See *supra* notes 88-91 and accompanying text (describing allegations and pleading of ATP case).

¹²⁵ See *supra* note 88 and accompanying text (describing allegations of plaintiff's complaint in ATP case).

¹²⁶ See *Am. Needle*, 538 F.3d at 742 (applying single entity defense to specific aspect of the NFL, not league as a whole). When examined on the micro-level, the requirement that the defendants have a complete unity of interest in all that they do is not the correct inquiry. *Am. Needle*, 538 F.3d at 724 (quoting *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n (Bulls II)*, 95 F.3d 593, 600 (7th Cir. 1996) ("[S]ingle entity [status] should be addressed . . . 'one facet of a league at a time.'"). Rather, it is proper to examine the unity of interest as it pertains to the subject of the litigation. *Id.*; see also Tucker, *supra* note 37, at 108 (discussing how venue provider may be a sport's "distribution arm" to satisfy single entity defense). Thus, notwithstanding the fact that a sport and a title sponsor may not *always* share a unity of interest, generally it is enough to show there is a unity of interest for the purpose of event sponsorship. See *id.*

¹²⁷ See Tucker, *supra* note 37, at 108 (explaining relationship between NASCAR and its venue provider, ISC). By limiting the application of single entity status to a specific facet of a sport, attorneys may argue that, for example, venue providers become temporary venue subsidiaries and for the purposes of the contract in question, share a unity of interest with the sport. See *id.* (advancing "distribution arm" single entity argument); see also *Am. Needle*, 538 F.3d at 742 (limiting holding to NFL's IP licensing plan); *NHL's Mot. to Dismiss*, *supra* note 63, at 1-5 (discussing NHL's new media strategy). Therefore, this limiting approach acknowledges that non-team sports leagues and those with whom they contract will not always share a complete unity of interest, but they may share a unity of interest relative to the specific facts of a given lawsuit. *Am. Needle*, 538 F.3d at 742.

¹²⁸ See *N. Am. Soccer League v. Nat'l Football League*, 505 F. Supp. 659, 671 (S.D.N.Y. 1980), *rev'd*, 670 F.2d 1249 (2d Cir. 1982) (explaining NFL advanced single entity argument in a pre-trial brief); see also *supra* notes 63, 89 and accompanying text (indicating best to advocate

interest concentrated in the sport's governing body, or represented in the contracts between the sport and its collaborators.¹²⁹ More specifically, attorneys should limit applying the defense to the specific aspect of the sport the plaintiff seeks to challenge.¹³⁰ Attorneys defending a non-team sport must seek to demonstrate that it would be unable to function effectively without the defendants' cooperation in furthering the sport's economic interest.¹³¹

Defense attorneys should also seek to attack the market size definitions alleged by the plaintiffs.¹³² Attorneys should first seek to demonstrate that the plaintiffs failed to establish the requisite market, limited in both size and geography.¹³³ Second, attorneys should again

single entity defense in pleadings and motions early in litigation). Because the single entity defense serves to provide immunity from § 1, successfully advocating the defense early in the pleadings could render the remaining allegations moot. *N. Am. Soccer*, 670 F.2d at 1257. The fact specific nature of the defense requires extensive discovery, thus summary judgment is the most efficient means to advance the defense. See *Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *13 (S.D.N.Y. Oct. 10, 2008) (indicating single entity consideration requires discovery to determine specific facts outside of pleadings).

¹²⁹ See sources cited *supra* notes 36-37 and accompanying text (describing requirements of single entity defense).

¹³⁰ See *Am. Needle*, 538 F.3d at 738-39 (explaining how NFL narrowly framed the issue); *supra* notes 59, 63 and accompanying text (noting importance of carefully framing issue when applying single entity defense). It is important that defendants do not attempt to broadly apply the defense. *Am. Needle*, 538 F.3d at 738-39; see also *NHL's Mot. to Dismiss*, *supra* note 63, at 1-5 (demonstrating narrow scope of a defendant's motion for partial summary judgment). *But see supra* note 88 and accompanying text (demonstrating expansive allegations in a plaintiff's complaint). This is often difficult to accomplish at trial where the plaintiff will seek to establish the relevant market and aspects of the sport at issue. See *id.* It may be necessary, therefore, to frame partial summary judgment motions. See *Am. Needle*, 538 F.3d at 738-39 (describing scope of defendants' summary judgment motion). Likewise, at the appellate stage it is important for the appellant sports league to narrowly frame the issue when it contends the lower court erred in denying single entity status. See *id.* at 742.

¹³¹ See sources cited *supra* notes 36, 60 and accompanying text (explaining need to show increased economic efficiency and cooperation).

¹³² See *Fraser II*, 284 F.3d 47, 59 (1st Cir. 2002); see also sources cited *supra* notes 48-49 and accompanying text (demonstrating challenges to market-definition element of plaintiff's § 1 claim). The plaintiff bears the initial burden of establishing antitrust injury within a particular market. *Fraser II*, 285 F.3d at 59. Once this is accomplished, the defendant's first opposition should be to the market size definition. See *Defendants' Motion*, *supra* note 48, at 1 (attacking plaintiff's market size definition). This is most efficiently accomplished by moving for judgment as a matter of law because, without a properly defined market, the plaintiff has failed to state a cognizable § 1 claim and therefore the defendants are entitled to judgment. See *id.* (detailing arguments presented in defendants' motion); see also *supra* notes 49, 69 and accompanying text (noting defendant entitled to judgment if plaintiff cannot establish market).

¹³³ See sources cited *supra* note 48 and accompanying text (explaining defense motions based on plaintiff's failure to establish product and geographic market). As evidenced in the *ATP* case, defendants may attack market definition via two paths: either attempt to exclude expert testimony regarding market definition via an evidentiary motion in limine, or file a motion for judgment as a matter of law asserting that plaintiff's definition is insufficient. See *Defendant's*

focus at the micro-level and assert that within a given market, the sport in question is a single entity.¹³⁴ Again, the fact specific nature of the single entity defense allows the attorney to focus his defense in a small market area and a small sector of the league's operations.¹³⁵

V. CONCLUSION

The antitrust law's dramatic impact on professional sports continues to provide a hotbed of litigation, commentary, and debate.¹³⁶ Sports leagues face a constant challenge to justify their actions in the face of anticompetitive allegations. The single entity defense provides one way in which non-team sports may seek exemption from § 1 of the Sherman Act. Recent trends in antitrust jurisprudence suggest the defense may have new life, especially if defendants carefully frame their approach.

In light of these decisions, non-team sports leagues should always advance the single entity defense as early in the litigation as possible. In doing so, the leagues should seek to limit their application to the specific aspect, plan, or component of the league challenged by the plaintiffs. This approach will help curb criticism that the defense is overly broad, and moreover, will simplify the unity of interest requirement that the defense mandates. Non-team sports are in a unique position to successfully

Motion, *supra* note 48, at I; Defendant's Motion in Limine, *supra* note 48.

¹³⁴ See *supra* note 59 (demonstrating concept of single entity status for a particular purpose); see also sources cited *supra* note 48 and accompanying text (explaining importance of market definition in antitrust analysis). It follows that if a sport may be a single entity within a given operational aspect, and market definition is a required aspect of antitrust analysis, then the sport should be a single entity within a narrowly defined market. See *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, No. 05-138 (WOB), 2008 WL 113987, at *6 (E.D. Ky. Jan. 7, 2008) (emphasizing requirement that anticompetitive effect occurs in specific market); Tucker, *supra* note 37, at 108 (explaining relationship between NASCAR and ISC). For example, NASCAR and its race track provider may not be parent and subsidiary, but within the relevant market of top tier North American stock car racing, they operate as a single entity to promote the efficiency of competitive auto races. See *id.*

¹³⁵ See *Madison Square Garden, L.P. v. Nat'l Hockey League (MSG)*, No. 07 CV 8455 (LAP), 2008 WL 4547518 at *12 (S.D.N.Y. Oct. 10, 2008); *Am. Needle*, 538 F.3d at 742; *Ky. Speedway*, 2008 WL 113987, at * 5; see also sources cited *supra* notes 48, 59-60 (considering importance of micro-analysis regarding market and business sectors). Thus, the defendants' framing of the defense and issue become critical; narrowly tailoring both will help offset the breadth of immunity associated with the defense. See cases cited *supra* notes 59, 63 and accompanying text (explaining importance in narrowly framing issues).

¹³⁶ See Posting of Professor Gabe Feldman to Sports Law Blog, <http://sports-law.blogspot.com/2009/02/2009-tulane-law-school-moot-court-mardi.html> (Feb. 25, 2009 18:34 EST). In 2009, Tulane Law School, sponsor of the prestigious Moot Court Mardi Gras Invitational Sports Law Competition, chose the single entity issue as raised in *Am. Needle* and *MSG* as the basis for its competition. *Id.*

advance the defense because their league structures and governances allow the leagues to demonstrate the economic unity of the sport. Still, leagues must be careful not to be too bold in their assertion of single entity status.

The single entity defense is a war that must be fought “one battle at a time.” Therefore, careful framing of the single entity issue, integrating the distribution and venue subsidiary arguments, and challenging market definitions are all essential elements of the defense. The above will help mitigate the concerns over the defense’s blanket grant of immunity and will encourage courts to reasonably apply the defense without exempting an entire league from antitrust law.

The future of the single entity defense is still very much open to interpretation by the courts. Undoubtedly, the Supreme Court’s review of *American Needle* will mark a key point in the defense’s continued viability as applied to sports leagues. Notwithstanding the future of *American Needle*, non-team sports will remain uniquely situated to advance the defense. Carefully doing so should result in these sports’ successful defense of antitrust allegations.

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