Marquette Sports Law Review

Volume 19
Issue 2 *Spring*

Article 2

Spring 2009

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ARTICLES

2008 ANTITRUST DEVELOPMENTS IN PROFESSIONAL SPORTS: TO THE SINGLE ENTITY AND BEYOND

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INTRODUCTION

The year 2008 produced some memorable sports moments, including the improbable New York Giants victory in the Super Bowl, the Tiger-less win by the United States in the Ryder Cup, and a World Series featuring the Philadelphia Phillies and the Tampa Bay Rays. It also witnessed several significant antitrust decisions involving professional sports leagues, with the opinions suggesting that the courts have recognized that the clubs in professional sports leagues are highly interdependent, that sports-related products compete with a broad range of entertainment products, and that a league's competitive balance can affect the value of its other assets.

The four most significant sports antitrust cases involved four different sports. The National Football League (NFL) and Major League Baseball (MLB) each had a federal court of appeals affirm summary judgment – granted for the leagues on different grounds – in separate antitrust challenges against the respective league's centralized trademark licensing programs.[1] In a third case, the National Association for Stock Car Auto Racing (NASCAR) won summary judgment in a federal district court against a claim that NASCAR illegally refused to sanction a race at the Kentucky Speedway.[2] The National Hockey League (NHL) found itself sued by one of its own – the

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1. Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008).

2. Ky. Speedway LLC v. NASCAR, No. 05-138, 2008 WL 113987 (E.D. Ky. Jan. 7, 2008).

New York Rangers – which wanted to opt out of the NHL's centralized internet and website operations. The Second Circuit affirmed the district court's refusal to grant the Rangers' motion for preliminary injunction,[3] and although the district court has since denied the NHL's motion to dismiss, the court suggested that the Rangers would have a significant uphill battle to prevail on an antitrust theory.[4]

The success of the professional sports organizations in defeating antitrust challenges is significant and may discourage other would-be plaintiffs from bringing such claims. But these sports antitrust cases of 2008 also have more far-reaching significance for antitrust – both as applied to sports leagues and in the broader world of business. The courts have stepped back from the per se or quick look approach and appear convinced that the rule of reason should apply not only to the on-field play but also to the traditional business functions of sports leagues. The latest chapters in the single entity debate suggest that a conflict remains between the circuits, which could remain unresolved for the foreseeable future.

This article reviews the recent antitrust cases involving professional sports, analyzes how these cases have changed or moved the law, and discusses the potential future implications of the various courts' approaches to these issues. What is particularly interesting about these 2008 cases is that the decisions address a range of important antitrust issues. As described below, the single entity issue received the most press attention, but scholars and lawyers should look to the implications beyond the single entity debate, particularly those that relate to relevant market definition and the use of competitive balance as a justification for restrictions on the business activities of sports leagues.

I. A REVIEW OF ANTITRUST CHALLENGES TO SPORTS LEAGUES

Despite their success in 2008, sports leagues have historically had mixed results when defending their rules and policies from antitrust challenges. For example, in *NCAA v. Board of Regents*, the Supreme Court upheld an antitrust challenge against the National Collegiate Athletic Association (NCAA) rule that limited television broadcasts of college football games.[5] The NCAA lost another antitrust challenge to its rule limiting compensation for certain assistant basketball coaches.[6] The NFL faced a series of antitrust cases,

3. Madison Square Garden, L.P. v. NHL, 270 Fed. Appx. 56, 59 (2d Cir. 2008).
4. Madison Square Garden, L.P. v. NHL, No. 07-CV-8455, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008).
5. NCAA v. Board of Regents, 468 U.S. 85, 119-20 (1984).
6. Law v. NCAA, 134 F.3d 1010, 1016-24 (10th Cir. 1998), *cert. denied*, 525 U.S. 822 (1998).

including some brought by players who claimed that the draft or other restrictions on player movement violated the antitrust laws.[7] Al Davis and his attempts to move the Raiders reflect another example of antitrust litigation in the sports industry.[8] Further, the United States Football League's challenge to the NFL resulted in a finding that the NFL violated the Sherman Act, although the jury awarded damages of only one dollar.[9]

Regardless of the nature of the policy or league rule that is challenged, sports antitrust plaintiffs typically bring their claims under Section 1 of the Sherman Act. Section 1 prohibits all contracts, combinations, or conspiracies in restraint of trade, but courts have long interpreted Section 1 to bar only those agreements that unreasonably restrain trade.[10] To establish a Section 1 claim, a plaintiff must establish two elements: (1) that there exists a contract, combination or conspiracy, and (2) that it unreasonably restrains trade. The proof needed to show an unreasonable restraint of trade varies by the type of conduct challenged, but the Supreme Court has said that it "presumptively applies rule-of-reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive."[11] Under the rule of reason, the plaintiff must first come forward either with proof of actual adverse effects on competition or with proof of facts from which adverse effects can be inferred (*e.g.* defendants have a large market share in a relevant market). If the plaintiff meets its burden, then the defendant may offer procompetitive justifications for the restraint. Finally, if admissible proof of a procompetitive justification exists, the plaintiff tries to show that, on balance, the anticompetitive effects outweigh any procompetitive benefits.[12]

The Supreme Court's presumption toward a rule of reason analysis is subject to two exceptions. First, the Court has applied an automatic rule of illegality – called the per se rule – in situations where the conduct is of the type with which the Supreme Court has had enough experience to enable the Court "to predict with confidence that the rule of reason will condemn [the

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7. *See* Mackey v NFL, 543 F.2d 606, 620-22 (8th Cir. 1976) (invalidating "Rozelle Rule"); McNeil v. NFL, 790 F. Supp. 871, 879-80 (D. Minn. 1992) (challenging Plan B restrictions); Smith v. Pro Football, Inc., 593 F.2d 1173, 1187-91 (D.D.C. 1978) (challenging college draft).

8. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984), *cert denied*, 469 U.S. 990 (1984).

9. United States Football League v. NFL, 842 F.2d 1335 (2d Cir. 1988).

10. *Board of Regents*, 468 U.S. at 98.

11. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

12. In undertaking this balancing, some courts have considered whether a less restrictive alternative would have achieved the same procompetitive effects.

conduct]."[13] But the per se rule (while desired by plaintiffs) applies only to a limited group of agreements or practices such as price fixing, bid rigging, or horizontal customer allocations – conduct recognized to have a "pernicious effect on competition and lack of any redeeming virtue."[14] Second, courts have applied a truncated or quick look rule of reason when the anticompetitive effect of the policy is clear and "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[15] If, however, the challenged arrangement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," then the court must apply more than a quick look.[16]

The sports antitrust cases of 2008 touched on all of these issues. American Needle's challenge to the NFL's trademark licensing system caused the Seventh Circuit to discuss whether a contract, combination, or conspiracy arose under Section 1 of the Sherman Act. The Rangers' lawsuit against the NHL raised the same issue. In *Major League Baseball Properties, Inc. v. Salvino, Inc.*, the Second Circuit considered and rejected a former licensee's argument that the per se or quick look analysis should apply to its challenge to MLB's centralized trademark licensing.[17] Both *Salvino* and *Kentucky Speedway* weighed proof of relevant markets in the sports context, and both the Rangers' case and *Salvino* considered the procompetitive justifications the leagues offered in defense of their policies.

II. THREADING THE *AMERICAN NEEDLE*: THE SEVENTH CIRCUIT HOLDS THAT THE NFL IS A SINGLE ENTITY

The Seventh Circuit made a precedent setting step on the single entity issue in *American Needle, Inc. v. NFL*,[18] when the court held that the NFL was a single entity (and therefore insulated from a Sherman Act Section 1 challenge) for purposes of the league's centralized trademark licensing and its refusal to license American Needle. This holding reflects the next logical step from Judge Easterbrook's dictum in *Chicago Professional Sports Ltd. v. NBA* ("*Bulls II*"),[19] but it creates a conflict with the joint venture approach adopted

13. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982)).

14. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

15. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

16. *Id.* at 771.

17. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008).

18. *See* Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008).

19. Chi. Prof'l Sports Ltd. v. NBA, 95 F.3d 593, 599-600 (7th Cir. 1996).

by a number of other circuits.[20] The limitation of the *American Needle* holding is that, rather than offering broad guidelines, the Seventh Circuit held that whether a challenged league policy falls within single entity protection presents an issue that must be decided not only "one league at a time" but also "one facet of a league at a time."[21] Further, and as discussed in more detail below, the Seventh Circuit's single entity approach appears to require more factual analysis than that normally needed under the Supreme Court's single entity analysis in *Copperweld Corp. v. Independence Tube Corp.*[22]

A. History of the Single Entity Debate

To appreciate the significance of the Seventh Circuit's single entity holding requires a return to the basic "contract, combination or conspiracy" element of a Sherman Act Section 1 claim. In *Copperweld*, the Supreme Court held that, as a matter of law, a parent company and its wholly owned subsidiary were incapable of conspiring for purposes of Sherman Act Section 1.[23] The Court reasoned that a parent and its subsidiary have a complete unity of economic interest because the parent may assert full control if the wholly-owned subsidiary failed to act in the manner desired by the parent company.[24] Just as an agreement between a corporation and its employees does not constitute a conspiracy or agreement for Section 1 purposes, an agreement between parent and subsidiary also fails as a matter of law. The joining of a parent and its subsidiary does not represent the combination of what were previously independent economic players in the market, and, consequently, the Court viewed the parent and wholly-owned subsidiary as a single entity for antitrust purposes. The Supreme Court did not set clear parameters for what constitutes a single economic entity, and antitrust defendants have cited *Copperweld* to argue that other forms of relationship fall within the single entity classification.[25] The importance of *Copperweld*, however, is that a Section 1 claim requires proof of an agreement or conspiracy and – if the only

20. *See* Sullivan v. NFL, 34 F.3d 1091, 1099 (1st Cir. 1994); N. Am. Soccer League v. NFL, 670 F.2d 1249, 1257-58 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982); L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387-90 (9th Cir. 1984); McNeil v. NFL, 790 F. Supp. 871, 880 (D. Minn. 1992).

21. *Am. Needle*, 538 F.3d at 742 (quoting *Chi. Prof'l Sports Ltd. v. NBA*, 95 F.3d at 600).

22. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

23. *Id.* at 777.

24. *Id.* at 771-72.

25. *See, e.g.*, Hood v. Tenneco Tex. Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984) (sister corporations); Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 611 (6th Cir. 1987) (sister corporations); Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1034-36 (9th Cir. 2005) (national dog breed club and regional affiliates).

conspiracy alleged was between a parent and its wholly owned subsidiary – the Court viewed those two corporate entities as a single economic entity and thus the agreement element failed as a matter of law.

In the sports context, some leagues have argued that courts should view a sports league as a single entity even though the league has separate teams or clubs. In a series of cases in the late 1970s and mid-1980s, courts treated the NFL not as a single entity but as a collection of separate business entities capable of conspiring for purposes of the antitrust laws.[26] For example, the Ninth Circuit reasoned that NFL teams had products with an independent value, and, therefore, the teams possessed the "attributes [that] operate to make each team an entity in large part distinct from the NFL."[27] In these circuits, a league rule or policy constituted an understanding or agreement among the independent teams; the agreement element of a Section 1 claim was thus satisfied and the analysis moved to whether the policy or rule unreasonably restrained trade.[28]

The single entity argument found a more receptive judicial response when the sports league was organized as a single corporate entity. In 1994, a federal district court rejected an antitrust challenge to the Professional Golfers Association (PGA), finding that the PGA was a single entity incapable of conspiring for antitrust purposes.[29] Several years later, Major League Soccer (MLS) formed as a limited liability company, an organization that a district court considered a single entity within the Supreme Court's teachings in *Copperweld*.[30] On appeal, however, the First Circuit questioned the viability of a single entity theory for sports leagues and opined that "[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases."[31] Whatever the value of considering the LLC or single corporate entity form for a new sports league may be, such a structural change was impractical for the older and well-established leagues.

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26. *See* L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387-90 (9th Cir. 1984); N. Am. Soccer League v. NFL, 670 F.2d 1249, 1257-58 (2d Cir. 1982).

27. *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1390.

28. *N. Am. Soccer League*, 670 F.2d at 1257-58.

29. Seabury Mgmt., Inc. v. PGA, 878 F. Supp. 771, 777 (D. Md. 1994), *aff'd in relevant part and rev'd in part*, 52 F.3d 322 (4th Cir.), *cert. denied*, 516 U.S. 867 (1995).

30. Fraser v. Major League Soccer, 97 F. Supp. 2d 130, 134-39 (D. Mass. 2000); *see also* Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, 213 F.3d 198, 205-06 (5th Cir. 2000) (discussing state amateur soccer association as a single entity).

31. Fraser v. Major League Soccer, 284 F.3d 47, 59 (1st Cir. 2002).

B. Trailblazing on the Seventh Circuit – From Bulls II to American Needle

New support for the single entity argument arose from language in the Seventh Circuit's second decision involving an antitrust challenge brought by the Chicago Bulls and WGN against the National Basketball Association's (NBA) limits on superstation broadcasts of NBA games. In *Chicago Professional Sports v. NBA* ("*Bulls II*"), Judge Frank Easterbrook suggested that professional sports teams might compete with each other in some contexts (*e.g.*, signing free agents and on the field of play) yet function as a single entity when acting in the broadcast market.[32] The opinion further warned that the *Copperweld* single entity issue would require an analysis not only "one league at a time" but also "one facet of a league at a time."[33] The Seventh Circuit remanded the case for consideration by the district court as to whether the NBA should be treated as a single entity or a joint venture.[34] Because *Bulls II* settled before a decision on remand, the case never resulted in a decision as to whether the NBA was, in fact, a single entity.

In 2008, *American Needle* gave the Seventh Circuit a chance to decide the single entity issue that it remanded in *Bulls II*. The Seventh Circuit recognized that the single entity argument required the court to enter "murky waters" because the court had "yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*."[35] Following Judge Easterbrook's reasoning in *Bulls II*, the court held that in some contexts a sports league is "more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under [Sherman Act] § 1."[36] The Seventh Circuit concluded that Copperweld could not provide definitive single entity antitrust protection for all sports leagues, but instead, "the question of whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'"[37]

The Seventh Circuit held, as a matter of law, that the NFL was a single entity under *Copperweld* when promoting NFL football through licensing the teams' intellectual property. More interesting than the holding is the court's rationale. Recognizing that the NFL is an unincorporated association of thirty-

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32. Chi. Prof'l Sports Ltd. v. NBA, 95 F.3d 593, 599-600 (7th Cir. 1996).

33. *Id.* at 600.

34. *Id.* at 601.

35. Am. Needle, Inc. v. NFL, 538 F.3d 736, 741 (7th Cir. 2008).

36. *Id.*

37. *Id.* at 742 (quoting *Chi. Prof'l Sports Ltd.*, 95 F.3d at 600).

two separately owned and operated football teams, the court found "most important" that since 1963 the NFL teams have acted as one source of economic power (NFL Properties) to license their collective intellectual property and to promote NFL football.[38] The court also found it significant that the league competes with other forms of entertainment for a limited audience and that the loss of audience to other forms of entertainment would hurt the individual teams' success.[39] The Seventh Circuit affirmed summary judgment for the NFL, stating:

> Simply put, nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization – such as, in this case, a professional sports league – to foster competition between that organization and its competitors. Viewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property.[40]

Taking its analysis one step further, the Seventh Circuit also affirmed summary judgment for the NFL on the monopolization claim, reasoning that the NFL was a single entity and a single firm's refusal to license a trademark is not an antitrust violation.[41]

C. The Implications of American Needle

The Seventh Circuit's single entity holding will likely cause sports leagues to pursue more aggressively a single entity argument in future antitrust litigation, but there exist serious questions as to how broadly *American Needle* can be applied. As discussed above, several other circuits have previously rejected the single entity argument and treated leagues as joint ventures. Even under the Seventh Circuit's holding, there exists no bright line rule, but instead, the court must examine the single entity question not only one league at a time but "one facet of a league at a time."[42] The Seventh Circuit's approach considers more than the corporate structure, an approach that is consistent with the *Copperweld* single economic unit rationale but that

38. *Id.* at 744.

39. *Id.* at 743.

40. *Id.* at 744 (quoting *Chi. Prof'l Sports Ltd.*, 95 F.3d at 599).

41. *Id.*

42. *Id.* at 742.

suggests that a more detailed judicial look is needed than is used for the more typical *Copperweld* cases.[43] Indeed, the Seventh Circuit has described the single entity issue as "fact intensive."[44]

What is particularly interesting about the *Bulls II* and *American Needle* analyses is that the court appears to intertwine in its *Copperweld* analysis issues that are traditionally viewed in the context of the first step under the rule of reason analysis for a Sherman Act Section 1 claim. *Copperweld* has provided a defense based on the lack of the requisite contract, combination, or conspiracy; a parent cannot conspire with its wholly-owned subsidiary, and employees cannot conspire with their employer. Viewed in this context, proof that only a single entity exists (*e.g.*, parent and its subsidiary) relieves the court of the need to proceed through the more detailed rule of reason analysis to determine the competitive effects of the challenged restraint. Most *Copperweld* arguments end here, without exploring the potential breadth of the Supreme Court's discussion of a unified economic actor. Under the Seventh Circuit's "fact intensive" look at "one facet of a league at a time," the courts will need to look at more than just corporate structure, with the Seventh Circuit referencing the need of the NFL to promote its collective product in competition with competitors – an inquiry that would seem to cross into the market and competition questions that courts typically bypass when they find *Copperweld* applies.[45]

Perhaps the *American Needle* reasoning reflects, without specifically saying, that the Seventh Circuit has taken the Supreme Court's decision in *Texaco, Inc. v. Dagher* one step further than that decision's holding. In *Dagher*, the Supreme Court held that the plaintiffs could not rely on a per se or quick look theory to challenge a legitimate joint venture's decision to set the same price to dealers for both Shell and Texaco branded gasoline.[46] The Court explicitly noted that the plaintiffs had not brought a rule of reason claim and that it was not deciding the joint venture partners' argument that Section 1 did not apply under any theory.[47] Nonetheless, the Court stated in *Dagher* that "[a]s a single entity, a joint venture, like any other firm, must have the

43. *See* Fraser v. Major League Soccer L.L.C., 284 F.3d 47, 58-59 (1st Cir. 2002).

44. *Am. Needle*, 538 F.3d at 741.

45. The benefit of a typical parent-sub *Copperweld* argument is that the defendants can offer evidence of the corporate structure and that, by itself, is sufficient to permit the court to find that no combination or conspiracy exists as a matter of law. These simple corporate structure arguments also limit the range of discovery relevant to a motion for summary judgment based on *Copperweld*. If more than mere corporate structure is needed to decide the single entity issue, more discovery would be relevant and expected.

46. *See* Texaco, Inc. v. Dagher, 547 U.S. 1 (2006).

47. *Id.* at 7 n.2.

discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price."[48] The Court's use of the phrase "must have the discretion to determine the prices" suggests that the reasoning would also extend to protect a legitimate joint venture's pricing decisions from a rule of reason claim.[49] Thus, *Dagher* could be read to hold that, once the district court determines that an entity is a legitimate joint venture for antitrust purposes, that joint venture is entitled to set its prices as a single entity. In the professional sports context, this would mean that once a court determines that a professional sports league's centralized business operations (whether for licensing of intellectual property rights or sale of product) is a legitimate joint venture, the venture should be viewed as a single entity for at least the pricing decisions.

The Seventh Circuit's analysis in *American Needle* hints that the court is looking beyond the mere parent/subsidiary corporate form to a fuller economic analysis of the *Copperweld* single entity. In determining whether a sports league, or a facet of a sports league, should be treated as a single entity for Sherman Act purposes, the Seventh Circuit phrased the ultimate question as whether the restriction deprives the market of a source of economic power. The court not only described the structure, ownership, and shared profits of the NFL licensing system but also noted that the league competed with many other forms of entertainment products and that the teams had a collective and interdependent interest in collectively promoting the NFL product in competition with these other forms of entertainment.[50] The court concluded that "nothing in § 1 prohibits NFL teams from cooperating so the league can compete with other entertainment providers."[51] Future cases will need to explore the depth of the inquiry into what is needed to prove a single economic entity, but this analysis suggests that the court views a need to delve deeper than the traditional structural inquiry used for parent/subsidiary and employer/employee relationships under *Copperweld*, and the question becomes how much market analysis is needed to demonstrate that a professional sports league or other joint venture should be treated as a single entity for Section 1 purposes. If proving a single entity requires evidence that the collection of teams acts as a single economic force that competes with at

48. *Id.* at 7. The Supreme Court also quotes *Arizona v. Maricopa County Medical Society* for the proposition that "When 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" *Id.* at 6 (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 356 (1982)).

49. *Id.* at 7.

50. *Am. Needle*, 538 F.3d at 743.

51. *Id.* at 744.

least some other providers, perhaps no detailed market analysis is needed as long as the league competes with other forms of entertainment. If, however, the single entity question becomes an analysis as to whether the formation or operation of the joint venture violates the antitrust laws (*i.e.* whether the formation itself is justified), then more of a market analysis is needed. Under either scenario, some discovery will likely be needed on both operational and market share issues.[52]

The next chapters of the single-entity saga have already begun. First, in the Rangers' lawsuit challenging the NHL's collective website rules, the NHL argued that it is a single entity. At the preliminary injunction stage, Judge Preska adopted a joint venture analysis, applied the rule of reason, and concluded that the Rangers had no reasonable probability of succeeding on the merits. The Second Circuit affirmed. The NHL then moved to dismiss on several grounds, including an argument based on *Copperweld*, *Dagher*, *Bulls II*, and *American Needle* that the NHL is a single entity.[53] Judge Preska denied the motion and noted that, while the Second Circuit and a number of other courts have declined to consider a professional sports league a single entity, a split of authority exists. She declined to reach the ultimate issue, however, holding that mere reliance on the pleadings was insufficient to decide the single entity argument and that she would want evidence on the relevant market definition as well as on how the NHL operates as an economic actor in that market before deciding the single entity question.[54]

The most intriguing potential next chapter (perhaps final chapter) may be written relatively soon by the Supreme Court. After American Needle filed a petition for writ of certiorari, the NFL responded with an answer requesting that the Supreme Court grant the petition so that the Court can decide the single-entity issue and end the split of authority in the circuit courts.[55] The

52. For example, it is not clear that the court could dismiss the complaint on a Rule 12(b)(6) motion, particularly if the complaint alleged a narrow relevant market and alleged that the league was not a single entity. For example, the NFL lost its motion to dismiss in *American Needle* in part due to the plaintiff's allegation of a market confined to NFL-trademarked headwear and apparel. Am. Needle, Inc. v. New Orleans La. Saints, 385 F. Supp. 2d 687, 692-96 (N.D. Ill. 2005). The district court needed to accept that narrow market for purpose of the motion to dismiss, but not on summary judgment (when the NFL prevailed).

53. Madison Square Garden, L.P. v. NHL, No. 07-CV-8455, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008).

54. She also noted that, if the Rangers defeated the single entity argument, the NHL would be treated as a joint venture and the Rangers would need to establish an anticompetitive effect under the rule of reason. That case subsequently was dismissed, so Judge Preska will not need to address this issue.

55. Brief for the NFL Respondents in American Needle, Inc. v. National Football League, Case No. 08-661 (U.S. Sup. Ct.) (brief filed Jan. 21, 2009)

NBA and NHL filed amicus briefs also urging the Supreme Court to accept the case and decide the issue, and the Supreme Court subsequently asked the Solicitor General for her views on whether the petition should be granted.[56] If the Supreme Court grants the petition of certiorari, the Court's decision is likely not only to explain if and when a sports league should be treated as a single entity for antitrust purposes but also to amplify on the Court's decisions in *Copperweld* and *Dagher* and provide guidance to non-sports ventures.

III. ASSESSING COMPETITIVE EFFECTS IN ANTITRUST CHALLENGES TO PROFESSIONAL SPORTS OPERATIONS – *MLBP v. SALVINO, KENTUCKY SPEEDWAY v. NASCAR,* AND *MADISON SQUARE GARDEN v. NHL*

Three 2008 cases weighed evidence concerning purported anticompetitive conduct by a professional sports organization and continued the trend toward applying a rule of reason analysis to challenges involving professional sports organizations. In both *Salvino* and *Madison Square Garden*, the courts rejected the plaintiff's attempt to apply *per se* or quick look prohibitions to the league operations. The *Kentucky Speedway* and *Salvino* decisions considered and rejected narrow relevant market definitions proposed by plaintiff. Through their respective analyses, the Second Circuit and two district courts gave insights into their assessment of relevant markets and purported procompetitive justifications.

A. Rejection of Per Se and Quick Look Standards of Review

Twice in 2008, the Second Circuit considered whether to apply a quick look or a rule of reason to a challenge to a professional sports league's centralized licensing or business operations. In *Madison Square Garden*, the court quoted *California Dental Ass'n* and held in a short, unpublished opinion that the "quick look" is essentially an abbreviated form of the rule of reason but should only be used in cases where the likelihood of anticompetitive effects is so obvious that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[57] The appellate court agreed with the district court that it was not obvious that the NHL's ban on independent team websites had no redeeming value and recognized that the

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56. Brief for Amicus Curiae National Hockey Association in Support of the NFL Respondents, Case No. 08-661 (U.S. Sup. Ct.) (brief filed Jan. 21, 2009); Brief of Amicus Curiae National Basketball Association and NBA Properties in Support of the NFL Respondents' Response, Case No. 08-661 (U.S. Sup. Ct.) (brief filed Jan. 21, 2009).

57. Madison Square Garden, L.P. v. NHL, 270 Fed. Appx. 56, 58 (2d Cir. 2008) (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999)).

league had identified several procompetitive effects of its internet and new media strategy.[58] Though unpublished, this opinion had the effect of assuring that –if the district court had decided not to accept the NHL's single entity argument – the district court would have applied the rule of reason to the Rangers' challenge to the NHL's new media strategy.

The Second Circuit issued a lengthy, published opinion six months later in *Major League Baseball Properties, Inc. v. Salvino, Inc.*, a case arising from an antitrust challenge against MLB's centralized trademark licensing.[59] Salvino had a license from MLB to use MLB trademarks on certain collectibles but not for the use of the MLB trademarks on Salvino's plush bean-filled toy bears (originally called Bamm Beanos and later called Bammers).[60] MLB sent Salvino a cease-and-desist letter after discovering that Salvino had used an Arizona Diamondbacks logo on a Bammer, and Salvino responded by filing an antitrust claim asserting that MLB's exclusive licensing policies violated the Sherman Act and the Cartwright Act.[61] The district court granted summary judgment for Major League Baseball Properties (MLBP) on Salvino's antitrust claims, holding that Salvino failed to offer evidence sufficient to support a finding that the MLBP collective licensing arrangement unreasonably restrained competition.[62]

Salvino argued on appeal that the district court erred by applying a rule of reason analysis rather than holding MLB's centralized trademark licensing arm either illegal per se or illegal under a quick look approach.[63] Salvino conceded that cooperation among the MLB clubs was needed for on field play and that certain licensing operations such as quality control were more efficiently handled on a league-wide basis.[64] What Salvino challenged was the MLBP rule that authorized MLBP to serve as the exclusive licensor of the trademark rights of all thirty clubs rather than allowing each club to license its marks for use on retail products.[65] The restriction against each club being able to license its own trademarks, Salvino asserted, was comparable to the NCAA's television broadcast restriction in *NCAA v. Board of Regents* and

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58. *Id.*

59. Major League Baseball Props., Inc. v. Salvino, 542 F.3d 290 (2d Cir. 2008).

60. *Id.* at 294.

61. *Id.* at 295. In many respects, Salvino's claims mirrored those alleged by American Needle but the single entity argument was not at issue before the Second Circuit.

62. Major League Baseball Props., Inc. v. Salvino, Inc., 420 F. Supp. 2d 212 (S.D.N.Y. 2005), *aff'd*, 542 F.3d 290 (2d Cir. 2008).

63. *Salvino*, 524 F.3d at 309.

64. *Id.* at 333-34.

65. *Id.* at 295.

thus illegal without the need for a full rule of reason analysis.[66]

The Second Circuit rejected Salvino's argument and held that the rule of reason applied.[67] Two factors of particular significance to the court were the increased output in licensed products after MLB centralized its licensing operations and the league's legitimate and related interest in competitive balance among the clubs. Relevant to the first point, the Second Circuit opinion included an extensive description of the history of MLB licensing efforts and the increase in output that MLBP had experienced after centralizing the licensing operations. The court noted that Coca-Cola had run a major "under-the-cap" promotion with the NFL in the 1960s but had not done so with MLB because MLB lacked centralized licensing.[68] The lack of centralized licensing resulted in one year when baseball card companies were unable to print copies of the Houston Astros team photo.[69] In the first year after MLBP assumed the role of exclusive licensor for MLB club trademarks, the number of licensees more than doubled. At the time the summary judgment motion was filed in the district court, MLBP had more than 300 licensees selling some 4000 licensed products in the United States and approximately 170 licensees for sales of product outside of the United States.[70] The court rejected the suggestion of Salvino's expert that the increase in MLB licenses and sales of MLB licensed products "would appear

66. *Id.* at 318. Salvino relied on *NCAA v. Board of Regents* more for its quick look argument rather than for a per se argument since in *Board of Regents* the Supreme Court explicitly did not apply per se treatment and instead used a relatively short version of the rule of reason that became the precursor to the "quick look." NCAA v. Board of Regents, 468 U.S. at 104-15; *see also* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459-65 (1986) (applying quick look to an agreement not to send dental records to insurers' offices).

67. Judge Sotomayor filed a concurring opinion in which she agreed that the rule of reason analysis was applicable, agreed that Salvino had not introduced sufficient evidence to withstand summary judgment, and agreed that the district court judgment should be affirmed. She disagreed with the majority's opinion in several respects. In particular, she criticized the majority's view that the MLBP licensing was not an agreement on price. *Salvino*, 542 F.3d at 335 (Sotomayer, J., concurring). Her concurrence suggests that the appropriate approach to a price fixing allegation in this context would be to consider whether (1) the joint venture is a sham, and (2) whether the challenged restraint is not reasonably necessary to achieve any of the procompetitive benefits of the joint venture and serves only as a naked restraint on competition. Id. at 338. Whether viewed under this approach or under the Supreme Court's analysis in Texaco, Inc. v. Dagher, 547 U.S. 1, 5 & n. 3 (2006), a challenge to a joint venture establishing a price for the joint venture product is subject to the rule of reason and not to per se or quick look standards.

68. *Salvino*, 542 F.3d at 297. As noted in the *American Needle* decision, the NFL has had centralized league licensing since 1963. Am. Needle, Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008). MLBP did not adopt centralized exclusive licensing until 1984. *Salvino*, 542 F.3d at 297.

69. MLBP v. Salvino, Inc., 420 F. Supp. 2d 212, 217 (S.D.N.Y. 2005), *aff'd*, 542 F.3d 290 (2d Cir. 2008).

70. *Salvino*, 542 F.3d at 319.

to be more consistent with a general increase in consumer interest in licensed retail merchandise of all sorts."[71] The Second Circuit held that assertion conjectural and not sufficient to rebut MLBP's evidence that centralizing the licensing operations had increased the output of MLBP licenses and licensed product.

The *Salvino* court's second reason for rejecting a quick look approach acknowledged the potential interplay between collective licensing and competitive balance. A question that has arisen in a number of sports antitrust cases is whether courts may consider the impact to on-field competition and competitive balance when assessing antitrust challenges to the off-field business operations of professional sports leagues. The Seventh Circuit suggested in *Bulls II* that courts should not second-guess how leagues share revenues but the Second Circuit's *Salvino* decision takes that point one logical step further. After *Salvino*, leagues may not only split the financial benefits of licensing but may also show that the restriction is justified by the need for competitive balance to improve the league's marketability and the value of its trademarks.

In allowing consideration of competitive balance, the Second Circuit recognized that professional sports leagues may have legitimate interests in preventing free-riding by limiting the ability of teams to license their trademarks independently of the league. The court cited extensively to the report of Franklin Fisher, MLBP's economics expert, who opined that allowing clubs to license their own marks would result in free-riding because the more popular clubs would obtain more revenues than less popular clubs even though the value of the trademarks resulted from the interdependent efforts of the clubs.[72] The competitive balance of the league generated greater fan interest and total value, and, Fisher said, the league had a legitimate interest in seeing that the league marks were promoted and licensed in a manner that would reward league-wide efforts and foster competitive balance.[73] The Second Circuit agreed, concluding that "the disproportionate distribution of licensing income [that would result under *Salvino's* proposed approach] would foster a competitive imbalance among the Clubs."[74]

The Second Circuit relied in part on these same considerations of increased output and the need for competitive balance when distinguishing the Supreme Court's decision in *NCAA v. Board of Regents*. *Board of Regents*

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71. *Id.*

72. *Id.* at 332-33.

73. *Id.* at 333. Note that this rationale is consistent with the NFL's joint promotion objective that the Seventh Circuit found persuasive in *American Needle*. *Am. Needle, Inc.*, 538 F.3d at 737-38.

74. *Salvino*, 542 F.3d at 333.

involved a restriction that placed an artificial and absolute limit on the quantity of college football games broadcast, which resulted in higher prices and a lower output than would exist but for the restriction.[75] By contrast, the MLBP venture did not limit the number of products licensed or sold, worked with prospective licensees to develop new licensed products, competed in a broader market, and experienced the demand for its products (and resulting royalties to MLBP) rise and fall with consumer preferences.[76] The court considered the equal sharing of revenue by the MLBP clubs to be "superficially similar" to the revenue sharing in *Board of Regents*, but found that factor to have a significantly different impact because Salvino challenged an integrated professional sports league in which the on-field competitors are not independent entities that exist without reference to the league (such as the separate universities in the NCAA) but are interdependent teams that rely on competitive balance for their collective appeal to fans.[77] The Second Circuit concluded that the MLBP joint licensing venture was more akin to the scheme upheld by the Supreme Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[78] than to the NCAA's limitation on college football broadcasts.[79]

The Second Circuit's decision to apply the rule of reason was consistent with the Supreme Court's holdings in non-sports antitrust cases. The Supreme Court has instructed that an arrangement warrants per se treatment only when the Court has had sufficient experience with that type of arrangement to conclude that the effect on competition is always pernicious.[80] The list of per se illegal conduct is short and relatively well known (*i.e.*, price fixing, bid rigging, and horizontal allocation of customers). For conduct outside the per se category, the quick look analysis abbreviates the rule of reason analysis when a plaintiff easily satisfies its burden of showing an anticompetitive effect and the court can determine on a "quick look" that the defendant has no plausible argument that would suggest a procompetitive justification for the obviously anticompetitive conduct. Put slightly differently, the quick look

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75. *Id.* at 325.

76. *Id.* at 325-31.

77. *Id.* at 331-32.

78. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

79. *Salvino*, 542 F.3d at 321-23. The court agreed with only one of Salvino's attempts to distinguish *Broadcast Music*, with that being the individual composers retained the right to license their songs independently of BMI while MLB clubs (with limited product exceptions) could not license their respective trademarks for retail use. *Id.* at 323. The court found this distinction insignificant, however, because the clubs were members of a professional sports league and thus had interdependent interests that the individual composers did not. *Id.*

80. *Id.* at 315.

should apply when, although the conduct does not fall within the narrow list of per se, the court is confident that the parties could try the case over and over again and always obtain the same result – an illegal agreement. The net effect of the *Salvino* decision – whether under the majority opinion or the concurrence – is a recognition that the interdependence of the teams in professional sports leagues prevents the use of the per se rule or the quick look in challenges to the league's collective efforts to market their products or intellectual property rights in competition with other sports and entertainment providers. More importantly, the court has recognized the legitimate need for competitive balance considerations in determining the level of scrutiny to apply to league off-field operations.

B. Defining the Relevant Market for Sports-Related Products

The 2008 sports antitrust decisions reflected a continuing trend by courts to reject single sport relevant markets and to hold plaintiffs' experts to the challenge of demonstrating that their alleged narrow markets existed. In *Board of Regents*, the Supreme Court accepted the proposed relevant market of live college television broadcasts despite the NCAA's assertion that the market included other broadcasting and that NCAA football telecasts represented merely one entertainment choice.[81] Earlier, the Supreme Court had accepted a relevant market limited to championship boxing matches.[82] More recently, however, some district courts and courts of appeals have eschewed the narrow relevant markets alleged by plaintiffs, although normally only on a motion for summary judgment.[83]

The 2008 cases confirm that professional sports leagues do not own a monopoly in a relevant antitrust product market. The Seventh Circuit's single entity analysis in *American Needle* recognized that the NFL competes with other forms of entertainment for a finite audience.[84] In both *Kentucky Speedway* and *Salvino*, the courts scrutinized the plaintiffs' proffered relevant markets and found them wanting. Whether due to the nature of the product

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81. NCAA v. Bd. of Regents, 468 U.S. 85, 111 (1984).

82. Int'l Boxing Club v. United States, 358 U.S. 242, 244-45 (1959).

83. *See* Chi. Prof'l Sports Ltd. v. NBA, 961 F.2d 667, 673 (7th Cir. 1992) ("*Bulls I*") (stating that "[v]iewers of basketball games do not have qualities uniquely attractive to advertisers."); Adidas Am., Inc. v. NCAA, 64 F. Supp. 2d 1097, 1103 (D. Kan. 1999) (rejecting allegations by Adidas that the relevant market contained only the market for NCAA member promotional rights).

84. Am. Needle, Inc. v. NFL, 538 F.3d 736, 743 (7th Cir. 2008). This differed from the district court's analysis on the NFL's original motion to dismiss, when the district court accepted, for purposes of the motion, the plaintiff's allegation that the market was limited to NFL-trademarked apparel and headwear. Am. Needle, Inc. v. New Orleans Saints, 385 F. Supp. 2d 687, 692-96 (N.D. Ill. 2005).

challenged, an emerging trend to recognize sports as a form of entertainment, or a more critical view of expert analyses, Kentucky Speedway, Salvino, and their respective experts failed to make the requisite showing to define narrow relevant markets.[85]

In the complaint challenging NASCAR's refusal to grant a sanctioned premium NASCAR event, Kentucky Speedway alleged a relevant product market limited to "premium NASCAR NEXTEL stock car races."[86] In 2006, the district court denied NASCAR's motion to dismiss, reasoning that relevant markets can sometimes be defined narrowly and that the Supreme Court had upheld a relevant market of championship boxing matches.[87] The court noted, however, that Kentucky Speedway's antitrust claim might fail under the higher standard of scrutiny applied at summary judgment or trial.[88] The district court's 2006 prediction proved true in 2008 when the court considered NASCAR's summary judgment motion and held that Kentucky Speedway's proof and its expert's opinion would not enable a jury to find a narrow relevant market in which NASCAR had market power.[89] Absent proof of market power, Kentucky Speedway's grouse that NASCAR would not sanction a race at its speedway was no different from that of a "jilted distributor" who objected when a manufacturer selected some other distributor to carry a product line.[90]

The dispositive step leading to summary judgment against Kentucky Speedway was the district court's decision to exclude the track's economic expert's opinions on *Daubert* grounds.[91] The court held that the critical factor for a relevant market definition was the cross-elasticity of demand between the product and possible substitutes, and both parties agreed that the Justice Department's Merger Guidelines SNIP test[92] was one accepted means of

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85. The *Madison Square Garden* decision includes an inherent assumption that any relevant market would include more than internet sites devoted to hockey. That issue was likely the subject of discovery on remand.

86. Ky. Speedway, LLC v. NASCAR, 410 F. Supp. 2d 592, 596 (E.D. Ky. 2006).

87. *Id.*

88. *Id.* at 597.

89. *Id.*

90. Ky. Speedway, LLC v. NASCAR, No. 05-138, 2008 WL 113987, at *5-*7 (E.D. Ky. Jan. 7, 2008).

91. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993). The Supreme Court identified four factors that a district court should apply as "gatekeeper" before admitting expert testimony: (1) whether the expert's theory had been tested; (2) whether the theory has been subject to peer review and publication; (3) whether there is an understood potential rate of error; and (4) whether the approach or theory has achieved general acceptance in the field of study. *Id.*; *see also* Fed. R. Evid. 702.

92. The relevant market test found in the Merger Guidelines issued by the Department of Justice

testing the interchangeability of a product and its substitutes.[93] The *Kentucky Speedway* court held that the plaintiff's expert failed to satisfy this criteria because the expert only considered the Busch NASCAR race as a possible substitute for premium NASCAR NEXTEL races and failed to consider whether other sports – if not other forms of non-sports entertainment – stood as interchangeable substitutes.[94] For the district court, a proper relevant market analysis would determine the total average cost for a family of four to attend a race (which the court estimated at four hundred dollars) and then determine whether a five percent increase in that total cost (twenty dollars in the court's example) would cause the family to patronize a Cincinnati Reds game, a Cincinnati Bengals game, or some other form of sports entertainment instead of a NEXTEL race.[95] The district court rejected the expert's "hybrid" version of the DOJ Merger Guidelines test and did not address the issue of whether it would have considered a relevant market analysis not based on the DOJ Merger Guidelines.[96] For Kentucky Speedway, the exclusion of its expert proved fatal to its claim, since the lack of relevant market evidence meant that Kentucky Speedway could not prove an anticompetitive effect from NASCAR's refusal to sanction a race at that track. What is not clear from the opinion is whether the district court would accept only a market definition using the DOJ Merger Guidelines test or whether the court would have considered other types of evidence if Kentucky Speedway had sought to introduce such evidence.

In *Salvino*, the Second Circuit relied heavily on non-statistical data in assessing the relevant product market. MLBP had introduced considerable historical data about the formation and performance of MLB's attempts to license the league and club marks, including evidence of losing a Coca-Cola promotion to the NFL, evidence that MLBP licensed product sales dropped during the players' strike, a market research study conducted for MLBP that concluded that MLB competed with "a wide range of leisure and entertainment options that vary with target group and lifestyle," pre-litigation business plans that identified a variety of sports and entertainment licensing

Antitrust Division and the Federal Trade Commission considers whether a small, but significant and nontransitory increase in price (SNIP) will cause some portion of consumers to switch to some other product. The Merger Guidelines suggest that a five to ten percent real increase in price (*i.e.*, accounting for inflation) is used for this test of cross-elasticity. *See* 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 1.11, http://www.ftc.gov/bc/docs/horizmer.htm.

93. *Ky. Speedway*, No. 05-138, 2008 WL 113987 at *3-*4.

94. *Id.* at *4.

95. *Id.*

96. *Id.*

entities (*e.g.*, Nike, Reebok, NFL, NBA, Summer Olympics, Disney and Warner Bros.) as competitors, and the MLBP expert's opinion that the relevant market consisted of the worldwide market for licensing of intellectual property for use in the production of consumer goods and services.[97] MLBP also relied heavily on Salvino's internal business plans and licensing applications, which identified its Bammer plush toys as being sold in the sports collectibles hobby market, the novelty and memorabilia market, and the general collectibles market.[98]

Salvino's expert initially asserted that the organization of MLBP functioned as a cartel that restricted output, and, thus, the court needed no market analysis to condemn the licensing arrangement. When the Second Circuit rejected the per se and quick look approaches, Salvino needed to establish market power in a relevant market to survive summary judgment under the rule of reason. Salvino's economics expert stated that "MLBP quite likely exercises sufficient control over pricing licenses for use of club marks for plush toys and similar products so that these constitute a relevant market."[99] His later declaration in opposition to MLBP's summary judgment motion suggested that a narrow MLB-focused market applied because "the bundle of . . . rights licensed by MLBP is . . . highly differentiated from other bundles with which MLBP apparently believes it competes."[100] The Second Circuit rejected this attempt to define a narrow relevant market on several grounds, most significant of which was the expert's deposition testimony that he had not performed the discrete choice analysis that he said he needed to confirm his relevant market conclusions.[101] Pushed to the logical conclusion of his "baseball licensing rights" argument at his deposition, Salvino's expert supposed that a consumer who wanted but could not find a New York Yankees Bammer would not substitute a New York Jets Bammer but instead would buy a Boston Red Sox Bammer.[102] To the Second Circuit Court of Appeals sitting

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97. Major League Baseball Props., Inc. v. Salvino, 542 F.3d 290, 298-99, 301 (2d Cir. 2008). Fisher also opined that, even if the market were narrowed to the licensing of intellectual property related to sports and certain entertainment products, MLBP would lack market power. *Id.* at 302.

98. *Id.* at 299-300.

99. *Id.* at 301.

100. *Id.* at 328.

101. *Id.* at 329. Salvino's expert admitted, for example, that he needed to undertake empirical analysis before he could conclude whether Bammers with MLB players names on them (Salvino had a license from the MLB Players Association) would fall within the same relevant market as Bammers with MLB club logos, before he could conclude whether Bammers with NFL marks fell within the same market as Bammers with MLB club marks, and before he could conclude that the plush bear products produced by an MLBP licensee (and thus with MLB club marks) would fall within the same market as the Salvino Bammers. *Id.*

102. *Id.* at 330.

in Manhattan, that proposition (Yankees fans would buy Red Sox products) demonstrated that Salvino's expert needed considerably more empirical analysis before his market definition views would be accepted.[103]

So what is needed to prove a relevant market in sports antitrust cases? Perhaps the most significant aspect of these decisions is that the courts appear willing to recognize that sports leagues and their related businesses may compete with other forms of entertainment (in *Kentucky Speedway*) and with intellectual property (in *Salvino*, *American Needle*, and *Madison Square Garden*). *Kentucky Speedway* and *Salvino* also reinforce the well-recognized concept that to survive summary judgment a plaintiff must proffer evidence sufficient to permit a finding of a relevant antitrust market. Without adequate evidence of a relevant market and market power in that market, a rule of reason case becomes more difficult to prove.[104]

Counsel should take caution not to read these cases too broadly. The *Kentucky Speedway* district court criticized the methodology adopted by the plaintiff's expert and held that the expert's "hybrid" approach to market definition did not satisfy *Daubert* standards, but it seems unlikely that the court was suggesting that only a SNIP test can establish (or disprove) a relevant product market. In *Kentucky Speedway*, both parties had agreed that the SNIP test is one acceptable approach; the court was not asked to consider what other types of proof might suffice. At least on the face of the decision, the plaintiff apparently relied solely on its expert's "hybrid" approach so that, once the court held that the hybrid did not satisfy the *Daubert* standard, the plaintiff had no other evidence to satisfy its burden of proving a relevant product market.[105]

The courts presumably would apply the same economic tools and relevant market analysis to evaluate markets in sports cases as they have in other industries. In other industries, courts have looked at far more than the DOJ SNIP test and have considered the testimony of market participants, the internal and third party market studies, pricing patterns, and other evidence.[106]

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103. *Id.*

104. The Supreme Court has held that an anticompetitive effect can be proven directly (rather than inferred from market power in a relevant market), but that option may be difficult to establish in most cases. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61 (1986).

105. The district court's opinion does not disclose how the hybrid model of the plaintiff's expert differed from the DOJ SNIP test.

106. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp 1066, 1075-76 (D.D.C. 1997) (Staples had different pricing policies in areas where it faced competition from Office Max or Office Depot); AD/SAT v. Associated Press, 181 F.3d 216, 227-29 (2d Cir. 1999) (considering views of the plaintiff and its management about what products competed); United States v. SunGard Data Sys., Inc., 172 F. Supp. 2d 172, 182-83 (D.D.C. 2001) (internal company and industry analyses).

Similarly, in *Salvino*, the Second Circuit described in detail what Salvino's principals, licensing applications, and marketing materials said about the market in which Salvino's Bammers competed.[107] Although the testimony of Rick Salvino and Wayne Salvino (the president and vice-president, respectively, of Salvino, Inc.) certainly would not meet any aspect of the DOJ SNIP test, the Second Circuit gave weight to their testimony that the Salvino Bammers "competed with everything in the store for shelf space," that "[a]nybody in a gift store that sells a product is a competitor of mine," and that Salvino competed with numerous other producers of plush products as well as "anybody who produces sports licensed products; anybody who produces, you know, signed products, collectibles, memorabilia; anybody who produces licensed key chains, zipper pulls, non-licensed key chains, zipper pulls."[108] The court further relied on Salvino's advertising materials that declared that the Bammer products were "America's Number 1 Sports Collectible" in baseball, football, boxing, basketball, ice skating, and NASCAR as relevant evidence that the speculative assumptions of Salvino's expert could not overcome.[109] As noted above, the court also evaluated MLBP's internal market studies and the effects on licensing royalties.

What the 2008 cases confirm is that it is not enough merely to say that a particular sport is unique and has no substitutes. Instead, the courts appear to recognize that sports leagues provide an entertainment or entertainment-related product that may compete with a variety of firms beyond the traditional sports leagues. As in other antitrust cases, the first step of a rule of reason analysis requires a plaintiff to show an anticompetitive effect, and if that is to be inferred in part from a high market share in a relevant antitrust market, the plaintiff must come forward with sufficient economic evidence to allow a jury to reasonably define the relevant market. In *Kentucky Speedway* and in *Salvino*, the courts held that the plaintiffs' experts failed to satisfy that burden.[110]

107. Salvino's business plan to the NFL (one of Salvino's licensors) described the Bammer product as part of the "novelty and memorabilia market" while the plan submitted to the NBA (another licensor) said that Salvino's various products, including the plush bears, were in both the "sports collectibles hobby market" and the "general retail market." *Salvino*, 542 F.3d at 300.

108. *Id.* at 299-300.

109. *Id.* at 299-300, 330. Salvino's expert testified that he needed to undertake a discrete choice or other empirical analysis in order to determine the scope of the relevant product market. Having not done those studies, he speculated as to how he would view the market, and the court found that insufficient given the evidence submitted by MLBP. *Id.* at 329-30.

110. As one district court has noted, an antitrust plaintiff can theoretically establish a relevant market without the testimony of an expert, but, as a practical matter, "plaintiffs' lack of any witness to testify about antitrust economics, or to rebut the defendants' economists, proves fatal." Va. Vermiculite, Ltd. v. W.R. Grace & Co., 108 F. Supp. 2d 549, 576 n.16 (W.D. Va. 2000).

C. Balancing the Competitive Effects of Sports League Restrictions

Because the courts in *American Needle*, *Salvino*, and *Kentucky Speedway* disposed of those cases on other grounds (single entity theory in *American Needle* and failure to prove market power in a relevant antitrust market in *Salvino* and *Kentucky Speedway*), those courts did not need to undertake the step of balancing the procompetitive and anticompetitive effects of a restriction to determine the net effect on competition. Nonetheless, the analysis undertaken by those courts – as well as the *Madison Square Garden* court – in reaching their respective decisions yields useful insights into how the courts may view claimed procompetitive justifications. Discussed below are three arguments that were used in the 2008 cases: (1) the centralized structure is needed to compete with other leagues/competitors, (2) the restriction is needed to maintain competitive balance and prevent free riding, and (3) the resulting or expected increase in output demonstrates that the policy is procompetitive.

1. Justifying Joint Conduct as Necessary to Match Competitors.

Both the Second Circuit and the Seventh Circuit considered the history of a sports league's centralized operations and whether other competitors used similar approaches in the analysis of the challenged restraints. In *Salvino*, the court noted that licensees appreciated the efficiencies of "one-stop shopping" for intellectual property licenses from other sports leagues and that MLB had lost a major promotional program sponsored by Coca-Cola because at the time the NFL had a "one stop shop" licensing operation, but MLB did not.[111] In *American Needle*, while decided on single entity grounds, the Seventh Circuit noted the NFL's forty-five year history of centralized licensing and the teams' interest in competing on a collective basis with other forms of entertainment.[112] Together these two cases suggest that a league should consider whether its historical organization, or that of a competitor, can help demonstrate the need for centralized or joint operations.

Newly established league operations require a prospective justification showing potential procompetitive benefits. In *Madison Square Garden,* the NHL asserted that it needed centralized new media operations in order to create greater demand for the NHL product. The NHL found that hockey fans tend to support their favorite team but that once that team is eliminated from the NHL playoffs, those fans no longer watch or follow the remainder of the

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111. *Salvino*, 542 F.3d at 330-31.

112. Am. Needle, Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008).

fight for the Stanley Cup.[113] No doubt in an effort to create the same type of broader fan following enjoyed by the World Series and Super Bowl, the NHL wanted to keep hockey fans watching the playoffs and Stanley Cup championship series even if their favorite teams were eliminated. The NHL concluded that it could compete more effectively with other sports and entertainment offerings by improving the strength of its league brand and that developing an integrated website would be a critical part of its national brand-building strategy. The court cited this rationale in considering whether to adopt a per se, quick look, or rule of reason approach.[114] Having determined that the proffered reason was a potential procompetitive effect (so that neither a per se nor a quick look analysis applied), the district court should allow evidence of this justification when actually applying the rule of reason.

2. Competitive Balance as a Procompetitive Justification.

As discussed in part III.A. *supra*, the *Salvino* decision suggests that courts should consider the league's desire for competitive balance when evaluating the alleged restraint. In *Salvino*, MLBP and its expert Franklin Fisher explained the interrelationship between competitive balance on the field and the licensing of the trademarks off the field. Fisher noted that no matter how successful the Yankees have been, the Yankees' mark would have little value over time if the Yankees no longer competed with other MLB clubs.[115] He opined that because the value of an individual club's mark depended on the popularity of the MLB entertainment product, and because no club could have victories (and a successful season) without playing other clubs, MLB had legitimate reasons to prevent the various clubs from licensing their marks on an individual club basis.[116] In Fisher's view, allowing individual licensing authority for clubs would enable the more popular clubs to free-ride on the contributions of the clubs they played to achieve their winning record.[117] This free-riding outcome was particularly problematic here because MLB needed competitive balance to enhance the value of its entertainment product, which would in turn lead to an increase in value of the trademarks and intellectual property. If the more popular clubs were allowed to free-ride and capture a

113. Madison Square Garden L.P. v. NHL, No. 07-CV-8455, 2007 WL 3254421, at *1 (S.D.N.Y. Nov. 2, 2007).

114. *Id.* at *6.

115. *Salvino*, 542 F.3d at 302. By way of example, the Second Circuit pointed to Fisher's reliance on the decline in value of the trademarks of the St. Louis Browns and the Houston Colt .45s. *Id.* at 332.

116. *Id.* at 305.

117. *Id.*.

disproportionate share of the licensing revenues, the other MLB clubs would have less incentive to invest in their collective brands, and that would weaken MLB's overall competitive position.

By explaining the link between the licensing restriction and competitive balance, this argument differed from that made in a series of cases in which courts had rejected league attempts to justify restraints based on the league's need for competitive balance. Most of the prior cases arose in the labor context, particularly when a league sought to justify a player draft with the argument that awarding the top picks to the teams with the worst records helped preserve competitive balance. For example, in *Smith v. Pro Football, Inc.*, the NFL argued that its player draft was necessary to achieve the procompetitive outcome of competitively balanced teams.[118] The D.C. Circuit rejected that argument, holding that the "procompetitive" effects were irrelevant because they related to the market for providing an entertainment product and not for the market for players' services:

> 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 be balanced against its "procompetitive virtues," and the draft be upheld if the latter outweigh the former. In strict economic terms, the draft's demonstrated procompetitive effects are nil.[119]

This refusal to consider procompetitive effects in "other markets" has been followed by a number of courts, including the federal district courts hearing antitrust challenges to the NFL's uniform salary provisions for practice squad players[120] and in its decision to require that three full NFL seasons have elapsed since a prospect finished one year of high school before the prospect is eligible for the NFL player draft.[121] As the court held in the challenge to the development squad, the NFL's desire to prevent teams from stashing players in order to preserve competitive balance was "irrelevant to the antitrust

118. Smith v. Pro Football, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1978).

119. *Id.* at 1186.

120. *See* Brown v. Pro Football, Inc., No. 90-1071, 1992 WL 88039 (D.D.C. Mar. 10, 1992); *see also* Brown v. Pro Football, Inc., 812 F. Supp. 237, 238-39 (D.D.C. 1992) (reaffirming holding on motion for reconsideration), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

121. Clarett v. NFL, 306 F. Supp. 2d 379, 408-09 (S.D.N.Y. 2004), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004), *cert denied*, 544 U.S. 961 (2005).

balancing analysis."[122]

In *Sullivan v. National Football League*,[123] the First Circuit appeared willing, despite describing the inquiry as entering "dangerous waters," to consider procompetitive effects in one market as a justification for an anticompetitive effect in a closely related market:

> [C]ourts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices; however, courts should also maintain some vigilance by excluding justifications that are so unrelated to the challenged practice that they amount to a collateral attempt to salvage a practice that is decidedly in restraint of trade.[124]

In *Sullivan*, the NFL attempted to justify its ban on public stock offerings by NFL clubs on the ground that publicly-owned teams could have shareholders more interested in short-term dividends than in the long-term interests of the league as a whole.[125] Holding that the NFL's proffered procompetitive justification involved a market arguably closely related to the market for interests in NFL clubs, the First Circuit appeared to create a split from the strict *Smith* approach and suggested that, in some situations, a defendant might rely on a broader range of possible procompetitive justifications.[126]

In response to Salvino's antitrust challenge, MLBP identified competitive balance as a justification for centralized trademark licensing, but expanded that argument by tying the need for competitive balance to the market that Salvino claimed was restrained. As described above, MLBP offered evidence demonstrating the interrelationship between on-field competitive balance, the

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122. *Brown*, No. 90-1071, 1992 WL 88039 at *10.

123. Sullivan v. NFL, 34 F.3d 1091, 1112 (1st Cir. 1994).

124. *Id.* The court held that the jury should have been permitted to consider whether the ownership policy enhanced the NFL's ability to produce and present a popular entertainment product with the result of increasing competition for ownership interests in NFL clubs. *Id.* at 1113.

125. The district court had instructed the jury under a "same market" approach, consistent with the holding in *Smith*. After the jury returned a verdict for the plaintiff, the NFL appealed, and the First Circuit reversed the trial court's decision and vacated the verdict. *Id.* at 1111-12.

126. Despite the holdings in *Smith* and *Brown*, the First Circuit opined that "[t]o our knowledge, no authority has squarely addressed this issue." *Id.* at 1111. *See also* United States v. Topco Assocs., 405 U.S. 596, 611 (1972) (suggesting that only Congress, and not the courts, can decide to sacrifice competition in one market to gain greater competition in another market); Paladin Assocs. v. Mont. Power Co., 328 F.3d 1145, 1157 (9th Cir. 2003) (discussing apparent conflict between *Topco* and *Sullivan*).

appeal and competitiveness of the league, and the value of club trademarks. This interrelationship causes the *Salvino* holding to reflect something less than a repudiation of the prior law found in cases such as *Smith*, *Brown*, and *Clarett*, in which the alleged restraint occurred in a labor market. Nonetheless, the *Salvino* decision indicates a willingness by the Second Circuit to consider at least some effects outside the market of the challenged restraint. Professional leagues will want to develop this competitive balance argument in future cases.

Even as the Second Circuit suggested an openness to consider competitive balance arguments from professional sports leagues, the court seemed less sanguine about recognizing such arguments in the college context. The court noted the Supreme Court's conclusion in *Board of Regents* that there was no real interdependence among the college teams and no readily identifiable group of competitors that would require the need to maintain competitive balance.[127] The Supreme Court also had noted in *Board of Regents* that the restriction did not tie to a particular league (and thus to the perceived need for competitive balance in that league) but instead affected broadcasts on a national basis. By contrast, the Second Circuit identified MLB as "a highly integrated professional sports entity comprising two Leagues, in which all of the Clubs compete" and noted that there was no dispute "that competitive balance is a necessary ingredient in the continuing popularity of the MLB Entertainment Product."[128]

College sports teams have legitimate competitive balance interests that should justify league rules designed to protect amateur status or player eligibility, to prevent recruiting violators, to prevent the use of performance-enhancing drugs, and other factors affecting on-field competition.[129] But colleges and universities lack the level of interdependence that characterizes professional sports leagues because the schools have a clear mission and existence completely apart from sports or the league in which they compete. To the extent that a college athletic conference or the NCAA seeks to justify limits on the business operations of its members, the conference or the NCAA will want to carefully assess the extent to which a competitive balance argument justifies the proposed rules or restrictions and whether there exist other free-riding arguments that would provide a more recognizable defense.

127. Major League Baseball Props. v. Salvino, Inc., 542 F.3d 290, 327 (2d Cir. 2008).

128. *Id.* at 328.

129. *See e.g.*, Bassett v. NCAA, 528 F.3d 426, 433-34 (6th Cir. 2008) (rejecting antitrust challenge brought by former coach who suffered sanction for recruiting improprieties).

3. Focusing on the Effects on Output.

Whatever other arguments or procompetitive justifications may exist for collective league operations, a league defendant should keep its eye on the output ball. In *Board of Regents*, the Supreme Court rejected the NCAA's attempt to claim competitive balance as a procompetitive justification by noting that 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."[130] Judge Easterbrook suggested in *Bulls II* that the key to analyzing an alleged restraint under antitrust law is the same whether the challenged companies produce sports products or manufacture widgets. To Judge Easterbrook, the court should look to how the alleged restraint affects output.

> The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. . . . Lack of an effect on output means that the [superstation broadcast] fee does not have antitrust significance.[131]

Put in its simplest economic form, everything else being equal, an increase in output demonstrates a procompetitive effect, while a decrease in output shows an anticompetitive one.

In *Salvino*, the court found considerable persuasiveness in the proof of increased output. MLBP argued that centralized operations made the licenses more appealing to potential licensees who were assured that, regardless which teams played in the World Series, the licensees would have rights to use the club marks.[132] MLBP also argued that it worked with existing and prospective licensees to attempt to develop new products that would use the MLB club trademarks.[133] The Second Circuit, while not deciding how output should be measured in a challenge to licensing practices,[134] cited to evidence that the number of trademark licenses and licensed products increased dramatically after the MLB clubs appointed MLBP as the exclusive licensor

130. NCAA v. Bd. of Regents, 468 U.S. 85, 119-20 (1984).

131. Chi. Prof'l Sports Ltd. v. NBA, 95 F.3d 593, 597 (7th Cir. 1996).

132. *Salvino*, 542 F.3d at 303-04.

133. *Id.* at 325.

134. The court did recognize that the market level at issue in the case was the market for licensing rather than a market for retail products. Demand at the consumer level (*e.g.*, the popularity of club marks or competing intellectual property) affected demand at the licensing level, but the markets were considered separate. *Id.* at 330.

for most uses of MLB and club trademarks on retail products.[135] The appeals court also distinguished the centralized MLBP licensing from the NCAA television broadcast rule challenged in *Board of Regents*, noting that the NCAA plan created an actual limit on the total number of televised games, whereas, MLBP does not limit the number of products that could be licensed.[136] Further, Salvino's expert testified that he could not "give . . . a straight yes or no answer" to the question whether there would be more licenses for MLB club trademark use if the clubs were permitted to license directly.[137] The speculation by Salvino's expert that perhaps there could be some anticompetitive effect from the licensing restrictions on clubs could not overcome the uncontroverted evidence that output, however measured, had increased as a result of the centralized MLBP operations.

The output question is relatively easy when, as in *Board of Regents*, the league imposes an absolute limit on the number of broadcasts and there exists strong economic evidence that lifting the limit would result in greater output.[138] The more challenging question for courts is how to interpret a change in output when there is credible economic evidence suggesting that a variety of factors affected supply and demand. In that context, a change in output (whether increased or decreased) may not reveal whether the policy or restraint increases or decreases competition. For example, as explained in *Madison Square Garden*, the NHL adopted its internet policy with the objective of causing the league's interactive site to increase the appeal of the NHL and its playoffs. Suppose for purposes of discussion that the NHL had adopted its internet/new media policy in the offseason of 2008. As the world economy heads into a significant recession and consumers reduce their discretionary spending, the demand for tickets, merchandise, and sponsorships on the NHL club websites could fall even if the NHL's decision was, in fact, procompetitive and enabled the NHL to compete more effectively than it otherwise would have. Merely looking at output would not yield the proper conclusion in that context.

Even without a recessionary downturn in demand, a decrease in quantity demanded may not reflect an anticompetitive effect. Suppose, for example, that the NHL improved its internet operations substantially – but so did each other sports league and World Wrestling Entertainment (WWE). The quality of the NHL website may have improved (and the NHL has become more

135. *Id.* at 319, 322-23.

136. *Id.* at 325.

137. *Id.* at 327.

138. The NCAA faced a similar issue a number of years later when it adopted a limit on the salaries paid to certain assistant coaches. *See* Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998).

competitive) due to the collective action, but the benefits may not translate to an increase in sales of licensed products or website visits because the quality of competitive products increased. In this context, the internet policy could be procompetitive by increasing the quality of the product offered and by preventing a loss of business to the competition even though the website output (whether measured by visits, purchases, or other units) stays constant or even decreases. So when looking at quantity, one relevant analysis might be to create the perceived "but for" world that would be predicted if the sports league had not undertaken the challenged joint activity, and compare, as the Supreme Court did in *Board of Regents,* the expected output if the policy or restriction had not been adopted. The court might also evaluate whether the league's output is responsive to demand (suggesting a lack of market power).[139] But, however the analysis is structured, to the extent that the league's policy has a clear effect on output, that provides "core" information for the antitrust analysis.

Plaintiffs, such as American Needle, Salvino, and Kentucky Speedway, may argue that output would be greater if they had a license or sanctioned event, but ultimately, the rule of reason seeks to find the net effect on competition, regardless of the effect or harm to a particular plaintiff. Both the district court in *Kentucky Speedway* and the Second Circuit in *Salvino* used language more commonly found in distributor cases, while holding that no anticompetitive effects resulted from the fact that one particular potential racetrack or licensee (the plaintiff in each case) did not receive what it sought from the professional sports league. As the Second Circuit stated, a mere refusal to grant a license to Salvino would not suffice to create an antitrust claim because the "antitrust laws were enacted for 'the protection of competition, not competitors.'"[140] The *Kentucky Speedway* court took the analogy one step further, calling the matter a "classic 'jilted distributor'" case and holding that:

> NASCAR has chosen certain tracks to be the distributors of its NEXTEL race to the exclusion of others. As noted in *Care Heating & Cooling*, quoted above: An agreement between a producer and a distributor to prevent a competitor of the distributor from expanding its business and competing with

139. The Second Circuit held that Salvino "ha[d] presented no evidence to suggest that the licensing of MLB Intellectual Property is not entirely responsive to demand." *Salvino*, 542 F.3d at 326. The court viewed the increase in output significant, in part, because MLBP did not issue licenses that were not requested and thus concluded that the MLBP licenses reflected the licensees' anticipation of consumer demand. *Id.*

140. *Id.* at 318 (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990)).

> the preferred distributor is "*per se* legal, because a manufacturer has a right to select its customers and refuse to sell its goods to anyone, for reasons sufficient to itself."[141]

Whether or not the "per se legal" standard can appear too broad in some contexts, the court not only has recognized the vertical nature of the relationship but also has applied traditional antitrust principles – namely, that a plaintiff must show an anticompetitive effect and not merely complain that someone else received the license or contract that the plaintiff desired.

CONCLUSION

Much more will be written as to whether sports leagues should be viewed as joint ventures or single entities, or both, and when and how a court should consider procompetitive effects in one market as a potential justification for negative competitive effects in another market. Indeed, the Supreme Court could decide the debate by granting the petition for writ of certiorari in *American Needle* and explaining if and when a sports league (or joint venture) should be treated as a single entity for antitrust purposes. But for now, the legacy of the 2008 sports antitrust cases will be that courts continued to move away from the concept that business operations of sports are unique and, instead, applied traditional tools of antitrust analysis to the sports branch of the entertainment industry.

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141. Ky. Speedway, LLC v. NASCAR, No. 05-138, 2008 WL 113987 at *5, *7 (E.D. Ky. Jan. 7, 2008) (quoting Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008, 1013 (6th Cir. 2005)).