CHAPTER 3 · ANTITRUST LAW

Section 1: The Baseball Anomaly

It has been observed, with considerable wisdom, that the relationship between professional sports leagues and the antitrust laws has been a curious one.[1] On the one hand it was not until the late 1960's that the antitrust laws began to have an influence on the structure of employment, and other, relationships in professional sports. On the other hand, since then, the antitrust laws have had an enormous impact, to say the very least.

A primary reason for the tardy application of these laws to professional sports unquestionably arises from the peculiar case of baseball and the Supreme Court's 1922 decision in *Federal Baseball* finding baseball exempt from the antitrust laws and its continued unwillingness to overrule its early decision. In the 1950's, however, the Court made it clear that other sports would not be similarly exempt and, thereafter, challenges to league rules under the antitrust laws followed.

The development of the treatment of baseball under the antitrust laws has been singular. For this reason alone, its treatment is significant. For historical perspectives and principles of jurisprudence, as well, the treatment of baseball under the antitrust laws is significant.

Historians usually trace the beginning of modern baseball to the adoption on February 2, 1876, of a formal constitution by the National League of Professional Baseball Clubs. The founders of what is presently the National League also instituted the first standard form contract, which the founders designed to prevent players from contract jumping. Nevertheless, team owners engaged in sometimes fierce bidding for talented players, resulting in the failure of eight of the original fifteen teams by the end of the 1879 season. Accordingly, in 1879 team owners in the National League secretly agreed to adopt the first reserve system. Under this agreement, each team put all of its players on a "reserve" list. Owners pledged to refrain from hiring or attempting to hire any player on the reserve list of any other club.[2]

The 1879 agreement among National League clubs was effective, and the prosperity the owners enjoyed[3] attracted competition. It effectively increased profitability among league clubs and, in turn, attracted competition. In 1881 wealthy brewery owners and other backers began a new baseball league, the American Association.[4] The

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1 WEISTART AND LOWELL, THE LAW OF SPORTS, Michie, Bobbs-Merrill at 477.

2 On September 29, 1879, the owners met and announced:

> The financial results of the past season prove that salaries must come down. We believe that players in insisting on exorbitant prices are injuring their own interests by forcing out of existence clubs which cannot be run and pay large salaries except at a large personal loss. The season financially has been a little better than 1878; but the expenses of many of the clubs have far exceeded their receipts, attributable wholly to the large salaries. In view of these facts, measures have been taken by this league to remedy the evil to some extent in 1880.

House Subcomm. on Study of Monopoly Power, H.R. Doc. No. 2002, 82d Cong., 2d Sess. 38 (1952) at 22.

3 In 1881, a majority of teams showed a profit for the first time since the league's organization. Receipts and earnings skyrocketed. Gross receipts at Philadelphia rose from $39,583 in 1884 to $99,000 in 1887. *Id.* at 24-25.

4 National League team owners derisively labeled the new league the "beer and whiskey league" because of the occupation of its founders. *See* H. Turkin & S. Thompson, *supra* note 44, at 39.
The platform of the league stated:

> Honest competition, no syndicate baseball, no reserve rule, to respect all contracts and popular prices....
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> All of the gentlemen present ... strongly intimated that it was war to the finish with the National Organization. By abolishing the reserve rule [*sic*] the new league thinks it will get a hold on the best baseball talent in the

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new league, which was not a party to the secret reserve agreement, created a bidding war by hiring away many players from teams in the National League. Profits plummeted, and teams in both leagues struggled for financial survival.

Owners in both leagues quickly recognized the impact that wage competition had on their profits. After the 1882 season, the two leagues signed a compact that was known as the National Agreement. This agreement permitted each team to reserve a stipulated number of players in a manner similar to the first reserve agreement. The compact prohibited teams from hiring or attempting to hire players on the reserve list of another team. The leagues prospered again and this prosperity again attracted competition. In 1884 a new league, the Union Association, was organized "specifically to fight the 'outrageous' reserve rule."[5] Although the Union Association hired many good players from the existing leagues, popular interest in baseball was not sufficient to support three leagues with thirty-four clubs. Consequently, the new league failed after one season of play.

Baseball's prosperity prompted the formation of employee organizations as well as the creation of new leagues.[6] In the fall of 1885 players from the New York Giants organized the first union of professional athletes, the Brotherhood of Professional Baseball Players. Other clubs followed and created chapters of the union. The primary goal and impetus for formation of the organization was the abolition of the reserve system.[7] By the end of the 1887 season, the fledgling organization had one hundred members and demanded an end to maximum player salaries and the reserve system, as well as recognition as the players' bargaining representative.

The owners refused and retaliated with a player classification plan. Under this plan owners unilaterally set players' salaries up to a maximum salary of $2,500. Owners forced the players to assent to the classification plan under threat of blacklisting. Leaders of the Brotherhood of Professional Baseball Players responded by creating yet another new league — the Players' League. On November 4, 1889, the Players' League issued a "Declaration of Independence" and began a truculent campaign against the established leagues with some initial success.[8]

The New York franchise of the National League, the Metropolitan Exhibition Company, lost several players to the Players' League and filed suit to enjoin its players from joining the new league. The court in *Metropolitan Exhibition Co. v. Ewing*[9] held that the reserve clause bound a player to a team vis-a-vis other teams in the National and American Leagues, but did not prevent a player's employment in a new league. The drafter of the reserve clause, A.G. Mills, who was president of the National League when the National Agreement was adopted, later concurred with the *Ewing* court's conclusion.

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country.... *A New Baseball League*, N.Y. TIMES, Sept. 18, 1889, *reprinted* in TIMES ENCYCLOPEDIA, *supra* note 43, at 4.

[5] H. TURKIN AND S. THOMPSON, THE OFFICIAL ENCYCLOPEDIA OF BASEBALL 16 (7th rev. ed. 1974).

[6] The monopoly power of the leagues after the National Agreement led to many abuses. For example, in 1885 the leagues voted to limit salaries to $2,000 and to eliminate salary advances. These measures led to hardship for many players because of the seasonal nature of employment. Moreover, the salary ceiling was approximately one-half of the salary that star players of the day had been earning. In addition, team owners imposed fines and suspensions for minor violations. One owner fined a player for failing to tip his hat.

[7] Salary limitations, the reserve rule, and other perceived abuses "brought the smoldering resentment of the players into the open." John Montgomery Ward, an early leader of the Brotherhood of Professional Baseball Players, wrote in an open letter to the president of the National League that the reserve rule was "a fugitive slave law."

[8] The Players' League established teams in seven of the eight National League cities and scheduled games for the same dates and times as National League games. Moreover, nearly two thirds of the National League's approximately one hundred players signed with teams in the Players' League.

[9] 42 F. 198 (C.C.S.D.N.Y. 1890)

> The "reserve rule," as I formulated it for the use of the clubs of our alliance, placed its obligation upon clubs, and prohibiting [sic] them from employing or negotiating with players reserved to other clubs; the penalties prescribed for the violation of such reserve rule were placed upon the clubs and the Association of which they were members, and not upon the players, who were not parties to the compact.

Subsequent courts, similarly, were unwilling to prevent players from abrogating their contracts. In the majority of cases courts denied petitioning clubs equitable relief on grounds that the underlying contract lacked mutuality or definiteness or that the contract was an impermissible restraint on trade. Since courts were reluctant to enforce the reserve provisions of players' contracts, team owners entered into agreements among themselves to restrain their players. For example, team owners reached a no-tampering agreement, which they enforced by threats of fines and forfeitures of games. Moreover, owners agreed to blacklist players who did contract with other teams.

The 1891 season was a financial disaster for all three leagues. Although the Players' League drew more attendance than either the National League or American Association, it nonetheless did not survive. Disagreements arose between the National League and the American Association when teams from each league attempted to sign players from the defunct Players' League. In 1891 the American Association withdrew from the National Agreement and began to recruit players from the National League. Four of the American Association's most profitable franchises, however, moved to the National League. This move increased the size of the National League to twelve teams and resulted in the failure of the American Association. For the next nine years the National League operated without a rival league.[10] This monopoly position again resulted in abuses. Owners unilaterally decreased players' salaries as much as forty percent and on occasion withheld players' salaries for relatively minor infractions.[11]

The National League's next challenge came from the American League, which was organized in 1900. The American League recruited many National League players because of the willingness of American League team owners to pay salaries in excess of the National League limit of $2,500.[12] In 1903 team owners in the two leagues concluded that cooperation was necessary for their prosperity and established the National Baseball Agreement. The agreement provided for a player draft and stated:

> Contracts with players must be respected under the penalties specified. The right and title of a major league club to its players shall be absolute, and can only be terminated by release or failure to reserve under the terms of the agreement by the club to which a player has been under contract.[13]

This agreement brought stability and prosperity to the teams once again.

In 1913 the Federal League was organized with teams in Brooklyn, Pittsburgh, Buffalo, Baltimore, St.

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10 Interestingly, the National League in 1892 instituted a split season to spark greater fan interest. The winner of the first half of the season played the winner of the second half to determine competitors in the World Series. This procedure was remarkably similar to the playoff system that the leagues adopted after the 1981 strike.

11 Amos Rusie, after leading the National League in strikeouts for six successive seasons and winning 24 games for New York in 1895, had his salary reduced from $3,500 to $3,400. In 1894 a group of promoters announced their intention to revive the American Association. Two managers and a player in the National League were among these promoters. The three men were given six weeks to abandon their plan or face permanent expulsion from organized baseball.

12 Cy Young, Jimmie Collins, Clark Griffith, and Napolean Lajoie were among the players who moved from the National League to the American League at this time. The National League franchise in Philadelphia went to court and successfully prevented Lajoie from playing for Connie Mack's rival Philadelphia Athletics. *Philadelphia Ball Club, Ltd. v. Lajoie*, 202 Pa. 210, 51 A. 973 (1902).

13 L. Sobel, PROFESSIONAL SPORTS AND THE LAW 88 (1974) (quoting HOUSE REPORT ON ORGANIZED BASEBALL at 34).

Louis, Kansas City, Indianapolis, and Chicago.[14] After the two established leagues refused to permit the Federal League to become a party to the National Agreement, the Federal League responded by recruiting players from the National League and the American League.[15] The two established leagues retaliated by blacklisting any player who moved to the new league. Attendance was low for the Federal League teams. Moreover, the three leagues suffered from the increased number of teams as well as a general economic depression and the advent of World War I.

In December 1915 the Federal League owners reached an agreement with owners in the National League and the American League that effectively ended the new league's existence.[16] Under this agreement owners in the National League and the American League paid the Federal League owners to dissolve the new league.[17] The agreement permitted some Federal League team owners to purchase existing franchises in the National League and the American League.[18] The agreement also gave all blacklisted players amnesty and permitted the Federal League teams to assign their contracts with players to teams in the established leagues.

FEDERAL BASEBALL CLUB OF BALTIMORE, INC. v. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS

259 U.S. 200 (1922)

HOLMES, Justice

This is a suit for threefold damages brought by the plaintiff in error under the Anti-Trust Acts of July 2, 1890, and of October 15. The defendants are the National League of Professional Base Ball Clubs and the American League of Professional Baseball Clubs, unincorporated associations, composed respectively of groups of eight incorporated baseball clubs, joined as defendants; the presidents of the two Leagues and a third person, constituting what is known as the National Commission, having considerable powers in carrying out an agreement between the two Leagues; and thee other persons having powers in the Federal League of Professional Baseball Clubs, the

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[14] Unlike the Union Association and the Players' League, which arose as a result of reform platforms, businessmen formed the Federal League solely as a capital investment.

[15] Of the 264 players who played in the Federal League during the 1914 and 1915 seasons, only 43 were not under contract to any club in the American or National Leagues at the time they signed with the Federal League.

On January 18, 1914, The New York Times declared: "The high-water mark in the frenzied finance of baseball was reached with the Federal League's big offer to 'Ty' Cobb of $15,000 a year for five years. Cobb last year was the highest salaried outfielder in the game, receiving $12,000 from Detroit." *Baseball Salaries Reach Top Mark*, N.Y. TIMES, Jan. 18, 1914, § 4, at 1, col. 1, *reprinted in* TIMES ENCYCLOPEDIA, *supra* note 43, at 17. In a revealing display of journalistic license the article continued:

> The recent activity of the outlaw league in threatening to invade the territory of the major league clubs has given an artificial impetus to the salaries of baseball players. Experienced baseball men say that the high salaries which are now being offered are absurd, in contrast to the profits made in baseball, and that when the reaction comes, the result will be the loss of a great deal of money by club owners.... During the Brotherhood trouble and during the American League raid, the value of baseball players jumped considerably, and the price has been going up ever since. *Id.*

[16] An article in The New York Times stated: "The most disastrous war that the baseball game has ever experienced came to a close here tonight when a treaty of peace between the Federal League and both parties to the national baseball agreement, known as Organized Baseball, was signed." *Long Baseball War is Settled*, N.Y. TIMES, Dec. 23, 1915, at 10, col. 1, *reprinted* in TIMES ENCYCLOPEDIA, *supra* note 43, at 19.

[17] The major leagues agreed to pay Federal League backers $600,000 in return for dissolution of the Federal League.

[18] The agreement permitted the Chicago Federals to purchase the Chicago Cubs and the St. Louis Federals to buy out the St. Louis Browns.

relation of which to this case will be explained. It is alleged that these defendants conspired to monopolize the base ball business, the means adopted being set forth with a detail which, in the view that we take, it is unnecessary to repeat.

The plaintiff is a baseball club incorporated in Maryland, and with seven other corporations was a member of the Federal League of Professional Baseball Players, a corporation under the laws of Indiana, that attempted to compete with the combined defendants. It alleges that the defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League, and that the three persons connected with the Federal League and named as defendants, one of them being the President of the League, took part in the conspiracy. Great damage to the plaintiff is alleged. The plaintiff obtained a verdict for $80,000 in the Supreme Court and a judgment for treble the amount was entered, but the Court of Appeals, after an elaborate discussion, held that the defendants were not within the Sherman Act. The appellee, the plaintiff, elected to stand on the record in order to bring the case to this Court at once, and thereupon judgment was ordered for the defendants. It is not argued that the plaintiff waived any rights by its course.

The decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery. A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two. Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the States. But we are of opinion that the Court of Appeals was right. The business is giving exhibitions of baseball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in ... the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

Judgment affirmed.

Note on Baseball's Exemption from the Antitrust Laws: *Federal Baseball* and its Progeny

The Supreme Court's decision on *Federal Baseball* removed all legal obstacles to the continued maintenance of the reserve system and sustained the system against all challenges for an additional fifty years. Players, however, continued to resent the system. In 1946 several players from the Pittsburgh Pirates organized the American Baseball Guild. The players sought collective bargaining with the management of the Pittsburgh franchise. Upon a petition for an election among Pirate players, the National Labor Relations Board, consistent with the Supreme Court's

conclusion in *Federal Baseball*, determined that baseball was not "commerce" within the meaning of the National Labor Relations Act.[19] Team owners, however, reacted to the effort by making several concessions to the players, including the adoption of a minimum salary, the establishment of a pension fund, and the shortening of the spring training period.[20]

During that same year the Mexican League began to recruit from the National League and the American League.[21] In a challenge to the reserve system by a player who was blacklisted for jumping his contract to play in the Mexican League, Judge Frank's concurring opinion in *Gardella v. Chandler*[22] recognized that the Supreme Court had broadened considerably the definition of "interstate" activates and "trade or commerce" for purposes of the Sherman Act during the intervening years since *Federal Baseball*.[23] Thus, Justice Holmes' conclusion in *Federal Baseball* that the Sherman Act did not apply to professional baseball was no longer tenable.[24] Judge Frank voted to remand the case to the trial court and opined that plaintiff's allegations, if proven, demonstrated that baseball was "a monopoly which, in its effect on ballplayers like the plaintiff, possesses characteristics shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America."[25] *Gardella* ultimately was settled before the Supreme Court could reconsider the *Federal Baseball* holding. Encouraged by Judge Frank's opinion, other players nevertheless challenged on antitrust grounds various aspects of the reserve system.[26] The Supreme Court in *Toolson v. New York Yankees, Inc.*[27], however, reaffirmed its holding in *Federal Baseball* and

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[19] Although the case never was reported officially, The New York Times noted that the Board denied jurisdiction because baseball was not "commerce" within the meaning of the National Labor Relations Act (NLRA). *Pennsylvania Labor Board Orders Pirates' Election on Guild Aug. 20*, N.Y. TIMES, Aug. 8, 1946, at 25, col. 3; *see* L. Sobel, *supra* note 32, at 271. *Cf.* Hoffman, *Is the NLRB Going to Play the Ball Game?*, 20 LAB. L.J. 239, 244 (1969). Subsequently, players rejected the American Baseball Guild in an election held under the auspices of the Pennsylvania Labor Relations Board. Krasnow & Levy, *supra* note 37, at 763.

[20] H. Turkin & S. Thompson, *supra* note 44, at 24; *see* L. Sobel, *supra* note 32, at 272; Maher, *Players' Association: A United Front ... To Face Owners*, L.A. TIMES, Feb. 12, 1973, § 3, at 6, col. 2. The New York Times reported:

> The most elaborate and complicated pension program ever undertaken by a professional sport was adopted yesterday when the National and American Leagues ... agreed to a plan assuring veteran baseball players an income ranging from $50 to $100 per month on reaching fifty years of age.
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> It was estimated yesterday that the ball clubs will carry approximately 80 percent of the burden of upkeep, thereby yielding another signal victory to the players who, when they started their movement for better working conditions last year, included a pension request among their demands. Drebinger, *Pension Program for Players Voted by Major Leagues*, N.Y. TIMES, Feb. 2, 1947, § 5, at 1, col. 1.

[21] *House Report on Organized Baseball*, *supra* note 34, at 77.

[22] 172 F.2d 402 (2d Cir. 1949).

[23] *Id.* at 412 (FRANK J., concurring).

[24] *Id.* at 408-09.

[25] *Id.* at 409.

[26] *See Corbett v. Chandler*, 202 F.2d 428 (6th Cir.), *aff'd sub nom. Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir.), *aff'd sub nom. Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Martin v. Chandler*, 85 F. Supp. 131 (S.D.N.Y. 1949).

[27] 346 U.S. 356 (1953). *Toolson* was a consolidation of cases in which players challenged the reserve system on antitrust grounds. Plaintiff baseball player was assigned by one team to another in the Yankee "farm" system. He refused to report to the new

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maintained baseball's exemption from the Sherman Act. For nearly twenty more years the reserve system continued to operate quietly.[28]

FLOOD v. KUHN
407 U.S. 258 (1972)

BLACKMUN, Justice

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.[1] Collateral issues of state law and of federal labor policy are

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team and was placed on an ineligible list. As a result, he was barred from playing baseball. *See Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd per curiam*, 200 F.2d 198 (9th Cir. 1952), *aff'd*, 346 U.S. 356 (1953). After its consideration of the case, the Supreme Court ruled:

> We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Base-ball Clubs*. 346 U.S. at 357. For a criticism of the *Toolson* holding, *see* L. Sobel, *supra* note 32, at 26-29.

[28] The quiet operation was interrupted in 1959 when Branch Rickey proposed to organize a third league, the Continental League. At the same time a congressional subcommittee was conducting hearings on Senator Kefauver's bill to remove the antitrust exemption from baseball. When Congress did not adopt the measure, the impetus behind the proposed league failed. "Again, Organized Baseball adapted to the nascent pressure by the expansion of the American League and then the National League for the first time since 1899 to include franchises in several of the cities for which Continental league teams were proposed." H. Turkin & S. Thompson, *supra* note 44, at 26. The New York Times reported the proposal of the third league:

> After more than half a century as a two-league operation, big-time baseball this week was faced with the prospect of a third major league.... The third league, with founding teams in New York, Houston, Denver, Toronto, and ... Minneapolis-St. Paul, expects to begin operating as an eight, ten or even a twelve-team circuit by 1961. *3rd League Hurls Curve at Majors*, N.Y. TIMES, Aug. 2, 1959, at E8, col. 5, *reprinted in* TIMES ENCYCLOPEDIA, *supra* note 43, at 123-24.

[1] The reserve system, publicly introduced into baseball contracts in 1887 centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum.

Thus:

A. Rule 3 of the Major League Rules provides in part:

> **(a) Uniform Contract.** To preserve morale and to produce the similarity of conditions necessary to keen competi-tion, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non reserve clause, except with the written approval of the Commissioner....
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> **(g) Tampering.** To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.

B. Rule 9 of the Major League Rules provides in part:

> **(a) Notice.** A club may assign to another club an existing contract with a player. The player, upon receipt of

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also advanced.

I
The Game

It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.

The Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride. With only one Cincinnatian on the payroll, this professional team traveled over 11,000 miles that summer, winning 56 games and tying one. Shortly thereafter, on St. Patrick's Day in 1871, the National Association of Professional Baseball Players was founded and the professional league was born.

The ensuing colorful days are well known. The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union Association in the 1880's; the introduction of Sunday baseball; interleague warfare with cut-rate admission prices and player raiding; the development of the reserve `clause'; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or `junior circuit,' in 1901, rising from the minor Western Association; the first World Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966. Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and

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written notice of such assignment, is by his contract bound to serve the assignee.

After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club....

C. Rules 3 and 9 of the Professional Baseball Rules contain provisions parallel to those just quoted.

D. The Uniform Player's Contract provides in part:

4. (a) The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract.

5. (a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games under the conditions prescribed in the Major League Rules....

6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules.

10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.

(b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof.

off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson, Honus Wagner, Joe McCarthy, John McGraw, Deacon Phillippe, Rube Marquard, Christy Mathewson, Tommy Leach, Big Ed Delahanty, Davy Jones, Germany Schaefer, King Kelly, Big Dan Brouthers, Wahoo Sam Crawford, Wee Willie Keeler, Big Ed Walsh, Jimmy Austin, Fred Snodgrass, Satchel Paige, Hugh Jennings, Fred Merkle, Iron Man McGinnity, Three-Finger Brown, Harry and Stan Coveleski, Connie Mack, Al Bridwell, Red Ruffing, Amos Rusie, Cy Young, Smokey Joe Wood, Chief Meyers, Chief Bender, Bill Klem, Hans Lobert, Johnny Evers, Joe Tinker, Roy Campanella, Miller Huggins, Rube Bressler, Dazzy Vance, Edd Roush, Bill Wambsganss, Clark Griffith, Branch Rickey, Frank Chance, Cap Anson, Nap Lajoie, Sad Sam Jones, Bob O'Farrell, Lefty O'Doul, Bobby Veach, Willie Kamm, Heinie Groh, Lloyd and Paul Waner, Stuffy McInnis, Charles Comiskey, Roger Bresnahan, Bill Dickey, Zack Wheat, George Sisler, Charlie Gehringer, Eppa Rixey, Harry Heilmann, Fred Clarke, Dizzy Dean, Hank Greenberg, Pie Traynor, Rube Waddell, Bill Terry, Carl Hubbell, Old Hoss Radbourne, Moe Berg, Rabbit Maranville, Jimmie Foxx, Lefty Grove.[3] The list seems endless.

And one recalls the appropriate reference to the `World Serious,' attributed to Ring Lardner, Sr.; Ernest L. Thayer's `Casey at the Bat'; the ring of `Tinker to Evers to Chance';and all the other happenings, habits, and superstitions about and around baseball that made it the `national pastime' or, depending upon the point of view, `the great American tragedy.'

II

The Petitioner

The petitioner, Curtis Charles Flood, born in 1938, began his major league career in 1956 when he signed a contract with the Cincinnati Reds for a salary of $4,000 for the season. He had no attorney or agent to advise him on that occasion. He was traded to the St. Louis Cardinals before the 1958 season. Flood rose to fame as a center fielder with the Cardinals during the years 1958 - 1969. In those 12 seasons he compiled a batting average of .293. His best offensive season was 1967 when he achieved .335. He was .301 or better in six of the 12 St. Louis years. He participated in the 1964, 1967, and 1968 World Series. He played errorless ball in the field in 1966, and once enjoyed 223 consecutive errorless games. Flood has received seven Golden Glove Awards. He was co-captain of his team from 1965 - 1969. He ranks among the 10 major league outfielders possessing the highest lifetime fielding averages.

But at the age of 31, in October 1969, Flood was traded to the Philadelphia Phillies of the National League in a multi-player transaction. He was not consulted about the trade. He was informed by telephone and received formal notice only after the deal had been consummated. In December he complained to the Commissioner of Baseball and asked that he be made a free agent and be placed at liberty to strike his own bargain with any other major league team. His request was denied.

Flood then instituted this antitrust suit in January 1970 in federal court for the Southern District of New York. The defendants (although not all were named in each cause of action) were the Commissioner of Baseball, the presidents of the two major leagues, and the 24 major league clubs. In general, the complaint charged violations of the federal antitrust laws and civil rights statutes, violation of state statutes and the common law, and the imposition of a form of peonage and involuntary servitude contrary to the Thirteenth Amendment Petitioner sought declaratory and injunctive relief and treble damages.

Flood declined to play for Philadelphia in 1970, despite a $100,000 salary offer, and he sat out the year. After the season was concluded, Philadelphia sold its rights to Flood to the Washington Senators. Washington and the petitioner were able to come to terms for 1971 at a salary of $110,000. Flood started the season but, apparently because he was dissatisfied with his performance, he left the Washington club on April 27, early in the campaign. He has not played baseball since then.

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[3] These are names only from earlier years. By mentioning some, one risks unintended omission of others equally celebrated.

III

The Present Litigation

Judge COOPER, in a detailed opinion, first denied a preliminary injunction, observing on the way:

> Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.
>
> Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground....

Flood's application for an early trial was granted. The court next deferred until trial its decision on the defendants' motions to dismiss the primary causes of action, but granted a defense motion for summary judgment on an additional cause of action.

Trial to the court took place in May and June 1970. An extensive record was developed. In an ensuing opinion, Judge COOPER first noted that:

> Plaintiff's witnesses in the main concede that some form of reserve on players is a necessary element of the organization of baseball as a league sport, but contend that the present all-embracing system is needlessly restrictive and offer various alternatives which in their view might loosen the bonds without sacrifice to the game....
>
> Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself, it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious....

He then held that *Federal Baseball Club v. National League*, and *Toolson v. New York Yankees, Inc.*, were controlling; that it was not necessary to reach the issue whether exemption from the antitrust laws would result because aspects of baseball now are a subject of collective bargaining; that the plaintiff's state-law claims, those based on common law as well as on statute, were to be denied because baseball was not 'a matter which admits of diversity of treatment,' that the involuntary servitude claim failed because of the absence of 'the essential element of this cause of action, a showing of compulsory service,' and that judgment was to be entered for the defendants. Judge COOPER included a statement of personal conviction to the effect that 'negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned' and that 'the reserve clause can be fashioned so as to find acceptance by player and club.'

On appeal, the Second Circuit felt 'compelled to affirm.' It regarded the issue of state law as one of first impression, but concluded that the Commerce Clause precluded its application. Judge MOORE added a concurring opinion in which he predicted, with respect to the suggested overruling of *Federal Baseball* and *Toolson*, that 'there is no likelihood that such an event will occur.'[9]

We granted *certiorari* in order to look once again at this troublesome and unusual situation.

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[9] We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'... While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch.

IV

The Legal Background

A. *Federal Baseball Club v. National League*, was a suit for treble damages instituted by a member of the Federal League (Baltimore) against the National and American Leagues and others. The plaintiff obtained a verdict in the trial court, but the Court of Appeals reversed. The main brief filed by the plaintiff with this Court discloses that it was strenuously argued, among other things, that the business in which the defendants were engaged was interstate commerce; that the interstate relationship among the several clubs, located as they were in different States, was predominant; that organized baseball represented an investment of colossal wealth; that it was an engagement in moneymaking; that gate receipts were divided by agreement between the home club and the visiting club; and that the business of baseball was to be distinguished from the mere playing of the game as a sport for physical exercise and diversion.

Mr. Justice HOLMES, in speaking succinctly for a unanimous Court, said:

> The business is giving exhibitions of baseball, which are purely state affairs.... But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.... (T)he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.
>
> If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

The Court thus chose not to be persuaded by opposing examples proffered by the plaintiff, among then (a) Judge LEARNED HAND's decision on a demurrer to a Sherman Act complaint with respect to vaudeville entertainers traveling a theater circuit covering several States, (b) the first Mr. Justice HARLAN's opinion in *International Textbook Co. v. Pigg*, to the effect that correspondence courses pursued through the mail constituted commerce among the States; and (c) Mr. Justice HOLMES' own opinion, for another unanimous Court, on demurrer in a Sherman Act case, relating to cattle shipment, the interstate movement of which was interrupted for the finding of purchasers at the stockyards, *Swift & Co. v. United States*, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905). The only earlier case the parties were able to locate where the question was raised whether organized baseball was within the Sherman Act was *American League Baseball Club v. Chase*. That court had answered the question in the negative.

B. *Federal Baseball* was cited a year later, and without disfavor, in another opinion by Mr. Justice HOLMES for a unanimous Court. The complaint charged antitrust violations with respect to vaudeville bookings. It was held, however, that the claim was not frivolous and that the bill should not have been dismissed.

It has also been cited, not unfavorably, with respect to the practice of law, with respect to out-of-state contractors, and upon a general comparison reference.

In the years that followed, baseball continued to be subject to intermittent antitrust attack. The courts, however, rejected these challenges on the authority of *Federal Baseball*. In some cases stress was laid, although unsuccessfully, on new factors such as the development of radio and television with their substantial additional revenues to baseball. For the most part, however, the Holmes opinion was generally and necessarily accepted as controlling authority. And in the 1952 Report of the Subcommittee on Study of Monopoly Power of the House

Committee on the Judiciary, it was said, in conclusion:

> On the other hand the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause.

C. The Court granted *certiorari* in the *Toolson*, *Kowalski*, and *Corbett* cases and, by a short *per curiam* affirmed the judgments of the respective courts of appeals in those three cases. *Federal Baseball* was cited as holding `that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws,' and:

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect.
>
> The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

This quotation reveals four reasons for the Court's affirmance of *Toolson* and its companion cases: **(a)** Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction. **(b)** The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. **(c)** A reluctance to overrule *Federal Baseball* with consequent retroactive effect. **(d)** A professed desire that any needed remedy be provided by legislation rather than by court decree.

The emphasis in *Toolson* was on the determination, attributed even to *Federal Baseball*, that Congress had no intention to include baseball within the reach of the federal antitrust laws. Two Justices (BURTON and REED, JJ.) dissented, stressing the factual aspects, revenue sources, and the absence of an express exemption of organized baseball from the Sherman Act. The 1952 congressional study was mentioned.

It is of interest to note that in *Toolson* the petitioner had argued flatly that *Federal Baseball* `is wrong and must be overruled,' and that Thomas Reed Powell, a constitutional scholar of no small stature, urged, as counsel for an amicus, that `baseball is a unique enterprise,' and that `unbridled competition as applied to baseball would not be in the public interest.'

D. *United States v. Shubert*, was a civil antitrust action against defendants engaged in the production of legitimate theatrical attractions throughout the United States and in operating theaters for the presentation of such attractions. The District Court had dismissed the complaint on the authority of *Federal Baseball* and *Toolson*. This Court reversed. Mr. Chief Justice WARREN noted the Court's broad conception of `trade or commerce' in the antitrust statutes and the types of enterprises already held to be within the reach of that phrase. He stated that *Federal Baseball* and *Toolson* afforded no basis for a conclusion that businesses built around the performance of local exhibitions are exempt from the antitrust laws. He then went on to elucidate the holding in *Toolson* by meticulously spelling out the factors mentioned above:

> In *Federal Baseball*, the Court, speaking through Mr. Justice HOLMES, was dealing with the business of baseball and nothing else.... The travel, the Court concluded, was `a mere incident, not the essential thing....

In *Toolson*, where the issue was the same as in *Federal Baseball*, the Courts confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called `reserve clause.' During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed.... And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball*. Instead, `(w)ithout re-examination of the underlying issues,' the Court adhered to *Federal Baseball* `so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' In short, *Toolson* was a narrow application of the rule of *stare decisis*.

If the *Toolson* holding is to be expanded — or contracted — the appropriate remedy lies with Congress.

E. *United States v. International Boxing Club*, was a companion to *Shubert* and was decided the same day. This was a civil antitrust action against defendants engaged in the business of promoting professional championship boxing contests. Here again the District Court had dismissed the complaint in reliance upon *Federal Baseball* and *Toolson*. The Chief Justice observed that `if it were not for *Federal Baseball* and *Toolson*, we think that it would be too clear for dispute that the Government's allegations bring the defendants within the scope of the Act.' He pointed out that the defendants relied on the two baseball cases but also would have been content with a more restrictive interpretation of them than the *Shubert* defendants, for the boxing defendants argued that the cases immunized only businesses that involve exhibitions of an athletic nature. The Court accepted neither argument. It again noted that `*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*.' It stated:

> The controlling consideration in *Federal Baseball* and *Hart* was, instead, a very practical one - the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court.

The Court noted the presence then in Congress of various bills forbidding the application of the antitrust laws to `organized professional sports enterprises'; the holding of extensive hearings on some of these; subcommittee opposition; a postponement recommendation as to baseball; and the fact that `Congress thus left intact the then-existing coverage of the antitrust laws.'

Mr. Justice FRANKFURTER, joined by Mr. Justice MINTON, dissented.

`It would baffle the subtlest ingenuity,' he said, `to find a single differentiating factor between other sporting exhibitions ... and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a `trade or commerce.' He went on:

> The Court decided as it did in the *Toolson* case as an application of the doctrine of *stare decisis*. That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport.... If *stare decisis* be one aspect of law, as it is, to disregard it in identic [sic] situations is

mere caprice.

Congress, on the other hand, may yield to sentiment and be capricious, subject only to due process....

Between them, this case and *Shubert* illustrate that nice but rational distinctions are inevitable in adjudication. I agree with the Court's opinion in *Shubert* for precisely the reason that constrains me to dissent in this case. 348 U.S., at 249-250, 99 L. Ed. at 299, 300.

Mr. Justice MINTON also separately dissented on the ground that boxing is not trade or commerce. He added the comment that `Congress has not attempted' to control baseball and boxing. The two dissenting Justices, thus, did not call for the overruling of *Federal Baseball* and *Toolson*; they merely felt that boxing should be under the same umbrella of freedom as was baseball and, as Mr. Justice FRANKFURTER said, they could not exempt baseball `to the exclusion of every other sport different not one legal jot or tittle from it.'

F. The parade marched on. *Radovich v. National Football League* was a civil Clayton Act case testing the application of the antitrust laws to professional football. The District Court dismissed. The Ninth Circuit affirmed in part on the basis of *Federal Baseball* and *Toolson*. The court did not hesitate to `confess that the strength of the pull' of the baseball cases and of *International Boxing* `is about equal,' but then observed that `(f)ootball is a team sport' and boxing an individual one.

This Court reversed with an opinion by Mr. Justice CLARK. He said that the Court made its ruling in *Toolson* `because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity.' He noted that Congress had not acted. He then said:

> All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.
>
> (S)ince *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to - but not extend - the interpretation of the Act made in those cases....
>
> If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.

Mr. Justice FRANKFURTER dissented essentially for the reasons stated in his dissent in *International Boxing*, Mr. Justice HARLAN, joined by Mr. Justice BRENNAN, also dissented because he, too, was `unable to distinguish football from baseball.' Here again the dissenting Justices did not call for the overruling of the baseball decisions. They merely could not distinguish the two sports and, out of respect for *stare decisis*, voted to affirm.

G. Finally, in *Haywood v. National Basketball Assn.* Mr. Justice DOUGLAS, in his capacity as Circuit Justice, reinstated a District Court's injunction *pendente lite* in favor of a professional basketball player and said, `Basketball ... does not enjoy exemption from the antitrust laws.'

H. This series of decisions understandably spawned extensive commentary, some of it mildly critical and

much of it not; nearly all of it looked of Congress for any remedy that might be deemed essential.

I. Legislative proposals have been numerous and persistent. Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball. A few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system's exemption to other professional league sports. And the Act of Sept. 30, 1961, and the merger addition thereto effected by the Act of Nov. 8, 1966, were also expansive rather than restrictive as to antitrust exemption.

In view of all this, it seems appropriate now to say that:

1. Professional baseball is a business and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

3. Even though others might regard this as `unrealistic, inconsistent, or illogical,' the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

4. Other professional sports operating interstate - football, boxing, basketball, and, presumably, hockey and golf - are not so exempt.

5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*.

6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity.

7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.

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

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

Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

The petitioner's argument as to the application of state antitrust laws deserves a word. Judge COOPER rejected the state law claims because state antitrust regulation would conflict with federal policy and because national `uniformity (is required) in any regulation of baseball and its reserved system.' The Court of Appeals, in affirming, stated, `(A)s the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.' As applied to organized baseball, and in the light of this Court's observations and holding in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with respect to the

application of state law, these statements adequately dispose of the state law claims.

The conclusion we have reached makes it unnecessary for us to consider the respondents' additional argument that the reserve system is a mandatory subject of collective bargaining and that federal labor policy therefore exempts the reserve system from the operation of federal antitrust laws.

We repeat for this case what was said in *Toolson*:

> Without re-examination of the underlying issues, the (judgment) below (is) affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any indicated, is for congressional, and not judicial, action.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

BURGER, Chief Justice concurring

I concur in all but Part I of the Court's opinion but, like Mr. Justice DOUGLAS, I have grave reservations as to the correctness of *Toolson v. New York Yankees, Inc.*, as he notes in his dissent, he joined that holding but has 'lived to regret it.' The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with Mr. Justice DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.

Mr. Justice DOUGLAS, with whom Mr. Justice BRENNAN concurs, dissenting

This Court's decision in *Federal Baseball Club v. National League*, made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream.

In 1922 the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era, particularly *United States v. E. C. Knight Co.*, *Hammer v. Dagenhart*, and *Paul v. Virginia*, the whole concept of commerce has changed.

Under the modern decisions such as *Mandeville Island Farms v. American Crystal Sugar Co.*, *United States v. Darby*, *Wickard v. Filburn*, *United States v. South-Eastern Underwriters Assn.*, the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system. An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues would be hard put today to say with the Court in the *Federal Baseball Club* case that baseball was only a local exhibition, not trade or commerce.

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the *Federal Baseball Club* decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs.

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word 'victims' in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade.

If congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation. The only statutory exemption granted by Congress to professional sports concerns broadcasting rights. I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.

There can be no doubt 'that were we considering the question of baseball for the first time upon a clean slate' we would hold it to be subject to federal antitrust regulation. The unbroken silence of Congress should not

prevent us from correcting our own mistakes.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting

Petitioner was a major leagues baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, which had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not `a piece of property to be bought and sold irrespective of my wishes,' and urging that he had the right to consider offers fm other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days.[10] He cannot escape from the club except by retiring, and he cannot prevent the club from assigning his contract to any other club.

The club owners assert that it is necessary to preserve effective competition and to retain fan interest. The players do not agree and argue that the reserve system is overly restrictive. Before this lawsuit was instituted, the players refused to agree that the reserve system should be a part of the collective-bargaining contract. Instead, the owners and players agreed that the reserve system would temporarily remain in effect while they jointly investigated possible changes. Their activity along these lines has halted pending the outcome of this suit.

Petitioner brought this action in the United States District Court for the Southern District of New York. He alleged, among other things, that the reserve system was an unreasonable restraint of trade in violation of federal antitrust laws. The District Court thought itself bound by prior decisions of this Court and found for the respondents after a full trial. The United States Court of Appeals for the Second Circuit affirmed. We granted *certiorari* on October 19, 1971, in order to take a further look at the precedents relied upon by the lower courts.

This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club v. National League*, and *Toolson v. New York Yankees, Inc.*, are totally at odds with more recent and better reasoned cases.

In *Federal Baseball Club*, a team in the Federal League brought an antitrust action against the National and American Leagues and others. In his opinion for a unanimous Court, Mr. Justice HOLMES wrote that the business being considered was `giving exhibitions of baseball, which are purely state affairs.' Hence, the Court held that baseball was not within the purview of the antitrust laws. Thirty-one years later, the Court reaffirmed this decision, without re-examine [sic] it, in *Toolson*, a one-paragraph *per curiam* opinion. Like this case, *Toolson* involved an attack on the reserve system. The Court said:

> The business has ... been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

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10 As Mr. Justice Blackmun points out, the reserve system is not novel. It has been employed since 1887. *See Metropolitan Exhibition Co. v. Ewing*, 42 F 198, 202-204 (CC SD NY 1890). The club owners assert that it is necessary to preserve effective competition and to retain fan interest. The players do not agree and argue that the reserve system is overly restrictive. Before this lawsuit was instituted, the players refused to agree that the reserve system should be a part of the collective-bargaining contract. Instead, the owners and players agreed that the reserve system would temporarily remain in effect while thay jointly investigated possible changes. Their activity along these lines has halted pending the outcome of this suit.

Much more time has passed since *Toolson* and Congress has not acted. We must now decide whether to adhere to the reasoning of *Toolson — i.e.*, to refuse to re-examine the underlying basis of *Federal Baseball Club* — or to proceed with a re-examination and let the chips fall where they may.

In his answer to petitioner's complaint, the Commissioner of Baseball `admits that under present concepts of interstate commerce defendants are engaged therein.' There can be no doubt that the admission is warranted by today's reality. Since baseball is interstate commerce, if we re-examine baseball's antitrust exemption, the Court's decision in *United States v. Shubert*, *United States v. International Boxing Club*, and *Radovich v. National Football League*, require that we bring baseball within the coverage of the antitrust laws. We have only recently had occasion to comment that:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.... Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers. Baseball players cannot be denied the benefits of competition merely because club owners view other economic interests as being more important, unless Congress says so.

> Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.

Americans love baseball as they love all sports. Perhaps we become so enamored of athletics that we assume that they are foremost in the minds of legislators as well as fans. We must not forget, however, that there are only some 600 major league baseball players. What muscle they might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which this Court has isolated them. It is this Court that has made them impotent, and this Court should correct its error.

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here.

To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only. Baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise.

Accordingly, I would overrule *Federal Baseball Club* and *Toolson* and reverse the decision of the Court of Appeals.

This does not mean that petitioner would necessarily prevail, however, Lurking in the background is a hurdle of recent vintage that petitioner still must overcome. In 1966, the Major League Players Association was formed. It is the collective-bargaining representative for all major league baseball players. Respondents argue that the reserve system is now part and parcel of the collective-bargaining agreement and that because it is a mandatory subject of bargaining, the federal labor statutes are applicable, not the federal antitrust laws. The lower courts did not rule on this argument, having decided the case solely on the basis of the antitrust exemption.

This Court has faced the interrelationship between the antitrust laws and the labor laws before. The decisions make several things clear. First, `benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires.' Second, the very nature of a collective-bargaining agreement

mandates that the parties be able to `restrain' trade to a greater degree than management could do unilaterally.

Finally, it is clear that some cases can be resolved only by examining the purposes and the competing interests of the labor and antitrust statutes and by striking a balance.

It is apparent that none of the prior cases is precisely in point. They involve union-management agree-ments that work to the detriment of management's competitors. In this case, petitioner urges that the reserve system works to the detriment of labor.

While there was evidence at trial concerning the collective-bargaining relationship of the parties, the issues surrounding that relationship have not been fully explored. As one commentary has suggested, this case `has been litigated with the implications for the institution of collective bargaining only dimly perceived. The labor law issues have been in the corners of the case - the courts below, for example, did not reach them - moving in and out of the shadows like an uninvited guest at a party whom one can't decide either to embrace or expel.'[8]

It is true that in *Radovich v. National Football League, supra*, the Court rejected a claim that federal labor statutes governed the relationship between a professional athlete and the professional sport. But, an examination of the briefs and record in that case indicates that the issue was not squarely faced. The issue is once again before this Court without being clearly focused. It should, therefore, be the subject of further inquiry in the District Court.

There is a surface appeal to respondents' argument that petitioner's sole remedy lies in filing a claim with the National Labor Relations Board, but this argument is premised on the notion that management and labor have agreed to accept the reserve clause. This notion is contradicted, in part, by the record in this case. Petitioner suggests that the reserve system was thrust upon the players by the owners and that the recently formed players' union has not had time to modify or eradicate it. If this is true, the question arises as to whether there would then be any exemption from the antitrust laws in this case. Petitioner also suggests that there are limits to the antitrust violations to which labor and management can agree. These limits should also be explored.

In light of these considerations, I would remand this case to the District Court for consideration of whether petitioner can state a claim under the antitrust laws despite the collective-bargaining agreement, and, if so, for a determination of whether there has been an antitrust violation in this case.

Questions

1. Is the Court's theory of *stare decisis* proper? In so considering, remember that while the Supreme Court is bound to decide a case properly before it, Congress may choose to make or not to make laws and it may make that decision based on factors entirely extraneous to the merits of the issue. Thus, is it proper to infer from Congress' failure to overrule *Federal Baseball* that Congress approved of Baseball's exemption from the antitrust laws?

2. Is the Court's reliance on the investment owners have made in the clubs proper?

3. Note Justice MARSHALL's concurring opinion. He raises ideas that become significant in other contexts.

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[8] Jacobs and Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 22 (1971).

Notes

1. In 1998, after many years of fruitless debate Congress enacted the "Curt Flood Act".
15 USCA 7(27a) (1999)

Sec. 1 - SHORT TITLE

This Act may be cited as the "Curt Flood Act of 1998"

Sec. 2 - PURPOSE

It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (*i.e.*, that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, *e.g.* football and basketball players), along with a provision that makes it clear the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.

Sec. 3 APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL

(a) Subject to subsections (b) through (d), the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.

(b) No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a). This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league base ball players to play baseball at the major league level, including but not limited to--

(1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;

(2) the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the "Professional Baseball Agreement", the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to organized professional baseball's minor leagues;

(3) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively;

(4) any conduct, acts, practices, or agreements protected by Public Law 87-331 (15 U.S.C. 1291}{ et seq.) (commonly known as the "Sports Broadcasting Act of 1961");

(5) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons; or

(6) any conduct, acts, practices, or agreements of persons not in the business of organized

professional major league baseball.

(c) Only a major league baseball player has standing to sue under this section. For the purposes of this section, a major league baseball player is--

(1) a person who is a party to a major league player's contract, or is playing baseball at the major league level; or

(2) a person who was a party to a major league player's contract or playing baseball at the major league level at the time of the injury that is the subject of the complaint; or

(3) a person who has been a party to a major league player's contract or who has played baseball at the major league level, and who claims he has been injured in his efforts to secure a subsequent major league player's contract by an alleged violation of the antitrust laws: Provided however, That for the purposes of this paragraph, the alleged antitrust violation shall not include any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players; or

(4) a person who was a party to a major league player's contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.

(d) (1) As used in this section, "person" means any entity, including an individual, partnership, corporation, trust or unincorporated association or any combination or association thereof. As used in this section, the National Association of Professional Baseball Leagues, its member leagues and the clubs of those leagues, are not "in the business of organized professional major league baseball".

(2) In cases involving conduct, acts, practices, or agreements that directly relate to or affect both employment of major league baseball players to play baseball at the major league level and also relate to or affect any other aspect of organized professional baseball, including but not limited to employment to play baseball at the minor league level and the other areas set forth in subsection (b), only those components, portions or aspects of such conduct, acts, practices, or agreements that directly relate to or affect employment of major league players to play baseball at the major league level may be challenged under subsection (a) and then only to the extent that they directly relate to or affect employment of major league baseball players to play baseball at the major league level.

(3) As used in subsection (a), interpretation of the term "directly" shall not be governed by any interpretation of section 151 et seq. of title 29, United States Code (as amended).

(4) Nothing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws.

(5) The scope of the conduct, acts, practices, or agreements covered by subsection (b) shall not be strictly or narrowly construed.

2. The Curt Flood Act does not overrule Federal Baseball and completely eliminate baseball's antitrust exemption. Only major league baseball players have standing to bring suit. Their right to bring suit is not clearly defined, since they are protected only to "the same extent" that players in other professional sports are protected. As we shall see later, this basically means that the players can disband their union and sue the owners if the negotiations don't go as planned. On the other hand, any restraint adopted by the owners concerning franchise movement, no matter how unreasonable, would be exempt from the antitrust laws. Thus, for example, if an owner

attempts to sell his team to a group of Florida buyers for $115 million, as Bob Luirie did in 1992, the league could order him to sell it to a local buyer for $15 million less.

Section 2: General Considerations

As noted above, with the exception of professional baseball,[1] it has long been held that professional sports and some aspects of amateur athletics are subject to the federal antitrust laws.[2] Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations...." If read literally, this language is broad enough to render almost every commercial agreement or contract illegal. In fact, shortly after the statute was enacted, the Supreme Court held that with the exception of certain collateral agreements, the statute's condemnation of "every contract ... in restraint of trade" encompassed all contracts of that nature, not only those invalid as unreasonable under common law.[3] This interpretation, however, was short lived, and in *Standard Oil Co. v. United States*, 221 U.S. 1, 60, 64-65 (1911), the Court announced that Congress "must have intended that the standard of reason which had been applied at common law ... was intended to be the measure" of illegality under the act. This rule was further refined in *Chicago Board of Trade v. United States* when the Court stated that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress competition.... (246 U.S. 231 (1918)) The rule of reason is basically a balancing test under which the court weighs all of the circumstances and decides whether the pro-competitive benefits outweigh the anti-competitive detriments.

The Court, however, was not content to leave the rule of reason stand alone as the only test of illegality under the Sherman Act. In *Unites States v. Socony-Vacuum* the Court proclaimed that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate `commerce is illegal *per se*.'"[4] In subsequent cases the Court went on to broaden the scope of the *per se* approach to any agreement which because of its pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm that have caused or the business excuse for their use. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

Today in order to establish a violation of § 1 of the Sherman Act, two elements are required: (1) the existence of a contract, combination or conspiracy and (2) a resulting unreasonable restraint of trade. There are basically two lines of analysis that can be followed in determining whether a restraint of trade is unreasonable: (1) the *per se* approach, and (2) the rule of reason approach. Combinations or conspiracies are *per se* violations of the

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[1] *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

[2] The Supreme Court applied the Sherman Act to professional boxing in *United States v. International Boxing Club Inc.*, 348 U.S. 236 (1955) and then extended the reach of the Act to team sports in *Radovich v. National Football League*, 352 U.S. 445 (1957).

[3] In *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897) the government sued to dissolve an association created by the railroads to set all freight rates for its members. The railroads argued that § 1 prohibited only unreasonable restrains of trade.

[4] 310 U.S. 150, 221-23 (1940). In this case the oil refine industry was caught in the throes of the great depression. With decreasing demand and increasing supply of gasoline the market faced panic conditions. "Distressed" gasoline selling on the spot market caused wide fluctuations in the price. The major oil companies entered into a program of bidding for and buying distressed gasoline from independent refiners, and storing it until the spot prices had stabilized.

Sherman Act only if they are so plainly anticompetitive that they lack any redeeming virtue.[5] An agreement is likely to be *per se* illegal if some pernicious effects are likely to occur in almost every manifestation of the scheme and competitive benefits are either infrequent or relatively small. The Supreme Court has held that price fixing, horizontal market divisions, group boycotts and tying arrangements are *per se* illegal. If the *per se* label attaches to a practice, the defendant in not permitted to offer any justification for his conduct the presumption of guilt is conclusive. Under the rule of reason, the court must inquire into "whether the challenged contract, combination or conspiracy is one that promotes competition or one that suppresses it.[6] Under rule of reason analysis the defendant is permitted to offer justification for his conduct and the finder of fact determines whether the pro-competitive effects outweigh the anti-competitive harms.

NCAA v. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA
468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)

[In 1981, NCAA adopted a plan for the televising of college football games for the 1982-1985 seasons. The plan stated that it was intended to reduce the adverse effect of live television on college football game attendance. The plan limited the total number of televised NCAA football games and the number of televised games that any one college could appear in. The plan also required that all television contracts must satisfy the requirements of the plan. At that time the NCAA had agreements with both the American Broadcasting Co. and the Columbia Broadcasting System, granting each network the right to telecast college football games in conformity with the plan. Each network agreed to pay a specified amount to the participating colleges and universities, and was authorized to negotiate directly with the members for the right to televise their games.

The College Football Association (CFA), was originally organized to promote the interests of major football-playing schools within the NCAA structure. CFA members, however, became dissatisfied with the limits which the NCAA's plan placed on their television appearances. Unable to persuade the NCAA to change its television plan, the CFA negotiated a contract with the National Broadcasting Co. that provided for an increased number of television appearances for each college and increased revenues realized for CFA members. In response, the NCAA announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. CFA members then filed a federal antitrust action alleging that the NCAA television plan was violative of § 1 of the Sherman Act. The District Court held that the plan violated § 1 of the Sherman Act, and granted injunctive relief. The court defined the relative market as live college football. It the went on to find that competition in this market had been restrained in three ways: (1) the NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were a group boycott of all other potential broadcasters and its threat of sanctions against its members constituted a threatened boycott of potential competitors; and (3) the plan placed an artificial limit on the production of televised college football. The Court of Appeals agreed that the Sherman Act had been violated, holding that the NCAA's television plan constituted illegal *per se* price fixing and that even if it were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justifications sufficient to save the plan even when the totality of the circumstances was examined.]

STEVENS, Justice

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5 *See National Society of Professional Engineers v. United States*, 435 U.S. 679, [illegible] S. Ct. 1355, 55 L. Ed. 2d 637 (1978); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958).

6 *See National Society of Professional Engineers, id.*

The Current Plan

The plan adopted in 1981 for the 1982-1985 seasons is at issue in this case. This plan, like each of its predecessors, recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance. It provides that "all forms of television of the football games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks."

* * *

The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2-year periods that the plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2-year period. Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus, although the current plan is more elaborate than any of its predecessors, it retains the essential features of each of them. It limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any sale of television rights except in accordance with the basic plan.

* * *

II

There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.

It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint — an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade. Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and

encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

As Judge BORK has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. BORK, THE ANTITRUST PARADOX 278 (1978). What the NCAA and its member institutions market in this case is competition itself — contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football - college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice - not only the choices available to sports fans but also those available to athletes - and hence can be viewed as procompetitive.

* * *

Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). A conclusion that a restraint of trade is unreasonable may be "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions."

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same - whether or not the challenged restraint enhances competition.[26] Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

* * *

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects. The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights. Moreover, the court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive

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[26] Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct....

market. And, of course, since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a `consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit. *See Standard Oil Co. v. United States*, 221 U.S. 1, 52-60 (1911). At the same time, the television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete. Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.

Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power — no ability to alter the interaction of supply and demand in the market.[38] We must reject this argument for two reasons, one legal, one factual.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers*, 435 U.S., at 692. Petitioner does not quarrel with the District Court's finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market — whether there are other products that are reasonably substitutable for televised NCAA football games. Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. These findings amply support its conclusion that the NCAA possesses market power. Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product.

* * *

Thus, respondents have demonstrated that there is a separate market for telecasts of college football which "rest[s] on generic qualities differentiating" viewers. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613 (1953). It inexorably follows that if college football broadcasts be defined as a separate market — and we are convinced they are — then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.

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[38] Market power is the ability to raise prices above those that would be charged in a competitive market.

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IV

Relying on *Broadcast Music*, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 365 (1982) (POWELL, J., dissenting) (footnote omitted). The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, is a matter left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music*'s blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA football could be marketed just as effectively without the television plan. There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." *Broadcast Music*, 441 U.S., at 23. In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint. Here production has been limited, not enhanced. No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors.[55] This is borne out by the District Court's finding that the NCAA's television reduces the volume of television rights sold.

V

Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which are shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.[56]

Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if unlimited television were permitted, the District Court found that there was no evidence to support that theory in today's market. Moreover, as the District Court found, the television plan has evolved in a manner

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[55] If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete. (Citations omitted.) Our conclusions concerning the availability of substitutes in Part III, *supra*, forecloses such a justification in this case, however.

[56] The NCAA's plan is not even arguably related to a desire to protect live attendance by ensuring that a game is not televised in the area where it is to be played. No cooperative action is necessary for that kind of "blackout." The home team can always refuse to sell the right to telecast its game to stations in the immediate area....

inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events. There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output - just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers*, 435 U.S., at 696.

VI

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second.

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league. The plan is nationwide in scope and there is no single league or tournament in which all college football teams compete. There is no evidence of any intent to equalize the strength of teams in Division I-A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools. The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenue that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. At the same time, as the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so. And much more than speculation supported the District Court's findings on this score. No other NCAA sport employs a similar plan, and in particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan.

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will

maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.

VII

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is affirmed.

Questions

1. Did the Court find that the NCAA plan violated § 1 of the Sherman act? Did it use a *per se* or rule of reason approach? What were the reasons given for the Court's choice? Was any one justification more important than the others? Should the nature of the joint undertaking determine whether a rule of reason or *per se* or a rule of reason approach should be used? Remember in *Socony* the Court said "any combination which affects price." The Court stated in *Socony* that "the Sherman Act, so far a price-fixing agreements are concerned, establishes *one* uniform rule applicable to *all* industries alike." 310 U.S. 150 (1940). Is this statement consistent with the Court's treatment of the NCAA?

2. Did the Court have any difficulty finding that there was a "contract, combination or conspiracy"? Did it even discuss this issue?

3. In what ways did the NCAA's television plan restrain trade? How did the Court characterize these restraints?

4. Was it necessary to show that the NCAA has monopoly power? Market power? What is the legal test for market power?

5. What justification was given by the NCAA for its television plan? Did any aspects of the plan have pro-competitive effects? In theory? In practice? Did the Court feel that maintaining competitive balance was a valid justification? If you were counsel for the NCAA could you have offered other reasons for the plan? In evaluating the Court's economic theory, consider that in 1983, the year before *NCAA*, a total of 89 TV games produced revenues of $69 million. In 1984, 195 games produced only $45 million (including regional and local syndication). By 1986, 99 games (excluding regional and local telecast) produced $53 million. SULLIVAN & HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 238 (2d Edition 1989).

Section 3: Player Restraints

The term "player restraints" refers to the various means used by professional sports leagues to limit the movement of players between teams. The principle devices employed by teams are: (1) the player draft, (2) the reserve or option system, (3) the no tampering rules, and (4) the draft eligibility rules.

The draft is the method used by team sports leagues to allocate players who have not previously played

professional sports. Athletes who are eligible for the draft are generally selected in the reverse order of the team's standing from the previous year's competition. The duration of the exclusive right to negotiate with a draftee varies from league to league. Reserve or option systems typically give the team for whom an athlete is currently playing, a unilateral right to renew the contract for an additional period of time under the same terms and conditions as the current contract. As with the draft, the number of times a team can unilaterally "renew" a contract varies from league to league. No tampering rules prohibit other members of a league from negotiating with or offering employment to a player who is currently under contract with a team.

All of these arrangements can be characterized as group boycotts or concerted refusals to deal under which the owners have agreed not to deal with the players, unless they agree to abide by employment restraints imposed upon them. As indicated above, there is considerable language in several Supreme Court cases indicating that such arrangements should receive *per se* treatment. For example, in *Eastern States Retail Lumber Dealers Assoc. v. United States*, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490 (1914) an agreement by a group of retail lumber dealers not to deal with wholesalers who sold directly to the retailers' customers was summarily condemned. In *Fashion Originators Guild of America v. Federal Trade Comm'n*, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941) a group of original dress designers refused to sell their creations to retailers who purchased and sold copies of the original designs. The Court stated that it was not error to refuse to hear the evidence offered, since the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by the combination. Finally, in *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), in condemning a department store chain's use of its buying power to coerce ten national appliance manufacturers and their distributors to stop selling appliances to another retailer, the Court stated:

> Group boycotts or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they `fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.'

In reading the following cases ask yourself whether player restraints should receive similar treatment.

MACKEY v. NATIONAL FOOTBALL LEAGUE
543 F.2d 606 (8th Cir. 1976)

LAY, Circuit Judge

This is an appeal by the National Football League (NFL), twenty-six of its member clubs, and its Commissioner, Alvin Ray "Pete" Rozelle, from a district court judgment holding the "Rozelle Rule"[1] to be violative of § 1 of the Sherman Act, and enjoining its enforcement.

* * *

The district court held that the defendants' enforcement of the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a *per se* violation of the Sherman Act. Alternatively, finding that the evidence offered in support of the clubs' contention that the Rozelle Rule is necessary to the successful operation of the NFL insufficient to justify the restrictive effects of the Rule, the court concluded that the Rozelle Rule was invalid under the Rule of Reason standard.

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[1] The Rozelle Rule essentially provides that when a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable.

* * *

The defendants raise two basic issues on this appeal: (1) whether the so-called labor exemption to the antitrust laws immunizes the NFL's enforcement of the Rozelle Rule from antitrust liability; and (2) if not, whether the Rozelle Rule and the manner in which it has been enforced violate the antitrust laws. Ancillary to these contentions, appellants attack a number of the district court's findings of fact and raise several subsidiary issues.

History

We first turn to a brief examination of the pertinent history and operating principles of the National Football League.

The NFL, which began operating in 1920, is an unincorporated association comprised of member clubs which own and operate professional football teams. It presently enjoys a monopoly over major league professional football in the United States. The League performs various administrative functions, including organizing and scheduling games, and promulgating rules. A constitution and bylaws govern its activities and those of its members. Pete Rozelle, Commissioner of the NFL since 1960, is an employee of the League and its chief executive officer. His powers and duties are defined by the NFL Constitution and Bylaws.

Throughout most of its history, the NFL's operations have been unilaterally controlled by the club owners.

* * *

For a number of years, the NFL has operated under a reserve system whereby every player who signs a contract with an NFL club is bound to play for that club, and no other, for the term of the contract plus one additional year at the option of the club. The cornerstones of this system are § 15.1 of the NFL Constitution and Bylaws, which requires that all club-player contracts be as prescribed in the Standard Player Contract adopted by the League, and the option clause embodied in the Standard Player Contract. Once a player signs a Standard Player Contract, he is bound to his team for at least two years. He may, however, become a free agent at the end of the option year by playing that season under a renewed contract rather than signing a new one. A player "playing out his option" is subject to a 10% salary cut during the option year.

* * *

Prior to 1963, a team which signed a free agent who had previously been under contract to another club was not obligated to compensate the player's former club. In 1963, after R.C. Owens played out his option with the San Francisco 49ers and signed a contract with the Baltimore Colts, the member clubs of the NFL unilaterally adopted the following provision, now known as the Rozelle Rule, as an amendment to the League's Constitution and Bylaws:

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

This provision, unchanged in form, is currently embodied in § 12.1(H) of the NFL Constitution. The ostensible purposes of the rule are to maintain competitive balance among the NFL teams and protect the clubs' investment in scouting, selecting and developing players.

During the period from 1963 through 1974, 176 players played out their options. Of that number, 34 signed with other teams. In three of those cases, the former club waived compensation. In 27 cases, the clubs involved mutually agreed upon compensation. Commissioner Rozelle awarded compensation in the four remaining cases.

* * *

We turn, then, to the question of whether the Rozelle Rule, as implemented, violates § 1 of the Sherman Act, which declares illegal "every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The district court found the Rozelle Rule to be a *per se* violation of the Act. Alternatively, the court held the Rule to be violative of the Rule of Reason standard.

Players' Services as a Product Market

The clubs and the Commissioner first urge that the only product market arguably affected by the Rozelle Rule is the market for players' services, and that the restriction of competition for players' services is not a type of restraint proscribed by the Sherman Act. In support of this contention, defendants rely on § 6 of the Clayton Act, 15 U.S.C. § 17, and on language construing that statute in *Apex Hosiery Co. v. Leader, supra*. Section 6 of the Clayton Act provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Based on this section, the Supreme Court, in *Apex*, observed:

> [It] would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

On the surface, the language relied on by defendants lends merit to the defense. However, we cannot overlook the context in which the language arose. Section 6 of the Clayton Act was enacted for the benefit of unions to exempt certain of their activities from the antitrust laws after courts had applied the Sherman Act to legitimate labor activities.

In other cases concerning professional sports, courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services. *See Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975). *See also Radovich v. National Football League, supra*; *Smith v. Pro-Football, supra*; *Boston Professional Hockey Ass'n, Inc. v. Cheevers, supra*; *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971), *stay vacated*, 401 U.S. 1204 (1971) (Justice DOUGLAS, Opinion in Chambers).

* * *

We hold that restraints on competition within the market for players' services fall within the ambit of the Sherman Act.

Per Se Violation

We review next the district court's holding that the Rozelle Rule is *per se* violative of the Sherman Act. The express language of the Sherman Act is broad enough to render illegal nearly every type of agreement between businessmen. The Supreme Court has held, however, that only those agreements which "unreasonably" restrain trade come within the proscription of the Act. *See Northern Pac. R. Co. v. United States*, 356 U.S. 1 (1958); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The "Rule of Reason" emerged from these cases.

As the courts gained experience with antitrust problems arising under the Sherman Act, they identified certain types of agreements as being so consistently unreasonable that they may be deemed to be illegal *per se*, without inquiry into their purported justifications. As the Supreme Court stated in *Northern Pac. R. Co. v. United States, supra*, 356 U.S. at 518:

> [There] are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Among the practices which have been deemed to be so pernicious as to be illegal *per se* are group boycotts and concerted refusals to deal. *See, e.g., Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941). *See generally Worthen Bank & Trust Co. v. National BankAmericard Inc., supra*. The term "concerted refusal to deal" has been defined as "an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms." Note, *Concerted Refusals to Deal Under the Antitrust Laws*, 71 Harv. L. Rev. 1531 (1958). The term "group boycott" generally connotes "a refusal to deal or an inducement of others not to deal or to have business relations with tradesmen." *Kalinowski, supra*, 11 UCLA L. Rev. at 580 n. 49. *See also Worthen Bank & Trust Co. v. National BankAmericard Inc., supra*, 485 F.2d at 124-25.

The district court found that the Rozelle Rule operates to significantly deter clubs from negotiating with and signing free agents. By virtue of the Rozelle Rule, a club will sign a free agent only where it is able to reach an agreement with the player's former team as to compensation, or where it is willing to risk the awarding of unknown compensation by the Commissioner. The court concluded that the Rozelle Rule, as enforced, thus constituted a group boycott and a concerted refusal to deal, and was a *per se* violation of the Sherman Act.

There is substantial evidence in the record to support the district court's findings as to the effects of the Rozelle Rule. We think, however, that this case presents unusual circumstances rendering it inappropriate to declare the Rozelle Rule illegal *per se* without undertaking an inquiry into the purported justifications for the Rule.

First, the line of cases which has given rise to *per se* illegality for the type of agreements involved here generally concerned agreements between business competitors in the traditional sense.... Here, however, as the owners and Commissioner urge, the NFL assumes some of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League fails, no one team can survive. *See United States v. National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953). Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply *per se* illegality rules here, fashioned in a different context. This is particularly true where, as here, the alleged restraint does not completely eliminate competition for players' services. *Compare Kapp v. National Football League, supra* with *Smith v. Pro-Football, supra*. In similar circumstances, when faced with a unique or novel business situation, courts have eschewed a *per se* analysis in favor of an inquiry into the reasonableness of the restraint under the circumstances. *See White Motor Co. v. United States*, 372 U.S. 253 (1963); *Worthen Bank & Trust Co. v. National BankAmericard Inc., supra*. In *White Motor*, the Supreme Court rejected the application of *per se* rules to vertically imposed territorial restrictions, stating:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business [citations omitted] and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack ... any redeeming virtue" [citation omitted] and therefore should be classified as *per se* violations of the Sherman Act. 372 U.S. at 263.

In *Worthen*, this court stated:

> The term "group boycott," as suggested above, is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the "group boycott" and "*per se*" labels obviously invites the chance that certain types of reasonable concerted

activity will be proscribed.... 485 F.2d at 125.

* * *

Second, one of the underpinnings of the *per se* analysis is the avoidance of lengthy and burdensome inquiries into the operation of the particular industry in question. Here, the district court has already undertaken an exhaustive inquiry into the operation of the NFL and the effects of and justifications for the Rozelle Rule. Accordingly, the instant case lacks much of the basis for application of the *per se* doctrine.

In view of the foregoing, we think it more appropriate to test the validity of the Rozelle Rule under the Rule of Reason.

Rule of Reason

The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary. *See Chicago Board of Trade v. United States, supra*; *Worthen Bank & Trust Co. v. National BankAmericard Inc., supra.*

In defining the restraint on competition for players' services, the district court found that the Rozelle Rule significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed. Without the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another. We find substantial evidence in the record to support these findings. Witnesses for both sides testified that there would be increased player movement absent the Rozelle Rule. Two economists testified that elimination of the Rozelle Rule would lead to a substantial increase in player salaries. Carroll Rosenbloom, owner of the Los Angeles Rams, indicated that the Rams would have signed quite a few of the star players from other teams who had played out their options, absent the Rozelle Rule. Charles De Keado, an agent who represented Dick Gordon after he played out his option with the Chicago Bears, testified that the New Orleans Saints were interested in signing Gordon but did not do so because the Bears were demanding unreasonable compensation and the Saints were unwilling to risk an unknown award of compensation by the Commissioner. Jim McFarland, an end who played out his option with the St. Louis Cardinals, testified that he had endeavored to join the Kansas City Chiefs but was unable to do so because of the compensation asked by the Cardinals. Hank Stram, then coach and general manager of the Chiefs, stated that he probably would have given McFarland an opportunity to make his squad had he not been required to give St. Louis anything in return.

In support of their contention that the restraints effected by the Rozelle Rule are not unreasonable, the defendants asserted a number of justifications. First, they argued that without the Rozelle Rule, star players would flock to cities having natural advantages such as larger economic bases, winning teams, warmer climates, and greater media opportunities; that competitive balance throughout the League would thus be destroyed; and that the destruction of competitive balance would ultimately lead to diminished spectator interest, franchise failures, and perhaps the demise of the NFL, at least as it operates today. Second, the defendants contended that the Rozelle Rule is necessary to protect the clubs' investment in scouting expenses and player developments costs. Third, they asserted that players must work together for a substantial period of time in order to function effectively as a team; that elimination of the Rozelle Rule would lead to increased player movement and a concomitant reduction in player continuity; and that the quality of play in the NFL would thus suffer, leading to reduced spectator interest, and financial detriment both to the clubs and the players. Conflicting evidence was adduced at trial by both sides with respect to the validity of these asserted justifications.

The district court held the defendants' asserted justifications unavailing. As to the clubs' investment in player development costs, Judge LARSON found that these expenses are similar to those incurred by other businesses, and that there is no right to compensation for this type of investment. With respect to player continuity, the court found that elimination of the Rozelle Rule would affect all teams equally in that regard; that it would not lead to a reduction in the quality of play; and that even assuming that it would, that fact would not justify the Rozelle Rule's anticompetitive effects. As to competitive balance and the consequences which would flow from abolition

of the Rozelle Rule, Judge LARSON found that the existence of the Rozelle Rule has had no material effect on competitive balance in the NFL. Even assuming that the Rule did foster competitive balance, the court found that there were other legal means available to achieve that end - *e.g.*, the competition committee, multiple year contracts, and special incentives. The court further concluded that elimination of the Rozelle Rule would have no significant disruptive effects, either immediate or long term, on professional football. In conclusion the court held that the Rozelle Rule was unreasonable in that it was overly broad, unlimited in duration, unaccompanied by procedural safeguards, and employed in conjunction with other anticompetitive practices such as the draft, Standard Player Contract, option clause, and the no-tampering rules.

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

We agree, in view of the evidence adduced at trial with respect to existing players turnover by way of trades, retirements and new players entering the League, that the club owners' arguments respecting player continuity cannot justify the Rozelle Rule. We concur in the district court's conclusion that the possibility of resulting decline in the quality of play would not justify the Rozelle Rule. We do recognize, as did the district court, that the NFL has a strong and unique interest in maintaining competitive balance among its teams. The key issue is thus whether the Rozelle Rule is essential to the maintenance of competitive balance, and is no more restrictive than necessary. The district court answered both of these questions in the negative.

We need not decide whether a system of inter-team compensation for free agents moving to other teams is essential to the maintenance of competitive balance in the NFL. Even if it is, we agree with the district court's conclusion that the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard. First, little concern was manifested at trial over the free movement of average or below average players. Only the movement of the better players was urged as being detrimental to football. Yet the Rozelle Rule applies to every NFL player regardless of his status or ability. Second, the Rozelle Rule is unlimited in duration. It operates as a perpetual restriction on a player's ability to sell his services in an open market throughout his career. Third, the enforcement of the Rozelle Rule is unaccompanied by procedural safeguards. A player has no input into the process by which fair compensation is determined. Moreover, the player may be unaware of the precise compensation demanded by his former team, and that other teams might be interested in him but for the degree of compensation sought.

* * *

In sum, we hold that the Rozelle Rule, as enforced, unreasonably restrains trade in violation of § 1 of the Sherman Act.

* * *

Conclusion

Although we disagree with the district court's determination that the Rozelle Rule is a *per se* violation of the antitrust laws, we do find that the Rule, as implemented, contravenes the Rule of Reason and thus constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act.

We note that our disposition of the antitrust issue does not mean that every restraint on competition for players' services would necessarily violate the antitrust laws.

* * *

It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this. We encourage the parties to resolve this question through collective bargaining. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts. *See Kansas City Royals v. Major League Baseball Players*, 532 F.2d 615, 632 (8th Cir. 1976). However, no mutual resolution of this issue appears within the present record. Therefore, the Rozelle Rule, as it is presently

implemented, must be set aside as an unreasonable restraint of trade.

With the exception of the district court's finding that implementation of the Rozelle Rule constitutes a *per se* violation of § 1 of the Sherman Act and except as it is otherwise modified herein, the judgment of the district court is Affirmed. The cause is remanded to the district court for further proceedings consistent with this opinion.

Questions

1. What player restraint was involved in *Mackey*? Did the court use the *per se* approach of the rule of reason approach in assessing the legality of the restraint? What reason was given?

2. What redeeming virtues did the restraint have? In theory? In practice?

3. If the league formulated a less restrictive rule, could it show that the rule was essential to maintain competitive balance?

SMITH v. PRO FOOTBALL, INC.

593 F.2d 1173 (D.C. Cir 1979)

WILKEY, Circuit Judge

[Smith, a former Washington Redskins player, brought suit alleging that the NFL draft as it existed in 1968 was an unreasonable restraint of trade in violation of § 1 of the Sherman Act, and that but for the draft, he would have negotiated a far more lucrative contract. The district court held that the NFL draft as it existed in 1968 constituted a "group boycott" and was thus a *per se* violation of the Sherman Act.]

* * *

The NFL draft, which has been in effect since 1935, is a procedure under which negotiating rights to graduating college football players are allocated each year among the NFL clubs in inverse order of the clubs' standing. Under the draft procedures generally followed, the team with the poorest playing-field record during the preceding season has the first opportunity, as among the NFL teams, to select a college player of its choice; the team with the next poorest record has the next choice, and so on until the team with the best record (the winner of the previous year's "Super Bowl") has picked last. At this point, the first "round" of the draft is completed. In 1968 there were 16 succeeding rounds in the yearly draft, the same order of selection being followed in each round. Teams had one choice per round unless they had traded their choice in that round to another team (a fairly common practice). When Smith was selected by the Redskins there were 26 teams choosing in the draft.

The NFL draft, like similar procedures in other professional sports, is designed to promote "competitive balance." By dispersing newly arriving player talent equally among all NFL teams, with preferences to the weaker clubs, the draft aims to produce teams that are as evenly-matched on the playing field as possible. Evenly-matched teams make for closer games, tighter pennant races, and better player morale, thus maximizing fan interest, broadcast revenues, and overall health of the sport.

The draft is effectuated through the NFL's "no-tampering" rule. Under this rule as it existed in 1968, no team was permitted to negotiate prior to the draft with any player eligible to be drafted, and no team could negotiate with (or sign) any player selected by another team in the draft. The net result of these restrictions was that the right to negotiate with any given player was exclusively held by one team at any given time. If a college player could not reach a satisfactory agreement with the team holding the rights to his services he could not play in the NFL.

Plaintiff Smith became subject to the draft when he graduated as an All-American football player from the University of Oregon in 1968. The Redskins, choosing twelfth, picked Smith as their first-round draft choice. After

several months of negotiations, in which he was represented by an agent, Smith and the Redskins signed a one-year contract — a version of the Standard Player Contract that the NFL requires all players to sign. The contract awarded Smith a $23,000 bonus for signing, an additional $5,000 if he made the team, and a compensation of $50,000.

Smith made the team and performed at a high level of play as a defensive back until he suffered a serious neck injury in the final game of the 1968 season. His doctors advised him not to continue his football career. After his injury the Redskins paid Smith an additional $19,800, representing the amount he would ordinarily have received had he played out the second ("option") year of his contract.

* * *

The legality of the NFL player draft under the antitrust laws[11] is essentially a question of first impression. This case requires us to consider (1) whether the legality of the draft is governed by a *per se* rule or by the rule of reason; (2) whether the draft, if tested by the rule of reason, is a reasonable restraint; and (3) whether, if the draft violates the antitrust laws, the measure of damages adopted by the District Judge was proper. We discuss these issues in turn.

A: *Per Se* Illegality

The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section 1 prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce." While this language is broad enough to render illegal nearly all commercial understandings, the Supreme Court in *Standard Oil* established a judicial gloss on the statute which made the "rule of reason" the prevailing mode of analysis. Under this rule, the fact-finder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The inquiry mandated by the rule of reason, however, is often laborious, and as the courts gained experience with antitrust problems they identified certain types of agreements which were so consistently unreasonable that they could be deemed illegal *per se*, without elaborate inquiry into their purported justifications. Among the practices that have been deemed so pernicious as to be unreasonable *per se* are certain "group boycotts."

Plaintiff argues that the NFL draft constitutes a "group boycott" because the NFL clubs concertedly refuse to deal with any player before he has been drafted or after he has been drafted by another team, and that the draft is in consequence a *per se* violation of § 1. The District Court accepted this argument. We reject it. We hold that the NFL player draft is not properly characterized as a "group boycott" — at least not the type of boycott that traditionally has been held illegal *per se* — and that the draft, regardless of how it is characterized, should more appropriately be tested under the rule of reason.

The classic "group boycott" is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boy-cotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates. The group may accomplish its exclusionary purpose by inducing suppliers not to sell to potential competitors, by inducing customers not to buy from them, or, in some cases, by refusing to deal with would-be competitors themselves. In each instance, however, the hallmark of the "group boycott" is the effort of competitors to "barricade themselves from competition at their own level." It is this purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott *per se* rule.

The NFL player draft differs from the classic group boycott in two significant respects. First, the NFL clubs which have "combined" to implement the draft are not competitors in any economic sense. The clubs operate basically as a joint venture producing an entertainment product - football games and telecasts. No NFL club can produce this product without agreements and joint action with every other team. To this end, the League not only determines franchise locations, playing schedules, and broadcast terms, but also ensures that the clubs receive equal

11 Professional football, like all professional sports excepting baseball, is subject to the antitrust laws. Restrictive agreements between the NFL and its Players Association, like collective bargaining contracts in other industries, may in proper circumstances be shielded from antitrust scrutiny under the "labor law exemption." The District Court found the labor law exemption inapplicable to the NFL draft on the facts of this case, defendants have not appealed this ruling.

shares of telecast and ticket revenues. These economic joint venturers "compete" on the playing field, to be sure, but here as well cooperation is essential if the entertainment product is to attain a high quality: only if the teams are "competitively balanced" will spectator interest be maintained at a high pitch. No NFL team, in short, is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails, no one team can survive.

The draft differs from the classic group boycott, secondly, in that the NFL clubs have not combined to exclude competitors from their level of the market. Smith was never seeking to "compete" with the NFL clubs, and their refusal to deal with him has resulted in no decrease in the competition for providing football entertainment to the public. The draft, indeed, is designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive equality.

In view of these differences, we conclude that the NFL player draft cannot properly be described as a group boycott - at least not the type of group boycott that traditionally has elicited invocation of a *per se* rule.[22] The "group boycott" designation, we believe, is properly restricted to concerted attempts by competitors to exclude horizontal competitors; it should not be applied, and has never been applied by the Supreme Court, to concerted refusals that are not designed to drive out competitors but to achieve some other goal.[23]

We are guided in reaching this conclusion by decisions in analogous areas of antitrust law. The courts have consistently refused to invoke the boycott *per se* rule where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted

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[22] The term "group boycott," as the Eighth Circuit has noted, can be used as " a very broad label for divergent types of concerted activity," and there is in consequence "more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." When confronted with concerted refusals to deal that do not fit the classic "group boycott" pattern, the courts almost without exception have held the *per se* rule inapplicable. In reaching this conclusion, however, they have vacillated between two divergent paths. Some courts have adhered to the traditional canon that all group boycotts are illegal *per se*, and concluded that the concerted activity at issue was not a group boycott. Other courts have held that the concerted activity at issue was a group boycott, but that there were two types of group boycotts - "*per se* boycotts" and "rule of reason boycotts" - and that the concerted activity at issue fell into the second category. Although these divergent paths presumably will lead in most cases to the same destination, their coexistence has not encouraged clarity or consistency of analysis.

The Supreme Court shed some light on this problem in *St. Paul Fire & Marine Ins. Co., v Barry*, 46 U.S.L.W. 4971 (U.S. 29 June 1978). In that case, the Court held that the refusal by a group of insurance companies to deal on any terms with certain policyholders was a "boycott" within the meaning of § 3(b) of the McCarran-Ferguson Act, 15 U.S.C. §1013(b) (1976). Noting that its own previous decisions "[reflected] a marked lack of uniformity in defining the term," the Court decided that "boycott" should be given the broad meaning familiar from labor law and rejected defendants' attempt to define it as "embracing only those combinations which target competitors of the boycotters as the ultimate objects of a concerted refusal to deal." Although the Court did not delimit "the precise reach" of the term, it held that a "boycott" was at least broad enough to include the practice involved in teat case, namely, an agreement by which one company "induced its competitors to refuse to deal on any terms with its customers."

Given the Court's broad definition of "boycott" in *St. Paul Fire & Marine*, we assume for purposes of this decision that the NFL draft could be described as a "boycott" - although, as we noted above, the draft, unlike the agreement in that case, is not strictly an agreement among competitors. To describe the draft as a boycott, however, is not to end our inquiry. The Court noted in *St. Paul Fire & Marine* that "boycotts are not a unitary phenomenon," and stated that the issue before it was only "whether the conduct in question involves a boycott, not whether it is *per se* unreasonable." In rejecting defendants' argument that a boycott should be defined as "limited to concerted activity . . . against competitors of members of the boycotting group," the Court expressed no view as to whether "a *per se* offence in this area" should be so defined. Although the Court has clarified boycott analysis by suggesting that judicial investigations should pursue the second path described above, it left open the question that confronts us here: whether boycotts not designed to exclude competitors are illegal *per se*.

[23] Suppose . . . that a group of professional football teams agreed not to hire any player found to have gambled on games. This is a concerted refusal to deal. But, whatever the purposes and effects may be thought to be, it is a concerted arrangement very different from the typical boycott. It does not constitute concerted action by competing firms at one level to exclude other would-be competitors. It ought, then, not to be analyzed under a generic rule which deals with concerted efforts by traders at a given level to insulate themselves from other competition.

activity manifested no purpose to exclude and in fact worked no exclusion of competitors. In view of the joint-venture characteristics of the professional football industry and the purpose of the concerted activity here, these decisions support our conclusion that the NFL player draft is not a group boycott which is illegal *per se*.

Whether the draft is a group boycott, or not, we think it is clearly not the type of restraint to which a *per se* rule is meant to apply. A *per se* rule is a judicial shortcut; it represents the considered judgement of courts, after considerable experience with a particular type of restraint, that the rule of reason — the normal mode of analysis — can be dispensed with. As the Supreme Court explained in *Northern Pacific Railway Co. v. United States*,[26] "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." A court will not indulge in this conclusive presumption lightly. Invocation of a *per se* rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a "naked [restraint] of trade with no purpose except stifling of competition."

The Supreme Court emphasized the "demanding standards" of *Northern Pacific Railway* last Term in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[29] Reiterating that "[*per*] *se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive," the Court overruled *Arnold, Schwinn & Co.*[31] which had held certain vertical restraints illegal *per se*. The Continental Court noted that the vertical restrictions in question possessed "redeeming virtues" in their stimulation of inter-brand competition; that the restrictions were "widely used in our free market economy"; and that there existed "substantial scholarly and judicial authority supporting their economic utility." For these reasons, the Court held that the restraints at issue were to be analyzed, not under a *per se* rule, but under the rule of reason.

For similar reasons we reach the same conclusion here. The NFL player draft, we think, quite clearly fails to satisfy the "demanding standards" of *Northern Pacific Railway*. Given that the draft's restrictive effect is temporally limited, we would hesitate to describe its impact on the market for players' services as "pernicious." More importantly, we cannot say that the draft has "no purpose except stifling of competition" or that it is without "any redeeming virtue." Some form of player selection system may serve to regulate and thereby promote competition in what would otherwise be a chaotic bidding market for the services of college players. The Redskins, moreover, presented considerable evidence at trial that the draft was designed to preserve, and that it made some contribution to preserving, playing-field equality among the NFL-teams, with various attendant benefits. The draft, finally, like the vertical restraints challenged in *Continental T.V.*, is "widely used" in our economy and has both judicial and scholarly support for its economic usefulness.

This is not to say, of course, that the draft in any one of its incarnations may not violate the antitrust laws. It is only to say that the courts have had too little experience with this type of restraint, and know too little of the "economic and business stuff" from which it issues, confidently to declare it illegal without undertaking the analysis enjoined by the rule of reason.

Our conclusion that the legality of the NFL draft should not be governed by a *per se* rule parallels the conclusion of most courts and commentators that the legality of player restrictions in professional sports should be governed by the rule of reason.... When anticompetitive effects are shown to result from a particular player selection system "they can be adequately policed under the rule of reason."

B: Rule of Reason

Under the rule of reason, a restraint must be evaluated to determine whether it is significantly

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[26] 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958).

[29] 433 U.S. 36, 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977), quoting 356 U.S. at 5, 78 S. Ct. 514.

[31] *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967).

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

After undertaking the analysis mandated by the rule of reason, the District Court concluded that the NFL draft as it existed in 1968 had a severely anticompetitive impact on the market for players' services, and that it went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purposes might be asserted for it. We have no basis for disturbing the District Court's findings of fact; and while our legal analysis differs slightly from that of the trial judge, having benefitted from intervening guidance from the Supreme Court, we agree with the District Court's conclusion that the NFL draft as it existed in 1968 constituted an unreasonable restraint of trade.

The draft that has been challenged here is undeniably anticompetitive both in its purpose and in its effect. The defendants have conceded that the draft "restricts competition among the NFL clubs for the services of graduating college players" and, indeed, that the draft "is designed to limit competition" and "to be a `purposive' restraint" on the player-service market. The fact that the draft assertedly was designed to promote the teams' playing-field equality rather than to inflate their profit margins may prevent the draft's purpose from being described, in subjective terms, as nefarious. But this fact does not prevent its purpose from being described, in objective terms, as anticompetitive, for suppressing competition, is the telos, the very essence of the restraint.

The trial judge was likewise correct in finding that the draft was significantly anticompetitive in its effect. The draft inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power.[48] The draft, as the District Court found, "leaves no room whatever for competition among the teams for the services of college players, and utterly strips them of any measure of control over the marketing of their talents." The predictable effect of the draft, as the evidence established and as the District Court found, was to lower the salary levels of the best college players. There can be no doubt that the effect of the draft as it existed in 1968 was to "suppress or even destroy competition" in the market for players' services.

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

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[48] Defendants argue that college football players possess a significant amount of bargaining power, since they can refuse to sign with the team that drafted them, electing instead to sit out several seasons or to play for the Canadian Football League. The first alternative, however, necessitates both a considerable financial sacrifice and a potentially harmful interruption of a player's career. The second alternative is little better: the evidence established that the opportunities for American players in Canada are both limited (owing to a hiring preference for native players) and significantly less rewarding (lower salaries, fewer promotional opportunities, less "glamour"). The evidence plainly supported the District Court's finding that the availability of these alternatives failed to furnish a player with much, if any, bargaining power in salary discussions with the drafting club.

be balanced against its "procompetitive virtues," and the draft can be upheld if the latter outweighed the former. In strict economic terms, the draft's demonstrated procompetitive effects are nil.

The defendants' justification for the draft reduces in fine to an assertion that competition in the market for entering players' services would not serve the best interests of the public, the clubs, or the players themselves. This is precisely the type of argument that the Supreme Court only recently has declared to be unavailing. In *National Society of Professional Engineers v. United States*,[51] the Court held that a professional society's ban on competitive bidding violated § 1 of the Sherman Act. In so holding, the Court rejected a defense that unbridled competitive bidding would lead to deceptively low bids and inferior work "with consequent risk to public safety and health,"terming this justification "nothing less than a frontal assault on the basic policy of the Sherman Act." Ending decades of uncertainty as to the proper scope of inquiry under the rule of reason, the Court stated categorically that the rule, contrary to its name, "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason," and that the inquiry instead must be "confined to a consideration of [the restraint's] impact on competitive conditions." The purpose of antitrust analysis, the Court concluded, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by Congress."

Confining our inquiry, as we must, to the draft's impact on competitive conditions, we conclude that the draft as it existed in 1968 was an unreasonable restraint of trade. The draft was concededly anticompetitive in purpose. It was severely anticompetitive in effect. It was not shown to have any significant offsetting procompetitive impact in the economic sense. Balancing the draft's anticompetitive evils against its procompetitive virtues, the outcome is plain. The NFL's defenses, premised on the assertion that competition for players' services would harm both the football industry and society, are unavailing; there is nothing of procompetitive virtue to balance, because "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

We recognize, on analogy with the Supreme Court's reasoning in *Goldfarb*[58] and *Professional Engineers*, that professional football "may differ significantly from other business services, and, accordingly, [that] the nature of the competition" for player talent may vary from an absolute "free market" norm. Given the joint-venture status of the NFL clubs, we do not foreclose the possibility that some type of player selection system might be defended as serving "to regulate and promote ... competition" in the market for players' services. But we are faced here, as the Supreme Court was faced in *Professional Engineers*, with what amounts to a "total ban" on competition, and we agree with the District Court that this level of restraint cannot be justified. The trial judge concluded, with pardonable exaggeration, that the draft system at issue was "absolutely the most restrictive one imaginable." Even though the draft was justified primarily by the need to disperse the best players, it applied to all graduating seniors, including average players who were, in a sense, fungible commodities. It permitted college players to negotiate with only one team. If a player could not contract with that team, he could not play at all.

Without intimating any view as to the legality of the following procedures, we note that there exist significantly less anticompetitive alternatives to the draft system which has been challenged here. The trial judge found that the evidence supported the viability of a player selection system that would permit "more than one team to draft each player, while restricting the number of players any one team might sign." A less anticompetitive draft might permit a college player to negotiate with the team of his choice if the team that drafted him failed to make him an acceptable offer. The NFL could also conduct a second draft each year for players who were unable to reach

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[51] 46 U.S.L.W. 4356 (U.S. 25 April 1978), *aff'g* 555 F.2d 978 (D.C. Cir. 1977).

[58] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975): The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the profession, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

agreement with the team that selected them the first time. Most obviously, perhaps, the District Court found that the evidence supported the feasibility of a draft that would run for fewer rounds, applying only to the most talented players and enabling their "average" brethren to negotiate in a "free market." The least restrictive alternative of all, of course, would be for the NFL to eliminate the draft entirely and employ revenue-sharing to equalize the teams' financial resources - a method of preserving "competitive balance" nicely in harmony with the league's self-proclaimed "joint venture" status.

We are not required in this case to design a draft that would pass muster under the antitrust laws. We would suggest, however, that under the Supreme Court's decision in *Professional Engineers*, no draft can be justified merely by showing that it is a relatively less anticompetitive means of attaining sundry benefits for the football industry and society. Rather, a player draft can survive scrutiny under the rule of reason only if it is demonstrated to have positive, economically procompetitive benefits that offset its anticompetitive effects, or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is insubstantial. Because the NFL draft as it existed in 1968 had severe anticompetitive effects and no demonstrated procompetitive virtues, we hold that it unreasonably restrained trade in violation of § 1 of The Sherman Act.

Question

Compare the tests in *Mackey* (p. 29) and *Smith* (p. 35).

Problem

Your firm represents a group of wealthy investors who would like to start a new Rollerball league. They are aware of the problems that owners of other professional sports franchises have had with free agency and high player salaries. The owners have stated that they would like to impose the following player restraints to eliminate these problems:

1. A player draft which gives the drafting team an exclusive right of negotiation with the player selected.
2. An option provision in their standard player contract which, for the first ten years of the player's career, gives the team an exclusive right to renew the player's contract for an additional year on the same terms and conditions as the previous year at a salary of no less than 75% of the compensation payable to the player under the previous contract.
3. A free agent compensation rule which provides for those cases in which a free-agent player signs with another team and the two teams cannot reach a mutually satisfactory arrangement.
4. A salary cap on the total payroll for each club in the league.
5. A college draft eligibility rule which forbids any team in the league from drafting a rollerball player until he or she has exhausted their college eligibility, or at least five (5) years have elapsed since the player first entered college, or such player receives a diploma from a recognized college.

The owners have heard that one or more of these restraints may violate the antitrust laws. They would nevertheless like to adopt one or more of these rules in some form. Can you find a way for them to implement their plan?

Section 4: Player Discipline

A. Introduction

Many times player discipline cases involve the suspension or even a total ban of a player by a league or association. Such action can have serious anti-competitive effects. For example, when a league or association blacklists a player because he breaks his contract with a team and takes a job with a team from a rival league, it is in effect a concerted refusal to deal or group boycott which prevents the athlete from earning a livelihood. *See Radovich v. National Football League,* 352 U.S. 445; 77 S. Ct. 390; 1 L. Ed. 2d 456 (1957); *Gardella v. Chandler,* 172 F.2d 402 (2d Cir. 1949). As we saw earlier, outside of the sports area the Supreme Court has dealt harshly with concerted refusals to deal applying a *per se* test. In *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 84 (1984), however, the Court noted that the sports industry by its very nature was one that requires a certain degree of rule making and cooperation in order to produce its entertainment product. There are probably few areas which are more important to the league than the belief that the outcome of its events are determined by merits of the competition. Nothing would erode fan interest more quickly than the disclosure that participants had wagered on the outcome of a game, or that they had cheated in the competition. Drawing the line between legitimate disciplinary action and the abuse of economic power for the purpose of restricting competition are not always easy.

Over the years, gambling in professional sports has been a persistent problem. Judge Landis banned all of the White Sox players in the 1919 World Series in the infamous Black Sox betting and game fixing scandal. In 1942, after discovering that William Cox, the owner of the Philadelphia Phillies, had placed several small bets on the Phillies to win, Landis forced Cox to sell his team. In 1963, Paul Horning of the Green Bay Packers and Alex Karras of the Detroit Lions were suspended for one year for betting on their own teams to win. In 1989, Pete Rose, who had bet regularly on Cincinnati Reds games, always to win, was permanently declared ineligible to associate with any major or minor league baseball clubs.

MOLINAS v. NATIONAL BASKETBALL ASSOCIATION

190 F. Supp. 241 (S.D.N.Y. 1961)

KAUFMAN, District Judge

[In the fall of 1953, Jack Molinas signed a contract to play with the Fort Wayne Pistons. In January of 1954, Molinas admitted in writing that he had placed several bets on his team, the Pistons, to win. Molinas would contact a person in New York by telephone, who informed him of the "point spread" on the particular game in question. Molinas would then decide whether or not to place a bet on the game. Molinas admitted that he received some $400 as a result of these wagers, including reimbursement of his telephone calls to New York. After Molinas admitted this wagering, Mr. Podoloff, the president of the league, acting pursuant to a clause in plaintiff's contract and a league rule prohibiting gambling, indefinitely suspended Molinas from the league.]

* * *

In the action presently before the court, the plaintiff alleges that the defendant National Basketball Association has entered into a conspiracy with its member teams and others in restraint of trade, and thus has violated the anti-trust laws.

* * *

It is further alleged that the suspension of the plaintiff by the league, and its subsequent refusal to reinstate him, is the result of a conspiracy in violation of these laws.

* * *

Plaintiff seeks treble damages in the sum of three million dollars, an injunction against the conspiracies alleged, and reinstatement to the league.

* * *

With respect to plaintiff's suspension from the league in January of 1954, and the subsequent refusal by the

league to reinstate him, plaintiff has patently failed to establish an unreasonable restraint of trade within the meaning of the anti-trust laws. A rule, and a corresponding contract clause, providing for the suspension of those who place wagers on games in which they are participating seems not only reasonable, but necessary for the survival of the league. Every league or association must have some reasonable governing rules, and these rules must necessarily include disciplinary provisions. Surely, every disciplinary rule which a league may invoke, although by its nature it may involve some sort of a restraint, does not run afoul of the anti-trust laws. And, a disciplinary rule invoked against gambling seems about as reasonable a rule as could be imagined. Furthermore, the application of the rule to the plaintiff's conduct is also eminently reasonable. Plaintiff was wagering on games in which he was to play, and some of these bets were made on the basis of a "point spread" system. Plaintiff insists that since he bet only on his own team to win, his conduct, while admittedly improper, was not immoral. But I do not find this distinction to be a meaningful one in the context of the present case. The vice inherent in the plaintiff's conduct is that each time he either placed a bet or refused to place a bet, this operated inevitably to inform bookmakers of an insider's opinion as to the adequacy or inadequacy of the point-spread or his team's ability to win. Thus, for example, when he chose to place a bet, this would indicate to the bookmakers that a member of the Fort Wayne team believed that his team would exceed its expected performance. Similarly, when he chose not be bet, bookmakers thus would be informed in his opinion that the Pistons would not perform according to expectations. It is certainly reasonable for the league and Mr. Podoloff to conclude that this conduct could not be tolerated and must, therefore, be eliminated. The reasonableness of the league's action is apparent in view of the fact that, at that time, the confidence of the public in basketball had been shattered, due to a series of gambling incidents. Thus, it was absolutely necessary for the sport to exhume gambling from its midst for all times in order to survive.

The same factors justifying the suspension also serve to justify the subsequent refusal to reinstate. The league could reasonably conclude that in order to effectuate its important and legitimate policies against gambling, and to restore and maintain the confidence of the public vital to its existence, it was necessary to enforce its rules strictly, and to apply the most stringent sanctions. One can certainly understand the reluctance to permit an admitted gambler to return to the league, and again to participate in championship games, especially in light of the aura and stigma of gambling which has clouded the sports world in the past few years. Viewed in this context, it can be seen that the league was justified in determining that it was absolutely necessary to avoid even the slightest connection with gambling, gamblers, and those who had done business with gamblers, in the future. In addition, conduct reasonable in its inception certainly does not become unreasonable through the mere passage of time, especially when the same factors making the conduct reasonable in the first instance, are still present. At any rate, plaintiff must show much more than he has here in order to compel a conclusion that the defendant's conduct was in fact unreasonable. Thus, it is clear, that the refusal to reinstate the plaintiff does not rise to the status of a violation of the anti-trust laws. Thus it is apparent that the plaintiff has not presented sufficient proof to make out a claim upon which relief may be granted.

* * *

Plaintiff's complaint, therefore, must be dismissed.

BLALOCK v. LADIES PROFESSIONAL GOLF ASSOCIATION

359 F. Supp. 1260 (D.C. Ga. 1973)

MOYE, D.J.

Plaintiff has moved for a partial summary judgment on the ground that her one-year suspension from defendant Ladies Professional Golf Association is illegal under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

[Plaintiff and defendants Cynthia Sullivan, Judy Rankin, Linda Craft, Penny Zavichas and Sharon Miller were professional women golfers who regularly competed against one another in tournament play sponsored by

LPGA for profit. They were all also active members of LPGA. The officers of the LPGA and defendant LPGA Tournament Players Corporation were the same. The policies, business and affairs of the LPGA were directed by the Executive Board, which is comprised of defendants Sullivan, Rankin, Craft, Zavichas and Miller, who were officers of the LPGA as well as player-competitor of plaintiff. During the week of May 15, 1972 Defendant Gene McCauliff III, Tournament Director of the LPGA, appointed four observers at the second round of the LPGA Tournament in Louisville, Kentucky, to observe the play of the plaintiff. The observers claimed that plaintiff had illegally moved her ball. The Executive Board of the LPGA disqualified plaintiff as to the Louisville tournament, placed her on probation for the remainder of the 1972 season and imposed a fine of $500 for cheating.

One week later the Executive Board again convened to discuss plaintiff's case. After listening to the testimony of two player-competitors of plaintiff concerning certain statements made by plaintiff when informed of her probation and fine, the tournament committee recommended that plaintiff be suspended. The members of the Executive Board who were present discussed the suspension of plaintiff and voted to suspend her for one year. Defendant Craft in Baltimore, Maryland, was called, and, after the case was explained to her, she, too, cast her vote for suspension. Defendant Zavichas, who was in Colorado, was unable to be reached. On May 30 plaintiff was informed that she was suspended from June 1, 1972, until May 31, 1973. That suspension was agreed to by all members of the Executive Board.

Plaintiff contended that suspension from the LPGA for a period of one year constitutes a group boycott and a *per se* restraint of trade.]

* * *

Before a concerted refusal to deal can be illegal under this section, two threshold elements must be present: (1) there must be some effect on "trade or commerce among the several States", and (2) there must be sufficient agreement to constitute a "contract, combination ... or conspiracy." *See Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971).

It is undisputed that both of these elements are present in the instant case. As to the first element, it is clear that defendant LPGA conducts its business in such a manner as to constitute interstate commerce, the golf tournaments, co-sponsored by defendant LPGA Tournament Players Corporation, are conducted in and among the several states and the rights to televise and broadcast certain tournaments for interstate transmission have been sold. As to the second element, defendants Sullivan, Rankin, Craft, Zavichas, Miller and the members of the LPGA, by the imposition of a one-year suspension, have agreed, through the LPGA's constitution and by-laws, not to deal with plaintiff.

The fundamental principle for determining the legality of conduct under the Sherman Antitrust Act is the "rule of reason" announced in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

* * *

Justice BRANDEIS explained the rule of reason in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), wherein he stated that:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition....

From this general principle has been carved a well-defined exception within which fall group boycotts:

> Certain arrangements are conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition. *See Northern Pacific Ry. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958). Once the existence of such an arrangement has been established, no evidence of actual public injury is required ... and no evidence of the reasonableness of defendant's conduct will be considered in justification. This rule of *per se* illegality has been applied thus far to horizontal and vertical price fixing agreements, divisions of markets between competitors, tying arrangements, and certain collective refusals to

deal, or "group boycotts."

> [C]ollective refusals to deal, or group boycotts, to be illegal *per se* ... fall into three categories:
>
> The first group, exemplified by *Eastern States Retail Lumber Dealers Assoc. v. United States*, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490 (1914), have involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. Thus, in *Eastern States*, a combination of retail lumber dealers black-listed lumber wholesalers who sold directly to the retailers' customers. The obvious purpose of the combination — eliminating competition from the wholesalers — placed it "within the prohibited class of undue and unreasonable restraints." 234 U.S. at 612, 34 S. Ct. at 954.

* * *

Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination. For example, in Klor's, a large appliance dealer, Broadway-Hale, used its purchasing power to induce defendant manufacturers and wholesalers to sell only at discriminatory prices to plaintiff, a competing appliance dealer. Since the effect of the agreement was to drive Klor's out of competition with Broadway, the Court found the three-cornered agreement illegal *per se*, notwithstanding the fact that the manufacturers and wholesalers, not in competition with Klor's probably had no such anti-competitive motive.

* * *

Unlike these first two categories, the third group of cases has concerned combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors. The leading case in the area is *Fashion Originators Guild of America v. Federal Trade Comm'n*, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941), in which a group of `original' designers refused to sell their creations to retailers who purchased and sold copies of the original designs. In holding this refusal to deal illegal *per se*, the Court declared that even though the object of the boycott was to prevent the retailers from dealing with manufacturers of the copies and thereby eliminate `style piracy,' the coercion practiced indirectly on a rival method of competition precluded application of the rule of reason.

* * *

In all of these cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as `naked restraints of trade,' and have fallen victim to the *per se* rule. On the other hand, where these elements have been missing, the *per se* rule has not been applied to collective refusals to deal.... We conclude that resort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a `naked restraint of trade.' Absent these factors, the rule of reason must be followed in determining the legality of the arrangement.

Measured by the standard set forth ... the Court finds that the purpose and effect of the arrangement in this case (the agreement by defendants Sullivan, Rankin, Craft, Zavichas and Miller to suspend plaintiff from defendant LPGA for one year) was to exclude plaintiff from the market and is therefore a "naked restraint of trade." Plaintiff is a member in good standing of defendant LPGA. Suspension therefrom is tantamount to total exclusion from the market of professional golf. Not only would plaintiff be excluded from LPGA sponsored tournaments, but, as defendant LPGA's Constitution and By-Laws provide in Article VIII:

> A member of the Ladies Professional Golf Association may not compete for prize money in tournament, professional-amateur, or qualifying event that is not co-sponsored by the LPGA Tournament Players Corporation, or approved in writing by the LPGA Executive Director....

The suspension was imposed upon plaintiff by defendants Sullivan, Rankin, Craft, Zavichas and Miller in the exercise of their completely unfettered, subjective discretion as is evident from the fact that they had initially

imposed upon plaintiff only probation and a fine, but then, without hearing from plaintiff, determined to impose the suspension at issue here. Furthermore, the suspension was imposed by competitors of plaintiff who stand to gain financially from plaintiff's exclusion from the market.

The Court therefore determines that the arrangement in this case is illegal *per se*. Consequently, it is not necessary that it inquire as to the reasonableness of the suspension.

Defendants have argued throughout their briefs that the instant case is governed by the "rule of reason" on the ground that the suspension of plaintiff was a valid exercise of self-regulation. Defendants principally rely on the case of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). Silver, a securities dealer, though not a member of the New York Stock Exchange, maintained direct private telephone wire connections with several member firms. Pursuant to the Exchange's rules, the member firms involved applied to the Exchange for approval of the connections. After granting temporary approval for the connections as well as for a direct teletype connection and stock ticker service, the Exchange, without prior notice to Silver, disapproved the applications and under the Exchange's constitution the member firms were then required to discontinue the services. The Exchange refused to disclose to Silver the reasons for such actions. Silver brought an antitrust suit, alleging that the cutoff was a collective refusal to deal. The district court granted summary judgment in Silver's favor.

* * *

The Supreme Court ... began its opinion by stating:

> It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act. The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market.... Hence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act. In this case, however, the presence of another statutory scheme, that of the Securities Exchange Act of 1934, means that such a conclusion is only the beginning, not the end, of inquiry.

The Court determined that the Securities Exchange Act of 1934 mandated that the Exchange exercise self-regulation, but rejected the Court of Appeals' conclusion that the particular application of such self-regulation was outside the purview of the antitrust laws (373 U.S. 357) since the collective refusal occurred under wholly unjustified circumstances - without notice and hearing prior to the Exchange's action.

The Court believes that defendants' reliance upon *Silver* in this case is misplaced. There is no statute here involved which might be construed in *pari materia* with the antitrust laws which justifies defendant LPGA's "self-regulation." The Supreme Court in *Silver* created an exception to the *per se* rule when there is present another statute which justifies concerted action which would otherwise be a *per se* violation of Section 1 of the Sherman Act. *Silver* did not sanction concerted actions not justified by some other federal statute. Some courts have focused on the phrase "or otherwise" (373 U.S. at 349) in the Supreme Court's opinion in *Silver* and have concluded that the Court intended to include within its exception cases wherein self-regulatory activities providing for notice and an opportunity for hearings exist without legislative mandate. However, this Court does not construe the exception to the *per se* rule announced in *Silver*, notwithstanding the "or otherwise" language, to sweep that broadly.

The question posed in *Silver* was whether the existence of a statutory framework for self-government in the security industry repealed the antitrust laws to that extent. The Supreme Court stated that "This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[it] is a cardinal principle of construction that repeals by implication are not favored.' " *A fortiorari*, a private, non-statutory rule to govern a private association cannot repeal by implication a federal statute, the "law of the land." Whatever the "or otherwise" in *Silver* refers to, it is clear that it necessarily must be of sufficient force and effect impliedly to repeal a federal statute. This Court cannot ascribe that weight to the Constitution and By-Laws of the LPGA.

* * *

Defendants have also cited the cases of *Molinas v. National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961), and *Deesen v. Professional Golger's Association*, 358 F.2d 165 (9th Cir. 1966). The Court finds these cases to be inapposite. The facts in *Molinas* demonstrate that Molinas, a professional basketball player, was suspended by the president of the National Basketball Association who was acting pursuant to a clause in Molinas's contract and a league rule prohibiting gambling. The suspension was not imposed by Molinas's competitors.

In the *Deesen* case, Deesen, a professional golfer and a member of the Professional Golfer's Association, had his approved tournament player status terminated by the PGA's national tournament committee. The national tournament committee was largely composed of non-competitors of Deesen (the only exception being Bob Rosburg). Furthermore, the Court of Appeals relied heavily on the fact that notwithstanding that Deesen's tournament status had been terminated, Deesen was not completely excluded from the market (tournaments) as he could still participate therein, if he chose to become a golf teacher employed by a golf club (358 F.2d 172). The termination in *Deesen* was based upon virtually a mathematical application of pre-determined standards. It did not involve a completely unfettered, subjective and discretionary determination of an exclusionary sanction by a tribunal wholly composed of competitors, as here.

* * *

By reason of these undisputed facts and for the reasons stated above, the Court orders that partial summary judgment in favor of plaintiff be granted to the limited extent of ruling that plaintiff's suspension by her competitors, defendants Sullivan, Rankin, Craft, Zavichas and Miller through the mechanism of defendant LPGA, was in violation of § 1 of the Sherman Act. This ruling does not reach the self-policing activities of defendant LPGA which are less than exclusionary in their effect.

Question

1. Can *Blalock* be reconciled with *Molinas*? Surely, the *Eastern States*, *Klor's*, and *FOGA* cases referred to in *Blalock* leave no doubt that a *per se* approach in appropriate in these cases. Or do they?

Section 5: Location and Ownership of Franchises

Professional sports leagues are voluntary associations consisting of persons, partnerships or corporations which have combined for the common purpose of providing the entertainment product of professional sports contests. Unlike most amateur athletic associations which are organized for such lofty, non-profit purposes as promoting amateurism or sportsmanship, leagues are basically organized to make money. Generally voluntary associations are free to adopt rules, regulations or conditions of membership free from judicial interference.[1] League decisions, however, may have an impact on competition. The rejection of an application for a franchise, the denial of permission to relocate a franchise, or a decision to expand the league, can have serious economic effect on an owner, owners from rival leagues, on consumers (fans), or the economy of whole cities. Such league activities have many of the characteristics of conduct condemned by the Sherman Act. A refusal to grant a franchise could be characterized as a group boycott or concerted refusal to deal. The granting of exclusive home territories might be an illegal horizontal territorial restraint. Expansion of a league into cities occupied by other leagues, or the insistence on exclusive stadium leases may constitute illegal acts of monopolization.

Many difficult doctrinal problems arise when attempting to apply the antitrust laws to professional sports leagues. For purposes of location and ownership issues which arise under § 1 of the Sherman Act, should the league

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[1] The general rule is that actions of voluntary associations are held to be conclusive, except when mistake, fraud, illegality, collusion or arbitrariness can be shown. *Oklahoma Secondary School Activities Ass'n v. Midget*, 505 P.2d 175 (Okla. 1972)

be considered a group of competitors or a single entity? Because of the unique nature of professional sports, should it receive special treatment under the antitrust laws? If league members are capable of conspiring under the antitrust laws, should a league member who has lost a vote (a co-conspirator in the league) be able to complain and recover damages because he now does not like the way in which a rule he has adopted effects him?

NORTH AMERICAN SOCCER LEAGUE v. NATIONAL FOOTBALL LEAGUE

670 F.2d 1249 (2d Cir. 1982)

[The district court dismissed the complaint of the North American Soccer League (NASL) alleging that the National Football League's (NFL) ban on ownership by its members of teams in competing leagues violated § 1 of the Sherman Act, and the NASL appealed. The NFL cross-appealed from the denial of its counterclaim for an order enjoining the plaintiffs from owning teams in both the leagues.]

MANSFIELD, Circuit Judge

* * *

The central question in this case is whether an agreement between members of one league of professional sports teams (NFL) to prohibit its members from making or retaining any capital investment in any member of another league of professional sports teams (in this case NASL) violates the antitrust laws. The answer requires an analysis of the facts and application of governing antitrust principles. Most of the facts are not in dispute.

* * *

[The NFL] is the only major league professional football association in the United States. Upon becoming a member of the NFL a team owner receives a non-assignable franchise giving him the exclusive right to operate an NFL professional football team in a designated home city and "home territory," and to play football games in that territory against other NFL members according to a schedule and terms arranged by the NFL. *See* NFL Constitution and By-laws, §§ 3.4, 4.1, 4.2.

The success of professional football as a business depends on several factors. The ultimate goal is to attract as many people as possible to pay money to attend games between members and to induce advertisers to sponsor TV broadcasts of such games, which results in box-office receipts from sale of tickets and revenues derived from network advertising, all based on public interest in viewing games. If adequate revenues are re-ceived, a team will operate at a profit after payment of expenses, including players' salaries, stadium costs, referees, travel, maintenance and the like. Toward this goal there must be a number of separate football teams, each dispersed in a location having local public fans willing to buy tickets to games or view them on TV; a group of highly skilled players on each team who are reasonably well-matched in playing ability with those of other teams; adequate capital to support the teams' operations; uniform rules of competition governing game play; home territory stadia available for the conduct of the games; referees; and an apparatus for the negotiation and sale of network TV and radio broadcast rights and distribution of broadcast revenues among members.

To perform these functions some sort of an economic joint venture is essential. No single owner could engage in professional football for profit without at least one other competing team. Separate owners for each team are desirable in order to convince the public of the honesty of the competition. Moreover, to succeed in the marketplace by attracting fans the teams must be close in the caliber of their playing ability.

* * *

[T]he record is clear that the NFL and most of its members now generally enjoy financial success. The NFL divides pooled TV receipts equally among members. Pre-season gate receipts from each game are shared on a 50/50 basis between opposing teams, and regular season gate receipts are divided on the basis of 60% for the home team and 40% for the visiting team.

Although NFL members thus participate jointly in many of the operations conducted by it on their behalf,

each member is a separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other members. Each also derives separate revenues from certain lesser sources, which are not shared with other members, including revenues from local TV and radio, parking and concessions. A member's gate receipts from its home games varies from those of other members, depending on the size of the home city, the popularity of professional football in the area and competition for spectators offered by other entertainment, including professional soccer. As a result, profits vary from team to team. Indeed as recently as 1978, the last year for which we have records, 2 of the 28 NFL teams suffered losses. In 1977, 12 teams experienced losses. Thus, in spite of sharing of some revenues, the financial performance of each team, while related to that of the others, does not, because of the variables in revenues and costs as between member teams, necessarily rise or fall with that of the others. The NFL teams are separate economic entities engaged in a joint venture.

The National American Soccer League ("NASL") was founded in 1968 upon the merger of two pre-existing soccer leagues. Like the NFL, the NASL is an unincorporated association of professional soccer teams whose members are separately owned and operated, and are financially independent. Its raison d'etre and the needs of its member teams are essentially the same as those of members of other major professional sports leagues, including the NFL.

* * *

The two sports are somewhat similar. Their seasons substantially overlap. The teams have franchises from their respective leagues in the same locations and frequently use the same stadia. An increasing, although small, percentage of the public are switching their interest as fans and TV viewers from professional football to professional soccer, threatening to reduce revenue which NFL teams derive from gate receipts and TV broadcast rights. Competition between NFL and NASL teams has not only increased on an inter-league basis but also between individual NFL and NASL teams. On the league front both organizations compete for a greater share of finite national and regional TV broadcast and advertising revenues. At the local level NFL teams compete against NASL teams for greater fan support, gate attendance, and local broadcast revenues.

* * *

Because of the interdependence of professional sports league members and the unique nature of their business, the market for and availability of capital investment is limited. As the district court found, the economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members. Damage to or losses by any league member can adversely affect the stability, success and operations of other members. Aside from willingness to take the risk of investing in a member of a league in which members have for the most part not demonstrated a record of profits, the potential investor must be reasonably compatible with other members of the league, with a sufficient understanding of the nature of the business and the interdependence of ownership to support not only his newly-acquired team but the sports league of which it is a member. As the district court further noted, these conditions have tended to attract individuals or businesses with distinct characteristics as distinguished from the much larger number of financiers of the type prevailing in most business markets. Although, as the district court observed, the boundaries of this "sports ownership capital and skill" market are not as confined as NASL contends and not limited strictly to present major league sports owners, the sources of sports capital are limited by the foregoing conditions and existing sports league owners constitute a significant source. In short, while capital may be fungible in other businesses, it is not fungible in the business of producing major league professional sports. Regardless of the risk involved in the venture, which may vary greatly from league to league, league members look not merely for money but for a compatible fellow owner, preferably having entrepreneurial sports skill, with whom the other members can operate their joint business enterprise. League members recognize, for example, that if the owner of one team allowed it to deteriorate to the point where it usually lost every game, attendance at games in which that team was playing would fall precipitously, hurting not just that team, but every other team that played it during the season. In view of this business interdependence team owners, through their leagues, are careful about whom they allow to purchase a team in their league and leagues invariably require that the sale of a franchise be approved by a majority of team owners rather than by the selling owner alone.

For these reasons individuals with experience in owning and operating sports teams tend to be the most sought-after potential owners.

* * *

The attractiveness of existing owners of major sports teams as sources of potential capital is further evidenced by the large number of members of major sports leagues who control or own substantial interests in members of other leagues. The record reveals some 110 instances of cross-ownership and some 238 individuals or corporations having a 10% or greater interest in other teams.

* * *

Beginning in the 1950's NFL commissioners had a policy against a team owner maintaining a controlling interest in a team of a competing league.... The participants agreed that any member holding such a controlling interest would make a "best effort" to dispose of it.

* * *

Finally in 1978 the NFL owners moved to take strong action against Hunt and Robbie [Two cross-owners]. An amendment to the NFL by-laws was proposed that would require both to divest their soccer holdings if they wished to continue to own an NFL team. The proposed amendment, which was to have been voted on at an October 1978 NFL owners' meeting, would also have prevented all majority owners, certain minority owners, officers and directors of NFL teams, and certain relatives of such persons from owning any interest in a team in a "major team sport."

* * *

[The district court found, the cross-ownership ban had a concededly anticompetitive intent and, in its impact on the NASL, would probably have an anticompetitive effect. The court found that the purpose of the ban was to weaken the NASL and its member teams so that they could not compete as effectively against the stronger, more mature, and lucrative NFL teams as they might be able to do with the aid of capital investment by NFL team owners. He nevertheless denied relief on the ground that in competing against NASL and its members the NFL and its members must be regarded as a "single economic entity," rendering § 1 of the Sherman Act inapplicable for the reason that it is limited to a plurality of actors. The decisions rejecting league contentions that they should be treated as single economic entities were distinguished on the ground that they involved different types of markets in which the members of a league were competing individually against each other (*e.g.*, for players' services, hiring availability and terms, reserve clauses, college drafts, etc.), whereas here the court considered them to act monolithically as one joint enterprise. The district court reasoned that because individual teams acting alone could not produce Pro Football, the combination of those teams through the NFL was justified by its dominant purpose, the production of the league sport, and was legal. The district judge chose to base his decision entirely on the single entity theory, thus he never reached the issue of what test of unreasonableness should apply.]

Discussion

The first issue is whether § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, on with foreign nations" applies to the cross-ownership ban adopted by NFL and its members. The NFL contends, and the district court held, that § 1 does not apply for the reason that the NFL acted as a "single economic entity" and not as a combination or conspiracy within the meaning of that law. We disagree. As the Supreme Court long ago recognized, the Sherman Act by its terms applies to "every" combination or agreement concerning trade, not just certain types. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). The theory that a combination of actors can gain exemption from § 1 of the Sherman Act by acting as a "joint venture" has repeatedly been rejected by the Supreme Court and the Sherman Act has been held applicable to professional sports teams by numerous lesser federal courts.... We are unpersuaded by the efforts of the district judge to distinguish these cases from the present one.

* * *

[T]he cross-ownership ban in the present case is not aimed merely at protecting the NFL as a league or

"single economic entity" from competition from the NASL as a league. Its objective also is to shield certain individual NFL member teams as discrete economic entities from competition in their respective home territories on the part of individual NFL teams that are gaining economic strength in those localities.... The NFL members have combined to protect and restrain not only leagues but individual teams.

Having concluded that § 1 of the Sherman Act is applicable, we next must decide whether the NFL teams' cross-ownership ban violates that statute. The plaintiffs, characterizing the ban as a "group boycott" and "concerted refusal to deal," contend that the conduct is a species of the patently pernicious anticompetitive kind that must be condemned as *per se* unlawful without further proof.... We disagree.

Combinations or agreements are *per se* violations of the Sherman Act only if they are so "plainly anticompetitive," ... and so lacking in any "redeeming virtue," ... that "because of [their] unquestionably anticompetitive effects," ... "they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases...." Examples are agreements between competitors fixing prices at which they will sell their competing products, limiting their respective marketing areas, or restricting customers to whom their products will be sold or from whom they will be purchased. The cross-ownership ban, though anticompetitive, does not meet these stringent conditions. Although competition exists between NFL members in various respects (*e.g.*, on the playing fields, for players' services and for fans within a home territory where two or more teams are franchised), that competition is not restrained by the cross-ownership ban. Indeed, it is irrelevant to that ban, which is designed to restrain competition by NASL teams against NFL teams, not competition between NFL teams.... As the arguments advanced by the NFL indicate, circumstances could exist that might justify a ban by a weak league as necessary to protect it against serious competitive harm by a cross-owner who threatened to misuse his position in that league to favor a stronger competing league and its members. Under those circumstances a ban "might survive scrutiny under the Rule of Reason even though [it] would be viewed as a violation of the Sherman Act in another context," *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 686.

Because agreements between members of a joint venture can under some circumstances have legitimate purposes as well as anticompetitive effects, they are subject to scrutiny under the rules of reason. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898). This entails an inquiry into "whether the challenged agreement is one that promotes competition or one that suppresses competition," *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 691, that is, whether the procompetitive effects of this restraint outweigh the anticompetitive effects.

* * *

Finally, in carrying out a rule of reason analysis, "the existence of [less restrictive] alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979).

In this case, the procompetitive effect claimed by the defendants for the cross-ownership ban is that the ban is necessary for the NFL owners to compete efficiently in the professional sports league market. On the other hand, the voluminous trial record discloses that the NFL's cross-ownership ban would foreclose NASL's teams from continued enjoyment of and access to a significant segment of the market supply of sports capital and skill, thereby restraining at least some NASL teams from competing effectively against NFL teams for fan support and TV revenues. Any resulting restraint would benefit not merely the NFL as a league but those NFL teams that would be otherwise weakened individually and disproportionally (as compared with other NFL teams) by competing NASL teams. This evidence of the defendants' anticompetitive purpose is relevant in judging its potential anticompetitive effect.

* * *

NFL argues that there is no such thing as a limited market or submarket for sports capital and skill, only a general market in which "capital is fungible." It further urges that in this much larger market the effect of the cross-ownership ban would be *de minimis*, working no appreciable anticompetitive restraint on NASL teams, and that their difficulty in attracting capital is attributable to the poor financial outlook of their franchises rather than to

the ban. Judge HAIGHT, while noting the weakness of the NASL teams' financial condition and prospects, made no definite finding regarding the existence or scope of a sports capital market other than to state that it was not, as NASL contended, limited to existing or potential major sports team owners, a finding with which we need not disagree. Simultaneously he rejected the NFL's contention as to the scope of the relevant capital market,...

* * *

Since we have rejected the "single economic theory" in the context of this case, it is necessary to determine whether the record discloses a separate market for sports capital and skill. We are satisfied that it does. As the Supreme Court noted in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 1524, 8 L. Ed. 2d 510 (1962):

> The boundaries of ... a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Because of the economic interdependence of major league team owners and the requirement that any sale be approved by a majority of the league members, an owner may in practice sell his franchise only to a relatively narrow group of eligible purchasers, not to any financier. The potential investor must measure up to a profile having certain characteristics. Moreover, on the supply side of the sports capital market the number of investors willing to purchase an interest in a franchise is sharply limited by the high risk, the need for active involvement in management, the significant exposure to publicity that may turn out to be negative, and the dependence on the drawing power and financial success of the other members of the league. The record thus reveals a market which, while not limited to existing or potential major sports team owners, is relatively limited in scope and is only a small fraction of the total capital funds market. The evidence further reveals that in this sports capital and skill market owners of major professional sports teams constitute a significant portion. Indeed the existence of such a submarket and the importance of the function of existing team owners as sources of capital in that market are implicitly recognized by the defendants' proven intent in adopting the cross-ownership ban. If they believed, as NFL now argues, that all sources of capital were fungible substitutes for investment in NASL sports teams and that the ban would not significantly foreclose the supply of sports capital, they would hardly have gone to the trouble of adopting it. Unless the ban has procompetitive effects outweighing its clear restraint on competition, therefore, it is prohibited by § 1 of the Sherman Act. That law does not require proof of the precise boundaries of the sports capital market or the exact percentage foreclosed; it is sufficient to establish, as was done here, the general outlines of a separate submarket of the capital market and that the foreclosed portion of it was likely to be significant.

NFL argues that the anticompetitive effects of the ban would be outweighed by various procompetitive effects. First it contends that the ban assures it of the undivided loyalty of its team owners in competing effectively against the NASL in the sale of tickets and broadcasting rights, and that cross-ownership might lead NFL cross-owners to soften their demands in favor of their NASL team interests. We do not question the importance of obtaining the loyalty of partners in promoting a common business venture, even if this may have some anticompetitive effect. But in the undisputed circumstances here the enormous financial success of the NFL league despite long-existing cross-ownership by some members of NASL teams demonstrates that there is no market necessity or threat of disloyalty by cross-owners which would justify the ban. Moreover, the NFL was required to come forward with proof that any legitimate purposes could not be achieved through less restrictive means. This it has failed to do. The NFL, for instance, has shown no reason why it could not remedy any conflict of interest arising out of NFL-NASL competition for broadcast rights by removing cross-owners from its broadcast rights negotiating committee.

For the same reasons we reject NFL's argument that the ban is necessary to prevent disclosure by NFL cross-owners of confidential information to NASL competitors. No evidence of the type of information characterized as "confidential" is supplied. Nor is there any showing that the NFL could not be protected against unauthorized disclosure by less restrictive means. Indeed, despite the existence of NFL cross-owners for some years there is no

evidence that they have abused confidentiality or that the NFL has found it necessary to adopt confidentiality rules or sanctions. Similarly, there is no evidence that cross-ownership has subjected the personnel and resources of NFL cross-owners to conflicting or excessive demands. On the contrary, successful NFL team owners have been involved in ownership and operation of other outside businesses despite their equal potential for demands on the owners' time and resources. Moreover, a ban on cross-ownership would not insure that NFL team owners would devote any greater level of their resources to team operations than they otherwise would.

Although there may be some merit in NFL's contentions that the ban would prevent dilution of the good will it has developed, that it would avoid any disruption of NFL operations because of disputes between its owners or cross-owners, or that it would prevent possible inter-league collusion in violation of the antitrust laws, these procompetitive effects are not substantial and are clearly outweighed by its anticompetitive purpose and effect. Its net effect is substantially to restrain competition, not merely competitors. It therefore violates the rule of reason.

* * *

Reversed.

Question

According to the Court, would a financially weak league be permitted to have an exclusive ownership rule?

LOS ANGELES MEMORIAL COLISEUM COMMISSION v. NATIONAL FOOTBALL LEAGUE

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

J. Blaine ANDERSON, Circuit Judge

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

I. Facts

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1

> as the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city....

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and brought this action in September of 1978. The district court concluded, however, that no present

justiciable controversy existed because no NFL team had committed to moving to Los Angeles. The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the rule to require only three-quarters approval by the members of the League for a move into another team's home territory.

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980, the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, but this court reversed, finding that an adequate probability of irreparable injury had not been shown.

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raiders' relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the Raiders in its effort to keep the team in its original home. The NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the trial, the court concluded the League was not a "single entity."

* * *

[The trial was bifurcated so the jury could first determine liability. The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. In the liability phase of the trial, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim. The damages phase of the trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.55 million and the Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. § 15.]

II. Sherman Act § 1

The jury found that Rule 4.3 violates § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, most restraints are analyzed under the so-called "rule of reason." The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition.

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is *per se* unlawful. In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine whether that restraint promotes or restrains competition.

In the present case, the district judge found that the unique nature of the business of professional football made application of a *per se* rule inappropriate. The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that Rule 4.3 is not an unreasonable restraint of trade under section 1.

A. Single Entity

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs' on this issue and as a preliminary matter the NFL states the jury should have been allowed to decide the question.

* * *

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of § 1 is a fact question. It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extension of this argument was to make the League incapable of violating Sherman Act § 1 in every other subject restriction — yet courts have held the League violated § 1 in other areas. Secondly, other organizations have been found to violate § 1 though their product was "just as unitary ... and requires the same kind of cooperation from the organization's members." Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." We agree with this reasoning.

NFL rules have been found to violate § 1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League v. National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied the rule of reason analysis and found the cross-ownership rule violated § 1.... As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from § 1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

* * *

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product" — the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act. In *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of *per se* illegality; instead, rule of reason analysis was the

proper method to determine the legality of the arrangement.

The case of *United States v. Sealy, Inc.*, 388 U.S. 350, 18 L. Ed. 2d 1238 (1967), is closely on point. Sealy licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. Describing the Sealy organization as a joint venture, the Court nonetheless found it a *per se* violation of the Sherman Act.

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respect an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution, which is to "promote and foster the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have an independent value." The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an NFL member." This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense. Of course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude § 1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason.

B. Rule of Reason

In *Chicago Board of Trade v. United States*,[5] Justice BRANDEIS announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition.

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5 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683, 687 (1918).

> To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a "thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition." This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition."

Our rejection of the NFL's single entity defense implicitly recognized the existence of the first element — the 28 member clubs have entered an agreement in the form of the NFL Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," proof that "is an absolutely essential element of a rule of reason case."

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. On the one hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal arrangement. On the other, and to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreement among competitors, *i.e.* cartels, to fix prices or divide market territories are presumed illegal under § 1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the *per se* rule. Instead, we must examine Rule 4.3 to determine whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility, weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the non-moving party, the jury's verdict is supported by substantial evidence.

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. Such evidence is essential in a section 1 case.

* * *

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, because of the similarity of their products, have the ability — actual or potential — to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded.

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographical market). The NFL argues it competes with all forms of entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the league. A similar conclusion can be drawn from the extraordinary number of television viewers -- over 100 million people — that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2 billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such as New York City-New Jersey, Washington, D.C.-Baltimore and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the

Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one another for the tenancy of NFL teams. Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams is presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the potential for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (*e.g.*, television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's market definition. Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, *i.e.*, competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

2. The History and Purpose of Rule 4.3

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another team's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however, the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous competition" can be a defense to a restraint of trade. Conversely, anticompetitive purpose alone is not enough to condemn Rule 4.3. *See Chicago Board of Trade*, 246 U.S. at 238. The rule must actually harm competition, and that harm must be evaluated in light of the procompetitive benefits the rule might foster.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice TAFT in *United States v. Addyston Pipe & Steel Co.*[6] Most often discussed in the area of covenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective."

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category. We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL argues, however, that territorial allocations are inherent in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel*, 85 F. at 282. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from

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[6] 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211, 44 L. Ed. 136 (1899).

areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice REHNQUIST, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. Here, the district court correctly instructed the jury to take into account the existence of less restrictive alternatives when determining the reasonableness of Rule 4.3's territorial restraint. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. The present case is in fact a good example of how the market itself will deter unwise moves, since a team will not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investments in stadia is undercut in two ways. First, the local governments ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of interbrand competition. To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intraband competition. Here, the jury could have found that the rules restricting team movement do not sufficiently promote interbrand competition to justify the negative impact on intraband competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised. Fan loyalty and location continuity could also be considered. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. In the present case, for example, testimony indicated the some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

* * *

V. Conclusion

The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is affirmed.

Questions and Notes

1. What was the purpose of the Court's "market" analysis? Was it a significant factor in the court's final decision? Should it be?

2. The Court chose the rule of reason rather than the *per se* approach. Why? Would the Court permit the major automobile manufacturers to allocate sales territories among themselves? How are the two cases different?

3. According to the Court what was the "critical issue"? The Court states that the jury was supposed to consider all interbrand and intrabrand competitive effects. If you were a juror, what would you have attempted to do? At the time the NFL was considering the Raiders' move to Los Angeles, the Oakland-Alameda County Stadium was preparing an antitrust complaint that it would have filed to restrain the Raider's move. Would a juror in Oakland view the effects on intrabrand competition differently than a juror in Los Angeles? Does it make any sense to leave the decision as to whether to locate a sports franchise to a jury? Is there some point at which the court will have to find a league rule per se legal to stop league decision making from being made by hometown juries? What were the competitive harms of the NFL rule? What were its benefits? How could the NFL have made its rule "reasonable"?

LOS ANGELES MEMORIAL COLISEUM COMMISSION v. NATIONAL FOOTBALL LEAGUE
791 F.2d 1356 (9th Cir. 1986)

NELSON, Circuit Judge

We now face the second and concluding set of appeals from the district court litigation concerning the move by the Oakland Raiders professional football team (the "Raiders") from Oakland, California to Los Angeles, California.... Here, we (1) affirm the trebled damage jury verdict in favor of the Coliseum; (2) vacate the Raiders' antitrust damage recovery, and remand for further proceedings; and (3) reverse the judgment of liability and

damages on the claim for breach of the implied promise of good faith and fair dealing.

Factual and Procedural Background

* * *

The damages portion of the trial commenced in September 1982. At the trial's conclusion in May 1983, the jury awarded damages on both claims, as follows: for the Coliseum, antitrust damages of $4,860,081, trebled by the district court pursuant to 15 U.S.C. § 15 to $14,580,243; for the Raiders, antitrust damages of $11,554,382, trebled to $34,663,146, plus contract damages stipulated by the parties to equal in amount the untrebled antitrust damages, $11,554,382.

* * *

Following our *Raiders I* decision in February 1984 affirming the district court judgment of antitrust liability, appellants filed a petition for certiorari with the Supreme Court. We then proceeded with the briefing and oral argument for this second set of appeals, but withdrew the case from submission pending the Supreme Court's response. On November 8, 1984, the case was resubmitted, after the Court's denial of the petition.

* * *

Prior to 1980, the NFL as a whole owned the right to expand into the Los Angeles area. As evidence at both phases of the trial in this case demonstrated, the Los Angeles opportunity represented an extremely valuable expansion possibility for the league.... The value of the Los Angeles opportunity arose not only from the economic potential of one of the nation's largest media markets, but also from the NFL's well-established and widely followed nationwide entertainment product. That product had developed over the years into a geographically diverse structure of teams, with traditions, rivalries, well-known players and national media interest, all of which greatly enhanced the value of any expansion opportunity. If and when the NFL placed an expansion team in the Los Angeles area, the accumulated value of the Los Angeles opportunity would have been realized by the NFL through charging the new expansion team owner for the expansion opportunity.

As indicated above, the value of the league's expansion opportunities belonged to the league as a whole, or in other words, was owned in part by each franchise owner. Unquestionably, when the Raiders moved to Los Angeles, they appropriated for themselves the expansion value that had accumulated in Los Angeles. Although by moving out of Oakland the Raiders "gave back" an expansion opportunity to the NFL, the uncontradicted testimony at trial showed the Los Angeles market to be a significantly more lucrative franchise opportunity. Indeed, the Raiders' managing general partner, Al Davis, testified that the Raiders increased their value by some $25 million by moving to Los Angeles.

If, as the Raiders contend and we have found, the jury decided that Rule 4.3 was illegal only as it was applied in 1980, then the NFL's development of the Los Angeles expansion opportunity until 1980 cannot be said to be illegal in the eyes of the antitrust laws. Thus, at least as far as the law of this case is concerned, the NFL legitimately possessed the value of that expansion opportunity that had accrued until 1980.... [T]he accumulated value of that business opportunity is not something to which the Raiders became entitled as a result of the liability verdict. As a result, the injunction permitting the Raiders to play NFL football in Los Angeles provided them with a windfall benefit beyond the scope of the antitrust verdict.

* * *

Because the Raiders' gross damages from their two year delay in moving to Los Angeles have been, as we have found, properly determined, the remaining task for the district court on remand will be to calculate the value of the Raiders' injunctive relief that exceeded the scope of the liability verdict, and offset that value against the Raiders' monetary award. As indicated above, the excess portion of the injunctive relief can be measured as the value of the NFL's Los Angeles expansion opportunity in 1980, prior to the NFL's illegal conduct, less the value of the Oakland opportunity returned to the league.

Another way of looking at the application of this offset to the facts is through a comparison of the Raiders' actual situation "with the hypothetical situation that would have existed" had there been no antitrust violation. As indicated above, it was the NFL's customary practice to charge owners of new franchises for the expansion

opportunity received. The price charged new franchisees reflected the value of the expansion opportunity being provided. For instance, the price charged for an expansion team doubled in the years from 1966 to 1976, from $8.5 million to $16-17 million. If the NFL had voted in favor of the Raiders' move to Los Angeles in 1980, it would have been justified in imposing an analogous charge on the Raiders to account for the excess value of the Los Angeles opportunity the Raiders were receiving over the "Oakland opportunity" that was being returned to the league. In other words, the amount of compensation sought by the NFL might reasonably have reflected the difference between what it could have obtained from a new franchisee in Los Angeles, and a new franchisee in Oakland. In the absence of the NFL's antitrust violation, the Raiders would have been playing football in Los Angeles, but would have been required to compensate the NFL for the excess value of the Los Angeles opportunity.

Application of this offset rule is consistent with, and indeed, virtually compelled by, this court's *Raiders I* opinion. In analyzing the "unique" nature of professional athletic leagues vis-à-vis the antitrust laws, this panel expressly acknowledged that "the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation." *Raiders I* at 1396.... Here, the league owners collectively possessed the value that had accumulated in the Los Angeles expansion opportunity. This value, as indicated above, was created at least in part through the NFL's development, over the years, of a popular spectator sport with a national following. Although this panel upheld the liability jury's conclusion that Rule 4.3 as it was applied to the Raiders' move was an unreasonable restraint of trade, the opinion noted several less onerous forms of territorial restrictions that could pass muster under the rule of reason. Among these were standards restricting team movement that expressly recognized certain objective factors such as population, economic projections and the like, that the league could legitimately consider in deciding whether to permit a team to move. If such restrictions, applied in a non-arbitrary manner, would be reasonable under the Sherman Act, then a fortiori, a rule requiring merely an objectively-determined payment to league members as compensation for the right to take a valuable, jointly-owned franchise opportunity out of the league's hands, would also be a reasonable restriction.

Thus, by taking possession of the Los Angeles expansion opportunity from the NFL, the Raiders reaped a windfall benefit beyond the scope of the antitrust verdict. For this reason, and also because the NFL, in the absence of its antitrust violation, would have been justified in requiring the Raiders to compensate the NFL for the excess value represented by the Los Angeles expansion opportunity, that excess value should have been offset against the Raiders' lost profits from the two years they were precluded from moving to Los Angeles. The district court therefore erred in refusing to admit evidence of the full benefits of the Los Angeles expansion opportunity received by the Raiders, and in refusing to instruct the jury on the NFL's offset defense. The court incorrectly limited the NFL's offset evidence in this regard to the "negotiating advantage" the Raiders received during the 1980-82 period by virtue of the fact that Rule 4.3 discouraged other teams from moving to Los Angeles during that period. On remand, the scope of the offset should be broadened to include the full value of the Los Angeles opportunity that had accrued prior to 1980, less the value of the "Oakland opportunity" that was returned to the NFL.

* * *

Conclusion

We reverse the district court's denial of the NFL's motion for judgment n.o.v. on the Raiders' good faith and fair dealing claim, and remand so that the damages award on that claim can be vacated. As for the Raiders' and Coliseum's antitrust awards, we affirm the trebled damage verdict in favor of the Coliseum, but vacate the Raiders' antitrust damage recovery, and remand for further proceedings consistent with this opinion.

Questions and Notes

1. Under the NFL Constitution and By-Laws, a three-fourths vote is require to transfer a franchise to a different city. In addition, guidelines developed by the league require the Commissioner to evaluate a proposed team

REVERSED and REMANDED.

Problem

Bunky and Buffy Bunt, two businessmenentered intoanagreementwithRedHourglasstopurchase the Boston Codfish, a professional basketball team, one of 24 members of Intergalactic Basketball Association.

I.B.A., as its constitution recites, is a joint venture "organized to operate a league consisting of professional basketball teams each of which shall be operated by a member of the Association". Each of its joint ventures holds a franchise to operate a team. While the teams compete vigorously on the basketball court, the joint venturers are dependent upon one another as partners in the league format to make it possible. I.B.A. operates through its Board of Governors which consists of one governor designated by each member. Action by the Board on a transfer of membership requires the affirmative vote of three quarters of the members of the Board.

When the Bunts applied to the I.B.A for membership, their application was denied when the motion to grant membership failed to carry at the meeting of the Board of Governors on June 15, 1990. There were four votes in favor, eighteen votes opposed and two not present.

The Bunts immediately demanded and were granted a personal hearing before the Board. Following the presentation of their case a second vote was taken. This vote resulted in 7 affirmative and 17 negative votes.

There is a sharp dispute on the reason for the rejection. The Bunts contend that they were rejected because of their friendship and business associations with one Sam Schwartz, owner of the San Antonio SubSonics, who was an anathema to the other members of the league. Buffy claims that he was told the "real" reason by Basketball Commissioner Jones and Richard Bush, President of the Hudson Bay Eskimos and Chairman of the I.B.A. Finance Committee. According to Bunt, Jones said:

> I don't have to draw you a picture.... They are obviously worried that if you fellows are also owners, that you will side with Sam Schwartz in all matters in the future and cause the league more troubles than they now have with Sam as it is.

According to Bunt, Bush said:

> You are with Sam Schwartz.... They are obviously worried that you fellows, being close to Sam, are going to be siding with him on any matters that come up before the I.B.A.

On the other hand, the reason given by the I.B.A. for the rejection was that the business association between Bunts and Schwartz violated the "conflict of interest" provision of the I.B.A. constitution. That provision reads: A member shall not exercise control directly or indirectly, over any other member of the Association. This provision is necessary, the I.B.A. claims, in order for the league to enjoy public support because there is in fact, and the public believes there is, intense competition in the league framework between the teams operated by the I.B.A. members.

The Bunts have come to you for advice. Do the Bunts have an antitrust claim? What elements must be alleged and proved to establish such a claim? If discovery is necessary, what additional facts will need to be developed? *See Levin v. National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974).

Section 6: Monopolization

A. Introduction

Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with other persons to monopolize any part of the trade or commerce ... shall be deemed guilty of a felony." In order to establish the offense of monopolization a plaintiff must establish that the defendant: (1) possessed monopoly power, and (2) has engaged in acts of monopolization.

For purposes of antitrust analysis, monopoly is not synonymous with exclusive possession or control. The Supreme Court has defined monopoly power as power to control prices and exclude competition. *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). There is no single, agreed upon method to determine monopoly power. Usually the first step in assessing a defendant's economic power is to define the relevant market in which power is to be measured. The scope of the relevant market can be viewed as that market in which products from adjacent geographic areas, or from other producers in the same area, cannot compete on a equal basis with those included in the market. Sullivan, *Antitrust* 41 (1977). Thus, the relevant market has two components: (1) the product market and (2) the geographic market. The Court has stated that reasonable interchangeability for the purposes for which a product is produced — considering price, use and quantities considered. *Id.* at 403.[1] The geographic market is defined as that area of the country within which a seller can increase price without new sellers relocating into the area, prompting a flow of substitute products into the area or, losing customers to supplier located outside the area. If any of these responses do occur then the geographic boundaries of the market should be expanded.[2]

Once the relevant market has been defined the defendant's strength within that market must be assessed to determine whether it possess monopoly power. There are basically three approaches to measuring power. The first is the structural approach which involves looking at market share in terms of either total dollar volume or number of units sold. The market share of the defendant is compared to that of the other firms and power is inferred from the percentage of the market which is controlled by the defendant.[3] The second approach involves looking at defendant's profitability and trying to determine how much it's performance deviates from the rest of the industry. If a firm's net profits greatly exceed the industry average it is likely that the defendants has monopoly power since

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[1] In *du Pont* the Court held that cellophane wrap was reasonably interchangeable with other form of flexible wrapping such as waxed paper, aluminum, etc. According to the 1984 Justice Department merger guidelines, the government seeks to identify a group of products such that a hypothetical firm that was the only present and future seller of those products (monopolist) could profitably impose a small but significant and nontransitory increase in price. The analysis will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical firm monopolist of that product imposed a small but significant and nontransitory increase in price - which will usually be assumed to be 5% for one year, although different assumptions may be used, depending upon the nature of the industry. Areeda, *Antitrust Analysis* 583 (4th ed. 1988).

[2] The Justice Department merger guidelines define the geographic market as an area such that a hypothetical firm that was the only present or future producer or seller of the relevant product in that area could profitably raise its price significantly. Beginning with the location of each merging firm (or relevant plant), we ask what would happen if a hypothetical monopolist of the relevant product at that point increased price significantly. If that price increase would be unprofitable because too many buyers would shift to products produced in other areas, then the next-best geographic substitute wold be added, and this process will be continued until we have an area in which a hypothetical monopolist could profitably increase price significantly. Areeda, *Antitrust Analysis* 584 (4th ed. 1988).

[3] For example in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) the court stated, "[t]hat percentage (over 90%) is enough to constitute monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." Between seventy five to ninety five percent of the shoe machinery market was held to be a sufficient to constitute monopoly power. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D.C. Mass. 1953).

its prices exceed its costs by a margin greater than that of the rest of the industry.[1] Finally, the responsiveness of customer demand for the defendant's product or service to changes in price. If relatively large increases in the price of defendant's product result in little or not drop in sales volume it said that the demand for the product is very inelastic. From this fact it can be inferred that the defendant possesses the power to control prices, and thus monopoly power since he has no effective competitors for his customers to deal with.[2]

Once it has been established that the defendant possesses monopoly power, it must be determined whether it has engaged in an acts of monopolization. The Supreme Court has stated that the type of conduct which will violate § 2 is that which unnecessarily excludes or handicaps competitors. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). The Court went on to say that conduct which does not benefit consumers by making a better product or service available or serve some other valid business purpose would violate § 2. *Id.* at 597. Thus, it is not illegal for a firm to possess monopoly power. Similarly it is not illegal for a firm with monopoly power to charge a profit maximizing price, even if that price is well in excess of the firm's costs. What is illegal is to willfully acquire, maintain, or use monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes. *Id.* at 596.

AMERICAN FOOTBALL LEAGUE v. NATIONAL FOOTBALL LEAGUE

323 F.2d 124 (4th Cir. 1963)

HAYNSWORTH, Circuit Judge

The American Football League and owners of its franchises are contending against the National Football League and the owners of its franchises for victory in the courts. The American Football League and the owners of its franchises lost in the Court below, when the District Court held that there had been no violation of Sections 1, 2 or 3 of the Sherman Act by the National Football League and the owners of its franchises. We affirm.

* * *

In 1959, the National Football League operated with twelve teams located in eleven cities. There were two teams in Chicago and one each in Cleveland, New York, Philadelphia, Pittsburgh, Washington, Baltimore, Detroit, Los Angeles, San Francisco, and Green Bay, Wisconsin. In 1960, two additional franchises were placed, one in Dallas and one in Minneapolis-St. Paul, the Dallas team beginning play in 1960 and the Minneapolis-St. Paul team in 1961. In 1961, one of the Chicago teams, the Cardinals, was transferred to St. Louis.

The American Football League was organized in 1959, and began with a full schedule of games in 1960. Affiliated with it were eight teams located in eight cities, Boston, Buffalo, Houston, New York, Dallas, Denver, Los Angeles and Oakland. After the 1960 season, the Los Angeles team was moved to San Diego.

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Many of the National League owners were interested in expanding the league. Hallas, owner of the Chicago Bears, was the earliest and most ardent advocate of expansion. Early in 1956, he predicted that National would

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[1] *See* AREEDA, ANTITRUST ANALYSIS 14-19 (4th ed. 1988).

[2] In *du Pont* the evidence established that small reductions in the price of cellophane resulted in large numbers of buyers switching from other forms of wrapping material to cellophane. The evidence also showed that du Pont's percentage of total wrap sales went up and that the sales of other wraps went down whenever du Pont lowered its price. From these facts the Court incorrectly inferred that du Pont had no monopoly power. Critics have pointed out that the purpose of this type of analysis is not to determine whether buyers will turn away from the defendant's product at some price, but whether they will abandon it before the defendant succeeds in pushing its price up to the point where it is earning monopoly profits. SULLIVAN, ANTITRUST 56 (1977). In order for this approach to be of any use it must be determined whether cross-elasticity of demand is high at prices closely related to cost, or whether the defendant has a substantial cost advantage which enables it to set prices at super-competitive levels before the discipline of substitutes sets in. *Id.* at 56.

expand from twelve to sixteen teams during the period of 1960-1965.... [B]y 1959 a majority of the owners were in favor of expansion to sixteen teams and the granting of four additional franchises, two at a time.

As the National League contemplated expansion, the interest of the owners centered on Houston, Dallas, and two or three other cities. The weather in the South-west was particularly favorable, and, with the improvement of the financial condition of the National League teams and the increasing revenues they received from television, it was thought that Houston and Dallas, with their natural rivalry, could each support a team. Those two cities were considered by National's owners as the most likely prospects for expansion with Minneapolis-St. Paul, Buffalo and Miami close behind.

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At National's annual meeting on January 28, 1960, franchises were granted to Dallas and Minneapolis-St. Paul, the grant to Minneapolis-St. Paul being conditioned upon the enlargement of the Minneapolis stadium and the sale of 25,000 season tickets for the 1961 season when play was to commence. The Dallas franchise, however, permitted it to operate in 1960, for Murchison was very anxious that his National League team commence play in Dallas in the same year Hunt's American League team commenced play there.

On the next day, the American League had its annual meeting, during which it granted a franchise to Oakland, which took the place of Minneapolis-St. Paul. The American League owners preferred Oakland to other applicants, because they wanted a second team on the West Coast and because they regarded the Oakland area as promising.

It thus came to pass that in the 1960 season, teams of the two leagues were in direct competition in New York, Dallas, Los Angeles, and in the San Francisco-Oakland area. Each league had teams in other cities in which there was no direct competition between the leagues. The two leagues were competing on a national basis for television coverage, outstanding players and coaches, and the games of each league competed for spectators with the televised broadcast of a game of the other.

The first and most important question on appeal, therefore, is a review of the District Court's determination of the relevant market. The District Court recognized that the two leagues and their member teams competed with each other in several ways, and that the relevant market with respect to one aspect of their competition would not necessarily be the relevant market with respect to another. Since each league recruited players and coaches throughout the nation, he concluded that the relevant market with respect to their competition in recruiting was nationwide. He necessarily found that their competition for nationwide television coverage, with a black-out only of the area in which the televised game was played, was nationwide. As for the competition for spectators, he found the relevant market to be those thirty-one metropolitan areas in the United States having a population of more than 700,000 people according to the 1960 census.

* * *

In short, it abundantly appears that cities throughout the United States and one Canadian city were actively competing for league franchises, there being many more applicants than available franchises.

In this Court, the plaintiffs contend that the relevant market is composed of those seventeen cities in which National now either has operating franchises, or which it seriously considered in connection with its expansion plans in 1959.... They include in the relevant market all of the closed cities in which there is a National League team, but no American League team, but exclude from the relevant market all of those closed cities in which there is an American League team but no National League team, and all of those other cities in which there is now no major league professional football team, but which would be hospitable to a franchise and which have a potential for adequate support of a professional football team. They advance the unquestioned principle that the relevant market should be geographically limited to the area in which the defendants operate, or the area in which there is effective competition between the parties.

In very different contexts, the relevant market has been found to be a single city, a group of cities, a state, or several states. In considering an attempt to monopolize, it, of course, is appropriate to limit the relevant geographic market to the area which the defendant sought to appropriate to itself, and, if monopoly power has been acquired in a separably identifiable and normally competitive market, it is irrelevant that the defendant did not

possess the same monopoly power in an unrelated market elsewhere.

Plaintiff's contention here, however, is a simple fractionalization of a truly national market. Each league has teams franchised to cities on the Atlantic, on the Pacific and in the midlands. Each team in each league travels back and forth across the country to play before many different audiences in many different cities. Most of the official season games are played in a city in which there is a franchised team, but that is not invariable, and most of the preseason exhibition games are played in cities in which there is no franchised team. In locating franchises, neither league has restricted itself to any geographic section of the country or limited itself to any particular group of cities. In American's brief history, it has moved one team from Los Angeles to San Diego, and the many changes which have occurred in National's franchises belie any notion of geographic limitation.

Though we may concentrate our attention upon competition between the leagues for franchise locations and lay aside for the moment clearly national aspects of their competition for players, coaches and television coverage, location of the franchise is only a selection of a desirable site in a much broader, geographically unlimited market. It is not unlike the choice a chain store company makes when it selects a particular corner lot as the location of a new store. It preempts that lot when it acquires it for that purpose, but, as long as there are other desirable locations for similar stores in a much broader area, it cannot be said to have monopolized the area, or, in a legal sense, the lot or its immediate vicinity.

The National League was first upon the scene. In 1959, it had franchises in eleven cities, the two Chicago teams being in direct competition with each other. It now has franchises in fourteen cities, some of which the District Court found capable of supporting more than one professional football team. Obviously, the American League was of that opinion, for it placed teams in New York, Los Angeles, and the San Francisco-Oakland area, where National, at the time, had well established teams. Most of the other cities in which each league operates, however, are incapable of supporting more than one professional football team. In such a city, a professional football team, once located there, enjoys a natural monopoly, whether it be affiliated with the National or American League, but the fact that National had teams located in such cities before American's advent does not mean that National had the power to prevent or impede the formation of a new league, or that National's closed cities should be included in the relevant market if American's closed cities are to be excluded. The fact is that the two leagues are in direct competition for regular season spectators only in New York, Dallas, and the San Francisco-Oakland area, and, during the 1960 season, in Los Angeles. If the relevant market is not to be limited to those cities, it must be, geographically, at least as broad as the United States, including Hawaii and portions of Canada.

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

The District Court's finding that National did not have the power to monopolize the relevant market appears plainly correct. In 1959, it occupied eleven of the thirty-one apparently desirable sites for team locations, but its occupancy of some of them as New York and San Francisco-Oakland was not exclusive, for those metropolitan areas were capable of supporting more than one team. Twenty of the thirty-one potentially desirable sites were entirely open to American. Indeed, the fact that the American League was successfully launched, could stage a full schedule of games in 1960, has competed very successfully for outstanding players, and has obtained advantageous contracts for national television coverage strongly supports the District Court's finding that National did not have the power to prevent, or impede, the formation of the new league. Indeed, at the close of the 1960 season, representatives of the American League declared that the League's success was unprecedented.

American advances a theory, however, that, since the National League won Minneapolis-St. Paul in competition with American, National could have taken several other cities away from American had it undertaken to do so. This is only a theory, however, unsupported by evidence. It ignores the fact that American won Houston over National's competition, and that each league has won one and lost one in their direct competition for franchise locations. It ignores the fact that National was committed to expansion from twelve to sixteen teams in two separate steps, two teams at a time, so that it had but two franchises to place at the time American was being organized.

American questions the finding that sixteen teams is a maximum that one league can efficiently accommodate, but the finding is based upon evidence and was not clearly erroneous. In short, there is no basis for a contention that the evidence required a finding that National, had it wished, could have placed a team in every location sought by American, or in a sufficient number of them to have destroyed the league.

American complains that National, the first upon the scene, had occupied the more desirable of the thirty-one potential sites for team locations. Its occupancy of New York and San Francisco-Oakland was not exclusive, however, and the fact that its teams in other locations, such as Baltimore and Washington, enjoyed a natural monopoly does not occasion a violation of the antitrust laws unless the natural monopoly power of those teams was misused to gain a competitive advantage for teams located in other cities, or for the league as a whole. It frequently happens that a first competitor in the field will acquire sites which a latecomer may think more desirable than the remaining available sites, but the firstcomer is not required to surrender any, or all, of its desirable sites to the latecomer simply to enable the latecomer to compete more effectively with it. There is no basis in antitrust laws for a contention that American, whose Boston, Buffalo, Houston, Denver and San Diego teams enjoy natural monopolies, has a right to complain that National does not surrender to it other natural monopoly locations so that they too may be enjoyed by American rather than by National. When one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly.

American also charges the defendants with an attempt to monopolize. They say that National offered franchises to be located in Dallas and Houston, and later to Minneapolis-St. Paul in substitution for Houston, for the sole purpose of preventing organization of the American League. It relies upon certain statements made by Marshall, of the National League Washington Redskins, and it discounts all of National's earlier discussion of its expansion plans as froth designed to influence congressional action upon a pending bill granting certain exemptions from the anti-trust laws to professional football.

It is true that a lobbyist for the Sports Bill had informed the National League owners that expansion of the National League, or plans for its expansion, would be helpful in developing congressional support for the bill, particularly among Congressmen from the areas affected by the expansion. It is also true that after National's absorption of three teams from the All American Conference in 1950, there was little talk in the National League of expansion until after the Supreme Court's decision in *Radovich* in 1957. Early in 1956, however, Hallas had predicted that National would expand from twelve to sixteen teams during the period, 1960-1965. Later, as indicated above, there was much discussion of its and much of it public. The remaining years of the 50's were consistently referred to as a period of consolidation, while the early years of the 60's were to witness the expansion of the league from twelve to sixteen teams in two separate steps. These declarations had gone so far and had become so specific that National would have greatly embarrassed itself if it had not undertaken their execution, though American had never appeared upon the scene. Moreover, the District Court found that there was substantial business and economic reasons for advocacy by National League owners of the planned expansion. The statement attributed to Marshall, of the Washington Redskins, that he had heard of no reason for expansion except to prevent formation of the American League, the District Judge found to be untrue, for Marshall had been present when business and economic reasons for the expansion had been discussed. Marshall, himself, consistently opposed expansion, though at the 1960 meeting, after some personal differences with Murchison and some of Murchison's associates had been adjusted, he acquiesced in the granting of franchises to Dallas and Minneapolis-St. Paul. Marshall may have made the statement attributed to him, but, in light of his opposition to expansion and the evidence of business considerations which induced other National League owners to advocate expansion, the District Court was not required to find that Marshall's statement was true. On the contrary, the District Court's finding is abundantly supported by the evidence, particularly in light of the fact that what the National League did in 1959 and 1960 was simply to implement on schedule the plans it had announced much earlier.

* * *

We conclude, therefore, that the District Court properly held that the plaintiffs have shown no monopolization by the National League, or its owners, of the relevant market, and no attempt or conspiracy by them, or any of them, to monopolize it or any part of it. No violation of the Sherman Act having been established,

the judgment of the District Court is affirmed.

Affirmed.

UNITED STATES FOOTBALL LEAGUE v. NATIONAL FOOTBALL LEAGUE

842 F.2d 1335 (2d Cir. 1988)

WINTER, Circuit Judge

This appeal follows a highly publicized trial and jury verdict of $1.00. The plaintiff is a now-defunct professional football league that began play in this decade; the defendant is a football league founded nearly seventy years ago. The older of the two leagues, the National Football League, is a highly successful entertainment product.... The newer league, the United States Football League, began play in March 1983 with twelve teams and network and cable television contracts with the American Broadcasting Company ("ABC") and the Entertainment and Sports Programming Network ("ESPN"). After three seasons and losses in the neighborhood of $200 million, the USFL played its last game in July 1985....

The USFL and certain of its member clubs brought this suit in the Southern District of New York against the NFL, its commissioner, Alvin R. "Pete" Rozelle, and twenty-seven of its twenty-eight member clubs. Seeking damages of $1.701 billion and appropriate injunctive relief, the USFL alleged that the NFL violated Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2 (1982), and the common law. Forty-eight days of trial before Judge LEISURE produced a trial transcript of nearly 7100 pages and thousands of additional pages in exhibits.

After five days of deliberations, the jury found that the NFL had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States. The jury also found that the NFL's unlawful monopolization of professional football had injured the USFL. The jury awarded the USFL only $1.00 in damages, however, an amount that, even when trebled, was no consolation for the USFL.

The jury rejected the remainder of the USFL's claims. It found that the NFL had neither monopolized a relevant television submarket nor attempted to do so; that the NFL did not commit any overt act in furtherance of a conspiracy to monopolize; that the NFL did not engage in a conspiracy in restraint of trade; that the NFL's television contracts were not unreasonable restraints of trade; that the NFL did not control access to the three major television networks; and that the NFL did not interfere either with the USFL's ability to obtain a fall television contract or with its spring television contracts. The USFL's common law claims were also rejected.

* * *

On this appeal, the USFL claims that a "litany of erroneous opinions, rulings and instructions" by Judge LEISURE resulted in a "verdict of confusion" that "sent one of the most egregious violators in the history of the federal antitrust laws on its way with a pat on the back." Specifically, the USFL contends that the NFL could not legally enter into a pooled-rights agreement with all three networks; that Judge LEISURE's jury instructions "destroyed" the effectiveness of the USFL's proof of its television claims and set improperly high standards of liability; that he improperly allowed the NFL to introduce evidence that the USFL was mismanaged; that he excluded other evidence critical to establishing the USFL's claims; and that his incorrect rulings and instructions on damages prevented the USFL from receiving appropriate relief. We affirm.

Summary

We briefly summarize our principal rulings. The jury's finding of illegal monopolization of a market of major-league professional football was based upon evidence of NFL attempts to co-opt USFL owners, an NFL Supplemental Draft of USFL players, an NFL roster increase, and NFL conduct directed at particular USFL franchises. These activities, however, were hardly of sufficient impact to support a large damages verdict or to justify sweeping injunctive relief. For that reason, the USFL candidly admits that "at the heart of this case" are its

claims that the NFL, by contracting with the three major networks and by acting coercively toward them, prevented the USFL from acquiring a network television contract indispensable to its survival. The jury expressly rejected the television claims.

The jury was clearly entitled by the evidence to find that the NFL's fall contracts with the three networks were not an anticompetitive barrier to the USFL's bidding against the NFL to acquire a network contract. Moreover, there was ample evidence that the USFL failed because it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league. In particular, there was evidence that the USFL abandoned its original strategy of patiently building up fan loyalty and public recognition by playing in the spring. The original plan to contain costs by adherence to team salary guidelines was discarded from the start. Faced with rising costs and some new team owners impatient for immediate parity with the NFL, the idea of spring play itself was abandoned even though network and cable contracts were available. Plans for a fall season were therefore announced, thereby making 1985 spring play a "lame-duck" season. These actions were taken in the hope of forcing a merger with the NFL through the threat of competition and this litigation. The merger strategy, however, required that USFL franchises move out of large television markets and into likely NFL expansion cities. Because these moves further eroded fan loyalty and reduced the value of USFL games to television, the USFL thereby ended by its own hand any chance of a network contract.

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

The Trial

1. The Parties' Contentions

The USFL contended at trial that the NFL maintained a monopoly in the market for major league professional football and in a submarket for the network broadcasting rights to such football by the following allegedly predatory tactics:

a. Signing multi-year contracts with the three major television networks;

b. Pressuring the major networks to abstain from televising USFL games in the spring or fall, and successfully preventing any network telecasts of the USFL in the fall, by threatening not to renew NFL contracts or by assigning unattractive NFL games under existing contracts;

c. Establishing contracts with the networks for artificially high rights fees that, because of the so-called "dilution effect" on demand for advertising during NFL games, precluded network broadcasts of the USFL;

d. Seeking to prevent any of the three major networks from signing a contract for the USFL's initial 1983 spring playing season;

e. Rotating the Super Bowl among the three networks and not submitting the Super Bowl, playoff and even regular-season television rights to competitive bidding;

f. Pursuing a strategy outlined in the so-called "Porter Presentation" to "conquer" and bankrupt the USFL, including: co-opting powerful USFL owners, such as Donald Trump and Alfred Taubman, by offering them NFL franchises; encouraging ABC not to continue USFL broadcasts; pressuring ABC by giving it an unattractive schedule for its Monday Night Football program in 1984;

targeting important USFL players for signing with the NFL through means such as the NFL's Supplemental Draft and expanded roster; and attempting to bankrupt the weakest USFL teams by driving up USFL player salaries in order to diminish the USFL's size and credibility;

g. Collaborating with the City of Oakland to destroy the Oakland Invaders of the USFL in order to hurt the credibility and image of the Invaders and the entire USFL;

h. Threatening to move an existing NFL franchise or to create a new NFL franchise solely to injure the USFL franchise in Oakland; and

i. Attempting to preclude the USFL's New Jersey Generals from moving to New York City.

The NFL contended that the relevant television submarket included entertainment broadcasting generally and that it had not monopolized either the market for major league professional football or the television submarket because:

a. Its contracts with the three major networks were not exclusionary;

b. The USFL's failure to secure a fall network contract was the result of the independent judgment of each network that the USFL was an inferior product, and of the USFL's self-destructive strategy of forcing a merger with the NFL;

c. It never pressured a network by threatening non-renewal or by assigning a schedule of unattractive games;

d. It never undertook the strategy outlined in the Porter Presentation;

e. It never sought to injure the USFL's Oakland franchise or to preclude the New Jersey Generals from playing in New York City; and

f. The losses suffered by the USFL were due to its own mismanagement.

2. The History of Major-League Professional Football

* * *

In 1966, the NFL and the AFL agreed to merge, largely because the competition for players had sharply increased salaries. Congress exempted this merger from the antitrust laws by legislation discussed *infra*. The merger became fully effective when a twenty-six-team NFL began play in 1970 with two conferences, the National Football Conference and American Football Conference. The NFL reached its present size of twenty-eight teams when expansion teams began play in Seattle and Tampa in 1976.

* * *

The USFL was founded in May 1982 by David Dixon as a league that would play spring football. The league began play in March 1983 with teams in Birmingham, Boston, Chicago, Denver, Los Angeles, Michigan, New Jersey, Oakland, Philadelphia, Phoenix, Tampa and Washington. In part because of the location of its teams in major television markets, the USFL was able to obtain multimillion dollar network and cable television contracts with ABC and ESPN. Nevertheless, for reasons explored in detail infra, the USFL demonstrated little stability. Over its three seasons of spring football (one of which was a "lame-duck" season commenced after an announced decision to shift to fall play), the USFL clubs played in twenty-two cities, and had thirty-nine principal owners. None of the majority owners of an original USFL team was a majority owner by 1986 when a planned fall schedule was aborted by the $1.00 verdict.

3. The NFL's Television Contracts

* * *

In 1961, the NFL teams agreed to sell their collective television rights as a single package and to share broadcast revenues equally among all franchises. This decision was in response to arguments by Commissioner

Rozelle that the league's competitive balance on the field would eventually be destroyed if teams in major television markets continued to sell their broadcast rights individually. In the long run, he believed, great differentials in television revenues among teams would lead to a competitive imbalance that would diminish the overall attractiveness of the NFL's product.... Rozelle's arguments were bolstered by the policy of the recently organized AFL to pool television rights and revenues in its first broadcast contract with ABC.

Before the NFL could enter a pooled-rights television contract, however, it had to overcome several legal obstacles. An earlier attempt by the NFL to control the sale of television rights by its teams had been deemed a violation of Section 1 of the Sherman Act in *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

* * *

[In 1961] Congress enacted the Sports Broadcasting Act of 1961, which exempted from the antitrust laws pooled-rights agreements entered into by professional sports leagues, Pub. L. No. 87-331 § 1, 1961 U.S. CODE CONG. & ADMIN. NEWS 822, 75 Stat. 732 (codified as amended at 15 U.S.C. § 1291) (Supp. IV 1986). In order to protect college games from competition with pro football telecasts, the exemption did not apply to the broadcast of professional football games on Friday nights and Saturdays during the college football season. *Id.* § 2 (codified as amended at 15 U.S.C. § 1293 (1982).

The first NFL pooled-rights contract was with CBS. For the 1962 and 1963 seasons, CBS was the only network permitted to bid for this contract because it had individual rights contracts running through 1963 with nine teams. The NFL received $4,650,000 per season from CBS during these two seasons. For the 1964-65 NFL contract, CBS outbid NBC and ABC with an offer of $14,100,000 per season. In 1964, the AFL, which had a contract with ABC, entered into a five-year, $36 million contract with NBC.

In 1966, Congress amended the Sports Broadcasting Act specifically to confer antitrust immunity on the NFL-AFL merger. Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1515 (codified as amended at 15 U.S.C. § 1291). At the same time, the restriction on Friday night and Saturday telecasts was expanded to include protection for high school football. *Id.* § 6(b)(3). In passing this legislation, Congress was plainly informed that, upon consolidation of the two leagues, the NFL would have broadcast contracts with at least two networks....

In 1970, the NFL entered into a contract with ABC to televise a game nationally on Monday nights. Since then, all three major television networks have broadcast NFL games, and the NFL's annual revenues from television have increased by more than 800 percent. The NFL teams received approximately $186 million for the 1970-73 seasons; $268 million for the 1974-77 seasons; $646 million for the 1978-81 seasons; and $2.1 billion over the five-year period 1982-86.

The ABC, CBS and NBC contracts from 1970 onward have given each network rights of first negotiation and first refusal to decide whether to continue its NFL contract for subsequent years. The NFL's 1982-86 contracts were nonexclusive and did not forbid a network from televising another football league's games at any time when it was not broadcasting NFL games. NBC was thus legally free to televise to a particular city another league's games on Sunday afternoons directly opposite NFL games on CBS when there was no NFL game scheduled for NBC to be televised to that city. CBS had a similar option. ABC was legally free to televise another league's games all afternoon each Sunday. All three networks were legally free to telecast another league's games in prime time. Because the NFL was forbidden by its network contracts to televise games on cable, cable television contracts were open to a competing league, although such contracts are less lucrative than network contracts. When the NFL's network contracts expired in 1981 and 1986, the networks were free to contract with a competing league's games for all time slots.

The NFL's three-network "tie-up" was a central issue at trial. The USFL claimed that the NFL intentionally set out to tie up the three networks as a means of excluding competitors. In support of its theory, the USFL introduced a memorandum from NFL general counsel Jay Moyer written during the NFL's 1973 network contract negotiations stating that "an open network may well be an open invitation to formation of a new league." Commissioner Rozelle testified, however, that in 1970, before contacting ABC and signing the Monday night football contract with it, he unsuccessfully approached CBS and NBC, both of which already televised NFL games,

about their interest in prime-time football. The USFL also emphasized at trial a June 1984 CBS business study suggesting that the fall broadcast of USFL games on Sundays would reduce the network's advertising revenues from NFL games by $49 million to $53 million over three years. This "dilution effect," the USFL argued, created a $50 million barrier to entry by a new league.

The USFL also sought to show that the NFL had placed unlawful pressure on the networks to prevent the broadcast of USFL games. Much of this evidence consisted of statements by USFL representatives and hearsay and speculation by third parties. Officials from the three networks and one cable network testified that the NFL had not exerted any pressure on them regarding the broadcast of USFL games. Several network officials did testify, however, that they feared that televising the USFL in the fall might jeopardize their NFL relationships — a fear somewhat at odds with the USFL claim that the NFL needed three network contracts to produce the "dilution effect." Executives from all three major networks also testified that by 1986, after the USFL had left several large television markets and was encountering financial and other difficulties, the USFL was not an attractive entertainment product.

4. "Conquering the USFL": Predatory Tactics

The USFL also sought to prove monopolization by the NFL through predatory tactics unrelated to television. It thus introduced a memorandum prepared by NFL labor negotiator Jack Donlan entitled "Spending the USFL dollar," which urged NFL owners to bid for USFL players to drive up USFL costs. The USFL's proof of predatory behavior, however, consisted primarily of allegations concerning the recommendations of the so-called "Porter Presentation," and of the so-called Oakland and New York "conspiracies."

The Porter Presentation was a two-and-one-half hour presentation, entitled USFL v. NFL, by Harvard Business School Professor Michael Porter to sixty-five NFL executives attending a multi-day seminar on labor negotiations. Porter's presentation, which was not previewed by anyone in the NFL, set out a strategy for the NFL to "conquer the USFL."

The USFL claimed that the NFL implemented a recommendation of the Porter Presentation by attempting to "co-opt" USFL owners with promises of an NFL franchise. Donald Trump, owner of the USFL's New Jersey Generals, testified that he was offered an NFL franchise by Commissioner Rozelle in exchange for his blocking the USFL's proposed move to the fall and his preventing the league from filing the instant action. Rozelle denied that he made such an offer to Trump. In addition, hearsay testimony by Al Davis, owner of the NFL's Los Angeles Raiders, a team not sued by the USFL, indicated an attempt to co-opt Alfred Taubman of the Michigan Panthers. Taubman, however, denied that he was offered an NFL team.

The USFL also claimed that the NFL followed Professor Porter's recommendation to "dissuade" ABC from continuing its USFL contract. Supporting evidence consisted largely of hearsay introduced to show the state of mind of the networks. The declarants denied making any such statements. Jim Spence of ABC did testify, however, that the NFL informed him that the NFL owners were "not enamored" with the network's USFL contract. Nevertheless, ABC subsequently offered the USFL a four-year, $175 million contract for spring football beginning in 1986. The USFL also claimed that the NFL used a method recommended by Porter to pressure ABC by offering it unattractive Monday night games that would and did earn low ratings in 1984. In response, NFL officials testified that the 1984 Monday Night Football schedule was settled before the Porter Presentation, that "weak" teams such as Buffalo and Cincinnati appeared on that schedule fewer times than in prior years, and that any change in ABC's ratings was due to economic conditions that affected the entire sports television marketplace.

Finally, the USFL claimed that the NFL followed Porter's recommendations for competing for players. This evidence consisted of the NFL's decision to conduct a supplemental draft of players still under USFL contract in March 1984, an increase in NFL roster size from forty-five to forty-nine, conversations between the Dallas Cowboys and USFL star Herschel Walker, and NFL salary offers to relatively unknown USFL players such as Todd Fowler.

The USFL also contended that the NFL and the City of Oakland conspired to destroy the USFL's Oakland Invaders in return for an NFL promise that Oakland would receive an NFL team. This so-called "Oakland conspiracy" was based on the testimony of Al Davis that he "sensed" that the NFL wanted to "destroy" the Invaders

and on Commissioner Rozelle's public statement that Oakland, having lost the Raiders, would be considered for an NFL expansion franchise.

The "New York conspiracy" involved a claim that the NFL and the NFL's New York Jets conspired to mislead New York City and State officials into believing that the Jets were willing to return from New Jersey to New York. The purpose of this conspiracy was to block the USFL's New Jersey team from moving to a new domed stadium in New York. Proof of this conspiracy consisted of testimony by Senator Alphonse D'Amato and Vincent Tese, Chairman and Chief Executive Officer of the New York State Urban Development Corporation, that Leon Hess, owner of the Jets, had promised to return his team to New York. In addition, Al Davis testified that there was an "understanding" reached at a 1983 NFL owners' meeting to keep a USFL team out of New York. Other participants in this meeting denied any such understanding or agreement.

5. Damages

The USFL's evidence of damages consisted of the testimony of economist Nina Cornell, who sought to estimate the league's losses by two methods. Method A was based on the assumption that the gate and television revenues of an unhindered USFL could be estimated by using the gate receipts and television revenues of the old AFL. Dr. Cornell estimated the USFL's damages under this method at $565 million. Method B was based on the June 1984 CBS business study examining the fall broadcast of USFL games. She estimated the USFL's damages under this method at $301 million.

Dr. Cornell's damage calculations rested on several other assumptions. First, of course, she assumed that illegal NFL conduct was the cause of the USFL's failure to obtain a network contract. Second, Dr. Cornell assumed that the NFL could lawfully contract with only one network. Third, her calculations attributed the USFL's damages entirely to illegal NFL conduct and not at all to the USFL's own mismanagement.

Finally, she assumed that there would be no increased player costs to the USFL resulting from the shift to fall play and that salaries would remain stable from 1986 to 1992. Tension existed between her assumption of stable salaries and her projections of large increases in USFL revenues as a result of playing in the fall during the 1986 to 1992 seasons. Player salaries had already increased dramatically because of the two leagues' competition for players, even when they were playing in different seasons. No reason was given to expect a stabilization of wages when the leagues would play in the same season and the USFL would have substantially greater revenues to compete for players. Moreover, a cornerstone of the USFL's television claim was that a network contract was essential so that it could compete for quality players, a position that is hardly consistent with stability in player salaries.

6. Management of the USFL

The USFL was conceived and organized in 1981 to play in the spring rather than the fall. Its founders believed that public demand for football was not satisfied by the NFL's and the colleges' fall seasons; that cable television, which could not televise NFL games under the existing NFL-network contracts, would offer unique opportunities for television revenues and exposure; that a spring football league would face limited competition; that there was a sufficient supply of football players for two leagues; and that a spring league could draft college players and put them on the field even before the NFL draft.

The USFL's founders placed a high priority on the fans' perception of the quality of play. They intended to use major stadiums and to hire well-known coaches. At the same time, they wanted the league to control costs. For its first season, therefore, the USFL established budget guidelines for player salaries of between $1.3 and $1.5 million per team.

* * *

The USFL's first year of play, 1983, was a mixed success....

* * *

The USFL's second year was marked by change. Four teams shifted locations. For example, the owner of the Chicago franchise exchanged that franchise for the Phoenix franchise, taking his winning Chicago coach and players while the original Phoenix team moved to Chicago under a new owner. The league, over the objection of some owners, expanded from twelve teams to eighteen. Five of the original owners left the league. Some of the new

owners, notably Donald Trump of the New Jersey Generals, believed that the USFL ought to play in the fall. Thereafter, the issue of when to play became divisive, and several owners came to believe that Trump was trying to bring about a merger with the NFL that would include only some USFL teams.

The NFL introduced extensive evidence designed to prove that the USFL followed Trump's merger strategy, and that this strategy ultimately caused the USFL's downfall. The merger strategy, the NFL argued, involved escalating financial competition for players as a means of putting pressure on NFL expenses, playing in the fall to impair NFL television revenues, shifting USFL franchises out of cities where NFL teams played into cities thought to be logical expansion (through merger) cities for the NFL, and, finally, bringing the antitrust litigation now before us.

Throughout the second half of 1983 and early 1984, several USFL owners escalated spending on player salaries. USFL teams, for example, signed established NFL players such as running back Joe Cribbs and defensive back Gary Barbaro. Trump, in particular, signed a number of players who were still under contract with the NFL to future contracts, including superstar Lawrence Taylor of the New York Giants. USFL owners also signed many top players coming out of college, for example, wide receiver Anthony Carter and quarterback Jim Kelly. The USFL's spending on players greatly outpaced its revenues. The owner of the Los Angeles team, for example, committed the team to $13.1 million in salaries and bonuses for just one season. He even entered into a multi-year, $40 million contract with just one player, Steve Young of Brigham Young University.

By the end of the 1984 season, USFL franchises in two of the top three television markets, Chicago and Los Angeles, had failed, and only four of the original owners remained in the league. The league was not a failure as entertainment, however. Despite a decline in the USFL's television ratings to 5.7 on ABC and 2.8 on ESPN, ABC exercised its option to carry the USFL in the spring of 1985 at $14 million and offered a new contract worth $175 million for four years in the spring beginning in 1986. ESPN offered a contract worth $70 million over three years.

Nevertheless, during an August 1984 owners' meeting, the USFL decided to move to the fall in 1986. This decision was made despite: (i) ABC's warning that such a move would breach its contract for the spring of 1985 and 1986; (ii) the contrary recommendations of a management consulting firm, McKinsey & Company, which the USFL had retained for $600,000 to consider the advisability of a fall season; and (iii) the contrary recommendations of the USFL's directors of operations and marketing.

Moreover, Eddie Einhorn, a USFL owner who was to represent the USFL in negotiations to secure a network contract for the fall, warned that moving from large television markets to "merger" cities too quickly might preclude the securing of a network contract. Nevertheless, in the ensuing months, the USFL withdrew from Chicago, Detroit, Philadelphia, Pittsburgh and Washington, D.C. — each a large television market with an NFL team — and moved into Baltimore (which had lost its NFL team in 1984) and Orlando (which had no NFL team).

* * *

In October 1984, the instant litigation was begun. The USFL's 1985 "lame-duck" spring season appears to have been affected adversely by the now publicly announced move to the fall. The league's television ratings declined to 4.1 on ABC and 2.0 on ESPN. By the end of the season, several owners had withdrawn financial support for their teams, and a number of clubs were no longer meeting their payrolls and other bills. The USFL scheduled eight teams for its fall 1986 season, which was ultimately canceled after the verdict in this case. Only one team (New Jersey), was in a top-ten television market. One other team (Tampa Bay), was in a top-twenty market. Three teams were located in Florida (Jacksonville, Orlando and Tampa Bay) but only one was west of the Mississippi River (Phoenix). In three years, USFL teams had left fourteen of the twenty-two cities in which they had played.

7. The Verdict

The jury found the NFL liable on the USFL's claim of actual monopolization, concluding that the older league had willfully acquired or maintained monopoly power in a market consisting of major league professional football in the United States. The jury also found that the NFL's unlawful monopolization had caused injury to the USF. In ruling on the NFL's motion for judgment notwithstanding the verdict with respect to these findings, the district court held that sufficient evidence existed that the NFL had engaged in predatory conduct. This evidence

related to: (1) NFL efforts to co-opt USFL owners and potential owners; (2) the NFL Supplemental Draft of USFL players; (3) the NFL's move to a forty-nine-man roster; and (4) the NFL's activity directed at specific USFL franchises such as the Oakland Invaders.

The USFL was unsuccessful on its remaining claims. The jury found that none of the defendants had violated Section 2 by attempting to monopolize a relevant market, or by conspiring to monopolize. In addition, the jury found that even though "one or more defendants [had] participate[d] in a contract, combination or conspiracy to exclude competition within major league professional football", that combination was not an unreasonable restraint of trade in violation of Section 1. The fatal blow, however, was the complete rejection of the USFL's television claims. The jury found that the NFL had not willfully acquired or maintained a monopoly in a relevant television submarket. It further found that the NFL's contracts with all three television networks for the right to broadcast the league's regular season and championship games through the 1986-87 season were not an unreasonable restraint of trade violative of Section 1. Finally, the jury rejected the USFL's "essential facilities" claim, specifically finding that "defendants [did not] have the ability to deny actual or potential competitors access to a national broadcast television contract", although it also found that such a contract was "essential to the ability of a major league professional football league to compete successfully in the United States" and "that potential competitors of the NFL, cannot as a practical matter, duplicate the benefits of a network contract."

Discussion

* * *

1. Liability

a. The Sports Broadcasting Act

The USFL contends that the Sports Broadcasting Act of 1961 limits the antitrust exemption for pooled-rights contracts to a single contract with one network. Therefore, it argues, the NFL's multiple contractual arrangements with three networks violates the injunction in *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953), a decision claimed by the USFL collaterally to estop the NFL from denying that its arrangements with the networks violate Section 1 of the Sherman Act.

The Sports Broadcasting Act states that:

> The antitrust laws ... shall *not* apply to all joint agreement by or among persons engaging in or conducting the organized professional team sport [ ] of football ... by which any league of clubs participating in professional football ... contests sells or otherwise transfers *all or any* part of the rights of such league's member clubs in the sponsored telecasting of the game [ ] of football.... 15 U.S.C. § 1291 (emphasis added).

This statutory language thus neither states nor implies that the exemption limits the NFL to a contract with only one network....

Faced with statutory language unambiguously hostile to its claims, the USFL resorts to alleged ambiguities in the legislative history. Upon examination, however, the legislative history offers no reason to depart from the statutory language.

* * *

In any event, the passage of the 1966 NFL-AFL merger statute provides conclusive evidence that Congress did not intend the 1961 Act to prohibit NFL contracts with more than one network. When considering this legislation, Congress was explicitly informed that the merged league would continue to broadcast its games on "at least 2 networks," and no concern whatsoever was expressed in Congress that such conduct was either undesirable or would go beyond the scope of the 1961 Act's exemption. Moreover, while permitting the merger, Congress added a further limitation to the exemption to protect high school games from televised competition with the NFL. The lack of a "one network" limitation in the 1966 merger bill thus dooms the USFL's claims. Accordingly, we hold that the mere existence of the NFL contracts with the three networks does not violate the antitrust laws. Having made this determination, we need not consider whether the decree in *United States v. National Football League* has

any collateral-estoppel effect.

b. The "Dilution Effect"

The USFL does not argue that there was insufficient evidence to support the jury's rejection of its claim that the NFL prevented it from obtaining a network contract. The failure to make this argument is understandable in light of the swift dismissal such a claim would encounter. However, the USFL does the next-best thing by attacking the district court's instructions regarding "intent and effect" and "legitimate business purpose," both discussed immediately infra, on grounds that these instructions led the jury to ignore an "unchallenged showing of anticompetitive effect" and "textbook example of an anticompetitive practice." Moreover, the USFL continues to seek broad injunctive relief concerning the NFL's television contracts on the ground that such relief is necessary to bring competition to the industry. Because these claims are based on the so-called "dilution effect" of the NFL's contracts with the three networks, a separate discussion of the concept of a "dilution effect" and its role in the professional football industry is necessary.

The term "dilution effect" comes from a CBS business study ordered by Neil Pilson, CBS Sports' President, and completed in June 1984. CBS conducted the study because it was apprehensive over ABC's signing a USFL fall contract and desired the leverage a second league would afford it in its negotiations with the NFL. The study estimated the economic impact on CBS of the televising of USFL games in the fall under various scenarios. One scenario posited only ABC televising USFL games on Sundays. The scenarios most pertinent to the present discussion posited CBS and either NBC or ABC televising USFL games. Under these scenarios, CBS would televise both USFL and NFL games on Sundays. The final scenario posited USFL games being televised by NBC and ABC on fall Sundays. No study was made of CBS being the only network with a USFL contract because CBS was not interested in such an arrangement.

As explained by Pilson, the value of a USFL fall contract to CBS was determined (in simplified fashion) as follows. From the estimated gross advertising revenues would be subtracted estimates of: (i) expenses related to production; (ii) losses in revenues that would otherwise have been earned by programs preempted by USFL games, or "preemptive impact"; (iii) decreases in advertising revenues from NFL games resulting from the addition of USFL games, or "dilution effect;" and (iv) rights fees to the USFL. Pilson testified that when these estimates were made in June 1984, the resultant calculation, CBS's profit, was negative. The USFL argues that, but for the "dilution effect" of $50 million, the sum would have been sufficiently positive to make a USFL contract attractive. The USFL assumes that the "dilution effect" was experienced equally by all three networks and thus concludes that the effect of NFL's network contracts was to exclude all competition.

The district court instructed the jury to analyze the NFL's television contracts in light of the CBS study. Specifically, the jury was told to consider "[t]he high NFL rights fees charged to the networks, which plaintiffs allege triggered a dilution effect that makes it economically infeasible for any network to offer a satisfactory television contract to any professional football league other than the NFL." The jury rejected the USFL's claims as to the "dilution effect" in finding that the NFL had not monopolized a television submarket, that the NFL television contracts were not an unreasonable restraint, and that the NFL did not have the power to exclude a competing league from obtaining a network contract. There was ample evidence to support these conclusions.

First, the USFL concedes, as it must, that the "dilution effect" is nonexistent when the NFL network contracts expire and negotiations over new contracts are under way. Whatever exclusionary effect exists is only for the term of the three NFL network contracts, and all leagues are free to compete on the basis of the quality of their product upon the expiration of these contracts. The district court's instructions directed the jury to consider the length of these contracts, then five years, in determining whether they were reasonable. Its verdict, therefore, is dispositive because the duration of the contracts was hardly unreasonable as a matter of law.

Second, there was no evidence that the result of the calculations described above would be the same for ABC as for CBS. ABC's contract was largely confined to televising a single NFL game in prime time on a weekday night. Its Sundays were free of football, and it would not encounter the scheduling problems faced by CBS in televising both NFL and USFL games on Sunday afternoons. ABC was thus free to schedule games so as to maximize revenue. Moreover, whatever "dilution effect" ABC's prime-time games might suffer was not necessarily

identical to that faced by CBS. The jury might easily conclude, absent evidence to the contrary, that the "dilution effect" on CBS from back-to-back NFL-USFL telecasts on Sunday afternoons would be greater than on ABC, which would not broadcast NFL games on Sunday. And there was no evidence to the contrary. The USFL, which bore the burden of proof on this issue, called two witnesses from ABC in a position to testify about the "dilution effect" on ABC. Neither witness was questioned about the "dilution effect." Both did testify, however, that the USFL's exodus from major television markets and its other difficulties greatly diminished the value of USFL telecasts by 1985 and 1986.

Third, the conduct of the NFL and the networks indicates that neither believed their contracts to be exclusionary. Notwithstanding the early opinion of the NFL's Moyer about a network without a contract being an "open invitation to a new league," the NFL's actual conduct displayed no marked desire to lock up all three networks. Prime-time weekday telecasts were offered to NBC and CBS, both of whom already had NFL contracts, before ABC was approached. It was the testimony of both the ABC executives and CBS's Pilson, elicited by counsel for the USFL, that Rozelle routinely used the threat of leaving them without an NFL contract in order to extract from them the largest possible rights fees. If the "dilution effect" theory of exclusion were correct, the NFL could not credibly threaten to leave one network without a contract. If the theory were correct, moreover, the last network to sign with the NFL would have a bargaining advantage because its agreement would be essential to the NFL's monopoly, much as the owner of the last lot in a tract of land needed for a construction project can demand the highest price. In the NFL-network negotiations, the opposite was the case, and the last network to sign was at a bargaining disadvantage. Thus, in 1982, the NFL first signed agreements with ABC and NBC and then approached CBS. According to Pilson, CBS regarded itself as being in a very disadvantageous bargaining position. As a result, CBS paid $736 million for the new contract, an increase of more than 100% over its previous contract. On the basis of this evidence, therefore, the jury would have been hard-pressed to conclude that the NFL needed a contract with CBS to freeze out a competing league, a circumstance that would have precluded a credible threat to leave CBS without a contract and the resultant hefty increase in rights fees.

Fourth, even if the "dilution effect" theory were alive and well in 1986, the jury could have found that "effect" was not a cause of the USFL's failure to get a network contract in that year. The CBS study was made in 1984 and was based on estimates of revenues that were plainly excessive given the circumstances of 1986. Immediately after the study was completed, the Supreme Court decided *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984), invalidating the NCAA's exclusive control over the televising of college football games. This decision had the effect of multiplying greatly the number of college games telecast and of reducing advertising revenue generally for football games. An ABC witness also testified there was a proliferation of sporting events on network and cable television after the fall of 1984 that also reduced the advertising fees that could be charged for professional football. In addition, there were the problems of the USFL itself. The league had failed to establish fan loyalty in most places because of repeated franchise moves. Most importantly, the USFL had abandoned most major television markets, thereby rendering telecasts of its games much less valuable than had been estimated by the earlier CBS study. Finally, the disagreements among the USFL owners, the financial condition of some of the franchises, and the "lame-duck" spring season of 1985 further lessened the value of USFL telecasts in 1986. In fact, Pilson himself testified that by 1986 the events described above had rendered the "dilution effect" irrelevant to CBS's decision not to televise the USFL. In light of this evidence, the jury was free to conclude that the revenues to be expected from USFL telecasts were so low that no network would purchase them even if there were no "dilution effect."

c. "Intent *and* Effect" Charge

We now consider the district court's instruction regarding liability on the USFL's television-related claims. The USFL contends that it should not have been required to show that the intent *and* effect of the NFL's television contracts with the major networks were exclusionary (rather than simply intent *or* effect) in order to prove a Section 2 claim. In addition, the USFL contends that the district court erred with respect to the Section 1 television instruction because it applied the intent-*and*-effect standard to the Rule-of-Reason claims. We reject both contentions.

The district court gave the following charge with respect to the USFL's Section 2 television-related claims:

> A company may not be found to have wilfully acquired or maintained monopoly power if it has acquired that power solely through the exercise of superior foresight and skill or because of natural advantages ... or because of economic or technological efficiency; ... or by laws passed by Congress....
>
> In this regard, you should be aware that in 1966 Congress passed a law permitting the merger of the two major football leagues then existing....
>
> Accordingly, I instruct you that the 1966 merger of the AFL and the NFL cannot be the basis for inferring that the NFL acquired monopoly power unlawfully.
>
> In addition, in 1961 Congress passed a statute that provides that a contract between a professional sports league and a television network for the sale of pooled telecast rights is not a restraint of trade in violation of the antitrust laws.
>
> Accordingly, I instruct you that the making of these contracts by the NFL with the television networks constitutes the lawful acquisition of power, [e]ven if you were to find that these contracts gave the NFL monopoly power, *unless you found that the intent and effect of these agreements is to exclude a competing league or its members from selling any of their television rights*. (emphasis added)

This instruction was consistent with the Sports Broadcasting Act, discussed *infra*, as exempting from antitrust scrutiny a league's pooled-rights contracts with networks unless they constitute illegal monopolization or an unreasonable restraint of trade so far as competing leagues are concerned. More importantly, the intent-and-effect charge was consistent with the legal standards for illegal monopolization under Section 2.

The Supreme Court has repeatedly defined monopolization as the "willful acquisition or maintenance" of monopoly power. *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19, 105 S. Ct. 2847, 2854 n. 19, 86 L. Ed. 2d 467 (1985); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966);... The willfulness element certainly requires proof of intent.... Proof of effect is required by definition alone to satisfy the "acquisition or maintenance" requirement.

A requirement that both intent *and* effect be proven is necessary to enable a trier of fact to make the critical distinction between conduct that defeats a competitor because of efficiency and consumer satisfaction, and conduct that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605 n. 32, 105 S. Ct. at 2859 n. 32 (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW 78 (1978)). Hopes and dreams alone cannot support a Section 2 claim of monopolization. If they did, the nationwide advertisement "Ford wants to be your car company" would constitute an open-and-shut Section 2 case. Success alone is not enough or the antitrust laws would have their greatest impact on the most efficient entrepreneurs and would injure rather than protect consumers.

Proof of intent and effect is also of evidentiary value. Distinguishing between efficient and predatory conduct is extremely difficult because it is frequently the case that "[c]ompetitive and exclusionary conduct look alike." Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 972 (1986). Evidence of intent and effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices. As Justice STEVENS stated in *Aspen Skiing*,

> [E]vidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive" — to use the words in the trial court's instructions — or "predatory," to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that "no monopolist monopolizes unconscious of what he is doing." As Judge BORK stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended." 472 U.S. at 602-3, 105 S. Ct. at 2857-58 (quoting R. BORK, THE ANTITRUST PARADOX 160 (1978)).

The present case is in fact a useful example of the intent-*and*-effect approach to determining whether certain practices are predatory. As the preceding discussion of the "dilution effect" indicates, the jury's conclusion that the NFL's three network contracts were not exclusionary was supported by evidence that a quality league could either have overcome the "dilution effect" or have acquired a contract when the NFL's contracts expired. The conduct of the NFL itself and the networks showed their disbelief in any exclusionary effect by the NFL's threatening to leave a network without NFL games and the networks' taking the threat seriously. The evidence also supported the conclusion that when the NFL locked up the third network, CBS, in the 1982 negotiations, it did so to obtain $736 million in rights fees, not to exclude competitors.

* * *

d. Legitimate Business Opportunities and Profit-Maximization Charge

The USFL further argues that the district court erroneously charged the jury that the NFL's three network contracts were lawful if motivated by any "legitimate" purpose, including profit maximization. The pertinent charge reads as follows:

> Plaintiffs allege that the NFL coerced the networks not to give the plaintiffs a contract.... So long as they have a legitimate business purpose in doing so, defendants have no duty to limit themselves in entering into the television contracts so that other football leagues would have an easier time entering the market, or to foresee that other leagues might do so, or for any reasons to decline a profitable business opportunity.

This charge was consistent with settled precedent. "[A] firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, --- U.S. ----, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (1987);... A monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market. The jury was thus properly instructed that:

> A monopoly achieved or maintained as a result of ... legitimate good business practices is not unlawful. A monopolist has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers. At the same time, a monopolist cannot use its lawfully acquired power to maintain its monopoly.
>
> In addition, there is nothing in the antitrust laws that requires a monopolist to act against its own self interest so long as the monopolist does not at the same time exercise its power to maintain that power. Thus, a monopolist is under no duty affirmatively to help or aid its competitors and is free to set as its legitimate goal the maximization of its own profits so long as it does not exercise its power to maintain that power.

The USFL challenges this charge on the ground that setting prices at a profit-maximizing level is an anticompetitive act. We disagree. Prices not based on superior efficiency do not injure competitors, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83, 106 S. Ct. 1348, 1354, 89 L. Ed. 2d 538 (1986), but rather invite competitive entry. As we stated in *Berkey Photo*:

> Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can. 603 F.2d at 294.

The USFL responds to this argument by falling back on its claim that professional football is not a typical market because of the "dilution effect," an argument rejected by the jury and discussed *supra*.

e. Television Submarket Definition

Regarding the relevant television submarket, the district court instructed the jury, first, to determine who were the potential purchasers of television broadcast rights for professional football in the fall. The jury was then, second, to determine from the perspective of those buyers what other products, if any, were reasonably interchangeable with broadcast rights to professional football. The USFL claims in particular that, in instructing the jury to determine who were potential purchasers, the district court erred by stating that:

> If you find that a professional football league would reasonably consider selling its broadcast rights to cable television companies or to individual television stations, then all those buyers must be included in the relevant submarket.

We do not agree with the USFL that this charge was error because it emphasized the view of potential buyers in determining the relevant submarket.... The fact that a cable contract might be less desirable, even much less desirable, to a league than a network contract is not relevant to determining the product submarket.

* * *

g. Consumer-Satisfaction Charge

The district judge also charged that in considering whether the NFL had engaged in anticompetitive conduct, the jury might "consider ... whether in a freely competitive market there would be any dissatisfaction with the present choices on the part of the buyers" or "whether or not the choices of those who purchased the rights to show or televise football have been restricted." This instruction was correct. An inquiry into consumer preference is obviously relevant to a determination of whether a monopolist has engaged in predatory conduct. *See Aspen Skiing*, 472 U.S. at 605, 105 S. Ct. at 2858. Given the USFL's vigorously pressed claim that the NFL coerced the networks not to televise USFL games, it was entirely proper to allow the jury to consider whether the networks eschewed USFL fall contracts because of NFL coercion or because they were satisfied with the NFL's product.

* * *

b. Prior NFL Antitrust Judgments

In his *Opinion No. 3*, Judge LEISURE excluded from evidence prior court decisions that found the NFL to have violated Section 1 of the Sherman Act, 634 F. Supp. at 1171-75. The USFL contends on appeal that this ruling was error, and that the NFL used this ruling as a "shield" to present a "good monopolist" defense.

Prior antitrust violations and the history of competition in a market may, in appropriate cases, be admissible to establish market power and intent to monopolize. *See e.g., United States v. Grinnell Corp.*, 384 U.S. at 576, 86 S. Ct. at 1706; *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53, 72 S. Ct. 181, 186, 96 L. Ed. 162 (1951). Such evidence also may be admissible to establish the intent, motive and method of a conspiracy under Section 1. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 710, 82 S. Ct. 1404, 1416, 8 L. Ed. 2d 777 (1962). In order for the NFL's prior antitrust judgments to be admissible, however, the USFL bore the burden of demonstrating that the conduct underlying those prior judgments had a direct, logical relationship to the conduct at issue in this case....

Judge LEISURE found that the USFL never made such a showing, and, although we do not fully embrace his reasoning, we agree that the prior judgments should not have been admitted as evidence of a longstanding conspiracy somehow casting light on current alleged illegalities. Two of the decisions in question, *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (invalidating rules for NFL player draft); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (invalidating "Rozelle Rule" for compensation of free agents), are not consistent with our decision in *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir.1987). The three others, *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.) (invalidating NFL Rule 4.3 limiting franchise relocation), *cert. denied*, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984), later opinion, 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, --- U.S. ----, 108 S. Ct. 92, 98 L. Ed. 2d *3 (1987); *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.) (invalidating rule forbidding franchise owners from owning other professional sports teams), *cert. denied*, 459 U.S. 1074, 103 S. Ct. 499, 74 L. Ed. 2d 639 (1982), and *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953)

(invalidating rules limiting broadcast of games into home territories of other teams), involve difficult antitrust questions that were (and, in circuits other than the place of decision, may still be) fair game for litigation. Accordingly, these cases are at best marginally probative of an ongoing intent to exclude competitors.

Judge LEISURE excluded the latter three judgments on the ground that they involved intraleague restraints, whereas the instant litigation involves interleague competition. Although we hesitate to adopt a rule that anticompetitive restraints among competitors can never reveal monopolistic intent toward would-be entrants, we do note that sports leagues raise numerous difficult antitrust questions involving horizontal restraints and group boycotts. The very concept of a league involving separate business entities (teams) requires concerted behavior among them and the exclusion of outsiders. Even the drawing up of a schedule requires that horizontal competitors (teams) conform to jointly made decisions and necessarily excludes others. *See* R. BORK, THE ANTITRUST PARADOX 332 (1978). Moreover, the antitrust law governing horizontal arrangements among competitors and group boycotts has been fluid. With regard to arrangements among competitors, compare *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 844, 84 L. Ed. 1129 (1940) ("[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*"), with *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23, 99 S. Ct. 1551, 1564, 60 L. Ed. 2d 1 (1979) ("[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints"). With regard to group boycotts, compare *Klor's Inc. v. Boradway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S. Ct. 705, 709, 3 L. Ed. 2d 741 (1959) ("[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden [*per se*] category"), with *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 30-31, 104 S. Ct. 1551, 1567-68, 80 L. Ed. 2d 2 (1984) (exclusion of physician from hospital staff privileges not violation of antitrust laws "[w]ithout a showing of actual adverse effect on competition" in product market), and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296, 105 S. Ct. 2613, 2620, 86 L. Ed. 2d 202 (1985) (group boycott was not *per se* illegal absent proof that buying cooperative possessed market power).

Accordingly, we are wary of allowing a trier of fact to draw inferences of intent from the outcome of prior lawsuits in an area so fraught with uncertainty and doubt. Our wariness in this regard is enhanced by the fact that the lawsuits most pertinent to the instant action — involving claims by another league or a team in another league — were in fact won by the NFL. *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983). The district court thus acted within its discretion in excluding evidence of prior antitrust judgments against the NFL on the grounds that their prejudicial value outweighed their probative value under Fed. R. Evid. 403....

* * *

3. The District Court's Damages Instructions

The USFL contends that it received an award of only $1.00 because of incorrect jury instructions regarding damages. Again, we disagree. Specifically, the USFL challenges the instructions with respect to an antitrust plaintiff's burden of proving the amount of damages and with respect to nominal damages.

a. The $1.00 Award

The jury was given the following nominal damages instruction:

> Just because you have found the fact of some damage resulting from a given unlawful act, that does not mean that you are required to award a dollar amount of damages resulting from that act. You may find, for example, that you are unable to compute the monetary damages resulting from the wrongful act, except by engaging in speculation or guessing, or you find that you cannot separate out the amount of the losses caused by the wrongful act from the amount caused by other factors, including perfectly lawful competitive acts and including business decisions made by the plaintiffs or the plaintiffs' own mismanagement. Or you may find that plaintiffs failed to prove an amount of damages.

> You may decline to award damages under such circumstances, or you may award a nominal amount, say $1.

The jury's $1.00 award was consistent with this instruction. The NFL offered much evidence of self-destructive USFL decisions, and the jury's nominal award suggests that it credited this proof, as it was free to do. Moreover, it is now clear that Dr. Cornell's testimony was based on a number of assumptions entailing legal premises that were incorrect or factual conclusions that were rejected by the jury. In awarding only nominal damages, the jury might reasonably have concluded that the USFL had failed to prove any damages.

* * *

c. Proof of Antitrust Injury and Damages

We next consider whether the district court properly instructed the jury with respect to an antitrust plaintiff's burden of proving the amount of damages. To recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), an antitrust plaintiff must prove that its injury was, in fact, caused by the defendant's violation of the antitrust laws.

Judge LEISURE instructed the jury as follows with respect to injury causation:

> [P]laintiffs do not have to prove that the unlawful activity that the defendants allegedly engaged in was the sole cause of their injuries. Plaintiffs meet their burden if they show that the defendants' unlawful facts substantially contributed to their injuries, even though other facts may have contributed significantly. An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors. Plaintiffs need only show that their injury to *some* degree resulted from defendants' violation. (emphasis added)

The USFL understandably does not challenge this instruction, which was consistent with established precedent.... Rather, the USFL challenges Judge LEISURE'S instruction that the jury could award no damages or one dollar in damages if they found that they could not "separate out the amount of losses caused by [NFL misconduct] from the amount caused by other factors, including perfectly lawful competitive acts and including business decisions made by the [USFL] or the [USFL's] own mismanagement."

The USFL claims that this instruction was incorrect because the NFL should have borne the burden of separating out the amount of USFL losses caused by the NFL's wrongful acts from the amount caused by other factors such as the USFL's unsuccessful merger strategy. It is true that once proof of injury causation has been established, courts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages. Proof of amount of damages thus need not conform to a particular theory or model, ... and exact proof of the amount of damages is not required.... An antitrust plaintiff must thus provide only sufficient evidence to support a "just and reasonable estimate" of damages. *Bigelow v. RKO Radio Pictures*, 327 U.S 251, 264, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946); *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S. Ct. 248, 150, 75 L. Ed. 544 (1931).

Whatever latitude is afforded antitrust plaintiffs as to proof of damages, however, is limited by the requirement that the damages awarded must be traced to some degree to unlawful acts. That latitude is thus circumscribed by the need for proof of causation. The Supreme Court emphasized this in *Bigelow* by relaxing the standard for proving amount of damages only after "proof of defendant['s] wrongful acts and their tendency to injure plaintiff['s] business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes.*" 327 U.S. at 264, 66 S. Ct. at 579 (emphasis added).

* * *

The Supreme Court's decisions in *Bigelow* and *Story Parchment* thus do not shift the burden of proving the cause of damages from the plaintiff to the defendant. They simply restate the established principle that where damages have been shown to be attributable to the defendant's wrongful conduct, but are uncertain in amount, the defendant bears the risk of those uncertainties.

* * *

Conclusion

For the foregoing reasons, we affirm the jury's verdict and the judgments entered thereon. We thus need not consider the NFL's conditional cross-appeal.

Affirmed.

Notes and Questions

1. What was the relevant product and geographic markets in the *AFL* and *USFL* cases? Why did the NFL not possess monopoly power in *AFL* and possess it in *USFL?*

2. What acts of monopolization did the NFL engage in against the USFL? Entering into the pooled television contracts? Coercing the TV networks not to give contracts to the USFL? Bidding for USFL players? Promising USFL owners franchises? Conducting a supplemental draft? Targeting certain USFL teams for destruction? Signing exclusive stadium lease contracts? The merger between the NFL and AFL?

3. The USFL had asked for an award of $440,000,000 in damages, which if it had prevailed would have been trebled to $1,320,000,000. Although the USFL recovered only $1.00 in its antitrust suit, its attorneys were far more successful from a financial standpoint. The court awarded attorneys' fees of $5,515,290, and costs of $62,220. *United States Football League v. National Football League*, 704 F. Supp. 474 (S.D.N.Y. 1989), *aff'd*, 887 F.2d 408 (2d Cir. 1989).

Section 7: Agents and the League

FIVE SMITHS, INC. v. NFL PLAYERS ASSN.
788 F. Supp. 1042 (D. Minn. 1992)

DOTY, District Judge

* * *

Background

In Count IV of the amended complaint, plaintiffs, the National Football League allege that:

> defendant has engaged, and continues to engage, in a combination and conspiracy with agents representing NFL players ("player-agents"), the purpose and effect of which is to fix, raise and/or maintain compensation paid to NFL players.

They assert that defendant's "conspiratorial activities constitute per se violations ... and/or unreasonable restraints of trade" under section 1 of the Sherman Act, 15 U.S.C. § 1. Defendant moves to dismiss Count IV under both theories.

* * *

Discussion

* * *

1. The Per Se Rule

In order to prove a violation of section 1 of the Sherman Act, a plaintiff must establish the existence of a contract, combination or conspiracy that unreasonably restrains trade. 15 U.S.C. § 1; *Standard Oil Co. v. United*

States, 221 U.S. 1, 60, 55 L. Ed. 619, 31 S. Ct. 502 (1911) (adding requirement that restraints must be unreasonable to violate Section 1). Two methods of analysis are used to determine whether a particular concerted action violates Section 1: the per se rule and the rule of reason. Courts apply the rule of reason to:

> agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978).

The per se rule is limited to certain categories of agreements that are so plainly anticompetitive and lacking in redeeming virtue that they are conclusively presumed to be illegal without elaborate inquiry into the precise harm that they have caused or their business justification. *See, e.g.*, *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). A plaintiff's attachment of a per se label, however, is inadequate to sustain a complaint; the court must scrutinize the alleged activity to determine whether such a characterization is appropriate. Plaintiffs purport to assert a per se theory of liability in Count IV of the amended complaint. The court will therefore examine the specific factual allegations in the complaint to determine whether they are sufficient to support a per se violation.

Plaintiffs' complaint contains one specific factual allegation of concerted action, that is: the player-agents, with the approval and assistance of the NFLPA, have regularly exchanged compensation information and information about current offers among themselves, in furtherance of the NFLPA's unlawful activity.

Plaintiffs thus allege that player-agents acted in concert with the NFLPA in the collection and dissemination of information concerning player compensation. That allegation alone, however, is insufficient to support a per se violation of the Sherman Act. The court first concludes that any exchange of salary information between players or their agents should not be subject to the per se rule because such an exchange occurs in an environment where most players are not able to compete for the same jobs on the same teams. In *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, the Supreme Court stated that:

> Per se rules are invoked when surrounding circumstances make the likelihood of anticompeti-tive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption, or actual market analysis, the essential inquiry remains the same — whether or not the challenged restraint enhances competition. 468 U.S. 85, 103-04, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (footnotes omitted).

The Supreme Court further acknowledged that even: Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. *Id.* at 104 n.26.

Examining the current structure of the National Football League, the court notes that under plaintiffs' annual college draft, virtually the entire supply of new players are apportioned amongst the clubs, with each team being assigned the exclusive rights to bargain with their draft picks. Thus, a player who is drafted by a given team cannot compete with other players for a position on another team. *Smith v. Pro Football, Inc.*, 193 App. D.C. 19, 593 F.2d 1173, 1185-86 (D.C. Cir. 1978) (affirming district court's determination that the college draft "leaves no room whatever for competition among teams for the services of college players, and utterly strips them of any measure of control over the marketing of their talents" (quoting *Smith*, 420 F. Supp. 738, 746 (D.D.C. 1976)). Moreover, once players sign contracts with their respective teams, the first refusal/compensation rule has the practical effect of preventing veterans players from outside the team from competing with veteran players on a team. Indeed, such competition would only be possible with respect to those players who are left unprotected under Plan B. *Powell v. National Football League*, 690 F. Supp. 812, 813 (D. Minn. 1988) (the Plan B "Right of First Refusal/Compensation System has essentially eliminated competition among NFL clubs for player services"). Thus, there is virtually no information sharing between the NFLPA and agents who represent players in actual competition with each other for the same job.

Even assuming that some players are competitors, an allegation that is both absent from the complaint and highly questionable in light of plaintiffs' system of player restraints, such an exchange of information among

competitors is not within any of the categories of conduct that is so manifestly anticompetitive as to warrant per se condemnation. *See United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975) ("the dissemination of price information is not itself a per se violation of the Sherman Act"). Rather, the Supreme Court has determined that such claims are to be analyzed under the rule of reason because:

> the exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, 57 L. Ed. 2d 854, 98 S. Ct. 2864 n.16 (1978)

The court therefore finds that plaintiffs' allegation of a per se violation based solely on an agreement to exchange salary information fails to state a claim on which relief can be granted. *Cf. Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (constant communication about price and marketing strategy, without more, does not show that competitors are acting in concert rather than making independent pricing decisions).

Plaintiffs attempt to avoid dismissal of their claim to the extent it alleges a per se violation by arguing that, in addition to the mere exchange of salary information, the complaint also asserts some broader price-fixing scheme involving the NFLPA and player-agents. The complaint states that in furtherance of a combination and conspiracy to fix, raise or maintain compensation to NFL players, the NFLPA engaged in the following activities:

> (a) Collected from and disseminated to player-agents current compensation information, including not only amounts agreed upon between players and clubs, but also amounts offered in ongoing negotiations;
>
> (b) Fixed minimum compensation for contracts for the 1990 season which minimums are expressed as percentage increases over compensation paid during the 1989 season;
>
> (c) Coerced player-agents into cooperating with its illegal conduct by making adherence to it a condition of becoming an NFLPA-approved contract advisor;
>
> (d) Urged player-agents to delay signing contracts so as to force compensation to higher levels approved of by it; and
>
> (e) Insisted on at least one occasion that a player not sign a contract for compensation notwithstanding that the player and the club had previously agreed to such terms.

The court will address each contention in turn.

* * *

To state a claim of horizontal price-fixing, plaintiffs must allege: (1) the existence of an agreement, combination or conspiracy, (2) among actual competitors ... (3) with the purpose or effect of "raising, depressing, fixing pegging, or stabilizing ... prices...." (4) in interstate ... commerce. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989).

Plaintiffs allege that a horizontal price-fixing conspiracy exists and that the NFLPA has "fixed minimum compensation", but other than the salary exchange, assert no specific facts that indicate what acts the NFLPA took to fix prices, what agreements were entered into, with whom such agreements were made or how the goals of the conspiracy were accomplished. Although plaintiffs allege that the NFLPA fixed the minimum compensation level of players subject to the college draft in 1990 at a percentage increase over the salaries for the previous season, the complaint is devoid of any allegation as to the nature of any such agreement, the parties to such an agreement and the way in which the alleged agreement operated to fix the salary of any specific player. Similarly, plaintiffs' allegations that the NFLPA "urged" unidentified agents to delay signing contracts or "insisted" on one unspecified occasion that an unidentified player refrained from signing a contract lack specificity because they fail to state which players or agents were involved, what actions were taken, at what time and what allegedly occurred as a result. The court thus determines that those allegations are too vague to provide adequate notice of the factual grounds on which

plaintiffs' broader price-fixing claim rests.

Those allegations further fail because they merely set forth the NFLPA's unilateral expression of its desires or advice to agents concerning player negotiation goals or tactics. Plaintiffs assert that the NFLPA somehow "fixed minimum compensation for contracts", "urged player agents to delay signing contracts", and "insisted on at least one occasion that a player not sign a contract." Those factual underpinnings, however, contain no allegation that the player-agents agreed to act in accordance with the NFLPA's alleged wishes. Without such concerted action, a Section 1 claim fails whether based on rule of reason or per se unlawful activity. Plaintiffs attempt to remedy that pleading deficiency by asserting that the NFLPA "coerced player-agents into cooperating with its illegal conduct", but fail to specify which agents were so coerced, how they were coerced or even what they allegedly agreed to do or did as a result of such coercion. Thus, plaintiffs' allegation of coercion by the NFLPA is too nebulous to ascertain what concerted activity underlies the alleged per se violation. Moreover, any allegation that the player-agents have acted in conformity with the NFLPA's recommendations or coercion concerning specific negotiating tactics, such as holding out or making higher salary demands, is insufficient to support an inference of collusive conduct because such conduct is wholly consistent with the agents' independent business interests in obtaining the best possible deal for their players. The court thus concludes that the allegations contained paragraph 74 of the amended complaint fail because they are either too vague to support plaintiffs' broader price-fixing claim, involving conduct other than or in addition to the salary information exchange, or do not assert concerted action or agreement between the NFLPA and its alleged co-conspirators, the player-agents.

Even if the court were to construe plaintiffs' allegations as sufficient to state some broader price-fixing conspiracy, the court determines that such an agreement fails to state a per se violation. A practice is to be characterized as a per se violation if such:

> practice facially appears to be one that would always or almost always tend to restrict competition ... and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19-23, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979).

Deprived of their ability to seek bids from competing clubs, players negotiating salaries are backed with no economic force and have virtually no opportunity to compete with one another. As a result, the court determines that plaintiffs could prove no set of facts to either support a per se violation based on their allegation that the NFLPA and the player-agents fixed compensation or to demonstrate how such an arrangement could have any possible anticompetitive effect because of plaintiffs' existing system of player restraints. The court therefore concludes that to the extent it alleges a per se price-fixing violation, dismissal of plaintiffs' claim is appropriate because as a result of the present structure of the National Football League, "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon*, 467 U.S. at 73.

* * *

In sum, the court concludes that plaintiffs' complaint asserts the existence of an exchange of salary information, which is not unlawful per se; conclusory claims of some broader, nebulous price-fixing agreement without adequate factual allegations to support its existence; and vague allegations of unilateral pressure or action by the NFLPA without any specific facts to support plaintiffs' conclusion that such action resulted in a per se unlawful price-fixing agreement. The court thus concludes that plaintiffs' complaint fails to state a per se violation.

2. The Rule of Reason

In order to state a rule of reason claim under Section 1 of the Sherman Act, a plaintiff must allege concerted action that is intended to harm or unreasonably restrain competition and that actually causes such injury to competition.... A plaintiff must further allege a relevant market that has been adversely affected by the challenged restraint; the failure to adequately plead a relevant market is grounds for the dismissal of a rule of reason claim. In their amended complaint, plaintiffs allege the following antitrust injury:

> the combination and conspiracy between the NFLPA and player-agents alleged herein is intended

> to injure, and has the effect of injuring, the plaintiffs in their business and property by increasing the compensation that they must pay professional football players. Each of the plaintiffs herein has suffered injury to its business and property and has been damaged financially by the combination and conspiracy between the NFLPA and player-agents.

Plaintiffs thus allege only injury to themselves; they fail to allege any injury to competition or to define a relevant market in which such injury occurred.

The court further rejects plaintiffs' reliance on *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990), to support their contention that they are not required to plead a relevant market. That case is wholly inapposite because it involved no rule of reason claims: the Supreme Court specifically held that the per se rule governed defendants' group boycott and horizontal price-fixing arrangement. *See id.* at 428-36 & n.19. As previously determined, however, in the present case plaintiffs' allegations fail to state a per se violation.

Plaintiffs argue against dismissal on the basis of a failure to adequately plead a rule of reason claim, contending that the court must wait until after the close of discovery and trial to determine whether to apply the per se rule or the rule of reason to their claim. However:

> when the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing case load of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. *Car Carriers, Inc.*, 745 F.2d at 1106.

Thus, courts routinely examine complaints that purport to state both per se and rule of reason claims in order to determine whether the elements of a claim under either theory have been adequately pled.

* * *

Even if plaintiffs were to adequately plead a relevant market, the court determines that their claim would nonetheless fail under the rule of reason because they are unable to allege the only type of price information exchange that the Supreme Court has determined constitutes a violation under the rule of reason. As previously discussed, plaintiffs allege only one specific example of concerted action, that the NFLPA and player-agents have acted in concert to share information on player compensation. The Supreme Court has determined that, absent some agreement between competitors to restrain price, the exchange of price and other market information is generally benign conduct that facilitates efficient economic activity. *See, e.g., Sugar Inst. v. United States*, 297 U.S. 553, 598, 56 S. Ct. 629, 80 L. Ed. 2d 859 (1936)("the dissemination of information is normally an aid to commerce"); *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 582, 69 L. Ed. 1093, 45 S. Ct. 578 (1925) ("Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.").

Plaintiffs argue, however, that the alleged agreement between the NFLPA and player-agents to share information on player compensation constitutes an antitrust violation like that found in *United States v. Container Corp.*, 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969). *Container Corp.* ruled that an exchange of price information among competitors, without an agreement to fix prices, was sufficient to raise antitrust concerns, but only in markets where certain structural conditions exist. *Id.* at 334-36. Those characteristics are: (1) a highly concentrated market dominated by relatively few sellers; (2) a fungible product; (3) competition that is primarily based on price; and (4) inelasticity of demand because buyers tend to order for their immediate short term needs. *Id.* at 337. Examining those characteristics, the court concludes that such market conditions do not exist in the present case. Plaintiffs neither allege nor can allege that there is a highly concentrated relevant market of competing sellers of players' services because there are over 1,500 professional football players, many of whom are represented in salary negotiations by agents, of whom there are hundreds. In addition, most football players do not compete by selling a fungible product as to which purchasing decisions are primarily made on the basis of price, additional structural factors which are necessary for an information exchange to violate the rule of reason. *See*

Container Corp., 393 U.S. at 337. Rather, each player has his own unique attributes and skills, which are of varying desirability to the different teams. Moreover, each player's salary is arrived at during the course of an individual negotiation with his employer club. Finally, the court concludes that there is no inelasticity of demand due to a market of buyers who purchase only for their immediate short term needs. To the contrary, the teams generally sign players to multi-year contracts and the system of player restraints essentially ties each player to his employer club for the duration of his career. Based on the foregoing, the court concludes the market structure of the National Football League does not have the characteristics required by *Container Corp.* and thus plaintiffs cannot allege the requisite factors to establish a rule of reason violation based solely on the exchange of salary information.

The court further concludes that the alleged salary exchange fails to state a rule of reason violation because any such exchange can have no anticompetitive effect given the present system of player restraints. *E.g.*, *Rosebrough Monument Co.*, 666 F.2d at 1138 (restraint of trade is considered unreasonable if "it has significant anticompetitive effects"); *Caremark Homecare, Inc.*, 700 F. Supp. at 1035; *see National Soc'y of Professional Eng'rs*, 435 U.S. at 688 ("Contrary to its name, the rule [of reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."). Plaintiffs' theory of rule of reason liability is essentially that information concerning the salaries of comparable players is a relevant factor in contract negotiations between an agent and the player's employer club and that having access to such information enables agents to negotiate higher salaries for their players than they would otherwise be able to obtain if forced to negotiate in the dark. Plaintiffs therefore contend that agents' access to such information is somehow anticompetitive. The court, however, rejects that contention. First, plaintiffs fail to allege any anticompetitive effect to either themselves as competitors or the market as a whole.... *See supra* note 10. Moreover, as previously discussed, the existing restraints have virtually eliminated competition among plaintiffs for layer services and also between players for positions. As a result, players have little leverage in their salary negotiations. Moreover, it is undisputed that the alleged salary information exchange merely provides agents and players with information that plaintiffs already possess. Although plaintiffs contend that it somehow violates the antitrust laws for agents to have independent access to that same negotiating information, the court determines that the availability of such information can only make the negotiation process fairer because the negotiations can take place without any misunderstanding or misrepresentation about what other players are earning. The court thus concludes that the dissemination of salary information has no anticompetitive effect and may actually benefit competition because it provides players with the same type of information concerning other players' salaries that plaintiffs already possess. *See United States Gypsum Co.*, 438 U.S. at 441 n.16 (exchange of price data may increase economic efficiency and thus have procompetitive effect); *cf. Broadcast Music, Inc.*, 441 U.S. at 20-21 (horizontal price-fixing arrangement was procompetitive because it increased market efficiency and reduced costs).

Based on the foregoing, the court concludes that plaintiffs' complaint fails to state a cognizable antitrust claim under either the per se rule or the rule of reason. Defendant also argues that the court should dismiss plaintiffs' claim with prejudice and without leave to amend. Because the court determines that the defects in plaintiffs' allegations are more than just superficial errors in pleading but are "fundamental inadequacies in their claim" the court determines that Count IV should be dismissed without leave to amend. Accordingly, defendant's motion is granted and Count IV of plaintiffs' complaint is dismissed with prejudice and without leave to amend.

Note and Question

1. There have been some cases in which the Supreme Court has held that an agreement to exchange information is a per se violation. *See American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). These cases usually involved an obvious sham which was intended to fix prices under the guise of an information exchange. Generally information exchanges are said to enhance competition. Why is this so?

2. Under new draft rules players have more freedom to negotiate. What does this do to the judge's statement that players are not competitors? What if the players brought an antitrust action, alleging that the owners have shared salary information and are using it to fix prices?