Marquette Sports Law Review

Volume 21
Issue 2 *Spring*

Article 3

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THE ECONOMICS OF COMPETITIVE BALANCE: SPORTS ANTITRUST CLAIMS AFTER *AMERICAN NEEDLE*

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The Supreme Court's *American Needle* decision represents a loss for the National Football League (NFL) but only in the league's quest for avoiding any Sherman Act liability on the theory that the league is a single entity.[1] American Needle sued the NFL, claiming that the NFL's centralized promotion and licensing operations constituted an illegal restraint of trade. The Supreme Court's decision conclusively ended the NFL's long-pursued argument that the teams' collective actions could not give rise to a claim under Section 1 of the Sherman Act because the teams functioned as a single economic entity rather than as a collection of potentially competing firms.[2]

On remand, American Needle still must prove that the NFL's centralized promotion and licensing operations unreasonably restrained competition within the meaning of Section 1 of the Sherman Act. In its defense, the NFL will benefit from the Supreme Court's comment in *American Needle* that competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[3] This recognition of competitive balance concerns provides a silver lining for the NFL in the *American Needle* decision and reflects a renewed recognition of the role of competitive balance as a potential defense in antitrust challenges to centralized sports league conduct.

This Article addresses competitive balance concerns for sports leagues and explains how and when such concerns may justify collective actions by the teams comprising a sports league. Part I reviews what the NFL lost in the *American Needle* case, how the single entity argument has no remaining validity for most sports leagues, and what the Supreme Court said about the

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1. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010).
2. *Id.*
3. *Id.* at 2217.

importance of competitive balance. Evaluating the legitimacy and weight of competitive balance issues requires an understanding of the basic economics underlying sports league issues. Thus, Part II reviews the economic theory explaining why a sports league, as a competitor in the entertainment field and as a rational economic actor, would seek some form of competitive balance. Part II also explains why a legitimate procompetitive interest in promoting balance may extend to the league's promotional and other commercial operations. Part III examines how courts have previously considered, and often rejected, competitive balance as a potential justification for imposing restrictions on a sports league's member teams. Part IV then suggests a method for analyzing purported competitive balance claims raised by a sports league. That part also proposes an analytical approach to weighing competitive balance considerations in a Sherman Act Section 1 claim based on the nature of the competitive balance concern and the likely effect on output. As discussed below, competitive balance concerns should provide a legitimate justification for a number of league restrictions related to products produced or created by the league but are much less likely to justify limits placed on competition for players or coaches.

I. *AMERICAN NEEDLE*: THE SUPREME COURT ENDS THE SINGLE ENTITY DEBATE

American Needle brought its antitrust claim against the NFL teams and Reebok after NFL Properties (the centralized promotion and licensing arm of the NFL) decided in early 2000 to alter its trademark licensing strategy and grant Reebok an exclusive license for the use of NFL team logos on caps, hats, and other headwear.[4] Prior to 2000, NFL Properties (NFLP) had granted non-exclusive licenses to a number of apparel manufacturers for the use of NFL team names and logos on apparel.[5] American Needle, a relatively small apparel manufacturer in Illinois, had manufactured hats and other licensed products under one of the non-exclusive NFL licenses but could no longer make such products after Reebok received the exclusive license.[6] American Needle alleged that the NFL had violated Section 1 of the Sherman Act in two ways: first, by licensing the trademarks only through the centralized NFLP rather than allowing each team to license its own marks and logos, and second, by granting an exclusive license to Reebok rather than licensing a number of

4. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 738 (7th Cir. 2008).

5. *Id.*

6. *Id.*

different apparel manufacturers.[7]

American Needle's antitrust claim, like most challenges to a sports league policy or restriction, was brought under Section 1 of the Sherman Act. That statute requires a plaintiff to prove (1) the existence of a contract, combination, or conspiracy and (2) that the agreement (the contract, combination, or conspiracy) unreasonably restrains trade.[8] In *American Needle*, the NFL contested the first element of a Section 1 claim—the existence of a contract, combination, or conspiracy—by asserting that the NFL teams should be treated as a single economic entity that was incapable of conspiring for antitrust purposes.[9] The district court granted summary judgment for the NFL on this ground and the Seventh Circuit affirmed.[10]

The Supreme Court, in a unanimous opinion written by Justice Stevens, refused to accept the NFL's argument and held that the teams should be treated as separate economic entities.[11] The Court emphasized a basic or fundamental difference in how the antitrust laws treat independent conduct and concerted conduct and instructed that courts should look to substance rather than form when determining whether two entities are capable of concerted action.[12] The Court viewed the thirty-two NFL teams as separate economic entities, in part because they were "separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being."[13] The Court also viewed the teams as separate potential sources of trademark licenses.[14] The Court concluded that the NFL teams were separate economic entities, were capable of entering into a combination or conspiracy within the meaning of Section 1, and could not rely on a single entity defense.[15] The Court remanded the case so that the district court could consider whether the challenged NFL conduct unreasonably restrained trade.[16]

Although the Supreme Court stated that the *American Needle* case came to the Court on the narrow issue of "whether the NFL respondents are capable of engaging in a 'contract, combination . . . , or conspiracy' as defined by §1 of the Sherman Act," the Court devoted its penultimate paragraph to discuss

7. *Id.*
8. Sherman Act, 15 U.S.C. § 1 (2011).
9. *Am. Needle*, 538 F.3d at 738.
10. *Id.* at 741, 744.
11. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010).
12. *Id.* at 2211.
13. *Id.* at 2215.
14. *Id.* at 2216 n.9.
15. *Id.* at 2213, 2217.
16. *Id.* at 2217.

competitive balance, stating

> Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *NCAA*, 468 U.S., at 117, 104 S. Ct. 2948, 82 L. Ed. 2d 70. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for §1 purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams.[17]

Why this paragraph was included is unclear. The Court stated twice that it was considering only the "narrow issue" of whether the NFL teams should be viewed as a single entity,[18] and the Court had no need to expand that analysis to insert the competitive balance issue. Perhaps the Supreme Court included this paragraph to inform the federal district and appellate courts that the defeat of the single entity theory should not be read as dooming the NFL's antitrust defense on remand. But, whatever the reason for including this discussion, the Supreme Court has signaled its appreciation that competitive balance considerations can justify collective action by sports leagues. The next step is to determine how and when these considerations may justify collective action by the teams in a sports league.

II. THE ECONOMIC UNDERPINNINGS OF COMPETITIVE BALANCE IN SPORTS

Any methodology considering competitive balance should find its foundation in the economic theory of markets and economic theory of the firm. The Supreme Court's decision to treat the teams in a league as separate entities for Sherman Act purposes does not mean that the economic literature on the theory of the firm is inapplicable. Rather, the *American Needle* decision holds that an antitrust challenge to the NFL's centralized promotion and licensing operations must be viewed under the rule of reason, with the court examining the procompetitive and anticompetitive effects of a league policy. The economic theory of the firm helps explain why the teams constituting a sports league might jointly undertake certain conduct for procompetitive reasons and why they may have a collective interest in

17. *Id.*

18. *Id*. at 2208.

addressing free riding concerns.

A. Why Competitive Balance Matters

From the perspective of economics, a professional sports league and its member teams should act as businesses with a profit-maximizing motive. Each team in a league seeks to entice consumers to spend more of their attention and disposable income on the league product and less on alternative forms of entertainment. Consider, for example, the options available to New York City residents when deciding whether to purchase tickets to a Rangers game. Rather than attend the National Hockey League (NHL) game, a fan might spend his or her money (and time) at a Knicks game, a Nets game, a Jets or Giants game (at least during the overlap portion of the year), a professional lacrosse or soccer game, a college basketball or hockey game, a movie, a play, or any of the numerous other entertainment options in New York. The Rangers—and their fellow teams in the NHL—want the fan to buy the Rangers tickets and to forego the other options. The Rangers can undertake a number of strategies toward that end: the team can offer a comfortable and enticing stadium experience (e.g., in terms of available food and drink, efficient entry and exit), publicize star players, give fans souvenirs (bobbleheads continue to amaze in popularity), retain entertaining announcers, or offer post-game concerts. The team also may offer ticketing specials or otherwise price its tickets to position them as attractive alternatives to other entertainment options.

What no team can individually provide, however, is the sporting event or game (often part of a championship season) that is the principal reason for the fans to pay for admission to the stadium or arena.[19] The teams in the league collectively create that entertainment product. The popularity of the league is driven by the attributes of the sporting events, including such factors as the excitement of the game and the display of physical prowess and skill. One of the factors that affects the appeal of the sporting event is competitive balance, or what some economists have described as the "uncertainty of outcome" for the match or season.[20]

Uncertainty of outcome concerns the ability to predict (or more specifically, not to predict) the outcome of the match before the event begins or to predict the league champion before the season is played.[21] Successful

19. Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q. J. ECON. 1, 4 (1964).

20. For a history of the "uncertainty of outcome hypothesis," see Rodney Fort, *The Golden Anniversary of "The Baseball Players' Labor Market,"* 6 J. SPORTS ECON. 347 (2005). *See also* Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 254 (1956).

21. *See* Rottenberg, *supra* note 20, at 254.

and less successful teams exist in all leagues, but the overall success of a league requires that teams be relatively evenly matched in terms of playing ability.[22] Again, we view the sporting event as an entertainment product and consider the factors that make the product more appealing vis-à-vis other entertainment products. If the Super Bowl champion was obvious before the season began, that would significantly undercut the interest in NFL regular season and playoff games. Similarly, the appeal of a Harlem Globetrotters game has little correlation with the final score but is tied to the pure entertainment value and the unique combination of basketball and comedy skills displayed by the Globetrotters.

Competitive balance affects the uncertainty of outcome for the athletic contests and, thus, the appeal of the sporting event to consumers. Economists may disagree as to the relative effect of competitive balance or as to "how balanced" competition needs to be, but the "special problem for sports leagues is the need to establish a degree of competitive balance on the field that is acceptable to fans."[23] Economic theory supports the concept that competitive balance is a legitimate and important consideration for a sports league as the league competes against other forms of entertainment for the consumer's attention and wallet.[24] Economists have attempted to measure the extent to which attendance at sporting events is explained by the quality of the teams (as measured by win-loss records) or the teams' likelihood of winning a championship.[25] Equally matched teams are likely to draw greater interest

22. *See id.*; John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1018 n.17 (1984) ("A point that has never been substantially disputed, even by critics of league practices, is that the success of a league requires that clubs field teams that are relatively evenly matched in terms of their playing ability.").

23. *See* Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LIT. 1265, 1265 (1995); *see also* Yang-Ming Chang & Shane Sanders, *Pool Revenue Sharing, Team Investments and Competitive Balance in Professional Sports: A Theoretical Analysis*, 10 J. SPORTS ECON. 409, 409 (2009) ("[A] sporting competition is more entertaining and of higher quality when the game's outcome is more unpredictable."); Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonalds and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 235 (2006) (creating league in franchise model would enable league/franchisor "to create incentives for clubs to succeed in a manner that creates the level of competitive balance that maximizes fan appeal . . . .").

24. Lawrence Hadley, James Ciecka & Anthony C. Krautmann, *Competitive Balance in the Aftermath of the 1994 Players' Strike*, 6 J. SPORTS ECON. 379, 379 (2005) ("Competitive balance is important to a sports league because game outcomes must be sufficiently uncertain to maintain fan interest in the league as a whole."); Ross & Szymanski, *supra* note 23, at 232 n.65; Rottenberg, *supra* note 20, at 254; Weistart, *supra* note 22, at 1018 n.17.

25. *See* Fort & Quirk, *supra* note 23, at 1267–68; Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. ECON. LIT. 1137, 1155–56 (2003).

than games involving teams with vastly different records. As Professor Neale once noted, "[w]hen, for a brief period in the late fifties, the Yankees lost the championship and opened the possibility of a non-Yankee World Series they found themselves—anomalously—facing sporting disgrace and bigger crowds."[26]

Recent revisions to the Association of Tennis Professionals (ATP) Tour provide a case study of a league's attempt to modify tournament structure and rules to make its sporting events more competitive and, hence, more appealing to consumers. Early in the past decade, the ATP encountered a declining fan base.[27] Market research indicated that tennis fans wanted to see the top tennis players compete against each other, causing the ATP to attribute the decline in ticket sales and the difficulty in securing television coverage and sponsorships to the fewer top-tier players in the ATP Tour's top events.[28] To address this concern, the ATP redesigned its ATP Tour to simplify the format to require the top players to play in all Tier I events, to adjust the point values for wins at various tournaments, and to downgrade the status of some tennis events:

> The plan was developed to make the ATP Tour more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events. The modifications to the tour calendar, increase of investment, higher payments to players, and expanded geographic reach were all designed to improve the Tour. Such rules and regulations can be procompetitive where they enhance the "character and quality of the 'product.'"[29]

In many respects, the rationale for changing the ATP Tour parallels the traditional economic analysis used to justify a manufacturer's decision to impose intrabrand restrictions on its distributors. In the typical distribution context, a manufacturer might adopt a distribution model with exclusive territories or customers (thereby reducing intrabrand competition) in order to cause the totality of its distribution network to form a more formidable force in competing with other brands.[30] Similarly, the ATP Tour restricted what some

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26. Neale, *supra* note 19, at 2; *see also* Andrew Abere, Peter Bronsteen & Kenneth G. Elzinga, *The Economics of NASCAR*, *in* OXFORD HANDBOOK OF SPORTS ECONOMICS 497 (Leo H. Kahane & Stephen Shmanske, Eds. 2011) (outcome uncertainty keeps fans engaged in a sporting event).

27. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 825 (3d Cir. 2010).

28. *Id.*

29. *Id.* at 833 (*quoting* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 102 (1984)).

30. Courts have routinely recognized that these types of restrictions *can* be procompetitive. *See*

of its sanctioned events could offer, but the ATP Tour did so in order to create a tour entertainment product that would compete more effectively against the interbrand competition of other forms of entertainment.

The ATP Tour approach would not work for many sports leagues, but there exist other ways that sports leagues try to maintain the interest in their league events by promoting competitive balance or uncertainty of outcome. The Masters offers an event at which no golfer enters with a lead and what happened in the last tournament has no effect on who wins the green jacket. The National Association of Stockcar Auto Racing (NASCAR) claims that its events have fewer predictable winners at the midpoint of the event than any other sporting event.[31] The National Collegiate Athletic Association (NCAA) March Madness Tournament creates excitement and fan appeal through the chance for a "Cinderella team" to advance several rounds into the tournament and perhaps to win the championship. Major League Baseball (MLB) increased fan interest through the use of wild card playoff slots so that more teams (and not just two league champions) have a possibility to compete in the playoffs and—perhaps even more importantly for regular season ticket sales—more teams remain in the hunt for a playoff slot late into the season.[32] By increasing the uncertainty as to who will win the ultimate championship, the sports leagues can increase fan demand for their products and enable the leagues to better compete with other entertainment products.[33]

Today, the effects of competitive balance extend beyond the number of tickets sold for the athletic contest. As the business of sports leagues has grown, fan interest in sports leagues has enabled leagues to derive increased revenues from broadcasting, sponsorships, trademark licensing, and Internet sales. For example, televised sporting events attract advertisers who seek to deliver their message to a particular demographic. Because the value of the advertising is driven by the number of viewers, a sporting event that does not draw much fan interest (e.g., curling) presents less value to the advertisers and,

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Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51–52 (1977); State Oil Co. v. Khan, 522 U.S. 3, 14 (1997).

31. Abere et al., *supra* note 26, at 513.

32. *See* Fort & Quirk, *supra* note 23, at 1269 ("Playoffs sustain fan interest in the later stages of the regular season which increases league profits (particularly for teams with good, but not outstanding, season records)."); Young Hoon Lee, *The Impact of Postseason Restructuring on the Competitive Balance and Fan Demand in Major League Baseball*, 10 J. SPORTS ECONS. 219, 233 (2009) (leagues can increase fan demand (as measured by attendance) by creating rules or postseason structures that create more uncertainty as to which teams will advance to the playoffs).

33. MLB executives attributed the record MLB revenues in 2010 to competitive balance, as reflected by the fact that fourteen different teams had played in the World Series in the past ten years. *See MLB's Brosnan Discusses Attendance, Revenue, Competitive Balance*, STREET & SMITH'S SPORTSBUSINESSDAILY.COM, Closing Bell, Oct. 27, 2010.

accordingly, will yield lower broadcasting revenue to the sports league. Similarly, because the value of association with the league drives the value to a potential sponsor, a more popular league is likely to realize higher sponsorship revenues. This creates an economic incentive for a league to strive to produce the most attractive entertainment product in order to maximize the financial rewards from these outside-the-stadium sources of revenue.

Competitive balance concerns affect the outside-the-stadium revenues as well because a team that starts a season with no chance of being competitive (or successful) is likely to attract lower revenues from broadcasting, sponsorships, or advertising deals than if the team was competitive. If a number of league teams lack a reasonable chance to proceed to the playoffs and championship, the popularity of the league suffers. Similarly, if the same team wins the league championship year after year, licensees of league trademarks are likely to face a diminished demand for their products. How often will consumers want to buy yet another New York Yankees/World Series Champions or Los Angeles Lakers/National Basketball Association (NBA) Champions cap?[34] By contrast, when the unexpected occurs (say the New Orleans Saints winning the Super Bowl), a new, largely untapped and extremely excited fan base flocks to the store to show their support by wearing team apparel. Thus, competitive balance is more than an "on-field" issue and can have considerable spillover effects for those other products whose popularity is driven by the popularity of the entertainment product.[35]

The term "competitive balance" needs no precise definition, and the appropriate level of "competitive balance" may vary by league or sport. Indeed, perfect "competitive balance" is likely neither attainable nor desirable. Rather, from an economic perspective, competitive balance should be viewed as a level of competitiveness and uncertainty of outcome sufficient to increase or optimize the fan appeal of a sports league. A league in which all teams have .500 records may be less appealing to fans than one in which, in any

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34. *See* E. Woodrow Eckard, *Free Agency, Competitive Balance, and Diminishing Returns to Pennant Contention*, 39 ECON. INQUIRY 430, 441 (2001) (repeated championships yield lower returns to team).

35. General league popularity also can drive demand for products such as fantasy football, which are individual player rather than team based. Fantasy sports fans retain their interest in the personal production of various sports players (and thus the league's games) even after their favorite team has been eliminated from playoff consideration. Increased interest in the league can result in more fantasy football, basketball, or baseball fans, which benefits the league and other providers of fantasy games. Moreover, the various league functions can reinforce each other so that the more appealing league games cause an increase in demand for fantasy teams and the increased popularity in fantasy games causes an increased interest in the purchase of team jerseys, t-shirts, and other licensed products.

given season, there exists one or few teams that have a considerably higher winning percentage and thereby bring excitement to their fans and pique the interest of fans of other teams.[36] For some sports leagues, consumer demand may be greater if almost all teams are competitive on the field but a handful of teams tend to win championships frequently, so that fans particularly want to see those "winning" or "wealthy" franchises lose. The "optimal" level of competitive balance probably does not require that each team be "competitive" every year—provided that each team has a reasonable probability of winning in the foreseeable future.[37]

From an economics perspective, a sports league would seek to attain a level of competitive balance that would maximize the appeal of its entertainment product and, ultimately, the league's collective profits. To the extent that uncertainty of outcome in the individual game, in qualifying for a playoff position, and in the ultimate season championship makes the sports events more appealing to consumers, efforts to improve competitive balance or uncertainty of outcome can be procompetitive.

B. Free Riding Concerns and Competitive Balance

In the antitrust field, competitive balance is an issue unique to sports leagues and relates to the nature of how a sports league creates its products. Despite the suggestion by some commentators that sports leagues operate as "cartels,"[38] teams in a sports league differ radically from members of a cartel. Each of the mattress manufacturers licensing the "Sealy" trademark was capable of making mattresses alone, unlike a sports team that cannot independently produce the games and championship season.[39] Rather, the sports league consists of teams that jointly and collectively produce the product that is NFL football or NBA basketball or MLB baseball or NHL hockey. The interdependent efforts of the member NFL teams create the excitement and appeal to attend or watch regular season games, playoffs, and ultimately the Super Bowl. Leagues not only establish the on-field rules of play, but they also create vehicles such as wild-card bids, interleague play, and division home-and-away games in an attempt to make their products more interesting and make fans more willing to devote time and money to the

36. Even with perfectly distributed athletic talent, some teams will perform better than others due to better coaching, scouting, off-season training, or teamwork, and those teams should reap the rewards for those efforts. Other teams may encounter a rash of injuries that weakens the team in a particular season.

37. Hadley, *supra* note 24, at 381.

38. Fort & Quirk, *supra* note 23, at 1265.

39. Neale, *supra* note 19, at 2; Weistart, *supra* note 22, at 1033–34.

league's games.

Because the products produced by a sports league result from the collective efforts of the member teams, there exists the risk that the actions of one team can impose a non-reimbursed cost or confer a non-compensated benefit to other teams. Economists refer to these effects as externalities, with "free riding" being a form of externality that exists when the actions of one firm benefit another firm without the latter firm (the free rider) having to pay for that benefit.[40] In the distribution area, antitrust law has long recognized that free riding concerns can justify restrictions.[41] This same rationale should apply to a sports league that faces free riding issues because the league's championship season is a jointly created product and league-wide promotion efforts benefit all teams.

In *American Needle*, the NFL argued that the league needed a centralized league-wide promotional effort because otherwise some teams would free ride on the promotional efforts of the league with the result that the league would present a less formidable interbrand competitor. If some teams in a sports league merely rely on the promotional efforts made by other teams, those free riding teams benefit disproportionately from the efforts of the league or other teams, and this free riding creates incentives that distort a team's (and the league's) incentive to invest in promotional efforts.[42] For example, a sports team that failed to pay its share of league promotional expenses would still benefit from the league's centralized promotional effort. If teams could refuse to contribute to the promotional efforts (and thus engage in free riding), the league would suffer in two ways. First, the league would have less to spend

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40. *See* Dennis W. Carlton et al., *The Control of Externalities in Sports Leagues: An Analysis of Restrictions in the National Hockey League*, 112 J. POL. ECON. S268, S271–72 (2004); Abere et. al., *supra* note 26, at 509 (discussing possible negative effects on other NASCAR races if problems arise at one race). *See also* Franklin M. Fisher, Christopher Maxwell & Evan Sue Schouten, *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 MARQ. SPORTS L.J. 1, 4, 8–11 (1999).

41. The classic example of a vertical restraint designed to prevent free riding is one requiring a car distributor or dealer to maintain a showroom of a sufficient size and a repair department to service customers. Without the manufacturer imposing that requirement on competing distributors, one might find it advantageous to "free ride" on the investment made by a competing distributor by having customers rely on the showroom and repair shop assets of the other distributor and then (having benefitted from not incurring the costs of a showroom and service department) offering a lower cost to the customer. The distributor who made the investment in facilities but who lost the sale has less incentive to make that investment. In the sports context, the NHL or another professional sports league may grant an exclusive territory to a franchise in order to provide the team with a sufficient incentive to promote the sport in the local market. *See* Carlton et al., *supra* note 40, at S272. Absent the territorial protection, other teams might enter and attempt to free ride on those promotional efforts. *Id.*

42. Justice Sotomayor recognized this principle in her concurring opinion in *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 340 (2d Cir. 2008) (Sotomayor, J., concurring).

on promotion than the league would otherwise choose.[43] The lower promotional spending, in turn, would likely reduce the league's ability to attract new fans and retain existing ones.[44] Second, those teams that elected to free ride might spend their saved promotional dollars as additional bonuses to players to gain a competitive advantage on the field. This second impact would exacerbate the injury to the clubs that paid the promotional expense and would cause those clubs to move more quickly to the free riding approach rather than one with more optimal promotional efforts. The league would want to correct the free riding problem to assure a more desirable level of promotion, to compete more effectively and attract fans who might otherwise choose other sports and entertainment options, and to prevent the free riding clubs from obtaining both an off-field financial advantage and an on-field competitive advantage.

Free riding concerns for a sports league can also arise in the form of free riding by the league's business partners. A sports league that licenses sponsorship rights or the right to use team trademarks may impose licensing restrictions in order to avoid downstream free riding by customers or potential customers of the authorized licensee. For example, in order to induce a licensee to more heavily promote a NFL-licensed product, NFLP may decide to grant an exclusive license for the use of the league trademarks on a category of product. NFLP might pursue this option if the league concludes that the added promotional and sales efforts by an exclusive licensee will result in more consumers switching from competing products to buy NFL-logoed products. The exclusivity would give the licensee increased incentive to promote the NFL-licensed line because the licensee would know that, with exclusive trademark rights in the product category, the licensee would reap the benefits of its promotional and sales efforts. If an individual team could license its team marks in that same category of product, the team licensee could free ride on the promotional efforts of the league licensee so that the league licensee would not capture the full return on its promotion investment. This free riding undercuts the league licensee's incentive to promote the league trademarks and licensed product and, as a result, weakens the competitive position of the league's trademarks.[45]

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43. *See id.* at 305.

44. Alternatively, if the league maintained the preferred level of promotion, those teams that contributed toward that expense would bear a disproportionate share.

45. Negative externalities also can arise, and leagues may address these through centralized operations and rules. For example, one team's decision to license the use of team trademarks on low quality, shoddy, or unsafe product could negatively affect not only the perceived value of that one team's licensed products but also customers' perception of all league-logoed products. A single, centralized trademark licensing organization allows the league to adopt a strategy that ensures

Whether free riding or other externalities arise and whether they undercut competitive balance objectives would need to be examined on a case-by-case basis. But any analysis of competitive balance for a sports league also should evaluate externalities that would result with (or without) the challenged policy. To the extent that measures adopted to maintain or promote competitive balance concerns reflect an attempt to correct free riding or other externalities, those measures may provide a legitimate procompetitive reason for adopting the restraints.

III. HISTORICAL TREATMENT OF COMPETITIVE BALANCE CONSIDERATIONS

With an understanding of the economic theory that applies to sports leagues, we turn to the legal framework. The Supreme Court remanded the *American Needle* case for further proceedings under the "rule of reason." Part A below explains the steps of a rule of reason analysis, and Parts B and C examine how courts have treated competitive balance arguments in prior cases that sought to justify collective league conduct on that basis.

A. The Rule of Reason Under Sherman Act Section 1

After *American Needle*, collective action by teams in a professional sports league will satisfy the requirement of a "contract, combination or conspiracy" under Section 1 of the Sherman Act. The second inquiry in a Section 1 case is whether the agreement unreasonably restrains trade. The Supreme Court has declared some types of agreements—such as agreements between competitors to fix prices—per se, or automatically, illegal.[46] Outside those limited categories of per se illegal agreements, the Court "presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive . . . ."[47] Courts typically apply a three-step rule of reason analysis to evaluate the procompetitive and anticompetitive effects and to determine the net effect of the challenged agreement on competition.

First, the plaintiff must show an anticompetitive effect. The plaintiff can satisfy this burden either directly by offering proof of an actual anticompetitive effect in a relevant antitrust market or indirectly by showing

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consistent quality standards and eliminates the possibility that lower quality licensees will free ride on the investments of others.

46. The most commonly cited examples of per se illegal conduct include horizontal price fixing, bid rigging, or allocations of customers. *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 332 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 643–44 (1980).

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

that market conditions and the nature of the agreement suggest that, as a matter of economics, an anticompetitive effect is likely to occur. Cases relying on direct proof of an anticompetitive effect include *National Collegiate Athletic Ass'n v. Board of Regents*,[48] *Federal Trade Commission v. Indiana Federation of Dentists*,[49] and *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*.[50] The more common approach of using indirect proof requires proof of a relevant market, market power in that market, and a restriction or limitation that is likely—as a matter of microeconomic theory—to have an anticompetitive effect in that relevant market. Defendants often counter that the plaintiff failed to prove a relevant antitrust market or that the plaintiff defined the market too narrowly so that, when the market is properly defined, the defendant lacks market power and no anticompetitive effect can be inferred.[51]

When the plaintiff offers sufficient proof to permit a finding of potential anticompetitive effect, the focus turns to the defendants. In the second step of a rule of reason analysis, a defendant may offer procompetitive reasons why the conduct or agreement benefits competition and, thus, is justified. Possible procompetitive justifications include that (1) the restriction was needed to ensure that the product would exist at all; (2) the restriction was needed to ensure that the affected party sufficiently promoted the product; (3) the restriction was needed to prevent free riding by distributors, partners, or other affiliates; or (4) the restriction was needed to ensure that the parties achieved economic efficiencies.

We say that the rule of reason *typically* has three steps because the

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48. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 98, 110–11 n.42 (1984) (restriction on college television broadcasts).

49. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (refusal to submit x-rays to insurers).

50. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 411 (agreement among lawyers not to accept public defender appointments).

51. The NFL will challenge American Needle's market definition on remand and argue that the NFL teams and NFL Properties compete in a market that is much broader than "NFL logos," that the relevant market includes a variety of intellectual property licenses, and that the NFL teams and NFL Properties lack the market power needed to cause any anticompetitive effect. Looked at from a fan's perspective, and using the Chicago Bears' trademarks as an example, a purported market of only NFL team marks means that a Bears' fan would turn to Packers, Colts, or Vikings gear before that fan would substitute Bulls, Cubs, Blackhawks, White Sox, Illini, or Northwestern products. Indeed, several courts that have viewed the relevant market issue with the benefit of an evidentiary record (including expert opinions) concluded that a league specific market was not sustained. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 298–300, 329–30 (2nd Cir. 2008); Ky. Speedway LLC v. Nat'l Ass'n of Stock Car Auto Racing, No. Civ.A.05-138 (WOB), 2008 WL 113987, at *4 (E.D. Ky. Jan. 7, 2008) (rejecting proposed market definition limited to sanctioning market for NEXTEL races and hosting market for NEXTEL races).

Supreme Court has also adopted what is sometimes called the "quick look" rule of reason analysis for conduct that does not require a full rule of reason analysis.[52] When "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," the court does not require the "full-blown" rule of reason analysis.[53] Put slightly differently, a "quick look," or more abbreviated rule of reason analysis, may apply when the anticompetitive effect of the restraint is clear but there exists no plausible procompetitive justification that might counter that effect.[54] In the sports context, the Tenth Circuit applied a quick look in *Law v. National Collegiate Athletic Ass'n*, holding that the cap on coaching salaries had a clear anticompetitive effect but there existed no legitimate procompetitive justification that merited balancing against this anticompetitive effect.[55]

If the defendant offers a procompetitive reason for the agreement or restriction (so that the quick look does not apply), the court's third step is to weigh the relative procompetitive and anticompetitive effects. Each party tries to prove whether, on balance, the effect of the restriction is more procompetitive (defendant's view) or anticompetitive (plaintiff's view). At this stage, the court also may inquire whether some less restrictive alternative would satisfy the purported need articulated by the defendant.[56]

In analyzing restrictions involving sports leagues, courts have recognized that some cooperation between sports teams is needed,[57] and the Supreme Court held in *American Needle* that the rule of reason will apply on remand as the trial court considers whether the NFL's centralized licensing operations violate antitrust law. Thus, the question becomes whether, under a rule of reason analysis, competitive balance concerns justify league rules that limit team autonomy. The Supreme Court has discussed competitive balance justifications only twice: once in *National Collegiate Athletic Ass'n v. Board of Regents* (*NCAA*) and in that single paragraph in *American Needle.* The

52. *See Ind. Fed'n of Dentists*, 476 U.S. at 460–61.

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

54. The Supreme Court's decision in *National Collegiate Athletic Ass'n v. Board of Regents* is sometimes referenced as the origin for the quick look analysis. As the Supreme Court explained in *California Dental Ass'n v. FTC*, however, the quick look is not a third form of analysis but rather a potentially abbreviated form of the rule of reason in which the court applies a level of scrutiny appropriate to determine the net competitive effects based on the facts at issue. *Id.* at 763.

55. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998).

56. In undertaking this balancing, some courts have considered whether a less restrictive alternative would have achieved the same procompetitive effects. *See* Bd. of Regents v. Nat'l Collegiate Athletic Ass'n, 707 F.2d 1147, 1159–60 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

57. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101 (1984).

district courts and courts of appeal have noted the competitive balance issue on several occasions, sometimes with inconsistent approaches and with no clear guidance on what weight to afford to competitive balance interests.

B. Competitive Balance Discussion in the Supreme Court

Antitrust challenges to sports league policies raise unique issues not present in most other industries. As the Supreme Court recognized in *NCAA*, "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."[58] The Court further recognized that an organization creating athletic contests "would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed" as well as the rules for 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 . . . ."[59] The Court suggested that "[i]t 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."[60]

The 1984 *NCAA* decision concerned limits on the ability of colleges and universities to license the television broadcasts of their football games. The University of Oklahoma and the University of Georgia sued, asserting that the NCAA rules reduced output of college football broadcasts and that the individual universities should be permitted to broadcast as many games as they wished.[61] In attempting to defend the broadcast limits, the NCAA argued that the interest in maintaining competitive balance justified the NCAA's television broadcast limitations.[62] The Tenth Circuit disagreed, holding that promoting athletically balanced competition, however worthy an objective, represented a noneconomic consideration that could not justify a restraint on the televised broadcasts of college football games.[63]

The Supreme Court affirmed the Tenth Circuit. The Court acknowledged that the NCAA had a legitimate and important interest in maintaining a

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58. *Id.*

59. *Id.* at 101–02.

60. *Id.* at 117 (distinguishing the limits of television broadcasts from "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").

61. *Bd. of Regents*, 707 F.2d at 1150–51.

62. *Id.* at 1153.

63. *Id.* at 1154. The Tenth Circuit concluded that the NCAA rule was illegal whether the per se rule or the rule of reason applied. *Id.* at 1154, 1159. In its rule of reason analysis, the court concluded that the existence of less restrictive alternatives (e.g., a passover payment or revenue sharing plan) could address the desire that teams have balanced revenues.

competitive balance among athletic teams but rejected the defense on several grounds: (1) the NCAA's television plan neither equalized nor was intended to equalize competition within any one league; (2) the interest in maintaining a competitive balance was "not related to any neutral standard or to any readily identifiable group of competitors;" (3) the television plan did not regulate the amount of money that a college could spend on its football program; and (4) the evidence—as found by the district court—demonstrated that lifting the NCAA-imposed limits would significantly increase the number of television broadcasts of college football.[64] This last consideration, that removing the restraint would increase output to consumers, appeared the most significant to the Court. The net effect of the Court's ruling was a recognition that the NCAA had a "legitimate and important" interest in maintaining competitive balance, but it provided little guidance on when and how that interest would justify a restriction.

The Supreme Court had no need to revisit the competitive balance issue until *American Needle*, and again, the Court provided little framework for assessing future cases. Quoting its decision in *NCAA*, the Supreme Court recognized that professional sports leagues also had a "legitimate and important" interest in maintaining competitive balance.[65] The Court then went one step further than it had in *NCAA* and held that competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[66] The Court also noted that a rule of reason analysis may require little more than a "twinkling of an eye," a reference to the quick look standard.[67] The Court provided little guidance, however, on how to weigh competitive balance arguments and no discussion of the role of economic analysis and theory in evaluating such arguments.

C. Competitive Balance Considerations in the Lower Courts

District courts and circuit courts of appeal have considered competitive balance arguments but also have failed to provide a robust explanation of how competitive balance concerns can justify what might otherwise be considered an unreasonable restraint of trade. Nor have they undertaken a more detailed economic analysis on the reasons why competitive balance matters. As discussed below, some courts have adopted very limited consideration of competitive balance concerns, particularly when competitive balance is cited

64. *NCAA*, 468 U.S. at 118–19.

65. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010).

66. *Id.*

67. *Id.*

as a justification to limit how teams compete for players. Two cases, one from the First Circuit and one from the Second Circuit, appear to adopt an approach more consistent with the Supreme Court's position in *American Needle*.

The district and circuit courts have routinely rejected competitive balance arguments when leagues offered them to attempt to justify limitations in the labor context. In *Mackey v. National Football League*, a number of professional football players claimed that the Rozelle Rule, which required any team signing a free agent to compensate the player's former team, constituted a per se violation of the Sherman Act.[68] The NFL defended with, among other grounds, the argument that the Rozelle Rule was needed to prevent players from moving to teams in larger economic markets and warmer climates.[69] The league asserted that voiding the Rozelle Rule would lead to the destruction of competitive balance, which in turn would result in diminished spectator interest, diminished franchise values, and perhaps the collapse of the NFL.[70] The Eighth Circuit rejected the players' call for a per se approach because the court felt that the unique nature of the business of professional football made it inappropriate to mechanically apply per se rules fashioned in a different business context.[71] In evaluating the NFL's argument that the Rozelle Rule was needed to preserve competitive balance, the court recognized "that the NFL has a strong and unique interest in maintaining competitive balance among its teams."[72] The court ultimately determined, however, that it need not decide whether competitive balance concerns could justify a system of inter-team compensation for free agents because the Rozelle Rule was significantly more restrictive than what would be needed for any legitimate competitive balance concerns.[73]

Two years later, in *Smith v. Pro Football, Inc.*, the NFL argued that its player draft was necessary to achieve the procompetitive outcome of competitively balanced teams.[74] The D.C. Circuit rejected that argument and gave the competitive balance argument less credence than the Eighth Circuit had suggested in *Mackey*. To the *Smith* court, a "procompetitive" interest in promoting competitive balance was irrelevant because that interest related to the market for providing an entertainment product and not to the market for players' services:

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68. Mackey v. Nat'l Football League, 543 F.2d 606, 609 (8th Cir. 1976).
69. *Id.* at 621.
70. *Id.*
71. *Id.* at 619.
72. *Id.* at 621.
73. *Id.* at 622.
74. Smith v. Pro Football, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1978).

> 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 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*.[75]

This refusal to consider procompetitive effects in "other markets" would be followed by a number of federal courts, including the federal district courts hearing antitrust challenges to the NFL's uniform salary provisions for practice squad players[76] and to the NFL's rule that at least three college football seasons have passed since a prospect's high school graduation in order for the player to be eligible for the NFL player draft.[77] The court, in the challenge to the development squad, held that the NFL's desire to prevent teams from stashing players in order to preserve competitive balance was "irrelevant to the antitrust balancing analysis" for a claim brought by development squad players claiming that the NFL's development squad rules prevented teams from bidding for the junior players' services.[78]

The competitive balance argument received more attention, but the same finding of a prohibited result, when raised by the NCAA as a defense to its rule restricting the pay for a category of graduate assistant basketball

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75. *Id.* at 1186 (emphasis added).

76. Brown v. Pro Football, Inc., No. 90-1071(RCL), 1992 U.S. Dist. LEXIS 2903, at *12, *14 (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).

77. Clarett v. Nat'l Football League, 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).

78. *Brown*, No. 90-1071(RCL), 1992 U.S. Dist. LEXIS 2903, at *33 n.15.

coaches.[79] In *Law*, the Tenth Circuit noted that "the NCAA must be able to ensure some competitive equity between member institutions in order to produce a marketable product" but held that the NCAA's rule was driven by cost reduction concerns rather than by competitive balance issues.[80] Because the NCAA did not establish sufficient procompetitive benefits to satisfy the defense burden, the court did not need to consider whether less restrictive alternatives were available.[81]

In contrast to the rejection of competitive balance arguments in the labor context, the First Circuit adopted a more receptive view to a competitive balance argument in the NFL's defense of the league's "public ownership" rule challenged in *Sullivan v. National Football League.*[82] The court opined that "courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices . . . ."[83] The court recognized that it entered "dangerous waters" to consider procompetitive effects in one market as a justification for an anticompetitive effect in another but nonetheless reversed the district court's decision to instruct the jury that any procompetitive justification had to relate to the same market that the plaintiff alleged to be restrained (using a "same market" approach consistent with the holding in *Smith*).[84] The First Circuit agreed that courts must "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."[85] Nonetheless, the court concluded that the NFL's proffered procompetitive justification involved a market arguably closely related to the market for

79. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1024 (10th Cir. 1998).

80. *Id.* at 1023–24. The court noted that the NCAA presented evidence suggesting that the objective was cost reduction but to be done without "significantly altering" or "disturbing" the existing competitive balance. *See also In re* Nat'l Collegiate Athletic Ass'n I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (denying motion to dismiss when plaintiffs alleged that "scholarship restraints were imposed in an attempt to reduce the costs of operating a big-time college football program, and for no other reason").

81. *Law*, 134 F.3d at 1024 n.16; *see also* Nat'l Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994) (on declaratory judgment action by NBA, court held that players failed to show that college draft, right of first refusal, and salary cap were unreasonably anticompetitive and that "pro-competitive effects of these practices, in particular the maintenance of competitive balance, may outweigh their restrictive consequences.").

82. Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994).

83. *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.

84. *Id.* at 1111–13.

85. *Id.* at 1112.

interests in NFL clubs.[86]

In *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, the district court rejected the NBA's argument that limits on superstation broadcasts of Chicago Bulls games were justified by competitive balance concerns.[87] The court found that the evidence contradicted any suggestion that the then-current level of superstation broadcasts had negatively affected the league or would lead to financial instability within the league (and thereby result in greater competitive disparity).[88] The district court noted that the league had other mechanisms, including the college draft, revenue sharing, and team salary caps, to more directly promote competitive balance.[89]

In *Major League Baseball Properties, Inc. v. Salvino, Inc.*, a challenge to the exclusive centralized promotion and trademark licensing operations of MLB, the Second Circuit agreed that MLB was "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."[90] Major League Baseball Properties (MLBP), the centralized promotion and licensing arm of the thirty clubs, asserted that competitive balance considerations were relevant when the court evaluated licensing restrictions imposed on the individual clubs' ability to license trademarks to third parties. In particular, MLBP noted the interrelationship between competitive balance on the field and the licensing of the trademarks off the field, specifically the fact that the licensing value of the trademarks offered by MLBP was driven in large part by the popularity of the game.[91] Thus, improved competitive balance drove not only increased appeal for the entertainment product but also assisted in creating additional demand for the

86. 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 n.11 (9th Cir. 2003) (discussing apparent conflict between *Topco* and *Sullivan*).

87. Chi. Prof'l Sports Ltd. P'ship. v. Nat'l Basketball Ass'n, 874 F. Supp. 844, 861 (N.D. Ill. 1995), *rev'd on other grounds*, 95 F.3d 593 (7th Cir. 1996). The Seventh Circuit did not evaluate the competitive balance argument but instead remanded the case for consideration of the NBA's single entity defense or a full rule of reason analysis. Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d at 599–601.

88. *Chi. Prof'l Sports Ltd. P'ship.*, 864 F. Supp at 861.

89. *Id.* The irony, of course, is that at least the salary cap and the college draft would likely also be subject to an antitrust challenge.

90. Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 328 (2d Cir. 2008).

91. *Id.* at 302. For example, the economics expert for MLBP noted the decline in value of the trademarks of the St. Louis Browns and the Houston Colt 45s. *Id.* at 332.

retail product with MLB logos and trademarks (and therefore increased the value of the licensing rights). But, while recognizing the legitimacy of MLBP's competitive balance concern, the Second Circuit ultimately did not need to weigh competitive balance concerns because the court affirmed summary judgment for MLBP based on Salvino's failure to prove market power or anticompetitive effect in a relevant antitrust market.[92]

Since 1984, when the Supreme Court recognized in *NCAA* that competitive balance concerns were "legitimate and important," no district court or circuit court appears to have determined the outcome of a rule of reason analysis by weighing the procompetitive benefits of competitive balance against the anticompetitive effects of the challenged restraint. At most, courts have said that a league or sports organization's competitive balance arguments were insufficient because less restrictive or "better tailored" alternatives would have addressed any legitimate concerns.[93] To the extent that competitive balance arguments are pursued more aggressively in light of the *American Needle* language, courts should consider the economics underlying the competitive balance argument in evaluating the relative strength of the arguments made.

IV. APPLYING COMPETITIVE BALANCE CONSIDERATIONS IN THE RULE OF REASON AFTER *AMERICAN NEEDLE*

Both the Supreme Court's holding in *American Needle* and the basic economic principles discussed above indicate that a sports league may have a legitimate and important interest in competitive balance that justifies collective conduct by the teams in the league. The question that remains is how courts should evaluate competitive balance in a rule of reason analysis. Certainly, the Supreme Court did not intend competitive balance to serve as a trump card to overcome any antitrust challenge; otherwise, no remand for further proceedings would have been needed. To examine how competitive balance arguments may be used on remand in *American Needle* and how they may develop in future cases, we apply the economic justifications for competitive balance to the steps of a rule of reason analysis.

As discussed above, a rule of reason analysis typically follows three steps. First, the plaintiff must offer either direct or indirect proof of an anticompetitive effect. Second, and assuming that the plaintiff meets that initial hurdle, the defendant must come forward with a procompetitive justification for the policy or restraint. Third, the court weighs the likely

92. *Id.* at 334.

93. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 119 (1984).

procompetitive and anticompetitive effects and considers whether alternative, and less competitively restrictive, policies would have satisfied the defendant's concerns.

Competitive balance arguments may have some limited relevance to the first step of a rule of reason analysis,[94] but the more likely consideration will occur in connection with evaluating whether a defendant has offered a procompetitive justification for the challenged arrangement and with weighing any potential anticompetitive effect against the procompetitive benefits of the arrangements. This final step of balancing the procompetitive benefits of competitive balance against restrictions on some form of competition is particularly challenging when the alleged anticompetitive effect occurs in a market different from the one affected by competitive balance. As discussed below, an examination of the likely effect on output can aid courts in weighing the procompetitive benefits of competitive balance against the limits the policy imposes on intrabrand competition.

A. Defendant's Burden to Offer a Procompetitive Justification

Competitive balance can factor into the second step of a rule of reason analysis, a step that requires the defendant to come forward with a procompetitive justification for the challenged arrangement or restraint. The Supreme Court's decision in *American Needle* clearly establishes not only that competitive balance is a "legitimate and important" consideration for sports leagues but also that competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[95] The Court suggested, however, that the rule of reason applicable to a sports league restriction may be decided in the "twinkling of an eye," often called the quick look, in some cases.[96]

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94. The competitive balance considerations may, for example, inform the analysis of the relevant product market in a rule of reason analysis. In *Deutscher Tennis Bund*, the ATP attributed its decline in fan base to not offering a sufficient number of matches between top-tier players. By classifying the tournaments and forcing the top-tier players to participate in all the Tier I tournaments, ATP increased the level of competition on the court and, accordingly, drew fans from other sports and entertainment products. The magnitude of the change in fan base would need to be considered, but the fact that a change in the level of competitiveness of the matches affected the fan base—all else being equal—suggests that the ATP Tour competes with other entertainment and sporting events. In *Chicago Professional Sports*, the Seventh Circuit noted that "[s]ubstantial market power is an indispensable ingredient of every claim under the full Rule of Reason" and suggested that, at least for restrictions on television broadcasts of NBA games, the relevant inquiry may focus on how advertisers view the audience and whether the unique nature of that audience gave the league market power. Chi. Prof'l. Sports Ltd. P'ship. v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996).

95. Am. Needle Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010).

96. *Id.* (*quoting NCAA*, 468 U.S. at 109 n.39).

If a sports league (or the NFL on remand) offers a plausible argument that the league's competitive balance concerns caused the league to adopt the challenged policy, the quick look or "twinkling of the eye" rule of reason should not apply to condemn the policy. In *California Dental Ass'n v. Federal Trade Commission*, the Supreme Court explained that a quick look condemnation of conduct should occur only 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."[97] 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.[98] The Court explained

> [p]ut another way, the [defendant's] rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). *As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong.*[99]

The Court's recognition of competitive balance concerns in *American Needle*, together with the Court's prior acknowledgement that some collective action is needed for the sport to exist at all,[100] should provide sports leagues with a basis to rely on the need for on-field rules and competitive balance concerns as plausible procompetitive justifications. The core of a sporting event entertainment product lies in the need for the teams to collectively produce the competitive event and the unpredictability of the outcome. Not surprisingly, no court has seriously challenged any sports league restraint directed to the integrity of the game or the play on the field or court. As one district court held, "actions by sports organizations in preserving the integrity of the sport and fair competition are reasonable restraints under the rule of reason, even if they operate to exclude some competitors and thus have an

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

98. *Id.* at 771.

99. *Id.* at 775 (emphasis added).

100. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101, 117 (1984).

incidental anticompetitive effect."[101]

Competitive balance concerns that correspond with an attempt to cause the entertainment product to be more popular with fans also should satisfy the plausibility standard of *California Dental*. The ATP Tour's change in structure to increase the number of competitive matches between top-tier tennis players provides a good example of this concept. The restructuring of the tour limited the availability of top players for the lower tier matches and resulted in some events, including the event sponsored by plaintiff Deutscher Tennis Bund (DTP), being "downgraded" to a lower tier, but the ATP Tour had a good competitive balance argument (and one that would clearly be at least plausible) that the restructuring and attendant restrictions made the ATP Tour Tier 1 events more appealing to fans and a better competitor in the interbrand sports and entertainment market. Similarly, a sports league restriction that promotes competitive balance that, in turn, promotes the demand for the entertainment product or a product that derives its demand from the entertainment product (e.g., sponsorships, licensed product) should meet the plausibility standard, such that the rule of reason analysis proceeds to the third (balancing) step.

Depending on the specific facts facing a sports league, competitive balance concerns (and the gain in fan appeal from improved competitive balance) could provide a plausible procompetitive reason for limiting the size of the coaching staff or implementing a player draft. Sports organizations have made similar competitive balance arguments in a variety of cases, but historically, courts have rejected that justification.[102] Whether or not a college draft survives the third step of a rule of reason analysis, economic theory suggests that the need for competitive balance could offer a plausible, procompetitive justification sufficient to satisfy the defendant's burden in the second step.

Merely reciting a mantra of "competitive balance" should not be sufficient to meet the plausibility standard. In *American Needle*, the Court quoted the classic rule of reason description by Justice Brandeis: that relevant facts include the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained . . . ."[103] Good intentions cannot salvage an otherwise anticompetitive

101. Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 382–83 n.17 (D.Ariz. 1983).

102. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1021 n.13 (10th Cir. 1998). For example, in *Law*, the restricted salary coaches challenged the NCAA's limitation on the amount that such coaches could be paid but did not challenge the limit on the number of coaches.

103. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2216 n.10 (2010) (*citing* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918)).

policy, but "knowledge of intent may help the court to interpret facts and to predict consequences."[104] If the proponent of a policy to reduce the number of assistant coaches announced that the purpose of the policy was to cut costs, a later claim that competitive balance justified the policy would find little sympathy in the courts.[105] Similarly, policies that limit competition for inputs or products not related to the appeal of the on-field contest are not likely to find any plausible procompetitive justification in game integrity or competitive balance. One would not expect competitive balance to provide any basis to justify an agreement that all the teams limit what they pay to the custodial staff or the non-coaching staff (e.g., office assistants, in-house counsel). When the league adopts a policy or restriction for both competitive balance and cost saving reasons, however, the rule of reason analysis should consider the plausibility of the competitive balance interests.[106]

As a practical matter, the teams' collective efforts in creating the athletic contests make it likely that competitive balance arguments in sports antitrust cases will be intertwined with other, more traditional procompetitive justifications considered in antitrust cases. The existence of externalities and free riding can provide valuable insights into the market and into whether the challenged policy or restriction does, in fact, plausibly promote competitive balance in order to enhance the appeal of the league's commercial offerings.

B. Balancing Procompetitive Justifications Against Anticompetitive Effects

The final step in a rule of reason analysis involves weighing the procompetitive and anticompetitive effects and evaluating whether less restrictive alternatives would satisfy the legitimate needs. As noted above, the *American Needle* decision yields no insight on how to weigh the procompetitive and anticompetitive effects, so the only Supreme Court guidance on how to weigh competitive balance considerations is found in the Court's 1984 *NCAA* decision. There, the Court considered and rejected the NCAA's argument that competitive balance concerns justified the limitations

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104. *Id.*

105. *See Law*, 134 F.3d at 1024 (undisputed record revealed that limits on pay for certain college coaches was nothing more than a cost-cutting measure and only consideration of competitive balance was to ensure that new policy did not reduce competitive balance).

106. As a practical matter, plaintiffs challenging a league restraint will likely draft their complaints to allege that the rule or restriction was adopted solely for cost saving reasons and without consideration of competitive balance. *See e.g.*, *In re* Nat'l Collegiate Athletic Ass'n I-A Walk-On Football Players Litig. 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005). On summary judgment motion and at trial, however, the sports league will have the opportunity to show that competitive balance is a basis for the policy.

on television broadcasts of college football games.[107] The Court concluded that the NCAA's plan did not improve competitive balance in any collegiate league, did not tie its competitive balance considerations to any standard, and resulted in a decrease in output. [108] Of particular import to the Court was the fact that eliminating the NCAA policy would increase the output of college football telecasts.[109]

The Supreme Court's examination of the output effect in *NCAA* meshes well with the economic theory of the firm in the sports league context. League restrictions have a net procompetitive effect if they cause the league and its teams to offer products with greater attraction and appeal to fans than the alternative.[110] This makes the league a more formidable competitor in the market and should, all else being equal, increase the quantity of league product (whether in the form of the sporting event or out-of-stadium products). A league restriction or policy that relates to competitive balance and that increases, or at least maximizes, output is likely to be procompetitive and to fall within the collective action of sports teams that the Supreme Court endorsed in *American Needle*.

This approach is consistent with the output-based approach espoused by Judge Easterbrook in *Chicago Professional Sports Ltd. Partnership v. NBA*: "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."[111] Measuring output can be difficult, both in terms of how one considers quality and quantity factors and in terms of the benchmark used as the "but for" output that would have existed without the challenged policy or arrangement.[112] Nonetheless, a focus on output provides

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107. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 118 (1984).

108. *Id.* at 118–19.

109. *Id.*

110. The offering of products with greater appeal to consumers marks a contrast with the Supreme Court's rejection of the NCAA argument that the television restriction was intended to protect live attendance at the football games. The Supreme Court described the NCAA argument as based "on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games" and that "college games are unable to compete in a free market." *Id.* at 116. If a league policy or restriction is designed to create a more appealing product—so that it better competes in the market—that should be procompetitive.

111. Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996).

112. In some cases there may exist evidence suggesting that a variety of factors affected supply and demand so that the mere change in output (whether increased or decreased) may not reveal whether the policy or restraint increases or decreases competition. For example, the NHL asserted that it adopted its Internet policy with the objective of causing the league's interactive site to increase the appeal of the NHL and its playoffs. Madison Square Garden L.P. v. NHL, No. 07-CV-8455, 2007 WL 3254421, *1 (S.D.N.Y. Nov. 2, 2007); *see also* James T. McKeown, *2008 Antitrust*

an economics-based means of looking at competitive balance considerations that can help frame the antitrust analysis.

Courts can apply an output-based approach to a variety of league rules and structures that purport to enhance competitive balance. First, little antitrust concerns should exist with league rules and policies designed to define the rules on the field or to protect the integrity of the game. A sports league "would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed" as well as the rules for 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 . . . ."[113] This rationale of the Court in *NCAA* implicitly acknowledges that, absent some agreed upon rules of the athletic contest, there would be no contest and output would necessarily be lower. The leagues—and not the courts—should determine what style of play best enables the league to draw fans away from other sports and entertainment options. On-field rules should not be considered capable of restraining trade, and any antitrust challenge to them should be dismissed with no more than a quick look or a "twinkling of an eye."[114]

Economic theory also justifies the need for the integrity of the sporting event, such that collective measures that go solely to the integrity of the event would not cause a decrease in output or an antitrust concern. Economist George Daly has described "contest legitimacy" as "the degree to which a league's fans perceive that the contests are fair and beyond manipulation and that the teams and players involved are doing their best to achieve athletic victory."[115] Legitimacy addresses the integrity of the athletic event and its participants: the same rules apply to both teams, the referees are impartial and rule fairly (even if they miss some calls), and the players are trying to win. If

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Developments in Professional Sports: To the Single Entity and Beyond, 19 MARQ. SPORTS L. REV. 363, 391 (2009). The improvement may increase the competitiveness of the NHL website and the likelihood that fans will buy NHL tickets and merchandise, but the actual quantity sold may not increase if the supply and demand are affected by other competitors improving their product offerings at the same time (changing the supply) or a dip in the economy (which may reduce discretionary income and demand for entertainment products). *See id.*

113. *NCAA*, 468 U.S. at 101; *see also* Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 382–83 n.17 (D. Ariz. 1983) ("actions by sports organizations in preserving the integrity of the sport and fair competition are reasonable restraints under the rule of reason, even if they operate to exclude some competitors and thus have an incidental anticompetitive effect").

114. The distinction between the rules defining the competition on the field and the restrictions applicable off the field addresses the question posed at oral argument by Justice Kennedy to the lawyer for American Needle. *See* January 13, 2010 Transcript of Oral Argument at 6–7, Am. Needle, Inc. v. Nat'l Football League, U.S. Supreme Court Case No. 08-661.

115. George G. Daly, *The Baseball Players' Labor Market Revisited*, *in* DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL, 11, 17 (P. Sommers Ed. 1992).

fans believed that a fighter planned to "take a dive," that the referees had been "paid off," or, as in the case of the Black Sox scandal, star players had accepted money from gambling interests to lose the event, the outcome of the game is not determined by a true sporting contest, and the event has less appeal. Fans are paying to see a legitimate athletic event, and part of the entertainment appeal is drawn from that legitimacy. An impression that the games were fixed would seriously undercut the appeal of the game, if not destroy the sports league altogether.[116]

These integrity concerns address the core of the product that the league is offering—a sporting event rather than a preordained outcome in a theatrical play or scripted event. They also raise competitive balance concerns to the extent that, for example, players on one team may use performance-enhancing drugs while those on the other team do not. A league should be able to suspend a player for the use of illegal drugs, for gambling on the outcome of games, and for other conduct that attacks the integrity of the game without the league bearing the risk of needing to defend an antitrust lawsuit that the teams conspired to restrain a relevant market. These on-field and integrity rules should increase output of the league's products or, at a minimum, protect against the loss of integrity that would result in a decrease in demand for the sports league's products. Challenges to such rules should be routinely rejected.[117]

Analyzing competitive balance concerns by focusing first on the effect of the challenged restriction on output also requires little economic analysis if the sports league has a plausible competitive balance justification but lacks the market power needed to reduce output and thereby increase price. Courts have recognized in the vertical non-price restraint context that no complex analysis is needed to dismiss a Sherman Act claim if the defendant lacks the market power necessary for the alleged conduct to harm competition.[118] In *Chicago*

116. In light of the Tim Donaghy scandal, some sports commentators have attacked the credibility of the NBA refereeing and suggested that fans should lack confidence in the league. *See, e.g.*, Phil Taylor, *The Hot Button: Why is the NBA Getting a Pass in Donaghy, Referee Scandal?*, SI.COM, Dec. 8, 2009, http://sportsillustrated.cnn.com/2009/writers/phil_taylor/12/08/donaghy/index.html; *see also* Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137 (2008).

117. *See e.g.*, Bowers v. Nat'l Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 497–98 (D.N.J. 1998) (upholding minimum academic requirements for athletic eligibility); *Justice*, 577 F. Supp. at 382 (barring eligibility to play college sports if athlete accepted payment for participation).

118. Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 547 (2d Cir. 1993); Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 316–19 (8th Cir. 1986). 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

Professional Sports, the Seventh Circuit noted that "[s]ubstantial market power is an indispensable ingredient of every claim under the full Rule of Reason" and suggested that, at least for restrictions on cable television broadcasts of NBA games, the relevant inquiry may focus on how advertisers view the audience and whether the unique nature of that audience gave the league market power.[119] If the challenged policy promotes competitive balance in the sports league and the league lacks the power to restrict output in the relevant antitrust market, the competitive balance consideration should prevail over the alleged restriction on competition.[120]

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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 "[t]he antitrust laws were enacted for 'the protection of competition, not competitors.'" Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 318 (2d Cir. 2008) (*quoting* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990)). 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*, . . . [a]n agreement between a producer and a distributor to prevent a competitor of the distributor from expanding its business and competing with 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."

Ky. Speedway LLC. v. Nat'l Ass'n of Stock Car Auto Racing, Inc., No. A05-138(WOB), 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)).

119. Chi. Prof'l Sports Ltd. P'ship. v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996).

120. A lack of market power may resolve challenges relating to league centralized licensing and sponsorship operations (such as the claim brought by American Needle) if the league competes with a variety of other licensors of trademarks and intellectual property. In the trademark licensing context, the NFL likely competes with the owners of a variety of other intellectual property for use on various consumer products. *See* Nat'l Football League v. N. Am. Soccer League, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., *dissenting from denial of cert*.) ("[T]he league competes as a unit against other forms of entertainment."). From the licensee's point of view, a licensed right to use the NFL trademarks on retail product is an input that the licensee uses to increase the appeal of its product to consumers. If the licensee manufactures apparel, for example, the licensee anticipates that the popularity of NFL football will cause more of its apparel product to be bought if that apparel (or some lines of that apparel) bears a NFL mark. There exist a number of other trademarks or associations that the manufacturer might license to use on its retail product, including the marks from other professional sports entities, from colleges and universities, and from a variety of entertainment offerings (e.g., Disney, Nickelodeon, MTV, The Simpsons). Each of the prospective licensors presumably tries to convince prospective licensees that the popularity of that licensor's brand (which in the NFL's case is driven by the popularity of the jointly created NFL championship season) would enable the licensee to sell more product than it would sell otherwise. But the prospective licensee of NFL marks has a number of intellectual property licensing options, and it is unreasonable to assume that NFL Properties has the power to cause anticompetitive effects in the market for the licensing of marks for use on retail products. As suggested by some of the questioning by the Supreme Court Justices at the *American Needle* oral argument, a relevant market limited to the licensing of NFL trademarks is

If the sports league potentially has market power in a relevant market so that a restriction in output is possible, competitive balance issues can be applied in the traditional antitrust context if the competitive balance concern can affect output in the market the plaintiff alleges is restrained. The ATP Tour's decision to revise its tournament format reflected a response to a decline in ticket sales and sponsorship support.[121] If the change to a more competitive format halted or reversed the decline, that fact should justify the restrictions imposed to create that more appealing entertainment product. In *Salvino*, MLBP showed the economic connection between the need for competitive balance and the licensing market that Salvino claimed was restrained. MLBP's expert opined that 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. He supported his opinion with evidence that the output of MLB-licensed product increased after the clubs centralized the licensing and promotion operations.[122] Neither the Third Circuit in *ATP* nor the Second Circuit in *Salvino* decided the competitive balance issue because the courts held that the plaintiffs failed to prove the narrow relevant market alleged in their complaints.[123] Nonetheless, the cases reflect facts demonstrating how improved competitive balance can yield a higher output not only for the on-field entertainment product but also for products competing in markets for intellectual property licenses.

The remanded challenge to NBA limits on superstation broadcasts in *Bulls II* also would have required an analysis of output to determine whether the NBA cable broadcast rules survived the antitrust challenge. The NBA argued that broadcasting more Bulls games via superstation cable broadcasts would result in higher revenues for the Bulls, which would in turn disturb the competitive balance between the teams.[124] If the only concern was which entity received the revenue, some form of revenue sharing might address the

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likely to face great skepticism. *See* January 13, 2010 Transcript of Oral Argument at 17–19, Am. Needle, Inc. v. Nat'l Football League, U.S. Supreme Court Case No. 08-661.

121. Deutscher Tennis Bund v. ATP Tour Inc., 610 F.3d 820, 825 (3d Cir. 2010).

122. Major League Baseball Props. v. Salvino, Inc., 420 F. Supp. 2d 212, 220–21 (S.D.N.Y 2005), *aff'd*, 542 F.3d 290 (2d Cir. 2008).

123. *Deutscher Tennis Bund*, 610 F.3d at 828–29; Ky. Speedway, LLC v. NASCAR, Inc., 588 F.3d 908, 921 (6th Cir. 2009) (holding that plaintiff failed to establish market for premium stock car race sanctioning market); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F. 3d 290, 334 (2d Cir. 2008).

124. An interesting point throughout the restriction discussions is the extent to which the league could either subject all revenues to league-wide revenue sharing or could tax the team for the usurpation of league-created opportunities. Judge Easterbrook discussed this concept in the first appeal in the Bulls/NBA litigation. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 675-76 (7th Cir. 1992).

issue. On the other hand, a conclusion by the NBA that national television broadcasts through the league resulted in greater appeal of the product suggests that at least the NBA thought that the league superstation policy could increase output. This method of analysis would support the recent holding by a district court that blackout restrictions applicable to the NBA League Pass, a bundled satellite television package of NBA games sold via DirecTV, did not restrict output but rather only affected the channel on which the game was broadcast.[125]

A competitive balance argument presents more difficulty for the sports league when the competitive balance justification could result in an increase in the league's output but at the cost of an alleged distortion of an input market. The facts presented by the labor cases may present the best example of this situation. The first step of the rule of reason analysis examines whether the plaintiff has proven an anticompetitive effect. If the relevant market is found to consist of NFL-caliber football players, the NFL would have a dominant position as a buyer in that market. Just as antitrust law would not allow competitors with that level of monopsony power to create a buying group, so too we would expect that an agreement by a sports league that made the league a monopoly buyer (or monopsonist) for some input would also raise significant antitrust concerns. There exists a legitimate economic argument why a draft of college players promotes competitive balance (and thus the fan appeal of the league) more than the alternative free agent world.[126] To demonstrate a net procompetitive effect, however, the league would need to show that the increase in competitive balance from the draft would increase the appeal of the downstream league products sufficiently to cause an increase in output (or demand for players by the sports league) in the labor market.[127]

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125. Kingray, Inc. v. Nat'l Basketball Ass'n, 188 F. Supp. 2d 1177, 1194 (S.D. Cal. 2002). The NBA teams contracted with DirecTV to create the NBA League Pass as the exclusive provider for individual consumers or commercial establishments to view out-of-market NBA games. Kingray challenged the black out rules that prevented NBA League Pass subscribers from obtaining the satellite broadcast for games that the local team had licensed for broadcast, alleging that this constituted an agreement amongst the teams not to sell satellite rights for their games outside their system of exclusive broadcast territories. The district court dismissed the complaint, concluding that, because the black outs only applied when the game was being broadcast on a free local over-the-air broadcast or via local and national channels, plaintiffs failed to allege sufficiently a reduction in the output of NBA games televised.

126. Today, the various players associations negotiate the terms of the draft through collective bargaining so that the non-statutory labor exemption protects the draft from antitrust scrutiny. *See* Brown v. Pro Football Inc., 518 U.S. 231, 250 (1996). Absent the labor exemption, the question would become whether a non-draft "but for" world would have a lower demand for the league entertainment product with fewer teams and/or fewer players.

127. By contrast, the competitive balance concerns could provide a stronger justification if the collection of teams had less than monopsony power so that the competitive effects in the second

Given the clear restriction in the labor market, the court is likely to focus more closely on how critical the restraint is to the league's ability to compete in the downstream market, how well the league establishes that the restriction increases output for the league's entertainment product, and whether less restrictive alternatives exist that would achieve all or most of the competitive balance needs without as great a restriction on the labor-related market.

Whatever the nature of the alleged restraint, courts evaluating competitive balance arguments should heed the Supreme Court's admonition in *California Dental Assn.*:

> What is required, rather, is an enquiry meet for the case, looking to the circumstances, details and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.[128]

Evaluating the effect of the challenged league policy on output provides a relatively straightforward method for those restrictions affecting only the downstream products of sports leagues. The approach does not solve the balancing that must occur when the restriction concerns players, coaches, or other inputs. In those cases, the court should analyze the extent to which the league policy or restriction is driven by a competitive balance concern, the relative strength of proof that the restriction does increase competitive balance, and how the restriction affects the quantity demanded and price in the input market. In whatever context competitive balance is considered, from an economics perspective, the court should consider whether the restriction enables the league to offer a more competitive product vis-à-vis other competitors and whether the restriction addresses legitimate free riding concerns.

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market were not as clear. For example, joint purchasing arrangements are typically permitted as long as the market share of the purchasing entities is relatively low and the purchased product does not comprise more than a moderate amount of the cost of the downstream market. *See e.g.*, Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, Statement 7, http://www.ftc.gov/bc/healthcare/industryguide/policy/statement 7.htm (last visited May 10, 2011). The reason for considering market share is to ensure that the joint purchasing group does not have monopsony power that permits it to force prices below the competitive level.

128. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

CONCLUSION

The criticisms of competitive balance concerns usually question the magnitude of the effect or whether some different paradigm of a sports league (whether vertical league arrangements or a relegation model) would provide a more optimal output and product. The Supreme Court recognized in *American Needle* that competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[129] Competitive balance, free riding, and similar concerns may provide procompetitive justifications for the league rules or policies, particularly when the restrictions relate to the integrity of the game or apply to markets for the downstream product offerings of the professional sports league. Competitive balance concerns also may provide a plausible economic justification for restrictions on league inputs, but the possible distortions of competition in the input markets would suggest that courts should look carefully at those situations to examine whether the league could have achieved the same competitive balance benefits through less restrictive means that would not create a potential anticompetitive effect.

129. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010).